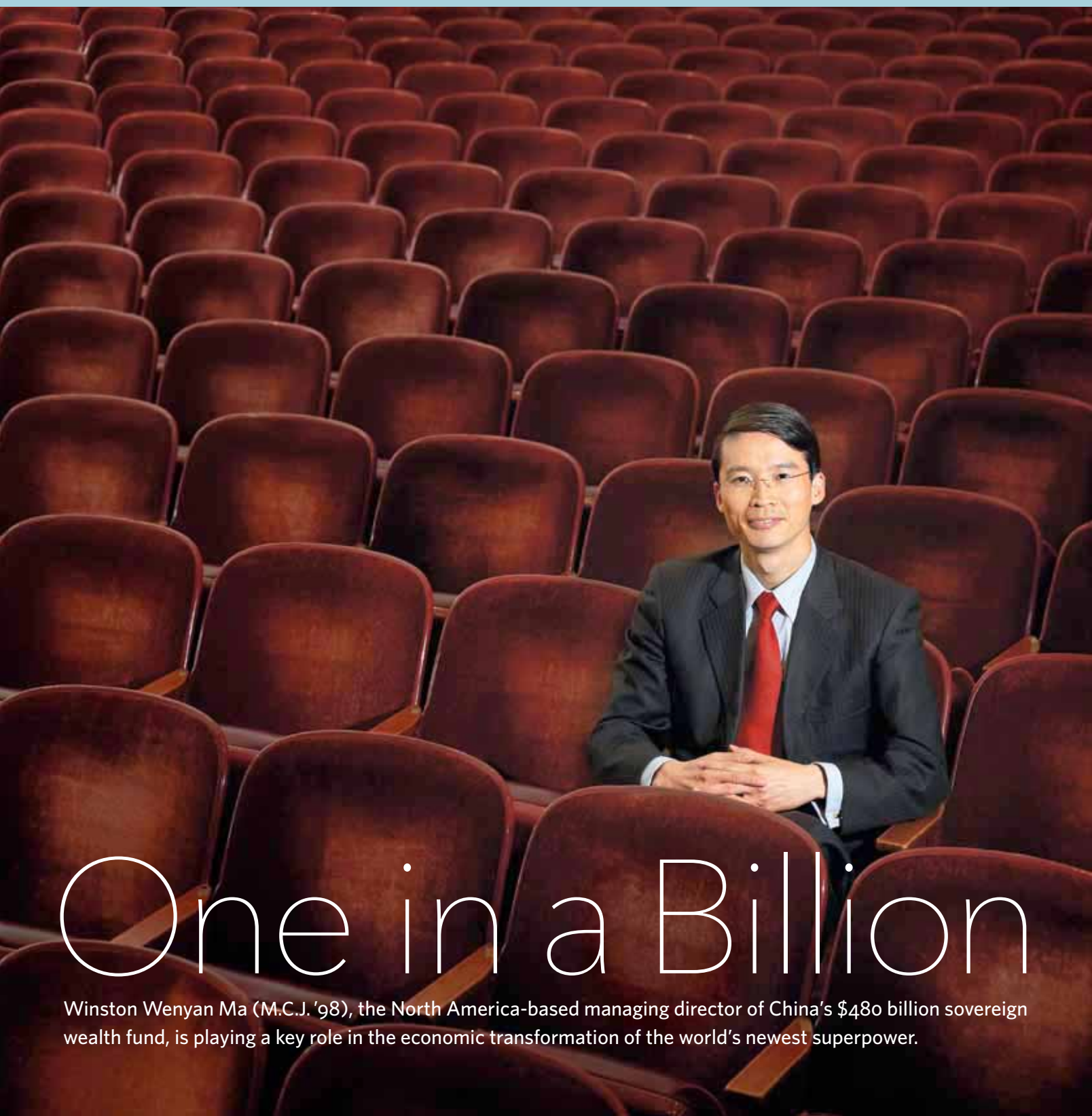
The Law School

THE MAGAZINE OF THE NEW YORK UNIVERSITY SCHOOL OF LAW | 2012

A DEVOTED DEAN
NYU Law's remarkable evolution continues under the tireless leadership of Richard Revesz.

ETHICAL CULTURE?
At a time of seemingly rampant corporate fraud, 10 alumni and faculty debate the causes and solutions.

ONE FOR THE BOOKS
Jerome Cohen helps Chinese dissident Chen Guangcheng write a new chapter.



One in a Billion

Winston Wenyan Ma (M.C.J. '98), the North America-based managing director of China's $480 billion sovereign wealth fund, is playing a key role in the economic transformation of the world's newest superpower.

Reunite!

REUNION

Friday & Saturday, May 3–4, 2013

Please visit law.nyu.edu/alumni/reunion2013 for more information.

A Note from the Dean

As I write this letter, I am a few months past my 10th anniversary as dean of the NYU School of Law. To mark the occasion, I sat down with Fred Bernstein '94 this spring to talk about the faculty appointments, initiatives, and fundraising I worked on during my decade as dean, and how this great law school has become even greater. Fred's story, complete with charts and graphs, begins on page 10. There is still much more to accomplish! Recently the Law School's board of trustees formed a strategy committee, which was tasked with examining our curriculum and making recommendations that both respond to and anticipate the changing legal environment and that will best equip students to be the leaders of the profession in the 21st century. There is no question in my mind that NYU School of Law will continue to offer the best legal education in the decades to come. Look for our bold announcements this fall.

Our cover subject, Winston Ma (M.C.J. '98), exemplifies the new global businessman. As you will learn when you read the fascinating profile written by Duff MacDonald on page 34, Ma had never been outside of China before he came to NYU to study at the age of 24 in what was then the new Hauser Global Law School Program. He has spent the last 15 years building on his NYU Law degree, creating a stellar global investment banking résumé that has enabled him to become a managing director of China's $480 billion sovereign wealth fund. We were thrilled to have him back at Washington Square last winter to give the keynote at the annual Hauser dinner.

International issues have transformed the study of commercial law and bankruptcy as well, as writer Larry Reibstein makes clear in "Signature Issues in Commercial Law and Bankruptcy" on page 16. He engages with the dozen members of our faculty who specialize in this field as they examine questions about how to structure laws and contracts to enable the flow of sales between businesses and consumers, in both the traditional and online marketplaces, domestically and globally. And just as importantly, these professors work to design the best way to handle the bankruptcy and reorganization of failing multinational corporations. Not only are billions of dollars at stake, but so are the livelihoods of hundreds of thousands of people around the world. In each issue of the *Law School* magazine since I became dean in 2002, we have featured an area of law in which I am confident a peer review would say we take the lead among the top law schools; I am proud to add commercial law and bankruptcy to the lengthy list.

In such an interconnected global business community, ethics become even more critical to maintaining a well-functioning marketplace. The *Law School* magazine invited 10 professors and alumni who work as corporate counsel, prosecutors, and regulators to tussle over why corporate fraud appears to be rising, and how to turn the tide. Their lively discussion is transcribed and edited in "Cops and Robbers: The Corporate Edition" on page 26.

It is wonderful to work with an outstanding faculty that never ceases to amaze me with all that they accomplish. This year, not only did one of the nation's leading capital defenders, our own Professor Bryan Stevenson, convince the Supreme Court to strike down mandatory life sentences without parole for juveniles, but the preeminent expert in China law, Professor Jerome Cohen, helped the U.S. State Department defuse a diplomatic crisis by bringing self-taught Chinese lawyer Chen Guangcheng to the Law School. Read more about our faculty on page 41. Also, Professor Vicki Been '83, faculty director of the Furman Center for Real Estate and Urban Policy, who, as most of you know, is my wife, helped steer her center to earn a $1 million "institutional genius" award from the MacArthur Foundation (see page 24).

To this impressive group we add three terrific new full-time faculty members: Adam Samaha, a top constitutional law expert from the University of Chicago; Alan Sykes, a leading international trade expert from Stanford; and David Kamin '09, a spectacular entry-level appointment who most recently worked at the White House as special assistant to the president for economic policy. We are also excited to welcome Intisar Rabb, who has a joint appointment between the Faculty of Arts and Science and the Law School; she is an authority on Islamic and comparative law. I'm thrilled by the arrival of these new colleagues. See them all beginning on page 52.

As you spend time with this issue, I am confident you will see why NYU School of Law is such a vibrant, enterprising, and collegial institution. It is a great privilege to be at the helm!

RICHARD REVESZ

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THE MAGAZINE OF THE NEW YORK UNIVERSITY SCHOOL OF LAW | 2012

Notes & Renderings

A Blue-Chip Change Agent

It's hard to imagine a better choice than Evan Chesler '75 to head a special strategy committee of the Law School's board of trustees that has been charged with ensuring that NYU Law graduates adapt to the changing legal environment and remain at the forefront of the legal profession. Presiding partner at Cravath, Swaine & Moore for six years (he will become the firm's chairman in January), Chesler maintains an active litigation practice and is intimately familiar with issues in corporate firms—the largest segment of the legal field. Also, he's not afraid to defy convention: Chesler has been a proponent of moving away from hourly billing, asserting it often fails to align lawyer and client interests.

Since the spring of 2011, Chesler and other members of the strategy committee—all law firm leaders and general counsels of major corporations—have been examining how the NYU Law course of study might be repositioned to be the best legal education for the 21st century. This fall, Chesler and Dean Richard Revesz will announce a series of enhancements to the curriculum based on the committee's recommendations.

"In recent years a variety of factors—technology, globalization, the economic crisis—have transformed legal practice," says Chesler. "I believe the initiatives that we are working on will cement NYU School of Law's reputation as innovative, enterprising, and a leader in legal education."

9/11 Fund Special Master Faces New Challenge

In June, a federal health official's ruling cleared the way for 50 different types of cancer to be added to the list of sicknesses covered by a $4.3 billion fund set up to compensate people exposed to toxic smoke, dust, and fumes in the months after the September 11, 2001, terrorist attacks.

While this was a win—Representative Carolyn Maloney of New York told the *New York Times* it was "an important statement that the country's going to take care of the workers and people who are there to save the lives of the people of the city"—it undoubtedly complicates the picture for all of the people who hope to receive funds, and for the administrator in charge of the process.

"We cannot add any more money to the fund," Sheila Birnbaum '65, special master of the September 11th Victim Compensation Fund, said in the *Times* shortly before the ruling. "So we would have to prorate what we're giving to people depending on the amount of people that apply, the seriousness of their injuries, the economic loss that they've sustained." Birnbaum was the cover profile of the 2011 *Law School* magazine (law.nyu.edu/magazine).

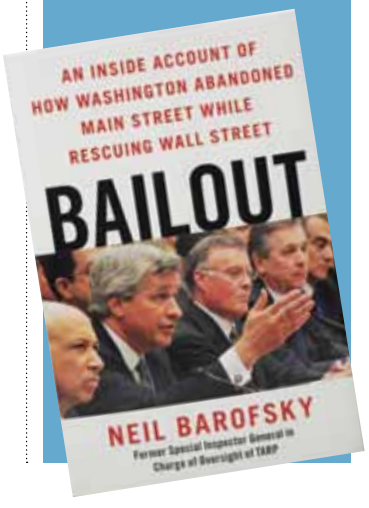
Victory for Ma

In January, Taiwan reelected President Ma Ying-jeou (LL.M. '76). Ma, who heads the Kuomintang Party, won with 51.6 percent of the vote, beating opponent Tsai Ing-wen of the Democratic Progressive Party. As he had during his first campaign, Ma ran on a platform of pursuing closer ties to Mainland China.

"We tag along

with Mr. Barofsky as he walks into a political buzz saw as the special inspector general for TARP. Government officials, he says, eagerly served Wall Street interests at the public's expense.... He says he was warned about being too aggressive...."

From a *New York Times* piece about *Bailout* by Neil Barofsky '95, which debuted at number nine on the paper's hardcover bestseller list. Barofsky is an adjunct professor and senior fellow at the Center on the Administration of Criminal Law.



PRESIDENT MA: REUTERS / PICHI CHUANG

A Stylish Endeavor

To Paul van Zyl's impressive titles—adjunct professor and director of NYU Law's Transitional Justice Program; co-founder and former executive vice president for the International Center for Transitional Justice; former executive secretary under Reverend Desmond Tutu of the Truth and Reconciliation Commission in South Africa, add...fashion designer? Maiyet, van Zyl's one-year-old line of bohemian luxe clothing and accessories, is a success of social entrepreneurship: high fashion sold in stores like Barneys New York that boost local economies by employing artisans in places like Nairobi and Gujarat. Next, van Zyl (LL.M. '99) and co-founder Kristy Caylor are setting their sights on a new horizon: e-commerce.

VAN ZYL: FLORA HANITIJO

Green on Top

Wilf Hall, home to many NYU Law centers and institutes, has earned a platinum rating from the U.S. Green Building Council for Leadership in Energy and Environmental Design. One of only six new buildings in New York City to receive the council's highest certification, Wilf Hall, which opened in 2010, features energy-saving innovations such as a green roof and planted terraces that insulate the building and filter pollutants out of rainwater. On the first floor, bicycle storage and showers encourage modes of commuting that promote health and don't use fuel.

In Good Company

The 219 newest members of the American Academy of Arts & Sciences include:

Mel Brooks
Hillary Clinton
Clint Eastwood
Melinda Gates

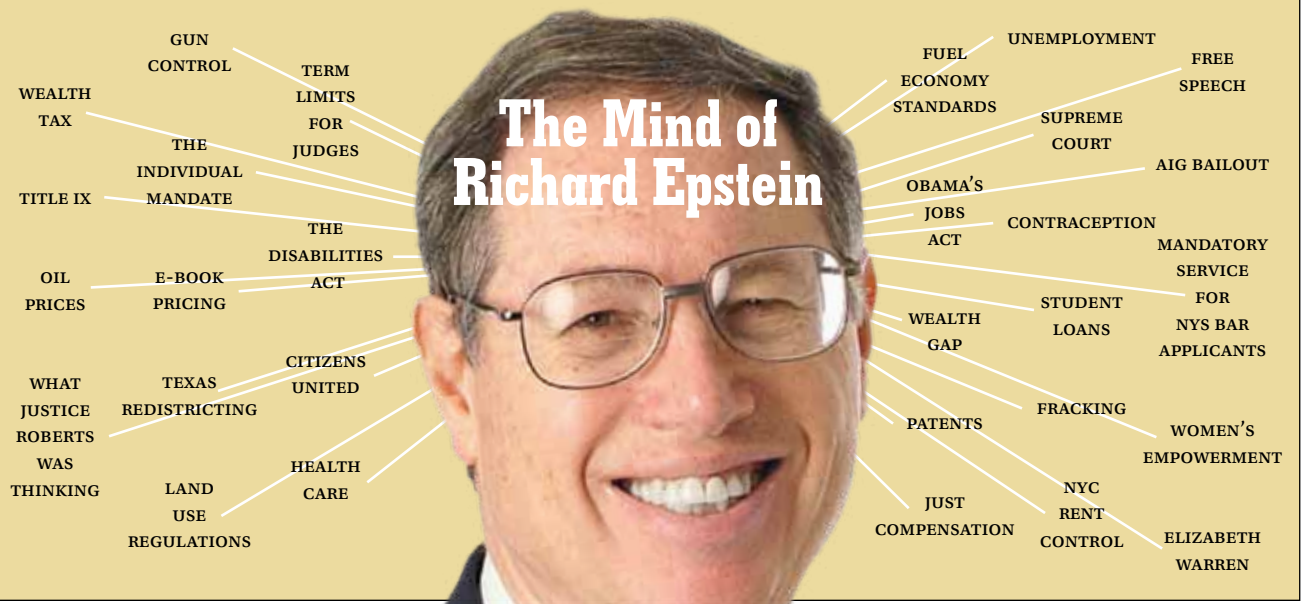
Trustee
Rita Hauser,
President of the Hauser Foundation

Robert Iger
Daryl Levinson,
David Boies Professor of Law

André Previn
Frederica von Stade
Sanford Weill

Chairman of the Board of Trustees
Anthony Welters '77,
Executive Vice President of UnitedHealth Group

A few subjects Richard Epstein has been speaking, blogging, writing, and thinking about over the last year.



Minding the Justice Gap

The White House recognized Deborah Ellis '82 as a Champion of Change last October. For nine years until last May, Ellis was assistant dean for public service where she directed the Public Interest Law Center and the Root-Tilden-Kern Scholarship Program.

Every week, the Champions of Change program brings to the White House Americans engaged in innovative work that makes an impact on communities. Ellis and 15 other public service Champions took part in a panel discussion, streamed live online, about how lawyers can close the justice gap in America.

More than 100 law schools tuned in, including NYU Law. Also representing the Law School on the panel were Laura Abel, acting co-director of the Justice Program at the Brennan Center for Justice; Michael Pinard '94, professor and director of the clinical law program at the University of Maryland Francis King Carey School of Law; and Jo-Ann Wallace '84, president and chief executive officer of the National Legal Aid & Defender Association.

The Robes Make the Judge

There's something to the British courtroom attire of powdered wigs and white wing collars after all. In "Judging Judges: The Effect of Courtroom Ceremony on Participant Evaluation of Process Fairness-Related Factors" from the Winter 2012 issue of the *Yale Journal of Law and the Humanities*, co-authors Oscar Chase, Russell D. Niles Professor of Law, and Jonathan Thong surveyed NYU Law 1L student participants after moot oral arguments and concluded that courtroom participants were more inclined to perceive the proceedings as fair when the judges wore robes, as opposed to wearing suits, and when the proceedings take place in a courtroom rather than a conference room.

Court Apprentices

Three recent graduates will clerk at the U.S. Supreme Court during the 2012–13 term.

Brian Burgess '09 and Charlotte Taylor '08 were selected by Justice Sonia Sotomayor. Burgess most recently served as special assistant to the U.S. solicitor general, and previously clerked for Judge David Tatel of the U.S. Court of Appeals for the District of Columbia Circuit and Judge Guido Calabresi of the U.S. Court of Appeals for the Second Circuit. He was a Furman Academic Scholar and received the University Graduation Prize for highest overall academic average after five semesters. He earned an A.B. in philosophy from Dartmouth College. Taylor, most recently an academic fellow at Columbia Law School, previously clerked for Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit and Judge Jed Rakoff of the U.S. District Court for the Southern District of New York. Before attending NYU Law as a Furman Academic Scholar, Taylor was a visiting assistant professor in letters at Wesleyan University. She holds a Ph.D. in English from Yale University and an A.B. in English and French from Duke University.

Ian Samuel '08 will clerk for Justice Antonin Scalia. He was most recently on the appellate staff of the U.S. Department of Justice's Civil Division, after serving as a Bristow Fellow in the Office of the Solicitor General. Samuel previously clerked for Chief Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit. He was a Furman Academic Scholar at the Law School. Samuel earned a B.S. in computer science from Truman State University, where he was a national parliamentary debate champion.

REPORTING FOR DUTY Most people start a new job by visiting H.R. But Ana Irene Delgado (LL.M. '06), Panama's new ambassador to the United Kingdom, went directly to H.M. She is shown above at Buckingham Palace, presenting her credentials to Her Majesty Queen Elizabeth II in February.

DELGARD: © ASSOCIATED PRESS

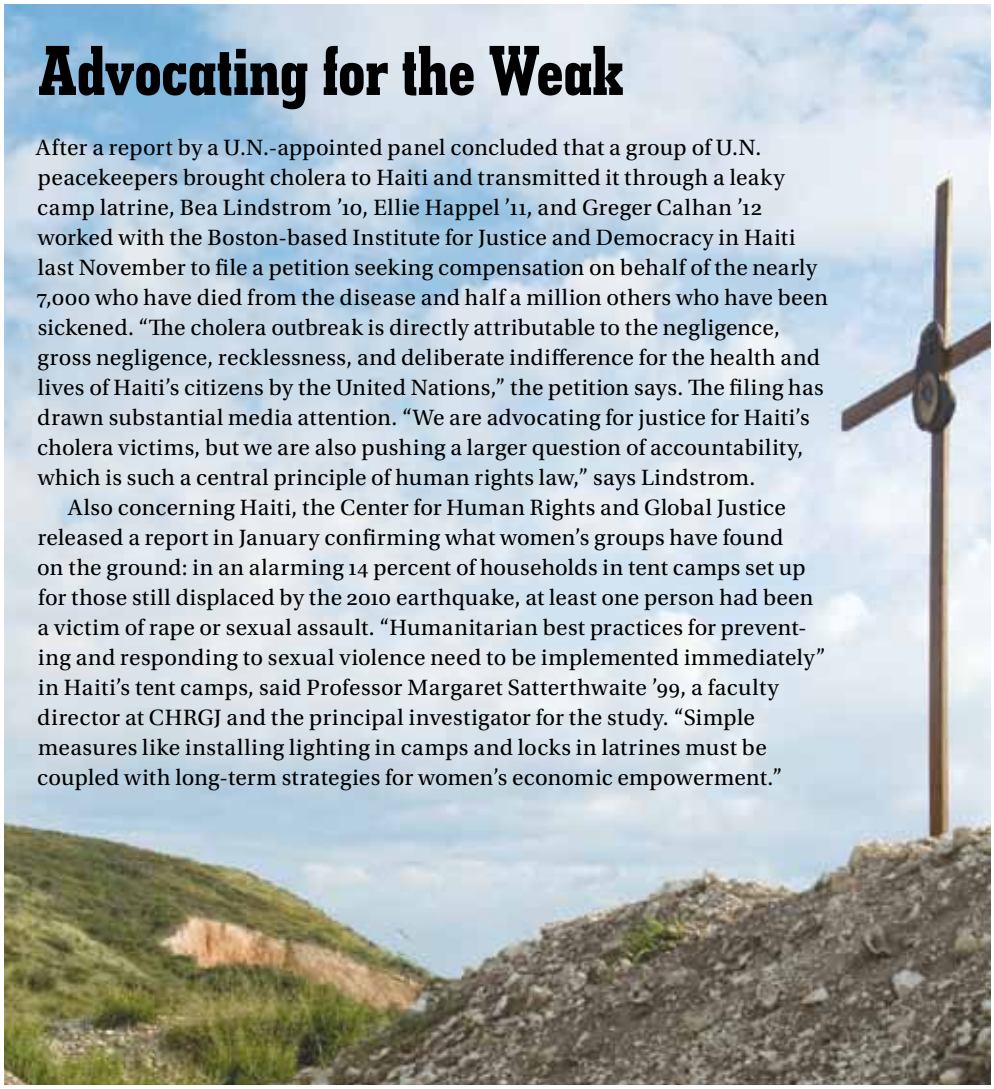
"Recognition and enforcement of foreign judgments, as well as non-recognition and non-enforcement, is and ought to be a matter of national concern. We are in an age of globalization and international commerce, and the relevant standards and criteria should be in the hands of the federal government."

Martin Lipton Professor of Law **LINDA SILBERMAN** *testified before the House Judiciary Committee's Subcommittee on Courts, Commercial and Administrative Law on November 16 as that body was considering federal legislation on a national standard for recognizing and enforcing foreign judgments in the U.S.*

Advocating for the Weak

After a report by a U.N.-appointed panel concluded that a group of U.N. peacekeepers brought cholera to Haiti and transmitted it through a leaky camp latrine, Bea Lindstrom '10, Ellie Happel '11, and Greger Calhan '12 worked with the Boston-based Institute for Justice and Democracy in Haiti last November to file a petition seeking compensation on behalf of the nearly 7,000 who have died from the disease and half a million others who have been sickened. "The cholera outbreak is directly attributable to the negligence, gross negligence, recklessness, and deliberate indifference for the health and lives of Haiti's citizens by the United Nations," the petition says. The filing has drawn substantial media attention. "We are advocating for justice for Haiti's cholera victims, but we are also pushing a larger question of accountability, which is such a central principle of human rights law," says Lindstrom.

Also concerning Haiti, the Center for Human Rights and Global Justice released a report in January confirming what women's groups have found on the ground: in an alarming 14 percent of households in tent camps set up for those still displaced by the 2010 earthquake, at least one person had been a victim of rape or sexual assault. "Humanitarian best practices for preventing and responding to sexual violence need to be implemented immediately" in Haiti's tent camps, said Professor Margaret Satterthwaite '99, a faculty director at CHRGJ and the principal investigator for the study. "Simple measures like installing lighting in camps and locks in latrines must be coupled with long-term strategies for women's economic empowerment."



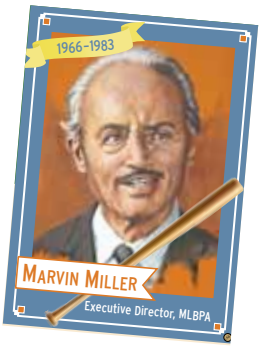
HAITI: DEMOTIX / JOSE GUZMAN

Celebrating the Past in Our National Pastime

The first major-league baseball player strike in history, on April 25, 1972, was such a watershed event in labor relations that a portrait of the strike's architect, Marvin Miller, then-executive director of the Major League Baseball Players Association, hangs in the hallowed halls of the U.S. Supreme Court. This spring, on the 40th anniversary of the strike, NYU Law's Center for Labor and Employment Law hosted a celebration of Miller during which the painted portrait was unveiled, and "Supreme Court Slugger" baseball cards were handed out. The cards came paired with those of Justice Arthur Goldberg, who argued the landmark case of *Flood v. Kuhn*, a challenge to baseball's Reserve Clause that ultimately led to the creation of free agency in sports.

Marvin Miller and Baseball Unionism

While noting that "I draw a sharp distinction between celebrating a strike and celebrating the results of a strike," Miller spoke at the event, warmly and admiringly recounting visits to spring training meetings and of the unanimous votes to take the unprecedented step of going on strike without knowing what might happen. It was a story of unmitigated triumph over management. "They folded. And when I say they folded, I mean they folded," Miller said with a grin of satisfaction. "It was a monumental misjudgment on the part of the owners as to who the players were and what their resolve was... and they have paid for it ever since."



> **"His only mistake was to accept the law as it was written, as a true believer in the power and promise of China's legal reforms."**
>
> **JEROME COHEN,** *Professor of Law, testified about the persecution of legal activist Chen Guangcheng before the Congressional-Executive Commission on China on November 1, 2011.*

Paper Chase

In this election year, the Voting Rights Program of the Brennan Center for Justice has been operating on all cylinders, using the courts, legislation, and the media to fight against new laws that make it harder to register or vote, particularly for young, minority, and low-income voters. Recently the center has reported...

★

Of 12 states with the largest Hispanic population growth, **7 passed restrictive voting laws**

★

Of 10 states with the highest black turnout, **5 passed restrictive voting laws**

★

At least **34 states** have introduced legislation that **would require voters to show photo identification to vote**

★

At least **17 states** introduced legislation that **would require proof of citizenship**, such as a birth certificate, to register or vote

★

More than **21 million** American citizens **lack the necessary government-issued I.D.**

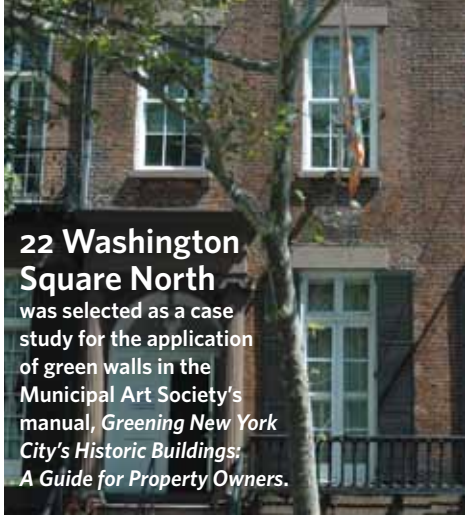
How People Who Don't Yet Exist Matter More to Us Than People Who Do

University Professor Samuel Scheffler delivered the prestigious, three-day Tanner Lectures on Human Values in March at the University of California, Berkeley. At the lectures, a multi-university series across nine institutions recognizing the lecturers' remarkable achievements in the field of human values, Scheffler spoke about the idea of a "collective afterlife"—the survival of other people after one's death. He expounded on this theme in two separate talks, titled "How People Who Don't Yet Exist Matter More to Us Than People Who Do" and "How the Present Depends on the Future."

Past philosophers who have given the Tanner Lectures include NYU Law's Ronald Dworkin, Thomas Nagel, and Jeremy Waldron.

Justice Without Borders

Elected to the International Criminal Tribunal for the Former Yugoslavia by the U.N. General Assembly in 2001, humanitarian law scholar Theodor Meron has helped establish the field of international criminal justice and encouraged the prosecution of war crimes. Now Meron, Charles L. Denison Professor Emeritus and Judicial Fellow, has published *The Making of International Criminal Justice: A View from the Bench*, a collection of speeches from his first decade on the bench as he presided over appeals from the International Criminal Tribunals for both the former Yugoslavia and Rwanda. Aryeh Neier, president of the Open Society Foundations and a former adjunct professor at NYU Law, was an early advocate for such a court. Speaking at a December book party for Meron that was hosted by NYU Law, Neier praised Meron for the passion he has for his work.



22 Washington Square North was selected as a case study for the application of green walls in the Municipal Art Society's manual, *Greening New York City's Historic Buildings: A Guide for Property Owners.*

THIS NYU LAW ALUMNUS APPEARED ON FOUR EPISODES OF JEOPARDY FROM JUNE 29 TO JULY 4, WINNING A TOTAL OF $61,402

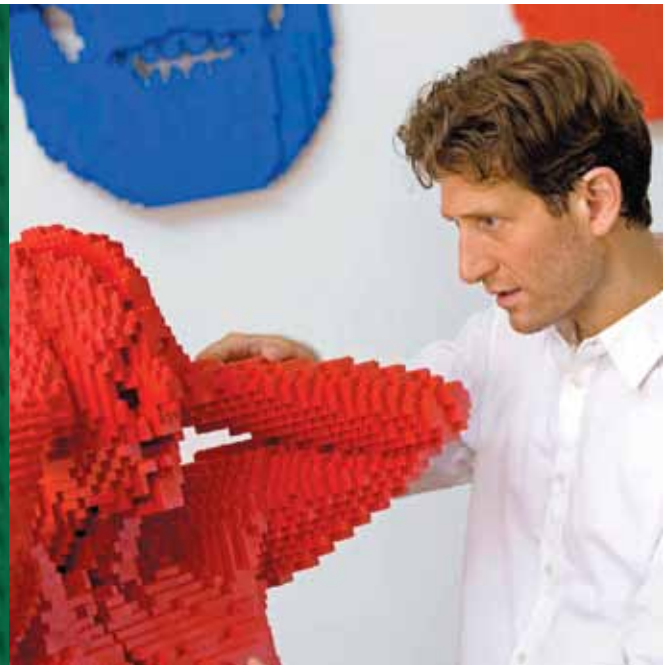
Who is Matthew Samberg '10?

"Special compensation programs do raise fundamental questions about fairness. Why do some victims of life's tragedies receive a fast-track ticket to quick cash, when other innocent victims do not qualify or must patiently wait their turn to gain access to the courtroom? Why this special treatment for a select few?"

Excerpted from Who Gets What: Fair Compensation after Tragedy and Financial Upheaval *by* **KENNETH FEINBERG '70**, *who has overseen numerous compensation funds, including those for September 11 and BP Deepwater Horizon victims.*

Toying with Innovation

Nathan Sawaya '98 didn't just hit the books when he was a law student—he also built a replica of Greenwich Village out of ordinary Lego sets. Now the former Big Law associate has a burgeoning second career as a Lego artist, with exhibits currently touring in North America and Australia. So what can corporate lawyers learn from building with Legos? "Brick by brick, you must have a solid foundation, otherwise your whole project will fall apart," said Sawaya.



NATHAN SAWAYA: © BRICKARTIST.COM

On the Ballot, November 6

Hakeem Jeffries '97
Member, New York State Assembly
SEEKING: seat in U.S. House of Representatives for New York's Eighth Congressional District
PRIMARY: won 72 percent of the vote

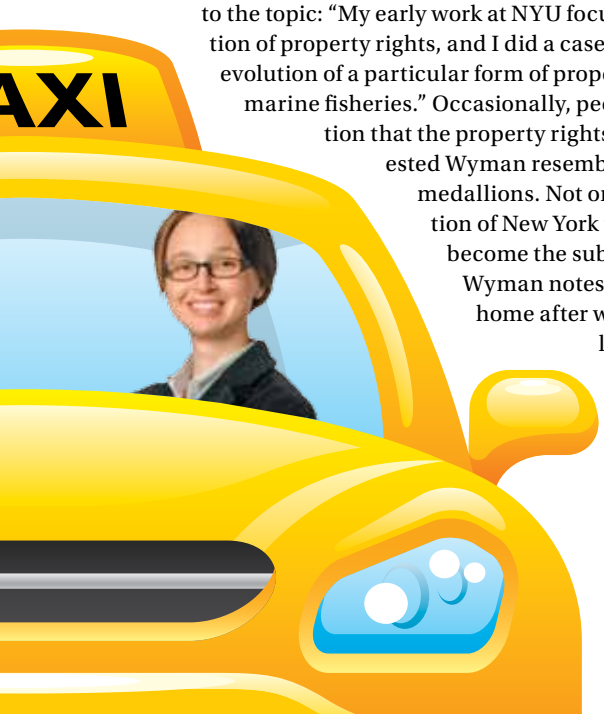
Scott Peters '84
Commissioner, Unified Port of San Diego
SEEKING: seat in U.S. House of Representatives for California's 52nd Congressional District
PRIMARY: won by 719 votes

Supreme Court Cite-Seeing

In a year when the nation was closely watching the Supreme Court, Professor Bryan Stevenson argued and won a pair of cases that will put an end to mandatory life sentences without parole for juveniles convicted of murder (see story on page 42). And the NYU Law faculty, clinics, and centers, in addition to filing more than a dozen amicus briefs, were cited in the following five cases:

CASE	ISSUE	CITATION
National Federation of Independent Business v. Sebelius	The Patient Protection and Affordable Care Act	Amicus brief by Professor Barry Friedman, in Justice Ginsburg's dissent 
Mayo v. Prometheus	Patent rights	 Amicus brief by Professor Katherine Strandburg
Missouri v. Frye	Right to effective counsel	1. Amicus brief from the Center on the Administration of Criminal Law 2. *Stanford Law Review* article by Professor Rachel Barkow (quoted) 
Vartelas v. Holder	Immigration	 Amicus brief by Professor Nancy Morawetz '81 and students of the Immigrant Rights Clinic  *Jordan Wells '13*  *Natasha Rivera-Silber '13*
Williams v. Illinois	Confrontation Clause	*California Law Review* article by Professor Erin Murphy 

Catch Me If You Can



Ever tried to hail a cab in the middle of Queens? In a forthcoming *Yale Journal on Regulation* article, Professor Katrina Wyman explains why it's so difficult. Wyman, whose primary focus is environmental regulation, took an interesting route to the topic: "My early work at NYU focused on the evolution of property rights, and I did a case study on the slow evolution of a particular form of property right in U.S. marine fisheries." Occasionally, people would mention that the property rights in fish that interested Wyman resembled those in taxi medallions. Not only did the evolution of New York taxi medallions become the subject of her article, Wyman notes, but "taking taxis home after working late quite literally was a big part of my life in my early years at NYU." Look for "Problematic Private Property: The Case of New York Taxicab Medallions" in the next year.

GAY MARRIAGE, RINGSIDE

2-0

Wins **Losses**

Round 1:
On August 4, 2010, U.S. District Court Judge Vaughn Walker, siding with Trustee David Boies (LL.M. '67), and Theodore Olson, a board director of the Dwight D. Opperman Institute of Judicial Administration, rules that California's Proposition 8 same-sex marriage ban is unconstitutional.

Round 2:
On February 7, 2012, the U.S. Court of Appeals for the Ninth Circuit ruled 2-1 that Judge Walker—and Boies and Olson—interpreted the U.S. Constitution correctly.

Final Round: U.S. Supreme Court?

Good Facts Make Good Neighborhoods

BY JANE HODGES

THE FURMAN CENTER'S IMPECCABLE RESEARCH AND DATA ON NEW YORK CITY HOUSING HAS HELPED TO SHAPE COMMUNITIES; A NEW $1 MILLION MACARTHUR AWARD WILL WIDEN THE CENTER'S GEOGRAPHIC SCOPE WITHOUT MORTGAGING ITS FUTURE.

Statistics about housing abound, but often they're skewed or designed to reinforce—rather than test—current beliefs among policymakers and a population that by and large is obsessed with housing.

But the Furman Center for Real Estate and Urban Policy has, since 1995, asked complex questions about housing and housing policy and provided data-driven answers in order to help municipalities, community groups, and builders see their communities' needs clearly and develop effective policies and programs to address them.

The world is taking notice: In February, the center won a $1 million MacArthur Award for Creative and Effective Institutions from the John D. and Catherine T. MacArthur Foundation to further its research and policy analysis in and beyond New York, where for years its quarterly and annual reports have served as bibles for those who work in both real estate development and housing policy. The center is one of 15 organizations around the world selected by the foundation for such funding.


Ellen and Been

Jointly operated by the Law School and the Robert F. Wagner School of Public Service, the Furman Center researches dozens of topics within four broadly defined areas of study: affordable housing, housing finance and foreclosure, land use regulation, and neighborhood change. These areas won't change under the grant, but the award will enable new approaches to the work as well as more research participation from faculty. Furman has earmarked $650,000 of the award as a seed fund that scholars across the nation can apply to use over the next decade to launch new real estate and policy work. "Furman Center scholars have made important contributions on such issues as the foreclosure crisis, the future of home mortgage lending, fair housing and access to opportunity, and environmentally sustainable urban development," said Margery Turner, vice president for research at the Urban Institute. "We look forward to continued collaboration with the center as it expands its capacity to engage in national policy research and debate."

Vicki Been '83, Boxer Family Professor of Law and the Furman Center's director, says the center's location at the intersection of the law and public policy means its research is not only academically rigorous but also useful in informing legislative and regulatory decisions. Sometimes Furman data—such as recent research on how New York City property taxes affect renters and new initiatives looking at how homeowners' perceived housing wealth will influence their financial decisions and retirement—spurs conversations that might not otherwise happen.

Often, those conversations lead to major policy change. In recent years, for instance, Furman played a key role in revealing that tenants were overlooked victims of the foreclosure crisis within a national dialogue that had focused mainly on homeowner distress; center research indicated that half of those affected by foreclosures in New York City were renters who had little power or protection. Policymakers used this data, which eventually led to the Protecting Tenants at Foreclosure Act of 2009 and similar protections in many states. These were unusual federal interventions into landlord-tenant regulations typically governed by states.

Ingrid Gould Ellen, professor of urban planning and public policy at Wagner and the center's co-director, says the award will help Furman dig deeper into how to make federal and local housing policy more effective. It's important work, since federal subsidies provide a layer of funding for states' and cities' affordable housing stock around the country. In addition, Been says, the funds will help the center augment its growing trove of New York-focused research with comparative studies and data from other urban areas. She calls this multi-site research, noting that locating appropriate research partners with similar urban data sets is often a complex process.

The center recently conducted work, for example, on inclusionary zoning—the practice of requiring or providing incentives for developers to create affordable housing along with market-rate properties—to establish how and where it works in the Bay Area, the 92 municipalities around Boston, and Montgomery County, Maryland. In addition, it is collaborating with teams at Northwestern University, the University of Connecticut, and Indiana University to research how children are affected by foreclosures.

Academic research centers tend toward either an academic and data-driven bent or a policy-focused one, Ellen says, but Furman's ability to integrate both talents—producing rigorous research that can support policymakers' decisions—set it apart in the eyes of the MacArthur Foundation. "We saw them as having the potential to become a national research center," said Ianna Kachoris, program officer for housing at the MacArthur Foundation. "It's not just about their doing data analysis but about producing data that is informative to policymaking."

Furman Center board member and founding benefactor Jay Furman '71, principal of RD Management, says the award will leverage the center's enormous but geographically limited New York City influence. "Vicki and Ingrid are extraordinary," he says. "Expanding the center's work will offer the dual advantages of addressing complex problems in America's cities and enabling a comparative study between New York and other cities."

As the housing correction continues to unfurl and the economy remains fragile, the Furman Center will do just that, Been and Ellen say. Research into how reduced housing wealth will affect families, and the challenges of providing high-quality affordable housing with reduced government budgets are on the center's lengthy research agenda. "We use our data to test theories and hypotheses," Been says. "We help policymakers base their decisions on facts and evidence.'" □

Jane Hodges is a writer in Seattle and author of Rent Vs. Own: A Real Estate Reality Check for Navigating Booms, Busts, and Bad Advice *(Chronicle, 2012).*

Early last year, Richard Pildes, Sudler Family Professor of Constitutional Law, learned that his friend Robert Bauer, a confidant of President Obama and the White House counsel since 2009, was thinking of leaving that post. Pildes tipped off Dean Richard Revesz, for whom strengthening ties to the legislative and executive branches of government has been a high priority. (The era of focusing the Law School curriculum almost exclusively on the judiciary has ended on Revesz's watch.) Within days, the dean had not only worked out a plan to persuade Bauer to choose NYU over the other top law schools that wanted him, but also had gone to Washington to close the deal.

Bauer, now chief counsel to the Obama-Biden campaign, agreed to come to NYU School of Law as a senior fellow and adjunct professor. He has already shared his inside-the-Beltway perspective with students in seminars on presidential power and campaign finance, and he will continue doing so until at least 2015. "The picture Ricky drew overall of the Law School and its direction was compelling," says Bauer. "He also made a powerful case for the excellence NYU had achieved—and that it would continue to pursue—in the fields of primary interest to me." (Among other important Washington figures

In nearly every measurable area, NYU School of Law has thrived and grown under the leadership of Richard Revesz.

DEAN OF THE DECADE

Born May 9, 1958, in Buenos Aires, Argentina

1980 *M.S., MIT*

1980

1979 *B.S.E., Princeton University Summa Cum Laude*

BY FRED BERNSTEIN '94

recently or currently teaching at the Law School, some on a full-time or half-time basis, are C. Boyden Gray, White House counsel under George H.W. Bush; Paul Clement, solicitor general under George W. Bush; Sally Katzen, administrator of the Office of Information and Regulatory Affairs in the Clinton White House; and judges Harry Edwards and Douglas Ginsburg of the U.S. Court of Appeals for the District of Columbia Circuit, who both maintain senior status on the bench.)

With moves like these, Revesz has surprised even his most ardent supporters—who 10 years ago had no idea how big the job would become under his aegis. "The faculty was wildly in favor of Ricky becoming dean," remembers Barry Friedman, Jacob D. Fuchsberg Professor of Law, who was on the search committee that recommended him to succeed John Sexton, now president of NYU. "But we knew there would be strengths and weaknesses. What's interesting has been to see his strengths increase and his weaknesses kind of evaporate."

One common perception was that Revesz—described by nearly everyone as brainy and hyper-logical—wouldn't be good at motivating donors. "With that professorial look, he's not the fund-raiser from central casting," says Robert Kindler '80, Morgan Stanley vice chairman and a Law School trustee. But David Tanner '84, executive vice president at Continental Grain Company and now also a Law School trustee, says he hadn't been a major donor until Revesz persuaded him to become one. "He has a wonderful way of making you feel like your philanthropy is really going to make a difference," Tanner says, adding that Revesz "has no qualms about asking for big numbers."

Very big numbers: Revesz has raised an average of about $50 million in each of his 10 years as dean, bringing his total so far to more than half a billion dollars. Despite the economic recession, he more than doubled the size of the annual fund from $3.1 million in 2002 to $6.5 million today and is building up the school's endowment (still smaller than those of several rival schools). But sometimes, at a school Revesz describes as "entrepreneurial," the endowment, which is composed of restricted funds, has to wait: Money, especially unrestricted funds raised for the annual fund, is needed to deliver student services, financial aid, and programs that, Revesz says, "help students and recent graduates do things they want to do"—including taking public interest and government jobs. (In the last decade, the school's Loan Repayment Assistance Program has grown to record levels; see page 13.)

In fact, nearly every aspect of Revesz's job has grown. Larry Kramer, until August the dean of Stanford Law School, says the responsibilities of law school deans have changed radically in recent decades. A dean was once primarily part of the faculty—a leader of the academic cohort. Then fund-raising and administrative duties multiplied, making the dean a veritable CEO. And NYU Law, which offers nearly a dozen joint-degree versions of its J.D., plus 10 LL.M.s and a J.S.D., is a particularly complicated organization to run, says Kramer, who was a vice dean and professor at NYU Law from 1994 to 2004.

Revesz is, by all accounts, a quick decision-maker once he hears the facts. And his door is always open, at least metaphorically; students and colleagues say he answers nearly every e-mail before the next day. Once, Revesz recalls, he got a 1:00 a.m. e-mail from a student who needed advice before a clerkship interview with Second Circuit Judge Guido Calabresi at 7:00 that morning. Revesz, who had studied with Calabresi at Yale, responded, and the student got the clerkship. Telling the story, Revesz says, "I remember thinking, This really is a full-service operation."

It's tempting to think it was the chaos of his childhood in Argentina—which came only two decades after the decimation of his father's family in the Holocaust—that fueled Revesz's ambition. Each morning, Revesz remembers, he turned on the radio to find out if a coup or a general strike would make it impossible for him to get to school that day. (Because the heat in his apartment building didn't come on until 8:00 a.m. and political paroxysms were frequent, Revesz says, it was rational to check the radio before deciding to crawl out from under the covers—a precocious application of cost-benefit analysis.) He chose the U.S., particularly Princeton, with its *This Side of Paradise* campus, as a refuge. After graduating summa cum laude, he went on to MIT for a master's in engineering; his adviser suggested he round out his studies by learning microeconomics. That fomented his interest in public policy and a transition from engineering to law. From Yale Law School, where he was editor-in-chief of the *Yale Law Journal,* and a pair of prestigious clerkships for Second Circuit Chief Judge Wilfred Feinberg and Supreme Court Justice Thurgood Marshall, he arrived at NYU in 1985.

"Ricky is a great American success story," says Raymond Lohier '91, a judge of the U.S. Court of Appeals for the Second Circuit. In fact, Lohier likens Revesz to Calabresi, former dean of Yale Law School (and, like Revesz, from a family displaced by European fascism).

Like many ambitious deans, Revesz has made a tangible mark on his institution, building Furman Hall (which had been planned by Sexton) and Wilf Hall, acquiring 22 Washington Square North, and upgrading and modernizing the Law School's cornerstone, Vanderbilt Hall. But he has made even more impressive changes to what happens *in* those buildings—including increasing the size of the full-time faculty from 83 to 109. Many of his 44 hires have been laterals from Columbia, Harvard, Michigan, and Chicago. The bottom line: Nearly half the current Law School faculty, including some of its biggest stars, has arrived during the Revesz era. "It's been a singular focus of his," says Kindler. "To get so many to come from Columbia and Harvard while losing very few to competitors is a very big deal."

Revesz says he doesn't rely on a checkbook to lure new faculty, explaining that NYU can't afford to outbid schools with much larger endowments. Instead he appeals to a scholar's desire to be part of a uniquely collaborative academic community that has an impact on the outside world. One Columbia professor, after meeting with Revesz, told the dean that it seemed the

1983 *J.D., Yale Law School*

1983–84 *Clerked for Chief Judge Wilfred Feinberg of the U.S. Court of Appeals for the Second Circuit*

1984–85 *Clerked for U.S. Supreme Court Justice Thurgood Marshall*

1985 *NYU School of Law, Assistant Professor of Law*

1988 *NYU School of Law, Associate Professor of Law*

1989 *Marries Vicki Been '83*

1990

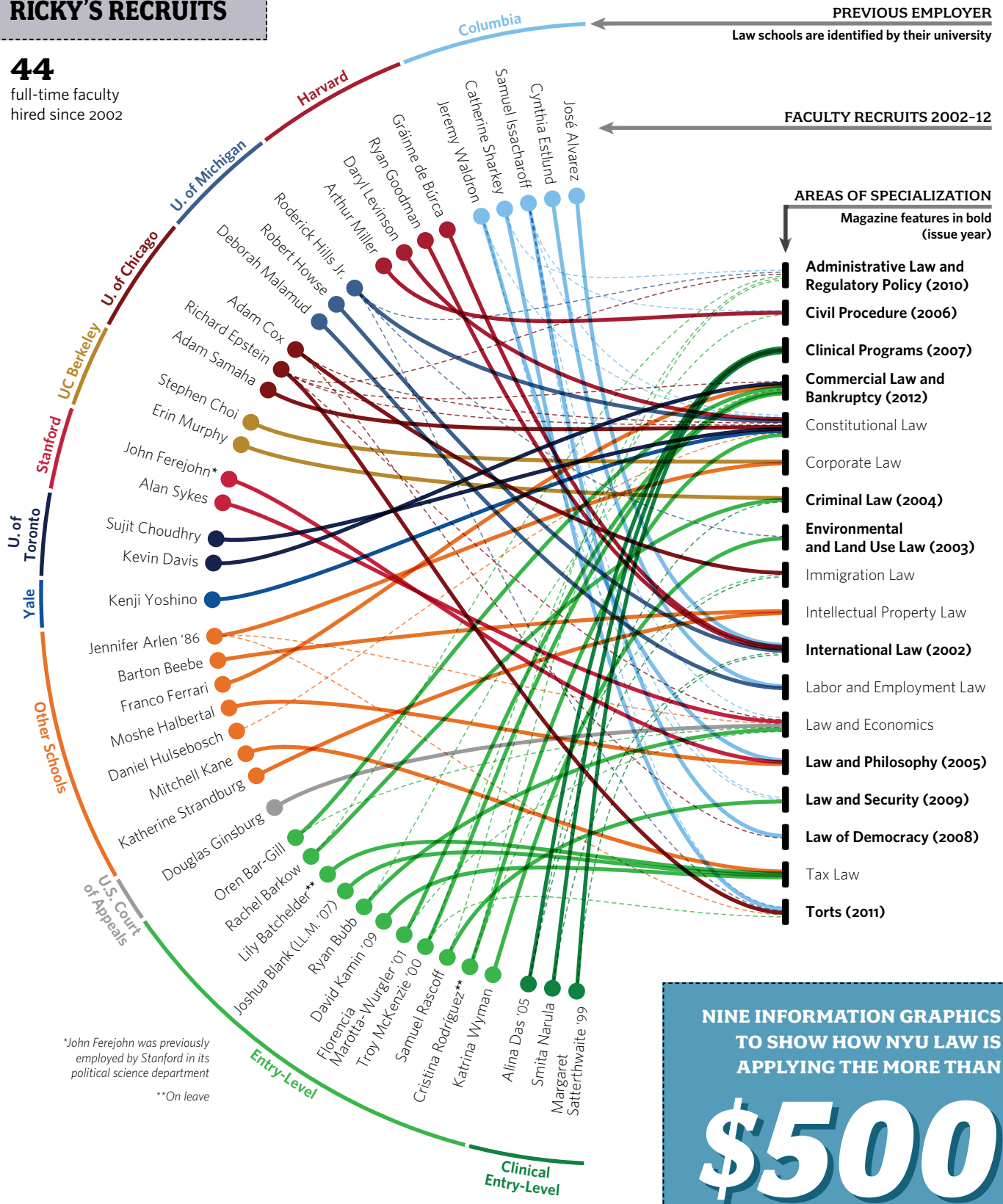
1990 *NYU School of Law, Professor of Law*

Son Joshua born

1991 *Election to the American Law Institute*

RICKY'S RECRUITS

44
full-time faculty hired since 2002



*John Ferejohn was previously employed by Stanford in its political science department

**On leave

31%
increase in the size of the full-time faculty from 2002 to 2012

0
full-time academic faculty members who left in the past five years

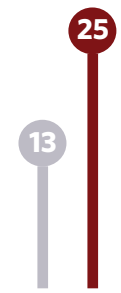
109
total full-time faculty in 2012

NINE INFORMATION GRAPHICS TO SHOW HOW NYU LAW IS APPLYING THE MORE THAN

$500 MILLION

DEAN REVESZ RAISED IN THE LAST TEN YEARS.

UP AND DOWN, IN AND OUT, SIDE BY SIDE: 2002 VS. 2012



NUMBER OF CENTERS

2002 2012

NUMBER OF CLINICS

2002 2012

ENDOWMENT

Additions to the endowment's managed assets, from fundraising, nearly **doubled the value of those assets between 2002 and 2012.**

BUDGET

In the aggregate the Law School had **balanced operating budgets from 2002 to 2012.**

J.D. SCHOLARSHIPS AND GRANTS

2002 2012

361 522

Number of annual recipients

$6,794,216 $11,395,975

Total dollars annually awarded

LOAN REPAYMENT ASSISTANCE PROGRAM

2002 2012

273 505

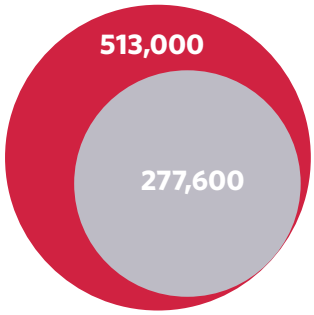
Number of annual recipients

$2,497,490 $4,450,000

Total dollars annually awarded

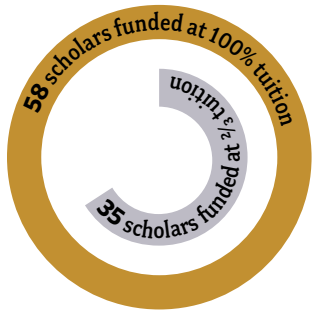
SQUARE FOOTAGE OF ACADEMIC FACILITIES

2002 2012



ROOT-TILDEN-KERN SCHOLARSHIP PROGRAM

2002 2012



ANBRYCE SCHOLARSHIP PROGRAM

2002 2012

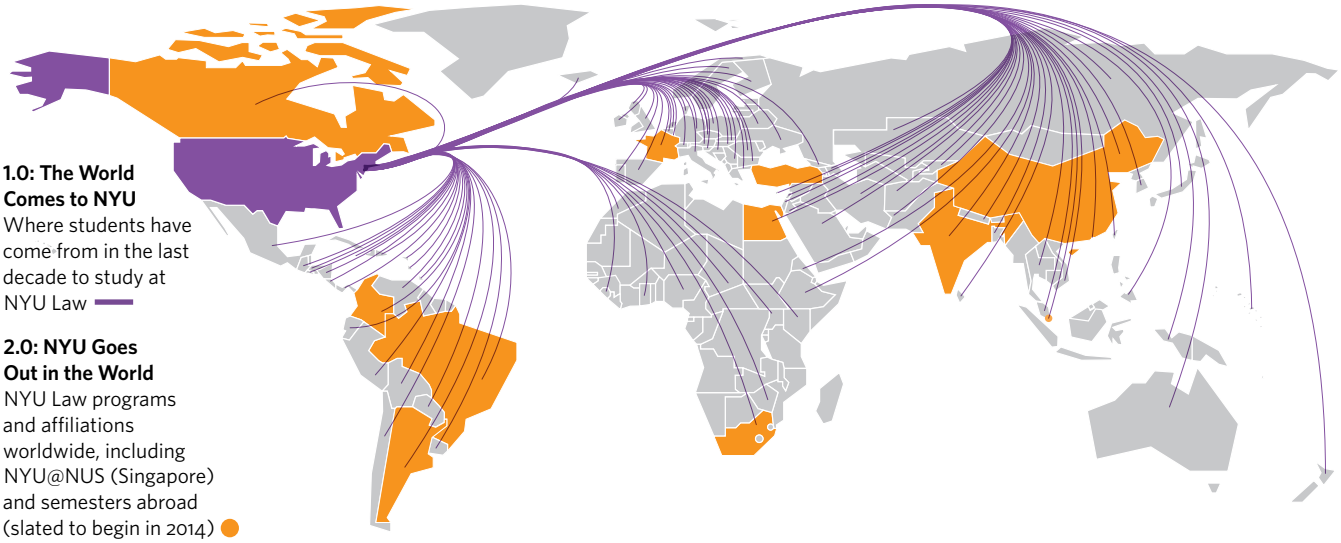
3 26

Number of annual recipients

$97,350 $1.3 MM

Total dollars annually awarded

THE HAUSER GLOBAL LAW SCHOOL



1.0: The World Comes to NYU
Where students have come from in the last decade to study at NYU Law

2.0: NYU Goes Out in the World
NYU Law programs and affiliations worldwide, including NYU@NUS (Singapore) and semesters abroad (slated to begin in 2014)

"RICKY'S RECRUITS" AND "THE HAUSER GLOBAL LAW SCHOOL" PRODUCED WITH INFOGRAPHICS.COM



SNAPSHOTS FROM A DEAN'S LIFE *Introducing Richard Epstein, recruited to NYU Law in 2010, at Epstein's inaugural chair lecture as the Laurence A. Tisch Professor of Law; chatting with students during a Dean's Roundtable, at which Revesz invites a distinguished alumnus or alumna to an intimate lunch with 18 students; celebrating the end of the capital campaign at the 2010 Weinfeld Gala; and greeting Justice Sonia Sotomayor after the Marden Moot Court in 2012.*

choice was between working alone in his office or joining NYU Law to work collaboratively; his eventual move downtown was another victory in legal academia's version of the Subway Series. For those Revesz wants to entice from other cities, he has taken advantage of his simple observation that people often change jobs when their children are about to start elementary school, or just after their children finish high school—timing his recruitment efforts accordingly.

