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U.S. FOCUS

COVER: *Photo by Greg Bybee '07, Design by Eva Liu '08*

LETTER FROM THE EDITOR:

Welcome to the inaugural issue of the Harvard College Law Journal, the only pre-law publication on campus!

Before the Harvard College Law Society became active on campus in Fall 2005, an undergraduate law publication was already on the cards. Such a publication was missing from the Harvard undergraduate scene, despite many students having an interest in law, taking law-related classes offered by departments in the social sciences and even writing papers on legal topics. The Harvard College Law Journal is an outlet catered to both pre-law – or just curious – students and professionals who wish to reach a college audience.

For this issue, Journal editors worked through Summer 2006 and the early part of Fall with our contributors, to whom we are most indebted. In addition to our undergraduate authors, we would like to thank Kenneth Schneider, Professor Alice Abreu, Judge Mary Fingal Erickson, Judge Brett London, Judge Linda Marks and Commissioner Thomas H. Schulte for their time and valuable contribution.

We hope that the Harvard College Law Journal will serve as a useful and interesting information source for students interested in law school, pursuing careers in the public or private sectors of law and learning as much as they can before they make any decisions.

Emily Ingram '08

Editor-in-Chief

The Harvard College Law Journal is the publication of the Harvard College Law Society. Emily Ingram is an Executive Board Member of HCLS and the President of the society is Greg D. Bybee.

Please visit www.HarvardCollegeLawSociety.com for more information about HCLS and our upcoming

INTERNATIONAL FOCUS

INTERVIEWS

A set of interviews with Judge Mary Fingal Erickson, Judge Brett London, Judge Linda Marks and Commissioner Thomas H. Schulte, who are all currently serving for the Orange County Superior Court in the State of California. Each speaks about his or her experiences as a judge presiding over a variety of legal matters and their perceived relationship with the law and court.

The Speaker Series committee organized several successful events last year and is planning many more for this year. In the society's first year of existence, guest speakers included representatives of the public and private legal sectors from Massachusetts, Suffolk County, Harvard Law School, Japan, South Korea and China.

LAW SCHOOLS & INTERNSHIPS

MD/JD and JD/MBA programs have become increasingly popular in the last decade. Proponents say that joint programs give law students an edge, offering them both specialization and flexibility.

A review of a Kaplan-sponsored event designed to give audience members an "advantage over other law school applicants" held on July 20, 2006 at Harvard University's John F. Kennedy School of Government.

A summer intern writes about her experiences working at Bernstein, Litowitz, Berger & Grossmann LLP, named top ranking firm prosecuting Securities Litigation by the Chambers and Partners' 2006 Guide to America's Leading Lawyers for Business.

BOOK REVIEWS

The Harvard College Law Journal is a semiannual publication dedicated to a high quality discussion of legal development and history with a focus on exposing students to legal professionals, professors and graduate students. The Journal welcomes contributions from Harvard undergraduates, other Harvard affiliates and professionals with no Harvard affiliation at all. Articles should be original pieces and 2000-3000 words in length with the exception of book reviews, which are shorter. Please email HCLS.LawJournal@gmail.com to receive further details on contributions, submit an article or to join the staff of the Journal. Also, visit www.HarvardCollegeLawSociety.com to join the Harvard College Law Society.

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Issue 1, November 2006

Reasonable Search and Seizure? An Analysis of the Justification for the NSA's Wiretapping Program

BY CARRIE ANDERSEN

One of the most controversial legal issues in America today involves the National Security Agency's Terrorist Surveillance Program, a program that aims to acquire knowledge of potential terrorist activities through wiretapping international and domestic phone calls. The program, however, does not have Foreign Intelligence Surveillance Act (FISA) court authorization; it is a felony under the text of the Act. The Bush administration, however, maintains that the program is legal given the fact that FISA itself is unconstitutional, in that it infringes upon the President's power, and that it was overridden by Congress after other acts were ratified. Their defense of the program, however, has not convinced many legal scholars, who insist that it is a blatant violation of the Fourth Amendment's protection against unlawful search and seizure.

In defense of the program, U.S. Attorney General Alberto Gonzales has argued that, "The key question under the Fourth Amendment is not whether there was a warrant, but *whether the search was reasonable.* Determining the reasonableness of a search for Fourth Amendment purposes requires balancing privacy interests with the Government's interests and ensuring that we maintain appropriate safeguards. *United States v. Knights*, 534 U.S. 112, *118-19* (2001). Although the terrorist surveillance program may implicate substantial privacy interests, the Government's interest in protecting our Nation is compelling. Because the need for the program is reevaluated every 45 days and because of the safeguards and oversight, the al Qaeda intercepts are reasonable."[1] In reality, however, the key question is whether Gonzalez's standard of reasonableness and balancing private versus public interests would hold up as constitutional if brought before the Supreme Court.

It is certainly true that the American legal system is often confronted with the difficult choice between the needs of society and the needs of the individual. Specifically, the courts frequently have to decide whether societal security takes precedence over the rights of individuals, and will often use "reasonableness" as the criterion for deciding between these interests. In these cases, courts determine whether the actions of governmental authorities to maintain national security are "reasonable," when determining whether the government was abiding by the constitution in limiting the scope of individual rights of citizens; if reasonable, such actions have been upheld, even if imposing substantial limitations upon individual liberties. However, when these courts decide cases using reasonableness as a standard of judgment, the result seems predisposed to be a decision in favor of societal security rather than one sustaining individual rights. Rather than being a principled basis for making a difficult judgment, the use of the reasonableness standard seems to be a subterfuge in which the courts stray from their prescribed role in government, and fail to uphold justice for those entitled to protection of their personal liberty, in order to increase societal security. This article explores why, given that the primary justification for the NSA's wiretapping program involves balancing private versus public interests (and given relevant historical and legal precedent), the program should be found unconstitutional.

The court system in American society is supposed to protect individual rights, such as those found in the Due Process Cause of the Constitution and the Bill of Rights generally. The Fourteenth Amendment states that "no state shall… deprive any person of life, liberty or property, without due process of law."[2] The Fifth Amendment requires the same of the federal government. The idea of due process refers to an individual's right to a hearing; yet the court system must determine the nature of this hearing, or if a hearing is even required in certain situations. The role of the court, then, is to determine exactly how much process is "due," which can vary depending on a court's constitutional interpretation and prior precedent. In these Amendments, the distinct roles of the three branches are hinted at: the legislature and executive branch make or enforce the laws that can potentially infringe upon rights, and the judicial branch determines the amount of process due in order to protect them against such laws when they do infringe upon individual rights. Thus, ultimately, it is primarily the judicial branch of government that protects these rights, while the more majoritarian, elected branches look out for broader interests.

Justice is only upheld when the courts adhere to their purpose of defending individuals against the potential violation of their rights through federal or state laws; it is not their role to promote social welfare at the expense of these rights. Certainly, as the Constitution says, "all legislative powers" are granted to the United States Congress; Senators and Representatives can enact legislation to protect society. However, if such laws violate individual rights of citizens under the Bill of Rights, it is the judiciary's job to overturn the laws as unconstitutional. The Executive branch, including the military, is concerned with protecting society as a whole; as Justice

Jackson of the Supreme Court observed, "the armed services must protect a society, not merely its Constitution. The very essence of the military's duty is to marshal physical force, to remove every obstacle to its effectiveness, to give it every strategic advantage."[3] Yet the actions to protect societal security by the Legislative and Executive branches necessitate another branch that will operate to prevent the government from infringing upon individual rights. If the judiciary did not perform its task and instead viewed its task as protecting societal security, individual rights would frequently be violated and there would be no institutional means to protect them. In order to maintain a society that values individual rights as well as societal security, the government needs branches of government to protect both. The appropriate role for the judiciary, therefore, is to protect rights when they are infringed upon.

One of the most famous Supreme Court cases in United States history, *Korematsu v. United States* (1944), illustrates how a reasonableness standard was used by the Court to avoid its proper role of protecting individual rights. In this case, Fred Korematsu, a Japanese-American citizen, argued that his internment was an unconstitutional breach of his right to due process, since he was not granted a hearing before being forcibly relocated to a camp set up during World War II for those of Japanese ancestry. This case squarely presented the question whether concern for national security would deprive citizens of their Fifth Amendment right to be heard before being deprived of their liberty. The majority opinion is mainly comprised of the Justices' attempts to determine whether or not General DeWitt's decision to intern the Japanese-Americans was reasonable. Justice Black, the author of the Court's majority opinion, notes that while "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,"[4] "pressing public necessity may sometimes justify the existence of such restrictions."[5] In essence, he is proclaiming that the need for security in this circumstance outweighed the right to legal process for those interned; in other words, the military's actions, given the necessity of protecting national security, were reasonable and should therefore be upheld. Black also defers to the military authorities in a time of war, all but saying that since they viewed their actions as necessary (or reasonable) they should be sustained:

> "[Korematsu] was excluded [and interned in a camp] because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders – as inevitably it must – determined that they should have

Photo by Carrie Andersen '08

the power to do this."[6]

Though Justice Black does not explicitly say that the Court is basing its decision on the apparent reasonableness of the military's actions, it is clear that the Court looks at the military judgment not in terms of its consistency with constitutional requirements, but whether it evidences reasonable decision-making. In doing so, the Court affirms national security at the expense of citizens' individual rights.

In his dissenting opinion, Justice Jackson points out that the majority was essentially using a reasonableness standard in the case, which led to a failure of the Court to protect individual rights. Jackson notes that "the military reasonableness of these orders can only be determined by military superiors," not the Supreme Court.[7] He then adds that "[his] duties as a justice as [he sees] them do not require [him] to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity."[8] He indicates that it is not his place as a Justice to examine the reasonableness of military action; rather, he argues that "the courts can exercise only the judicial power, can apply only law, and must abide by the Constitution...."[9] Jackson does not consider the question at hand to be whether or not the military's actions were reasonable; he calls for the Court to decide only whether or not the military's actions violated the Constitution. If it had done so, the Court may have arrived at the same conclusion Jackson did: regardless of whether or not the internment was "reasonable," the military violated the Constitution in denying Korematsu a hearing. Ultimately, the negative effects of using the reasonableness standard in a constitutional context are revealed in the Korematsu case: the Supreme Court's focus on reasonableness allowed it to avoid constitutional analysis and allowed an infringement upon citizens' constitutional rights.

But what about the specific case of the NSA wiretapping program? Given that the reasonableness standard, if used in a legal setting, can be seen as a way for courts to uphold national security and government action at the expense of rights guaranteed by the Constitution, it is clear that the NSA's program, if brought before the Supreme Court, should be found unconstitutional. Gonzales makes the claim that since the warrantless searches were reasonable, they should be upheld as legal. Yet the primary question of a court does not involve the reasonableness of such searches; it involves whether the secret actions of the government, in this particular case, were constitutional. As illustrated in the Korematsu case, it is not the Supreme Court's role to decide whether or not actions were reasonable. Rather, their role is to protect those rights articulated in the Constitution, and act as a check, on the power of the other two branches of government to protect society as a whole. Were the Supreme Court to consistently rule on the reasonableness of certain actions as opposed to their constitutionality, it would be a pointless body of government that merely yielded to the Executive and Legislative branches. This is not the appropriate role for the judicial branch as described in the Constitution, and as such, the program should be deemed unconstitutional.

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Gender Entrapment and Gender Bias in Female Criminality

BY MELINDA BIOCCHI

THE INCREASE IN CRIMINAL CONVICTIONS OF WOMEN & ABUSE PREVALENCE

As I browsed libraries for resources on the subject of female criminals and the causes of female crime, I came across shelves of books on females as victims of crime. Titles indicating topics on battered women, spousal abuse, and female child abuse were the most frequent. I even stopped a few times, ready to grab one that read "Violence and Women" and "Abuse and Crime" before realizing they were about violence *against,* women not *by* women. Through my own research on women as perpetrators of crime, I have discovered that the surplus of literature on women as victims of violence and crime on those shelves was actually a reflection of a terrible reality.

A vast amount of women who commit crime have been previously and consistently sexually or physically abused. Bureau of Justice statistics from 1999 show that "Nearly 6 in 10 women in State prisons had experienced physical or sexual abuse in the past; just over a third of imprisoned women had been abused by an intimate in the past; and just under a quarter reported prior abuse by a family member."[1] Women have been subjugated by men and by society for decades—these abusive pressures are increasingly manifesting themselves in deviant behavior in women. This is a concern not just for the women of our society but for our entire culture. Victims who, in turn, become predators are common. The rehabilitation of the victim is not being accomplished and, based on the overcrowded state of most prison facilities today, is likely not even seriously attempted.

I. SOME CAUSES OF FEMALE CRIME: ABUSE AND ENTRAPMENT

The number of criminally convicted women has risen tremendously over the past several decades. In 1999, women comprised 16% of the correctional population.[2] The rate of incarcerated women continues to grow, in many cases, at faster rates than men. Dr. Mesa Chesney-Lind, professor of Women's Studies at the University of Hawaii documents the recent increase in women's convictions and the disproportionality of the increase based on gender:

> In just the last decade (between 1990 and 1998), the number of women on probation increased by 40 percent…the number of women in prison in creased by 88 percent, and the number of women under parole supervision increased by 80 percent…Since 1990, the number of female defendants convicted of felonies in state courts has grown at more than twice the rate of increase for male defendants.[3]

Such large increases in both incarcerated women and women on probation in recent years calls for an exploration of the more current causes of female aggression and underlying motivations for committing crimes—especially with disproportionately large growth rate when compared with their male counterparts. In a study done in two Oklahoma all-female correctional facilities, 80% of all subjects reported were abused in the past, and 72.3 percent reported *two or more* types of abuse in their past.[4] The proportion of abused women is much higher in incarcerated populations relative to the general population. Since abuse is more common among incarcerated women, it is possible that there is some type of link between abuse and crime, though it may not necessarily be a direct causal relationship. Examining the emotional and psychological effects of abuse on women can elucidate the correlation between abuse and criminal activity in women.

Scholar Judith Herman describes the effects of abuse on women's actions. She asserts that abused women experience a lack of control during their abuse, have difficulty with authority figures, and therefore engage in unhealthy coping strategies.[5] Abuse takes such a severe physical and emotional toll on the suffering women often causing their emotions to be suppressed for long periods of time and slowly wearing away their self-worth. Battered and sexually abused women experience traumatic emotional turmoil during and after the time of abuse. In her book *Compelled to Crime*, based on a study done at Riker's Island, Beth Ritchie describes their pain. She writes, "Whereas the physical abuse led to pain, fear and for some women, embarrassment, the emotional abuse created a sense of powerlessness, inadequacy, and alienation."[6] All types of abuse perpetrated against women have strong psychological and emotional effects. These effects, in turn, can cause what is known as gender entrapment.[7]

Gender entrapment is founded on the basic legal definition of entrapment—inducing a person to commit a crime that otherwise would not have been committed—but is applied to the model of abused women. Ritchie defines gender entrapment as "The socially constructed process whereby… women who are vulnerable to men's violence in their intimate relationship are penalized for behaviors they engage in

even when the behaviors are logical extensions of their… culturally expected gender roles, and the violence in their intimate relationships."[8] She claims that these abused women have very few choices in their lives, and that they see ways of survival through illegal activities. Through abuse, women's identities and self-images are broken, yet these women are still expected to maintain the outward appearance of a normal and stable life. Many resultant factors of abuse motivate these women to participate in criminal activity: fear and injury, poverty, isolation, and—particularly with African American battered women—the oscillation between loyalty to their batterers and nihilism.

These problems can facilitate committing crimes for several reasons. Some women anticipate threat of death, harm of children, or escape of pain. Instances of terrible abuse can also make the abused paranoid. Sometimes abused women lash out at other men, or those with similar characteristics to their abuser, because of the fear and destruction their abuser has caused in their lives. Extreme poverty and necessity are also cited by Ritchie as impetuses to illegal activity. All of these volatile emotional, psychological, and physical effects stem from the abuse that these women experienced, and when interviewed,[9] many name these various problems as leading them into committing or attempting criminal activity. Social stigma also factored in as a motivation to stay in an abusive relationship, especially for African American women. Keeping the façade of a strong family meant success for many of them, even if they had to become criminals to ease the pain from their private abuse. Ritchie comments on this:

> Given the broader social conditions that the African American battered women lived in, staying *for them* meant participating in illegal activity. From their perspective—created by their experience of abuse and their marginalized social location—becoming involved in crime was a reasonable behavioral response to abuse—it was a part of their survival strategy.[10]

Abused women often feel trapped in a situation where they feel incapable of changing its horrific outcomes. Crime eventually becomes an attractive option when compared to death, social disapproval, murder of a child, or extreme physical pain.

Of course, there are some incarcerated women who have not previously been abused. Many of these women have grown up in marginalized households, not relying on family or social networks, but finding the world alien and unfriendly. As Ritchie points out, these women "were not surprised by their lack of social success when they entered the public sphere."[11] Having an unstable foundation on which to begin their own lives in the world, these women expected to be shut out, and were led, by psychological default, into illegal activity. As the aforementioned statistics demonstrate, however, this breed of woman represents a much less significant portion of the incarcerated population than those who have been abused.

II. TYPES OF CRIME COMMITTED BY WOMEN

Crimes committed by incarcerated women differ substantially from those committed by the incarcerated male population. Though incarceration rates for women *are* increasing, the types of crimes they commit are typically offenses that are not classified as violent crime. According to the FBI Uniform Crime Report for 2004, males accounted for 82.1 percent of the total number of arrestees for violent crimes.[12] Based on self-reports of victims of violence, women account for 14% of violent offenders.[13] Usually, if women have committed violent crime, it is in the form of a simple assault, a less severe form of violence. 3 out of 4 violent female offenders have committed only simple assault, while male violent offenders rank at a lower percentage of 1 in 2. When women do commit a serious violent crime like murder, their history of abuse and gender dynamics factor into that decision. Chesney-Lind notes, "Even when women commit violent offenses, gender plays an important role in their crimes. Research indicates, for example, that of women convicted of murder or manslaughter, many had killed husbands or boyfriends who repeatedly and violently abused them."[14] Women's violent acts are not typically isolated incidents of bloodlust. Though women certainly do commit violent crime, they are far more likely to have committed property crime (burglary, larceny, and motor-vehicle theft) or drug offenses. Women's involvement with the drug trade has increased largely over the past 30 years. In 1979, 1 in 10 women were incarcerated for a drug offense; in 2000, it was 1 in 3.[15] In 1998, over half of the women incarcerated were convicted of drug or property crimes.[16]

Many women still believe the home their central focus of effort, a place wherein they strive to maintain stability. Nanci Wilson of Indiana University says that it is the very fact that women are so closely associated to their homes that makes them so appealing as assistants in the drug trade, which may account for such a striking increase in women with drug offenses in the past 20 years. If women are primarily focused on child-rearing and homemaking, and their home is transformed into a place of business for a drug dealer, then the woman will always be available for work. "Women can provide (a) a place to conduct business, (b) credit (e.g. cash loans), and (c) communication facilities (a telephone can provide a way to receive and relay messages). All of these things require or are enhanced by a stable base and/or stable income. They are not things which…daily responsibilities

would impede."[17] Since homes sometimes become the basis of the drug trade, women have equal opportunity to become involved. They do not have to work late hours out on the streets, which may cause family disruption. Contrastingly, they may see it as an opportunity to maintain the home and also to gain financially. Arrests for drug offenses are likely to be made at the individual or street level and, typically, these dealers are also users of the drugs they deal. Because arrests of these dealers are more prevalent, and arrests of women involved with drugs have risen, it is likely that women have become more involved at the street level, as well.

