



THE COMMENTATOR

Vol. XLII, No. 5

The Student Newspaper of the New York University School of Law

November 12, 2008

O'Connor and Panel Discuss Importance, Challenges of Modern Independent Judiciary



Joseph Jerome

Retired Supreme Court Justice Sandra Day O'Connor addressed a crowded Tishman Hall Thursday, November 6, spear heading a panel discussion of judicial independence. The discussion marked the 1931st meeting of the American Academy of Arts & Sciences.

By JOSEPH JEROME '11

Dean Ricky Revesz banged a gavel on the podium in a packed Tishman Auditorium on Thursday evening, November 6, formally calling to order the 1931st meeting of the American Academy of Arts & Sciences. The purpose of the night's meeting: to bring together top legal minds, including former Supreme Court justice Sandra Day O'Connor, to discuss the state of judicial independence in American courtrooms.

O'Connor began the relaxed-yet-serious discussion with an anecdote about Texas judge and saloon-owner Roy Bean and his outlandish courtroom behavior. Running his courtroom from inside his saloon, Bean would force litigants to buy him drinks or suffer his wrath. Bean's behavior falls far from O'Connor's idea of judicial independence—"somebody who is constrained by what the law says and requires, free from outside influence."

Bean may now be gone from the bench, but today O'Connor fears even more for the independence of our state judiciaries. She warned that the increasing monetization of popular judicial elections threatens to erode faith in justice. "It isn't hard to see

how corrupting money can be, injected into these campaigns," she said. "Increasingly expensive, unwieldy, and nasty." She wrapped up her introduction with a call to action: "I think statutes and constitutions do not protect judicial independence—people do."

The justice turned over the discussion to Judith Resnik '75, a professor at Yale Law School, for a shotgun history of judicial independence. Resnik presented a slideshow of gruesome pictures of judges with their hands severed, eyes gouged out, and skin slowly flayed off. Early judges, she said, "were loyal servants of the state, or you'd lose your skin." Though justice today has an air of tradition about it, historically justice was conceived of as nothing but a public ritual. The advent of democracy transformed "rites into rights," she suggested, pausing to spell out the two homonyms.

"With democracy," Resnik warned, "demands for adjudication have soared." She cited the numerous lower echelon judges in immigration, employment, and administrative proceedings who handle the vast majority of our judicial proceedings. "They might not get flayed alive," she said, "but reassigned or even fired."

Resnik then gave way to Bert Brandenburg, director of the Justice at Stake Campaign and former member of the Justice Department during the Clinton administration. Brandenburg elicited much laughter with a series of recent campaign ads for state judicial races. The auditorium was treated to the "fairy tale of the sleeping judge" (available on YouTube) while he dished out a number of disconcerting statistics: 85% of our

state judges are elected, and they handle 98% of state legal work; 75% of Americans, 80% of businesses, and 50% of the judges themselves believe popular judicial elections affect judicial behavior.

Brandenburg lamented how low profile these judicial races are. As a result, the public is completely uninformed about the real qualifications of those running for judicial office. Absurd political ads constitute most of what the average American knows about any local elected state judge. These advertisements, "the mainstay of the diet," according to Brandenburg, are "the equivalent of french fries to nutrition."

Up last to speak was Viet Dinh, professor at Georgetown University Law Center and a key member in the development of the PATRIOT Act while at the Justice Department. Dinh worried that much of the criticism directed at the judiciary today was in the form of ad hominem attacks and personal critiques. While conceding that a judicial opinion could be so far "out of bounds" as to give rise to questions about a judge's fealty, he contended that the real problem is that "legal concepts are not concepts easily communicated through mass media to the general populace." In contrast to the other speakers, Dinh thought political elites played a considerable role in eroding judicial independence. "We elites know how to criticize judges in ways that force them to change their behavior," he suggested, disclaiming any pejorative intent in using the term "elite." He thought elites could do more to channel constructive criticism upwards and into the judicial branch.

O'Connor wrapped the evening up, noting again her concern for judicial independence at the state level. She urged everyone present to remain informed and cognizant of the independence of the judiciary. "I learned tonight judges got flayed alive," she said, smiling. "Not sure we need that, though."