One of the results of the hiring spree, besides a faculty deeply loyal to the dean: There are now at least a dozen fields of law in which NYU arguably has the best faculty among the leading law schools. (Since Revesz became dean, this magazine has made the case for NYU's preeminence in 11 of those fields.) But not content to merely hire leading academics, he exhorts them to do their best work after they arrive at NYU—one reason he personally moderates the weekly brown-bag lunches at which professors take turns sharing works in progress. His involvement, he says, helps keep research and writing on the front burner.

Revesz encourages professors to collaborate with students; he himself has had student co-authors on nearly all his recent publications, including his 2008 book, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health*, co-authored with Michael Livermore '06, now an adjunct professor at the Law School. The book lives up to its title, making a powerful argument for employing cost-benefit analysis—which, in Revesz's view, had been co-opted by pro-business, anti-regulatory interests—in the service of environmentalism.

One reason Revesz seeks out student co-authors, he jokes, is that knowing a student is depending on him keeps him working when he might otherwise grab an extra hour's sleep. But the real motivation, he says, is to give students an opportunity to share an experience he had at MIT, where his adviser made him feel, he says, like "a full colleague." Even 30 years later his gratitude is palpable when he talks about it. That kind of interaction between students and professors is typical of Ph.D. programs but has rarely been available in law schools. In 2003, however, NYU Law launched the Furman Academic Scholarship Program. It is based on the graduate model, offering full-tuition scholarships, summer funding, and close faculty mentoring to a select group of students interested in academic careers.

The larger goal is to give all students interested in research the chance to do professional-level work, just as students in litigation clinics get to work on real (and sometimes important) cases. "You should think of your three years here as a time when you can accomplish significant professional things," Revesz announces each spring at a breakfast for admitted students, who might have mistakenly thought law school was just for taking classes.

Matthew Shahabian '11, now a law clerk to Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit, recalls speaking to Revesz about a subject of mutual interest: how discount rates, which are used to determine the present value of future benefits, influenced the perceived worth of various environmental regulations. At their first meeting, Revesz proposed co-authoring an article—"not," Shahabian says pointedly, "that I be his research assistant." From then on, he became accustomed to receiving comments and revisions from Revesz late at night. Eventually, Shahabian says, it dawned on him that at the same time Revesz was working on their article, "he was also writing another article with a friend of mine, teaching, traveling for conferences, meeting with donors...."

But Shahabian didn't know the half of it. One way that Revesz has increased the complexity of the organization he leads is by adding a dozen academic centers and institutes that vary in the details but share the goal, he says, of getting professors, students, and professionals in the field "to work on topics of great legal or public-policy salience." In 2008, the dean himself started the Institute for Policy Integrity, making his former student and collaborator Livermore the executive director.

1994 *Daughter Sarah born*

1995–96 *Harvard Law School, Visiting Professor of Law*

2001 *NYU School of Law, Lawrence King Professor of Law*

2002 *Princeton University, Visiting Professor of Public and International Affairs*

2000

First American Bar Association Award for best book or article on administrative law and regulatory practice

1997 *Author,* Foundations of Environmental Law and Policy

Yale Law School, Visiting Professor of Law

NYU School of Law, Dean

Celebrating the "topping off" of Wilf Hall in 2010; in the classroom—Revesz keeps his skills sharp by teaching Environmental Law and the Administrative and Regulatory State Clinic each year; psyching himself up for a Wii Tennis match to raise funds for summer internships at the Public Interest Law Center's annual auction; and in 2006 with Bishop Desmond Tutu, one of the many dignitaries and political and legal leaders who visit the Law School annually.

And that's just in New York; the dean's portfolio includes major global initiatives, including a dual LL.M. degree program with the National University of Singapore Faculty of Law and a recently announced plan to give J.D. students semesters abroad in Shanghai, Paris, and Buenos Aires—the city Revesz left three decades ago.

At the same time, he has strengthened student opportunities to learn about the legislative and executive branches of government. Notably, he oversaw the addition of a required course on the Administrative and Regulatory State to the first-year curriculum, setting the stage for 2Ls and 3Ls to delve deeply into how Washington functions. He underscores the importance of this area by co-teaching, with Livermore, the Administrative and Regulatory State Clinic, in which students work with non-governmental organizations to prepare petitions, draft public comments for notice-and-comment rulemakings under the Administrative Procedure Act, and participate in administrative law litigation.

Mindful that many NYU Law graduates go on to work in corporate law firms or on Wall Street, Revesz has forged significant ties to the business community, taking advantage of resources that are available only in New York City. In 2007, the Law School launched the Mitchell Jacobson Leadership Program in Law and Business, which offers a J.D./M.B.A., mentoring, and a curriculum that includes a Business Law Transactions Clinic as well as roughly 10 "Law and Business of" courses—in investment banking, microfinance, and bankruptcy, to name a few—co-taught by faculty from NYU Law and the Stern School of Business to students of both schools, who work collaboratively to analyze significant transactions presented by the principals who negotiated them.

Revesz has also made a considerable effort to support socio-economically disadvantaged students, to diversify not only classrooms but also, eventually, law firm partnership rosters and corporate boardrooms. Last year, Sponsors for Educational Opportunity honored NYU Law for helping students from underserved communities succeed in college and the workforce. The Law School's programs that support such students include TRIALS (Training and Recruitment Initiative for Admission to Leading Law Schools), a partnership with Harvard Law School and the Advantage Testing Foundation that offers LSAT preparation courses and other support; a five-week summer course in partnership with Legal Outreach to introduce middle-school and high-school students in underserved areas to careers in the law; and the AnBryce Scholarship Program—created by the chairman of the Law School Board of Trustees, Anthony Welters '77, and his wife, Beatrice Welters, the U.S. ambassador to Trinidad and Tobago—which provides 10 full-tuition scholarships per class 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 says.

With all these initiatives and responsibilities, Revesz might resent the time spent on fund-raising, especially because there are no shortcuts—if he wants to raise twice as much money, he says, he has to make twice as many calls. But, in a typically Revesz-ian way of finding intellectual stimulation in jobs others might find tedious, he says he enjoys fund-raising because it introduces him to leaders in a variety of fields. Potential donors, he explains, tend to be innovators. Asked by a reporter why American universities are so much more innovative than their European counterparts, he responded that because leaders of U.S. institutions have to fund-raise, they need to interact with successful non-academics. As a dean, "you wouldn't learn as much," he says, "if you were just sitting around waiting for a big check from the government."

Sitting around isn't Revesz's style. When he took the job, he had big shoes to fill. In 10 years he has not only filled those shoes, but used them to cover a lot of new ground. □

Fred Bernstein '94, a journalist, clerked for two federal judges and now writes about his favorite subjects—including law, architecture, and fatherhood—for many publications.

2007 *Fellow, American Academy of Arts and Sciences*

2008 *Faculty Director, Institute for Policy Integrity, NYU School of Law*

2008 *Member, Council on Foreign Relations*

2010 *Member, Administrative Conference of the United States*

2010

2004 *Trustee, American Museum of Natural History*

Second American Bar Association Award for best book or article on administrative law and regulatory practice

Co-author, Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health

2011 *Member, Committee on Conscience, United States Holocaust Museum*


FISH MARKET

Signature Issues in Commercial Law and Bankruptcy

Globalization and the Internet are just two factors making commerce and bankruptcy—and the laws that apply to them—exponentially more complicated than two people, face to face, exchanging cash for, say, a fresh catch.

If you graduated from NYU School of Law more than 10 years ago, it's likely that you think of commercial law courses as essentially focused on one area: how sales transactions in the U.S. are governed. Specifically, that meant studying the UCC, or Uniform Commercial Code. Oh, how things have changed. To be sure, students still intensely study the UCC and domestic contract issues. But the commercial world is shrinking. International transactions have soared dramatically, raising complicated global legal questions as deals are cut across countries with different legal systems. "Commercial law can no longer be thought of from a purely domestic perspective," says Clayton Gillette, Max E. Greenberg Professor of Contract Law. "It's no longer plausible in a law school curriculum to think of commercial law in that limited way."

NYU Law has responded in a variety of innovative ways to prepare students for that new world. The school has beefed up classes on international sales law and arbitration; professors are reorienting their scholarship to look overseas and organizing conferences here and around the world to discuss international commercial law issues. Also on the agenda: the announcement this fall of a program allowing students to study abroad for a semester in Buenos Aires, Paris, or Shanghai.

An explosion in international trading isn't the only big change in the commercial realm. The study of commercial law has increasingly expanded beyond business-to-business transactions to include those between business and consumers. That has meant a growing emphasis in both the classroom and research on contracts involving everything from credit cards to mortgages to cell phones. The boom in online transactions alone has raised a host of tricky and novel contractual questions about things like disclosure and privacy that are receiving intense focus from professors and students. The financial crisis led to a flood of high-profile bankruptcies—General Motors, Lehman Brothers, and Bernard L. Madoff Investment Securities, to name a few—each of which raised challenging and controversial issues. NYU Law professors have found themselves smack in the middle of the heated debates over the courts' authority and the government's role.

In each of these aspects of commercial law and bankruptcy, NYU Law can claim some of the nation's preeminent faculty. Gillette and Franco Ferrari both delve deeply into commercial law. Kevin Davis has focused his recent contract law scholarship through the lens of developing countries. In the consumer credit area, Oren Bar-Gill and Ryan Bubb have separately and together taken aim at exploitative contracts involving credit cards, mortgages, and cell phones, among others. Florencia Marotta-Wurgler '01 has concentrated her scholarship on contracts and privacy issues in the online world. The school recently hired Arthur Gonzalez (LL.M. '90), who, as chief judge of the U.S. Bankruptcy Court for the Southern District of New York, presided over three of the largest bankruptcies in history: Enron, WorldCom, and Chrysler. He joins Barry Adler, one of the nation's foremost bankruptcy scholars, and Troy McKenzie '00, who is exploring questions about the limits of the powers of bankruptcy courts. The theoretical study of contract law is the province of Lewis Kornhauser, Liam Murphy, and Richard Epstein.

BY LARRY REIBSTEIN
ILLUSTRATIONS BY RICHARD MIA

These scholars and practitioners are a lively, independent-thinking cohort, who don't necessarily agree on either normative or prescriptive policies about contracts, commercial law, or bankruptcy. While Bar-Gill and Bubb, for instance, favor more contract disclosure regulation, Marotta-Wurgler questions its practicality and Epstein thinks government should not be the regulating authority.

"NYU has an unsurpassed portfolio of commercial law scholars, comprising leaders in the application of empirical, theoretical, and doctrinal analysis to commercial and consumer issues," says George Triantis, a Stanford Law School professor and expert in commercial law, contracts, and bankruptcy. "The tradition of excellence in this field spans generations of scholars, keeping NYU School of Law at the cutting edge of the discipline."

Contract Law Here and Abroad

Clayton Gillette likes to tell his students the adage "If you give a person a fish, you feed him for a day; if you teach a person to fish, you feed him for a lifetime." But then he tacks on an instructive twist: "If you teach a person how to buy and sell fish and open a fish market, you feed the person, the person's family, employees, and customers."

His message, in his words: "Commerce is the great mechanism for wealth creation and entrepreneurship." Gillette hopes it especially resonates with students interested in developing countries. "Commercial law will bring both individuals and nations out of poverty," he says. "I truly believe that."

Gillette, who joined the NYU Law faculty in 2000 from the University of Virginia School of Law, does extensive work on domestic and international fronts. That's reflected in his 2002 text, *Sales Law: Domestic and International*, co-written with Steven Walt. His recent domestic work has focused on whether standard form contracts tend to disfavor buyers. His argument: not necessarily, because market forces and the seller's need to maintain his or her reputation will constrain bad contracts. He also presented a paper at a contractual innovation conference in May, organized by Kevin Davis and Florencia Marotta-Wurgler, that explored why some parties do not opt out of paying "consequential damages" in a contract, such as lost profits.

Professor Franco Ferrari, director of the Center for Transnational Litigation and Commercial Law, concentrates solely on international issues in commercial law and is widely considered one of the world's experts on the topic, highly sought after by companies and lawyers eager for his advice. He has written 14 books and some 230 papers in French, German, Italian, English, and Spanish, oft cited by U.S. and German courts. In 2012 alone, he published two books: *Internationales Vertragsrecht (International Contract Law)*, which he co-wrote and co-edited, and *Contracts for the International Sale of Goods*.

For two professors who well understand the importance of international trade, Gillette and Ferrari both describe themselves as "skeptics" of the uniform law governing worldwide sales transactions. Commonly known as CISG, the United Nations Convention on Contracts for the International Sale of Goods came into force in 1988 and was ratified by 78 countries at last count. Intended to promote trade and ease the worries of cross-border buyers and sellers, it sets up the rules that govern sales transactions between companies in different nations, such as when a deal is breached, what constitutes a change in a contract, and how disputes should be resolved.

"If you're an American company buying shoes from Italy," says Gillette, "you should understand, if nothing else, that your contract is not governed by the Uniform Commercial Code [which applies in the U.S.], and not by Italian domestic law, but is governed by this international sales law, CISG."

While many observers hail CISG, Gillette thinks it could eventually fail for a variety of reasons. For one thing, he says, many of its provisions are vague and ambiguous, written not by commercial parties but by politicians more interested in reaching compromises than in setting up the clearly defined rules that businesses seek. "The upshot is a treaty whose provisions are likely to become less and less useful as time goes on," he co-wrote (with Robert Scott) in a 2005 piece, "The Political Economy of International Sales Law," for the *International Review of Law and Economics*.

Even the underlying notion of a worldwide uniform law bothers Gillette. "Just as we think competition for coffee leads to better coffee, so we think competition for law leads to better law," he says. "There are benefits to be had when New York law competes with London law, which competes with French law, and parties have the ability to choose which law they want to apply to their transaction."

The article was controversial among international scholars for obvious reasons. Gillette recalls how one of the drafters of CISG described the piece as "brilliant but flawed." Laughing loudly, Gillette adds: "My view is he was half right."

Ferrari falls roughly in the same camp as Gillette: Although the goal of uniform global law is worthwhile, it has been carried out poorly. "Unification is a myth up to now," he declares, adding that it is filled with loopholes that lawyers can—and should—exploit. Indeed, much of his scholarship and outside consulting practice are devoted to debunking the myth and advising companies on how to take advantage of the loopholes.

One loophole he has widely written about is what he labels the "homeward trend." Judges in the 78 countries are supposed to apply CISG uniformly, he says, "yet there's no way a French judge applies the convention the same way as a U.S. judge."

To take advantage of this loophole, he strongly advocates "forum shopping" as a way for companies to find courts that are more inclined to rule in their interest. He even teaches a seminar called Forum Shopping and International Commercial Law. "Forum shopping is, in my opinion, something lawyers have to do as an obligation to their client," he says. "It is legal, no doubt. Those who hate it are those who can't do it."

Despite his gaming, or perhaps because of it, Ferrari doesn't advocate junking CISG: "I believe that it's a good thing, as long as you know what its defects are."

Ferrari came to NYU Law full-time in 2010, and that year he created the Center for Transnational Litigation and Commercial Law. In addition to hosting visiting overseas lawyers and scholars, the center organizes conferences throughout the year at which discussion typically focuses on the different ways commercial law is applied internationally. In October 2011, for instance, the center, under the auspices of the United Nations Commission on International Trade Law, gathered 19 Italian academics in Milan to discuss the interpretation, applicability, jurisdiction, formation, and liability of international sales law.

Ferrari and Gillette collaborate frequently. In a 2010 article in *International Commercial Law (Internationales Handelsrecht)*, "Warranties and 'Lemons' Under CISG Article 35(2)(a)," they tackled the question of what international standard to apply when determining whether a breach of warranty had taken place. They've also organized several conferences, including one in Florence a few years ago that gathered American and European scholars to talk about their approaches to commercial law. "European commercial law is more regulatory than American commercial law," Gillette notes, while "Americans tend to begin from the proposition that the rules of commercial law should do for the parties

The Signatories

PLEASE READ AND AGREE TO TERMS

A dozen members of the NYU Law faculty who write about and study aspects of commercial law, contracts, and bankruptcy, and sometimes testify before Congress.

BARRY ADLER
BERNARD PETRIE PROFESSOR OF LAW AND BUSINESS

OREN BAR-GILL
PROFESSOR OF LAW

RYAN BUBB
ASSISTANT PROFESSOR OF LAW

KEVIN DAVIS
VICE DEAN AND BELLER FAMILY PROFESSOR OF BUSINESS LAW

RICHARD EPSTEIN
LAURENCE A. TISCH PROFESSOR OF LAW

FRANCO FERRARI
PROFESSOR OF LAW

CLAYTON GILLETTE
MAX E. GREENBERG PROFESSOR OF CONTRACT LAW

ARTHUR GONZALEZ (LL.M.'90)
SENIOR FELLOW AND ADJUNCT PROFESSOR OF LAW

LEWIS KORNHAUSER
ALFRED B. ENGELBERG PROFESSOR OF LAW

FLORENCIA MAROTTA-WURGLER '01
PROFESSOR OF LAW

TROY MCKENZIE '00
ASSOCIATE PROFESSOR OF LAW

LIAM MURPHY
HERBERT PETERFREUND PROFESSOR OF LAW AND PHILOSOPHY

what otherwise they would do for themselves." He adds with a smile, "It was a full and frank discussion of a wide range of issues."

Ferrari and Gillette are also mulling the idea of creating an encyclopedia of international sales law, around which they would organize a conference in Europe. "I like to do these in Europe because a lot of people who write on international sales law come from Europe," Ferrari notes. It's also a way, he says, to spread NYU Law's expertise and to promote his own center.

Kevin Davis, vice dean and Beller Family Professor of Business Law, teaches a highly popular course, Financing Development, which dissects how capital flows to developing countries. Students study specific transactions and contracts, from aid agreements to sovereign lending to private financing. "What I try to do is to think about how legal principles can be designed to take into account the broader public interest," says Davis, who joined the NYU Law faculty in 2004 from the University of Toronto Faculty of Law.

He's especially interested now in anticorruption law. While much attention has been paid in recent years to the criminal side of overseas bribery, Davis is intrigued by the civil consequences of such acts. One question that he has explored in a working paper is this: If a company procures a contract through bribery, does it lose all rights to restitution and compensation?

A leading civil case sparked his interest. During a dispute between the Republic of Kenya and World Duty Free stores, it came to light that a representative of the stores had bribed Kenya's president with $500,000 for approval to open stores there in 1989. The Kenyan government then voided the contract. World Duty Free sued, claiming Kenya had wrongly expropriated its property, and sought restitution. A panel of arbitrators sided fully with Kenya, ruling that claims based on contracts obtained by corruption cannot be upheld.

The decision is an example of the zero-tolerance approach: contracts obtained through bribery should be automatically made null and void with no restitution. But Davis advocates a different stance, which he calls proportional liability. "It takes into account the level of culpability of the firm," he says, such as if it brought the situation to the attention of authorities. The problem with zero tolerance, says Davis, is that it leads to perverse incentives. Companies won't come forth as readily or will lack incentive to undertake monitoring to self-report instances of bribery.

Consumer Credit—From Cell Phones to Credit Cards

Professor Oren Bar-Gill and Assistant Professor Ryan Bubb often work together on contract issues involving consumer credit. Each has an elite educational background, was an entry-level hire, and receives high praise from colleagues. Bar-Gill joined the faculty in 2005 and focuses on the law and economics of contracts and contracting. In 2011 he received a Young Scholars Medal from the American Law Institute recognizing his work in consumer contracts. Bubb came in 2010. His background is in political economy and government, and he had been a senior researcher at the Financial Crisis Inquiry Commission charged with investigating the causes of the economic meltdown.

Bar-Gill's early research contemplated business-to-business contracts between two sophisticated parties, he says. But his recent work has turned to studying consumer contracts—between "one sophisticated party, a seller, and a less sophisticated party, a consumer." Here, he's employing behavioral economics, a combination of economics and psychology, to try to understand how the contracts are designed and to what extent they harm consumers.

Consumers are "imperfectly rational," and sophisticated sellers tend to design contracts to exploit that trait, he notes. This occurs in everything from contracts for cell phones to credit cards to mortgages, and when it happens it "hurts consumers and reduces total social welfare," Bar-Gill asserts.

One anecdote he likes to relate to students involves the introduction of the second generation of Apple's iPhone. It was advertised as cheaper because the upfront price was dropped from $400 to $200. Yet the two-year service contract raised the monthly fee from $60 to $70. "It's no longer a cheaper iPhone," he says. "It might be better, but it's not cheaper." The broader point, Bar-Gill says, is that sellers are taking advantage of buyers' myopic tendencies to focus on the short run. "The purpose of the contract design is to create a wedge between the cost of the product as it is perceived by the consumer and the actual cost of the product," he says. Bar-Gill elaborated on this in "Mobile Misperceptions," a 2009 paper he co-authored for the *Harvard Journal of Law & Technology*. He and then-Furman Academic Scholar Rebecca Stone '09 argued that cell carriers' contracts played on consumer misperceptions of pricing plans.

Bar-Gill has identified two general features that are detrimental to consumers that show up time and again in contracts for cell phones, credit cards, and mortgages: One is a high level of complexity, the other cost deferral.

Both features permeated and contributed to the subprime mortgage meltdown, as he discussed in his 2009 *Cornell Law Review* article, "The Law, Economics, and Psychology of Subprime Mortgage Contracts." Mortgages went from the relatively simple 30-year, fixed-rate note to complicated hybrid adjustable-rate mortgages, where the rate is fixed for, say, two years, then fluctuates every year. "The problem with complexity is that imperfectly rational borrowers can't understand what they're getting, and the complexity also allows the seller or lender to hide various costs in non-salient features," Bar-Gill says.

The cost-deferral problem arises when the initial mortgage rate for a hybrid is low yet jumps for the remainder of the term. "This ties into the myopia of consumers and optimism about how they might be able to make higher payments later on, and maybe they'll be able to refinance their loans later on," Bar-Gill suggests. Everyone knows how that played out.

Is there a policy solution to complexity and cost deferral? The answer, he thinks, is coming up with a smart, sophisticated way to require companies to disclose all the costs, something the new Consumer Financial Protection Bureau is working on now. He advocates an "aggregate" disclosure—"a simple disclosure that imperfectly rational consumers can easily understand, which aggregates all the different price dimensions of the contract."

Bar-Gill is active in trying to stimulate new ideas for consumer protection. In February he and Omri Ben-Shahar of the University of Chicago Law School organized a conference at NYU with the American Law Institute that explored regulatory techniques for enforcing consumer laws. Bar-Gill is also working to compile articles on consumer protection into a book, tentatively titled *The Law, Economics, and Psychology of Consumer Contracts*.

Other potential solutions to confusing and misleading credit resulted from an article Bubb and Bar-Gill wrote earlier this year for the *Cornell Law Review* titled "Credit Card Pricing: The CARD Act and Beyond." They examined the impact of the 2009 law that overhauled regulations governing the credit card industry. The law, known as the CARD Act, cracked down on a variety of industry practices, such as raising the interest rate and sharply increasing fees when consumers went over their credit limits. Credit card companies complained that they would be forced to charge annual fees again, lower rewards programs, and make other changes to cover the lost revenue. But surprisingly, Bubb and Bar-Gill found that credit card companies in fact made none of those changes, even though revenues from late and over-limit fees dropped. "We saw no increase in annual fees, no change in the use of introductory interest rates," Bubb says.

On the whole, Bubb thinks the CARD Act was for the good. "It increased consumer welfare and reduced issuer profits," he says. Yet their paper also found that card companies haven't changed their basic pricing structure much. They still offer low introductory interest rates, which entice consumers to make bad choices. So the authors proposed a counterintuitive solution: Go after the low prices; that is, ban abnormally low teaser interest rates. "They confuse consumers and have no plausible social function," says Bubb. "They are just being used to lure in borrowers and confuse them about the cost of credit."

Bubb admits to the difficulty in winning political support for such a proposal. "It's like saying you can't have a sale," he says.

Internet Contracts: Does Anyone Read the Fine Print?

If consumers think credit card contracts are complicated, Professor Florencia Marotta-Wurgler can only shrug. She has focused her scholarship on contracts in the online world—where merchants literally have no limits as to how long and complicated they want to make their terms. Over time, she notes, online contracts have grown "ridiculously bigger and bigger" as they attempt to govern all aspects of online commerce—from privacy information to warranties to dispute resolution. This phenomenon was one reason she got interested in online contracts. Another was the wonder of how people buy just about anything from the comfort of their home and trust the transaction will take place. "I was thinking today," she related during our interview, "that every single item of clothing I'm wearing, including my purse, was bought online. And everything went smoothly."

Raised in Buenos Aires, she attended the University of Pennsylvania and New York University School of Law. She joined the NYU faculty as an entry-level hire in 2006 and teaches Contracts and Internet Contracts.

In her research, Marotta-Wurgler attempts to discover, with intensive empirical study, whether online contracts, with their fine print and voluminous detail, tend to favor the sellers. That has long been the view of consumer advocates and some scholars, who figured that strong disclosure rules would help solve the problem. Turned out things aren't so simple.

In one paper, she looked at so-called "Pay Now, Terms Later" contracts for software—meaning buyers didn't get to see the terms until after forking over the purchase price and opening the box. This is common in software products sold in shrink-wrap packages.

Marotta-Wurgler studied about 800 contracts involving software products, of which half disclosed terms after the purchase and half before. She found that there was no difference between the two types in terms of their consumer-friendliness, as she wrote in her 2009 *Journal of Legal Studies* paper, "Are 'Pay Now, Terms Later' Contracts Worse for Buyers? Evidence from Software License Agreements." She concluded that the amount of disclosure was unrelated to the terms of the contract and that regulation to ban these types of contracts would make little difference to consumers.

A related article looked at whether sellers in competitive markets offer more pro-consumer contracts versus sellers in concentrated markets, as one would imagine. There, too, Marotta-Wurgler found little difference among the contracts, as she detailed in "Competition and the Quality of Standard Form Contracts: An Empirical Analysis of Software License Agreements," published in 2008 in the *Journal of Empirical Legal Studies*. In "'Unfair' Dispute Resolution Clauses: Much Ado About Nothing?" she also debunked the concern that anticonsumer dispute resolution clauses, such as mandatory arbitration and forum selection, were pervasive in online software contracts. That chapter appeared in the 2007 book *Boilerplate: Foundations of Market Contracts*.

It was clear, then, that disclosure mattered very little in online contracts. And the reason might be that almost nobody reads the contracts. So Marotta-Wurgler and a researcher set out to find some real data on the number of people who read online contracts, focusing on software products. Combing through a terabyte of data provided by online monitors Nielsen and comScore, she looked at the reading habits of 50,000 people. It was well-known that few people read online contracts, but her finding was astonishing: Only 0.1 percent read them. And these were sophisticated buyers of expensive software. (When Marotta-Wurgler testified in 2009 before a Senate committee on misleading Internet practices, Chairman Jay Rockefeller asked her twice to restate the percentage of people reading contracts to emphasize the point.)

Taken together, her empirical research is a yellow light to policymakers itching to legislate restraints on online contracts—restraints that could impose unnecessary costs.

The Power of Bankruptcy Courts

No one has had a better seat in the world of bankruptcy than Judge Arthur Gonzalez, who presided over the Enron, Chrysler, and WorldCom bankruptcies, three of the biggest in history. He retired from the bench in March 2012 and became a senior fellow at the Law School. Gonzalez is no stranger to NYU, having been an adjunct since 2008. He's teaching several bankruptcy courses, as well as serving as faculty co-director (with Barry Adler) of the Lawrence P. King and Charles Seligson Workshop on Bankruptcy and Business Reorganization, which gathers top talent in the restructuring world, and the Galgay Fellows Program, which provides grants for students to work as summer interns in bankruptcy courts.

NYU Law students of bankruptcy wanting to connect the theoretical with the practical need look no further than to Gonzalez. "One of the goals here," he says, "is to be available to students, explore ideas of clinical programs, and also to give students some practical view of what they are learning and how it plays out."

Gonzalez had an unusual career path. He taught in New York City schools for 13 years before switching to law. He received a J.D. from Fordham University School of Law in 1982 and an LL.M. in taxation from NYU Law in 1990. After working for a while for the Internal Revenue Service and in private practice, he eventually was appointed to the Bankruptcy Court in 1995. He was reappointed to another 14-year term in 2009 but decided, he says, that he "really wanted to do more teaching." (The court keeps him close, however. In July, Gonzalez was named the independent examiner investigating details of the $4 billion bankruptcy of home lender Residential Capital.)

This semester Gonzalez is teaching Bankruptcy; in the spring he will teach a course in cross-border insolvency laws, and another that concentrates on large corporate reorganizations like Enron and WorldCom. He won't need a textbook for that one.

Enron was not only "fascinatingly complex," Gonzalez recalls, but also wrapped in a "Hollywood aspect, a political aspect, and an investigatory aspect." His challenge was to conduct hearings and "insulate them from what was going on outside of the courtroom," he says. He's proud that creditors got maximum value even while the company was being investigated on numerous fronts.

Judging from the rhetoric in this year's presidential campaign, Gonzalez's handling of the Chrysler bankruptcy was by far his most controversial. Republican candidates insisted it was an unprecedented abuse of the normal procedures of bankruptcy law. They argued it disregarded the rights of secured creditors and blocked other, nongovernment bidders in order to get the company up and running quickly. Gonzalez responds that the government never would have agreed to fund a full, planned reorganization, which could have taken up to a year to complete. Instead, the quick sale that he allowed lasted only 41 days. "Some people argued the government was bluffing, that it would not pull the plug on the funding, so I should go through with a full planned process," Gonzalez recalls. "I took the position that the record was supported by the notion that the government meant what they said."

His colleague Barry Adler, Bernard Petrie Professor of Law and Business, was among the bankruptcy scholars who also found fault

with the way the process was handled. "Judge Gonzalez streamlined the proceeding and saved the company and maybe saved the economy," says Adler, "but he did it in a way, in my view, that the bankruptcy law shouldn't have permitted him to do."

He argues that Gonzalez should have opened up the bidding more fully to better judge the real value of Chrysler. He says neither he nor anyone else could have predicted what would have happened with a full proceeding, but his bottom line is this: Judges shouldn't "mess with" the rights of creditors.

In 2009, Adler was invited to speak before an oversight committee looking into the Troubled Asset Relief Program's role in the auto industry bailout. Adler recalls wryly: "The Republicans wanted me to say secured creditors were cheated, and the Democrats wanted me to say they were not. I would say neither. And no one was happy." As he summed up in a 2010 article in the *American Bankruptcy Institute Law Review*, the GM and Chrysler bankruptcies were "no doubt interesting. But the law that they produced may be more curse than blessing."

Adler joined the NYU Law faculty in 1996. He had previously taught law at the University of Virginia, Emory University, and George Mason University. It was at Emory, in 1993, where Adler wrote an article on bankruptcy that first got him noticed in the academic world. And now, 20 years and a financial meltdown later, the ideas he advocated then are "oddly enough," as he puts it, back in vogue. (Alas, he's not always cited.)

The article, "An Equity-Agency Solution to the Bankruptcy-Priority Puzzle" in the *Journal of Legal Studies*, proposed a rapid-fire way for companies in financial distress to reorganize and avoid the time and expense of a typical bankruptcy proceeding. He called it "chameleon equity"—a phrase that didn't stick. Today the strategy is called a bail-in (as opposed to a bailout, of course).

Bankruptcy is usually a cumbersome process in which shareholders and creditors argue over the value of a company, which the judge ultimately decides. Adler insisted in the article that the valuation process is unnecessary. When a company can't cure a debt, there should follow an automatic transformation of its capital structure (one that the parties agreed to in the original contract). The equity shares disappear, the junior debt turns into new equity, and the senior debt is reinstated as whole.

Fast-forward to the 2008 financial crisis, and now scholars and the popular press are advocating the bail-in idea. It would be especially valuable to save large financial institutions, where a restructuring process is required literally overnight to stave off a run on their assets. Adler is writing a book on the subject, after having co-written a chapter on the idea in the 2010 book *Regulating Wall Street: The Dodd-Frank Act and the New Architecture of Global Finance*, published by the NYU Stern School of Business.

Adler's work in contracts tends to tilt more toward the theoretical. In a 2008 article in the *NYU Law Review*, he analyzed the long-held theory of efficient breach—the notion that it's legally OK for a party to breach a contract as long as the victim is compensated. But he turned the question on its head, looking at cases in which the person who breaches the contract actually benefits the other party rather than injures it. The law now says a person who breaches a contract cannot sue the victim to gain those benefits, known as negative damages. Using economic analysis, Adler suggested that, in fact, allowing negative damages might be beneficial in certain cases, though not all. He aptly called his article "Efficient Breach Theory Through the Looking Glass."

Nestled in a pile of papers on Associate Professor Troy McKenzie's desk is, as he describes it, "a nice letter" from the chief justice of the United States. In it Justice Roberts appointed McKenzie a reporter, or academic adviser, to the committee on bankruptcy

for the Judicial Conference of the United States. The committee serves to consider changes to the nation's bankruptcy rules. That's not a bad honor for a guy who originally planned on becoming a chemical engineer, his major at Princeton University. He joined the Law School faculty as an entry-level hire in 2007. With a laugh, he says he might get around to framing the letter.

McKenzie's scholarship on bankruptcy has taken him in several directions. One involves exploring how bankruptcy courts handle mass torts and similar complex litigation—and how they can become a litigation resolution device. McKenzie argues in a forthcoming paper, "Toward a Bankruptcy Model for Non-Class Aggregate Litigation," that bankruptcy courts can do a better job than regular courts in dealing with aggregating mass tort cases.

He is also delving into questions about the role and powers of bankruptcy courts and judges. It's particularly timely, as bankruptcy judges have played prominent roles during the recession, in everything from Lehman Brothers to mortgage foreclosures to the bankruptcy reorganizations of General Motors and Chrysler. Yet as they exercise those broad powers, McKenzie notes, they enjoy neither of the twin protections that regular federal judges receive under Article III of the Constitution: life tenure (their terms are for 14 years) and compensation that cannot be diminished. To some commentators, that structure threatens to undermine the protection of an independent judiciary under the separation of powers doctrine.

McKenzie wrote about this conundrum in a 2010 *Stanford Law Review* article, "Judicial Independence, Autonomy, and the Bankruptcy Courts." He concluded that the current system for bankruptcy judges works for the most part. The Supreme Court has dealt with this issue in numerous cases, most recently in the highly publicized matter involving Anna Nicole Smith, the former *Playboy* Playmate who was widowed after a brief marriage to J. Howard Marshall II, a former Yale Law School professor turned wealthy Houston oilman.

"Most people don't realize this is quite an important case about bankruptcy," says McKenzie. "The question is, what kinds of decisions can bankruptcy judges decide and enter, and what kinds of decisions do they have to leave to district judges?"

The Supreme Court ruled 5–4 that Smith's estate (she died in 2007) was not entitled to a portion of Marshall's $1.6 billion fortune. A federal bankruptcy judge had earlier ruled in her favor, while a Texas probate judge had sided with one of Marshall's sons. The Supreme Court ruled in 2011 that the bankruptcy court

did not have the authority to decide her claims against Marshall, citing constitutional issues including the lack of lifetime tenure.

McKenzie, who is working on an article about this case, is critical of the decision on grounds it draws an "artificial line" for determining the powers of bankruptcy judges. In doing so, he contends, the Court has opened questions about whether bankruptcy judges can enter final judgments in even bread-and-butter cases. In the Bernard Madoff scandal, for instance, a bankruptcy trustee is trying to recover money under the Fraudulent Conveyance Provision. That's a common practice in bankruptcy cases, McKenzie says, yet the Court's decision in *Stern v. Marshall* now casts doubt on its validity.

For his part, Gonzalez doubts that the decision will amount to much. He expects future rulings to favor keeping cases with bankruptcy courts and allow them to enter final rulings. Besides, he argues, separate bankruptcy courts provide a valuable service. It would be "extremely difficult" for a federal district judge to oversee the lengthy and continual demands of a Chapter 11 reorganizational filing, for instance, while ensuring speedy trials in other cases.

The Theoretical Approach

Lewis Kornhauser, Liam Murphy, and Richard Epstein have played important roles in a long-running theoretical debate about the fundamental purpose of contract law. The dominant theory has varied over the years as one camp or another takes hold, alternating between an economic view and one more based in moral theory, with various shades of gray thrown in. Contract law is about making commerce efficient, argued one view. No, it's about preventing harm and compensating people for unfair losses, said another. No, it's about enforcing promises, said yet another. Today, the economic theory still reigns, even as advocates of the philosophical foundations of contract law have reemerged to challenge that view.

Kornhauser, Alfred B. Engelberg Professor of Law, who joined the faculty in 1982, was one of the earliest scholars to write on the idea of using economic analysis to analyze contractual issues. Not surprising, given his economic bent including a J.D. and Ph.D. in economics from the University of California, Berkeley. Economic analysis had already crept into other areas of law, especially torts, in the 1960s and '70s. In his 1983 dissertation, published in the *Journal of Law & Economics*, he used economics to explore how nonlegal matters, like a seller's reputation, could serve as a substitute to enforce contracts and determine remedies for breach. It's a simple idea, but very little was written using such analysis back then, Kornhauser notes. His paper, "Reliance, Reputation, and Breach of Contract," is peppered with equations. Kornhauser later wrote a half-dozen other contract papers, each looking through the economic prism, including "An Introduction to the Economic Analysis of Contract Remedies" in the *University of Colorado Law Review* in 1986. Written as a survey of literature for lawyers, it was, he says, an effort to "propagate the faith" of economic analysis in contract law.

Murphy, Herbert Peterfreund Professor of Law and Philosophy, entered the debate a few years later and remains today the self-described philosopher of the contract faculty. "My connection is primarily foundational, theoretical, philosophical," he says. While teaching Contracts to 1Ls, he keeps abstract theory to a minimum. But his Contract Theory seminar is where he lets loose on teaching contract doctrine from a theoretical point of view.

Murphy agrees with central ideas from the economic camp—that the role of the law of contracts is to promote mutually beneficial transactions. But he believes that economic theory doesn't capture all the aims of contract law, that it requires philosophical underpinning. It is especially important, he says, that contract law not conflict with commonsense ethical ideas about keeping promises. For example, contract remedies should be in line with the simple idea that promises should, all things equal, be performed. If they are not, the practices of both contract and promise are likely to be weakened.

Still, Murphy doesn't go as far as the theory that Charles Fried, the former solicitor general and now Harvard Law professor, laid out in his 1981 book, *Contract as Promise*. Injecting morality into the debate, Fried argued that contract law is about enforcing a moral obligation to keep promises. In "Contract and Promise," which appeared in the *Harvard Law Review Forum* in 2007, Murphy suggested a more nuanced view. While the "morality of promise" is relevant to understanding the purpose of contract law, he argued, he disagreed with Fried's more stringent notion that contract law is about enforcing the moral obligation to keep promises for their own sake. Murphy is working on a book on contract theory that will include this debate as well as issues such as the basis of the obligation to keep promises. As is usual in his philosophical world, the answer "is rather more elusive than you might have thought," he says.

There are few areas in commercial law (or all of legal scholarship, for that matter) that the prolific Epstein, Laurence A. Tisch Professor of Law, hasn't written about. He has tackled contracts, bankruptcy, consumer credit, cyberspace issues—you name it. But his heart and head appear most obsessed by issues involving contracts, the "most generic" area in commercial law, as he puts it. Epstein's work on contracts often focuses on the practical question of whether contracts are better than other structures for creating agreements and understanding. Well known for his libertarian views, he is consistent on that issue: Contracts work a heck of a lot better than government regulations or torts, in everything from malpractice to antitrust, from labor law to securities regulation.

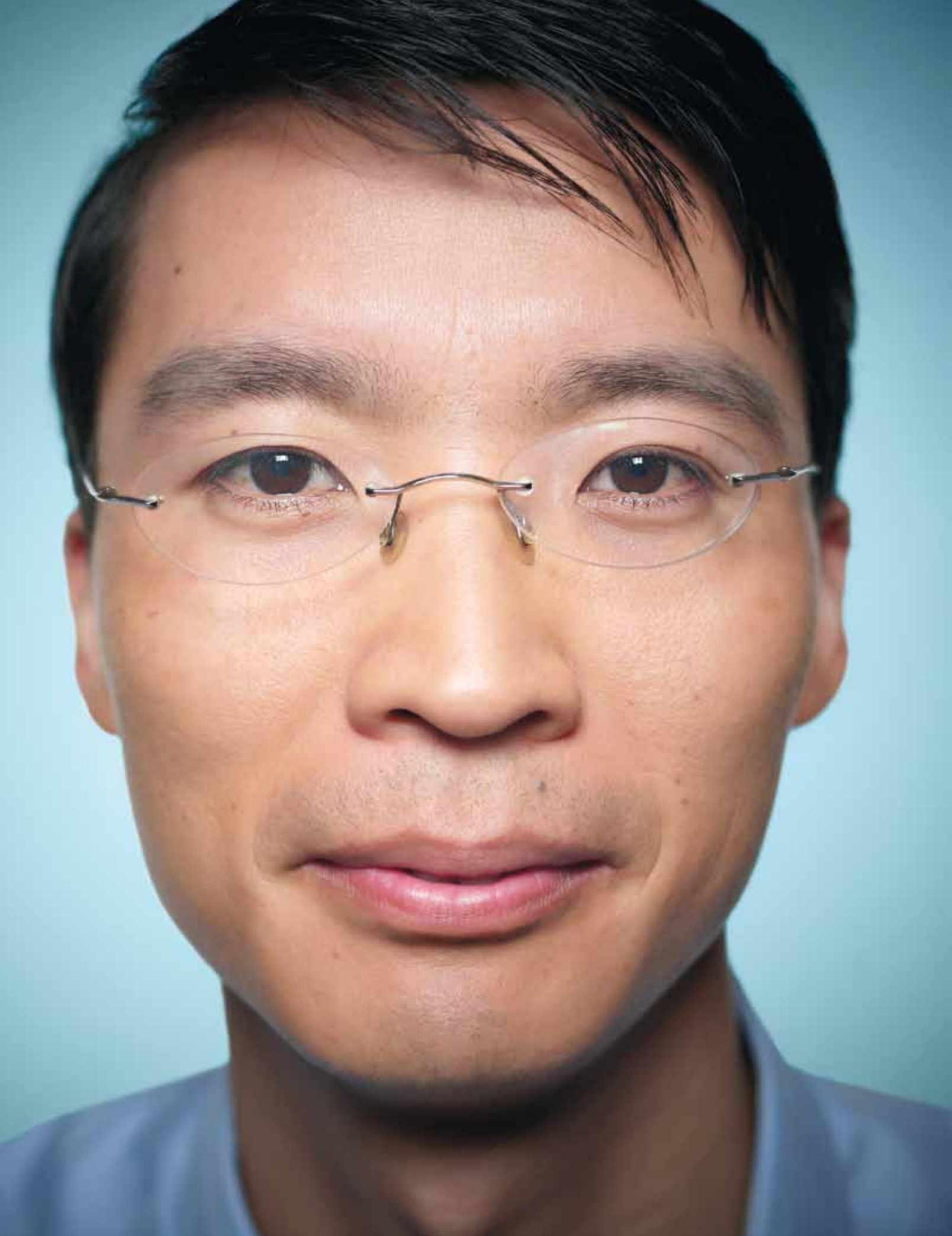
"There are many obstacles to contracting, but the obstacles are always greater from direct government coercion," he contends.

Epstein, who joined the NYU Law faculty full-time in 2010 after five years of alternating semesters between the University of Chicago and NYU, teaches Contracts to 1Ls. He tends to structure the class into three major themes. One is to teach contract doctrine, which "they really have to know." This involves centuries-old issues such as the rules of consideration, what promises are enforceable, the meaning of conditions, and knowing when contracts are completed, among many others. Another leg of his class scrutinizes deals that were litigated and figures out why they went awry and how that could have been avoided. The third is to discuss the scope of the law of contracts.

On that point, he says students often ask about the limits of contracts, in doctrines such as unconscionability and contracts against public policy. "There is a temptation to limit the scope of the field and to say some form of direct regulation is necessary," he says.

In all of these signature issues of commercial law and bankruptcy, it is easy to get lost in the details. That's why Clay Gillette's office is adorned with gorgeous pictures of his visits to Kenya and other emerging nations, where he often comes upon people buying stuff in marketplaces. They are a reminder of his heartfelt views about marketplaces and the law. Marketplaces improve people's lives, he says flatly. "And the objective of commercial law is to facilitate well-operating markets—to ensure that they operate in a way that leaves buyers and sellers both better off." That's about as good a definition of commercial law as you could find. □

Larry Reibstein is a New York-based journalist.



Face Forward

Winston Wenyan Ma (M.C.J. '98) has made every professional decision with an eye toward becoming the consummate global businessman of the 21st century.

BY DUFF MCDONALD

ON JANUARY 28, 2012, the *Economist* did something it hadn't done in 70 years: it launched a weekly section focused on a single country—in this case, China. The last country to receive such special treatment in the pages of the august publication was the United States, in 1942. The recent move was a belated acknowledgment of an increasingly apparent geopolitical and economic reality: if the story of the 20th century was of the rise of the U.S., the story of the 21st will be about the rise of China.

Those seeking to unravel the increasingly intertwined U.S.-China relationship generally look to Washington/New York and Beijing/Shanghai. That's only appropriate, given the political and financial centers of the two countries. Those looking to identify crucial individual participants in that dynamic, however, should enlarge their North American focus a few hundred miles to the north, to Toronto, Canada. There, they will find Winston Wenyan Ma (M.C.J. '98), the 39-year-old managing director and deputy chief of China Investment Corporation's representative office in Toronto. It's a mouthful of a title, but the gist of it is simple: Ma is China's financial front man in North America.

Ask him to describe his job, and he will tell you that he is a simple investment professional tasked with a simple mandate: to seek out attractive investment opportunities for his employer, CIC, one of China's sovereign wealth funds. That's an honest description, but it deftly sidesteps the larger point: with some $482 billion in assets as of December 2011, CIC is currently the fifth largest sovereign wealth fund in the world, according to the Sovereign Wealth Fund Institute. And Ma's specific focus is on investments in natural resources, among other sectors, that will help ensure that China can continue its remarkable economic transformation for years—and decades—to come. In 2009, for instance, CIC bought a $1.5 billion ownership stake in Canadian coal mining company Teck Resources and invested $1.58 billion in Virginia-based power company AES, in part to own 35 percent of its wind-generation business. Collectively, this makes Ma a key executive in the most fundamental financial transaction of our time: having lent the United States hundreds of billions of dollars during the debt binge of the last quarter-century, China is now converting that debt to ownership in some of the most crucial assets in the world. His job might be simple to describe, but it has profound implications.

U.S.-China relations are often viewed through a zero-sum lens: exchange rates are seen to benefit China at the expense of the American trade deficit, for example, and the use of overworked (and, by implication, underpaid) labor in Chinese factories makes iPhones and all manner of consumer goods affordable for the American masses. With Winston Ma, however, it's not a case of one profiting at the expense of the other. His entire career is, in fact, an example of the possibilities of combination, especially the bringing together of people of diverse backgrounds for mutual benefit.

IN THE LAST THREE DECADES more than two million Chinese students have left home to study in another country. As keynote speaker at the Hauser Global Law School Program's annual dinner in January, Ma played the historian and put himself in the larger context of waves of Chinese seeking broader opportunities.

The first wave was in the 1980s, when China opened up after the Cultural Revolution. This was a very focused group: the majority came to the U.S. for Ph.D.s in physics, chemistry, and engineering. "Most came on scholarships," he said, "because they couldn't have afforded to otherwise, and they were taking any chance they could to get out of China." Many in that initial wave were happy to stay abroad after graduation, given the palpable increase in their standard of living. They bought homes, started families, and plotted a future in their adopted countries.

Ma arrived as part of the second wave. By the 1990s, China had been on a headlong course of economic development for 10 years and was reaping the initial benefits of modernization. Students began broadening their scope, taking law, management, and finance. "Many of us, myself included, were happy to join a big law firm or a bank, earn a great salary, and stay put," he said. But he also noticed an increasing number of fellow expats returning to China.

The third wave of students began arriving after China's entry into the World Trade Organization in 2001. That seminal event changed the face of the Chinese economy, creating a sizable number of Chinese millionaires: a 2011 survey by China Merchants Bank and Bain & Company reported that more than half a million Chinese have investable assets of more than $1.6 million, almost 60 percent of whom were considering emigrating. But more and more are returning home as well. "As China has become much more integrated in the global financial system and enjoyed huge economic growth, the focus is not on leaving China but returning to it," said Ma. "Students now consider studying abroad to have opportunity costs as well as benefits."

Even members of the first and second waves are today considering a return home after formative years abroad. The term bestowed on the increasing number of these Chinese is haigui, or "sea turtle." Just as adult female sea turtles return to the very beach on which they were hatched in order to lay their eggs, Chinese are returning to their homeland in increasing numbers to participate in the remarkable transformation of their country.

Just as adult female sea turtles return to the very beach on which they were hatched in order to lay their eggs, Chinese are returning to their homeland after several years' absence to participate in China's transformation.

Ma and his wife, Angela Ju-Hsin Pan (LL.M. '99), visiting the Terracotta Warriors of Xi'an, China, in 2010.

Ma became a sea turtle himself in 2008. Before he did, though, he spent a decade deliberately becoming a bilingual, bicultural businessperson. A coveted one. "There's an endless appetite on both sides of the water for people with the expertise that Winston has. People who are not only very knowledgeable about the business world, but who know how to commute between two very different political-legal cultures with very different values, attitudes, and experiences," says Professor Jerome Cohen, co-director of NYU's U.S.-Asia Law Institute, who was, in the early 1980s, the first Western lawyer to practice in Beijing. "We just don't have anything like the number of people we need, on both sides."

As exchanges around the globe eye Greece with concern, there is no doubt that our world is shrinking and enmeshed. We should all care how China fares in investing its trillions, says Cohen. Consider Japan in the 1980s and '90s, he adds. "Japan did not invest wisely in the U.S. Its subsequent economic difficulties created tensions between the countries that might have better been avoided."

MA WAS BORN IN JULY 1973 IN SUZHOU, the historic silk capital of China, which boasts numerous lakes and interconnecting canals and about 150 classical Chinese landscaped gardens. Known as the Venice of the East, it is only about 40 minutes by commuter rail from Shanghai. Ma enjoyed a middle-class youth there as the second child of two high school teachers. (His sister, Xiaoyan, lives with their mother and works for the Suzhou government.) After a strong showing in high school, he entered Dalian Military Academy in Liaoning Province for a compulsory one-year course in military training as a member of Fudan University's Class of 1990. Along with Tsinghua and Peking Universities, Fudan, established in 1905 in Shanghai, is considered one of China's most elite educational institutions.

Ma earned a bachelor of science degree in electronic materials and silicon devices in 1995, graduating first in a class of 23. While a number of Ma's classmates then took the obvious route, snagging jobs at places like Intel and Singapore Semiconductor, Ma had other ideas. With an eye already on U.S.-China relations, he decided that he would dive headlong into the middle of a raging debate of the time: software piracy. The two governments were in the midst of negotiating a pact to help protect American software, and Ma saw an opportunity to be a pioneer in intellectual property protection in China. "It was a chance to combine knowledge of American culture, technology, and cross-border issues," he says. So he decided to go to law school to round out his expertise. He didn't go far, enrolling in a post-undergraduate degree program at Fudan's own School of Law.

Ma graduated at the top of his class once again—this time the first of 32. But he soon realized he'd made a miscalculation. Intending to stay ahead of the curve, Ma actually might have been too far ahead of it when it came to intellectual property in China. The epiphany came, he says, when he visited a friend in the graduate dormitory at Fudan and watched a steady stream of students come knocking at the door to buy versions of pirated software that the friend kept stashed under his bed. "At that moment, I knew it was the wrong choice of career," he says. "I was way too early. It was the right path, but it wasn't really taken seriously until after the turn of the century."

It was time to change directions, and as luck would have it, NYU Law sent a contingent of professors to lecture at Fudan during Ma's final year of law school. Led by John Pagan, then head of the school's Hauser Program, the effort was a trailblazing one. The program, conceived in 1995, set out to invite about a dozen international scholars each year to join the NYU Law community. But it came with a remarkable twist: the program would fully fund the candidates. Law schools rarely gave scholarships to foreign students at the time, and to find one that included a full ride—airfare, board, and living expenses—was almost unheard of. Hauser was charting a new course, though, and had Ma in its sights from the very beginning.

The only problem? It had its eyes on another student as well, and with only one scholarship planned for a Chinese student that year, Ma seemed destined to do something very uncharacteristic: come in second place. While his parents had provided for top schools, financing a foreign education was another thing entirely, and when he learned from Pagan that he wasn't the frontrunner, Ma says he faced the depressing prospect that he might not get a U.S. law degree. (Harvard Law was ready to have him, but he'd have to finance it himself.)

NYU AND ME: Outside Vanderbilt Hall in August 1997, Ma's first trip out of China; Convocation, May 1998; chatting with Professor Jerome Cohen at the Hauser Global Annual Dinner, January 2012; catching up with fellow alumni and Hauser program benefactors Rita and Gustave Hauser that same night.

Then he got "the e-mail." Pagan informed him that his rival for the scholarship had chosen to go to Harvard. Hauser wanted Winston Ma. Pagan, who currently teaches law at the University of Richmond, jokes that Ma's memory must be failing him. "I can't believe that we ever considered him our number two choice," he says. "I recall him as a brilliant, focused, and highly motivated young scholar." Ma impressed Pagan to such a degree that Pagan later invited him to teach at Richmond as a visiting international scholar. "I've never met the guy who chose to go to Harvard," Ma says now. "Maybe I should track him down and thank him."

When Ma flew from Shanghai to New York, it was his first trip out of China. He joined a mini-U.N. of young scholars—his Hauser cohorts hailed from Australia, China, Germany, India, Israel, New Zealand, the Philippines, and Venezuela—and he even met his future wife, Angela Ju-Hsin Pan (who enrolled from Taiwan one year after Ma, earning an LL.M. in 1999), at the school. Even if publications like the *Wall Street Journal* still hadn't grasped the paradigm shift in China's global economic position—Ma remembers having to read well into the newspaper to find *any* stories about China—he knew he was part of a select group of native Chinese speakers who would soon be in a position to help shape history.

While Ma narrowed his focus to capital markets law during his studies at NYU, he says the coursework that initially resonated with him was about civil procedure. In a course taught by Andreas Lowenfeld, Herbert and Rose Rubin Professor of International Law, he was flabbergasted by one of the very first issues, that of constitutional law and the matter of jurisdiction. "I'd had a legal education, but I'd never heard of civil procedure being discussed in the context of constitutional law," Ma recalls. "It was also the first time I got to see the eloquence of a Supreme Court justice opinion."

The lawsuit in question was a famous one: *International Shoe v. Washington*, a landmark case in which the Court established a number of legal rules, from corporate participation in interstate commerce in state unemployment compensation funds to the due process clause of the 14th Amendment. "They were talking about whether it was fair to have a case like this, before even addressing the substantive question of whether they were for or against," says Ma. "The opinion by Chief Justice Harlan Stone was one of the most eloquent I have ever read. I still remember some of the exact words, like the fact that a lawsuit cannot 'offend traditional notions of fair play and substantial justice.' I was also amazed that a professor would be so familiar with a case written by a judge. In China, you opened up a book and looked up the penalty for the charge. Here, it was much more of an engaged discussion.

"I went to Chinese law school from an engineering background," he continues, "where everything is structured. Chinese law was like that too, with the Supreme Court issuing opinions not in essay format but merely saying, 'These are the standards, and this is how we're going to apply them in court.' Contractual law, for example, might say that if there's a dispute about a contract, then the jurisdiction should be at the defendant's side, because if you want to bring a case, you bring it at their jurisdiction. It's a very practical approach to the law. In China, I would never have paid that much attention to legal theory, as practical rules ultimately prevail. So what really fascinates me about the U.S. is that it's actually much more sensitive to the facts. There are general themes, but the facts are all different and unique, and thus require a better appreciation of cultural history. My civil procedure course at NYU was the starting point for me of a more balanced understanding of language and culture and social concerns."

In particular, says Ma, his NYU Law studies showed him the value of understanding the human factor in business and social dealings, and of being aware of precedent and history. "In this interconnected world, understanding other people's cultural traditions, historical backgrounds, and social values is critical," says Ma. "When you're working in the derivatives business, you're dealing with the most complicated financial models that are out there. But I also spend a lot of time trying to understand

TEAM CIC: Ma, in the center, with the staff of the China Investment Corporation in a photo from its 2010 annual report.

the people on my side and the counterparty side." Even today, in a continuing attempt to understand Anglo-Saxon culture in an English-dominated world, he goes the extra mile. Beside his bed is a volume of Shakespeare.