When drug sales are not based in and around a secure home, some women still become involved with the drug trade. Women are involved in the drug trade at the production level in third-world countries (such as harvesting opium) and are very prevalent as drug couriers. Over half of all drug couriers arrested in London Heathrow Airport from September 1991 to April 1992 were female.[18] Many of these women were not users of these drugs, but simply found the monetary gains attractive. Ninety-six percent of those women caught in London had no prior criminal record. The lack of a previous record of drug use and involvement demonstrates either a lack of consequential information or pure necessity. If a circumstance is desperate enough, drug transferring often appears to be a viable option. Particularly for low-level workers in rural Africa or Central America, the prospect of gaining a large sum of money for simply transporting drugs can seem extremely appealing for a woman who is struggling to survive. Gender entrapment[19] may also contribute to drug sales and coercion to sell drugs for a partner can be significant, as well. Women are likely to comply and sell drugs if they feel their lives are in danger or if they think abuse from their partner will stop. Since both abuse and drug offenses are common among incarcerated women, one can deduce that many female criminals would have identified some advantage in selling or using drugs. Many times, because of their desperate situations, these women are willing to ignore the legal risk factors associated with such criminal behavior.

III. HOW GENDER BIAS PERVADES ATTITUDES ABOUT CRIME

Female criminal activity has been taboo for generations, while male crime is sometimes even hallowed. In a comparison of perceptions of male and female crime, two scholars point out that "There are no acceptable deviant roles for women comparable to those for romanticized "rouge or "macho" males."[20] If female crime was recognized, then it was reasoned that women became criminals only because they failed at "womanly pursuits." Their crimes were not taken seriously, or recognized as a cry for help. These biases based on gender still persist today. Elizabeth Windschuttle notes:

> The interpretation of female delinquency in the context of the femininity stereotype assumes that the main goals of adolescent girls are…aimed towards the development of stable heterosexual relationships. Any criminal activity on the part of the adolescent girl has then been seen in terms of the inability to achieve these goals; and criminal activity on the part of an adult woman is seen to contravene her responsibility as moral guardian of family and society. Similarly the delinquent activities of boys are explained in terms of the inability to gain status in society through achievement of occupational and financial goals.[21]

Women often *do* pursue crime for financial reasons or for failure to achieve their occupational and personal goals, not simply because of the inability to maintain a relationship. Primarily because in most instances the female criminal has been a victim of abuse, it is unjust that we focus the relationship failure on the woman's shortcomings and not the man's inadequacies, if relationship failure is, in fact, the cause for crime. Though the female may often strive for a stable family relationship, it is not her failure to do so that leads her to crime in cases of abuse, but the active sabotage of her male counterpart.

CONCLUSION: THE STATE OF FEMALE CRIMINALITY AND PROPOSED SOLUTIONS

Female crime is on the rise, and the causes of such an increase indicates that there are problems in the social structure of society that need examining. It is important that we seek to legitimate ways to remedy this increase of crime through the correctional system. Prior physical or sexual abuse is prevalent across the entire spectrum of female offenders, ranging from those who commit violent crime to drug offenders. Compared to the 12.2% reported by men, the abuse experienced by women criminals is significantly higher[22] and, therefore, should be a significant factor in the criminal rehabilitative treatment that women undergo. The types of crime that female perpetrators commit are also less violent and more economically and personally motivated than those of men. Many times, for women living in poverty or abusive situations, a criminal life provides an escape and drugs can provide a very literal medication for their pain. The correctional methods used for women criminals should be different from incarcerated males. Since abuse is so prominent among female criminals, we must first attempt to treat the symptoms of abuse. Though these abused women were victimizers, *they were victims first*. Perhaps if we treat them as

victims, and provide help, there will be far less victimizing in the future.

A focus on treatment for female criminals would have a very definite effect on the female crime rate, and most especially on female recidivism. At least 50% of women currently in large state prisons have prior offenses.[23] Because this is a significant proportion, it makes sense to rehabilitate these women with their first offense, causing less harm to be done to the community and to the individual criminal. Since a causal relationship between the history of abuse and propensity towards criminal activity has been established, it is certainly worth attempting to heal the effects of the abuse before serious and more frequent crimes are perpetrated by the female criminal. Therapy and safety are very important for rehabilitation from abuse, even if one is not a criminal.

Though there have been some positive statistical effects of both the surveillance and treatment aspects of parole,[24] recidivism is still extremely high. Almost 45% of women who ended parole in 1996 returned to the criminal justice system.[25] This demonstrates that parole has not been as effective as once was expected. If there was a separate facility for abused criminal females that focused on psychiatric rehabilitation from that abuse, it is my claim that the effects of recidivism would be noticeably decreased. If abused women offenders are forced to confront what may be the cause of their criminal activity, and to do so with their first offense, it is possible that they can be helped before they establish a prolonged criminal history.

Treatment facilities are also not always effective, but there are ways to make success more likely. In her article on community policing, Joan Petersilia discusses some aspects of treatment programs that made them successful in helping to heal prisoners of past psychological distress. Productive treatment facilities were intense and behavioral, stressed positive reinforcement, had modes of rehabilitation, counselors who were specifically matched with their patients and replaced criminals' old social networks with newer safer social circles.[26] By removing the offender from the world of offending, and also the world of their abuse to construct a productive new world around them, these facilities were able to heal the victims successfully.

Not all women criminals have been abused, and not all treatment for the abused will work in preventing these women from committing crime. However, a significant portion of female criminals have had extremely difficult lives. Female criminals could have made the choice to deviate on their own, but studies have shown that their family circumstances and social networks gave them the impetus to be antagonistic towards the legal system. What is of utmost important is the effect that gender stratification has had on female criminality. Gender bias pervades both the legal realm and the criminal realm; this link between female subjugation and crime needs to be broken. We should take steps to help these women and, in turn, help our own society. If we treat each female offender as an individual victim, healing can begin and the cycle of hatred can end.

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Affirmative Action and the Limitations of the Judiciary

BY NICOLE BROWN

The question of whether or not the judicial process actually makes a difference in the hearts, minds, and, as a consequence, the actions of ordinary citizens is one that has preoccupied legal scholars since the institution of American constitutional democracy. The Founding Fathers were extremely cautious about the amount of Constitutional authority relegated the judiciary. The Anti-Federalists in particular feared that the Supreme Court, because of its insulation from the public opinion and the finality of its rulings, was entrusted with an undue level of influence over the other two branches. However, the Federalists were convinced that because of its inability to enforce its decisions or nominate the cases brought before its chambers, the Court would always remain at a practical disadvantage relative the other arms of the government. Recall Alexander Hamilton's famous quotation from Federalist Paper No. 78: "The judiciary is beyond comparison the weakest of the three departments of power…"[1] The debate over the role of the modern Supreme Court in American society remains as impassioned today as it was during the Constitutional era. The impartiality of individual justices is of more concern today—most likely as a result of the highly publicized nomination process—in addition to charges that the Court is merely a symbolic fixture of American government because the general public is largely out of touch with the significance of its decisions to their daily lives.

Due to the limitations of this particular undertaking, it would be impossible to tackle the very broad question of the overall effectiveness of the federal judiciary. However, there is much to be gained from a discussion about the role that the Court has played in producing—or failing to produce—social change in one narrow arena of society. I have chosen to analyze the effectiveness of the Supreme Court within the context of affirmative action policy with respect to the allocation of public works contracts. To this end, I specifically rely on *Fullilove v. Klutznick* (1980), a case in which the Court endorsed the Congressional mandate to encourage the use of minority contracting firms in public works projects. After a careful exploration of the measurable impact of *Fullilove* and its aftermath, I would best characterize the decision as a relevant link in the series of events leading up to the acceptance of government set-aside programs as a legitimate mechanism with which to address past discrimination in contracting.

Before embarking on an in-depth analysis of the implications of the *Fullilove* ruling, it is first necessary to briefly outline the specifics of the case. In 1976, Congress enacted the Local Public Works Capital Development and Investment Act, a short-term federal works initiative in the spirit of the New Deal reforms implemented in the wake of the Great Depression, in order to stimulate a weak national economy through the creation of jobs in the construction of needed public facilities. Following its first assessment of the 1976 Act, one year later Congress appropriated an additional $4 billion dollars to the program as a result of its early success. At the time of this initial review of the success of the Act, there also arose a call in Congress for certain other modifications as conditions precluding its apparent expansion. While the program had indeed been very successful in increasing the accessibility of government funds to prospective contractors, there was a certain homogeny—particularly in racial composition—among the firms that had benefited from the Act in its original form seemingly due to a deficiency of competitive minority-owned firms. Therefore, out of a desire to overcome the legacy of discrimination in the contracting process as well as increase the number of minority-owned businesses taking advantage of the government grants, Congress offered several amendments to the Act, including the minority business enterprise (MBE) provision, which lies at the heart of the constitutional question before the Court in *Fullilove*.

The MBE provision provides that no public works funds be granted to applicants without their consent to set aside at least 10% of the total amount of the grant for minority business enterprises, defined as companies owned by members belonging to racial minority groups. On November 30 1977 the petitioners, a consortium of construction contractors, filed suit against H. Earl Fullilove, the Secretary of Commerce at the time, as well as the State and City of New York in District Court, alleging that the new MBE provision violated their right to the Equal Protection and Due Process clauses of the Fourteenth and Fifth Amendments. The District Court and Court of Appeals each, on separate occasions, upheld Congress's interest in ensuring minority representation in the construction of public works projects and the MBE provision's narrow tailoring to that specific government interest.

When the Supreme Court handed down its decision on the *Fullilove* case in 1980, major news outlets, such as the New York Times and Congressional Quarterly, covered the story. However, despite the buzz surrounding its announcement, the ruling was in fact far from groundbreaking. The Court never actually reached a consensus on a majority opinion, yet buried deep within the individual statements of six justices was a plurality of opinions in support of MBE, and so the prior two lower court decisions as well as Congress's right to move forward with its proposed plan were affirmed.

Photo by Nicole Brown

As a side note, *Fullilove* represents a prime example of the conflicting nature of affirmative action casework in that it authorizes the use of the remedy of past discrimination as a valid justification for affirmative action programs, where other prior decisions had not, in addition to the concept of a numerical set-aside, very similar to the quota structure, specifically for minority contractors. The factionalism of the justices' opinions is consistent with this overall shortcoming of the case.

As I commence the analytical portion of this essay, I offer a complete definition of the term "social change" within the context of my research so that my conclusions are evaluated from the vantage point that I intend. In his thorough account on the limitations of the Supreme Court, *The Hollow Hope: Can Courts Bring about Social Change?* Gerald Rosenberg characterizes social change very narrowly as "policy change with nationwide impact."[2] There are several conditions for the specific form of policy change that Rosenberg refers to in *The Hollow Hope.* Policy change of the Rosenberg persuasion involves the institutionalization across national bureaucracies of a new procedure replacing the existing status quo method. Therefore, social change goes beyond the scope of the merits of a single case and impacts national policy in a measurable way.[3]

It might seem logical that an investigation into the level of social impact of a particular Supreme Court decision would also be evident in data corresponding to the change in public opinion as it relates to the controversial issue under scrutiny from the period immediately prior to the ruling and its aftermath. Public opinion statistics have the ability to produce very dramatic results regarding the impact of Supreme Court decisions over time, and have served as the basis for the studies of a number of accredited legal scholars. I have made the conscious decision to not rely on public opinion data in this essay for two reasons. First, public opinion alone should never be the justification for conclusions about the efficacy of the Court for the simple fact that the hearts and minds of individuals are often resistant to change regardless of the pace of the progression of society and its governing institutions. For example, there are numerous cases, such as *Brown v. Board of Education*, in which public opinion has lagged far behind the federal courts in terms of acceptance of the turning tide towards a new social norm, the racial integration of public schools, in the case of *Brown.* Therefore, it is possible for a controversial case to achieve significant policy reform without immediately impacting public opinion. Furthermore, I am skeptical of the validity of public opinion statistics on structural grounds because of the excessive tendency of individuals to misrepresent their opinions on critical issues for fear of self-incrimination. Pollsters have long since ceased asking participants whether or not they consider themselves racist because of the implausibly high instances of negative responses. Despite recent methodological improvements, public opinion data remains to be taken with a grain of salt, particularly surrounding the highly contentious and public matter at hand: affirmative action in employment.

A review of the changes in policy following the *Fullilove* decision point to a consistency with an already evolving political attitude promoting set-aside programs as a legitimate means of rectifying past discrimination in the allocation of public contracts. *Fullilove* itself did not lead the nation down the path of social reform; rather, it was a key component of an initiative spearheaded by the legislature. Therefore, according to my assessment, at least with respect to *Fullilove*, the Supreme Court cannot on its own exercise the authority to carry out large-scale social change. In approving the expansion of the Local Public Works Capital Development and Investment Act, the Court effectively provided an open-ended endorsement of similar acts of Congress with respect to other government institutions. In 1983, Congress included set-asides in foreign affairs legislation in an amendment to the Foreign Assistance Act of 1961. The minority set-aside provision stipulates that, "not less than 10 percent of the aggregate of the funds made available for the fiscal year 1984 to carry out chapter 1 of part 1 of the Foreign Assistance Act of 1961 shall be made available only for activities of economically and socially disadvantaged enterprises…which are controlled by individuals who are Black Americans, Hispanic

Americans, or Native Americans," writing almost identical to the MBE provision under evaluation in *Fullilove*.[4] The closeness of the two assistance programs in language coupled with the enactment of the Foreign Assistance provision practically on the heels of *Fullilove* demonstrates one instance of the precise efficacy of the decision.

Fullilove has also had major implications for state and local jurisdictions. According to the findings of Mitchell F. Rice in the Public Administrations Review piece, "Government Set-Asides, Minority Business Enterprises, and the Supreme Court," set-aside plans were implemented in the following locals across the country at the respective rates: Atlanta (35%); State of Arkansas (10%); Birmingham (15%); Houston (12%); Massachusetts Bay Transit Authority (30%); State of Michigan (7%); Milwaukee (19%); State of Ohio (5%); New York City (10%); Pierce County, Washington (12%); State of Tennessee (7%); and Washington, D.C. (40%).[5] More specifically, in Atlanta, city officials noted a growth from 29% of MBEs participating in all city contracting activities in 1980 to 41.3% as early as1981.[6] The apparent positive relationship between the *Fullilove* decision and the instance of MBE provisions authorized by local government entities speaks to the unique impact of the Court in this area. Congress's efforts had not previously been targeted toward that particular implementing population; therefore, it appears as though the Court was most likely instrumental in expanding the application of the already-existing policy.

Throughout this essay, I have been purposefully cautious not to overstate the significance of the role of the Supreme Court in the development of social change. In fact, I may ultimately be criticized for being biased against the Court. However, there are several immitigable factors that seriously call into question the capability of a case such as *Fullilove* to actually produce meaningful change. The first of these factors relates to role of the Court as the ultimate arbiter of legislation already enacted by the Congress. At best, the Court can only be conceptualized as one piece of an already-existing puzzle shaping the standards of affirmative action in employment because it merely served to permit current legislation to continue to move forward. In a sense, the Court stepped in at the moment at which the implementation of its decision had already taken place at the federal level.

While the statistics demonstrating the impact of the *Fullilove* decision on the local level appear to corroborate an important role of the Court in the policy arena, it is also necessary to attempt to devise alternative explanations for these findings as well in order to arrive at the most accurate conclusion regarding the power of the Court to affect social change. It should be obvious from my earlier parenthetical treatment of public opinion data that I do not find it to be the most credible indicator of social change from the perspective of cases credited with having successfully changed the way individuals think about a certain issue. However, in the case of Court decisions which follow in the mode of public opinion, one should consider how the power of the Court might be limited in such instances. Congress, of the three branches of government, is the most reliable institutional embodiment of the will of the masses and it had already sanctioned the use of MPEs before the *Fullilove* ruling. Therefore, local entities may have already been moving in a similar direction and acted on their own as opposed to in response to the Court's action. Furthermore, the absence of any sort of a backlash in response to the decision may also be related to the remedial nature of the statute in question. In no way does *Fullilove* mandate that government entities implement MPEs; but rather gives the option to those wishing to do so. Therefore, any negative responses to the ruling would not be well reflected in the data.

As I draw to a close, I return to the seminal question of this essay, that being whether the Supreme Court has the authority to wield major change in American society. Ultimately, an investigation into the impact of the case, *Fullilove v. Klutznick*, demonstrates that the Court is only a significant force when acting in collaboration with another branch of government, in this case the legislative. However, one must also consider the historical legacy of groundbreaking Supreme Court decisions. This point is not as relevant to Fullilove, as it was ultimately overturned in 1989 by the case of *City of Richmond v. Croson*. However, cases like *Brown* and *Roe*, which had questionable impact in the immediate aftermath of their declaration, have over time become part of the social and legal fabric of this nation. I would emphasize this potential role of the Court as its most central function in the process of producing social change in America.

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Same Game, Different Players

The extent to which race should be taken into consideration in public school assignments BY JENNIFER GREEN

Meredith v. Jefferson County Board of Education, to be argued before the United States Supreme Court in December 2006, calls into question the merits of historical cases such as *Brown v. Board of Education (1954),* which declared that "separate but equal" public education facilities were unconstitutional. Crystal Meredith, the mother of a Louisville Kentucky elementary-aged student, claims that her son was denied transfer to another school because he is white. The system employed by Jefferson County School district, commonly referred to as the "managed choice" plan, requires that each school within the district – elementary through high school – have a black enrollment that is no less than 15 percent while not exceeding 50 percent. Approximately one third of students in the Jefferson County Public School district are non-white.