Epstein et al. Debate Regulation as Solution to Financial Crisis



Ben Peacock

Adam Pritchard, Eric Posner, and Richard Epstein debated the causes of and solutions to the financial crisis in front of a packed house on November 6. While Pritchard concluded that the crisis is the result of over-regulation, which will now be combatted with more regulation, Posner and Epstein argued that some regulation is necessary to correct the moral hazard problem that exists in the lender-borrower relationship.

Over 100 Law Students Skip Class to Protect Swing-State Voters' Rights

By ERIN SCHARFF '11

More than 100 NYU Law students volunteered with the Obama campaign's Counsel for Change program, which was geared toward reducing voter suppression, on November 4, Election Day. The majority of students worked out of precincts in Philadelphia, but students also went to Ohio, Virginia, and other critical swing states.

"We're thrilled with the number of students we managed to get out to polling locations," said Law for Obama Organizer Judah Ariel. "Every year our country's complicated election laws mean that voters are denied access to the ballot box. It's a great feeling helping someone vote."

NYU Law Dems and NYU Law for Obama had been organizing their Election Day effort since the beginning of the year. In September, they sent a group of almost 50 students to Philadelphia to register voters.

With the support of organizations like the New York Democratic Lawyers Council and alumni like Assemblyman Jonathan Bing '95, the Law Dems have been able to organize well-attended debate-watching parties and fund voter protection trips to battleground states.

"As a graduate of NYU, supporting efforts of NYU Law Dems is important," said Bing. "They are our next generation of democratic leaders, and I look forward to working with their graduates when they enter

government as policymakers or elected officials themselves."

Recruitment efforts were also helped by the law school's decision to record classes on November 3 and 4 for students doing voter protection work on Election Day.

"The administration's approach to Election Day this year made me really proud," said Scott Paul '11, who worked with the Law School on the effort. "By taping classes, they ensured we didn't have to choose between keeping up with our academic commitments and doing our part to make elections fair. That's an amazing thing."

For students that participated in the voter protection program, the experience was intense. After being trained by the Obama campaign, they were each assigned a specific polling location and required to be there before polls opened.

"It was inspiring to see how determined people were to participate," said Sara Johnson '09, who spent Election Day in Philadelphia. "One elderly woman showed up to the polling place in an ambulance. Two paramedics wheeled her in on a stretcher so she could vote for Obama."

Other students got a chance to put their training and legal skills to use. Jason Law '11 was in Columbus, Ohio on Election Day.

"At my polling location the poll workers were asking some voters to vote using the dreaded 'provisional' ballots," said Law. "The poll workers were following an out-dated rule about acceptable identification." Because Law was there, the problem was fixed. "My presence definitely made a difference."

SLAP Season Enters Home Stretch



Joseph Jerome

With SLAP playoffs fast approaching on Friday, November 21, Betsey's Ballaz (left) are fighting to make the playoffs. Todres Tortfeasors—the defending champions—are currently undefeated.

Looking for another reason that Harvard is better than NYU? We're lazier—and we don't give a damn. page 2

Read about Clarence Thomas's Happy Hour shenanigans with Charlie Kaufman and Philip Seymour Hoffman in Commentator arts. page 3

Best Fall Ball eva! Remember the memories. page 4

Infra

NYU Law Students' Apathy, Malaise Undermine Sense of Community

By Andrew Gehring '09

How many NYU law students does it take to review class evaluation comments? Apparently, more than are actually disposed to undertake the project. Problems finding enough students that are willing to read and summarize the free-form comment sections of class evaluations have stymied efforts to make those comments available to the student body in a useful format, said Dean Ricky Revesz at last month's town hall meeting. President of the Student Bar Association Carly Leinhesier '09 hinted that the problem was with the task itself: students don't want to be involved with such a thankless task for no compensation. Yet the situation seems emblematic of a broader malaise particular to NYU law students.

