

# The Law School

THE MAGAZINE OF THE NEW YORK UNIVERSITY SCHOOL OF LAW | 2011

## TORT À LA MODE

NYU Law faculty are pushing the modernization of one of our oldest legal systems.

## WIKILEAKS, UNPLUGGED

Nine experts in law and journalism debate unauthorized disclosures, civil rights, and national security.

## THE NEXT PRESIDENT OF EGYPT?

Mohamed ElBaradei (LL.M. '71, J.S.D. '74, LL.D. '04) leads in the polls.



# A CLASS OF HER OWN

Legendary corporate defender Sheila Birnbaum '65 is uniquely suited to her newest assignment: special master of the 9/11 fund.

NYU School of Law

# REUNION

Friday & Saturday, April 27–28, 2012

Please visit [law.nyu.edu/alumni/reunion2012](http://law.nyu.edu/alumni/reunion2012)  
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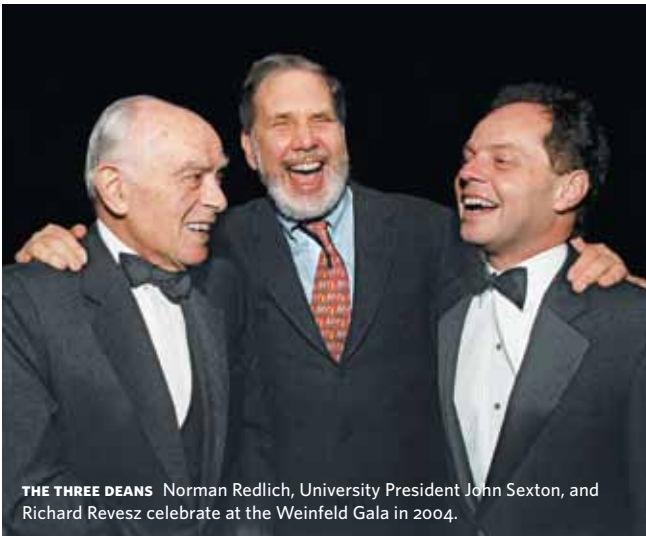




# A Note from the Dean

Twenty years ago, the Law School magazine made its debut with a cover celebrating 100 years of women at NYU Law. So I am particularly proud to have Sheila Birnbaum '65 profiled in this issue's cover feature, on page 28. Her story of defying society's narrow expectations for women in the '60s to become one of the most accomplished and respected corporate lawyers in the nation is inspiring. Just days before we photographed her, Sheila was appointed special master of the \$2.8 billion September 11th Victim Compensation Fund.

It is a testament to her prodigious talents and expertise that the Justice Department has entrusted Sheila to recompense the rescue workers and New York City residents who are still ailing a decade after the attacks.



**THE THREE DEANS** Norman Redlich, University President John Sexton, and Richard Revesz celebrate at the Weinfeld Gala in 2004.

An active alumna who endowed a faculty chair two years ago, Sheila was once a tenured professor at NYU Law as well as an associate dean. She taught torts, the subject of our academic feature. As many readers know, in each year's magazine since I became dean in 2002, we have focused on an area of law in which I am confident a peer review would say we take the lead among top law schools. Past issues have highlighted our programs in international, environmental, criminal, and clinical law; legal philosophy; civil procedure; and administrative law and regulatory policy, as well as the new areas of law and democracy and law and security. Torts has become a hotly contested area of law

over two issues: whether federal health and safety standards block private litigation, and just how large punitive damage awards should be. "The System Everyone Loves to Hate," on page 12, features professors Jennifer Arlen, Richard Epstein, Mark Geistfeld, Catherine Sharkey, and others whose work will undoubtedly have a lasting impact on law and society.

As dean, one of my priorities is to build a stronger bridge between our students and the federal government. In "Washington at Washington Square" on page 10, we highlight leading public figures in federal government who are or have recently been teaching on our campus. The roster includes the White House counsels of presidents George H.W. Bush and Barack Obama, as well as appellate judges appointed by presidents Carter and Reagan, policy experts, and administrators representing a broad political spectrum. I am proud to let you know that one, Judge Douglas Ginsburg of the U.S. Court of Appeals for the District of Columbia Circuit, will be one among five outstanding professors to join our full-time faculty this academic year. We introduce this impressive group on page 47.

The depth and talent of our faculty and alumni in multidisciplinary fields are also on display on page 20 in our annual roundtable discussion, "The End of Secrets." This March the magazine invited nine alumni and NYU faculty—including a former director of intelligence analysis for the NYPD, two former ACLU

counsel on the Pentagon Papers case, a physicist, and a lawyer involved in the investigation of the leak that exposed CIA agent Valerie Plame's identity—to take part in the conversation. The participants analyzed what the advent of WikiLeaks might mean for First Amendment rights, national security, Internet law, and the press itself. It makes for thought-provoking and fascinating reading.

We began the year with a ribbon-cutting for Wilf Hall (see page 98), our state-of-the-art new home for academic centers generously supported by trustees Leonard Wilf (LL.M. '77) and Mark Wilf '87.

Sadly, we close the issue having suffered more than our share of losses. In Faculty Focus, page 37, and Alumni Almanac, page 107, we remember Dean Emeritus Norman Redlich (LL.M. '55), Gerald L. Wallace Professor of Taxation Emeritus James Eustice (LL.M. '58), Professor Emeritus Howard Greenberger '54, Assistant Professor Sarah Woo, civil rights attorney Charles Conley '55, and U.N. human rights worker Joakim Dungal (LL.M. '07). Among them are legal legends who committed half-centuries to their fields, and, tragically, young lives of great promise cut short. As we remember them and honor all they accomplished or set out to do, we redouble our own efforts to make a difference.

RICHARD REVESZ

# The Law School

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## 4 Notes & Renderings



The Queensboro Bridge is renamed for Ed Koch '48; Queen Elizabeth II awards Arthur Miller; Irving Picard (LL.M. '67) sues a lot of suits; Nabil Elaraby (LL.M. '69, J.S.D. '71) emerges from the tumult of the Arab Spring; and more.

## 37 Faculty Focus



Moshe Halbertal gives the Israeli military ethical guidance; Dean Richard Revesz remembers Dean Emeritus Norman Redlich (LL.M. '55); the ALI honors Oren Bar-Gill for his scholarship; and more.



## 47 ADDITIONS TO THE ROSTER

The Law School welcomes five new faculty members, including Sujit Choudhry, and 53 visiting faculty and fellows.

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## FACULTY SCHOLARSHIP

Kenji Yoshino, Kevin Davis, and Erin Murphy share excerpts from their recent journal articles. Plus, a list of 2010 publications by the full-time faculty.

## 77 Student Spotlight



The 2011 *Annual Survey* is dedicated to Cass Sunstein; Stephen Breyer, Caroline Kennedy, and others honor the late Edward Kennedy; Bill Clinton delivers NYU's commencement address; Eli Northrup '11 moonlights as a rapper; Fall Ball photos (above); and more.

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## STUDENT SCHOLARSHIP

Laura Trice '10 argues for procedural safeguards in the attorney general's review of immigration appeals, and Michael Nadler '11 examines the legality of community benefits agreements.

## 97 Around the Law School



Janet Napolitano analyzes today's counterterrorism; China's legal growing pains inspire discussion; NYU Law's part in the Triangle Fire is remembered; and more.

## 107 Alumni Almanac



Why Benjamin Brafman (LL.M. '77) is no celebrity lawyer; Elena Kagan and Clarence Thomas engage with trustees; remembering civil rights attorney Charles Conley '55; donors meet their scholars (above); and more.

## 120 A Chat with...

Robert Kindler '80, vice chairman and global head of M & A at Morgan Stanley, discusses J.D.s, M.B.A.s, his favorite deal, and how to go with the flow.





# 28

## Master Defender

Consummate products liability defense strategist Sheila Birnbaum '65 has built a career out of successfully settling complex and mass torts cases. Appointed this May by the Justice Department to be special master of a \$2.8 billion 9/11 fund, she will use all her skill, insight, and compassion to compensate thousands of Ground Zero rescue workers and New York City residents who are still suffering the consequences of the attacks a decade later.

*On the cover: Sheila Birnbaum standing before Tiles for America, a spontaneous memorial created in Greenwich Village in the aftermath of 9/11.*



# 10

## Capitol Access



Leading public figures from the federal government, including former White House Counsel Robert Bauer and federal appeals court judge Douglas Ginsburg, bring their political, administrative, regulatory, and judicial expertise to NYU Law's classrooms.

# 12

## A Full-Tort Press



One of the oldest areas of law has become cutting-edge as the U.S. Supreme Court and leading NYU Law tort scholars and teachers, including Richard Epstein, Mark Geistfeld, Catherine Sharkey, and others, weigh in on a central issue: How can we best keep people safe?

# 20

## Plumbing the Depths



A spirited debate ensues when the Law School magazine invites nine NYU faculty, fellows, and alumni with expertise in journalism, constitutional law, and Internet law to meet at the junction of free speech, freedom of the press, national security, and WikiLeaks.

# Notes & Renderings

## Making Law School Possible for All

**S**PONSORS FOR EDUCATIONAL OPPORTUNITY (SEO) HONORED NYU Law for supporting the organization's mission of helping students from underserved communities succeed in college and the workforce.

In accepting the award in April, Dean Richard Revesz said, "SEO's mission aligns with the Law School's longstanding commitment to supporting students from all backgrounds, in order to create more diverse classrooms, courtrooms, boardrooms, law firms, and public and private institutions." Founded in 1963, SEO offers educational and career programs to hundreds of

high school and college students and young professionals annually. The Law School's association with SEO began when Peggy Cooper Davis, John S.R. Shad Professor of Lawyering and Ethics, adapted NYU Law's acclaimed Lawyering Program to train SEO interns during the summer.

At the awards presentation, Revesz noted that a variety of programs at the Law School share the same objective, including TRIALS (Training and Recruitment Initiative for Admission to Leading Law Schools), a partnership with Harvard Law School and the Advantage Testing Foundation to assist

college students from underrepresented communities who are interested in going to law school, and the AnBryce Scholarship Program, which provides full-tuition scholarships to outstanding J.D. students who are among the first in their family to pursue a graduate degree. "I truly believe in this approach to education," Revesz concluded, "and I am thrilled that NYU can help make a difference through programs like yours."



### A Silver for Being Green

Renovated by NYU Law in 2008-09 to house the Straus Institute for the Advanced Study of Law & Justice, the Tikvah Center for Law & Jewish Civilization, and the Jean Monnet Center for International and Regional Economic Law & Justice, the historic 1830s brick townhouse at 22 Washington Square North has earned a coveted silver rating from the U.S. Green Building Council's Leadership in Energy and Environmental Design building certification system.



### For Bringing "Clarity to the Law"

The Lynde and Harry Bradley Foundation recognized Richard Epstein, Laurence A. Tisch Professor of Law, as one of four people to receive the 2011 Bradley Prize, which includes a \$250,000 stipend, from the Lynde and Harry Bradley Foundation.

"Richard Epstein's contributions to his students' understanding of so many areas of the law are immeasurable," said Michael Grebe, president and chief executive officer of the foundation.

"His research, teaching, and writing have brought clarity to the law and have helped to advance freedom."

The Bradley Foundation's mission is to support limited government; a dynamic marketplace for economic, intellectual, and cultural activity; and the defense of American ideas and institutions.

"[I]t would be counter-productive and indeed futile to try to target all natural resource damages restoration efforts exclusively on seeking to undo the adverse effects of the BP spill, and nothing beyond that."

University Professor  
**RICHARD STEWART**,  
who prosecuted Exxon for the Exxon Valdez oil spill when he was an assistant attorney general in the Justice Department, testified before the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling on September 28. He laid out the key legal issues the government faces in seeking justice against BP for its disastrous spill in the Gulf of Mexico.

## Moral Support

When the Nobel Peace Prize was awarded in Oslo last December, the medal was placed on an empty chair on the stage. The intended recipient, Chinese pro-democracy activist Liu Xiaobo, remained in a Chinese prison, where since 2009 he has been serving an 11-year sentence for

"inciting subversion of state power." His wife, Liu Xia, was under house arrest. For the first time in 75 years, no one was present to receive the award.

But Liu did not lack for supporters in the hall. Sharon Hom '80, executive director of New York-based Human Rights in China (HRIC), had been invited to attend. HRIC has published English translations of Liu's essays, as well as documents related to his case, and has for years sought to bring international attention to his imprisonment.

Reacting angrily to the announcement of the peace prize, China suspended trade negotiations with Norway and led a boycott of the ceremony. But Hong Kong-born Hom believes that the prize may compel a positive reaction, too. A group of Chinese party elders has called for an end to restrictions on expression, for example, and more activists are speaking out. "The Nobel Peace Prize has generated a game-changing process," Hom told the *Christian Science Monitor*. "There are voices within the party who are now going public."





Since December 2008, when he became the court-appointed trustee for the liquidation of Bernard Madoff Investment Securities, Irving Picard (LL.M. '67), partner at Baker & Hostetler, has been busy. His team responded to:

**5,200 e-mails**  
and **7,100 hotline**  
calls from Madoff  
customers and claimants.

As of March 31, 2011



**Irving Picard**  
**BY THE NUMBERS**

Picard filed **1,050 suits** in  
**30 countries** seeking  
**\$90 billion**, including  
**\$19 billion** from JPMorgan.

He has recovered  
**\$8.6 billion**  
of the  
**\$17.3 billion**  
in principal lost in  
the fraud.

As of July 28, 2011



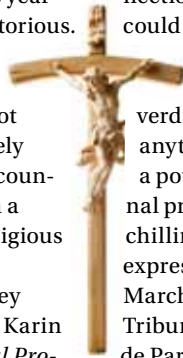
*A Bloom in the Arab Spring*

In the unprecedented turmoil produced by the Twitter revolution in the Middle East and Africa, Egyptian Nabil Elaraby (LL.M. '69, J.S.D. '71), a former judge in the International Court of Justice, has emerged as a confident leader. One month after the ouster of President Hosni Mubarak, the youthful opposition coalition behind the uprising proposed Elaraby as foreign minister. Accepting the appointment, Elaraby quickly proved popular among his people—while causing concern in Israel and the Western world—by reopening the border crossing between Egypt and Gaza, brokering the reconciliation of Palestinian factions Hamas and Fatah, and urging humanitarian intervention in Libya. But just weeks into this post, he was tapped again, to lead the 22-member Arab League as secretary-general, breaking a standoff that threatened Egypt's leadership position in the region. "I am taking this difficult task at a time when the Arab nation is going through many problems," Elaraby said in a speech. "This is the toughest assignment I will have."

**A Tale of (Two Trials in) Two Cities**

University Professor Joseph Weiler saw both sides of a European courtroom this year—and twice emerged victorious. As a defendant, Weiler, Joseph Straus Professor of Law, enjoyed a not guilty verdict in a closely watched libel trial. As counsel, he argued and won a landmark ruling on religious symbols.

Weiler's legal odyssey began after a review of Karin Calvo-Goller's *The Trial Proceedings of the International Criminal Court: ICTY and ICTR Precedents* appeared on a book review website he edits. Unhappy with the review, Calvo-Goller asked that it be removed. When Weiler declined, Calvo-Goller, a French citizen living in Israel, filed a criminal complaint in France against him.



Aside from the author's nationality, the only French connection was that the review could be accessed online in France. Experts feared that a guilty verdict could have made anything published online a potential target for criminal prosecution, producing a chilling effect on freedom of expression worldwide. In its March ruling for Weiler, the Tribunal de Grande Instance de Paris characterized the lawsuit as forum shopping and deemed the review legitimate criticism. Following the verdict, Dean Richard Revesz said, "We are so proud of our remarkable colleague, who stood firm for the cause of intellectual freedom."

Later that month in Strasbourg, Weiler was rewarded for standing up in support of another freedom: Italy's right to display crucifixes in public classrooms. Weiler had argued the case pro bono the previous June. In a decision Weiler characterized as "a rejection of a one-size-fits-all Europe," the Grand Chamber of the European Court of Human Rights ruled in favor of Italy. "Europe," Weiler said, "is special in that it guarantees at the private level both freedom



of religion and freedom from religion but does not force its various peoples to disown in its public spaces what for many is an important part of the history and identity of their states."

**But Don't Call Him Sir**

Queen Elizabeth II has named University Professor Arthur Miller a Commander of the Order of the British Empire (CBE), one of the United Kingdom's highest honors. The Order of the British Empire recognizes distinguished service to the arts and sciences, public services outside the Civil Service, and work with charitable and welfare organizations of all kinds."

Miller's service to the United Kingdom includes his 2010 gift of more than 1,800 Japanese woodblock prints by 19th-century artist Utagawa Kuniyoshi to the American Friends of the British Museum. For more than 20 years, he also moderated *Hypotheticals*, a series of high-level panel discussions aired on the BBC, modeled on the PBS Fred Friendly dialogues Miller moderated in the U.S.

More important is the question of what to call him. "I am one rank in the Order below knighthood, so 'Sir' is inappropriate," says Miller. "I am two ranks above the Beatles as a group, however."



ELARABY: AP PHOTO/AMR NABIL PICARD: REUTERS/BRENDAN MCDERMID

# One for the Books

A federal jury awarded \$1.3 billion in damages to Oracle, a software company represented by David Boies (LL.M. '67), in a copyright infringement case. Oracle's rival SAP, a German software maker, admitted that a subsidiary had stolen thousands of copies of Oracle's software and materials, but it was willing to pay only \$40 million in damages. Only a day after Boies's final arguments last November, the jury sided with Oracle and came close to the \$1.7 billion he recommended for damages. The amount is the largest-ever jury award in a copyright-infringement case—the next-largest was \$136 million in 2002. "We had the facts, and we had the law," Boies told reporters.

**\$1.3 billion**  
**2011**

**\$136 million**  
**2002**

**Bruce McBarnette '83** won a gold medal in the high jump for men 50 to 54 years old at the World Masters Track and Field Championships held at Hornet Stadium at California State University in Sacramento. McBarnette has won eight world track and field championships and 24 USA national championships for his age group in the high jump.



"Since we believe that the most fundamental rights should remain with prisoners even during their incarceration, the notion that this one we can take away just because it seems to be easy to do it is, I think, a serious mistake."

University Professor **JEREMY WALDRON** testified before U.K. Parliament's Joint Committee on Human Rights on March 15. He reacted to the European Court of Human Rights' November 2010 ruling that the U.K. was violating the European Convention on Human Rights by barring prisoners from voting.

## "If the planet has a lawyer, it's John Adams."

Quoting from *Rolling Stone* magazine, President Barack Obama bestowed a 2010 Presidential Medal of Freedom, the nation's highest civilian honor, on former adjunct professor John Adams.

Adams co-founded the Natural Resources Defense Council in 1970 and has dedicated a career of over 40 years to environmental law. He taught for 26 years as an adjunct faculty member at NYU Law, where he created the Environmental Law Clinic in which students to this day work under the supervision of NRDC attorneys. "Four decades ago, when there was no such thing as environmental law in our country, when pollution was so severe and commonplace that rivers caught on fire, it took extraordinary vision to even imagine the modern-day environmental movement and its place in our society," said NRDC President Frances Beinecke in a statement from the organization.



## Recognition for Competition

The U.N. Conference on Trade and Development (UNCTAD) recognized five former LL.M. students for their work on revisions to commentaries to Model Law on Competition, which suggests good principles and alternative approaches for developing countries' competition law.

Last year Hassan Qaqaya, head of UNCTAD's Competition Law and Policy and Consumer Protection Branch, asked Eleanor Fox '61, Walter J. Derenberg Professor of Trade Regulation, for assistance on the revisions. Fox took the assignment into her International Competition Law: Globalization and Developing Countries Seminar last spring, and the five students volunteered to focus their research papers on the task. They also worked as a team to draft commentaries on sections of the

model law ranging from system design to mergers to abuse of dominance.

The five students, who earned their LL.M. degrees in Spring 2010, were a kind of mini-U.N. themselves, each hailing from a different country: Simon Peart (New Zealand), Felipe Serrano Pinilla (Colombia), Denise Junqueira (Brazil), Tone Oeyen (Belgium), and Apostolos Giannakoulas (Greece). They are thanked in the official UNCTAD document that incorporates their work, and all were also invited to attend the Sixth Review Conference of the UNCTAD competition principles in November in Geneva, where the document including their work was adopted.





## Crushing One Man's Catch-22

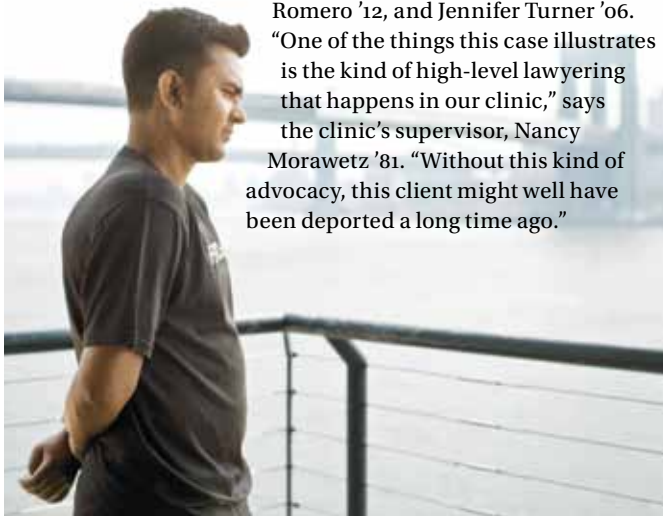
The Immigrant Rights Clinic won a seven-year battle on June 1 when U.S. Immigration and Customs Enforcement (ICE) announced it was dropping deportation efforts against Mohammed Azam, who was caught in bureaucracy exacerbated by post-9/11 concerns about Muslims.

In 2003, Azam complied with a new federal requirement, now discontinued, that Arab and Muslim men register with the authorities. He immediately faced deportation for having an expired visa, even though his family had applied for permanent resident status in 2001 that would be granted to the other members of Azam's family in 2007. This winter, an immigration judge ruled that Azam should not have to pay the price for the government's slowness. The judge ruled that Azam's deportation proceedings should cease and that he should become a permanent resident. The government, however, proceeded to appeal.

In response, the clinic got creative, obtaining letters supporting Azam signed by more than two dozen government officials and neighborhood advocates, and inviting media response. The *New York Times* published a story in May about Azam's long ordeal in which Manhattan Borough President Scott Stringer said that Azam "is what our country is all about. For ICE people to dig in their heels, I think, is just outrageous."

The day after the article appeared, ICE dropped its case. Over the past seven years, 11 clinic students have represented Azam: Kelli Barton '10, Briana Beltran '11, Arlen Benjamin-Gomez '06, Annie Lai '06, Sonia Lin '08, Benjamin Locke '11, Hena Mansori '06, Roopal Patel '11, Anna Purinton '09, Camilo

Romero '12, and Jennifer Turner '06. "One of the things this case illustrates is the kind of high-level lawyering that happens in our clinic," says the clinic's supervisor, Nancy Morawetz '81. "Without this kind of advocacy, this client might well have been deported a long time ago."



Associate Professor **SAMUEL RASCOFF** testified before the Senate Committee on Homeland Security and Governmental Affairs on February 15. He responded to the findings in the committee's report on the November 2009 shooting rampage at Fort Hood and raised the question of the FBI's proper intelligence role in analyzing homegrown threats.

"[T]he Bureau and the federal government ought to be leveraging much more effectively the know-how of local police officers, who after all know their terrain intimately, have lived and worked in their communities more or less their whole lives, and have a distinctive leg up on their federal counterparts when it comes to that kind of anthropological understanding of the world in which they operate."

MASHID MOHADJERIN/THE NEW YORK TIMES/REXUS

## The Power of a Good Story

Described by the *Los Angeles Times* as a "mixture of showbiz memoir, academic tutorial, and self-help manual," the third book by famed Hollywood producer Peter Guber '67 (LL.M. '68), *Tell to Win: Connect, Persuade, and Triumph with the Hidden Power of Story*, quickly topped the best-seller list after its March release. In an appearance on *Charlie Rose*, Guber pointed out that storytelling comes naturally. "People think that LinkedIn and MySpace and Facebook and Twitter created social cohesion," he said. "No, no, we created social cohesion around the campfire for 40,000 years. They just exploited it."



## Honored for Daring to Help



The Ford Foundation honored Professor Bryan Stevenson this spring with one of its 12 Visionaries Awards for social innovators.

The \$100,000 prizes were created this year to mark the Ford Foundation's 75th anniversary. "Through these awards, we want to highlight the unheralded work of thousands of courageous leaders whose lives are devoted to improving systems and institutions so that all people have a voice in the decisions that affect

their lives," said Luis Ubiñas, president of the Ford Foundation. "These 12 individuals represent the courage, commitment, and innovative thinking of all the remarkable people who work on the frontlines of social change."

The globally dispersed honorees include a Peruvian indigenous women's rights leader and a Kenyan political cartoonist. Stevenson was recognized for "challenging the injustice of poverty" through his scholarship and clinical teaching at NYU Law as well as his leadership of the Equal Justice Initiative (EJI), a nonprofit organization he founded to provide legal representation to indigent defendants and prisoners who have been denied fair and just treatment in the legal system. Stevenson has been particularly active on behalf of death-row inmates and children sentenced to life without parole. Acknowledging the award in a statement, Stevenson said he would use the monies to continue EJI's efforts, adding, "The opposite of poverty is not wealth—it's justice."



## Poetry in Brief

Many lawyers may believe their writing is art, but Monica Youn, senior counsel in the Democracy Program of NYU School of Law's Brennan



Center for Justice, has proof. *Ignatz*, her collection of poems about unrequited love inspired by George Herriman's pre-World War I comic strip characters *Krazy*

*Kat and Ignatz Mouse*, was a finalist for the 2010 National Book Awards in poetry. Youn received \$1,000 and a medal as one of five finalists out of 148 submissions.

## Alston Cited by Top European Court

In *Al-Skeini and Others v. the United Kingdom*, the European Court of Human Rights' Grand Chamber relied on the work of Philip Alston, John Norton Pomeroy Professor of Law, in holding that the rights of the families of four Iraqis killed by British forces had been violated by the U.K.'s failure to independently investigate the deaths. "The principal significance of the judgment,"



Alston says, "was its definitive rejection of the British government's position that human rights law did not apply to the acts of its forces committed overseas, even when it was an occupying force and controlled the security situation." The court quoted at length from a March 2006 report by Alston when he was U.N. special

rapporteur on extrajudicial, summary, or arbitrary executions. In it, he asserted that under Article 6 of the International Covenant on Civil and Political Rights, "armed conflict and occupation do not discharge the State's duty to investigate and prosecute human rights abuses. The right to life is non-derogable regardless of circumstance."

"The ethical premise of the Nuclear Waste Policy Act... was that the current generation had to deal with the waste as soon as possible. [W]e now realize that we need a more sophisticated approach that leaves options open to future generations without unduly burdening them in the process."

University Professor  
**RICHARD STEWART**

testified before the Blue Ribbon Commission on America's Nuclear Future on November 15. He presented a plan to solve the nation's nuclear waste disposal dilemma.

## Crown Heights



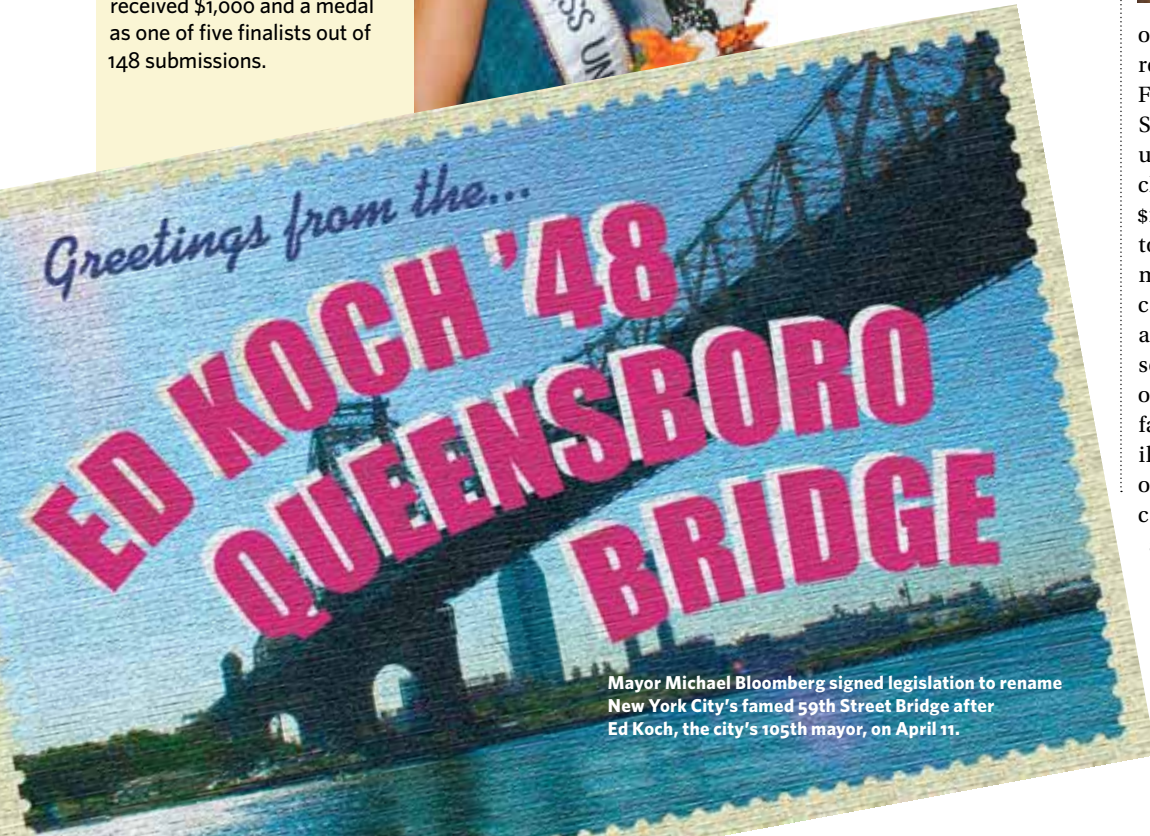
Vasuki Sunkavalli (LL.M. '10) was crowned Miss Universe India 2011 in July, which will allow her to compete in the Miss Universe pageant in September in Brazil. "I entered the contest like a winner," said Sunkavalli as quoted in the Indian press, "so didn't prepare myself to lose." She earned her LL.M. in international law and human rights, and has worked at the Permanent Mission of India to the United Nations and at Human Rights Watch.

## Helping Mentally Ill Youth Get Out of Jail



Former Root-Tilden-Kern Sinsheimer Scholar Sara Zier '10 is one

of 18 people nationwide to receive a 2011 Soros Justice Fellowship from the Open Society Foundations. Zier will use her fellowship, which includes a stipend of \$74,000 to \$108,750 over 12 to 18 months, to help young people with mental illnesses avoid incarceration by facilitating their access to mental health care services. Roughly two-thirds of youth in juvenile detention facilities suffer from mental illness. Zier, who has developed a cross-systems advocacy project with TeamChild, a nonprofit civil legal aid organization in Washington State, to address this issue, says, "Both the health care and juvenile justice systems are failing youth with mental illnesses."



Mayor Michael Bloomberg signed legislation to rename New York City's famed 59th Street Bridge after Ed Koch, the city's 105th mayor, on April 11.



## Ensuring Food for All

Three months before the Republic of South Sudan established its independence, David Deng '10 and Sylwia Wewiora '11 presented reports related to one of the new nation's most pressing issues, land grabbing, at the International Conference on Global Land Grabbing hosted by the Institute of Development Studies at the University of Sussex.

Wewiora presented "Foreign Land Deals and Human Rights: Case Studies on Agricultural and Biofuel Investment," a 118-page report released by the Center for Human Rights and Global Justice (CHRGJ) in October 2010. Focusing on four case studies, the report examines the human-rights dimensions of large-scale land deals, particularly whether the deals ensure equitable and sustainable food security, and is based on extensive research by Professor Smita Narula, CHRGJ faculty director, and by students in the International Human Rights Clinic, including Wewiora, Deng, Lauren DeMartini '11, Colin Gillespie '11, Geoffrey Johnson '11, and Andrea Johansson (LL.M. '10).

Deng, who spent a postgraduate year as an Arthur Helton Global Human Rights Fellow, spoke about the importance of community consultation in drafting land deals in Southern Sudan. He presented his report, "The New Frontier: A Baseline Survey of Large-Scale Land-Based Investment in Southern Sudan," which had been commissioned by Norwegian People's Aid and was partly funded by a United States Institute of Peace Priority Grant.



## World Leader on Campus



Former British Prime Minister Gordon Brown came to NYU Law last December to discuss his book, a first-hand

account of how he pushed his country past the worst of the financial crisis. University President John Sexton, Benjamin F. Butler Professor of Law, took the opportunity to announce Brown would become the University's first "distinguished global leader in residence," which entails spending four weeks with students and faculty at various University locations annually.

**"It could hardly be surprising to propose that ... workers need to know about their rights under the law, and we really have very good reason to believe that workers are quite ignorant of their rights under the National Labor Relations Act."**

**CYNTHIA ESTLUND**, Catherine A. Rein Professor of Law, testified before the House Education and the Workforce Committee's Subcommittee on Health, Employment, Labor and Pensions on February 11. She challenged the notion that the National Labor Relations Board's recent decisions, including a proposal to require the posting of workers' rights in the workplace, indicated a move toward radicalism.

## Down to Business

Seth Harris '90, deputy secretary of the U.S. Department of Labor, is at the forefront of the Obama administration's efforts to address the plight of America's 14 million unemployed workers, more than six million of whom have been out of a job for six months or longer. In a keynote at the 64th annual Conference on Labor at NYU Law in June, Harris described the ways in which the administration is grappling with the problem by promoting job training and continuing education, universal health care, and worker protection against



abuse and unfair competition. "New policies won't eliminate these problems overnight, but we can do better by adapting government's responses to change in workplaces and the labor market," Harris said. "But at the end of the day, recovery must come from the private sector, from investment decisions and hiring decisions by employers across industries and across the country, and the resilience and resolve of American workers. They haven't given up on the promise of a better future. We should not give up on them."

## The Appellate Advocate's Apprentice

This August, Brian Burgess '09 began a one-year term as assistant to the solicitor general of the United States, Donald Verrilli. Burgess, a former Furman Fellow, has clerked for Judge Guido Calabresi of the U.S. Court of Appeals for the Second Circuit and Judge David Tatel of the U.S. Court of Appeals for the District of Columbia Circuit.

As a student, Burgess worked as a research assistant to both Dean Richard Revesz and Jacob D. Fuchsberg Professor of Law Barry Friedman. His paper "Limiting Preemption in Environmental Law: An Analysis of the Cost-Externalization Argument and California Assembly Bill 1493" from the April 2009 *NYU Law Review* won the Judge Rose L. & Herbert Rubin Law Review Prize.

Aiming for a career in appellate advocacy, Burgess called his new job an "unparalleled opportunity": "Given the amazing caliber of the attorneys in the Solicitor General's office and the complex legal issues they constantly grapple with, I can't think of a better place to learn the craft."





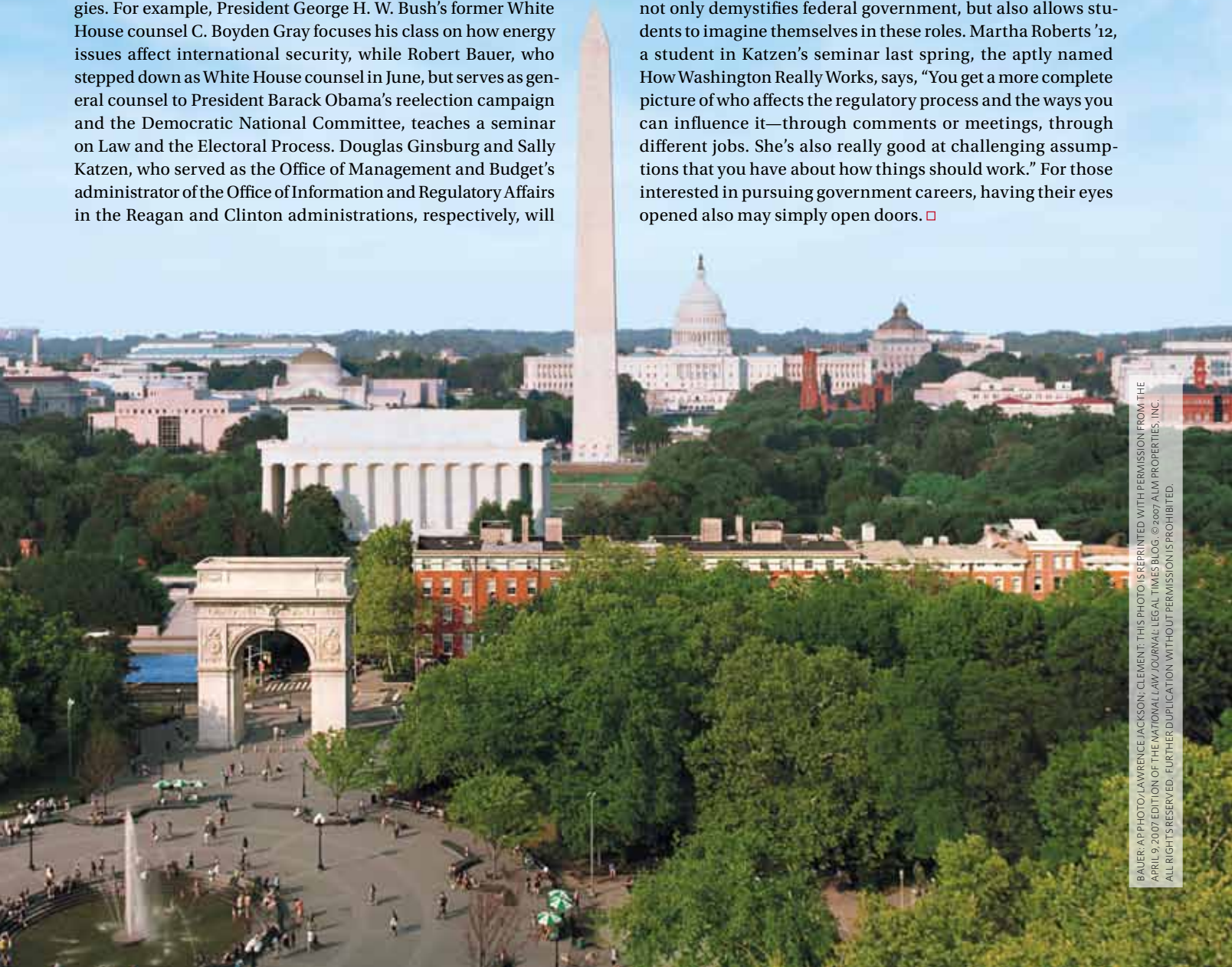
# WASHINGTON AT WASHINGTON SQUARE

THE HIGHLY ORDERED WORLD OF LEGAL THEORY CAN SEEM far removed from the hard-nosed, policy-driven ethos of Washington, D.C. Recently, however, a host of leading public figures from the federal government have bridged that distance by teaching at NYU Law. It's a golden opportunity for students to learn how things get done in the capital.

The visitors from Washington span political parties and ideologies. For example, President George H. W. Bush's former White House counsel C. Boyden Gray focuses his class on how energy issues affect international security, while Robert Bauer, who stepped down as White House counsel in June, but serves as general counsel to President Barack Obama's reelection campaign and the Democratic National Committee, teaches a seminar on Law and the Electoral Process. Douglas Ginsburg and Sally Katzen, who served as the Office of Management and Budget's administrator of the Office of Information and Regulatory Affairs in the Reagan and Clinton administrations, respectively, will

each teach a 1L course, the Administrative and Regulatory State, this spring. Judge Ginsburg's current colleague on the U.S. Court of Appeals for the District of Columbia Circuit, Judge Harry Edwards, was appointed by President Carter. Edwards's classes elucidate the appellate process as well as the art of decisionmaking from the bench.

Hearing stories firsthand of the crafting of major policy initiatives or of dealing with political heat and a media hungry for a story not only demystifies federal government, but also allows students to imagine themselves in these roles. Martha Roberts '12, a student in Katzen's seminar last spring, the aptly named *How Washington Really Works*, says, "You get a more complete picture of who affects the regulatory process and the ways you can influence it—through comments or meetings, through different jobs. She's also really good at challenging assumptions that you have about how things should work." For those interested in pursuing government careers, having their eyes opened also may simply open doors. □





**Neil Barofsky '95** ▶

*Special Inspector General of the Troubled Asset Relief Program, 2008-11*

COURSE: Government Responses to the Financial Crisis Seminar



**Robert Bauer** ▶

*White House Counsel, 2010-11*

COURSE: Seminar on Law and the Electoral Process



◀ **Paul Clement**

*U.S. Solicitor General, 2005-08*

COURSE: Supreme Court Seminar



◀ **Harry T. Edwards**

*Senior Circuit Judge, Chief Judge Emeritus, U.S. Court of Appeals for the District of Columbia Circuit*

COURSES: The Art of Appellate Decisionmaking; Federal Courts and the Appellate Process

## REGULARS ON THE ACELA EXPRESS

*Nine distinguished federal public servants who have recently taught or are currently teaching as adjunct or visiting professors, and a sampling of their courses.*

**Ezekiel Emanuel** ▶

*Special Advisor for Health Policy to the Director of the White House Office of Management and Budget, 2009-11*

COURSE: Health Law Policy Seminar



◀ **Kenneth Feinberg '70**

*Administrator of the Gulf Coast Claims Facility; Special Master of September 11th Victim Compensation Fund, 2001-04*

COURSE: Mass Torts



◀ **Douglas H. Ginsburg**

*Judge, U.S. Court of Appeals for the District of Columbia Circuit*

COURSE: Readings in Legal Thought Seminar; Administrative and Regulatory State

**C. Boyden Gray** ▶

*White House Counsel, 1989-93*

COURSE: Law and Policy Seminar on Energy, Environment and Security



**Sally Katzen** ▶

*Administrator of the Office of Information and Regulatory Affairs, 1993-98*

COURSE: How Washington Really Works Seminar; Administrative and Regulatory State



**B**eginning in late 2002, Wyeth Pharmaceuticals was hit with a torrent of lawsuits brought by women who alleged that its two controversial hormone-replacement-therapy drugs Prempro and Premarin had caused them to develop breast cancer. Although scientific studies suggest a higher risk of breast cancer from hormone therapies, they are not conclusive, especially when it comes to particular drugs. Nonetheless, plaintiffs who had taken their cases to trial were winning staggering jury awards, including compensatory and punitive damages totaling more than \$134 million to three plaintiffs in Nevada state court in 2007 (a judge reduced the total award to \$58 million in 2008), and \$75 million in punitive damages to a single plaintiff in a Pennsylvania court in fall 2009 (later reduced to \$5.6 million).

Despite these liabilities Wyeth was in the midst of being acquired by Pfizer. So by late 2009, when the \$68 billion deal had closed, Pfizer had inherited a full-blown litigation nightmare: Plaintiffs had racked up a 10-to-three record of trial wins and were clearly on a roll. With 10,000 cases still to be litigated, Pfizer, the world's largest pharmaceutical company, had to take decisive action. The company brought in a new team that included its longtime outside counsel, Sheila Birnbaum '65, a top products liability defense specialist who is partner and co-head of the Mass Torts and Insurance Litigation Group at New York-based Skadden, Arps, Slate, Meagher & Flom.

Setting her sights on defense strategy, the five-foot-two-inch Birnbaum did what she typically does in the high-stakes, bet-the-company cases she handles: She shrewdly surveyed the scope

of the litigation, then proceeded to devise a game plan for stepping up settlement talks while also challenging the plaintiffs' scientific evidence to strengthen Pfizer's hand at trial.

The litigation is still far from over. Yet thanks to Birnbaum's efforts, said Pfizer in-house attorney Malini Moorthy last May, the momentum, at least for now, is no longer so heavily on the plaintiffs' side. "I don't want to tempt fate, but it's fair to say the pendulum has swung," says Moorthy. "We've evened up the game."

Impressive as this turnabout has been, it is what clients expect from the 71-year-old Birnbaum, who has spent much of her career helping corporate defendants resolve their most difficult and costly litigation problems. Take Dow Corning's leaky silicone gel breast implants, W.R. Grace's asbestos contamination, or State Farm's litigation involving claims arising from Hurricane Katrina. Birnbaum has played an integral role in defending and settling them all, not to mention countless other major mass torts cases involving everything from salmonella contamination to toxic spills to alleged injuries from cell phones.

Most recently, Birnbaum was tapped by U.S. Attorney General Eric Holder to serve as the special master of the revived September 11th Victim Compensation Fund. She is charged with distributing \$2.8 billion to compensate Ground Zero rescue workers and New York residents who have suffered debilitating health problems in the aftermath of the World Trade Center attacks. This exceedingly difficult and public role complements the one she held between 2006 and 2009, when she successfully mediated settlements totaling \$500 million for 92 of the 95 victims' families who chose to litigate their claims instead of accepting compensation through the original 9/11 fund, administered by Kenneth Feinberg '70. (For more, please read "An Interpreter of Maladies" on page 32.)

Knowing how and when to settle headline-making cases like these have elevated Birnbaum to the pinnacle of the legal profession. She has been called a "legal genius," a "lawyer's lawyer," and the undisputed "Queen of Torts." She routinely comes in near the top (if not at the top) of the products liability defense bar in lawyer rankings by *Chambers*, *Who's Who*, and other legal industry publications. And when the *National Law Journal* assembles its

# THE

# CLOSER


By fall 2010, Pfizer had secured three straight trial wins, with juries in Pennsylvania, Virginia, and Arkansas finding that plaintiffs had failed to prove either that Prempro or Premarin had caused their breast cancer or that they had received inadequate warning of the drugs' risks. What's more, the federal judge overseeing multidistrict litigation proceedings in Arkansas recently barred the testimony of a few of plaintiffs' key scientific witnesses who claimed these types of hormone-replacement therapies can cause cancer, deeming their testimonies insufficiently reliable or relevant. As a result, dozens of cases were dismissed or settled. All told, as of July Pfizer has managed to either knock out or settle some 3,300 suits, roughly a third of its caseload.

picks for the 100 most influential lawyers in the country, or when *Fortune* and *Crain's New York Business* choose the most powerful national and local women business leaders, Birnbaum's name is invariably on the list.

"On every type of serious matter, Sheila is my secret weapon," says Eve Burton, general counsel of Hearst Corporation, a longtime client of Birnbaum's. Even Zoe Littlepage, a lead plaintiffs' attorney in the Prempro and Premarin litigation, says she can't help but admire Birnbaum's prowess as a tactician and the artful way she plots and maneuvers to advance her clients' goals. So much so that at their first

by Susan Hansen  
Portrait by Juliana Thomas



A portrait of Sheila Birnbaum, a woman with short, dark hair, wearing a light-colored blazer and gold earrings. She is resting her chin on her hand, looking thoughtfully at the camera. The background is a solid blue color. A red vertical bar is visible on the right side of the image.

**When Fortune 500 companies are facing a massive wave of complex products liability or toxic torts cases, they call on Sheila Birnbaum '65—master defense strategist, former law professor, and the Justice Department's new special master of the September 11th Victim Compensation Fund.**

meeting Littlepage immediately went up to shake Birnbaum's hand. "She's a legend," says Littlepage. "I told her, 'I finally got to meet the master puppeteer.'"

Indeed, over more than four decades, as both a law professor and practicing attorney, Birnbaum has not only set standards and practices that helped to pioneer the practices of products liability and mass torts law. She has also blazed a path for women in the profession as a top rainmaker and longtime leader at Skadden, one of the world's biggest law firms, with 2,000 lawyers around the globe and \$2 billion-plus in annual revenue. She has even argued and won two Supreme Court cases, including *State Farm Mutual Automobile Insurance Co. v. Campbell et al.*, a landmark 2003 defense victory in the long-running battle over punitive damages. "Pretty good for a torts lawyer," quips Birnbaum.

**V**isiting Birnbaum's office at Skadden's 4 Times Square headquarters, one sees the usual signs of a successful senior partner and rainmaker. There is the 42nd-floor view of downtown Manhattan, including a dramatic close-up of the Empire State Building's upper reaches. Papers and overstuffed file folders are piled on nearly every horizontal surface. On the coffee table is the odd tennis trophy amid a small village of gleaming crystal recognition and appreciation awards. Hanging on the walls, stacked on the floor, and propped up on a credenza are dozens of framed *Wall Street Journal*, *New York Times*, and legal journal newspaper articles, plus plaques and awards from women's groups, Jewish groups, schools, and professional organizations. She has a mounted Louisville Slugger on a windowsill—a souvenir from a conference in Kentucky—along with a delightfully odd alligator sculpture with the words "Lady Litigator" painted on it. Here and there are photos, including a snapshot of Birnbaum with a beaming Supreme Court Justice Sandra Day O'Connor.

Most days Birnbaum gets to this office before 8:00 a.m. and works until 7:00 p.m., then logs additional hours during nights

and weekends from her homes on Manhattan's East Side and in East Hampton. She also maintains a sometimes grueling travel schedule: In one recent monthlong stretch, Birnbaum hopscotched between London (for a critical arbitration), Philadelphia (for oral arguments in a key appeal), and Little Rock (for a crucial hearing in the Prempro multidistrict litigation proceedings) before returning to Skadden's Manhattan offices, packing in three full days, then jumping on a plane to Phoenix, where she helped lead a Sedona Conference panel discussion on mass torts and punitive damages.

Despite her devotion to her job and her climb to the top of megafirm Skadden, Birnbaum defies the stereotype most people have of the diehard corporate lawyer. For one, although she fights to restrain punitive damages—which aligns her with Republican reform efforts—she is a reliable Democratic voter. And although she is a fierce defender of her clients, she has also earned the respect and affection of members of the plaintiffs' bar, among them Christopher Seeger, co-founder of Seeger Weiss, who considers Birnbaum a mentor and has sought her advice on cases in which her clients were not involved. She is known as a consensus-builder as well as an excellent listener who is generous with her time and advice for younger attorneys. "She's old-school in the way she relishes her role as a lawyer and a teacher," says Skadden products liability partner Mark Cheffo, who adds that Birnbaum often urges him and other veteran lawyers to bring junior associates along to key depositions and hearings.

Friends and colleagues add that there's nothing affected, showy, or self-important about her. "With Sheila, there's no pretense and no big ego to be assuaged," says Matthew Mallow '67 (LL.M. '68), a former Skadden partner and longtime friend. Indeed, although she can certainly afford to be extravagant, Birnbaum still balks at paying exorbitant prices for first-class air travel, using her frequent-flier miles to upgrade instead. This frugality harks back to Birnbaum's childhood in a lower-middle-class section of the Bronx. Even her voice, surprisingly sweet, almost girlish, has an accent that still hints of her old neighborhood. "Like they say, you can take the girl out of the Bronx, but you can never take the Bronx out of the girl," says Barbara Wrubel, a recently retired Skadden partner who is one of Birnbaum's closest friends. "She really is still Sheila from the Bronx."

**T**he eldest of three children, Birnbaum, who was born Sheila Lubetsky, grew up in the mainly working-class, southeast section of the borough, the kind of old-style New York neighborhood

**REACHING FOR THE STARS**

Birnbaum, age 4; in the second row, far right, with her sixth grade class; Birnbaum's sixth grade autograph book, in which she lists her career aspiration as "lawyer."





*Birnbaum often urges veteran lawyers to bring junior associates along to key depositions and hearings: “She’s old school in the way she relishes her role as a lawyer and a teacher.”*



#### FAMILY MATTERS

With her father, Louis, circa 1980; the Hunter College graduate, in 1960; with her mother, Belle, brother Paul, and his family, circa 1992.

where mothers yelled out apartment windows and kids spent summer days playing stickball in the streets. Birnbaum could be counted on to join in. “I was a tomboy,” she says. “I didn’t like dolls.”

Her parents, Belle and Louis Lubetsky, didn’t make much money from the small grocery store they ran in Harlem. And space in the two-bedroom apartment that Birnbaum’s family shared with her grandmother (and sometimes an aunt) was definitely tight. But Birnbaum says she never really wanted for anything and recalls a safe, carefree childhood.

Though neither of her parents had gone to college, and her Russian immigrant father hadn’t finished high school, they were big believers in the American Dream and were determined that their children would get a better education than they had. Birnbaum was a standout student at P.S. 50, and though she says she wasn’t at “the top of the top” of her classes, she apparently made a strong enough impression that when her brother Paul, who’s 10 years her junior, came along, teachers would still gush over Sheila. “They’d all say, ‘Oh, you’re Sheila Lubetsky’s brother,’” says Paul. “I’ve been following in her footsteps all my life.”

Birnbaum isn’t sure where she first got the notion that she’d like to be a lawyer. Growing up, she says her family didn’t know any attorneys, much less any women attorneys, nor does she remember reading books or seeing television shows or movies about lawyers. Yet somehow when she filled in the space for My Favorite Profession in her sixth-grade autograph book, she wrote down “lawyer.” The only explanation that Birnbaum can think of is that she might have been inspired by one of the current events discussions that a favorite teacher, Mrs. Stahl, used to lead.

There were some other early signs that she might be cut out for courtroom combat, however. Her brother Paul recounts the time when a neighborhood bully started harassing her. Birnbaum’s mother, who caught the action from the window of the family’s apartment, urged her to fight back. Birnbaum, 11 or 12 at the time, did just that. “She turned around and walloped him,” says Paul. “He never bothered our family again.”

Birnbaum majored in history with a minor in political science at Hunter College. When she took a law survey course covering torts, property, and criminal law, she says the subject instantly clicked with her and helped crystallize her elementary-school dream of being a lawyer. “It was clear to me that I wanted to go to law school,” says Birnbaum, who also participated in a mock World Court at Hunter and loved the complexity of the issues and the debating.

The problem was that women at the time weren’t supposed to go to law school or become attorneys. They were expected to get married as soon as possible, and if they had to work, being a teacher was about the only socially acceptable option. “It’s hard to imagine the pressure we were under to go into teaching,” says Birnbaum, who remembers feeling as if her only choice was to go with the flow.

Thus, a week before she graduated cum laude from Hunter in May 1960, she married Bernard Birnbaum, an accountant. And that fall she started a job teaching fourth grade at P.S. 62 in the South Bronx, several miles from where she grew up. “Everybody was going to teach, so that’s what you did,” says Birnbaum. “That’s what was expected.”

Birnbaum liked her students, but from the start it was clear that teaching fourth-graders just didn’t provide the kind of intellectual challenge she was looking for. She took night classes at Hunter, where she got an M.A. in history. But her dream of becoming a lawyer kept nagging. So late in 1962, she finally decided to quit her job. In the new year, she enrolled at New York University School of Law in a program that allowed her to finish in two and a half years by taking courses continuously, without summer breaks. She was one of just 13 women in her class of 360 students.

The very month after she matriculated, February 1963, the watershed book *The Feminine Mystique*, by Betty Friedan, helped ignite the feminist movement. For Birnbaum, the bestseller was an affirmation that she could really have the kind of career she knew she wanted. “It really crystallized the fact that you could be a woman and have a life,” recalls Birnbaum.

Though some men would certainly have been threatened by their wife making such a bold move, Birnbaum says her husband, who also was taking classes at Brooklyn Law School at night, was encouraging. Even so, Birnbaum says, the two were “growing apart.” Within two years after she started at NYU Law, they decided to divorce.

**A**t NYU Law, Birnbaum excelled in her classes and developed a clear interest in litigation. She jumped at the chance to test her oral argument skills in moot court competition. It turned out to be a fortuitous move: Birnbaum and her team not only won handily, but the hypothetical case happened to focus on the then-nascent area of products liability law, in the wake of a landmark 1963 decision by the California Supreme Court in *Greenman v. Yuba Power Products*. That ruling set forth the doctrine of strict liability for defective products, thus making it far easier for purchasers of those goods to pursue damages regardless of whether the manufacturer was found to have been negligent or at fault. It was, as Birnbaum recalls, a whole new concept, and she and her team wound up spending the better part of a year debating the parameters of the new doctrine and trying to understand how strict liability worked.

"She was always asking questions," says moot court teammate Gorman Reilly '65, who also remembers her as being very organized and having a real zest for the law. "She could look below the surface and facts. In making a court presentation, she had a way of getting to the point and getting [the judges] on the panel to go along with her arguments." He adds, "You could just see that she was really made for this."

After graduating, Birnbaum—with the assistance of a friend who had a talent for typing—sent out close to 100 letters to law firms around the city before landing an interview and a less-than-enthusiastic job offer from Berman & Frost, a small litigation firm on William Street that handled a mix of plaintiffs and defense-side matters. "They weren't sure they wanted me," says Birnbaum, who recalls that the firm had never hired a woman lawyer before and

made it clear in the interview that they had strong doubts about whether she was up to the job. "I remember them asking me what I would do if one of them called from court and needed me to check on a decision right away," recounts Birnbaum, who responded with the obvious answer: She'd simply go to the firm's library and look it up. "I think they expected I would fall apart and cry," she says with a laugh.

In making their offer, according to Birnbaum, the firm's senior partners also informed her that, at least for starters, she'd be earning \$1,000 a year less than a man in her position. Birnbaum took the job anyway. She quickly proved that she knew what she was doing. Within three months, she was making the same salary as her male counterparts, and over time she was given more and more responsibility on new matters. Some were simple personal-injury

## An Interpreter of Maladies

In May, Sheila Birnbaum '65 took on what could be the toughest task of her career: serving as the Department of Justice's special master for the reopened September 11th Victim Compensation Fund, which has provided \$2.8 billion to compensate Ground Zero workers and New York City residents who suffered debilitating health problems, or to compensate the families of those who died as a result of the 9/11 attacks.

In announcing her selection, U.S. Attorney General Eric Holder cited Birnbaum's "extensive experience, credibility, and unique insight." She does have singular expertise, having been the court-appointed mediator for the 95 families who opted out of the original 9/11 fund and were headed to court against the airlines and security firms. Add her 40-plus years of expertly resolving complex torts and Birnbaum is distinctly well suited to this role.

Even so, Kenneth Feinberg '70, the current administrator for the Gulf Coast Claims Facility who served as special master of the original 9/11 fund, says the job is even more daunting this time. "She really has her work cut out for her," he says.

For starters, Birnbaum has to design the rules and procedures governing the distribution of money to claimants, who are likely to number in the thousands, with the payout process scheduled to take five years. Much harder will be the task of determining a link between exposure to toxic dust and debris from Ground Zero and the respiratory problems and other illnesses that those who lived or worked around the site have suffered. Finally, unlike with the original

fund, which gave Feinberg an unlimited pool of money to draw from, he points out that this time Congress authorized a set amount, which must cover administrative expenses, too. With a cap on the money she's able to distribute, Birnbaum will have to deal with the inevitable perception by claimants that "she's taking from Peter to pay Paul," he says. "She's confronting a much more difficult set of problems than I faced."

Birnbaum said when the announcement was made that she wants the process to be "fair, transparent, and easy to navigate." To that end, just a little more than a month after being named to the role, she released proposed regulations that broadened the geographic boundaries within which New York City residents can make claims and closed the door on coverage for mental illnesses such as post-traumatic stress disorder. True to form, Birnbaum waited for a scientific review by the National Institute for Occupational Safety and Health before indicating in July that there was too little scientific evidence linking cancer to the Ground Zero dust and wreckage to allow for cancer coverage. The public has been given 45 days to comment on the proposal; Birnbaum will release final regulations in September; and the fund officially opens its doors on October 3, 2011.

Birnbaum reportedly wasn't the first choice of the 9/11 workers or downtown residents, but she has since won criti-

cal praise. On the day her appointment as special master was announced, Birnbaum met with a vocal representative of Ground Zero workers, John Feal. The former construction supervisor had lobbied for another candidate but publicly supported Birnbaum after their face-to-face discussion. "It was a surprisingly pleasant meeting which got into the issues and I'm happy with the outcome," Feal told the *Wall Street Journal*. "I think this is somebody I can work with." One person who would not be surprised that Feal was won over is Alvin Hellerstein, the federal judge who appointed Birnbaum as the mediator who settled all but three of the last 95 wrongful death and personal injury suits from 9/11, for a total of \$500 million. As he noted in his March 2009 final report: "She allowed each of the plaintiffs' families to express their loss and the quality of the lives lost on September 11.... She gained plaintiffs' confidence. Without her assistance, most of these cases, in my opinion, would not have settled."

Recently, Hellerstein said Birnbaum's empathy as well as her ability to make 9/11 family members comfortable was crucial to that outcome. "They had to know that they weren't selling out their loved ones cheaply," says Hellerstein, recalling how emotionally draining the process was.

Clearly, all of Birnbaum's talents for bringing closure to huge, complicated—and often emotionally charged—litigation matters will come to bear. "If anyone can do this, Sheila can," says Feinberg. "I can't think of anyone more qualified to do the job." S.H.





and slip-and-fall cases in which she represented plaintiffs. Others, however, happened to involve cutting-edge issues in the young but fast-growing area of products liability law, including a huge matter Birnbaum took on in the late 1960s for Syntex Corporation, a pharmaceutical company that was facing hundreds of lawsuits alleging that its oral contraceptives caused blood clots and strokes.

The sheer volume of suits was larger than almost any company had had to fend off before, and though no one at the time called it a mass tort, says Birnbaum, that's what it was. She and other lawyers for Syntex's co-defendants had to invent a new approach for managing such large-scale litigation, including setting up a national defense team and establishing ways to organize the massive discovery effort and ensure that defense filings across various jurisdictions were consistent. "We were sort of writing the rules," says Birnbaum, who traveled all over the country attending meetings and hearings in connection with the Syntex litigation. "We were starting to create a blueprint for how these kinds of cases would be handled."

As more and more states followed California's lead and adopted the doctrine of strict liability, a new plaintiffs' bar specializing in products liability matters emerged. And with consumer advocate Ralph Nader ratcheting up his campaign against defective car designs and other allegedly unsafe products, plaintiffs' lawyers had a host of new targets. It was clear a tidal wave of large-scale litigation was coming.

Along with Syntex, Birnbaum also represented Chrysler Motor Corporation in connection with claims that the steering system on its Newport Custom sedan was defective, and she wound up taking a lead role in the car giant's appeal in *Codling v. Paglia*, a seminal 1973 case that established the doctrine of strict products liability in New York State. Despite the court adopting strict liability, Birnbaum notes that the decision was actually slightly more pro-defendant than in other states. "It was the best a defendant could do given the way the law was shifting," says Birnbaum.



**W**hile Birnbaum was making a name as an expert in products liability matters, the dean of Fordham University School of Law, Joseph McLaughlin, was seeking to add women to a virtually all-male faculty. In 1974, he made Birnbaum a surprise job offer, and she accepted. "Somehow he convinced me," says Birnbaum, who recalls that McLaughlin played heavily on the fact that she'd be a pioneer, opening doors for women in the law.

Birnbaum's detour into academia ultimately lasted a dozen years—first at Fordham, then at her alma mater NYU Law, where she taught from 1980 to 1986, and served a two-year stint as associate dean. Though it has been 25 years since Birnbaum left the NYU Law staff, she enthusiastically recalls how much she enjoyed the back-and-forth with her students. "I loved teaching" law students, says Birnbaum, who also appreciated the freedom to study and analyze the quickly evolving products liability landscape in a way that a busy practitioner never could.