ARMED WITH A DEGREE IN INTERNATIONAL ECONOMIC LAW, Ma dived right into corporate and capital markets work in a succession of jobs with increasing responsibility at Davis Polk & Wardwell, J.P. Morgan, and Barclays Capital. He detoured exactly once, by leaving Davis Polk for the University of Michigan in 2001 to pursue an M.B.A. and a master's in engineering with an eye to hitching onto the tech boom bandwagon. When the tech bubble burst partway through his M.B.A., he finished his degrees but headed to Wall Street.

Ma's focus was capital markets, specifically, sophisticated equity derivatives. At Davis Polk, Ma's initial strategy had been to take on as much local U.S. work as he could, with the goal of being seen on par with his American associates and not just as someone with a specialty in speaking to Chinese clients or to Chinese on behalf of U.S. clients. So while he did work on initial public offerings for Chinese companies, he made sure it was only part of his workload. He took the same approach at his Wall Street jobs. While he helped Chinese companies looking to learn about (and use) novel financial products developed in the U.S. market, he also made sure to play a significant part in U.S.-centric transactions.

One notable example: in July 2003, J.P. Morgan partnered with Microsoft to create a one-time transferable stock option program that allowed holders of underwater Microsoft options to sell their options to the bank. Some 51 percent of Microsoft employees, representing 55 percent of the eligible shares, chose to do so in one of the largest equity derivative transactions ever—$8.8 billion worth. In this and other instances of J.P. Morgan's entering into derivatives trades on its own balance sheet, Ma frequently served as one of the firm's main financial engineers.

Linda Simpson, the partner overseeing Davis Polk's equity derivatives capital markets business, says Ma uses all the available tools at his disposal to get his job done neatly and cleanly. "Winston is nothing short of a Renaissance man," she says. "On one deal, he realized that all the other lawyers had overlooked an interesting mathematical issue about the pricing of one security. He wrote letters to professors about the issue, and they wrote him back. I was blown away. How many associates do that?"

Simpson also noticed something that most people who work with Ma have seen: regardless of what job he happened to be doing at any point in time, he didn't just get buried in the details; he also stepped back to take a wide-angle view. When working with Securities and Exchange Commission regulations on a specific derivatives deal, he would also ask: How should the Chinese securities officials regulate local markets in China? How will China adopt usage of new kinds of derivatives that the U.S. is introducing? "He is a terrific U.S. lawyer," says Simpson. "But he is also a lawyer with a Chinese law degree and an M.B.A. There aren't that many people with qualifications like that, and it's no surprise that he's now become extraordinarily valuable to China as well."

Beyond his day-to-day role in structuring financial products for clients at J.P. Morgan, Ma was often brought in as a translator of China-specific issues that his New York colleagues found more difficult to understand than the usual concerns of U.S.-based issuers. When Chinese companies sought U.S. financing, for example, the country's foreign exchange system required establishing offshore financial affiliates that served as pass-through vehicles for transactions that couldn't be done directly in China itself. "It was pretty confusing to some of my New York colleagues," says Ma. "And I played a particular communications role in bringing them up to speed on how the transactions worked."

MA HAS A KNACK FOR MAKING COMPLEX PRODUCTS UNDERSTANDABLE, despite English being his second language. In every trading desk he has worked on, Ma has been known as a patient teacher of younger and less experienced traders, and he has even helped CFOs and treasurers of client companies polish their own communications with such constituents as investors, rating agencies, and regulators.

Starting from his first job at Davis Polk, Ma began honing his writing skills in English, contributing numerous articles

on legal and other technical matters regarding derivatives to the newsletter *Derivatives Week*'s "Learning Curve" column. He eventually published some 20 articles on derivatives pricing, trading theory versus practice, and capital markets innovations in China.

Eventually, Ma's ambitions grew and he began working on a book that capitalized on his position as a Chinese national on Wall Street. His 2006 opus, *Investing in China: New Opportunities in a Transforming Stock Market*, is one part investing textbook and one part treatise on the ongoing developmental challenges still facing Chinese securities markets. The publication turned Ma from a well-regarded banker and lawyer into an internationally quoted expert on China's markets and legal system. Rather than being merely Chinese Investing 101, Ma's book characteristically demystified all manner of complex topics, including multiple derivative securities; the differences, due to local regulatory and legal frameworks, between Chinese and Western investment products; and the overriding influence of China's particular brand of state-owned capitalism on its securities markets.

"It wasn't just cheerleading," says Richard Sylla, Henry Kaufman Professor of the History of Financial Institutions and Markets at NYU's Stern School of Business, who wrote the foreword. "He also provided some warnings, in particular about those enterprises that were majority-owned by the state. He pointed out that if China followed the path of other countries, they would privatize these things. He didn't make an explicit argument, but by talking about it, he was tacitly endorsing the idea. And that's just what they did, with the result that China became much more attractive to foreign investors."

Ma sees the book as a major turning point in his career. "After my book, it had become very clear that I might prove a valuable link between China and the U.S.," he told a reporter. Indeed, senior Chinese bureaucrats were now noticing their countryman as well. Peter Zhang, deputy director general of the China Banking Regulatory Commission, offered high praise in a book blurb: "His expertise in both legal and financial areas combined with his understanding of the Chinese financial system make the book attractive to those interested in the Chinese financial markets, particularly in the legal aspects and market innovation."

In late 2006, Chinese authorities established the country's first derivatives trading exchange, the China Financial Futures Exchange. The first product was an index futures contract. Soon thereafter, the Shenzhen Stock Exchange organized an annual China International Derivatives Forum, where Ma was an "international expert" speaker and usually the sole Wall Street representative from the North American markets. Even at that late date, few Chinese had made it to the front office of a U.S. trading floor.

Remarkably, the increased attention didn't go to his head. When it was suggested that he translate his book into Chinese, he demurred. "I'm of the view that local people always know the situation the best, and it seemed to me that Chinese people didn't need advice from someone sitting in New York on how to invest in their own markets," he says. "I think about the guys who were paid to watch bicycles outside the Shanghai Stock Exchange in the 1990s, at 10 cents per bike. They could probably read the market up and down much more sensitively than I could have, just by counting the number of bicycles out there."

AT BARCLAYS, where he had ascended to the title of deputy chief of the convertible and equity solutions group, Ma began a series of dinners modeled on the salons of the 19th century, inviting bankers, lawyers, journalists, regulators, and businessmen interested in the broad topic of China for evenings of inspired conversation.

The effort was another example of Ma's deliberateness. "He called them 'China dinners' and invited a select group of people he thought would mesh well," says Ruth Sherman, a communications consultant who attended a few and who had worked with Ma on improving the cultural aspects of his speech. "Winston guided the conversation at those dinners; he showed that he knew the value of being a connector—something that is obviously highly valued in the business world. He understood that intuitively."

One topic that consumed the group at more than one dinner: the "Made in China" miracle after the country's entry into the World Trade Organization in 2001. Ma's guests debated the big questions: Why had China become the world's manufacturing center? How long would its competitive advantage last?

Ma's co-host, Michael Zakkour, who at the time was running a consulting firm for U.S. multinationals, says dozens of friendships came out of the dinners, as well as business partnerships. "We put together some of the best intellects in New York and beyond for those salons," says Zakkour, who marvels at Ma's cross-cultural fluidity. "He comes across as both Chinese and American. Winston is one of those rare characters who can live, work, operate, think, and act in both cultures." Zakkour lived in Beijing for four years and continues to commute to China regularly. He points out that there are lots of people who can learn Mandarin and then speak to Chinese natives by substituting Chinese words in American phrases and syntax. But the brilliant ones, he argues, speak in a cultural and social context as one Chinese would to another. "That's a whole degree of difficulty higher," says Zakkour. "And Winston has done it, only in reverse." Frank Guarini '50 (LL.M. '55), the 88-year-old seven-term New Jersey congressman who counts Ma among his friends, agrees: "He is a man of the future—someone who will be a major player in the business world of tomorrow."

"As China has become much more integrated in the global financial system and enjoyed huge economic growth, the focus is not on leaving China but returning to it. Students now consider studying abroad to have opportunity costs as well as benefits."

–From the Hauser Global Dinner keynote speech on January 24, 2012

Among friends and coworkers, Ma is always quick with a joke or, somewhat surprisingly, a line straight out of a Hollywood blockbuster. Salim Mawani, who worked with Ma at Barclays Capital, recalls a never-ending string of movie one-liners that poured out of Ma deep into long nights on the trading desk. Ma's memos to colleagues often began with references such as "Houston, we have a problem," from *Apollo 13*, or "We will not vanish without a fight!" from *Independence Day*.

Ma readily admits to being a movie buff, but points out that it was also a subtle way for him to practice English with his colleagues instead of getting mired in legalese or banking-speak. As usual, his cultural barometer is unerring, to the point where he has a genuine appreciation of good, old-fashioned raunchy American comedy. "I like *Old School*," he says, referring to the 2003 frat boy favorite starring Will Ferrell, Vince Vaughn, and Luke Wilson. It is hard to imagine, but the fact is that behind the otherwise formal and polite demeanor, Ma laughs along with his trading floor peers at R-rated comedies. When asked of other ways Ma finds to blow off some steam, his wife, Angela, says he enjoys relaxing and having a beer while watching the New York Knicks. He is also an avid runner and swimmer, and a self-taught student of Chinese medicine. Plus, he enjoys cooking; one of his specialties is eel.

Ma is also a perfectionist, which his wife acknowledges can be irksome to a self-described "normal" person such as herself. "He has 'correct' attitudes toward almost everything," she says. "He eats healthy—fruits and vegetables—likes to exercise, and likes to go to bed and get up early. Winston values efficiency and is always working on something productive. That's basically a good thing, but it can occasionally be annoying."

Describing Ma as a perfectionist seems suspiciously like the answer to the cliché interview question, "What is your greatest weakness?" Only in this case, it seems to have the virtue of truth. Winston Ma *is* a perfectionist, in both his personal and professional life: always on message, always proper. It can make it a little difficult to get a read on him as an actual person, but spend enough time with him and you will see a twinkle in his eye.

Not that Angela Ma doesn't have her own drive. Since earning her LL.M. from NYU Law, she has passed the bar in three jurisdictions—Taiwan, the United States (New York), and China—and has worked for law firms and banks herself. In the past dozen years, though, she has moved four times in support of her husband's career. Now she is writing her dissertation on ownership issues regarding stolen art and looted cultural property to earn a J.S.D. at the Central University for Nationalities, in Beijing.

IN 2007, Ma recalls, he and another colleague from Barclays, Dev Shrotri, would have numerous conversations asking each other why they were watching from afar as their respective countries were undergoing massive economic transformation. "We were a Chinese guy and an Indian guy working for a British bank," says Ma. They named it their "Chindia" quandary. And then they acted: Dev went to India to work on a start-up, and Ma went to Beijing.

As much as recent headlines about China's government emphasize that connections and nepotism are still a common way to land lucrative jobs, Ma found his position in a surprisingly old-fashioned way: by answering a help-wanted ad.

China Investment Corporation was founded in 2007 as a wholly owned entity of the Chinese government. According to its 2011 annual report, it is "a vehicle to diversify China's foreign exchange holdings." Like the Chinese government itself, the fund takes the long view, and has elucidated plans to evaluate performance over a 10-year horizon. CIC posted recruiting notices in the *Financial Times* and the *Wall Street Journal*, and Ma submitted his résumé without having any personal contacts there. (He'd met the fund's president, Gao Xiqing, at a speech at NYU but had not run into him again until his interview.) Ma got the job, joining the fund in May 2008 as a managing director in the special investments department in Beijing. He took a pay cut and became a "sea turtle," but says the pride of working for his country and the fact that he is once again on the cutting edge of global finance more than make up for it.

His transformation has not gone unnoticed. "Winston Ma is at ease in both Eastern and Western cultures," says Gustave Hauser (LL.M. '57), a cable television pioneer who with his wife, Rita, a member of the President's Intelligence Advisory Board, founded NYU School of Law's eponymous program. "He understands the nuances between the two cultures. Not only that, he is intellectually stimulating, socially adept, and gregarious. People like him. And the Chinese government has clearly recognized his competence by giving him such great responsibility."

Since joining CIC, Ma has had leadership roles in major direct transactions in mining, energy, agriculture, and financial services sectors. He mentions that he is working with the Canadian heads of Chinese companies to establish the first-ever China Chamber of Commerce in Canada, which will include finance and information technology companies in Toronto, energy companies in Alberta, and mining companies in British Columbia and Quebec. But he is otherwise understandably reticent about discussing his specific duties, given the political sensitivity of his post. Nonetheless, all signs point to Ma's enjoying the favor of his superiors. "Winston's education and training in law have enabled him to be more effective in his work at our company," says CIC president Gao. "In particular, the analytical capabilities and sensitivity to risks required of a lawyer prove to be valuable to a large financial investor like CIC."

What are Ma's views on China's particular version of state capitalism? Or the Chinese aphorism "The state advances while the private sector retreats"? If Ma has opinions, he's not sharing them. "I'm just acting as an investment professional," he repeats, perhaps the only time over the course of several discussions with Ma that his answer seems programmed and not considered. CIC's mandate makes clear it is a financial investor and does not seek corporate control. Returns have been solid, if not extraordinary. Despite a 4.3 percent loss in 2011, the fund has registered a 3.8 percent annual return since 2007.

Steer Ma away from the confidential details of his day-to-day job, and it's possible to engage him in an area he enjoys speaking about: what we can learn from history and how we can use its lessons to better ourselves and our relationships today. He likens the current mutable state of global capital markets to the shifts that faced the Solvay Council in 1911, when physicists were confronting earthshaking discoveries in the quantum realm that threatened the foundations of a discipline rooted in the notions of Isaac Newton and James Clerk Maxwell. Solvay was convened as a cooperative focused on intellectual debate and collaborative efforts. Ma sees both the Hauser Program and his job at CIC as similar opportunities to move the dialogue forward about a still rapidly changing world.

And indeed, Ma is one of an extremely select group of people with the experience, education, and background to provide a bridge for constructive dialogue between China and the United States as they feel out their respective positions in a new world order. "Each government must work to build domestic security and prosperity to fit its own unique political, economic, geographic, cultural, and historical circumstances," Ma said in his Hauser dinner keynote in January. "But there must be cross-border conversations and brainstorming in the broadest possible context, and NYU and the Hauser Program are the perfect venues for that. This historic time of the century calls for the collective effort of the NYU community—each and every one of us." □

Duff McDonald is a contributing editor at Fortune. *He is at work on* The Firm, *a history of McKinsey & Co., due from Simon & Schuster in 2013.*

COPS AND ROBBERS

THE CORPORATE EDITION

The international interest rate–rigging scandal currently ensnaring at least a dozen banks—and the fact that regulators might have known about it—stokes suspicions that corporate malfeasance is spinning out of control. This spring, the *Law School* magazine invited 10 distinguished faculty and alumni representing corporate defense, regulators, and prosecutors to discuss fraud, corruption, and bribery, and how to fight it. Rachel Barkow, a criminal law expert, moderated the discussion that appears here in condensed and edited form.

Watch the full discussion online at law.nyu.edu/news/magazine_roundtable_2012

RACHEL BARKOW, Segal Family Professor of Regulatory Law and Policy (moderator): One of the signs at Occupy Wall Street protests said, "We'll know corporations are people when Texas executes one." That's a pretty good sentiment for how corporate America is viewed right now. And so what this panel is going to talk about is whether that's a fair characterization, what is the scope of corporate malfeasance, what's the right level for government to be addressing, what are the real wrongs that are out there. There's no shortage of statutes aimed at targeting corporate wrongdoing: the Foreign Corrupt Practices Act, Sarbanes-Oxley, Dodd-Frank. Yet the FBI has reported that corporate fraud is on the rise. We have more prosecutions for foreign bribery. And in the wake of the financial crisis, many are asking questions about the conduct of players on Wall Street. So, Kathryn, suppose the president wants to know what, if anything, the government should do differently to combat corporate malfeasance. What would you tell him?

KATHRYN REIMANN '82, Chief Compliance Officer, Citibank NA and Citi Global Consumer: I am not a sociologist or criminologist, but I do have a lot of practical experience in large corporate organizations with respect to culture and combating malfeasance.

When you talk about corporate fraud, you need somebody who is both motivated and, on a moral level, open to doing this kind of an activity. You need the opportunity and you need their assessment of what's the threat or exposure to them. One thing that makes fraud in the context of any large organization, including government, particularly difficult to deal with is that when you talk about opportunity, unlike many other kinds of crimes, the opportunity often isn't fleeting; it develops over time. Somebody comes in day after day, learns the system, learns the people around them. They know what the flaws are, they know where to exploit. The opportunity is continually there, the temptation is continually there, and they have the time to really get good at what it is that they're going to do.

One thing that militates against commission of a crime is your perception of the victim. In corporate fraud, not only is it sometimes difficult for people to conceive of a victim, but also, if you view the victim as either not going to experience a harm or as perhaps having somewhat unclean hands themselves or in some way owing you or the public something, that, coupled with the opportunity, is going to put you in a situation where it's much more difficult to combat fraud. From this perspective, I don't think we need more legislation; we've got a lot right now that does speak to governance and basic controls, which are very important in preventing fraud. But we need to build the right culture, step up awareness. I would suggest that the government consider awareness campaigns in partnership with business that look for ways to set good civic examples, good cultural and governance examples that make people aware that fraud hurts them as well and that build a culture where everybody's looking for this.

BARKOW: Harry, I assume you're going to go right for it and say to the president, "I want your ear."

HARRY FIRST, Charles L. Denison Professor of Law: I'm tempted, but I'm going to go for a law enforcement response. There used to be a place near the Law School called the Lone Star Cafe that had a huge slogan: "Too much ain't enough." This applies to prosecutions for corporate fraud. Too many prosecutions is not enough. I would look for ways to go after all those malefactors. Here are three.

First: individuals. Government prosecutors need to make a greater effort to go after higher-level managerial officers. Prosecutors prefer to win cases, so they're cautious about going after managers where they might not have so much direct proof that they actually knew about things, but who should have known about things. There's law to enable prosecutors to reach such conduct, and we need to go after higher-level people as a matter of deterrence.

Second: corporations. Many of us are familiar with the deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) that have become very popular and useful tools for prosecutors. The Justice Department should be a little more cautious in the way they're used. Particularly NPAs. When corporations are willing to give up lots of money in return for a letter that says we're not prosecuting you, it's very tempting. But it's troubling. We need criminal prosecutions against corporations. DPAs at least have a criminal complaint filed.

Third: better mechanisms for getting those people inside to rat out their co-conspirators. Tools that can get information to prosecutors are really important. We should have amnesty from prosecution, not just leniency. You get off in return for turning others in. This works really well in crimes of conspiracy and has been used to extraordinary effect in the antitrust area. There are other areas in which it can be used and other tools that prosecutors can think of because if there's one thing prosecutors generally don't have, it's the information that people inside know. To get that information is really important.

BARKOW: All right. I want to hear from a defense lawyer perspective. Bruce, do you think we need more snitching and more cooperation? Why are the incentives not sufficient right now to do that? Or are they?

BRUCE YANNETT '85, Partner, Debevoise & Plimpton: Now that Harry can't give me a grade, I can get away with saying at the start that there's nothing that Harry just said that I agree with.

Look, there are plenty of incentives for people to come forward, and prosecutors do give people amnesty. They do enter into agreements whereby in exchange for information, they agree not to bring charges. A good defense lawyer with someone who has significant information will work hard to negotiate something. And Dodd-Frank, which we are just beginning to feel the effects of now, provides substantial financial incentives for people to rat. They can recover up to 30 percent of what the government recovers if they report to the SEC. Since the law took effect a year ago, the SEC has seen an explosion in whistleblower complaints, very

often drafted by plaintiff lawyers and very often 15 to 20 pages long with exhibits attached. Not crazy handwritten, Martians-landed-on-top-of-Citibank kind of letters. The incentives are pretty substantial for people to come forward; we don't need more.

On the deferred prosecution agreements and the non-prosecution agreements, Harry said that NPAs are used too often, and basically companies can buy their way out of problems. I will agree that they're used too often—but for the opposite reason. What happens is that the government decides they don't really have a case. Because if they really had a case, they'd either be talking about a deferred prosecution or an indictment. So it makes it too easy for them because the company wants to put this behind it. For its employees. For its shareholders. For a million reasons. Rather than put the government to its proof and attack a thin case, they'll agree to an NPA.

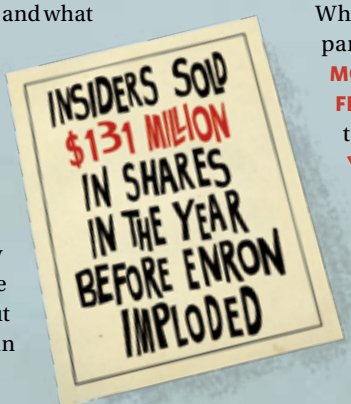
I actually disagree, though, with the opening premise that corporate fraud is on the rise. What you've got is flavors of the month. I've been practicing in this area now for 25 years, and we've seen different waves of fraud. There's been healthcare fraud, there's been accounting restatement fraud—and now we're dealing with the mortgage and banking fraud. I can assure you, five years from now it will be something different. And it's not that any of those are increasing or decreasing materially; it's certain things coming to light and the government deciding to allocate resources to attack that problem.

BARKOW: So maybe we should hear from the government, because you're getting beat up a little bit, Sanjay. What do you think: Does the government need more tools? Do you have what you need?

SANJAY WADHWA (LL.M. '96), Associate Regional Director for Enforcement, Securities and Exchange Commission: To your original question about what would I ask the president, I, too, have three items on my list: money, money, money. If you could only see the circumstances under which the government or the SEC operates, with limited resources, where we are pressed in terms of human capital, technological capital, and investigating and then prosecuting wrongdoing by corporate America and folks associated with it, you'd be struck by just how much of an imbalance there is. Anyone who's served in the government at any time in their career knows what I'm talking about. So…resources. That's what we need.

I don't know if corporate fraud is on the rise. I am a practitioner, so I only see what I see. Last year we brought a historic number of enforcement actions—over 730—which was significantly higher than in years past.

Just to deviate a little bit, my group has been working for the last five years on the Galleon insider trading investigation involving Raj Rajaratnam and now the expert networks, and what we're seeing is this shockingly poor culture of compliance at hedge funds, mutual funds, exchange-traded funds. Folks at companies are essentially just selling confidential company information when they moonlight as consultants to hedge funds. Hedge funds then trade on it and make millions. I don't know what companies are doing to prevent this culture, which is really viral, from spreading in their corporation. We have employees from just about every tech company out there—prestigious and highly reputable American corporations—who have been implicated in the expert networks matter. It's no different than backing up a truck to the loading dock, stuffing it with stuff you've pilfered from your employer, and then taking it out into the marketplace to sell it.



In terms of senior officers, look, Rajaratnam was the co-founder of Galleon. We've brought about 95 enforcement actions concerning the financial crisis, and we've named 50 or so CEOs and CFOs, but I don't know if anybody at this table necessarily knows that. An SEC action is not nearly as sexy as a DOJ action with the handcuffs and the spectacle of a criminal trial. The *Journal* and the *Times* and other such publications aren't reporting this. But the fact is that we are continuing to bring significant enforcement actions at an increasingly rapid pace, and that has been the case for the last couple of years.

BARKOW: Among the business community, are people more aware of the increased enforcement?

WADHWA: I should hope so. But we're also not in the business of publicizing. We make our statements through our enforcement actions, and if the message is not being absorbed by compliance officers and general counsels and other legal officers at big companies, that's really something that they need to fix. It's not something that we can fix; the message is out there.

BARKOW: So, Sara, what's a good corporate officer to do to try to improve the culture?

SARA MOSS '74, Executive Vice President and General Counsel, Estée Lauder Companies: I'm certainly aware of the enforcement actions, but there have been enforcement actions for years. On prosecutions and SEC actions, it really is putting your fingers in the dike. There will never be enough resources to prosecute everyone. People will find ways to get around the rules. And there will be rogue employees, there will.

But going back to talking to the president: Why are there not incentives for companies that have outstanding compliance programs? We have the Federal Sentencing Guidelines for corporations; it lays out the factors for a robust compliance program. As the chief legal officer, I make sure we have a robust compliance program. And that includes a code of conduct, consistent enforcement, modules that people have to answer. Tone at the top is critical, and we try to make it vibrant and real and have people understand that it's their obligation to protect the company and the shareholders from wrongdoing. Their job includes doing the right thing. I hadn't thought about it in this way until you asked us to talk to the president, but it would be a lot cheaper, more effective, and a lot more positive to reward companies that have a robust compliance program and have not had problems.

WADHWA: Isn't the lack of a reputational hit itself an incentive for companies to have robust compliance cultures?

MOSS: Sure. But how many do you actually hit? It's like when instilling in children the difference between not getting caught and doing the right thing.

FIRST: Do you pay your children when they do well? What more incentive do you need than that the company doesn't get into trouble?

MOSS: Maybe the government gives you a gold star.

FIRST: Usually we try to control ourselves; self-control comes at some cost to all of us.

YANNETT: But the fundamental difference—and I'm going to join with my colleague Sara—is for corporations, the strict application of respondent superior. I mean, if one of your kids hits the kid next door with a stick, you don't get arrested for assault with a deadly weapon as the parent. If somebody on the NYU faculty

assaults a student, the entire school doesn't get shut down and prosecuted. You can have a fundamentally good company that takes compliance deadly seriously and have employees who do stupid things.

BARKOW: One underlying premise with what you are saying is that we can scratch the surface and figure out which compliance programs are real and which ones are not. How do we tell?

MOSS: There are auditors and people in the government who sit inside banks, and they know. You take the factors, for example, of what constitutes a real compliance program, and you talk to people. You look at the internal records of what the company has done when they find wrongdoing. Maybe I'm wrong, but I think you can determine that.

REIMANN: But think about Enron. Enron actually won an award and recognition for their compliance program and corporate culture right before the implosion.

As I listen to what everyone's saying, one thing we get back to is leadership. I'm glad to hear the number of prosecutions that have been brought against Galleon and the like. Entities like that, where the people at the top have become engaged in something that is wrong, are not just corporations anymore. They're criminal enterprises, and people do what they're rewarded to do from the top of the house. You can paper over a compliance program as much as you'd like to, but if there is that at the core in leadership, if people are committed to a course of conduct that violates the law, there's no compliance program that's going to save you. What we've got to do is figure out a way to be vigilant and to find those places where leaders of companies are doing wrong. It's very powerful when you can punish somebody who is sitting at the helm. There's been a lot of research in this area.

Corporations where the CEOs are bullies or exhibit some very manifest behaviors that are not good leadership behaviors, there's a tie between that and a bad culture. What we've got to think about and what I would also suggest to the president is these people come from somewhere, and building up civic awareness, starting even at the school level, will help you generate people who are thinking about these things and who can look for them and who place some value on governance and culture. As an employer, you want to have people who are discerning about the kind of company they're joining. There isn't a silver-bullet answer for that question. But it permeates this whole discussion.

BARKOW: So let's get the law-and-economics perspective on this. The economists don't love culture as the necessary factor, but what's the right approach to target the bad apples? Assess compliance programs?

JENNIFER ARLEN '86, Norma Z. Paige Professor of Law: In order to deter corporate crime, we need to reward companies that have good compliance programs, self-report, and cooperate, and we have to punish the individual wrongdoers. But we need cooperation from the corporations. Corporations can help or they can make it nearly impossible to get the needed information.

Historically, we held corporations strictly liable for corporate crimes committed in the scope of employment. This was a terrible approach because it discouraged firms from detecting and self-reporting their employees' wrongs. After all, why would a rational firm detect and report a crime if this will just result in it getting convicted and punished?

So I support rewarding "good" companies by allowing those who self-report and cooperate avoid formal conviction. But they still should pay a monetary penalty in order to induce them to want to deter future crime.

To induce firms to help us go after the individual wrongdoers, we can threaten substantial criminal penalties if they fail to cooperate, and offer a DPA or NPA if they do cooperate. One advantage of the DPAs and NPAs is that we can exempt a firm from prosecution but still impose a substantial monetary penalty on the firm. You need firms to pay even if they do everything right to make sure that shareholders do not profit from the crime and that managers want to intervene ex ante to deter the crime, even if they expect that the firm will get credit for cooperation should a crime be detected.

I teach corporate governance, and I'm fascinated by the collision between the worlds of corporate crime and corporate governance. In corporate crime we're worried about compliance. In corporate governance we sing the praises of high-powered incentives. We want managers whose pay goes up in the good times

and plummets to poverty levels in the bad times so they'll work hard. Yet anyone who knows about compliance knows that the evidence shows that short-term, high-powered incentives dramatically increase the risk of corporate crime. So if we are seeing more crime it is likely that it is arising out of this movement in the corporate governance world to enhance the high-powered incentives without any real recognition that there's a serious downside combined with a bad economy: Bubbles create crime.

BARKOW: How much is the financial crisis tied to fraud and criminal activity or some kind of corruption at banks? We have monitors of banks—how come they couldn't catch some of this? Geoff, what tool kit do they need in order to do a better job?

GEOFFREY MILLER, Stuyvesant P. Comfort Professor of Law: I don't think the financial crisis caused misbehavior in banks. Nor did misbehavior in banks cause the financial crisis. The financial crisis was caused by something else, which was the tremendous amount of readily available cheap credit during the decade of the 2000s, which caused a housing bubble and many activities by firms, banks, and others that were highly risky. So the financial crisis was ultimately caused by cheap credit, and the chief culprit for the cheap credit is Alan Greenspan. I would recommend that, Sanjay, you go after Alan Greenspan for having caused most of the problems that we have now. Just kidding.

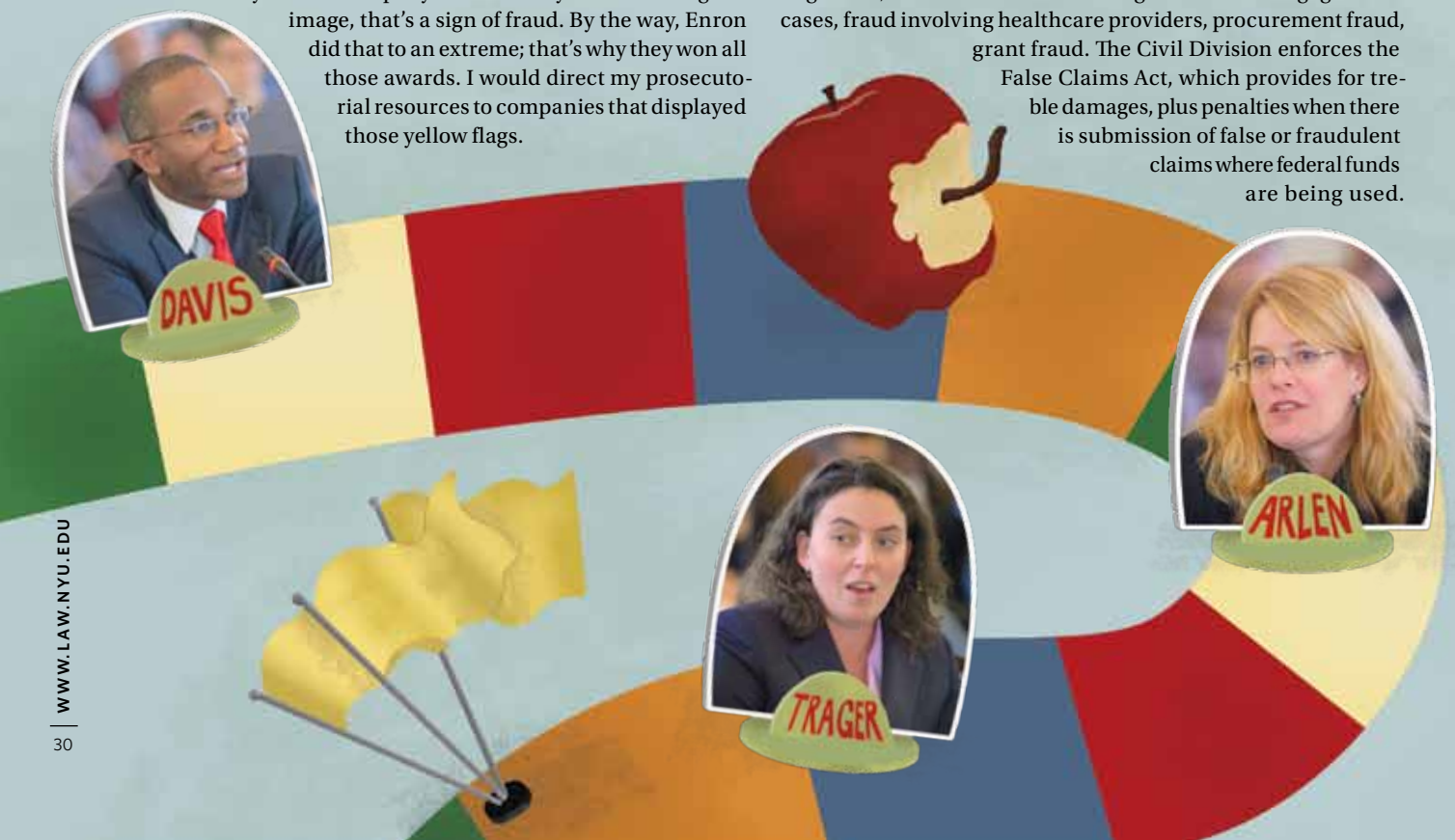
If I was talking to the president, I would say look for yellow flags. That is, look for things that indicate a possibility of fraud. And you'd use that to try to optimize your surveillance strategy to look for where fraud is. One of those indicators is cheap credit. And that happened in the 2000s, and there were plenty of people who took advantage of that. Also, a company that's growing very rapidly is a sign of fraud. If you see a company where an insider or small group of people dominate and others don't really know what's going on, that's a sign of fraud. If you see companies where people manipulate political connections a lot, that's a sign of fraud. If you can't quite understand the nature of the business, that's a sign of fraud. If you see a company that has extreme operational complexity—Enron being an example—that's a danger sign. If you see a company that tries very hard to manage its image, that's a sign of fraud. By the way, Enron did that to an extreme; that's why they won all those awards. I would direct my prosecutorial resources to companies that displayed those yellow flags.

Now, one last point—Berkshire Hathaway displays all the yellow flags of fraud, but I doubt that Berkshire Hathaway is committing fraud. So these yellow flags are only an indication, not a definite conclusion as to the presence of fraud.

REIMANN: If you think about the insider trading scandals and the housing market and the current debacle you're dealing with, one thing that stands out is these are not instances where it was just a company committing the fraud. You have a variety of people who all have come to accept a level of behavior. Insider trading is a great example. From the hedge funds involved in it to the folks sitting in other companies who might have been issuers, to the fact that how long did it take Congress to kind of admit that, gee, maybe we shouldn't be able to trade on insider information? Some of this passing of information just became accepted practice. The housing market—you had easy credit and people who found it profitable to let that easy credit roll on. You had people who applied for credit and because they didn't need to give documents, they lied about their income. And then you had people who did appraisals and, well, everybody else was looking the other way, why not lie about the appraisal as well? There were colluding forces here, and if you want to get to the bottom of this, you have to figure out how corporations and others interact in these situations.

BARKOW: So, Mara, as I was listening to the yellow flags, I actually was wondering who was left, because that actually did strike me as all of corporate America. What are you doing at Civil Frauds to detect the good apples from the bad apples?

MARA TRAGER '98, Assistant U.S. Attorney, Southern District of New York, Civil Division: My office, meaning the U.S. Attorney, has made civil fraud enforcement a priority. That's reflected in part with the formation approximately two years ago of the Civil Frauds Unit that almost exclusively handles affirmative cases. In addition, there are many AUSAs in the Civil Division who have primarily defensive dockets who are also handling affirmative fraud cases. Since the formation of the Civil Frauds Unit, we filed over 20 lawsuits and have obtained judgments of almost half a billion dollars. In general, the cases that we've brought include mortgage fraud cases, fraud involving healthcare providers, procurement fraud, grant fraud. The Civil Division enforces the False Claims Act, which provides for treble damages, plus penalties when there is submission of false or fraudulent claims where federal funds are being used.



And we also have been making greater use in recent years of the Antifraud Injunction Act. In terms of yellow flags that Professor Miller mentioned, he's given us a lot of directions to go in potentially. The whistleblowers were mentioned earlier today, and whistleblower provisions are extremely important—certainly a lot of our cases stem from whistleblowers.

BARKOW: So one statute that you didn't mention that also takes us a little more globally is the Foreign Corrupt Practices Act. Let's talk a little bit about bribery. Our focus has been individuals in a company who engage in either criminal activity or civil violations, either to profit themselves or to gain recognition within their corporation. The bribery context is different, because companies may say that the kinds of things they're doing in other countries is the cost of doing business in a global environment. So, Kevin, what should we be doing on a global level?

KEVIN DAVIS, Vice Dean and Beller Family Professor of Business Law: Just dealing with corporate misconduct on the national scale is challenging enough. Listening to all the domestic issues that have come up, I was thinking those are really tough questions. We don't know what the problem is and we don't know how to respond to it. The issues are even more challenging when you start to think about them on a global scale. Even in terms of do we know if foreign bribery is on the rise. Yes, we've got more enforcement actions, but we'll never know if there's been more or less corruption over the past few years. I suspect it's been about the same. And I would guess that on account of all the FCPA enforcement that corporate America is probably somewhat less corrupt these days. We can never do enough, but we're probably doing something. Given the recognition that it's impossible for the United States to be the policeman for the globe—we're not going to clean up corruption in Nigeria, right? We're not going to clean up corruption in Afghanistan—because we can't do it in New York or Chicago.

So that's not on the table. We have to figure out what the priorities are, figure out what the purpose behind the statute is, and then decide how to move forward. The Foreign Corrupt Practices Act, as I understand it, is to try to prevent the United States or U.S. corporations from contributing to corruption in foreign countries. To prevent their governments from being undermined, to prevent development from being compromised, to prevent the United States from being embarrassed. Well, are we going to go after low-level bribery? Are we going to worry about people paying bribes to evade customs duties? That may not be such a high priority compared to the big bribes to obtain contracts for mobile phone systems. We can set priorities in terms of the type of misconduct. We can also focus on particular countries, the kinds of countries that need the most help from us. Some countries have their own anticorruption agencies that are more or less capable of dealing with these issues. But the Haitis of this world may not. Then we also have to figure out some new tactics. If the idea is to actually help these foreign countries, then we should think about helping them financially. $1.6 billion in the Siemens case went to the German government and the U.S. government and stayed there. Didn't go to all those countries around the world that were actually the victims of the bribery. So we should give more thought to things like restitution payments for either the governments or particular groups within the foreign countries that are affected. And also think more about cooperation with foreign actors. This is also something we haven't had to think about on the domestic side so much. Cooperation with foreign regulators, figuring out who prosecutes, what happens if one country wants to provide leniency, another one doesn't. Working out all those issues should be a priority for us in the FCPA area as well.

BARKOW: This roundtable is presenting more problems than solutions. Bruce, you worked on the Siemens case, and I'm curious about how multinational corporations navigate a global regulatory environment where they can find themselves being prosecuted or charged in multiple jurisdictions. What are the pitfalls for companies? What are the kinds of things that companies have to think about going forward?

YANNETT: I headed up the audit committee investigation to figure out what happened at Siemens, and we were dealing with 14 separate government investigations around the world. It's a real challenge. One of the things that we accomplished in Siemens really for the first time in a significant case was we were able to, over time, develop trust with the German prosecutors. We had the trust of the SEC and Justice Department. They know we're going to do a good job and an honest job. But in fact, in most of Europe, companies do not hire lawyers to get to the bottom of things; they hire lawyers purely in a defensive mode. Here we're showing up saying no, our job is, on behalf of the audit committee, to find out the truth and they're like, yeah, right. It took a long time to overcome that initial distrust. We were able, though, by the end of the day, to get both the Germans and Americans talking to one another, meeting together, coordinating, so that the penalties were actually announced on the exact same day at the exact same moment and were totally coordinated. The multicultural differences, from a law enforcement standpoint, are enormous in terms of the Fifth Amendment privilege: Does it exist, does it not exist? Does the attorney-client privilege exist or not exist? Data protection laws: Here, if I do an investigation for a big company, there are effectively no limits on what I can look at, and in Europe there are all kinds of legal restrictions on what data you're allowed to look at and what the company is even allowed to keep. You've got, in the U.S., employees at will, so if they do something wrong, Sara or Kathryn can fire them tomorrow. In places like France or Italy, there are very strict labor protection laws, and you may have to negotiate with the union. So the complexity is enormous.

The issues that Kevin was addressing and that your question brings up is not so much how do you deal with it once it hits the fan, if you will, but how do you deal with it from an operational standpoint and trying to operate a compliant business on a global basis? I'm the last person at the table who's naïve, but most Fortune 100 U.S.-based companies have people like Kathryn and Sara who are genuinely committed to trying to instill a good culture.

Companies spend tens of millions of dollars a year just on compliance and, yes, they're going to have bad people. We all do. So for them the challenge is how do we compete in Africa against the Chinese when the Chinese don't prosecute these things internationally? They prosecute their own people for corruption, but they're literally bringing suitcases full of cash into Africa for the natural resources—something that used to happen in the West but is way, way down. The level of corruption is probably fairly static. Just the bribers have changed over time. It was the Americans and then it was the Europeans, and now even they're getting serious about enforcement. So it's the Russians and the Chinese now. And if the enforcement by the U.S. authorities against the American companies is so tough and they go after the $50-customs-agent-fee kind of situation, what it does is, if you're in Sara's position as general counsel of a big global company, you may decide, you know, Vietnam is a really hard place, it's just not worth it, so we're going to pull out of Vietnam because the corruption is so high. If the American and Western European companies pull out of Vietnam, who's there? And has the corruption problem gone down or up?

BARKOW: I have found a silver lining, which is that this is all good for lawyers. There's a need for good lawyers to ferret out fraud, bribery, corruption, and to do the compliance work. To do the auditing. And then to do the defense work if companies find themselves charged, and to bring the actions on behalf of the government. But what happens when we find somebody who is the bad actor, the bad corporation, the bad individual? What's the appropriate sanction in this context? What's the right hammer to throw at the problem?

REIMANN: Well, within the realm of a corporation, it's critically important that whatever compliance program you have, that your disciplinary program enforces it in a very evenhanded and obvious way. There are activities where no matter who it is, who's caught doing them, they must and need to be fired. And not permitted to resign. Some activities have to be fireable offenses, and people need to know that. That shows people that you're serious and starts building a culture and shows through example how a good leader leads—which is that you don't tolerate certain things. One of the issues in these fraud bubbles we've talked about is that the environment has just become too tolerant and permissive for that activity. If people are going to get slapped on the hands, then it sends the message that this behavior is really not so bad.

MOSS: I would agree, but I would go a step further. Criminal prosecution of the individuals is an important tool. I've referred a number of employees for criminal prosecution. These have not been bet-the-company kinds of things, but I would do that anyway. That sends a very important message. If there's criminal wrongdoing, there should be criminal prosecution. I'm not saying there should not be sanctions and fines. But certainly criminal prosecution should be a tool. Financial fraud is very serious, and when it is committed against us or our clients, criminal prosecution is warranted. It's the lesser offenses where companies tend to be lax in discipline, and they don't view firing as that kind of a tool.

ARLEN: There is a role for DPAs and NPAs to impose structural reform sanctions. Most frauds by publicly held firms are agency costs—they're done by managers for themselves, not for shareholders. In some cases, the agency costs not only cause the crime to happen but also undermine managers' response to news that a crime occurred: Managers do not report the crime because they benefit from it. In this case, sanctioning the firm will not deter the crime, because the sanction falls on the shareholders. You need some mechanism for reducing those agency costs that affect corporate compliance, self-reporting, and cooperation. When we have those agency costs, it can be helpful to use DPAs to mandate compliance programs structured to reduce agency costs—for example, with chief compliance officers who report directly to the board. You also may need a mechanism to ensure that the firm adopts the program. That was the idea behind the corporate monitors. You could have reporting requirements or you could have civil oversight, but you need some kind of oversight mechanism.

We started out with this revolution in DPAs and NPAs where we impose compliance programs and then had monitors, and we now are moving into a world where we impose these compliance programs on firms as part of DPAs and NPAs and then not have any monitor. The DPAs and NPAs are changing. We're not doing enough to make sure that companies genuinely comply. We're not using the DPAs and NPAs enough to indirectly penalize the people responsible for why the firm had bad compliance or didn't investigate.

We also are not using DPAs to help shareholders oversee managers. The statements of facts in the DPAs and NPAs say whether the firm had a good compliance program or not. But the DPAs rarely identify the managers whose actions caused the prosecutor to conclude that the firm's compliance program or cooperation was deficient. If shareholders had more information on who within the firm was involved in having the noneffective compliance program, you would see some pressure brought to bear on those people either to do a better job or exit. We're not using the disclosure tools available to the government to harness the monitoring of the market.

BARKOW: Sanjay, can you give us context to the broader criticism about the SEC accepting settlements without any admission of wrongdoing aside from just monetary fines?

WADHWA: You're talking about Judge Rakoff's decision in the Citigroup proposed settlement. It's not just the SEC; every federal agency does this "neither admit nor deny" in its settlements. At some level it's just practical. We don't have the resources to litigate everything on every matter,

and the neither-admit-nor-deny allows a company to settle with us while protecting itself from flank attacks in the private litigation arena. When Citigroup is ready to pay $285 million and they say we're neither admitting nor denying, it's a little simplistic to say they're doing it because they want to get this behind them. There is something there. That was what we argued before Judge Rakoff. He doesn't think it's fair, he doesn't think there's enough transparency there. But we're fairly comfortable that we're going to ultimately prevail because we are an independent agency, and our take on the matter needs to be respected by the judiciary to a large degree. Judge Rakoff is making his points, but I don't think he's got the law on his side.

At the conclusion of the discussion, there was just enough time for the moderator to take questions from a student in the audience.

ALEX GORMAN '14: Regarding having incentive for good compliance programs: In the manufacturing world there are ISO standards, which are best practices, and if you meet that standard you then have access to certain preferred government contracts and private contracts. So perhaps if you can put together some sort of gold star for good compliance, then maybe the premium on the stock price or access to preferred contracts could act as some sort of affirmative incentive for change.

MOSS: Shareholders and investors really care, for example, about environmental issues. There are all sorts of gold stars or gold standards. The government cares about it, but also investors care about it. We have reports on what we do environmentally; we don't on corporate governance. But you would think that investors and shareholders would care about that. Look at Avon—that's had a huge impact on the company. It's a good point.

GORMAN: What is the role of private party litigation and how that fits in? What is the role vis-à-vis government enforcement mechanisms?

BARKOW: Kevin, is private law sufficient? A good complement? Sanjay's already brought up the point that the neither-admit-nor-deny language is really designed by agencies to protect a company from mass-action lawsuits. But how should we think about private litigation more broadly?

DAVIS: Ideally it would complement, but the problem is it's impossible to coordinate all these different types of sanctions that can be imposed on a company because often you have to worry—at least in the FCPA context—not only about shareholder litigation and litigation coming from competitors who lost out because you paid a bribe; you also have to worry about debarment. The federal government could bar you from doing business with them going forward. This is possible not just in the U.S., but with the international financial institutions, in the European Union, elsewhere. Contracts might be canceled. There's a lot that can be done on the private law side to sanction firms for engaging in all sorts of misconduct. The problem is we don't know if all that will add up to the right level of sanctions. To echo what Jennifer was saying, it's important for the government to at least try to target their sanctions, focus on the individuals or the group who is engaged in wrongdoing to the extent possible. Because what is the point of a few hundred million dollars in penalties for Citibank?

ARLEN: When we talk about the need to punish the firm with private sanctions, we don't always distinguish adequately in the type of crime. It's one thing to impose a sanction on a firm for an FCPA violation where the firm probably profited from it. But private sanctions in the area of financial misstatement securities fraud are a terrible idea. Private liability on individual managers is a great idea if they committed the fraud. But private corporate-level sanctions for securities fraud imposed on corporations have very little deterrent effect. Moreover it punishes the victims twice, because most securities fraud involves lying to the market so that people buy into the firm at an excessively high price. When the fraud is revealed, the market price plummets, both because of the truth and the anticipation that the firm will bear private liability. One of the things that Judge Rakoff completely missed about the SEC's policy when it applies to financial misstatement fraud is that you want to disable the class actions as applied to corporations and force plaintiffs to go after the individuals. Do private sanctions complement public enforcement, or are they just another way of victimizing the people who were victims of the crime originally?

FIRST: Private-actions remedies are very complicated, and we've got lots of different possibilities. We didn't mention putting people in jail, which is a really good remedy, and then that raises the question of for how long. But for private remedies to have a deterrent effect, they must also provide compensation to victims to incentivize them to sue. One of the problems is separating that out. It looks a little different in these fraud cases than in antitrust cases where you can very well have victims who need compensation and deserve it, like consumers, and that may have a deterrent effect, but it also has a very important compensatory effect. In fraud cases there is a problem even in thinking about who was hurt and who was helped, because the shareholders are a floating bunch. People who were helped may already be out of the stock by the time the suit is brought. And that's also true for the financial penalties. If they're ultimately paid by the shareholders, that's not a fixed set of people. These difficulties may lead us, in certain kinds of cases, to look for other things like the monitors.

Debarment has pluses and minuses. It can actually lead to distortions in the food and drug area, where the debarment is for Medicare and Medicaid, which the pharmaceutical companies don't very much need. We have to really think hard about that.

One area in which debarment could be used more is individuals rather than corporations. If you debar a corporation, you actually may end up hurting unintended victims like consumers who lose a product. Whereas if individuals for a period of time either can't be rehired by their company or have to be in a different business, that may actually be a very useful and targeted penalty. The remedies issue is very important, and you do have to consider the effect of private rights, but we also shouldn't lose sight of the fact that the remedies are not just for class-action plaintiffs' lawyers, but are mainly for the victims.

BARKOW: Thank you all. □

Note: The views expressed by Sanjay Wadhwa and Mara Trager are their own and do not represent those of the SEC or the U.S. Department of Justice.

Illustrations by Max Dalton
Photography by Juliana Thomas

JAMES DUNCAN DAVIDSON/TED

Faculty Focus

Professor Bryan Stevenson's powerful TED Talk, stressing that any person is more than the worst thing he or she has ever done, stirred an audience of jetsetters to make substantial contributions to his legal defense organization. Later the same month, Stevenson convinced the Supreme Court to overturn mandatory life-in-prison sentencing for juvenile homicide defendants.

The Ayes of March

Two wins in the highest court and a million dollars, all in 30 days.

For professor of clinical law Bryan Stevenson, March 2012 came in like a lion and went out with a roar. He began the month giving a speech that within 24 hours raised a million dollars to support his legal defense work, and ended it with two winning oral arguments before the U.S. Supreme Court.

Stevenson more than fulfilled the requirements for a speaker at the TED2012 conference, where "the world's most fascinating thinkers and doers are challenged to give the talk of their lives (in 18 minutes or less)." His moving, highly personal March 5 speech, recalling his grandmother's words and the effect they had on him as a child, would be familiar to any student who has attended one of Stevenson's annual Public Interest Law Center lectures, for he touched on his favorite themes of impressionability, hope, rehabilitation, and humanity. For the 1,400-seat TED audience, each of whom paid $7,500 to attend the conference, the talk "inspired one of the longest and loudest standing ovations in TED's history," according to its founder, Chris Anderson. It also moved them to pledge $1.12 million to support a campaign that Stevenson said from the stage would "end excessive sentencing of children and stop the practice of putting kids in adult jails and prisons, where they are 10 times more likely than other incarcerated people to be the victims of sexual assault and violence."

Only three weeks later, Stevenson would argue that mandatory life-without-parole sentencing schemes for juveniles convicted of homicide are cruel and unusual punishment and therefore unconstitutional. The Court's 5–4 combined decision in *Miller v. Alabama* and *Jackson v. Hobbs*, released in June, builds upon earlier Eighth Amendment arguments Stevenson has been making for nearly his entire legal career against capital punishment and what he calls death-in-prison sentences.

Stevenson began representing death row prisoners in 1985, four years before founding the Equal Justice Initiative (EJI), where he is executive director. He and his staff provide legal representation to indigent defendants and prisoners who have not received fair and just treatment in the criminal justice system. About five years ago, the mission of EJI, located in Montgomery, Alabama, expanded beyond capital defense to include life-without-parole sentences for juveniles.

In 2009, Stevenson argued *Sullivan v. Florida*—his third appearance before the Supreme Court (*see sidebar*). He laid the foundation for his position then when he argued that children under 18 should not be sentenced to die in prison for non-homicide crimes. He pointed to evidence indicating that children differ significantly from adult offenders in terms of level of maturity and a sense of responsibility, making mandatory life in prison a form of cruel and unusual punishment. While the Court ultimately declined to decide *Sullivan*, it upheld Stevenson's reasoning in a companion case, *Graham v. Florida*, argued along similar lines the same day. Justice Elena Kagan's majority opinion in *Miller*, released in June, invoked *Graham* as precedent: "While *Graham*'s flat ban on life without parole was for non-homicide crimes, nothing that *Graham* said about children is crime-specific."

Coming from a Court not known to sympathize with criminal defendants, the recent decisions provide capital defenders with renewed hope. "Having the U.S. Supreme Court make announcements about what just can't happen consistent with the Eighth Amendment was momentous," says Cathleen Price, EJI's cooperating senior attorney. "It's momentous for that mission, for our national community, for our conversation about how to deal with criminal behavior."

Stevenson is not one to dwell on his own achievements—at the Supreme Court level or otherwise—although even he allows that it has been "a very eventful year." Instead, he maintains a longer-term view. "Throughout most of my career I've been trying to advocate for a more hopeful perspective on how we think about difficult and complex problems," he says, before turning to the same stirring themes he sounded with the TED audience. "I do think that we can't afford to reduce people to their worst acts. We can't afford to engage in harsh judgments without an appreciation of the complexity of human existence. It really is when people fail, when they fall down, when they're struggling, when they offend that we test our core values and principles. I talk about it differently in different settings, but I hope it reflects the same vision that a just society needs to be just to everyone, not just the powerful and the privileged." □

Atticus Gannaway

Breaking a Tie

Before his two winning arguments for juveniles this year at the Supreme Court, Bryan Stevenson had a 1–1 record on behalf of adults Walter McMillian and David Nelson.

***McMillian v. Monroe County, Alabama*, 1996**

Decision: 5–4 against McMillian. Stevenson's client had been on death row for six years before being exonerated. He sued the county because its sheriff suppressed evidence that would have prevented his conviction. The Court ruled that the county was not liable for the sheriff's actions.

***Nelson v. Campbell*, 2004**

Decision: 9–0 for Nelson. The Court ruled that Stevenson's client had a right to challenge the method of his execution, which involved cutting into his body to expose the veins through which he would be lethally injected with poison.

Our Man Behind the Journey from China

WHEN CHEN GUANGCHENG landed at Newark-Liberty International Airport in New Jersey after his dramatic exit from Beijing, he took a short drive to Greenwich Village. A throng of television crews and curious locals gathered outside the residential tower that would now be home to the blind activist and his family, and they erupted in cheers as Chen emerged from a car. (See related story on page 120.) Thanking his supporters in a public speech that would have been unthinkable just a month earlier, Chen stood side by side with one of the men who made his departure from China possible: NYU Professor of Law Jerome Cohen.

Three weeks earlier, Harold Koh, legal adviser to the State Department, called Cohen out of the blue on a Monday morning. Cohen, one of the foremost scholars in the U.S. of Chinese law, had been following the news about his friend Chen—the daring nighttime escape from detention in Chen's home in Shandong, the secret journey to Beijing, and Chen's taking refuge at the U.S. Embassy—but had no clue that he himself was about to be entangled in the diplomatic standoff between the U.S. and China. Koh and Kurt Campbell, assistant secretary of state for East Asian and Pacific Affairs, asked if Cohen could advise Chen.

The U.S. negotiators had already hammered out a deal with Chinese officials: Chen could spend two years studying in China, followed by a third year in the U.S. But Chen wasn't convinced. If he took the deal, he would be risking his safety and freedom. He asked to speak to Cohen, his old friend in New York.

The two men had met for the first time in 2003 in the U.S., when the self-taught legal advocate, who fought on behalf of the disabled and victims of forced abortions and sterilizations, was a guest of the U.S. State Department. Chen so impressed Cohen that their 30-minute appointment lasted four hours. At that initial meeting, says Cohen, "I could see that he could become a Gandhi figure for China as an authentic child of the rural Chinese masses."

Koh and Campbell put Chen on the phone with Cohen that day. "I was feeling anxious because I knew the U.S. government wanted him to take this choice," says Cohen. "On the other hand, it's a heavy responsibility to tell someone to take a risk while I sit here safely in New York."