Browsing the websites of the law school's sixty student organizations reveals that 26 of them are obviously outdated (determined largely by whether the individuals listed as contacts still attend school here or not), and six of them list only a single member of the organization. (I realize this isn't the best method by which to judge student involvement, but it's the best proxy I could manage.) Ru-

dimentary tech skills and about 45 minutes are all that's required to update an organization's website, so the conspicuous lack of current content on many of them is suggestive of minimal group activity. The dearth of events hosted by these organizations (with a few exceptions; some campus groups do a fantastic job staying active and putting on programming) points to the same conclusion: as a collective, we're apathetic, lazy, or both.

Harvard Law School serves as a good foil to the point. Dean Revesz cited Harvard as the inspiration for wanting to create a digest of comments from the evaluations; they have apparently successfully instituted a volunteer-based program similar to the one Revesz envisioned for NYU without encountering personnel problems akin to our own. And of their 120 organizations—double the number we're able to support, even though their student body population is only slightly larger than our own—only seven are currently listed as "inactive."

Yes, we're law students, and we're busy, but that doesn't excuse our exceedingly poor showing when it comes to things that aren't directly related to getting us jobs—especially considering that substantially similar

schools don't exhibit the same problems. I have no real explanation for why we're so less willing to contribute our time to school activities than are our peers elsewhere, but I do think the situation is detrimental to the law school experience. It might not be a big deal if certain plans fall through; instead of synthesizing evaluation comments, we can just make them available in toto (which is the solution the administration finally settled on). But there's no similar fix for organizations that decline to bring speakers to campus or organize outings or whatever else student organizations are supposed to do.

The result is not only that we're deprived of events that other law schools get to enjoy, but we also inhibit the formation of a real school community. NYU is at a disadvantage on that front to begin with: the campus is fractured with no real center, many students don't live on campus anyway, and the city itself provides ample opportunities to do things unrelated to the law school. And maybe that's the reason participation in and enthusiasm for school activities is low—with no sense of community, it's hard to be invested in what goes on here. If that is the case, though, declining to become active only feeds into the cycle and perpetuates the problem. But the converse is true, too: if we increase our involvement with the school, we'll build the community that seems essential to sustaining that interest long-term. Assuming we think the benefits of fostering school community and having active student groups are worth pursuing, it seems we would all be served by being more willing to give some of our time back to the school, and to each other.

SBA Tackles Registration, Evaluations, Alcohol Policy

By Carly Leinhesier '09



It's hard to believe it's already the middle of

November! As we get closer to exams, I want to remind everyone (especially the 1Ls) to take a little time for yourselves before things get too crazy. Make plans with your friends who aren't in law school, go play in Central Park or go for a run before it gets too cold to go outside, or just spend a little time reading a book that has nothing to do with the law. To help you prepare for finals, the SBA has a bunch of old course outlines available on our website. Of course, we always need more, so if you have outlines to send in, please do! You can reply to one of my weekly emails or send them to SBA secretary Jess Lau '09.

The SBA has also had a busy semester. We've been working with Academic Affairs to coordinate testing of the new registration system. About 55 students signed up, along with several members of the SBA, so if there are any issues with the system, we'll be working to get those resolved before the new system goes into effect for next year.

We've also come to an agreement with the administration and the faculty on the issue of posting students comments from course evaluations online. Starting this semester, all comments provided on course evaluations will be available online for students to view. The administration and the SBA will reserve the right to take down extremely offensive and inappropriate comments (such as personal attacks on the professor that

are irrelevant to their teaching style or the course), and the final decision on these issues will rest with representatives from the SBA. So, with that in mind, we are asking that you provide thoughtful, insightful, and appropriate comments that will be useful to your fellow classmates in selecting their courses. If you have negative feedback on a class, you are definitely encouraged to share it, but do keep the tone respectful and constructive. (Remember, professors have feelings too—I know, shocking!)

I am also participating on a committee, along with members of the SBA and several other students, that Assistant Dean for Student Affairs Pascale Walker put together to reexamine how we handle alcohol policy at the law school. The SBA worked with the administration last year in hopes of increasing the number of drink tickets available at events like Fall Ball and Spring Fling, but those conversations unfortunately did not result in any change in policy. This year, Walker decided to create a committee so she could hear the opinions of a wide range of students on this issue.