"Sheila came and hit the ground running," says Sylvia Law '68, Elizabeth K. Dollard Professor of Law, Medicine, and Psychiatry, who has been on the NYU Law faculty since 1973. Indeed, Law recalls that Birnbaum not only won the instant admiration of students and colleagues, but also shared some helpful tips with Law and the handful of other women who were still a tiny minority on the faculty and sometimes struggled to get the full attention

*"Sheila was really ahead of the curve. She anticipated where the law was going and understood that the changes would require a whole different kind of representation."*



#### CAREER APTITUDE

Lecturing at NYU School of Law, circa 1980–86; with then-New York Attorney General Robert Abrams '63 when she received an award from the UJA-Federation of New York, 1993; the honorees of the American Bar Association's 2000 Margaret Brent Award: Justice Sandra Day O'Connor; Birnbaum; Judith Kaye '62, then-chief judge of the State of New York; Shirley Hufstедler, former U.S. secretary of education; Karen Mathis, then-chair of the ABA Commission on Women; and Dovey Roundtree, civil rights attorney.



and respect of some of the male students. “She gave me some of the best advice I ever got,” says Law, who remembers Birnbaum telling her that she was probably too nice and needed to seize control by batting down obstreperous students the very first week of class. Birnbaum says her strategy for handling students with an attitude was to make a few barbed comments or jokes at their expense. “You’re smarter than they are,” she says. “You just confront them straight on.”

One NYU Law student from that era who is deeply indebted to Birnbaum is Gregory Miao (LL.M. ’85). He was born and raised in Shanghai and was the first Chinese-trained lawyer to come to the Law School as a visiting scholar in the thaw that followed the end of China’s Cultural Revolution.

Landing in New York in fall 1983, Miao had virtually no money and no real sense of purpose or belonging at NYU Law, because as a visiting scholar he was simply auditing classes and wasn’t really connecting with students. He could have easily spent the entire year at Washington Square drifting about. Miao recalls that Birnbaum took the time to talk to him and find out how he was doing. She strongly encouraged him to improve his English, then apply for a slot in NYU’s LL.M. program. Even better, according to Miao, she also made it her mission to help him secure the

*Reading Betty Friedan’s 1963 bestseller, The Feminine Mystique, “really crystallized the fact that you could be a woman and have a life.”*



#### THE SPICE OF LIFE

Traveling in Egypt; kayaking in New Zealand; finishing the Susan G. Komen Foundations’s Race for the Cure in New York City in 1993.



funds he needed to pay for the program once he was in. “You can’t believe how wonderful that was,” says Miao, who vividly remembers the day Birnbaum called him into her office and handed him a big check. Birnbaum, by then associate dean and in charge of the LL.M. and visiting scholars programs, remembers Miao as “just an outstanding person,” and says that her efforts were all in the line of duty.

Birnbaum’s willingness to—at least in Miao’s view—go out of her way to help him led him to spend another few years in New York after he earned his LL.M. working for Paul, Weiss, Rifkind, Wharton & Garrison. Then, returning in the late 1980s to China, he ended up joining Skadden Arps (entirely independently of Birnbaum), where he is currently a partner splitting time in the Shanghai, Beijing, and Hong Kong offices and leads Skadden’s mergers and acquisitions and corporate practice in China. “I am so grateful to Sheila,” says Miao. “I was so surprised that a dean would spend that kind of time with me. It really changed my life.”

**T**oday, Birnbaum is such a fixture at Skadden Arps that it’s a little hard to imagine her anywhere else. Still, as she recalls, it was really just a chance encounter at a Fordham faculty cocktail party in 1979 that brought her to the firm. Birnbaum says she had barely heard of Skadden at the time, but she got to talking to Skadden partner and Fordham adjunct professor John Feerick at the party, and he suggested she speak with one of the firm’s name partners, Joseph Flom, about setting up a part-time practice at the firm.

Skadden was in full growth mode at the time and actively looking to add new practice groups. Firm leaders believed Birnbaum’s expertise in products liability would be a smart fit. “For us, it was a no-brainer,” recalls former Skadden partner Stephen Axinn. He and other Skadden veterans, including Irene Sullivan, who would become one of the first woman partners, contend that gender was never much of an obstacle at Skadden, which has always prided itself on its entrepreneurial, egalitarian culture. “It was very much a meritocracy,” says Sullivan. “If Joe [Flom] believed you were talented, and you worked hard, that’s what mattered.”

Birnbaum says she had originally conceived of her work for Skadden as a “nice little side job.” Almost as soon as she joined the firm as counsel, however, clients with major products liability exposure began calling. Birnbaum’s practice, which included both products liability defense and insurance coverage matters, took off.

It wasn’t just the volume of new cases. The sheer size of the litigation was also increasing exponentially, with thousands upon thousands of plaintiffs now claiming injuries—a development that, as Birnbaum points out, was spurred by the rise of computers, which made it possible for the plaintiffs’ bar to instantly replicate filings. “Without computers you couldn’t have mass torts or class actions,” says Birnbaum. “There’d be just no way to do it.”

Birnbaum began hiring new lawyers to help her keep up with all the work. By the early 1980s, however, Birnbaum was spending so many long nights and weekends at Skadden that she decided it was time to leave NYU Law and join the firm as a full-time partner. In the months and years that followed, Birnbaum’s workload only got larger. In 1984, Dow Corning enlisted her help fending off what eventually mushroomed into more than 40,000 suits by women who claimed that the company’s silicone gel breast implants caused a range of serious autoimmune diseases. During the 1980s, she also defended Olin Corporation in thousands of suits involving DDT, as well as Georgia-Pacific in a mammoth class action in Louisiana alleging the company had contaminated the local water supply in 1981. Plus, she served as lead defense counsel on more than 100,000 asbestos-related lawsuits against insurance giant Metropolitan Life.



And that's just a sampling. Indeed, as the numbers of large-scale class actions, products liability, and toxic torts cases continued to explode, Birnbaum became the go-to defense lawyer for a long list of Fortune 500 companies. "Sheila was really ahead of the curve," says Samuel Issacharoff, Bonnie and Richard Reiss Professor of Constitutional Law, an expert in complex litigation who faced Birnbaum in a water contamination case against BP, Chevron, and other oil giants involving the gasoline additive MTBE. In the early wave of products liability cases, Issacharoff notes, many companies would hire individual lawyers to litigate each matter separately. But Birnbaum understood that the flood of products liability litigation would make that strategy untenable. She built a practice around the idea of providing comprehensive representation to defendants with the aim of global resolution of their liabilities, says Issacharoff: "She anticipated where the law was going and understood that the changes would require a whole different kind of representation."

**A**s co-head of Skadden's Mass Torts and Insurance Litigation Group, Birnbaum oversees about 60 lawyers. She views her role as a big-picture strategist—assessing the present and future scope of the litigation, weighing the risks, and figuring out the best way to proceed to limit her clients' exposure. "I'm always looking at what the endgame is," says Birnbaum, who notes that it's exceedingly rare for the defense to find a silver bullet that can suddenly make the thousands of cases in a mass torts litigation go away.

Allies and adversaries alike contend that one of her greatest talents lies in devising creative ways to resolve even the most massive, complicated matters. "A lot of defense lawyers have drunk the Kool-Aid—all they want to do is litigate," says plaintiffs' attorney Perry Weitz, co-founder of Weitz & Luxenberg. In the vast majority of mass torts and class actions, Birnbaum contends, the most cost-effective course of action for clients is to settle. The key question is when and for how much, she says: "You have to ask how you are going to win the most battles and skirmishes along the way so you get to the point where the litigation can be settled for the least amount of money."

It is during those battles and skirmishes that Birnbaum demonstrates her strength and leadership. She is calm and even-tempered under pressure, even when she's marshaling Skadden associates to meet deadlines on critical motions. "She's our Rock of Gibraltar," says David Zornow, global head of Skadden's Litigation and Controversy practices. And she has a firm hand in defusing volatile situations. During settlement talks for thousands of toxic injury cases against the maker of the diet drug Dexatrim, Christopher Seeger recalls that one of his fellow plaintiffs' attorneys jumped out of his chair and began yelling expletives in Birnbaum's face. He says Birnbaum stuck her finger in the lawyer's chest, said a few choice words, and put him right back into his chair. Seeger, who has had his own share of heated moments with Birnbaum over the years, contends that "if you push her too hard, the Bronx is going to come out."

Seeger and other plaintiffs' attorneys say, however, that Birnbaum is almost always pleasant to deal with, listening and respecting their positions. When the time comes to close settlement talks, Birnbaum is pragmatic and flexible, they say, and when she makes a promise during negotiations, she delivers. "When she gives you her word, you can count on it," says Weitz, who has faced Birnbaum across the bargaining table in at least a dozen cases. "She's shown she's someone the plaintiffs' side can trust."

**O**ver the years, some of Birnbaum's pro-plaintiffs friends and colleagues on the NYU Law faculty have ribbed her about the merits of helping polluters, manufacturers of drugs, and the many



#### ROLE MODEL

With her niece Sara Lubetsky, and with Mark Geistfeld, the first Sheila Lubetsky Birnbaum Professor of Civil Litigation, at his inaugural chair lecture in January 2010.



other corporate defendants she represents to get off easy. "I tell her she's a running dog for corporate America," says University Professor Arthur Miller with a chuckle. To which, he says, Birnbaum can be counted on to retort that he's "a supporter of extortionist plaintiffs' lawyers. Likewise, Sylvia Law recalls debating Birnbaum about whether helping to block plaintiffs who might have suffered real injuries from collecting damages is a worthy endeavor. "I thought that corporations should be held accountable," says Law, while Birnbaum was sympathetic to the defendants.

Those sorts of debates haven't done much to change the way Birnbaum regards her work. She maintains that she, too, firmly believes that corporations should not be let off the hook for willful misconduct. If, say, a drug company hid studies from the Food and Drug Administration showing a medication was harmful, then that company should be punished, says Birnbaum. The problem is that the facts on the whole in the vast majority of drug injury cases and many other types of toxic torts litigation are never that simple. She contends pieces of the story often get distorted and are used to malign corporate defendants. "It's very easy to take an e-mail or document out of context to create passion and prejudice against a big corporation" and win a huge award, says Birnbaum. "But maybe you're taking money from corporate shareholders and workers."

Birnbaum says she is moved by the plight of many of the plaintiffs whose cases she defends, such as the women with advanced breast cancer in the Prempro and Premarin litigation. Still, as tragic as those women's stories are, she insists that there's just no proof that the two hormone-replacement drugs caused their illness. "No one knows what causes breast cancer," says Birnbaum. "No doctor can tell a jury that the mere fact that a plaintiff took a particular drug caused their individual injuries."

The Dow Corning case serves as a cautionary tale that helps to explain how Birnbaum can see past the swirling emotional drama of plaintiffs' stories and insist on scientific proof of causation. Despite the tremendous hype in the 1980s and '90s about the debilitating health issues the silicone gel breast implants allegedly caused, in the end the independent panel of scientific experts who examined the evidence found there was no credible proof linking the implants to the alleged injuries. "We knew the science [the plaintiffs were relying on] was very weak," says Birnbaum, who helped lead the push for an independent review of the scientific evidence. "It was a decisive win for defendants." Unfortunately for the company, by the time the review was completed Dow Corning had already declared bankruptcy and opted to settle the litigation.

And don't even try to argue the merits of large punitive damages. While she supports the jury process, Birnbaum says large punitive damages are emotionally driven, and therefore frequently reduced by judges. She is proud of her Supreme Court win on behalf



of State Farm in the 2003 *Campbell* case, which challenged a \$145 million punitive damages verdict that State Farm had been hit with in Utah for bad faith in settling a case. Birnbaum argued that the size of the award was so excessive compared to compensatory damages that it violated State Farm's due process rights under the 14th Amendment. She asserted that since civil defendants have fewer rights than criminal ones, grossly excessive or arbitrary



punishment is unjust. A majority of the justices agreed and proceeded to lay down new guidelines on "reasonableness" for lower courts to consider when reviewing punitive damage awards. "Birnbaum argued quite forcefully that a punitive award must be limited to the rights violation suffered by the plaintiff," says Mark Geistfeld, an expert in punitive damages who became the Sheila Lubetsky Birnbaum Professor of Civil Litigation in 2009. "*Campbell* has largely reoriented the hugely important tort practice of punitive damages away from the punishment of social wrongdoing to the redress of the individual issue in the tort claim." (For more on punitive damages and torts, please read "The System Everyone Loves to Hate" on page 12.)

Birnbaum says the Court's decision has clearly had a positive impact in making punitive damage awards more rational and predictable, in addition to reducing their size. And she contends that the net effect is actually pro-consumer. "When you punish a corporation [with a huge award], consumers often end up paying for it with higher prices," says Birnbaum. In fact, she says, it's simply a windfall for plaintiffs and their lawyers.

**H**ow a lawyer whose victory in *Campbell* was called "a big win for corporate America" by the *Washington Post* is not a Republican boils down to being, at heart, a hometown girl.

Growing up in the Democratic bastion of the Bronx, Birnbaum says, she never knew any Republicans. And though she officially labels herself an independent, she says that she almost invariably supports Democrats. During the 2008 presidential campaign, she was an enthusiastic donor to Hillary Clinton and went to Philadelphia on the day of the Pennsylvania primary to assist in the Clinton

campaign's get-out-the-vote effort. "I really wanted to see the first woman president," says Birnbaum.

Over dinner with good friends, Birnbaum is always up for a lively debate about the latest political issues. "She loves to argue about politics," says her friend Barbara Wrubel, who describes Birnbaum as liberal on social issues but a fiscal conservative.

Birnbaum, for her part, does say she's strongly pro-choice, but she declines to get into her views on other hot-button issues for public consumption—especially in light of her recent appointment to oversee the 9/11 fund.

In her free time, Birnbaum can usually be found at her East Hampton home. Besides being an enthusiastic Scrabble player, she took up golf seven years ago. And all her corporate travel hasn't dimmed her wanderlust or sense of adventure. She is an avid kayaker and outdoor enthusiast. This year she toured northern India and went snowshoeing in Aspen. "It's just a beautiful thing to get out in the woods with the snow falling," says Birnbaum.

She has also recently started cooking Italian food—thanks to Brooklyn Law School President Joan Wexler (and former NYU Law professor) and other longtime friends, who gave Birnbaum lessons with a private chef for her 71st birthday this past March. "We're hoping she gets back into cooking," says Wexler, who adds that in the past Birnbaum has hosted some great dinner parties, in addition to the party she throws in East Hampton every summer, when she treats a group of about 30 friends to an outdoor meal on the night of an annual town fireworks show.

Despite Birnbaum's frenetic work schedule, Wexler and others say she's exceptionally giving of her time and is the kind of friend who can be counted on whenever they're in need. "We all know that Sheila will be there for us," says Madeline Stoller, who says that when one of Stoller's family members was ill, Birnbaum called her every day and offered helpful, practical advice.

Likewise, years back, when Stoller flew back to New York from Florida after her mother died, she says Birnbaum came to LaGuardia to pick her up at 11:00 p.m. "She's the most supportive friend in every way possible," says Stoller, who met Birnbaum when the two shared a summer home in the Hamptons roughly 40 years ago and credits Birnbaum with urging her to go to law school. Now retired, Stoller was in-house counsel at Wyeth Pharmaceuticals until 2006.

During Birnbaum's early 40s, there was a period when she thought she might like to have children. That time came and went, but Birnbaum says she has no regrets. "I wouldn't have been able to accomplish all I've accomplished," she says, noting that she has three nieces whom she's close to, including one—Sara, her brother Paul's daughter—who graduated magna cum laude this spring from NYU's College of Arts and Science.

Looking back at her many achievements, Birnbaum says she feels best about her ability to show that a woman could build a leading practice with top-tier clients and practice law at the very highest level. She's also proud of the many things she has done to support other women lawyers, including serving as a mentor and helping to organize an annual Skadden women's retreat, where the firm's female partners can network with top clients. "I've always tried to open doors for other women," says Birnbaum, who was also involved in the creation of the Women's Bar Association of the State of New York.

For now, Birnbaum insists she's still enjoying her practice at Skadden too much to think about retiring. "I love practicing law, and I intend to keep practicing as long as I can," she says. You don't need scientific evidence to conclude that's a sound decision. □

*Susan Hansen is a freelance writer in New York.*





# The System Every

**The complexity and sophistication of our institutions and services—government, banking, health care, and communications, to name a few—have grown beyond the grasp of all but those who specialize in them. And sometimes things go wrong. So it's no surprise that even the once basic tort is emerging as a hotly contested area of law where the Supreme Court weighs in on whether private lawsuits can be brought in areas regulated by the federal government, and billion-dollar corporations seek cover from thousands—even millions—of individuals claiming to have been injured by their products. At NYU Law, a dedicated group of faculty is thinking through the ramifications of torts today and how to shape a legal system that will serve our needs into the future.**

**I**n Fall 2008, Jared Roscoe '11 admits a bit sheepishly, he began his 1L Torts class not quite knowing what a tort even was. "I knew it covered things like ambulance chasing, medical malpractice...but I didn't really know," Roscoe says. By the end of that class, followed by an advanced one, both taught by Catherine Sharkey, Roscoe, like generations of law students before him, well understood the basics of a tort suit. But he also saw how in recent years torts have collided with the regulatory state, as corporations began seeking federal regulation as a shield from potentially big-ticket state lawsuits. Put simply, the question is this: Who's best at determining how to keep people safe and at what level of risk—a federal bureaucrat or a bunch of jurors? And although torts remain predominantly a state issue, the Supreme Court has been increasingly stepping into important tort reform cases to answer that question. "This is where torts is most relevant to today. I found that really fascinating," says Roscoe, who is now clerking for Judge Roger Gregory of the U.S. Court of Appeals for the Fourth Circuit.

The faculty of the NYU School of Law has in many ways led this tort evolution. Three of its members—Richard Epstein, Mark Geistfeld, and Catherine Sharkey—are focused principally on their scholarship and teaching in

torts, and are co-authors of leading casebooks in the field. Other equally distinguished faculty members have made significant contributions to the field even while devoting much of their intellectual energy to other areas. "There's no better faculty in torts," says torts scholar Gregory Keating of the University of Southern California Gould School of Law. Most other law schools are lucky to have one serious tort expert, notes Robert Rabin, Stanford Law School's top tort scholar, who teaches at NYU Law every other year. And many of the people who do teach it elsewhere don't consider torts their primary field. By contrast, most tort classes at NYU Law are taught by professors with a strong grounding in the field.

Each of the NYU Law professors is working to improve a tort system everyone loves to hate. But their approaches diverge in critical ways. Epstein, Laurence A. Tisch Professor of Law, is the preeminent writer on torts from a libertarian viewpoint, a long-standing and vocal proponent of strict liability who greatly favors using contracts rather than torts to resolve personal injury cases. Geistfeld, Sheila Lubetsky Birnbaum Professor of Civil Litigation, is a self-described liberal-egalitarian guy and product liability expert who meshes economics with notions of justice in setting tort policy. Sharkey, steeped in law and economics, is doing pioneering work at the intersection of tort and administrative law, especially the issue of federal preemption of state tort actions. "Each of them has carved out a kind of distinctive path and is engaging in first-class scholarship," says Rabin.

BY LARRY REIBSTEIN



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Hate

But NYU Law's outstanding tort scholarship doesn't stop there. Jennifer Arlen '86, Norma Z. Paige Professor of Law, while generally known for her expertise in law and economics and corporate crime, has written ambitious papers in the area of vicarious liability—concerning to what extent a company should be liable for the actions of its employees. She's probably best known for her often provocative work in medical malpractice litigation, which remains highly controversial and politicized at the state level. She has advocated for holding managed care organizations liable for their physicians' errors, and argues that caps on damage awards are unfair, especially to people who are seriously injured. She is in the midst of editing a book, *The Research Handbook on the Law and Economics of Tort*, tentatively set for publication in 2012.

Roderick Hills Jr., William T. Comfort, III Professor of Law, whose interests center on public law, dips his toe into torts at the intersection of preemption and federalism. Noted civil procedure expert Samuel Issacharoff, Bonnie and Richard Reiss Professor of Constitutional Law, has extensive experience in mass litigation such as the Vioxx cases. University Professor Richard Stewart, an authority on environmental and administrative law, has made important contributions to the study of punitive damages, and recently testified on tort issues surrounding the BP oil spill (see page 16). He was also a chief reporter for the influential American Law Institute study on enterprise liability for personal injuries. Troy McKenzie '00, a specialist in bankruptcy law, is exploring the use of bankruptcy court to handle mass torts. Geoffrey Miller, Stuyvesant P. Comfort Professor of Law, who predominantly focuses on financial institutions and corporate and securities law, is an expert on class actions. And finally, Lewis Kornhauser, Alfred B. Engelberg Professor of Law and a microeconomics ace, and Dean Richard Revesz, Lawrence King Professor of Law and a noted scholar of environmental and regulatory law and policy, have written seminal pieces on vicarious liability and joint and several liability. (Epstein, Geistfeld, Kornhauser, Miller, and Sharkey are all contributing chapters to Arlen's book.)

A feather in the cap of the torts faculty at NYU Law: Two of the leading torts casebooks are currently being revised in new editions by professors here. Geistfeld and Rabin are co-authoring one of them, *Tort Law and Alternatives*, and Epstein and Sharkey the other, *Cases and Materials on Torts*.

NYU Law also hosts a meeting of tort scholars known as the NYC Tort Theory Group. Each month the group of 10 or so meets on the fourth floor of Vanderbilt Hall to hear presentations and critique scholarly papers. Professors fly in from around the world to participate. Earlier this year, for example, USC's Keating presented "Is Tort a Remedial Institution?" Ariel Porat of Tel Aviv University discussed "Risk of Death." The discourse can be vigorous. Epstein recalls commenting at one meeting that recent Supreme Court decisions meant, unfortunately to him, that drug manufacturers could no longer expect federal regulatory approval to shield them from state tort actions (the preemption concept). Few agreed with him and weren't shy about letting him know, he says with delight.


At the same time, NYU Law professors are engaged in the modern world of torts, a front-page topic, as evidenced in recent drug and car safety cases. (Alumni make headlines, too. Please see "The Closer" on page 28.) About a half-dozen preemption cases were before the Supreme Court in the 2010-11 term. In one, *Bruesewitz v. Wyeth*, Geistfeld filed an amicus brief arguing that a federal vaccine law does not bar people injured by an injection from filing state tort suits (the Court, however, ruled 6-2 that it mostly does). Sharkey is advising the Administrative Conference of the United States on dealing with the collision between regulation and tort law. Epstein lambasted the Supreme Court's decision in *Wyeth v. Levine* for permitting a state tort case to go forward against a Wyeth drug, rather than allowing federal regulations to govern. "Awful' does not begin to capture what I think of that decision," he says. "This is really an extraordinary point in American tort law," says Issacharoff. A field that "used to be defined by common law doctrines," he says, "is now becoming thought of in terms of its regulatory role and how it fits into an increasingly administrative society."



## Torts for 1Ls

If a 1L has any knowledge of what a tort is, it's often a negative view, especially "if one of your parents is a physician," Geistfeld quips. Yet by the end of the first-year course, students have learned that, as Sharkey likes to tell her class, "all roads lead back to torts." Along with Procedure and Contracts, Torts is a core law school requirement. "It teaches students fundamental ways of thinking about law as an institution-regulating system," Sharkey says. She adds: "It's a fabulously interesting class to teach, as long as you don't teach it myopically." It shows students how the various mechanisms that strive to achieve optimal deterrence of risky behavior work together, such as private suits, government regulations, criminal law, and damages. Different intellectual approaches to torts are explored, such as the debate between the law and economic view and the corrective-justice view. "It gets students to think about deep questions that go beyond memorizing causes of action," Sharkey says.

Unfortunately, too many law schools dragoon professors to teach a course in which they have little interest. The result is professors who impart a cynical view of torts. Those who dismiss torts as an unexciting area of practice, Sharkey says, are "wrong."



The heart of the Torts class is negligence liability, on which the vast majority of suits turn, according to Geistfeld. He spends half or more of the semester teaching its various elements: duty, breach of duty, causation, and damages. He and other NYU Law professors also teach the intentional torts, the earliest torts, which typically involve a crime as well, such as punching someone in the face. Many law schools have dropped this area as irrelevant, but Geistfeld insists it remains historically and conceptually interesting. A couple of weeks are then devoted to products liability, a complicated and challenging but hugely important area of study. "The raw numbers in dollars involved" in those cases warrant the focus, says Geistfeld, who also teaches an advanced class in products liability.

Although the essentials remain the same in Sharkey's class, she says her approach is "unbelievably different" from the one in the Torts class she took as a J.D. student. New cases have arisen that enliven the class. For example, an old arcane tort known as trespass to chattels—someone interferes with another's property—might have been glossed over. Now, thanks to the Internet, the concept is back in such cases as *Intel Corp. v. Hamidi*, in which the chipmaker claimed an employee's use of its e-mail system to criticize the company constituted trespass to chattels. (It lost before the California Supreme Court.) Conversion, another old tort that's similar to theft, arises in cases involving stealing of domain names or patents.

Sharkey notes that some of the basics learned in the Torts class feed into upper-level courses, which Jared Roscoe also observed. He graduated in May with an elective advanced torts class under his belt as well: Torts and the Administrative State. His understanding of tort issues such as preemption came in handy when he took Constitutional Law, for instance. Skills learned are translatable, too, he says. Just as in showing a tort (duty, breach, etc.), a lawyer has to break out each element when proving a crime.

Beyond that, Roscoe argues that although law schools need to focus on the "big, sexy" questions that come before the Supreme Court, the real judicial business of courts is dealing with the large volume of tort suits. "It's not as immediately appealing as gay marriage," he says, but hugely important. Remember, this is from a student who as a 1L wasn't quite sure what a tort was.

## Taking Positions

Richard Epstein joined the NYU School of Law faculty full-time in Fall 2010, bringing his polymathic scholarship, prolific writing, contrarianism, collegiality, and bluntness.

As I prepare to interview him in his fourth-floor office, I place two digital tape recorders on a stack of papers covering his desk.

"Two?" he asks.

"I don't trust technology," I answer.

He peers at them. "They're the same brand, so they will make the same error," he says.

I chuckle at his joke, but it's soon clear he is making more than a joke. He is parlaying my two similar tape recorders into a point about the failings of the modern tort system.

"You know Ludwig Wittgenstein, the philosopher? He read something in the paper, and to make sure it was correct he got another copy."

I laugh again.

"It's called common mode failure: all sorts of things that you think are independent but are all resting on a single particular function."

"OK, but let's get back to torts," I say.

"But it is torts!" Epstein bellows. "Common mode failure is one of the essential themes in tort law."

The concept helps explain the massive growth of tort liability in the 20th century, an expansion that Epstein decries. Tort liability has expanded, he says, "from idiosyncratic events to systematic wrongs" as seen under common mode failure. To help curb that growth, Epstein is a strong proponent of preemption, the idea that federal regulation of a product—say, drugs or cars—overrides or preempts state tort actions.

### ON PREEMPTION

Federal preemption invokes a host of important legal and policy threads that have been dissected by NYU's law professors. What does the Constitution's Commerce Clause say about whether the federal government or state tort law governs certain tort liability, and how and when? Who is best at setting national safety standards? Congress? Agencies such as the Food and Drug Administration? Private state suits and juries? Is federal regulation a more efficient way to reduce risk and liability, or are after-the-fact tort suits more effective at compensating injuries and deterring behavior to reduce the risk of accidents?

It's a highly politicized issue. Trial lawyers, traditionally Democratic supporters, loathe preemption in that it blocks their lucrative state tort suits, and federal regulations don't allow for damages to injured parties. Business generally prefers the consistency of federal regulation and the avoidance of potentially big jury awards at the state level.

And for students, preemption, despite the eye-glazing nature of the word, is a favorite part of her tort class, according to Sharkey: "It engages them because it's not a historical or theoretical discussion, and it's not about horses and buggies in the 19th century. They hear 'torts' and think it's not for them, but this makes the subject come alive."

Among the faculty, the clashes play out in academic papers and debates. Epstein, as always, knows where he stands. "I'm in favor of preemption almost across the board," he says. Tort suits brought in state courts should be tossed out—"all of them, one and all"—on grounds that federal regulation of the activity protects against liability at the state level. "I've had this position for close to 40 years," Epstein says, noting his long-ago preemption work for Philip Morris

in the cigarette litigation. (“I worked for them when they won, and when I stopped they started to lose,” he says. “It’s not quite a causal relationship, but I’ll take it.”)

His essential reasoning is that the FDA, to name one federal agency, has already carried out extensive fact gathering on a drug and has issued a rule. This alone “should rule out state tort causes of action based on the inadequacy of any drug label,” he wrote in the *Tulsa Law Review* in 2009. Allowing state tort suits does not “let you make a better judgment.” Writing in the 2010 *New York University Annual Survey of American Law*, Epstein notes the “massive disruption” that “even a single trial causes to a blameless product.” These tort suits lead to “an absolute brawl,” he says, in trying to determine causation or whether a warning was adequate, as both sides need to hire batteries of experts. “You’re talking billions of dollars in wasted money, and God knows what it does to innovation,” Epstein says in our interview.

In his NYU *Survey* article, Epstein notes that tort law and the FDA lived in a “peaceful co-existence” before the mid-1960s. But the “huge expansion” of state product liability law since has led to the current collision between state torts and federal regulation generally. Epstein gives this example of the ballooning of liability in the last 50 years: “The original definition of a defective car was when it exploded because of a gasoline leak into the carburetor. Now the definition is in effect a car that won’t protect you when you crash—drunk—into a steel pole at 85 miles an hour.”

And yet, he adds, the safety of products, from cars to TVs, toasters to drugs, has grown enormously. “The safety probability error rate is one-one-thousandth of what it was in 1950—and the liability is a thousandfold what it was. Something is obviously out of whack,” Epstein says.

Roderick Hills Jr. expresses a far different view. He argues that state tort suits serve as an incentive to business to help federal agencies regulate products. “Federal agencies like the FDA just do not have the resources or the personnel to monitor industry,” says Hills, who explored the topic in a 2007 *NYU Law Review* article, “Against Preemption: How Federalism Can Improve the National Legislative Process.” He explains that the FDA’s clinical trials on a drug are done only once and on a relatively small number of people compared with the number who often take the drug—like Lipitor, for instance. The FDA can’t possibly anticipate the complete array of risks associated with a product. When a problem arises



after approval, he says, a drugmaker has little obligation (and no incentive) to go back to the FDA for a new rule. That’s the role state tort suits should play. The threat of huge payouts, legal fees, and bad publicity should create an incentive for a company to ask the FDA for new rules—an updated warning label, for instance—that would also serve to block any future suits on preemption grounds.

“I don’t care if state tort suits are stupid and inefficient; you need some kind of prod,” Hills says. “The point is to force industry to help the FDA get it right.” He adds that opponents to tort suits have never offered up another mechanism to induce industry and agencies to update their regulations.

Sharkey has carved out an approach to tort suits and preemption that she has dubbed the “agency reference model.” She believes that federal rulemaking should block tort suits when the regulatory agency can show it has done its homework in investigating a product. Too many times, she says, agencies merely declare that their regulations require preemption (in a preamble, for instance) without a factual basis. Or they might be subject to ideological considerations—they don’t like torts, for instance, so they’ll reach for preemption in an arbitrary way. Courts, by looking to agencies to determine if they’ve done a thorough job, can make more informed decisions about whether the regulation was an optimal one or not—and hence, whether it should trump state action. Says Sharkey: “Courts are making decisions about whether there is preemption, but they are not well equipped” to parse the complicated regulatory process.

Is her model gaining any traction? Courts are starting to recognize that agency input is important, she says, but she won’t claim that the Supreme Court has embraced it. At the root of the issue is how Congress handles—or mishandles—the federalism question when enacting product liability laws. Sometimes Congress knows what it wants to do, so it expressly bars state tort suits. In those cases there is no ambiguity: suit dismissed. But often it writes muddled, conflicting language, declaring in one passage that the federal law trumps state law jurisdiction, while insisting in another that nothing in the law prevents the filing of state suits. In effect, Congress is punting the question to courts and agencies.

So what’s a poor judge to do when faced with a tort action? Here, too, courts must confront what Sharkey calls “two warring strands of jurisprudence” in administrative law. On the one hand,



**Fifty years ago a defective car was one that exploded...  
Now it's a car that won't protect you when you crash,  
drunk, into a steel pole at 85 miles an hour.**

**RICHARD EPSTEIN, LAURENCE A. TISCH PROFESSOR OF LAW**





judges can go with the notion that there exists a presumption against preemption—and allow the suit to go forward. On the other, there's *Chevron* deference (after a landmark Supreme Court decision), meaning judges should defer to agency interpretation of laws. "They are clashing, and that's why the Supreme Court hasn't squarely addressed it," she says.

Epstein, however, *has* squarely addressed Sharkey's agency reference idea—and doesn't much like it. "As I told Cathy, compared to what Justice Stevens has ruled, I ought to embrace and kiss you," Epstein says. But he maintains that federal agencies already carefully study products before issuing regulations. Her model will generate "too many fact-dense inquiries to work well in hard cases," he has written.

The professors' differing views play out in the Supreme Court's 2009 ruling in the major preemption case *Wyeth v. Levine*. Stevens, writing for the 6-3 majority, said the fact that the FDA had approved a drug's warning label doesn't shield it from tort liability in Vermont. The plaintiff had lost her hand to gangrene when she was injected with Phenergan, an anti-nausea drug made by Wyeth.

Was it a bad decision, I ask Epstein? "It's a level of institutional unawareness and incompetence beyond which you cannot compare," he answers. The physicians who administered the drug made mistake after mistake and admitted as much, but insisted that if the label

had told them more, they would have been more careful, according to Epstein. The suit should have been tossed out, he says. ("The state court ought to be put on a funeral pyre and left to burn," he suggests in typical understatement.) Instead, the *Wyeth* decision means drug companies will find it almost impossible to obtain protection from state liability, Epstein concluded in his *Annual Survey* article.

Hills, again, disagrees with Epstein, insisting the Court's decision to allow the suit was the right one. Wyeth's Phenergan label was inadequate, Hills says, by failing to discuss the risks as compared with the benefits.

Sharkey is unhappy with the ruling, though for different reasons. She says the Supreme Court should have remanded the case to a lower court, which, using her agency reference model, could have explored more of the "indeterminate," in her word, regulatory record on Phenergan. She thinks Epstein is reading the decision too broadly to say that it largely shuts the door on preemption. But she laments that lower courts seem to be interpreting it that way, too. "They're putting the bar way too high," she says.

Sharkey grew interested in the preemption debate while working with Samuel Issacharoff on a paper published in the *UCLA Law Review* in August 2006. At the time she was working on punitive damages issues, while Issacharoff was focused on class-action law. Their joint article, "Backdoor Federalization," addressed what

## It's Not Easy Being Green: Litigating Environmental Disasters

When University Professor Richard Stewart first learned of the BP oil well explosion in April 2010, he thought, Here it goes again. Stewart played a central role in the



\$1 billion settlement for the *Exxon Valdez* disaster in 1989. Then a Justice Department assistant attorney general, Stewart spearheaded both the criminal and civil actions brought by the U.S. against Exxon. He adopted a unified strategy with the state of Alaska—to avoid any Exxon divide-and-conquer maneuver—and managed to deal with at least five U.S.

agencies, three of whom vied for restoration monies. "It was a very complex process of keeping things together," he says. "It was not easy. Not easy."

And yet, on paper at least, settling the BP litigation could easily surpass Exxon's in difficulty. Five states are involved as plaintiffs, and there are a number of potential defendants, including Halliburton and Transocean, in addition to BP.

And unlike the pristine Prince William Sound, Stewart notes, the Gulf of Mexico was already "beaten up," making it difficult to pinpoint BP's responsibility.

For starters, Stewart suggests that officials borrow a page from his Exxon strategy: Push for a global settlement of all criminal, civil, and natural resources claims. Such an approach would "avoid potentially immense litigation delay and expense," Stewart testified in September 2010 before the national commission investigating the spill. "Most important, a global settlement could deliver restoration resources to the Gulf more rapidly."

At press time, the parties in the BP spill were making progress toward such a settlement. In April, BP agreed to pay \$1 billion to begin restoration work in the Gulf. Stewart lauded the preliminary agreement, but says he's concerned that the money will be allocated evenly among the affected states even though the Louisiana coast is the top restoration priority. "It's not clear the political logic matches the ecological needs," he says.

Indeed, Stewart notes that questions on how settlement money gets spent and who makes the decisions can easily turn into a bruising free-for-all. In *Exxon*, Stewart says the Department of Justice wanted large fines for deterrent effect, while government agencies wanted a big slice to go for restoration, as did Exxon (it's tax-deductible and good public relations). In the end, there were large fines and criminal restitution, but the money was mostly targeted for restoration costs.

In *Exxon*, a six-person body of both federal and Alaska representatives made the spending decisions. Stewart told the oil spill commission that the number of parties in the BP case would make that arrangement unworkable. He urged instead that the president appoint one person for federal decisions on restoration while the states collectively do the same.

The bigger lesson here, Stewart says, is how to prevent such disasters in the first place. The threat of big sanctions to create an incentive for corporations to act responsibly clearly didn't work, he says. The answer may include special training for rig operators, such as the training that airline pilots and nuclear workers receive, and targeted incentives for innovation in safety. "Torts are not enough," Stewart says. "Liability alone is not going to do the job." — L.R.



they called the Supreme Court's "quiet federalization" of areas of law historically governed by state law, referring, in part, to preemption decisions. They argued that in doing so, the Court was attempting to capture the benefits that flow from "national uniformity" and to protect commercial markets from "unfriendly state legislation."

Sharkey says the question in her mind was how to tap the expertise of agencies but not bow to them indiscriminately. To achieve this balance, she devised her agency reference model. "It places federal agencies front and center in a realm in which they have often lurked just out of focus," she wrote in her paper for the *George Washington Law Review* in April 2008.

Sharkey's ideas did not go unnoticed. Her paper on the agency reference model was read by Paul Verkuil (LL.M. '69, J.S.D. '72), who had recently been appointed by President Barack Obama to head the Administrative Conference of the United States, which issues recommendations on administrative law matters. (Revesz is a public member of the conference.) Verkuil invited Sharkey to lunch in May 2010 and proposed that she work up some practical ideas flowing from her academic papers, she recalls.

Intrigued, she accepted and began intensive research. The issue of preemption was especially high-profile at the time, and highly politicized. Just months after taking office in 2009, Obama had issued a presidential memo condemning how agencies such as the FDA and the National Highway Traffic and Safety Administration were too aggressive under former President George W. Bush in asserting blanket preemption of state law, known as preemption by preamble.

Over the summer of 2010, Sharkey interviewed officials in charge of preemption at various agencies in Washington, including the FDA, NHTSA, EPA, and Consumer Product Safety Commission. Her goal was to learn an agency's inner workings—who specifically made decisions about preemption, how they reached those decisions, with whom they consulted. After undertaking an exhaustive review of agency rulemaking and intervention in court cases, she prepared a series of recommendations for the Administrative Conference, which were subsequently adopted. They boiled down essentially to her agency reference model.

Sharkey was that most unusual of law school students—she actually liked torts. She had gone to Yale as an undergraduate economics major. Embracing the intersection of policy and problem solving, she took off her first semester of senior year to pursue an independent study of the bail bond system in New Haven, Connecticut. Her paper,

which concluded that private bail bondsmen tend to treat minority clients better than the courts do, won Yale's prize for the best original economics thesis.

She went on to get her master's in economics from Oxford, where she was a Rhodes Scholar. After attending Yale Law School, and falling under the law-and-economics sway of professor and Second Circuit judge Guido Calabresi, and then clerking for two years (for Calabresi, then Justice David Souter), she worked for three years in private practice, handling appellate litigation involving product liability and punitive damages. "I liked that because it had a law-and-economics spin," she says. She then accepted a research fellowship at Columbia Law School, where she wrote a paper on punitive damages.

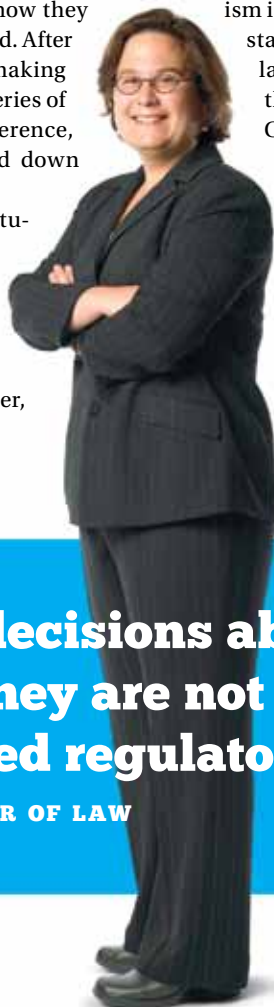
She had the chutzpah to send the paper to Epstein, then at the University of Chicago, whom she did not know. "He was unbelievably critical," Sharkey recalls with a smile. Responds Epstein: "She gives as good as she takes." At one point, Sharkey found herself editing a piece Epstein had written on preemption. "It was an insane experience," she recalls in awe. "He'd send me something at 3 in the morning, then I'd get something back to him at 5, and at 7 he'd be back to me. He was very engaged." The two went on to become good friends and colleagues, and Sharkey speaks admiringly of his extraordinary support for students.

Sharkey became interested in preemption just before the Supreme Court jumped in and made it a hot issue. She says the Court's focus on the issue has "kept me in the subject probably longer than I otherwise would."

## ON PUNITIVE DAMAGES

Another area of state torts into which the Supreme Court has injected itself, raising some of the same constitutional and federalism issues as preemption, is punitive damages. In three cases starting in 1996, the Supreme Court rejected excessively large punitive damage awards by state juries on grounds they violated the defendant's due process rights under the Constitution. The controversial rulings sparked renewed interest in the area from several professors, including Geistfeld and Sharkey.

Both wrote about the 2007 smoking case *Philip Morris USA v. Williams*, which involved an Oregon jury award of \$97 million for punitive damages and only \$821,485 in compensatory damages. The Supreme Court vacated the award in part on grounds that the punitive award far outweighed the compensatory damage. (The Court, in an earlier ruling, had suggested a proper



**Courts are making decisions about whether there is preemption, but they are not well-equipped to parse the complicated regulatory process.**

**CATHERINE M. SHARKEY, PROFESSOR OF LAW**





ratio requires that punitive damages be less than 10 times the size of the compensatory award.) But Oregon courts, after a protracted back-and-forth with the Supreme Court, upheld the smoking award.

In law review articles, Sharkey criticized the “heavy-handed direction” of the Supreme Court and also attacked the punitive-compensatory ratio as “theoretically bankrupt,” saying it lacks any correlation with the underlying deterrence and retributive goals of punitive damages.

Geistfeld took another tack, dissecting the *Philip Morris* decision to explore the novel question of how to justify and calculate punitive damage awards in a wrongful death case. In the Court’s two previous punitive damage cases, the plaintiffs had suffered economic damages—in one, diminished value in a new BMW that had been repainted; in the other, fraudulent insurance reimbursement. Those damages became a baseline to determine the size of the punitive award. But in the *Philip Morris* case the plaintiff, Jesse Williams, was dead. Wrongful death cases typically produce minimal, if any, compensatory awards. So, how to figure out the baseline to multiply for punitive damages?

Geistfeld scrutinized the award through the lens of the individual tort right to compensation. He first borrowed from government data that puts a value of \$6.1 million on a person’s statistical life (used when assessing a proposed regulation’s cost versus its benefit in saving lives and preventing injury). But the risk of death from smoking is so high and clear that it yielded an injury measure between \$10 million and \$20 million, according to Geistfeld’s estimate. A single-digit multiplier, as specified by the Supreme Court, could then easily get punitive damages to the \$79 million awarded by the jury. “I did everything from the perspective of what Jesse Williams’s rights might require,” Geistfeld said.

That emphasis on rights marks a substantial change in Geistfeld’s original thinking on tort issues. Geistfeld received an economics degree from Lewis & Clark and a master’s in economics from the University of Pennsylvania. Early on, he was interested in using the lessons of economics to figure out legal issues. As applied to tort law, this well-established school of thought evaluates liability rules in terms of their ability to minimize the social cost of accidents. That line of inquiry led him to the law. He returned to school for a joint Ph.D. in economics and law at Columbia.

Unlike Sharkey, he didn’t find torts in law school to be so interesting. “Kind of cookie-cutter,” he says. But in the mid-1980s, the tort reform movement and product liability cases were the rage, all of which Geistfeld found fascinating to observe through his economics lens. “I started writing papers [for his Columbia mentor, Susan Rose-Ackerman, a professor of law and political science now at Yale Law School] and did my dissertation on product liability,” he recalls. He graduated in 1990, and joined NYU Law two years later.

Geistfeld happened to have an office in Vanderbilt Hall near two of the most revered figures in the study of legal philosophy: Ronald Dworkin, Frank Henry Sommer Professor of Law, and University Professor Thomas Nagel. Influenced by them, he grew intrigued by a vision of torts that invokes fairness and justice, the idea that if you hurt someone you have committed a wrong and hence have a responsibility to pay for any losses. “I took the justice argument seriously because I was surrounded by really superb philosophers. I couldn’t just dismiss it out of hand as something I didn’t have to worry about,” Geistfeld recalls. “So I started on an exercise to try to figure out if I, as an economist, can make sense of what the fairness is that people are talking about in tort law.”

The result for Geistfeld was a kind of hybrid philosophy, the incorporation of economics into the justice view of torts. Most scholars insisted it had to be one or the other. But, wrote Geistfeld in a chapter of the 2009 book *Theoretical Foundations of Law and Economics*, “The idea that economic analysis is incompatible with or irrelevant to a rights-based principle of justice is mistaken.” In fact, he argues, economic analysis is “integral” to any rights-based tort system, an argument he has since defended by showing how this conception can resolve a number of doctrinal issues that have long vexed the tort system.

Of his new focus on fairness, one thing is clear to Geistfeld: “If I had been somewhere else and not here at NYU, I’m not sure I would have gone in that direction.”

## ON MEDICAL MALPRACTICE

There’s probably no area of torts more controversial in the public arena than medical malpractice litigation. That’s where Jennifer Arlen has made her mark, employing economics reasoning to debunk conventional wisdom about such suits. No surprise there: She has an economics B.A. from Harvard and a Ph.D. in the field from NYU. In between she earned her J.D. at NYU Law.

The overall tort system, she says, acts essentially as a corrective to the market: “Markets often don’t work, and you can’t regulate everything, so you need what I think of as a potentially market-enhancing system: the tort system. It can make markets function better. It’s not an opponent.”

That’s the argument she presented in a 2003 *NYU Law Review* article suggesting that the market alone was not sufficient to ensure optimal medical care. The article dealt specifically with managed care organizations (MCOs) and the extent of their tort liability. MCOs, which rose to vast influence in the 1990s, affect patient care by holding the power to approve or deny medical treatments selected by affiliated physicians (in a process known as utilization review). But federal law barred most state tort actions against MCOs.

Arlen, with co-author W. Bentley MacLeod, argued that MCOs should be held liable for their coverage decisions that ended with negligent medical care. The most obvious reason is when an MCO denies a costly treatment that, in fact, was appropriate for the patient. But the less obvious reason, they argued, is that physicians are less likely to invest in gaining “expertise” about medical procedures if their MCOs deny their use. Using the tools of economics in a follow-up 2005 paper for the *RAND Journal of Economics*, they showed how utilization review acts as a disincentive for physicians to gain that expertise to make better treatment choices. All in all, they wrote, the lack of liability results in less effective medical care and more negligence. “The cost of not having medical malpractice is increased patient deaths and injuries,” says Arlen. “Those are a real cost in an economic perspective. We have to see that as being as much of a cost as a dollar spent on care.”

In 2004 the Supreme Court ruled in *Aetna Health Inc. v. Davila*, its biggest case on MCO liability, that the federal Employee Retirement Income Security Act takes precedence over state tort suits. “We’ve lost this battle,” Arlen says.

She has also written extensively on the proposal, pushed by Epstein and others, that one way to reform medical malpractice is to use voluntary contracts between doctor and patient. In this scheme the parties agree on the level of liability—Cadillac or Kia—based on how much each patient is willing to pay for levels of safety. The patient then gives up the right to sue. The idea is that this would reduce the overall cost of liability in the health-care system and allow for more patient autonomy.

But Arlen, writing in a 2010 *University of Pennsylvania Law Review* article, argues that contracting over malpractice liability would not benefit patients, even well-informed ones, or do much to reduce health-care costs. The economic incentives are all wrong, she suggests. The problem is that physicians' incentives to improve care by investing in technology, expertise, and safety measures arise from their expected liability to all patients, not just individual patients. So the quality of care that each patient receives does not depend primarily on her own decision to impose liability; it depends on choices made by patients collectively. Each patient knows that her decision to waive liability would not materially affect her provider's expected liability costs. Therefore, the patient would be rational to waive, reasoning that she will get the benefit even without paying more. "Why should they pay for something they can get for free?" Arlen asks. As a result, most patients would waive, and in turn doctors would have too little incentive to invest in patient safety, to the detriment of all patients.

## Markets and Venues

Troy McKenzie is exploring a novel, and he thinks better, model to handle mass tort cases: bankruptcy. It was used in the 1980s when Johns Manville filed for bankruptcy as a way to aggregate all its asbestos liability in one place. But McKenzie thinks bankruptcy concepts can be applied more broadly now to handle other mass tort claims. "By its nature, the bankruptcy court and code are quite good at dealing with large-scale creditor claims that might be widespread and of high value," he notes. That's similar to when a manufacturer of a defective product is sued by hundreds of thousands of claimants—like creditors filing claims in bankruptcy.

His proposal is a reaction to the current debate over the right way to handle mass tort injuries. Courts are increasingly slamming the door on class-action suits as questions arise over certifying a class of victims. So plaintiff lawyers have moved to what McKenzie calls quasi-class actions, meaning aggregating mass torts claims but without the formal appointment of class counsel and court certification of the class. Yet courts grappling with quasi-class actions continue to rely on concepts that do not fit a post-class action world.

Bankruptcy would provide a model of aggregation different from the class action. One advantage is that bankruptcy courts can deal better with future or contingent claims. In mass tort cases, courts now are often bedeviled by new claims of injuries popping up post-settlement. The Johns Manville bankruptcy provided for a future claims representative. Bankruptcy is also better at coordinating claims—making sure claimants who are in the same boat are treated in similar ways and that compensation



levels are truly pegged to the level of injury. Now, the first plaintiff in a suit could get a \$2 million award, the second nothing, and the third \$500,000. "It shouldn't matter when you file your suit; that shouldn't determine the level of compensation or the chance you'll succeed," McKenzie says.

The downside, he says, is that bankruptcy is expensive and that companies might feel a stigma filing for it. He nevertheless believes it provides lessons for handling mass tort claims even if defendants do not actually end up in bankruptcy court. If nothing else, he wants to inject some "mild skepticism" into the view that aggregated court actions must be modeled on class actions.

That view is warranted, according to Issacharoff, who has worked on several mass actions in private practice, including the 2007 \$4.85 billion mass aggregate settlement by Merck for its painkiller and anti-inflammatory drug, Vioxx. "Bankruptcy has the right mindset of a workout," he says, "whereas the litigation system still seems mired in individual-by-individual responsibility."

Issacharoff explored this area in "Private Claims, Aggregate Rights," a 2008 *Supreme Court Review* article. He noted that courts, including bankruptcy, are more flexible when overseeing private, non-class-action, mass litigation compared with the "formalism" they bring to traditional class-action cases.

Each NYU Law professor, in his or her own way, is dealing with "big, hard problems of justice," as Geistfeld puts it. Their particular view of justice will influence how they think.

But any tort suit stripped down to its bare facts involves the conflict between one party exercising liberty and another getting killed or injured by it.

Thus, to Geistfeld, the question for all is this: "How do you balance life and liberty in the pursuit of happiness? I think that is the fundamental tort problem." □

*Larry Reibstein is an executive editor at Forbes Media.*

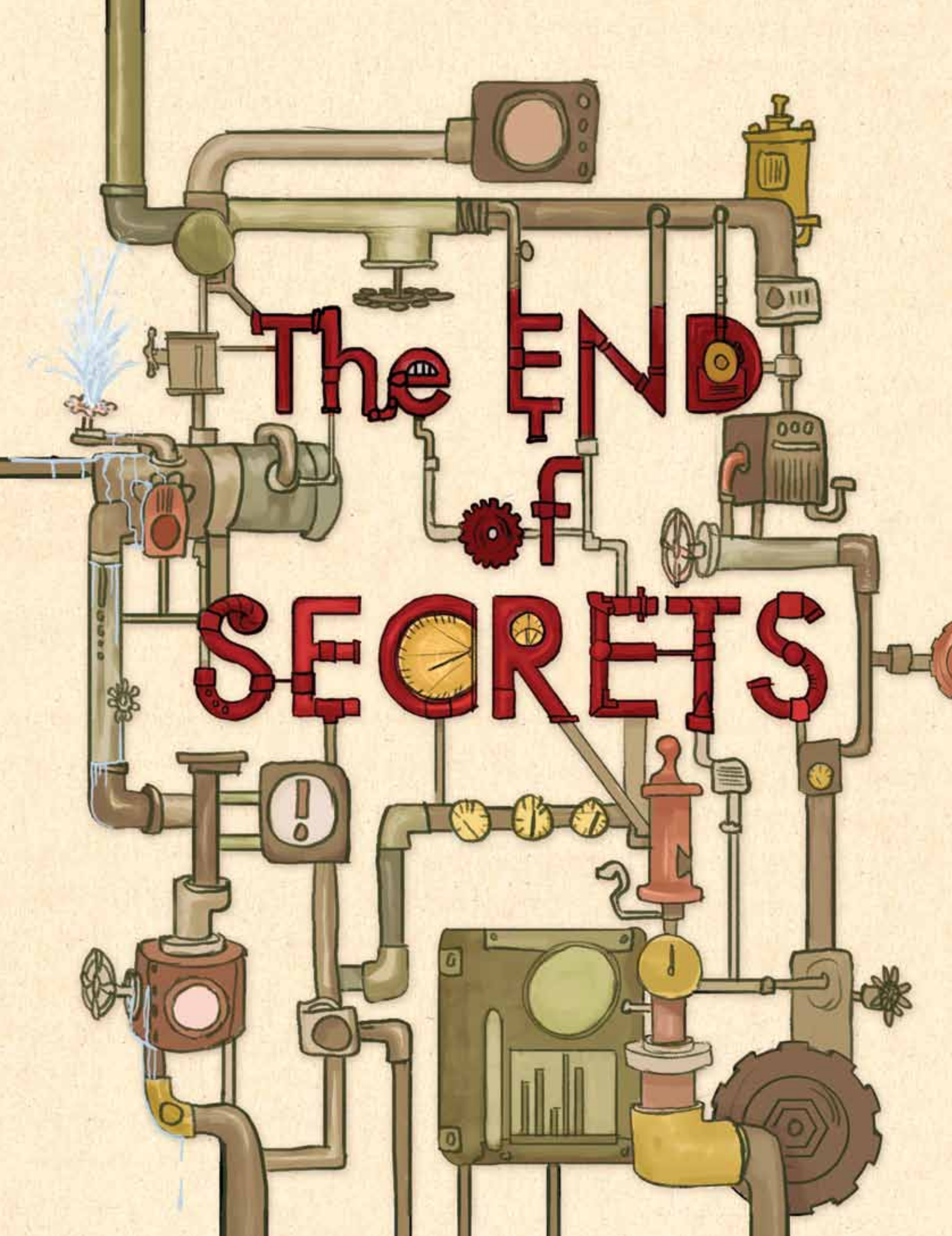


**How do you balance life and liberty in the pursuit of happiness? That is the fundamental tort problem.**

**MARK GEISTFELD, SHEILA LUBETSKY BIRNBAUM PROFESSOR OF CIVIL LITIGATION**







The END

SECRETS



**IRA RUBINSTEIN**, Senior Fellow, Information Law Institute at NYU School of Law: WikiLeaks is the epitome of what some observers call the networked fourth estate: reporting and commentary that is Internet-based, decentralized, published by users rather than media outlets, more amateurish than professional, and much less dependent than newspapers on market financing. WikiLeaks began in 2006 and in its first several years won awards for exposing corruption around the world.

In 2010, however, it released a video showing U.S. helicopters firing on Iraqi civilians. Then it released hundreds of thousands of field reports from Afghanistan and Iraq, having redacted names of individuals who might be endangered. And finally, it worked with the *New York Times* and other major newspapers on a controlled release of 250,000 State Department cables. These three releases have caused a great deal of anxiety, especially in the United States, where Private First Class Bradley Manning, the apparent source of the leaks, is now in solitary confinement. And Julian Assange, WikiLeaks founder, is considered by many to be public enemy No. 1. So, as a group of lawyers and

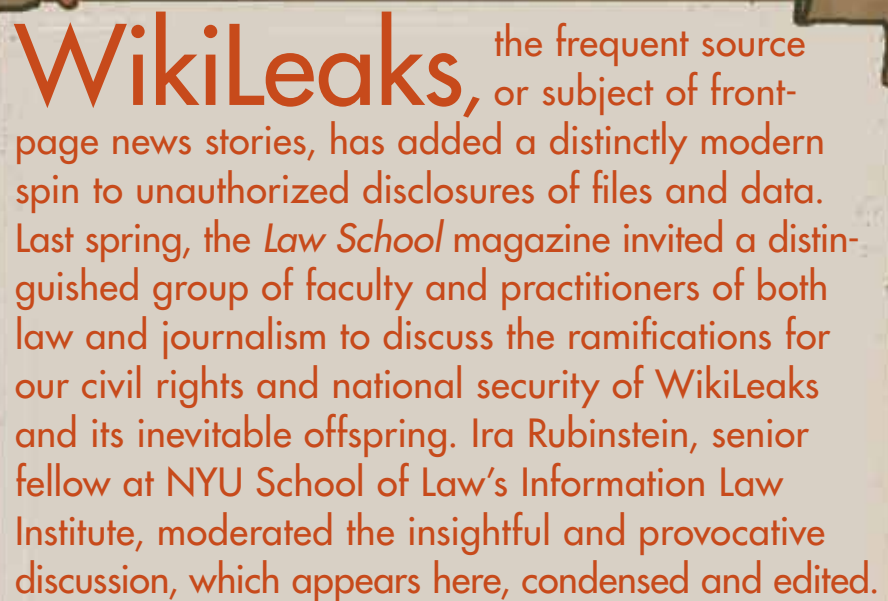
journalists, experts in the First Amendment, national security, Internet law, and journalism, what worries you the most about WikiLeaks or the responses to it?

**SAMUEL RASCOFF**, Associate Professor of Law, NYU School of Law: The thing that's causing deep-seated anxiety in the national security establishment is that the government seems to be structurally incapable of maintaining a secret. It's not just that hundreds of thousands of sensitive diplomatic cables, dispatches from the battlefield, and records of covert operations have now been disclosed; it's the sense that, going forward, the government will never be able to do anything without public knowledge and participation.

Couple that with the recognition that the available legal tools for addressing this state of affairs are actually totally ineffective. Whereas someone like Manning is certainly vulnerable to criminal prosecution of one sort or another, the likes of Assange are effectively immune from prosecution, on par with the *New York Times* itself.

There are two good news stories, however. One of them is that the leaks revealed thus far have not been terribly damaging to the reputation of the United States. In some ways, they've actually enhanced our reputation. American diplomats, generals, spies actually come across looking quite a bit more conscientious than some might have suspected. And whereas our legal architecture is radically ill-equipped, there are plausible information technology infrastructural fixes to the problem. So that's got to be the way forward.

**BURT NEUBORNE**, Inez Milholland Professor of Civil Liberties, NYU School of Law: Widespread secrets in a modern society are a pipe dream. That's as much a function of technology as anything else. When Gutenberg invents the printing press, all of a sudden the people who are in control are terrified because information is now going to be widely available to the masses. Milton is talking about unlicensed printing in *Areopagitica*. And in the United States, you had the 18th-century trial of John Peter Zenger, a printer. And so Assange is a modern heir to this notion of technology allowing widespread dissemination of information that is likely to be highly disturbing to the existing power structure.



**WikiLeaks**, the frequent source of front-page news stories, has added a distinctly modern spin to unauthorized disclosures of files and data. Last spring, the *Law School* magazine invited a distinguished group of faculty and practitioners of both law and journalism to discuss the ramifications for our civil rights and national security of WikiLeaks and its inevitable offspring. Ira Rubinstein, senior fellow at NYU School of Law's Information Law Institute, moderated the insightful and provocative discussion, which appears here, condensed and edited.

Watch the full discussion online at [law.nyu.edu/news/audiovideo](http://law.nyu.edu/news/audiovideo).

The stuff that comes out of WikiLeaks just reinforced my assumption for years that we have radically overclassified information. When you have a government that is bent on getting as much information as it can about individuals and goes through tremendous violations of privacy and violations of the Fourth Amendment and at the same time claims the ability to keep what it does secret, that's just a formula for WikiLeaks. It's a formula for rebellion: A government that doesn't respect my privacy doesn't have any privacy of its own. That's what we're living through now.

**JAY ROSEN**, Associate Professor of Journalism, NYU: WikiLeaks is the first significant stateless news organization. Up to now, the press is free to report on what the powerful wish to keep secret because the laws of a given nation protect it. But WikiLeaks is able to report on what the government wishes to keep secret because the logic of the Internet permits it; it doesn't require the law to protect it.

The press we have in the United States has, through its own mythology, obscured the way that national law creates it. It sees itself as a counterweight, an adversary, a watchdog, but is actually embedded with the state. This is one of the reasons that the professional press's reaction to WikiLeaks has been so distorted, disappointing, and error-strewn. The *New York Times* reporters



and editors were very insistent on describing Assange as a source. If he's just a source, they have rules and constructs for dealing with that. Of course, he's not just a source because he has what Yoichi Benkler calls the networked public sphere at his disposal. He has the ability to publish himself. He is, in fact, a news organization.

The real source is Manning, and the fascinating thing is that the sources are voting with their leaks. That is, they are choosing to go to WikiLeaks rather than the press. There must be a reason for that. But rather than interrogate that reason, our press has tried to belittle WikiLeaks, to keep it in a box that makes it more familiar. This insistence that he's just a source is a little clue that the press is freaked out by WikiLeaks. A bigger clue is a finding in Benkler's really excellent paper on WikiLeaks: that 60 percent of all the reports that appeared in newspapers and magazines falsely claimed WikiLeaks indiscriminately dumped all of the cables online. This factual inaccuracy can only be a result of anxiety about WikiLeaks and its presence in what had been a very closed club.

**NORMAN DORSEN**, Frederick I. and Grace A. Stokes Professor of Law, NYU School of Law: I doubt if we'll hear a more important comment than Sam Rascoff's: The reason for anxiety is ultimately that we can't do anything about it. We have to rely on individuals to make decisions about whether or not they're going to leak,

publish, or otherwise disseminate information. This was also true in the Pentagon Papers case. The *Times* had plenty of other information that its editors regarded as secret and dangerous, and didn't publish. But because of the Internet, these days we're relying in a sense on everyone. That's us. There are going to be a lot of leaks

that are going to cause harm of some kind or another.

We've got to be tough on the people in the government who are like Manning. That doesn't mean we should subject them to cruel and unusual punishment, but if you're in the government, how are you going to run the government if people are free to leak things to the world using their individual judgment?

**SIMON CHESTERMAN**, Global Professor of Law, NYU School of Law: I don't think Assange is Gutenberg. I don't think Assange is that important. And the WikiLeaks "Cablegate" is not the Pentagon Papers. WikiLeaks is not the reason why the information got out. It's the reason why the information was widely disseminated and hard to put back in the box. None of this would have come out in the absence of Manning.