Meredith v. Jefferson County Board of Education calls into question the very tenets of landmark Supreme Court cases in the life of race relations in this country, such as *Brown v. Board of Education (1954), Regents of University of California v. Bakke (1978)* and most recently, the two Supreme Court cases involving the University of Michigan's law school and undergraduate program, *Gratz v. Bollinger (2003)* and *Grutter v. Bollinger (2003)*. The phenomenon coined "reverse discrimination" is certainly an idea that deserves acknowledgment but there is valid opposition for several reasons. First of all, many of the claims associated with it are often based on faulty logic. In addition, they deliberately ignore the legacy of institutionalized oppression and discrimination exacted against certain minority groups in this country and usually are based on prejudice. Contrastingly, the Jefferson County Public School System must continue its efforts of taking precautionary steps, to ensure that the causes many of our predecessors devoted their lives to during the Civil Rights era, namely public school desegregation, were not in vain. Moreover, the school district must do more than just make provisions for the numerical presence of Black students in grades kindergarten through 12th but also actively enact measures to ensure that these children are in a learning environment that is conducive to their growth and development. Notwithstanding this, if Meredith is victorious in her Supreme Court battles, the ramifications will be devastating for an already inefficient and segregated American public education system. We have only to look to the University of California and the University of Michigan – both schools that narrowly escaped vicious assaults on their affirmative action programs – to understand the many drawbacks of eliminating active measures to ensure diversity in the American post-secondary education system. The American public school system simply cannot afford to revert back to the era of pre-Civil Rights era segregation.

It is extremely telling that, in a society that avows to have progressed so much since the painful times of Jim Crow segregation, over five decades later we are still grappling with the same issues. The purpose of this article is two-fold: firstly, to examine the conditions out of which such an aggressive race-based policy was born in order uphold the validity of Jefferson County Public School System's decision to institute the "managed choice" plan. Perhaps more importantly, this article also aims to contribute to the dialogue about the importance of diversity in all aspects of American society, particularly in the American public education system, a system already plagued with vast inequalities, disparities and achievement gaps between white and black children. In so doing, this article seeks to illuminate an issue that is much larger than Meredith's claims, the Jefferson County Public School System and the state of Kentucky. It is an issue that government programs such as the Bush administration's "No Child Left Behind" have only exacerbated. The question is: how does one go about leveling the playing field for low-income and minority students across this nation? Or, simply, how can we best prepare children from disadvantaged backgrounds for successful futures?

In the case of *Brown v. Board of Education of Topeka 1*, the United States Supreme Court, in essence, overturned *Plessy v. Ferguson* and the "separate but equal" doctrine. The court ultimately ruled that separate but equal public education facilities were inherently unconstitutional, saying that to separate black children "…from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone".[1] To deprive children of equal educational opportunities, according to the Court, is not only unconstitutional, but it "… is a right that must be available to all on equal terms."[2] Although equal public educational opportunities are not a natural right, they are rights guaranteed by state governments because every citizen pays taxes to maintain the state public education system. Unlike in the case of *Plessy v. Ferguson*, where the court ruled that separate does not necessarily imply inequality or inferiority, it was a well-known fact that schools for Black children and for White children were separate and anything but equal.

Central High School in Kentucky Photo by Jennifer Green

Thus, the implications of *Brown v. Board of Education* on the Jefferson County Public School district's decision to implement the managed choice plan are evident. Recognizing the gross disparities that existed between White public schools and Black public schools, the need to move in a direction that lawfully mandated integration was critical. Still, as with most school districts, the legacy of integration in the Jefferson County Public School System has not been without obstacles. *Brown v. Board of Education* mandated that American public schools move towards desegregation "…with all deliberate speed." For the Jefferson County Public School System, "all deliberate speed" translated into 21 years later when mandatory "busing" was instituted as an official means to move towards an "integrated" system that had, up until that point, maintained its status quo even after *Brown v. Board of Education* was handed down in 1954.[3] As can be imagined, the busing era was a tumultuous time in the life of Louisville area public schools. Many black students paid a high price that often compromised their safety and wellbeing, to ensure that Black students would not have to grown up learning in a district that was separate and unequal.

In the case of *University of California Regents v. Bakke*, Allan Bakke claimed that the Medical School's admission policy violated the Equal Protection Clause of the Fourteenth Amendment because the University of California at Davis maintained two separate admissions processes, a regular program and a special program. The regular admissions program was open to all applicants, while the special admissions program was open only to minority applicants from disadvantaged backgrounds. The school argued that the special admissions program was designed to increase the number of minorities and historically underrepresented people in the medical professions, counter societal discrimination, to increase the numbers of practicing physicians in underserved communities and to create a diverse student body. The court recognized that all of these were worthy goals for any institution of higher learning, but declared that the goal of rectifying societal discrimination is too broad and arbitrary of a concept. In the end, the court ruled that the use of race as a sole means of admission is discriminatory and, therefore, unconstitutional.[4]

University of California Regents v. Bakke implicitly brings out a key element about modern manifestations of affirmative action that many people often ignore in their impassioned plea of reverse discrimination. It is illegal, by mandate of the United States Supreme Court, to use race as a single factor in determining admissions in all American public institutions of higher learning. While *Meredith v. Jefferson County Board of Education* will certainly set the precedent for rulings as it relates to primary and secondary education, in the face of no formal judgment on how race should be used in public school placements, it is my claim that school districts should err on the side of caution and not rely solely on race as a determinant of where students are placed. Often, claims of reverse discrimination are based on the erroneous assumption that some less-deserving minority "took my spot". This is certainly a sentiment that has reverberated even in the hallowed halls of fair Harvard. The reality is that race, in post-secondary education admissions, is only one among many factors in determining admissions decision. In the college admissions process, these factors may include, but are not limited to, standard determinants such as grades and test scores, but also immeasurable components such as overcoming obstacles, unique talents, or coming from an underrepresented background or region, as examples. In the Jefferson County School Public School System, factors such as grades, test scores, and application essays are often key determinants of whether or not a child is admitted into a magnet program. The Jefferson County Public School System should devise a formula for placement, even in its non-magnet programs, that does not rely solely on race in order to prevent further claims, such as the one made by Meredith, from happening in the future. What the variables of this formula will be can only be devised through much research and consultation, but it must be done to ensure that claims such as the one made by Meredith will be automatically deemed to be without merit.

With integration comes a responsibility; the pledge of the district to commit itself to creating a positive learning environment for all students. We must ask ourselves, *what good is it for a black student to sit in a class with a white student if the teacher is not as committed to the success of the black child as they may be for the other?* In addition, school districts, especially urban and diverse ones, must begin to examine why there is such a dearth of black teachers, but more importantly, principals and superintendents at the helm of these systems which are supposed to play such an instrumental role in the lives of its

students. Until such wide-reaching policies are actively engaged, the American public education system is "missing the forest for the trees," so to speak. Most certainly, the Jefferson County Public School District must vigorously defend itself against this assault but it also must begin reforming a system that has merely functioned, and not flourished, when it comes to meeting the needs of its students and employees from culturally diverse backgrounds. It must begin to inform the community why diversity is so important in public education, and must support this case with concrete measures that demonstrate their own commitment. These may include, but are not limited to, a more diverse mandatory social sciences curriculum that is not based almost exclusively on European history or district leadership that does not try to undermine the success of its schools with a high non-white population, as examples. In short, the Jefferson County Public School System needs to align its actions with its words.

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U.S. Immigration Reform — Help Needed? BY EMILY INGRAM

"That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation… maintenance of its absolute independence and security throughout its entire territory."

(U.S. CONST. art. I, § 8)

With ongoing concerns of security and worldwide terrorism, immigration is a hot topic in the United States. The United States is not alone: several other countries with large immigrant populations including France, Germany and Australia continue to have problems with immigration policy.

For the next U.S. elections, immigration policy will surely be important. According to a July 2006 National Survey of Voter Attitudes on Immigration conducted by the National Immigration Forum and Manhattan Institute for Policy Research, 11% of voters[1] think that illegal immigration is the "most important issue for your Member of Congress to deal with [this year]." By comparison, 15% chose Iraq, 10% healthcare and 7% "retirement and social security."

Illegal immigration has shown sharp increases in recent years. The number of legal immigrants into the United States is also rising. However, parts of the U.S. can be so concerned that immigrants are "taking jobs away" from citizens that they overlook the root of the problem: the need to regulate illegal immigrants and those who help them evade U.S. laws.

IMMIGRATION GROWTH

In the decade between 1990 and 2000, the foreign-born population in the U.S. increased by nearly half.[2] The latest data from the U.S. Census Bureau shows that 12.4% of the U.S. population was born in different country, which reflects a steady but slow incline of 1.3% over five years.[3] Geographically, immigration is not uniform across the country because together, the six states of California, New York, Florida, Texas, New Jersey and Illinois admitted almost two thirds of the total (legal) immigrant population in the United States in fiscal year 2004. The highest concentrations of immigrants occurred in many of the same states: first-generation immigrants make up almost three tenths of California's population, New York had just over a fifth and New Jersey, Florida, Nevada and Hawaii not too much less than that.[4]

Legal immigration growth rate aside, U.S. Immigration and Nationalization Services reported in January 2000 that the estimated illegal immigrant population numbered 7 million, twice the number in 1990.[5] This year, the Pew Hispanic Center estimated that the total illegal immigrant population in the U.S. is most likely between 11 and 12.5 million.[6] Of these, 46.2% entered legally, either with a visa that they subsequently overstayed or with a border-crossing card that they later violated. The remaining 53.8%, representing some 7 million people, entered by illegal means.

A poll taken by the Pew Hispanic Center[7] in August 2005 showed that the number of illegal immigrants from Mexico, which represents the largest proportion of illegal immigrants to the United States, is showing no signs of slowing. 21% of Mexicans in the survey said they were willing to attempt illegal immigration to the United States.

THE COSTS OF ILLEGAL IMMIGRANTS

11 to 12.5 million people are a lot of people to fall through the cracks.

Illegal immigrants make up approximately 4% of the U.S. population or the rough equivalent of Ohio or Pennsylvania's state population,[8] so their effect on the United States economy is substantial. A 2004 paper[9] for the Center for Immigration Studies estimated that illegal immigrants cost the federal government $10.4 billion annually, mostly because many have minimal skills or education and collect benefits through their U.S.-born children who are entitled to American citizenship. The same report mentions that this cost would almost triple if an amnesty were granted.

Perhaps more surprisingly, the annual federal cost is even higher for legal immigrants than illegal immigrants. For both Mexican and non-Mexican legal immigrants, there was a very strong negative correlation between level of education attained and federal cost. Individuals with education beyond high school tended to be more gainfully employed, earn more and pay higher taxes, which reduced their "cost" to the government. This relationship is almost certainly the case with illegal immigrants as well. A problem remains: 65.3% of illegal immigrants are "dropouts,"[10] representing the group with the lowest level of education and accordingly the highest cost to the United States government.

It seems that education requirements for all immigrants should be heavily emphasized and enforced. In particular, proficiency in English is essential. After all, immigrants should (and often do) assimilate into and enhance their adopted country. With higher-level skills, more immigrants

will enter the U.S. workforce at higher positions and, through that, contribute substantially to the nation's economy. As for those low-wage jobs, 74%[11] of Americans believe that the United States does not need immigrants to fill them because there are already enough Americans to do them. Furthermore, as these types of jobs are increasingly outsourced to countries like India and China, less qualified people – Americans and foreigners alike – will need to accommodate by either changing industries or attaining a higher level of education.

Immigrants are important: in maintaining the American "melting pot" culture and for the promotion of free trade. But illegal immigrants must either be legalized or removed, even though – contrary to the beliefs of many born-and-bred Americans – they are certainly not all poorly educated and guilty of criminal offences. Education levels and other requirements can be controlled for those entering the United States legally but for illegal immigrants, it is impossible.

It is in the interest of the United States government to reduce as much as possible the inflow of illegal immigrants and, therefore, the number of illegal immigrants residing in the country. This is no easy task and probably not a quick one either. Incentive, not just high fences and rigorous patrols at the borders, will play a large role in encouraging illegal immigrants to either turn themselves in or, if they have not successfully entered the U.S. yet, to consider a legal entry route.

THE IMMIGRATION DEBATE IN THE NEWS

With data showing the extent and growth in unauthorized foreign nationals or "aliens" in the U.S., it is no surprise that immigration has climbed to the top of the agenda. Earlier this year, the "no tolerance" U.S. Immigration and Customs Enforcement raid resulted in the arrest of over 2,000 people in less than three weeks. President Bush this year proposed a "temporary guest worker" scheme which included a possible path to eventual U.S. citizenship combined with increased border security in order to control the problem, pointing out that it was "neither wise nor realistic" to track down and deport every illegal immigrant in the U.S. in a repeat of 1954's Operation Wetback.

TWO PARALLEL ACTS

THE BORDER PROTECTION, ANTITERRORISM AND ILLEGAL IMMIGRATION CONTROL ACT OF 2005[12] (HOUSE OF REPRESENTATIVES BILL 4437)

Passed on December 16 2005 by a majority vote of 239 to 182, H.R. 4437 has been blamed for causing the pro-immigration protests of 2006. The main parts of the bill included abolishing green card lotteries and imposing much tougher penalties on offenders (both foreign nationals and "criminal aliens", illegal immigrants who commit crimes) in addition to heightened border security and immigration law enforcement.

The criteria for naturalization and avoiding deportation is described in the bill as "good moral character," loosely defined as those who have neither committed a felony nor been automatically barred by the INA because they are a security or terrorist threat.[13]

COMPREHENSIVE IMMIGRATION REFORM ACT OF 2006[14] (SENATE 2611)

The Comprehensive Immigration Reform Act or "Reid-Kennedy Amnesty" was introduced by Senator Arlen Specter and passed on May 25 2006. The Act diverged from H.R. 4437 on the point of possible citizenship for illegal immigrants, namely with the establishment of a "temporary guest worker program" which would allow 200,000 individuals into the U.S. annually, with an option to work towards citizenship at the end of the program if they meet certain requirements.

Both acts proposed heightened border security and electronic identification to help differentiate between legal and illegal immigrants. On August 2 2006, the Senate passed an amendment that would dedicate $1.8 billion to securing America's Mexican borders in the next fiscal year.

In terms of lowering the number of illegal immigrants in the U.S. as much as possible, it seems that there are not so many options after borders are fully secured, laws are enforced and existing illegal and new "guest workers" have a chance to legitimately attain citizenship. With the Act in place, the Congressional Budget Office predicts that 0.8 million illegal immigrants will enter the U.S. in 2016, as opposed to 1.4 million without it. With a forecasted 0.9 million illegal immigrants entering in fiscal year 2007, the Act may not seem entirely convincing at first but over the ten years of the CBO's projections, the difference in total number of illegal immigrants is nontrivial: 3.3 million illegal immigrants fewer with the act.[15]

RESPONSES TO THE H.R. 4437 AND S. 2611

Results from a recent Zogby poll published by the Center of Immigration Studies[16] suggest that only 43% of respondents would endorse the S. 2611, with 50% of respondents calling it a "bad or very bad idea." By contrast, 69% said they would support the H.R. 4437. The same survey also found that a third of Americans believe that immigration should be reduced "so we can assimilate the immigrants already in the

country."

On the other hand, the President has fairly widespread public support on the guest worker scheme. In the aforementioned National Survey of Voter Attitudes on Immigration, 71% supported a legislation that included tightened borders, a temporary worker program and the possibility of citizenship for those who meet stipulated requirements such as learning English and complying with U.S. laws.

Although many Americans do not oppose the idea of immigrants gaining eventual citizenship by legitimate means, many feel uncomfortable with the idea of amnesty – granting American citizenship without substantial punishment (i.e., deportation) to illegal immigrants already in the United States. In fiscal year 2004, the Department of Homeland Security reported an unprecedented high of 202,842 "formal removals." In addition, 1,241,089 people including over 1.1 million Mexicans were apprehended and sent home after attempting to cross borders illegally.[17]

Bush's proposal and the legislation in the survey include the possibility of citizenship for legal guest workers as well as illegal immigrants already in the United States who come forward and pay a fine that represents a "meaningful punishment" for breaking the law and to eliminate the possibility of deportation for illegal entry. For critics, it is necessary to emphasize the "track" element of citizenship for illegal immigrants who seek to be naturalized and to balance United States security and economic priorities – not to mention practicality – with the interests of prospective American citizens, the United States must retain some control of the immigrants it admits. A limited amnesty, not an indiscriminate amnesty, could deliver promising results if it were only available to applicants who meet stipulated educational and skills requirements.

AMNESTIES AND THE IMMIGRATION AND NATIONALITY ACT

While removing each illegal immigrant in the United States is "neither wise nor realistic" and tightening border security is the beginning of a solution, the illegal immigrant problem is far from being solved. There are 11 to 12.5 million illegal immigrants already in the United States and many of them have family both born in the United States and in their country of origin, possibly with intentions to enter the United States. Enforcing immigration law at the borders will not end the plights of prospective illegal immigrants because often, their place of origin leaves them with few other options than to continue evading immigration laws. Enforcement of United States immigration laws cannot be limited to borders, either. If not deportation, there must be amnesty of some sort, one that includes a possible track to citizenship after a meaningful punishment to both themselves and their employers for breaking the law, or helping them break the law.

The enactment of the Immigration and Nationality Act (INA)[18] in 1952 was important to the development of U.S. immigration policy. Notably, it eliminated discrimination on the basis of sex or race (such as the 1882 Chinese Exclusion Act) and increased national origin quotas for immigration, a system introduced by the 1924 Immigration Act and not replaced for more than a decade. Since 1952, it has been amended several times. Additional attempts at solving the problem of illegal immigration have also included the Immigration Reform and Control Act (IRCA) in 1986 and the Immigration Act (1990). In both of these acts, treatment of immigrant workers and access to welfare benefits were core issues.

According to Numbers USA, a website that supports lowering (but not eliminating) immigration, 2.7 million illegal aliens were granted amnesty following the IRCA. Subsequent amnesties between 1994 and 2000 granted citizenship to just over 3 million illegal immigrants,[19] or 1% of the current United States population.[20]

A SOLUTION?

Any start to a solution needs to include agreements and cooperation between countries (the United States and foreign countries that illegal immigrants are coming from) to reduce illegal immigration. Inside the United States, employers must be penalized for breaching employment laws and illegal immigrants fined, if they use forged documents to obtain employment.

A limited amnesty offered to illegal immigrants who meet minimum education requirements would enable the United States government to maintain control over the quality of immigrants admitted to legal status and potential citizenship. It might also reduce the incentives for unskilled or illiterate illegal immigrants to remain in the United States. If it worked, this strategy would be beneficial to the United States because millions of people would emerge from the American cash economy and into the tax and legal systems.

Some might argue that America's "melting pot" is only welcoming to those who do not break its laws but over 11 million illegal immigrants simply cannot be rounded up and detained. Illegal immigration will never be entirely eradicated but reducing incentives to those already in the United States and those who intend to cross borders illegally will certainly help. International agreements to stop illegal trafficking of immigrants will stem the flow of illegal immigrants. Less illegal immigration and stricter requirements on the level of

education is in the best interest of the United States, from both a security and economical perspective.