We're hoping that these conversations will be constructive and that we can come up with a policy that works for students, the administration, the security and janitorial staff, and everyone involved in making sure that we have safe and fun parties at the law school. If you have ideas or opinions on these issues, please contact me or anyone else on the SBA. We want these conversations to be as open and inclusive as possible and are hopeful we can get to a place where everyone is happy with the outcome.

THE COMMENTATOR

*The Student Newspaper of
New York University School of Law*

Editor-in-Chief
Andrew Gehring

Managing Editor
Robert Gerrity

Senior Staff Editors
Roberto Reyes-Gaskin
Andrew Simon

Staff Editors

Ashok Ayyar	Michael Mix
Stephanie Herbert	Ben Peacock
Joseph Jerome	Jennifer Rodriguez
Gavin Kovite	Molly Wallace

Web Editor
Jason Law

The Commentator serves as a forum for news, opinions and ideas of members of the Law School community. The Editorial Board consists of the Editor-in-Chief and the Managing Editor. Only editorials and policies developed by the Editorial Board reflect the opinion of the Editorial Board. All other opinions expressed are those of the author and not necessarily those of *The Commentator*. *The Commentator* is issued on alternate Thursdays during the academic year except during vacations and examination periods. Advertising rates are available on request. Subscriptions are also available at a rate of \$15 per year. Letters to the Editor should be sent to the following address, either on paper or via e-mail.

240 Mercer Street
New York, NY 10012
212.998.6080 (phone)
law.commentator@nyu.edu

All submissions become property of *The Commentator*.

Copyright 2008 New York University

Blinded with rage at an editorial, the outcome of the election, or Jenny Humphrey's guerilla fashion show?

Tell us your story.

Write a Letter to the Editor.

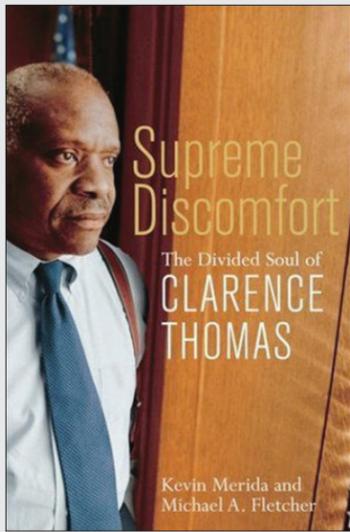
Contact law.commentator@nyu.edu.
Make your voice heard, through print media.

Supreme Discomfort Never Strays from Comfort Zone

BY GAVIN KOVITE '10

Kevin Merida and Michael Fletcher's new biography of Justice Clarence Thomas, *Supreme Discomfort: The Divided Soul of Clarence Thomas*, begins with a scene at the Savannah library the justice frequented in his childhood. The adult Thomas gives an inspirational chat to a group of youngsters and is catching up with some of his old friends when a young librarian walks up to his group. She looks Thomas in the eye and says, "I just wanted to see what a group of Uncle Toms looks like."

This sort of thing doesn't happen in Queens. Thomas's status as a racial pariah is the focus of the book, the first biography on the justice by black authors. Thomas, of course, is a conservative. His natural inclinations, along with the tough love of his grandfather, have given him a Horatio Alger-type worldview. He wanted to pull himself up by his bootstraps, and—for the most part—he has. Furthermore, he sees it as beneath human dignity to ask for hand-outs or preferences, or their policy equivalents.



In general, Thomas is all about personal pride and self-reliance, qualities that his critics say butt up in practical terms against both the needs of American blacks after slavery and Thomas's own professional history. The lawyers and politicians interviewed in *Supreme Discomfort* seem to all agree that Thomas wouldn't have made it to Yale, nor to the top of the Equal Employment Opportunity Commission, nor to the Supreme Court, were he not black.

This dissonance, say the authors, is a major point of discomfort in Thomas's psyche, and most of the book is spent examining it. The disconnect between Thomas's personal ideology and the path his career has taken is not uninteresting, but I would have liked the book to deal with a little more jurisprudence, especially as it illustrates these fraught tensions so well—for instance, Thomas's concurring opinion in *Missouri v. Jenkins* (515 U.S. 70, 114 (1995)), where he discusses forced integration in a school district after desegregation resulted in "white flight."