WikiLeaks is just taking advantage of the positive aspects of the Internet: that it's decentralized, anonymous, user-driven. These are also the disadvantages. The real tension on the journalistic front is that, whereas some of the disclosures during the past decade about government abuse of authority have come out primarily because of quality investigative journalism, WikiLeaks is quantity journalism. Certainly WikiLeaks itself has confessed the inability to do quality control, and that's why it had to rely on the traditional media.

It's also important to note that the information that comes out was available to three million people in the U.S. government, which is why PFC Manning had access to it. And most of it, frankly, is quite marginal. Who didn't know that Silvio Berlusconi was vain? Or Robert Mugabe is a crazy old man?

The things that were influential tended to be accidental. So there were bits and pieces published about Ben Ali in Tunisia that were not commented on until the population of Tunisia started getting access to that information and then used it in their campaign against him. We found out Muammar el-Qaddafi has a

voluptuous Ukrainian nurse and is afraid of flying over water. But we didn't find out that his people were going to rise up against him. The really useful stuff wasn't there.

What worries me is the message that went around the world: that you need to be careful what you put in writing. Diplomats in the future will be wary about giving full and frank commentary. Decisions will not be based on minuted meetings. And that the entirely justified push for greater information sharing within the U.S. government after September 11 will be rolled back. We've already seen that with the State Department taking itself out of the SIPRNet.

This will not lead to what Assange wants, which is greater transparency. It will actually lead to *less* transparency, *worse* decision making, and *less* accountability, which seems to be a pretty high price to pay for gossip.

**NEUBORNE**: The closest analogy is the Pentagon Papers. They did prosecute Ellsberg. But the government's case disintegrated because it had engaged in far greater violations of things we care about than Ellsberg's leaking. So their criminal prosecution came unhinged and the case was dismissed. The Supreme Court never definitively decided whether the *Times* could have been prosecuted. If you read the Pentagon Papers case very, very closely, you find that there are not five votes for the proposition that no criminal prosecution could have been brought against the *Times* under the Espionage Act.

**DORSEN**: I'm not sure that the Pentagon Papers case would be decided the same way today. The vote was 5-4, and as Burt suggested, White and Stewart concurred on a very narrow ground that would not cover the statutory espionage case. But in a way, that's not too important. Despite the attention given to the Pentagon Papers case, it was a unique situation where the *Times* and the *Washington Post* published the materials serially. They told the government in advance, so then the government could come in and ask for an injunction. But supposing they published all the information the same day? There would be no injunction. It would be a question of criminal liability.

**RASCOFF**: Let's go past the black-letter First Amendment law here to a more policy-oriented discourse. The fact is that the *New York Times* in the last decade published at least two stories, one about warrantless wiretapping, the other about the so-called Swift program, the consequences of which were felt around the world, and specifically within the American national security establishment. In both cases, the Bush administration had actively engaged the *New York Times* and sought to have them delay publication or not to publish at all, but ultimately the *Times* did publish both stories. The implications for national security were more significant than the stuff that WikiLeaks put out.

**DIANE ZIMMERMAN**, Samuel Tilden Professor of Law Emerita, NYU School of Law: It's very easy to think of WikiLeaks as carving out entirely new territory, but in fact these problems with leaks of sensitive information are recurrent. The press has sometimes declined to publish things and sometimes regretted it afterward; the Bay of Pigs comes to mind. The *New York Times* knew about that before it happened; they were asked not to publish the story. They acceded. Afterward, President Kennedy said he wished he had either never asked them to or they hadn't paid attention to him.

It would be a shame if the desire to get Assange leads us to bend our law, because there's an awful lot of important information that comes out in the form of leaks. Government is not the most reliable representative of its people. An example occurred recently in Japan, where they attempted to underplay the damage to the cooling system of those reactors. There are things that governments do







**IRA RUBINSTEIN**

LEAK: Worked in Microsoft's law department for 17 years and served as associate general counsel in charge of the Regulatory Affairs and Public Policy group from 2000 to 2007.



**SAMUEL RASCOFF**

LEAK: Was the director of intelligence analysis for the New York City Police Department from 2006 to 2008.



**BURT NEUBORNE**

LEAK: As assistant legal director of the ACLU, appeared as amicus curiae in *New York Times Co. v. United States* (the Pentagon Papers case) in 1971.

each individual document to see if it's really genuine. And given that these are digital documents, they're also pretty easy to alter, so you have to have some way of figuring out how we know that all of these documents came from the source they're supposed to have come from. This is a big concern.

**BRIAN MARKLEY '00, Partner, Cahill Gordon & Reindel:** I am troubled by the way WikiLeaks went about disseminating this information and, by contrast, I admire the way the *New York Times* went about its coverage. What the *Times* did, as described in various stories they've published, was to go in and sit down with administration officials and genuinely listen

because it's convenient, it's pragmatically desirable, but it's not necessarily for the public good. We have to be sure we don't shut off all avenues of public dissemination of controversial information.

**RUBINSTEIN:** The Pentagon Papers were obviously very lengthy, but Ellsberg had a specific goal in mind, a single topic. WikiLeaks promises that all diplomacy, all military action may now be carried out in the shadow of permanent, massive leaks. Does the scale make any difference?

**ZIMMERMAN:** I don't know how much difference it makes. One of the things about having a gazillion tons of information out there is nobody can process it all. Somebody has to sift through and pick out what is important in that mass of material.

**ROSEN:** The scale of the leaks that are possible and the scale of their distribution is different than the Pentagon Papers. But nobody was asking about scale when they vastly increased the number of secrets, right? That's the problem of scale right there.

**KATHERINE STRANDBURG, Professor of Law, NYU School of Law:** WikiLeaks is not really the scary story because in fact they haven't just put everything indiscriminately up there; they redacted some things, they worked with the newspapers, and so forth. If we go too hard after WikiLeaks, we will drive leakers even further underground and end up with indiscriminate leaking rather than consultation with the *New York Times*.

Without some trusted vetting organization, you just have anonymous dumps of information that might well include information that is just fabricated. It could even be disinformation from the government or from another espionage service. Once you have a huge quantity of supposedly leaked material, it's very hard to vet

listen to concerns about leaks that could harm people, and there were things that were redacted as a result. They redacted soldiers' Social Security numbers. They redacted the names of Afghan informants. They chose not to publish information about how to disable devices that themselves disable IEDs in Iraq and Afghanistan.

Each of those things was disclosed by WikiLeaks. While maybe it was inadvertent, there were quotes from Assange himself in the *New Yorker* about how he's not able to look at every piece of information and there will be what he called "collateral damage" that might harm individuals. I'm not saying that WikiLeaks should be prosecuted, because there are ramifications from that, too. We just need to think about all of this in context.

Lastly, among the things that concern me and members of the media is that the reporters' shield law that was moving forward in Congress is now basically dead in the water, in part due to WikiLeaks. It had passed the House, and while it wasn't perfect from our perspective—it defined journalists too narrowly—we needed something in the wake of developments such as the Judith Miller incarceration. The bill had gone through the House and the Senate Judiciary Committee and then was simply shut down in the wake of WikiLeaks.

**ROSEN:** WikiLeaks did ask the government if it would help it redact information that should not be released, and the Pentagon told them to go to hell and return all the documents. That should be mentioned when you talk about the difference between the *Times* and WikiLeaks.

If the press had been doing a better job at being a watchdog, at uncovering what had to be uncovered—if, for example, we had a press that was capable of preventing a phony case for war from being passed into history—maybe the leakers wouldn't be voting with their leaks by going to WikiLeaks, an upstart, unknown



organization. Maybe they would be going through these allegedly more responsible channels of the *New York Times*. I don't think you can separate press failure from the popularity and viability of WikiLeaks.

**NEUBORNE:** You can't have a worse situation than we've been living under. One of the more enraging things in recent years has been the government insisting on a very broad set of secrecy norms, and then selectively leaking information to journalists in a way that would enhance their particular political views. We've been manipulated as a people now for the past 25 years by selective leaks that lead us toward war. It is inevitable that institutions like WikiLeaks will rise up when you overclassify so that vast amounts of material are secret, and then you selectively release information to handpicked journalists who then write in distinguished newspapers that shape public opinion. So I acknowledge that there's a cost, Simon. There will be a smaller number of people discussing the information. But the question we have to ask is, "Are we better off with secrets or without them?" Fundamentally, we're better off without them.

**DORSEN:** I have a rather more pessimistic and less idealistic view about government than my good friend Burt. What he describes is nothing new. What do we think Franklin D. Roosevelt was doing when he made the destroyer deal with Winston Churchill in 1940? I could go back to Wilson in the First World War, and probably to Lincoln.

**CHESTERMAN:** After the McCarthy hearings, Edward Shils had a wonderful line: Liberal democracy depends on protecting the privacy of individuals and denying it to governments. In theory that sounds like a wonderful model, but in practice the last half-century has seen exactly the opposite happen.

It would be a mistake to believe that governments cannot still keep secrets. They keep vast amounts of information secret still. The material that's been disclosed was only at the "secret" level, nothing above that level.

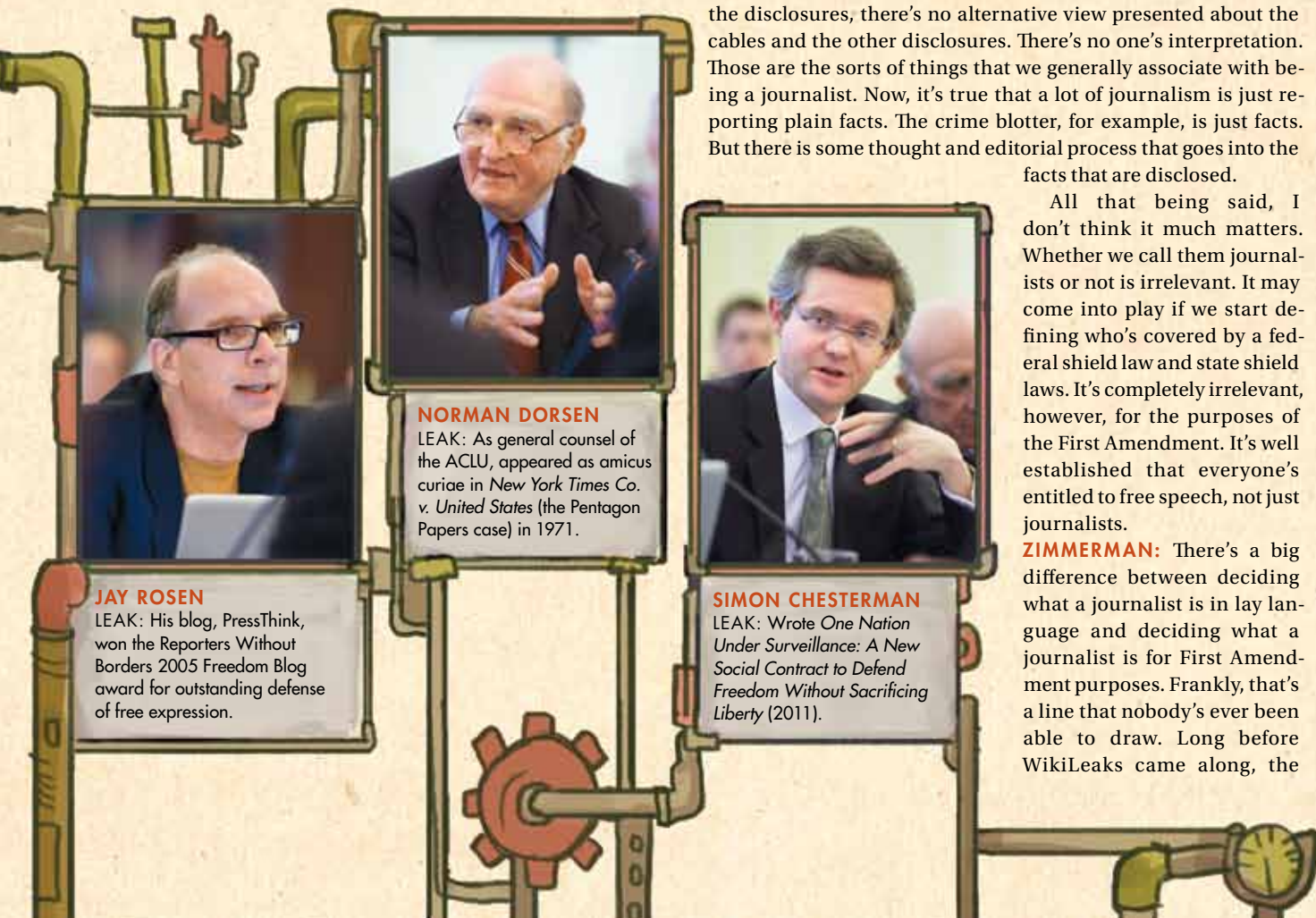
Yet a slightly different problem is the danger of what happens when you *do* get access to classified information. One is that you mistake words like "secret" or "top secret" as meaning "true." It doesn't mean true. It just means damaging if it got released. So there's a danger that you overvalue classified information and that you therefore undervalue other information. Likewise there's a tendency to think that WikiLeaks is special because of this privileged access. I completely accept the problems concerning journalism in the lead-up to the Iraq War, but in the last decade, the big scandals that have been released through traditional news media were things like warrantless electronic surveillance, extraordinary rendition, torture, and I don't see any suggestion that Manning went to WikiLeaks because he had a scandal that he wanted to identify that the *New York Times* was not going to publish. He went to WikiLeaks because WikiLeaks was the venue of choice for volume or quantity disclosures rather than quality investigative journalism.

**RUBINSTEIN:** There's a tension between traditional journalism, despite some of its failures, and the very different approach of WikiLeaks over the question of whether and to what extent journalists are using their judgment of the public interest in deciding what to publish, what to investigate, and how to go about this.

**MARKLEY:** WikiLeaks is trying to look like a journalist. If you look at its website, the words *journalist* or *journalism* appear all over it. But at its core it's not very journalistic, at least in the traditional sense. Assange himself has said, "We are not the press." WikiLeaks doesn't provide any analysis, there's no context in the disclosures, there's no alternative view presented about the cables and the other disclosures. There's no one's interpretation. Those are the sorts of things that we generally associate with being a journalist. Now, it's true that a lot of journalism is just reporting plain facts. The crime blotter, for example, is just facts. But there is some thought and editorial process that goes into the facts that are disclosed.

All that being said, I don't think it much matters. Whether we call them journalists or not is irrelevant. It may come into play if we start defining who's covered by a federal shield law and state shield laws. It's completely irrelevant, however, for the purposes of the First Amendment. It's well established that everyone's entitled to free speech, not just journalists.

**ZIMMERMAN:** There's a big difference between deciding what a journalist is in lay language and deciding what a journalist is for First Amendment purposes. Frankly, that's a line that nobody's ever been able to draw. Long before WikiLeaks came along, the



**JAY ROSEN**

LEAK: His blog, PressThink, won the Reporters Without Borders 2005 Freedom Blog award for outstanding defense of free expression.

**NORMAN DORSEN**

LEAK: As general counsel of the ACLU, appeared as amicus curiae in *New York Times Co. v. United States* (the Pentagon Papers case) in 1971.

**SIMON CHESTERMAN**

LEAK: Wrote *One Nation Under Surveillance: A New Social Contract to Defend Freedom Without Sacrificing Liberty* (2011).



Supreme Court had essentially thrown up its hands collectively at the idea of being able to draw a real distinction between “the press” and individuals for purposes of speech protection. It’s more a question of a distinction between mass dissemination and private dissemination. Truthfully, the blurring goes back to our historical roots because the people who were the first “press” were oftentimes just individuals who had a printing press and individuals who had a soapbox. We weren’t talking in the 1800s about a professional press. We were talking about people who had big mouths and a way of disseminating what they wanted to say, true or untrue.

**ROSEN:** When I started teaching journalism 25 years ago, it was very common for professional journalists to say, “We’re the only profession who’s mentioned in the Constitution.” I used to look at people who would say this as if they were nuts because it says Congress shall make no law abridging freedom of the press. It doesn’t say *journalism*. It doesn’t refer to a profession.

What is so threatening to professional journalists about WikiLeaks is that it completely explodes this notion of an occupational group that somehow carries out the First Amendment functions that really belong to the people. The contrast between professional journalism and WikiLeaks is overdrawn. WikiLeaks does perform an editorial function. WikiLeaks has not published any significant documents shown to be fake. WikiLeaks does engage in verification before they publish something, and any way you look at it, verifying that this document is what people said it is *is* a journalistic act.

**NEUBORNE:** The press clause means something. The First Amendment says “freedom of speech” and “freedom of the press,” so the press has to mean something more than the freedom of speech, or else it’s just an inkblot. What WikiLeaks does, at least in my mind, is it illustrates the flip side of Jay’s point. There are large numbers of people who are now performing that function in ways that we never dreamed the function would be performed.

Bloggers, for example. The whole blogosphere is a massive perversion of the press but nevertheless is the press. WikiLeaks falls into that. Structurally, the press has an enormous role to play, not just as the disseminator. It wasn’t just a Xerox machine or a loudspeaker for somebody else’s speech; it was a filtering mechanism. It was a way that enabled people like me who don’t have time to verify everything that comes over the transom that it will have passed through some responsible set of hands who did either a good or a bad job of deciding what got published, but at least thought about it. Without that filtering device, I wonder whether free speech is going to be as powerful.

**DORSEN:** A.J. Liebling wrote that freedom of the press belongs to those who own one, and these days everybody owns one. That’s the world we’re in.

The Supreme Court considered Burt’s view on separate protection for the press, and Burt got one vote: Justice Stewart. One of the reasons is that liberals such as Justice Brennan believed more protection for the press would mean reduced protection for everybody else. But let’s talk about the press protection statutes that Brian mentioned, the shield laws. We now have many different statutes, but the press, which is national, is subject to different laws by state. It’s a shame that the federal law was rejected, because for the first time we would have had a consistent rule.

**STRANDBURG:** This issue of professionalism versus crowdsourcing, you might call it, is a general issue that the Internet raises and a real dilemma in many arenas. Is there some mechanism for vetting? Some of the things that work in other contexts, like restaurant reviews or Wikipedia, where you just get a lot of people and they all tell you what they think, I’m not sure that leaks can work that

way. Collaboration with the mainstream media can work. But that’s not going to be open to everybody who wants to post a bunch of leaks on the Internet. We need something more.

**CHESTERMAN:** As someone based in Singapore, I think one of the great absences in much of the world outside the United States is quality investigative journalism on the level of the *New York Times*, the *Washington Post*. Historically, the most important factor in ensuring accountability of government in these most secret areas, second only to its self-restraint, has been investigative journalism.

**ZIMMERMAN:** The responsible filter, the press that we idealize, is going into the pits because none of us wants to pay for it. As long as we think that everything should be free and we should be able to log on and see anything we want to, we can’t support serious journalism. It costs a lot of money to have reporters in the field, around the world, and people seem quite unwilling to pay for it. That’s a serious problem.

One of the things that I worry about with WikiLeaks, even though we’re an awful lot better off knowing most of this stuff, is the problem of danger to individuals. WikiLeaks has been actually much more careful than we had any right to expect. There are going to be others that may get information that can lead to harm to individuals who won’t be so careful. That is really a scary problem, and I don’t know how we deal with that.

But one thing for sure is that we would have an awful lot stronger ground to stand on in trying to protect the things that are important if we actually limited classification to real secrets. Almost a million people have clearance—850,000 for the top level of security documents. That’s an awful lot of people, and even in that category there’s a lot of stuff that simply doesn’t belong there. If we tried to protect less, we’d be able to protect it better.

**ROSEN:** Here’s a radical proposal: What if public statements and private behavior came more in line? That’s not the way diplomacy works: We put this out for public consumption, and then we do this other thing. Maybe that is what’s outmoded. We actually have experience with this; I don’t assume that my e-mails are going to remain private. Now, that hasn’t actually oppressed me. I’ve realized that I have to actually bring what I believe in line with what I tell people.

On this question of filters, the Internet has a kind of a cycle to it. First we get these improvements that allow there to be this explosion of uncontrolled, unfiltered information. And that becomes unmanageable. Instead of throwing up our hands and drifting on a sea of information chaos, what comes is improvements in filters. As my friend Clay Shirky says, “There is no such thing as information overload; there’s only filter failure.” No matter how much information there is out there, we still need to trust reliable accounts. There’s a demand for that. Filters themselves will become part of Benkler’s networked public sphere. This is actually happening right now in reporting on things like disasters, conflicts in Libya and the Middle East where reports come in over the Internet, and the Internet itself has to figure out how to filter and check those reports.

**MARKLEY:** I generally agree that public and private statements ought to be the same, but there is also a genuine need for secrets. For example, one of the WikiLeaks disclosures dealt with the government in Yemen authorizing bombings of al Qaeda bases while they were telling their people they weren’t behind it. That was a positive secret from my perspective. If public statements had matched the private statements, we wouldn’t have been in a position to attack al Qaeda. There were other examples





involving, for instance, President Mugabe's opponent who was privately supporting sanctions against his country while publicly opposing them.

**RASCOFF:** It's not simply a question of officials dissembling and then becoming exposed. Very significant issues of timing are involved here. Supreme Court opinions ultimately see the light of day. You get majority opinions and you frequently get dissents, but we don't have a culture in which it's been acceptable for those opinions to circulate in newspapers or WikiLeaks prior to their release. It sometimes seems that the only two institutions in our society that can keep a secret are the Supreme Court and Apple. Can you imagine the outcry if the iPad3 design were exposed tomorrow on WikiLeaks? Secrecy, if only for the sake of preserving the official right to time the decision, is a necessary fact of running any government agency or any business.

**RUBINSTEIN:** Let's look at the role of the private sector. At the request of members of Congress, a number of private companies either shut off WikiLeaks' domain name access or cut off its hosting services, and then other companies began to eliminate its ability to accept payments on the Internet. Is it a problem that the private sector, with its very significant role in the Internet infrastructure, may be in a position to take steps that we would consider improper for the government to take? Or that the government may in fact be pressuring private firms to take these steps?

**STRANDBURG:** There's cause for concern that in fact private entities are able not only to put into practice government objectives in ways that the government would not be able to do, as a matter of constitutionality or democratic legitimacy, but that those private entities are also able to manipulate communications to serve their own goals. Think back to the previous election when there was a flap about a NARAL Pro-Choice America text message that Verizon didn't let through. Later Verizon said it was a mistake, but that could have been an exercise of private censorship power. The circumstances under which communications providers are permitted to disclose information to the government is regulated, but what they can do about taking people's access to lines of communication down is not.

We should also consider what happens after a private party denies WikiLeaks access to payment systems or Internet service. The response is often also a private one. Organizations like Anonymous, basically hackers, attack the payment providers and so forth in retaliation for their denial of service to WikiLeaks. One can



say this is good, this is protest, so this is the way we're getting the democratic legitimacy. But it's really mob rule. It's not like protest historically, where the more people you get, the more effective you are. Small numbers of people can be extremely effective at these kinds of Internet shutdowns and other attacks. So on the whole, there is a worry about getting out of rule-of-law territory so that we're no longer talking about protected speech and breaches of rights being handled through law.

**NEUBORNE:** When I was younger, if a newspaper published something that offended a very large advertiser, the advertiser would pull the advertisement. We were convinced that lots of American newspapers were being manipulated by the local advertisers, especially about civil rights.

I'm glad we're talking about private controls on information because the last time I looked, seven large corporations in the United States owned every single media platform other than an Internet medium, whether it was a book publisher, a newspaper, a magazine, a television station, a radio station. Now, I don't suggest that there's anything nefarious necessarily going on there, but it is a dangerous idea to allow that kind of private concentration over the control of information, especially when we then say that the private concentration is reinforced and protected by the First Amendment. The response that I thought was going to emerge would be an Internet response—in other words, an alternative set of information that was not controlled by them.

The flip side of WikiLeaks is Switzerland, where you have terrific privacy and terrific control of information, and unbelievable abuses that go on under the shadow of secrecy. It's why nobody in South America pays taxes, because they can have accounts in Switzerland and no one will find out about it because of privacy and control about information.



**RUBINSTEIN:** The irony is that although we began by describing WikiLeaks as Internet-based, decentralized, et cetera, in effect it's the one large organization doing this type of activity. But every mainstream media outlet could have its own WikiLeaks operation, as could specific organizations with expertise in different areas such as the environment, energy, human rights; each could have a WikiLeaks operation. Is that a more attractive model?

**ROSEN:** That's already happening. Al Jazeera has its own drop box. The *Los Angeles Times* this week put out an appeal to people to send in government documents that would allow it to find more stories like the one in Bell, California, where the city manager was being paid over \$700,000. And there's an organization, OpenLeaks, that's designed to enable any organization, news or non, to have its own secure drop box. That's one reason why prosecuting Assange is idiotic, because the secret is out.

**ZIMMERMAN:** One thing that makes you think lovingly about the system under which we regulate telephones is you have to wonder if we should allow so much private censorship. We did tolerate it in the past, in part because we thought that it was sporadic and that there would be counterbalances. If Procter & Gamble withdrew its ads, somebody else might come in and advertise. But what we really have here is the potential for systematic censorship by virtue of the basic infrastructure of the Internet.

**STRANDBURG:** We tend to think that networks are so very dispersed, that they're equal and egalitarian and so forth, but in general networks tend to organize themselves into a system in which there are highly connected nodes and highly unconnected nodes. The Internet was developed to withstand an attack, but that's if you attack a random node. If you attack a supernode, where a concentration of connections is, like the domain name server or something like that, the Internet can in some ways be highly concentrated.

**ROSEN:** At the time when Amazon cut WikiLeaks off from its rentable server capacity, Newsweek.com was hosted on Amazon. I was astounded that the mainstream media didn't react much more forcefully, because it threatens them just as easily as it threatens WikiLeaks. That that could happen, that there was no legal challenge to it, that Amazon wasn't ashamed to do that, that the CEO of Amazon never even had to address it, is amazing. We don't have the Internet we thought we had.

*Ira Rubinstein then invited questions from the audience.*

**JERAMIE SCOTT '12:** Professor Rascoff, although we don't expect to see the drafts of Supreme Court opinions, there is an expectation that the reasoning in the opinion that's made public is what the reasoning is behind closed doors. That may not be the case, but there's that expectation.

**RASCOFF:** But see *Bush v. Gore*.

**SCOTT:** Yes, but the larger point is that if you're not trying to maintain consistency in public and private, aren't you undermining the people's ability to make a decision? If you're saying you're going to war because of national security reasons or saying you're bombing Libya because we're trying to protect the people but the real reason is oil, aren't you undermining the people from making choices about their government that is supposed to represent them?

**RASCOFF:** Ultimately a relationship between a people and the government depends on some amount of trust. If there's a prevalent view that the people are being bamboozled consistently by the state, by politicians, by the national security apparatus, you have a breakdown in the social contract. More transparency may be part of the solution. But this tension was not first identified by Julian Assange. It fundamentally implicates 3,000 years of Western political theory about the relationship between what gets said publicly and what gets done behind closed doors in government, and how accountability functions.

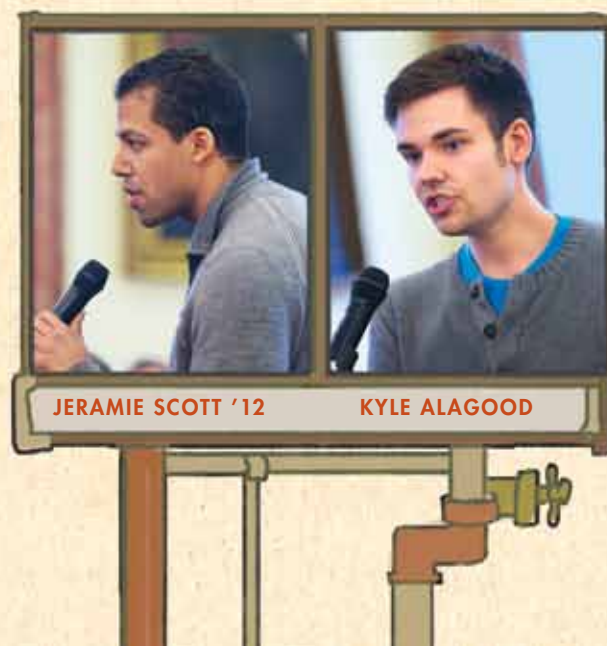
**ROSEN:** We need to cut way back on the number of people who think they're smart enough to say one thing in public and do another in private and control it. You can't control it, and that's one of the messages of WikiLeaks.

**CHESTERMAN:** The diplomatic angle on this is worth touching on, too. Voltaire said that when a diplomat says yes, he means maybe. If he says maybe, he means no. And if he says no, he's not a diplomat. In addition to the Yemen example that was highlighted earlier, the sotto voce Arab support for U.S. and Western handling of Iran was one of the things that was appropriately kept secret. Now it makes it that much harder for certain Arab governments to cooperate with the United States.

**KYLE ALAGOOD,** Research Associate, Liberty & National Security Program of the Brennan Center for Justice at NYU School of Law: How might we reconcile the recommendations of the 9/11 Commission—that all the agencies need to share their information—with the problem that seems to exist from someone like Manning, a very low-level army private being able to access the information? How do we not clamp down too much on secrecy but also keep the 9/11 Commission's recommendations intact?

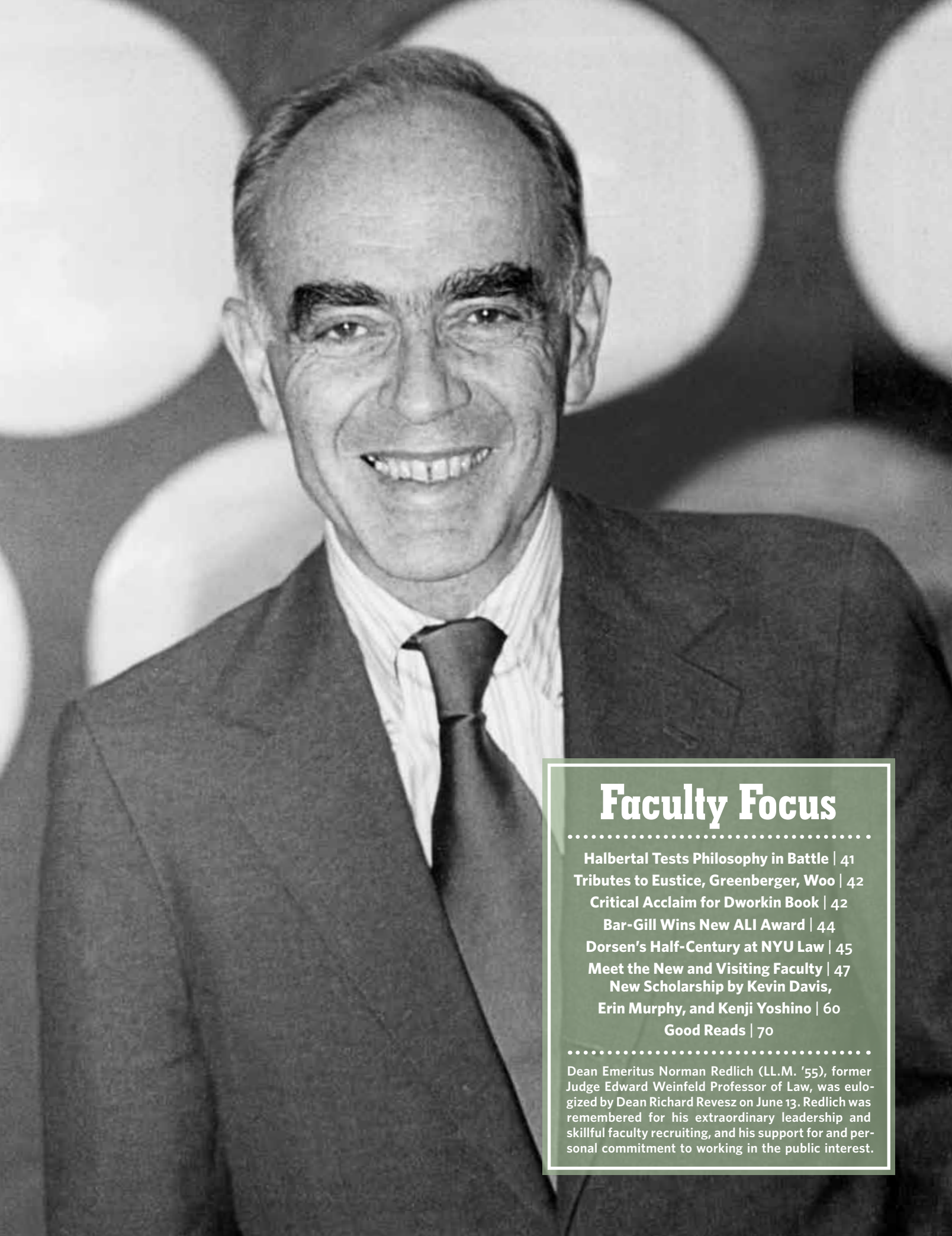
**CHESTERMAN:** Rather than limiting the sharing of information, another approach would be to move away from the current 1950s approach to counterintelligence, which relies on polygraphs and background checks. The CIA, the NSA, various other agencies have less-effective security protocols than many banks. In a bank, security is less a matter of background checks than it is a process of continuous monitoring to look for suspicious behavior. In the history of the United States, there have been 130 or so traitors who have given secrets or sold secrets to the enemy; 128 of them did it for money. This is not something that you can necessarily see in a background check.

**ZIMMERMAN:** There needs to be a cost-benefit analysis. I don't know why Manning had the kind of access that he had. If you read what's been written about him, he does seem to have been a person likely to become disaffected. But I don't think we can expect to protect secrets in every case. We're going to have to weigh the value of dissemination against the risk of disclosure. In the long run, I don't believe it will have all that much effect on how people conduct their meetings or exchange information, because we will fall back into our old patterns. That's what we do. □



Illustrations by Erin McGuire  
Photographs by Juliana Thomas





## Faculty Focus

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Dean Emeritus Norman Redlich (LL.M. '55), former Judge Edward Weinfeld Professor of Law, was eulogized by Dean Richard Revesz on June 13. Redlich was remembered for his extraordinary leadership and skillful faculty recruiting, and his support for and personal commitment to working in the public interest.

# An Extraordinary Dean

Dean Emeritus Norman Redlich passed away on June 10, 2011. Below is the eulogy delivered by Dean Richard Revesz at the memorial service held on June 13.

**Norman Redlich (LL.M. '55) was my family's dean. He was the dean who hired me in 1985 to join the NYU Law School faculty and during whose tenure I served for three years as a very junior faculty member. And for the last nine years, I've been occupying an office that I had long referred to as "Norman's office."**

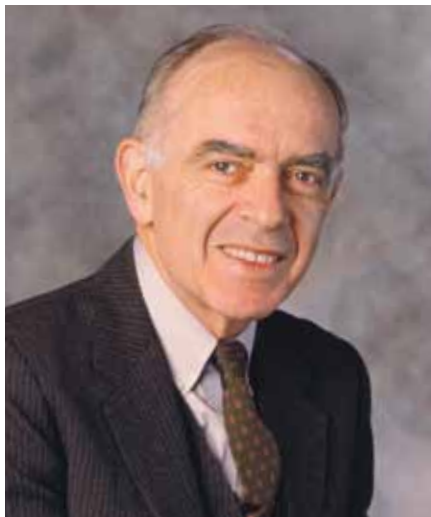
Norman was also the dean when my wife, Vicki Been '83, was a law student. He was the dean who called her to his office to let her know in a stern but caring way that during her clerkship with Judge Edward Weinfeld, perhaps the Law School's most illustrious alumnus at the time, she would need to uphold the Law School's reputation and honor.

## LAW SCHOOL CAREER

Norman was an extraordinary dean. Much of the Law School's current success can be traced to Norman's visionary leadership. Norman served in the military during World War II. Then, after graduating from Williams College in 1947 and receiving his LL.B. from Yale Law School in 1950, Norman earned his LL.M. in taxation from NYU School of Law in 1955. He joined our faculty in 1960, received tenure in 1962, and became the Judge Edward Weinfeld Professor of Law in 1983. Norman was a prolific scholar in the areas of constitutional law and professional responsibility, and authored an influential casebook in each of these areas.

Norman served as the NYU Law School dean from 1975 to 1988, and was dean emeritus at the time of his death. After stepping down as dean, he continued to teach Professional Responsibility for many years while he was counsel to the law firm of Wachtell, Lipton, Rosen & Katz.

Norman's deanship significantly accelerated the Law School's remarkable upward trajectory, which had begun in the early 1950s under Dean Arthur Vanderbilt. He made many transformative appointments to our faculty, including Ronald Dworkin and Thomas Nagel, whose Colloquium in Legal, Political, and Social Philosophy institutionalized the school's commitment to interdisciplinary work; Anthony Amsterdam, who designed our Lawyering Program and greatly expanded the Law School's clinical programs; and John Sexton, who followed in Norman's footsteps as dean and led the Law School through 14 extraordinary years.



In addition, much of the Law School campus's current footprint can be attributed to Norman's vision. Both of our residence halls, D'Agostino and Mercer, were built during his deanship, and the Law Library was extended underground, making it possible for us to now connect our two main academic buildings: Vanderbilt and Furman Halls. Norman laid solid groundwork that helped propel the Law School's success well after his deanship.

He set a high bar in another area as well. Every year, the students put together a show, called the Law Revue, pronounced Law Revuee, to distinguish it from the far more staid *Law Review*, the publication often seen as the hallmark of law school academic success. And at each performance Norman sang a song, written by students, which typically poked fun at him. Norman was quite self-effacing, and this kind of stage appearance must have been difficult for him, but he was an incredibly good sport.

In 1988, as Norman was getting ready to step down from the deanship, he wrote the lyrics himself. I will not sing them because this is one area in which, I'm sorry to say, the talent at the Law School's helm has gone downhill since Norman's time. But I will read Norman's lyrics.

*Thanks for the memories  
Of listening to me croon  
Each May and every June  
I may not be Sinatra but I try to keep a tune  
Oh, thank you so much.*

*Thanks, friends at NYU  
Oh, how the students swore  
Construction noise galore  
But now we've Mercer, D'Agostino,  
Fuchsberg still in store  
Oh, thank you so much.*

*I tried to beef up the clinics  
While other schools started as cynics  
But now they are trying to mimic  
Ah, now they know, I told you so.*

*Oh, thanks for the memories  
We built a school that's strong  
And now I say so long  
Just keep your sights on doing right  
I know you can't go wrong  
How lovely it's been.*

*Oh, thanks for the memories  
The budgets were a chore  
You always asked for more  
I may have been a headache  
I often was a bore  
How lovely it's been.*

It is nice to know that his deanship was lovely to Norman. It was certainly very lovely for the Law School.

## OTHER ACCOMPLISHMENTS

His impact on the Law School, by itself, would be considered an extraordinary accomplishment, but for Norman, it was only one facet of his remarkable career. Norman also performed significant public service in New York City and in the federal government. Just three years after joining our faculty, Norman was appointed assistant counsel to the President's Commission on the Assassination of President Kennedy (popularly known as the Warren Commission), where he investigated the relationship between Lee Harvey Oswald and Jack Ruby. He later worked in New York City's Law Department, where, among other accomplishments, he litigated significant cases concerning the city's pathbreaking historic preservation law. In this connection, Norman's legal acumen and negotiating skills had already helped his friend Jane Jacobs save Washington Square Park from Robert Moses's plans to run a highway through it. In 1972, Mayor John Lindsay named him corporation counsel, the city's highest legal office, a position he held until he became dean of our Law School.

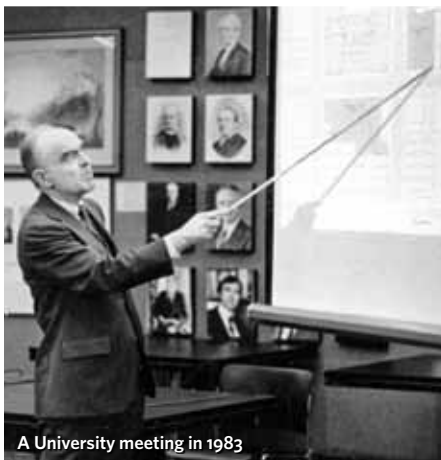




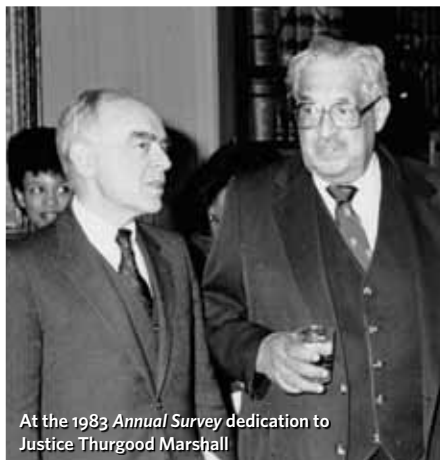
At City Hall in Manhattan in 1972



With Chief Justice Earl Warren



A University meeting in 1983



At the 1983 Annual Survey dedication to Justice Thurgood Marshall

Norman also was devoted to improving the state of the legal profession. Among other significant leadership roles, he was chair of the American Bar Association's Section of Legal Education and Admissions to the Bar and a member of the ABA's House of Delegates.

In the ABA, he was one of the leading voices for promoting and improving clinical legal education in law schools. He worked closely with Robert MacCrate and our colleagues Tony Amsterdam and Randy Hertz on the MacCrate Report, which sought to narrow the perceived gap between legal education and the legal profession. In the years following the issuance of that report, he played an important role in implementing the report's blueprint for improving the teaching of professional skills and values in law schools.

#### CIVIL RIGHTS AND CIVIL LIBERTIES

Norman was passionately committed to civil liberties and civil rights. Steven Epstein '86, a Law School alumnus and also a Williams graduate, reported the following: "During my time at NYU Law I had some great conversations with him about Williams and his love for the place. There's only one commercial street in Williamstown and one

barber shop. He told me that when he was a student, he started a protest because the African Americans at Williams wouldn't be served in the barber shop—and he changed that. He used it as a lesson that you can fight injustice pretty much anywhere."

A decade later, as a young lawyer in the 1950s, Norman courageously challenged the tactics of Senator Joe McCarthy. On behalf of the National Emergency Civil Liberties Committee, he defended people blacklisted because of their refusal to answer questions before the House Un-American Activities Committee. Subsequently, then-Representative Gerald Ford sought—unsuccessfully—to have him removed from the Warren Commission as a result of these activities.

Just before joining the NYU faculty, while serving as counsel to the New York Committee to Abolish Capital Punishment, Norman brought one of the early challenges to the death penalty. Later in his career, he was on the Executive Committee of the NAACP Legal Defense and Education Fund, and chair of the National Governing Council of the American Jewish Congress. He also served as a co-chair of the Lawyers' Committee for Civil Rights Under Law and received that organization's highest award—the Whitney North Seymour Award—in 1993.

#### CONCLUSION

In his wonderful speech at the Law School's graduation in 1985, Norman commented on another Law Revue (as in Law Revuee) song, titled "I Want it All." The song had been written by the students from the perspective of a woman, as in "I want to be Scarlett O'Hara, Joan of Arc, Lauren Bacall." For his speech, Norman wrote a companion song from the perspective of a man, which I will read:

*I want to be Mario Cuomo and work pro bono  
I want to shop at Tower and be a legal power  
I want to run the Fed and play in the Grateful Dead  
I want to be seen at the ballet and at Shea  
I want to be Henry K., Dr. J., I.M. Pei, Reggie J., and Dr. K.  
I want to run the firm  
I want to be David Byrne  
I want to be Arthur Ashe and Sam Dash  
I want to be Andrew Young, Robert Young, Coleman Young, and Neil Young  
I want to be Clarence Darrow and Robert De Niro  
I want to get top fees and honorary degrees  
I want to fight the crooks, be Albert Brooks  
Negotiate Ewing's deal, eat a five-star meal  
Be a loving dad, a supportive mate  
Have an East Side pad, be Secretary of State  
I want to be Earl Warren, and drive a car that's foreign  
I want to win big trials, run four-minute miles  
Clean up the sludge, and be a judge  
I want it all!*

Those of you who knew Norman well know how close he came to having it all, even by the standard of this song. But to the Law School graduates whom he was addressing, for whom accomplishment of this magnitude might have seemed unfathomable at the time, he had the following words of wisdom: "If you maintain a good sense of balance, a bit of humor, resist the pressures to be narrowed into narrow grooves, and define what you want in terms of a personal and professional life of meaning and concern, then, indeed, you can have it all." By this standard, there is absolutely no doubt that Norman had it all.

To conclude, Norman's extraordinary energy and powerful leadership inspired not only generations of students and faculty, but also a much broader community of lawyers and public servants. Dean Redlich: Vicki and I, as well as so many others, will deeply miss you. □

# New Chairholders Deliver Inaugural Lectures

**RICHARD EPSTEIN**  
*Laurence A. Tisch*  
*Professor of Law*



***Citizens United v. Federal Election Commission: The Constitutional Right that Big Corporations Should Have but Don't Want***  
SEPTEMBER 27

Epstein waded into a complex area of constitutional law pertaining to regulation of campaign speech. The *Citizens United* ruling struck down portions of the McCain-Feingold law that restrict corporate and union election spending. Epstein said critics who say the case is at odds with the intent of the framers and threatens to drown out individuals and take control of politics are wrong on both counts.

**“Hysterical predictions of transformation are heavily overblown. It will be politics as usual, which is not to say that it will be politics as it should be.”**



Epstein and Wilma (Billie) Tisch

**HELEN HERSHKOFF**  
*Herbert M. and Svetlana Wachtell*  
*Professor of Constitutional Law and Civil Liberties*



***The Private Life of Public Rights: State Constitutions and the Common Law***  
FEBRUARY 3

Hershkoff observed that state courts might need to apply common law in concert with state constitutional norms in order to protect individual rights.

**“Whether a constitutional right to free speech ought to run against a private landowner raises a lot of thorny issues. A commercial shopping center is just that: a place where you are expected to shop until you drop. But shopping malls also function as the new downtown: a place where ordinary people gather and talk.”**



Svetlana and Herbert Wachtell '54 with Hershkoff

**DARYL LEVINSON**  
*David Boies*  
*Professor of Law*



***How Constitutions Work (When They Work)***  
JANUARY 25

While constitutions might be imperfect, Levinson noted, they can be deeply rooted and enduring. In this respect, he likened them to the New York City subway, bad marriages, and Microsoft's operating system.

**“The positive puzzle of constitutionalism lies in explaining the willingness and ability of powerful political actors to make sustainable commitments to abide by and uphold constitutional rules even when these rules stand in the way of their immediate interests.”**



Levinson and Boies (LL.M. '67)

 For lecture videos: [law.nyu.edu/2011mag/lectures](http://law.nyu.edu/2011mag/lectures).



# Shaping Minds and Morals in Battle

Moshe Halbertal reinforces a code of conduct that allows for principled behavior in wartime.

**M**ANY PHILOSOPHERS HAVE GRAP-  
pled with the ethics of war—  
Mill, Rawls, Kant, and Aristotle  
among them. But in 2000, Moshe  
Halbertal, along with lawyers, generals, and  
other philosophers, worked with a standing  
army to draft a new Israeli military code  
of ethics that would test their philosophical  
ideas in real life-and-death situations.  
Halbertal's work didn't stop once the code  
was written. Now Gruss Professor of Law  
at NYU, he spends each spring at Hebrew  
University of Jerusalem, and on his days off  
teaches ethics to commanders and lectures  
to platoons at the Israel Defense Forces  
Command and Staff College.

"Professor Halbertal can be philosophical and very practical with two feet on the ground, which is essential, because what he teaches will be put into action tomorrow by our commanders," says Noam Tibon, IDF commander in charge of the officer training school. "He can deal with any problem in three or four dimensions and is reviewing his views at all times."

As a small country not at peace with all of its neighbors, Israel has seen much change since 2000. While the capture of soldier Gilad Shalit (2006), the war in Gaza (2008-09), and the raid by Israeli forces on a flotilla of "Gaza freedom" activists (2010), for example, have not forced revisions to the code, they have provided new questions for Halbertal, who is still engaged in making sure the code addresses and accounts for modern realities. By speaking to different groups of soldiers who have been engaged in recent conflicts, Halbertal has learned some of the reasons that the soldiers on the ground have had difficulties applying the code, and even about times the code has failed to translate to the field.

**It is not enough to say,  
"I am not intending to harm  
civilians." You have to show  
intention of not harming.**

For instance, one of the principles the team of ethicists codified in 2000 stated: "One must do everything possible to minimize the enemy's civilian casualties. It is not enough to say, 'I am not intending or did not intend to harm civilians.' You have to show

intention of not harming." Speaking to those who were charged to fire artillery in the recent Gaza war, Halbertal learned that the way war is currently fought, a target is often not visible to whoever is on the ground. A soldier is given coordinates by central command, which is miles away. In other words, the soldier firing the missile is not in a position to apply the ethical principles in the way the team desired. His or her individual ethical autonomy has to be replaced by "a shared world of trust within the operation because of such heightened divisions of labor," as Halbertal put it. Thinking through how to create this shared world of trust is one of Halbertal's newest endeavors.

How the soldiers now think about the capture of their comrade Shalit is another challenge to the application of the code. The principle of proportionality, as modified for this code, states that "if you foresee a collateral harm to enemy civilians (even after doing everything you can to avoid doing so), you have to weigh whether that military achievement is proportional to the death you will cause." A minor military victory is not enough to justify the collateral death of many civilians. But when the other side thinks capturing one soldier or shooting down one tank can embolden them, especially through the use of propaganda and modern media, the soldiers in the field who are trying to act ethically can lose their bearings and misapply the principle of proportionality. "You can't be obsessed with how it will look to the other side," teaches Halbertal. "This was an element that I never understood fully in the nature of this war."

Soldiers and commanders bring their own battle experiences into the classroom.

Halbertal recognizes that war is not an ethics seminar and takes soldiers' objections to aspects of the code seriously. ("You want me to go through the principles of avoidance, proportionality, etc., when I am under fire?") Halbertal's answer is that soldiers



must train and internalize these principles before going to battle so that they become second nature. This ability to act from an absorbed ethical character rather than having to calculate consequences is similar to Aristotle's concept of phronesis, or practical wisdom.

Commander Tibon believes that allowing even the lowest-level soldiers to be inspired and challenged by one of Israel's top philosophers keeps them open-minded and reminds them of the importance of their jobs in the army. "Moshe is very smart, and he takes you to a very high point in your thinking," says Tibon. "It is not two plus two is four. There is no clear-cut right and wrong, and so he has to teach us how to think beyond simplicity." Such high-mindedness, one can hope, might eventually lead to fewer conflicts in the Middle East along Israel's borders. □ *Micah Kelber*

# Latest Book Makes Raves

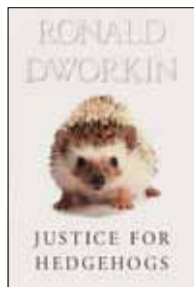
Critics embrace Dworkin's opus on truth, morality, and justice.

**F**RANK HENRY SOMMER PROFESSOR OF Law Ronald Dworkin published his most comprehensive book, *Justice for Hedgehogs*, in January. It is an ambitious and wide-ranging exploration of moral, legal, and political philosophy. This spring Dworkin's arguments were challenged in some academic corners, but overall the book has met with critical acclaim.

The hedgehog of the title is a reference to the Greek saying that while the fox knows many things, the hedgehog knows one big thing. Dworkin's big thing is the unity of value, which is, as he writes in the book, "the hedgehog's faith that all true values form an interlocking network, that each of our convictions about what is good or right or beautiful plays some role in supporting each of our other convictions in each of those domains of value."

In his essay in *Problema*, "How Far Can You Go with Quietism?" Gerald Lang concludes that "Dworkin's arguments are deeply powerful and suggestive," but he

takes issue with Dworkin's attack on meta-ethics, or the study of whether values really exist (as opposed to the question of what actual moral rights and duties we have). "Dworkin's concern to avoid leaving metaphysical hostages to fortune is taken by him, rashly, to justify a principled incuriosity about moral metaphysics," Lang writes. "But the arguments he deploys do not justify this incuriosity."



No such reservations were evident in a glowing review in the *New York Review of Books*. Dworkin weaves together ethics, morals, interpretation, politics, free will, and law into a complex argument to make this case, reviewer A.C. Grayling notes, and then explores the practical implications. "That is what gives the overall argument its ur-

gency, for Dworkin's principal aim in establishing unity of value is the familiar and central one for him: to show how law and government can be based on political morality." The book develops theories of liberty and economic justice, democracy, law and ethics, among many other subjects,

and qualifies, Grayling says, as a debate-changer: "We are in at the birth, here, of a modern philosophical classic, one of the essential works of contemporary thought."

Writing in *New Humanist*, reviewer Conor Gearty says that, in *Justice for Hedgehogs*, "all of Dworkin's great talent is on display," and likens reading this philosophical exploration to "being on an ideas roller-coaster: periods of calm punctuated by extreme excitement as you try desperately to hang in there while being pushed back and forth, in and out of your comfort zone, albeit with occasional brief returns to the known to calm you down."

After having opened his review with the rueful observation that academic scholarship today is often akin to staying at a hotel—well-furnished rooms but little meeting of the minds with other guests—Gearty concludes with this observation: "If Ronald Dworkin were a hotel he would be the Savoy, but a Savoy that is genuinely open to all, doors always open, guests spilling into the reception rooms, talking, arguing and laughing too."

Dworkin created a blog ([justiceforhedgehogs.com](http://justiceforhedgehogs.com)) to respond to the book's critiques, including exploring unpublished comments on the book made by University Professor Samuel Scheffler. On Gearty's Savoy equation, Dworkin wrote, self-deprecatingly, "That hotel, I note, was closed a few years ago as in urgent need of modernization. (It has since reopened.)" □

## In Memoriam: Howard Greenberger '54

HOWARD GREENBERGER, PROFESSOR OF LAW emeritus, passed away on July 5. A member of the NYU School of Law faculty from 1961 to 2001, Greenberger concentrated on comparative and international law and also wrote about contracts, comparative procedure, and the legal profession. He worked diligently to enhance the LL.M. and M.C.J. programs as well as the Law School's scholarly ties with China.

During his tenure, Greenberger was an associate dean; director of the Practising Law Institute, the Institute of Comparative Law, and the Inter-American Law Institute; and editorial board chair of the *Journal of Legal Education*. He received several NYU Alumni Association awards and the Law Alumni Association's Legal Teaching Award.



A Root-Tilden alumnus, Greenberger served on the Law School's Board of Trustees for 20 years, became a life member of the Weinfeld Program, and was a director of the Law Alumni Association for several decades. He established the annual Howard Greenberger Award for Outstanding Achievement in Comparative Law.

"He was generous with his 'out-of-class' time and could often be found sitting in the student coffee lounge at a table surrounded by students," Oscar Chase, Russell D. Niles Professor of Law, says fondly. "He took special care of the many foreign students who flocked to his class and regarded him as a bridge to the U.S. legal system. He was a warm and supportive colleague who will be much missed." □

## Sarah Woo (1978–2011)

Assistant Professor Sarah Woo passed away in July after falling ill suddenly in May.



Woo joined the NYU Law faculty in June 2010 and was

profiled in last year's magazine. A specialist in financial regulation, corporate bankruptcy, and credit risk management, she used sophisticated empirical research methods to inform financial regulatory reform. She taught a new course on international financial regulation.

"Sarah was a gifted colleague whose intelligence and cutting-edge scholarship made her an important member of our intellectual community," said Dean Richard Revesz. "Her time with us was much too brief."



# James Eustice (1932–2011)

**N**OT EVERYONE CAN HAVE HAD my good fortune to have Jim as a teacher, a mentor, a colleague, and a friend. Jim and I taught together at NYU Law for 45 years and practiced law as colleagues for 40—first at Kronish Lieb, then more recently at Cooley after the firms merged. There was a synergy in our relationship that was unique.

I first met Jim in 1964 when he was my Tax Accounting professor. I thought I was a good student and a smart guy. But every time we got into the details of a code section, regulation, or case, I wondered whether I had actually read the material he had assigned. His ability to see issues in words and drill into the meaning of positions taken by Congress, the commissioner, or the courts was unequalled.

After having been put through the intellectual wringer by Jim in Tax Accounting and then Advanced Capital Gains, I ended up literally on his doorstep in 1966. I had graduated and returned to Florida to practice when Jerry Wallace, founder of NYU Law's Graduate Tax Program, invited me to join the faculty. But Jerry hadn't arranged for me to have an office. Jerry placed me temporarily in Jim's office. That would not have been too bad, but Jim had a unique habit: He collected his used Styrofoam coffee cups, and all five years' worth was on the extra desk in his office. So my first job as assistant professor of law was to find a home for Jim's cups without otherwise disturbing his very organized piles of papers.



We didn't talk much during those first six weeks. He was immersed, as he was to the end of his life, in keeping the Bittker and Eustice *Federal Income Taxation of Corporations and Shareholders*, the seminal work on corporate taxation, current. I surmised we had a budding friendship, however, when he offered to let me copy his notes to teach Tax Accounting. In fact, as the years went by, he also let me copy his notes for Advanced Capital Gains and Reorganizations. For those of you familiar with Jim's handwriting and his habit of writing notes in his copy of the Internal Revenue Code, you might conclude that he really wasn't doing me a favor.

I thought he was, however, and he must have thought he was, because in 1971, after agreeing to become counsel to Kronish

Lieb, he asked me to join him in building its tax department. We had a uniquely symbiotic relationship: Jim dressed in track clothes and hated dealing with clients but had an astounding depth of knowledge. I wore starched shirts and bow ties and was in my prime dealing with clients. Together, we had great successes.

Jim was a brilliant lawyer and a great mentor and colleague. I often said he did the thinking and I did the talking, and I often struggled to keep silent so he could finish thinking. In fact, he never did finish. Jim's mind was an unrivaled source of tax knowledge. He always sought to go deeper in any analysis. I will forever be indebted to Jim for all our years of friendship.

—Stephen Gardner (LL.M. '65)  
Adjunct Professor of Law

**"Jim was my teacher in the early 1970s. He was my mentor from the time I began teaching in the Tax Program in 1972. He was my colleague—I had the privilege and joy of seeing him, sharing lunches and dinners, and discussing and debating the law on a daily basis for decades. He was my friend. Jim's amazing mind and memory, and his caring humanity, brightened my existence for more than half of my life. Teacher, mentor, colleague, and friend: I will miss Jim profoundly."**

**HARVEY DALE**, UNIVERSITY PROFESSOR OF PHILANTHROPY

**"We partied together, worshipped together, were part of the same generation of young faculty families at NYU Law that grew up together, and propped each other up during life's inevitable potholes. There was a competitive side to Jim, which showed in his marathon running, his pride in the success of our tax program, and the supremacy of his great text, but it never invaded our friendship that, through all his years of triumphs and frustrations, was deep and abiding. It still is."**

**M. CARR FERGUSON (LL.M. '60)**, ADJUNCT PROFESSOR OF LAW

**"There can be no question about Jim's enduring contribution to the academy and the tax world. Say 'B and E' to any tax lawyer and they will know instantly to what you are referring. It is on every tax lawyer's desk, in every law library, and read by generations of corporate tax students. It is the first place everyone looks for an answer to any corporate tax question, and, as I say to my students, if the answer isn't there, there is no answer."**

**DEBORAH SCHENK (LL.M. '76)**, MARILYNN AND RONALD GROSSMAN PROFESSOR OF LAW

**"Jim broke the mold in tax academe, along the lines that Larry Bird did in basketball: different, even peculiar, stubborn, relentlessly independent, dignified but occasionally fond of zany adventure, quietly friendly, kind-hearted, devilishly funny, extremely bright and hardworking, committed to professional excellence, loyal, and ultimately, with self-knowledge but not arrogance, in a class very few could join. Underneath the seemingly shy, stolid exterior was an always-churning, even introspective mind. I will miss him."**

**JOHN STEINES (LL.M. '78)**, PROFESSOR OF LAW

# On a Shifting Balance of Power

**P**ROFESSOR CATHERINE SHARKEY, A leading expert on federal preemption in the realm of products liability, won a prized fellowship from the John Simon Guggenheim Memorial Foundation.

For her fellowship project, Sharkey is examining the established view of preemption and analyzing the expansion of federal power. "I hope to show that the preemption debate is no less than a debate over the fundamental allocation of power between the federal government and the states," she says, "and one that is not likely to be resolved anytime soon."



Sharkey focuses her teaching on torts. In her research, she has been studying the interplay between private and public law through the lens of torts and products liability. Sharkey combines a love of theory and a devotion to practical problem solving in both her classes and her scholarship. She studied economics as an undergraduate at Yale, where she also received her law degree; her work on the bail bond system and racial discrimination earned her Yale's prize for the best original economics thesis. As a Rhodes Scholar at Oxford, she pursued a master's in economics. □

## ALI Names Bar-Gill Top Young Scholar

**P**ROFESSOR OREN BAR-GILL RECEIVED THE prestigious American Law Institute's first-ever Young Scholars Medal. According to ALI, the award was created "to call attention to academic work that is practical, focused on the real world, and can influence law for the better." Bar-Gill was recognized for "his insights into consumer psychology, which are the basis for his proposal of specific legal solutions to match specific problems in the markets for cell phones, subprime mortgages, and credit cards."

In 2009, Bar-Gill and Rebecca Stone '09 (who is currently clerking for U.S. Supreme Court Justice Stephen Breyer) co-authored "Mobile Misperceptions" in the *Harvard Journal of Law and Technology*. The piece, which discussed consumer confusion regarding cell phone contracts, attracted the attention of the Federal Communications Commission, which invited Bar-Gill to present the paper's findings.

Bar-Gill also consulted with FCC staff who were drafting new regulations for the cell phone and other telecommunications service markets. Other articles by Bar-Gill that served as

the basis for the ALI medal were "The Law, Economics, and Psychology of Subprime Mortgage Contracts," published in the *Cornell Law Review* in 2009, and "Seduction by Plastic," in the *Northwestern University Law Review* in 2004.

Law school deans nominated more than 70 candidates, all professors in their first decade of teaching, and Bar-Gill was one of only two to receive the medal. Last fall, Bar-Gill also became associate editor of *Behavioral Science and Policy*, a new quarterly journal sponsored by the Rand Corporation that aims to translate behavioral science research into public and private policy solutions in the public interest. □



## An Ethical Choice

Stephen Gillers '68, Crystal Eastman Professor of Law, has won the 2011 Michael Franck Award from the Center for Professional Responsibility of the American Bar Association.

The Michael Franck Professional Responsibility Award is bestowed on those with career commitments in legal ethics, disciplinary enforcement, and lawyer professionalism who "demonstrate the best accomplishment of lawyers." Gillers, a professor at NYU School of Law since 1978, focuses his research and writing on the regulation of the legal profession. His widely used casebook *Regulation of Lawyers: Problems of Law and Ethics* is in its eighth edition. Gillers, who is consulted and quoted widely in legal and popular media as an expert on legal ethics, currently sits on the ABA Commission on Ethics 20/20, which is thoroughly reviewing the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of technological advances and developments in global legal practice.