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Life With Roommates: Privacy in a Barracks

BY ALYSSA KING[1]

After World War II, Congress enacted the Uniform Code of Military Justice. The Code introduced common due process protections, including a few that are still not found in civilian life, to all courts-martial. It also established a judicial structure, with cases moving from the convening authority, to court-martial, to the convening authority again, to the court of appeals for that service. The judges are JAGs. The juries are members of the United States military. The entire system is overseen by the civilian Court of Appeals for the Armed Forces (CAAF). It is the final appellate arbiter of most cases and gateway to the Supreme Court. Dealing in the criminal law, the CAAF has seen a number of search and seizure cases. *United States v. Daniels*,[2] a short per curium opinion, illustrates the operation of Fourth Amendment principles in a military context.

The story is fairly simple. In March 2000 Seaman Apprentice Daniels brought a vial of material he claimed was cocaine to his Navy dorm, showing it off to roommates, including Seaman Apprentice Voitlein. Voitlein then told his training officer what his roommate had been up to. The officer, assuming it was a joke, told Voitlein to retrieve the vial from Daniels' drawer.[3] Unfortunately for Daniels, he hadn't been joking. He ended up pleading guilty to the charge of possessing the drug, but raised the question of whether the search of his room was lawful. The Navy-Marine Corps Court of Appeals approved the verdict. The CAAF overturned the lower courts. It agreed that Daniels had an expectation of privacy and dismissed arguments that the search had not been a search under the Fourth Amendment.[4] What makes *Daniels* notable is the fact that it is not notable. It is part of a line of cases affirming a concept that was not always accepted as applicable to military life. We are now facing Fourth Amendment issues that may seem, as the situation in *Daniels* may seem, well, weird. However, current Supreme Court doctrine may be able to take us through more strange situations than some might expect.

There was no question that Daniels had a reasonable expectation of privacy in this situation. The word "privacy," of course, is never mentioned in the Fourth Amendment, which seems at first to describe only: "persons, houses, papers and effects."[5] That is how the Supreme Court interpreted the Amendment in *Olmsted v. United States,* in which a majority found wiretapping to be outside the Fourth Amendment because the Framers had not thought of it.[6] However, since that time, our understanding of the Fourth Amendment has come to encompass searches and seizures of evidence created or made possible only by new technology.[7] The concept of an expectation of privacy, introduced by U.S. Supreme Court Justice Harlan's concurrence in *Katz v. United States*, provides a way to understand the Fourth Amendment as connected to the individual, rather than rooted in his or her home or property alone.[8] It has become a standard tool in evaluating Fourth Amendment claims.

It was not always clear whether the Fourth Amendment applied in a military justice setting, although the Military Rules of Evidence bear a great deal of resemblance to the Federal Rules of evidence. Judge Crawford's opinion in *United States v. Lopez* raised this issue, citing an unwillingness by the Supreme Court to take up the applicability of the Bill of Rights to military personnel.[9] As two JAGS argued in an army journal: "[t]he often smaller, if not sometimes *de minimis*, expectation of privacy held by military personnel, coupled with the substantial social policy justification for privacy intrusions in the military framework, would at least justify a sharply different [application of the Fourth Amendment] to avert dangers to readiness caused by drugs or other criminal activity."[10] The standard of probable cause gave the CAAF difficulty when determining whether commanders could issue a search authorization (the military version of a warrant) in given situations.[11] Others pointed out that civilian search and seizure rules had always applied in Supreme Court cases affecting the rights of soldiers.[12] Several commentators use *New Jersey v. T.L.O.*[13] as an important case from the civilian world that integrates a substantial interest in discipline with Fourth Amendment analysis.[14] Members of the armed forces often live and work in contexts in which there is a need for discipline and a reduced expectation of privacy. Commanders retain a general inspection power, which they can exercise over all or part of their unit, in order to insure readiness as well as health and welfare of the troops.[15] Yet, the CAAF has affirmed that basic Fourth Amendment principles operate. *United States v. McCarthy* dealt with the seizure of an individual in his barracks room.[16] The CAAF ruled that those in barracks do not have the same expectation of privacy as those in a private home, yet it indicated the existence of that privacy even as it declined to delineate where its limits were.[17] The frame of privacy also lends itself to attempts to understand searches that do not involve physical things. In *United States v. Monroe*, for example, the CAAF found a reduced expectation of privacy in emails sent on a Department of Defense computer over an e-mail system also provided by the department.[18] The consistent application of this principle demonstrates the degree to which civilian precedents have governed the military.

The questions that remained in *Daniels* were whether what had happened was a search and whether the roommate who did the search was a government agent, the criteria necessary for the above analysis to become relevant and the fruits of

the search to be discarded. The Navy-Marine Corps Court of Criminal Appeals seemed to believe that the taint of the illegal search could be removed by the intent of the searchers, neither of whom started out collecting evidence for a criminal prosecution.[19] The lower court stated that the training officer's "honest belief that…Voitlein's expressed concerns about Appellant actually having illegal drugs in their barracks room were unreasonable" absolved him of responsibility.[20] Citing Supreme Court precedent in civilian trials, CAAF refused the motive analysis. An illegal seizure is an illegal seizure even if it was not preceded by a search for criminal evidence.[21] While the officer and roommate may be right that they found the cocaine somewhat unintentionally, they did not have a license to seize Mr. Daniels' personal effects. Similar statements disclaiming intent to find evidence of wrongdoing, conveniently made after the fact, might be abused as a way to justify seizing evidence without a search authorization, eroding the protection of the Fourth Amendment. Even if the Court were to refuse to treat Voitlein's action as a search, the evidence unlawfully seized would be unusable. For similar reasons the CAAF could not accept the argument that Daniels' roommate, once deputized, was acting on his own volition in searching the room. It wrote: "In the instant case, rather than retrieve the vial on his own initiative and then bring it to [his training officer] Chief Wilt for consultation, SA Voitlein instead first consulted Chief Wilt about the issue, and then, only after he received the order from Chief Wilt to do so, retrieved the vial. In other words, Chief Wilt's specific order as a government official triggered SA Voitlein's actual seizure of the vial."[22] That meets the standard from the civilian world that the government must provide "clear indices of encouragement, endorsement, and participation" in a search.[23] Again, the military was not treated differently than the rest of the country.

As *Daniels* demonstrates, the past half-century's work to understand the Fourth Amendment in a variety of contexts provides us with standards that are capable of being used in a wide variety of ways. It is a reminder that the government cannot easily avoid its responsibilities. Government agents may not have meant to trigger the Fourth Amendment, but if they do, even the best intentions are irrelevant. Nor can proxies absolve the government of its responsibility when the order to search is given. The standards to which we hold government agents come back to the issue of respect for an individual. Actions that show disregard for an individual may be careless, or malicious, but they undermine the sense that an elected government is not master, but servant of the public. The issue of respect is important, because, as Justice Brandeis wrote in his *Olmsted* dissent: "government is the potent, the omnipresent teacher. For good or ill it teaches the whole people by its example. Crime is contagious. If government becomes a lawbreaker, it breeds contempt for law."[24] The type of culture we create in the American military directly determines whether the actions of its personnel will be demonstrative of American values. That means restraining our first instinct to treat it as a strange context, different from normal life, as in the civilian precedent CAAF uses, but allowing real differences to be dealt with, as with the commander's inspection power. We ought to remember this example as we are asked to evaluate civil liberties in other novel contexts. There is no reason to expect the principles of governance we generally rely on to change without good cause.

ADDENDUM

In *U.S. v. Conklin* an opinion regarding privacy and the inspection power came out several weeks after the deadline for submitting this article. It is not a deviation from the general line followed in *Daniels* and earlier cases, but is worth our attention as an illustration of the border between privacy and the commander's inspection powers. It may be found on the CAAF's website: www.armfor.uscourts.gov.

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Drug Testing in Schools: A Legal and Empirical Analysis

BY RORY MALONE

I. INTRODUCTION

Though transformed into a catchphrase by presidential administrations in recent decades, the United States' "War on Drugs" has been dated to the 1880s, when the U.S. and China agreed to shut down the opium trade between the two countries. Since then, the battle has been fought on many fronts, foreign and domestic, including the classrooms and hallways of schools. It is indisputable that a prevalence of narcotics or a strong drug culture is detrimental to the educational mission of a school, but the fundamental rights of students must be cultivated and respected for the school's education function to be truly fulfilled. This article evaluates, from both practical and legal perspectives, the Supreme Court's rulings on students and the Fourth Amendment, with particular focus on the question of random drug testing, and finds that the policies identified as constitutional by the Court fail to further the best interests of both the schools and their students.

II. CASE HISTORY

The Court's first foray into the issue of the Fourth Amendment rights of students was its 1985 decision in *New Jersey v. T.L.O.*[1] T.L.O., a student at a public high school, had her purse searched following a teacher's claim that she had been smoking in a restroom. The assistant principal conducting the search found cigarettes, marijuana and items indicating that the student had been dealing drugs to her peers.[2] The majority decision, written by Justice White, contains three key findings: first, that the search in question was constitutional;[3] second, that the Fourth Amendment does apply to school officials in their conducting searches for administrative or disciplinary reasons;[4] and third, that the standard governing teachers and school administrators in their enacting a search is not that of "probable cause," but rather "reasonableness."[5] The standard of reasonableness in this case is attained when "there are reasonable grounds for suspecting that the search will turn up evidence" of wrongdoing, and "the measures adopted are reasonably related to the objectives of the search, and not excessively intrusive."[6] The Court justifies this move by pointing out "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard," for example in the cases of "stop and frisk" procedures implemented by highway patrol officers.[7] In this case, the majority of the justices held that the State's interest in maintaining order and an environment conducive to learning justified the intrusion into students' privacy.

The issue of random drug testing in middle and high schools was brought before the Court in *Veronia School District 47J v. Acton*.[8] Responding to teacher and parent concerns about a growing drug problem, of which student athletes were perceived to be the leaders, the district instituted a policy requiring student athletes to consent to a regime of random drug tests as a condition of participation.[9] Justice Scalia, writing for the majority, declares the tests to be constitutional, considering the diminished privacy expectations of student athletes,[10] the minimally intrusive nature of the urinalysis tests,[11] and the "compelling" nature of the State's interest in curbing adolescent drug use.[12] Finally, the majority declare random drug testing superior to suspicion-based testing, due to its non-accusatory nature and various practical considerations.[13]

Writing in dissent, Justice O'Connor denies that the drug testing regime employed by the school district crosses the threshold previously required for constitutional blanket searches. She documents the Court's longstanding preference for searches based on individualized suspicion, and notes that exceptions have been made only in cases where the searches were not intrusive, or when circumstances, such as the chaotic nature of the aftermath of a railroad accident or the sheer volume of airport passengers, made suspicion-based testing impractical or useless.[14] O'Connor notes that the vast majority of exceptions to the individualized suspicion requirement of a reasonable search occur in cases where "even one undetected instance of wrongdoing could have injurious consequences for a great number of people."[15] Given the absence of such a scenario in the case of student drug testing, and the existence of alternative methods of curbing student drug use, O'Connor holds that the district's random testing of athletes fails to align with the protections of the Fourth Amendment.

The Court's decision in *Board of Education of Independent School District 29 v. Earls* expanded its approval of random drug testing of students to include all students involved in competitive extracurricular activities in the Tecumseh district.[16] The district's policy was similar to the one enacted in the prior case, with the major distinction that it applied to students participating in extracurricular activities such as "the Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, pom pom, cheerleading and

athletics."[17] Many of the arguments of the majority opinion, written by Justice Thomas, mirror those used by the majority in *Veronia*. Students are again afforded limited expectations of privacy,[18] the method of urine collection is judged to afford students more privacy than the one under review in *Veronia*,[19] and the drug problem in the district is sufficient to make the random testing regime "entirely reasonable."[20] Again, the balancing scales tip in the direction of the district's interest in reducing drug use among the students it has custody over.

Justices O'Connor and Ginsburg wrote separate dissents to the Court's decision. Justice O'Connor maintained that *Veronia*, upon which the majority relied heavily as precedent, was wrongly decided.[21] Justice Ginsburg argued that the school district's policy in *Earls* was not reasonable, as it targeted a section of the student body "least likely to be at risk for illicit drugs and their damaging effects."[22] She emphasizes the difference between the athletes targeted in *Veronia* and the students of District 29 involved in non-athletic extracurriculars like choir or Academic Team in terms of the amount of privacy each group reasonably expects to relinquish as a condition of participation,[23] and the difference in magnitude of the alleged drug problems in each district, which were of a qualitatively lower order in District 29 than in *Veronia*,[24] and concludes that the majority gives too much weight to the district's custodial duties, and fails to properly protect the rights of students.

III. LEGAL ANALYSIS

The Court's decisions in *Veronia* and *Earls* have come under criticism for departing from precedent and virtually eviscerating the Fourth Amendment rights of schoolchildren. As *Earls* serves largely as an extension of the principles articulated in *Veronia*, most scholars focus their attention on the 1995 decision. Samantha Shutler's analysis leads her to conclude that "the Court decided [*Veronia*] primarily for overreaching policy goals," namely the furtherance of the "war on drugs."[25] She questions the compelling nature of the district's interest in curbing drug use among student athletes, noting that in the cases cited by the majority, suspicionless drug testing was upheld in cases in which the "drug problem…poses a substantial risk of harm either to the public or to national security."[26] Given that other courts have applied that standard to declare unconstitutional the random drug testing of federal prosecutors and unarmed police personnel, among others,[27] and that the risk of injury to drug-impaired athletes is both minimal and individual,[28] Shutler argues that the government interest to be balanced against student's privacy rights should not be considered compelling.

Another factor that played a role in the majority's decision was their belief that the "drug problem [was] largely fueled by the 'role model' effect of athletes' drug use,"[29] which justified the targeting of student athletes under the district's policy. As Shutler points out, Justice Scalia, who authored the majority opinion, stood firmly against testing for this purpose in his dissent in *National Treasury Employees Union v. Von Rabb*, where the issue at hand was the random drug testing of U.S. Customs officials who carried firearms and were responsible for the interdiction of drug shipments. In that case, Justice Scalia wrote, "I think it is obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point."[30] The ineffectiveness of drug tests in reducing student drug use, which will be discussed below, makes the symbolic nature of the district's policy all the more apparent.

Shutler also contends that the majority decision misapplied the Court's ruling from *T.L.O.* in holding that the custodial nature of the school's relationship with its students allows the relaxation of the individualized suspicion requirement for reasonable searches.[31] Examination of the opinion, however, casts doubt on this claim. Although the Court's reasonableness standard in *T.L.O.* mandates a reasonable suspicion that the search will turn up evidence of wrongdoing "in ordinary circumstances,"[32] the majority explicitly declares its disinterest in the question of suspicionless searches as immaterial to the facts of the case.[33] Thus, the question as to whether searches enacted without individualized suspicion are constitutional in the context of public schools is, as far as the Court in *T.L.O.* was concerned, still open.

IV. EMPIRICAL CONSIDERATIONS

Empirical studies that document the effectiveness of policies such as those employed in Veronia and Tecumseh can and should be evaluated as a factor in deciding the reasonableness of drug testing measures. The invasion upon students' privacy in each case is justified by the government's interest in curbing student drug use. Even if one finds the government's interest compelling, as the majority of the justices do, the drug testing policies must reasonably further that interest, otherwise the privacy intrusion cannot be justified.

In light of this practical requirement, a 2003 study by researchers at the University of Michigan strikes a strong blow against random drug testing policies.[34] The study reported "among the eighth-, 10th- and 12th-grade students surveyed… school drug testing was not associated with either the prevalence or frequency of student marijuana use, or other illicit drug use."[35] Looking more specifically at the situation of athletes, the researchers found drug testing had no deterrent effect on the use of marijuana or other drugs.[36] Drug testing of students is not an effective weapon in the war on drugs.

A 1995 study corroborates the concerns Justice Ginsberg raised in her dissent in *Earls*. Researchers found that students who were engaged in extracurricular activities for 1-4 hours a week were 49 percent less likely to use illicit drugs than students who did not participate in extracurriculars.[37] Drug use was even less likely among students who spent more time in extracurricular activities. The only exception was participation in varsity athletics, which was positively correlated with binge drinking,[38] but alcohol is typically not screened for in urinalysis tests. Therefore, Justice Ginsberg's argument that the *Earls* testing procedure is inappropriately targeted seems to be supported by the facts. Additionally, the findings of this study indicate that, insofar as extracurricular involvement does a better job of reducing student drug use than testing, it does not serve the government's interests to place hurdles in the path of students who wish to participate in such activities, as the requirement to consent to an invasion of privacy does.

V. CONCLUSION

The Supreme Court's rulings that random urinalysis tests for public school students enrolled in athletic or extracurricular activities are constitutional are calculated to reduce drug use in schools, and the disciplinary and safety issues that school drug abuse brings. However, the justification for infringing upon the right to freedom from unreasonable searches, which Justice Brandeis once lauded as "the most comprehensive of rights and the right most valued by civilized men,"[39] must be a compelling one indeed. The issue of student drug use does not cross the threshold established by the Court in decades of Fourth Amendment jurisprudence, and furthermore, the measures approved by the Court fail to accomplish their goals. A new approach to the problem of drug abuse in schools is sorely needed.

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REDISCOVERING HOPE:

Analyzing New York Times v. Sullivan (1964) as a Counter-Example to The Hollow Hope BY THEA SEBASTIAN

Undermining and revolutionizing customary views of the judiciary, *The Hollow Hope* argues that — despite popular opinions to the contrary — the courts have no ability to produce social change. By examining a pair of seemingly far-reaching and society-shaping cases — *Brown v. Board of Education (1954)* and *Roe v. Wade (1971)* — and demonstrating their basic inefficacy, Gerald N. Rosenberg holds that the sweeping promises of the judiciary are only a 'hollow hope.' However, his conclusions may be premature. Leaving aside the particular findings of his case studies, *New York Times v. Sullivan (1964)* provides a striking example of court-driven social change. The case, addressing the scope of First Amendment liberty, both was effective in its era and continues to shape society today. While Rosenberg and other such scholars may argue that the courts are powerless to manufacture sweeping change, *New York Times v. Sullivan* demonstrates that, on the contrary, some opinions *can* have a comprehensive and lasting influence on society.

Cutting to the essence of democratic liberty, *New York Times v. Sullivan* explores the hazy contours of free speech jurisprudence. The case arises over some erroneous remarks in a *New York Times* advertisement. Seeking to raise money for the defense of Martin Luther King Junior, the advertisers state that "after students sang 'My Country 'Tis of Thee' on the (Alabama) State Capitol steps, their leaders were expelled from school, and truckloads of police... ringed the Alabama State College Campus" (*New York Times v. Sullivan*). Later, they add that "Southern violators... have bombed the home (of Dr. King) almost killing his wife and child" (*New York Times v. Sullivan*). Although neither of these comments directly impinges the Commissioners of the City of Montgomery, L.B. Sullivan, the director of the police force, argues that they *indirectly* slander his character. Justice Brennan rejects this idea. Revisiting the history of the First Amendment, he holds that "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct" (*New York Times v. Sullivan*). Unless the statements are made with "actual malice" or "reckless disregard for the truth" censure of public officials is always permissible under the First Amendment.