Broadway Publishing
2008
\$15.95

Happy Hour Chronicles an Unhappy Decade

BY BEN PEACOCK '09

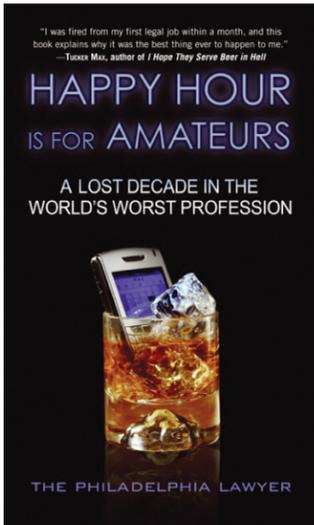
Happy Hour Is for Amateurs: A Lost Decade in the World's Worst Profession, a new work of fiction attributed to "The Philadelphia Lawyer," recounts the decade-long legal career of a man obviously unsuited to the job. Many of the chapters, especially at the beginning of the book, have been taken nearly verbatim from the author's website—philalawyer.net—where they were published as stand-alone pieces. The book cobbles these stories together into a single, relatively coherent chronological work, but that cobbling often results in rocky transitions from one chapter to the next. But those who enjoy reading about the chemical and sexual exploits of the endlessly cynical and unhappy (and who doesn't) will find much to laugh at and appreciate in *Happy Hour*.

The book can be read a couple of ways. First, we might make things easy on ourselves by reading it dismissively as a humorous-but-hyperbolic screed directed at a straw man version of law firm life by an alcoholic burnout of the profession. Second, and more worryingly, we might decide that the author's attacks on the legal profession, and on the upper-middle class ethos more generally, may be more meritorious than that. Between the puerile—but very funny—tales that fill the work, the author rails against the billable hours system, questions the sanity of working sixty-hour weeks for forty years, and suggests that law is less an honorable profession than a wasteland of the uncreative and risk averse. As a whole, the work savages the notion of seeking the American Dream in our chosen profession. I hope that the former reading proves itself the correct one, but I fear that we might need to give more credence to the latter.

The Philadelphia Lawyer takes a dim view of the intelligence of the average successful professional. I came to law school with few preconceived notions about the legal profession or white-collar work generally, but I did hold dogmatically to the American Dream ideal that hard work and talent were both necessary and sufficient for "making it." In undergrad, that view had me laughing quite often at Porter, a stereotypically named southern frat boy, clad in a pink Lacoste shirt and overly short khaki shorts, who loved telling everyone that his low GPA and chronic absenteeism didn't matter since "college is about networking and making connections." "S why I joined my frat." Imagine my shock 1L year when I ran into Porter at my school's NYC alumni bar and learned that he was now an analyst on Wall Street (probably aggressively advocating mortgage-backed securities to the bitter end).

One of the more common tropes in the book is the avoidance of situations by "lifers"—lawyers for life, ostensibly—when those situations would raise questions that the lawyers would rather leave unexamined. On Tuesday night, President-elect Obama answered a question I had been trying not to ask myself: "If there is anyone out there who still doubts that America is a place where all things are possible, who still wonders if the dream of our founders is alive in our time, . . . tonight is your answer." Perhaps you can still make it big with hard work and determination. Maybe you can

still patiently climb that ladder all the way to the top (though if you're thinking of starting on a lower rung of the government ladder, make sure you can count the



number of times you've smoked marijuana on one hand).

But it's clearly better to make an end-run around the whole process. Do some blow in your twenties. Get a degree from a top law school, but eschew the typical paths of success. Instead, write an autobiography. Be a law professor that never publishes on the law. Run for state senate and get the other four Democrat candidates thrown off the ballot due to technicalities. Vote present. Have an uneventful two-thirds of a freshman term in the U.S. Senate and amass a quarter of a billion dollars. Be elected president. Raise taxes on the losers paying off their student loans by the billable hour.