## Prize Finds Howse in Good Company

The journal *Global Policy* and members of the Global Public Policy Network named an article by Robert Howse, Lloyd C. Nelson Professor of International Law, a winner of its 2010 Best Article Prize. Howse and co-author Ruti Teitel of New York Law School and the London School of Economics won for "Beyond Compliance: Rethinking Why International Law Really Matters," which appeared in *Global Policy's* May 2010 issue. "We are liable to miss many of the important effects of international law if



the focus is narrowed to whether the parties to a specific treaty are in compliance with its rules," says Howse about the main point of the article. For example, he says, "the emerging climate regime, while plagued with compliance issues, is actually shaping behavior even of states not parties to it."

Howse and Teitel's piece tied for the prize with an article co-authored by Joseph Stiglitz, the Nobel Prize-winning economist, and physicist-turned-economist Claude Henry.

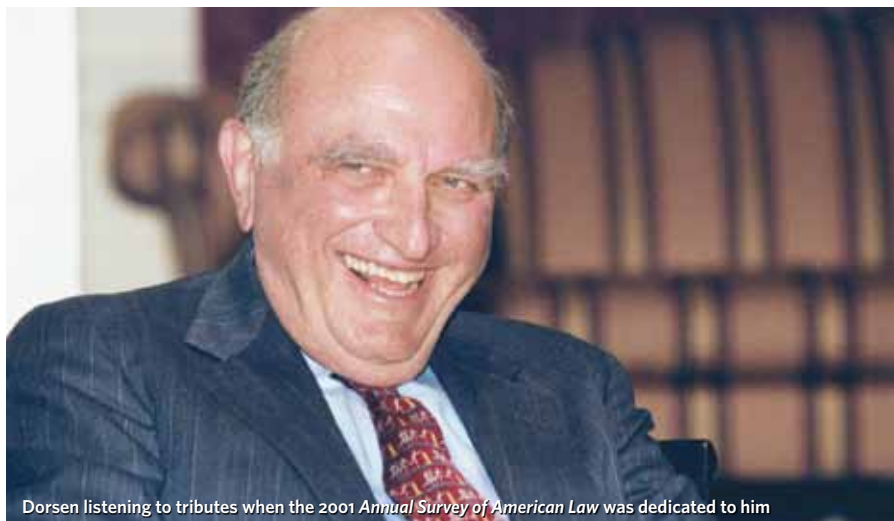


# A Look Back

**N**ORMAN DORSEN, FREDERICK I. AND Grace A. Stokes Professor of Law and co-director of the Arthur Garfield Hays Civil Liberties Program, celebrated his 50th anniversary on the faculty last spring.

Dorsen recalls his pivotal role in the Law School's rise to national prominence since his arrival in 1961. "The school at that time was not a first-rate institution," he says. So in 1965, Dorsen drafted a frank memorandum to his fellow faculty members, signed by five others. "We spelled out why we thought the school was not what it could have been, even though it had many strengths," he says. "The final point was, If you're not improving, you're declining. The only thing to do is to get better, and we have to do certain things to get better." Dorsen acknowledges that had he not just received tenure, "I probably wouldn't have written the memorandum."

Enacting a reform agenda inevitably created conflict. "There were a lot of disputes over curriculum, appointments, the general direction of the school," says Dorsen. "In these disputes, no one person is always right, and that certainly is true for me, but it was important to have a process that was open and the ability to debate the issues. As the faculty improved, the product was much stronger, and the Law School, in turn, became a better law school."



Dorsen listening to tributes when the 2001 Annual Survey of American Law was dedicated to him

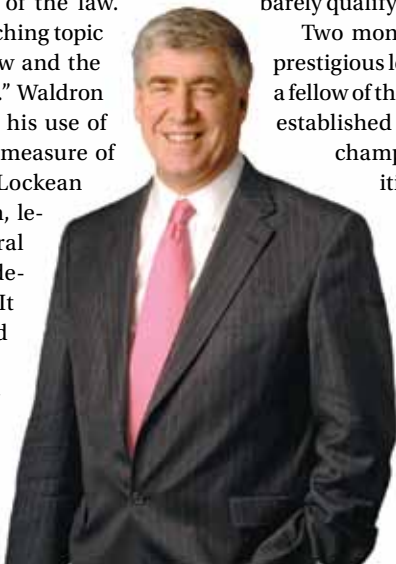
With his half-century of perspective, Dorsen considered the possibilities for NYU Law's next 50 years: "I do believe it will continue to become globalized. Also, the school has become much more interdisciplinary. That changes the way people think about the law. People who came to law teaching when I arrived were usually very bright law graduates, may have practiced two or three years, had a clerkship or two. They thought like lawyers and wanted to solve legal problems. Nowadays, a large proportion are people who come with the perspective of another discipline—history, philosophy, linguistics, even science—and they look at problems in a different way."

At the Law School's end-of-the-year dinner this May, Burt Neuborne, Inez Milholland Professor of Civil Liberties, said it is no coincidence that the Law School has risen so prominently during Dorsen's 50 years. "Norman was there every day, teaching, writing, shaping the law, but also carrying out the hard, often thankless tasks of faculty governance that made the transition possible. He was an apostle of excellence driving us to improve.... I can't remember half the committees he's chaired, the problems he's solved, the institutions he's launched—each with characteristic good judgment, commitment to detail, and brilliant strategic insight." □

## Three Lectures and the British Academy

UNIVERSITY PROFESSOR JEREMY WALDRON delivered three lectures—one on each of three successive days last May—as part of the Hamlyn Lectures series, administered by the University of Exeter and held annually since 1949 to give distinguished legal minds an opportunity to further knowledge and understanding of the law.

Waldron's overarching topic was "The Rule of Law and the Measure of Property." Waldron argued that, despite his use of Locke's phrase "the measure of property," the non-Lockean aspects of the origin, legal status, and moral force of property deserve attention: "It is better in the end to evaluate laws on their own merits—and to make whatever case can be



made about the exigencies of market economy untrammelled by too much regulation—better to take that case directly, rather than muddy the waters by pretending that some laws have transcendent status under the auspices of the Rule of Law and that other laws—like environmental regulations—barely qualify for legal respect at all."

Two months after he delivered these prestigious lectures, Waldron was elected a fellow of the British Academy, which was established by a royal charter in 1902 to champion and support the humanities and social sciences in the United Kingdom and internationally. He joins two other NYU Law professors, University Professor Thomas Nagel and Frank Henry Sommer Professor of Law Ronald Dworkin, among the academy's nearly 900 distinguished scholars. □

## Five Degrees of Commendation

Four distinguished faculty received honorary degrees from around the world in the 2010–11 academic year.

**Philip Alston**, John Norton Pomeroy Professor of Law: honorary doctorate of laws from Maastricht University.

University Professor **Jerome Bruner**: honorary doctorate from Argentina's National University of Rosario.

**Theodor Meron**, Charles L. Denison Professor of Law Emeritus and Judicial Fellow: honorary doctorate of law from the University of Warsaw.

University Professor **Joseph Weiler**, Joseph Straus Professor of Law and European Union Jean Monnet Chaired Professor: honorary doctorate in law from CEU San Pablo University, and another honorary doctorate in law from Humboldt University of Berlin.

# Laurels and Accolades

## ACADEMY INDUCTIONS

The American Academy of Arts and Sciences named Marcel Kahan, George T. Lowy Professor of Law, and Geoffrey Miller, Stuyvesant P. Comfort Professor of Law, as fellows in April. They join 210 other leading “thinkers and doers” who were named to the highly prestigious honor society, including actress Helen Mirren, Microsoft co-founder Paul Allen, and Bob Dylan.

## COUNCIL ELECTION

José Alvarez, Herbert and Rose Rubin Professor of International Law, was elected to the Academic Council of the Institute for Transnational Arbitration, which runs programs on transnational arbitration of commercial and investment disputes and functions as a global forum on contemporary issues in the field.

## LABOR LAW AWARD

Samuel Estreicher, Dwight D. Opperman Professor of Law, director of the Center for Labor and Employment Law, and co-director of the Dwight D. Opperman Institute of Judicial Administration, won the 2010 Susan C. Eaton Scholar-Practitioner Award from the Labor and Employment Relations Association. LERA gave the award to Estreicher in January “in recognition of outstanding research, teaching, and practice emphasizing the value of bringing together the academic and practitioner communities.”

## LIFETIME ACHIEVEMENT AWARD

In February, Eleanor Fox '61, Walter J. Derenberg Professor of Trade Regulation, was honored as one of 10 leading antitrust lawyers in the world. The journal *Global Competition Review (GCR)* gave her a Lifetime Achievement Award for her “decades of outstanding contributions to the field of competition law and policy.” The award, voted on by more than 1,500 *GCR* readers, goes to an individual whose career has had a lasting and transformational impact on the field.

## BOOK AWARD

David Garland, Arthur T. Vanderbilt Professor of Law and a professor of sociology, has won the 2010 PROSE Award in the category of law and legal studies for *Peculiar Institution: America's Death Penalty in an Age of Abolition*. Garland's book, published last October, explores the reasons why capital

punishment has persisted in the United States, even though most Western countries abolished it long ago. The PROSE Awards are sponsored by the Professional and Scholarly Publishing division of the Association of American Publishers.

*Peculiar Institution* won additional recognition in August from two sections of the 14,000-member American Sociological Association: the Mary Douglas Prize for best book from the Society of Culture section, and the Barrington Moore Award for best book from the Comparative and Historical Sociology section.

## COUNCIL MEMBERSHIP

Ryan Goodman, Anne and Joel Ehrenkrantz Professor of Law and co-chair of the Center for Human Rights and Global Justice, has been elected a member of the Council on Foreign Relations, a nonpartisan think

tank. Goodman, also a member of NYU's Department of Sociology and Department of Politics, is an expert on international human rights, international humanitarian law, international relations, and public international law.

## EXCELLENCE ACKNOWLEDGED

The American Immigration Lawyers Association awarded Professor of Clinical Law Nancy Morawetz '81 the 2011 Elmer Fried Excellence in Teaching Award for outstanding professors in the area of immigration law. Morawetz co-founded the NYU Immigrant Rights Clinic, an innovative program combining litigation and non-litigation work on behalf of individual immigrants, advocacy groups, and community-based organizations. For the past two years, she has also chaired the Supreme Court Immigration Law Working Group, a national coalition that monitors immigration cases at the Supreme Court and works to ensure that those cases benefit from the best possible advocacy.

## AGENCY APPOINTMENT

Dean Richard Revesz was sworn in by Supreme Court Justice Antonin Scalia as a public member of the Administrative Conference of the United States (ACUS) in December. ACUS, an independent organization dedicated to improving the fairness and effectiveness of the administrative process at federal agencies, was reestablished in 2010 after a 15-year hiatus.

## PHILOSOPHY PRIZE

University Professor Jeremy Waldron received the American Philosophical Society's Henry M. Phillips Prize in Jurisprudence for 2011. The Phillips Prize recognizes outstanding lifetime contributions to the field. A prolific scholar, Waldron most recently published *Torture, Terror, and Trade-Offs: Philosophy for the White House*, a collection of writings on the moral, political, and legal issues involved in the post-9/11 response to terrorism.

## BOARD ELECTION

Kenji Yoshino, Chief Justice Earl Warren Professor of Constitutional Law, was one of five newly elected members of Harvard University's Board of Overseers. The 30 overseers, nominated by the Harvard Alumni Association and elected by their fellow alumni to six-year terms, exert broad influence over Harvard's strategic vision, including the quality of its educational and research programs. □



Kahan



Miller



Alvarez



Estreicher



Fox



Garland



Goodman



Morawetz



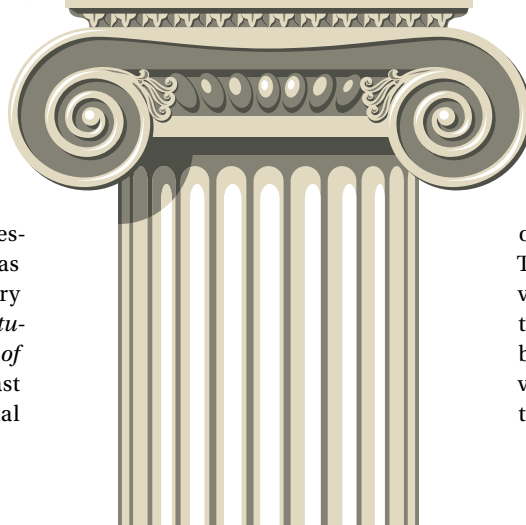
Revesz



Waldron



Yoshino











# Richard Revesz

During the last nine years, the *Law School Magazine* has introduced each of the **38 new members** of the **NYU Law faculty** (to be joined by the **five additions** profiled in this issue). Here, we imagine these **distinguished professors** posting on a certain well-known **social networking site**.










## News Feed

Top News • Most Recent

### News Feed

-  Events 2
-  Messages
-  Wall
-  Info

### Recruits (38)

-  **Lily Batchelder**  
on leave
-  **John Ferejohn**
-  **Moshe Halbertal**
-  **Roderick Hills Jr.**
-  **Mitchell Kane**
-  **Florencia Marotta-Wurgler '01**
-  **Erin Murphy**
-  **Cristina Rodríguez**  
on leave
-  **Sarah Woo**  
1978–2011



**Jeremy Waldron** ▸ **Arthur Miller**

I see the Queen named you a Commander of the Order of the British Empire. Congrats!



**Robert Howse**

Ditto. And Jeremy—I just saw that you won this year's Phillips Prize!



**Richard Epstein**

Robert, congratulations on your *Global Policy Journal's* Best Article win.



**Arthur Miller**

Thank you! And the Bradley Prize, Richard? Not so bad yourself! Well done.



**Margaret Satterthwaite '99**

CHRGJ's report on sexual violence in Haiti is gaining traction in the press.



Smita Narula and Ryan Goodman like this.



**Ryan Goodman**

joined the [Council on Foreign Relations](#).



José Alvarez likes this.



**Cynthia Estlund**

Back from Capitol Hill—testified on recent developments at the NLRB, and assured them the sky is not falling!



Samuel Issacharoff likes this.



**Stephen Choi**

Justice Scalia just cited a paper I co-authored with Linda Silberman, "Transnational Litigation and Global Securities Class Action Lawsuits."



**Franco Ferrari**

Speaking of transnational law, I just returned from the [Conflict of Laws in International Commercial Arbitration](#) conference I organized in Verona.



**Deborah Malamud**

Had a great day with the AnBryce Scholars, attending oral arguments and dinner at the U.S. Supreme Court!



Troy McKenzie and Barton Beebe like this.



**Kevin Davis**

Video from ILLJ's conference on indicators and global governance is now up.



Margaret Satterthwaite and Ryan Goodman like this.



**Joshua Blank (LL.M. '07)**

Spread the word: our [Executive LL.M. in Taxation](#) can now be earned entirely online!



Mitchell Kane likes this.

## Albums

by Richard Revesz



**Samuel Rascoff**  
Law and Accountability in the Age of WikiLeaks



**Daryl Levinson**  
Inaugural Lecture of the David Boies Professorship



**Smita Narula**  
Introducing the Emilio Mignone Lecture on Transitional Justice



**Rachel Barkow**  
A Conversation on Urban Crime with Cory Booker, Mayor of Newark



**Katherine Strandburg**  
Genes and Diagnostics: Patenting and the Science of Medicine



**Kenji Yoshino**  
Academic Freedom v. Equality



**José Alvarez**  
The Shape of Global Governance



**Ryan Bubb**  
Regulatory Reform and the Future of the U.S. Financial System



**Samuel Issacharoff**  
Is What's Good for GM Good for America?



**Daniel Hulsebosch**  
Scholarship Reception with donor John Golieb '79 and Samuel I. Golieb Fellow Nicholas Pedersen



**Oren Bar-Gill**  
Legalizing Drugs: What Would a Regulatory Framework Look Like?



**Troy McKenzie '00**  
Is It Safe Yet? Or Could Wall Street Still Blow Up the Economy?

### Upcoming Events

**Sixth Annual Conference on Empirical Legal Studies**  
November 4 & 5, 2011  
RSVP: Yes · No · Maybe



Co-founder **Jennifer Arlen '86** is attending



**NYU Law Reunion**  
April 27 & 28, 2012  
RSVP: Yes · No · Maybe

### Sponsored



**Samuel Scheffler**  
*Equality and Tradition*



The *Review of Metaphysics* raves, "Scheffler's writing has the merit of defending Rawls more clearly and more cogently than Rawls himself does."



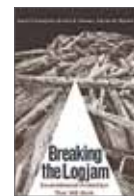
**Catherine Sharkey** and **Richard Epstein**  
*Cases and Materials on Torts, 10th Edition*



Twice as good as the ninth edition!  
Pre-order today!



**Katrina Wyman**  
*Breaking the Logjam*  
(co-authored by David Schoenbrod and Richard Stewart)



The *New York Law Journal* calls it "[a] welcome opportunity to grapple with some of the central environmental issues confronting our nation."

### Chat

Friend Lists Options



**Barton Beebe**

### Barton Beebe



This Facebook parody is a nice demonstration of the principle of fair use as established in

Friends on Chat



# New Faculty

## Sujit Choudhry

### PROFESSOR OF LAW

For a renowned comparative constitutional law scholar who has written or edited more than 60 works, Sujit Choudhry spends a lot of time with his boots on the ground.

In 2003, he and a team of foreign constitutional experts traveled to Sri Lanka to propose a federalist solution to the country's ethnic conflict. They drove past burned-out villages and barbed-wire checkpoints guarded by machine gun-toting soldiers. He made similar trips to Nepal in 2007 and 2010 in support of constitutional negotiations. "He's not an ivory-tower intellectual," says Michael Trebilcock, chair in law and economics at the University of Toronto Faculty of Law. "He's a public intellectual with a bewildering array of public policy involvements."

Choudhry has appeared before the Supreme Court of Canada three times, including for the highly publicized case of Omar Khadr, the only Canadian citizen held at Guantánamo Bay. He was part of the three-member Governing Toronto Advisory Panel that drafted a proposal leading to the restructuring of the city government. As a board member of Legal Aid Ontario, he found himself in the middle of a nightmare scenario when the organization's defense counsel went on strike, threatening to shut down Ontario's criminal justice system.

Choudhry leaves the University of Toronto Faculty of Law, where he held the Scholl Chair, to join the NYU Law faculty this fall. He'll teach Comparative Constitutional Law, both in the classroom and in the field, as he plans to create a center to deploy students and colleagues to post-conflict countries that are grappling with constitutional issues. He also plans to visit the Middle East to identify projects emerging out of the Arab Spring. "He brings a unique dimension to our program," says Beller Family Professor of Business Law Kevin Davis,



Choudhry's childhood friend, as his interest in Asia and Africa complements the faculty's strength in European constitutional law.

Choudhry started writing in the late 1990s, when the changing political landscape in Eastern Europe and South Africa produced an enormous but polarized scholarship in comparative constitutional law. Some scholars encouraged courts to look to other nations for guidance. Others discouraged comparative engagement by courts, arguing that a nation's constitution is the very embodiment of its unique identity. Both camps missed the boat, according to

Choudhry, who staked out a third position in "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation" (*Indiana Law Journal*, 1999). He argues that a nation can best grasp what its constitution should be by using others as a tool for self-reflection: "Comparative materials help us define better what we want to include, and what we want to avoid."

Since then, Choudhry has focused on forging constitutions in ethnically divided societies. He brought together legal scholars and political scientists in editing one of the most important collections in the field, *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press, 2008). "He's by far the best comparative constitutional scholar of his generation," says Sanford Levinson of the University of Texas School of Law.

Born in Delhi and raised in Toronto, Choudhry says his Indian immigrant parents created a home for grooming scholars. "Our house was all about intellectual stimulation. The radio was permanently tuned to CBC [Canada's version of NPR], and we read several newspapers daily," he recalls.

His late father, Nanda, taught economics at the University of Toronto; his mother, Ushi, taught nursing. "They had a procession of academic visitors from around

the world to the house for dinner parties," he remembers. "My brother, Niteesh, and I always sat at the table and were part of these events. It's no coincidence that we're both academics." (Niteesh teaches at Harvard Medical School.)

Premed at McGill University, Choudhry became interested in law after a summer internship in bioethics. Attending Oxford as a Rhodes Scholar, he earned a Bachelor of Arts in Law in 1994. Two years later he earned a Bachelor of Laws from the University of Toronto. After clerking for the Supreme Court of Canada, he earned a Master of Laws at Harvard Law School in 1998.

Choudhry joined the University of Toronto in 1999, receiving tenure in 2004. He received high marks for teaching. "It was hard to come out of his class without being a little more excited about constitutional law because he had such passion for it," says former student Michael Pal (LL.M. '10).

Of a typical busy week, when he may be teaching, writing, chairing faculty meetings, and attending to his policy work, Choudhry says, "It can be a bit frenetic. And then there are the kids!" He and his wife have a daughter and son, and, he says, "We look forward to raising our kids in a global city." — *Jennifer Frey*

## Adam Cox

### PROFESSOR OF LAW

It was tough for Adam Cox to choose between practicing law and teaching it. "I knew I'd love to teach," he recalls, "but I was a little less confident that I'd love the process of legal scholarship because I'm a social person." The gregarious Cox decided to teach, but surmounted the "lonely academic" issue by working collaboratively with other scholars to produce a significant body of multidisciplinary research on two dinner-table topics of debate: voting rights and immigration law.

Cox will join the faculty of NYU School of Law as a tenured professor this fall. He will



teach immigration law, as he did while a visiting professor in Fall 2008. He comes from the University of Chicago Law School, where he began his academic career in 2002 as a Bigelow Teaching Fellow and was most recently professor of law. University of Chicago colleague Eric Posner, who has co-authored several articles with Cox, including “The Rights of Migrants: An Optimal Contract Framework” (*New York University Law Review*, 2009), adds: “Professor Cox brings to bear a wide range of interdisciplinary approaches, such as economics and political science, which enable him to advance the literature in immigration law significantly.” For example, by applying economic models, the authors concluded that rather than being a problem due to insufficient enforcement resources, illegal immigration is a policy choice that allows the United States to obtain cheap labor while retaining the power to deport those who burden the justice or welfare systems and grant amnesty to those who become productive members of society.

Cox has also made significant contributions to the literature of voting rights and election law. In “Judging the Voting Rights Act” (*Columbia Law Review*, 2008), he and co-author Thomas Miles, an economist and law professor at the University of Chicago Law School, provided the first empirical evidence that race as well as political ideology can influence judicial decisions. Their analysis of how judges voted on lawsuits brought under the Voting Rights Act of 1965 also revealed that the political affiliation and race of the colleagues that judges sat with on panels affected their decisions.

Cox and Miles had clerked for judges on opposite ends of the political spectrum on the U.S. Court of Appeals for the Ninth Circuit. Cox worked for Judge Stephen Reinhardt, who is so renowned as an activist that *The Onion* once satirically reported that he had declared the private celebration of Christmas unconstitutional. Noting that their findings didn’t make them any friends on either side of the political divide, Miles praises Cox: “He is a fantastic person to collaborate with who has great academic and scholarly values and is interested in a thorough and wide-ranging inquiry.” Posner, echoing Miles, describes Cox as “by nature dispassionate rather than ideologically inclined, which allows him to understand and evaluate all points of view.”

Growing up in suburban Detroit, Cox was more interested in science than public policy. His father, an engineer, and mother, a child psychologist, own a small manufac-

turing company, and Cox entered Princeton University on the techie track, graduating summa cum laude in 1996 with a degree in mechanical and aerospace engineering. (Miles adds that Cox is still mechanically adept, having fixed his iPhone recently.) Cox won a full-tuition merit scholarship to the University of Michigan Law School, eventually graduating first in his class.

After his clerkship in Los Angeles, Cox moved to New York City, where he spent a year as Karpatkin Civil Rights Fellow at the American Civil Liberties Union Foundation. Before beginning his academic career, he worked for a year as an associate at Wilmer, Cutler & Pickering, where he litigated civil rights and immigration cases.

He and his wife, Courtney Oliva, who until recently was an associate at Winston & Strawn in Chicago and will work at NYU Law’s Center on the Administration of Criminal Law, are eager to move to the West Village. Cox is looking forward to listening to indie bands at the Bowery Ballroom and small Brooklyn clubs, and checking out the foodie scene on the Lower East Side and in Brooklyn. — *Denise Topolnicki*

## Alina Das ’05

### ASSISTANT PROFESSOR OF CLINICAL LAW

As students in the Immigrant Rights Clinic, Alina Das and her friends would joke about making those years last forever, perhaps by forming a law firm to fight for immigrants’ rights. “Of course, we all knew that we’d go our separate ways, but we fantasized about what an ideal job it would be,” she says.

Returning to the IRC first as a teaching fellow in 2008, then joining the faculty in May 2011, she has come close to realizing her dream. “To actually have this be my professional home for the foreseeable future is really exciting,” says Das.

Petite, unassuming, and reserved, Das is nonetheless “a tenacious advocate, focused and completely attuned to what really matters to immigration judges,” says her mentor and fellow IRC instructor, Professor of Clinical Law Nancy Morawetz ’81. Her students concur. “What stands

out is her boisterous laugh and genuine joy when we’re doing well for our clients,” says Stephen Kang ’11. “She encourages us to always keep our clients front and center.”

Coming from an immigrant background that often made her feel an “overwhelming otherness,” Das has a personal connection to her specialization at the intersection of immigration and criminal law. With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, “all the rights that we assume apply to everyone—a day in court, a judge’s discretion—get tossed out the window once the defendant is labeled an immigrant and a criminal,” she says.

In “The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law” (*New York University Law Review*, forthcoming), Das notes that convictions once triggered a categorical immigration penalty based on the statutory definition of the offense. Today’s courts increasingly permit inquiry into the adverse facts of the crime. She argues for the traditional approach.

In “Immigrants and Problem-Solving Courts” (*Criminal Justice Review*, 2008), Das examined the unintended consequences that incarceration alternatives have on immigrants. Typically, a defendant pleads guilty up front to lessen or erase the offense if he successfully completes a treatment program. But under federal immigration law, officials assert that the plea, coupled with a restraint on one’s liberty (albeit a volunteer program), is grounds for deportation.

Joanne Macri, director of the Criminal Defense Immigration Project at the New York State Defenders Association (NYSDA), says Das’s work helped bring about a provision in the Rockefeller Drug Law Reform to waive the up-front guilty plea when it can result in severe consequences such as deportation. Similarly, another brief Das co-authored was cited in *Jean-Louis v. Attorney General of the United States*, which ruled in favor of categorical analysis. “It’s amazing to see what she’s accomplished in such a short time,” says Macri. “I can’t wait to see what she’s going to do next.”

Das and her brother, Shamik, grew up in Baton Rouge, Louisiana, with dad, Dilip, and mom, Mala, who encouraged Das to focus on her education. “I was a nerdy, focused student who joined the math club, went to





science fairs, and threw myself into learning,” she recalls.

As an undergraduate at Harvard University, she spent one summer at an NGO in Bangladesh working on women’s issues, and another in Mozambique studying democratization. After graduating magna cum laude in 2001 with an A.B. in government, she entered NYU Law on a Root-Tilden-Kern Public Interest Scholarship and continued to explore a variety of interests, taking internships in mental health, racial discrimination, housing, community health, and employment discrimination. She graduated with a J.D. and a master’s of public administration.

After clerking for the Honorable Kermit Lipez of the U.S. Court of Appeals for the First Circuit, she was a Soros Justice Fellow and staff attorney for the NYSDA Immigrant Defense Project.

Das spends her spare time with her fiancé, Nafees Tejani, and a close group of friends. Given her intense focus, it’s understandable that she might need time to learn how to adjust her tempo and relax sometimes. “I’ve worked hard to carve out a space where I can get outside of my head,” she says, “and just enjoy being in this really great place.” — *J.F.*

## Gráinne de Búrca

### PROFESSOR OF LAW

One of the foremost scholars on E.U. law and its relationship to national legal systems and the international legal order, Gráinne de Búrca has written or edited nine books and 50-plus articles and book chapters, and she edits the *Oxford Studies in European Law* book series. Her influential *E.U. Law: Text, Cases, and Materials* (fifth ed., 2011) has been in print since 1995. Throw the unusual name into the mix, however, and people “often expect to meet this wise old man, the Great Gráinne de Búrca,” says her friend Neil Walker from the University of Edinburgh. “Instead, they meet this chirpy young woman.”

NYU Law colleagues will have no such confusion, having already worked with de Búrca when she was a Hauser Global Visiting Professor in 2005 and Straus Inaugural Fellow in 2009–10. “Copies of her books sit open on desks from Moscow to Madrid,” says Murry and Ida Becker Professor of Law Benedict Kingsbury. “Her insights into every case, directive, proposal, and parliamentary position paper in the large and complex European legal system are acute and creative. She is a scholar who really knows her field and helps to shape it.”

De Búrca’s academic interests stem from a fascination with the E.U. itself. “Despite its current troubles, the E.U. remains one of the most successful examples of regional economic and political cooperation,” she says. Her work analyzes the kind of international actor the E.U. is becoming and whether lessons learned (both positive and negative) can be applied in other arenas of global governance.

In “The European Court of Justice and the International Legal Order After Kadi” (*Harvard International Law Journal*, 2010), she criticized the popular European Court of Justice decision that blocked the implementation of U.N. Security Council measures, freezing the assets of a Saudi businessman with alleged terrorist connections. De Búrca argues that the decision, along with recent ECJ case law, reveals an increasingly reserved and even skeptical approach to international law.

In “The Road Not Taken: The E.U. as a Global Human Rights Actor” (*American Journal of International Law*, 2011), de Búrca challenges the notion that the European Community in the 1950s was unconcerned with human rights protection. Delving into the archives, she finds that long-forgotten plans for the E.C.’s engagement with human rights were in many respects more ambitious than the current E.U. human rights system. De Búrca “has mastered not only the intricacies but all the subtleties of European Union law,” says George Bermann, director of European Legal Studies at Columbia Law School. “She is a meticulous and insightful scholar.”

One subject de Búrca doesn’t study, however, is status. Colleagues say she judges her peers’ work solely on merit, assesses that work generously even if its views contradict hers, and appears to be immune from strategizing. “She goes where she wants to go,” says Oxford’s Stephen Weatherill. “There’s never any sense of having an agenda.”

One might say de Búrca follows the Golden Rule. Having been, at age 23, one of the youngest fellows appointed to Oxford University, and a decade later the youngest professor—and one of the first female law professors—at the prestigious European University Institute in Florence, de Búrca is all the more impressive for emerging from humble beginnings.

De Búrca and her three siblings were raised in a strict household in suburban Dublin with an emphasis on education and discipline. Both her late father, Seán, and her mother, Bernadette, taught Gaelic.



The children attended Gaelic-speaking public schools and spent summers with their dad’s family in a fishing village in the west of Ireland.

At her mother’s urging, de Búrca studied law at University College Dublin, graduating in 1986. The following year, she got an LL.M. from the University of Michigan, then returned to Dublin to become a Barrister-at-Law. In 1989 she got a one-year teaching position at Oxford, giving her an edge, she said, when a tenured post came her way. “It’s so often a matter of serendipity where people get their appointments,” she says modestly.

In 1998, she left Oxford to join the European University Institute—a graduate research institute set up by the founding members of the E.C.—“a dream for anyone interested in European law,” she says, and became the co-director of the Academy of European Law. There she met her husband, John Norton Pomeroy Professor of Law Philip Alston, who was then a professor at the EUJ, then moved to the U.S., where she taught at Fordham Law School from 2006 to 2010 before joining the Harvard Law faculty.

Their two young children in tow, de Búrca and Alston visit Ireland often. “We have a running joke that my family doesn’t understand what academics do,” she says with a laugh. “My mother, to this day, thinks that once I’m done with my teaching, I’m on holiday. I have to justify my existence.” To her mother, maybe, but certainly not to the legal academy. — *J.F.*

# Douglas H. Ginsburg

## PROFESSOR OF LAW

When Judge Douglas H. Ginsburg of the U.S. Court of Appeals for the District of Columbia Circuit isn't wearing his black robe, he prefers red—a scarlet jacket, to be precise. Among Ginsburg's many extrajudicial interests, none is more arresting than his passion for foxhunting.

"It's thrilling, a melding of horse and rider into one joint effort that can be fatal if separated," says Ginsburg, who started riding when he moved to rural Virginia in 1993 and "earned his colors" a few years later. "For four hours at a time, one clears the mind and focuses only on not getting killed." That respite is significant for a jurist often described as "meticulous and thorough," with an "academic and intellectual rigor." Ginsburg has for 25 years heard more than 100 cases annually as one of the top appellate judges in the nation. This September he announced he will be taking senior status from the D.C. Circuit in January 2012, which will allow him more time for his pastimes and to increase his teaching load from part-time at various law schools to full-time on the faculty of NYU Law.

Known among corporate attorneys as a "giant in antitrust law," Ginsburg has heard appeals in several of the landmark antitrust cases of our times, including *U.S. v. Microsoft*, a series of suits alleging that the company had excluded competition in bundling its Internet Explorer web browser with its Microsoft Windows operating system, and therefore should be broken into two units. Ginsburg's court reduced the number of violations found by a lower court and remanded the case for a reassessment of the remedy. Those decisions "set the template for evaluating monopolization practices today," says Rick Rule, head of Cadwalader, Wickersham & Taft's antitrust group, who had been Ginsburg's deputy and succeeded him as assistant attorney general for antitrust at the Department of Justice.

A self-described originalist, Ginsburg coined the term "Constitution in exile" to refer to decisions when the canon has not been interpreted as originally intended. "No one would put on a Shakespeare play without trying to understand what the words meant 400 years ago," he explains.

Although he is regarded as a conservative, his clerks and other lawyers say he is not an ideologue. "When deciding a case, he makes an honest assessment of the facts in front of him and the governing law. He doesn't bend the case to become a piece of advocacy for a conservative agenda," says former clerk

David Lehn '04. On the bench, he asks penetrating questions but is always courteous. He keeps his opinions short—with very few footnotes—and painstakingly redrafts each one 10 to 20 times. As chief judge from 2001 to 2008, he strove to unify the court and to reduce the number of dissenting opinions.

Ginsburg's esteemed judicial career began with great tumult and disappointment. In 1987, President Ronald Reagan nominated the yearling judge to the Supreme Court. The 41-year-old soon withdrew over admissions that he had smoked marijuana. Ginsburg took the letdown in stride, says Rule: "He remained as outgoing and amiable as ever. And he moved on to become one of the leading lights on the D.C. Circuit."

What led to the nomination was Ginsburg's impressive career in government. In 1984 he became the administrator for the OMB Office of Information and Regulatory Affairs in the Reagan White House. At the center of the president's deregulation effort, Ginsburg was charged with approving all federal agency regulation and policy proposals—an inherently combative task. The stress was such that "the morning staff meetings looked like the locker room of a rugby team after a game," relates John Cooney, a Venable partner who was then an OMB deputy general counsel. "But Doug wore it well and was a calming factor within the institution." In fact, none of Ginsburg's decisions was ever appealed to the president.

A year later, Ginsburg served as assistant attorney general in the Justice Department's Antitrust Division; one of his lasting executive decisions was to elevate the position of the chief economist.

Ginsburg, a University of Chicago Law School graduate, was among the first students to study law and economics with the now legendary Judge Richard Posner. He has applied the cost-benefit analysis and other "Chicago School" economic principles he learned then to help shape modern antitrust law, and regulatory law and policy, ever since. He has published more than 50 influential scholarly works, including co-authoring the seminal 1986 *Harvard Law Review*

article "White House Review of Agency Rulemaking," which "explained to the world at large how one should assess a regulatory program," says Cooney.

In 1975, after clerking for Supreme Court Justice Thurgood Marshall, Ginsburg got his first teaching job at Harvard Law School. He and his childhood friend Hal Scott taught one of the first courses in the country on the regulation of financial institutions. "There was no course, no body of writing," says Scott, who remains at Harvard. So the two did original research by calling regulators to analyze specific problems, once even calling bank regulators in Honolulu when offices in all other time zones had closed.

Now Ginsburg can return to the classroom, where this spring he will teach one of NYU Law's signature foundation courses, the Administrative and Regulatory State. Possessing firsthand knowledge of regulation, Ginsburg will nonetheless exhaustively prepare for each class, says Scott. Students, says Rule, should follow suit and come thoroughly primed and ready to be engaged.

Ginsburg is fond of pointing out that he was born on May 25, 1946, nine months after V-J Day, making him one of the earliest baby boomers. His mother, Katherine, stayed at home to raise Ginsburg and his two siblings in Chicago. His father, Maurice, was self-

educated and owner of a small financial advisory business. He entered Cornell University in January 1964 but took leave a year later and started Operation Match—the world's first computer dating company. His enduring interest in computers and technology has, former colleagues say, influenced his well-informed antitrust decisions such as *Microsoft*.

In 2007, Ginsburg married government affairs consultant Deecy Gray. He has three daughters from earlier marriages. His wry wit and engaging manner make him a coveted dinner party guest. For now, he will commute from the D.C.-area, where his varied interests and pursuits allow him to be, as Rule put it, "a foxhunting Virginia gentleman in the old sense and a thoroughly modern man at the forefront of technology and the law." — J.F.





# Visiting Faculty

## STEPHEN ANSOLABEHRE



Professor of Government, Harvard University  
**When:** Fall 2011  
**Courses:** Campaign Finance; Redistricting: Law, Politics & Science Seminar

**Research:** Elections, democracy, and the mass media

**Representative publications:** Co-author, "Profiling Originalism," *Columbia Law Review* (2010); co-author, "Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act," *Harvard Law Review* (2010); *The End of Inequality: One Person, One Vote and the Transformation of American Politics* (2008)

**Education:** Ph.D. in political science, Harvard University

## DANIEL ERNST



Professor of Law, Georgetown University Law Center  
**When:** 2011-12  
**Courses:** Property; American Legal History: Law and the State in Twentieth-Century America; History of the American Legal Profession Seminar

**Research:** U.S. legal history; property  
**Representative publications:** "Ernst Freund, Felix Frankfurter and the American Rechtsstaat: A Transatlantic Shipwreck, 1894-1932," *Studies in American Political Development* (2009); "The Politics of Administrative Law: New York's Anti-Bureaucracy Clause and the Wagner-O'Brien Campaign of 1938," *Law and History Review* (2009); "Morgan and the New Dealers," *Journal of Policy History* (2008)

**Education:** Ph.D. in history, Princeton University; LL.M. in legal history, University of Wisconsin Law School; J.D., University of Chicago Law School

## JEANNE FROMER



Associate Professor of Law, Fordham University School of Law  
**When:** Spring 2012-Fall 2012  
**Course:** Copyright Law

**Research:** Intellectual property, with emphasis on unified theories of patent and copyright law

**Representative publications:** "Expressive Incentives in Intellectual Property," *Virginia Law Review* (forthcoming, 2012); "Patentography," *NYU Law Review* (2010); "A Psychology of Intellectual Property," *Northwestern University Law Review* (2010)

**Education:** J.D., Harvard Law School; S.M. in electrical engineering and computer science, Massachusetts Institute of Technology

**Clerkships:** Justice David H. Souter of the U.S. Supreme Court; Judge Robert D. Sack of the U.S. Court of Appeals for the Second Circuit

## DANIEL HO



Professor of Law, Stanford Law School  
**When:** Fall 2011  
**Course:** Administrative and Regulatory State  
**Research:** Quantitative

empirical legal studies; administrative law; antidiscrimination law

**Representative publications:** Co-author, "Did a Switch in Time Save Nine?" *Journal of Legal Analysis* (2010); co-author, "Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006," *Stanford Law Review* (2010); co-author, "Viewpoint Diversity and Media Consolidation: An Empirical Study," *Stanford Law Review* (2009)

**Education:** J.D., Yale Law School; Ph.D. in government, Harvard University

**Clerkship:** Judge Stephen F. Williams of the U.S. Court of Appeals for the District of Columbia Circuit

## SALLY KATZEN



Senior Advisor, Podesta Group  
**When:** 2011-12  
**Courses:** How Washington Really Works Seminar; Administrative and Regulatory State

**Representative publications:** Co-author, "Office of Management and Budget: Ensuring Fiscal Responsibility and Government Accountability," *Change for America: A Progressive Blueprint for the 44th President* (2009); co-author, "Letting Government Agencies Do What They Were Created To Do," *American Constitution Society Issue Brief* (2008); "A Reality Check on an Empirical Study: Comments on 'Inside the Administrative State,'" *Michigan Law Review* (2007)

**Education:** J.D., University of Michigan Law School

**Clerkship:** Judge J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia Circuit

**Related experience:** Deputy Director for Management, Office of Management and Budget (1999-2001); Deputy Director of the National Economic Council (1998-1999); Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget (1993-1998); Agency Review Working Group, Obama-Biden Transition; Partner, Wilmer, Cutler & Pickering

## YAIR LISTOKIN



Associate Professor of Law, Yale Law School  
**When:** Spring 2012  
**Course:** Income Taxation  
**Research:** Tax law; corporate law; contract law;

bankruptcy law; law and economics; empirical legal studies

**Representative publications:** "Taxation and Liquidity," *Yale Law Journal* (forthcoming, 2011); "The Income Tax Code Negating Fiscal Policy: Why Tax Scholars Can No Longer Overlook Macroeconomics," *Yale Law Journal on Regulation* (forthcoming, 2011); "Bayesian Contractual Interpretation," *Journal of Legal Studies* (2010); "Management Always Wins the Close Ones," *American Law and Economics Review* (2008)

**Education:** J.D., Yale Law School; Ph.D. and M.A. in economics, Princeton University

**Clerkship:** Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit

## EDWARD ROCK



Saul A. Fox Distinguished Professor of Business Law, University of Pennsylvania Law School; Professor of Business and Public Policy, Wharton School,

University of Pennsylvania

**When:** Fall 2011

**Courses:** Corporate Law Theory Seminar; Mergers & Acquisitions

**Research:** Corporate law

**Representative publications:** Co-author, "When the Government Is the Controlling Shareholder," *Texas Law Review* (forthcoming, 2011); co-author, "The Hanging Chads of Corporate Voting," *Georgetown Law Journal* (2008); co-author, "Corporate Taxation and International Charter Competition," *Michigan Law Review* (2008)

**Education:** J.D., University of Pennsylvania

## PAMELA SAMUELSON



Richard M. Sherman Distinguished Professor of Law & Information, University of California, Berkeley

**When:** Fall 2011

**Courses:** Copyright

Law; Copyright Reform Seminar

**Research:** Digital copyright law; intellectual property; cyberlaw; information policy

**Representative publications:** "The Uneasy Case for Software Copyrights Revisited," *George Washington University Law Review* (forthcoming, 2011); "The Google Book Settlement as Copyright Reform," *Wisconsin Law Review* (forthcoming, 2011); "Legislative Alternatives to the Google Book Settlement," *Columbia Journal of Law and Arts* (forthcoming, 2011)

**Education:** J.D., Yale University

## DAVID SCHLEICHER



Assistant Professor of Law, George Mason University School of Law

**When:** Fall 2011

**Course:** Local Government Law

**Research:** Election

law; local government law

**Representative publications:** "The City as a Law and Economic Subject," *University of Illinois Law Review* (2010); "The Steep Costs of Using Non-Cumulative Zoning to Preserve Land for Urban Manufacturing,"

*University of Chicago Law Review* (2010);

"Why is There No Partisan Competition in City Council Elections?: The Role of Election Law," *Journal of Law and Politics* (2007)

**Education:** J.D., Harvard Law School; M.Sc. in economics, London School of Economics

**Clerkship:** Judge Carlos Lucero of the U.S. Court of Appeals for the 10th Circuit

## Multi-Year Visitors

### ALAN AUERBACH



Robert D. Burch Professor of Economics and Law; Director, Burch Center for Tax Policy and Public Finance, University of California, Berkeley

**When:** Spring 2012

**Course:** Tax Policy & Public Finance Colloquium and Seminar

**Research:** Behavioral effects of taxation; tax reform; demographic change and fiscal policy; budget rules

**Representative publications:** Co-author, "Measuring the Output Responses to Fiscal Policy," *American Economic Journal: Economic Policy* (forthcoming, 2012); co-author, "Welfare and Generational Equity in Sustainable Unfunded Pension Systems," *Journal of Public Economics* (2011); co-author, "Activist Fiscal Policy," *Journal of Economic Perspectives* (2010)

**Education:** Ph.D. in economics, Harvard University

**Related experience:** Deputy Chief of Staff, U.S. Joint Committee on Taxation

### CHARLES CAMERON



Professor of Politics and Public Affairs, Princeton University

**When:** Spring 2012

**Course:** Political Environment of the Law Seminar

**Research:** Political

institutions and policy making

**Representative publications:** Co-author, "Strategic Defiance and Compliance in the U.S. Court of Appeals," *American Journal of Political Science* (2010); "Changing Supreme Court Policy Through Appointments: The Impact of a New Justice," *Minnesota Law Review* (2009); co-author, "Bargaining and Opinion Assignment on the U.S. Supreme Court," *Journal of Law, Economics & Organization* (2007)

**Education:** Ph.D. in public affairs, Princeton University

## ROBERT RABIN

A. Calder Mackay Professor of Law,



Stanford Law School

**When:** Spring 2012

**Courses:** Torts; Toxic Harms Seminar

**Research:** Tort law; health and safety regulation

**Representative**

**publications:** Co-author, *Tort Law and Alternatives: Cases and Materials* (2011); "Tobacco Control Strategies: Past Efficacy and Future Promise," *Loyola of Los Angeles Law Review* (2008); co-author, "The Renaissance of Accident Law Plans Revisited," *Maryland Law Review* (2005); co-editor, *Torts Stories* (2003)

**Education:** J.D. and Ph.D. in political science, Northwestern University

**Related experience:** Senior Environmental Fellow, U.S. Environmental Protection Agency

## DANIEL RUBINFELD



Robert L. Bridges Professor of Law and Professor of Economics Emeritus, University of California, Berkeley

**When:** Fall 2011

**Courses:** Antitrust

Law and Economics Seminar; Quantitative Methods in Law I & II

**Research:** Antitrust; economics of litigation; federalism

**Representative publications:** "Econometric Issues in Antitrust Analysis," *Journal of Institutional and Theoretical Economics* (2010); co-author, *Microeconomics* (2009); co-author, "Empirical Study of the Civil Justice System," *Handbook of Law and Economics* (Volume 1, 2007); co-author, *Econometric Models and Forecasts* (2002)

**Education:** Ph.D. in economics, Massachusetts Institute of Technology

**Related experience:** Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice

## In Residence

### DAVID SHAPIRO



William Nelson Cromwell Professor of Law Emeritus, Harvard Law School

**When:** Spring 2012

**Research:** Civil procedure; federal system; legal

profession; statutory interpretation



**Representative publications:** “The Story of Lincoln Mills: Jurisdiction and the Source of Law,” *Federal Court Stories* (2009); “The Role of Precedent in Constitutional Adjudication: An Introspection,” *Texas Law Review* (2008); *Federalism: A Dialogue* (1995)  
**Education:** LL.B., Harvard Law School  
**Clerkship:** Justice John M. Harlan of the U.S. Supreme Court

### E. THOMAS SULLIVAN

Senior Vice President for Academic Affairs and Provost, University of Minnesota; Former Dean, University of Minnesota Law School  
**When:** Spring 2012  
**Course:** Antitrust Law: Complex



Litigation Strategies Seminar

**Research:** Antitrust law and complex litigation

**Representative publications:**

Co-author, *Complex Litigation* (2010); co-author, *Understanding Antitrust and its Economic Implications* (fifth edition, 2009); *Antitrust Law, Policy, and Procedure* (sixth edition, 2009)

**Education:** J.D., Indiana University School of Law

## Senior Fellows

### NEIL BAROFKSY '95



**When:** Fall 2011  
**Course:** Government Responses to the Financial Crisis Seminar  
**Education:** J.D., NYU School of Law  
**Related experience:**

Special Inspector General for the Troubled Asset Relief Program, U.S. Treasury Department; Assistant U.S. Attorney, U.S. Attorney's Office for the Southern District of New York

### ROBERT BAUER



**When:** Fall 2011  
**Course:** Law and the Electoral Process  
**Education:** J.D., University of Virginia School of Law  
**Related experience:**

White House counsel; general counsel, Democratic National Committee; general counsel, Barack Obama's election campaign; partner, Perkins Coie

### ARTHUR GONZALEZ (LL.M. '90)

Senior Fellow, NYU School of Law  
 Chief Judge, U.S. Bankruptcy Court



for the Southern District of New York  
**When:** Spring 2012  
**Courses:** A Study of Cross-Border

Insolvency Cases and Relevant Law; Introduction to Corporate Reorganization Under the Bankruptcy Code

**Education:** LL.M. in taxation, NYU School of Law; J.D., Fordham University Law School  
**Related experience:** Assistant United States Trustee for the Southern District of New York; United States Trustee for New York, Connecticut, and Vermont; Attorney, Office of Chief Counsel of the Internal Revenue Service

**Note:** In April 2011, Gonzalez announced he would retire from the bench in February 2012, and immediately join the NYU School of Law.

## Furman Fellows

### EMILY ANN BERMAN '05 (LL.M. '11)



**Research:** National security and counterterrorism; separation of powers  
**Representative publications:** “Domestic Intelligence Collection: New Powers,

New Risks,” Brennan Center Publication (2011); co-author: “Too Big a Canon in the President's Arsenal: Another Look at *United States v. Nixon*,” *George Mason Law Review* (2010); “Executive Privilege Disputes Between Congress and the President: A Legislative Proposal,” *Albany Government Law Review* (2010)

**Education:** LL.M. and J.D., NYU School of Law

**Clerkship:** Judge John M. Walker Jr. of the U.S. Court of Appeals for the Second Circuit

### D. THEODORE RAVE '06

**Research:** Election law; law of democracy; civil procedure; aggregate litigation  
**Representative publications:** “Questioning the Efficiency of Summary Judgment,” *NYU Law Review* (2006); co-author, “Conversation, Allocation, and Representation:



Justice Breyer's Active Liberty,” *NYU Law Review* (2006)

**Education:** J.D., NYU School of Law

**Clerkships:** Judge Leonard B. Sand of the U.S. District

Court for the Southern District of New York; Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit

## Koch-Searle Fellow

### KAREN BRADSHAW



**Research:** Law and economics; environmental law  
**Representative publications:** Co-author, *Wildfire: Law & Economics Policy Perspectives*

(forthcoming, 2011); “Backfired! Distorted Incentives in Wildfire Suppression,” *Utah Environmental Law Review* (2011); “A Modern Overview of Wildfire Law,” *Fordham Environmental Law Review* (2010); co-author, “Linking Physical and Online Communities in Academic Settings,” *The Offensive Internet* (2009)

**Education:** J.D., University of Chicago; M.B.A., California State University, Chico  
**Clerkship:** Judge E. Grady Jolly of the U.S. Court of Appeals for the Fifth Circuit

## Hauser Global Visiting Faculty

### BRIAN J. ARNOLD



Senior Adviser, Canadian Tax Foundation  
**When:** Spring 2012

**Courses:** International Tax Policy; Tax Treaties: The OECD Model Convention  
**Research:** Interna-

tional tax; tax treaties

**Representative publications:** *Reforming Canada's International Tax System: Toward Coherence and Simplicity* (2009); co-author, *Comparative Income Taxation: A Structural Analysis* (third edition, 2010)  
**Education:** J.D., Harvard Law School

**EYAL BENVENISTI**

Anny and Paul Yanowicz Professor of Human Rights, Tel Aviv University  
**When:** Fall 2011  
**Courses:** Law and Global Governance;

International Law and the Resolution of Israeli-Palestinian Conflict

**Research:** Constitutional law; international law; human rights; administrative law

**Representative publications:** *The International Law of Occupation* (second edition, forthcoming, 2012); "Reclaiming Democracy: The Strategic Uses of Foreign and International Law," *American Journal of International Law* (2008); co-author, "The Empire's New Clothes: Political Economy and the Fragmentation of International Law," *Stanford Law Review* (2007)

**Education:** LL.B., Hebrew University of Jerusalem; LL.M. and J.S.D., Yale Law School

**Clerkship:** Justice M. Ben-Porat of the Supreme Court of Israel

**DANIEL JOSEPH FITZPATRICK**

Reader, Australian National University



College of Law  
**When:** Fall 2011  
**Courses:** Humanitarian Assistance after Armed Conflicts and Natural Disasters; Land and the Environment in Asian

Economic Development

**Research:** Law and development in Asia; land tenure in developing countries; land policy after armed conflicts and natural disasters

**Representative publications:** Co-author, "The Relative Resilience of Property: First Possession and Order Without Law in East Timor," *Law & Society Review* (2010); *Land and Natural Disasters: Guidance for Practitioners* (2010); "Evolution and Chaos in Property Systems: The Third World Tragedy of Contested Access," *Yale Law Journal* (2006)

**Education:** Ph.D., Australian National University; LL.M., University of Sydney

**Clerkships:** Justice Lindsay G. Foster of the Federal Court of Australia

**Related experience:** United Nations land rights adviser in post-conflict East Timor and post-tsunami Aceh, Sumatra

**PHOEBE OKOWA**

Reader in Public International Law, Queen Mary, University of London

**When:** Fall 2011



**Courses:** Use of Force in International Law; International Criminal Law

**Research:** Public international law with a focus on responsibility of non-

state groups in conflict zones, protection of the environment and natural resources in armed conflict, and the relationship between state and individual criminal responsibility

**Representative publications:** "State and Individual Criminal Responsibility in Conflict Zones: Contours of an Emerging Relationship," *Finnish Yearbook of International Law* (2009); "Congo's War: The Legal Dimension of a Protracted Conflict," *British Yearbook of International Law* (2006); *State Responsibility for Transboundary Air Pollution in International Law* (2001)

**Education:** LL.B., University of Nairobi; BCL and D.Phil., University of Oxford

**CATHERINE O'REGAN**

Ad hoc Judge of the Namibian Supreme Court

**When:** Spring 2012  
**Course:** Courts, Rights and Democracy: The South African Experience

**Education:** LL.M., University of Sydney; Ph.D., London School of Economics

**Related experience:** President, International Monetary Fund Administrative Tribunal; Judge, Constitutional Court of South Africa (1994-2009); Chairperson, United Nations Internal Justice Council

**MARCO TORSELLO**

Professor of Law, University of Bologna and University of Verona



**When:** Fall 2011

**Courses:** Comparative Private Law; International Commercial Agreements in Practice

**Research:** Comparative law; international contracts; conflict of laws; transnational litigation and arbitration

**Representative publications:** Co-author, *Il contratto internazionale. Diritto comparato e prassi internazionale* (2010); "Preliminary Agreements and CISG Contracts," *Drafting Contracts under the CISG* (2008); *Common Features of Uniform Commercial Law Conventions: A Comparative Study Beyond the*

*1980 Vienna Sales Convention* (2004)

**Education:** J.D., University of Bologna, Italy; LL.M., Pallas Consortium, University of Nijmegen, the Netherlands

**NEIL WALKER**

Regius Professor of Public Law and the Law of Nature and Nations, University of



Edinburgh, Scotland

**When:** 2011-12

**Courses:** Jurisprudence and Global Law; Crimes that Shape States: History and Global Prospects Seminar

**Research:** European and transnational constitutional theory; law and security

**Representative publications:** Co-author, *Relocating the Rule of Law* (2009); co-author, *Civilizing Security* (2007); co-author, *The Paradox of Constitutionalism* (2007)

**Education:** LL.B. and Ph.D., University of Strathclyde, Scotland; LL.D., University of Uppsala, Sweden

**PATRICK WEIL**

Senior Research Fellow, French



National Center for Scientific Research; Professor, Paris School of Economics  
**When:** Fall 2011  
**Courses:** Comparative Immigration, Citizenship and

Antidiscrimination Laws and Policies; Comparative Church State Relations: Old Regimes

**Research:** Comparative immigration; citizenship, church states law and policy  
**Representative publications:** "From Conditional to Secured and Sovereign: The New Strategic Link Between the Citizen and the Nation-State in a Globalized World," *I•CON* (2011); "The Anti-racist Origins of the American Immigration Quota System," *Social Research* (2010); "Why the French Laïcité is Liberal," *Cardozo Law Review* (2009)

**Education:** Ph.D. in political science and M.B.A. ESSEC, Sciences Po, Paris

**SULI ZHU**

Professor of Law, Peking University Law School

**When:** Spring 2012

**Course:** Law and Culture: An Asian Perspective

**Research:** Law and social sciences; law and social transformation



**Representative publications:**

*Songfa Xiaxiang (Sending Law to the Countryside)* (2010); "An Economic Analysis of Hai Rui's Judicial Theorems," *Peking University Journal of Legal Studies* (2008); "Political Parties in China's Judiciary," *Duke Journal of Comparative & International Law* (2006)

**Education:** LL.B., Peking University; LL.M., McGeorge School of Law; Ph.D., Arizona State University

## Straus Fellows

### ADAM BECKER

Associate Professor of Classics and Religious Studies, New York University



**Research:** Examining the Western missionary background to the development of nationalism among the indigenous Christian population of Mesopotamia in the 19th and early 20th century

**Representative publications:** "Political Theology and Religious Diversity in the Sasanian Empire," *Between Contact and Contrast: Jews and Christians in Sasanian Mesopotamia* (forthcoming, 2011); "The Comparative Study of 'Scholasticism' in Late Antique Mesopotamia: Rabbis and East Syrians," *Association for Jewish Studies Review* (2010); *Fear of God and the Beginning of Wisdom: The School of Nisibis and the Development of Scholastic Culture in Late Antique Mesopotamia* (2006)

**Education:** Ph.D. in religion, Princeton University

### SEYLA BENHABIB

Eugene Meyer Professor of Political Science and Philosophy, Yale University



**Research:** The status of international law and of transnational legal agreements and treaties with respect to the sovereignty claims of liberal democracies

**Representative publications:** *Dignity in Adversity: Human Rights in Troubled Times* (forthcoming, 2011); co-editor, *Mobility and Immobility: Gender, Borders & Citizenship* (2009); co-author, *Another Cosmopolitanism: Hospitality, Sovereignty, and Democratic Iterations* (2006); *The Rights of Others: Aliens, Citizens and Residents* (2004)

**Education:** Ph.D. in philosophy, Yale University

### ANDREA BÜCHLER

Professor of Private Law and



Comparative Law, University of Zurich  
**Research:** Religious, cultural and legal norms and the public and private struggles over the body

**Representative publications:** *Islamic Law in Europe? Legal Pluralism and its Limits in European Family Laws* (forthcoming, 2011); co-author, "Children and Divorce: Investigating Current Legal Practices and their Impact on Family Transitions," *Handbook of Transdisciplinary Research, Heidelberg* (2007); "The Transplantation of Human Fetal Brain Tissue: The Swiss Federal Law," *Regulating Technologies: Legal Futures, Regulatory Frames and Technological Fixes* (2008)

**Education:** Ph.D. in private law, comparative law, and gender law, University of Basel, Switzerland

### WAEEL FAROUQ

Visiting Professor of Law, Macerata University, Egypt; Instructor, Arabic



Language Institute at the American University in Cairo, Egypt

**Research:** Analyzing the factors that have shaped Arab minds and constituted the seeds of contemporary Islam's contradictions and problematic issues

**Representative publications:** *Difference and Dialogue* (in Arabic, 2010); *The Linguistic and Historical Roots of the Islamic Law* (in Arabic, 2009); "Alle Radici Della Ragione Araba" ("Roots of the Arabic Reason"), *Dio Salvi la Ragione* (2007)

**Education:** Ph.D., Institute of Arabic Studies—Arab League

David M. Friedman Fellow

### PHILIP HAMBURGER



Maurice and Hilda Friedman Professor of Law, Columbia Law School

**Research:** Religious liberty

**Representative publications:** "Beyond Protection," *Columbia Law Review* (2009); *Law and Judicial Duty* (2008); "Getting Permission," *Northwestern Law Review* (2007)

**Education:** J.D., Yale Law School

### JANEZ KRANJIC



Professor of Roman Law, University of Ljubljana

**Research:** The relevance of traditional values and principles for the development of law and the

perception of justice and legality in the modern society

**Representative publications:** *Rimsko pravo (Roman Law)* (second edition, 2010); "La législation provinciale et la traduction des lois centrales en slovène: le cas de la province de Carniole," *La province: circonscrire et administrer le territoire de la République romaine à nos jours* (2010); "Die actio praescriptis verbis als Formel- aufbauproblem," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (1989)

**Education:** LL.M., University of Ljubljana

**Related experience:** President, Judicial Council of the Republic of Slovenia

### JOSÉ TOLENTINO MENDONÇA



Professor of the New Testament, Catholic University, Portugal

**Research:** The hermeneutics of the writings of Saint Paul

**Representative publications:** *O Tesouro Escondido (The Hidden Treasure)* (2011); *O Hipopótamo de Deus e Outros Textos (God's Hippopotamus and Other Texts)* (2010); *A Leitura Infinita. Bíblia e Interpretação (Infinite Reading: The Bible and Interpretation)* (2008)

**Education:** Ph.D. in Biblical theology, Catholic University, Portugal

### MICHEL TROPER

Professor Emeritus of Public Law,



University of Paris X

**Research:** Legal philosophy; constitutional law; constitutional theory; constitutional history

**Representative publications:** Co-author, *Droit constitutionnel* (31st edition, 2009); *La separation des pouvoirs* (second edition, 2009); *La philosophie du droit* (2003)

**Education:** Ph.D. in French constitutional history, University of Paris

# Tikvah Fellows

## YEHOYADA AMIR



Rabbi and Associate Professor of Jewish Thought, Hebrew Union College, Jerusalem

**Research:** Analyzing and evaluating the writings of A.D. Gordon, H.N. Bialik, Shmuel Hugo Bergmann, Martin Buber, Lea Goldberg, and Eliezer Schweid from the perspective of Jewish religious renewal

**Representative publications:** *A Small Still Voice* (Hebrew, 2009); *Reason Out of Faith: The Philosophy of Franz Rosenzweig* (Hebrew, 2004)

**Education:** Ph.D. in Jewish thought, Hebrew University, Israel

## DAVID FLATTO

Assistant Professor of Law, Religion, and History, Penn State University Dickinson School of Law



**Research:** Investigating the foundational stories that animate or shape the Jewish legal tradition

**Representative publications:** “Theocracy and the Rule of Law,” *Dine Israel* (2011); “Tradition and Modernity in the House of Study,” *Tradition* (2011); “The King and I: The Separation of Powers in Early Hebraic Political Theory,” *Yale Journal of Law and the Humanities* (2008)

**Education:** Ph.D. with distinction in Near Eastern languages and civilizations, Harvard University; J.D., Columbia Law School

## JONATHAN GARB

Associate Professor of Jewish Thought, Hebrew University, Israel



**Research:** Relating the kabbalistic thought of Ramhal and his 18th-century Italian circle to other forms of writing to show that research of Kabbalah cannot be divorced from other branches of Jewish creativity and learning

**Representative publications:** *Shamanic Trance in Modern Kabbalah* (2011); *The Chosen will Become Herds: Studies in Twentieth Century Kabbalah* (2009); *Manifestations*

*of Power in Jewish Mysticism from Rabbinic Literature to Safedian Kabbalah* (2004)

**Education:** Ph.D. in Jewish thought, Hebrew University, Israel

## Berkowitz Fellow

### MARC HIRSHMAN



Mandel Chair for Jewish Education, Melton Centre, Hebrew University of Jerusalem; Director, Institute for Research on the Land of Israel, Yad Itzhak Ben Zvi

**Research:** Completing a critical edition of Ecclesiastes Rabbah chapters 1-6 with commentary and introduction

**Representative publications:** *The Stabilization of Rabbinic Culture 100 C.E.-350 C.E.: Texts on Education in their Late Antique Context* (2009); *Torah for the Entire World: A Universalist School of Rabbinic Thought* (in Hebrew, 1999); *A Rivalry of Geniuses: Jewish and Christian Interpretation of the Bible in Late Antiquity* (1996)

**Education:** Ph.D. in rabbinics, Jewish Theological Seminary of America

## LAWRENCE J. KAPLAN

Associate Professor of Jewish Studies, McGill University



**Research:** Examining differing methods and approaches to teaching Talmud in contemporary Religious Zionist Yeshivot and Midrashot

**Representative publications:** *Halakhah and Religious Experience in the Thought of Rabbi Joseph B. Soloveitchik* (forthcoming, 2012); co-editor, *Rabbi Abraham Isaac Kook and Jewish Spirituality* (1995); co-editor, *The Thought of Moses Maimonides: Philosophical and Legal Studies* (1991)

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# Legal Universalism: Persistent Objections

**KEVIN DAVIS** challenges the idea that laws promoting development can successfully cross all borders.



**T**HERE IS A NATURAL URGE TO search for what works in promoting development. The value of finding a cure for under-development, in terms of avoided suffering and greater opportunities for human flourishing, is on par with the value of finding a cure for cancer. A conundrum, though, is deciding how seriously we should take the possibility that there is no single cure. This issue is probably worth considering in relation to every kind of policy initiative, whether it is an HIV/AIDS program or an irrigation system. The scope of this essay, however,

is limited to legal reforms. In that context, the question becomes: how seriously should we take the possibility that there is no set of legal institutions that invariably promote development?