Measuring the power of Supreme Court decisions inherently involves a variety of complications; however, *New York Times v. Sullivan* offers scholars both quantitative and qualitative ways to measure its influence. Firstly, they may examine the later holdings of lower courts. Since lower courts were the primary implementors of the ruling, these statistics are an accurate gauge of how well on-paper promises became on-the-ground realities. Secondly, they may do a comprehensive before-and-after study. By analyzing the changes in libel law directly following the case, they can demonstrate the effects of *New York Times v. Sullivan* on the American media. Thirdly, researchers may compare contemporary American law to regulations in other nations. Although some of the changes in the before-and-after study of libel law may be the produce of a liberalizing, modernizing society, comparing present-day cases in otherwise-similar countries will mitigate the effects of these trends. Finally, analysts can assess the influence of *New York Times v. Sullivan* via a pair of specific case studies: the push for racial justice and the ImpeachBush campaign.

While the difficulties of successfully implementing Supreme Court decisions plague many cases, the holding in *New York Times v. Sullivan* was, fortunately, relatively easy to execute. Dealing exclusively with the constitutionality of defamatory falsehoods, the only necessary implementors of *New York Times v. Sullivan* were the lower courts. Accordingly, the number of opinions that cite *New York Times v. Sullivan* — either positively or negatively — provides a reasonable estimate of compliance with the case. A large number of positive citations shows that courts were faithfully implementing the holding; a large number of negative citations denotes resistance. There are, presently, 458 positive treatments of *New York Times v. Sullivan* and only 82 negative. Although this data ignores the number of arbitrations and out-of-court suits that may also play a strong role, the preponderance of positive citations suggests that, overall, *New York Times v. Sullivan* became a reality with remarkable ease and rapidity. Moreover, these 82 negative treatments appear equally across the country. Unlike highly divisive issues that may induce conservative circuits to rule differently than their liberal counterparts, the *Sullivan* case was applied relatively uniformly across the country (see Figure 1).

From a more qualitative perspective, the influence of *New York Times v. Sullivan* is manifested clearly in the history of American free speech jurisprudence. In concordance with existing British doctrine, truth was the only defense under the majority of turn-of-the-century state constitutions. Any statements "which in any way bring ridicule, contempt and censure on a person" were libelous and, accordingly, "actionable unless true."[1] In some cases, even this defense was lacking. For many state officials, "free speech and its

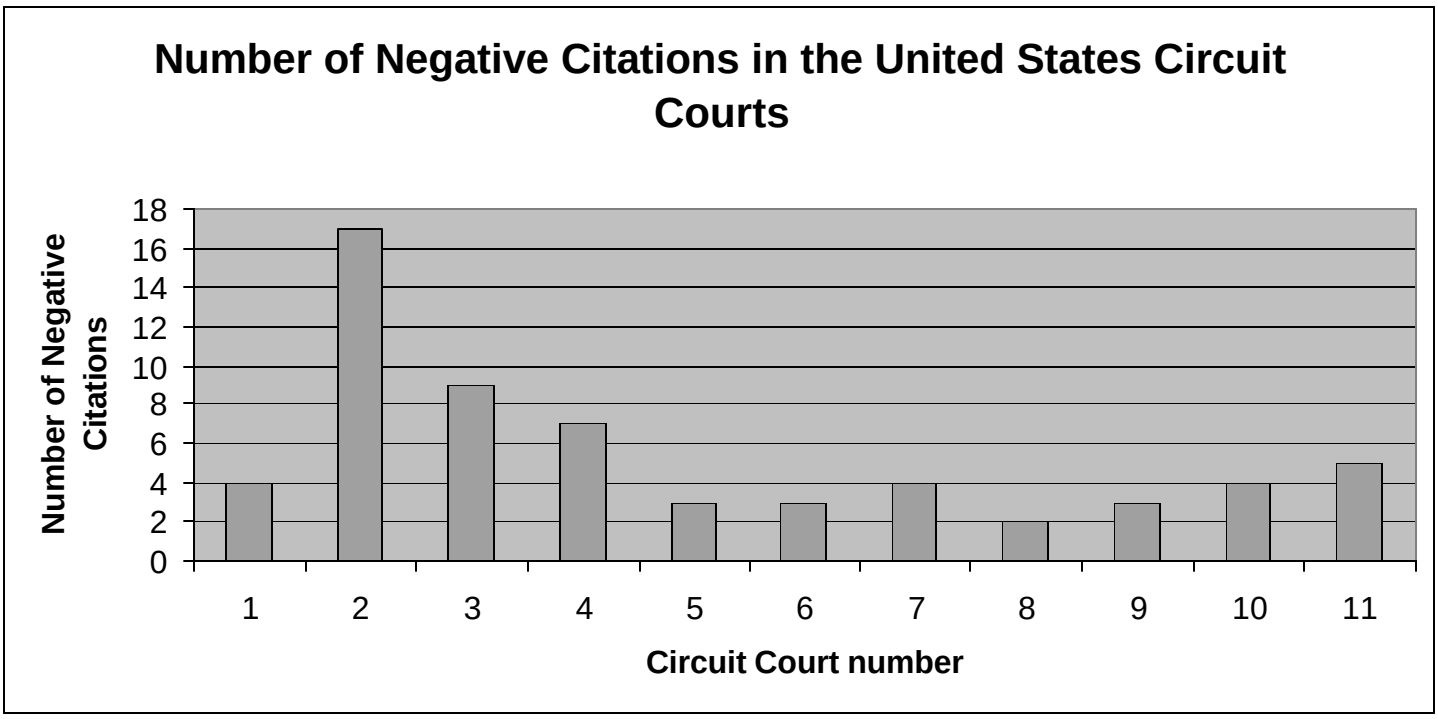

Figure 1 Graph by Thea Sebastian

abuse" were entirely separate entities.[2] *New York Times v. Sullivan* was a revolutionary departure from these formulations. The holding that libelous remarks "have no talismanic immunity" from the Constitution marks a clear change in First Amendment jurisprudence.[3] Although some cases — most notably *Gertz v. Robert Welch, Inc. (1974)* and *Dun and Bradstreet, Inc. v. Greenmoss Builders (1984)* — have made minor caveats to the "actual malice" guideline, the majority of later decisions have only made the press more and more immune. Decisions such as *Curtis Publishing Co. v. Butts (1967)*, in which public figures became largely comparable to public officials, and *Time Inc. v. Hill (1967)*, which protected "false light" policy actions, exemplify the markedly more liberal tendencies of post-*New York Times v. Sullivan* First Amendment law. Moreover, the wide leeway to criticize public officials was a key factor in the rise of investigative journalism — a practice whose influence on American policies and politics is nearly immeasurable.

The sweeping effects of *New York Times v. Sullivan* also become obvious in comparisons to otherwise-similar societies, especially Britain and South Africa. Although analogous to the United States in the majority of other aspects of the law, Britain places " the burden of proof" in libel cases "on the defendant, with the law essentially assuming that a published statement is false and requiring proof that it is true."[4] Accordingly, Bill Clinton took the preventative measure of publishing two versions of his memoir, *My Life* — one for the American consuming public and another for the British. In the American copy, he made numerous, derisive references to Kenneth Starr, a primary figure in the impeachment hearings; in the British edition, such remarks were missing. The availability of *House of Bush, House of Saud: The Secret Relationship Between the World's Two Most Powerful Dynasties* further illustrates this idea. Although, in America, this provocative book is readily available for purchase, "its British publisher, Secker & Warburg, canceled publication, saying that it was afraid of being sued."[5]

South Africa also illustrates these trends. After a high profile, black-white double murder, the South African courts chose to reprieve the white killer while sentencing his black partner-in-crime to death. When a newspaper took the liberty of calling this, "an example of racial bias in capital punishment," the Minister of Justice sued for libel. The defense gave specific reference to *New York Times v. Sullivan*, however, the Appellate Division of the Supreme Court of South Africa was deaf to their plea, summarily upholding "the Minister's right to sue."[6] Both Britain and South Africa are similar to pre-*New York Times v. Sullivan* America. Seeing examples of how this difference affects society emphasizes the significance of the *Sullivan* case.

One of the most momentous consequences of *New York Times v. Sullivan* was not as much to enhance free speech and debate but rather to provide a strong defense of the civil rights movement. *New York Times v. Sullivan* was, above all, "a race case."[7] The hearing arose as a way to punish, intimidate and silence "all those who criticize and seek to change" the Jim Crow South.[8] The implications were clear: if these enormous libel suits became a reality, the New York Times would

face economic ruin, even bankruptcy. Across the country, the issues of race and social justice would disappear from the press. No Northern newspaper would have the courage to run any articles, advertisements or stories dealing with the South. For the N.A.A.C.P and other such groups, this was synonymous with disaster. Advertisements were, at that time, a primary way to raise money and increase visibility. The very premise of nonviolence campaigns — a strategy that succeeds by raising nationwide ire and feelings of injustice — *depends* on having access to the press. Accordingly, the Warren Court justices took the case to be directly targeting civil rights groups, much as *N.A.A.C.P v. Alabama (1958)* and *N.A.A.C.P v. Button (1963)* had recently done. This was the motive for their choice to hear the *facts* of the case, rather than merely the overarching principles involved, and the only part of the opinion that offered a hint that Sullivan was about anything except the First Amendment.[9] Overall, the Court was victorious in its objective. Following the ruling, the N.A.A.C.P was able to continue its media campaigns for justice — campaigns that were, undoubtedly, key factors in instigating social change.

The struggle to disempower George W. Bush proves, moreover, that these protections are still operating in strength today. Impeachbush.org and Moveon.org, left-wing advocacy groups, frequently take out full-page advertisements in the New York Times and other papers. Impeachbush.org lists the transgressions of President Bush, urging people both to write letters to Congress and to donate money. According to Moveon.org, "our impeachment ads in the New York Times, San Francisco Chronicle and Boston Globe show that we can make a difference" (Moveon.org). By making a progressive view into a countrywide topic of knowledge, if not debate, "they broke the media silence on the call for Impeachment and have helped spark widespread discussion of the grounds and basis for taking this necessary constitutional step" (Moveon.org). In many ways similar to the "Heed Their Rising Voices" advertisement in the March 29 1960 issue of the New York Times, these media campaigns would have been impossible in pre-*New York Times v. Sullivan* America.

These brief examples prove that *New York Times v. Sullivan* had a remarkable influence on American society. Its new angle on libel law led to both a greater freedom of the press and to the rise of investigative journalism, differentiating contemporary America from both pre-*New York Times v. Sullivan* America and other nations. Its specific safeguarding of the civil rights movement led, indirectly, to the increase of race consciousness across society — and the leeway that it gave radical organizations to promulgate their ideas is currently allowing Impeachbush.org and Moveon.org to reach the mass public. The issue subsequently becomes: why did the case have such an influence? A brief answer is that, firstly, the facts of the case made it possible for the Supreme Court to overcome the limitations that the constrained court view professes; secondly, much of the influence of the holding was indirect, rather than direct; and thirdly, the case quickly became built-in to American norms and values.

Although Rosenberg's constrained court view may arguably apply to many cases, *New York Times v. Sullivan* was able to overcome these inhibiting factors. Constraint I argues that the "bounded nature of constitutional rights prevents courts from hearing or effectively acting on many significant social reform claims, and lessening the chances of popular mobilization."[10] In *New York Times v. Sullivan*, however, there were clearly constitutional rights at issue: freedom of speech and of the press. Moreover, the sweeping effects of this case imply that, perhaps, the "bounded nature" of constitutional rights is actually less limiting than Rosenberg believes. With a willing Supreme Court, the various Amendments can frequently expand to suit a wide range of circumstances and events. And where such broadening fails, they can frequently help or hinder issues *indirectly*. Constraint II contends that "the judiciary lacks the independence from the other branches to produce significant social reform."[11] While this may be true in many cases, deciding the grounds for damage awards and liability is exclusively the province of the courts. Their authority in this sphere is absolute, neither needing nor allowing interference from either the Executive or Congress. Constraint III deals with implementation. Rosenberg argues that the inability of courts to induce compliance negates their efficacy. Whatever the merits of this line of reasoning, the only implementors were, in this case, the lower courts. Sometimes even these bodies may choose not to comply with a ruling. By distinguishing cases on minute grounds or, in other cases, flatly disobeying precedents, district and state judges may modulate decisions on ideological/ political grounds. *New York Times v. Sullivan* had, however, two advantages to overcome this issue. Firstly, the specific nature of the "actual malice" guideline made distinguishing cases practically synonymous with overruling the case. Secondly, the step of actually considering the facts of *New York Times v. Sullivan* made a clear statement that, if lower courts strayed from the "actual malice" formulation, appellate courts were ready and willing to overturn their decisions.

New York Times v. Sullivan also had a wide impact because its most potentially contentious consequences were largely indirect. The liberalization of libel law was immediately responsible for increasing the freedom of the press and allowing the criticism of public officials. However, its *specific* effects on a variety of American movements and events were slightly more circuitous. For example, the case was necessary for the rise of investigative journalism — a genre that, from Vietnam to Watergate, has had a tremendous influence on American society — but the Courts obviously had no role in

causing those stories to break. They only made such critiques and exposés a possibility. Likewise, the Supreme Court never explicitly made any pro-civil rights gestures in the *Sullivan* case. While the ruling did facilitate the work of the N.A.A.C.P, allowing them to continue their activism, this way of changing society was undeniably beneath the surface. Most Americans had no idea that *New York Times v. Sullivan* was an effort to shelter the civil rights movement; if they had known this, perhaps the resistance would have been greater. Rosenberg never considers this idea. His searches for court-led change stop at the *direct* consequences of every case – the number of abortions after *Roe v. Wade (1973)* or the slow pace of integrating schools following *Brown v. Board of Education (1954)* — while never considering the *indirect* influence of the decisions. *New York Times v. Sullivan* suggests that, perhaps, the Supreme Court can instigate social change by protecting the *tools* that lower-level and grassroots activists require.

Finally, *New York Times v. Sullivan* was effective in creating social change because it was able to work its way into American norms. Resistance to charges of libel dates back to the 1735 when John Peter Zenger won his trial after writing some (true) defamatory comments about Governor William Cosby.[12] Although libel laws were, in 1964, still fairly conservative, the idea that people should have "robust" freedom of speech already had many roots. Accordingly, the Sullivan holding quickly became a feature of American customs and values. Ordinary people took this liberty to speak and write freely, and they made it a part of their identity. Of course, some of this zealous acceptance of vigorous free speech and press may also have its roots in the Cold War: allowing citizens to criticize their governing bodies openly was, doubtlessly, one way to differentiate the United States from the Soviet Union. However, *New York Times v. Sullivan* gave this fervor room to grow. It gave people a sense of what free speech really was, and this passage into normative values was, to a large degree, what made *New York Times v. Sullivan* so able to produce change.

Although Rosenberg claims in *The Hollow Hope* that Supreme Court decisions are largely unable to produce social change, *New York Times v. Sullivan* suggests that his conclusions may be pre-mature. This case clearly had a large influence on society, changing the very nature and role of the media in addressing provocative and sensitive issues. The case made investigative journalism possible — a genre that has had enormous effects on society — and currently allows the press to criticize public officials in ways that other countries, and pre-*New York Times v. Sullivan* America, saw as criminal. Moreover, the *Sullivan* case had immediate effects on the civil rights movement, and is exercising similar influence on the drive to impeach Bush today. Perhaps *New York Times v. Sullivan* is the anomaly — the exception to the rule. However, its sweeping power to sway society suggests that, in truth, the courts *can* be effective media for social change. Despite what Rosenberg and other scholars say, there still is a chance to shape America through the courts. There is still hope.

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Do We Owe It All To A Footnote?

BY TEMILOLA SOBOWALE

Each year, on the first Monday of October, a group of nine prepare for heated debate. As members of the highest appellate court in the United States, they use their power to interpret the Constitution and ensure equal justice under law.[1] From *McCulloch v. Maryland,* which outlined the limits of the Commerce Clause, to *Grutter v. Bollinger*, which upheld the use of affirmative action in university admissions, the Supreme Court has made substantial contributions to American history and jurisprudence. Irrespective of the final decision reached by the Court, individual opinions written by justices can also influence subsequent cases. During Chief Justice Charles Hughes tenure, Justice Harlan Stone proved that even a seemingly inconsequential case could become the origin of a new form of jurisprudence. These words are engraved above the main entrance to the Supreme Court.

United States v. Carolene Products appeared to be an unremarkable case concerning the interstate shipment of filled milk.[2] The issue centered around the federal ban on interstate shipment, and whether it violated the Commerce Clause. The Court rejected the due process challenge and adopted the rational basis test; the government had deemed such milk was unhealthy, and substantial evidence from public health officials demonstrated that this position was justified. The rationale necessary to permit use of the Commerce Clause was present. Still, it is not because of the Court's final decision that *Carolene* has endured; the case's ongoing presence is due to a footnote penned by Justice Stone. It reads,

> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the 14th. [...]
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the 14th Amendments than are most other types of legislation
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious [...] or national [...] or racial minorities; [or] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry..."[3]

Chief Justice Stone's era was that of the New Deal, a period marked by economic advancement. Roosevelt's administration sought to provide recovery and relief from the Great Depression while implementing social and economic legislation that benefited the working class. However, the public was still stuck in the Lochner Era. Anachronistic decisions that had the Court enforcing its own mechanical jurisprudence had strained their relationship. Hence, the division in the Court during the New Deal era, some justices believed the Lochner era had been unnecessarily harsh, and consequently, felt judicial review was inherently undemocratic.[4] Justice Stone perceived an opportunity to address this matter and did so efficiently through Footnote Four.

The concepts advanced by Justice Stone in Footnote Four were a necessary step in the progression of the Supreme Court. There was a need for a definitive method of distinguishing between the type of review necessary for cases concerning economic rights and those involving civil liberties. Stone attempted to develop a framework for this in Footnote Four. He recognized that there was a lack of clarity surrounding judicial review, rational basis could not be applied in all cases. Inherent differences between cases involving property rights and fundamental rights exist. Although it began as a footnote, Justice Stone's innovative proposal greatly affected the manner that judicial review was and continues to be applied.

Justice Stone may have contributed to the advancement of the Supreme Court but Chief Justice Earl Warren implemented Stone's ideas. The jurisprudence of the Warren Court affirmed that the maintenance of democratic processes was a critical endeavour. As John Hart Ely explained in his book *Democracy and Distrust*, "a desire to ensure that the political process…was open to those of all viewpoints on something approaching an equal basis"[5] was necessary. Chief Justice Warren's successful tenure was due, in part to his adherence of the ideas outlined in Footnote Four.