In a long conversation, Chen repeatedly told Cohen that he felt "feichang bu anchuan"—very unsafe. Upon hearing this, Cohen advised Chen to stay in the embassy. But the next day, Chen seemed more confident, and Cohen discussed with him various options for staying in China, including convincing President Obama to guarantee his interest in Chen's welfare. By Wednesday, Chen had accepted the deal and left the U.S. Embassy, only to change his mind within hours: He wanted to go to the U.S.

With a full-blown diplomatic tempest marring long-planned trade and strategy talks, both nations looked for a way out. Just one part of the deal still seemed viable: Could Chen go immediately to the U.S. to study? Cohen said the U.S.-Asia Law Institute, which he co-directs, would be thrilled to host the activist.

By Friday, Chinese officials had stated that Chen, like any other Chinese citizen, was free to apply to study abroad. Though details would be hammered out over the next two weeks, the crisis was over.

For Cohen, this episode showed just how much U.S.-China relations had evolved. In 1992, Cohen was among those who tried to intervene on behalf of human rights activist Wei Jingsheng, but China did not permit Wei to leave the country for five years. In Chen's case, it took just five days. "Human rights continues to be an area of disagreement," says Cohen, "but under pressure China can be practical, even if it means a certain loss of face—and the U.S. put a lot of pressure on China in public."

Still in daily contact, Cohen remains an adviser to Chen. So what tips has he given his most famous advisee for navigating law school? "To learn, to take advantage of the fabulous reception NYU has given him," says the professor. "To try to conduct himself in a way to leave open the possibility of return to China." □ *Michelle Tsai*

GETTY IMAGES / ANDY JACOBSOHN

Best in Class


Levinson


Murphy

Since they were established by Albert Podell '74 in 2007, the Podell Distinguished Teaching Awards have recognized outstanding achievement of NYU Law faculty in the classroom. This spring, Daryl Levinson, Erin Murphy, and the late Derrick Bell were honored.

Levinson, David Boies Professor of Law, is a leading expert in constitutional law and theory. He was recently inducted into the American Academy of Arts & Sciences. Presenting the award at the end-of-year faculty dinner, Dean Richard Revesz highlighted Levinson's mentoring and his attentive guidance of students as they pursue their own scholarship.

A nationally recognized expert in forensic DNA typing, Professor Murphy teaches Criminal Law, Criminal Procedure, and Evidence. Revesz applauded her "engagement in and outside the classroom."

Longtime Visiting Professor Bell was a constitutional law scholar and a leading proponent of critical race theory. "Derrick touched the lives of countless students, who were inspired by his scholarship, activism, and teaching," said Revesz. "In his classroom, he created a safe haven for unconventional ideas and for students who otherwise felt alienated." Bell's widow, Janet, and former student Lisa Boykin '95 accepted the award on his behalf. (See next page for more on Bell.)

Last spring, Podell also founded the Distinguished Administrator Awards. The first awards went to Irene Dorzback, assistant dean for career services, and Clara Solomon, director of counseling and career development.

For 29 years, Dorzback has helped graduating students realize their career goals, even in tough financial times. "She spares no effort in encouraging students to dream big," Revesz said, "and to work hard to achieve those dreams." The dean also praised Solomon as a "quiet superstar" for providing career counseling, primarily to LL.M. students.

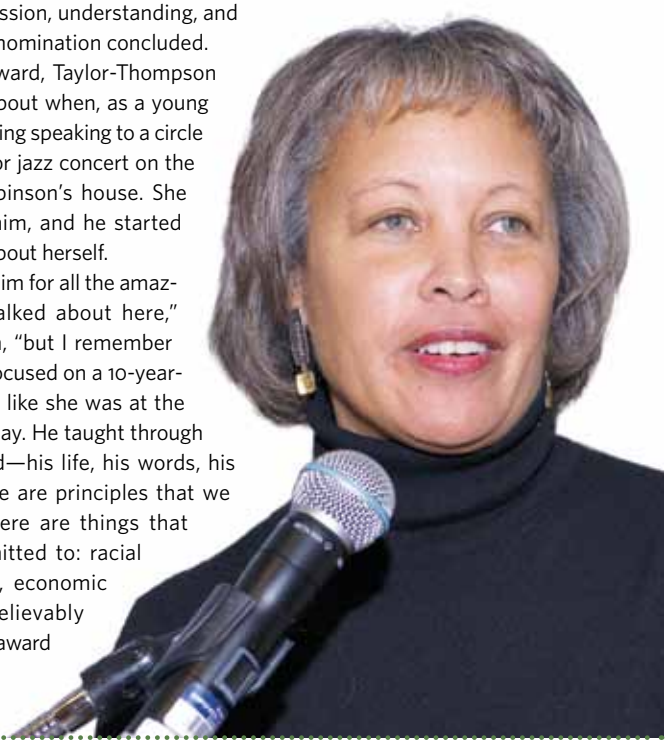
A Professor Worthy of the Name

Kim Taylor-Thompson was one of five professors to receive the 2012 Dr. Martin Luther King Jr. Faculty Award in February. The student-nominated honor recognizes professors across the University who exemplify King's spirit through scholarship, research, and teaching, and also considers their positive impact in the classroom and the greater NYU community.

Students singled out Taylor-Thompson for her passion and her work examining the effect of race and gender on criminal behavior, particularly among juveniles. "It is all too easy to label a person who commits a crime a criminal and forget that they, too, are human, with a history and psychology that bear on their actions," read one student's nomination. "Professor Taylor-Thompson reminds us that these people cannot be left to the system without careful consideration for why they did what they did and whether the punishment fits the crime." But, the student continued, she does not gloss over the fact that people, even juveniles, do commit crimes, and that they must be brought to justice. "I have found the evenhanded approach with which our Criminal Law class has been conducted to be both an aid to learning the law and a lesson in compassion, understanding, and equal treatment," the nomination concluded.

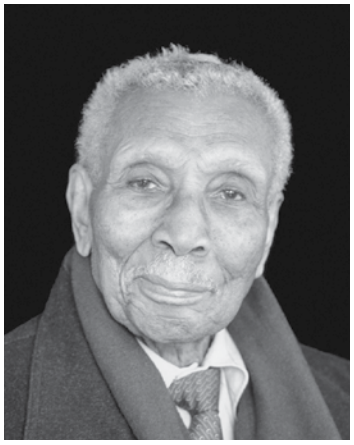
In accepting the award, Taylor-Thompson related an anecdote about when, as a young girl, she encountered King speaking to a circle of people at an outdoor jazz concert on the grounds of Jackie Robinson's house. She boldly walked up to him, and he started asking her questions about herself.

"We all remember him for all the amazing things that we talked about here," said Taylor-Thompson, "but I remember him as the man who focused on a 10-year-old and made her feel like she was at the top of the world that day. He taught through everything that he did—his life, his words, his loss of life—that there are principles that we have to stand for, there are things that we have to be committed to: racial justice, social justice, economic justice. It is so unbelievably humbling to receive an award in his name." □



Robert Carter, 1917–2012

JUDGE ROBERT CARTER, a leader in the legal battle against racial segregation, passed away at the age of 94 on January 3, 2012. He is remembered for his work with Thurgood Marshall and the NAACP Legal Defense and Educational Fund, culminating in the 1954 landmark case *Brown v. Board of Education*, which Carter argued before the Supreme Court. He would succeed Marshall as general counsel of the NAACP LDF and go on to argue or co-argue 22 cases in the Supreme Court, 21 of which he won.



From 1966 to 1971, while working at the NAACP LDF, Carter became one of the first African American instructors at NYU Law, beginning as a lecturer and then becoming an adjunct professor of law. In 1972, President Nixon nominated Carter to be a judge on the U.S. District Court for the Southern District of New York. In 1986 he took senior status, remaining in that capacity until his death. Carter was a close mentor to Derrick Bell, who worked with him at the NAACP LDF. Bell named one of his sons Carter. □

CARTER: © MARIANA COOK 2010

In One Short Year, Remembering a Life

When constitutional law scholar and critical race theory pioneer Derrick Bell passed away last October at age 80, NYU School of Law, which welcomed him as a visiting professor more than 20 years ago, seemed not quite ready to let him go. At the family's beautiful memorial service at the Riverside Church, NYU President John Sexton, *Ms.* founder Gloria Steinem, and Harvard Professor Charles Ogletree Jr. spoke, and Jessye Norman sang a tearful and moving rendition of "Amazing Grace." But the Law School continued a conversation for several months, invoking his memory at many events including the annual Derrick Bell Lecture on Race in American Society in November; the Bell Annual Gospel Choir Concert, performed with even more tears than usual; and the Black, Latino, Asian Pacific American alumni organization Spring Dinner, where he was celebrated alongside other leaders of the civil rights movement. But the galvanizing event was the posthumous dedication to him of the 69th volume of the *NYU Annual Survey of American Law*, when Bell was remembered as a compassionate teacher and scholar by his former students, colleagues, and deans.

Bell famously came to NYU in 1991 after leaving Harvard Law School to protest the utter lack of tenured black women on the faculty. It was not his first such act. In 1985 he resigned as dean of the University of Oregon Law School when the faculty failed to give a tenured job offer to an Asian American female candidate he recommended. Earlier, in the 1960s, he left his first post–law school job in the Civil Rights Division of the Department of Justice, where he was the only African American lawyer, when he was asked to give up his NAACP membership. He then became the first assistant counsel at the NAACP Legal Defense and Educational Fund, working for Thurgood Marshall and supervising more than 300 school desegregation cases in Mississippi. Dean Richard Revesz told the assembled guests, "The two qualities that I think best exemplify Derrick's life and that weave in and out of everything he did professionally are courage and integrity."

The students and colleagues who spoke at the dedication ceremony spanned Bell's career, from his years at the NAACP through NYU. Norman Dorsen, Frederick I. and Grace A. Stokes Professor of Law, who first met Bell in the 1960s, remembered him as a dedicated mentor: "He felt a special urgency about monitoring African Americans and other students who were making their way through the maze of legal education. These students often came from families that had not previously had a member who attended college. He considered his relations with students to be a deeply important responsibility and opportunity."

Bell


Williams


Norman at Riverside Church


Dorsen

Sexton, who was dean of the Law School in 1991 and invited Bell to NYU after the Harvard imbroglio, recounted how he told Bell that he could be the "Walter Alston of legal education" by signing only one-year visiting professor contracts but staying at his job for decades. Sexton first met Bell in 1976, when Bell taught him at Harvard Law. "He had the capacity that the really great teachers have," said Sexton, "to make you think about something completely differently from the way you thought about it before you began to work with him.... I'm not sure I'd be here today if it hadn't been for his pushing me as a scholar."

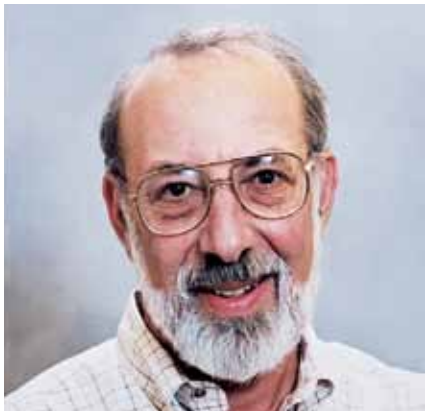
That notion that Bell inspired students to devote their careers to the law was echoed by other speakers. Gabrielle Prisco '03, director of the Correctional Association of New York's Juvenile Justice Project, first met Bell in the fall of her 1L year after she told Sexton that she felt out of place. He introduced her to Bell, who invited her to sit in on his Constitutional Law class and to join his students and him afterward for their regular dinners. After graduating, Prisco returned to NYU Law as a Derrick Bell Fellow, teaching with Bell and engaging in scholarship on race and racism in American law. "I learned how to ground my thoughts on justice and on fairness in the framework of the Constitution and in legal thinking," she said. "Derrick reminds us that the work we do in the world matters, that we are the problem-solvers of this time and place, and that much rests in our hands and in what we do with that."

Patricia Williams, James L. Dohr Professor of Law at Columbia Law School, was another of Bell's students at Harvard Law and, she says, became a critical race theory scholar and professor because of him: "He made ideas come alive, he made the dry pages of treatises vivid. He never let us forget the human stories behind every tract, every suit, every appeal. He imbued legal education with a sense of purpose and responsibility, and we weren't there for ourselves alone, but to live up to a calling and to be of service." More personally, she said, "He helped me reframe the sense of isolation and intimidation I felt as causes, and as precisely the reasons there was an obligation to stay the course."

Bell's legacy will live on in many ways at NYU Law, including through the two annual Derrick Bell scholarships for NYU Law students. □ *Atticus Gannaway*

Harry Subin, 1935–2011

HARRY SUBIN, PROFESSOR OF LAW Emeritus, passed away on September 4, 2011. A member of the faculty from 1969 until his retirement in 2000, he pioneered NYU School of Law's clinical program, building the foundation of what would become the leading program in the country. He introduced the Criminal Defense Clinic in 1969 and



later added the Federal Defender Clinic after recruiting the late Professor Chester Mirsky, with whom he also co-authored a book on federal criminal procedure. In 1989, Subin started the Prosecution Clinic in conjunction with the Manhattan District Attorney's office. In addition, he helped to create two courses that he continued to teach throughout his career: Criminal Procedure and Practice, and Professional Responsibility in the Practice of Criminal Law. Subin wrote extensively on these topics and, in 1985, received the New York State Bar Association's award for outstanding work in the field of criminal law education.

Before joining the Law School, Subin played an instrumental role in reforming the federal and New York State criminal justice systems. After graduating from Yale Law School in 1960, he was accepted into the honors program in the Justice Department. There, for the next several years, Subin worked as a member of the Organized Crime and Racketeering Section, investigating and prosecuting cases involving leaders of La Cosa Nostra, as well as political corruption cases. As an attorney in the Office of Criminal Justice, he authored *Criminal Justice in a Metropolitan Court* (1973), which led to a wholesale reorganization of the District of Columbia's Court of General Sessions. Subin also helped to draft the Bail Reform Act of 1966, which was the first major change in the law since the 18th century.

"Harry was beloved by generations of students," says Fiorello LaGuardia Professor of Clinical Law Martin Guggenheim '71. "His Criminal Defense Clinic was the most oversubscribed clinic NYU offered for many years. He was an innovative, dynamic teacher with a wonderful sense of humor." □

Paula Ettelbrick

Paula Ettelbrick, an adjunct professor at NYU Law since 1998, passed away from cancer on October 7. A leader on legal issues in the LGBT civil rights movement over the course of three decades, Ettelbrick had been legal director of the Lambda Legal Defense and Education Fund, legislative counsel to the Empire State Pride Agenda, executive director of the International Gay and Lesbian Human Rights Commission, and, most recently, executive director of the Stonewall Community Foundation.

Ettelbrick played a large role in state-level grassroots civil rights efforts across the country. In advance of the 2000 U.S. Census, she launched a national campaign urging same-sex partner households to let themselves be counted as she insisted upon the importance of LGBT visibility in demographic statistics. (The same-sex couple tally in 2000 was a threefold increase over the 1990 count.) In recent years, as the marriage-rights movement gained steam, Ettelbrick steadfastly continued her work to protect the rights of non-traditional families.

All of the major LGBT nonprofit organizations mourned Ettelbrick's untimely death, including the Human Rights Campaign, whose then-president, Joe Solmonese, said in a statement, "We mourn the loss of a tremendous force in the LGBT community and honor her unrivaled commitment to the full equality of all people." □

John Johnston Jr. 1932–2011

John D. Johnston Jr., Professor of Law Emeritus, passed away on December 18 after a battle against cancer. Johnston was a member of the NYU Law faculty from 1969 until his retirement in 1990, teaching courses in property law, trusts and estates, and land use regulation. He received his LL.B. from Duke University School of Law, where he was a member of the editorial board of the *Duke Bar Journal*. After several years in private practice with J.P. Morgan & Co. in New York and Wright & Shuford in his hometown of Asheville, North Carolina, he began his career as a law professor in 1962 at Duke, where he taught until he joined NYU Law.

Johnston was a brilliant and passionate scholar. He wrote a leading treatise on land use and numerous articles on this subject, and he explored the history of discrimination against women, writing several articles in the 1970s. One in the *New York University Law Review*, co-authored by Max E. Greenberg Professor of Contract Law Emeritus Charles Knapp, focused on sexism in judicial opinions; another frequently cited piece in the *UCLA Law Review* evaluated the Supreme Court's progress in resolving the constitutional issues of gender discrimination. Johnston challenged his fellow professors to address discrimination as part of the curriculum and encouraged his students to be aware of these significant issues as they made their way in their careers.

Lewis Kornhauser, Alfred B. Engelberg Professor of Law, gratefully remembers the pivotal role Johnston played in his own academic career, calming him down after a particularly trying moment during his first year of teaching when he was ready to quit. "Jack gave me the sense that I was appreciated," says Kornhauser. "He convinced me to stay."

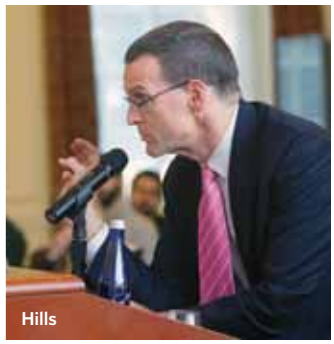
JOHNSTON: PATRICK PAGNANO

When Is a Pig Like a Mad Cow?


Sharkey


Smith


Epstein


Hills

THE NYU STUDENT Animal Legal Defense Fund's October moot court of a then-pending Supreme Court case featured a cast of legal powerhouses. William T. Comfort, III Professor of Law Roderick Hills Jr. and Crystal Eastman Professor of Law Catherine Sharkey argued the case before moot judges Robert Smith, associate judge of the New York State Court of Appeals and Richard Epstein, Laurence A. Tisch Professor of Law.

In *National Meat Association v. Harris*, the trade association sued California over its law banning the slaughter and inhumane treatment of non-ambulatory animals in federally regulated slaughterhouses. The organization contended that the Federal Meat Inspection Act preempted the California penal code, which requires slaughterhouses to immediately euthanize a non-ambulatory pig, in conflict with the federal regulation that requires slaughterhouses to hold non-ambulatory animals for observation to identify evidence of disease.

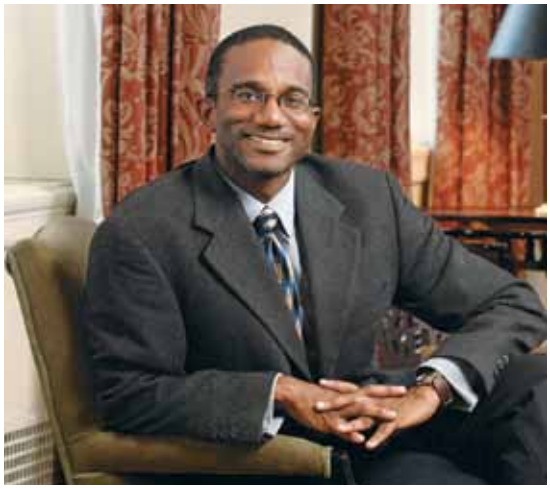
Arguing for the petitioner, Hills said that regulating a certain category of animal interferes with the operations of a slaughterhouse: "For the states to define a type of animal in terms of the very ailment over which the feds have exclusive jurisdiction is to circumvent preemption through a pretext."

Representing the respondent, Sharkey asserted that "states have the prerogative to regulate, if they so choose, anything going on with respect to animals on farms and as a general matter, and the federal government has no interest at the present time in doing so."

Smith and Epstein deliberated publicly through open microphones for the audience. Epstein felt that while the trade association might win on the merits of the case, it had not demonstrated irreparable harm. Smith was even more ambivalent: "It's a close case. If it's a pure ethical problem like 'We don't kill horses,' that's an easy case, and if it's a pure health problem like 'We're going to inspect for mad cow disease,' that's easy the other way. I'm not quite sure whether a non-ambulatory pig is more like a mad cow or a horse."

While the moot judges stopped short of a firm ruling, they both expected the Supreme Court to uphold the Ninth Circuit ruling for the defendants. "My guess is it will be affirmed," said Epstein. "I would affirm it and I would go to bed feeling very uneasy about the decision." He need not have worried, however. Four months later, the Supreme Court rejected the earlier circuit decision, ruling 9–0 for the National Meat Association. □

Ready to Travel the World



KEVIN DAVIS, Beller Family Professor of Business Law, has taken on a newly created vice deanship focused on the continued expansion of the Law School's global reach. Davis's role is integral to NYU Law's mission of making legal education applicable to practice in the 21st century.

"My objective is not only to enhance the quality of our global programs, but also to institutionalize them," says Davis, who credits his predecessors for the global initiatives they have built through the Hauser Global Law School Program and its NYU@NUS dual-degree program in Singapore. "Many of NYU School of Law's strengths flow from our location at the heart of the U.S. legal system and our ties to the local legal community," he says. "At the same time, everything we do at the Law School should be understood in a global context, and many of the things we do can be done on a global scale. It should be natural for our students and graduates to work on cases or transactions that involve multiple jurisdictions and to pursue opportunities overseas as well as in the U.S." A new study-abroad program slated to begin in 2014 will further those aims.

Two new clinics will augment the Law School's international bent. One of them, taught by Cecelia Goetz Professor of Law Sujit Choudhry and sponsored by NYU Law's Center for Constitutional Transitions, will focus on constitutional transitions in the Middle East and North Africa. The other, co-taught by Florence Ellinwood Allen Professor of Law Gráinne de Búrca and Adjunct Professor Angelina Fisher (LL.M. '04), will center on international organizations and global governance.

Davis succinctly voiced the exciting possibility manifested by NYU Law's commitment to an array of continuing global initiatives: "Every member of the NYU community is a potential member of a global community of practitioners and scholars." □

A Scholar with Big Pages to Fill

PROFESSOR JOHN P. STEINES JR. (LL.M. '78) has been named the new author of *Federal Income Taxation of Corporations and Shareholders*, the preeminent work on corporate taxation that for decades was co-authored by Boris Bittker, a Yale Law School professor who died in 2005, and James Eustice (LL.M. '58), Gerald L. Wallace Professor of Taxation Emeritus at NYU Law, who passed away in 2011. "Say 'B and E' to any tax lawyer and they will know instantly to what you are referring," said Ronald and Marilynn Grossman Professor of Taxation Deborah Schenk (LL.M. '76) in her remembrance of Eustice. "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."

Steines acknowledges that he has accepted a huge undertaking: "I am deeply honored to follow in the footsteps of Jim and of Boris Bittker and am keenly aware of the enormity of creating a new edition that reflects the last decade of incredibly complicated tax law with style and substance worthy of its predecessors." Not only does he have decades of experience and scholarship in tax law, but he also had a long working relationship with Eustice that he can refer to. Steines co-taught a course on consolidated tax returns with Eustice and William Lesse Castleberry, and for many years Steines and Eustice were counsel to the tax practice at Cooley. Adjunct Professor Stephen Gardner (LL.M. '65) applauded the selection of Steines, saying, "He will bring both his vast experience in corporate taxation and his extensive collaboration with Jim Eustice to the maintenance of this unparalleled work."

Steines is the author of the casebook *International Aspects of U.S. Income Taxation* as well as articles on corporate, partnership, and international tax issues. A former editor-in-chief of the *Tax Law Review*, he has provided expert testimony on tax-related controversies and instructed IRS employees. Given all of this experience, he compares the tremendous task of updating the treatise with gardening. "The book is a diverse vineyard with ancient vines in need of gentle pruning and newer cultures that need more light," he says. "I look forward to the gardening and am committed to maintaining the book's preeminence." □

Beware of the Records We Keep

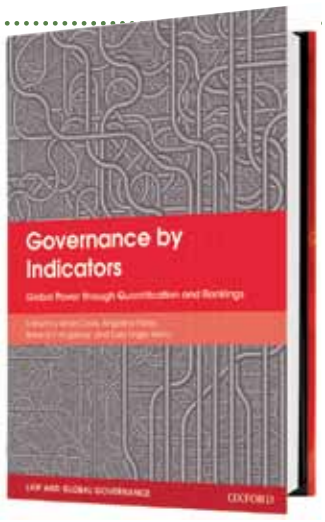
PROFESSOR JAMES JACOBS, Chief Justice Warren E. Burger Professor of Constitutional Law and the Courts, became interested in the evolution, operation, and significance of criminal records in the late 1990s while working on a book about gun control. He was struck by the impact that the Brady Handgun Violence Protection Act had on stimulating the computerization and upgrading of police and court records. The Brady Law called for creation of a National Instant Criminal Background Check System (NICS) that could instantly inform federally licensed firearms dealers about whether a customer was ineligible to purchase a firearm on account of a criminal record. To make NICS a reality required a massive initiative to update the nation's criminal record infrastructure.

"Criminal records are like the criminal justice system's nervous system," says Jacobs. "They are crucial for law enforcement and court efficiency. But they also label and stigmatize those who are convicted, charged, or even suspected of criminal conduct."

Jacobs is working on the first book to be published on U.S. criminal records policy and jurisprudence. It is tentatively titled *The Negative C.V.* and is slated for publication by Harvard University Press in 2014. This year, Jacobs won a fellowship from the Guggenheim Foundation to support his research and writing for the book. He was one of 181 fellows selected from nearly 3,000 applicants, and one of only two individuals named in the field of law.

During the last several years, Jacobs has published more than a dozen articles on criminal records, several of which compare relevant policies in Europe and the U.S. "I am so fortunate to have been an NYU faculty member for 30 years," he said. "No scholar could ask for a more supportive and stimulating environment." □

A Real Team Effort



In growing numbers, national and transnational government agencies, NGOs, and private consultancies are producing rankings of everything from political risk to vaccination rates. Increasingly, these rankings are playing a crucial role in global allocation of funds and resources. What are the implications of our relying on rankings to guide policy and investment? What kind of oversight should there be? These are among the issues being examined by NYU Law's Institute for International Law and Justice (IILJ) through its Indicators as a Global Technology/Governance by Information Project. In July, the IILJ published a book, *Governance by Indicators: Global Power Through Quantification and Rankings*, edited (and in good part written) by four NYU Law scholars: Kevin Davis, vice dean and Beller Family Professor of Business Law; Angelina Fisher (LL.M. '04), adjunct professor and IILJ program director; Benedict Kingsbury, Murry and Ida Becker Professor of Law and IILJ faculty director; and Sally Engle Merry, professor of anthropology, law, and society.

"I have found the project extremely rewarding," says Davis, "because it focuses on a set of very practical issues—virtually every policymaker I talk to uses indicators but has misgivings about them—and analyzes them through an interdisciplinary lens and from a global vantage point." □

Giving Constitutional Designers a Foundation

When Sujit Choudhry, Cecelia Goetz Professor of Law, headed to Sri Lanka in 2003, he knew his task was to advise on constitutional design for a nation still rebuilding after decades of civil war. But it wasn't until after he had already landed, driven across the island in a van, and begun briefing sessions with local stakeholders that the key question facing the nation's constitution finally emerged: What role would law enforcement have in the federal state?

Scholars had already developed comparative models for this problem using Northern Ireland and Bosnia, but while in Sri Lanka, Choudhry was unable to access this work. "I did the best I could," he says.

For comparative constitutional specialists, fieldwork usually involves little advance notice, minimal support, and a bare-bones technology infrastructure. "This sense of being at sea and not being able to get to the knowledge that already exists is an experience that a lot of advisers have," says Choudhry. Without the relevant research, advisers are hampered in their efforts to inform and counsel.

To address this problem, the professor has launched the Center for Constitutional Transitions, an academic center that will provide research support and infrastructure for scholars in the field—in short, a back office that also produces scholarship. Staffed by 12 J.D.s and eight LL.M.s based in New York and eight researchers in Cairo and Beirut, the center will first tackle approximately three projects for the Cairo office of the International Institute for Democracy and Electoral Assistance (International IDEA). Two projects have emerged already: One will focus on how constitutions in Middle Eastern and North African countries should regulate political parties, while another will explore the question of executive-legislative relations in the context of the Arab Spring. The LL.M.s in particular, many of whom have held clerkships in their home countries, are a major strength of the clinic, says Choudhry.

The center has already hosted two events this spring: a symposium about the trajectories of Arab constitutionalism and an event focusing on current constitutional reforms in Turkey. Scholars came from American as well as Turkish universities.

Although the Arab Spring has dominated recent headlines, constitutional design is an evergreen field, and Choudhry's long-term vision for Constitutional Transitions includes expanding beyond the Middle East. He hopes international agencies will be attracted to his center's value proposition: the ability to dramatically enhance the existing efforts with a research infrastructure. International IDEA, the center's first client, will fund a fellow who will oversee students at the center.

Choudhry first piloted the idea for a research back office on a trip to Nepal in 2010. Enlisting the help of a law student in Toronto, who wrote memos for Choudhry each night, the law professor was able to deliver a successful talk about self-determination in the context of Nepal's indigenous peoples. Because Choudhry was so well prepared, he was able to reframe the conversation by puncturing some myths about the international laws regarding the self-determination of indigenous peoples. "Knowledge is power," says Choudhry. □

A Streak of Top 10s Times Two

For the sixth year in a row, articles authored or co-authored by both Marcel Kahan, George T. Lowy Professor of Law, and Stephen Choi, Murray and Kathleen Bring Professor of Law, appear on the *Corporate Practice Commentator*'s annual "Top 10 Corporate and Securities Articles" list. This year's poll tabulates the top selections by teachers of corporate and securities law from a pool of more than 580 articles published in 2011.

Over the 18-year history of the annual lists, 17 of Kahan's articles and 12 of Choi's have been recognized by their peers, making Kahan and Choi first and second, respectively, among all the authors selected since the poll began in 1994.

Two of Kahan's articles appear on this year's list. "When the Government Is the Controlling Shareholder," from the *Texas Law Review*, concerns the recent corporate bailouts and shows that existing accountability structures do not provide sufficient protection of minority shareholder interests; it ends by hoping "this anomalous era of government control comes to a speedy conclusion." "The Insignificance of Proxy Access," from the *Virginia Law Review*, argues that shareholder access to the proxy will result in some increase in company expenses, but may only rarely have an impact on governance and only a marginal impact on company value. Both articles were written with Edward Rock of the University of Pennsylvania Law School.

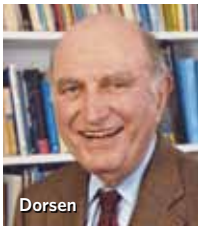
Choi's top-10 entry this year, "Motions for Lead Plaintiff in Securities Class Actions" in the *Journal of Legal Studies*, examines securities class actions filed from 2003 to 2005. It reports evidence that plaintiffs' attorneys retain significant control over the selection of lead plaintiff, and that plaintiffs' attorneys with greater power are able to negotiate higher attorneys' fees as a percentage of the recovery while working fewer hours.

Honors and Awards

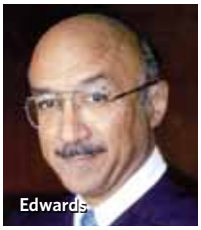

Blank


de Búrca


Choudhry


Dorsen


Dworkin


Edwards


Epstein


Ferejohn


Ferrari


Fox

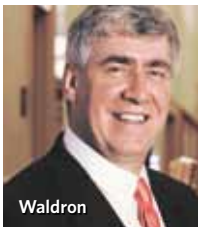

Gonzalez


Meron


Noble


Rosenfeld


Thompson


Waldron

National Reporter

Joshua Blank (LL.M. '07), associate professor of the practice of tax law, attended the Institute for Austrian and International Tax Law's global conference on "Tax Secrecy and Tax Transparency—the Relevance of Confidentiality in Tax Law" as the national reporter for the United States.

International Lecturer

Gráinne de Búrca, Florence Ellinwood Allen Professor of Law, gave the John M. Kelly Memorial Lecture at University College Dublin on May 10 and the Distinguished Lecture during the Academy of European Law at the European University Institute in Florence on July 2. The subject of both lectures was "Appraising the E.U. Experiment After 60 Years."

Best Practitioner

The South Asian Bar Association of Toronto honored Sujit Choudhry, Cecelia Goetz Professor of Law, with the Male Practitioner of the Year Award at its annual gala in November. This award is given to academic legal professionals for the inspiration and mentorship they provide to students, their contributions to furthering the law, and their assistance to South Asians in need.

On July 29, Choudhry also delivered the Neelan Tiruchelvam Memorial Lecture in Colombo, Sri Lanka, given in honor of the legislator who was assassinated on that date in 1999. The subject of Choudhry's talk was "Constitutional Designs in Plural Societies: Integration or Accommodation?"

Debate Moderator

Norman Dorsen, Frederick I. and Grace A. Stokes Professor of Law, moderated a congressional debate among Connecticut's Fifth District Democratic candidates, Chris Donovan, Elizabeth Esty, Dan Roberti, and Randy Yale.

Honorary Doctor

Ronald Dworkin, Frank Henry Sommer Professor of Law, received an honorary doctorate from the University of Buenos Aires Faculty of Law. The university conferred the degree upon Dworkin in recognition of his contributions to scholarship on human rights and democracy, as well as the influence of his writing on Argentine law and constitutional jurisprudence.

Judicial Awardee

Judge Harry T. Edwards of the U.S. Court of Appeals for the District of Columbia Circuit, a longtime visiting professor of law at NYU, was honored with the A. Leon Higginbotham Award at the 44th convention of the National Black Law Students Association.

Constitutional Champion

Richard Epstein, Laurence A. Tisch Professor of Law, was the inaugural recipient of the Institute for Justice's Champion of the Constitution Award in recognition of his pathbreaking scholarship, original thinking, and tireless advocacy.

Interdisciplinary Prizewinner

John Ferejohn, Samuel Tilden Professor of Law, won the 2012 William H. Riker Prize in Political Science for work that has "advanced the scientific study of politics through excellent, theoretically informed study of real-world politics, creative and influential theoretical study of political phenomena, and the productive combination of theory and empirical study." The biennial prize includes an invitation to present the Riker Lecture at the University of Rochester.

Medical Malpractice Expert

The Bundesgerichtshof, Germany's supreme court, cited a paper by Professor Franco Ferrari in a decision determining which country's law should apply in a medical malpractice case brought by a German patient against a Swiss doctor. The Court relied on a paper by Ferrari that asserted that, for the purpose of identifying the law applicable to a doctor-patient relationship, one should look at the law of the country in which the doctor practiced—in this case, Switzerland.

European Competitor

Eleanor Fox '61, Walter J. Derenberg Professor of Trade Regulation, gave her 28th consecutive annual lecture to the Competition Directorate of the European Community in Brussels. Her theme was antitrust in a world without a dominant world power.

HNBA Honoree

Judge Arthur Gonzalez (LL.M. '90), senior fellow and adjunct professor, was honored by the Hispanic National Bar Association. At the ceremony, Norma Ortiz '87, who was Gonzalez's first clerk, highlighted

the former judge's special role as New York State's first Latino bankruptcy judge and first and only Latino chief judge of a bankruptcy court.

Mechanism President

Judge Theodor Meron, Charles L. Denison Professor of Law Emeritus and Judicial Fellow, was appointed president of the International Residual Mechanism for Criminal Tribunals, which was established in 2010 by the U.N. Security Council to complete the last of the prosecutions undertaken by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Meron has acted as a judge on the appeals chamber for both tribunals since 2001 and continues to serve as president of the ICTY.

Commencement Speaker

Professor of Law on Leave Ronald Noble, secretary general of INTERPOL, the international police organization, delivered the commencement address at his alma mater, the University of New Hampshire, where he also received an honorary degree.

Council Members

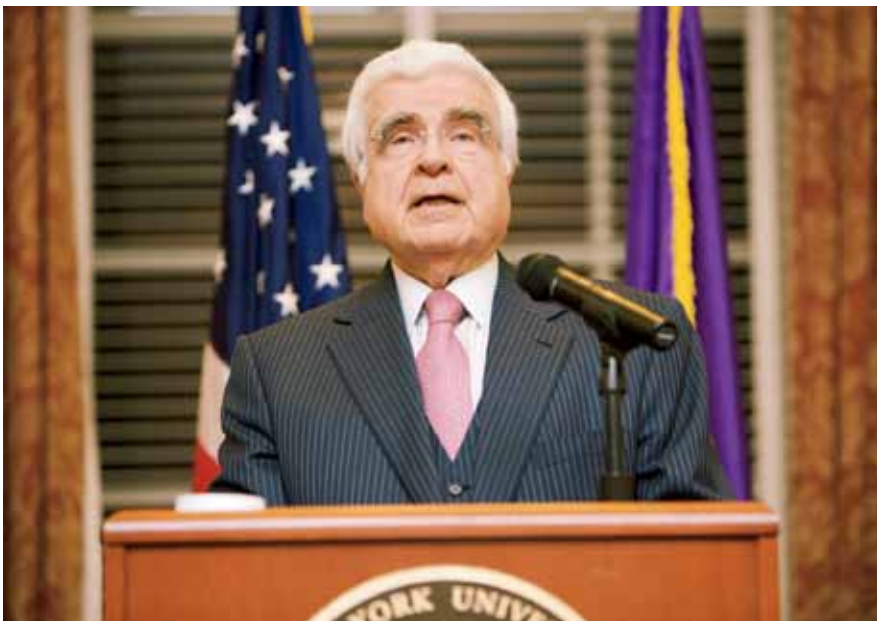
Gerald Rosenfeld, distinguished scholar in residence and faculty co-director of the Jacobson Leadership Program in Law and Business, was admitted as a member of the Council on Foreign Relations, a nonpartisan think tank that analyzes policy choices facing the U.S. and other countries. Samuel Rascoff, associate professor of law, was also named a life member of the council.

El Diario Awardee

Professor of Clinical Law Anthony Thompson received an EL Award from *El Diario La Prensa*, the oldest Spanish-language daily newspaper in the United States. The EL Awards are given to the most outstanding Latinos in the New York tristate area. Thompson focuses his instruction and research on race, criminal justice, and offender reentry. He has said that he strives to "explore the impact of race, power, and politics on individuals and communities as they come into contact with our system of justice."

Political Theorist

University Professor Jeremy Waldron delivered a keynote address, "Unbinding the Executive: The Challenge to Liberal Legalism," at the University of Oxford's inaugural Oxford Graduate Conference in Political Theory. □



A Packed Calendar to Mark 50 Years of Teaching

If his golden anniversary year as a law professor is any indication, University Professor Arthur Miller has no plans to rest quietly on his laurels. In addition to maintaining a full course load, he has kept up a busy schedule of appearances, some at events celebrating his long and distinguished career.

Last March, Miller delivered his inaugural University Professorship Lecture, titled "Are They Closing the Courthouse Doors?" (Read an excerpt on page 65.) In it, he decries recent Supreme Court rulings that, he says, erode plaintiffs' chances of getting to trial in federal court. The topic came from the field with which he is most closely associated: civil procedure. But in introducing Miller at the event, NYU President John Sexton noted that a university professorship is reserved for outstanding scholars whose work reflects exceptional breadth. Miller has written more than 40 books, and the focus of his work has ranged from copyright to privacy to sports law. He is best known, of course, as the nation's preeminent authority on the rules that govern our courts, and he is co-author, with the late Charles Wright, of the legendary treatise in that field, *Federal Practice and Procedure*. His reputation also extends beyond his scholarship. "Generations of students … would point to him as the greatest teacher they ever experienced," said Sexton, who took Miller's Civil Procedure class at Harvard Law School.

In April, Miller flew to Portland, Oregon, for a daylong symposium honoring his career, sponsored by the *Oregon Law Review* and the University of Oregon schools of law and journalism. Although Miller was far from his NYU Law home, he did not lack for familiar faces. The law school at Oregon boasts an extraordinary concentration of Miller's academic progeny: Seven of the school's 37 full-time faculty, including the current dean, Michael Moffitt, were Miller's students at Harvard before he moved to NYU. And the symposium featured roughly two dozen speakers and panelists—academics, practitioners, jurists, and journalists—who have worked with Miller over the course of his long career.

Miller, who honed his skills as a discussion moderator on the acclaimed "Fred Friendly Seminars" on PBS, is still in frequent demand to play that role. During the 2011-12 academic year at the Law School, the Emmy-winning moderator took panelists through the paces at two Milbank Tweed Forums, one in the fall that looked at career options for J.D.s, and the other in the spring on sports and the law. And the requests keep coming. In January 2013, at the annual meeting of the Association of American Law Schools in New Orleans, Miller will moderate a discussion commemorating the 75th anniversary of the Federal Rules of Civil Procedure. Among the scheduled panelists is Supreme Court Justice Antonin Scalia. □

New Faculty

David Kamin '09

Assistant Professor of Law

In early 2012, when President Obama's economic team was putting together the 2013 federal budget, Treasury Secretary Tim Geithner and Jack Lew, then-director of the Office of Management and Budget (OMB), were debating how much money would be saved by ending the Iraq war and how it should be accounted for. They turned to the young assistants at the side of the room, zeroing in on David Kamin—probably the youngest-looking of them all. "You could tell from his expression that he knew the answer but was too polite to interrupt," says Jason Furman, deputy director of the National Economic Council (NEC).

Kamin gave the number and an explanation. Everyone took it as fact, and moved on.

"Regardless of who is in the room, there's one authoritative voice when it comes to the budget, and that's David," says the NEC's Michael Pyle, special assistant to the president for financial and international markets. Even Geithner has been known to reach outside of his staff to seek Kamin's advice. "David Kamin has been making invaluable contributions on budget and tax policy since the very beginning of this administration. His deep knowledge of the numbers and intricacies of the budget has helped win him the respect of the entire economic team," says Geithner.

Before leaving his NEC position as special assistant to the president for economic policy to join the faculty of his alma mater this fall, Kamin, 31, had made a significant impact on important legislation. He influenced Obama's healthcare law, and the continuation of the payroll tax cut and unemployment insurance. He played a role in resolving the debt crisis last year and in crafting each of the president's budgets. He was one of the main authors of Obama's plan to rescue the U.S. Postal Service from bankruptcy. While by all accounts he is cool under fire, "I'm looking forward to getting a little bit off of the high-wire act," Kamin says of his move to academia.

Kamin's scholarship, an outgrowth of his real-world work, shows how budget and tax metrics can deeply influence policy debates, even as they are frequently misunderstood. In "What Is a Progressive Tax Change? Unmasking Hidden Values in Distributional Debates" (*NYU Law Review*, 2008), Kamin asks what it means for a tax change to be progressive or regressive. He delves into underlying theories of tax fairness and concludes that measures of progressivity are often used in misleading or incoherent ways.

"Risky Returns: Accounting for Risk in the Federal Budget" has yet to be published but, according to colleagues, is nonetheless widely debated in the capital. It argues against the emerging consensus that federal budgeting should take into account the "cost of risk"—the amount that the private market would demand to bear uncertainty. Doing so dramatically increases the price tag on many federal programs. When the bailout was budgeted this way, for example, the cost was doubled. Kamin argues that this adjustment undermines the budget as a measure of the federal government's fiscal position and confuses cost-benefit analysis with budgeting.

Kamin's love of policy and public service is born and bred. His father, Alan, now retired, was a judge in the Arizona Superior Court for 20 years after having served as an assistant attorney general. Trained as a tax lawyer, he once worked for Ralph Nader on tax reform. Kamin's mother, Carol, now a public policy consultant, served three Arizona governors and was the director of the first-ever Governor's Office for Children. "Public policy and law would define our conversations around the dining room table," says Kamin, who has an older brother, Daniel.

In high school, Kamin ran cross-country and still runs six miles each morning, but otherwise was a bit of a nerd. "My mother set up a high school class trip to visit the Center on Budget and Policy Priorities (CBPP) in Washington, D.C.," he recalls. "I found it fascinating."

Kamin earned his bachelor's degree in economics and political science from Swarthmore College, giving the commencement address in 2002. He then worked at the Committee for Economic Development in Washington, followed by two years as a research assistant at the CBPP, where he learned how to "spreadsheet a budget," and worked on some projects with Peter Orszag, then at the Brookings Institution. He attended NYU Law in part because he was offered a Furman Academic Scholarship (founded by Jason Furman's family), an opportunity that provided an intellectual community and support system for those preparing to enter academia. "I loved the idea of being able to sit in seminars discussing papers on a variety of legal topics from the get-go," says Kamin. His enthusiasm for tax law and policy was evident to all. "He's possibly the best student I've had," says Wayne Perry Professor of Taxation Daniel Shaviro. Clayton Gillette, Max E. Greenberg Professor of Contract Law, concurs: "His comments were so thoughtful and so provocative that I often felt that I was the student."

Kamin was sitting in class during his final semester in the fall of 2008 when he received a phone call. It was Orszag, newly appointed director of the OMB, asking him to serve as his special assistant. At the OMB, Kamin would attend meetings with Orszag, Geithner, and then-NEC director Lawrence Summers. "It was the moment I had always hoped for. To be able to inform those kinds of discussions. But to have it happen that quickly—there was this moment of 'Wow. I'm actually sitting here,'" recalls Kamin, who commuted back from D.C. to take his finals.

From the start, Kamin was a standout. Most White House staffers attended meetings with a notebook. "But David always

wanted to have his numbers close at hand," says Avi Feller, who worked with Kamin at the OMB. "He'd pull out his laptop and was prepared with every spreadsheet you could imagine." Indeed, there was a stretch of time during Obama's transition when the sole repository of the nation's new budget was Kamin's laptop.

Kamin married Heather Weyrick, 32, in 2004. In many ways, they couldn't be more different. As a freelance TV producer, Weyrick has worked on everything from travel shows to a piece on cupcakes. "She rounds me out. There's no doubt she's the cooler half of this marriage," he says. "She is the one who brings pop culture into my life, but I'm still somewhat ignorant." In August, the couple welcomed their first child, Iris. Their dog, Mitzi, and cat, Kitty, are adjusting. Having spent the last few years within a three-block radius of the White House, Kamin is enjoying being back in New York. "Some people dream to be an astronaut," says Kamin. "I dreamed to be a public policy wonk, and I got to live that out."

Adam Samaha

Professor of Law

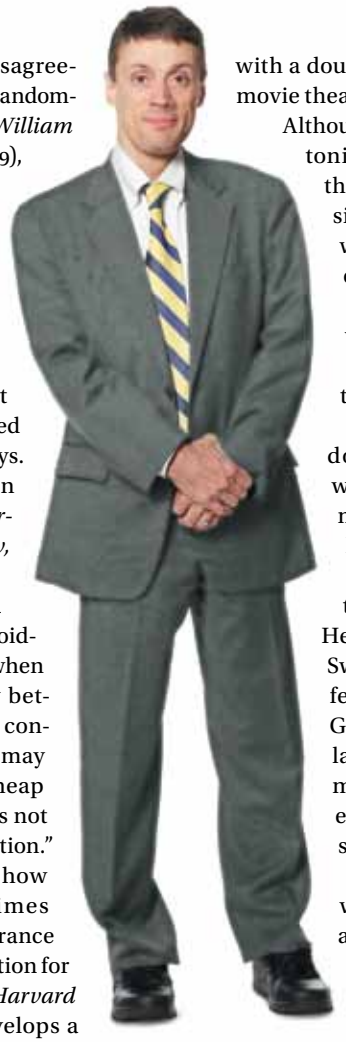
Adam Samaha's idea of a wild spring break as a teenager was a weekend at the Iowa caucuses. His bachelor party was a trip to the Herbert Hoover Presidential Library and Museum. His favorite video is a debate among little-known Democratic candidates in Alaska for the U.S. Senate.

"There are some people who watch *The Rocky Horror Picture Show* over and over, then there's Adam," says Lior Strahilevitz of the University of Chicago Law School.

Fueled by his passion for politics, Samaha, 42, who joins NYU Law this fall, is rapidly becoming one of the nation's leading scholars in constitutional law and theory. "If you're attending a workshop with Adam, it almost doesn't matter who the speaker is. His questions are great and he genuinely loves the law," says Rachel Barkow, Segal Family Professor of Regulatory Law and Policy.

Samaha manages to find fresh perspectives in much-dissected themes of constitutional law. In "Undue Process" (*Stanford Law Review,* 2006), inspired by attending long condo board meetings, he wonders not whether there is *enough* due process but why we're not concerned with *too much* process. "These are not questions that anyone in constitutional law had ever thought to ask before," says Daryl Levinson, David Boies Professor of Law.

Samaha's recent scholarship examines decision-making within legal institutions when people face deep disagreement and uncertainty. In "Randomization in Adjudication" (*William and Mary Law Review,* 2009), Samaha asks why judges won't flip a coin to decide the merits of a case, but will accept case assignments via random lotteries. "Some cases that are quite similar are going to come out differently just because one judge is assigned rather than another," he says.



In a similar vein, "On Law's Tiebreakers" (*University of Chicago Law Review,* 2010) explores how legal institutions, which have a unique commitment to avoiding ties, make a decision when one option is not clearly better than another. Samaha concludes that flipping a coin may be best because "it is a cheap and decisive tool that does not waste any relevant information."

He also weighs in on how regulations are sometimes adopted to avoid the appearance of wrongdoing. In "Regulation for the Sake of Appearance" (*Harvard Law Review*, 2012) he develops a framework for evaluating claims that a government decision is justified because it will create a desirable appearance, citing campaign finance regulations as an example. "It turns out that there is some empirical evidence to suggest that an appearance of corruption or non-corruption will influence the reality," he says, "but with no guarantee that a desirable reality will follow a pleasant appearance in this setting."

Samaha was raised in suburban Minneapolis by his dad, Joel, a University of Minnesota sociology professor, and his mom, Jennifer, a social worker. Aside from being "a little bit of a rule breaker" in his youth, he had an ordinary childhood except for the onset of a rare neurological disorder. At age 8, he was diagnosed with dystonia, which manifests itself in repetitive movements and abnormal postures, but he did not let the disorder slow him down. He ran cross-country in middle school, played tennis in high school, and had a tight group of friends with whom he took road trips to both the East and West coasts. "He has always been witty and fun, with an appetite for the unconventional and unpredictable," said long-time pal Minnesota State Representative Steve Simon. Samaha even served up his wedding rehearsal dinner with a double feature at a one-time movie theater turned event hall.

Although there is no cure for dystonia, Samaha refuses drug therapy because a potential side effect is confusion. "I wouldn't accept that trade-off—interference with my ability to think about the world in exchange for my ability to physically move through the world."

Samaha attended Bowdoin College in Maine, where he received a Truman Scholarship and honed his extemporaneous wit as a disc jockey for the college radio station. He spent his junior year in Sweden "to experience a different kind of democracy." Graduating summa cum laude in 1992 with a double major in history and government, Samaha seemed set on a career in politics.

From 1992 to 1993 he worked as a research assistant at Clinton-Gore National Campaign Headquarters, a writer for the Minnesota House of Representatives, and a speechwriter for the U.S. Department of Energy. But the superficiality of politics left him dissatisfied. Suspecting he'd find law more meaningful, he attended Harvard Law School, where he received the Fay Diploma and the Sears Prize. "He was one of the brightest students I'd taught in a number of years," recalls Laurence Tribe.

Earning his J.D. in 1996, Samaha clerked for Chief Justice Alexander Keith of the Minnesota Supreme Court, and U.S. Supreme Court Justice John Paul Stevens. He went to work for Robins, Kaplan, Miller & Ciresi in Minneapolis, where he assisted the litigation team in a $6 billion landmark lawsuit against the tobacco industry, but felt a calling to academia.

He started his academic career in 1999 part-time at the University of Minnesota Law School, and like his dad, who twice won distinguished teaching awards, was ranked among the top four professors in overall teaching ability for three consecutive years. In 2007 he won the Graduating Students Award for Teaching Excellence at the University of Chicago Law School, where he started in 2004. "Good teachers offer encouraging words. But great teachers, like Professor Samaha, challenge students

to think more carefully, to push beyond settled and comfortable ideas, and to achieve new understandings," says former student Mitha Rao. "He remains unmatched."

Samaha is devoted to his research and family. And sometimes, there's synergy between the two. When considering baby names for their now two-year-old son, he and his artist wife, Abby, fed their favorite names into a computerized randomization program to yield a huge number of three-name permutations. The exercise was merely for inspiration. "Randomization is a sensible decision tool in some situations. But I won't flip a coin to decide whether Oscar needs a diaper change."

Alan Sykes

Robert A. Kindler Professor of Law

International law and economics scholar Alan Sykes is a low-key, no-nonsense kind of guy. His résumé presents the facts without embellishment. He drives a decade-old Toyota and wears khakis with golf shirts from Costco. "If you met me on the street you could well imagine that I was an electrician," says Sykes, who goes by the name Al.

A model of efficiency in the classroom, he answers questions briefly, keeps the class moving, and has been known to give a crash course in microeconomics in one session. "Whereas other professors go off on tangents, every word he says is valuable. There is no excess," says Kendall Turner, a student at Stanford Law School, where Sykes has taught since 2005.

Not one to beat around the bush, if he's unhappy with his co-author's work, Sykes will delete or rewrite it, says frequent co-writer Eric Posner of the University of Chicago Law School. Likewise, his straight-shooting approach is reflected in the content of his scholarship. "A lot of international legal scholars write about the world as they wish it were rather than the way it actually is. He's very skeptical about work that is utopian and too idealistic for states to actually pay attention to," says Posner, who shares his view.

That pragmatism, coupled with an expertise in economics, has brought a bottom-line approach to international law generally and international trade law specifically that has reshaped the discipline. "He's really created the modern scholarship in this field," says Daniel Fischel, also at Chicago. "International law was not looked at in a systematic, analytical, and organized way. He took this hugely important area—dealing with trade agreements between countries, issues of treaties—and analyzed them most rigorously."

Sykes, who joins the faculty this fall, made a splash in 1984 with "The Economics of Vicarious Liability" (*Yale Law Journal*), a nontechnical version of a chapter in his economics Ph.D. dissertation. The piece examines when it is economically efficient for one party to be held liable for the conduct of another simply because of the relationship between them (such as employer-employee). In 1995, he co-authored *Legal Problems of International Economic Relations*—now in its fifth edition—the field's gold-standard casebook.

More recently, Sykes's work in the economics of international trade law upends conventional wisdom. In "Currency Manipulation and World Trade" (*World Trade Review*, 2010), Sykes and co-author Robert Staiger question the commonly held view that Chinese currency practices significantly distort trade. They argue that the effects of unexpected devaluations decay over time and depend in the short run on how goods are priced.

Currently, Sykes and Posner are collaborating on a book, *Economic Foundations of International Law* (Harvard University Press, 2012). Its overriding objective is to use economic analysis to shed light on international law across a range of subject areas, including trade and investment, monetary law, international criminal law, and even the law of war. While there is no single conclusion, the authors show how international law responds to a wide range of externalities, some of which are far more amenable to solutions than others.

"He's one of the few scholars in international trade law that combines law and economics, and does so in a readily accessible way. His forthcoming book will undoubtedly become the seminal reference work on international economic law," says Michael Trebilcock, chair in Law and Economics at the University of Toronto.

Sykes, 57, was brought up in a middle-class suburb of Washington, D.C., with his younger brother, Edward. His father and namesake was a scientist for the U.S. Department of Defense. His late mother, Emily, left her position as a defense department mathematician to raise her children.

Sykes was a studious kid who played the oboe. In high school, he added debate to the mix. "Most of the popular kids were the athletes. That was not me," he says.

Entering William & Mary without a clue as to what he wanted to study, Sykes took a smattering of classes and realized that "economics resonated. It wasn't soft and mushy, and it seemed relevant." He also joined the debating team, where he met Maureen Gorman. They married in 1980 and have two children: Madeleine, 20, a junior at New York University, and Sophie, 17. Maureen is a partner at the law firm Mayer Brown.

In 1976, after graduating Phi Beta Kappa and with honors, he spent six years at Yale studying economics and law. Sykes earned his J.D. in 1982 and became a litigator at Arnold & Porter in Washington, D.C., which exposed him to international trade law. "I had a great time and could have imagined staying there," he says. But Fischel and Judge Frank Easterbrook (then at the University of Chicago Law School), impressed by Sykes's editing of an article of theirs at the *Yale Law Journal*, wooed him. "The chance to do law and economics at the University of Chicago was just too exciting to turn down," Sykes says. He taught at Chicago for 20 years, finishing his doctorate in economics along the way.

Outside of academics, he and his wife like to travel, but not far off the beaten track. "Our idea of rustic is a Motel 6," he says. Yet don't let the regular-guy image fool you. He wears the apron strings in the family, and cooks a variety of spicy Indian curries and other ethnic foods. He likes a good bottle of wine, plays golf and poker, and has a great sense of humor—even at his own expense.

In a parody of Arnold Schwarzenegger's most famous role, Sykes stars in a Stanford law student video spoof called *The Tortinator*. Amid a blaze of fire and menacing music, Sykes strides through the door, and is met by students asking about proximate cause and strict liability. He answers in the somewhat robotic way that is characteristic of his manner in class. Sykes says, "I try not to take myself or anyone else too seriously." □ *Profiles by Jennifer Frey*

Intisar Rabb

Associate Professor

Growing up in the nation's capital led to an interest in law, says Intisar Rabb, who holds a joint appointment with the Department of Middle Eastern and Islamic Studies at the Faculty of Arts and Sciences. After completing a double major in government and Arabic at Georgetown College, Rabb continued to pursue her dual interests, earning a J.D. from Yale Law School, where she focused on American constitutionalism, legislation, and criminal law, and a Ph.D. in Near Eastern studies from Princeton University, where she won the 2010 Bayard and Cleveland Dodge Memorial Prize for her dissertation.