My own position is simple: all claims that any specific feature of the legal system invariably has a causal and positive relationship to development are inherently suspect. This is an old argument. As far back as 1748, Montesquieu famously asserted:

[The political and civil laws of each nation] should be adapted in such a manner to the people for whom they are framed that it should be a

great chance if those of one nation suit another. They should be in relation to the nature and principle of each government; whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions. They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs.

Notwithstanding Montesquieu, attempts to identify universally desirable laws are remarkably popular. The simplest examples of legal universalism posit causal relationships between specific substantive legal rules, such as limited liability for shareholders of corporations, and presumptively beneficial outcomes, such as economic growth. More sophisticated universalistic theories of law and development describe “good” laws in terms of the functions they perform rather than their formal characteristics, and sometimes focus on the processes by which laws are made rather than their substantive characteristics. The primary goal of this essay is to show that Montesquieu’s basic argument can apply with full force to sophisticated contemporary forms of legal universalism as well as the simpler forms.

THE ESSENCE OF THE CASE AGAINST LEGAL universalism is as follows: Universalistic claims about law and development take the form, “The presence of Law X invariably promotes development.” The idea is that the functional relationship between law and development—that is to say, the extent to which particular laws promote development—does not vary fundamentally across societies. Or to put it another way, societies do not vary in ways that cause variations in the impact of laws on development. If societies vary in ways that cause the impact of a particular law to vary, then universalistic claims about that law cannot stand. I believe that societies generally do vary in such ways.

There are three relevant kinds of variation. First, development can mean different things in different places. This idea will make no sense to anyone who believes that there is only one universally applicable conception of development, whether it happens



to be per-capita GNP or the Human Development Index. However, a respectable body of opinion holds that, in any given society, development should mean what the people—acting through legitimate political institutions—choose it to mean. Those choices will not necessarily be consistent. For example, societies may legitimately disagree about how to balance economic growth and income inequality, or what compromises to strike for the sake of reducing unemployment, or even, as I will show, whether certain kinds of legal institutions have such overriding intrinsic value that they must be embraced at all costs.

Societies might also vary in ways that alter the causal connections between law and social or economic outcomes. Law is part of a complex system that determines such outcomes. The system is complex in the sense that, even if there is a causal connection between a particular law and a particular development outcome, that connection will be sensitive to interactions with other features of the society. First, the law may not be necessary to induce the outcome in question because the presence of certain other factors is sufficient—there may be substitutes for the law. Second, the law may not be sufficient to generate the outcome in question—there may be complements for the law, in the absence of which it has no impact.

The most interesting universalistic claims about law and development assert that particular laws are either necessary or sufficient, or both, to cause particular development outcomes. However, if the law in question has substitutes, and those are present in some societies but not in others, then the law will be necessary to promote development in some societies but not in others. Similarly, if the law in question has complements that are not universally distributed, then adopting the law will be sufficient in some places but not in others.

The main objections to universalistic legal theories are that they cannot accommodate variations across societies, either in conceptions of development or in the presence of substitutes or complements for the components of the legal system upon which they focus. By way of illustration, consider two prominent examples of universalistic claims about the relationships between law and development.

The first example emphasizes the importance of common law (as opposed to civil law, which traces its heritage to France) to development. In the contemporary literature this claim has most famously been elaborated in a series of papers by a group

of economists led by Andrei Shleifer, Rafael La Porta, and Florencio Lopez-de-Silanes. Their central claim, based on over 10 years of cross-country statistical analyses, is this:

Compared to French civil law, common law is associated with (a) better investor protection, which in turn is associated with improved financial development, better access to finance, and higher ownership dispersion, (b) lighter government ownership and regulation, which are in turn associated with less corruption, better functioning labor markets, and smaller unofficial economies, and (c) less formalized and more independent judicial systems, which are in turn associated with more secure property rights and better contract enforcement.

The argument that the common law is universally superior to the civil law is vulnerable to all of the fundamental objections to legal universalism. Even if we accept Shleifer et al.'s empirical claims, people who hold different conceptions of development may disagree about whether those claims count as proof that common law does a good job of promoting development.

Those disagreements can take at least two different forms. In the simpler form, law is viewed merely as a means of achieving certain economic outcomes, and the disagreement is about how to evaluate them. The idea that such disagreement exists seems eminently plausible. Not everyone cares about access to finance and ownership dispersion, or obsesses about lighter government regulation. Why should they? You might say that we care about these outcomes because they tend to be associated with economic development, as measured by growth in GDP per capita. Interestingly, though, no matter how hard they tried, the authors of this study could not show that the common law was causally connected with higher growth rates.

Common law universalism also ignores a second way in which conceptions of development might differ. Sometimes people treat laws not as means to an end but as ends in themselves. This possibility radically expands the scope for disagreement about both what forms of social change represent development and whether particular laws contribute to development. For example, the French might object, saying that having judges make law is inherently undesirable and that having a lawmaking process that relies exclusively on the legislature to make law is an intrinsically valuable end. In this view, even if the common

law is associated with all of the economic outcomes that its proponents suggest, and those outcomes are regarded as desirable, there may still be disagreement about whether replacing the civil law with the common law would promote development.

Now some might say that, aside from a few legal theorists, no real people, and especially not real people in poor countries, are sufficiently committed to abstract ideas like the notion that particular laws are intrinsically valuable to justify using them as criteria for determining what makes good law. All that most people care about is peace and prosperity. I am not persuaded by these arguments.

Take the example of the English-speaking Caribbean. Over the past decade or so, the most pressing legal issue in the region has been whether to retain the Judicial Committee of the Privy Council as the appellate court of last resort or to replace it with a local institution known as the Caribbean Court of Justice (CCJ). A number of pragmatic arguments weigh for and against abandoning the Privy Council in favor of the CCJ, including, on one side, arguments about relative travel costs and familiarity with local values, and, on the other side, the relative expertise and independence of the Privy Council. Interestingly, in addition to these pragmatic arguments, a prominent argument in the debate—perhaps even the most prominent—has been about the intrinsic value of having final judicial decisions made by local judges rather than foreign judges. One lawyer summed it up this way: “Every nation aspires to its own institutions. It has been said very often in public life that self government is better than good government.”

Think about the ramifications. The implication is that the best law ought to be selected without regard to its tangible social or economic impact, but rather on the basis of its pedigree. Think also about the ramifications of taking this kind of argument seriously. If creating a legal system with a particular pedigree is considered a legitimate objective of legal reform, then we open a tremendous amount of room for disagreement. Some people may think the ultimate end is homegrown law. Others who want to escape the shackles of traditional society may think that the most pressing concern is the development of modern law. Others might be preoccupied with a legal system they believe manifests due process or the rule of law. Others think that none of those sentimental concerns are relevant, and that all that matters is economic growth. No single legal model, and certainly not one premised on the inherent

superiority of the English common law, is compatible with all of these divergent conceptions of the purposes of legal reform.

Common law universalism is also vulnerable in some straightforward ways to the objection that legal universalism ignores the significance of potential substitutes. France and Belgium are rich countries. They are wonderful places to live. It is difficult to argue that their civilian legal systems place more of a drag on their development than America's common law system. In fact, as even Shleifer et al. admit, the most plausible conclusion is that France and Belgium have ways of achieving development that serve as effective substitutes for a common law legal system.

Finally, there is the objection that the universalistic theories have to account for complements. The common law arguably places a premium on having good judges. In other words, good judges are complements to reforms that increase reliance on judge-made law. In this view, trying to adopt a common law system in a jurisdiction without competent or trustworthy judges seems like a recipe for disaster.

A SECOND AND SOMEWHAT MORE sophisticated universalistic take on law and development is embodied in some recent research conducted by the World Bank as part of its Doing Business project. The premise of the project is that law promotes economic development by facilitating certain key economic activities such as starting a business, collecting on a debt, transferring real property, or moving goods across borders. The Doing Business team collects data from lawyers around the world on the time, cost, and number of procedures required to complete these tasks. They compile those data into an "ease of doing business index" and then rank the countries. They publish features on "who reformed and who didn't" as well as "the top 10 reformers." There is clearly a message about what counts as good business law: laws that make doing business faster, cheaper, and simpler. And this claim is undeniably universalistic. A heading in the first Doing Business report says it all: "One Size Can Fit All—in the Manner of Business Regulation."

At first glance the Doing Business team's brand of legal universalism seems invulnerable to the standard objections. Since the focus is on business law, the room for emotionally inspired disagreement seems attenuated—will anyone really take to the streets over commercial law reform? In any event, the stated objectives of the Doing Business project—faster, cheaper, simpler



law; increased employment; greater economic growth—seem inoffensive.

Consider, however, the law of secured credit. The Doing Business project assumes that it is best to permit debtors to grant security interests in a broad range of collateral, to make it as fast and as cheap as possible for a secured creditor to foreclose in the event of default, without going to court, and to give secured claims priority over all other claims, including tax claims and claims of employees. This may make sense if you think that the purpose of debtor-creditor law is to minimize the cost of credit. But if you are concerned about issues such as due process for debtors, or protecting the welfare of vulnerable creditors such as employees, then you may have a very different take on what qualifies as an optimal law of secured transactions. Again, the concern is that there may be legitimate grounds for disagreement about the ends to be served by any particular law.

The Doing Business project's prescriptions also neglect the roles of substitutes for the types of legal institutions they condemn, and complements for the types of legal institutions they praise. For example, a few years ago one of the African students in my law and development class took exception to the data on the number of days it took to start a business in her country. It reportedly took 30 days, placing the country in the bottom half of the countries on the World Bank's table. She claimed that it could be done in two or three days. Her objection was to the fact that the World Bank researchers had asked how long it would take to start a business without using a lawyer. If you used a lawyer, it could be done in two or three days, in part because the lawyers all knew one another and could simply call

up the lawyers working in the registry office and arrange to have their clients' files expedited. In other words, there was an informal substitute for the kind of formal institutions the researchers were looking for.

In another example, a USAID lawyer named Wade Channel reports that, for a period of time, USAID lawyers bragged that, as a result of reforms they had helped usher in, it took only eight days to start a business in Afghanistan. However, while it was true that it took eight days to incorporate a business, it still took up to 18 months to get it up and running because all of the delays had been shifted to the licensing stage. The reforms were no doubt helpful in some sense. But they would have been more helpful if they had been complemented by an efficient set of licensing laws. As it stands, they may not have been worth the investment.

SO WHAT SHOULD BE DONE WITH THESE concerns about legal universalism? As far as I can tell, the objections to universalism have been deployed in three distinct kinds of debates. First, the concerns outlined above have been raised in substantive debates as critiques of specific examples of legal universalism. For example, critics of the Doing Business project have used versions of these arguments to criticize its findings and recommendations. Concerns about universalism have also been used in methodological debates to question whether it is even worthwhile for scholars to search for or test universalistic theories. This is one way, for instance, to understand claims that it does not even make sense to speak of a field such as law and development. Finally, concerns about universalism have been put to political use—they have been used to support claims that one kind of expertise



and one set of experts ought to be given primacy over others in lawmaking processes. For those who have faith in universalistic theories, it makes sense to view the task of legal reform as a largely technocratic exercise, properly assigned to experts steeped in the international literature on the impact of various reforms and insulated from less scientific influences such as personal ties, respect for tradition, or the desire to advance particular political parties or programs. By contrast, placing a higher value on knowledge of local values or the complexities of local society weighs in favor of governance by people with much stronger attachments to and knowledge of local society.

These are all valid ways of invoking concerns about legal universalism, but caution is warranted. It makes little sense to use these objections to support one universalistic theory over another. It is also difficult to justify abandoning the quest for a universally applicable theory of law and development. There may be conceptions of development that have virtually universal appeal—proponents of the universality of human rights would certainly make this argument. And, in principle, complex systems that vary in their details but are made up of the same basic components—e.g., human beings living in post-industrial society under conditions of scarcity and interdependence—might exhibit persistent regularities, including regular relationships between certain laws on the one hand and social or economic outcomes on the other. Moreover, whether or not there are universally valid relationships between law and development, there are almost certainly some relationships that can be expected to remain constant over modest periods of time and across roughly similar societies. Forsaking input from people with insight into those potential relationships smacks of throwing the baby out with the bathwater.

The claim here is not that universalistic theories of law and development should be rejected out of hand. Rather, they should be regarded skeptically and tested against a powerful set of objections to which even the most sophisticated theories of this kind have proven vulnerable.

**KEVIN DAVIS**, *Beller Family Professor of Business Law*, focuses his scholarship on contract law, the governance of financial transactions involving developing countries, and the general relationship between law and economic development. This excerpt is adapted from a paper of the same title published in the June 2010 University of Toronto Law Journal.

# Relative Doubt: Familial DNA Database Searches

**ERIN MURPHY** describes the perils to our civil liberties if law enforcement is allowed to use partial DNA matches.



**I**N APRIL 2008, CALIFORNIA BECAME the first state in the country to set out an explicit policy authorizing intentional DNA databank searches for partial matches—commonly known as “familial” or “kinship” searches. Following enactment of the policy, police conducted 10 searches, but all proved unsuccessful. However, in April 2010, police discovered a partial match to a recently convicted offender they thought might be the son of the Grim Sleeper, the unknown perpetrator of at least 11 murders that began in the 1980s, which had been connected by DNA evidence but which failed to match any known offenders in law enforcement databases. After a sting operation in which officers surreptitiously collected a piece of pizza discarded by the father/suspect, tests revealed a match to the crime-scene samples, and the suspect was arrested and charged with the crimes.

The Grim Sleeper case is simply one whitecap on a cresting tide propelling familial match methods toward legitimization as a law enforcement technique. In the

five years since the FBI lifted restrictions forbidding interstate sharing of information from database searches about anything other than a “putative perpetrator,” additional jurisdictions, most recently Virginia and New York, have formally announced their intention to engage in various forms of familial matching. Only the District of Columbia and one state, Maryland, have laws forbidding familial searches. In several states, laboratories have conducted or reported such matches, citing the absence of formal laws or policies either permitting or forbidding them. Such legal uncertainty can result in serious consequences—in 2007, the administrator of the Massachusetts state DNA database was fired in part for reporting four near-matches, a practice state officials claimed was prohibited.

It is always difficult to question a law enforcement technique that results in the apparent apprehension of a notorious killer. But the merits of any law enforcement method ought not be judged solely on its capacity to achieve success; if that were the case, we would have no reservations about

installing cameras in every home, attaching GPS bracelets to every individual, or taking DNA from every citizen. Likewise, a more sensitive examination of the Grim Sleeper case illustrates both the promise and the perils of familial DNA searching. On the one hand, familial searches offer the opportunity to solve horrific crimes that have frustrated all law enforcement efforts; on the other hand, the 10 prior unsuccessful searches reveal the method's inherent fallibility, and gesture toward the possibility of false starts or wrongly cast suspicion. As a matter of law and policy, then, how should we think of this emerging use of the nation's DNA databases?

### FAMILIAL MATCH BASICS

The vast majority of the 3.2 billion nucleotides that make up an individual's genome strand are identical to that of another human being. But there are certain areas of known variation, called "microsatellites," that vary among individuals. The most common form of forensic DNA typing in the United States, known as "STR" or "single-tandem repeat" typing, looks to 13 of these variable loci on the genomic strand and counts the number of times certain known sequences repeat themselves. At each locus, analysts measure two repeat lengths, otherwise known as "alleles"—one descended from the mother and one from the father. By counting the repeats at 13 loci, an analyst can obtain 26 discrete measurements that help individuate one person from another.

At present, all 50 states and the federal government collect and type biological samples, typically from convicted persons, but more recently also from arrestees. These DNA profiles are then stored in databases at the local, state, and national levels; as of November 2010, the national database contained over 9.1 million known offender profiles. These databases were originally established in order to make exact matches between profiles extracted from crime-scene evidence and known offenders, or to the same profile across different crime scenes. But the search software also allows for partial or inexact matches, which can be useful because related persons are more likely to have similar genetic profiles than unrelated persons.

Importantly, however, such similarity is inexact. In much the same way that full siblings in a family may all physically resemble one another or may appear utterly dissimilar, genetic profiles can also vary according to the vicissitudes of nature. At minimum, a child and a parent will match at 13 alleles, but siblings could

in theory share none—the unpredictability of inheritance means that it is possible for one sibling to inherit one-half of a parent's 26 alleles, while the other inherits the other half. Generally speaking, however, siblings bear genetic resemblance—one estimate suggests that siblings on average share 16.7 alleles in common. The probability of overlap turns on several factors—most pertinently on common inheritance, but also on the likelihood that the parents themselves shared a particular allele and the commonness of that allele in the population at large. Matching is thus not just a question of quantity (in terms of total number of alleles in common), but also of quality (how many of those alleles are rare versus common).

It is for this reason that the number of leads generated in a familial match search will be a function of, among other things, the technical parameters of the search. The higher the standard set (of allelic quality and quantity), the greater likelihood that a match will be probative; but high standards also increase the likelihood of excluding a relative that might have been found if standards had been lowered. Choosing how to conduct the search is thus often a trade-off between possibly missing a lead but raising the likelihood that a lead is good, and almost certainly returning a good lead, but having it be buried within a large number of false leads.

This trade-off is exemplified in the manner in which partial match leads come about, since near-miss matches can come about two ways. The first, often called "inadvertent partial matching," occurs when investigators search the database intending to find an exact match, but inadvertently turn up matches that are closely approximate. At that point, the analyst may choose either to report the partial matches to law enforcement or to return a report that states that no exact matches were found. Which of those routes the analyst takes often depends on the policy, custom, or laws of the particular jurisdiction. The second method, called "intentional familial searching," is an intentional search for partial match leads. In that case, the very purpose of the search is to identify possible offender partial matches and then investigate any of their relatives.

### ARGUMENTS AGAINST FAMILIAL SEARCHES

Despite their obvious allure, I argue that familial matches should be forbidden because they embody the very presumptions that our constitutional and evidentiary

rules have long endeavored to counteract: guilt by association, racial discrimination, unwarranted propensity inferences, and even biological determinism.

### THEY CREATE ARBITRARY SUSPECTS

Familial searches are, by nature, arbitrary and discriminatory searches. There has been much debate over their disproportionate impact on minority communities as a result of the demographics of the criminal justice system in general, but familial searches are also discriminatory in a more fundamental way: they unjustly distinguish between innocent persons related to convicted offenders and innocent persons unrelated to convicted offenders.

That is, just because a search in a database returns some partial matches does not itself make it more likely that those partial matches belong to a relative of the crime-scene sample source. Visualize it this way: imagine there are two databases, one composed of profiles of 10,000 convicted offenders and the other composed of profiles of 10,000 people picked at random. A crime occurs, and a DNA sample is developed from the scene. In searching for an exact match in each database, it is arguably reasonable to expect that the convicted offender database is more likely to return a "hit" than the random database, on the theory that convicted offenders are more likely perpetrators of criminal offenses than those never before convicted (not, we should note, because they are more likely to have a particular genetic profile). We might also justify such a search by saying that convicted offenders, by virtue of their crimes, have forfeited the privacy to which law-abiding persons are entitled, and thus it is legally defensible to treat them as the "usual suspects" in looking for crime-scene matches. Indeed, the constitutional arguments upholding the collection and databasing of DNA from convicted offenders rested on precisely these claims.

But what if the search returns no exact matches? Is there any reason to think that a search for a partial match will be more likely to find a perpetrator if conducted in the convicted offender database than in the random database? No. As a matter of biology, there is no reason to expect that one database is more likely to have a similar genetic profile than the other, and indeed we would expect to see an equal number of partial matches from each database search. In other words, there is nothing about biology—the profile itself—that makes it more likely to match a convicted offender database than a random persons database.



This logic fails only if we believe that the innocent relatives of convicted offenders are more likely themselves to have perpetrated a crime than the innocent relatives of unconvicted people. Indeed, that is an argument that some proponents of familial searches have made, but that argument is too poorly supported by empirical evidence to serve as the basis for segmenting the law-abiding public into two classes—those who are automatic suspects (relatives of offenders) and everyone else. Even if it could be shown that relatives of convicted offenders are more likely to themselves have committed an offense, then that simply suggests that those relatives will already be, of their own accord, in the offender databases. In a family of five brothers, one of whom has a criminal record and rest of whom do not, familial searches are appropriate only if we think it proper to assume that the law-abiding brothers deserve to be treated as suspects.

Finally, to the extent that this arbitrary use of DNA databases is justified as the “best available option”—then it is critical to note an obvious alternative. If society’s commitment to DNA investigation of innocent persons is so strong that the benefits outweigh the drawbacks, then the equitable approach is to create a national, universal DNA database. Then all innocent persons—not just those who happen to be related to a convicted offender—would share equally in the burdens and benefits of genetic typing.

#### THEY ARE INSUFFICIENTLY PROBATIVE

The imprecision of familial matches means that searches will inevitably return false leads, or that on occasion a “source” will prove not to have been a perpetrator. Yet the investigation that follows a match based on nothing more than common “genetic suspicion” can indelibly mark the suspected person. Matches might lead police to “backward reasoning”—in which they start from the genetic tip and build a case around it, rather than going through the laborious process of traditional investigation. By way of illustration, consider the case of a man who volunteered his DNA sample in a dragnet conducted to find a rapist. Although the sample did not match in the rape case, it was not destroyed but was instead entered into the database. A later search linked the sample to a 1996 rape, and the man was arrested despite his protestations of innocence. He was eventually released when the victim came forward to exonerate him, explaining that she and the man had engaged in consensual sex just before a stranger had raped her. Imagine,



however, if the victim had died in the attack, or had not been located 10 years after the offense, or if the liaison had been merely fleeting? Given that genetic evidence alone can serve as the basis of conviction, it is easy to imagine that a grave injustice might have occurred.

The serious potential costs of familial matches must also be weighed against their real benefit. It is interesting to observe that even jurisdictions that regularly conduct such searches, in both the United States and the United Kingdom, report only moderate actual success. Although by no means scientific, it is perhaps illustrative that the website of one of the most vocal proponents of familial DNA searching, Denver District Attorney Mitch Morrissey, contains an ongoing list of successful identifications of suspects using the technique; although culled from around the world, it is currently up to only 31. Simulated models likewise demonstrate that it is in fact quite difficult to strike a functional balance between setting partial match thresholds low enough to ensnare a good lead and high enough to ensure that a manageable number of over-all leads are returned. Such indications that familial search methods deliver limited positive results, when weighed against their serious risks and costs, ought to tip the balance away from their continued use.

#### THEY INVADE PRIVACY

Familial searches unjustifiably compromise the privacy of a variety of individuals, perhaps most gravely the implicated innocent relatives of a databased person. Imagine a partial match search leads to the

relatives of an offender: what happens next? No law prevents investigators from inquiring of family or coworkers if a suspect knew the victim or engages in certain activities (say, frequenting prostitutes), or if the suspect cannot account for where he was last week. No law requires that officers act quickly in testing the DNA sample voluntarily submitted for exclusion rather than allow the sample to get lost in a year-long backlog during which the suspect’s name is muddled and tarred. And no law mandates that, once a name is formally cleared, the officer return and assure the suspect’s family and coworkers that he is truly as innocent as he was the day before the investigation began. No national law requires that samples submitted in such an investigation be destroyed once a suspect is ruled out, or prohibits the person’s profile from being uploaded into the national database. The worst indignity of an investigation can be living under a cloud of suspicion; even mere suspicion, quickly dispelled, has the potential to disrupt a career, destroy a marriage, or ruin a life.

Moreover, in our society, families are largely social, not biological, constructs. Yet when investigators follow up on genetic familial searches by asking, “Do you have any children?” or “Who is your father?,” they ask a biological, not social, question. Answering may call for the disclosure of the most intimate kinds of information: abandoned parental bonds, adoptee relationships, children conceived with the aid of technology, even family secrets about paternal identity. A lead may feel torn between identifying relatives, potentially

exposing them to intrusive investigation, and revealing a confidence that severs the perceived biological tie. Analysts assigning value to genetic relationships may inadvertently uncover biological truths that even the parties do not know. And such invasions of privacy may be particularly harmful for family members who may have already suffered as a result of the actions of their relative, the databased offender. They may have incurred financial losses due to legal costs, have themselves been victims of the offender, or have endured emotional harms from incarceration, embarrassment, abandonment, or betrayal. Yet by exploiting DNA profiles, the state becomes a party to the family's further victimization.

#### THEY ARE RACIALLY DISCRIMINATORY

The concerns related to race and ethnicity are manifold, but I will focus on three here. First, familial searches of convicted offender and arrestee databases exacerbate the actual and apparent disparities of the criminal justice system. Given the disproportionate representation of blacks and Hispanics in the criminal justice system, the use of known offender databases to conduct familial searches necessarily means that the burden of such search techniques will primarily be borne by innocent relatives of those subpopulations. Quantifying the exact impact on those groups is imprecise and difficult, but even advocates of familial searching have acknowledged that "familial searching potentially amplifies . . . existing disparities" in the criminal justice system.

Moreover, using offender databases to find relatives sends a message that in cases where there is no evidence of the perpetrator's identity or ethnicity, it is fair to focus suspicion not just on the "usual suspects," but on the innocent relatives of the usual suspects. In this respect it is misleading for advocates of familial searches to repeatedly suggest that the technique is no more pernicious than looking in a DMV database for a match to a partial license plate. Such an analogy is inaccurate: a search in a DMV database is a search of the entire universe of possible suspects—the DMV database is a registry of *all* license plates. Instead, a familial search is like looking for partial matches to a license plate, but in a database that contains only cars registered to those with surnames starting with M through Z.

Second, the dependence on racial categorization in interpreting DNA typing results transmits a biological determinism about race that is not supported by science and that risks formally inscribing within the justice system inaccurate biases under

the legitimizing mantle of scientific truth. DNA typing already employs sorting methods, borrowed from the U.S. Census's admittedly "social, not biological or genetic" racial and ethnic categories, that have little scientific meaning. But even if asserting actual racial identity were straightforward, it still would not definitively dictate a particular genetic profile, since genetics at best offers probabilities and likelihoods. In fact, the statistics used to compute allelic frequencies depend on the very existence of a degree of heterogeneity in the reproductive profiles of the population at large. Thus, endorsing an investigative method that quantifies findings in starkly racial terms conveys a sense of biological certainty that science cannot support. It risks investigators pursuing a profile assumed to be "White" or "Hispanic" or "Black" when biology supports such inferences only weakly.

Lastly, this widespread acceptance of racial and ethnic categorization as a means of quantifying DNA results (say, allelic frequencies) opens the door to a kind of 21st-century racial eugenics in which crime and criminology are viewed largely as functions of genetics and biology. Of course, advocates of familial search policies might argue that, to the extent that some racially discriminatory effects may occur as a result of familial searches, they are offset either by the benefits of the searches themselves or by the claim that studies show a "strong probabilistic dependency between the chances of conviction of parents and their children, as well as among siblings." But it is easy to fall into a familiar pattern of racial stereotyping without asking more difficult and nuanced questions about the social construction of crime, or conversely the distribution of privileges, along racial lines. Festooning racial assumptions in technological flourishes particularly distracts from such inquiries: a police department would readily draw criticism if it announced a policy of focusing primary attention in all cold cases on innocent minority young males, simply because statistically their rate of arrest is disproportionately high. An equivalent policy, imposed on genetic grounds, should escape no lesser opprobrium.

#### THEY ARE UNDEMOCRATIC

Closely related to individual liberty concerns of those persons affected by familial searches are democratic accountability concerns about the quality of the public debate concerning the scope of the databases. DNA databases are largely creatures of legislative enactment. That is, the federal government and each of the 50 states

have laws that set out exactly who should be required to submit genetic material for inclusion. The courts continue to confront challenges raised by those mandated by statute to contribute DNA samples, and consensus is lacking around certain practices like arrestee sampling. Yet familial searching easily skirts such challenges by effectively adding relatives to the database not through statutory mandate, but through search technique. As the American Society of Law, Medicine, and Ethics wrote in a report it prepared on the issue, "[l]ow stringency searches are an implicit database expansion that should be open to public debate." If some persons are to be added to the database, it should be by duly enacted law, not executive order or surreptitious laboratory search technique.

#### CONCLUSION

There are also possible constitutional objections to familial search methods, but those remain to be aired in the courts. It may be that, like other investigative methods that pose serious risks to privacy such as wiretapping telephones, familial search techniques will be judged appropriate only upon the condition that statutory safeguards superintend their use. If such methods are to be approved, then at the very least a variety of restrictions, imposed on the basis of either law or policy, should be implemented in order to maximize the likelihood of successfully identifying a perpetrator and minimize the potential intrusiveness of any investigation. For instance, familial searches might be limited to certain kinds of cases and conducted in accord with strict technical search parameters. The permissible scope of subsequent investigation could be circumscribed, and require, for example, that samples taken for matching purposes be processed within a designated time frame or with confidentiality terms akin to those in the field of healthcare. And perhaps most importantly, concerted effort to regulate familial searches should embed structures for general quality control and oversight by mandating the collection and review of data concerning the efficacy of searches conducted. In short, even if we should choose to overlook the disadvantages of this technique, we should not wholly ignore them.

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# The New Equal Protection

**KENJI YOSHINO** analyzes the U.S. Supreme Court's shift from group-based civil rights to universal human rights.



**O**UR NATION IS INCREASINGLY beset with pluralism anxiety. Commentary from both the right and the left has expressed the fear that we are fracturing into fiefs that do not speak with each other. That fear has a basis in fact, as the nation confronts “new” kinds of people (introduced to the country through immigration) or newly visible people (introduced to the country by social movements). We are, for instance, arguably the most religiously diverse country in world history. The number of associations for sexual minorities, individuals with disabilities, and the aged has skyrocketed. No end lies in sight.

Pluralism anxiety has pressed the Supreme Court's constitutional jurisprudence away from group-based civil rights toward universal human rights. To demonstrate this movement, I first show how the Supreme Court has closed three traditional equality doors in the past decades. I then show that even as the Supreme Court has closed these equality doors, it has pushed open related liberty doors to permit the relevant constitutional values expression. Finally, I turn to a normative assessment of whether this shift is desirable.

## THREE CLOSING EQUALITY DOORS

Over the past 40 years, the Supreme Court has closed off three forms of relief under the Constitution's equality and free exercise guarantees. Under its own account, it has done so because of the fear that it will not be able to draw principled distinctions among various groups in our diverse society.

First, the Court has closed the canon of heightened scrutiny classifications under the equal protection guarantees of the Constitution. “Heightened scrutiny” means the Court looks more closely at the government's use of a particular classification. When the Court uses this level of scrutiny, it generally invalidates the government's action. While the phrase “heightened scrutiny” suggests a closer look rather than a result, this is a jurisprudence in which looks can kill.

Beginning in the 1940s, the Court extended such scrutiny to five classifications: race, national origin, alienage, sex, and non-marital parentage. While groups still sometimes petition the Court for heightened scrutiny, these requests seem somewhat antiquated. The last classification to receive heightened scrutiny was non-marital parentage in 1977. The Court has closed the list

of classifications that receive this critical form of protection.

The Court has not left us in suspense about why it has done so. In the 1985 case *Cleburne v. Cleburne Living Center*, the Court denied individuals with mental retardation heightened scrutiny. Writing for the majority, Justice White observed:

[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.

In *Cleburne*, Justice White expressed the “too many groups” problem—the concern that if the mentally retarded were granted heightened scrutiny, the Court would have no “principled basis” on which to deny other groups the same protection. Because the Court is a “forum of principle,” the absence of such a basis ended up dooming the claims not just of mentally retarded individuals, but also of other groups.

The Court has also curtailed protections even for groups that have already received heightened scrutiny by foreclosing so-called “disparate impact” claims. In the 1976 case *Washington v. Davis*, the Court held that disparate impact on a protected group would not, in and of itself, lead the Court to apply a higher level of scrutiny. To succeed, a plaintiff would have to show discriminatory intent against the group on the part of the government. Three years later, in *Personnel Administrator v. Feeney*, the Court defined “discriminatory intent” so stringently that it was tantamount to malice.

To see the restriction represented by the *Davis/Feeney* framework, consider *Feeney* itself. The case involved a Massachusetts civil-service hiring preference for veterans. The vast super-majority of veterans were men. Even though Helen Feeney (a non-veteran) consistently outshone other applicants on her civil service examinations, she was denied employment because of this veterans' preference. She brought an equal protection challenge, arguing that the preference for veterans operated as an unconstitutional preference for men.

The Court disagreed. It observed that even though Massachusetts might have known this preference would operate to fence out women, mere knowledge was not enough. Feeney would have to show that Massachusetts adopted the preference because of, not just in spite of, its disparate impact on women. This level of intent is hard to prove because governmental actors—particularly collective bodies such as legislatures—usually have mixed motives for their actions. Feeney lost her case.

In formulating the *Davis/Feeney* framework, the Court did not refer to pluralism anxiety. However, it did refer to the “too many groups” problem when it moved the framework over to the free exercise context in 1990. In *Employment Division v. Smith*, the Court considered two Native American religionists who smoked peyote for sacramental purposes. The Court acknowledged that the general ban on controlled substances would have a disparate impact on those who smoked peyote. However, it held that because Congress had not criminalized peyote with the intent to burden religious minorities, the religionists could not get an exemption from the general ban. Writing for the Court, Justice Scalia observed that “in a cosmopolitan nation made up of people of almost every conceivable religious preference,” accommodating religious drug use would “open the prospect of constitutionally required religious exemptions from civic obligations of almost every kind.” In a 2006 debate he had with Justice Breyer, Justice Scalia put his “too many groups” argument in *Smith* more humorously. He stated that while “France is a country with 300 cheeses and two religions, the United States is a country with two cheeses and 300 religions.” Under this view, judicial religious accommodation is as impossible in the United States as judicial caseic accommodation would be in France.

The final way in which the Court has shut down traditional group-based equal protection claims is by placing restrictions on Congress’s ability to enforce the Equal Protection Clause. The fifth section of the Fourteenth Amendment gives Congress the power to “enforce” the other provisions of the amendment, such as the Equal Protection or Due Process Clauses. In the liberal Warren Court years, the Court deemed Congress’s so-called “Section 5” powers to be extremely broad. However, in the 1997 case *City of Boerne v. Flores*, the Court severely constricted Congress’s Section 5 powers. This meant Congress could not enact certain forms of civil-rights legislation at all.



In 2000, the Court struck down a provision of the federal Violence Against Women Act that permitted victims of gender-motivated violence to sue their assailants.

Even when Congress was permitted to enact legislation, *Boerne* often prohibited it from enforcing that legislation against the states. In 2001, the Court found that Title I of the Americans with Disabilities Act, which protects individuals with disabilities from employment discrimination, could not be enforced against state employers. The Court once again justified this limitation with reference to pluralism anxiety. In his majority opinion in *Alabama v. Garrett*, Chief Justice Rehnquist stressed that disability only drew rational basis review under Section 1 of the Fourteenth Amendment. In his view, this meant Congress’s power to legislate with respect to disability was concomitantly constrained. He cited the entirety of Justice White’s “too many groups” passage from *Cleburne*, describing it as “quite prescient.”

### THREE OPENING LIBERTY DOORS

If that were the end of the story, the prospects for constitutional civil rights would be dreary. But as the Court has closed these three equality doors, it has pushed related liberty doors further open. The dynamic has been like that of squeezing a balloon, where pinching off equality jurisprudence has caused the Court’s civil-rights commitments to be pressed over to a collateral area of doctrine—the court’s liberty or “substantive due process” jurisprudence.

First, the Court has sidestepped the ban on new heightened scrutiny classifications by translating group-based equality claims into universal liberty claims. For instance, in the 2003 case *Lawrence v. Texas*, the Court considered the constitutionality of a Texas

statute that prohibited sodomy between people of the same sex. In striking it down, the Court could have decided the case on equality grounds. But this would probably have required the Court to grant sexual orientation some form of heightened scrutiny.

So the Court struck down the statute on liberty grounds, stating that it violated the right of every individual to sexual privacy in the home. This permitted the Court to avoid the “too many groups” problem, because the right it vindicated belonged to individuals of all sexual orientations. Yet while this rising tide lifted all boats, it lifted some more than others, given that sodomy statutes disproportionately targeted gay individuals. The Court acknowledged this by observing that the right to private consensual adult sexual intimacy needed to be guaranteed to prevent gay individuals in particular from being demeaned.

The Court has also bypassed the bars on disparate impact claims through its due process analysis. Restrictions on abortion obviously have a disparate impact on women. But in a 1993 case, the Court observed that such a disparate impact would not, in and of itself, raise equal protection concerns. It cited *Feeney* for the proposition that such abortion restrictions would have to be enacted not in spite of, but because of their negative effect on women to trigger the heightened scrutiny garnered by gender-based distinctions.

Yet the Court’s refusal to analyze abortion as a women’s equality issue does not mean it left the woman’s right to choose completely unprotected, as evidenced by its due process decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*. Like *Lawrence*, these due process “liberty” decisions underscored their equality dimen-



sions. In 1973, the *Roe* Court noted that “[m]aternity, or additional offspring, may force upon the woman a distressful life and future.” Such statements led then-Justice Rehnquist to complain in dissent that the Court was importing “legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under Due Process Clause of the Fourteenth Amendment.” When it revisited *Roe* in 1992, the *Casey* Court stood its ground, contending: “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”

Finally, the Court has used liberty analysis to loosen some of the restrictions precedent has placed on Congress’s ability to enact civil rights legislation. In the 2004 case *Tennessee v. Lane*, the Supreme Court considered whether Congress’s Section 5 power permitted it to enact Title II of the Americans with Disabilities Act, which protects the rights of individuals with disabilities to access public accommodations. One of the plaintiffs, George Lane, had to crawl up courthouse steps to answer criminal charges against him. After he refused to do so a second time, he was held in contempt of court. When he sued Tennessee for violating Title II, the state argued that Congress did not have the power to enact that provision under Section 5 of the Fourteenth Amendment.

In stating that Congress had this power, the Court did not rely on Congress’s power to protect the rights of individuals with disabilities. That move was effectively foreclosed by the 2001 *Garrett* case discussed above. The Court instead stated that Congress had the power to assure that all individuals retained the “right to access the courts.” It cited other cases outside the disability context where the Court had guaranteed this right, such as a case that held that the state had to pay for the stenographic transcript needed to file an appeal if an individual could not afford it. Again, the Court pivoted away from the group-based equality claim toward the universal liberty claim.

### A NORMATIVE ASSESSMENT

Because I believe pluralism anxiety will only increase in future years, I take the shift from equality to liberty to be largely inevitable. Yet the Court has room at the margins to choose between the old and new models of equal protection. I therefore move here from the descriptive to the prescriptive. My conclusions here are tentative. While I generally approve of the

Court’s movement toward a liberty analysis, I believe it would be premature categorically to affirm the shift in the Court’s jurisprudence, given that it cuts across so many contexts. My primary aim is to initiate a discussion of what is gained and lost by the Court’s shift toward the liberty claim.

The largest advantage of the liberty claim is that it combats pluralism anxiety. The new equal protection paradigm stresses the interests we have in common as human beings rather than the demographic differences that drive us apart. In this sense, the shift from the “old” to the “new” equal protection could be seen as a movement from group-based civil rights to universal human rights.

Seen in that light, pluralism anxiety is a blessing in disguise. It causes us to vary and vary the human being in our imagination until we discover what is invariable about her. This brings us to a clearer sense of what rights we need to flourish as human beings. Confronted with massive diversity in the global context, we have responded with documents like the Universal Declaration of Human Rights. Such documents offer more protection to rights than to groups. The United States is increasingly becoming a microcosm of the world with respect to its diversity, making a movement from groups to rights seem organic and natural. I suspect it is no accident that several cases exemplifying the “new equal protection,” such as *Lawrence*, look to international and comparative law.

A related advantage of the Court’s move toward liberty analysis is that it is less likely to essentialize identity. A new wave of progressive scholarship has criticized the tendency of civil rights to stereotype the social identities it purports to protect. Such “left critiques of the left” argue that when the courts protect a trait as part of a group’s identity, they strengthen the misperceptions they meant to disestablish. If the Court protects “speaking Spanish” as an essential part of an individual’s national origin, it has effectively held that speaking Spanish is an essential part of being Latino or Latina. If the Court protects “speaking Spanish” as part of a “right to speak one’s first language,” no such essentialism is entailed.

At the same time, the move toward liberty in constitutional civil rights jurisprudence can be criticized in at least three ways. The first objection argues that even if increasing pluralism is inevitable, pluralism anxiety is not. At the individual level, we do not encourage individuals to capitulate to their anxieties, but to overcome them.

We should ask, then, why societies are not similarly pressed to surmount their anxieties rather than to surrender to them. When pluralism anxiety instructs us that there are too many groups to permit group-based protections, we should question why this is so. Any argument to the contrary is, as Justice Brennan put it in a different context, an argument against “too much justice.”

I think this position is utopian, at least in this raw form. We may someday have six or seven heightened scrutiny classifications rather than five. Obama’s attorney general, for instance, has recently argued that the Court should recognize sexual orientation as a heightened scrutiny classification. But we cannot have 20 without diluting the meaning of heightened scrutiny for all the classifications that earn it. Similarly, I have difficulty seeing how a return to disparate impact analysis could be put into practice, particularly in the free exercise context, where the number of groups is potentially infinite. Unless we want the Court to go back to evaluating the validity of every asserted religion, which I emphatically do not want, then it would be hard not to risk having every individual become a law unto herself.

The second critique is a narrower, more powerful, version of the first. It does not contend that the movement from group-based equality to universal liberty is a mistake across the board. It instead observes that with respect to certain groups, we should be careful about jumping too quickly to a higher level of generality. In certain circumstances, such as the right to sexual intimacy, rising to a higher level of generality identifies a commonality among the relevant groups (such as straights and gays). In other situations, moving to that higher level of generality papers over the subordination that the Court should be correcting.

A classic instance of the latter situation concerns the right to abortion. To speak of the right to reproductive autonomy as if men and women were similarly situated with respect to the right is obtuse and retrograde. Real biological differences between men and women with respect to pregnancy make the exercise of the right completely different for the two sexes. A jurisprudence that foregrounds liberty concerns over equality concerns dangerously conceals the enduring forms of group-based subordination that the equal protection jurisprudence was meant to correct. My intuition is that this will be particularly true in contexts where differences between the relevant groups are both enduring and differentiating, as in the contexts of sex or disability.

For me, however, this is not an argument for abandoning the move toward liberty altogether, but an argument that this move will not be a panacea. As noted, even liberty cases such as *Roe* or *Casey* underscored the equality concerns that were present in these decisions. I believe that if we keep those equality concerns steadily visible, we can also address the concerns about sex-based subordination described above.

A final objection to the move toward liberty is that it is a false rescue because it substitutes one slippery slope for another. Pluralism anxiety directs our attention to the group-based slippery slope. A movement from equality to liberty seems to solve this problem, as it focuses on rights that belong to all. However, an approach that foregrounds liberty raises a different question. It replaces the question of which groups should be protected with the question of which rights should be protected.

Some slopes, though, are more slippery than others. Here I intuit that the slope of rights is less slippery than the slope of groups. I say this because I have seen lists of rights that could be deemed fairly comprehensive. Martha Nussbaum, for instance, has created a list of 10 human “capabilities”—the kinds of activities in which individuals need to engage to have a chance at human flourishing. These rights seem relatively complete to me, as do the rights embodied in the Universal Declaration of Human Rights. I have never, however, seen a list of groups that felt even remotely exhaustive.

## CONCLUSION

This article has made a strong positive claim and a weak normative one. The strong positive claim is that pluralism anxiety has driven the United States Supreme Court to shift from a group-based equality jurisprudence toward a universal human rights jurisprudence. The weak normative claim is that this shift is not just largely inevitable, but also probably desirable. Having the judiciary lead with claims that sound in universal human rights rather than group-based civil rights contributes to that unified sense of “we, the people” even as it extends those rights to groups that have historically been denied them. This is the new equal protection.

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# Good Reads

*Publications by the full-time faculty from January 1, 2010 through December 31, 2010. Works by multiple NYU School of Law faculty authors are shaded.*

## BOOKS

**Chase, Oscar**  
*Common Law, Civil Law and the Future of Categories*. Markham, Ontario: LexisNexis, 2010 (with Janet Walker).

**Davis, Kevin**  
Editor. *Institutions and Economic Performance*. Cheltenham: Edward Elgar Publishing, 2010.

**Dorsen, Norman**  
*Comparative Constitutionalism: Cases and Materials*. 2nd edition. St. Paul: Thomson/West, 2010 (with Susanne Bear, Michel Rosenfeld, and Andras Sajó).

**Dreyfuss, Rochelle First, Harry Zimmerman, Diane**  
*Working within the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*. New York: Oxford University Press, 2010.

**Estlund, Cynthia**  
*Regoverning the Workplace: From Self-Regulation to Co-Regulation*. New Haven: Yale University Press, 2010.

**Estreicher, Samuel**  
Editor. *Global Labor and Employment Law for the Practicing Lawyer: Proceedings of the New York University 61st Annual Conference on Labor*. Austin, TX: Wolters Kluwer Law & Business, 2010 (with Andrew Morriss).

Editor. *Workplace Privacy: Proceedings of the New York University 58th Annual Conference on Labor*. Austin, TX: Wolters Kluwer Law & Business, 2010 (with Jonathan Remy Nash).

**Ferejohn, John**  
*A Republic of Statutes: The New American Constitution*. New Haven: Yale University Press, 2010 (with William Eskridge).

*War and State Building in Medieval Japan*. Palo Alto: Stanford University Press, 2010 (with Frances McCall Rosenbluth).

**Fox, Eleanor**  
*Fox and Crane's Global Issues in Antitrust and Competition Law*. St. Paul: West, 2010 (with Daniel Crane).

**Garland, David**  
Editor. *America's Death Penalty: Between Past and Present*. New York: New York University Press, 2010 (with Randall McGowen and Michael Meranze).

*Peculiar Institution: America's Death Penalty in an Age of Abolition*. Cambridge, MA: Belknap Press, 2010.

**Gillette, Clayton**  
*Local Government Law: Cases and Materials*. 4th edition. New York: Foundation Press, 2010 (with Lynn Baker).

**Hershkoff, Helen Miller, Arthur Sexton, John**  
*Civil Procedure: Cases and Materials—Compact 10th Edition for Shorter Courses*. St. Paul: West, 2010 (with Jack Friedenthal).

**Issacharoff, Samuel**  
*Principles of the Law of Aggregate Litigation*. St. Paul: American Law Institute, 2010.

**Kingsbury, Benedict**  
*Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*. Oxford: Oxford University Press, 2010 (with Benjamin Straumann).

**Kornhauser, Lewis**  
*L'Analyse économique du droit*. Paris: Michel Houdiard Editeur, 2010.

**Malman, Laurie**  
*The Individual Tax Base: Cases, Problems and Policies in Federal Taxation*. 2nd edition. St. Paul: Thomson Reuters/West, 2010.

**Miller, Geoffrey**  
*Economics of Ancient Law*. Cheltenham: Edward Elgar Publishing, 2010.

*The Origins of the Necessary and Proper Clause*. New York: Cambridge University Press, 2010 (with Gary Lawson, Robert Natelson, and Guy Seidman).

**Nagel, Thomas**  
*Secular Philosophy and the Religious Temperament: Essays 2002–2008*. New York: Oxford University Press, 2010.

**Richards, David**  
*Fundamentalism in American Religion and Law*. New York: Cambridge University Press, 2010.

**Shapiro, Daniel**  
*Getting It*. New York: iUniverse, 2010.

**Stewart, Richard Wyman, Katrina**  
*Breaking the Logjam: Environmental Protection that Will Work*. New Haven: Yale University Press, 2010 (with David Schoenbrod).



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### Dorsen, Norman

*Comparative Constitutionalism: Cases and Materials*. 2nd edition. St. Paul: Thomson/West, 2010 (with Susanne Bear, Michel Rosenfeld, and Andras Sajó).

### Dreyfuss, Rochelle

**First, Harry Zimmerman, Diane**  
*Working within the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*. New York: Oxford University Press, 2010.

### Estlund, Cynthia

*Regoverning the Workplace: From Self-Regulation to Co-Regulation*. New Haven: Yale University Press, 2010.

### Estreicher, Samuel

Editor. *Global Labor and Employment Law for the Practicing Lawyer: Proceedings of the New York University 61st Annual Conference on Labor*. Austin, TX: Wolters Kluwer Law & Business, 2010 (with Andrew Morriss).

Editor. *Workplace Privacy: Proceedings of the New York University 58th Annual Conference on Labor*. Austin, TX: Wolters Kluwer Law & Business, 2010 (with Jonathan Remy Nash).

### Ferejohn, John

*A Republic of Statutes: The New American Constitution*. New Haven: Yale University Press, 2010 (with William Eskridge).

*War and State Building in Medieval Japan*. Palo Alto: Stanford University Press, 2010 (with Frances McCall Rosenbluth).

### Fox, Eleanor

*Fox and Crane's Global Issues in Antitrust and Competition Law*. St. Paul: West, 2010 (with Daniel Crane).

### Garland, David

Editor. *America's Death Penalty: Between Past and Present*. New York: New York University Press, 2010 (with Randall McGowen and Michael Meranze).

*Peculiar Institution: America's Death Penalty in an Age of Abolition*. Cambridge, MA: Belknap Press, 2010.

### Gillette, Clayton

*Local Government Law: Cases and Materials*. 4th edition. New York: Foundation Press, 2010 (with Lynn Baker).

### Hershkoff, Helen

**Miller, Arthur Sexton, John**  
*Civil Procedure: Cases and Materials—Compact 10th Edition for Shorter Courses*. St. Paul: West, 2010 (with Jack Friedenthal).

### Issacharoff, Samuel

*Principles of the Law of Aggregate Litigation*. St. Paul: American Law Institute, 2010.

### Kingsbury, Benedict

*Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*. Oxford: Oxford University Press, 2010 (with Benjamin Straumann).

### Kornhauser, Lewis

*L'Analyse économique du droit*. Paris: Michel Houdiard Editeur, 2010.

### Malman, Laurie

*The Individual Tax Base: Cases, Problems and Policies in Federal Taxation*. 2nd edition. St. Paul: Thomson Reuters/West, 2010.

### Miller, Geoffrey

*Economics of Ancient Law*. Cheltenham: Edward Elgar Publishing, 2010.

*The Origins of the Necessary and Proper Clause*. New York: Cambridge University Press, 2010 (with Gary Lawson, Robert Natelson, and Guy Seidman).

### Nagel, Thomas

*Secular Philosophy and the Religious Temperament: Essays 2002–2008*. New York: Oxford University Press, 2010.

### Richards, David

*Fundamentalism in American Religion and Law*. New York: Cambridge University Press, 2010.

### Shapiro, Daniel

*Getting It*. New York: iUniverse, 2010.

### Stewart, Richard Wyman, Katrina

*Breaking the Logjam: Environmental Protection that Will Work*. New Haven: Yale University Press, 2010 (with David Schoenbrod).

**Waldron, Jeremy**  
*Torture, Terror, and Trade-Offs: Philosophy for the White House.* New York: Oxford University Press, 2010.

## CHAPTERS AND SUPPLEMENTS

**Alvarez, José**  
“The Evolving BIT,” in *Investment Treaty Arbitration and International Law.* Ian Laird and Todd Weiler, editors. Huntington, NY: Juris Net, 2010.

“The Once and Future Foreign Investment Regime,” in *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman.* Mahnoush Arsanjani, Jacob Katz Cogan, Robert Sloane, and Siegfried Wiessner, editors. Boston: Martinus Nijhoff Publishers, 2010.

“The Rise of Emerging Market Multinationals: Legal Challenges Ahead,” in *Foreign Direct Investments from Emerging Markets: The Challenges Ahead.* Karl Sauvant, Wolfgang Mascheck, and Geraldine McAllister, editors. New York: Palgrave Macmillan, 2010.

**Alston, Philip**  
“Killings by Law Enforcement Officials: The International Human Rights Legal Framework,” in *International Law, Conflict and Development: The Emergence of a Holistic Approach in International Affairs.* Walter Kälin and Joseph Voyame, editors. Boston: Martinus Nijhoff Publishers, 2010 (with William Abresch).

*Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Addendum: Study on Targeted Killings.* New York: United Nations, 2010.

**Davis, Kevin**  
“Does the Globalization of Anti-Corruption Law Help Developing Countries?” in *International Economic Law, Globalization and Developing Countries.* Julio Faundez and Celine Tan, editors. Cheltenham: Edward Elgar Publishing, 2010.

“Institutions and Economic Performance: An Introduction to the Literature,” in *Institutions and Economic Performance.* Kevin Davis, editor. Cheltenham: Edward Elgar Publishing, 2010.

**Dreyfuss, Rochelle**  
“Enhancing Global Innovation Policy: The Role of WIPO and Its Convention,” in *Interpreting the TRIPS Agreement.* Carlos Correa, editor. Cheltenham: Edward Elgar Publishing, 2010 (with Graeme Dinwoodie).

“Patents and Human Rights: Where is the Paradox?” in *Intellectual Property and Human Rights: A Paradox.* F. W. Groscheide, editor. Northampton, MA: Edward Elgar Publishing, 2010.

“TRIPS and Essential Medicines: Must One Size Fit All? Making the WTO Responsive to the Global Health Crisis,” in *Incentives for Global Public Health: Patent Law and Access to Essential Medicines.* Thomas Pogge, Matthew Rimmer, and Kim Rubenstein, editors. New York: Cambridge University Press, 2010.

**Epstein, Richard**  
“The Imperfect Art of Medical Malpractice Reform,” in *Reforming America's Health Care System: The Flawed Vision of ObamaCare.* Scott Atlas, editor. Palo Alto: Hoover Institution Press, 2010.

**Estreicher, Samuel**  
*Cases and Materials on Employment Discrimination and Employment Law, Fall 2010–2011 Case Supplement.* St. Paul: West, 2010 (with Michael Harper).

**Fox, Eleanor**  
“Antitrust and Institutions: Design and Change,” in *A Comparative Analysis of Antitrust Law Regimes: Designing Better Institutions for Deciding Antitrust Issues.* Chicago: Loyola University Chicago School of Law, 2010.

*Cases and Materials on U.S. Antitrust in Global Context, 2010 Supplement.* St. Paul: West Publishing, 2010.

“The EC Microsoft Case and Duty to Deal: The Transatlantic Divide,” in *Microsoft on Trial: Legal and Economic Analysis of a Transatlantic Case.* Luca Rubini, editor. Northampton, MA: Edward Elgar, 2010.

**Gillers, Stephen**  
“Choosing and Working: Estate and Foundation Counsel to Secure an Artistic and Philanthropic Legacy,” in *The Artist as Philanthropist, Volume II.* Washington: Aspen Institute, 2010.

*Regulation of Lawyers: Statutes and Standards.* Austin, TX: Aspen Law & Business, 2010 (with Andrew Perlman and Roy Simon).

## Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct

EDITED BY ANTHONY S. BARKOW AND RACHEL E. BARKOW

New York University Press, 2011



Thus we have entered a new era in which prosecutors and firms have embraced ... regulation by prosecutors. Prosecutors have increasingly reached agreements with companies that allow the companies to avoid indictments so long as they meet the prosecutors' regulatory terms. The agreements go by different names. In the federal system, they consist of non-prosecution agreements and deferred prosecution agreements. In some states, they are known as settlement agreements. When the agreements require companies simply to obey the law or pay for prior bad acts, they are not particularly noteworthy because they are incidental to the traditional exercise of executive power.

But in many of these agreements, prosecutors impose affirmative obligations on companies to change personnel, revamp their business practices, and adopt new models of corporate governance. These dictates are often sweeping and some prosecutors have imposed them on industries, not just isolated companies. They resemble, in significant respects, the structural injunctions courts have imposed in areas like prison and school reform and the regulations promulgated by administrative agencies. ...

The practice of regulation by prosecutors thus raises a number of fundamental questions. Perhaps most fundamentally, there is the question of how the government should seek to deter corporate misconduct and the role of the criminal law in that endeavor. Relatedly, there is the question of prosecutorial competence and legitimacy to set regulatory terms. What is the comparative institutional competence of prosecutors to regulate as compared with traditional regulatory agencies like the SEC? Are there differences in the relative competence of state versus federal prosecutors in pursuing this kind of regulation? What factors—accountability, expertise, independence, ethical concerns, efficiency or lack thereof—make prosecutorial participation in the regulation desirable or undesirable? How could these factors be adjusted to improve the quality of that participation? What safeguards can promote good practices in prosecutorial involvement in corporate governance, and what measures can improve coordination and minimize collisions between prosecutors and regulatory agencies? How much power should corporate monitors have, and by what process should they be appointed? These questions motivate the authors who have contributed to this volume.

This book is a compilation of papers presented at the Center on the Administration of Criminal Law's inaugural conference, “Regulation by Prosecutors.”





**Gillette, Clayton**  
*Municipal Debt Finance Law: Theory and Practice*. 2010 Supplement. Boston: Little, Brown, 2010 (with Robert Amdursky).

**Hershkoff, Helen Miller, Arthur**

**Sexton, John**  
*Civil Procedure Supplement for Use with All Pleading and Procedure Casebooks*. 2010–2011 Supplement. St. Paul: West, 2010 (with Jack Friedenthal).

*Teacher's Manual to Accompany Civil Procedure: Cases and Materials—Compact 10th Edition for Shorter Courses*. St. Paul: West, 2010 (with Jack Friedenthal).

**Hertz, Randy**  
“The Legal Aid Society,” in *Thirteenth Annual Children's Law Institute*. New York: Practising Law Institute, 2010.

**Hills, Roderick Jr.**  
“Federalism and Public Choice,” in *Research Handbook on Public Choice and Public Law*. Daniel Farber and Anne Joseph O'Connell, editors. Northampton, MA: Edward Elgar, 2010.

**Howse, Robert**  
“Do the World Trade Organization Disciplines on Domestic Subsidies Make Sense? The Case for Legalizing Some Subsidies,” in *Law and Economics of Contingent Protection in International Trade*. Kyle Bagwell, George Bermann, and Petros Mavroidis, editors. New York: Cambridge University Press, 2010.

“The End of the Globalization Debate: Continued,” in *International Economic Law and National Autonomy*. Meredith Lewis and Susy Frankel, editors. New York: Cambridge University Press, 2010.

“Global Justice, Poverty, and the International Economic Order,” in *The Philosophy of International Law*. Samantha Besson and John Tasoulias, editors. New York: Oxford University Press, 2010 (with Ruti Teitel).

“Man of Peace: Rehearing the Case against Leo Strauss,” in *The Legacy of Leo Strauss*. Tony Burns and James Connelly, editors. Exeter: Imprint Academic Press, 2010.

**Issacharoff, Samuel**  
“Aggregating Private Claims,” and “Facts, Investigation, and the Role of Discovery,” in *Litigation in England and Germany: Legal Professional Services, Key Features and Funding*. Peter Gottwald, editor. Bielefeld: Gieseking-Verlag, 2010.

“Democracy and Electoral Processes,” in *Research Handbook on Public Choice and Public Law*. Daniel Farber and Anne Joseph O'Connell, editors. Northampton, MA: Edward Elgar, 2010 (with Laura Miller).

“Party Funding and Campaign Finance Law in the United States,” in *Supervising Electoral Processes*. Strasbourg: European Commission for Democracy through Law, Council of Europe Publishing, 2010.

**Kingsbury, Benedict**  
“State of Nature versus Commercial Sociability as the Basis of International Law: Reflections on the Roman Foundations and Current Interpretations of the International Political and Legal Thought of Grotius, Hobbes and Pufendorf,” in *The Philosophy of International Law*. Samantha Besson and John Tasoulias, editors. New York: Oxford University Press, 2010 (with Benjamin Straumann).

**Kumm, Mattias**  
“Best of Times and the Worst of Times: Between Constitutional Triumphalism and Nostalgia,” in *The Twilight of Constitutionalism? Petra Dobner and Martin Loughlin, editors*. New York: Oxford University Press, 2010.

“Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm,” in *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*. Loïc Azoulai and Miguel Poiares Maduro, editors. Portland, OR: Hart Publishing, 2010.

**Miller, Geoffrey**  
“The Corporate Law Background of the Necessary and Proper Clause,” in *The Origins of the Necessary and Proper Clause*. Gary Lawson, editor. New York: Cambridge University Press, 2010.

**Miller, Geoffrey Rosenfeld, Gerald**  
“Intellectual Hazard and the Design of Financial Stability Regulation,” in *Law and Economics of Global Financial Institutions*. Peter Nobel, Katrin Krehan and Anne-Cathrine Tanner, editors. Zurich: Schulthess, 2010.

**Murphy, Liam**  
“International Responsibility,” in *The Philosophy of International Law*. Samantha Besson and John Tasoulias, editors. New York: Oxford University Press, 2010.

**Nagel, Thomas**  
“Mortal Questions,” in *Ethics: The Essential Writings*. Gordon Daniel Marino, editor. New York: Modern Library, 2010.

“Ruthlessness in Public Life,” in *Ethics Across the Professions: A Reader for Professional Ethics*. Clancy Matin, Robert Solomon, and Wayne Vaught, editors. New York: Oxford University Press, 2010.

**Narula, Smita**  
“Law and Hindu Nationalist Movements,” in *Hinduism and Law: An Introduction*. Timothy Lubin, Donald Davis, and Javanth Krishnan, editors. New York: Cambridge University Press, 2010.

**Revesz, Richard**  
*Environmental Law and Policy: Statutory and Regulatory Supplement*. New York: Foundation Press, 2010.

**Waldron, Jeremy**  
“The Image of God: Rights, Reason, and Order,” in *Christianity and Human Rights: An Introduction*. John Witte and Frank Alexander, editors. New York: Cambridge University Press, 2010.

“Legal Pluralism and the Contrast between Hart's Jurisprudence and Fuller's,” in *The Hart-Fuller Debate in the Twenty-First Century*. Peter Cane, editor. Portland, OR: Hart Publishing, 2010.

“Questions about the Reasonable Accommodation of Minorities,” in *Shari'a in the West*. Rex Ahar and Nicholas Aroney, editors. New York: Oxford University Press, 2010.