STRICT SCRUTINY

After Footnote Four, a hierarchy of judicial review was established. The most importance was placed on cases that warrant strict scrutiny, thereby giving justices the opportunity

to be more exacting. In order to prove the legitimacy of legislation under this test three prongs must be satisfied. The law must be justified by a compelling governmental interest, seen as something crucial to that cause. Once the Court agrees that such an interest exists it must be demonstrated that the law has been narrowly tailored to achieve only that goal, the most restrictive means possible must be utilized to achieve said interest. The Court's implementation of such jurisprudence was noticeably different from rational basis review, which simply required legislation to be reasonably related to a legitimate interest. The Court understood that there was a need "to articulate a constitutional theory that would support the withdrawal of heightened scrutiny from some types of legislation while maintaining it for other types."[6]

VOTING

Footnote Four suggested rational basis review was insufficient to determine cases relating to voting rights. Prompted by such beliefs the Warren Court began applying strict scrutiny in such cases. Voting is a fundamental right and any legislation that limits such a right invoked strict scrutiny. *Reynolds v. Sims* (1964) was one of the first opportunities the Court had to demonstrate how fully they had embraced Justice Stone's legacy. *Reynolds* concerned voting districts in Alabama that had not been reapportioned every ten years as required. As a result, in some voting districts although they had 400% more people, it was possible for 25% of the electorate to elect the House of Representatives.[7] The votes of the citizens were being diluted. The Court affirmed the claim, asserting that "the constitutional prescription for election of members of the House of Representatives "by the People," construed in its historical context, "means that, as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's."[8] Application of strict scrutiny meant a realization of the imbalance reflected in such a political system. One man, one vote became the mantra echoed by supporters of the Warren Court.

Harper v. West Virginia Bd. of Elections (1966) was another decisive decision that reaffirmed restrictions on the right to franchise "must be closely scrutinized and carefully confined."[9] The plaintiff, Harper, claimed Virginia's statute that made payment of a poll tax necessary before voting could occur was unconstitutional, and a violation of the Equal Protection Clause. The state argued that the tax was imposed in order to fund the elections systems - people willing to pay, are more likely to be politically informed, the result would be a more informed electorate. Utilizing strict scrutiny, the Court argued, "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process."[10] Voting is a fundamental right that has an indirect effect on other rights that a citizen receives, therefore, making a citizen's participation in the electoral process dependent on their affluence was deemed unreasonable. The court's decision reflected their attempt to become a defender of civil liberties. Discarding rational basis review in such cases began the movement towards an unbiased voting system.

RELIGION

The Warren Court protected religious rights in a similar manner. As was stated in Footnote Four, cases that restrict religious minorities warrant heightened scrutiny. For *Engel v. Vitale* the Court adopted strict scrutiny. The case questioned the constitutionality of morning prayer in NY public school, even though the prayers were nondenominational. The Court ruled that any mandatory prayer violated the First Amendment's ban on establishment of religion. It was difficult for the state to fulfill any of the requirements necessary to pass strict scrutiny. In the opinion, Justice Black explained that, "The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people [could] say."[11] The Court was to defend its decision just a year later when it heard *Abington School District v. Schempp*. Using *Engel v. Vitale* as precedent, the Court ruled that public recitations of the Lord's Prayer, and passages from the Bible were violations of the First Amendment's Establishment Clause. A compelling interest could not be shown, and without the use of rational basis review the School District could not substantiate their case for religious recitations. The definitive 8-1 decision demonstrated that the Court was united in its decision.

"DISCRETE & INSULAR MINORITIES"

The text contained in the last paragraph of Footnote Four affirms that various groups necessitate strict scrutiny. As Lewis Powell asserted in an article in the Columbia Law Review, it was time for the Court to use the Equal Protection Clause "as a sword with which to promote the liberty interests of groups disadvantaged by political decisions."[12] The chance to do so came only a year after Warren's appointment to the position of Chief Justice in the form of *Brown v. Board of Education*. The Justices actions would change American society and they were given a solid legal grounding. Although it was not the first case to address desegregation the justices were aware of the social climate and the lasting impact their decision would have for minorities at this stage in time. In order to have a definitive impact, a unanimous decision was necessary, hence the 9-0 decision. Chief Justice

Warren ordered the states to comply with the ruling and to desegregate "with all deliberate speed." The use of rational basis review alone would not have allowed for the such a pervasive outcome. Though the decision itself was groundbreaking, the procedure that was utilized to reach it would not have been secure without reinforcement.

Cooper v. Aaron came to the attention of the justices a mere four years after the *Brown* decision. The school board in Arkansas reneged on their agreement to abide by a court order to admit nine black students, the Governor called out the National Guard to prevent racial integration of the student body. President Eisenhower had to act in view of this open defiance of the federal court order, he ordered soldiers into the state to maintain order. The Supreme Court heard the case and delivered a unanimous opinion affirming that their "interpretation of the 14th Amendment in *Brown* was the supreme law of the land and that it had a "binding effect" on the states."[13] In doing so, the Court asserted its promise to minorities to enact stricter scrutiny in cases that appeared to single them out unfairly.

A footnote at the end of a case about filled milk allowed judicial review to develop into the system it is today. Though the composition of each Court has led to new advances and undertakings, each Court still looks to the past as a guide. Chief Justice Warren looked to the words of Justice Stone and was successful.

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Depending on Judicial Independence:
The Argentine Supreme Court and Democratization

BY PAMELA C. CHAN

Corte Suprema de Justicia. Photograph by Pepe Robles, no copyright asserted. Source: [http://en.wikipedia.org/wiki/Image:Corte_Suprema_Argentina.JPG].

INTRODUCTION

Now in the twenty-third year of his lengthy tenure, Argentine Supreme Court Chief Justice Enrique Petracchi once wrote that "All judges are politicians, whether they know it or not."[1] Although one may not agree that all judges are politicians, there is no doubt that the Argentine Supreme Court has been subject to politicization. As Iaryczower et al. put it, after "the impeachment of four of the five sitting justices during the first Perón administration, the norm of judicial independence was lost."[2] But what is the significance of judicial independence with regards to Argentina's democratic consolidation? It will be argued that judicial independence, insofar as it allows civil liberties to be upheld, is a necessary condition for the consolidation of a democratic state. Accordingly, it will be shown that the subsequent deterioration of democracy under President Menem starting after 1989 was in part the result of an incomplete transition to judicial independence during the Alfonsín regime.

In order to pursue this argument, I will first define the notion of judicial independence. Second, I will explain the mechanism by which judicial independence sustains liberal democracy. Third, I will give a brief overview of the norm of judicial independence in Argentina before 1976. Fourth, using the criteria for judicial independence as outlined by Christopher Larkins, I will assess the level of judicial independence in two regimes: the military Proceso (1976-1983) and Alfonsín's democratic government (1983-1989). The former case illustrates that democracy cannot exist where there is no judicial independence; conversely, the latter case shows that where there is judicial independence, and so the guarantee of constitutional rights, democracy can be sustained. Finally, having demonstrated that judicial independence is necessary for democratic consolidation because of its key role in the protection of constitutional rights, I will propose that the erosion of democracy following Alfonsín's regime was the result of insufficient judicial independence.

WHAT IS JUDICIAL INDEPENDENCE?

Judicial independence is commonly defined in terms of the freedom judges have to "decide cases on the basis of the

established law and the 'merits of the case,' without substantial interference from other political or governmental agents."[3] That is, with judicial independence, "[n]o judicial decision should be dictated strictly by partisanship or by ideology or by any form of coercion aimed at achieving an outcome that is favored by political interests, but not dictated by the law."[4] Additionally, judicial independence may be described as the "extent to which justices can reflect their preferences in their decisions without facing retaliation measures by congress or the president."[5] Most comprehensively, Larkins states that "judicial independence refers to the existence of judges who are not manipulated for political gain, who are impartial toward parties of a dispute, and who form a judicial branch which has the power as an institution to regulate the legality of government behavior, enact "neutral" justice, and determine significant constitutional and legal values."[6] That is, judicial independence requires judges to be impartial, to be insulated from political influence and to have a clearly defined and adequately broad scope of authority. I will elaborate further on these criteria – all of which must be satisfied for judicial independence to exist – in my discussion of each of the regimes.

JUDICIAL INDEPENDENCE AND DEMOCRACY

Having briefly introduced what judicial independence entails, I will now explain how judicial independence is theoretically linked to the preservation of a liberal democracy. From the Center for Strategic and International Studies, Douglas W. Payne describes democracy as including "a true separation of powers that guarantees an independent nondiscriminatory judiciary."[7] But what is it about having an independent judiciary that makes one necessary for liberal democracy? Frühling replies that "[i]n a democracy, judges play a key role in upholding constitutional law and principles, and, for this reason, they should be independent from governmental interference."[8] That is, given that citizens of a liberal democracy are constitutionally guaranteed certain civil rights and liberties, it follows that the institution charged with the protection of such rights must be allowed to function properly in order to sustain liberal democracy. Thus, since "[t]he judicial branch…is the institution normally charged with the enforcement of the constitution, rights and other democratic procedures," its proper functioning must be protected.[9] Administration and adjudication must be distinct such that "[t]he final authority to determine what the law means rests on the judge, who should be independent from the administrator, so as to ensure the impersonal interpretation of legal rules."[10] Accordingly, because "the ability of the courts to fulfill this role is…heavily contingent upon the independence of the judicial branch," judicial independence is in theory a necessary condition of liberal democracy.[11]

THE NORM OF JUDICIAL INDEPENDENCE IN ARGENTINA PRIOR TO 1976

Judicial independence in Latin America has generally not been strong. According to Frühling,

> The problems of justice and of the state institutions charged with administering it are deep and pervasive in Latin America, and most of the judicial systems in existence are neither independent nor effective… fail[ing] to ensure citizens' proper enjoyment of constitutional rights [and] suffer[ing] from political manipulation by both democratic and military governments.[12]

Similar to the continental trend, the history of judicial independence in Argentina after the 1930 coup has been volatile at best. As alluded to in the Introduction, the first Perón administration in 1946 impeached all but one of the Supreme Court justices because of "the Court's earlier [unfavorable] decisions on issues important to the new government."[13] Since then the norm of judicial independence has been tenuous as demonstrated by the fact that "[w]hile until [Juan] Perón's presidency, 82 percent of the Supreme Court justices left the Court because of (natural) death or retirement, since then…91 percent [have] left it either because of resignation, impeachments or irregular removal."[14]

The norm of judicial independence having been dissolved, a new habit of court purging was established as incoming regimes replaced the court in 1957, 1966 and 1973. As Helmke puts it, "after Perón, incoming governments could expect to remove the justices appointed by their predecessor's regime with very little effort" and this prerogative was exercised by "incoming military and democratic regimes alike."[15] Being itself the product of executive politicizing, the "judiciary…consistently supported executive dominance in Argentina" and thus, ironically, reduced its own independence.[16] As such, "[d]espite the constitutional guarantee of lifetime tenure for Argentine Supreme Court justices, the decades of political instability that plagued Argentina from the 1930s through the 1980s resulted in the de facto norm of removing and replacing the members of the Supreme Court with each regime transition" and this was the case both following the military coup in 1976 and with the advent of Alfonsín's democratic government in 1983.[17]

JUDICIAL INDEPENDENCE IN ARGENTINA FROM 1976-1989

As explained earlier, judicial independence "takes on a critical significance when the government is one of the parties to a dispute" because of the government's ability to legislate or formally execute the violation of constitutional rights under the guise of legitimate state power.[18] In this section, I will assess whether judicial independence existed during the

military Proceso (1976-1983) and Alfonsín's democratic government (1983-1989). Ultimately, my project is to show that judicial independence has historically been necessary for the integrity of constitutional guarantees. To make this assessment, I will measure the actions of each regime against Larkins' three criteria for judicial independence: impartiality, insularity and scope of authority. He states that all three must be satisfied in order for judicial independence to exist. Importantly, judicial independence does not exist where "judges merely have the mindset to act objectively when dealing with the behavior of powerful political and social actors, but will pay the price if and when they attempt to do so."[19] Likewise, the courts may be formally granted a wide scope of authority, and "be publicly acknowledged by powerful political and social actors to be an important, separate institution for the determination of what is 'legally acceptable"';[20] however, this is not indicative of judicial independence if the formal scope of authority is simply promoted because it disguises an underlying lack of impartiality or insularity.

JUDICIAL INDEPENDENCE AND THE MILITARY PROCESO 1976-1983

Echoing Perón's actions in 1946, General Videla completely purged the Supreme Court in 1976 and his new appointees "proceeded to legitimate his government [with] the often proclaimed 'independence' of the Judicial Branch."[21] It was conventional that "the junta would replace the individual members of the Court with judges who shared the military's basic outlook and ideology."[22] As Munck notes, "the independence of the Supreme Court was severely limited, because in accepting the constitutive powers of the junta the court rendered itself incapable of interpreting the constitution independently."[23] Without the power of constitutional interpretation, the Court could not determine whether or not a law violated the Constitution and so was incapable of protecting constitutional rights. As such, the atrocities of the Dirty War initially went unpunished as a consequence of judicial dependence (stemming from a lack of insularity), and the resulting lack of civil liberties extinguished any hopes of democratic consolidation. Accordingly, with the junta removing judges 'deemed suspicious,' i.e. who might rule against the government, the insularity of the Court was menaced, even though it may have been superficially provided with a broad scope of authority.

In fact, focused on eradicating subversion, the junta, in the 1976 Acta Para El Proceso de Reorganización Nacional, established itself as the "supreme political power of the nation" and thus declared that the Statutes of the Proceso "superseded the [Argentine] constitution."[24] In other words, the Proceso was free to do anything that would forward its goal of preventing an uprising, including disregarding constitutional rights. Not only did the Statutes of the Proceso trump the Constitution but also, during General Galtieri's leadership of the junta, with the judiciary thoroughly intimidated, the Supreme Court 'ruled' that "the institutional acts and the Statutes of the Proceso [were] norms compatible with the Constitution."[25] That is, the military's Statutes were endowed with constitutional legitimacy. Thus, "while seeking to maintain the fiction of an independent judiciary" to maintain a modicum of legitimacy for its activities, the junta evidently "conceived of its political power as being without juridical nor factual limits."[26] Accordingly, "in…day-to-day practice, the military used unrestricted discretion at every step – and [this] was most evident in their holding of citizens in detention, at the disposition of the Executive Power without ever going through ordinary procedures of accusation, presentation of evidence, and sentencing."[27] As such, the limited nature of the Court's insularity (if it in fact existed at all) led directly to an unchecked executive with "power that did not recognize limits" to whose whim was left the constitutional rights of the Argentine population.[28] And, we need only to look to the many grievous human rights violations of the junta during the Dirty War to see a sample of the gross consequences that this lack of judicial independence had on Argentina's hope for democratic consolidation during the Proceso. As Vacs succinctly put it, "a full-blown system of state terror and violence was implemented."[29]

In short, throughout the entire Proceso, the Supreme Court's independence was nearly nonexistent and this had drastic implications for the guarantee of constitutional rights. A case in point: In September 1979, although the Court ordered the state to set Timerman free on a habeas corpus appeal since the state had yet to find anything criminal on which to prosecute him, it was forced to quickly withdraw its ruling when the army's leadership rejected the verdict and Videla announced that "unless the court obeyed, the justices would resign as a body."[30]

JUDICIAL INDEPENDENCE DURING ALFONSÍN'S REGIME 1983-1989

Unlike Videla, Alfonsín appointed a Supreme Court with diverse ideological and party backgrounds, and afforded the judiciary between 1983 and 1989 "notable degrees of impartiality and insularity and [a] fairly broad authority to regulate the legality of official acts."[31] Helmke makes similar observations, noting that "[i]n contrast to the concerns of the military junta, the Alfonsín administration seemed to place very little priority on building a… court…that was…necessarily politically homogenous."[32] In his campaign, Alfonsín had promised to "punish the former military leaders for abuses committed during the Dirty War and to install a democratic regime that would ensure…respect for human and civil rights" and both of these goals were advanced with the reestablishment of judicial independence.[33]

In spite of the fact that Alfonsín later proposed to reduce the reach of these human rights prosecutions (under the pressure of the military) and that the Supreme Court would eventually validate these decisions – which will be discussed in the next section – President Alfonsín nevertheless "did nothing to rally a unanimous opinion from the court, which might have given legitimacy to his extremely unpopular decision to grant amnesty to some of the accused."[34] Alfonsín's gesture demonstrates the level of judicial independence afforded to the Court to decide constitutional rights cases. Once the trial was being heard, the Court was insulated from government pressure and so was allowed to rule impartially. The only dissenting vote in the ruling, which upheld grants of amnesty, Justice Jorge Bacqué, commented: "It was widely known that one justice was definitely opposed to the law. The logical thing to do, if the executive wanted to intervene, would have been to make gestures to that justice… But no one ever made such gestures to me."[35] Thus, enjoying insularity and impartiality, the Court decided human rights cases according to the law and matters of fact rather than taking executive orders. Otherwise put, the Court had the authority to determine when a constitutional infringement had occurred and to deliver the appropriate verdict.

In addition to the Dirty War human rights cases, the judiciary delivered other contentious decisions; "[i]t liberalized society's laws on divorce, drugs, and other issues much farther than one would expect in a traditionally Catholic country" and so "frustrated several of Alfonsín's important policies."[36] Its ability to frustrate the executive agenda without being chastised distinguishes Alfonsín's court from that of the Proceso, since with the latter, any disagreement between the Proceso's Statutes and the Constitution would have been easily decided in favor of the Statutes. In fact, Alfonsín's Court even "soundly rejected the government's claims that "economic emergency" authorized it to reduce stipends owed to retirees without congressional approval."[37] Thereby, it limited executive discretion and the application of the political question doctrine – quite a change from the complete politicization of the Court under the Proceso.