Rabb has continued to accrue honors; most recently, she was won a grant from the Carnegie Corporation to research criminal law reform in the Muslim world. She is also currently working on a book, *The Burden and Benefit of Doubt: Legal Maxims in Islamic Law*, which explores the question of how judges make decisions in Islamic legal contexts when the legal texts do not contain clear directions.

In addition to teaching courses on Islamic Law at the Law School, Rabb will also be co-convening the Constitutional Transitions colloquium alongside Professor Sujit Choudhry. In this year's colloquium, "The Middle East Revolutions," Rabb hopes to look at the effects of recent developments in the Middle East on the fields of comparative constitutionalism and Islamic constitutionalism. "What does it mean for a constitution to say that Islam is the source of law?" Rabb asks. "And how does that actually translate to laws on the ground, to interbranch relations and judicial review, and to the task of interpretation itself with constitutions containing elements from the Islamic and liberal democratic traditions?"

Rabb is excited to be exploring these issues at NYU, where she is impressed both by the "institutional vibrancy, intellectual resources, and diverse student body," as well as the commitment to provide programming and training for faculty and students interested in Islamic comparative constitutional law.

Visiting Faculty

Sharon Dolovich

Professor of Law,
UCLA School of Law

When 2012–13
Courses Prison Law and Policy; Eighth Amendment Seminar; After Guilt: Sentencing, Incarceration, and Other Post-Conviction Issues
Research Law, policy, and theory of prisons and punishment
Representative publications "Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail," *Journal of Criminal Law and Criminology* (forthcoming, 2012); "Exclusion and Control in the Carceral State," *Berkeley Journal of Criminal Law* (2011); "Cruelty, Prison Conditions, and the Eighth Amendment," *NYU Law Review* (2009)
Education Ph.D., Cambridge University; J.D., Harvard Law School
Clerkship Judge Rosemary Barkett of the U.S. Court of Appeals for the 11th Circuit

Jody Freeman

Archibald Cox Professor of Law,
Harvard Law School

When 2012–13
Courses Administrative Law; Energy and Climate Law and Policy; Advanced Environmental Law
Research Administrative law; environmental law
Representative publications "Agency Coordination in Shared Regulatory Space," *Harvard Law Review* (2012); "*Massachusetts v. EPA*: From Politics to Expertise," *Supreme Court Review* (2007); "Public Agencies as Lobbyists," *Columbia Law Review* (2005)
Education LL.B., University of Toronto; S.J.D., Harvard Law School
Clerkship Court of Appeal for Ontario
Related experience Counselor, Energy and Climate Change, White House, 2009–10

Jeanne Fromer

Associate Professor of Law,

Fordham University School of Law
When 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 S.M. in electrical engineering and computer science, Massachusetts Institute of Technology; J.D., Harvard Law School
Clerkships Judge Robert Sack of the U.S. Court of Appeals for the Second Circuit; Justice David Souter of the U.S. Supreme Court

Michael McConnell

Richard and Frances Mallery Professor of Law, Stanford Law School

When Fall 2012
Courses Creation of the Constitution; Religion and the First Amendment
Research Freedom of speech and religion, the relation of individual rights to government structure, originalism, and various other aspects of constitutional history and constitutional law
Representative publications Co-author, "Due Process as Separation of Powers," *The Yale Law Journal* (2012); "Originalism and the Desegregation Decisions," *Virginia Law Review* (1995); "The Origins and Historical Understanding of Free Exercise of Religion," *Harvard Law Review* (1990)
Education J.D., University of Chicago Law School
Clerkships Judge J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia Circuit; Justice William Brennan of the U.S. Supreme Court
Related experience Circuit Judge, U.S. Court of Appeals for the 10th Circuit

DISTINGUISHED SCHOLAR

Peter Orszag

Vice Chairman of Corporate and Investment Banking at Citigroup

Economist and U.S. budgetary policy expert Peter Orszag joined Citigroup as a vice chairman in 2010, becoming a member of the bank's senior strategic advisory group after serving as a top-level economic adviser to President Barack Obama. Orszag was the youngest member of President Obama's cabinet, where he served as director of the Office of Management and Budget from January 2009 to July 2010. From January 2007 to December 2008, Orszag was the director of the Congressional Budget Office. He led the agency in expanding its focus on areas such as Social Security and climate change, and brought attention to the long-term problem that rising healthcare costs posed for the fiscal gap.

Prior to the CBO, Orszag was the Joseph A. Pechman senior fellow and deputy director of economic studies at the Brookings Institution. He held a variety of roles in the Clinton Administration, including special assistant to the president for economic policy and senior economist at the President's Council of Economic Advisers. Orszag received a Ph.D. in economics from the London School of Economics, which he attended as a Marshall Scholar, and earned an A.B. in economics from Princeton University, where he graduated summa cum laude.

Orszag is currently a *Bloomberg View* columnist and an adjunct senior fellow at the Council on Foreign Relations.

Looking forward to joining NYU Law in the fall, Orszag says, "The law school combines rigor with relevance in an appealing way, and I'm thrilled to be a part of the NYU community."

Theodore Ruger

Professor of Law, University of Pennsylvania Law School

When Fall 2012
Courses Health Law and Regulation; Health Law and Policy Seminar
Research Health law; constitutional law; statutory interpretation
Representative publications "Of Icebergs and Glaciers: The Submerged Constitution of American Health Care," *Law and Contemporary Problems* (2012); "Health Law's Coherence Anxiety," *Georgetown Law Journal* (2008)
Education J.D., Harvard Law School
Clerkships Judge Michael Boudin of the U.S. Court of Appeals for the First Circuit; Justice Stephen Breyer of the U.S. Supreme Court

Jason Schultz

Assistant Clinical Professor of Law, University of California, Berkeley, School of Law

When Fall 2012
Course Law and Policy Clinic
Research Intellectual property; consumer protection; privacy; technology policy
Representative publications Co-author, "Protecting Open Innovation: A New Approach to Patent Threats, Transaction Costs, and Tactical Disarmament," *Harvard Journal of Law & Technology* (2012); co-author, "Copyright Exhaustion and the Personal Use Dilemma," *Minnesota Law Review* (2012); co-author, "Digital Exhaustion," *UCLA Law Review* (2011)
Education J.D., University of California, Berkeley, School of Law
Clerkship Judge D. Lowell Jensen of the U.S. District Court for the Northern District of California
Related experience Senior Staff Attorney, Electronic Frontier Foundation

Christopher Sprigman

Class of 1963 Research Professor in Honor of Graham C. Lilly and Peter W. Low, University of Virginia School of Law

When Spring 2013
Course Innovation Without IP Seminar
Research Intellectual property; antitrust law
Representative publications Co-author, *The Knockoff Economy: How Imitation Sparks Innovation* (2012); co-author, "The Creativity Effect," *University of Chicago Law Review* (2011); co-author, "The Piracy Paradox: Innovation and Intellectual Property in Fashion Design," *Virginia Law Review* (2006)
Education J.D., University of Chicago Law School
Clerkships Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit; Justice Lourens Ackermann of the Constitutional Court of South Africa
Related experience Appellate Counsel, U.S. Dept. of Justice, Antitrust Division

Multi-Year Visitors

Charles Cameron

Professor of Politics and Public Affairs, Princeton University

When Fall 2012
Course Political Environment of the Law Seminar
Research Political institutions and policymaking
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

Sally Katzen

Senior Adviser, Podesta Group

When 2012–13
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 (OMB; 1999–2001); Deputy Director, National Economic Council (1998–99); Administrator, Office of Information and Regulatory Affairs, OMB (1993–98); Agency Review Working Group, Obama-Biden Transition; Partner, Wilmer, Cutler & Pickering

David Shapiro

William Nelson Cromwell Professor of Law Emeritus, Harvard Law School

When Spring 2013
Research Civil procedure; federal system; legal profession; statutory interpretation
Representative publications "The Role of Precedent in Constitutional Adjudication: An Introspection," *Texas Law Review* (2008); "Class Actions: The Class as Party and Client," *Notre Dame Law Review* (1998); *Federalism: A Dialogue* (1995)
Education LL.B., Harvard Law School
Clerkship Justice John Harlan of the U.S. Supreme Court

Hauser Global Visiting Faculty

Eyal Benvenisti

Anny and Paul Yanowicz Professor of Human Rights, Tel Aviv University Faculty of Law

When Fall 2012
Courses International Law and the Resolution of the Israeli-Palestinian Conflict; Law and Global Governance Seminar
Research International law; constitutional law
Representative publications *The International Law of Occupation* (2012); "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts," *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, Israel; LL.M. and J.S.D., Yale Law School
Clerkship Justice Miriam Ben-Porat of the Supreme Court of Israel

Radhika Coomaraswamy

Former U.N. Under-Secretary-General, Special Representative for Children and Armed Conflict

When Spring 2013
Courses International Human Rights of Women; Children and Armed Conflict
Research Human rights; gender studies; ethnic studies; the protection of civilians
Representative publications *Stage Managing the Décor: Gender, Ethnicity and Conflict* (2001); *Ideology and the Constitution: Essays on Constitutional Jurisprudence* (1997); *A Manual on Economic, Social, and Cultural Rights* (1988)
Education J.D., Columbia Law School; LL.M., Harvard Law School

Horst Eidenmüller

Visiting Professor, University of Munich; Permanent Visiting Professor, University of Oxford

When Spring 2013
Courses European and Comparative Company, Financial Markets, and Bankruptcy Law; Analytical Methods for Lawyers
Research Private law theory; European and comparative company law; financial markets; bankruptcy law, alternative dispute resolution
Representative publications "Why Withdrawal Rights?" *European Review of Contract Law* (2011); "Abuse of Law in the Context of European Insolvency Law," *European Company and Financial Law Review* (2009); co-author, "Incorporating Under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage," *European Business Organization Law Review* (2009)
Education Ph.D. and J.D., Ludwig Maximilian University of Munich; LL.M., University of Cambridge
Related experience Associate, McKinsey & Company

Shaheed Fatima

Barrister, Blackstone Chambers

(Junior Counsel to the Crown, A Panel)
When Fall 2012
Courses European Human Rights Law; Post 9/11 National Security Law Seminar
Research Relationships between systems of law; human rights issues in the context of national security; role of foreign affairs in executive decision-making
Representative publications *International Law and Foreign Affairs in Domestic Courts, 2nd edition* (forthcoming, 2012); *Using International Law in Domestic Courts* (2005)
Education LL.B., University of Glasgow; B.C.L., University of Oxford; LL.M., Harvard Law School

Carlo Garbarino

Professor of Taxation, Bocconi University, Milan, Italy

When Spring 2013
Courses E.U. and Comparative Taxation; Tax Treaties
Research International and comparative taxation law; the economic analysis of law
Representative publications "Tax Transplants and Circulation of Corporate Models," *British Tax Review* (2011); "Comparative Regulation of Corporate Tax Avoidance," *Proceedings of the XVIIIth International Congress of Comparative Law* (2011); "The Development of a Judicial Anti-Abuse Principle in Italy," *British Tax Review* (2009)
Education J.D., University of Genoa; LL.M. and Ph.D. in comparative and international tax law, University of Michigan

Fernando Gómez

Professor of Civil Law and Law and Economics, Pompeu Fabra University, Barcelona

When Fall 2012
Courses Comparative Law and Economics of Contracts; Legal Harmonization
Research Law and economics; contracts; torts; comparative law
Representative publications Co-author, "Optional Law for Firms and Consumers: An Economic Analysis of Opting into the Common European Sales Law," *Common Market Law Review* (forthcoming, 2013); co-author, "Judging Under Political Pressure: An Empirical Study of Constitutional Review Voting in the Spanish Constitutional Court," *Journal of Law, Economics and Organization* (forthcoming, 2013); co-author, "Soft Negligence and the Strategic Choice of Firm Size," *Journal of Legal Studies* (2011)
Education J.D., University of Bologna

DISTINGUISHED GLOBAL FELLOW

Dorit Beinisch

President of the Supreme Court of Israel (Retired)

When Fall 2012
Course Judging National Security: A Comparative Perspective Seminar
Career Highlights Dorit Beinisch received her LL.B and LL.M. from

Hebrew University. She began her career as a lawyer in the Israel Ministry of Justice, holding increasingly senior positions, including director of the constitutional and administrative law department. In 1989, Beinisch was the first woman ever to be appointed the state attorney of the State of Israel. In 1996, Beinisch was appointed justice of the Supreme Court of Israel, and in 2006 was named president of the court (the equivalent of chief justice in the United States), the first woman to hold that position.

Beinisch ruled in numerous cases relating to terrorism and national security, including a 2005 ruling against the Israeli Army's use of "human shields"; she concurred with then-President Aharon Barak that the practice of sending in a local Palestinian ahead of Israeli troops during arrest raids endangered his life and violated his free will and his human dignity. Other significant cases: In 2009, Beinisch issued a precedent-setting ruling on the unconstitutional nature of the privatization of prisons, and in May 2012, the court ruled that employers who pay female employees a significantly lower salary than their male counterparts will bear the burden of proof if they are accused of discrimination, thus strengthening women's workplace rights. "Justice Beinisch has had an extraordinarily distinguished career," says Dean Richard Revesz. "Her particular concern with issues of security, the rule of law and human rights, and the role of courts in addressing those issues means she'll bring invaluable perspective to matters that have been a central focus in this country for more than a decade. It will be thrilling to have her at NYU School of Law as a colleague."

János Kis

Professor, Departments of Political Science and Philosophy, Central

European University; Distinguished Global Professor, Department of Philosophy, New York University
When Fall 2012
Courses Introduction to Political Philosophy
Research Political obligation; theory of justice; democratic theory
Representative publications "Constitutional Precommitment Revisited," *Journal of Social Philosophy* (2009); *Politics as a Moral Problem* (2008); *Constitutional Democracy* (2002)
Education M.A., Eötvös Loránd University, Budapest

Dirk van Zyl Smit

Professor of Comparative and International Penal Law, University

of Nottingham
When Fall 2012
Courses Sentencing and Punishment: A Comparative and International Human Rights Perspective; Imprisonment and Human Rights
Research Comparative research on indeterminate sentencing and on non-custodial sanctions
Representative publications Co-author, *Principles of European Prison Law and Policy: Penology and Human Rights* (2009); *Taking Life Imprisonment Seriously in National and International Law* (2002)
Education Ph.D., University of Edinburgh; LL.B., Stellenbosch University

Vincenzo Varano

Professor and former dean, University of Florence Faculty of Law

When Spring 2013
Courses Comparative Law; Comparative Civil Procedure
Research Comparative methodology; comparative legal systems; comparative civil justice
Representative publications Co-author, *Manuale di diritto processuale civile europeo* (2011); co-author, *La tradizione giuridica occidentale* (2010); co-author, *Civil Litigation in Comparative Perspective* (2007)
Education J.D., University of Florence Faculty of Law

Straus Fellows

Bruce Cain

Professor of Political Science, Stanford University; Director Designate, Bill Lane Center for the American West
Research U.S. political regulation, political reform, and the courts' role in

improving democracy
Representative publications "Redistricting Commissions: A Better Political Buffer?" *Yale Law Journal* (2012); "More or Less: Searching for Regulatory Balance," *Race, Reform, and Regulation of the Political Process* (2011); co-editor, *Democracy in the States: Experiments in Election Reform* (2008)
Education Ph.D. in political science, Harvard University

Alessandra Casella

Professor of Economics, Columbia

University
Research Voting and policy coordination; applications to the European Union
Representative publications *Storable Votes: Protecting the Minority Voice* (2012); "Agenda Control as a Cheap Talk Game. Theory and Experiments with Storable Votes," *Games and Economic Behavior* (2011); co-author, "Protecting Minorities in Large Binary Elections. A Test of Storable Votes Using Field Data," *B.E. Journal of Economic Analysis & Policy* (2010)
Education Ph.D. in economics, Massachusetts Institute of Technology

Bernard Grofman

Jack W. Peltason (Bren Foundation) Endowed Chair, University of California,

Irvine; Director, Center for the Study of Democracy, UCI Interdisciplinary Research Unit
Research The structure of electoral representation
Representative publications Co-editor, *In Situ and Laboratory Experiments on Electoral Law Reform: French Presidential Elections* (2011); co-author, *Behavioral Social Choice: Probabilistic Models, Statistical Inference, and Applications* (2006); co-author, *A Unified Theory of Party Competition: A Cross-National Analysis Integrating Spatial and Behavioral Factors* (2005)
Education M.A. and Ph.D. in political science, University of Chicago

Ellen Lust

Associate Professor, Department of Political Science and MacMillan Center for International and Area Studies, Yale University

Research How societal organization influences elections, and consequently, the potential for and nature of democracy

Representative publications Co-editor, *Governing Transforming Societies: The Challenge of Development in Africa* (2012); co-editor, "Societal Challenges and the Transformation of Governance in the Middle East," *Journal of Middle East Law and Governance* (2010); *Structuring Conflict in the Arab World: Incumbents, Opponents, and Institutions* (2005)

Education M.A. in Middle Eastern and North African studies and Ph.D. in political science, University of Michigan

Christina Murray

Professor of Constitutional and Human Rights Law, University of Cape Town

Research The constitutional choices that Kenya has made and the role that its new institutions are expected to play in transforming Kenya's social and political institutions and practices

Representative publications Co-editor, *Fostering Constitutionalism in Africa* (2010); co-editor, *Advancing Women's Rights: The First Decade of Democracy* (2005); co-author, *Building Representative Democracy: South Africa's Legislatures and the Constitution* (2002)

Education LL.B., Stellenbosch University; LL.M., University of Michigan Law School

Philippe Raynaud

Professor of Political Science, University of Pantheon-Assas (Paris 2)

Research Legal positivism, moral skepticism, and the moral visions of the constitutional courts

Representative publications *Trois Révolutions de la liberté* (2009); *Le juge et le philosophe* (2008); *L'extrême gauche plurielle* (2006)

Education M.A. in history and Greek philosophy and Ph.D. in political science, École Normale Supérieure de Saint-Cloud, France

Nancy Rosenblum

Senator Joseph S. Clark Professor of Ethics in Politics and Government, Harvard University

Research Democratic theory

Representative publications *On the Side of the Angels: An Appreciation of Parties and Partisanship* (2008); editor and contributor, *Obligations of Citizenship and Demands of Faith* (2000); *Membership and Morals: The Personal Uses of Pluralism in America* (1998)

Education Ph.D. in political science, Harvard University

Jack Snyder

Robert and Renée Belfer Professor of International Relations, Saltzman Institute of War and Peace Studies, Department of Political Science, Columbia University

Research Human rights pragmatism in political transitions

Representative publications *Power and Progress: International Politics in Transition* (2012); co-editor, *Electing to Fight: Why Emerging Democracies Go to War* (2004); *From Voting to Violence: Democratization and Nationalist Conflict* (2000)

Education Ph.D. in political science (international relations), Columbia University

Ruti Teitel

Ernst C. Stiefel Professor of Comparative Law, New York Law School; Founding Co-Director, Institute for Global Law, Justice, and Policy

Research The "legalization" of transitional justice through international criminal law and the emergence of a "right to accountability" in the jurisprudence of regional human rights regimes in the Americas and Europe

Representative publications *Humanity's Law* (2011); *Transitional Justice* (2000); "Comparative Constitutionalism in a Global Age," *Harvard Law Review* (2004)

Education J.D., Cornell Law School

Tikvah Fellows

James Diamond (LL.M. '79)

Joseph & Wolf Lebovic Chair of Jewish Studies, University of Waterloo

Research Maimonidean variations: Midrashic point and counterpoint of Jewish law, philosophy, and mysticism

Representative publications *Converts, Heretics, and Lepers: Maimonides and the Outsider* (2007); *Maimonides and the Hermeneutics of Concealment: Deciphering Scripture and Midrash in the Guide of the Perplexed* (2002)

Education M.A. and Ph.D. in religious studies, University of Toronto; LL.B., Osgoode Hall Law School; LL.M. in international legal studies, New York University School of Law

Eric Gregory

Professor of Religion, Princeton University

Research Global justice and the good Samaritan

Representative publications "Religion and Bioethics," *A Companion to Bioethics: Second Edition* (2009); *Politics & the Order of Love: An Augustinian Ethic of Democratic Citizenship* (2008); "Before the Original Position: The Neo-Orthodox Theology of the Young John Rawls," *Journal of Religious Ethics* (2007)

Education Ph.D. in religious studies/ethics, Yale University

Marion Kaplan

Skirball Professor of Modern Jewish History, New York University

Research Jewish refugees in Portugal during World War II

Representative publications *Dominican Haven: The Jewish Refugee Settlement in Sosúa, 1940-1945* (2008); *Between Dignity and Despair: Jewish Life in Nazi Germany* (1998)

Education M.A. and Ph.D. in modern European history, Columbia University

Richard Lewis

Rosh HaYeshiva (Academic and Spiritual Head of School), The Conservative Yeshiva, Jerusalem

Research Urging inner devotion in public space: Lithuanian musar and liberal religious discourse, a philosophical, phenomenological comparison

Representative publications *"And before Honor—Humility": The Ideal of Humility in the Moral Language of the Sages* (forthcoming, 2012); editor, *Za'akat Dalot: Halakhic Solutions for the Agunot of Our Time* (2006)

Education Ph.D. in rabbinic thought, Hebrew University

Adam Mintz

Founding rabbi, Kehilat Rayim Ahuvim, New York City; Adjunct Assistant Professor in Jewish Studies, City College of New York

Research The rabbinic eruv: a study in the history and halakhah of sacred space in America

Representative publications "Halakhah in America: The History of City Eruvin, 1894-1962" (dissertation, NYU, 2011); *The Relationship of Orthodox Jews with Believing Jews of Other Religious Ideologies and Non-Believing Jews* (2010); "Variable, Vital, and Frequently Chaotic: American Jewry," *The Jewish Quarterly Review* (2010)

Education Ph.D. in modern Jewish history, New York University

Michal Tamir

Associate Professor (Senior Lecturer), Shaárei Mishpat College of Law

Research Human rights in private law: the vision of the prophets of Israel

Representative publications *The State Comptroller: A Critical Look* (2009); *Selective Enforcement* (2008)

Education LL.D., Hebrew University

BERKOWITZ FELLOW

Shai Wozner

Senior Lecturer, Tel Aviv University Faculty of Law

Research The public aspects of legal discourse and its implications in Jewish law

Representative publications *Legal Thinking in the Lithuanian Yeshivot* (forthcoming, 2013); co-author, *Controversy and Dialogue in the Halakhic Sources* (2002)

Education LL.D., Hebrew University

Mordechai Zalkin

Associate Professor, Department of Jewish History, Ben-Gurion University of the Negev

Research The erosion of the rabbinate status in early modern Jewish society and its ramifications for the Jewish public sphere

Representative publications *Naujos Lietuvos žydų istorijos perspektyvos* (2009); *From Heder to School: Modernization Processes in Nineteenth Century East European Jewish Education* (2008); *A New Dawn: The Jewish Enlightenment in the Russian Empire* (2000)

Education Ph.D. in Jewish history, Hebrew University

Senior Emile Noël Fellows

Kenneth Armstrong

Professor of European Union Law, School of Law, Queen Mary, University of London

Research The reform of E.U. economic governance

Representative publications *Governing Social Inclusion: Europeanization through Policy Coordination* (2010); co-author, *The Governance of the Single European Market* (1998)

Education LL.M., University of Toronto; Ph.D. in law, University of Glasgow

Armin von Bogdandy

Director, Max Planck Institute for Comparative Public Law and International Law, University of Heidelberg; Professor of Public Law, Goethe University Frankfurt, and Heidelberg University

Research Developing the publicness of public international law

Representative publications Co-author, "In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification," *European Journal of International Law* (2012); "10 x 10," *International Journal of Constitutional Law* (2010); co-author, "Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities," *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (2010)

Education M.Phil., Faculty of Philosophy of the Freie Universität, Berlin; LL.B. and LL.D., University of Freiburg, Germany

Laurence Boisson de Chazournes

Professor of International Law and International Organization, University of Geneva

Research Relationships and interfaces between regional and universal organizations: the need for new legal approaches

Representative publications Co-author, *Le pacte mondial des Nations Unies 10 ans après* (2011); "Les relations entre organisations régionales et organisations universelles," *Recueil des cours de l'Académie de droit international de La Haye* (2010); co-author, *International Law and the Quest for Its Implementation* (2010)

Education Ph.D. in international law, Graduate Institute of International Studies, Geneva, Switzerland

George Katrougalos

Professor of Public Law, Demokritos University of Thrace; President of the Department of Social Administration

Research Multilevel constitutionalism and economic crisis

Representative publications *Social Policy and Social Rights at national and international levels* (2009); editor, *Human Rights and Development* (2000); *Constitution, Law and Rights in the Welfare State...and Beyond* (1998)

Education Ph.D. in administrative and constitutional law, University of Paris 1—Sorbonne

Straus and Senior Emile Noël Joint Fellows

Stephen Gardbaum

MacArthur Foundation Professor of International Justice and Human Rights, UCLA School of Law

Research Comparative separation of powers

Representative publications *The New Commonwealth Model of Constitutionalism* (forthcoming, 2012); *La structure comparative et la portée des droits constitutonnel* (forthcoming, 2012); "The Place of Constitutional Law in the Legal System," *Oxford Handbook of Comparative Constitutional Law* (forthcoming, 2012)

Education M.Sc. in politics with sociology, University of London; Ph.D. in political theory, Columbia University; J.D., Yale Law School

Kalypso Nicolaïdis

Professor in International Relations, University of Oxford

Research The crisis of European democracy

Representative publications Co-editor, *Echoes of Imperialisms: The Present of Europe's Colonial Pasts* (forthcoming, 2013); co-editor, *European Stories: Intellectual Debates on Europe in National Contexts* (2010); co-editor, *Mediterranean Frontiers: Borders, Conflict and Memory in a Transnational Era* (2009)

Education Ph.D. in political economy and government, Harvard University; M.P.A., John F. Kennedy School of Government; D.E.A. in international economics, Institut d'Etudes Politiques, Paris

DAVID M. FRIEDMAN FELLOW

Pasquale Pasquino

Global Distinguished Professor of Politics, New York University; Senior Fellow, CNRS in Paris

Research Democratic theory; constitutional adjudication in contemporary democracies

Representative publications Co-editor, *Le pouvoir constituant et l'Europe* (2011); editor, *Costituzione francese* (2009); editor, *The Political Origins of Constitutional Courts* (2009)

Education Ph.D. in political and constitutional thought of modern Europe, University of Paris 1—Sorbonne

Straus and Tikvah Joint Fellows

MAIMONIDES FELLOW

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Furman Fellow

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Representative publications "Accuracy Counts: Illegal Votes in Contested Elections and the Case for Complete Proportionate Deduction," *NYU Law Review* (2008)

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Bilski: Preemption and the Case of Genetic Diagnostics

ROCHELLE DREYFUSS uses DNA research as a test to show the limiting effects of patent law on science.

THIS WAS TO BE THE END OF AN ERA. After prolonged uncertainty regarding the patentability of claims drawn to business methods, *Bilski v. Kappos* was expected to provide guidance on when they constituted patentable subject matter. But while the Court explicitly laid to rest earlier approaches taken by the Court of Appeals for the Federal Circuit, its fractured decisions did no more than state the obvious. The Patent Act should be read broadly, but "laws of nature, physical phenomena, and abstract ideas" are not within the ambit of protection.

The opinions featured a series of anomalies. The majority insisted on strict construction of the statute. However, the three exceptions it cited had all been imposed judicially. Cases approving of business method patents were deemed to be based on bad law, but it was impossible to attract five votes for the proposition that business methods are not patentable. The Court held that the Federal Circuit's "M-or-T test"—under which inventions are unpatentable unless they are tied to a machine (M), or they transform (T) an article into a different state or thing—is a mere "clue" to patentability, but the Court never indicated how that clue should be used. The justices did, however, agree on one thing: a patent that "preempts" something is very bad indeed. Convergence on the term would provide an important hint to the Court's concerns if it had meaning within technological discourse. In fact, however, its use is entirely within the legal domain, where it most often describes the displacement of one law (state law) by another (federal law). Justice William O. Douglas elevated the concept to center stage in *Gottschalk v. Benson*, when the issue of protecting computer programs first reached the Supreme Court. Since then, it has caused endless confusion. Nonetheless, we are apparently now back to *Benson,* and with the return of preemption, it is time to operationalize the concept. To do so, this piece uses as a case study the field of genetic diagnostics, where there is considerable empirical work on the effect of patenting, several cases waiting in the wings, a pending U.S. Patent and Trademark Office (PTO) study, and many promising medical advances on the horizon. The case study suggests that at its core, the preemption problem arises when an advance cannot be invented around.

A. THE SCIENCE OF GENETICS

In the most general terms, genetics seeks to explain why children look like their parents—and also, why they are unique and why some are vulnerable to disease or especially likely to benefit from particular medication. At the root of genetics is deoxyribonucleic acid, or DNA. A long chain of nucleotides, DNA comprises a series of genes: individual locations on the chain where the instructions for a human being are "encoded" through the order in which the nucleotides appear. DNA has only two jobs in the living organism: it serves as a store of information, and it instructs the cell on how to synthesize proteins (which execute the work necessary for living cells) and RNA (which carries information and possesses regulatory functions). For example, the gene for insulin is 1,430 nucleotides long, while the part that actually encodes the insulin protein is 153 nucleotides. There are two introns (noncoding regions), which the cell removes when the gene is functioning; likewise, investigators using modern molecular techniques will snip out these introns when they isolate the insulin gene to study it.

A mutation is simply an error in the DNA sequence that disrupts the ability of the gene to encode a functioning protein. A mutation may consist of a single

or multiple missing nucleotides, an insertion of a single or many nucleotides, or the substitution of a nucleotide. For example, if a patient has a mutation in the BRCA1 gene (an extra nucleotide, a missing nucleotide, or the wrong nucleotide at a given position), the gene may be unable to regulate cell growth, putting the patient at increased susceptibility to breast cancer. The field of DNA diagnostics thus hinges on assaying genes for sequence integrity—most accurately, by determining the precise order in which the nucleotides are joined. Typically, the study of genetics looks at families or large numbers of individuals with a given disease and sequences the patients' genes to detect mutations that track with (are "linked to") the presence of the disease. While in classic genetic diseases, the relationship between harboring a mutation and developing the corresponding disease is very strong (e.g., 100 percent of people with a mutation in the Huntington gene eventually develop Huntington disease), geneticists are now learning about many weaker associations that predispose an individual to develop the corresponding disease. They have also found that individuals all carry innocuous genetic differences; sorting out those without health implications is a major challenge for the future of genomic medicine. Because it requires the pooling of sequence information and health information from many individuals, researchers have a strong commitment to putting sequencing data into publicly available databases. This commitment does not, however, mean that genetic information cannot be protected by patents. In fact, about 20 percent of the genes in the human genome are associated with patents. Some patents claim products covering isolated sequences comprising specific genes or mutations; others claim processes, such as for detecting a specific sequence or for using the sequence to diagnose a predisposition to disease.

B. THE EFFECT OF PATENTING

Because patenting behavior in this field has been highly variable, it is possible to conduct a natural experiment on the effects of patents on both the practice of medicine and on innovation in medical science. In a series of eight case studies, the Health and Human Services Secretary's Advisory Committee on Genetics, Health, and Society (SACGHS) examined 10 clinical conditions involving heritable disorders for which genetic tests are available. Some of the conditions are associated with patents, and some not; some patents were widely licensed, and others were not; some of the conditions are highly prevalent, while others afflict small groups. In each case, the associations were known for at least 10 years—long enough for the use of the diagnostics to be well established within the medical community. By comparing the experiences under a variety of patenting strategies, SACGHS identified the effects of patents on the development of genetic diagnostics and on their availability to patients.

The results demonstrate the impact of these "upstream" patents on "downstream" activities. In cases where there was broad access (no patents or broadly licensed patents), there were many laboratories conducting diagnostic tests. In these settings, laboratories competed on the basis of quality, price, innovation, and the specific nature of the test employed. In contrast, when there were patents held exclusively by a single entity, both clinical practice and scientific development were impaired. Once a patent holder cleared the market, doctors and patients could no longer get second opinions, even when the only treatment options involved drastic actions. Nor could they be sure of the quality of the tests performed, for proficiency testing requires analysis of the same sample by more than one provider. In some cases, tests deemed necessary for patient care were simply not available. For example, patent holders did not always develop tests needed by a segment of the population deemed insufficiently large, but nonetheless enforced the patent against academic labs that routinely cater to such small populations. Some providers failed to offer prenatal screening. Most disturbingly, when exclusive providers did not have relationships with insurance providers (such as state Medicaid offices), poor patients were denied access to testing. Finally, in at least one example, a test for a life-threatening cardiac condition (long QT syndrome) was practically unavailable for 18 months when the exclusive rights holder failed to either offer the test clinically or license it so that another lab could perform it. More generally, in none of the SACGHS case studies was the patent holder ever the first to market.

The SACGHS Report also identified several potential effects on research. Because many clinically identical diseases can result from mutations in widely disparate genes, fears were articulated that patent thickets and holdouts could obstruct the development of new diagnostic methodologies, such as multiplex testing (testing multiple genes simultaneously) and new therapeutic techniques. For example, while sequencing an individual's whole genome will soon be a practical reality and a boon to patient care, "personalized medicine" may be a legal impossibility, given the number of patents that would be infringed in one fell swoop. Other evidence tends to support these fears. Proponents of patenting cite the work of Wesley Cohen of the Fuqua School of Business at Duke University, who conducted surveys of scientists in a variety of fields. This work suggests that research is unimpeded by patents, largely because scientists tend to ignore them. However, the Cohen studies have limited application to diagnostics. Whereas researchers were rarely sued in most of the fields Cohen studied, both SACGHS and Cohen found that geneticists do receive threatening letters. Furthermore, there is evidence that sole providers do not always make new mutations available for study by others.

It may seem surprising that the downstream impact of gene patents is so profound. As Judge Howard Markey, the first chief judge of the Federal Circuit, took pains to stress, patents are rarely true monopolies; usually alternative ways exist to achieve a result similar to the one for which the patented invention is utilized. Genetics is, however, hostage to biology. Genes evolved over millions of years to serve specific biological purposes; that is why disruptions by mutation result in disease. These evolved genes are unique, and the key value in isolation is the production of sequences identical to the genes found in nature. There is no possibility of sidestepping or "inventing around" patenting technology in this arena. Admittedly, many genetic conditions demonstrate the phenomenon of "genetic heterogeneity," in which a mutation in one of any number of different genes can result in a clinically identical disease. However, the mutations are not substitutes for each other. Consider, for example, BRCA1, BRCA2, and p53, each of which is associated with early-onset breast and ovarian cancer. When a patient's family exhibits characteristics of hereditary breast and ovarian cancer, it is necessary to assay all the patient's genes, since a derangement of any one of them can cause breast cancer. It is not possible to bypass BRCA 1 and 2, which are patented, and assay only for mutations of p53, which is not. It is thus necessary for clinicians to deal with Myriad Genetics, one of the firms the SACGHS Report found to be raising barriers to patient access to breast cancer diagnoses, and which is also failing to deposit new mutations in the public database.

Given the difficulty in finding effective substitutes for genetic information, it is no wonder that courts have begun to question the validity of these patents. In *Association for Molecular Pathology (AMP) v. U.S. Patent and Trademark Office*, the Federal Circuit held invalid a claim for diagnosing a predisposition to breast cancer from BRCA sequences. And in a very recent case, *Mayo v. Prometheus*, the Supreme Court appears to have affirmed that conclusion by rejecting a claim to a nongenetic diagnostic test on the theory that it would "t[ie] up the use of natural laws." While the *AMP* court upheld claims to isolated sequences, *Prometheus* casts doubt on that decision as well.

C. LESSONS

The problems geneticists encounter in both clinical and research settings illustrate why the Supreme Court is wary of patent claims that preempt rivals from competitive development. Admittedly, these effects are most evident after the patents have issued and the inventions are widely distributed. Thus, it can be argued that even if a preemption approach is desirable in theory, there is no way for the PTO to administer a system that requires such fact-based decisions. There are two responses. First, there are many issues in patent law that cannot be fully implemented by the PTO. For example, application of the novelty requirement requires knowledge of the prior art, some of which may come to light after the patent has issued. Second, as the *Bilski* Court intimated, there are clues to patentability that both the PTO and courts can use. The genetics case studies suggest several additions to the M-or-T test discussed in *Bilski*.

1. Inventing Around.
A critical feature of patents in the context of diagnostics is that claims to gene sequences and associations between sequences and predisposition to disease cannot be easily invented around. Patent holders can raise prices, refuse to license laboratories, or fail to develop needed tests without fear that an alternative technology will usurp the market for their advance. If society's interest in the development of the field is not aligned with the patent holder's, then it is society that is the loser: it is "preempted" from finding alternatives. In genetics, the problem is that geneticists must work with the physical phenomena of the genes, but the same problem—the fundamental impossibility of circumventing—arises when claims are drawn in the abstract or to fundamental principles.

"Marry me, Virginia. My genes are excellent and, as yet, unpatented."

The inability to invent around can, however, be no more than a clue to patentability. After all, patents are intended to produce exclusivity; at some level, no claim can be invented around. The issue, then, is one of degree. Furthermore, the determination is sensitive to context. In the genetic realm, for example, the case study demonstrates how patents on diagnostic processes can impede the delivery of healthcare. However, patents on therapeutic products could be circumvented through sequence changes that improve efficacy or reduce side effects. Because inventing around is not only possible but desirable, product patents on isolated genes would be acceptable if the rights could be limited to therapeutic uses—for example, by creating exemptions for diagnostic and research uses, or by limiting patent scope.

2.Interoperability.
A closely related concern is interoperability—the demand for equipment that can easily interact. The most familiar example is in the computer arena, where consumers want software that works with the hardware of their computers, computers that work with their printers, and backwardly compatible upgrades. In science, researchers need to compare their results and so require wide access to the same research tools. Similarly, the hope of synthetic biology is that a stable set of "parts" (synthesized DNA sequences) will become—like sockets and plugs—interchangeable elements that can be utilized in a wide array of products. In these situations, there may be a variety of ways to achieve a particular result. However, once a choice is made, those who come later are hostage to earlier decisions in much the way that geneticists are hostage to biology. Thus, a case can be made for excluding elements needed for interoperability from patenting.

3. Prospect Breadth.
Information about genetic sequences and patient health opens many important opportunities to both clinicians and researchers. In none of the cases studied did it appear that these opportunities were fully utilized when the patent was controlled by a single patent holder or licensee. Indeed, a lack of broad distribution has a profound quelling effect on future development. The number of opportunities a claim produces thus furnishes another, related clue to the possibility that the claim is preemptive and should not be regarded as patentable.

4. The Identity of the Inventor.
Another useful clue may be gleaned from the status of the inventors named in the patent. The genetics case studies show that associations tend to be identified by academics—inventors who are not primarily motivated by the promise of patents. Indeed, because academic rewards tend to depend on abstract knowledge production, work that comes out of academia is likely to be fundamental science—and thus raise preemption concerns. Of course, this will not necessarily be the case: an academic who has discovered a broad prospect may also find narrow applications. Nonetheless, academic involvement furnishes a clue to preemption concerns.

Academics can also be considered examples of a broader class of inventors whose work requires greater scrutiny: those whom Eric von Hippel of the MIT Sloan School of Management has dubbed

user-innovators—individuals who develop technology for their own use, rather than for the rewards associated with patents. In the case of diagnostics, for example, clinicians develop associations in order to treat their patients, find new cures for diseases, and understand the biology of disease (and reap the reputational awards that will advance their careers). Similarly, research tools are primarily developed to facilitate further research. As MIT Sloan's Fiona Murray has shown in connection with the oncomouse, which is used in cancer research, patents on research tools can reduce lines of research and retard technological development. Thus, they raise the same concerns that underlie the *Bilski* Court's focus on preemption.

CONCLUSION

As new technological opportunities emerge, and as universities become increasingly aggressive in pursuing patent protection, promoting a culture of innovation becomes ever more difficult. There are many ways to preserve a robust creative environment, including through the disclosure and utility requirements of patent law, defenses to infringement, discretion over injunctive remedies, and antitrust law. Many of these approaches may be easier to apply than *Bilski*'s preemption doctrine—and now, *Prometheus*'s concern with "tying up" natural laws. But because some of these approaches have been significantly narrowed, there is considerable pressure on the subject matter doctrine and a need to ensure that core scientific advances remain in the public domain. The hallmark of such an advance is an invention so close to nature that it creates broad prospects that cannot be exploited by inventing around the patent. Other clues include the absence of physicality (the M-or-T test), the demand for interoperability, and academic or user-innovator involvement. Presumably, as the Federal Circuit begins to apply *Bilski*—and *Prometheus*—it will develop other ways for determining when a claim is too preemptive to patent. □

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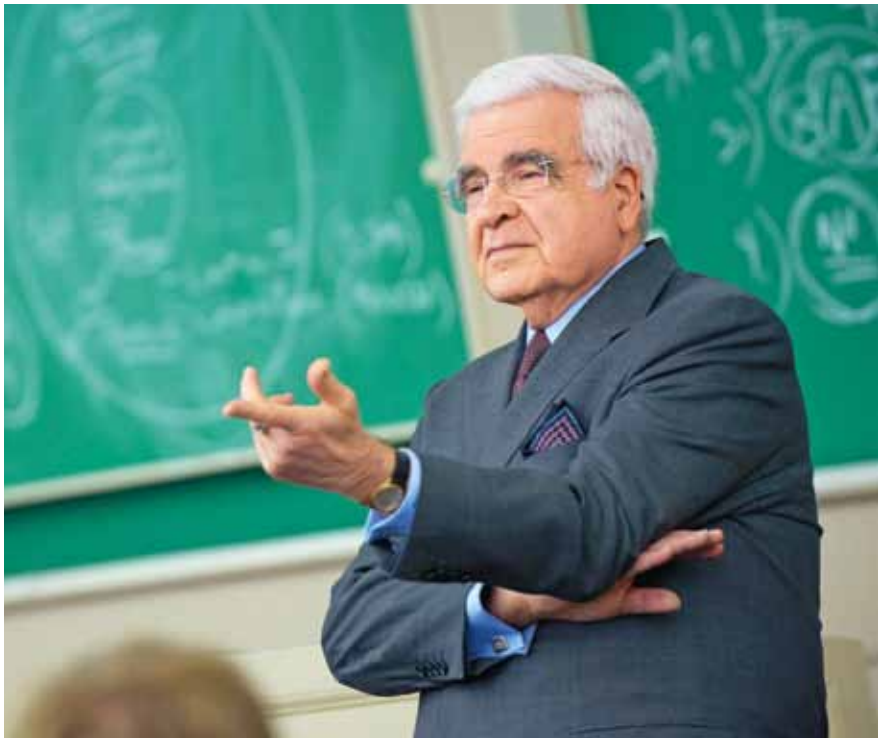
Don't Look Now, But the Doors to the Federal Courthouse Are Closing

ARTHUR R. MILLER takes umbrage at recent Supreme Court decisions that chip away at the rights to a day in court and a trial by jury in federal civil matters.



THROUGHOUT THE MORE THAN half-century I've been involved with federal procedure as commentator, teacher, and participant, I have believed in the purposes of the Federal Rules of Civil Procedure stated in Rule 1—"the just, speedy, and inexpensive determination of every action and proceeding." When the Federal Rules were promulgated—in 1938—they embodied a justice-seeking ethos. The people who wrote them believed in citizen access to the courts and in the resolution of disputes on their merits, not by tricks or traps or obfuscation. The Rules established a relatively plainly worded, non-technical system.

Because the drafters wanted to avoid the debilitating technicalities of prior procedural systems, they provided a simplified pleading regime for stating a grievance that abjured factual detail and verbosity. The Rules' so-called notice pleading demanded little of the plaintiff; it only required informing the opposing side of what was claimed. This was followed by the availability of wide-angle discovery permitting the parties to secure any information relevant to the action. The objective was simple. The litigation's resolution should be based on the revealed facts, not on who was better at playing tricks or hiding the ball. A summary judgment procedure was available to avoid trial when discovery showed there was no factual dispute justifying trial, but that motion was granted infrequently. Cases were to be determined using the gold standard of Anglo-American dispute resolution: a trial, and when appropriate, trial by jury. The process promoted litigation openness and honored the constitutionally based day-in-court principle and the jury trial right. This always felt very American to me! Getting it right after joining issue on a level litigation field

seemed like apple pie, baseball, and the flag. Promoting the system's objectives seemed a worthy calling for one's life.

For many years that 1938 vision was pursued by the bench and bar, and taught in law schools. But, of course, civil litigation has changed dramatically. Back then the typical lawsuit involved one plaintiff and one defendant litigating a discrete number of simple issues. Today, science, technology, communications, economics, and mass phenomena characterize many cases. In recent decades, we have experienced a tremendous growth in multi-party, multi-claim disputes, sometimes involving millions of people, and, of course, an extraordinary sophistication and resort to class and mass actions. These behemoths—many national in character—feature disputes about a tremendous range of intricate matters as well as important public policy issues—dangerous pharmaceuticals, toxic substances, mass disasters, mind-numbingly complex financial transactions, technology claims, defective products, and improper governmental conduct. Litigation arising out of mass phenomena and globalized commerce and communications cannot be resolved the old-fashioned way—one by one—putting enormous pressure on existing procedural norms.

The societal and technological revolutions following World War II transformed the business of our national courts by producing the most extraordinary growth in federal substantive law in this country's history. When the Federal Rules were birthed, the workload of the federal courts involved a limited number of substantive areas—antitrust, copyright, patent, various interstate commerce matters, and diversity of citizenship actions. The securities laws were in their infancy, the civil rights revolution was yet to happen, and textually neuralgic statutes like the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Employee Retirement Income Security Act (ERISA) were yet to be enacted. Today's worlds of civil and human rights, employment discrimination, environmental, consumer protection, and product safety litigation basically did not exist. Most of them still didn't exist when I was in law school in the late 1950s. It was a world of library books, fountain pens, manual typewriters, and carbon paper.

Additionally, law practice has become a business as much as a profession. It is highly competitive and territorial. Lawyers on both sides of the "v."—and often even on the same side of the "v."—troll for clients and play turf games. The mega-law firms, some now global in character, are partnerships in name only. Law firm marketing, replete with wining and dining, networking meetings at posh resorts, and glossy brochures, has become commonplace.

On a more positive note, because of the tremendous development of federal law designed to meet the desire for social justice that emerged in post-WWII America, we have something that didn't exist in 1938—the public interest and social action bars. These lawyers, who deserve enormous respect and gratitude, resort to the courts for ideological and social justice reasons and do wonderfully creative work in the public interest. Many work on a contingent fee basis and assume enormous risks; others are entrepreneurial in outlook, although embedded in their activity often lies a strong desire to further the national policies underlying the rights they seek to vindicate. The value of private enforcement of public policies by public interest and entrepreneurial lawyers speaks for itself. They have helped hold asbestos accountable, cabined tobacco, removed defective products from our midst, and halted illicit financial and market practices of companies such as Enron. And so, some Americans don't die or become incapacitated from toxic substances, and important social and economic policies are enforced. Thus, today there are private civil actions under laws relating to antitrust, securities, consumer protection and unfair business practices, civil rights, employment discrimination, the disabled, and, my personal favorite, age discrimination.

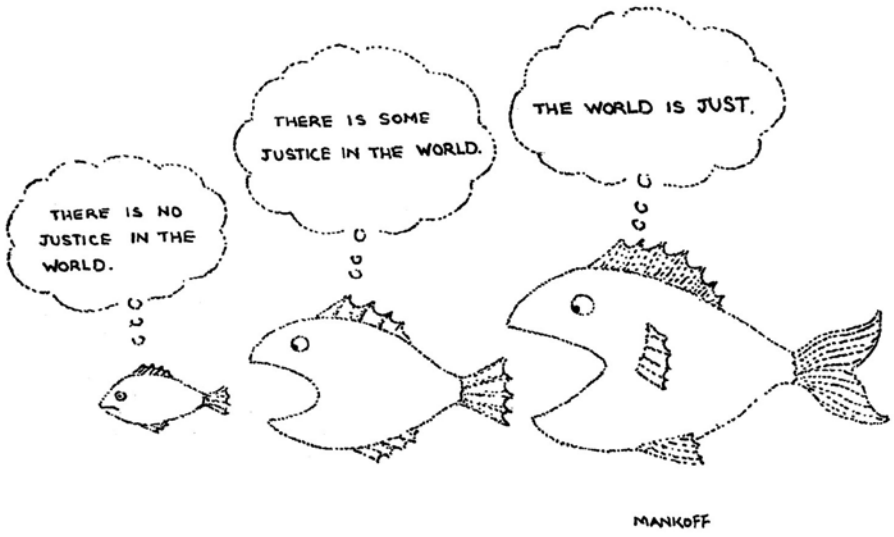
But a backlash has set in against the private enforcement of public policies—a backlash that often champions corporate and governmental interests. The plaintiffs' bar has been vilified as fee-hawking ambulance chasers; Americans have been defamed as litigious fortune hunters; bogus statistics are propagated and fears spread by claims that Americans pay a litigation tax rendering our businesses uncompetitive; politicians make merry with their attacks on our justice system, cloaking themselves in the mantle of "tort reform"; and urban legends about certain cases—sometimes imagined cases—abound, typically in highly distorted form. The so-called McDonald's coffee cup case has been grotesquely misdescribed and, aided by simplistic media accounts, has become a cosmic anecdote. The HBO documentary *Hot Coffee* puts the case in proper perspective.

This backlash has been given considerable traction by a number of substantive decisions by the Supreme Court—for example, the elimination of liability for aiding and abetting in certain financial contexts no matter how egregious the conduct and the number of people hurt. These shifts in legal doctrines have been accompanied by a transformation of the way cases are processed. I am particularly concerned about procedural changes that have resulted in the earlier and earlier disposition of lawsuits that impair a citizen's opportunity for a meaningful adjudication. Remember the image of civil litigation suggested earlier: trial before a jury. Today, there are hardly any federal civil trials, let alone jury trials. Most federal courtrooms are empty much of the time, and "the vanishing trial" has become a contemporary cliché.

This acceleration of case disposition has come about because judges have erected a sequence of procedural stop signs over the past 25 years. This episodic process began in 1986 when the Supreme Court decided a trilogy of cases invigorating the summary judgment motion. This has encouraged defendants to make the motion more frequently and increased the likelihood of its being successful. Unfortunately, there is reason to believe that federal judges occasionally inappropriately have resolved trial-worthy disputed fact issues or characterized cases as "implausible," disposing of them on motion rather than trial.

The Supreme Court continued the trend in 1993 by emphasizing the concept of "judicial gatekeeping." The Court directed judges to oversee the introduction of economic, scientific, and technological evidence. This has been particularly burdensome for plaintiffs, who often must provide expert testimony or reports on these matters at an early stage. If the plaintiff's expert is disqualified, his weakened case often is vulnerable to early disposition by dismissal or abandonment. Gatekeeping represents another procedural obstacle, another motion, another hearing, another potential issue on appeal producing delay and expense. This plays into the hands of the billing-by-the-hour regime of the large firms that usually represent corporate interests; it has precisely the opposite effect on under-resourced contingent fee and public interest lawyers, who must bear these expenses without any assurance of reimbursement.

More recently, judicially established heightened class action certification requirements have become a major obstacle, often obliging a plaintiff to establish certain elements of his or her case long before trial and without testimony or a jury.



For example, the Supreme Court's much publicized decision last year in *Wal-Mart Stores, Inc. v. Dukes* denying class status to 1.5 million women employees advancing gender discrimination claims has increased the burden of showing "significant proof" of a general policy of employment discrimination to secure certification. Thus certification represents another stop sign undermining the utility of an important procedural mechanism for handling disputes arising from large scale, small claim phenomena. If the class cannot survive certification, as is now common, the case is not pursued because individual claims are not economically viable. Today's heightened risk of non-certification inhibits the institution of potentially meritorious cases, leaving public policies underenforced and citizens uncompensated. Even when certification is granted, the elaborate process, which now includes a possible interlocutory appeal, imposes additional cost and delay.

And another recent Supreme Court decision, *AT&T Mobility LLC v. Conception*, which denies class arbitration, replaces judges and juries with one-by-one arbitrators for controversies better dealt with on an aggregate basis. Consequently, powerful economic entities are free to impose no-class-action-arbitration clauses on people in take-it-or-leave-it contracts for credit cards, mobile phones, brokerage accounts, car rentals, and a myriad of social amenities and necessities. This is simply the latest example of arbitration clauses trumping access to the courts, even when the clause is found unconscionable.

In another major transformation, the Supreme Court in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* erected an even earlier stop sign on the procedural road map: heightened pleading requirements. These cases turned their back on over 60 years of jurisprudence based on the language of the federal pleading rule, which requires only a "short and plain statement."

The Rule essentially was rewritten in *Twombly* from requiring mere "notice" of the claim to demanding a factual statement of a "plausible" claim but provided little guidance. The Court simply said it's something more than purely speculative or possible, but less than probable. It was more specific in *Iqbal*, saying it means the pleading must "show" a reasonable possibility of relief. To divine that, the Court invited district judges to use their "judicial experience and common sense" and compare the challenged conduct to a hypothesized innocent explanation of the defendant's actions, which appeals to subjectivity and sounds very much like evaluating the case's merits based only on the complaint.

A motion to dismiss always has asked a single question—does the complaint state a legally cognizable claim? For example, suppose I allege one of my students gave me a dirty look. That pleading is vulnerable to a motion to dismiss if directing a dirty look at another is not actionable under the governing tort law. The challenge had nothing to do with what actually happened, let alone who should prevail on the merits. As any good procedure instructor tells the class each year, the judge is supposed to bend over backwards, accept the allegations as pleaded, and interpret the complaint in the light most favorable to the pleader. But now the motion to dismiss may become a trial-type inquiry based on nothing but judicial intuition. *Twombly* and *Iqbal* have destabilized both the Federal Rules' established pleading standard and their motion to dismiss practice.

Ignored is the problem of information asymmetry. In many contexts the critical information, such as the formulation and testing of a pharmaceutical, is entirely in the defendant's possession. I can understand requiring a plaintiff to plead what he or she knows or should and could know with reasonable effort, but it seems rather futile and a bit absurd to insist the pleader state what he or she doesn't know. Discovery was designed to solve that problem by providing each side with informational access to promote more informed settlements and trials.

Employment discrimination cases are illustrative. A discharged employee typically is not told why. If facts must be pleaded to state a claim for discriminatory discharge or some other nefarious practice, how can the plaintiff surmount the newly minted pleading requirement? How does the plaintiff show discriminatory conduct —let alone a pattern or practice of discrimination—without access to the employer's treatment of the plaintiff? Similarly, how does a pleader challenge illegal or unconstitutional governmental action without deposing members of the department in which the alleged misconduct took place?

Thus, the Supreme Court has moved the system from a requirement of giving notice, which is what the pleading Rule was designed to accomplish, to a fact pleading structure, a throwback to the discarded code procedure era, which is exactly what the Rules rejected. To me, it makes no sense to apply the new pleading standard to slip-and-fall cases, and a wide swath of lawsuits that do not require extensive gatekeeping with its attendant cost, delay, and risk of premature termination. Yet the Court said the new pleading principles applied to all federal civil actions.

And, most recently, a Supreme Court plurality attempted to move the disposition clock back again. Dividing 4-to-2-to-3 (a very odd double play combination for you baseball fans), the plurality opinion redefined the constitutional limits on personal jurisdiction. Justice Kennedy, writing for four justices, departed analytically and linguistically from the Court's personal jurisdiction jurisprudence going back 65 years to *International Shoe Corp. v. Washington*, and clearly signaled a contraction. In his view, the Constitution "permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State." That might enable a corporate defendant to structure its national distribution system by sending its products to only one state while avoiding jurisdiction in states to which they were

then shipped. In many circumstances, injured consumers and employees would not be free to bring suit where they receive defective products or services, or live, or are injured; rather, plaintiffs might have to litigate in distant fora or abandon their claims altogether.

Despite the expressed concern of Justice Kennedy for a hypothetical small Florida farmer whose produce may be marketed nationally and that of Justice Breyer, concurring for himself and Justice Alito, for an equally hypothetical Appalachian potter being sued in Alaska or Hawaii because the "stream of commerce" has carried his cups and saucers there, the obvious beneficiaries of the case's restriction on jurisdiction will be manufacturers and other significant economic entities. The plurality justices focused on state sovereignty and the defendant's contacts with the forum, and its intent to submit to the forum with no acknowledgement that the farmer and potter can be protected by the principles of fair play and substantial justice the Court recognized long ago. Since Justices Breyer and Alito only concurred in finding no jurisdiction but not in Justice Kennedy's analysis, we really don't know where we are. But if the plurality view ultimately prevails, it creates yet another stop sign, this one erected at the courthouse door.