“Treating Like Cases Alike in the World: The Theoretical Basis of the Demand for Legal Unity,” in *Highest Courts and Globalisation*. Sam Muller and Sidney Richards, editors. The Hague: Hague Academic Press, 2010.

“Two Conceptions of Self-Determination,” in *The Philosophy of International Law*. Samantha Besson and John Tasoulias, editors. New York: Oxford University Press, 2010.

**Yoshino, Kenji**  
“Of Stranger Spaces,” in *Law and the Stranger*. Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, editors. Stanford, CA: Stanford University Press, 2010.

## ARTICLES

**Adler, Barry**  
“A Reassessment of Bankruptcy Reorganization after Chrysler and General Motors,” 18 *American Bankruptcy Institute Law Review* 305 (2010).

**Arlen, Jennifer**  
“Contracting Over Liability: Medical Malpractice and the Cost of Choice,” 158 *University of Pennsylvania Law Review* 957 (2010).

**Bar-Gill, Oren**  
“Consent and Exchange,” 39 *Journal of Legal Studies* 375 (2010) (with Lucian Bebchuk).

“The Prisoners' (Plea Bargain) Dilemma—Most Defendants Could Avoid Both Plea Bargaining and Trial If They Could Coordinate,” 33(1) *Regulation* 42 (2010) (with Omri Ben-Shahar).

**Bar-Gill, Oren Davis, Kevin**  
“Empty Promises,” 84 *Southern California Law Review* 1 (2010).

**Bar-Gill, Oren Ferrari, Franco**  
“Informing Consumers about Themselves,” 3 *Erasmus Law Review* 93 (2010).



# Recommended reading

Back issues of *The Law School* are now online at [blogs.law.nyu.edu/magazine](http://blogs.law.nyu.edu/magazine).



## Barkow, Rachel

"Categorizing Graham," 23 *Federal Sentencing Reporter* 49 (2010).

"Insulating Agencies: Using Institutional Design to Limit Agency Capture," 89 *Texas Law Review* 15 (2010).

"Organizational Guidelines for the Prosecutor's Office," 31 *Cardozo Law Review* 2089 (2010).

## Beebe, Barton

"Intellectual Property Law and the Sumptuary Code," 123 *Harvard Law Review* 809 (2010).

## Been, Vicki

"Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?" 77 *University of Chicago Law Review* 5 (2010).

## Blank, Joshua

"When Is Tax Enforcement Publicized?" 30 *Virginia Tax Review* 1 (2010) (with Daniel Levin).

## Choi, Stephen

"Attorneys as Arbitrators," 39 *Journal of Legal Studies* 109 (2010) (with Jill Fisch and A. C. Pritchard).

"Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary," 26 *Journal of Law, Economics, & Organization* 290 (2010) (with Mitu Gulati and Eric Posner).

"Punitive Damages in Securities Arbitration: An Empirical Study," 39 *Journal of Legal Studies* 497 (2010) (with Theodore Eisenberg).

## Choi, Stephen

### Kahan, Marcel

"The Power of Proxy Advisors: Myth or Reality?" 59 *Emory Law Journal* 869 (2010) (with Jill Fisch).

## Cohen, Jerome

"Report of the Mission to China of the Association of the Bar of the City of New York, December 6 to 17, 2009," 48 *Columbia Journal of Transnational Law* 519 (2010) (with Mark Shulman, Robert Hornick, John Walker, Sarah Fitts, Margaret K. Lewis, R. Scott Greathead, Sidney H. Stein, and Elisabeth Wicker).

## Davis, Kevin

"Legal Universalism: Persistent Objections," 60 *University of Toronto Law Journal* 537 (2010).

"Peer-to-Peer Financing for Development: Regulating the Intermediaries," 42 *New York University Journal of International Law and Politics* 1079 (2010) (with Anna Gelper).

"Penalty Clauses through the Lens of Unconscionability Doctrine: *Birch v. Union of Taxation Employees, Local 70030*," 55 *McGill Law Journal* 151 (2010).

"The Privatization of Development Assistance: Symposium Overview," 42 *New York University Journal of International Law and Politics* 1209 (with Sarah Dadush).

## Davis, Peggy

"Desegregating Legal Education," 26 *Georgia State University Law Review* 1271 (2010).

## Dreyfuss, Rochelle

"Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm," 31 *Cardozo Law Review* 1437 (2010).

"The Federal Circuit as an Institution: What Ought We to Expect," 43 *Loyola Law Review* 827 (2010).

"What the Federal Circuit Can Learn from the Supreme Court—and Vice Versa," 59 *American University Law Review* 787 (2010).

## Dworkin, Ronald

"Justice for the Hedgehogs: Keynote Address," 90 *Boston University Law Review* 469 (2010).

"Justice for the Hedgehogs: Response," 90 *Boston University Law Review* 1059 (2010).

## Epstein, Richard

"Carbon Dioxide: Our Newest Pollutant," 42 *Suffolk Law Review* 797 (2010).

"The Classical Liberal Alternative to Progressive and Conservative Constitutionalism: Review of *The Constitution in 2020*" (Jack Balkin and Reva Siegel, editors), 77 *University of Chicago Law Review* 887 (2010).

"The Contextualization of Tort Law," 88 *Texas Law Review* 105 (2010).

"The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary," 62 *Stanford Law Review* 455 (2010).

"Executive Power in Political and Corporate Contexts," 12 *University of Pennsylvania Journal of Constitutional Law* 277 (2010).

"How to Undermine Tax Increment Financing: The Lessons of *City of Chicago v. ProLogis*," 77 *University of Chicago Law Review* 121 (2010).

"*NRA v. City of Chicago*: Does the Second Amendment Bind Frank Easterbrook?" 77 *University of Chicago Law Review* 997 (2010).

"Obama's Constitution: The Passive Virtues Writ Large," 26 *Constitutional Commentary* 183 (2009–2010).

"A Speech on the Structural Constitution and the Stimulus Program," 4 *Charleston Law Review* 395 (2010).

"Takings Law Made Hard," *Regulation* (Winter 2009–2010).



"Toward a General Theory of Tort Law: Strict Liability in Context," 4 *Journal of Tort Law* 6 (2010).

"What Tort Theory Tells Us about Federal Preemption: The Tragic Saga of *Wyeth v. Levine*," 65 *Annual Survey of American Law* 485 (2010).

"Why I Will Never Be a Keynesian," 33 *Harvard Journal of Law & Public Policy* 387 (2010).

#### **Estreicher, Samuel**

"Opting for a Legislative Alternative to the Fourth Amendment Exclusionary Rule," 78 *UMKC Law Review* 949 (2010) (with Daniel Weick).

"A Post-Formation Right of Withdrawal from Customary International Law?: Some Cautionary Notes," 21 *Duke Journal of Comparative and International Law* 57 (2010).

"Trade Unionism under Globalization: The Demise of Voluntarism?" 54 *Saint Louis University Law Journal* 415 (2010).

#### **Ferejohn, John**

Book Review: "The Lure of Large Numbers. A Constitution of Many Minds" by Cass Sunstein and *Law and the Limits of Reason* by Adrian Vermeule," 123 *Harvard Law Review* 1969 (2010).

#### **Ferrari, Franco**

##### **Gillette, Clayton**

"Warranties and 'Lemons' under CISG Article 35(2) (a)," 10 *Internationales Handelsrecht* 2 (2010).

#### **First, Harry**

"Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions," 89 *North Carolina Law Review* 23 (2010).

#### **Fox, Eleanor**

"Antitrust and Institutions: Design and Change," 41 *Loyola University Chicago Law Journal* 473 (2010).

"Antitrust Welfare'—The Brodley Synthesis," 90 *Boston University Law Review* 1375 (2010).

#### **Friedman, Barry**

"The Wages of Stealth Overruling (with Particular Attention to *Miranda v. Arizona*)," 99 *Georgetown Law Journal* 1 (2010).

"The Will of the People and the Process of Constitutional Change," 78 *George Washington Law Review* 1232 (2010).

#### **Galowitz, Paula**

"How Bioethics Can Enrich Medical-Legal Collaborations," 38 *Journal of Law, Medicine & Ethics* 847 (2010) (with Dr. Stewart Fleishman, Amy Campbell, Jay Sicklick, and Randy Retkin).

#### **Garland, David**

"Le Processus de civilization et la peine capitale aux États-Unis," 106 *Vingtième siècle* 193 (2010).

#### **Gillette, Clayton**

"Who Should Authorize a Commuter Tax?" 77 *University of Chicago Law Review* 223 (2010).

#### **Golove, David**

##### **Hulsebosch, Daniel**

"A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition," 85 *New York University Law Review* 932 (2010).

#### **Hershkoff, Helen**

"Just Words': Common Law and the Enforcement of State Constitutional Positive Rights," 62 *Stanford Law Review* 1521 (2010).

#### **Hills, Roderick Jr.**

"A Hidden Gift to Manufacturing—Cities Should Stop Zoning Land Exclusively for Industrial Use," 33 *Regulation* 30 (2010) (with David Schleicher).

"The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing," 77 *University of Chicago Law Review* 249 (2010) (with David Schleicher).

#### **Holmes, Stephen**

"Does Hobbes Have a Concept of the Enemy?" 13 *Critical Review of International Social and Political Philosophy* 371 (2010).

#### **Howse, Robert**

"Beyond Compliance: Rethinking Why International Law Really Matters," 1 *Global Policy* 127 (2010) (with Ruti Teitel).

"Beyond the Countertrade Taboo: Why the WTO Should Take Another Look at Barter and Countertrade," 60 *University of Toronto Law Journal* 289 (2010).

"Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by Its Ruling on Kosovo?" 11 *German Law Journal* 841 (2010) (with Ruti Teitel).

"US-Stainless Steel (Mexico)," 9 *World Trade Review* 117 (2010) (with Meredith Crowley).

#### **Issacharoff, Samuel**

"Judging in the Time of the Extraordinary," 47 *Houston Law Review* 533 (2010).

"On Political Corruption," 124 *Harvard Law Review* 118 (2010).

"Pragmatic Originalism?" 4 *New York University Journal of Law & Liberty* 517 (2010).

#### **Jacobs, James**

"The Jurisprudence of Police Intelligence Files and Arrest," 22 *National Law School of India Review* 135 (2010).

"Remedying Defamation by Law Enforcement: Fallout from the Wen Ho Lee, Steven Hatfill and Brandon Mayfield Settlements," 46 *Criminal Law Bulletin* 223 (2010) (with Daniel Curtin).

#### **Kahan, Marcel**

"Embattled CEOs," 88 *Texas Law Review* 987 (2010) (with Edward Rock).

"When the Government Is the Controlling Shareholder: Implications for Delaware," 35 *Delaware Journal of Corporate Law* 409 (2010).

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"The State of Nature and Commercial Sociability in Early International Legal Thought," 31 *Grotiana* 22 (2010) (with Benjamin Straumann).

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#### **Kumm, Mattias**

"The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review," 4 *Law & Ethics of Human Rights* 140 (2010).

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"Parchment and Politics: The Positive Puzzle of Constitutional Commitment," 124 *Harvard Law Review* 657 (2010).

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"The International Monetary System: A Look Back Over Seven Decades," 13 *Journal of International Economic Law* 575 (2010).

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"Judicial Independence, Autonomy, and the Bankruptcy Courts," 62 *Stanford Law Review* 747 (2010).

#### **Miller, Arthur**

"From *Conley* to *Twombly* to *Iqbal*: A Double Play on the Federal Rules of Civil Procedure," 60 *Duke Law Journal* 1 (2010).

#### **Miller, Geoffrey**

"Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008," 7 *Journal of Empirical Legal Studies* 248 (2010) (with Theodore Eisenberg).

"Bargains Bicoastal: New Light on Contract Theory," 31 *Cardozo Law Review* 1475 (2010).

"The Common Law Origins of the Necessary and Proper Clause," 79 *George Washington University Law Review* 1 (2010).

"The Corporate Law Background of the Necessary and Proper Clause," 79 *George Washington Law Review* 1 (2010).

"A Modest Proposal for Fixing Delaware's Broken Duty of Care," 2010 *Columbia Business Law Review* 319 (2010).

"Narrative and Truth in Judicial Opinions: Corporate Charitable Giving Cases," 2009 *Michigan State Law Review* 831 (2010).

"Preliminary Judgments," 2010 *University of Illinois Law Review* 165 (2010).

"Process as Currency with the Courts: Judicial Scrutiny of Directors' Decisions," 1 *International Journal of Corporate Governance* 337 (2010) (with Jonathan Macey).

"The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal," 63 *Vanderbilt Law Review* 107 (2010) (with Charles Silver).

"A Simple Theory of Takeover Regulation in the United States and Europe," 55 *Rivista Delle Società* 680 (2010).

**Miller, Geoffrey  
Rosenfeld, Gerald**

"Intellectual Hazard: How Conceptual Biases in Complex Organizations Contributed to the Crisis of 2008," 33 *Harvard Journal of Law and Public Policy* 807 (2010).

**Murphy, Erin**

"Common Errors and Fallacies in Forensic DNA Statistics: An Amicus Brief in *McDaniel v. Brown*," 46 *Criminal Law Bulletin* 709 (2010) (with William Thompson).

"Databases, Doctrine & Constitutional Criminal Procedure," 37 *Fordham Urban Law Journal* 803 (2010).

"Relative Doubt: Familial Searches of DNA Databases," 109 *Michigan Law Review* 291 (2010).

"What 'Strengthening Forensic Science' Today Means for Tomorrow: DNA Exceptionalism and the 2009 NAS Report," 9 *Law, Probability & Risk* 7 (2010).

**Nelson, William**

"The Lawfinding Power of Colonial American Juries," 71 *Ohio State Law Journal* 1003 (2010).

"Politicizing the Courts and Undermining the Law: A Legal History of Colonial North Carolina, 1660-1775," 88 *North Carolina Law Review* 2133 (2010).

**Neuborne, Burt**

"The October 2008 Term: First Amendment and Then Some," 26 *Touro Law Review* 465 (2010).

**Pildes, Richard**

"Free Enterprise Fund, Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration," 6 *Duke Journal of Constitutional Law & Public Policy* 1 (2010).

**Rascoff, Samuel**

"Domesticating Intelligence," 83 *Southern California Law Review* 575 (2010).

"The Law of Homegrown (Counter)Terrorism," 88 *Texas Law Review* 1715 (2010).

**Revesz, Richard**

"Cost-Benefit Analysis in U.S. Environmental Law," 117 *Estudios Públicos* 87 (2010).

**Rodríguez, Cristina**

"Constraint through Delegation: The Case of Executive Control over Immigration Policy," 59 *Duke Law Journal* 1787 (2010).

"Immigration and the Civil Rights Agenda," 6 *Stanford Journal of Civil Rights & Civil Liberties* 125 (2010).

"Noncitizen Voting and the Extraconstitutional Construction of the Polity," 8 *International Journal of Constitutional Law* 30 (2010).

**Schulhofer, Stephen**

"Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans," 44 *Law & Society Review* 365 (2010) (with Tom Tyler and Aziz Huq).

**Sharkey, Catherine**

"Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?" 5 *New York University Journal of Law & Liberty* 564 (2010).

"The Exxon Valdez Litigation Marathon: A Window on Punitive Damages," 7 *University of St. Thomas Law Journal* 25 (2010).

"Federal Incursions and State Defiance: Punitive Damages in the Wake of *Philip Morris v. Williams*," 46 *Willamette Law Review* 449 (2010).

"Trespass Torts and Self-Help for an Electronic Age," 44 *Tulsa Law Review* 677 (2009) (published 2010).

**Shaviro, Daniel**

"Rethinking Foreign Tax Creditability," 63 *National Tax Journal* 709 (2010).

"Taxation and the Financial Sector," 63 *National Tax Journal* 781 (2010) (with Douglas Shackelford and Joel Slemrod).

**Stewart, Richard**

"Solving the U.S. Nuclear Waste Dilemma," 40 *Environmental News & Analysis* 10783 (2010).

**Strandburg, Katherine**

"Constructing Commons in the Cultural Environment," 95 *Cornell Law Review* 657 (2010) (with Michael Madison and Brett Frischmann).

**Waldron, Jeremy**

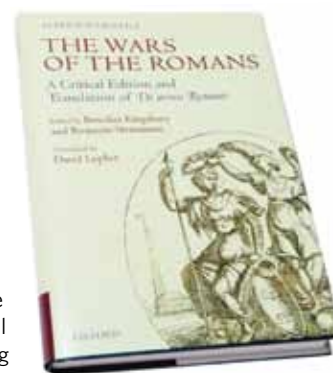
"Dignity and Defamation: The Visibility of Hate," 2009 Oliver Wendell Holmes Lectures," 123 *Harvard Law Review* 1596 (2010).

"A Majority in the Lifeboat," 90 *Boston University Law Review* 1043 (2010).

## The Wars of the Romans: A Critical Edition and Translation of *De armis Romanis*

EDITED BY BENEDICT KINGSBURY AND  
BENJAMIN STRAUMANN

Oxford University Press, 2011



“How can questions concerning imperial expansion be addressed from the perspective of justice? To what extent does law provide a satisfactory way of making assessments of the justice or rectitude of imperial wars, imperial conquests, and governance within a far-flung empire? How does the law concerning relations within and between empires overlap or differ from the law concerning interstate relations? To what extent are specific practices and legal principles of the Roman empire instantiations of arguments about universal moral principles of justice in imperial and interstate relations applicable also to other contexts?”

In *The Wars of the Romans*, first published in its complete form by Wilhelm Anton in Hanau-am-Main in 1599, the Italian jurist Alberico Gentili explicitly deals with the military expansion of the Roman empire from the perspectives of law and justice....

*The Wars of the Romans* can thus be seen as an attempt to justify a legal order, introduced by Roman imperialism into a situation in which only an under-specified body of natural law applied. Rather than lending support to the empires of Gentili's own day, *The Wars of the Romans* focuses on the Roman empire of classical antiquity, its justification, and its legal legacy. The rules and norms developed by the Romans were apt, in Gentili's analysis, to guide and justify some imperial conduct, but also to constrain early modern empires and emerging sovereign states. Indeed, Gentili is critical of the Spanish and Ottoman empires of the late sixteenth century, and far from enthusiastic about the Holy Roman Empire. While he does not deny a certain continuity between the latter and the ancient Roman empire, his argument in *The Wars of the Romans* clearly does not rest on an analogy between the two. Rather, the Holy Roman Empire of his own day appears in his thought as but one polity among many, all of which are susceptible to being judged according to the principles of law established in the ancient and enduring Roman legal order.

*This excerpt comes from the introduction to this edition of Alberico Gentili's 16th-century work, which was translated into English by David Lupher.*

”



"Torture, Suicide and Determination," 55 *American Journal of Jurisprudence* 1 (2010).

**Weiler, Joseph**

"Il crocefisso a Strasburgo: una decisione 'imbarazzante,'" 30 *Quaderni Costituzionali* 148 (2010).

"The Trial of Jesus," 204 *First Things* 39 (2010).

**Woo, Sarah**

"Simultaneous Distress of Residential Developers and Their Secured Lenders: An Analysis of Bankruptcy & Bank Regulation," 15 *Fordham Journal of Corporate and Financial Law* 617 (2010).

**Wyman, Katrina**

"Rethinking the ESA to Reflect Human Dominion over Nature," 40 *Environmental News & Analysis* 10803 (2010).

**Yoshino, Kenji**

"The Choice of the Four Fathers: Henry IV, Falstaff, the Lord Chief Justice, and the King of France in the *Henriad*," 22 *Yale Journal of Law and the Humanities* 417 (2010).

"The Gay Tipping Point," 57 *UCLA Law Review* 1537 (2010).

"On Empathy in Judgment," 57 *Cleveland State Law Review* 683 (2010).

**Zimmerman, Diane**

"The Statute of Anne and Its Progeny: Variations without a Theme," 47 *Houston Law Review* 965 (2010).

**MISCELLANEOUS**

**Dworkin, Ronald**

"The Decision That Threatens Democracy," 57 (8) *New York Review of Books* (May 13, 2010).

"The 'Devastating' Decision," 57 (7) *New York Review of Books* (Feb. 25, 2010).

"The Temptation of Elena Kagan," 57 (13) *New York Review of Books* (Aug. 19, 2010).

**Epstein, Richard**

"The Spurious Constitutional Distinction Between Takings and Regulation," 11 *Engage* (2010).

**Estreicher, Samuel**

"Employee Representation in a World of Global Competition," 27 *GPSolo* 40 (2010).

"Is the 'Manifest Disregard' Standard Still Alive?" *New York Law Journal* (March 17, 2010) (with Steven Bennett).

"Preclusive Effects of Arbitration," *New York Law Journal* (Sept. 15, 2010) (with Steven Bennett).

"Preemption of California's Standard of Review of Class Arbitration Waivers," *New York Law Journal* (June 25, 2010) (with Steven Bennett).

"Second Circuit Rejects Corporate Liability under Alien Tort Statute," *New York Law Journal* (Nov. 5, 2010) (with Meir Feder).

"Supreme Court Hears Argument on Class Arbitration Waivers," *New York Law Journal* (Dec. 22, 2010) (with Steven Bennett).

"Supreme Court: No Class Arbitration Where Agreement Is Silent," *New York Law Journal* (May 18, 2010) (with Elena Voss).

"Third Circuit Limits Ability to Modify Retiree Benefits During Bankruptcy," *New York Law Journal* (Sept. 7, 2010) (with Corinne Ball).

**Issacharoff, Samuel**

"Il caso *Citizens United v. Federal Election Commission*: il finanziamento dei partiti nel diritto Americano," 39 *Quaderni Costituzionali* 392 (2010).

**Nagel, Thomas**

Book Review. "*The Moral Landscape: How Science Can Determine Human Values*, by Sam Harris," *The New Republic* (Nov. 11, 2010).

Book Review. "My Future Me. *Surviving Death* by Mark Johnston," *Times Literary Supplement* (June 4, 2010).

Book Review. "What Peter Singer Wants of You. *The Life You Can Save: Acting Now to End World Poverty*, by Peter Singer and Peter Singer Under Fire: *The Moral Iconoclast Faces His Critics*, by Jeffrey A. Schaler, editor," 57 (5) *New York Review of Books* (March 25, 2010).

Book Review. "Who Is Happy and When? *Exploring Happiness: From Aristotle to Brain Science*, by Sissela Bok; *The Politics of Happiness: What Government Can Learn from the New Research on Well-Being*, by Derek Bok," 57 (20) *New York Review of Books* (Dec. 23, 2010).

**Weiler, Joseph**

Book Review. "*Jesus on Death Row*, by Mark Oshler," 52 *Journal of Church and State* 573 (2010).

"Editorial," 21 *European Journal of International Law* 501 (2010).

## A Thousand Times More Fair: What Shakespeare's Plays Teach Us About Justice

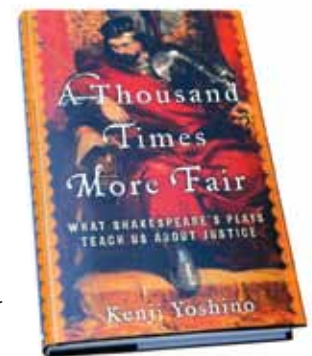
BY KENJI YOSHINO  
*HarperCollins Publishers, 2011*

“ We live in a time when human factfinding has triumphed decisively over supernatural factfinding: we trust judges or juries to find the facts rather than requiring parties to carry hot coals or to battle their accusers. I therefore ask whether a tragedy like *Othello's* could happen in our time. Of course it can and does.

To show this, I compare *Othello* and the 1995 trial of O. J. Simpson. The analogy has little to do with race. It relies instead on the ability of ocular proof—hard physical evidence—to overwhelm all other forms of evidence. In the Simpson trial, the distracting object was not Desdemona's white handkerchief “spotted with strawberries,” but a black glove spotted with blood. By exonerating Simpson, the jury showed that even collective human factfinding is vulnerable to what I will call ocular proof bias.

This vulnerability raises the question of whether the jury is really as much of an antidote to such ocular proof bias as it seems to be. Recently, much has been made of the putative “*CSI* [*Crime Scene Investigation*] effect,” in which forensic science television shows like *CSI* ostensibly cause juries to fixate obsessively on physical evidence. Although both the cause and extent of the *CSI* effect have been questioned, juries do seem at least as susceptible as ever to ocular proof bias.

My point is not that we should abandon the jury system, but that we should understand better why we continue to use it. As legal historian George Fisher points out, we use the jury not because it is an infallible factfinder, but because it gives us closure in a world in which infallible factfinders do not exist. The jury permits us to evade the inherent difficulties of factfinding, because, like God, the jury need not respond to questions or justify its results. But if so, we have not traveled as far from the supernatural proofs as we may think. *Othello* helps us grapple with the question of whether human factfinding is a triumphal step away from supernatural factfinding, or simply a different way of letting an inscrutable but definitive authority help us negotiate a world that is, and will remain, largely opaque to human apprehension.







## Student Spotlight

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A degree with a side of fries. Eight thousand violet-robed graduates converged on Yankee Stadium to attend New York University's 179th Commencement Exercises on May 18. President Bill Clinton gave a sweeping address analyzing global and national issues, and the University bestowed its Gallatin Medal on Kenneth Feinberg '70.





Stein '11



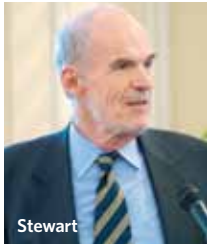
Heinzerling



Gray



Pildes



Stewart



Katzen

# Recognition for the Ruler of Rules

*Annual Survey* dedicates a volume to public intellectual and prolific scholar Cass Sunstein.

**T**HE AUTHOR OR CO-AUTHOR OF hundreds of articles and more than two dozen books, Cass Sunstein is the most widely cited legal scholar in the United States. His breadth of study includes but is not limited to administrative law and policy, constitutional law and theory, behavioral economics and law, and environmental law. After a long career as a University of Chicago Law School professor, he joined the Harvard Law School faculty in 2008. Two years later, Sunstein took a leave of absence to become the administrator of the Office of Information and Regulatory Affairs (OIRA), part of the Office of Management and Budget. Thrust into the media spotlight, he was soon a favorite target of conservative talk-show hosts.

In April, the *Annual Survey of American Law* held a ceremony to mark the dedication of its 68th volume to Sunstein. He joins earlier honorees such as NYU Law professors Arthur Miller (2010), Ronald Dworkin (2006), and NYU President John Sexton (2003), and Supreme Court justices Stephen Breyer (2007), Antonin Scalia (2005), and Thurgood Marshall (1983), for whom Sunstein clerked in 1979–80. Sunstein’s “contributions to the development and understanding of American law are second to none,” said *Annual Survey* Editor-in-Chief Darryl Stein '11 at

the ceremony. Indeed, when President Barack Obama tapped Sunstein to run OIRA, NYU Law Dean Richard Revesz and Michael Livermore '06, executive director of the Institute for Policy Integrity at NYU Law, co-wrote a *Forbes.com* commentary lauding the choice. OIRA, which reviews federal regulatory rules to decide whether the benefits are greater than the costs to implement them, “is a hugely significant office that many people in the country don’t know much about,” Revesz observed at the dedication. “I don’t think anyone has been as prepared for this job as Cass.”

The dedication ceremony featured tributes to Sunstein from people whose lives have intersected his in a variety of ways, including one of his former law professors and a former law student. Richard Stewart, University Professor and John Edward Sexton Professor of Law, who taught Sunstein at Harvard Law School, noted that Sunstein is not only “a prominent public intellectual who can do theory with the best of the theorists” but also someone who is “deeply serious about law and institutions...for their role in contributing to human flourishing.” And Lisa Heinzerling, who was a senior official at the Environmental Protection Agency before returning to teach at Georgetown University Law Center in

January, took administrative law with Sunstein at the University of Chicago Law School. “He was my favorite teacher, not just in law school, but anywhere,” Heinzerling said. “He is the reason I do what I do.”

Others offering tributes included Sally Katzen, a visiting professor at NYU Law and OIRA administrator from 1993 to 1998; C. Boyden Gray, an adjunct professor and former White House counsel, who met Sunstein when he worked in the Department of Justice’s Office of Legal Counsel; and Sudler Family Professor of Constitutional Law Richard Pildes, who co-authored an article with Sunstein about cost-benefit analysis and the regulatory state.

In his own remarks, Sunstein outlined some changes he has overseen at OIRA. Then he pulled back to address a broader theme: the value of work done by people who primarily study and advance ideas about the law versus that done by those who practice it. Both, of course, matter, he said, but as a deeply curious scholar addressing an audience of faculty and students, he wanted to emphasize the value of the former. “What you do...really matters,” Sunstein said. “People will pick it up, people will listen to it, and it will feed into a kind of river that is an intellectual tradition that matters and affects lives.” □

# A Tribute to the Lion of the Senate

**H**ONORING THE LATE SENATOR Edward Kennedy and his lasting influence, the *Journal of Legislation and Public Policy* held a symposium and dedicated a special issue to his legislative legacy. The February event included warm remembrances by Justice Stephen Breyer, Caroline Kennedy, and Kenneth Feinberg '70, as well as others who knew him for decades.

The hallmark of Ted Kennedy's 47-year Senate career was his inclusiveness and ability to reach across the aisle to find common ground. His niece Caroline painted a portrait of how his family and childhood influenced this characteristic. As the youngest of nine children, Kennedy knew what it was like to be crowded out. This sensitivity "helped him develop his special gifts of always looking out for others, of making people laugh, and bringing them together no matter how differently they saw the world," she said. "He saw the law

as an instrument of social change, not in the abstract but in its effect on the everyday lives of those who were left out or left behind and needed his help."

The other speakers described his political acumen and boundless energy. Thomas Susman, who was assistant adviser to Kennedy and then general counsel on the Senate Judiciary Committee from 1968 to 1979, summed up the senator's philosophy in reaching across the aisle: "Persuade, don't trade. Don't ask for personal favors. Get them there on the merits." This strategy had its defensive advantages as well. If a senator would give him a vote that was not on the merits, there was a good chance that that senator would want one back, said Susman. Kennedy didn't do that, he added—no

small achievement given the more than 15,000 Senate votes Kennedy cast.

Breyer, who met with NYU Law students earlier in the day, recalled Kennedy's vigor. Kennedy had appointed Breyer special counsel to the Judiciary Committee; later, Breyer became chief counsel. "We used to

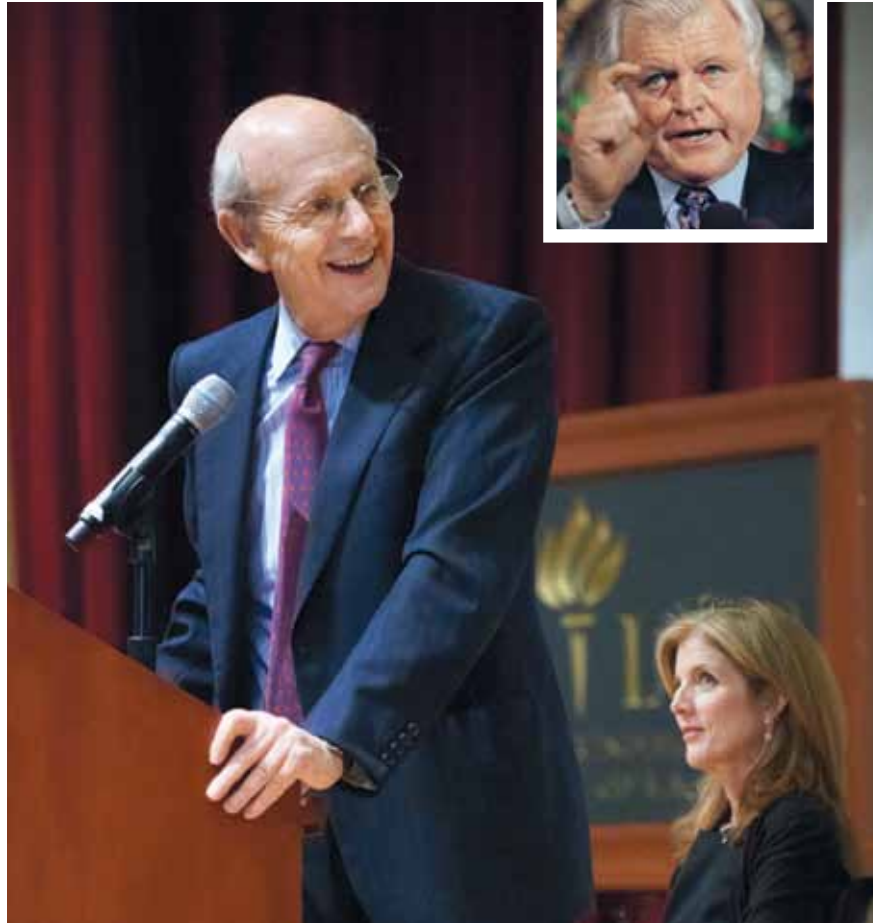
general counsel to the Senate Judiciary Committee. Appearing by webcam because his flight was grounded, Feinberg characterized Kennedy as one of very few senators in modern times with "the political and institutional credibility to legislate"

and achieve true partnership with members of the opposing party. The late senator worked tirelessly and went to great lengths to foster personal relationships with everyone in his orbit, Feinberg said. "He was constantly working from early in the morning till late at night, seven days a week, in order to achieve the endgame. He was driven by his name, by the history of his family, by the reputation he was determined to vindicate."

One of Kennedy's most lasting legacies, said Nick Littlefield, who worked as a staff director and chief counsel for Kennedy on the Senate Committee on Health, Education, Labor and Pensions, would be universal health care, an issue on which Kennedy worked hard throughout his career.

Although the health-care bill did not pass until after Kennedy's death, Littlefield asserted that the senator "had a key role through the moral force of his personality, through his strategic sense, through being there for key votes, through talking to Obama, through the letters he wrote to Obama, through the speeches he gave. In many ways, universal health care in America is the great Kennedy legacy." That something as basic as health care was so important to Kennedy affirms what Caroline Kennedy said about him: "More than almost anyone else I've ever met, Teddy's humanity is what made him such a legislative giant." □ *Atticus Gannaway*

(See page 84 for more symposia reports.)



just wake up in the morning and try to get to work fast, because every minute, there was something going on," the justice said. "Kennedy's personality just gripped the whole thing."

Recently, the current Republican chairman of the House Judiciary Committee asked Breyer to speak to its members. To Breyer's surprise, Lamar Smith wanted to know how Kennedy had run the Senate Judiciary Committee. This request was a testament, Breyer said, to the efficacy of Kennedy's bipartisanship.

Feinberg, administrator of the Gulf Coast Claims Facility, compensating those affected by the BP *Deepwater Horizon* oil spill, worked for Kennedy from 1975 to 1980, eventually becoming his chief of staff and



# A Man with Many Plans



Gupta with a student in Mandalay

**A**S AN UNDERGRADUATE MAJORING in international relations and Middle Eastern and Islamic studies at NYU, Anurag Gupta '11 became concerned with the plight of the Burmese people. Typically, Western nations exerted pressure on Myanmar's longstanding military regime through boycotts. But to Gupta, that didn't compute: "The regime was still getting money from other countries; the people were the ones who were suffering."

A few years later, while he was on a Fulbright grant, Gupta and some fellow Fulbright scholars founded Opening Possibilities Asia (OPA), a nonprofit that creates educational opportunities in Myanmar. Partially funded by a Goldman Sachs Global Leaders Program grant, OPA has improved the lives of 7,000 students at Phaung Daw Oo, a Mandalay charitable school run by Buddhist monks.

The changes are astonishingly simple. OPA put garbage bins, for instance, in all 200 classrooms so students no longer had to step over refuse on the floor. And it furnished the library with Burmese-language books where previously only English volumes filled the shelves. Gupta also organized teacher training workshops to foster peer support, introduce creative techniques for teaching and motivating students, and tackle common classroom issues.

Eager to advance his nonprofit management acumen, Gupta earned a master's in development studies at Cambridge. He then became a Root-Tilden-Kern Scholar at NYU Law, where he honed essential entrepreneurial and development skills.

Fellow RTK Scholar Keren Raz '10 recalls telling Gupta, then a 1L, about NYU's Reynolds Foundation Program in Social Entrepreneurship, which seemed tailor-made to

his interest in addressing huge societal issues outside the limitations of a traditional nonprofit structure. Although it was the day before the application deadline, Gupta pulled an all-nighter and became one of eight fellows accepted out of 1,000-plus applicants. The two-year, University-wide program provides up to \$25,000 annually, along with cross-disciplinary skills training. "The Reynolds Program has been transformative in helping me really appreciate what a law degree is," says Gupta. "It's changed my way of looking at the world."

Adjunct Professor Jill Manny, who taught Gupta in her Law of Nonprofit Organizations class, attributes his success to intense focus. Manny, executive director of the National Center on Philanthropy and the Law, also encouraged him to apply for the highly competitive Rockefeller Brothers Fund Fellowship in Nonprofit Law, which he won over "an enormous crop of incredible candidates," she says. For the yearlong fellowship, Gupta will work for the Vera Institute of Justice's general counsel on issues related to immigration, youth justice, racial justice, and prosecution reform.

Still maintaining a focus on Myanmar, Gupta recently completed a business plan for a social enterprise that would help Burmese expatriates worldwide learn to start businesses. As Gupta sees it, a thriving diaspora eventually will improve the conditions of those still living there.

Professor Helen Scott, co-director of the Mitchell Jacobson Leadership Program in Law and Business, helped supervise Gupta's business plan draft. Like many others, she sees great promise in Gupta: "There are a lot of students here who want to change the world. And there are some who will. But he's one of the ones I would put money on, that he will, in fact, change the world for the better." □ A.G.

## Lifting the Threat of Deportation from Lawful Residents

THANKS TO IMMIGRANT RIGHTS CLINIC students Benjamin Cady '12, Frances Kreimer '12, and Ruben Loyo '11, two lawful permanent residents no longer live under the threat of deportation.

Cady and Kreimer represented a lawful permanent resident of 48 years who faced deportation due to a 30-year-old nonviolent felony and more recent misdemeanor offenses. She was detained out of state for nearly five months. The students filed a federal habeas petition challenging her unlawful and prolonged detention, and within days the government released her.

"Such a deprivation of liberty undermines the values of fundamental fairness and due process we study in our doctrinal courses," says Kreimer. In January, the client was afforded a full hearing on relief. Cady and Kreimer represented her at trial and won. The government waived its right to appeal.

Loyo represented a lawful permanent resident who faced deportation to Jamaica, where he faced persecution as a gay man. At John F. Kennedy Airport, through which he was returning from a relative's funeral, officials seized his green card and passport,

citing inadmissibility due to two misdemeanor convictions for shoplifting and evading a subway fare. "This case was my introduction to the field of criminal-immigration law, and I was shocked to learn that such minor offenses were routinely treated as grounds for deportation," says Loyo. Last spring, he, along with Kulsoom Naqvi '10, filed a motion to terminate the proceedings based on the government's failure to establish that these convictions were "crimes involving moral turpitude" as required under the law. Loyo argued and won the case in the fall. □



Preston, Wood, and Jadwat



Bartiromo



Salzman, Huang, Friedman, Stewart, and Epstein



Nocera



Moreno-Ocampo



MacKinnon

# Ripped from the Headlines

Insiders, experts, faculty, and students discuss the latest issues over a brown bag lunch.

**S**ETTling INTO ITS SECOND YEAR, the NYU Law Forum cemented its place at the center of the Law School's intellectual life. On 14 Wednesdays at 12:25 p.m., newsmakers, insiders, and influencers debated the hot topics and pressing public policy issues of 2010–11, ranging from aggressive policing to WikiLeaks and “don’t ask, don’t tell” to taxation.

The discussions often featured panelists with widely differing views. Take, for example, the kick-off forum, on the aftermath of BP’s *Deepwater Horizon* oil spill in the Gulf of Mexico. The role the government can play in preventing similar disasters was central to points made by Richard Stewart, John Edward Sexton Professor of Law; Amelia Salzman ’85, associate director for policy outreach at the White House Council on Environmental Quality; and Albert Huang, an attorney at the Natural Resources Defense Council. But fellow panelist Richard Epstein, Laurence A. Tisch Professor of Law, introduced himself with a disclaimer: “My job here, as usual, is to sort of be the Grinch who stole Christmas.” He hewed to his longstanding views that government regulation should be minimal and presented arguments that BP might make to limit its damages in court proceedings.

A few weeks later, Omar Jadwat ’01, a staff attorney at the ACLU Immigrants’ Rights Project; Julia Preston, an immigration correspondent for the *New York Times*; and Julie Myers Wood, former head of the Department of Homeland Security’s Immigration

and Customs Enforcement, waded into a discussion of the highly charged Arizona statute that made it a state crime for an alien to be in Arizona without carrying required immigration documents. “Let me be clear,” said Jadwat. “The impact in day-to-day terms is not restricted to folks who lack documentation. These laws subject people to different treatment based on how they’re perceived, not on their actual status.”

Prominent business journalists Maria Bartiromo of CNBC and Joseph Nocera of the *New York Times* were part of a panel that examined the financial crisis and whether we are at risk for another one. “Bubbles are part of the human condition, and delusions are part of the human condition,” said Nocera. He believes the next market meltdown is, at best, 60 or 70 years away.

No holds were barred, or opinions blunted, when Luis Moreno-Ocampo, prosecutor of the International Criminal Court, and Catharine MacKinnon, the renowned scholar on issues of sexual equality, headlined a discussion of gender-based crimes in Sudan. Moderated by José Alvarez, Herbert and Rose Rubin Professor of International Law, the discussion examined the ostensible choice between accountability and peace in the Sudanese conflict. While Moreno-Ocampo was more measured, asserting that the underlying mission of the ICC is to establish “respect for the victims, respect for the law, and also respect for the accused,” MacKinnon vehemently rejected the idea suggested by some people that the

prosecution of Sudanese officials for gender-based crimes should yield to efforts to negotiate peace. “Bartering off crimes against women to pacify politics among men,” she said, “emerges as just the latest way to make women and their rights expendable.” □ *Michael Orey*

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# Tax Return

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## Fall Ball

▽ Carnevale



▽ The Joker



▽ Lady Gaga



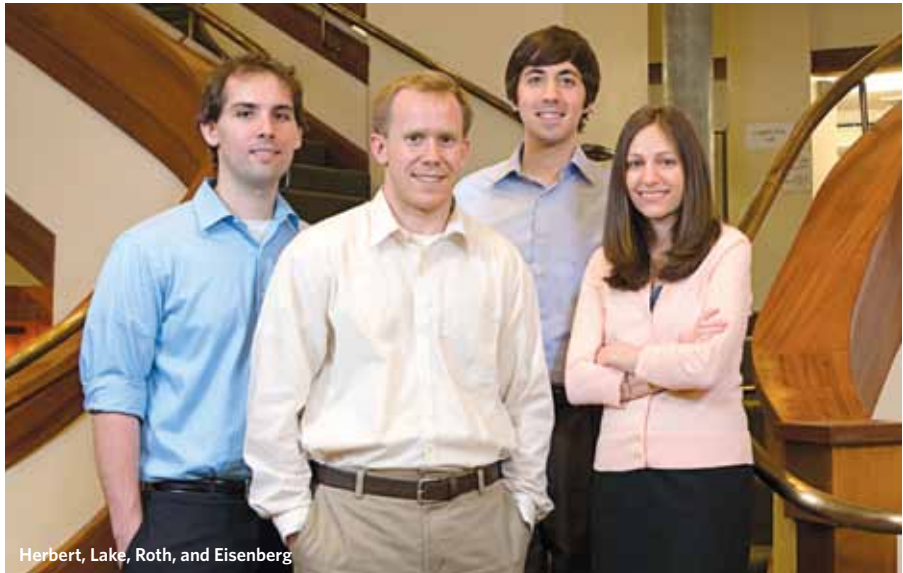
▽ Super Mario Bros.



## West Fourth Story

▽

The 2011 NYU Law Revue, the student musical that pokes fun at all things NYU Law, was a nod to a certain collaboration of Leonard Bernstein, Stephen Sondheim, and Arthur Laurents. In this version, the two warring groups are the Gunners and the Slackers, but among them are two students destined for each other.



Herbert, Lake, Roth, and Eisenberg

# Just Icing on the Case

Students hone their skills working on high-profile litigation.

**T**HIS PAST SCHOOL YEAR SAW NYU LAW students taking part in several prominent court cases, including one of the first legal challenges to health-care reform and a public campaign finance case that was argued before the U.S. Supreme Court.

In *Commonwealth of Virginia v. Sebelius*, now before the U.S. Court of Appeals for the Fourth Circuit, the state is suing the U.S. secretary of health and human services, alleging that the health-care law's mandate that everyone have insurance coverage is unconstitutional under the interstate commerce clause.

After learning that no amicus brief dealt squarely with the relevant history of the commerce clause, Jacob D. Fuchsberg Professor of Law Barry Friedman reached out to students in late January for research assistance. With less than three weeks before the filing deadline, the 2Ls divided the work by era: Graham Lake '12 and Colin Roth '12 researched the years of the country's founding, while Lynn Eisenberg '12 covered the Gilded Age. Ian Herbert '12 focused on the necessary and proper clause. Two Yale law students also contributed to the work. Friedman worked with appellate attorneys including Jeffrey Lamken, the counsel of record, to produce a brief based on the research. The appellate team plans to file the brief in every upcoming health-care-reform case.

"This is what people come to law school to do, to be involved in the hot-button issues of the day and to have a chance to work

on something that affects so many people," says Roth. For Eisenberg, who worked on Barack Obama's presidential campaign before coming to NYU Law, the research was an opportunity to contribute to an issue she had supported on the campaign trail.

Also this year, as part of the Brennan Center for Justice's Campaign Finance Reform project, students in the Brennan Center Public Policy Advocacy Clinic assisted on a high-profile Supreme Court case. Last March the Brennan Center defended *McComish v. Bennett*, a case challenging one provision of Arizona's public financing system—trigger matching funds. The Brennan Center and its pro bono partner Munger, Tolles & Olson represented the respondent, the Clean Elections Institute. "The Arizona Clean Elections system, in effect for over a decade, helped move the state beyond egregious corruption and recurrent scandal," says Brennan Center Executive Director Michael Waldman '87. "This law has boosted speech while combating corruption." Despite the Brennan Center's efforts, however, the Court threw out the provision.

In addition to providing research and editing for the case, Laura Moy '11 and Marcus Williams '12 drafted a report on the impact, efficacy, and benefits of public financing. Noting that the 2010 election cycle was the most expensive in history, Moy adds, "A lot of people don't realize that, as consumers, we are paying for a lot of it. We pay companies for their goods and services, and they turn around and spend money on political goals that we may or may not agree with." □



## THREE-PEAT!

For the third year in a row, NYU Law defeated Columbia Law in the annual Deans' Cup fundraiser. The final score was 78-67. NYU Law also triumphed, 4-2, in the 10-minute faculty half-time game, breaking Columbia's five-year winning streak. In its 10th year, the co-ed basketball game continues to be the largest student-run law school event in the country. The organizers raised more than \$40,000 to finance student public interest law organizations at both law schools.

## Scholarly Awards

American Bar Association Business Law Section 2010-11 Mendes Hershman Student Writing Contest: "Textron: The False Choice Between Financial Transparency and Litigant Confidentiality," by **Chris Jung '11**

LexisNexis's 11th annual James William Moore Federal Practice Award: "Pleading in the Information Age," by **Colin Reardon '10**

New York State Bar Association Environmental Law Section 2010 Professor William R. Ginsberg Memorial Essay Contest: "Eco-Antiterrorism: EPA's Role in Safeguarding Our Nation's Chemical Plants," by **Jon Kalmuss-Katz '10**

Theodore Tannenwald Jr. Foundation for Excellence in Tax Scholarship's 2010 Writing Competition: "In Defense of College Savings Plans: Using 529 Plans to Increase the Impact of Direct Federal Grants for Higher Education to Low- and Moderate-Income Students," by **Caroline Waldner '10 (LL.M. '11)**

Virginia Journal of International Law 2011 Human Rights Student Scholars Writing Competition: "Reassessing the Role of Supplier Codes of Conduct: Closing the Gap Between Aspirations and Reality," by **Andrew Herman '10**

## Marden Moot on Surveillance

**T**HE CASE ARGUED IN THE 39TH annual Orison S. Marden Moot Court Competition, prepared by Peter Farrell '12 and Steve Rowings '12, involved a narcotics investigation in which D'Angelo Barksdale was tracked remotely for six weeks using a GPS device that a detective had attached to the undercarriage of Barksdale's vehicle. Barksdale appealed his subsequent cocaine-related convictions, arguing that the use of a GPS device without a warrant was an unreasonable search under the Fourth Amendment. Hugh Murtagh '11 and David Hodges '12, counsel for the petitioner, and Anthony Mozzi '11 and Jeremy Hays '12, representing the respondent, argued before U.S. Court of Appeals judges Thomas Griffith for the District of Columbia Circuit, David Hamilton for the Seventh Circuit, and Debra Ann Livingston for the Second Circuit.

Mozzi, who won best oralist, faced an uphill battle in convincing three skeptical judges of the constitutionality of Barksdale's GPS surveillance.

Distinguishing between planting a GPS device on a person as opposed to a vehicle, Mozzi said, "This court has held that there's a diminished expectation of privacy in your vehicle. It has repeatedly held that the exterior of your car is not subject to any reasonable expectation of privacy." Hodges won the award for outstanding brief writing. □



Mozzi



## Public Service Auction raises \$105,000

With the lingering economic downturn, more students are doing public service summer internships—everywhere from the International Criminal Tribunal for Rwanda in Tanzania to the New York City Fire Department. Under Dean Richard Revesz, the Law School has guaranteed funding for such internships to every 1L and 2L who wants to do one. The annual auction helps pay their way. "Literally hundreds of NYU Law students volunteered to canvass local businesses, reach out to alumni, and help things run smoothly on the night of the auction," says Sara Rakita '98, associate director of the Public Interest Law Center, which coordinates the event. "It's great to see so many students, alumni, and faculty come together to celebrate public service at the Law School."





## The Year in Issues

### STUDENT SYMPOSIA

#### Regulatory Reform and the Future of the U.S. Financial System *Journal of Law & Business*

The Dodd-Frank Wall Street Reform and Consumer Protection Act, signed in 2010, created the most sweeping financial regulatory change since the Great Depression. Practitioners and scholars including Assistant Professor Ryan Bubba (far left) and Sullivan & Cromwell Partner and Senior Chairman H. Rodgin Cohen (middle) discussed banking reform, while other distinguished panels explored derivative regulation and the future of Fannie Mae and Freddie Mac. The former inaugural director of the SEC Division of Risk, Strategy, and Financial Innovation, Henry Hu, gave the keynote address. Now a professor at the University of Texas School of Law, Hu is credited with warning banks of the risks of derivatives.

#### Plain Meaning in Context: Can Law Survive Its Own Language? *Journal of Law and Liberty*

What role does the plain meaning of language have within the law? Moderators Burt Neuborne, Inez Milholland Professor of Civil Liberties; Roderick Hills Jr., William T. Comfort, III Professor of Law; and Amy Adler, Emily Kempin Professor of Law, respectively, led discussions on the broad question of when plain meaning works and when it doesn't; the influence of language in administrative law; and plain meaning in respect to intellectual property law. Richard Epstein, Laurence A. Tisch Professor of Law, offered "A Modest Theory of Interpretivism" in his keynote address.

#### Corporations as Progressive Actors *Review of Law & Social Change*

Scholars, activists, and practitioners examined the role that corporations play—as employers, participants in global markets, and political actors—in promoting progressive ideals, and considered the limits and risks raised by a shift away from public regulation and toward the private sphere. EEOC Commissioner Chai Feldblum reviewed some corporate sector accomplishments and appealed to progressive lawyers and corporations to continue to collaborate on important goals. Panels were moderated by Kenji Yoshino, Chief Justice Earl Warren Professor of Constitutional Law; Professor

of Law Florencia Marotta-Wurgler '01; and Yolanda Wu, co-founder and co-president of A Better Balance: The Work and Family Legal Center and adjunct professor of law.

#### The 16th Annual Herbert Rubin and Justice Rose Luttan Rubin International Law Symposium | On Thin Ice: International Law and Environmental Protection in a Melting Arctic *Environmental Law Journal and Journal of International Law and Politics*

The United States is one of eight nations with territory above the Arctic Circle. Melting sea ice has thrust these previously unnavigable and commercially inaccessible waters into a series of legal, political, and environmental disputes, which are expected to intensify in the years ahead. Peter Taksøe-Jensen, Danish ambassador to the U.S. and former U.N. assistant secretary general for legal affairs, gave the keynote address.

#### Policing, Regulating, and Prosecuting Corruption *Annual Survey of American Law*

Keynote speakers gave firsthand accounts of their efforts to combat corruption. Anne Milgram '96, former attorney general of the State of New Jersey, focused on structural challenges to prosecuting corrupt government officials, particularly at the state and local levels. Neil Barofsky '95, former special inspector general of the Troubled Asset Relief Program, discussed TARP's success in rescuing the nation's major banks and preventing a collapse of the financial system, and its "horrendous" failure in restoring lending and preserving homeownership. Milgram and Barofsky are both senior fellows at the Center on the Administration of Criminal Law, the co-sponsor of the event. □

## Katrina's Blow to Social Justice

SOMETIMES A PICTURE CAPTION IS worth a thousand words. Beneath an August 30, 2005 photo of an African American, a newswire wrote: "A young man walks through chest-deep flood water after looting a grocery store in New Orleans." A similar image of two white people was labeled this way: "Two residents wade through chest-deep water after finding bread and soda from a local grocery store."

This was one of many examples of racial disparity highlighted by William Quigley, director of the Gillis Long Poverty Law Center at Loyola University New Orleans School of Law, at a February program sponsored by more than a dozen law student groups to coincide with NYU's annual Martin Luther King Jr. Celebration Week.

Quigley's stirring lecture and slide show, "Justice Delayed Is Justice Denied: How to Destroy an African-American City in 33 Steps," grew out of an encounter at a New Orleans grocery store, where Quigley overheard white patrons wondering aloud why black residents repeatedly complained about racial problems in the city. Quigley, who during the worst flooding was with his wife, an oncology nurse, at a New Orleans hospital where more than 40 people died, became angry. In one sitting, he created a list of almost three dozen post-Katrina racial injustices.

"Our U.S. laws...don't work for justice.... There must be recognition of the inherent



In New Orleans' Lower 9th Ward, 2007

dignity and equal and inalienable rights of all members of the human family," said Quigley. "What you see in Katrina, what you see in Haiti, what you see in this town and all the other places doesn't begin to measure up to equal and inalienable rights. It might be legal, but it's not just. Our challenge is to narrow the gap between law and justice." □



## Man and Music in Harmony

**E**LI NORTHROP'S ACTIVITIES ARE AS diverse as his iPod playlist. Just as he listens to jazz, bluegrass, pop, and punk, the Arthur Garfield Hays Civil Liberties Fellow and *Review of Law & Social Change* staff development editor was also captain of this year's victorious Deans' Cup basketball team and a member of the rap/hip-hop band Pants Velour, which he started in 2006 with two Cornell undergraduate classmates. "I want to be a lawyer," says Northrup '11, "but I don't feel like I need to be just one thing."

Pants Velour performs in quintessential downtown clubs such as Arlene's Grocery and Webster Hall. Onstage, Northrup is the hype man who accentuates the last words of the lead rapper's lines and plays to the crowd to get them excited throughout the show. "I'm there to have a good time," says Northrup.

Northrup, who once played piano and guitar, co-writes the band's catchy songs. A video of his parody rap, "Charlie Sheen: Always Winning," which lampooned the actor's highly publicized antics after he was fired from his top-rated sitcom last winter, has been seen more than 355,000 times on YouTube and caught the attention of the national legal community. The blog *Above the Law* posted the video, while the *Am Law Daily's Careerist* blog called it "fast and saucy—especially amazing coming from a serious law student."

Within Law School circles, Hays Faculty Co-Director Sylvia Law '68 counts herself a fan, having attended a gig, while Co-Director Helen Hershkoff donated a Pants Velour prize package to this year's PILC auction. Northrup's Criminal and Community Defense Clinic professor, Anthony Thompson, appreciates how music has enhanced Northrup's legal skills. "Hip-hop has given Eli a unique perspective as a lawyer,"

he says. "It gives him a broad knowledge of both creative and diverse communities."

Northrup agrees wholeheartedly. "It's easy to get into a routine where you just interact with other students and lose sight of what people are going through," he says. "Not that musicians are the most down-to-earth group, but a mix of the two worlds keeps me closer to reality."

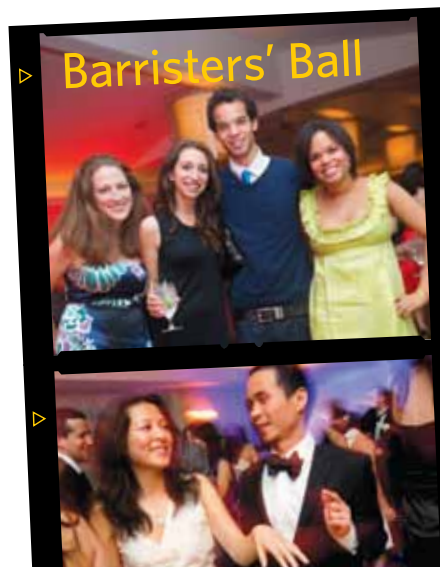
That reality is what set Northrup upon his legal career path. After graduating from Cornell, Northrup volunteered with the DREAM Project in the Dominican Republic, where he taught preschool, ran a library, and taught basketball and swimming. He also witnessed racial tension between Dominicans and their Haitian neighbors. "Haitian immigrants were essentially treated as undeserving of rights or protections," Northrup says. "They had no voice, and that disturbed something in me."

As a Hays Fellow working for the NAACP Legal Defense and Educational Fund (LDF) this year, Northrup says he has also witnessed similar underrepresentation in the criminal justice system, as he had already seen while working in public defender offices. The LDF's client is a 25-year-old Mississippi

man who, at 16, drove two older teens to a store where the pair robbed and killed the owner. The client, who had remained in the car, was convicted of capital murder and sentenced to life in prison without parole.

Northrup's ease in chatting about music and basketball helped him find common ground with the client. "I can see how much of an uphill battle it is for anyone accused of a crime," Northrup says. "It's that sense of frustration and helplessness that I want to work toward alleviating as a lawyer." In May, after researching similar cases involving juveniles convicted of homicide, Northrup helped draft a brief filed in Mississippi State Court arguing that the client's sentence was disproportionate and thereby violates the Eighth Amendment. If relief isn't granted, a federal habeas petition will be filed in federal district court.

This fall, Northrup is clerking for U.S. District Judge Robert Patterson of the Southern District of New York, and he will somehow still find time to perform and write music with Pants Velour. Hershkoff, for one, expects no less: "One of the things that distinguishes Hays Fellows is their ability to combine a passion for something outside the law, like artistic expression, with their practice of law," says Hershkoff. "Eli is a renaissance person." □ *Graham Reed*





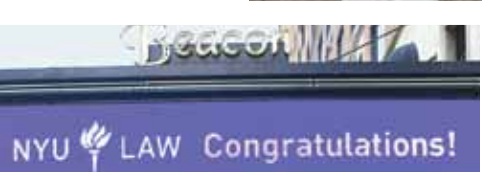


# Convocation 2011

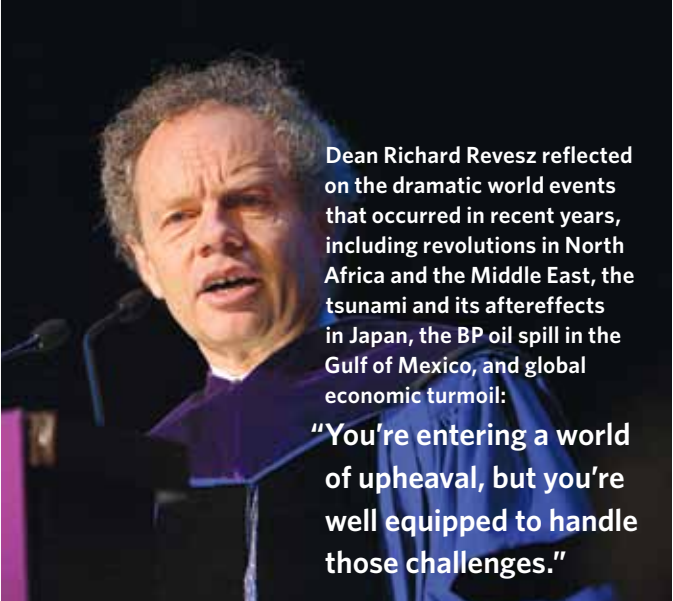
ON MAY 20, NYU SCHOOL OF LAW OBSERVED TWO FIRSTS AS IT held its 2011 graduation exercises. It was the first time that the ceremonies took place at the historic Beacon Theatre on the Upper West Side, as well as the first year that the J.D. recipients and those earning postgraduate degrees were graduated in consecutive morning and afternoon events. All told, there were eight speeches, two processionsals, and 751 graduates who received any of 15 degrees on the same stage where the 2011 Tony Awards were held and the Rolling Stones and Michael Jackson rocked the house.



Albert Ackerman '36, left, was among the VIP guests at the morning ceremony. The 97-year-old founder of Ackerman Court Service and his family were celebrating the 75th anniversary of Ackerman's own J.D. convocation.