I don't mean to equate the next president with a drunken southern frat boy—I'm eight years too late for that. But the events of the past several months, economic and electoral, have cast doubt on the "typical" path of upward mobility. If you've ever questioned your decision to attend law school or wondered how you might ever fit into law firm culture, you might want to avoid this book—or risk finding yourself wishing you'd read it before taking the LSATs.

William Morrow Publishing
2008
\$23.95

"Synecdoche" More Than Just a Literary Term in Kaufman's Film

BY MICHAEL MIX '11

Think back to high school English class and try to remember the meaning of the literary term "synecdoche." For those of you who blocked those dark days out of your memories, the word refers to a part standing for a whole, or a whole standing for a part. For example, the sentence "Law school is giving me a headache" makes use of synecdoche because the whole law school is standing for the individual professors who are actually giving me a headache.

An understanding of this term is critical to understanding the new Charlie Kaufman film *Synecdoche, New York*. Kaufman, who previously wrote the fabulous *Being John Malkovich*, *Adaptation*, and *Eternal Sunshine of the Spotless Mind*, makes his directorial debut with this new movie, which he also penned. In typical Kaufman fashion, the film is multi-layered, is incredibly well-written, and probably gets better after a second viewing.

The film stars Philip Seymour Hoffman as Caden Cotard, a theater director from Schenectady, New York (note the play on words) who suffers, appropriately enough,

from Cotard's Syndrome. He is constantly worried about death and the deterioration of his body while simultaneously dealing with the deterioration of his marriage to his wife Adele (Catherine Keener) and his attraction to Hazel (Samantha Morton), a young woman who works at the theater box office.

This first part of the film is straightforward, and Cotard brings back memories of Hoffman's character from last year's *The Savages*. About one third of the way into the film, however, the whole thing takes a wild left turn. After his wife leaves him and he receives a MacArthur Genius Grant, Cotard decides to stage a massive play in a New York City warehouse, with each actor playing out their character in small vignettes. Cotard wants the audience to walk around and view the different vignettes, in order to understand the lives of each character.

In an art-imitating life motif, Cotard, Hazel, Cotard's second wife Claire (Michelle Williams), and others eventually become characters in Cotard's play. Soon, the actors begin to know the characters they are playing better than the characters know themselves. As the years

and decades pass, and Cotard's life further deteriorates, the line between reality and art begins to blur. The play symbolizes the movie itself; as audience members, we walk through the vignettes of Cotard's life. Similarly, Cotard is being watched and talked to by different people throughout the movie, almost as if the audience is right there, watching him in his own play. The play begins to represent Cotard, and Cotard represents the play.

If this sounds as complicated as the West Coast Offense, it's because it is. Kaufman has created a sweeping story on a grand scale, and there is more than one way to interpret the film. In keeping with Kaufman's record, though, there also are some hilarious one liners mixed with gripping drama. This film is just more proof that Kaufman may be the greatest screenwriter working today. As a director, though, nothing really stood out beyond a hint of surreal-



Writer-director Charlie Kaufman (right) gives actor Philip Seymour Hoffman (left) his motivation in the new film *Synecdoche, New York*, now playing in limited release.

ism. Michel Gondry's use of color and relativity in *Eternal Sunshine* really added to the meaning of the film, but there are no equally effective directorial devices here.

Hoffman's performance is, once again, astounding. He manages to be simultaneously hilarious, caustic, sad, and endearing in a way that most actors cannot pull off. Most of the supporting cast is excellent, but Morton stands out above all the rest. Her performance as a woman dealing with the prospect of

spending her life alone is incredibly poignant. My one problem with the acting, however, is that some of the actresses—like Hope Davis, Emily Watson, Dianne Wiest, and Jennifer Jason Leigh—are underutilized.

Synecdoche, New York is a cerebral film that will keep you thinking about it for several days. It's most likely too surreal and deviates too much from standard filmmaking to receive much attention come Oscar-season, but hopefully in time it will get its due.



COMPILED BY:
JWJ

PHOTOS COURTESY OF:
JASON BANKS, CAITLIN BEER,
JESSICA DE LEON, HEATHER MALINIK,
JOHN MCHUGH, MICHAEL MIX, KIMBERLY ONG, CHEN YE