A panoramic view of these decisions leaves no doubt about what has been happening. We are moving toward a system in which an increasing number of civil actions may be stillborn. Not only is case disposition moving back in time, but it is being based on less and less information. A trial provides live evidence, examination, cross-examination, and often jury deliberation. Summary judgment is based on lawyers' papers. The motion to dismiss, however, is based only on the complaint. No discovery. No evidence. No witness testimony. No cross-examination. No voice of the community. Adjudication based on paper should be the exception. Deciding cases based on a single paper as evaluated by subjective factors, such as judicial experience and common sense and an abstract comparison to a hypothesized innocent explanation, is a process completely alien to me. And personal jurisdiction challenges, of course, have nothing to do with who should win on the merits. These cases have created procedural playthings for defendants that, not surprisingly, are now being employed with increased frequency. More motions, more delays, more costs, more appeals, and potentially more early dismissals.

Yes, there are concerns of uncertain dimension and significance that are advanced to justify what has happened. Judges have very real docket pressures, and discovery, especially e-discovery, can be extremely resource-consuming in large-scale cases. But even if the need for some change is acknowledged, what has occurred has negatively impacted access, the day-in-court principle, and jury trial, improperly compromising systemic values without any real empirical support.

A majority of the justices have offered three propositions to justify the changes: The threat of abuse, litigation is expensive, and the possibility of extorted settlements. Assertions of abuse are not new. When I served as Reporter to the Federal Rules Advisory Committee in the late 1970s and early 1980s, the defense bar and their clients were noisily complaining about abuse and frivolous litigation and the need for cost reduction. This being new to me at the time, I spent six months asking judges and lawyers about abuse and frivolous litigation so that I could aid the committee in pursuing intelligent rule revision. After listening carefully, I confidently reported to the committee that, according to the practicing bar, frivolous litigation is any case brought against your client, and abuse is anything the opposing lawyer is doing.

More than 30 years have now passed, and except at the margins I cannot do any better in identifying litigation abuse and frivolousness. We have never defined them; we have never measured their frequency; we don't know who is guilty of such conduct. Abuse and frivolousness simply lie in the eyes of the beholder. Nonetheless, assumptions about them apparently motivate judicial decision-making.

And what of extortionate settlements? Again, we simply don't even know what an extortionate settlement is or how to recognize one. Some find it useful to proclaim, "We were extorted." But people and entities settle cases for a myriad of varied human and business reasons that further their self-interest and have little to do with the litigation's merits or costs.

And what about costs? The truth is we really don't know much about many economic aspects of litigation. The limited empirical evidence we do have, which often is impressionistic or superficial and is largely focused on defense costs—not the plaintiff's, the justice system's, or society's—suggests that in most cases costs are less than what they are claimed to be, and that the very high-cost cases represent a rather small portion of the federal workload. Even as to them, we don't know how much cost and delay result from tactical decisions by the defense, as opposed to the plaintiffs' bar, that are driven by economic self-interest regarding billing and reflect practices of attrition and dilatoriness.

By shifting the procedural system dramatically against plaintiffs—moving the specter of case termination forward in time, denying access to discovery, limiting forum choice, and requiring potential plaintiffs to engage in pre-institution investigation—could it be that the defense bar has been empowered to extort settlements that are artificially low? Maybe that is the real extortion phenomenon—not contingent fee plaintiffs extorting settlements from defendants. Or maybe it is a bit of both? Or maybe extortion really is a non-issue? We don't know. Yet important litigation values are being impaired by the erection of procedural stop signs.

A majority of the justices seem singularly concerned about the litigation burdens on corporations and governmental officials. But we also should care about the litigation burdens on plaintiffs. We should care about potentially meritorious cases involving important public policy and private interest matters that are not being instituted, cases being dismissed because of procedural stop signs despite obvious information asymmetry or a claim's potential merit, antitrust and civil rights and consumer violations and product failures not being deterred or remediated, and the possibility that people are being improperly detained by government action.

This nation's longstanding legislative and judicial commitment to the private enforcement of fundamental public policies and constitutional principles is at stake. If procedural rules inhibit litigation designed to vindicate those policies or if cases pursuing these ends cannot survive a motion to dismiss, they won't be instituted. That is not what our system is designed to achieve. I fear that after more than 70 years, the Rules have lost their moorings, and some in the profession—judges and practitioners—have lost sight of the objectives our procedural system should pursue. I always ask my first-year law students: "Why do we have courts?" After asking and thinking about that for more than 50 years and watching the procedural changes of the last quarter-century, I no longer am clear what the answer is. A Supreme Court that appears preoccupied with ways of avoiding merit adjudication seems no further advanced in answering the question than my students and I have been.

The developments I have described represent a downgrading of the day-in-court principle and the commitment to jury trial in favor of accelerated and subjective decision-making by judges. It should be obvious that procedural stop signs primarily further the interests of defendants, particularly those who are repeat players in the civil justice arena: large businesses and governmental entities. It seems fair to say that some of the justices have a predilection that favors these entities, and that significant parts of the federal judiciary are disenchanted with litigation, which, of course, negatively impacts citizen access and works against those in our lower and middle classes.

I don't think a system that focuses on gatekeeping, early termination, and erecting procedural stop signs befits the aspirations of the American civil justice system. This is a myopic field of vision. At a time when the complexities of American life and the need for a level litigation field seem to be growing, our courts should focus on how to make civil justice available to promote our public policies: by deterring those who would violate them and by providing efficient procedures to compensate people who have been damaged. Our judges should concentrate on effectuating the vision of the rulemakers of the 1930s: citizen access and the merit resolution of disputes.

If necessity is the mother of invention, perhaps it is time to recognize our civil justice system is in a state of necessity. There are a myriad of possibilities for pursuing the objectives of Rule 1 other than putting up stop signs. The profession should employ its inventive skills and explore them. Our aspirations should be those our Founders embedded in the Constitution, which gave us the rule of law and took us to the moon and beyond, and not to construct a procedural Maginot Line to block access to our courts. □

University Professor **ARTHUR R. MILLER** *is the nation's leading scholar of civil procedure. This piece is adapted from and inspired by three of his recent works: "From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure," an article published in the October 2010* Duke Law Journal*; "The Implications of* McIntyre *and* Goodyear Dunlop Tires*," a keynote speech at the* University of South Carolina Law Review *2011 symposium; and "Don't Look Now, But They May Be Closing the Federal Courthouse Doors," a March 2012 lecture commemorating Miller's designation as a University Professor.*

Regulatory Change and Optimal Transition Relief

RICHARD REVESZ uses cost-benefit analysis to determine the best strategy to encourage compliance with, and reduce lobbying against, new environmental regulations.

Whenever legislators adopt a legal change, they must decide whether to provide actors negatively affected by the new regime with some form of transition relief. For example, when lawmakers approve more demanding pollution restrictions, should they grandfather existing plants so they will be exempted from the new requirements? Or should they require existing plants to immediately comply with new regulations, even if doing so would prove costly? The appropriate level of transition relief to grant, if any, is one of the most salient issues in U.S. regulatory policy, particularly in light of two looming concerns: the threat of global warming, which will likely lead to significant new regulations, and the ongoing economic crisis, which will create pressure to reduce regulatory burdens on private actors.

The appropriate scope of transition relief has been discussed extensively in the academic literature, as has the question of whether transition relief is desirable at all. The position now referred to as the "old view" favors transition relief because existing actors have relied on the previous laws in ordering their affairs, and hence should be granted some time to adjust to new laws. The "new view" argues against transition relief on the ground that it can discourage actors from anticipating socially desirable legal changes. The new view was first articulated by Columbia Law School's Michael Graetz in the tax context and Harvard Law School's Louis Kaplow in the regulatory context. Although the new view has been very influential, it has recently been challenged by Harvard's Steven Shavell. While Kaplow contends that transition relief is generally undesirable because it gives actors little incentive to anticipate desirable legal changes, Shavell correctly notes that, in the regulatory context, because of the significant investments that new actors must make in order to respond to previous regulations, it is desirable in some instances to grandfather existing actors.

The current academic literature implicitly assumes that decisions concerning grandfathering should occur in two steps. First, regulators should determine the optimal prospective rule by reference only to new sources constructed after promulgation of the rule. Second, in light of this prospective new standard, regulators should determine what grandfathering, if any, of existing sources is desirable. If one assumes that the number of firms entering and exiting the activity is exogenous to the type of grandfathering, this sequential approach makes sense. However, because the grandfathering rule that is selected has an impact on entry decisions, this approach is flawed. If the grandfathering rule is so generous that all existing plants continue to operate, there may be no demand for additional plants, and few if any new plants may actually come into existence. Also, although new plants can operate more efficiently than old plants, new plants may be unable to compete with old plants, because new plants must bear the costs of complying with new regulations while old plants do not. Even when, in the absence of regulatory standards, it would be efficient for old plants to shut down, they would continue running to avoid the costs of complying with new regulations. Thus, a policy of imposing very stringent standards on new sources and grandfathering existing sources can have the effect of prolonging the existence of old plants and discouraging the introduction of new plants that would be subject to the stringent standards, a result known as the "old plant effect."

In some circumstances, when old plants operate beyond their useful lives, the resulting environmental quality is actually worse than it would be with no regulation at all. In a prior article, Emory University School of Law's Jonathan Nash and I illustrated the decision of the owner of an existing plant, A, as follows:

> Say that the annual operating cost of an existing facility is $100, while—as one might expect because of the greater efficiencies offered by newer plants—the annual operating cost of a new facility with the same production capacity is $90 (including annualized capital cost). … A will choose to construct a new facility.

But now say that the applicable environmental regulation imposes costs of $20 if A constructs a new facility, but no cost if A retains her existing facility. The modified annual operating cost of a new facility is $110, while the annual operating cost of the existing facility remains $100. Accordingly, A will now opt to retain her existing facility in operation.

The example then shows why the stringent regulation of new sources can lead to perverse results: "Assume that the old plant emits five units of pollution per ton of output; that a new, unregulated plant would emit three units because of its greater efficiency; and that a new plant subject to regulation would emit one unit." In this example, in the absence of regulation, the pollution would be three units because the old plant gets replaced by a new plant, but with the stringent regulation the pollution remains at five units because the old plant continues to operate.

This example illustrates why the current approach to determining the desirability of grandfathering is seriously flawed. It does not take into account the impact that the disparity between the regulatory stringency that applies to new sources and grandfathered sources has on the rate at which grandfathered sources close down and are replaced by new sources. If this disparity is too great because the new source standards are far more stringent than standards applying to grandfathered sources, grandfathered sources will continue operating for a longer time than they would in the absence of the stringent new regulations. Thus, there will not be demand for new sources and the stringent standard will exist only on paper, with no sources to which it actually applies, while the grandfathered standards persist for a long time. Instead of sequential optimization, the correct approach to maximize social welfare would seek to jointly optimize the new source standard and the grandfathering rule.

The joint optimization approach is likely to lead to a less stringent new source standard and a more limited grandfathering rule than the sequential optimization approach. The first prong is necessary in order to provide sufficient incentive for existing sources to close down. One might ask why that incentive should not be provided instead by denying grandfathering to existing sources. The reason is given by Shavell: in light of a stringent new source standard, grandfathering is sometimes optimal. Just as it is cheaper to purchase a new hybrid car than it would be to convert a gasoline-powered car into a hybrid car, it is almost always cheaper to impose stringent pollution regulations on plants that are being newly constructed than it is to impose such regulations on plants that have already been built and have already installed different pollution abatement equipment. Unlike a new plant, an old plant faces transition costs—such as removing previously installed safety devices (if any) and possibly retrofitting the plant so that it is compatible with new pollution abatement technology. Of course, the costs associated with requiring an old plant to comply with new regulations may be overstated because, at least with performance standards, an old plant could also meet the standards by makings changes to its production process, which may be cheaper than retrofitting the plant or implementing new pollution-control technology. For example, a plant could reduce its emissions by switching from high-sulfur coal to low-sulfur coal or from coal to natural gas. Even so, old plants will likely face higher costs than new plants. Grandfathering existing actors will not always be optimal, but is appropriate when their compliance with the new rule would cost more than the reduction in the expected harm that would result from complying with the new rule.

As a result, the socially optimal approach is to pick not only a less stringent new source standard than would be ideal if there were no existing sources, but also a less generous transition rule than the one that results from the current, sequential approach. Only through joint optimization can one achieve the socially optimal portfolio of new source standards and grandfathering rules. Under this approach, in some cases it will be desirable to compromise the stringency of the new source standards and deny grandfathering to existing sources, even though grandfathering would have been desirable if the new source standard had not been compromised. In other cases, however, it will be preferable not to compromise the new source standard and grandfather existing sources.

The desirability of grandfathering depends on two important factors. First, the more the demand for the product grows, the more desirable grandfathering will be, because the benefits of not compromising the new source standards will be more compelling the more new sources there are likely to be. Second, the period of time during which a grandfathered source continues in operation is also relevant. The shorter that time, the less desirable it is to compromise the new source standard to make it socially preferable to deny grandfathering.

The article from which this excerpt is taken also challenges the main public choice justification for providing transition relief: while accompanying new regulations with transition relief may make it easier for political actors to adopt new

regulations in the first place, transition relief may render the new regulations so ineffective that it would be preferable to maintain the status quo. Many scholars argue in favor of transition relief because it increases the likelihood of enacting socially desirable legal changes. Relatedly, J. Mark Ramseyer of Harvard Law School and Minoru Nakazato of the University of Tokyo Faculty of Law argue that transition relief is desirable because it can reduce wasteful public choice expenditures. If interest groups will be harmed by the repeal of an existing law or passage of a new law, they may expend fewer resources opposing the initiative if it includes transition relief for those groups. From a societal perspective, it is desirable to avoid these expenditures because, as Gordon Tullock of the George Mason University School of Law notes, "[t]hese expenditures are spent not in increasing wealth, but in attempts to transfer or resist transfer of wealth."

However, grandfathering does not necessarily bring about desirable legal changes or reduce wasteful lobbying expenses. First, in arguing that transition relief is often necessary to enact legal changes, the literature ignores how transition relief can affect the desirability of the legal changes. Suppose it is socially desirable to require all sources to emit less pollution than is currently allowed. If existing sources are grandfathered, these sources will likely stay in operation longer than they otherwise would. In turn, few if any new firms may come into existence, because they will be at a competitive disadvantage compared to those grandfathered existing sources. If there are no new firms to meet the more stringent standards, it would be better to maintain the status quo than to pass more stringent regulations coupled with grandfathering. Under the status quo, inefficient existing sources would gradually be replaced by more efficient, and therefore cleaner, new sources.

Second, the argument that public choice expenditures are lower at the outset when transition relief accompanies proposed legislation is flawed. It assumes that existing sources are indifferent between the status quo and new source standards with grandfathering, so they do not invest in public choice expenditures to fight such standards if grandfathering is provided. In reality, however, existing sources benefit from new source standards with grandfathering because such standards impose no costs on existing sources but impose additional costs on new sources, deterring potential competitors from entering the market. Operators of existing sources are thus more likely to make public choice expenditures to support the new source standards when the initial program is adopted.

"These new regulations will fundamentally change how we get around them."

Third, the argument that transition relief lowers wasteful lobbying expenses is flawed because it assumes that once transition relief is granted, there will be no additional lobbying expenses to extend transition relief. Consider transition relief that takes the form of limited-time grandfathering, under which legislation specifies that grandfathering will end at a certain time. There is then no reason to believe that existing actors will cease lobbying once the initial legislation is adopted, because the benefits of grandfathering are ongoing. The legislation might specify that sources will be required to come into compliance with new regulatory standards after a certain period, or could require old sources to come into compliance with the new regulatory standards when they undergo certain modifications. In either event, beneficiaries of grandfathering will have incentives to lobby to extend the time period during which they receive the benefit.

The Clean Air Act illustrates how existing actors lobby for continued grandfathering as the existing grandfathering benefit is about to expire. Under this act, existing actors were not required to immediately comply with stringent new source performance standards. But once existing sources undergo a "modification" that increases their emissions, the sources become subject to these standards through a process known as New Source Review (NSR). Congress's expectation was that old plants would eventually shut down or undergo modifications to upgrade their equipment and become subject to the federal new source standards. In practice, grandfathering bestowed a competitive advantage on existing sources because they were not subject to the stringent new regulations and continued to operate decades after the adoption of the new standards.

Absent pollution regulations altogether, an old plant may rationally decide to retire its equipment and build a new plant because old equipment becomes increasingly inefficient as it begins to degrade. The existence of pollution regulations applying to new sources, however, may give the plant an incentive to bear these inefficiencies for longer than it otherwise would because this would be less costly than complying with the new standards. True, eventually the equipment becomes so old that modifications triggering the new source standards become necessary, but firms have a strong incentive to delay this moment as long as possible.

In the 1990s, many old plants—including at least 12 utility companies—decided to make major modifications without complying with the new standards as their equipment began to degrade. The Department of Justice (DOJ) filed suit on behalf of the EPA against nine of these companies in 1999 and 2000. These enforcement actions were the first to target the coal-fired electric utility industry in the more than 20 years since the new source rules were enacted. The first settlements exceeded

$3 billion, and the industry began a coordinated lobbying effort to attack these rules.

Utility companies made substantial campaign contributions during this period. The Edison Electric Institute (EEI), the electric utilities' largest trade association, contributed more than $17 million to federal candidates for the 1998, 2000, and 2002 elections. In the 2000 presidential campaign, executives, employees, and political action committees of the electric utility industry gave $4.8 million to George W. Bush's campaign, the Republican National Committee, and the inaugural committee. Companies facing enforcement action and the EEI contributed over $2 million of that amount. In addition, Thomas Kuhn—head of the EEI—personally contributed over $100,000 to the Bush campaign.

When President Bush took office, the Energy Department's transition team included Kuhn and officials from three companies facing NSR litigation. Bush also appointed Jeffrey Holmstead, who had lobbied against NSR on behalf of two clients, as assistant administrator for the Environmental Protection Agency's Office of Air and Radiation. Nine days after taking office, Bush created an energy policy task force, which submitted recommendations to the president in May 2001. The group called for formal reviews of both the NSR rules and the legal basis for the DOJ's pending enforcement actions. With advocates for their cause firmly in place in both the White House and EPA, the stage was set for major policy changes.

Rather than merely relying on its trade association, in 2000, Southern Company and five other electric utilities created a new association, the Electric Reliability Coordinating Council (ERCC), to lobby exclusively for NSR changes. The ERCC has spent over $8 million pushing for pro-industry new source rules over the last decade. The EEI also spent over $49 million on lobbying for this purpose between 1999 and 2002.

The industry succeeded in extending grandfathering when the EPA implemented two new rules that made it easier for old plants to avoid triggering NSR. The first rule altered the baseline used to determine whether a physical or operational change has resulted in increased emissions. Instead of requiring plants to use emissions from the last two years as a baseline, the new rule allows plants to "choose any consecutive 24-month period from the 10 years immediately preceding the proposed modification." Thus, a plant can pick a period when its emissions were comparatively high, making it "less likely that a plant's modernization will be found to result in increased emissions."

The second rule expanded what was considered "routine" maintenance, which does not count as a "modification," allowing plants to make significant changes without triggering NSR. The rule provided a safe harbor for changes that cost up to 20 percent of the replacement value of the entire plant. This rule, however, was struck down in court.

In summary, while the initial grandfathering under the Clean Air Act may have appeased industry actors—perhaps reducing political opposition to its enactment—it also bestowed a competitive advantage upon existing actors that gave them an incentive to lobby to extend grandfathering beyond its expiration date. Even if a grandfathering provision were to decrease wasteful lobbying when the legal change is initially enacted, additional wasteful lobbying will almost certainly occur when the grandfathering nears expiration.

While optimal transition policy varies depending on the circumstances surrounding the legal change, the article from which this excerpt is taken provides a more nuanced understanding of optimal transition relief than the previous academic literature. We demonstrate flaws in the prevailing approach of first setting a standard for new sources without taking existing sources into account and then choosing the best transition rule in light of this standard, and present a novel argument for why the joint optimization of these two decisions is preferable. We also critique the public choice justifications for providing transition relief and suggest that routinely accompanying new regulations with generous transition relief can result in undesirable legal changes and wasteful lobbying. □

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On Sacrifice

MOSHE HALBERTAL
Princeton University Press, 2012

"Self-sacrifice, with all its subtleties and complexities, enables violence because it allows a role reversal between the aggressor and victim. The contemporary suicide bomber is a complex icon of such a merger of violence and self-sacrifice. In his act of unleashing violence, the suicide bomber is simultaneously initiating an act of self-sacrifice and murder. He constitutes himself as the victim of the violence that he is perpetrating. The suicide bomber is presumably an effective tactical instrument—a human version of a high-tech smart bomb. Yet despite the surface efficiency of the act, suicide bombing is a powerful cultural statement, a simultaneous image of self-sacrifice and murder, a perverse conjunction of blood and purity, crime and atonement. It is no accident that the suicide bomber emerges from a larger politics of victimhood. This internal connection between self-sacrifice and violence along with the reversals that self-sacrifice enables do not belong exclusively to the religious sphere. War, which manifests such a connection, has been practiced in thoroughly secularized nation-states, and Camus's just assassin is a secular socialist.

A deep inner tension is thus evident in the noble ideal of self-transcendence. Through two reversals, self-sacrifice mobilizes crimes that in their magnitude are far greater than those motivated by self-interest. This phenomenon forces a critical reformulation of the nature of moral conflict, especially in light of Kant's view that the essence of moral conflict is the struggle between self-love and the categorical imperative. By posing this polarity, Kant ignored the realm at the core of moral drama: self-sacrifice—by no means an expression of self-love, and yet also unable to fulfill the demands of the universalized categorical imperative....

The moral drama and its psychology have to be reformulated: *misguided self-transcendence is morally more problematic and lethal than a disproportionate attachment to self-interest*. In line with a long philosophical tradition, I think that self-transcendence does constitute the moral act. But from that fact itself, self-sacrifice also derives its corrupting force. Misdirected self-transcendence falsely stimulates a noble moral act, and with that it enables a complex mechanism, based on the two reversals, to purify crimes. The religious sensitivity to such a phenomenon is the reason why misguided self-transcendence constitutes the ultimate sin of idolatry. Idolatry, in this sense, is the utmost surrender to a cause that is not worthy of the corresponding sacrifice."

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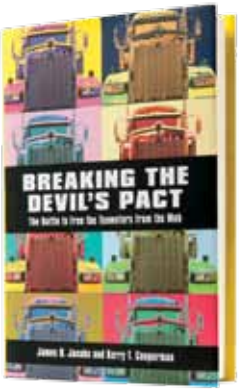

"After *Mobsters, Unions & Feds: the Mafia and the American Labor Movement* (2006), I thought I would have nothing more to say about labor racketeering. But as *U.S. v. International Brotherhood of Teamsters*, the government's two-decades long effort to purge the Teamsters Unions of organized crime's presence and influence went on and on, I realized the need for a case study of the most important anti-labor-racketeering initiative in U.S. history. First, at the time the lawsuit was filed, the IBT had the largest membership of any U.S. private-sector union. Second, the IBT was indisputably the nation's most powerful union. Third, the IBT was the most written-about union. More than 20 books and scores of articles by journalists, historians, labor studies scholars, and Teamsters offer a rich, if uneven, history of a single labor union, thereby providing a window on 20th- and 21st century American labor history and American history generally. Obviously, the case warranted a major study....

Because *U.S. v. IBT* was, first and foremost, meant to sever ties between Cosa Nostra and its most important economic and political power base, the IBT, this study also contributes to 20th- and 21st century organized-crime studies, especially to the history of the government's organized crime-control strategies. *U.S. v. IBT* was groundbreaking for federal law enforcement because it stretched the legs of civil RICO farther than ever before. DOJ sought to purge Cosa Nostra's presence and influence from an international union (the United States, Canada, and Puerto Rico) with nearly 700 local and regional affiliates. *U.S. v. IBT* tested DOJ's ability to use civil RICO to achieve systemic organizational reform, a goal that scores of criminal prosecutions had failed to achieve. Moreover, the stakes were huge. Failure would likely dissuade DOJ attorneys from bringing future civil RICO suits against systemically corrupted organizations and might thereby encourage labor racketeering. Success would likely encourage similar lawsuits against organized crimes' influence in other unions."

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The Harm in Hate Speech

JEREMY WALDRON
Harvard University Press, 2012

"A man out walking with his seven-year-old son and his ten-year-old daughter turns a corner on a city street in New Jersey and is confronted with a sign. It says: "Muslims and 9/11! Don't serve them, don't speak to them, and don't let them in." The daughter says, "What does that mean, papa?" Her father, who is a Muslim—the whole family is Muslim—doesn't know what to say. He hurries the children on, hoping that the will not come across any more of the signs. Other days he has seen them on the streets: a large photograph of Muslim children with the slogan "They are all called Osama," and a poster on the outside wall of his mosque which reads "Jihad Central."

Many of my colleagues who are not Muslim say that they detest these signs and others like them (the racist slogans, the anti-Semitic signage). But they say that people like us, who detest hate speech, should learn to live with it. Less often, and only under pressure, they will say that the father in our example (who is not a First Amendment scholar) and his children and others like them should also learn to live with these signs. But they say that uneasily. They are more often confident in their own liberal bravado, calling attention to their ability to bear the pain of this vicious invective: "I hate what you say but I will defend to the death your right to say it."

I disagree. I think there is something socially and legally significant at stake. There is a sort of public good of inclusiveness that our society sponsors and that it is committed to. We are diverse in our ethnicity, our race, our appearance, and our religions. And we are embarked on a grand experiment of living and working together despite these sorts of differences. Each group must accept that the society is not just for them; but it is for them too, along with all of the others. And each person, each member of each group, should be able to go about his or her business, with the assurance that there will be no need to face hostility, violence, discrimination, or exclusion by others. When this assurance is conveyed effectively, it is hardly noticeable; it is something on which everyone can rely, like the cleanness of the air they breathe or the quality of the water they drink from a fountain. This sense of security in the space we all inhabit is a public good, and in a good society it is something that we all contribute to and help sustain in an instinctive and almost unnoticeable way."

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Student Spotlight

U.S. Supreme Court Justice Sonia Sotomayor received an honorary law degree and gave the commencement address at Yankee Stadium on May 16. The venue was especially meaningful for Sotomayor, a Yankees fan who grew up near the old stadium but never had the opportunity to go to a game when she was a child.


Brachman


Sutton, Sotomayor, Lohier

Arguments That Inspired a Justice

A cry of "all rise!" brought the crowd in Greenberg Lounge to its feet on April 9 as final arguments in NYU Law's 40th annual Orison S. Marden Moot Court Competition got underway. Presiding over the fictional case of *Fitts v. United States of America* were three real-world members of the bench: U.S. Supreme Court Associate Justice Sonia Sotomayor, Judge Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit, and Judge Raymond Lohier Jr. '91 of the U.S. Court of Appeals for the Second Circuit.

The case, prepared by Moot Court Board members Jerilyn Laskie '13 and Nicole Geoglis '13, centered on the child pornography conviction of one Ezra Fitts and presented two issues for the moot Supreme Court to review. Zachary Briers '12 and David Hodges '12 squared off on the first, involving the sufficiency of probable cause for the search that led to Fitts's arrest. Thomas Bennett '12 and Paul Brachman '13 debated the second: whether a court could properly order Fitts, who was convicted solely of possession of child pornography, to pay restitution to the victim depicted in those materials.

As is common in the actual Supreme Court, each of those arguing received tough questions from the justices. At one point, Sotomayor asked Briers whether he rejected the Eighth Circuit's position on an issue relating to search warrants, and Sutton then pressed Briers on the matter. "Do you concede the Eighth Circuit's wrong?" Sutton asked. "No skin off your nose," Sutton joked after Briers offered a hesitant yes. "I had to think about who is on which circuit here," Briers responded, causing the room to erupt in laughter.

Sotomayor posed a thorny issue to Brachman on restitution: "Why should this one defendant who happens to get caught pay the price for the person who made the film and every other person who the victim is suffering about? Why should this one individual bear the brunt of the entire cost?"

"Because it's so difficult to determine with exactitude how each possessor causes harm to victims like John Doe," said Brachman, "it makes a great deal of sense both as a matter of law and as a matter of policy to impose the burden for remedying the harm on the individuals who caused the harm rather than on the victims." Later, he added, "The petitioner's argument boils down to this: It's okay to rub salt in a wound because I didn't inflict the first cut, and because so many people have rubbed salt in the wound we can't tell which grain of salt caused the injury. That interpretation is perverse and contrary to the purposes for which the statute was enacted."

The justices named Brachman as Best Oralist. "We pick one person," said Sotomayor, "but there really shouldn't be any losers because each of you has done an extraordinary job."

Lohier was likewise impressed: "I think it's fair to say that, based on what I saw this evening, you'd do exceptionally well before the Second Circuit. I think that the most important thing, besides candor—never forget candor in your responses—is to listen to the question and to answer the question. All four of you were able to do that in a very professional way." Lohier is currently (and Sotomayor was formerly) an adjunct faculty member at NYU Law.

"Why do I bother doing a moot court, adding another case to my docket?" Sotomayor asked as the event drew to a close. "I do it because after I engage in an exercise like this by students, I'm inspired. I'm inspired because I know that those who are following in the job I love so much—lawyering—are being trained so well that you give me hope, both about the profession and about the future of the profession and my job." □ *Atticus Gannaway*

Read It Online

The newest NYU School of Law journal published its first issue, but it can't be found on any library shelf. The biannual *Journal of Intellectual Property and Entertainment Law*, which covers the law of art, entertainment, intellectual property, Internet, sports, and technology, is the Law School's first online-only journal (jipel.law.nyu.edu).

The journal began as the *IP and Entertainment Law Ledger*, essentially an academic blog started by the Intellectual Property and Entertainment Law Society. After becoming editor-in-chief of the *Ledger* last year, Nicole Nussbaum '12 worked to win official journal status. She was enthusiastic about producing a new kind of journal with shorter articles than traditional journals that covers a rapidly evolving area of the law: "It's exciting to be going into a field where there's so much that still needs to be figured out."

Solicitor General Proves No Match for the IRC


Park, Saunders, Lee, Reisch

Even for a clinic accustomed to high-profile wins, the Immigrant Rights Clinic (IRC), taught by faculty co-directors Nancy Morawetz '81 and Alina Das '05, has had an extraordinary year. A report from the clinic exposed mistreatment of immigrants in New Jersey detention centers, and the Supreme Court cited a brief prepared by IRC students in which the students argued that a 1996 law barring reentry to the U.S. by immigrants convicted of crimes should not apply to immigrants who have only pre-1996 convictions. But perhaps the biggest win came for a Freedom of Information Act request filed in 2011. After all, it's not every day that the Office of the Solicitor General confesses error and the Justice Department alters immigration procedures for deportees—thanks to two years of hard work by six recent graduates.

In 2011, IRC students Wonjun Lee '12, Julie Mao '11, Saerom Park '12, Nikki Reisch '12, Martha Saunders '12, and Nancy Steffan '11 asked the Justice Department to turn over a group of e-mails that discussed the government's purported policy and practice of returning deportees. This spring Park and Saunders faced off against U.S. attorneys representing the Department of Homeland Security, withstanding rapid-fire questioning by Judge Jed Rakoff of the U.S. District Court for the Southern District of New York. The students prevailed; the judge ordered the Justice Department to disclose the bulk of the e-mails.

In April, the consequences of this ruling played out in the upper echelons of federal government. The Office of the Solicitor General said it would "clarify and correct" a 2009 statement to the Supreme Court in which it erroneously implied that the government already had procedures in place to ensure the return of deportees who win their immigration appeals. And the Justice Department announced it would implement new procedures to ensure that such deportees can return to the U.S.

The developments were a reminder of the importance of this type of work, something the judge pointed out on the bench. "It was really interesting to hear Judge Rakoff talking about how our case had made a difference in ways that he himself found surprising," says Morawetz.

Reisch, who presented arguments with Lee in front of Judge Rakoff in May to request the release of additional documents related to deportation procedures, says the collaboration among the students working on the case this year—Lee, Saunders, Park, and Reisch—was critical to the success of their FOIA request. Supervised by Morawetz, they worked together over several months to fine-tune every aspect of their arguments, challenge one another with different lines of questions, and edit practically every line of their written briefs.

That's how Reisch was able to deliver a strong rebuttal in Judge Rakoff's courtroom this May. "Wonjun and I had both mooted each other, so we were prepared," she says. The graduate, who is clerking for Judge Marsha Berzon of the U.S. Court of Appeals for the Ninth Circuit this year, says she discovered her passion for oral advocacy through working on cases with the IRC. On another case, Reisch had the opportunity to argue at the Third Circuit—an experience she calls both exciting and intimidating.

"If you're on the side of justice," says Reisch, "there are ways to make that come through in the stories you tell and the way you go about your litigation." In other words: Fight with passion. □ *Michelle Tsai*

Masterpiece Theater

An intellectual lunch conversation with NYU President John Sexton and University Professor Arthur Miller? Check. A brutal chess matchup with Professor Roderick Hills Jr.? Check. Poker night with professors Oscar Chase and Troy McKenzie '00, and skybox tickets to a Yankees game? Check and check. The live-bid items at the 18th annual Public Service Auction, which raises crucial funds for student public interest summer internships, offered a little something for everyone, even those who collect modern art. The live auction concluded with a painting performance by Dean Richard "Renoir" Revesz; the finished and signed abstract masterpiece going home with high bidder Walter Ciacci '14. Under Revesz's deanship, NYU Law continues to guarantee funding for the summer internships. Proceeds from an array of silent-auction items supplemented the live-auction funds; the quirkiest item may have been a homemade, three-dimensional specialty cake in the shape of Ruth Bader Ginsburg. Justice is sweet. □


From left: Paulette Caldwell, Kim Taylor-Thompson, Ralph Richard Banks, Sumi Cho


Barofsky


White


Jameel Jaffer, Samuel Rascoff, Michael Leiter


Spitzer


Breuer


Arthur Miller, standing

Talks of the Campus

Insiders, experts, faculty, and students discuss pressing issues of the year in the weekly Milbank Tweed Forum.

With its provocative title, "Crooks on the Loose? Did Felons Get a Free Pass in the Financial Crisis?" the February 8 session of the 2011–12 Milbank Tweed Forum did not disappoint. Before reporters, news cameras and a standing-room-only audience, moderator Neil Barofsky '95, senior fellow at the Center on the Administration of Criminal Law and the Jacobson Leadership Program in Law and Business as well as former special inspector general of the Troubled Asset Relief Program, kicked off by asking his star panelists why, three years after one of the worst financial crises in U.S. history, had not one executive of a major investment bank been prosecuted?

Representing the federal government, Lanny Breuer, assistant attorney general for the Criminal Division of the U.S. Department of Justice, bristled. "I just don't accept the fact that we haven't done anything," he said, pointing to myriad recent insider trading convictions and Ponzi scheme busts. As for the big banks, Breuer expressed sympathy with the idea that Wall Street has not been held accountable but said that bringing criminal cases was challenging, as the government must prove every element of a crime beyond a reasonable doubt. "Viscerally, I understand people want to see Wall Street executives being ushered out in handcuffs," he said. "While I understand the desire, that's not enough."

Wall Street crusader Eliot Spitzer, former New York governor, gave a glimpse of the ferocity that got him elected by continuing the pressure on Breuer. "There was significant deception and fraud that should be prosecuted," he said. "Corporations are not held accountable. Wall Street persuaded us that they could regulate themselves. Self-regulation is complete hokum."

Barofsky mentioned the new financial fraud task force announced in President Obama's 2012 State of the Union address. He questioned whether the new initiative would amount to anything.

Predictably, Breuer defended it as worthwhile and dropped respected names such as current New York Attorney General Eric Schneiderman. Just as predictably, Spitzer, former New York AG, dismissed it. The wild card was Mary Jo White, former U.S. Attorney for the Southern District of New York and now a partner at Debevoise & Plimpton. She criticized the task force, but because it would make Wall Street firms, now her clients, targets: "It gets back to my frenzy concern. You don't want that kind of pressure in the system. You don't want the search for scalps to be the metric for success. Politics doesn't belong in this space at all."

Breuer's exasperated response: "On the one hand, we haven't done enough; on the other, task forces are too aggressive." There were no winners here. □

More Highlights of the 2012 Milbank Tweed Forum

Life in the Law: Where Your J.D. Can Take You *(Photo above, bottom right)*

The State of the Threat: Ten Years After 9/11, Who Threatens Our Way of Life Most—Al Qaeda or Uncle Sam? *(Photo above, top right)*

A Brewing Debate: Does the Tort System Need Reform?

Collateral Consequences of Criminal Convictions: The Impact on Family and Community

Dispelling the Myth of a Post-Racial America *(Photo above, far left)*

Global Warming or Nuclear Meltdown? The Future of Nuclear Power After Fukushima

The Morality and Legality of Targeted Killings: From Bin Laden to al-Awlaki

Governments Gone Bust: Addressing and Avoiding State and Local Fiscal Crises

Arab Spring: The State of the Revolution as it Turns One

How NYC is Breaking the Gridlock on Traffic Policy

Greek Drama, Global Stage: Perspectives on the Euro Crisis

Voting Rights Controversies Today

The IP Divide: Why SOPA Loses, TRIPS Wins, and Confusion Reigns

Crime and Punishment

With more than 2.3 million people locked up, the U.S. incarcerates more of its population than any other country in the world. But when judges and juries sentence people to prison, Lisa Kerr (LL.M. '09, J.S.D. '13) wonders what their expectations are for what will occur during their time there. "We see in our cultural language that we think certain things are included in going to prison," she says. "We joke about prison rape. We imagine solitary confinement. At other times we criticize 'country club prisons.' We have these ideas that prisons are awful, or sometimes they're too good."

Last spring, Kerr won a 2012 Trudeau Foundation Scholarship, the most prestigious doctoral award in Canada, which will fund $60,000 per year for three years of scholarship. In her doctoral research, Kerr is rethinking current approaches to incarceration and justice, focusing on how much control courts and legislatures actually exert over post-conviction punishment. "What I ask is, How does the legal system imagine the prison; what does the judge consigning an individual to prison expect in terms of the actual administration of the sanction? And what legal concepts and techniques work to control the actual quality of the sanction?" Kerr says.

The field of sentencing and punishment theory asks when punishment is justified, but the actual nature and features of imprisonment remain largely unexamined. "In those exchanges, few theorists debate what kinds or modes of imprisonment are legitimate," she says. "They use a notion of 'hard treatment' as a placeholder concept; they tend not to unpack and define. But if you want to ask if something is legitimate, you need to know what that something is or ever could be. To ask about the legitimacy of imprisonment, we must ask about the capacity and limitations of actual prison systems."

Kerr's doctoral research proposal grew out of her experience as a staff lawyer at Prisoners' Legal Services in Vancouver, where she pursued human rights litigation on behalf of prisoners such as transgender inmates with medical needs, aboriginal people who wanted to practice their spirituality, and mentally ill inmates whose illness-driven behavior led to frequent disciplinary sanctions. After graduating from the University of British Columbia Faculty of Law, Kerr clerked at the British Columbia Court of Appeal before practicing as a litigation associate at the firm Fasken Martineau. In addition to her other activities, Kerr is working with the British Columbia Civil Liberties Association on constitutional litigation related to the use of solitary confinement in Canadian prisons and with Pivot Legal Society to decriminalize sex work; a case on the latter issue is currently pending before the Supreme Court of Canada. She is also a doctoral fellow of the Social Sciences and Humanities Research Council of Canada.

While earning her LL.M. at NYU Law, Kerr worked as a research assistant to David Garland, Arthur T. Vanderbilt Professor of Law, on *Peculiar Institution: America's Death Penalty in an Age of Abolition*, his prize-winning book. "Lisa Kerr is an outstanding young academic whose talents, experience, and research project make her perfectly suited to be a Trudeau Scholar," says Garland, who is also Kerr's doctoral supervisor. "The subject of her dissertation—the legal regulation of life inside prisons—is now an urgent problem, given the growth in prison populations and the deteriorating conditions of confinement in a post-rehabilitative era. Lisa is on her way to producing a dissertation of the first importance that will bridge the gap between the academic and the practitioner worlds and open up the possibility of serious reform in this important area." □

Atticus Gannaway

LISA KERR: COURTESY OF THE TRUDEAU FOUNDATION

Deans' Cup

NYU Law continued an unprecedented four-year winning streak when it bested Columbia Law 56–46 on its home turf in the 11th annual Deans' Cup basketball game. The friendly competition raised more than $30,000 for public interest law organizations at both institutions. The Violets also prevailed in the halftime faculty game, 10–5. NYU co-captain Milad Sedeh '12 said his team's enthusiastic fans made all the difference: "They were outnumbered, but they were definitely louder."

The Issues of the Year: Student Symposia

The Affordable Care Act: The Constitutionality of Reform, Its Implementation and Implications *Annual Survey of American Law*

Months before the U.S. Supreme Court decided the Affordable Care Act was constitutional, Ezekiel Emanuel, founding chair of the Department of Bioethics at the National Institutes of Health's Clinical Center and former health policy advisor in the Obama White House, gave a keynote address arguing for the act as good economics and good policy. "I don't think we've appreciated how important the Affordable Care Act is," said Emanuel, a recent NYU Law adjunct professor. "I said to the president on the night it was passed that he should get a Nobel Prize in Economics, because it's really going to have a dramatic effect on the American economy."

Emanuel pointed out that annual U.S. healthcare spending was a staggering $2.6 trillion, more than the GDP of France. "We've been saying 'We can't go on like this' forever. We're not going to go on like this unless we have a fundamental change. And I think the Affordable Care Act is that fundamental change."

Following Emanuel's keynote, three panels examined different facets of the health care reform legislation spearheaded by the Obama administration. At one on the fiscal complexities of the health care industry, Eleanor Kinney, professor emeritus at Indiana University's Robert H. McKinney School of Law, asked the question of the day: "It's all very well and good to say the Affordable Care Act has this and that flaw and go on and on, but why is it that we have public subsidies of health care in the first place? Almost every country in the world seems to need to draw on taxpayer funds to support health care for everybody. Why has the market failed in this way?"

Corporate Governance in the Global Marketplace: New Players, Cross-Border Investing, and Corporate Crime *Journal of Law and Business*

Professor Helen Scott, co-director of NYU Law's Mitchell Jacobson Leadership Program in Law and Business, led "Corporate Governance in a Global Context," which included John Suydam '85. "Players in New Capital Markets" featured Sophia Lee '96, deputy general counsel at Liquidnet Holdings, and Roberta Karmel '62, Centennial Professor of Law at Brooklyn Law School and former SEC commissioner. Vice Dean Kevin Davis moderated a panel on the Foreign Corrupt Practices Act and the U.K. Privacy Act with Sara Moss '74, vice president and general counsel of Estée Lauder, and Lee Dunst '92, partner at Gibson Dunn.

American Tragedy: Race, Poverty, and the Criminal Justice System Black Allied Law Students Association

Manuel Vargas '84, founder and senior counsel of the Immigrant Defense Project, discussed the collateral immigration consequences of criminal convictions. NYU Law Professor Kim Taylor-Thompson led a panel on "Selective Enforcement, Selective Punishment, and Disproportionate Impact: Our Criminal Justice System." She discussed the two cases challenging the constitutionality of life without parole for juveniles convicted of homicide that Bryan Stevenson argued and won at the Supreme Court this year. Participants also discussed disproportionate minority contact with the juvenile justice system.

The 17th Annual Herbert Rubin and Justice Rose Luttan Rubin International Law Symposium—From Rights to Reality: Beth Simmons's *Mobilizing for Human Rights* and its Intersection with International Law *Journal of International Law and Politics*; Center for Human Rights and Global Justice; International Law Society; and Law Students for Human Rights

Eric Posner, Kirkland & Ellis Professor of Law at the University of Chicago Law School, engaged in a conversation with Beth Simmons, Clarence Dillon Professor of International Affairs at Harvard University and author of *Mobilizing for Human Rights: International Law in Domestic Politics*. In this much-discussed recent book, Simmons used meticulous social scientific research to explore whether international human rights treaties change government behaviors and public policies.

Localities in the Lead: The Path of Environmental Progress through New York City *Environmental Law Journal*; Environmental Law Society; and Furman Center for Real Estate and Urban Policy

In his keynote address, Carter Strickland, commissioner of the New York City Department of Environmental Protection, emphasized the growing importance of cities as platforms for environmental policy. NYU Law Professor Roderick Hills Jr. moderated two additional panels, one focusing on the challenges and limitations that confront efforts to promote sustainability in the urban setting, and another looking at some of the environmentally progressive efforts that have arisen in New York City.

Justice in Transition: Serving the Transgender Community in Law and Practice OUTLaw

How does trans identity intersect with race, class, disability, and age? Beginning with a trans awareness workshop, the symposium also included "Challenging the Criminalization and Detention of Trans Communities," "Challenges Facing Trans Youth," and "Disability Justice and Trans Liberation."

No Strings Attached: U.S. Internet Governance in an Increasingly Global World *Journal of Law & Liberty* and *Journal of Legislation & Public Policy*

From legislating and regulating Internet infrastructure to controlling Internet content, this symposium addressed issues at the intersection of law and technology. NYU Law Professor Katherine Strandburg moderated two panels, including one on "Being Online: Mechanisms for Controlling Content and Content Providers," which explored government Internet regulation and voluntary private regulation. Other issues included what net neutrality looks like as part of a rights-based discourse. □

Puppy Love

Harper, a Boston Terrier, giving therapy in D'Agostino Hall.

One spring day during exams, a large crowd of students gathered in Vanderbilt Courtyard. It wasn't the sunny weather that drew the students away from the library but two therapy dogs, mini whoodles named Emma and Finn, who were making themselves available for hugs, pats, and belly rubs.

The first therapy dog program at NYU School of Law came about through the efforts of Scot Goins '12 and Lance Polivy '13, the outgoing and incoming presidents of the Student Bar Association. "I've desperately missed having a dog since I moved to New York City, and during stressful times I sometimes travel to local pet stores or dog parks," says Goins. He imagined that other students who had left their pets at home might feel the same way.

Inspired by learning of a therapy dog that visited the Yale Law campus during the fall, Goins and Polivy worked closely with the administration to organize four therapy dog sessions during exam period through the Good Dog Foundation. "As soon as we began publicizing it, there was just this tremendous response from students," Polivy says.

Michael Stromquist '14, who misses his family's three dogs in Tampa, can attest to the puppy effect. Although he was harried and preoccupied by exams, he made a detour to stop and play with the therapy dogs for 15 minutes. Says Stromquist: "It made my day about a million times better." □

Alawddin

This year's NYU Law Revue, the annual student-produced musical spoofing the Law School, satirized a popular animated Disney musical. When a genie grants a mediocre law student three wishes and he asks for the best grades at NYU Law, tuneful complications ensue. Rotating guest appearances by 10 Law School faculty and a sketch including dancing Supreme Court justices enlivened the proceedings.

Value Added: Tax

NYU Law's Graduate Tax Program would like to thank the following alumni for joining us during our Graduate Tax Program Lunch Series this year to share their experiences with our students.

LAURIE ABRAMOWITZ '87 (LL.M. '93)
Kaye Scholer LLP

JAMES M. PEASLEE (LL.M. '79)
Cleary, Gottlieb, Steen & Hamilton LLP

BARNET PHILLIPS IV (LL.M. '77)
Skadden, Arps, Slate, Meagher & Flom LLP

DAVID H. SCHNABEL '92 (LL.M. '93)
Debevoise & Plimpton

JODI J. SCHWARTZ (LL.M. '87)
Wachtell, Lipton, Rosen & Katz

To support the Tax Lunch Series, scholarships, and other initiatives by making a gift to the world-renowned Graduate Tax Program at NYU Law, please visit law.nyu.edu/giving.

Awards and Fellowships

Peter Barker-Huelster '12 earned a Skadden Fellowship to establish the Low-Income Bankruptcy Project at MFY Legal Services in New York, and **Alexa Rosenbloom '10** received one to work at Greater Boston Legal Services, where she will advocate for disabled individuals denied accessible care and reasonable accommodations.

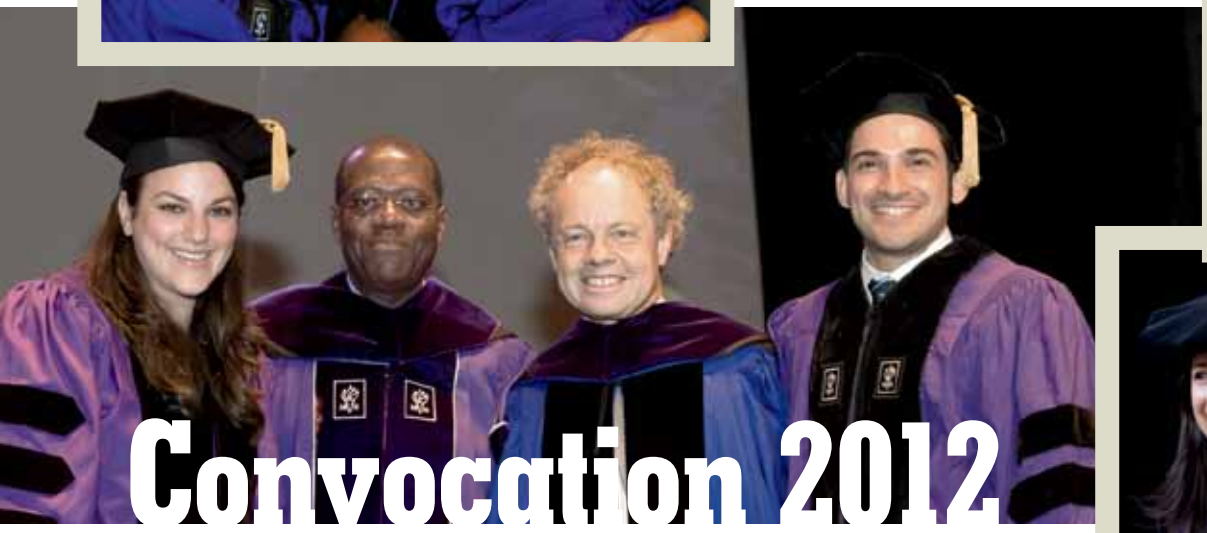
Sebastian Omlor (LL.M. '12) won the international Helmut Schippel Prize for outstanding scholarly accomplishments in notary law. Omlor will receive a $7,000 prize for "Bona Fide Transactions in Corporation Law."

Four recent graduates won Equal Justice Works Fellowships: **Sara Cullinane '12** will work at Make the Road New York, a grassroots immigrant rights organization founded by Oona Chatterjee '98 and Andrew Friedman '98, helping low-income local immigrants access health care. **Ashley Grant '12** will work at Advocates for Children of New York to prevent older students from being pushed out of New York City schools. At the American Civil Liberties Union of Southern California, **Carmen Iguina '10** will help detained asylum seekers who lack representation. **Kathryn Kliff '12** will work in the Legal Aid Society's Civil Practice Program to enforce homeless families' right to shelter.

As part of the Equal Justice Works' Public Defender Corps, **Jessica Heyman '12** has received a three-year fellowship to work as a staff attorney providing holistic team-based advocacy for clients at Juvenile Regional Services in New Orleans.

Debbie McElligott '13 and **Justin Roller '13**, coached by Rebecca Welsh '12, won Best Brief in Vanderbilt University Law School's National First Amendment Moot Court Competition.

Abby Belknap '13 and **Eric Merin '13**, coached by Brian Richichi '12, won Best Overall and Best Brief in Howard University School of Law's Bryant-Moore Invitational Moot Court Competition.



Convocation 2012

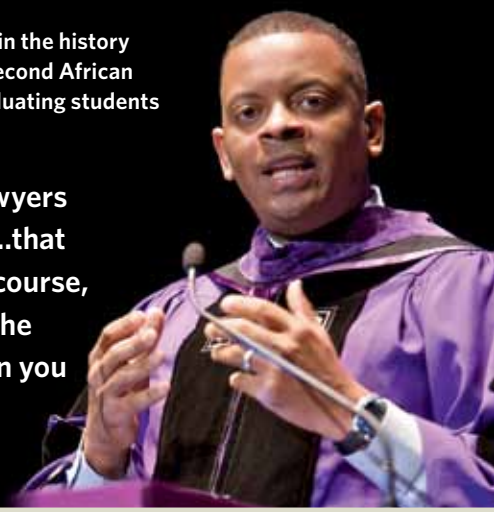
PASSION AND DETERMINATION were themes of the day as NYU School of Law held its graduation exercises at the historic Beacon Theatre on the Upper West Side. Speakers included the mayor of Charlotte, North Carolina, the prime minister of Trinidad and Tobago, and the U.N. under-secretary-general for legal affairs and legal counsel. Class Gift committee co-chairs Gerardo Gomez Galvis '12, Elana Wilf '12, and Catherine Karayan (LL.M. '12) presented a $125,000 check to Board of Trustees Chair Anthony Welters '77. They recruited a record 36 new alumni to become Weinfeld Fellows. As junior members of NYU Law's most prestigious giving society, Weinfeld Fellows are alumni who have graduated in the past decade and contribute $1,000 or more to the Law School annually. "It's a testament to the class and to the school that so many people wanted to join," said Wilf. "It is a lot of money, especially given the economy, but it really shows our support of NYU." □

Philip Kovoor '12, now an assistant district attorney at the Manhattan District Attorney's Office, said that although he might not achieve his childhood dream of becoming a superhero, there were plenty of examples of NYU Law professors who had been models of heroism:

"Now, more than ever, the world needs you and your superpowers. We will be expected to speak up when others are silent, to give voice to the voiceless, and to do the right thing even when it's the hard thing."

Anthony Foxx '96, the youngest mayor in the history of Charlotte, North Carolina, and the second African American to hold the office, urged graduating students to pursue what inspires them:

"I hope that your careers as lawyers are just as filled with passion...that when you're directed along a course, that you stay stubborn. Take the skills you have and the passion you have and make a difference."

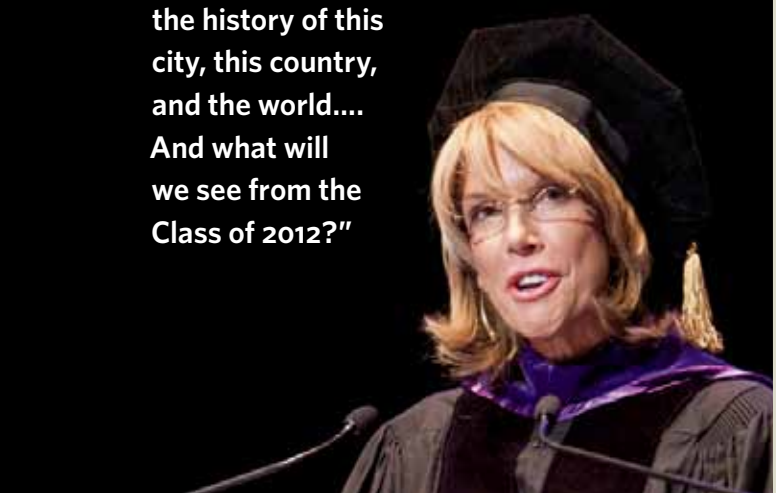


Kate Cornford (LL.M. '12), now International Law and Human Rights Fellow at the International Centre for the Legal Protection of Human Rights, in London:

"Too often lawyers have hesitated in times of great need. If there is one crucial thing NYU has equipped us with, it is the knowledge and the insight to be able to analyze current and future conflicts, and then to dive in and participate in unraveling problems for the common good."

Patricia O'Brien, U.N. under-secretary-general for legal affairs and legal counsel, invoked the names of accomplished alumni such as Elihu Root (Class of 1867), a U.S. senator and secretary of state, and Mohamed ElBaradei (LL.M. '71, J.S.D. '74, LL.D. '04), who both won the Nobel Peace Prize:

"The men and women of NYU Law have changed the history of this city, this country, and the world.... And what will we see from the Class of 2012?"



Kamla Persad-Bissessar, the prime minister of Trinidad and Tobago, emphasized the need to understand the evolving nature of law, and especially globalization's impact on the legal landscape:

"Law is changing. It is for you to give deep thought to how you intend to place yourselves into that changing environment; take hold of the change you wish to see, and achieve the change. Law is changing, but the pursuit of justice remains our sacred ideal."