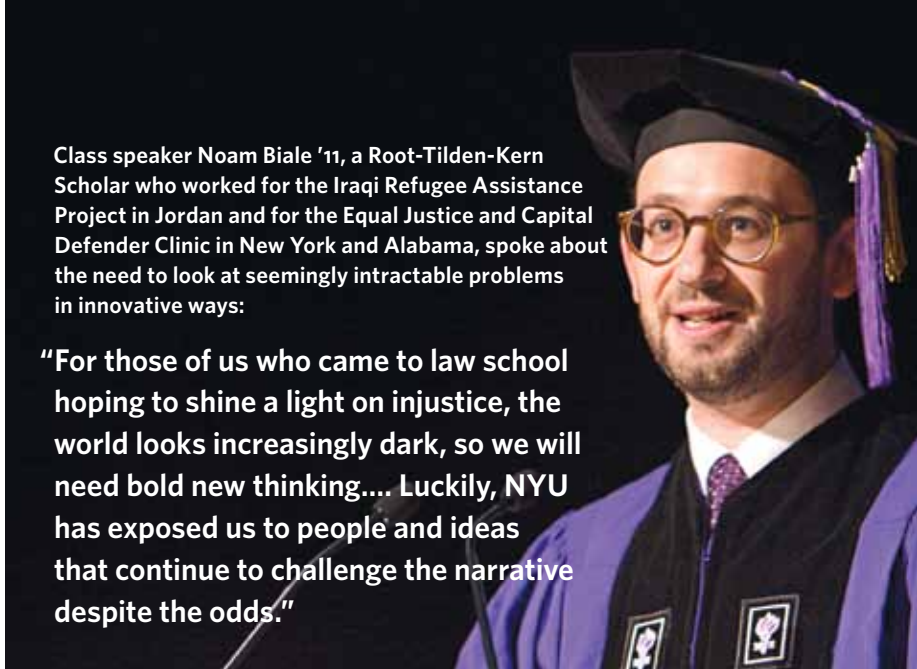






Dean Richard Revesz reflected on the dramatic world events that occurred in recent years, including revolutions in North Africa and the Middle East, the tsunami and its aftereffects in Japan, the BP oil spill in the Gulf of Mexico, and global economic turmoil:

**"You're entering a world of upheaval, but you're well equipped to handle those challenges."**



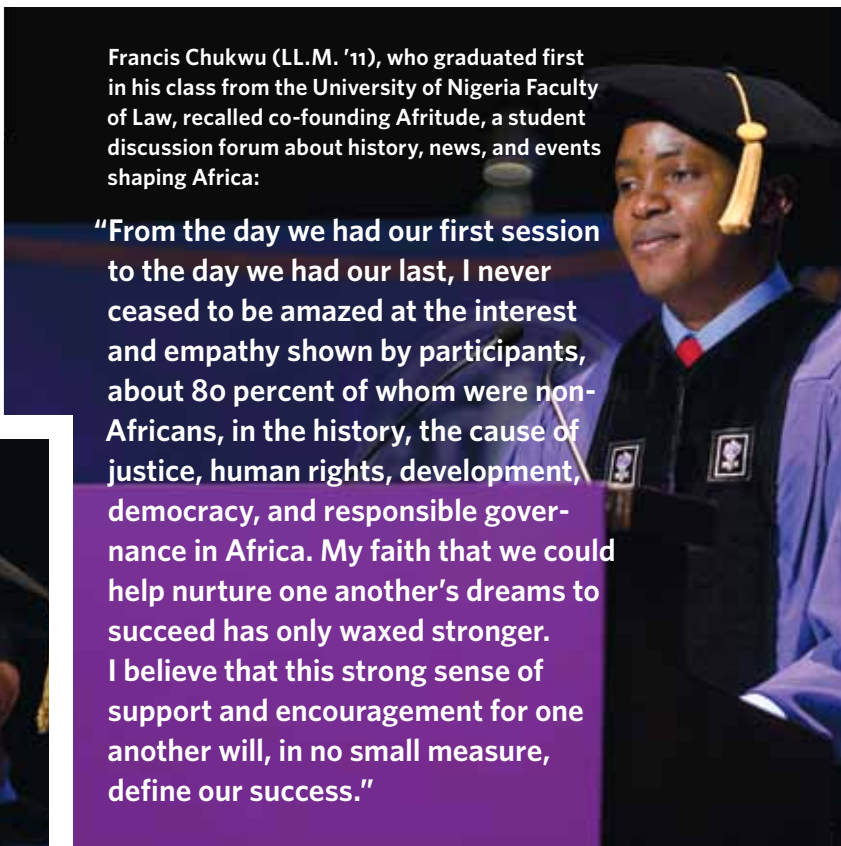
Class speaker Noam Biale '11, a Root-Tilden-Kern Scholar who worked for the Iraqi Refugee Assistance Project in Jordan and for the Equal Justice and Capital Defender Clinic in New York and Alabama, spoke about the need to look at seemingly intractable problems in innovative ways:

**"For those of us who came to law school hoping to shine a light on injustice, the world looks increasingly dark, so we will need bold new thinking.... Luckily, NYU has exposed us to people and ideas that continue to challenge the narrative despite the odds."**



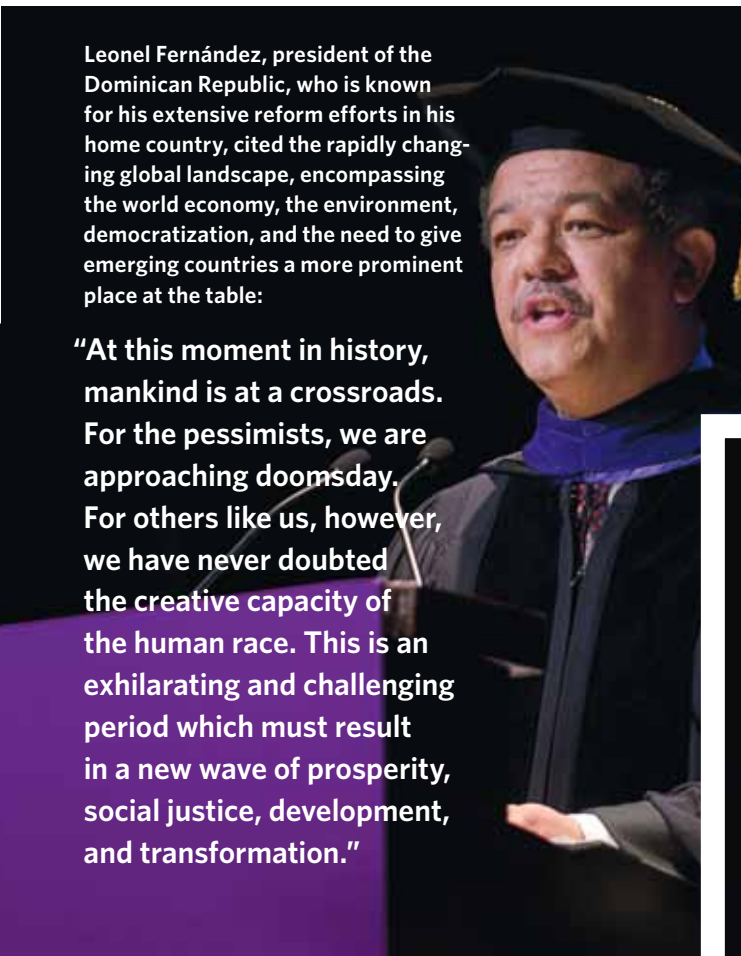
Martin Lipton '55, chair of New York University's Board of Trustees and a founding partner of Wachtell, Lipton, Rosen & Katz, described the history of the Law School through the efforts of each of its deans:

**"Go forth in the tradition that Arthur Vanderbilt described, combining the professional practice of law with public service."**



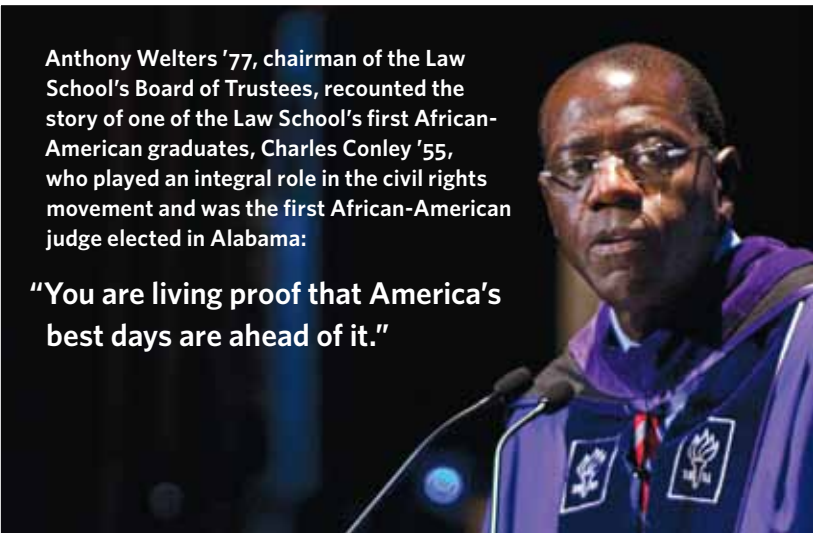
Francis Chukwu (LL.M. '11), who graduated first in his class from the University of Nigeria Faculty of Law, recalled co-founding Afritude, a student discussion forum about history, news, and events shaping Africa:

**"From the day we had our first session to the day we had our last, I never ceased to be amazed at the interest and empathy shown by participants, about 80 percent of whom were non-Africans, in the history, the cause of justice, human rights, development, democracy, and responsible governance in Africa. My faith that we could help nurture one another's dreams to succeed has only waxed stronger. I believe that this strong sense of support and encouragement for one another will, in no small measure, define our success."**



Leonel Fernández, president of the Dominican Republic, who is known for his extensive reform efforts in his home country, cited the rapidly changing global landscape, encompassing the world economy, the environment, democratization, and the need to give emerging countries a more prominent place at the table:

**"At this moment in history, mankind is at a crossroads. For the pessimists, we are approaching doomsday. For others like us, however, we have never doubted the creative capacity of the human race. This is an exhilarating and challenging period which must result in a new wave of prosperity, social justice, development, and transformation."**



Anthony Welters '77, chairman of the Law School's Board of Trustees, recounted the story of one of the Law School's first African-American graduates, Charles Conley '55, who played an integral role in the civil rights movement and was the first African-American judge elected in Alabama:

**"You are living proof that America's best days are ahead of it."**



# The Class of 2011

Beaming relatives and scholarship donors had the honor of hooding family and scholars onstage.







### Who's Who: Legacy Families

1. Julio Guzman-Carcache with his sister, Ana Cristina Guzman (LL.M. '01).
2. David Moses with his brother, Matthew Moses '07.
3. Nyasha Pasipanodya and her sister, Tafadzwa Pasipanodya '08.
4. Mark Friedman with his father, Lawrence Friedman '76 (LL.M. '82).
5. Lucia Navratova with her brother, Matus Navrat (LL.M. '10).
6. Justin Weitz with his sister, Michelle Weitz Gewanter '01 (LL.M. '05).
7. Daniel Novack with his brother, Jeffrey Novack '08.
8. Jonas Oransky with his father, Charles Oransky '75 (LL.M. '80).
9. Dori Straus with her uncle, Law School Trustee Daniel Straus '81.
10. Benjamin Hall Schaefer with his father, David Schaefer '73, and his mother, U.S. District Judge Janet Hall '73.
11. Giulia Stella Previti with her godfather, the Honorable Frank J. Guarini Jr. '50 (LL.M. '55).
12. Diego Quiñones with his sister, Natalia Quiñones (LL.M. '08).
13. Joseph Soltis with his father, Michael Soltis (LL.M. '86).
14. Sarah Schoenbach with her aunt, Arlene Popkin '74.
15. Alexander Mindlin with his wife, Danielle Posen Mindlin '08, and their daughter Ruth.
16. Carlos Jimenez-Cantu with his father, Carlos Jimenez-Barrera (M.C.J. '80).







## Scholars and Donors

1. Anthony Welters '77, chairman of the Law School's Board of Trustees, and Ambassador Beatrice Welters hood AnBryce Scholars (clockwise from top left): Angela Libby (Clifford Chance Scholar), Victor Davis (William Randolph Hearst Foundation Scholar), and Carroll & Milton Petrie Foundation Scholars Patrick Armstrong, Sean Aasen, Lilia Toson-Dysvick, Isaly Judd, and Claudia Flores.
2. Thomas M. Franck Scholar in International Law Maria Cecilia Sicangco (Hauser Scholar) was hooded by Rochelle Fenchel.
3. WilmerHale Scholar Noam Biale (Root-Tilden-Kern) was hooded by Brian Johnson '99.
4. Sinsheimer Public Service Scholar Kosha Tucker (Root-Tilden-Kern) was hooded by Law School Trustee Warren Sinsheimer (LL.M. '57).
5. Susan Isaacs & Elkan Abramowitz Scholar Renee Hatcher was hooded by Susan Isaacs and Elkan Abramowitz '64.
6. M. Carr Ferguson Fellow in Tax Law Jeffrey Arbeit was hooded by Law School Trustee M. Carr Ferguson (LL.M. '60).
7. Dwight Opperman Scholar Alexandra McCown was hooded by Law School Trustee Dwight Opperman.
8. Thomas E. Heftler Scholar Brian Pete was hooded by Lois Weinroth.
9. John Sexton Scholar Jacob Berman was hooded by NYU Law Board Chair Emeritus Lester Pollack '57. (Not photographed: John Sexton Scholar Lawrence Dabney.)
10. Bickel & Brewer Latino Institute for Human Rights Scholar Alba Villa was hooded by Annalisa Miron '04.
11. Herbert & Rose Hirschhorn Scholar Andrea Clowes was hooded by Nancy Karlebach.
12. Sullivan and Cromwell Public Interest Scholar Ruben Loyo (Root-Tilden-Kern) was hooded by Law School Trustee Kenneth Raisler '76.
13. Andrew W. Mellon Scholar Yihong Mao (Root-Tilden-Kern) was hooded by Michele Warman.
14. Furman Scholars Michael Pollack, Matthew Shahabian, Genevieve Lakier, Elliot Tarloff, Erin Adele Scharff, Joanna Langille, and Pieter de Ganon were hooded by Law School Trustee Jay Furman '71.
15. Richard L. Posen Scholar Albert Huang was hooded by Warner Posen.
16. Herman Diamond Scholar Sarah Adam was hooded by Jessica Diamond.

*Photographs by Leo Sorel*









## Commencement 2011

# Pursuing Happiness in an Interdependent World

**W**ITH NEW YORK UNIVERSITY rapidly fulfilling its goal to be the premier “global network university,” graduating 8,000 world citizens in 2011 from campuses on six continents, it was fitting that Bill Clinton, sometimes called the president of the world, gave the 179th commencement speech on May 18. Clinton elucidated the pros and cons of globalization in a stirring, sometimes personal, and at times politically pointed address.

The former president invoked a sweeping array of world issues, including global warming, the lack of opportunities for young people in poorer countries, and the ease with which not only violent actors but also disease and financial instability can cross national borders.

Clinton acknowledged that his own story of being raised by a hard-working, single mother to become the 42nd president of the United States is not only an American Dream but also possible only in wealthier countries. He expressed concern that future generations could potentially be shut out: “The problem with all countries that have great systems is they get long in the tooth. They become so successful that those who run them are more interested in holding on to their positions than advancing the purposes for which they were established, more interested in maintaining the gains of the present than achieving even greater ones for our children in the future.”

In the past 30 years, Clinton argued, the U.S. had been hurt by two ideas that benefited the most powerful in society: the notion that corporations should cater to their shareholders at the expense of other stakeholders and the assertion that the government ruins everything it touches. Mimicking those who espouse privatization, essentially declaring “there is no such thing as a good tax, no such thing as a bad tax cut, no such thing as a good regulation, no such thing as a bad deregulation,” Clinton countered that the idea “contradicts the evidence in the United States and every other country in the world. The only truly successful countries have both strong economies and effective governments and a public-private partnership to share the future.”

He left the graduates with advice that they look inward before setting their future goals: “The great challenge of your life will be how to live out your personal story, pursue your personal dreams, enjoy your personal compassions and compulsions and interests in a world that is getting better, not worse, where the forces of positive interdependence outweigh the negative ones.”

Also honored at commencement was Kenneth Feinberg '70, who was awarded the Albert Gallatin Medal for outstanding contributions to society. Among many roles, Feinberg has served as special master to the September 11th Victim Compensation Fund and is currently administrator of the BP disaster's Gulf Coast Claims Facility. □



## NYU@NUS held its fourth convocation,

at Singapore's Asian Civilisations Museum on February 28. Guest of honor Sundaresh Menon, Attorney-General of Singapore, exhorted the graduates to proceed in their careers mindful of the importance of ethics, application, passion, and service: “You have come this far and with so many opportunities open to you; you no longer have the luxury of settling for mediocrity. Excellence comes at a price. You will have to work very hard to maintain the highest possible standards.”

## Student Scholarship

# The Need for Procedural Safeguards in Attorney General Review of Immigration Appeals



LAURA TRICE '10

**O**N NOVEMBER 8, 2008, JUST TWO months before he left office, Attorney General Michael Mukasey issued an opinion that reversed decades-old principles of immigration adjudication. Exercising his power to review decisions of the Board of Immigration Appeals (BIA), the attorney general used the BIA's unpublished decision in *Matter of Cristoval Silva-Trevino* as a vehicle to completely rewrite longstanding precedent governing "crimes involving moral turpitude"—a term of art that plays a critical role in deportability determinations. The precedent had not been questioned by either of the parties; the attorney general gave no indication that he planned to reconsider it; and the parties were given no opportunity to brief

or argue the issue, even though it had never been addressed below. Nonetheless, when Silva-Trevino moved for reconsideration in part on due process grounds, the attorney general responded with a one-paragraph denial that flatly rejected any due process concerns, stating only that "this matter was properly certified and decided in accordance with settled Department of Justice procedures," and declaring that "there is no entitlement to briefing when a matter is certified for Attorney General review." Att'y Gen. Order No. 3034-2009 (Jan. 15, 2009).

*Silva-Trevino* is a dramatic illustration of an issue that has long troubled immigration advocates. Under immigration regulations, the attorney general has discretion to certify to himself any of the 30,000-plus BIA decisions issued each year, either on

his own initiative or upon referral by the BIA or the Department of Homeland Security (which represents the government in removal, or deportation, proceedings at the administrative level). Although the attorney general rarely exercises his authority to review BIA decisions, averaging less than two certified decisions annually between 1999 and 2009, the majority of his decisions produce significant changes in the law that directly affect whole classes of immigrants in removal proceedings. The certification process has been used to announce new rules, overturn longstanding precedent, and announce the attorney general's position on constitutional issues. As such, certification functions as a selective policymaking device that allows the attorney general to assert control over the BIA and effect profound changes in legal doctrine.

For all its significance, the certification process is almost entirely lacking in procedural safeguards. The regulations governing certification require only that the attorney general's decision be stated in writing and transmitted to the BIA or DHS for service upon the party affected. They impose no requirement that the attorney general give notice of the issues to be considered on review, provide an opportunity for the parties to be heard, or solicit input from interested amici on issues of broad significance. This lack of procedural requirements results in haphazard, secretive, and sometimes politicized review, with process determined by the attorney general in an ad hoc, case-by-case manner. Even in cases less extreme than *Silva-Trevino*, where the attorney general has permitted briefing by the parties and amici, advocates complain that the process takes place in "a precipitous manner, without affording an adequate opportunity for parties and interested amici to provide full briefing of the serious issues involved." (Taken from an October 6, 2008 letter from Lee Gelernt et al., ACLU Immigrants' Rights Project, to Attorney General Michael Mukasey.) The unconstrained nature of attorney general review is particularly troubling given that the issues considered upon certification are often politically charged, and thus potentially vulnerable to politically driven decisionmaking.

Contrary to the attorney general's pronouncement, there should be an entitlement to briefing and other procedural protections when the attorney general certifies a matter for review. First, from the perspective of the individual immigrant, the lack of procedural safeguards raises serious due process concerns. Courts have long held that an immigrant's interest in



remaining in the U.S. is extremely significant, and noncitizens residing in the U.S. are therefore entitled to due process in deportation proceedings and appeals. Attorney general review presents special risks that should heighten concerns about due process in the certification context: the complex analysis of law and fact that underlies attorney general decisions presents a significant risk of error, and this risk is enhanced by the structural position occupied by the attorney general as both adjudicator and litigator in immigration matters. The Office of Immigration Litigation (OIL), part of the Department of Justice, handles immigration litigation in the federal courts, and OIL is frequently consulted regarding the litigation consequences of immigration policy decisions. Advocates have speculated that communications by OIL may guide the attorney general's decision to certify a case and inform his resolution of the issues reviewed. These concerns should counsel in favor of stronger procedural protections. Before the attorney general, however, immigrants are not guaranteed even the basic protections of notice and an opportunity for briefing that we take for granted in other contexts.

The lack of procedural safeguards in attorney general review also presents broader concerns. When the attorney general uses the certification power to announce binding rules of general applicability without providing for meaningful participation by the parties or soliciting input from expert amici, he runs the risk of issuing decisions of lesser quality and undermining public confidence in immigration law. Like most agencies, the attorney general has a number of policymaking tools at his disposal, including both adjudicative review of BIA decisions and notice-and-comment rulemaking. Because rulemaking permits broad participation in policymaking by all affected groups and individuals, many scholars argue that rulemaking, rather than adjudication, results in higher quality rules. Whereas adjudication permits consideration of only the data and arguments presented by the parties, rulemaking allows solicitation of input from the broader public and forces the agency to consider the national effects of adopting a rule that will bind parties in a wide spectrum of cases. Given the availability of rulemaking, many view the attorney general's use of the secretive certification process as a means of avoiding transparency and participation. This makes the certification process appear not only unfair, but also a poor means of making high-impact policy decisions.

This is not to say that the attorney general should abstain from policymaking through certification altogether or that he should choose, whenever possible, to issue rules of general applicability through the rulemaking process. Instead, the attorney general should seek to increase the quality and fairness of his decisions by maximizing participation in the certification process—by providing for meaningful, adversarial participation by the parties and solicitation of briefing by interested amici. To ensure such participation, the attorney general should promulgate binding regulations that lay out in detail the procedures that must be followed when a case is certified for review.

Strong procedural requirements for attorney general review should begin with adequate notice to both the parties and the public. Ideally, notice should occur at the stage of referral or consideration for certification, rather than upon certification itself, and the parties and interested amici should be provided an opportunity to object to certification. Under the current regulations, the government has absolute control of what cases are brought before the attorney general for review. The BIA, the DHS, or the attorney general can pick and choose among the 30,000-plus cases decided by the BIA each year to find the case that presents the issues in the light most favorable to its own position. Granting the parties and amici the right to object to certification would permit them some minimal participation in the selection process, allowing them to argue either that a particular issue does not merit review at all or that the case selected does not present the issues fully. Such opportunity to object would also allow the parties or amici to persuade the attorney general that some other mechanism, such as notice-and-comment rulemaking, is a more appropriate means of resolving the issue.

Additionally, as in an appeal before the BIA, the parties must be given notice of certification procedures and sufficient information to allow them to prepare and present arguments. At the very least, this means identifying the issues to be considered upon review and giving the parties notice of the briefing schedule and other procedures. To address broader accuracy and fairness concerns, notice that a case has been certified to the attorney general should also be accessible to the general public, through publication in the *Federal Register* or a public docket maintained online.

Finally, to satisfy the basic requirements of due process, the attorney general must, at a minimum, provide the parties an opportunity to fully brief the issues under review.

Because the parties themselves may not be well positioned to address the broader implications of a generally applicable rule, the opportunity for briefing should also be extended to interested amici. Providing amici a meaningful opportunity to be heard will both facilitate full and accurate development of the issues and help to legitimate a process that may otherwise appear to circumvent the broad participatory process of notice-and-comment rulemaking.

The certification power is unlikely ever to become a wholly uncontroversial device. Under any administration, the power is likely to be used to effect significant changes in immigration law, to the dissatisfaction of one party or another. But there is no reason for attorney general review to take place under a veil of secrecy, without the relatively simple procedural safeguards that we take for granted in other contexts. By promulgating regulations that bind himself and future attorneys general to fair and clear procedures, the attorney general could lift the veil of secrecy and restore transparency to the certification power, improving the legitimacy and perhaps the quality of immigration law in the process.

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**LAURA TRICE**, a former Palmer Weber Fellow in Civil Rights within the Arthur Garfield Hays Civil Liberties Program, has worked on civil rights issues for the American Civil Liberties Union's Immigrants' Rights Project, Professor Bryan Stevenson's Equal Justice Initiative, the American Immigration Lawyers Association, and Human Rights Watch. She graduated in 2010 as a Butler Scholar and a member of the Order of the Coif, and received the University Graduation Prize, the Frank H. Sommer Memorial Award, and the Administrative Law Prize.

Trice was inspired to write the note that is excerpted here after working with Professor of Clinical Law Nancy Morawetz '81 in the Immigrant Rights Clinic to represent a noncitizen who was unlawfully detained. She gratefully acknowledges the support she received from Morawetz and Assistant Professor of Clinical Law Alina Das '05. The full note was published as "Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions" in the November 2010 NYU Law Review, of which she was a staff editor and a notes editor.

Currently clerking for Judge David S. Tatel of the U.S. Court of Appeals for the District of Columbia Circuit, Trice has clerked previously for Judge Lucy H. Koh of the U.S. District Court for the Northern District of California.

# Addressing the Exactions Problem of Community Benefits Agreements



MICHAEL NADLER '11

**C**OMMUNITY BENEFITS AGREEMENTS (CBAs), contractual agreements related to large development projects, are a relatively new tool in the realm of land use and urban planning. They are the result of negotiations between developers proposing specific land use projects, and coalitions claiming to represent the neighborhood in which the developer wishes to build. Generally, the developer agrees to provide the community with a wide array of benefits, and, in return, the coalition promises either to support the proposed development project, or at least not to challenge it politically or legally. Since 2001, the practice of negotiating and signing CBAs in connection with major development projects has spread across the country. Over 30 CBAs have now been signed or are currently being negotiated in the United States, while New York City alone has been home to more than five such agreements in the last five years.

Given their brief history, several issues regarding CBAs remain controversial and unresolved. Among these is the question of whether CBAs are legally enforceable, an issue yet to be addressed by the judiciary.

While commentators have noted several potential obstacles to their enforceability, one of the most pressing and commonly cited is whether CBAs violate the Takings Clause. In the landmark cases of *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, the Supreme Court held that certain requirements governments imposed in exchange for the right to develop land violated the Fifth Amendment. In the context of CBAs, many scholars have questioned whether *Nollan* and *Dolan* apply to CBAs, and if so, under what conditions. This paper argues that when the government is sufficiently involved in the CBA negotiation process, *Nollan* and *Dolan* should apply. In practice, this would lead to the invalidation of many promised community benefits contained in existing CBAs.

## ATLANTIC YARDS (BROOKLYN, NY)

On December 10, 2003, developer Forest City Ratner (FCR or Ratner) announced its plans for a \$2.5 billion commercial and residential development in Brooklyn. Centered around a \$435 million, 19,000-seat arena to be designed by celebrity architect Frank Gehry, FCR envisioned building four office towers with 2.1 million square feet of commercial

space, as well as residential buildings containing 4,500 apartments. Over the course of the following 18 months, FCR's proposed development would lead to the negotiation and signing of New York's first community benefits agreement in June 2005.

In part due to its scale, the project immediately attracted controversy and opposition. In order to placate the community, Ratner expressed interest in negotiating a binding contract with the community and began meeting with several community organizations in 2004. The following summer, FCR signed a CBA, which promised community benefits related to, inter alia, first-source hiring; job training and referral programs; the hiring of minority- and women-owned subcontracting firms; affordable housing; the construction and maintenance of various community facilities, parks, and open spaces; mitigation of environmental harms caused by the project; capital improvements for preexisting community facilities; and educational and youth-targeted programs, including the development of four schools to be located in the surrounding community.

The membership of the coalition that negotiated the CBA quickly became a point of contention. FCR met with only a small number of groups, one of which had already publicly announced its support for the project. While eight groups eventually signed the CBA on behalf of the community, only two of them appear to have actually existed prior to the commencement of negotiations. In addition, at least one of the signatories appears to have been provided with millions of dollars in seed money for its operations by FCR, while another was reportedly given \$1.5 million. Conversely, the chairs of the community boards affected by the proposed development claim that they were effectively frozen out of the CBA negotiations.

While the CBA talks were underway, FRC was also in discussion with city and state officials regarding government approval and subsidization of the project. On March 3, 2005, FRC, Mayor Michael Bloomberg, and Governor George Pataki announced that the Empire State Development Corporation (ESDC) would act as the "lead agency" for Atlantic Yards, effectively circumventing the city's Uniform Land Use Reviewing Procedure, and that the city and state would each contribute \$100 million in funding to the project, to be spent on site preparation and public infrastructure improvements. In August 2006, the development project was approved by the ESDC, and the Public Authorities Control



Board (PACB) followed suit in December 2006. FRC broke ground on the Atlantic Yards Development in February 2007, but the developer subsequently announced that, due to deteriorating economic conditions, it would be forced to delay construction of the office and residential buildings, prompting fears that some of the promised community benefits would never be delivered.

While the Atlantic Yards CBA has drawn much criticism due to its opaque negotiation process and the questionable enforceability of its promised community benefits, it is likely the New York CBA that is least susceptible to constitutional challenges. It is difficult to see how the CBA's negotiation and signing could be plausibly described as a state action. The governmental bodies that approved of the Atlantic Yards project, the ESDC and PACB, do not appear to have compelled FRC to negotiate a CBA either through encouragement or coercion; they did not act in concert with those negotiating the CBA; and they were not entwined in the control or management of the coalition that did negotiate the CBA. While Bloomberg supported and signed the CBA, he did so "acting merely as a witness" rather than a party to it. Both the New York City Law Department and FRC have adamantly denied that the mayor played any significant role in its negotiation. Indeed, immediately following the signing ceremony, a leading opponent of the development project criticized both Bloomberg and Public Advocate Betsy Gotbaum for their hands-off approach. Additionally, the local Community Board chairs, appointed government officials, claimed that they had been excluded from the negotiation process as well. Thus, the Atlantic Yards CBA negotiation process appears to be an apt example of a "private action [that] is immune from the restrictions of the Fourteenth" and Fifth Amendments.

#### **KINGSBRIDGE ARMORY (BRONX, NY)**

Prior to 2009, the threat of the city government rejecting a development project because the developer refused to provide community benefits was entirely theoretical, as no developer had refused to do so when pressured by city officials. The Related Companies' (TRC) experience with the Kingsbridge Armory, however, proved that the municipal government was, in fact, willing to back up its words with action. The rejection of TRC's project has put all New York City developers on notice that the city's demands cannot be viewed simply as political

posturing, but rather as a genuine threat should the developer refuse to play ball.

In 2008, TRC was chosen by the city to turn the Kingsbridge Armory, a landmark building that had been vacant for over a decade, into a 575,000-square-foot commercial mall. In short order, local community groups, churches, and labor organizations banded together to form the Kingsbridge Armory Redevelopment Alliance (KARA), which threatened to oppose the project unless TRC promised various community benefits. That summer, Bronx Borough President Ruben Diaz Jr. entered the fray, drafting a model CBA with KARA, the local community board, and other elected officials. Among other requested community benefits, the draft included a provision that all retail tenants would be required to pay a living wage to their employees. However, TRC declared that a living wage requirement was a "deal killer," as it would make it impossible for the developer to find tenants. While TRC and KARA engaged in negotiations toward a CBA, the living wage issue proved an impasse.

Throughout the Uniform Land Use Review Process, pressure to sign a CBA weighed heavily on TRC. Early in the process, the local community board voted to approve the project contingent on the signing of a CBA, while Diaz disapproved of the project due to the continued absence of a CBA. CBA negotiations continued until the eve of the City Council vote, with Diaz and KARA ultimately rejecting a last-minute proposal that would have created a fund to boost the salaries of tenants' employees, but would stop short of including a living wage requirement in the CBA itself. On December 14, 2009, the City Council overwhelmingly voted to reject TRC's development project. Bloomberg vainly vetoed the council's vote, as the council subsequently voted by an even greater margin to override his veto. Both TRC and KARA attributed the negotiations' failure to the dispute over the living wage provision, despite TRC's offer of other community benefits.

TRC's experience with Kingsbridge Armory appears to fall within several of the exceptions to the State Action Doctrine, allowing KARA's actions to be considered those of a government actor. First, KARA was a "willful participant in joint activity with the State or its agents," rather than a purely private actor engaged in negotiations. Unlike Ratner's experience with the Atlantic Yards CBA, TRC was not simply negotiating with a coalition of local labor, church, and community groups, but sitting

across the table from government officials as well. This "joint activity" was first demonstrated by the role played by Diaz, members of Bronx Community Board 7, and other unidentified "local elected officials," who worked with KARA in the drafting of the model CBA. The government officials appear to have continued playing a role in the CBA negotiations, with unidentified "Council members and staffers" reportedly involved as late as December 10, 2009, less than one week before the council's vote. Indeed, Diaz explicitly trumpeted his efforts to negotiate on behalf of the community, declaring that "I am proud of the work that my office did to negotiate a strong community benefits agreement for this project" before complaining that the final terms offered by TRC "fall short of our stated goals." Additionally, the government also "exercised coercive power" through its repeated threats to reject the development project in the absence of a CBA that included living wage provisions. While Diaz appears to have been the first elected official to explicitly demand a living wage promise from TRC, the City Council's Bronx delegation had openly signed on to Diaz's threat by the time of the council vote. When KARA and elected officials from the Bronx failed to extract a living wage agreement from TRC, they ensured that the development project would be rejected.

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**MICHAEL NADLER** became interested in community benefits agreements while working on two CBA-related papers as a research assistant at the Furman Center for Real Estate and Urban Policy. Vicki Been '83, Boxer Family Professor of Law, and Clayton Gillette, Max E. Greenberg Professor of Contract Law, provided advice on the paper, originally written for their Law of New York City Seminar. A longer version of the note, which received first prize in the American Planning Association's annual Smith-Babcock-Williams Student Writing Competition, appeared as "The Constitutionality of Community Benefits Agreements: Addressing the Exactions Problem" in the Spring 2010 issue of the *Urban Lawyer*.

Nadler, who graduated as a Florence Allen Scholar and a member of the Order of the Coif, served as an articles editor of the NYU Annual Survey of American Law. Now a litigation associate at Paul, Weiss, Rife, Wharton & Garrison, he previously worked in the Office of the U.S. Attorney for the Southern District of New York and the Office of the Manhattan Borough President, and also advised former Representative Michael McMahon's Congressional campaign.



## Around the Law School

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Mere weeks after the death of Osama bin Laden and with the 10th anniversary of the 2001 attacks looming, Janet Napolitano, U.S. Secretary of Homeland Security, delivered "Strength, Security, and Shared Responsibility: Preventing Terrorist Attacks a Decade After 9/11," a sweeping lecture in which she discussed the evolving challenges of counterterrorism.



# The State of Chinese Law



Cohen, Belkin, and Orlins

**T**HE RAPID MODERNIZATION OF THE Chinese economy is spurring change in the country's legal system, too. This transformation, which touches on labor law, human rights, criminal law, and the justice system, was the topic of two important discussions hosted or co-hosted by the U.S.-Asia Law Institute this past year.

"Coerced Confessions and Wrongful Convictions in the People's Republic of China," co-hosted by the National Committee on United States-China Relations in April, focused on the Chinese government's year-old rule allowing criminal defendants to ask that their confessions be excluded if they can prove the confession was coerced. Stephen Orlins, president of the National Committee; Professor Jerome Cohen; and featured speaker Ira Belkin '82, a former federal prosecutor and now program officer for law and rights at the Ford Foundation in Beijing, questioned how much the criminal justice system had really changed as a result.

The new rule, introduced after a man spent 10 years in prison for the murder of a neighbor who later turned up alive, didn't necessarily address the root of the problem, Belkin argued, since citizens still lack a right to silence and the rule excludes only coerced confessions that turn out to be false. "It's hard to understand how the police would be deterred when there are no consequences for coercing a true confession," he said. "The rule itself appears to contain some advances, but in my view really doesn't go far enough."

In September, Cohen moderated a panel discussion at the 16th annual Timothy A. Gelatt Dialogue on the Rule of Law in Asia that generally focused on the frustratingly

slow progress in legal reform. "All the social progress spawned by economic development is only creating more and more tensions and problems," said Cohen. "This is not unique to China. Modernizing states that modernize too rapidly, including Iran under the shah, see many tensions develop."

Frank Upham, Wilf Family Professor of Property Law, observed that, in an attempt to achieve both rule of law and a harmonious society, the country steps back whenever a political controversy arises.

But Margaret Lewis '03, associate professor at Seton Hall University School of Law, said that a series of high-profile wrongful convictions covered by non-state media and blogs has made the need for reforms impossible for the government to ignore.

At the same event, Cynthia Estlund, Catherine A. Rein Professor of Law, reported that worker discontent remains high despite labor law reforms in 2008. "Chinese workers have long faced grueling hours and low wages and hazardous and degrading conditions," she said. "But in the last decade, workers have been increasingly willing to take to the streets to publicly protest those conditions." Workers going through official channels are often frustrated, she said, but the government is beginning to focus more on workers' welfare, and unions might become a greater force.

Other China-related events at the Law School included a lecture on judicial decision-making by Ling Li, senior research fellow at the U.S.-Asia Law Institute and assistant professor at Northwest University of Political Science and Law in China; a panel discussion of human rights abuses moderated by Samuel Estreicher, Dwight D. Opperman Professor of Law and director of the Center for Labor and Employment Law; and a two-day conference on criminal justice and the constitutional court in Taiwan, featuring faculty and students from the National Taiwan University. □



**OPENING CEREMONY:** Trustees Leonard Wilf (LL.M. '77) and Mark Wilf '87 cut the ribbon on the Law School's newest building, Wilf Hall, which they generously underwrote. Located at 139 MacDougal Street, Wilf Hall was designed and constructed to platinum-level specifications of the U.S. Green Building Council's Leadership in Energy and Environmental Design and houses a dozen centers, programs, and institutes, plus an admissions welcome desk. Cool features include a green roof and terraces, and bike storage space.



Napolitano with Dean Richard Revesz, left, and Brennan Center Executive Director Michael Waldman '87

## Counterterrorism Still the Top Post-9/11 Challenge

**W**HEN U.S. SECRETARY OF HOMELAND Security Janet Napolitano spoke at NYU School of Law in June, she observed that her talk fell between “two focusing events”: the death of Osama bin Laden and the 10th anniversary of 9/11. Yet, she notes, even though the U.S. is stronger than it was on 9/11, terrorism remains a real and evolving threat.

In a sweeping speech entitled “Strength, Security, and Shared Responsibility: Preventing Terrorist Attacks a Decade After 9/11,” delivered at the invitation of the Brennan Center for Justice, Napolitano discussed the many challenges tackled by the Department of Homeland Security, including border security and natural-disaster response. Chief among them: counterterrorism.

Today, terrorism plots, which are increasingly being hatched by Americans rather than outsiders, are becoming harder to detect, Napolitano noted. Key national security players must work together and share information to successfully prevent attacks, she said, because, most important to note, the federal government alone cannot protect the country. The states, local law enforcement, first responders, the private sector, and individual Americans also play a role: “Everyone has a stake in the safety of our people.”

In fact, between 1999 and 2010, Napolitano said, a third of foiled domestic terrorist plots were stopped with the help of

individual citizens, while most of the others were halted with the aid of state and local law enforcement. National security begins locally, and if citizens see something unusual, they should say something—echoing the campaign, she noted, that’s promoted by New York City’s Metropolitan Transportation Authority.

This vigilance can co-exist with respect for personal liberty, Napolitano said: “There is a false dichotomy if you say we have to sacrifice liberty for security. We don’t. We just have to think about them at the same time and look for common-sense and pragmatic ways to make sure that both are being pursued.” What’s more, she added, policing beliefs or profiling based on religion or ethnicity is a futile exercise.

In conclusion, Napolitano emphasized the ongoing nature of the efforts to keep the nation secure. “We need as a country to keep adapting, to think ahead, to be nimble and to be adaptive as individuals, as communities, and as a nation,” she said. “We have made great strides, but, even given that, we cannot provide guarantees. And while all the things I’ve discussed with you today are steps forward, we will never put this country under a kind of glass dome and seal it against all threats.” Along with this foresight, she added, we must have confidence that American communities can respond and recover quickly: “It’s with that kind of confidence that we proceed.” □

## Fighting the Cults of Gender

CAPPING OFF A DAYLONG SYMPOSIUM in Greenberg Lounge celebrating the New York State Judicial Committee on Women in the Courts’ 25 years of helping female litigants, attorneys, and court employees, feminist icon Gloria Steinem called on women to shed gender stereotypes and take control of their future. “Democracy starts with our bodies,” she said.

In her speech—read by Jill Laurie Goodman ’75, the committee’s counsel, because of an illness that made it difficult for Steinem, who sat nearby, to speak that day—Steinem urged listeners to stop mistaking prostitution for sexuality. “Does each of us have a right to sell our own body? Yes,” she said. But, she added, in nearly 40 years of speaking with prostituted women, children, and men, she’d met few who had acted for a reason other than fear, economic need, or abuse leaving them with little self-worth.

Later, drawing a link between society’s ideas about gender and violence, Steinem argued that a “cult of masculinity is in the heart of terrorism, whether in the home as domestic violence or in the street as political violence.” This fiction of masculinity is supported by the cult of femininity, she added: “We must take responsibility for our failure to name it, to resist it, and to rebel. When violence is normalized and disguised as sexuality, we must all name that lie.”





## Italy's Past and Future, and the E.U.

**P**RESIDENT GIORGIO NAPOLITANO HAS devoted his life's work to Italy. A member of the Italian Chamber of Deputies from 1953 to 1996 (with the exception of one term), he was made a senator for life in 2005 and elected president in 2006. In March, the 85-year-old statesman sat down with University Professor Joseph Weiler at the seventh annual Emile Noël Lecture for a free-ranging discussion of the challenges facing his continent.

A strong advocate for cooperation between left and right, Napolitano said Italy's biggest difficulty today is extreme partisanship. "My first duty is to put the emphasis on what unites Italy, not on what divides Italy," he said, "and to recall all Italians, all political parties, all social forces to the necessity of a certain acceptable and effective degree of national cohesion."

Napolitano also reflected on the European Union's current troubles, with decreasing voter turnout and the failure of its original constitutional treaty. "European institutions have become a very comfortable scapegoat for national problems," he said. "The national political leadership has the moral duty to tell the truth about what its responsibilities are and what the responsibilities of European institutions are." □



## The Accountability Gap

**H**AS THE SHEER NUMBER OF HUMAN rights investigations and fact-finding missions created the false impression that the perpetrators of atrocities are being held accountable for their acts? That question was put to Richard Goldstone and Radhika Coomaraswamy in a talk hosted last November by the International Center for Transitional Justice (ICTJ) about "The Dilemmas of Human Rights Fact-Finding."

"The proliferation of fact-finding commissions is an impressive symptom of the huge development of international law, starting with Nuremberg," said Goldstone, a former judge in South Africa and chairman of the Goldstone Commission that investigated political violence during the country's transition from apartheid. "This should be seen in a positive light."

Moderator David Tolbert, president of the ICTJ, challenged both speakers to explain why the explosion of fact-finding missions has failed to land more war criminals in international court. The answer, they conceded, is politics. But that doesn't mean the investigations haven't served a purpose. "We really cannot have a conflict anywhere

where we won't attempt to find out what took place," said Coomaraswamy, U.N. Special Representative for Children and Armed Conflict, and, as with Goldstone, a former Hauser Global Professor. "Accountability is much more complicated." One problem is a perceived double standard, Coomaraswamy noted. While there is international political will to investigate alleged atrocities in Darfur, for example, why is there none to pursue the regime in Myanmar?

Goldstone knows how complicated politics and accountability can be. As the head of the U.N. Fact Finding Mission on the Gaza Conflict, he ignited a firestorm after concluding that both Israeli and Hamas militants committed war crimes in Gaza in 2008 and 2009. (In an April *Washington Post* op-ed, he retracted some of his findings.) Nonetheless, Goldstone pointed out at the ICTJ event, militant groups now know their actions can constitute an international crime, and the Israeli military is investigating some officers: "I'm not optimistic that the fact-finding mission will go further in the international arena, but it is still resonating in the area." □

## When States Fail Their People, the World Must Step In

**T**HE U.N.'S FIRST WOMAN UNDER-secretary-general for legal affairs and legal counsel made a strong case for the key role the United Nations plays in promoting international law. "There is always a terrible tension between the need of the international community to get involved in state affairs and the need to respect sovereignty of states," said Patricia O'Brien, in a February speech at the Hauser Global Law School Program Annual Dinner. But when states fail to take care of their people, she said, the international community must assist.

The special Cambodian court that convicted Khmer Rouge leader Comrade Duch of crimes against humanity,

murder, and torture in 2010, for example, is a cooperative effort of the U.N. and the national government. More than 30,000 Cambodians traveled to Phnom Penh to be in or near the courtroom—a sign, O'Brien said, of how important the court's work is to the people: "It has become, in my view, the catalyst for the rule of law within the entire country."

O'Brien also praised the International Criminal Court, citing the tribunals for Yugo-

slavia, Rwanda, Sierra Leone, and Lebanon: "Without the rule of law, the lines between justice and tyranny can dissolve or disappear altogether."

O'Brien, who came to the U.N. from Ireland in 2008, consults daily with Secretary-General Ban Ki-moon and advises on issues related to war, humanitarian aid, and treaties.

"International law lies at the very heart of what the secretary-general is committed to doing for the United Nations," said O'Brien.



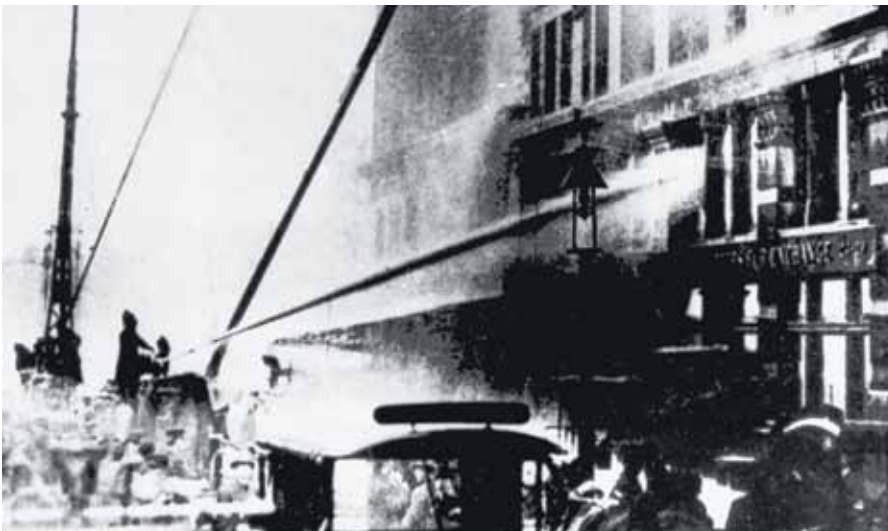
# The Tragedy Next Door

**O**N MARCH 25, HUNDREDS GATHERED on the corner of Washington Place and Greene Street to commemorate the centennial of the Triangle Shirtwaist Factory fire tragedy, which claimed the lives of 146 workers and inspired the first real labor laws in the United States. Among the crowd were current NYU Law students and professors joining union members, local and national political leaders, and relatives of the victims.

Some remember that, thanks to NYU Law students and their professor, the death toll that day wasn't even higher. As the horrific fire engulfed the top floors of the factory, workers, mostly young immigrant Jewish and Italian women, found themselves trapped. In the building next door, Professor Frank Sommer and his students took action, climbing to the roof and using

ladders to span the gap between buildings. The students "worked like beavers, apparently never giving a thought to the possibility that their own building might catch fire," Sommer told the *New York Times* that day. "How it was done I don't know, but in surprisingly short time about fifty girls were brought across the ladders to safety."

Arieh Lebowitz, associate director of the Jewish Labor Committee, who was taking part in the commemoration, said: "Before the fire there were no sprinklers, no limit on maximum number of hours a person can work, no ban on overnight shifts, no age restrictions, and no fire drills or fire exits." The legal influence of the tragedy is so wide and far-reaching that the *NYU Journal of Legislation and Public Policy* is preparing an upcoming special issue on the subject to mark the centennial. □



Senator Charles Schumer



Mayor Michael Bloomberg



## The Long Fight for Workers' Rights

Looking back at more than half a century of fighting for low-wage workers, women, and children, longtime labor advocate Dolores Huerta urged students to support wider equality. "If we don't have a strong working class, if we don't have strong labor unions," she said in the 17th annual Rose Sheinberg Lecture in October, "we don't have a democracy."

Huerta, who co-founded United Farm Workers of America (UFW) with César Chávez, has played a role in key workers' rights victories, including the California Agricultural Labor Relations Act and the federal Immigration Reform and Control Act of 1986, which granted amnesty to 1.3 million workers.

Her visible energy belying her octogenarian status, Huerta recalled her four-year stint in New York City leading a UFW grape boycott on behalf of workers who had been denied toilets, drinking water, and rest periods. She pointed to racism as the primary cause of today's anti-immigrant sentiment. Recent crackdowns have been applied selectively, she said: "They're aimed at those of us who happen to be people of color."

Now president of the Dolores Huerta Foundation, which brings together immigrants, the LGBT community, feminists, environmental activists, and labor rights advocates, Huerta shared her connection to the country's most famous community organizer: President Barack Obama. His "Yes we can" campaign slogan, she said, is a translation of "Sí, se puede," a phrase she coined in 1972 during a protest fast by Chávez. "When I met President Obama," Huerta recalled, "he said to me, 'I stole your slogan.' And I said, 'Yes you did.'"





## Law in the “Post-Racial” Era

**T**WO YEARS AFTER THE ELECTION OF the nation’s first African-American president, race continues to pose challenges for the legal system. Those problems were the subject of the 15th annual Derrick Bell Lecture on Race in American Society, “After Obama: Three ‘Post-Racial’ Challenges,” by Professor Devon Carbado of UCLA School of Law last November.

Often missing in contemporary discussions of race, said Carbado, is the issue of discrimination within racial groups. Phenotype and ancestry are not the only factors in racial mapping, he said. Dress, religion, level of assimilation, and speech can also trigger harmful stereotypes and support the idea of “degrees of blackness.” (A 2007 *Time* headline asked, “Is Obama Black Enough?”) Even if both candidates for a job are the same race, discrimination can still occur. “The question is not whether an institution might prefer white over black but whether an institution might prefer one

black over another,” he said. “It’s not total exclusion. It’s rather selective exclusion.”

Turning to the topic of racial preferences, Carbado suggested that the courts, which now apply a strict scrutiny framework in assessing the constitutionality of those policies, incorrectly assume that affirmative action is a thumb tipping the scale. But that ignores preexisting “tipping” of some groups against others, he added.

Carbado also took on the concept of color blindness—the idea that people should not see race (even if they do) in order to achieve “race neutrality.” However, stripping personal stories of anything that would potentially identify race robs the narrative of its meaning, he said. “Engaging the three problems as I posed them at least engenders a rethinking about some of our most fundamental assumptions of race,” Carbado concluded, “and that, I’m hoping, will open up doctrinal space for more antiracist possibilities.” □

## Safeguards for the Next Crisis

On the eve of his retirement from a congressional career that spanned more than three decades, Senator Chris Dodd reflected on the measures lawmakers have taken to protect consumers in their dealings with financial services firms, in particular the Dodd-Frank Act, which, among other things, established the new Consumer Financial Protection Bureau. As keynote speaker at the 2010 Global Economic Policy Forum last October, the former chairman of the Senate Banking Committee offered glimpses into the legislative battle to pass Dodd-Frank, including the wheeling and dealing needed to overcome stiff Republican opposition to a number of provisions. “We cannot legislate against crisis,” Dodd said. “But what we can do—what I hope we have done—is to build safeguards for the American people, so they know that they won’t get ripped off or see the economy collapse around them.” The event was co-hosted by the Jacobson Leadership Program in Law and Business, Pollack Center for Law and Business, and Center for Financial Institutions.



## An Abysmal Win-Loss Record for Asian-American Trials

JUDGE DENNY CHIN OF THE U.S. Court of Appeals for the Second Circuit illuminated the legal history of Asian Americans in the 12th annual Korematsu Lecture, “Great Asian-American Trials,” last March. Students in constitutional law courses are exposed to some of the most famous examples—including the Chinese Exclusion Act and *Korematsu v. United States*—but Chin went into greater detail in his lecture.

Whether as victims of crimes or as de-



defendants, Asian Americans have an “abysmal” record of winning favorable verdicts, Chin said. Among other examples, he described the multiple trials for the bias-motivated beating death of Vincent Chin in 1982, for which the defendants received no jail time. The Asian-American community responded with public rallies for justice, leading to new sentencing procedures and the increased application of civil rights laws to Asian Americans.

Some of the examples Judge Chin described, however, took place during or after World War II. He detailed the trial of Iva Toguri D’Aquino, who was convicted of treason in 1949 for allegedly broadcasting anti-American propaganda over Radio Tokyo under the notorious moniker Tokyo Rose. After proof emerged decades later of perjured testimony, Gerald Ford pardoned D’Aquino on the last full day of his presidency.

“The arc of justice sometimes bends under the pressure of national crisis,” said Chin. “We must do better.” □

# Thrust into the Spotlight



Guarini, Barofsky

**N**O ONE WAS MORE SURPRISED THAN Neil Barofsky '95 when he was tapped to oversee the government's \$700 billion bailout fund in 2008. In the eight days after Barofsky learned of George W. Bush's interest in him, the then-assistant U.S. attorney for the Southern District of New York interviewed at the White House and Treasury Department, and Bush officially recommended him. He became a national figure almost overnight.

Barofsky was the inaugural speaker for the Guarini Lecture last January. Part of the Public Interest Law Center's Leaders in Public Interest Series, the event also officially launched the Frank J. Guarini Government Scholars Institute, which aims to help NYU Law students build government careers in public service.

Barofsky discussed how great criticism comes with great power. He self-deprecatingly cited dubious honors (first on the *Wall Street Journal's* "Who Wall Street Hates the Most" list) and disparaging comments

("irresponsible headline hunter," said *New York Times* correspondent Floyd Norris). "We have wide authority to conduct the necessary oversight civilly and criminally and to report to the American people—the taxpayers, the involuntary investors in this program—exactly what's going on with their money." His office had charged 45 people with TARP-related fraud and had recovered or prevented losses of more than \$700 million, said Barofsky.

Shortly after the event, Barofsky would announce he was stepping down, and in March 2011 he would join NYU Law as senior fellow and adjunct professor. So in retrospect, it was touching for him to credit Professor Bryan Stevenson and Adjunct Professor S. Andrew Schaffer for inspiring him to pursue public service. "You can be a little selfish about public interest," Barofsky said. "It's not just about giving back—which is so important—but you can do it because it's something that you love. Because it makes the day go much more quickly." □

# Tackling the Great Issues of Our Time

**T**HE NEED FOR GOOD PEOPLE—PEOPLE with integrity, common sense, experience, dedication—in public service has never been greater," said Massachusetts Attorney General Martha Coakley. "We need our best and brightest, not just as an abstract principle, but as a commitment that we make to each other about how this democracy is going to work."

Coakley, who left private practice 25 years ago to work in government, spoke at the 14th annual Attorney General Robert Abrams '63 Public Service Lecture last September of the demand for public service-minded lawyers. She also reflected on her experiences with child abuse cases.

Five years after joining Massachusetts' Middlesex District Attorney's Office, Coakley was appointed chief of the Child Abuse Prosecution Unit in 1991. She worked to improve techniques for interviewing children, ensure victim safety, and change public perception about abuse cases. "There are few things worse than a false claim of child abuse," Coakley said. "They were the toughest cases in the world because you were in trouble if you didn't indict, and you were in trouble if you did and got it wrong." □



Richard Revesz, Coakley, Abrams

*In addition to Barofsky's and Coakley's lectures, other events in the Leaders in Public Interest Lecture Series were:*

"Pursuing Public Service," U.S. Representative **Diana DeGette '82**

"Using the Master's Tools: How Law School Prepares You to Change America," **Sally Kohn '02**, Founder and Chief Education Officer, Movement Vision Lab

"Confronting Injustice," Professor **Bryan Stevenson**, Executive Director, Equal Justice Initiative

"Living a Life in Legal Services," **Chris Lamb '86**, Executive Director, MFY Legal Services

"Expect the Unexpected: The Musings of a Department of Justice Lawyer," **Gail Johnson**, Senior Trial Counsel, U.S. Department of Justice, Torts Branch, Civil Division

"Social Change Through the Law," **Anthony Romero**, Executive Director, ACLU

"Small Organizations Can Do Big Things: Juvenile Justice and Child Welfare Reform," **Lourdes Rosado '95**, Associate Director, Juvenile Law Center

"Is Social Justice Best Promoted by Being a Prosecutor or Public Defender?" **Robin Steinberg '82**, Executive Director, the Bronx Defenders; **Nigel Farinha '92**, Deputy Chief, Manhattan District Attorney's Office

"Ending Poverty: The Lawyer's Role," **Alan Houseman '68**, Executive Director, Center for Law and Social Policy

"Striking the Balance in HIV Law: Protecting Civil Rights and Saving Lives," **Rose Gasner**, Deputy General Counsel, NYC Department of Health; **Hayley Gorenberg '92**, Deputy Legal Director, Lambda Legal

"Tiny Ripples of Hope: Lawyers in Public Service," **Judge Amul Thapar**, U.S. District Court for the Eastern District of Kentucky





Henry with Norman Dorsen, director of the Madison Lecture Series

## Examining Justice Harlan

**U**.S. SUPREME COURT JUSTICE JOHN Marshall Harlan II, a conservative-leaning justice who concurred in some of the more progressive opinions of the Warren Court, was the subject of the 42nd James Madison Lecture last October. In an address on constitutional originalism, Robert Henry, former chief judge of the U.S. Court of Appeals for the 10th Circuit and now president of Oklahoma City University, examined Harlan's jurisprudence.

"In one important sense, Justice Harlan could be thought of as an originalist," Henry said. "He believed that his approach was both faithful to the principles of the nation and more likely to lead to just

decisions." The justice's dissent in *Poe v. Ullman* (1961), for example, laid out his support of a broader reading of the 14th Amendment's due process clause, but not an unfettered interpretation. Harlan characterized the method as part of a balancing act between individual liberties and societal demands, and described "judgment and restraint" as vital when weighing literal text and living legal traditions.

Harlan was confident, Henry said, "that good judges can, as they have for centuries, exercise their authority in a principled, restrained way without requiring an ahistorical, formal rule to constrain them. Justice Harlan was living our traditions." □



## Religion and Charity

Gary Anderson, a joint fellow at NYU Law's Straus Institute for the Advanced Study of Law & Justice and Tikvah Center for Law & Jewish Civilization, presented the ninth annual Caroline and Joseph S. Gruss Lecture, "I Give Therefore I Am—The Meaning of Charity in Jewish and Christian Thought," last April.

## The Trial of Jesus

IN HIS THREE-PART LECTURE SERIES ON Jesus of Nazareth, University Professor Joseph Weiler noted that at least 400 books focused solely on the trial have been published. He called Jesus's appearance before the Sanhedrin "arguably the most famous trial in Western civilization" and asserted that verifying the historical accuracy of the trial's details is much less important than examining the influence of the New Testament version of the event on latter-day perceptions of justice.

Weiler launched "The Passion of the Christ: The Trial of Jesus" by examining procedure and considering the cultural significance of the trial. In his second lecture, he focused on the trial's substance in looking at exactly what Jesus was accused and convicted of, as well as the theological implications



of the proceedings. In the third and final lecture, Weiler examined the trial's aftermath in terms of its subsequent historical significance for the relationship between Jews and Christians. He also touched on questions of identity, guilt, and collective responsibility.

The lectures, part of the Tikvah Public Lecture Series, were presented by the Tikvah Center for Law & Jewish Civilization, of which Weiler is co-director. □

## A Challenge to the Health Reform Act

**O**N THE SAME OCTOBER DAY THAT Florida Judge Roger Vinson of Federal District Court denied the Obama administration's motion to dismiss a lawsuit challenging the constitutionality of the Patient Protection and Affordable Care Act, citing an *NYU Journal of Law and Liberty* article by Randy Barnett, the Carmack Waterhouse Professor of Legal Theory at Georgetown University Law Center, Barnett spoke at NYU School of Law on the part of the law that's at the heart of the legal battle: the health insurance mandate.

The individual mandate requires everyone who can afford to buy insurance to do so, thus, asserts Barnett, compelling citizens to engage in economic activity. In the sixth annual Friedrich A. von Hayek Lecture, "Commandeering the People: Popular Sovereignty and the Health Insurance Mandate," Barnett examined historic



Supreme Court decisions relating to both the commerce and necessary and proper clauses, and concluded that the mandate is unauthorized and unconstitutional. □

# Ridding Cities of Crime

Employing a controversial policing technique or being shocked into action, urban crimefighters share what works.

**W**HAT DOES IT TAKE TO BRING DOWN urban crime? Two of today's leading voices on the topic, New York City Police Commissioner Raymond Kelly (LL.M. '74) and Newark Mayor Cory Booker, shared insights last fall on what works, in lectures that kicked off the "Conversations on Urban Crime" series at the Center on the Administration of Criminal Law (CACL).

Kelly, called a "living legend in law enforcement" by CACL Executive Director Anthony Barkow in his introduction, has presided over a dramatic drop in crime since taking over the city's police force. In his November talk, Kelly spoke of the crime-fighting strategies the NYPD has relied on during a time when the risk of terrorism has escalated, the economy has deteriorated, and the police force has shrunk by some 6,000 officers since 2001.

One of the department's most controversial crime suppression tactics is what's known as "stop and frisk." While critics claim it leads to racial profiling and that minorities are stopped at an inappropriately high rate, Kelly denied those claims and vigorously defended the approach: "I believe there is a direct relationship between the stops we conduct and the fact

that last year we recorded the lowest level of crimes [since 1963]."

A month earlier, Booker described how he successfully delivered on his promise to reduce crime in a city long known for violence in its streets.

A notorious triple homicide in a city schoolyard in August 2007 proved to be a turning point, Booker said. In the tragedy's aftermath, local foundations provided funds for public safety cameras and other crime-detection technologies, community leaders stepped up to do more, and area law enforcement agencies began to coordinate information more effectively.

The city also launched a project in which law firms offer pro bono legal assistance to people being released from prison, which has helped improve certain recidivism rates. "The more innovative we

can be in looking at the criminal justice system as a whole," Booker said, "the more difference we can make."

While acknowledging the reductions in violent crime, Booker maintained that no level of violence is tolerable. Yet, the man who has led New Jersey's largest city for four years added, "I'm actually more hopeful than I've ever been." □



Booker



Kelly

## Above the Law?

DICTATORS ARE BULLIES. BUT AS former Egyptian President Hosni Mubarak demonstrated this year, they are bullies with the power to create their own reality and believe their own lies. "Trying the Tyrants: The Trials of Slobodan Milosevic and Saddam Hussein," a February panel discussion co-sponsored by the Institute for International Law and Justice, explored why bringing a dictator to justice is challenging. "They made the law, they were the law, they were above the law," said Judith Armatta, a human rights lawyer and author of *Twilight of Impunity: The War Crimes Trial of Slobodan Milosevic*.

Armatta was joined on the panel by Patricia Wald, a former judge on the International Criminal Tribunal for the former Yugoslavia, and Jennifer Trahan, an NYU assistant clinical professor who consulted on the prosecution of Saddam Hussein for the International Center for Transitional Justice. Lisa DiCaprio, an NYU clinical associate professor of social sciences, moderated the discussion.

Milosevic and Hussein flagrantly used the court as a platform to make their case, and both became adept at manipulating the media. The judges' failure to clamp down probably added years to the Milosevic proceedings. (Milosevic died of a heart attack four years into the trial.) "In the Saddam Hussein trial, every time he got up and walked out, screaming and yelling and boycotting, the press covered it," said Wald. "They never covered the times when he actually obeyed what the judge said to do."



Wald

## Activism and State Courts

Paul J. De Muniz, chief justice of the Oregon Supreme Court, delivered the 17th annual Justice William J. Brennan Jr. Lecture on State Courts and Social Justice last October. De Muniz's talk, "Overturning Precedent: The Case for Judicial Activism in Reengineering State Courts," addressed measures court officials need to take to cope with burgeoning dockets and shrinking budgets. State court systems today, said De Muniz, are regarded as "too big, too costly, and too cumbersome" and need to change if they hope to maintain their fiscal and institutional independence.