Not only did the Supreme Court under Alfonsín limit the executive's discretionary power and so demonstrate its insularity and impartiality but it also enjoyed an expansion in its scope of authority, as its purview was increased to include oversight of the military. The reform of the Código de Justicia Militar ("Code of Military Justice") required that "all sentences of the military court be appealed before the Federal Court of Appeals, thereby establishing the firm preeminence of the civilian courts."[38] Otherwise put, by having purview over final appeals, the civilian judiciary's independence in determining the constitutionality of military and government actions was fortified. Thus, the judiciary "emerged as a surprisingly powerful and independent force in the development of civil-military relations during the Alfonsín administration"

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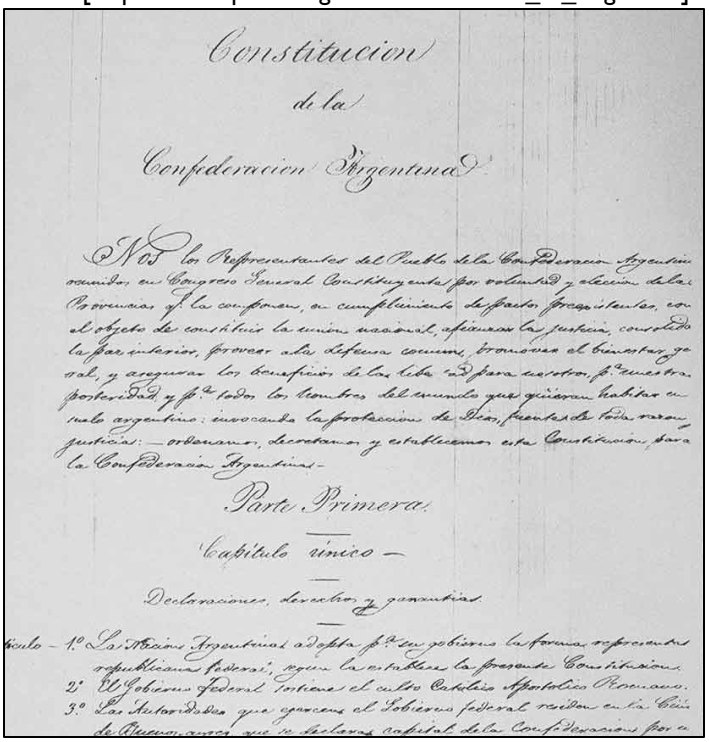

Constitucion
de la
Confederacion Argentina

Nos los Representantes del Pueblo de la Confederacion Argentina reunidos en Congreso General Constituyente por voluntad y eleccion de las Provincias que la componen, en cumplimiento de pactos preexistentes, con el objeto de constituir la union nacional, afianzar la justicia, consolidar la paz interior, proveer a la defensa comun, promover el bienestar general, y asegurar los beneficios de la libertad para nosotros, para nuestra posteridad y para todos los hombres del mundo que quieran habitar en suelo argentino: invocando la proteccion de Dios, fuente de toda razon y justicia: — ordenamos, decretamos y establecemos esta Constitucion para la Confederacion Argentina.

Parte Primera.

Capitulo unico —

Declaraciones, derechos y garantias.

Articulo — 1.° La Nacion Argentina adopta para su gobierno la forma representativa republicana federal, segun la establece la presente Constitucion.
2.° El Gobierno federal sostiene el culto Catolico Apostolico Romano.
3.° Las autoridades que gobiernen el Gobierno federal residen en la Ciudad de Buenos Ayres, que es la declarada capital de la Confederacion por una

Original Manuscript of the 1853 Argentine National Constitution

having been provided with a wide scope of authority and allowed to be impartial and insulated.[39]

However, even with all the accomplishments of the court during Alfonsín's regime and its greater judicial independence, it cannot be overlooked that the Supreme Court, after 1983, "continued to be purged and stacked by elected presidents."[40] Moreover, how are we to interpret the fact that the Court did end up ruling in favor of the government, although by a slim majority, to reduce the scale of the human rights prosecutions? What was the extent of the judicial independence from 1983-1989 and what were its implications?

AN INCOMPLETE TRANSITION TO JUDICIAL INDEPENDENCE

In this final section I will briefly introduce possible explanations for why the democracy that was established under Alfonsín failed to survive into the 1990s under Menem. In particular, I will discuss Alfonsín's failure to completely dispel the habit of court purging and the military's residual influence during Alfonsín's regime.

President Menem is quoted as saying, "Why should I be the only Argentine President not to have my own court?"[41] Accordingly, in 1990, he built his 'own court,' allowing "political expediency…to undermine…constitutional autonomy". Moreover, President Menem "reduced the scope of Supreme Court jurisdiction over cases bearing on the

'economic emergency"' and thus, the Court's independence and legitimacy was further compromised.[43] As evidenced by the Olivos Pact between Alfonsín and Menem in 1994 which "attempted to depoliticize the judiciary," the lack of judicial independence following 1990 did not go unnoticed.[44] In 1990, the Supreme Court had been "transformed into a willing pawn" subordinate to the government without strength to defend Argentines from any abuse of constitutional rights.[45]

So, what occurred during Alfonsín's regime that failed to reinforce the norm of judicial independence resulting in democracy's deterioration under Menem? One might argue that in appointing his own Supreme Court at the beginning of his term, Alfonsín himself did not adhere to the norm of judicial independence and merely followed the habit established by his predecessors. However, Owen Fiss argues that "wholesale dismissal of a judiciary by newly installed democratic governments…should have no consequences on the actual or perceived independence of the judiciary."[46] Likewise, Alfonsín's leading legal adviser, Carlos Ninos, said that "the very fact that the justices had been sworn in by a de facto government meant that the tenure of the sitting justices would not be respected by the incoming democratic government."[47] However, it is clearly impossible for court purging – even if justified – to have no effect on the court's legitimacy and independence. For, "when a judicial body is dismissed and reconstituted, it needs to begin its process of development all over again, thereby delaying by many more years the establishment of a judiciary which can be a forceful mechanism in the protection of the rule of law."[48] Even Fiss himself accidentally acknowledges that court purging has an effect when he claims that one "need not respect the independence of the judiciary established by a previous regime."[49] Thus, the norm of judicial politicization may have been reinforced by Alfonsín's own court appointments and this may account for the erosion of democracy under Menem in spite of an increase in judicial independence from 1983-1989.

Next, I will address the military's lingering influence during Alfonsín's rule. Tocqueville claimed that a "large army in the midst of democratic people will always be a source of great danger."[50] During Alfonsín's regime, the military threatened to resist civilian control and "resign en masse if the government did not immediately do something to solve the human rights trials."[51] With a strong military and low popular support, Alfonsín "was cornered into concessions to the military's demands."[52] These concessions included the Due Obedience Law, which offered amnesty for lower ranking officers that had committed human rights crimes during the Dirty War and the Punto Final Bill, which was a sixty-day statute of limitations beyond which all officers not already heard by the courts would be absolved from any guilt.[53]

Correspondingly, as one attorney explained, the judiciary "received enormous pressure, enormous pressure from the government...not to indict anyone [and to] send the cases to military justice."[54] Caving under this pressure in June 1987, the Supreme Court upheld the Due Obedience Law dropping the number of charges from 450 to 100, thereby freeing hundreds of accused torturers.[55] Further, after the second military rebellion, the Court ruled that only 20 of the remaining 100 officers facing trial could be charged.[56] As former army chief of staff Jorge Arguindegui declared, "the final decision regarding the trials would have to be taken by Alfonsín, despite the political cost, rather than the Supreme Court."[57] As such, even though the justices acted admirably in trying to process as many cases as possible after the passage of the Punto Final Bill, the judicial independence established under Alfonsín – though improved since the Proceso – was still inadequate to unequivocally limit the executive powers of the Menem government.

Thus, the incomplete democratic consolidation illustrated by the Menem 'democracy' can be in part explained by the incomplete transition to judicial independence from 1983-1989.

CONCLUSION

In sum, I have argued that judicial independence, in safeguarding constitutional rights, is necessary for the consolidation of liberal democracy. Whereas liberal democracy could not have existed during the Proceso because of a dearth of judicial independence, it was briefly sustained during Alfonsín's regime because of a greater degree of judicial independence. However, even so, that liberal democracy did not last beyond 1989 because there were still considerable factors hindering judicial independence. Thus, I conclude that liberal democracy depends on judicial independence.

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Separation v. Geneva: The Real Factors in the Supreme Court's Guantánamo Decisions

BY CHIMNOMNSO N. S. KALU '07

"*The executive branch of the United States Government operates as judge, prosecutor and defense counsel of the Guantánamo detainees.*"

—United Nations Human Rights Commission Report: Analysis of the Rights of Guantánamo Bay Detainees.[1]

In the post-9/11 world, the United States government has been understandably concerned with the safety of the American people. The attacks on the Twin Towers in New York City were the most devastating since the bombing of Pearl Harbor during the Second World War. Among the responses to the atrocities that took place almost five years ago were the invasion of Afghanistan and the creation of a detention center in Guantánamo Bay, an area in Cuba that has been under U.S. control since 1903. The U.S Administration has been transporting suspected terrorists there since January of 2002, and because of the alleged human rights violations taking place there, the prison – as well as the Administration itself – has come under a great deal of scrutiny from those concerned with international human rights law.

Indeed, those who view the treatment of the detainees at Guantánamo Bay as victims of human rights violations see the United States Supreme Court decisions in *Rasul v. Bush* (2004), *Hamdi v. Rumsfeld* (2004) and *Hamdan v. Rumsfeld* (2006) as victories. These three decisions, which grant foreign nationals access to the United States legal system and affirm their rights to fair trials seem to imply that the Highest Court in the country is willing to place the mandates and customs of international law as the first and foremost sources of law in cases involving human rights, even at the expense of the obvious displeasure of the executive branch of the government. While that is possibly true, the issue at play in both cases is more subtle. Although all decisions involve international human rights law, the real mechanism that forced the hand of the Supreme Court is the separation of powers between the executive and judicial branches of government. The ambiguity in the language of the Geneva Convention Relative to the Treatment of Prisoners of War, alongside the stringent laws of the United States, forced the Administration of the United States to attempt to operate in an extra-legal sphere in order to achieve its national security objectives. The attempt to circumvent both international and domestic legal systems failed with "Congress' failure to include Section 1005(e)(1) within the scope of Section 1005(h)(2)."[2] It is this omission that drove the Supreme Court decision, not the concern for international human rights law.

Hamdan represents the most recent decision by the United States Supreme Court on the Guantánamo Bay issue, as well as the harshest. The story begins soon after 9/11 with the Authorization for Use of Military Force (AUMF), the result of a joint resolution by Congress that gave the President the right to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[3] The result of the Resolution was an invasion of Afghanistan, then controlled by the Taliban, and the eventual detainment and imprisonment of many suspected terrorists, among them Salim Ahmed Hamdan. He was eventually transported to the U.S. Naval base in Guantánamo Bay, Cuba, where he remained for some time without real access to any court system before he was charged with "one count of conspiracy 'to commit . . . offenses triable by military commission.'"[4] In 2004, the Combatant Status Review Tribunal (CSRT), which had the authority to make determinations about a foreign national's combatant status, found him to be an enemy combatant, and his detention was deemed legal.[5]

It is here, with the language of 'enemy combatant', that we can begin to analyze the mechanisms that the Administration attempted to use, and in fact almost succeeded in using to circumvent international law, all the while remaining out of reach of the United States Federal Court System. The term enemy combatant was first used in 1942 by the Supreme Court in *ex Parte Quirin*, a case in which the Court distinguished between 'lawful' and 'unlawful' combatants.[6] However, pursuant to a military order issued on July 7 2004, an enemy combatant was explicitly defined as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."[7] Any individual characterized as such is also, according to Section 1005 of the Detainee Treatment Act (DTA), under the sole jurisdiction of the executive branch of the United States government.[8]

Upon review of the Third Geneva Convention, also known as the "Geneva Convention Relative to the Treatment of Prisoners of War," it will be noted that nowhere is

the phrase 'enemy combatant' used; the post-*Quirin* definition of that term was the conception of drafters of the executive branch, i.e., those acting on behalf of the President. The Convention instead refers to those "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely".[9] The question then becomes, what exactly was the purpose of deviating from the terminology, if the government truly intended to adhere to the Conventions in the first place? It follows that the deviation was part of a larger attempt to ensure that any action used to extract information from or determine the guilt or innocence of the suspected terrorists at Guantánamo Bay were not subject to *formal* review or rebuke from the international legal community.

Review or rebuke would stem from failure to adhere to the principles of the 3rd Geneva Convention. However, the Administration is fearful of giving detainees their full rights as outlined in Article 3 of the 3rd Geneva Convention because of the ambiguity of the language. For example, Article 3 refers to "cruel treatment and torture" without delineating what exactly constitutes either. Certainly torture is not quite as ambiguous, and can in fact be defined as "(1) the deliberate infliction (2) of physical pain or psychological distress," whereby "(3) victims of torture [are] defenceless [sic]… [and] (4) the purposes for which it is inflicted must be purposes that the recipient of the pain and suffering does not share and cannot be reasonably expected to share."[10] What, on the other hand, is the exact definition of "cruel treatment"? It is this ambiguity, and not that of torture, that is most likely to be troublesome to the Administration. While torture is more easily recognizable, that which constitutes cruel treatment is infinitely more complex, and subject to differing definitions depending on social, cultural and/or legal contexts.

In the face of the conundrum of the legal definition of 'cruel treatment', the Administration needed to make a decision. It could either choose to operate within the ambiguously defined context of the international system, or it could operate within the legal system of the United States. On the one hand, while the conditions within the American legal system may not be completely amenable to the ultimate objectives of the legal proceedings at Guantánamo Bay, at the very least the Administration would know what to expect within the domestic legal system. Unlike the laws of legal system of the United States of America, the laws of international legal system are not subject to judicial review by any specifically recognized body, and thus, whereas the meaning of the "cruel and unusual punishment" that is found in the Eighth Amendment of the U.S. Constitution is not itself easily defined, it is still constrained by case law in a way that the language of Article 3 is not. However, operating within the American legal system was not an option considering that, "in *Trop v. Dulles*, the Court specifically held that the Eighth Amendment to the United States Constitution contains 'evolving standards of decency that mark the progress of a maturing society.' In *Trop* and subsequent cases, the Court made clear that this 'evolving standard' should be measured by reference not just to maturing American experience, but to foreign and international experience as well."[11] In other words, the laws of the American legal system are also somewhat subject to customary international law, and for this reason, operating within it would be undesirable in cases involving enemy combatants.

Additionally, the existence of national security concerns made both the international and domestic legal systems objectionable. The nature of the national security objective of finding and stopping terrorists necessarily precluded the involvement of the international community and, interestingly enough, it precluded that of the U.S. as well. It remains possible and probable that there are terrorists in America, and thus secrecy in proceedings would be of the utmost importance. The option that remained was to create a system that could not be easily accessed by either the international or domestic legal bodies. Thus Guantánamo Bay presented itself as an opportunity, and as a place with the potential to harbor an extra-legal system under the control of the executive.

Detention placed suspected terrorists in the custody of the United States Military, which then transported them to a place with relatively ambiguous jurisdictional claims—Guantánamo. All that remained was the enactment the section of the Uniform Code of Military Justice that provides for the modification of courts-martial in such a way as to deprive the suspects of access to any court of law other than that of the executive.[12] The culture of fear that pervaded the U.S. after 9/11 created a permissible context for this type of action; it seemed anyone could be a terrorist, and therefore detentions and secret proceedings were essential to confirm innocence or guilt, thereby protecting the country from future attacks on a scale comparable to those of the Twin Towers.

Ostensibly, the U.S. lays claim to jurisdiction over Guantánamo Bay and so the legal hands of the international community were somewhat tied. With the issue of international law resolved, the most pertinent issue that *Hamdan* raised was one of separation of powers between the different branches of the government, and the ability of that separation to extend beyond the boundaries of the United States. The DTA, as it is written, is intended to operate in a realm of law that is under the jurisdiction of the executive, but not under the jurisdiction of any ordinary court of law, and in that sense the DTA is not law at all, but rather an executive

order masquerading as law. Such a masquerade was the only chance that the Administration had to try suspected terrorists with the lack of transparency that has existed to date. No reasonable court of law would deprive defendants the right to meet with their attorneys or to see and hear the evidence against them.

The ploy might have succeeded except for the statutory failure of the DTA. As noted in the decision of *Hamdan*, Congress did not act "§ 1005(e)(1) within the scope of § 1005(h)(2)."[13] In other words, in approving the DTA, Congress did not grant blanket prosecuting power to the executive branch of the government, and perhaps never intended to. To do so would have been to misappropriate the power of the judiciary branch to the executive in conscious violation of the spirit of the U.S. Constitution.

Misappropriation of power was the true driving force of the *Hamdan* decision. While it is evident that the Supreme Court of the United States is somewhat concerned with matters of international law, it has no jurisdiction over matters of international law and in fact does not seek any such claim. Its realm of power is synonymous with the realm of power of the Constitution—that it to say that the Supreme Court, as it exists now has jurisdiction over the U.S. with little regard for the opinions of other nations except insofar as those opinions are directly related to issues that can be interpreted from the language of the Constitution. The Court will change the most when the Constitution changes; if the latter ever changes to, and in and of itself, recognize international law, then so will the former. Presently, the Supreme Court is only concerned with maintaining the integrity of the United States legal system; and regardless of other impressions that it may give, the decision in *Hamdan* was a necessary step to preserve that integrity. The perceived prevalence of the influence of international law was only a by-product of that step.

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Social Entrepreneur of the Arts:
Interview with Kenneth Schneider BY JOHN H. SILVA

Social entrepreneurs and global leaders with a vested interest in the public good are nothing new to the business community. There is, however, a dearth of attorneys involved in social enterprise. Perhaps because the legal profession is more resistant to change than the business world, the traditions of pro bono legal services continue to differ from true social enterprise. Pro bono services still tend to facilitate existing modes of social action, whereas the social entrepreneur seeks to develop unconventional approaches and solutions.

Kenneth Schneider worked for several of the world's largest international law firms and financial groups before launching his career as a social entrepreneur by creating The Apogee Foundation and Aurience Ltd. to promote excellence in the performing arts from both the non-profit and for-profit perspectives. His progress in doing so shows how social enterprise can provide a means for the legal professional to employ and expand his spectrum of talents in unconventional ways to address social needs and, in doing so, positively impact the lives of people around the globe as well as prevailing views of the legal profession.

The Apogee Foundation is a non-profit organization formed in Russia in 1997 and incorporated as a public charity based in the United States in 2004. Aurience Ltd. is a company formed in the United Kingdom in 2006 to further the same principles in ways that can best be achieved through attracting investment and management on a for-profit basis. In building these institutions to further social goals, Mr. Schneider blended his background in law, finance, East-West dynamics and the arts to create international entities enabling talented artists around the world to achieve their full potential.

Mr. Schneider is a graduate of The University of Chicago Law School (J.D. 1992).

"It is by maximizing our ability to assist others in achieving their potential that we maximize our value as professionals. This is the challenge for the shapers of society and therefore the project of law."

How would you describe the most valuable lessons learned while in law school and in what manner do you believe the lawyers of the future can get the most out of their legal education?

Given that law now addresses itself to nearly every aspect of human life, the lessons of law school have less to do with the multitudes of rules – very few of which are retained after graduation and most of which change over the course of a lawyer's career – than with the paradigm of "thinking like a lawyer." So the most valuable lesson I learned in law school certainly had to do with this mode of thought being inculcated into my life.

We deem mental versatility to be a cardinal good in our culture. However, if we pause to consider the public perception of the costs lawyers impose upon society as compared to the benefits they provide, by-and-large, then we will recognize the need to look objectively at how the lessons underlying this mode of thought are being taught. I remember finding myself "at the top of my class" after the first semester of law school. At the time this seemed to me all about the thrill of mastering a new way of addressing the world and therefore of my own potential in it. But it also meant that I was submitting to a system of having my potential digitized; and that I was being digitized in relation to others as well. I remember actually trying to convince my parents that these numbers were not important, but they were – although not in the way intended. As soon as we were all digitized, the learning environment changed completely. It became based on the greed and fear inspired by these numbers – which

formed the basis of identifying us as "good" or "bad" students and, presumably, potential lawyers. The impact on my enthusiasm and happiness was immediate, but it was only years after I had emerged from this environment that I was able to see the lesson I had learned: that greed and fear are self-centered impulses, and any institution wishing to promote careers based on service to others cannot properly cultivate admissions and promotions processes which are antithetical to these aims.