The Class of 2012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Who's Who: Legacy Families

1. Meredith Borner with her grandfather, Ken Koopersmith '54.
2. Peter Barker-Huelster with his mother-in-law, Trustee Karen Freedman '80.
3. Claire Vitrich with her brother, Guillaume Vitrich (LL.M. '07), and uncle, Didier Malaquin (M.C.J. '76).
4. Andres Carey with his father, Jorge Carey (M.C.J. '67).
5. Eric Weinstein with his father, Lawrence Weinstein '78.
6. Jenna Bass Levy with her mother, Judith Bass '76, and father, Jack Levy '76.
7. John Green with his mother, Karen Green (LL.M. '76).
8. Kaitlyn Suydam with her father, Trustee John Suydam '85.
9. Anha Vo with her mother, Bich-Thu Doan '01.
10. Logan Levine with her uncle, Trustee Jonathan Mechanic '77.
11. Elana Wilf and Jeff Wilf with their relatives, Trustees Leonard Wilf (LL.M. '77) and Mark Wilf '87.
12. Isabel Marques da Cunha with her sister, Mariana Marques da Cunha (LL.M. '00).
13. Alice Byowitz with her father, Michael Byowitz '76.
14. Robert Fisher with his wife, Sara Raisner '09.
15. Jessica Heyman with her mother, Linda Mensch '76, and father, Michael Heyman (LL.M. '76).
16. Alexis Tucker with her sister, Ara Tucker '04.
17. James Maimone-Medwick with his father, Craig Medwick '77.


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Scholars and Donors

1. WilmerHale Scholar (Root-Tilden-Kern) Sara Cullinane was hooded by Brian Johnson '99.
2. Herbert & Rose Hirschhorn Scholar Heather Groves was hooded by Nancy Karlebach. (Not photographed: Ali Assareah.)
3. Thomas M. Franck Scholar in International Law (Hauser) Tessa Bromwich was hooded by Shelley Fenchel.
4. C.V. Starr Scholars Catherine Yourougou, Zachary Pyle, and Rachael Liebert were hooded by Trustee Florence Davis '79. (Not photographed: Holly Arujune.)
5. Irving Goldstein Scholar Kara Scheiden was hooded by Susan Goldstein.
6. KPMG Scholar James Gifford was hooded by Lawrence Pollack (LL.M. '88).
7. Cravath, Swaine & Moore LLP Scholar Victoria Portnoy was hooded by Trustee Evan Chesler '75.
8. Bickel & Brewer Latino Institute for Human Rights Scholar Maria Romani Quispe was hooded by Annalisa Miron '04.
9. Michael A. Schwind Scholar Tiantian Zhuang was hooded by Milton Schwartz '55 (LL.M. '61).
10. Bingham McCutchen Scholar Lauren Gambier (AnBryce) was hooded by Reed Auerbach.
11. Furman Scholars Martin Raphan, Jeremy Peterman, Kirti Datla, Thomas Bennett, and Oliver Board were hooded by Trustee Jay Furman '71.
12. Clifford Chance Scholar Jon Shields (AnBryce) was hooded by Craig Medwick '77.
13. Sullivan & Cromwell Public Interest Scholar Saerom Park (Root-Tilden-Kern) was hooded by Trustee Kenneth Raisler '76.
14. John D. Grad Memorial Scholar Andrew Meyer (AnBryce) with Dr. Joyce Lowinson.
15. David Owens Scholar Lu Chen was hooded by Kelly Librera.
16. Judge Charles Swinger Conley Scholars Latoya Herring and Kenneth Perry were hooded by Ellen Conley.
17. Carroll and Milton Petrie Foundation Scholars Stephanie Gamiz, Amanda Dewyer, Larissa Kravanja (AnBryce), and Joseph Tillman were hooded by Beth Lief '74.
18. Ruth L. Pulda Scholar Allison Haupt was hooded by Howard Rifkin.
19. William Randolph Hearst Foundation Scholar Gerardo Gomez Galvis (AnBryce) with Mason Granger.
20. Erich Leyens Scholar Anand Parikh was hooded by Randy Hertz.
21. Anthony Welters '77, chairman of the Law School's Board of Trustees, and Ambassador Beatrice Welters hooded the Class of 2012 AnBryce Scholars, from left: Lauren Gambier (Bingham McCutchen Scholar), Jose Medina (Carroll and Milton Petrie Foundation Scholar), Jon Shields (Clifford Chance Scholar), Rodrigo Diaz (Petrie Foundation Scholar), Gerardo Gomez Galvis (William Randolph Hearst Foundation Scholar), Andrew Meyer (John D. Grad Memorial Scholar), Larissa Kravanja (Carroll and Milton Petrie Foundation Scholar), William Scot Goins (Wachtell, Lipton, Rosen & Katz Scholar), and Lois Saldana (Kenneth and Kathryn Chenault Scholar).

Photographs by Leo Sorel

"Embrace Challenge"

Having grown up in a South Bronx housing project a few miles from the old Yankee Stadium, U.S. Supreme Court Justice Sonia Sotomayor seemed noticeably moved by the honor of delivering NYU's 180th Commencement address at Yankee Stadium on May 16. A former adjunct professor at the Law School, she also received an honorary Doctor of Laws degree.

Kenji Yoshino, Chief Justice Earl Warren Professor of Constitutional Law, introduced the justice to the enthusiastic crowd as "a self-described and proud Nuyorican" and "an early and awesome achiever." Sotomayor, however, said in her address, "Nothing in my childhood hinted to me that I would be in a position someday to stand on this field and speak to such a large crowd."

Continuing in this personal vein, Sotomayor reflected on the simultaneous feelings she was experiencing—humility, excitement, challenge, gratitude, and engagement—and drew parallels between her own life and the lives of those graduating. She also spoke of her deep affection for New York City. "Having been a part of the fabric of this city, you will always carry its energy inside you," she said. "And the city will challenge you to do big things, to accomplish as much as you can, to work at bettering the world in every way you know how."

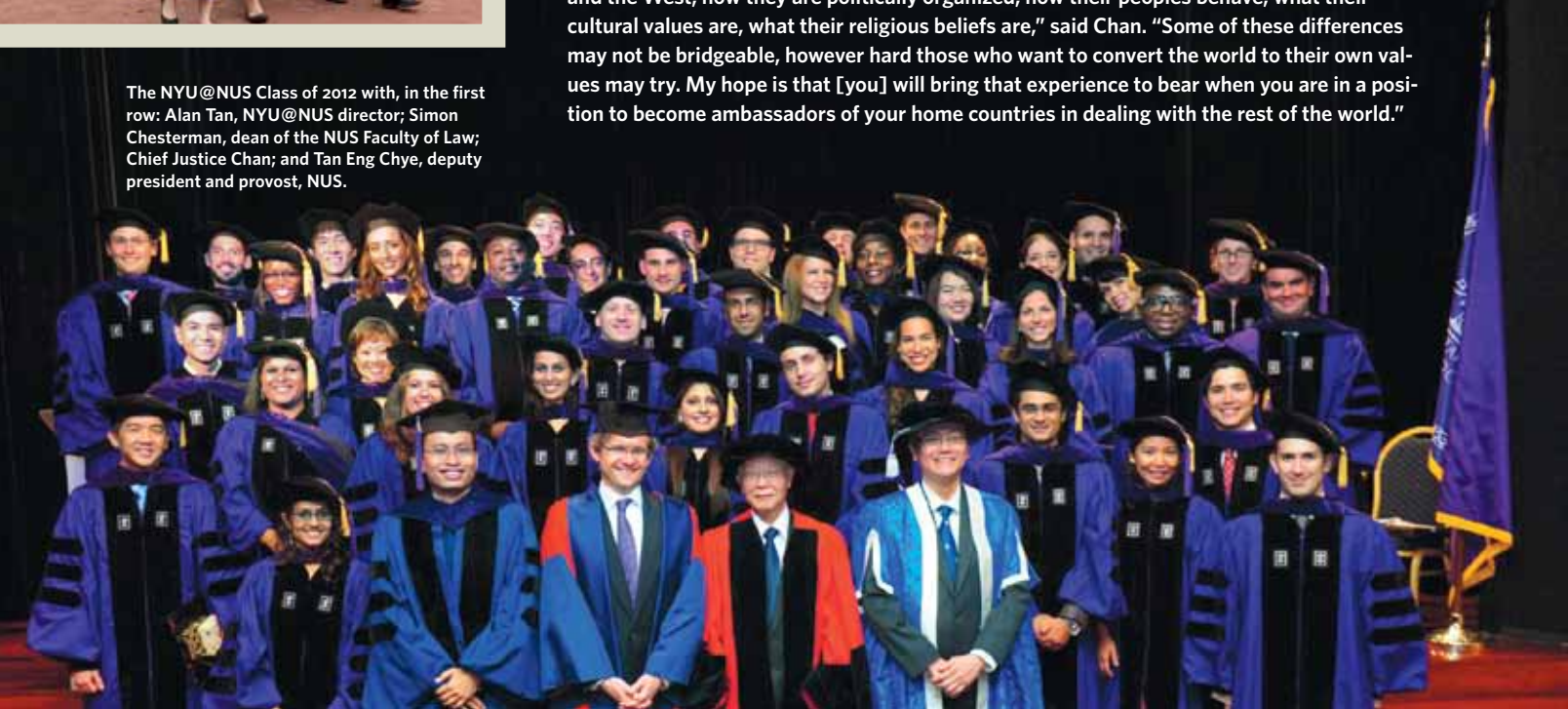
Sotomayor urged graduates to embrace challenge and the attendant fear: "Being a little frightened, as I have been taking every step in my life, including becoming a Supreme Court justice, is natural and unavoidable. But being hopeful and remaining open to the joy of a new experience can counterbalance that anxiety and help you meet each new challenge."

Her ultimate message was of service to others: "Neither your life nor the world you live in just happens. You control the quality of your lives and your communities. It is only in giving to others that you can find meaning and satisfaction in what you do." □

Ambassadors to the World

The most powerful judicial figure in the country gave the fifth class of the NYU School of Law and National University of Singapore Dual Degree Program a grand send-off during its February 27 convocation at the Asian Civilisations Museum. Chief Justice Chan Sek Keong of the Supreme Court of Singapore addressed the 44 graduands, who hail from two dozen nations, and their families. Gloria Matovu (LL.M. '12) of Uganda and Steven Dejong (LL.M. '12) of Australia spoke on behalf of their fellow classmates.

The chief justice invoked the value of interacting with students from a multiplicity of countries. "You must be aware that there are still great differences in societies in the East and the West, how they are politically organized, how their peoples behave, what their cultural values are, what their religious beliefs are," said Chan. "Some of these differences may not be bridgeable, however hard those who want to convert the world to their own values may try. My hope is that [you] will bring that experience to bear when you are in a position to become ambassadors of your home countries in dealing with the rest of the world."



The NYU@NUS Class of 2012 with, in the first row: Alan Tan, NYU@NUS director; Simon Chesterman, dean of the NUS Faculty of Law; Chief Justice Chan; and Tan Eng Chye, deputy president and provost, NUS.

Search Warrants for Electronically Stored Information

DAVID LIN '12

In August 2002, the federal government began its investigation of the Bay Area Lab Cooperative ("Balco") for allegedly distributing steroids to professional baseball players. As part of its investigation, the government applied for warrants to search Comprehensive Drug Testing (CDT) and Quest offices for the drug-testing records and specimens of 10 named major league baseball players with Balco connections. Comprehensive Drug Testing and Quest had conducted anonymous drug testing on major league baseball players in 2003 pursuant to a collective bargaining agreement between Major League Baseball and the Major League Baseball Players' Association. The warrants authorized the search of any computer equipment that might contain such information. If an on-site search was impracticable, the government was further authorized to seize either a copy of the data stored on the computer equipment or the equipment itself. In the case of a seizure, computer personnel, not the investigating agents, would segregate the data relevant to the warrant from irrelevant data. An affidavit supporting the warrants sought to justify such a broad seizure of computer records by reciting the generic hazards involved with retrieving electronically stored information: computer files can be given false names or extensions; files can be erased or hidden or encrypted; and files may not be accessible without certain software. While executing the search warrants, the government seized a copy of a computer directory containing the drug-testing results of hundreds of major league baseball players not under investigation, as well as those of other athletes with no connection to professional baseball. The government used this information to apply for search warrants to seize the specimens and records of over a hundred additional baseball players who had tested positive for steroids. CDT and the Players' Association subsequently moved for return of the seized property pursuant to Federal Rule of Criminal Procedure 41.

The Ninth Circuit ruled against the government in *United States v. Comprehensive Drug Testing*, finding that the government's conduct had disregarded the constitutional rights of athletes not named in the warrants. In its concluding thoughts, the court succinctly stated the problem with warrants for electronically stored information. Because electronic evidence "may be stored or concealed" on electronic storage media containing many other files, and since "[t]here is no way to be sure exactly what an electronic file contains without…examining its contents," government efforts to obtain some files will necessarily examine "a great many other files to exclude the possibility that the sought-after data are concealed there." Consequently, the "pressing need of law enforcement for broad authorization to examine electronic records… creates a serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant."

Of course, this problem of intermingled data, where data relevant to a warrant is mixed with irrelevant data, is not unique to warrants for electronically stored information. When executing a warrant to search a suspect's residence, the government can enter any room or open any container reasonably capable of holding an object subject to seizure, a process likely to reveal information about the suspect's personal life that is irrelevant to the investigation. If the warrant authorizes the government to seize physical documents, these documents may be intermingled with irrelevant documents in boxes or filing cabinets.

Still, warrants for electronically stored information implicate privacy interests to an unprecedented degree. Storage media continue to grow in capacity. Since the hard disk drive was introduced in 1956, the density of electronically stored information has increased by over 50-million-fold. And a single storage medium may contain personal data belonging to a number of individuals. To facilitate data sharing between their electronic devices, more and more individuals have turned to online storage services, where their data is likely to be intermingled with that of other users. As a result, a search warrant for a particular storage medium may allow the government to view a greater quantity of irrelevant data than possible in the case of a search warrant for a building or a physical container.

Courts and scholars have proposed several solutions to address the privacy concerns associated with warrants for electronically stored information. Some have suggested that warrants for searches of digital devices should be subject to the same Fourth Amendment rules as searches of physical containers. Thus, a search warrant for a storage medium or a place containing storage media should authorize the government to examine all files on that storage medium. Others have maintained that warrants for electronically stored information demand a special approach and should restrict the manner of the search's execution in order to tailor the search to the warrant's objects. Following this perspective, warrants should require the government to employ specialized personnel to segregate relevant data from irrelevant data, or should limit the government to viewing files containing certain key words. Another type of restriction would reduce the availability of the plain view doctrine, depending on the specific government officer's subjective intent or the offense under investigation.

These divergent views have been caused in part by disagreements as to how searches for electronically stored information should be conceptualized. In searches for physical documents, the process is straightforward. Government officers may look for the objects of a warrant by simply moving into a room or opening a container and observing the surroundings or contents. Searches for electronically stored information add a layer of complexity. While storage media record information by physically modifying a magnetic disk or memory chip, this physical aspect of storage media is largely hidden from government officers executing a search. Instead, data on the storage medium is accessible to a user through logical abstraction. The storage medium's file system or operating system groups portions of the physical device into files. In the process of segregating relevant data from irrelevant data on a storage medium, government officers may inspect files one-by-one or use computer forensics software to search for files containing certain key words. The physical container analogy for storage media emphasizes the physical aspect of storage media over the logical file structure.

The opinions of courts and scholars might also depend on their preferences for search recall—the fraction of relevant information obtained—and precision—the fraction of information obtained that is relevant. For example, a strong preference for recall would require searching all files on a storage medium, even if only a small number of such files were likely to be relevant, whereas a strong preference for precision would require narrowing the search to a subset of files on the storage medium (i.e., files containing certain key words), even if some relevant files were likely to be excluded by the narrowing criteria. Because the government has only limited information about the files on a storage medium prior to seeking a warrant, search protocols may increase precision at the cost of recall.

These differences are not of constitutional significance, as the Fourth Amendment's particularity requirement provides courts with the authority to incorporate search protocols in warrants for electronically stored information. The particularity requirement specifies that warrants must "particularly describ[e] the place to be searched, and the persons or things to be seized," and it is the Fourth Amendment's solution to the problem of general warrants, warrants which extend a search beyond its justifications or leave the scope of a search to the discretion of the executing government officers. Reviewing a warrant under the particularity requirement, a court may, for example, restrict a warrant to "John Doe's residence," as opposed to "John Doe's neighborhood." In addition, a court may require the warrant to include the street address or physical description of John Doe's residence instead of "any building where John Doe sleeps."

While the particularity requirement does not define "place" or "persons or things," courts have interpreted the terms to comport with how individuals organize and access information. A warrant for John Doe's neighborhood lacks particularity due to the fact that physical boundaries preclude John Doe from concealing evidence of his offenses in a neighbor's residence. Similarly, a warrant for John Doe's residence should include a street address as opposed to a physical description, unless the residence is located in a rural area where few streets exist. In contrast, John Doe's electronically stored information may be physically located on any portion of his hard disk drive or even on a distant server, ready to be accessed through a search tool like Google Desktop. As individuals have come to rely on search tools as a method of organizing and accessing electronically stored information, it is not surprising that some courts have requested search protocols in warrants for electronically stored information. Just as a residence may be described by way of a physical description or a street address, so too may a "place" on a storage medium be described with reference to a location on a magnetic disk or to a set of files containing certain key words. Like the example of street addresses in rural areas, the government may not always be capable of designing a specific search protocol. Whereas the government could have worked with Comprehensive Drug Testing and Quest to locate drug-testing results in a computer directory maintained for business purposes, the same cannot be said of an investigation of an individual's personal computer. □

DAVID LIN *graduated with a B.S. and an M.Eng. in computer science from Cornell University. Then, for three years, he worked as an advanced software engineer for Altera, a San Jose, California, maker of programmable logic devices. He became interested in legal aspects of information retrieval during his 1L year and through the following summer as he learned about the problems facing the criminal justice system in general, as well as the difficulties that courts, legislators, and government investigators have had in applying existing rules and techniques to new technological contexts. Lin gratefully acknowledges the support and guidance he received from Barry Friedman, Jacob D. Fuchsberg Professor of Law.*

Lin served as a notes editor of the NYU Law Review *and co-chair of the Asian Pacific American Law Students Association. He was named a Robert McKay Scholar for being in the top quarter of the class after four semesters. Lin was a 2L summer associate at Paul, Weiss, Rifkind, Wharton & Garrison.*

Applying Cost-Benefit Analysis to Deferred Prosecution Agreements

CHRISTINA DAHLMAN '12

A DECADE AGO, the Enron accounting scandal vividly illustrated the potential scope and consequences of high-level corporate misconduct. It also ensnared Arthur Andersen in misconduct related to Enron's fraud. When the venerable accounting firm subsequently collapsed, prosecutors and citizens alike took notice of the potentially devastating consequences for corporations subjected to criminal charges that affect employees, shareholders, and customers as well as high-level executives.

As a result, since 2003, so-called "pre-trial diversion agreements" have become a familiar tool in federal investigations of corporate wrongdoing. Indeed, these agreements—which permit corporate criminal defendants effectively to avoid being subjected to formal criminal charges—have become a near-standard practice when federal prosecutors target organization-level wrongdoing such as securities fraud, accounting fraud, or tax fraud. Major corporations including AOL, AIG, KPMG, Boeing, and Bristol-Myers Squibb have all been parties to such agreements.

There are two major types of pre-trial diversion agreements. In a deferred prosecution agreement (DPA), the prosecutor files criminal charges against a company but postpones prosecution provided that the corporation agrees to comply with the substantive terms of the agreement. In a non-prosecution agreement (NPA), the prosecutor agrees to abstain altogether from filing charges against a corporation that remains compliant with the terms of the agreement. By presenting a way for corporations to avoid indictment—and all its collateral consequences—prosecutors leverage these agreements to extract substantial promises of sweeping internal reforms of corporate governance and regulatory compliance practices.

In general, DPAs and NPAs require both compliance with the government's investigation and specific internal reforms. Firms generally accept responsibility for their wrongdoing and agree to undertake remediation. The corporation frequently pays substantial monetary restitution instead of, or in addition to, criminal penalties.

But these agreements also often contain line items that impose specific requirements and restrictions on the substantive conduct of the corporation. In these cases, pre-trial diversion agreements do more than simply penalize or prohibit misconduct; they may go further to impose affirmative changes in business practices and governance. When DPAs and NPAs directly affect the future conduct of the corporation in this way, they also indirectly signal to other private entities the kind of conduct that federal prosecutors will expect, tolerate, or target. In this way, pre-trial diversion agreements are not just a species of informal adjudication: they may be fairly characterized as regulation, comparable in effect to informal rulemaking promulgated by the SEC, FTC, or other federal agencies.

One problematic scenario is when corporations accept responsibility for actions that had never previously been found illegal or improper by any court or regulatory body. In this way, stipulated findings of fact may take on the character of new regulations, promulgated without the benefit of notice-and-comment rulemaking or any of the other protective procedures set out by the Administrative Procedure Act to ensure reasoned regulatory decision-making.

For example, in September 2007, five of the leading fabricators of hip and knee surgical implants each entered into a DPA or NPA with the U.S. Attorney's Office for the District of New Jersey to avoid being charged with violations of federal anti-kickback law. Each company undertook a series of corporate reforms and submitted to ongoing monitoring by a third party, appointed by the prosecutor.

The drug and device reimbursement regulations in question are some of the most complicated federal regulations in existence. Prosecutors had filed criminal complaints alleging that the five companies violated federal laws by entering certain contracts with outside medical consultants, even though the applicability of fraud statutes to such conduct had never before been clear. In this regulatory landscape, which had a history of infrequent and uneven enforcement by the FDA and

other agencies with jurisdiction over the area, prosecutors entering the field may have only muddied the waters, adding to the confusion and making it more difficult for the regulated entities to comply.

A perhaps less egregious scenario, but a more common one, is when prosecutors leverage pre-trial diversion agreements to intervene in matters of corporate governance. For example, Bristol-Myers Squibb's DPA with New Jersey's U.S. Attorney's Office required that the company bifurcate the roles of chairman of the board and chief executive officer, and mandated the appointment of a new non-executive director who would be subject to the approval of the federal prosecutor.

In addition, many DPAs and NPAs require the appointment of a corporate monitor, tasked with monitoring the firm's compliance activities and serving as an emissary between the corporation and the prosecutor's office. Monitors may become intimately involved in discussions related to the financial and legal issues facing the corporation, to the point where their input may influence corporate decision-making and potentially affect shareholder returns. The problem is that monitors are frequently required to report simultaneously to the prosecutor's office. In this manner, the appointment of an "independent" corporate monitor may be tantamount to permitting DOJ to participate in or oversee the governance of the corporation.

This kind of regulation-via-prosecution is not per se impermissible; but the mechanisms by which it is effectuated are potentially problematic. The use of DPAs and NPAs effectively constitutes a regulatory regime—one that operates without any of the procedural protections associated with most other policy-making activity undertaken by federal agencies. As Rachel Barkow and Anthony Barkow have pointed out, there is no reason why this regulatory regime should not be subjected to a rigorous assessment of its costs and benefits, just as any other regulatory system would be. I argue that this cost-benefit analysis should take place at the level of the individual line-item terms of NPAs and DPAs.

The most common justification for the use of cost-benefit analysis is that it promotes efficiency: imposing a requirement that costs be weighed against benefits can help promote rational decision-making based on economic realities and ensure that scarce prosecutorial resources are not being squandered.

In addition, a forthright assessment of anticipated costs and benefits—to all the various parties involved, not just government and corporations but also line prosecutors, individual shareholders, and employees—should help ensure that DPAs and NPAs are meaningful without being burdensome.

Cost-benefit analysis also exerts a standardizing effect on discretionary decisions. When the costs and benefits weighed in choosing one regulation over another are made explicit, the public—and the courts—are made aware of the basis for the agency's decision, enabling better comprehension and more searching review. Requiring prosecutors, like agencies, to justify their regulatory choices could, over time, help build a body of consistent regulatory precedent on which regulators and regulated entities alike might rely.

For all these reasons, cost-benefit analysis is broadly accepted as a tool for rational decision-making by the civil executive agencies. In addition, in the civil sphere, the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget performs an even more rigorous cost-benefit analysis for a small subset of the rules issued by federal agencies. Executive Order 12,866 provides for OIRA review of any "significant regulatory actions" that have either a notable monetary impact ($100 million or more annually) or any broad applicability that raises novel issues, creates a potential inconsistency, or materially alters existing rights, entitlements, or benefits.

Unlike civil administrative agencies, prosecutors are by and large insulated from checks on their behavior. Moreover, rather than functioning as a unified agency, prosecutors in different U.S. Attorneys' Offices and units within Main Justice promulgate pre-trial diversion agreements in an ad hoc fashion. As a result, the terms of DPAs and NPAs are not constrained by any institutional pressures to uphold consistency and uniformity, the way that enforcement decisions by a civil regulatory agency might be.

Who should conduct this cost-benefit analysis of the substantive regulatory provisions in DPAs and NPAs between corporations and federal prosecutors?

The most obvious candidate is OIRA, which has the established personnel, resources, and experience. However, the kind of analysis routinely conducted by OIRA may be too rigorous to be useful in this setting. In the area of corporate conduct, it may be unnecessary to implement a full-blown cost-benefit analysis of each agreement, whose measures may be difficult to monetize.

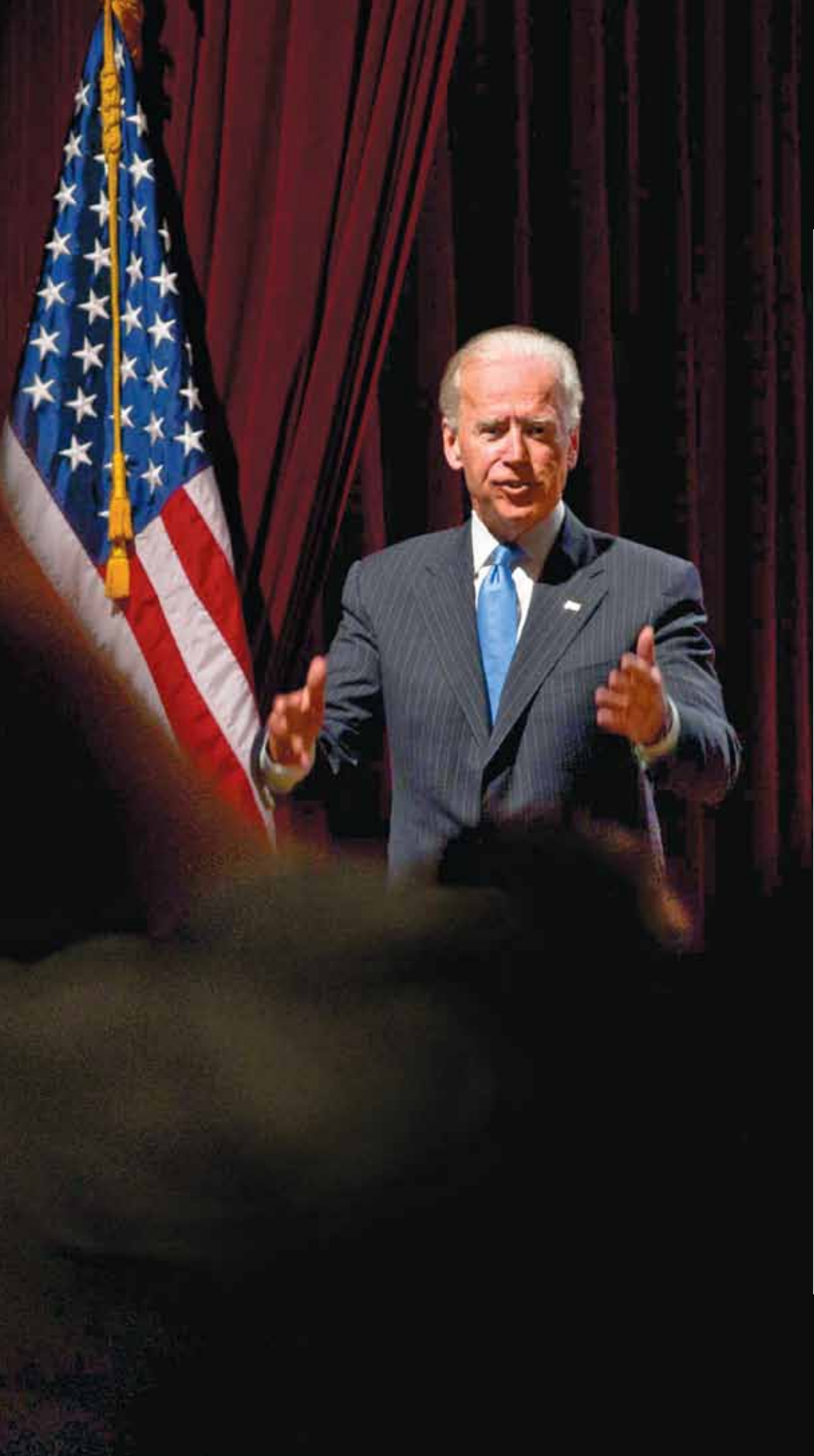
A more appropriate entity might be designated within the Department of Justice. A central authority tasked with conducting a less-formal—non-monetized—kind of cost-benefit analysis might be a sufficient force to prevent abuses of prosecutorial discretion without treading on local determinations of the appropriate balance among deterrence, punishment, and rehabilitation. While DOJ oversight means that regulatory review would be conducted without the benefit of the kind of economic training that is in play at OIRA, cost-benefit analysis for regulation by prosecution could be targeted less at monetization than at a uniform determination of proportionality. This approach could also facilitate the creation of a central repository for such agreements that could be periodically revisited, and subjected to additional review for uniformity and efficacy.

As an alternative to fully centralized review, a collaborative regulatory framework could involve exchange between central DOJ and the local U.S. Attorneys' Offices, or require individual prosecutors to seek authorization from Main Justice before proceeding with a DPA or NPA. If the DOJ provided clearer, more explicit standards for what kind of regulatory terms are appropriate for inclusion in pre-trial diversion agreements, individual prosecutors' offices could ensure compliance.

Any of these proposed regulatory frameworks could form the basis for a rational cost-benefit approach to implementing pre-trial diversion agreements in a more consistent manner, and would bring these prosecutorial decisions in line with the kind of oversight that is provided for substantive regulations promulgated by the more conventional administrative agencies. □

CHRISTINA DAHLMAN *became interested in the regulatory effects of DPAs and NPAs while serving as a student fellow at the Center on the Administration of Criminal Law under the supervision of faculty director Rachel Barkow, Segal Family Professor of Regulatory Law and Policy, and then-executive director Anthony Barkow. This excerpt is taken from a work-in-progress. Dahlman also was an articles editor of the* NYU Journal of Legislation and Public Policy. *She graduated from Harvard College with an A.B. in philosophy.*

Dahlman is currently working as an associate in the Washington, D.C., office of Gibson, Dunn & Crutcher, where she was a 2L summer associate.



Around the Law School

Vice President Joseph Biden stumped for the Obama/Biden 2012 ticket before a University-wide audience in Tishman Auditorium. Drawing on his foreign policy expertise, he contrasted Barack Obama's and Mitt Romney's approaches to Afghanistan, Syria, and Iran, and laid out future plans.


Lippman


Levine


Katzmann


Barnett

A Moral Obligation

Through his three-year, all-out effort to expand legal services for poor New Yorkers, Jonathan Lippman '68, chief judge of the State of New York, has gained a national profile as a legal crusader. Last October, he spoke at length about the legal profession's obligations to society in a passionate address at the NYU School of Law sponsored by the *Journal of Legislation and Public Policy* and the Arthur Garfield Hays Civil Liberties Program.

With the most recent state budget cutting $170 million from the judiciary's portion, funding for civil legal services is on the line just when it's needed most, Lippman said in his address: "When families can't pay their mortgages or rent, when people default on credit card payments or child support obligations, when frustrations over household finances boil over into domestic violence, it all ends up as a matter on a court docket. State courts are truly the emergency room for the ills of society, and our caseloads are proof of that fact."

Federal funding to the Legal Services Corporation, the nonprofit corporation established by Congress to pay civil legal service providers nationwide, is being threatened. At the state level, revenues from the New York State Interest on Lawyer Account Fund (IOLA), which generates interest used to fund civil legal services from client money that attorneys place in escrow accounts, have plunged from $32 million in 2008 to $6.5 million in 2011.

While the court system has opened more offices for self-representation help and expanded pro bono programs, Lippman argued that such efforts were insufficient. "It is simply not enough," he said, "to rely on the wonderful good works of the bar and on a patchwork of unreliable revenue streams." Lippman argued that the money for civil legal services should come from the state's general fund to ensure the stability of the system, rather than relying on uncertain sources like IOLA. "Access to justice is not a luxury, affordable only in good times," he said. "It is a bedrock principle in a society based on the rule of law and transcends the vagaries of our economy."

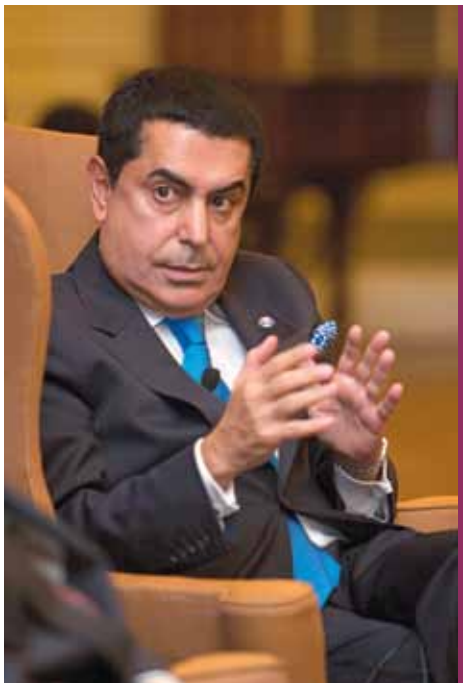
In May 2010, Lippman created the Task Force to Expand Access to Civil Legal Services in New York, appointing as chair Helaine Barnett '64, former president of the Legal Services Corporation. The task force has worked to measure the need for legal services and presented efficiency proposals to increase the numbers of people receiving legal help.

During a panel discussion after Lippman's keynote speech, Barnett pointed out that although much more needs to be done, New York has the highest dollar amount of state funding for civil legal services of any state, thanks to Lippman's efforts. She was joined by Alan Levine '73, a partner at Cooley and former board chair of the Legal Aid Society, and Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit, an adjunct professor at NYU Law. Katzmann has tapped a group of 50 lawyers to investigate the lack of quality representation in federal immigration cases. With Dean Richard Revesz, he is working to create an immigration representation fellowship program at NYU Law.

Lippman, recently designated as one of the "power players of New York" by the *New York Times*, attracted national headlines in May when he announced that, beginning in 2013, each applicant to the New York State bar must complete 50 hours of pro bono legal service before being admitted.

The unprecedented state bar requirement caused a stir in the legal community. While a *Times* editorial called it "a worthy step in the right direction" that could well prompt other states to follow New York's lead, other voices were more critical. On her blog, Susan Cartier Liebel, the founder of Solo Practice University, pulled no punches: "This is indentured servitude."

Lippman then created a committee, co-chaired by Levine, to recommend how best to implement the new requirement. "If pro bono is a core value of our profession… [it] ought to be instilled from the start," he said in announcing the proposal. "This will not only affect the way we as lawyers perceive ourselves—it will also shape the way we are perceived in the wider community and the society in which we play such an important role." □ *Atticus Gannaway*



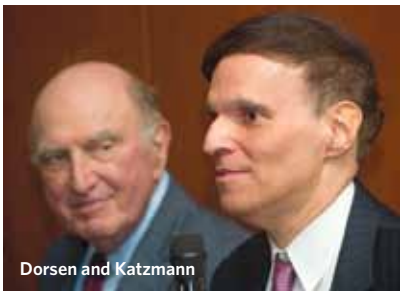
Speaking Up

In February, U.N. General Assembly President Nassir Abdulaziz Al-Nasser spoke at Vanderbilt Hall about the challenge of achieving consensus among 193 nations. A day earlier, Al-Nasser had requested a briefing by the U.N. High Commissioner for Human Rights about violence against Syrian civilians; Syria protested this as a procedural violation. "We have to do something," Al-Nasser told the audience, admitting that his actions "could cause trouble." Three days later the General Assembly approved a resolution calling for the resignation of Syrian President Bashar al-Assad.

For the Contextualist Approach

Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit delivered the 43rd James Madison Lecture last October. Katzmann, who has taught an administrative law seminar at NYU Law for a number of years, addressed the judicial interpretation of federal statutes.

A substantial majority of the Supreme Court's caseload, he said, involves statutory construction: "In the best of all possible worlds, the language of the statute is plain on its face, pristine, brimming with clarity. Then the job of the judge is generally straightforward.... But when, as so often happens, the statute is ambiguous or vague or otherwise imprecise, then the interpretive task is not so obvious."


Dorsen and Katzmann

In his lecture, introduced by Norman Dorsen, Frederick I. and Grace A. Stokes Professor of Law, Katzmann traced the evolution of purpose- and textualist-oriented approaches to statutory interpretation, considered lawmaking from the perspectives of Congress and federal agencies, and examined how the legislative process has evolved, including the ways lawmakers signal legislative meaning to the agencies charged with interpreting and executing the law. "Although in a formal sense the legislative process ends with the legislative enactment of a law, in their interpretive role courts inescapably become part of that process," he said. "For the judiciary, understanding that process is essential if it is to construe statutes in a manner that is faithful to legislative meaning."

Coming down on the side of judges' using background materials and other sources to discern legislative intent, Katzmann said, "Depriving judges of context risks having courts interpret the legislation in ways that legislators did not intend. The danger, as Justice Breyer powerfully observed, is that the court will divorce law from life."

The 43rd James Madison lecture was the first since Judge M. Blane Michael '68 of the U.S. Court of Appeals for the Fourth Circuit passed away on March 25, 2011, at age 68. Michael gave the 2009 Madison Lecture, in which he examined the appropriate application of the Fourth Amendment to privacy protection for personal electronic data. Appointed by President Clinton in 1993, Michael was known for fostering collegiality with his more conservative fellow judges. His career included stints in politics as counsel to Governor John D. Rockefeller IV of West Virginia and as campaign manager for both Rockefeller and Robert Byrd in five separate runs for the U.S. Senate. □

Reaching Consensus Among Judges

Judge Diane Wood of the U.S. Court of Appeals for the Seventh Circuit delivered the 2011–12 Brennan Center Jorde Symposium Lecture at NYU Law on April 16. The annual event was created in 1996 to feature top scholarly discourse on issues central to the legacy of Supreme Court Justice William J. Brennan Jr. It is named in honor of its major benefactor, Brennan Center trustee Thomas M. Jorde, a former Brennan clerk and professor emeritus at the University of California, Berkeley, School of Law.

In her lecture, "When to Hold, When to Fold, and When to Reshuffle: The Art of Decision Making on a Multi-Member Court," Wood examined the factors a judge must consider before writing a separate opinion, whether it is a concurrence or a dissent. Senior Circuit Judge Harry Edwards of the U.S. Court of Appeals for the District of Columbia Circuit and Jacob D. Fuchsberg Professor of Law Barry Friedman, both NYU Law faculty members, commented. □

Seeing Trouble

Chief Justice Stuart Rabner of the New Jersey Supreme Court raised troubling questions about the reliability of eyewitness identification—with vast implications for the entire justice system—when he delivered the 18th annual Justice William J. Brennan Jr. Lecture on State Courts and Social Justice in February.

New York State Chief Judge Jonathan Lippman '68 introduced Rabner, describing as "groundbreaking" his August 2011 decision in *State v. Henderson* that state courts should change the ways eyewitness identification is evaluated at trial.

"It's no longer accepted that memory functions like a video recording," said Rabner, "where all one need do is press a button and a witness can recount with 100 percent precision what it is that he or she observed at the time of the crime.... Instead, social scientists have demonstrated that there are many factors which affect and possibly distort memory."

After reviewing more than 200 scientific studies as well as testimony from leading eyewitness identification experts, a special master appointed in the *Henderson* case reported to the New Jersey Supreme Court that eyewitness misidentifications are the leading cause of wrongful convictions nationwide.

Currently, judges can only admit or suppress identification evidence, Rabner said, but the *Henderson* ruling allows for more flexibility, such as assessing admissibility of evidence pretrial to give defendants a chance for a hearing when an eyewitness may be compromised.

"We continue to wrestle with the issue of eyewitness identification in the 21st century because of the vital role that it plays in our system of justice," said Rabner. "It's a routine part of so many criminal trials, and it bears directly on guilt or innocence, which means that the very integrity of the criminal justice system and our ability to conduct fair trials as a society is at stake."

Women in the Red

On the sixth annual Equal Pay Day NYC on April 16, U.S. Senator Kirsten Gillibrand of New York led women's advocates and local politicians in calling for an end to the wage gap. Stephanie Bazell '13 of NYU Law Women, an event sponsor, emphasized why women need greater representation among law firm partners and law school administrators.


Bazell and Gillibrand

Responding to questions from PBS journalist Maria Hinojosa, Gillibrand underscored that equal pay is an issue that affects all Americans because most families have two wage earners. The senator championed the Lilly Ledbetter Fair Pay Act, a 2009 law that allows employees more time to file lawsuits alleging pay discrimination, and shared her hope to pass the Paycheck Fairness Act, legislation aimed at addressing pay disparity.

Accessorizing her suit with a scarlet scarf—to show that women's salaries are still "in the red"—Gillibrand encouraged female law students to know their worth and demand equal pay, whether that means the same salary or the same billable rate as male colleagues. She offered a litany of sobering statistics: The wage gap amounts to between $400,000 and $1 million in lost earnings for each woman over her lifetime. Seven percent of women negotiate the salary for their first job, while 57 percent of men do. And today women make only 78 cents for every dollar earned by men. Women of color have it worse: African American women make 72 cents and Latinas make 59 cents for each man's dollar. Harking to a time when American women rose up to serve their country, Gillibrand urged, "We need a Rosie the Riveter call to action."

Racism Since the Civil Rights Act

At the 16th Annual Derrick Bell Lecture on Race in American Society, held just one month after Bell passed away, Ian Haney López argued that racism survived the passage of the 1964 Civil Rights Act and continues to be entrenched in the politics, courts, and culture of the United States.

López, John H. Boalt Professor of Law at the University of California, Berkeley, School of Law, focused on electoral politics and the Southern strategy, which López said is "(a) Republicans can win if they can break the New Deal coalition that put together white members of the working class, Northeast elites, and blacks, and (b) they can do that through coded racial appeals to the Republicans."

Nixon won the White House with this strategy, López said, emphasizing coded issues such as neighborhood stability, forced busing, welfare, and law and order. The Southern strategy "is now just the basis on which Republicans and Democrats compete for the presidency."

The Southern strategy is also influencing the selection of conservative judges, added López, leading courts to rule against equality laws that explicitly address matters of race. Since the late 1980s, for example, in every affirmative action case to come before the Supreme Court but one, the Court has deemed such laws unconstitutional. The implication, López claimed, is that the government cannot consider race at all with respect to policymaking.

López acknowledged Bell's foresight in writing about these issues nearly two decades ago. "It has taken me a long, long time to recognize the fundamental genius of Derrick Bell," he said. "It's when you think about what's happening to all of us in this society that Derrick Bell seems prescient in 1991, when he writes about the permanence of racism. Because the great promise of the Civil Rights movement has slid into irrelevance. It was a temporary peak of progress. But racism reconsolidated in a way that ultimately did maintain the racial status quo and in fact made everyone worse off in our society." □

Teaching Tolerance

The 18th annual Rose Sheinberg Lecture last October featured Debbie Almontaser, founding principal of the nation's first public school with a focus on the study of Arab language and culture. In "Arab Culture and Islam: Challenges in Diversity Education," Almontaser emphasized the societal importance of challenging bigotry within the school system.

Donna Nevel, coordinator of the Participatory Action Research Center for Education Organizing, introduced Almontaser, saying, "She is committed to challenging our two-tiered system of education that privileges some at the expense of others, and to ensuring that all our children receive the education they deserve."

Almontaser has firsthand experience with bigotry and its insidious effects. She founded the Khalil Gibran International Academy (KGIA) in Brooklyn, which, she says, was cast in the press as an extremist organization. Nevel called the controversy "a vicious smear campaign" that forced Almontaser to step down as principal. She currently chairs the Muslim Consultative Network.

Attributing the incendiary reaction against KGIA to a growing Islamophobia, Almontaser pointed to a number of incidents in 2010, including the protests against the building of a Muslim center near the World Trade Center. "We must make very clear that Muslim and Arab American identities do not contradict the founding values of the United States. One can be fully Muslim and fully American simultaneously without compromising either identity," Almontaser said.

She suggested a number of ways that schools might combat Islamophobia, including: "hire counselors who understand the diverse needs of Muslim American students; establish academic centers that will specialize in integration; and hire Muslim American chaplains in large universities." The ultimate goal, Almontaser said, is for schools to teach children to become "empowered, independent thinkers who are able to work with cultures beyond their own." □


Nevel and Almontaser

A Historic Error Corrected

In May 2011, when Neal Katyal was acting U.S. solicitor general, he issued a confession of error for two 70-year-old Supreme Court cases, *Hirabayashi v. U.S.* and *Korematsu v. U.S.*

Now Paul and Patricia Saunders Professor of National Security Law at Georgetown University Law Center, Katyal delivered the 13th annual Korematsu Lecture, "Gordon Hirabayashi and Fred Korematsu: The Solicitor General's Error." He asserted that then–Solicitor General Charles Fahy "acted in a way that was not with full candor to the Court.... It's a cautionary note about what the bounds of respectable advocacy are."

Following Franklin Roosevelt's February 1942 Executive Order 9066, U.S. Army General John DeWitt imposed a curfew for Japanese Americans on the Pacific coast. He cited the possibility of enemy invasion aided by residents of Japanese ancestry, which led to mass relocation and internment. Hirabayashi and Korematsu each defied the restrictions, and their cases went to the Supreme Court.

Two attorneys in the Office of the Solicitor General raised strong objections to Fahy. Edward Ennis, director of the Alien Enemy Control Unit, told him that DeWitt's orders were potentially unconstitutional and that the Office of Naval Intelligence's Ringle Report contradicted the Army's assertions: "[W]e should consider very carefully whether we do not have a duty to advise the Court of the...Ringle memorandum and...the view of the Office of Naval Intelligence.... [A]ny other course of conduct might approximate the suppression of evidence." Fahy ignored the warning and used the Army's reasoning in his brief to the Supreme Court, which unanimously upheld Hirabayashi's conviction.

Then John Burling joined Ennis in voicing dissent regarding Korematsu. The two argued in a memo that "it is highly unfair to this racial minority that these lies... go uncorrected." But Fahy, when questioned in court, responded untruthfully that no one in the government had contradicted DeWitt's threat assessment. Korematsu's conviction was upheld.

Praising Ennis and Burling, Katyal also expressed sympathy for the Court: "In matters of national security, intelligence, foreign affairs...they have to rely on what the government says, and the government has to have absolute candor." □

Obstacles in Civil Rights Now

Presenting the Bickel & Brewer Latino Institute for Human Rights' annual Latinos and the Law Lecture, David Hinojosa, counsel for the Southwest Regional Office of the Mexican American Legal Defense and Educational Fund (MALDEF), described hurdles in winning *Vicente v. Barnett*, in which MALDEF represented 16 immigrants who alleged that they had been assaulted by a vigilante rancher at the Mexico-Arizona border. Finding jury members for the trial was not easy, Hinojosa said. When asked if undocumented immigrants have any rights in U.S. courts, most of the potential jury members answered that they did not. Ultimately, however, the jury found in favor of the plaintiffs for their tort claims in 2009, and $73,000 in damages was awarded to the women in the group. The judgment withstood two appeals from the defendants.

Hinojosa also recounted *Santamaria v. Dallas Independent School District*, a class action suit launched in 2006 on behalf of Latinos who alleged that a school had illegally used its ESL program to segregate students by race, regardless of their language abilities. "You can't segregate someone just because they're not born in this country," Hinojosa said. "The parents I was with didn't understand much English, but they understood that."

2012 Election Battleground?

Former Planned Parenthood president Faye Wattleton; MergerWatch director Lois Uttley; conservative scholar Christina Hoff Sommers; and feminist blogger Jill Filipovic '08 debated "Sex at the Polls: Women's Issues for 2012." Sommers questioned the very premise: "The issues that concern women in the upcoming election are identical to the issues that concern men," she argued, citing the economy and healthcare. Uttley decried health insurers' denial of coverage that is especially onerous on women for such "pre-existing conditions" as having had a C-section delivery or having been raped. And Wattleton fought Sommers's charges of the "appalling disregard" for the majority of American women who believe abortion is morally wrong: "Most of us really do understand that people struggle with this decision. The issue is whether the government gets to make that decision for the woman."


Uttley


Sommers


Wattleton


Filipovic

Trayvon Martin and *The New Jim Crow*

THE SHOOTING of unarmed teenager Trayvon Martin revealed the pervasive racism in the U.S., said Michelle Alexander, author of *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. Delivering a keynote address at the Center on the Administration of Criminal Law's New Frontiers in Race and Criminal Justice conference, Alexander drew links between Martin, the cycle of incarceration, and earlier forms of racial control in the U.S.

By demonizing George Zimmerman, the man who shot Martin, we are missing the bigger picture, Alexander said. She argued that the U.S. justice system has been infected with "a Zimmerman-like mindset" for centuries—endemic racism she linked to the war on drugs, the prison-building boom, and the enduring view of black men as problems. "Zimmerman's mindset has become normal," said Alexander, "like separate water fountains."

To end the cycle of incarceration and racial bias that Alexander sees as so pervasive in the criminal justice system, she said, "Nothing short of a major social movement will do." □

An Irony-Clad Case

The landmark case *Lawrence v. Texas* famously overturned anti-sodomy laws in 2003, but the actual facts were surprisingly hidden. Only after meticulous research and interviews with all of the parties did Dale Carpenter, Earl R. Larson Professor of Civil Rights and Civil Liberties Law at the University of Minnesota Law School, discover that the sodomy charges were likely trumped up. OUTLaw invited Carpenter to discuss his acclaimed book *Flagrant Conduct: The Story of Lawrence v. Texas*. "Sodomy laws were never really about prohibiting specific behaviors," said Carpenter. "They were about making an entire class of people beyond the law. It's somehow fitting that sodomy laws are undone in a case in which there very likely was no sodomy." □


Jeffries and Frank Guarini '50 (LL.M. '55)

A More Perfect Union

A WEEK AFTER announcing his candidacy for the U.S. House of Representatives, New York State Assemblyman Hakeem Jeffries '97 detailed his legislative priorities in the January Guarini Lecture, part of the Leaders in Public Interest Series.

Now in his fifth year in the state legislature, Jeffries decried the prison industrial complex, arguing that "an entire economy has grown up around the notion that when you get older...you can find a job as a correctional officer in a prison.... These facilities had become part and parcel with the economic survival of certain communities."

He also took aim at the New York City Police Department's stop-and-frisk practice, a program under which hundreds of thousands of individuals are stopped, questioned, frisked, and searched every year. Almost 90 percent of those stopped, most of whom are black or Latino, are never charged, Jeffries said, yet the NYPD had put the names and personal information of more than a million in an electronic database. Jeffries sponsored a successful bill to shut the database down.

Arrests in New York City for the possession of small quantities of marijuana—even though a 1977 law had downgraded marijuana possession from a misdemeanor to a violation if the substance was not in plain view—remain the highest in the nation, due to the stop-and-frisk practice. Although studies show that whites and minorities use marijuana roughly equally, 85 percent of arrests are of minorities. "It can't be criminal activity for one group of people," Jeffries said, "and socially acceptable behavior for others."

The assemblyman concluded by asking, "How do we create a more perfect union? I'm hopeful that through our reforms in the criminal justice system, we've taken a few steps forward in that regard, and I'm looking forward to continuing the fight in this area and beyond." □

Factory (Farm) Recall

Declaring a crisis in American food culture due to an alleged "environmental and public health scourge," the Student Animal Legal Defense Fund and the Environmental Law Society hosted a panel discussion on concentrated animal feeding operations, known as CAFOs, last October. Panelists included *New York Times* columnist Mark Bittman (pictured at right), Nebraska farmer Kevin Fulton, Natural Resources Defense Council litigator Jen Sorenson, and Humane Society attorney Jon Lovvorn.

Privacy Law and the FTC

DESCRIBING HER CAREER PATH from the Vermont attorney general's office to the Federal Trade Commission, Julie Brill '85 reflected on the privilege of influencing policy that will affect future generations when she gave the 15th annual Attorney General Robert Abrams Public Service Lecture last September.

As an FTC commissioner—working with her classmate and FTC Chairman Jon Leibowitz '84—Brill has tackled issues of consumer privacy, financial fraud against consumers, and ensuring adequate high-tech and health-care industry competition. But she places particular emphasis on privacy and data security in the Internet age.

"Just as technology is extending our reach to the limits of our imagination," she said, "many of those providing us with these advances are reaching back, harvesting and trading information about us.... If all the data collected online were just to sell movie tickets or shoes, I wouldn't make it the centerpiece of my talk to you today. But what about the data brokers that market lists of elderly patients who suffer from Alzheimer's disease and other maladies as 'the perfect prospects for holistic remedies, financial services, subscriptions, and insurance'?" Brill also cited firms that troll social networking platforms and search histories looking for red-flag data to report to potential employers contemplating a hire, banks considering loan applications, and insurance companies setting coverage rates. Another problem, she said, is the possibility of unintended security breaches exposing consumers' private data.

Citing as a legal "mentor" Louis Brandeis, who was instrumental in the FTC's founding, Brill said, "I feel fortunate to have joined the FTC just as the agency is grappling with revising Brandeis's law of privacy in light of the new Internet age. Interestingly, Brandeis's own engagement with privacy issues was founded on his concern about modernizing the law to address technologies that were new in his day." One of those technologies? The snapshot camera. □

The End of "Don't Ask, Don't Tell"

NYU LAW celebrated the repeal of the military's "don't ask, don't tell" (DADT) policy last October. "Progress of this magnitude should be publicly affirmed," Dean Richard Revesz said in a memo to the Law School announcing plans for a DADT panel discussion.


Rosenkranz


Yoshino

Moderator Kenji Yoshino, Chief Justice Earl Warren Professor of Constitutional Law, asked panelists to walk through the history of the military's policy toward gays, and in particular of the battle against DADT. Joshua Rosenkranz, partner and head of the Supreme Court and appellate litigation practice at Orrick, Herrington & Sutcliffe, who was also the founding president of the Law School's Brennan Center for Justice, noted that NYU Law "in a very real way was ground zero for a particular front of this war against don't ask, don't tell." NYU Law was among the first of 26 law schools that signed up seeking to overturn the Solomon Amendment, which denied federal funding to universities if they failed to provide equal access for military recruiters. While that effort, spearheaded by Rosenkranz and the Brennan Center, ultimately failed, Yoshino said it was part of the "multidimensional advocacy"—acting in all three branches of government at once—that ultimately led to the repeal of DADT.

The other panelists included Brenda Fulton, co-founder of Knights Out, an organization of LGBT West Point graduates and allies; Jonathan Lee, special assistant to the Secretary of Defense; and Emily Sussman, then-government affairs co-director of the Servicemembers Legal Defense Network. Yoshino ended the event with a personal admonition not to be complacent with this victory: "We're on the cusp of actually getting positive rights, not just to serve our country, but also to marry, and so this is another step along the road to full equality."

Gotham's D.A.

The Manhattan district attorney's office is unlike any other in the country. It handles about 100,000 new cases a year, more than the U.S. Department of Justice does. In a February speech that was part of the "Conversations on Urban Crime," series hosted by NYU Law's Center on the Administration of Criminal Law, Manhattan District Attorney Cyrus Vance Jr. focused on the challenges he faces running a 21st-century prosecutor's office.

Vance described a number of initiatives he started to address these modern challenges, such as the Crime Strategies Unit, whose mission is to centralize and analyze the vast amount of data collected by the hundreds of individuals and departments of the D.A.'s office, and implement intelligence-driven prosecution strategies to target priority offenders. This effort, Vance said, had recently led to the successful dismantling of one of Harlem's most violent gangs. He also created a Forensic Sciences Cold Case Unit, which made the national news by reinvestigating the 33-year disappearance of Etan Patz, and a Cybercrime and Identity Theft Bureau. In addition, the Manhattan D.A.'s office coordinates with national and foreign law enforcement agencies on critical counterterrorism issues, and, because a substantial portion of the financing for global trade involves institutions in New York, it plays a major role in efforts to monitor funding of terrorism and weapons proliferation.

Vance emphasized that the aim of his office is not just convictions, but also justice. To that end, he created the Conviction Integrity Program, which has developed training programs and checklists to "minimize the risk of wrongful charging and conviction," and evaluates post-conviction claims of innocence. Rachel Barkow, Segal Family Professor of Regulatory Law and Policy and faculty director of the Center on the Administration of Criminal Law, has been a member of the CIP advisory panel since 2010. □

The Science of Sharing

Elinor Ostrom, a Nobel laureate in economics who passed away this June at the age of 78, delivered the keynote address at the Engelberg Center on Innovation Law and Policy's conference last September. She was a leading scholar of common-pool resource management of depletable systems such as water sources, fishing grounds, and the atmosphere. Professor Katherine Strandburg, Engelberg Center co-director, explained in her introduction that the conference was a chance to apply Ostrom's findings to cultural common resources such as ideas, inventions, and creative works.