Winship, Bonner, Kimball, Vice Dean Jeannie Forrest, Sharpe, and Anderson

## Making Transgressors Pay

**O**NE YEAR AFTER THE BP *DEEPWATER Horizon* oil spill in the Gulf of Mexico, the 10th biennial Nicholas J. Healy Lecture on Admiralty Law asked, "What Is the Limit?" regarding punitive damages in maritime law. Speakers included Charles Anderson, head of Skuld North America and adjunct professor at Columbia Law School, and Peter Winship, James Cleo Thompson Sr. Trustee Professor of Law at the Southern Methodist University Dedman School of Law. The speakers

examined past precedents, with Winship discussing Supreme Court cases over the past couple of decades that have dealt with punitive damages in maritime law and Anderson focusing on punitive damages assessed in oil pollution cases. The event was moderated by Patrick Bonner, president of the Maritime Law Association of the United States; John Kimball, adjunct professor at NYU School of Law; and David Sharpe, professor emeritus at the George Washington University Law School. □

## When the U.S. Shares Tax Returns with Other Governments

ON MARCH 22, MICHAEL DANILACK (LL.M. '90), deputy commissioner of the Internal Revenue Service's Large Business and International Division, delivered the 11th annual NYU/KPMG Tax Lecture. In "Increasing Transparency in the U.S. Self-Assessment Tax System: A Paradigm Shift," Danilack focused on greater disclosure by taxpayers to the IRS on their tax returns, especially concerning offshore bank accounts and uncertain tax positions. He received some heat when he took the position that the U.S. government has the right to share its taxpayers' return information with foreign governments without notify-

ing the individual or corporation. The audience took issue with the government's argument and debated the intentions of information sharing.

Danilack said the U.S. government deals only with governments that intend to use the information for legitimate auditing purposes. "We're sensitive to the argument

that taxpayers should know when their information is being shared," he said. The IRS, Danilack added, notifies a taxpayer when another government asks for information. But he also conceded that if the foreign government specifically asks that the IRS not notify the taxpayer under investigation, it will comply. □



## One Family, Three Political Beliefs

Nobel Peace Prize winner Shirin Ebadi, co-founder of the Defenders of Human Rights Center in Iran, discussed her memoir, *The Golden Cage: Three Brothers, Three Choices, One Destiny*, with Karen Greenberg, executive director of the Center on Law and Security, which co-hosted the talk with the Kevorkian Center for Near East Studies at NYU. Ebadi wrote of a family that has a daughter and three sons.



"One of the sons is a nationalist, one is a Communist, and one is an Islamist," said Greenberg. "And the building tensions between these sons pull the family apart."

## The Art of Incorporation

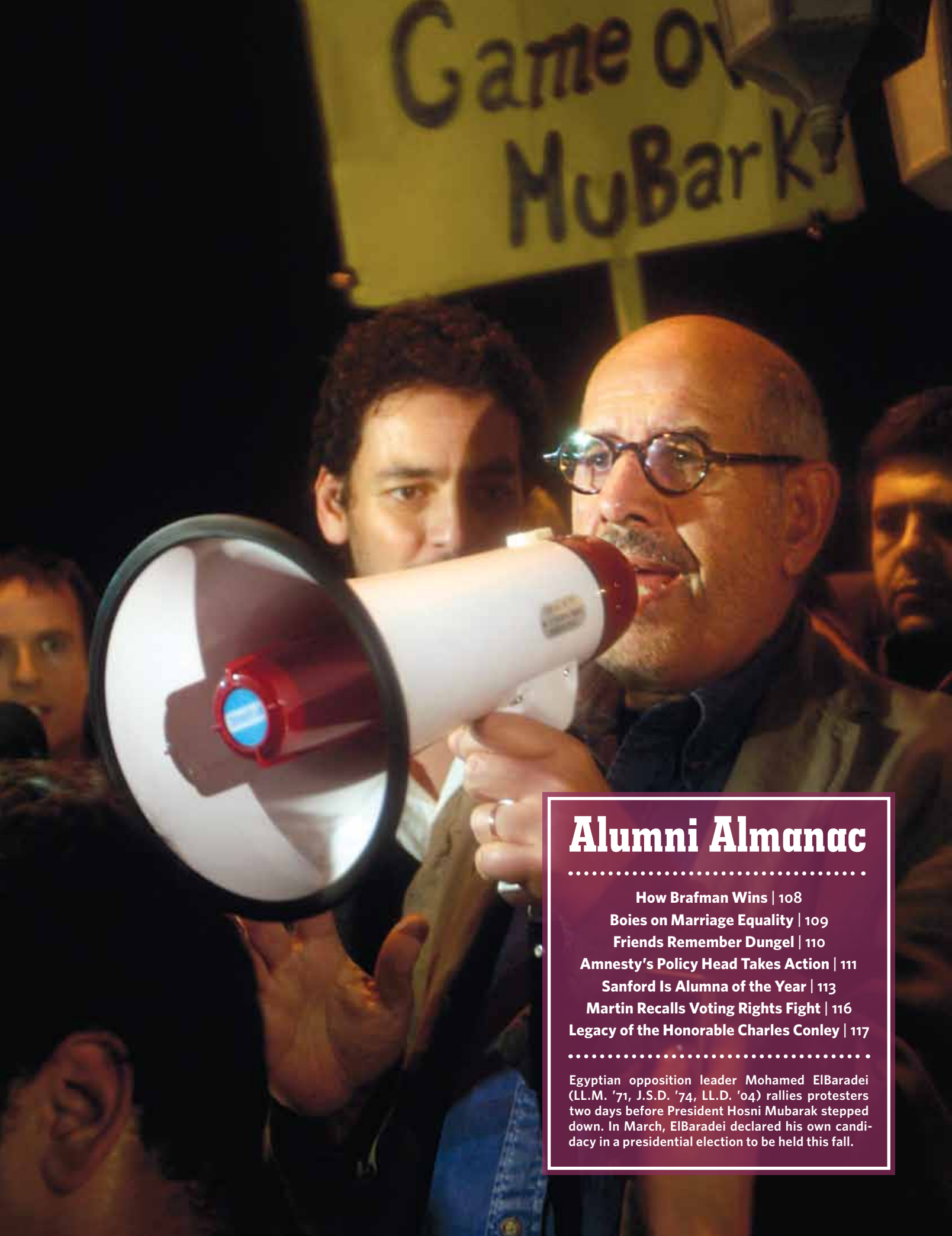
Wayne Perry Professor of Taxation Daniel Shaviro delivered the 15th annual David R. Tillinghast Lecture on International Taxation last September. In "The Rising Tax-Electivity of U.S. Corporate Residence," Shaviro explored the tension that exists between the U.S. system of worldwide taxation on resident corporations and the ease with which companies can decide to incorporate domestically and abroad.

H. David Rosenbloom, director of the International Tax Program, introduced Shaviro and acknowledged the lecture's namesake, David Tillinghast, a partner at Baker & McKenzie and a preeminent international tax expert. Rosenbloom also took a moment to remember Paul McDaniel, the first faculty director of the International Tax Program, who passed

away in July 2010. "Paul's contribution to this program was just immeasurable," said Rosenbloom. "He was an absolute giant in this field, and I want to honor his memory, his contribution, and my profound respect for everything he did."



Rosenbloom, Shaviro



Game over  
Mubarak!

## Alumni Almanac

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Egyptian opposition leader Mohamed ElBaradei (LL.M. '71, J.S.D. '74, LL.D. '04) rallies protesters two days before President Hosni Mubarak stepped down. In March, ElBaradei declared his own candidacy in a presidential election to be held this fall.





## The Defense Never Rests

With talent, heart, and hard work, Benjamin Brafman wins over clients and juries in many, many impossible cases.

**N**IGHTCLUB OWNER PETER GATIEN remembers awaiting the verdict in his February 1998 federal trial for promoting drug dealing at the popular New York clubs Limelight and the Tunnel. Federal prosecutors had endless resources, tape recordings, and documents in their favor, and Gatien feared he didn't have a chance. Standing next to him was defense attorney Benjamin Brafman (LL.M. '79). "It was the defining moment of my life," Gatien says. "I was looking at 17 years. Ben held my hand, and he was actually shaking."

After just two and a half hours of deliberation, the jury acquitted Gatien. Onlookers (many of whom worked in his clubs) burst into cheers. He and Brafman hugged, Gatien recalls. "He lived my trial as much as I did."

That devotion accounts in large part for Brafman's tremendous success as a defense lawyer. The rest is "a combination of theatrical skills and dogged preparation," says *New Yorker* legal affairs staff writer Jeffrey Toobin, who insists that Brafman is the best courtroom lawyer he has ever witnessed.

Brafman first attracted notice in the 1970s as an assistant district attorney in the Manhattan D.A.'s office. Itching for trial experience, he took any and all cases, including the long shots. He tried 24 cases over a four-year period and lost only one. In 1985, with a practice of his own, he won an acquittal for a defendant in a highly publicized case involving the Gambino crime

family. More mob cases came his way. "I cut my teeth on those cases," Brafman says.

Today, he is one of the best-known defense attorneys in the city—and well beyond. Dominique Strauss-Kahn hired Brafman to fight bombshell sexual assault charges that forced his resignation from the International Monetary Fund this spring. Brafman also represented hip-hop/fashion entrepreneur Sean Combs over his alleged role in a 1999 nightclub shooting, and rapper Jay-Z on assault charges. He briefly defended Michael Jackson in a 2004 child molestation trial, and New York Giant Plaxico Burress in a 2008 firearms case.

Although celebrity cases have propelled Brafman into the spotlight, they comprise just a small portion of a practice that includes white-collar and common criminal cases, plus commercial litigation. Among his peers he is not viewed as a celebrity lawyer, says defense attorney Andrew Lawler. "Ben is someone to go to because you have a problem and you're looking for a good lawyer."

That good lawyering starts with fierce loyalty to his clients. "He gives them his blood and guts," says colleague Robert Katzberg, whose firm, Kaplan & Katzberg, shares a floor with Brafman & Associates in an East Midtown office tower. Katzberg says that Brafman's clients respond in kind, with one even naming his son Benjamin.

Brafman is also blessed with the gift of gab, a likable personality, and quick-

footedness—all of which make for riveting courtroom performances. Michael Bachner, who represented a co-defendant (also acquitted) in the Combs trial, recalls how Brafman "decimated a key witness during a two-hour extemporaneous cross-examination, at the end of which everyone in the courtroom wondered why the prosecution ever even called that witness."

Colleagues say he charms judges, jurors, and opposing witnesses alike with his disarming 5'6" stature and down-to-earth Brooklyn upbringing as well as a self-deprecating sense of humor, which he cultivated while doing a short stint as a stand-up comic in his 20s. "Jurors love him," says Combs, who calls Brafman "Uncle Benny" and gets in touch each year on his trial anniversary. "He has a New York way of connecting with New York jurors. He's the guy you'd go to a baseball game with, the guy from around the neighborhood."

Speaking to a group of students as the guest at a dean's roundtable in November, Brafman said: "Natural talent gets you somewhere. But it doesn't mean anything unless you put in the hours." (See page 119 for a list of the dean's guests in 2010–11.)

By all accounts, Brafman prepares assiduously for trial. Bachner worked with Brafman in the 1980s on organized crime cases that hinged on government wiretaps. Brafman required him not only to listen to the prosecutors' tapes (while other lawyers would only read the transcript) but also to listen to the part when the witness is being wired up—a strategy that often provides the facts that are the key to victory. Brafman credits his work ethic to his father, Sol, who spent 40 years working in the garment district. Brafman's father and mother, Rose, were Holocaust survivors and raised their family in an Orthodox home.

Brafman earned his B.A. in 1971 from Brooklyn College and his J.D. in 1974 from Ohio Northern University. He went on to get an LL.M. in criminal justice from NYU School of Law. "It was important for me to know that I could dance with the best and not trip," he says, explaining why he sought a degree specifically from NYU Law.

Brafman says his faith and family keep him grounded: "I have a solid, happy personal life, which makes me a better lawyer." He and his wife of 38 years, Lynda, are close to their two children and grandchildren. He is also active in a number of charities, including Kulanu, a Jewish school for disabled children, and the Israel Cancer Research Fund. "Being a good lawyer is great," says Brafman, "but being a good person is more important." □ *Jennifer Frey*

# For Marriage For All

ONE MONTH AFTER HE ARGUED BEFORE the U.S. Court of Appeals for the Ninth Circuit to strike down California's ban on gay marriage, Trustee David Boies (LL.M. '67), founder and chairman of Boies, Schiller & Flexner and one of *Time* magazine's 100 Most Influential People in the World, delivered an impassioned speech, "Why Marriage Equality is Important to Everyone," at the January NYU School of Law Annual Alumni Luncheon.

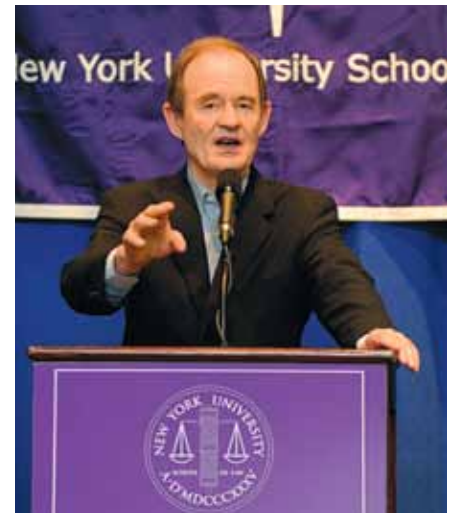
The stakes, Boies said, could not be more universal. "Each one of us has a stake in the equality of our country, of the non-discriminatory nature of this country," he said. "This is a nation that is defined not by race, not by a particular ethnic group, not even by language. It is defined by culture, and that culture is a culture of equality, of opportunity, of non-discrimination."

In a surprise, high-profile announcement nearly two years ago, Boies joined forces with former U.S. Solicitor General Theodore Olson, a member of the Dwight D. Opperman Institute of Judicial Administration's board of directors, to challenge the constitu-

tionality of Proposition 8, the ballot measure that amended the California state constitution to prohibit same-sex marriage. At press time, the unlikely co-counsel—Olson bested Boies in *Bush v. Gore* in 2000—were still awaiting a decision from the Ninth Circuit that will likely arrive after publication of this magazine issue. Many expect the case to reach the Supreme Court.

As Boies explained, his and Olson's legal argument has three components. First, marriage is a fundamental right that the Supreme Court has continually upheld. Second, depriving same-sex couples of that right causes both them and their children direct harm. Finally, outlawing same-sex marriage fails to advance any legitimate state interest.

How the media-dubbed "odd couple," with their almost diametrically opposed political viewpoints, agrees on the issue of same-sex marriage boils down to logic, Boies explained. "This is not a conservative or liberal issue. This is not a Republican or Democratic issue. This is a human rights issue, a civil rights issue. It's maybe the last



really important civil rights issue that we face in this country."

Despite his "scars" from his loss in *Bush v. Gore*, Boies displayed a sense of humor regarding his collaboration with Olson. "When we get to the Supreme Court... I'm going to guarantee the four justices that I got in *Bush v. Gore*, and [Olson is] going to guarantee the five justices that he got—or their ideological successors—in *Bush v. Gore*, and we're going to win this case nine to nothing." □

## A Chance to Use Law for Change

The political uprisings against controversial rulers in the Middle East and North Africa helped Professor of Law on Leave Ronald Noble make his point about the use of law to achieve social justice. "You could say that the desire for fair and equitable treatment by all has gone viral," he said in his keynote at the 2011 Black, Latino, Asian Pacific American Law Alumni Association (BLAPA) spring dinner in April.

Noble was appointed secretary general of Interpol, the world's largest international police organization with 188 member countries, 10 years ago at age 44. He was the youngest person ever to hold that office. Last year, he was re-elected to serve his third five-year term. And for the last four summers he has taught in the NYU@NUS program in Singapore. Noble described how Interpol has helped achieve social justice worldwide, including his own efforts to appoint officials from underrepresented countries to key leadership positions. Doing so also ensures that Interpol's "actions do not reflect the will of any one individual or one system or one country, but they include the best of all possibilities," he said.

Also at the dinner, members of the NYU Law community were honored. New York City Family Court Judge Betty Staton '79 presented Distinguished Alumni Achievement awards to Taina Bien-Aimé '91, executive director of Equality Now, and Suzette Malveaux '94, associate professor of law at the Catholic University of America Columbus School of Law; a Distinguished Service Leadership Award to Professor of Clinical Law Bryan Stevenson; and the \$10,000 BLAPA Public Service Scholarship to Adrienne Lucas '13.

**IN THE LIMELIGHT** Staton, far right photo, presented awards to Stevenson, Malveaux, and Bien-Aimé, who flank BLAPA President Rafiq Id-Din '00 and keynote speaker Noble.





# From Research to Advocacy, Forging Careers in Human Rights



Corcoran



Huckerby



Goodman



Satterthwaite



Bien-Aimé

“Sharpening the Cutting Edge: NYU Law Alumni at the Forefront of Human Rights Scholarship, Lawyering, and Advocacy,” moderated by Anne and Joel Ehrenkranz Professor of Law Ryan Goodman, was the Law Alumni Association’s fall lecture, co-sponsored by the Center for Human Rights and Global Justice. Joining Goodman were Taina Bien-Aimé ’91, executive director of Equality Now;

Widney Brown ’94 (profiled on opposite page), senior director of international law and policy at Amnesty International; Carole Corcoran ’83, general counsel and director of special projects at International Crisis Group; and Adjunct Professor Jayne Huckerby (LL.M. ’04) and Professor Margaret Satterthwaite ’99, who co-teach the NYU School of Law Global Justice Clinic.



## Joakim Dungal (1978–2011)

On April 1, Joakim Dungal (LL.M. ’07), 33, died when a large group of demonstrators attacked the U.N. mission where he worked as a human rights officer in Mazar-e-Sharif, Afghanistan.

A native of Sweden, Dungal earned his bachelor of laws and an LL.M. at Gothenburg University and an additional LL.M. in international law at NYU. Colleagues say he was equally adept at writing scholarly articles and gently interviewing victims of human rights abuses. Before moving to Afghanistan in February, Joakim worked with the Special Court for Sierra Leone and in the war crimes tribunal at The Hague in respect to war crimes in Yugoslavia and Rwanda.

Dungal’s NYU Law faculty and friends remember a man who was uncommonly strong both physically and in spirit, who had a passion for peace and justice, and who knew exactly what he wanted to do with his life.

*Joakim was intrigued by human rights and the power they held to bring positive change, and he made it very clear in conversations that he wanted to go out into the world and make a difference. He certainly kept his promise, taking a succession of important jobs in the field, and finally made his way to the most difficult post of all, working for the U.N. in Afghanistan.*

**PHILIP ALSTON**  
JOHN NORTON POMEROY PROFESSOR OF LAW

*He was a very hard-working, dedicated scholar of human rights law. He was determined to extract the utmost from his academic experience at NYU. Quite apart from his studies, he was a thoroughly decent person. He was forthright and confident. And somewhat incongruously—incongruous in academics, at least—he was physically one of the strongest people I have ever met. The weight machines in the NYU gym weren’t enough for him so he would get people—me included—to lean down on the weights while he lifted them.*

**PATRICK MAIR (LL.M. ’07)**

*Joakim was so good at his job that he could have done anything, but he wanted to be the closest to the people he wanted to help. I thought he was invincible and still have difficulty realizing that he is gone.*

**CÉLINE FOLSCHÉ (LL.M. ’07)**

The most revealing, and now poignant, of statements is the one Dungal himself wrote in 2005 as he prepared to enter the NYU Law LL.M. program.

*Pierre Bayle said that history is “but a collection of continuous crimes and misfortunes of mankind.” Sad as I am to have to agree with him, I have chosen not to stand by and watch while this history continues, because I believe people can settle their differences peacefully, rather than through violence.*

## Thomas Brome’s Pillars of Success

AT A CEREMONY LAUDING EXCELLENCE based on academic success, Trustee Thomas Brome ’67 made the point that true success also requires two less-quantifiable attributes. “Your academic achievements are a marvelous platform for a professional career, but it does not make one. You will need character,” he said. “Your successful careers will require love and support from your loved ones. And your family will require love and support to be successful.”

Brome retired in 2007 from his partnership at Cravath, Swaine & Moore, where he represented investment banks and companies on IPOs and general corporate matters for 40 years. On April 6, 2011, he was inducted as an honorary member of the NYU School of Law chapter of the Order of the Coif. He had first earned membership the traditional way, graduating in the top 10 percent of his class.

A Root-Tilden Scholar while at NYU Law, Brome continued his public service through many philanthropies, including serving as president of the Legal Aid Society from 1994 to 1996. □



HONORABLY INDUCTED The Order of the Coif’s NYU Chapter President Oscar Chase with Thomas Brome.

# Following Words with Action

**A**FTER STORIES OF ABUSE AND torture at the Guantánamo Bay detention facility began seeping out in 2003, human rights groups demanded basic rights for detainees. But when lobbying government officials, organizing protests, and drafting reports proved ineffective, Widney Brown '94, senior director of international law and policy at Amnesty International, made a bold choice. "There are times when the top decision makers aren't interested in change," Brown says. "That's when you need to be more aggressive."

Brown's solution was to help create the hard-hitting "Close Guantánamo" campaign. Amnesty unfurled the effort in 2008 to capitalize on the presidential race. The cornerstone of the initiative was putting a 10-by-6-foot Guantánamo cell on tour across the United States, inviting passersby to enter. In some cases, volunteers were asked to assume the stress positions detainees had been subjected to. "People were saying, 'Wow, this hurts,'" says Brown. "And we were like, 'That's the point.'" Public sentiment shifted. One of President Obama's first official acts was to sign an executive order to close Guantánamo. Although it remains open, conditions have reportedly improved.

In her 14 years as a human rights advocate, Brown has learned how to strategically rabble-rouse to get things done. That willingness to act sets her apart from other policy directors, who traditionally produce reports. "A lot of rights activists come from an academic research background," says Joseph Saunders '93, deputy program director at Human Rights Watch, where Brown worked for nine years before moving to Amnesty in 2006. "Widney's instincts have long been those of an advocate, and that's one reason why she doesn't just focus on researching reports but keeps her eye on the broader issue—namely, figuring out how we can actually change policies to improve lives."

Indeed, one of the hallmarks of Brown's career has been trying to stretch the human rights agenda so that it addresses the challenges that make life for the most vulnerable so difficult. "People in many parts of the world," she says, "live daily with fear and want, and as a human rights organization we need to address both issues." Officially, her portfolio at Amnesty covers issues that cross transnational boundaries; she's responsible for everything from refugee and

immigrant rights to advocacy before international bodies such as the United Nations. But Brown sees her mandate—and Amnesty's—more expansively. To her, issues like access to basic health care and food security are part of the human rights community's bailiwick.

That conviction stems in part from her international travels. As she visited places ranging from Saudi Arabia to Uganda, Brown was struck by the fact that the most marginalized citizens were suffering from a lack of services such as potable water and consistent electricity, and governments were unable, or unwilling, to provide the infrastructure to deliver them. On her own time, she convened a group of civil engineers in London to discuss how they could tap technology to improve conditions in the most deprived regions of the earth. "The idea," she explains, "is to find something like the cell phone that's done more to improve the lives of the world's poor than any other modern invention." Members of the group are now attempting to raise money from the corporate engineering private sector to pay to dispatch an Iraqi engineer to install solar panels in his native country, with an eye toward providing sustainable electricity to communities there.

Brown decided to attend law school 13 years after graduating from George Washington University because she knew a J.D. could provide the entry to the human rights work she coveted. In 1997, after representing gay victims of hate crimes in New York City for three years, Brown joined Human Rights Watch. There, she started authoring reports on human rights abuses, and her work quickly garnered attention. "Hatred in the Hallways"—an investigation into the harassment of gay, lesbian, bisexual and transgender youth in U.S. high schools—has been cited by multiple U.S. courts since its publication in 2001.

Now that she does more conceptualizing rather than writing of reports, Brown has made a point of coaching junior colleagues in how to showcase their research. When Esther Major, a researcher in the Central America division at Amnesty, presented arguments against Nicaragua's

total ban on abortion at the U.N.'s Committee Against Torture, Brown guided her through every step of the process. "She was permanently on the phone with me," says Major. The researcher succeeded in convincing the committee to issue a "strong recommendation" in 2009 that Nicaragua reconsider its abortion policy.

Brown emphasizes the importance of matching the technique of persuasion to the target Amnesty is trying to sway. As "Close Guantánamo" proved, she doesn't shy away



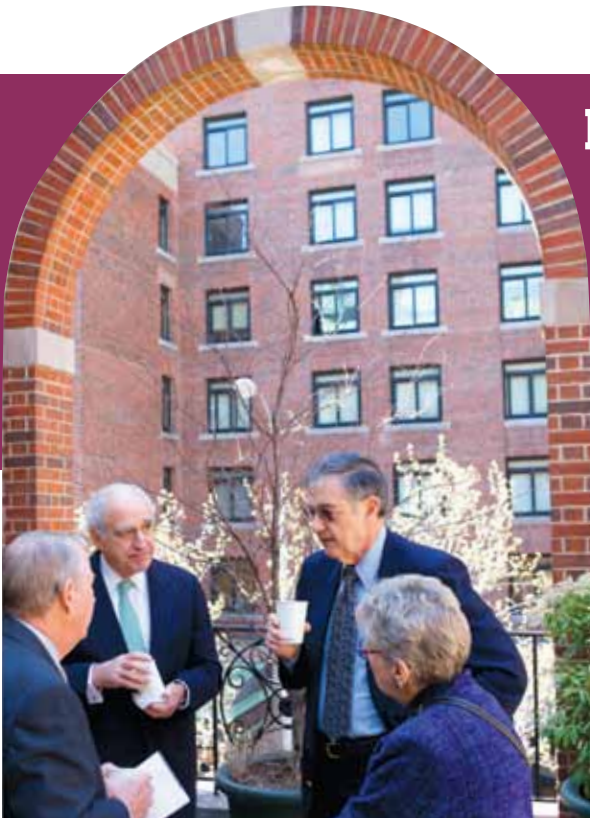
from confrontation, but she is also a believer in subtle persuasion—something she says she learned at the NYU School of Law.

In 1992, Colorado passed a constitutional amendment that excluded gays and lesbians from antidiscrimination laws in the state. Brown and Glenn Greenwald '94, now a blogger at Salon, responded by urging the Law School to boycott Colorado. The pair met with individual members of the faculty to encourage them to sign on. Brown says she "learned not to ask up front if someone was going to vote our way" but to begin by making her case instead. "You need to give people room to change their minds." A majority of faculty agreed to boycott conferences in that state, which admittedly was more a statement than an economic blow. And four years later the Supreme Court struck down the amendment, in *Romer v. Evans*. Brown now credits those hours in faculty offices with teaching her the skills she uses today to coax foreign ministers and U.S. policymakers to support a human rights agenda. "It was," says Brown, "the best training for what I do now." □ *Alexandra Starr*



## Reunion 2011: Old Friends, New Ideas

The Reunion program featured Daniel Shaviro moderating a panel on tax policy, jobs, and the deficit; Katherine Strandburg on DNA and patents; Vicki Been '83 on the impact of the Stuyvesant Town default; and Barbara Gillers '73 (LL.M. '87) on advocating before a tribunal. At the awards luncheon, Martin Payson '61 received the Judge Edward Weinfeld '21 Award; Jay Furman '71, the Alumni Achievement Award; John Goldberg '91, the Legal Teaching Award; Amanda Norejko '01, the Recent Graduate Award; Taina Bien-Aimé '91, the Public Service Award; and Mitchell Jacobson '76, the Vanderbilt Medal. Alumni spanning five decades of classes carried on the tradition of dining and dancing at the Waldorf-Astoria in the evening.





# Seizing the Moment

**M**ANY LAWYERS MAP OUT THEIR career plans with precision. They know exactly what kind of law they want to practice almost from the minute they begin law school. Christina Sanford '00, a Root-Tilden-Kern Public Interest Scholar, thought she knew, too.

"I had one main goal: I wanted to work in public policy on child welfare and poverty issues," said the Law Women's 2011 Alumna of the Year in an interview before she accepted the award. The international arena wasn't part of that plan. But after serving as



a summer intern at the State Department, she was offered a spot as an attorney/adviser in the Office of the Legal Adviser at the U.S. Department of State a year out of law school. "She was a self-described U.S. policy wonk," says her NYU Law roommate Carrie Syme '00. "So ending up in the State Department surprised her a little bit. But I think she quickly realized that it's all part of the same commitment to public service."

Sanford started on Monday, September 10, 2001, expecting her job responsibilities to be a mixture of management and regulatory work, such as dealing with what allowances foreign-service officers are legally eligible for. "The first day was pretty quiet," she told the audience at the award reception. "It got considerably busier."

When the second plane hit the tower, Sanford remembers, she was getting her badge. The nature of her job changed instantly. During the year that followed, she spent a majority of her time coordinating embassy evacuations. Since then she has helped establish the Office of the U.S. Global AIDS Coordinator, worked on the State Department's 9/11 task force, advised the newly appointed government in Baghdad in 2004 through the transition to the nation's first democratically elected gov-

ernment, and most recently helped Sudan figure out how to handle the upcoming secession of southern Sudan. "It's not your typical legal job," she admits candidly. "But I can't think of a better job or one that has given me more opportunities."

The chances she has had would make a wistful globetrotter green with envy. In the first six months on the job, she traveled to New Delhi to help with evacuations at the embassy there and has since been to Ethiopia, Chad, Kenya, Iraq, and the Sudan, among other countries. Not bad for someone who grew up just outside of San Francisco, went to college in Arizona, and hadn't ever applied for a passport. "Before I started at the State Department, I had never gone anywhere that required one," she says.

Mindful of her responsibility to be discreet, Sanford, now 37, says that she has been able to have an impact on world events and how they unfold. "Watching things happen that you know you have contributed to—knowing that you've helped—is incredibly exciting and rewarding," she says. She also loves the constantly changing nature of her job. State's legal office moves the 170 attorneys in the department around every few years—and for Sanford that's a good thing. "I may sound a bit like Pollyanna. But what I like most about this job is that I get to change jobs on a regular basis," she says with a warm smile, tucking her long brown hair behind her ear. "We get to work on lots of different issues, and that lets you continue learning. It never goes stale."

Not everything is always rosy, of course. Sanford had to live in a war zone in Iraq for a year, for example, where she rarely, if ever, ventured outside without a military escort. And she says the seeming paralysis caused by consensus-based decision making frustrates her. Nevertheless, Sanford considers herself lucky. "When I go to work, I deal with issues of law like how the Sudanese will be able to divide the wealth in the country between its two halves when the south secedes," she says. "It's human interest."

And after all, helping people is pretty much what Sanford's original goal boils down to. "Be prepared," says the recipient of the 2006 Call to Service Medal awarded by the Partnership for Public Service, offering advice to today's law students. "You could end up doing something completely different than you expect. But don't close yourself off from the opportunity." You very well might end up where you wanted to be after all. □ *Dody Tsiantar*

## Celebrating Panama's First Presidente

A Panamanian alumni reception last September became a tribute to Guillermo Endara (M.C.J. '63) on the first anniversary of his death. After years of dictatorship, Panama made Endara its first democratically elected president in 1989. NYU Law alumni were joined by 300 guests from the worlds of Panamanian politics, courts, and legal academia.







# Scholars and Benefactors Meet and Greet

**1** Kenneth and Kathryn Chenault AnBryce Scholar Jayla Randleman '13 with Trustee Kathryn Chenault '80



**2** Brodsky Family AnBryce Scholar Alina Fortson '12 with Katherine Brodsky '06 and Daniel and Estrellita Brodsky

**3** Thomas E. Heftler Scholars Brian Pete '11 and Wentao Yuan '13 with Lois Weinroth and Alan Klingler '81



**4** Eric M. '77 and Laurie B. Roth Scholar Corinne Milliken '12 with Laurie Roth and Trustee Eric Roth '77

**5** Traci Quackenbush Viklund and Diana Holden with Britton Kovachevich '13, recipient of the AnBryce Jacob Marley Foundation Scholarship in honor of Christopher Quackenbush '82

**6** A.H. Amirsaleh Scholar Abid Hossain '13 with Mahyar Amirsaleh

**7** Akin Gump Strauss Hauer & Feld Scholar Paula Vera '13 (far right) with Bryna Beckler-Knoll, Sarah Posner, Rachel Presa '10, and Estelle Diaz of Akin Gump Strauss Hauer & Feld



**8** George T. Lowy Scholars Victoria Portnoy '12 and Richard Kim '12 with Trustee George Lowy '55

**9** Sullivan and Cromwell Public Service Scholars Candace Mitchell '13, Saerom Park '12, and Ruben Loyo '11 with Trustee Kenneth Raisler '76

**10** Bonnie and Richard Reiss Scholars Kristen Matthews '13 and Nina Bell '12 with Life Trustee Bonnie Reiss '69 and Trustee Richard Reiss Jr. '69



**11** Sinsheimer Public Service Scholar Kosha Tucker '11 with Florence Sinsheimer and Life Trustee Warren Sinsheimer (LL.M. '57)

**12** Ruth L. Pulda Scholar Allison Haupt '12 with Janet Sabel '84 and Howard Rifkin

**13** Thomas E. Franck Scholar Maria Cecile Sicangco '11 with Martin Daley and Rochelle Fenchel



## 2010–11 Career Highlights

**Seth Glickenhau** '38 was honored for lifetime achievement and contributions to the arts, design, and education by the Museum of Arts and Design.

Former New York City Mayor **Ed Koch** '48 formed New York Uprising, a coalition to reform the state's government.

The Federal Bar Association's Inland Empire Chapter awarded **Charles Doskow (LL.M. '62)** its 2011 Erwin Chemerinsky Defender of the Constitution Award.

**Stephen Ross (LL.M. '66)** received an honorary doctorate of laws from the University of Michigan.

**D. Paul Jones (LL.M. '68)** was inducted into the Alabama Business Hall of Fame.

New York State Chief Judge **Jonathan Lippman '68** received an honorary doctorate of laws from Pace University.

The International Criminal Court appointed **Judge Daniel David Ntanda Nsereko (LL.M. '71, J.S.D. '75)** to chair a case on post-election violence in Kenya.

Retired New York City Fire Department captain **Brenda Berkman '74** is featured in the CNN documentary "Beyond Bravery: The Women of 9/11."

**Richard Ketchum '75** was appointed to the President's Advisory Council on Financial Capability.

The New York State Association of Criminal Defense Lawyers named **Joel Rudin '78** Outstanding Criminal Practitioner and gave **Manuel Vargas '84** its Lifetime Achievement Award.

**Julie Salamon '78** published *Wendy and the Lost Boys: The Uncommon Life of Wendy Wasserstein* in August.

**Jeffry Aronsson (LL.M. '79)** was named CEO of the Paris fashion house Emanuel Ungaro.

**Michael Bardee '83** was named general counsel at the Federal Energy Regulatory Commission.

**Peggy Twohig '83** joined the Consumer Financial Protection Bureau implementation team.

**Elliot Peters '85** was named a fellow at the American College of Trial Lawyers.

Former State Senator **Jonathan Harris '90** was appointed deputy treasurer by the Connecticut state treasurer.

**Jonathan Donnellan '91** was named a deputy general counsel at Hearst Corp.

**Nicole Jones '95** was named general counsel at CIGNA.

**Sarah Coyne '98** was promoted to deputy chief of the Eastern District of New York U.S. Attorney's Office business and securities fraud section.

**Kevin Huffman '98** is the new education commissioner of Tennessee.

**Winston Ma (M.C.J. '98)** has become managing director of China Investment Corp.'s new office in Toronto.

**Jacqueline Maduneme (LL.M. '98)** published her memoir, *Ada's Daughter*.

**Daniel Schwager '98** was appointed staff director and chief counsel of the U.S. House Committee on Ethics.

**Paul Quigley (LL.M. '05)** founded the Irish news website NewsWhip.

**Craig Van Matre (LL.M. '07)** joined the University of Missouri Board of Curators.

## Sanctuary Recognizes NYU Law Nine

Sanctuary for Families' Center for Battered Women's Legal Services named its 2010 Above and Beyond Honorees for Excellence in Pro Bono Advocacy. Among those honored in November were **Kimberly Spoerri '08**, an associate at Cleary Gottlieb Steen & Hamilton; **Melissa Aoyagi '03**, an associate, and **Dara Sheinfeld '02**, a former associate, at Davis Polk & Wardwell; **Tyler Amass '07**, **Kristen Hendricks '06**, and **Kristen Mathews '08**, associates at Gibson, Dunn & Crutcher; **Henry Ko '98**, an associate at Kirkland & Ellis; **Alyssa Watzman '07**, an associate at Simpson Thacher & Bartlett; and **Laura Greenberg '07**, an associate at Willkie Farr & Gallagher.

Led by Executive Director **Laurel Eisner '84**, Sanctuary for Families is dedicated to serving domestic violence victims and sex trafficking victims, and their children. **Dorchen Leidholdt '88** directs the organization's Center for Battered Women's Legal Services.

## Rising Stars in the Legal Academy and the Judiciary

NYU Law alumni landed an impressive number of posts at the helm of law schools or on the bench. The following are appointments announced in the year ending July 1, 2011.

### DEANS

**Paul Schiff Berman '95**, Dean, George Washington University Law School

**Craig Boise (LL.M. '99)**, Dean, Cleveland-Marshall College of Law

**Stephen Mazza (LL.M. '93)**, Dean, University of Kansas School of Law

**Eric Schwartz '85**, Dean, University of Minnesota Humphrey School of Public Affairs

**Philip Weiser '94**, Dean, University of Colorado Law School

### JUDGES

**Albert Diaz '88**, Judge, U.S. Court of Appeals for the Fourth Circuit

**Todd Edelman '94**, Associate Judge, Superior Court of the District of Columbia

**Patrick Ende '82**, Judge, Maine District Court

**Sean Lane '91**, U.S. Bankruptcy Judge, U.S. Bankruptcy Court

**Tony Leung '85**, U.S. Magistrate Judge, Fourth Judicial District of Minnesota

**Raymond Lohier '91**, Judge, U.S. Court of Appeals for the Second Circuit

**Marc Marmaro '72**, Judge, Los Angeles Superior Court

**Louis James Menendez (LL.M. '76)**, Judge, Juneau Superior Court

**Lynn Nakamoto '85**, Judge, Oregon Court of Appeals



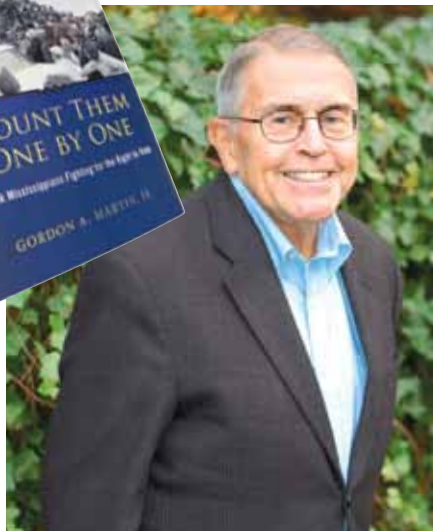
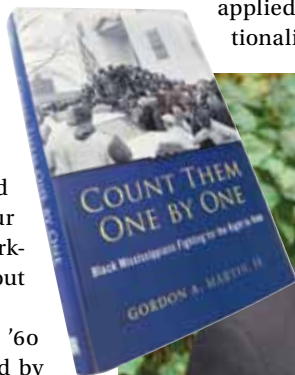
# Acts of Courage, Revisited

**I**N 1946, 12-YEAR-OLD GORDON MARTIN Jr. played for Boston's all-white West Roxbury baseball team. It was a year before Jackie Robinson broke the color barrier, and that season's big game was against an all-black team. "I had never thought about black people playing baseball," Martin recalled. "The grass was green, and the players were white. That's the way it had been for me. But by the end of our game, I was impressed by these dark-skinned kids who had ventured out to play with us."

Sixteen years later, Martin '60 would again be indelibly touched by courageous black citizens, this time in Hattiesburg, Mississippi. Armed with a law degree that he earned as a Root-Tilden Scholar, Martin was a staff attorney in the Civil Rights Division of the Department of Justice. He prepared witnesses for the government's case *United States of America v. Theron C. Lynd*, during which they would attest that they were denied the right to vote for failing to answer such questions as "How many bubbles in a bar of soap?"

That year, 1962, the federal government won its very first contempt conviction of a southern registrar, the cigar-chomping Lynd. It was a significant step toward passage of the Voting Rights Act of 1965, by which Congress outlawed discriminatory practices in voter enrollment.

A quarter-century later, Gordon was a Boston criminal court judge and overwhelmed by daily stories of senseless violence. Needing a change of scenery, he applied to attend Race and Nationality in Modern America, a



seminar offered by NYU's Humanities Department. As Martin recounts, Professor David Reimers called to ask if he'd actually come from Boston every Friday. "I told him," says Martin, "So long as the shuttle is flying, I'll be there."

Martin's seminar project idea grew into his 2010 book, *Count Them One by One: Black Mississippians Fighting for the Right to Vote*, an account of how, after several de-

acades, he tracked down those brave Lynd witnesses, or their descendants, and had them recall the case and the times.

The book was nominated this spring for a Silver Gavel award from the American Bar Association by retired DePauw University History Professor John Dittmer, who calls it "a masterful combination of historical memoir and scholarly research. What is particularly impressive and important is the oral history component of the book. [T]he local people are at the center of this book, where they should be."

Now retired and an adjunct professor at New England Law, Martin went on a southern book tour this winter. In Memphis he met Reginald Houze, the 33-year-old grandson of one of Lynd's black witnesses. A high school music director with a master's in education from NYU's Steinhardt School, Houze grew up in a Hattiesburg where white and black children "went to school together, played together, slept over at each others' homes, and still know one another." He had only a vague awareness of Hattiesburg's past. "What a history lesson," Houze said. "Now I know why Election Day was always important in my family."

Indeed, it's hard to imagine any day more significant than the one in 2008 when people could vote for Barack Obama to become the first black U.S. president. But the criminal court judge in Martin is not yet ready to celebrate. "An adolescent black male has a greater likelihood of coming under penal or probation restraint than attending a four-year college," he points out. "We still have a long way to go." □ *Thomas Adcock*

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Contact Wendy Siegel, Director of the Office of Career Services, at (212) 998-6096 or [wendy.siegel@nyu.edu](mailto:wendy.siegel@nyu.edu) to discuss how we can best assist you.

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# Charles Conley (1921–2010)

Trusted counsel, accomplished Alabama civil rights attorney

**A** HALF-CENTURY AGO, WHEN AUDACIOUS black southern men had grave reason to fear for their lives, Charles Swinger Conley '55 hung a shingle in his native Montgomery, Alabama, and set about becoming a “radical threat to the status quo,” says NYU Law Professor Bryan Stevenson, founder and executive director of the Montgomery-based Equal Justice Initiative. During his long and illustrious career, Conley fought civil rights cases small and large, counseled movement leaders Martin Luther King Jr. and Ralph Abernathy, and eventually became Alabama’s first elected black judge. “It was tremendously courageous for an African-American lawyer to challenge the system that existed in the '50s and '60s throughout the South,” says Stevenson. “Judge Conley’s accomplishments shape and inspire us in our work today.”

Conley died last September at age 89. Before his death, he had made provisions for a \$1.2 million gift to his alma mater that will endow the Honorable Charles Swinger Conley Scholarship Fund and will also fund a permanent memorial at the Law School honoring Conley’s outstanding legal accomplishments and historic career.

Conley’s law office on Bainbridge Street—walking distance from King’s Dexter Avenue Baptist Church—was informally known as Executive House. During the 1960s, it was a center of social activism in a city that was itself ground zero for the civil rights movement. Conley’s strategic counsel was sought by the likes of Rosa Parks, leader of the Montgomery bus boycott; King, Abernathy, and other members of the Southern Christian Leadership Conference; and fellow crusading lawyers Virginia Foster Durr and Fred Gray.

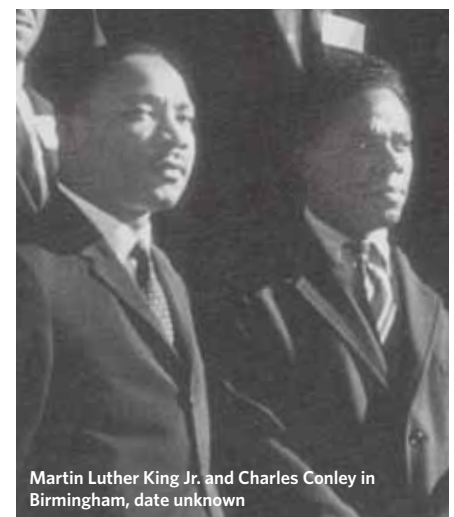
Upstairs at Executive House, Conley maintained overnight accommodations—full bar included—for out-of-town activists and visiting counsel such as New Yorkers William Kunstler and Arthur Kinoy.

Conley was engaged in a full-scale battle for civil rights. In *Cobb v. Montgomery Library Board* (1962), for example, Conley’s pro bono client was a black child denied use of the city’s main library. When Conley prevailed and the U.S. District Court in Montgomery ordered the library desegregated, officials removed all the visitor chairs from the library. No patron, black or

white, could sit. “Well, that was just pure spite,” says Conley’s widow, Ellen, “but it didn’t last long.” In one of Conley’s most significant victories, *Seals v. Wiman*, also in 1962, the U.S. Court of Appeals for the Fifth Circuit in New Orleans overturned the conviction of Conley’s client, Willie Seals, a young black man found guilty of raping a white woman in 1958 by an all-white jury and sentenced to Alabama’s death row. The court held that exclusion of blacks from Alabama’s jury rolls violated the 14th Amendment.

Conley also played a part in the landmark 1964 Supreme Court case *New York Times Co. v. Sullivan*. He represented four ministers, including Abernathy, as plaintiffs with the *Times*, contributing to briefs in a case that ultimately established an “actual malice” standard had to be met before news accounts about public officials could be deemed libelous. The ruling allowed unfettered coverage of civil rights demonstrations then taking place throughout the South.

Ellen Conley was her husband’s chauffeur and protector in the turbulent '60s, especially when he worked at his office late into the night. “I’d always insist on getting out of the car first,” she said in a telephone interview. “If a bullet was coming, it would get me. Chuck had important work to finish.” □ T.A.



Martin Luther King Jr. and Charles Conley in Birmingham, date unknown

## Leading at the Hub of Business and Law

University and Law School Trustee Mitchell Jacobson '76 was awarded the Vanderbilt Medal, the Law School’s highest honor, at the 2011 NYU Law reunion this spring. He is the patron of the Jacobson Leadership Program in Law and Business, a collaboration with the Stern School of Business that is specially designed to train students at the crossroads of these complementary disciplines who aspire to nontraditional career paths. Jacobson is chair and former chief executive officer of MSC Industrial Direct, one of the nation’s leading direct distributors of industrial supplies and equipment. He began his career in 1976 at his father’s business, Sid Tool, restructuring it in 1995 to create MSC, then taking it public.

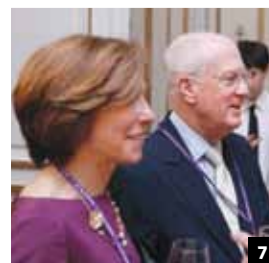
Jacobson also serves as a trustee for New York-Presbyterian Hospital. In addition, he and his wife, Kathy, support the

Jacobson Public Service Scholarship for Women, Children, and Families at NYU Law.

In bestowing the award, Dean Richard Revesz said: “It is a tremendous honor to award the Vanderbilt Medal to Mitchell, who has been a valuable role model, adviser, and friend throughout my deanship. His support has made a profound difference to the quality of the education we provide our students and to the intellectual environment we provide our faculty and the greater-Law School community.”







# Tangoing with Terrorism

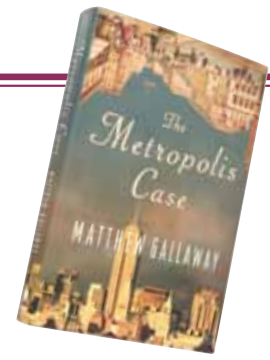
**W**ith the 10th anniversary of the 9/11 attacks on the horizon, a group of distinguished judges and lawyers, faculty, trustees, alumni, and their guests gathered in Buenos Aires in mid-July for a three-day National Security and Civil Liberties conference co-convened by Dorit Beinisch, president of the Supreme Court of Israel, and University Professor Jeremy Waldron. The group discussed the implementation and interpretation of international law by national courts in the fight against terrorism, protection of rights in times of war, the courts' role in counterterrorism measures, and judicial review of security issues, as well as examining models of military justice and criminal law enforcement.

**1** Lord Jonathan Hugh Mance, Justice of the Supreme Court of the United Kingdom, with University Professor Jeremy Waldron **2** Lady Justice Mary Arden of the Court of Appeal of England and Wales **3** His Excellency Ricardo Luis Lorenzetti, President of the Supreme Court of Argentina **4** Frank J. Guarini Jr. '50 (LL.M. '55) with Adjunct Professor and Co-Director of the Leadership Program in Law and Business Gerald Rosenfeld **5** Dorit Beinisch, President of the Supreme Court of Israel, with Trustee Jay Furman '71 **6** U.S. Supreme Court Justice Clarence Thomas **7** Trustee Charles Klein '63 with Jane Klein **8** Trustee Rachel Robbins '76 with Richard Robbins '75 **9** Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit **10** Vilma Martinez, U.S. Ambassador to Argentina **11** U.S. Supreme Court Justice Elena Kagan with Chairman of the Board of Trustees Anthony Welters '77





Tyree with West Virginia residents at a press conference, seeking to ban underground disposal of coal slurry.



## Letters of the Law

AFTER THE PUBLICATION OF HIS DEBUT novel, *The Metropolis Case*, last December, Matthew Gallaway '95 received the writer's holy grail—a glowing *New York Times* review: “The book is so well written—and there’s hardly a lazy sentence here—and filled with such memorable lead and supporting players that it quickly absorbs you into its worlds.”

*The Metropolis Case* features a cast of characters and story lines that span modern-day New York and Pittsburgh as well as 19th-century Europe. The unifying theme is opera. Gallaway, a senior acquisitions editor in the law division of Oxford University Press, toured for several years as a guitarist for an indie rock band before turning to legal publishing. “Studying law, because it’s so language-based, teaches you to be a very careful writer and thinker,” says Gallaway. “That’s very important for any kind of writing, whether it’s creative or a brief.” □

## Charity Begins at Home

**A**S ENVIRONMENTAL POLICY CO-ordinator for WE ACT for Environmental Justice in Harlem—her first job after graduation—Stephanie Tyree '08 watched from afar as residents in her home state of West Virginia strapped themselves to dump trucks or formed human chains with their linked hands encased in hardened cement to protest coal mining that they believed destroyed mountains, polluted water sources, and created hazardous living conditions. “People were standing up in a way that I’d never seen before, drawing the line and saying, ‘We’re not going to take this anymore,’” Tyree says.

In August 2009, Tyree traded her Bedford-Stuyvesant apartment for a house in the foothills of the Appalachian Mountains. And she has joined activists and residents in protesting detrimental coal mining practices as the environmental justice coordinator at the Ohio Valley Environmental Coalition (OVEC), a West Virginia-based grassroots advocacy organization.

Tyree’s work is divided between fighting mountaintop removal, in which explosives are used to blast off as much as 500 feet from the top of a mountain to expose its coal seam, and coordinating the Sludge Safety Project, which educates the community about the potential hazards of slurry or sludge—the wastewater that results from washing coal. The coal industry “will tell you up and down that slurry is safe, that it doesn’t travel into people’s groundwater,” Tyree says. But when some people turn on the tap, she asserts, their water “comes out black with lumps of coal.”

The only employee at OVEC to hold a law degree, she helps residents file lawsuits and deal with permits, assists in drafting proposed legislation, and educates community

members about their rights. Making house calls to taste residents’ water and hear their complaints, Tyree “never uses a notepad,” says resident Maria Lambert. “She just listens and has a way of leading people into conversation so that they can figure solutions out on their own.”

Because of Tyree’s persistence, politicians were moved to invite West Virginia coal industry leaders and local residents to a meeting about a bill she helped draft that proposed alternative means of processing coal. In the end, the state legislature defeated the bill. “But as a result of that meeting,” says Dianne Bady, co-director of OVEC, “we’ve educated the legislature and gotten a lot more publicity, so in the future we may likely get the bill passed.”

Tyree and coal industry leaders generally don’t see eye to eye. Jason Bostic, vice president of the West Virginia Coal Association, says there are certain issues on which he and Tyree “respectfully agree to disagree.” He insists that the only chemicals found in coal slurry are minerals that occur naturally in West Virginia’s soil. And he asserts that the industry is highly regulated, its mines frequently inspected. But he calms down when talking about Tyree. “We fight like cats and dogs on a particular issue but can walk out of the state capitol and have a decent, tame, civilized conversation,” he says. “Stephanie is a class act.”

During the meeting about the draft bill, Bostic admits that he lost his temper at Tyree. But Tyree remained on point and did not back down. “She handled it gracefully without giving an inch of ground,” says Mat Louis-Rosenberg, an activist with Coal River Mountain Watch in West Virginia, who was also in attendance. “After the session, he apologized.” □ *Jennifer Frey*

### Roundtable Guests

During 2010–11, Dean Richard Revesz invited these prominent alumni, along with defense attorney Benjamin Brafman (LL.M. '79; profiled on page 108), to intimate luncheons with students.

**GARY CLAR '91**  
General Partner and Co-Founder,  
JANA Partners

**JOHN GAFFNEY '86**  
Senior Vice President, Corporate  
Development and General Counsel,  
Solyndra

**ALAN KAVA '90**  
Partner, Goldman Sachs

**ROBERT KINDLER '80**  
Global Head of M & A and  
Vice Chairman, Morgan Stanley

**RANDAL MILCH '85**  
Executive Vice President and General  
Counsel, Verizon Communications

**ANDREW SIEGEL '90**  
Senior Vice President, Strategy  
and Corporate Development,  
Advance Publications

**DAVID TISCH '06**  
Managing Director, TechStars NYC



# A Chat with Robert Kindler '80

For a guy who has been at the top of both Big Law and Wall Street, Robert Kindler has a pretty idiosyncratic background. Start with the fact that he majored in romantic poetry and music in college (he was recruited to Colgate because of his talents on the flute). He briefly dropped out of law school and went to work for his father's plumbing company because he wasn't sure a legal career was for him. And he once owned an ice cream shop in Katonah, in New York's Westchester County, where he could have all the coffee ice cream he wanted. • Since then, each career choice has led Kindler in only one direction: up. He worked at Cravath, Swaine & Moore for 20 years—from 1980 to 2000—ultimately running the firm's mergers and acquisitions business. Then he jumped the fence and became an investment banker, first at Chase Manhattan for nearly six years—rising to global head of M & A at JPMorgan Chase—and more recently at Morgan Stanley, where he is vice chairman and global head of M & A. Kindler sat down in February with writer Duff McDonald to talk dollars and sense.

**W**hat are the differences between law and banking other than the money? When I was at Cravath, the culture of the firm was that a partner, no matter how senior, needed to read every document—and every word of every document. So as a partner at Cravath, you were still negotiating merger agreements. As a banker, you are not doing that kind of work; it is much more about your interpersonal skills, plotting strategy, and being out meeting with clients. I find that far more interesting. But on the downside, you travel a lot more as a banker. I'm on the road at least three days a week. And I didn't do that as a lawyer.

**So, then...J.D. or M.B.A.?** You can't go wrong with either degree or even a combined degree. There are a lot of people in the M & A group at Morgan Stanley who have legal degrees. Getting a law degree is great training and doesn't stop you from getting into banking—it might even help you. The business world is filled with people with law degrees. James Gorman, the CEO of Morgan Stanley, has one. Having said that, I think if you're certain that you want to become a banker, it makes more sense to get an M.B.A.

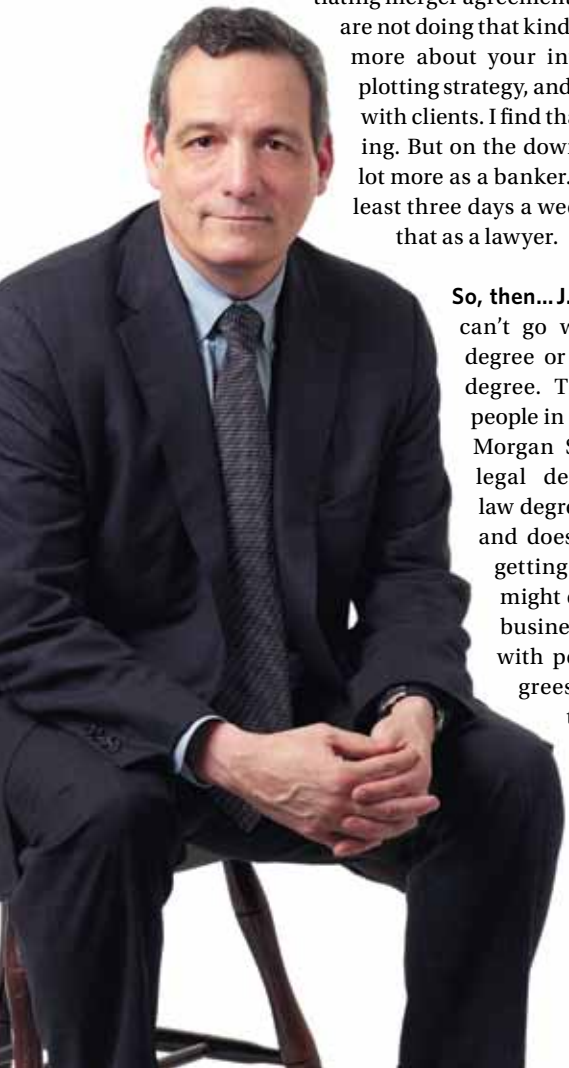
**What advice would you give your law school self if you could talk to him right now?** I would tell him that your career is going to take a very unpredictable path, and that you just need to focus on learning from everything you do wherever you happen to be working. And don't think you can plan out your entire career. A lot of law students think that they can map out their careers, and you can't.


**After a recessionary lull, a lot of deals are getting done in early 2011. What's your outlook for M & A?** The prognosis for 2011 is quite good. I've been fairly pessimistic about M & A the last couple of years, but going into 2011, all the signs indicate that we're going to have a very good year. Corporations need growth, and they can't get it organically. So one of the ways they'll get it is through M & A. The other factor is a strong equity market. When you have a strong equity market, M & A is usually very strong. And maybe a third factor is that the equity markets are not that volatile. When you have wide swings in the equity markets, people stay away from doing deals, but that's not the case right now.

**You were at the center of the action in the credit crisis. What was the main thing you learned?** I didn't fully appreciate how fragile financial systems can be. There were periods of time when you couldn't get your money out of money market funds! A lot of us thought that while there are ups and downs in the stock market, the overall financial system was sound. But to see how fragile the system was—that it wouldn't have survived without massive government intervention—was an eye-opener.

**What was your favorite deal—as a lawyer or a banker?** The most exciting and unlikely deal was when Comcast took over AT&T's cable business in a hostile bid. It was a \$72 billion hostile bid for a subsidiary of AT&T. Taking over a subsidiary is tough—and complex—but we made the proposal publicly and kind of forced them to do it.

**Your brother, Andy, is a successful stand-up comedian who has been on *Letterman* numerous times. What kinds of parents raise a comic and the global head of M & A at Morgan Stanley?** A plumber with two master's degrees and a Quaker. □





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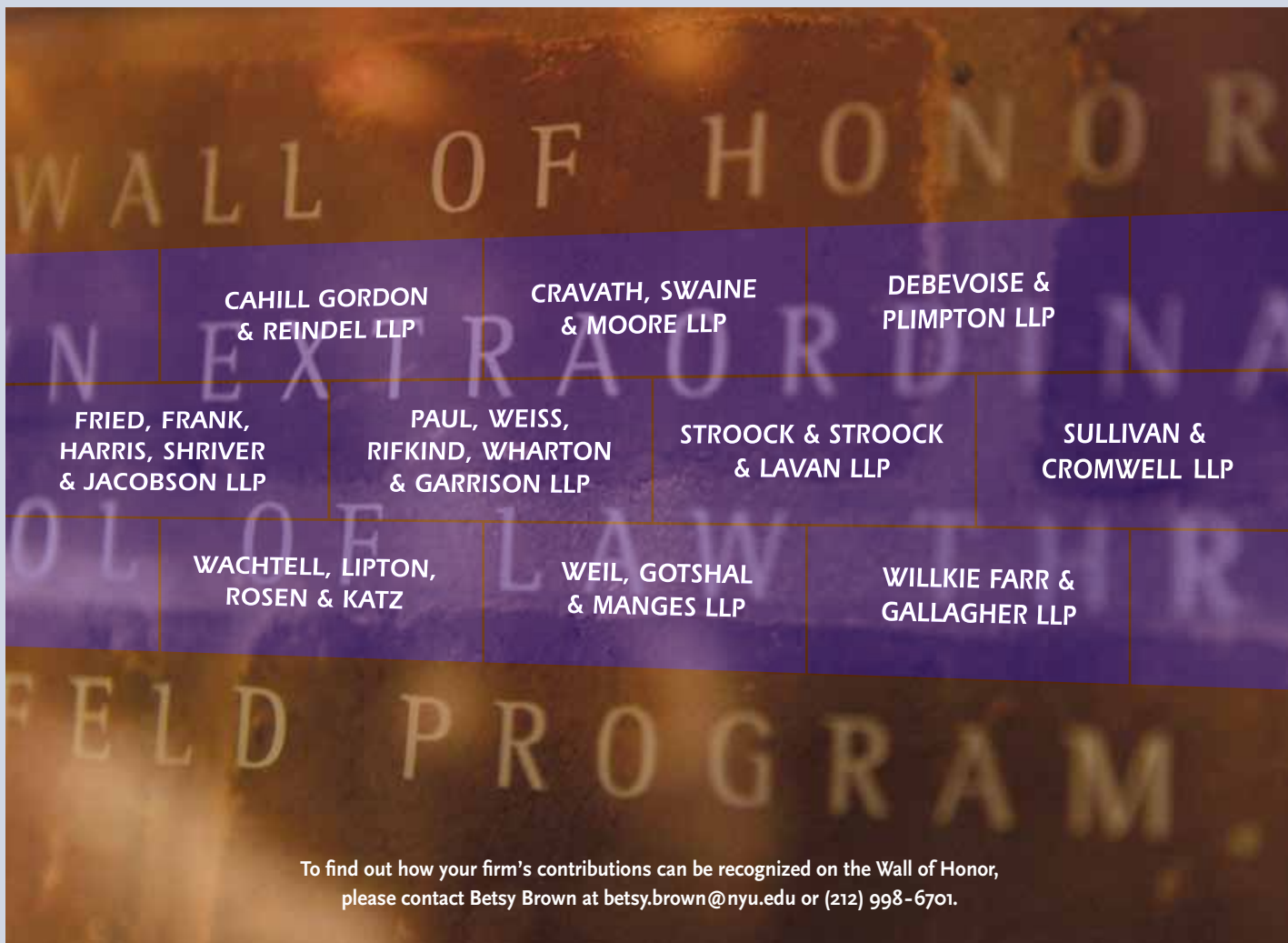
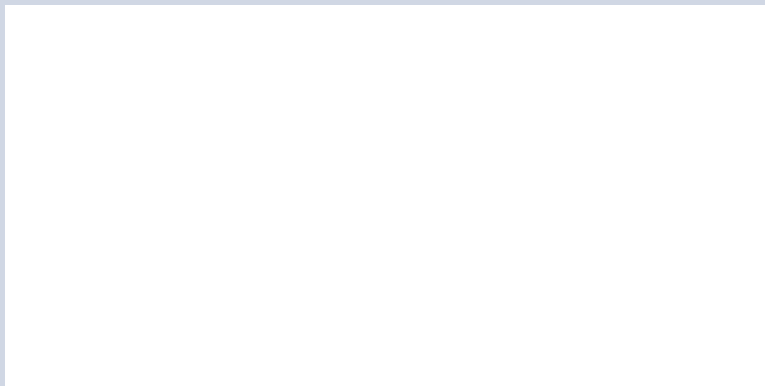
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