In her lecture, "The Role of Culture in Solving Social Dilemmas," Ostrom cited Garrett Hardin's seminal 1968 article "The Tragedy of the Commons," which argued that a population sharing a common resource will deplete it because each individual is self-interested, unless the resource is privatized or its use controlled by the government. Not so, Ostrom said, asserting that her years of research showed how all arrangements—whether government-controlled, privatized, or owned by a community—work in some places but not in others. The success or failure of a specific approach hinges on the match of the specific institutional arrangement, local culture, and particular problems involved, as well as how the approach is implemented.

Ostrom addressed the slippery question of how communities develop effective rules for governing their commons, and the pluses and minuses of different systems. Ultimately, she said, policies for common resources should be considered experiments within complex systems: "We've tried to get everything as simple as we can when we analyze it, and the world ain't like that. Trying to find the best set of rules... there isn't one best set. We need to move beyond some simple panacea." In other words, embrace complexity. □

Friedman

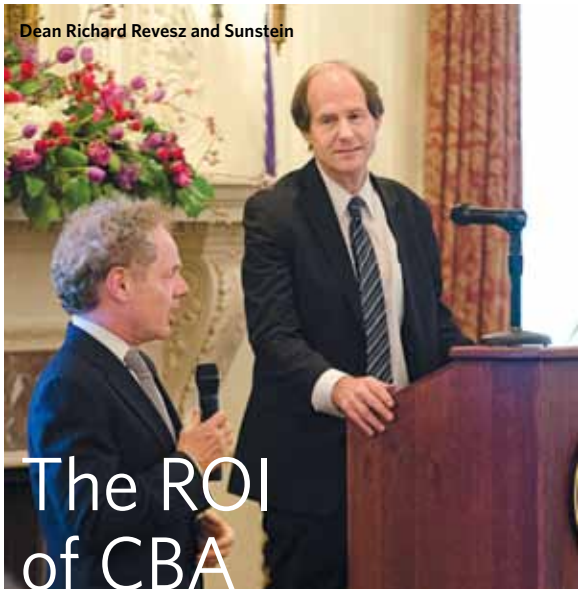
For Now, No GPS Under Your Car

The NYU/Princeton Conference on Mobile and Location Privacy in April brought policy and technology experts to campus to explore privacy issues arising from the growth of mobile and location technologies.

Edward Felten, Federal Trade Commission chief technologist, gave the keynote address. The daylong conference included a lively discussion on "Phones, Drones, and Social Networks—New Technologies and the Fourth Amendment After *Jones*" that was moderated by Stephen Schulhofer, Robert B. McKay Professor of Law.

In *U.S. v. Jones*, the justices unanimously ruled unconstitutional a law enforcement decision to attach a GPS tracking device to the car of a suspected drug dealer's wife for a month. The decision narrowly characterized the placement of the GPS on the car as trespass under the Fourth Amendment, but the complexities of the case splintered the justices into three camps to explain the opinion's rationale. Questions about technology and privacy remain unresolved in the wake of the ruling's reliance on 18th-century tort law. "The *Jones* opinion makes trespass everything," Schulhofer said. "However, there are five justices ridiculing that idea. As I read it, they're not saying that trespass might not be necessary; they are saying that trespass is not necessary.... There's this idea that prolonged monitoring might be less intrusive than the search of a house, but it also could be considered much more intrusive."

"In the rare instances in which the justices have tried to protect privacy rights," said panelist Barry Friedman, Jacob D. Fuchsberg Professor of Law, "it's been doomed to failure, largely because of problems of technology."



Dean Richard Revesz and Sunstein

The ROI of CBA

Cass Sunstein, administrator of the Office of Information and Regulatory Affairs, detailed some of the promising results of using cost-benefit analysis (CBA) in shaping the Obama administration's regulatory agenda when he spoke at an April Institute for Policy Integrity event.

Sunstein explained that the government has expended considerable effort in simplifying regulations and information for citizens. For example, new fuel economy labels on cars reveal average annual fuel costs, which is more useful information than the old labels' miles per gallon.

This CBA focus has yielded real monetary benefits, Sunstein reported: $91 billion in its first three fiscal years, manifested in fuel and energy efficiency, consumer and business savings, and deaths and injuries averted. "In an economically hard time," he said, "we've been extremely diligent to try to keep those costs down as low as possible."

Transparency has increased through a disclosure initiative in which the government provides data to the private sector, which then uses the information to make apps for consumers. One example is an app for energy usage so that consumers can calculate possible savings: "The potential here is very large for enabling people to make comparisons across a wide range of consumer products."

Sunstein cited the importance of the public comment process, adding that agencies really do pay attention to citizens' remarks on potential rules. He also discussed collaborative efforts with Canada, Mexico, and Europe to eliminate regulatory differences that present trade barriers. "In a 21st-century economy," Sunstein said, "one thing you can do that's really important for growth and job creation is to eliminate red tape that has no justification." □

President of a Divided Nation

The small island of Cyprus is at the center of a potentially explosive situation over recently discovered offshore natural gas fields. As the issue heated up the U.N. General Assembly and Turkish Prime Minister Recep Tayyip Erdogan threatened to send warships last fall, Demetris Christofias, president of the Republic of Cyprus, addressed a broad range of matters affecting his nation at the eighth annual Emile Noël Lecture.

Christofias defended Cyprus's sovereign right to exploit its natural resources under international law and said he was not afraid of Turkish threats because he had faith in the global community to do the right thing: "It's a matter of justice."

The event's host, University Professor Joseph Weiler, director of the Jean Monnet Center for International and Regional Economic Law & Justice, asked the president about everything from his view on the state of negotiations in solving the Cyprus problem to personal inquiries about his favorite author (Nikos Kazantzakis), music (leftist composer Mikis Theodorakis), and food (dolmades, or stuffed grape leaves). In a seemingly jovial mood, Christofias responded to every question with candor and humor. "I felt like a fly in milk," he said, describing his mood when Cyprus first joined the European Union.

Since 1974, nearly 40 percent of the island has been occupied by Turkish troops. And most of the evening's discussion was centered on the problems of the divided island. Christofias blamed both sides. "The Greek Cypriots and the Turkish Cypriots committed mistakes," he said, admitting that he often came under fire for saying that. "I was, and am, of the opinion that both communities must say to each other, 'Mea culpa.'"

"The real danger is the occupation of [all of] Cyprus by Turkey," said Christofias. "For Cypriots, a solution must be viable, a solution must be functional. It must be a lasting solution." □

A Champion for Global Cooperation

Former U.K. Prime Minister Gordon Brown took part in a question-and-answer session with students last September that focused primarily on the global economic crisis, which Brown emphasized would require a united, worldwide effort to solve. "It is not mutually assured destruction, but mutually assured disappointment if we can't work together," he said.

Brown also warned against the danger of relying on protectionism and austerity measures in efforts to fix the economy: "The real answer for America, as it is for my country and the rest of Europe, is to trade with the rest of the world."

In the wide-ranging discussion, Brown spoke strongly against capital punishment and commented briefly on the Israeli-Palestinian conflict, dismissing what he sees as merely symbolic gestures toward peace rather than real negotiation. "Most people can see a final outcome here," he said. "The question is how you get there."

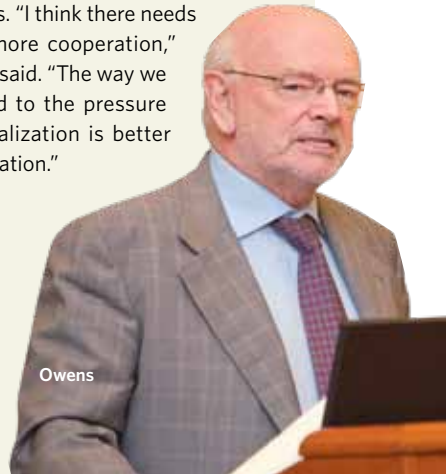
Brown is currently serving as the University's inaugural Distinguished Global Leader in Residence. In this role, he engages with NYU students and faculty throughout the world. □

U.S. Tax Policy in Context

The 16th annual David R. Tillinghast Lecture on International Taxation began with a tribute to James Eustice (LL.M. '58), who passed away in 2011 after serving on the NYU Law faculty for more than 50 years. Eustice's friend, Adjunct Professor M. Carr Ferguson (LL.M. '60), gave a moving and colorful tribute before an audience that included Eustice's wife, Carol, and daughter, Cynthia LaPier. The NYU Law Library will be home to the Eustice papers, which include Eustice's handwritten notes for the first edition of the Bittker & Eustice treatise and his collection of tax cartoons that had adorned his filing cabinets.

The lecture that followed featured Jeffrey Owens, director of the Centre for Tax Policy and Administration at the Organisation for Economic Co-operation and Development in Paris. Owens spoke about the ways that nations are shaping their tax systems to compete for increasingly mobile players in the international economy. "We need to change the dynamics in the relationship between large corporations, their advisers, and tax authorities," Owens said, emphasizing the importance of predictability in taxation and transparency in the enforcement policy. With deficits and debt reaching unprecedented levels as a share of GDP throughout the OECD membership, the United States is not the only country considering major tax reform.

Owens cautioned that tax policy must be considered in the context of other key factors that influence patterns of trade, including investments in infrastructure and services, as well as the effectiveness of government institutions and administration of tax laws. "I think there needs to be more cooperation," Owens said. "The way we respond to the pressure of globalization is better coordination."



Owens

Examining 100 Years of Justice in China

Last November, 11 accomplished scholars of Chinese law met for the 17th annual dialogue in memory of Timothy Gelatt, former NYU Law professor and avid Asian law scholar. "China's Quest for Justice: Law and Legal Institutions Since the Empire's Collapse" examined law and justice in the century since the fall of the Qing Dynasty in 1911 and was moderated by Jerome Cohen, co-director of the U.S.-Asia Law Institute at NYU.

Cohen and Feinerman

With 10 minutes allotted to each speaker, shifts in perspective and focus came quickly, but one theme emerged: the centrality of law to the most pressing issues for China. As Daniel Ping Yu, U.S.-Asia Law Institute consultant, and James Feinerman, Georgetown Law Center Asian legal studies professor, pointed out, the overwhelming political reality for 19th- and early-20th-century Chinese leaders was the brutal fact that China did not have the legal right, much less the practical power, to control its borders or its population. Subsequently, as Andrew Nathan, Columbia University political science professor, noted, each successor regime to the Qing, including most emphatically the People's Republic of China, has started with a constitution and legal rights, albeit "limited by law," an important limitation but one that still invokes "law." Clear deficiencies in the current Chinese legal system notwithstanding, therefore, law has been a core institution in China, from the meticulously documented practices of the Qing magistrates as described by North Carolina State University history professor Jonathan Ocko to the contemporary efforts to implement freedom of information legislation as noted by Jamie Horsley, deputy director of Yale's China Law Center.

What complicates this picture, however, is an equally consistent aversion to allowing law to operate as the rules of the game, at least when the game is state governance. On this issue there are several examples: The Qing magistrates, while issuing "bright line" decisions, noted Ocko, proceeded to replace them with "fuzzy law" in the implementation; the sequence of Chinese company laws, characterized by Donald Clarke, George Washington University law professor, as constant reinvention of the rules for doing business without ever affecting the actual doing of business; and the Chinese state caught between the desire to use law to control society and its deep distrust of both law and lawyers, as Columbia Law School professor Benjamin Liebman argued. The message seems to be that the contemporary Chinese regime is searching for a legal system that can contribute to economic growth and social stability without any political messiness, which, as David Law, Washington University professor of law and political science, pointed out, is the dream of many authoritarian regimes. □

Rising Tides Concerned about the impact of rising sea levels due to climate change, several island nations announced in February that they would seek an advisory opinion from the International Court of Justice. During a visit to New York to request a U.N. General Assembly resolution supporting their efforts, President Johnson Toribiong of Palau (left) and Prime Minister Tillman Thomas of Grenada (right) spoke at a Law School reception. "The truth is that nothing we or other Pacific countries do will stem the rising tides or the flood of global emissions," said Toribiong. "We need everyone to buy in or it won't work."

The E.C. President Discusses the E.U.

The Jean Monnet Center hosted Herman Van Rompuy, the first president of the European Council, at its annual "Transatlantic Dialogue." Center director and University Professor Joseph Weiler, Florence Ellinwood Allen Professor of Law Gráinne de Búrca, and Harvard University Senior Visiting Scholar Renée Haferkamp steered questions to him about several European political issues.

The European Council, the supreme political authority of the European Union, features two presidents—one of the European Commission, the other of the European Council. "Does this institutional solution serve Europe well?" de Búrca asked. Van Rompuy said his office is able to provide "coherence and continuity" on matters involving E.U.-wide governance and can work to build consensus among all 27 E.U. members, which, he noted, is particularly important in times of crisis. And the E.U. foreign minister, he said, is in a "steering position" for the E.U. as a whole in matters of diplomacy. He pointed to efforts to resolve the Israeli-Palestinian conflict as an area in which E.U. members have been able to act in concert.

Eventually the discussion turned to the euro crisis. Is there a sufficient sense of solidarity in Europe, Weiler asked, to move the E.U. further in the direction of a fiscal union? Van Rompuy acknowledged that there are hurdles to overcoming the current crisis but counseled patience. The E.U., he said, has been built gradually: "At each stage there are difficulties, but never a step backwards." Is default by Greece, asked Haferkamp, a possible option? "Not at all," Van Rompuy said. "Because there is no alternative. The dangers of contagion…are so great that you can't take that risk."

Alumni Almanac

Guests at the Annual Alumni Luncheon, including Katie Couric, listened to Benjamin Brafman (LL.M. '79) speak about the interaction between criminal justice and the media.

In the Eye of the Media Tsunami

Criminal defense lawyer Benjamin Brafman (LL.M. '79) has tackled some of the highest-profile cases of the last three decades, defending luminaries such as Sean Combs, Jay-Z, and Plaxico Burress. More often than not, his untiring efforts result in acquittals. Last year, he defended Dominique Strauss-Kahn (DSK), the presumptive candidate for France's presidency, against explosive sexual assault charges but ultimately saw the Manhattan district attorney's office drop the charges as its case began to unravel.

Brafman spoke about his DSK experiences and handling media pressure to an audience of more than 400 attending the Annual Alumni Luncheon at the Pierre Hotel on January 20. During the business portion of the luncheon preceding Brafman's talk, outgoing Law Alumni Association president Emily Campbell '95 introduced the new president-elect, Rocco Andriola '82 (LL.M. '86), who expressed eagerness to accept his new role. Campbell received a citation from Vice Dean Jeannie Forrest expressing the Law School's deep appreciation for her service.


Brafman


Barofsky


Andriola and Campbell

Neil Barofsky '95, senior fellow at the Center on the Administration of Criminal Law and former special inspector general of the Troubled Asset Relief Program, introduced "When the Media and the Criminal Justice System Collide," Brafman's keynote address. "If you get in trouble, there is no better advocate in the world to have on your side than Ben Brafman," Barofsky said. The principal of Brafman & Associates, Brafman first honed his quick thinking as a stand-up comic while working his way through college, then as an assistant district attorney for the very office that would drop the DSK charges decades later.

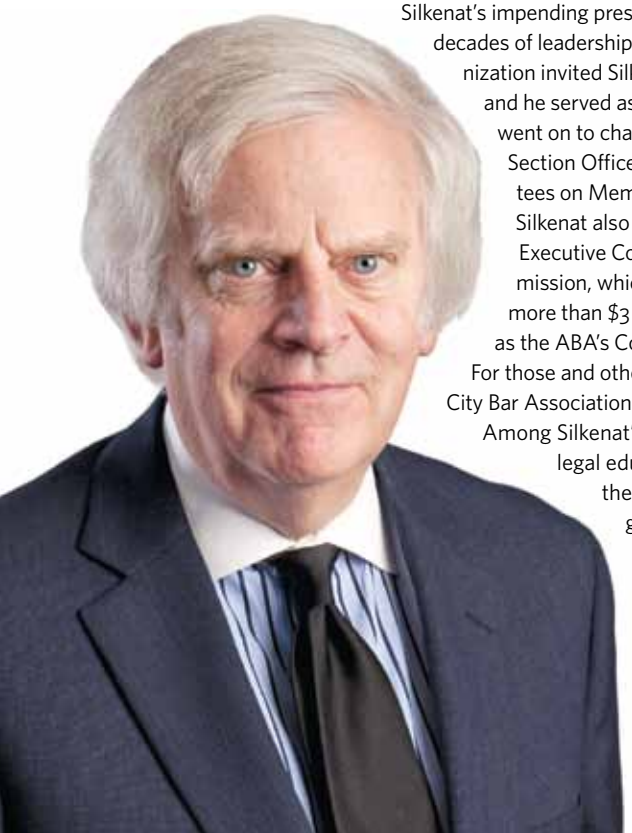
The DSK case landed Brafman and his client on front pages all over the globe. "I am on a world stage with no script, dancing as fast as I can," he said. "When I'm right I'm a hero, and when I'm wrong I'm a jerk. And it's the same talent, it's the same skill, it's the same effort. You win, it's good. You lose, someone's life is over. And I mean over.... You have to maintain your focus. And like a tsunami, you have to hold on very tight to something that's grounded and wait until the wave passes and hope you're still standing."

Such experiences don't leave Brafman feeling bitter toward the press. "I like the media," he said to an audience that included journalists Katie Couric and Jeffrey Toobin, both his invited guests. "But the press has a great deal of protection.... If I am a public figure in the crosshairs of the media, anything you want to say about me is essentially fair game."

Brafman acknowledged that the blame for media frenzies is a shared one. He characterized the DSK case, for example, as vastly overhyped: "The priorities of the media have to be carefully looked at...yet it's not the media that's at fault. It's us. We were junkies. We needed to have more and more and more material and information about something that really wasn't—in my opinion, anyway—that interesting." □

Ready to Hit the Ground Running

James Silkenat (LL.M. '78), a partner at Sullivan & Worcester, was voted president-elect at the American Bar Association's annual meeting in Chicago in August, which will lead to a one-year term as president beginning in August 2013.



Silkenat's impending presidency caps off more than three decades of leadership within the ABA. In the 1970s, the organization invited Silkenat to join its first delegation to China, and he served as chair of the China Law Committee. He went on to chair the ABA's Section of International Law, Section Officers Conference, and Standing Committees on Membership and Constitution and Bylaws. Silkenat also sat on the Board of Governors and its Executive Committee and the ABA's diversity commission, which has provided scholarships totaling more than $3 million to minority law students, as well as the ABA's Commission on Women in the Profession. For those and other efforts, he received the New York City Bar Association's Diversity Champion Award in 2009.

Among Silkenat's priorities as president are improving legal education as well as tackling immigration, the death penalty, election reform, and gun violence. "There has been lots of talk among lawyers on those issues but not necessarily real agreement," he says. "I'm hoping lawyers can provide more information for the public and for the rest of the legal profession, and maybe we can come up with some better answers." □

SILKENAT: ABA

Between Profits and Pro Bono

The Judge Edward Weinfeld '21 Award was presented to Warren Sinsheimer (LL.M. '57) at the Weinfeld Gala last September. The award recognizes the professional distinction of alumni who graduated from the Law School 50 years ago or more.

"Warren is a spectacular example of someone who has made it a priority to give back over the years, and, even more important, he is inspirational in his message to others to do the same," Dean Richard Revesz said in his introductory remarks.

After working in corporate law for 45 years, Sinsheimer retired from Patterson Belknap Webb & Tyler in 1996 and founded Partnership for Children's Rights, a not-for-profit law firm that helps disadvantaged children throughout New York City. He created the Warren J. Sinsheimer Fellowship, which allows recent NYU Law graduates to work for a year as a Partnership for Children's Rights attorney, and he established the Sinsheimer Service Scholarship within the Root-Tilden-Kern Program.

"Warren's support of the Law School and its students has not only made a difference in the careers of dozens of students and NYU Law graduates; it has affected the lives of thousands of children and their families," Revesz said. "Often the legal world is divided into dichotomous categories. People either work for the for-profit sector or do public interest. Warren has shown better than most how you can do both at a very high level."

Christopher Meade '96 and Sinsheimer

Crump

Brookman

Milch

Strandburg

Caproni

Crawford

All (Electronic) Eyes Are Watching You

THE LAW ALUMNI ASSOCIATION'S fall lecture, "You Are Here: Location Data, Tracking Technology, and Consumer Privacy Law," moderated by Professor Katherine Strandburg, brought together lawyers from the ACLU, Federal Trade Commission, Verizon, and other corporations and think tanks in lively debate. "Ten years ago, the only companies that knew your real-time location were your cell carriers," said Justin Brookman '98, director of the Center for Democracy and Technology's Project on Consumer Privacy. "Now Angry Birds, ESPN, and whoever else I download can have access to it." He argued that the lack of location privacy can lead to real harm, whether through the applications that individuals can load onto one another's mobile devices, or through changing the ways in which companies interact with consumers.

Molly Crawford, a senior attorney with the Division of Privacy and Identity Protection at the FTC, described the "Do Not Track" option for consumers. This option, recommended by the FTC, would need to be universally implemented and easy to use. "What we want to see is privacy that is baked in, part of the process, that is not an afterthought," she said.

However, Randal Milch '85, executive vice president and general counsel of Verizon, warned that legislation might not be quite so easy to implement. "Attempts to legislate in this area are very freighted with the inability to keep up with technology," he said. He also argued that part of the difficulty with creating privacy legislation is that the generation creating privacy laws is not the generation most commonly using new technologies. "We try to lock these kids into a regime based on old fogies' views of what's private and what's not private," he said.

Other panelists included Valerie Caproni, former general counsel to the FBI and currently vice president and deputy general counsel of Northrop Grumman Corporation, and ACLU staff attorney Catherine Crump.

Caproni described herself as "the token jack-booted thug for the purpose of this discussion," arguing that the use of GPS tracking by the police and the FBI is not a violation of Fourth Amendment rights. "When you're out on the public street, you do not have a reasonable expectation of privacy, because you can be seen by the public eye," she said. According to Caproni, GPS location tracking accomplishes the same goal that 24-hour surveillance by several FBI teams would accomplish, just with much more efficient use of manpower.

Crump emphasized the importance of taking into account the fast-changing nature of technology, whether in consumer privacy regulation or criminal justice legislation. "If you had said in 1984 that in 25 years every American would carry a tracking device, you would have been dismissed as crazy. Someone would have handed you a tinfoil hat, or you would have concluded that the Soviets had won the Cold War," she said. "But that's the reality that we live in today." □

BLAPA Celebrates the Courage to Act

On March 30, the Black, Latino, Asian Pacific American Law Alumni Association held its annual Spring Dinner. Theodore Wells, partner and co-chair of the Litigation Department at Paul, Weiss, Rifkind, Wharton & Garrison, gave the keynote address on the importance of mentorship. Debo Adegbile '94, acting president and director-counsel of the NAACP Legal Defense and Educational Fund; Dean Garfield '94, president and chief executive officer of the Information Technology Industry Council; and Christine Sun '98, deputy legal director of the Southern Poverty Law Center, received distinguished alumni awards.

Kellsie Barton '13 and Ashley Harrington '13 received Derrick Bell Scholarships for Public Service, and Latoya Herring '12 and Kenneth Perry '12 were the inaugural recipients of the Charles S. Conley Scholarships. At a ceremony earlier that day in Vanderbilt Hall, a plaque was dedicated to Conley '55. Dean Richard Revesz and Conley's widow, Ellen, were joined by University and Law School Trustee Martin Lipton '55 and members of the Class of '55.


Wells, Sun, Adegbile, and Garfield


Janet Bell, Barton, and Herring


BLAPA President Rafiq Kalam Id-Din '00


Conley and Lipton

In Pursuit of Justice and Integrity

In April, the NYU School of Law chapter of the Order of the Coif inducted Charles Stillman '62 as an honorary member. Stillman began his career as a clerk for Judge Irving Kaufman of the U.S. Court of Appeals for the Second Circuit, after which he worked under U.S. Attorney Robert Morgenthau at the U.S. Attorney's Office for the Southern District of New York. In 1977, he became a founding partner of Stillman & Friedman. "He is one of the very leading criminal defense lawyers in the city, and a model of excellence in the legal profession," said Dean Richard Revesz in his introduction of the honoree. "He is an inspiration for our students and a paragon of integrity."

Stillman, in congratulating the provisional student members of the Order of the Coif, emphasized the many opportunities in direct public service, as well as pro bono work, that the law profession offers. "That should be the hallmark of what we are as lawyers," he said. "Don your wigs and come join us in pursuing justice, serving well our clients, and helping make ours a better society." □

Reversal of Misfortune

A mere four years after his abrupt separation from Bank of America on the eve of its troubled acquisition of Merrill Lynch, Timothy Mayopoulos '84 was named CEO of Fannie Mae.

Mayopoulos, known for his integrity, became Fannie Mae's general counsel in spring 2009; with his promotion, he took a pay cut of more than 75 percent due to Fannie Mae's promise to reduce executive compensation. "This is a very difficult job and a challenging job," he told the *New York Times* in June, "but I'm excited about the prospects of this organization, considering all the good it does."

Striking a Balance

When dreams of being a trial attorney collided with the realities of family, Sara Moss found a new career path.

Forty floors above Central Park, just a couple of doors away from the corner office where the legendary Estée Lauder ruled her cosmetics empire, Sara Moss '74 runs the legal activities of the global powerhouse. Moss laughingly says her son has dubbed her job "glerious," as in half glamorous, half serious. "It's much heavier on the serious side," she admits—and this year's recipient of the New York University Law Women Alumna of the Year Award is not kidding.

Cosmetics are glamorous, of course, but Moss's portfolio at the Estée Lauder Companies consists of all the responsibilities that go along with advising a $24 billion company that sells its products in more than 150 countries: drafting public filings, developing corporate governance best practices, overseeing a staff of 32 lawyers, and handling everything from trademark, patent, and licensing issues to lawsuits charging antitrust violations and animal cruelty. Serious stuff, by any measure. "What keeps me up at night are global regulations issues," Moss says, sitting in her stylishly appointed office graced with a tall orchid. Nothing is uniform across borders, she explains; what works in one country does not necessarily apply in another.

Despite the challenges, she feels blessed. She did not intend to go into corporate law, but she's happy where she has ended up. "I wanted to be that lawyer running up the courthouse steps," Moss says. But as she pointed out to the audience when she accepted her award in February, sometimes ending up somewhere you hadn't planned can turn out to be a good thing.

"The best advice I can give you," she told the organization's members, "is to support each other, take risks, and follow your heart. Find passion in your work, make time for the people you love, and have some fun along the way."

This advice has worked well for Moss. Seizing opportunities has led to a career path as twisty as a mascara wand. Moss didn't start her professional life as a lawyer; she taught history in a high school in New Haven, Connecticut. After graduating from NYU School of Law, she clerked for Judge Constance Baker Motley of the U.S. District Court for the Southern District of New York, whose illustrious career as a lawyer, New York state senator, Manhattan borough president, and judge was devoted to civil rights and women's rights. "It was probably the best career decision I ever made," she said.

Over the next two decades, she bounced between public and private litigation, working as an associate for Davis Polk & Wardwell and as an assistant United States attorney in the Southern District of New York, and even helping to start a white collar and corporate defense firm, Howard, Smith & Levin. But in 1996 another opportunity presented itself and Moss seized it: an offer to serve as general counsel for Pitney Bowes. Moss stepped off the partnership ladder once again.

The job had its advantages, including better hours so that she could spend more time with her four young children. But her new employer, located in Stamford, Connecticut, was also nearly 40 miles from Manhattan. On the day of the terrorist attacks in 2001, she couldn't get back to her children, who were working or in school in the city. The moment drove Moss to make yet another career U-turn: to find a job closer to home (she told her bosses she would stick around until a replacement, whom she helped find, was hired). "It was not so rational," she says. "But after 9/11, I made the decision to never be that far away while I had children who were still at home."

Moss's friend of 35 years, Ruth Hochberger, former editor-in-chief of the *New York Law Journal* and now a professor of legal journalism at the CUNY Graduate School of Journalism, calls her devotion to her children extraordinary. Indeed, photos of her four children—now adults—line her office shelves. "She is always there for her children, finding a balance in a way that a lot of successful women find very difficult to do," says Hochberger. "She's very disciplined at setting aside time for them."

Finding the ideal job close to home, however, took longer than she expected. She flirted with the possibility of joining Court TV or a public interest group, but in September 2003 she began the job at Estée as general counsel. The job, so far, has been the perfect fit, letting her exercise her legal muscles but allowing her the flexibility to spend time with her family.

That's not to say she doesn't miss the courtroom. Litigation, Moss confesses, still gets her adrenaline pumping. "I'm a litigator in remission," she says with a laugh. "I have to strap myself into my seat to not jump up when the company is involved in litigation." □ *Dody Tsiantar*

Daring to Be Green

THE DREAM OF A TECHNOLOGY that produces nonfossil fuel for our industrial world has been an entrepreneurial holy grail since the 1970s. Jonathan Wolfson '00 was first seduced by that idea as a student in NYU's joint J.D. and M.B.A. program when he came across research suggesting that algae are capable of producing oil. What if he and his friend Harrison Dillon, a geneticist, could figure out a way to commercialize the process?

"The scope of our ambition was colossal," says Wolfson now. "We intended to produce the first wide-scale technique to produce oil for fuels."

Fast-forward 15 years, and Wolfson is the CEO of Solazyme, a company he co-founded with Dillon that produces an algae-based oil that has been used to power a commercial jet and a Navy ship. Here's how the technology works: They place plant-based sugars into fermentation tanks and introduce algae. The algae then convert the sugar into oil that can be applied diversely as fuel for engines or to make soap, cosmetics, and even food.

Wolfson, who was the guest at a dean's roundtable last October (see all of the dean's 2011-12 guests at right), believes the technology is potentially world-changing. Big business seems to be listening, as Wolfson has inked partnerships with Dow Chemical, United Airlines, and the Department of Defense. He and Dillon took the company public in 2011, raising $227 million. And they are hiring at such a pace that Solazyme is effectively a new company every 18 months.

So far, though, their production has been relatively modest, and the open question to Wolfson is whether they can scale up to levels at which they could meaningfully compete in the global oil market. Solazyme's investors are about to find out. This spring he negotiated a deal with agribusiness giant Bunge to build a factory in Brazil that will produce oil for chemical and fuel products at a volume five times greater than the company has ever attempted. Bunge's investment represents an unprecedented bet on both Solazyme and the biofuel industry.

So how has Wolfson convinced several of the world's largest and most conservative companies to place bets on this new and relatively untested technology?

"Jonathan can identify opportunity where others see risk," says Dillon. "He has an ability to see down the field that you're frankly not going to get in large, slow-moving corporations."

Take, for instance, Wolfson's decision in 2003 to found Solazyme with Dillon. Wolfson was three years out of NYU and working for a software company in New York. Meanwhile, Dillon, his former college roommate at Emory, had only recently earned his doctorate in genetics. The two friends knew from the basic science that algae could produce oil through photosynthesis. So they hatched an untested plan to build bioreactors and ponds where the algae would be exposed to direct sunlight.

They had very little hard evidence to confirm that the model would actually work on a commercial scale. But for Wolfson the idea was enough to compel him to quit his job, buy a $600 car off Craigslist, drive cross-country to California and, in the quasimythical tradition of Steve Jobs and Steve Wozniak, set up shop in Dillon's Santa Clara garage.

The pair devoted a year to securing funding and building the reactors. Then reality hit. The ponds did not produce enough oil to make the company commercially viable. "It was a real meet-your-maker moment," remembers Wolfson. Faced with that failure, Wolfson doubled down and went back to his investors—many of whom were family and friends—and asked for more money to try an equally untested method of introducing the plant sugars to algae in the dark.

The experiment worked, but Wolfson took a detour instead of building capital-intensive factories immediately: He focused instead on positioning Solazyme more broadly as a renewable oil company, which would enable it to penetrate several industries on a smaller scale.

Solazyme was openly scoffed at within the burgeoning biofuel industry. "Jonathan and I would speak at these big biofuel conferences, and we were literally ridiculed for talking about having a food business," Dillon recalls. "We were viewed as taking our eye off the trillion-dollar fuel market."

But the bet paid off. The partnerships that Wolfson forged with food, cosmetics, and chemical companies made Solazyme profitable while it continued to develop fuels for cars, ships, and planes on a small scale. Environmentalists as well as the fuel industry paid attention last fall when United Airlines used the company's Solajet fuel to make the first commercial flight using microbially derived biofuel, and the U.S. Navy powered a destroyer up the coast of California with the company's diesel fuel.

"Failure on some level is your friend," says Wolfson, pausing for a moment to reflect. "You have to be willing and open to the idea that everything you do isn't going to succeed." □ *Jacob Levenson*

Roundtable Guests

Harold Akselrad '77
Former General Counsel
Home Box Office

Tor Braham '82
Managing Director of Technology
Mergers & Acquisitions
Deutsche Bank

Cliff Chenfeld '85
Co-founder
Razor & Tie Music

Jared Kushner '07
Publisher, *The New York Observer*
Principal, Kushner Companies

David Lee '99
Founding Partner
SV Angel

Joel Marcus
Founder and CEO
Alexandria Real Estate Equities

Irving Picard (LL.M. '67)
Partner, Baker & Hostetler
Trustee, Liquidation of Bernard Madoff Investment Securities

Gary Swidler '95
Managing Director
Bank of America Merrill Lynch












Scholars and Donors 2011 Reception

1. Jonathan L. Mechanic/Fried, Frank, Harris, Shriver & Jacobson Fellow John Infranca '08 with Trustee Jonathan Mechanic '77
2. Norman Ostrow Memorial Scholars Katherine Pannella '12, Jehiel Baer '13, and Amandeep Singh '14 with Audrey Strauss
3. Root-Tilden-Kern Scholars Julia Torti '13, Julia Kaye '13, Leslie Coleman '13, Kate Berry '13, Evan Milligan '14, Lindsay Miller '13, Gabriel Hopkins '13, Ariel Werner '14, Pierce Suen '13, and Semuteh Freeman '13 with Trustee Jerome Kern '60
4. Susan Isaacs & Elkan Abramowitz Scholar Paula Vera '13 with Elkan Abramowitz '64
5. Jacobson Family Foundation Public Service Scholars Anne Matthews '13, Julia Kaye '13, and Shannon Cumberbatch '12 with Kathy Jacobson
6. Doris C. & Alan J. Freedman Scholars Robert Pollack '14 and Gabe Hopkins '13 with Trustee Karen Freedman '80
7. William Toppeta Scholar Paula Querol Abenia (LL.M. '12) with Debra and William Toppeta '73 (LL.M.'77)
8. Wilf J.D. Merit Scholars and Wilf Tax Scholars Thomas Fahring (LL.M. '12), Clark Lacy (LL.M. '12), Michael Telford (LL.M. '12), Molly Talbert '13, Nathan Henderson '13, and George Davis '13 with Trustee Leonard Wilf '77
9. Michael A. Schwind Global Scholar Tiantian Zhuang (LL.M. '12) with Professor John Slain '55 and Milton Schwartz '55 (LL.M. '61)
10. John D. Grad/AnBryce Scholars Calisha Myers '14, Natasha Silber '13, and Andrew Meyer '12 with Dr. Joyce Lowinson
11. Judge Charles S. Swinger Conley Scholars Latoya Herring '12 and Kenneth Perry '12 with Ellen Conley
12. Sinsheimer Public Service Scholars Rachel Hoerger '14 and Jesse Rockoff '14 with Florence Sinsheimer and Life Trustee Warren Sinsheimer (LL.M. '57)

Reunion 2012

In this election year, five decades of classes gathered for discussions on hot-button topics moderated by NYU Law professors. Lily Batchelder led a panel on tax reform; Nancy Morawetz '81 took a look at the challenges and obligations of lawyers representing immigrants in both criminal and immigration proceedings; Gerald Rosenfeld examined activist hedge fund investing and the new regulatory framework; and Katherine Strandburg suggested ways to advise and invest in the volatile tech industry.

Three members of the 1982 class were honored at the awards luncheon on Saturday, April 28: Marc Platt, a film, theater, and television producer, won the Alumni Achievement Award; Deborah Ellis, who stepped down in May as assistant dean for public service at NYU Law, received the Public Service Award; and Abbe Smith, director of the Criminal Defense and Prisoner Advocacy Clinic at Georgetown University, where she is a professor of law, won the Legal Teaching Award. Tatia Miller '02, regional legal advisor with the U.S. Agency for International Development, won the Recent Graduate Award. At Friday night's alumni tax reception, Joshua Blank (LL.M. '07), faculty director of the Graduate Tax Program, gave the James S. Eustice Tax Leadership Award to John M. Samuels (LL.M. '75), vice president and senior counsel of tax policy & planning for General Electric, recognizing his extraordinary contributions to the tax community.

Blank and Samuels

Ellis, Miller, and Smith

Knowing How to Sweeten the Deal

THERE'S A RUNNING JOKE at the offices of Wachtell, Lipton, Rosen & Katz that David Katz '88 showed up as a summer associate in 1987 and never left. "People would make fun of me because I'd show up to class in a suit," says Katz, an adjunct professor at NYU Law who has taught Mergers and Acquisitions since 1993. "I was commuting back and forth to the office, not the library or the dorm."

It has been 25 years since he got his foot in the door of the prestigious law firm, best known for its mergers and acquisitions practice, and he never did leave. Katz has been earning his paycheck, too: *American Lawyer* named Katz a dealmaker of the year in 2005 for his representation of Sanofi-Synthelabo in its $68 billion acquisition of Aventis. Last year he was again named an *American Lawyer* dealmaker of the year and *Who's Who Legal* mergers and acquisitions lawyer of the year—for the fourth time in a row—both for representing natural gas provider El Paso in its $37.4 billion acquisition by rival Kinder Morgan that was announced last October. The combined entity is the largest operator of natural gas pipeline in the country, with more than 80,000 miles of pipe.

Although not the largest deal of Katz's career, it was nevertheless the largest deal in the world in 2011. The most interesting thing about it: If it hadn't happened, that would have been just fine with Katz and his client. Indeed, the alternative—a tax-free spin-off of El Paso's gas exploration and production business to shareholders—was already in process. In the M&A world, that's known as having a strong negotiating position. Katz smiles as he remembers El Paso's stance from the very start: "It gave us the ability to say, 'Look, you can negotiate with us and give us the price we want, or we will just go on our merry way.'"

A little background: In February 2011, Kinder Morgan successfully completed the largest-ever initial public offering for a private equity–backed company, raising a $2.9 billion war chest. It was looking to do a deal, and El Paso was in its sights.

Meanwhile, El Paso was minding its own business. In May 2011, the company announced a plan to separate into two companies—the pipeline business as well as the tax-free spin-off of the company's E&P business. The idea was to give shareholders the choice of whether they wanted to own the two different businesses or to sell their shares of either. That August, El Paso filed a registration statement for the spin-off with the Securities and Exchange Commission. The next day, Kinder made an unsolicited offer of $25.50 per share for El Paso—a 35 percent premium to El Paso's closing price.

At that point, Katz and his partners at Wachtell, Lipton became a crucial part of the discussions. (The six key members of Katz's Wachtell team included tax partner Jodi Schwartz (LL.M. '87).)

"The role of the corporate lawyer has changed quite a bit over the last 20 years," says Katz from his corner office on the 27th floor of the CBS building. The room is literally stuffed to capacity with deal toys as well as a growing number of awards and framed news articles. He has carved space behind his desk, however, for two signed *Peanuts* comic strips. "We're much more involved in the business aspects of a deal in addition to the legal aspects," he continues. "And there are a lot of business issues. How do you get the best price? What strategy do you use? How do you counter other bids? Are they going to go hostile or not? You end up holding hands with a lot of different people."

At the end of the day, however, there are really only two questions: Will the deal get done? And on what terms? Katz says the job of the deal lawyer is to help the client achieve as much certainty as it can on both fronts—certainty of value and certainty of consummation. Katz used the alternative of the spin-off as leverage in getting as much certainty of consummation as he could possibly get. And he got a lot.

"It would have been harder if they'd come knocking right after we'd announced the spin-off, but we'd been at it for several months," he says. "We had an alternative we could pursue unilaterally."

The biggest risk? Financing the deal. "We were not prepared to let them proceed without having an agreement that they would get the financing done," says Katz. It proved a non-issue, as Barclays eventually provided $11.5 billion in financing.

Given the size of the combined companies, there was also potential for antitrust issues. Facing Kinder counsel Thomas Roberts of Weil, Gotshal & Manges across the negotiating table, Katz obtained what is known as a hell or high water provision that ensured Kinder Morgan would do what was necessary for regulatory authorities to approve the deal.

El Paso sought a so-called standstill agreement that would have precluded Kinder Morgan from going hostile had negotiations faltered. The Kinder team balked but eventually agreed to limited due diligence so as to expedite negotiations over price.

After weeks of back-and-forth, agreement was reached on October 16 for a deal at $25.91 per El Paso share, plus a sweetener of warrants that brought the total to $26.87, a 37 percent premium to El Paso's share price at the time. The deal finally closed on May 24, 2012.

"A mistake people frequently make is to draw lines in the sand when they don't really have an answer as to how to bridge a gap," Katz says. "We had a gap in value. And the parties were pretty set on what each side was going to accept. But nobody knew exactly what the warrant was going to be worth over time, so it allowed us to bridge the gap."

As luck, or deft lawyering, would have it, Kinder Morgan's stock price has moved up since signing, making the warrants much more valuable. □ *Duff McDonald*

KATZ: TODD FRANCE

Small Acts of Resistance

Martin Garbus '59 has had a legendary career as a trial lawyer and free speech proponent, representing Daniel Ellsberg, Lenny Bruce, and Don Imus domestically, and also Andrei Sakharov, Václav Havel, and Nelson Mandela overseas.

At its 35th anniversary celebration this spring, One to World, a cultural exchange organization, gave Garbus a Fulbright Award for Global Leadership. In his inspiring acceptance speech, Garbus described a long-ago "small act" he performed when he was a member of the Fair Trial Committee for Chilean Political Prisoners, and the impact he later learned he had made. Here is an edited excerpt:

In September 1973, Salvatore Allende was killed, and in December, Augusto Pinochet put 12 prominent defendants who supported Allende on trial, including General Alberto Bachelet. Pinochet claimed these were open trials, but no one, including the media, could get in.

I would get up at four in the morning and work my way through the people and the blockade. In court, the military hovered over me. After a few more days, the Chilean government left me alone. In the enormous courtroom I was the only outsider, and the defense lawyers and I were the only civilians.

I saw Bachelet, spoke to him, spent some time with him each day before court started, before and after lunch, and during the breaks. When the defendants went back to the barracks, they were beaten and tortured. They had not seen their families since they were arrested.

Bachelet asked me to deliver his last words to his daughter, and I did.

Bachelet's wife, Angela Jeria, and his 21-year-old daughter Michelle were also arrested and tortured.

The guilty verdict came down a few days later. After weeks in Chile, I left feeling awful. The genocide continued. What I did felt meaningless. Bachelet, 51 years old, died in prison on March 12, 1974.

Michelle Bachelet, after a lifetime of politics, became president of Chile in 2006, totally committed to the punishment of Pinochet and his men.

Several weeks ago, a former New York Times *reporter met Michelle Bachelet, who now runs the United Nations Women's Agency, and called to tell me what he learned. She told him of the enormous significance to her of my coming to the trials. She saw two things in my presence in the courtroom: a commitment from people outside of the United States government to reach in and help even if the government would not do it, and that someone had pierced the Pinochet killing machine. The Pinochet regime was four months old and was seemingly less impregnable. This helped teach her, at 21, of the power of the smallest resistance. Small acts can become extremely significant.* □

Alumni Applause

Joseph Russoniello '66, former U.S. attorney for the Northern District of California, was the commencement speaker at Fairfield University.

Daniel Nsereko (LL.M. '71, J.S.D. '75), former appeals judge at the International Criminal Court, was sworn in as appeals judge for the Special Tribunal for Lebanon.

David W. Newman (LL.M. '79), a partner at Mitchell Silberberg & Knupp, is the 2012 recipient of the Los Angeles County Bar Taxation Section's Dana Latham Memorial Award.

The NYC Bar presented its 2012 Diversity and Inclusion Champion Award to **Steven Banks '81**, attorney-in-chief at the Legal Aid Society.

Paul Wilson '81, formerly a partner at Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, was confirmed as a justice of the Massachusetts Superior Court.

The City of Jersey renamed the corner of Baldwin and Newark avenues in honor of the late **Judge Shirley Tolentino (LL.M. '82)**.

Kevin McNulty '83, a former assistant U.S. Attorney for the District of New Jersey, was confirmed as a U.S. district judge for the District of New Jersey.

Jane Sujen Bock '85, a staff attorney in the Homeless Rights Project of the Legal Aid Society's Civil Practice Program, received the NYC Bar Legal Services Award.

The U.S. Senate confirmed **Roy McLeese III '85**, former chief of the appellate division at the U.S. Attorney's Office for the District of Columbia, as associate judge of the District of Columbia Court of Appeals.

City University of New York School of Law Professor **Jenny Rivera '85** received the 2012 Diversity Trailblazer Lifetime Achievement Award from the NYS Bar Association.

Human rights attorney **Marlen Suyapa Bodden '86** gave the commencement speech at the University of Rhode Island.

Sara Shudofsky '86, a former assistant U.S. attorney for the Southern District of New York, was named chief of the Civil Division of the U.S. Attorney's Office for the SDNY.

Maureen McCabe Murphy (LL.M. '90), recently a partner at Murphy, Murphy, and Nugent, was confirmed as a judge on the Connecticut Superior Court.

Amanda White '92, an interim civil court judge serving the family court since January 2011, was newly appointed as a New York City Family Court judge.

GARBUS: GETTY IMAGES / MATT CARR

Ask the Expert

Q: How far off are we from being able to select a do-not-track option in the corner of our Google search box?
A: I think we'll have a do-not-track option for third-party tracking by the end of the year or early next year. Industry is clearly moving in the right direction. We're no longer arguing about whether we will have one, but when it will be effectuated and what precisely it will do. It will probably be self-regulated, with major advertisers agreeing not to collect certain types of information from consumers who opt out. That said, if they violate that commitment, then they'd be subject to the FTC Act. So it's self-regulation with an enforceable backstop. *—Jonathan Leibowitz '84, chairman of the Federal Trade Commission since 2009. The 1,100-person bipartisan agency is focused on consumer protection and the enforcement of antitrust laws.*

The Manhattan District Attorney's office appointed **Polly Greenberg '93** as chief of the Major Economic Crimes Bureau.

Kathryn Keneally (LL.M. '93) was confirmed as an assistant attorney general for the U.S. Department of Justice Tax Division.

The *Legal Times* honored **Paul Schiff Berman '95**, dean of the George Washington University Law School, with its Champion Award.

Sharon Rabin-Margalioth (LL.M. '96) became dean of Radzyner School of Law in Herzliya, Israel.

Jessica Rosenworcel '97 was confirmed as a commissioner of the Federal Communications Commission.

Lauren Burke '09, in-house attorney at the New York Asian Women's Center, founded Atlas, a cooperative empowerment center for immigrant youth in Brooklyn, New York.

ALGER: DEBORAH FEINGOLD; LIEBOWITZ: GETTY IMAGES / BLOOMBERG

From 1L Lawyering, Learning How to Write

Cristina Alger '07 admits that before she graduated from college, she had little grounding in finance other than balancing her checkbook. Her father, David Alger, was the head of Fred Alger Management—Fred was his brother—and an investing wizard who achieved great success as a mutual fund manager. After his tragic death in the World Trade Center on 9/11, Cristina felt she needed to learn the ins and outs of her father's business in case she were ever called upon to help sustain it. "That radically shifted my sense of what I should be doing with my life," she says.

With an English degree from Harvard, Alger entered the two-year investment-banking program at Goldman Sachs. Business school was the traditional next step, but banking had been such a culture shock to her that she instead decided on NYU Law. "Law school seemed like the liberal arts major's alternative," she says.

But shortly after Alger became an associate for Wilmer Cutler Pickering Hale and Dorr in 2007, the global economy cascaded into full crisis and she felt its effects in her proximity. The firm transferred her from its corporate group to bankruptcy, and around her there were layoffs and hiring and salary freezes. She found a refuge in writing. Mining material from the collapse around her and her personal insight into families in the money management business, Alger began work on *The Darlings*, her debut novel, which was published this year.

Set contemporaneously, the book tells the story of the Darling family, a wealthy New York City clan that exists in the rarefied air of Manhattan's Upper East Side where, even during the financial crisis, charity balls, private schools, and billion-dollar real estate deals are the order of the day. The gilded cocoon crashes down around them over Thanksgiving weekend 2008, when patriarch Carter Darling finds himself, and his family, about to lose everything in the wake of a massive Bernard Madoff–like financial scandal.

"There was a lot of nonfiction that came out relatively quickly, that I thought was wonderfully written but fell short of getting into the kind of human backstory behind what was going on," she says of other books analyzing the Madoff scandal. "I was more curious about the families and how it affected them."

Alger's professional background may have provided the knowledge necessary to write a dramatic thriller set against the complex world of banking transactions and SEC investigations, but it was her first-year Lawyering course that taught her how to put words on the page.

The first paper she submitted to her professor, Doni Gewirtzman, came back covered in red and with a B-minus. Alger was shocked. Gewirtzman guessed that she had been an English major in college. Alger recollects, "He said to me, 'Ugh, you English majors put so many adjectives in front of everything.'"

Alger says making the switch from descriptive to economical writing was painful at first but essential to her work as a writer, which since 2010 has become her full-time career. "I learned in that class how to streamline my thoughts and not default to language that's just pretty," she says. "My mom still tells me, 'You would never have been able to be a novelist if you hadn't gone to law school, where you learned how to write.'" □ *Graham Reed*

A Chat with Chen Guangcheng

Henry Holt announced in July that it will publish the memoirs of Chen Guangcheng, a self-taught Chinese lawyer, in fall 2013. Chen's story promises suspense and thrills. After his dramatic escape from unlawful house detention in Shandong Province set off a diplomatic crisis, Chen and his family negotiated a way out of China and into NYU Law. Blind since infancy, Chen had earlier spent four years in jail after angering local officials by filing a class-action lawsuit in 2005 on behalf of thousands of women who suffered forced sterilizations or late-term abortions. Over the summer, Chen; his wife, Yuan Weijing; and an interpreter met with Public Affairs Officer Michelle Tsai to talk about his thoughts on U.S. and China law.

What are you studying now? American constitutional rule with Professor Frank Upham. It's interesting how, in the Constitution, Congress holds much of the power. In reality, the president might hold more power than prescribed in the Constitution. This makes me think that, in order for the government to operate properly, executive power might need more checks and balances.

What do you think of the recent U.S. Supreme Court decision on our healthcare laws? I am not familiar with the specific content, but one point is, in America, there will be a clear exposition of ideas, of the verdict. In the end, even the president, with all his power, is subject to a court's ruling. This is an extremely good social mechanism. If many things are prolonged indefinitely or drowned like a stone in the sea, this would severely limit a society's production and development.

How does this compare to China's supreme court? In 2007 or 2008, I submitted the appeal for my own case to the Supreme People's Court through various channels. There is no doubt that the Court received it, but to this day they have not given me a response. The highest body of the judicial system has not responded to a citizen's appeal for years. This is a very big difference. With respect to my case, then, does it matter at all whether or not this court exists?

Do you expect things in China to change with the turnover in political leadership this fall? It is not important whether the leaders change. The most important thing is whether citizens have the consciousness to recover their own rights. Just like with our things: If I take your cell phone, and you do not ask for it back, you tacitly approve of my taking it away, and you might have fewer possessions in the future. But all in all, the awakening of the Chinese people is occurring at the pace of a thousand miles a day. This is very encouraging. And the speed is accelerating. This historical development is inevitable—I don't think any force can obstruct it.

What misunderstandings do you see between China and the U.S.? When Americans discuss the problems of China, it is usually just about the urban conditions, not about the rural village populations, which make up about 80 to 90 percent of the country. I don't think people understand at all or nearly enough about rural village society and conditions. Chinese people have a dire lack of understanding about America, because it is only cases like those about American firearms gone amok that everyday Chinese people might know.

Can you be an influence in China from the U.S.? There is a Chinese saying: "It is for people to plan, and it is for the heavens to determine the results." My imprisonment and illegal detention add up to about seven years. During that time, I was entirely unable to make even a phone call to the outside world. And yet do you think my influence has increased or decreased over these seven years?

How do you feel about life here? This is a big topic! With regard to everyday life, there is a greater variety of food. As far as people, I don't think there is that great a difference. Every people, every country shares certain commonalities, such as a sense of good and bad, or innate kindness. The free flow of information strikes me as the most prominent point of difference.

Do people recognize you? Many, many people. Some people greet me, some see me and applaud, and some want to take photographs with me. Anyway, they are very friendly. "Are you Mr. Chen?" they ask. "Welcome to America." □

THIS Q&A WAS TRANSLATED BY C.J. HUANG, EDITED, AND CONDENSED.

What does it take to nourish a top-tier law school?

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For more food for thought, visit the NYU Law Food Court blog (blogs.law.nyu.edu/foodcourt), a forum for various members of the Law School community to talk about what they're up to—typically over lunch.

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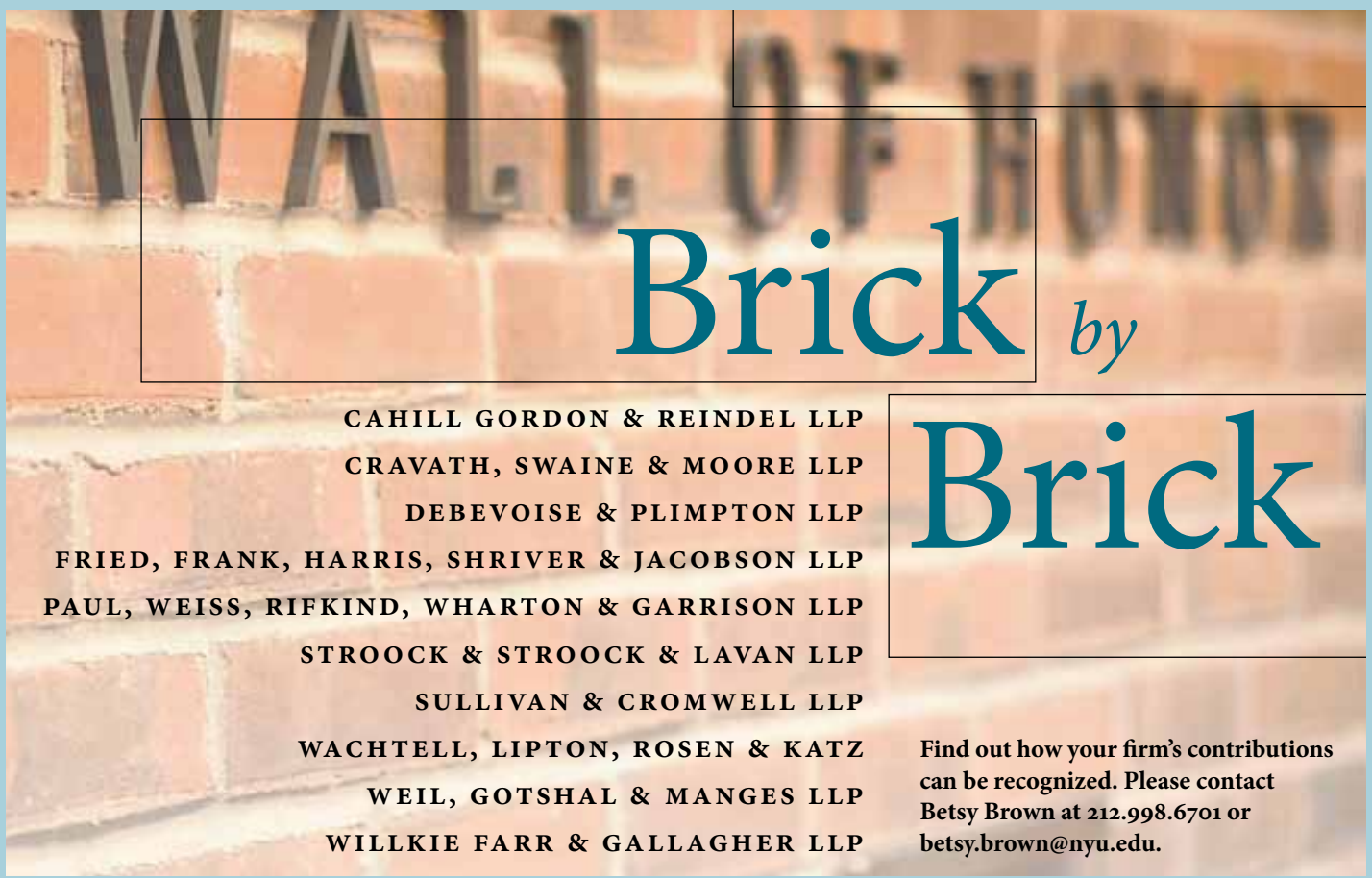

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