I likewise eventually came to see the paradox of employing what is referred to as the "Socratic Method" to bring about this goal of "thinking like a lawyer." Socrates' method of honing his students' intellectual powers was based on and directed towards instilling in them a fundamental understanding of themselves and their place in the world – and on eliciting an appreciation of the responsibility they bear for applying such understanding to their own conduct. It was not based on fostering greed and fear in them and then unleashing them on the world to be employed as gladiators dependent on wealth and power to assuage their insecurity. I believe that Socrates would have a few questions for those employing such a method in his name. We should as well. I wish there was a law school curriculum which, in addition to honing students' mental instruments into weapons for gladiator sports sought to help young people seek these fundamental understandings of themselves and their place in the world. Surely, thinking about our own place in the world and what we can achieve here as professionals with power and responsibility for shaping the relations of others and, thereby, society as a whole must be at the heart of "thinking like a lawyer." If so, then surely our law schools are the proper place to help young people at the threshold of their careers resolve such fundamental questions about what they are doing and why they are doing it.

It is by maximizing our ability to assist others in achieving their potential that we maximize our value as professionals. This is the challenge for the shapers of society and therefore the project of law. I attribute most of the success I achieved both as a legal professional and as what you term a social entrepreneur to this conviction; and also most of the challenges which I've faced. I've certainly learned that holding to your principles is not an easy thing to do, but I also have learned the more important and profound lesson that doing so eventually pays off because this compels you to find the place – or to create a place – that will allow you to fulfill your real potential. Your own potential is fundamentally tied to and dependent upon the potential of others, and can only be fulfilled if the people with whom you form relationships are fulfilling theirs in the process. The greatest lesson I learned both in law school and in my career as a lawyer therefore was how to be more than a digital identity, to rise above the greed and fear, and to take responsibility for my power to make this happen.

If you cultivate the ability to hold to such principles, any principles, there is sacrifice involved – but out of that sacrifice grows a far more valuable set of skills than anything inculcated in law school classrooms or the corridors of wealth and power. You learn how to succeed in rising above the agents of corruption rather than learning how to succeed in being controlled by them. You learn that you need to make the most of every talent you have to maximize the potential of everyone around you because this magnifies your own potential through the talents all of them possess. It was when I had learned this lesson that I finally had completed my fundamental legal education and learned to "think like a lawyer."

There is a long-standing debate on the designation of law as a science, art or a combination of the two. As a professional with a deep background both in law and in the arts and sciences, what do you believe is the relation between law as an art and/or science?

Given that I spent my undergraduate career studying music and physics and my graduate career studying law, I'd like to offer you a strong opinion. My college work was focused on showing the deep unity of artistic and scientific approaches to our understanding of the world – because both approaches are unified at the deepest levels of consciousness. If we describe art as the order we give to subjective reality and science as the order we give to objective reality, then I would describe law as a bridge between the two, ideally with one foot planted firmly in each.

While I was in college, a study was conducted at the University of Michigan which suggested that many of the most successful lawyers come from backgrounds in music and engineering, and it was actually these aspects of my background which first led to advice that I go to law school. People are social creatures and form relationships to fulfill their subjective drives and dreams: whatever it is that they value most. We manifest our highest capacity for artistic awareness when we share what we value most with others, and regulating social relationships and optimizing the sharing of value is the province of law. Hence, the practice of law is deeply concerned with the art of being human. Yet it also is meant to operate as the engineering of social relations based on the same principles as any other scientific undertaking: empirical study, rational analysis, theoretical extrapolation, practical experimentation and encyclopedic documentation. Law is thus the science of our arts: the means by which people optimize the sharing of their values.

But we know what happens when greed and fear corrupt the practice of arts and sciences. Every day we see around us and within us the results, as the beauty of cultural diversity is manipulated into the ugliness of repression

and as the ultimate transformative power of the atom is developed into the ultimate destructive power of the bomb. The people who are corrupted by these perversions of art and science are no less harmed by the infection than are the victims against whom they therefore act. They've allowed themselves to become carriers of anti-values – a fate I would not wish on my worst enemy. Because the practice of law can so easily be exploited by and for developing wealth and power, it is particularly susceptible to the forces of corruption. Until lawyers are ready to take responsibility for these fundamental aspects of their significance for the world, and rather than finding ways to help others optimize the sharing of value they are being prepared only to win at the expense of others like gladiators, then the profession can't properly be called an art or a science.

Musicians must find harmony and balance between complex, evolving interrelationships – achieving an optimal potential among disparate elements that works effectively from every point of view. Engineers must find ways to achieve a multiplicity of potentials by bringing to bear every form of knowledge and every available element into a whole that functions in the real world to serve people's real and varying needs. It's therefore not surprising that people who have developed such skills will be likely to succeed in the legal profession. I've found in my own career that, the more I think like an artist and like a scientist, rather than like a gladiator, the easier it has become to optimize the value of any set of relations and thereby the potential of everyone involved in them – and therefore the more valuable I have become to anyone who is involved in or affected by the results. People are generally ready to maximize available value as long as it is clear that this is what you can achieve together – and, when you begin to think in these terms the practice of law can actually begin to seem almost too easy. As this occurred in my own career, I naturally began to branch out from traditional approaches to legal practice –thinking more like an artist and like a scientist and thereby finding other ways, more needed ways, of thinking like a lawyer. Apogee and Aurience grew directly out of my desire to find ways of using everything I had learned as an artist, scientist and lawyer to maximize my value to the world by helping others to achieve their potential and thereby achieving my own.

"I decided to put myself through a kind of intellectual boot camp by going to law school at the University of Chicago and, while there, I remember watching the Soviet flag come down over the Kremlin – and, at that moment, all of the possibilities I could only have imagined the rest of my life suddenly were waiting just at the other end of an airport tarmac."

At what point did you decide it was the proper time and place to halt practicing law full-time and create a non-profit organization? Did historical, political and/or financial trends at the time make it an especially fortuitous time to start The Apogee Foundation, and if so what were the indicators of such trends?

The major internal and external trends of my life did come together to make such a transition inevitable. The best teacher in my school, someone who inspired me early on to achieve my potential, taught Russian – and, if I were going to achieve my potential in anything academic, it was certain to be this. Also, my ancestors were from the region, so I found myself attuned to East-West dynamics all my life. Because the Soviet system of repressing human potential seemed unattractive to me, however, this attunement began to evolve into a focus on the Pacific Rim. After college I began to operate in the financial world of the Pacific, forming an investment company, but then I decided to enhance my professional skill sets so that I could play a more significant long term role within the enormous sets of relationships unfolding there.

I decided to put myself through a kind of intellectual boot camp by going to law school at the University of Chicago and, while there, I remember watching the Soviet flag come down over the Kremlin – and, at that moment, all of the possibilities I could only have imagined the rest of my life suddenly were waiting just at the other end of an airport tarmac. While the ink was drying on my sheepskin, I went first to New York to earn my stripes in cross-border transactional work and then to London when the international financial boom went into high gear. By the mid 90's, I had integrated the set of professional skills I felt I needed to put myself into the middle of all the potential unfolding out of the former Soviet Union – right at the point when those skills were most needed. When everyone else was trying to avoid a huge engagement working for the fledgling government of Kazakhstan, I volunteered – and, when others still didn't want to work in Russia, I moved there. When the financial meltdown occurred in 1998 and most Westerners deserted Moscow, I stayed and established a position that would eventually allow me to achieve potentials which frankly I would not have believed if someone had predicted them.

Throughout my schooling I had dreamed of changing the way people are educated – opening their eyes to fundamental understandings of their potential and finding ways to help them achieve it. But I could see from early on that the path to doing this was not an easy one. The same teacher whom I

mentioned earlier, the person who enabled so much of what I was able to achieve in the world through his own vision for human excellence, was let go the year I graduated. He demanded that students achieve their full potential – and unfortunately by then most students already had become greedy and fearful participants in their own digitization rather than focusing on the real value of what they might be able to master or create in the process. At this point I realized that, if I wanted to achieve a different vision for human excellence, I also would need to harness the economic and political resources which could create and sustain an environment where talented people could learn to think like artists and scientists rather than like digits. I began to make compromises, and sacrificed much of what I would have liked to pursue as an artist or scientist in order to figure out how I could enable others to achieve more than the system they were in seemed to allow. But, in the process, I discovered that this actually was achieving my own potential because, by seeing how much I was willing to sacrifice to achieve those ends, I discovered what these fields really meant to me. Rather than authoring, composing, researching and teaching, I went into law and finance, relocated to the heart of the former "Evil Empire" and put my life at risk struggling with the forces which undermined talented people's destinies there. In doing so, I achieved much more than I could ever have accomplished on my own because, by learning to maximize the potential of people around me, I was actually learning to magnify my own abilities to create value and to be valuable in the world.

A huge turning point came in 1998 when instructors I'd befriended at one of the most famous performing arts training institutions in the former Soviet Union asked me to help an extremely gifted young student who had been thrown out on the street because his parents, both former artists, had lost their work and couldn't pay some obscure amount. Apogee already had been taking shape for a year, at that point, and we'd done a great deal for that particular institution -- so we managed to put this kid back in school and to build around him support structures which we've since provided to hundreds of gifted students across Eurasia. And here is where the trends came together. I found myself actually having persevered with my vision to the point where I was at the economic and political core of one of the world's most exalted artistic cultures; and, right at that moment, the foundations of that culture were crumbling with tragic results all around me. Gifted and good people's dreams were on the verge of failing – and I knew that, if I allowed these dreams to fail, then I also would be failing to fulfill my own lifelong dream. Soon after, the administration of this institution was itself thrown out after more than four decades in power; and this young artist went on to perform for full houses in the Bolshoi Theatre, Lincoln Center and Covent Garden. He later was central to developing our Fusion Program, which is designed to help others from similar backgrounds transition to the world stage, and he represents the interests of beneficiaries on the Foundation's Advisory Council – fulfilling his own potential by helping others to do the same.

"The motto of The Apogee Foundation is: 'achieving the potential of human excellence in the performing arts.'"

When these trends came together and this awareness crystallized, ten years into my legal career, I realized that my potential as a professional could be fulfilled only by enabling the potentials and professions of others to be fulfilled. This is where whatever skills I'd developed of thinking like an artist and like a scientist merged with all of my experience in the real world into truly "thinking like a lawyer," and enabled me not only to finally return to my original dreams in life but to achieve them. In large part thanks to the expansion of thinking skills which these achievements required, I began to see new ways to enhance my value to others – and conventional ways of practicing fell away like a chrysalis as these larger goals took flight.

The motto of The Apogee Foundation is: "*achieving the potential of human excellence in the performing arts.*" As lawyers and as people, all of our lives are really a collection of performances – and, if we are pursuing our dreams, these performances are our highest art. For how many digits on a transcript or paycheck would anyone trade their ability to make a dream come true, and for how many digits could they ever buy that dream back again? These are the questions I answered at the point when all of these trends came together in my career – Apogee and Aurience were my answer. If answering these questions were to become a fundamental part of what we teach our lawyers to think, just consider in what esteem the profession would be held by ourselves and those around us. More importantly, just consider how different the world would look.

John H. Silva is a third-year undergraduate student at Harvard Extension School. He is also an Advisory Council Member and New England Regional Representative for the Apogee Foundation.

Three Judges and a Commissioner

INTERVIEWS BY KATHERINE HOWARD

JUDGE MARY FINGAL ERICKSON

Judge Mary Fingal Erickson has served as Chair of the court's Temporary Judge Committee, during which she oversaw recruitment and training of lawyers to assist the court as judges pro tem. She also served as Supervising Judge of the West Judicial District, during which she supervised sixteen judges and commissioners, and oversaw the operations of the court.

Over what type of court do you currently preside?

I handle mostly general jurisdiction civil matters. These are cases in which the amount in controversy exceeds $50,000: business disputes and personal injury, and review of decision of various administrative bodies such as the Department of Motor Vehicle's decisions on driver's license suspensions. I am also a back-up court to the family law courts for their longer trials involving custody, child support, and property division.

I was a deputy district attorney for several years, right after law school, prosecuting misdemeanors. I took a 3-year leave of absence from practicing law to have my sons, one of whom graduated from Harvard last year. After that I was an associate and then a partner in a firm that handled all types of civil matters: personal injury, medical malpractice, business disputes, products liability cases, mostly on the defense side. I did jury and court trials, and also arbitrations. I volunteered with the Orange County Bar Association as an arbitrator and on the Client Relations Committee. The latter committee investigated complaints against lawyers. I was featured in the *Los Angeles Daily Journal's "Litigator Profile"* in 1996.

What are your favorite and least favorite aspects of your career?

I have many favorite aspects: the variety and challenge of the work, the people, and the intellectual challenge. I do not miss at all the pressures of running a law business, or of business development. [My] least favorite aspect would be that there never seems to be enough time for any one case. I have over 400 active cases on my inventory.

"Many people have the perception that groundless lawsuits are proliferating, when in fact case filings, at least in my county, are down."

– Judge Mary Fingal Erickson

What issue/debate do you consider to currently be the most important (and possibly controversial) in your area of law?

Tort reform is a hot topic in California, and everywhere. Many people have the perception that groundless lawsuits are proliferating, when in fact case filings, at least in my county, are down. People also have the perception that there are many "runaway verdicts," [although] high verdicts are relatively rare when compared with the number of cases submitted to juries. There are limits on monetary damages in medical malpractice cases; the so-called "non economic" damages of pain and suffering and loss of consortium or companionship have been limited to $250,000 since 1974. In today's dollars that is far less than it was 32 years ago, but efforts to change that to be more in tune with the times have failed. In reality, most lawyers don't have much incentive to take cases of doubtful merit, because the lawyer's recovery of fees is often, at least in the personal injury case, tied to the amount of the recovery.

For whom do you think judgeship is ideal?

[Judgeship is ideal for] anyone who likes the idea of deciding disputes, who can make decisions and support them, who likes people, and who likes something new every day.

What preparatory advice would you give to pre-law/law school students?

Do volunteer work for a judge, lawyer, law firm or legal clinic, even if it is just filing… It will give you exposure to the world of the law, as well as contacts. Have a well rounded life! Don't keep your nose buried in law books. Develop hobbies and friendships. Take a variety of courses in law school. You may end up working in a different field of the law from what you start out in, or from what you think you may like. [For example,] I never thought I would be a trial attorney, but that is what I ended up doing. Another person I know wanted to be a trial attorney but is a very successful corporate lawyer.

JUDGE BRETT LONDON

"The judge is primarily a listener, whereas the attorney is primarily a speaker. The judge must be neutral, the attorney is an advocate."

– Judge Brett London

Judge Brett London presides primarily over criminal cases. He is also an Adjunct Professor of Constitutional Law, and previously served as a criminal prosecutor with the Orange County District Attorney's Office.

In what ways (both positive and negative) does your role in the courtroom differ from that of an attorney?

In the criminal context, the judge must reconcile the demands of justice (prosecutor's position) and the demands of mercy (defense position). This requires judgment and humility. The judge is primarily a listener, whereas the attorney is primarily a speaker. The judge must be neutral, the attorney is an advocate. The judge must set aside his/her personal political views and follow the law. As one who did a lot of appellate and criminal law and motion work as an attorney, I have always been able to step back and see both sides. That has helped me tremendously as a judge.

What issue/debate do you consider to currently be the most important (and possibly controversial) in your area of law?

[One] controversial issue is the special collaborative courts (DUI court, Domestic Violence Court, Drug Court, Duel Diagnosis Courts). Some believe that these courts are shifting judges from their traditional role – adjudicating cases and controversies – to becoming social workers based on the "crime du jour."

Another key issue is the "fiscal prostitution of the courts." Legislators are too timid to raise taxes to support their programs, and so they look at the courts as "cash cows" imposing huge fines, fees and penalty assessments on those least able to afford them (criminal defendants).

What skills or traits do you believe to be valuable to a successful judge?

- Good listener
- No personal agenda
- Decisive but deliberate
- Hard-working
- Awareness that [he/she is] here to serve
- Patient
- Kind
- Teachable
- Sense of humor, does not take himself/herself too seriously
- Earns, rather than demands, respect

JUDGE LINDA MARKS

Judge Linda Marks serves on the Peer Court, the Judicial Resource Committee, and the Court Technology Committee.

Over what type of court to you preside? What type of law did you practice prior to your judgeship?

Master Calendar Court which is a high volume criminal misdemeanor court. Prior to appointment, I was a civil litigator practicing in the area of product liability and insurance defense matters.

"A judge's rulings are only as good as the advocates that appear before him or her."

– Judge Linda Marks

In what ways (both positive and negative) does your role in the courtroom differ from that of an attorney? How is your relationship to the law different than before you became a judge? How, if at all, has your perception of law application and rulings changed?

I am no longer an advocate. I am impartial and neutral when hearing facts. I rely on the law and precedent to dictate my ruling, not my interpretation of the law driven by a desire to influence an outcome for my client.

As a judge, I have to rely on the attorneys to do their job properly. A judge's rulings are only as good as the advocates that appear before him or her. It is not the judge's job to advocate or take sides. Therefore, if the attorneys are not prepared, do not

know the law, and fail to argue vigorously on behalf of their client, the outcome is affected. A judge cannot insert himself into the controversy and appear to be partial. No matter how much I would like to, I do not get involved in the manner [with which] cases are presented before the court. The rulings are directly related to the evidence and law presented to the court which, at times, can create conflict for a judge.

For whom do you think judgeship is ideal? What skills are required to be a good judge?

A lawyer who has many years of practice before the courts, has a great deal of experience working and getting to know people, and has a desire to give back to the community. Skills involved include being articulate, patient and tolerant, reasoning, humility, sense of humor, maturity, writing skills, and kindness.

"Becoming a judge is a journey, not a destination."

– Judge Linda Marks

What preparatory advice would you give to pre-law/law school students?

Learn the law, and get involved in Law Review or Moot Court. Becoming a judge is a journey, not a destination. The more experience you have before taking the bench only enhances the position. It is not a position to contemplate until you have experienced being a lawyer, practicing before the court, and observing judges in the courtroom.

As a practicing lawyer, learn the law, educate the judge, and *be prepared* before coming to court. Never file faulty papers, never misrepresent the law, and be courteous and professional to other counsel and the court at all times.

COMMISSIONER THOMAS H. SCHULTE

Commissioner Thomas H. Schulte is a former adjunct professor at Western State University, College of Law where he taught Trusts, Community Property and Family Law. He is also a member of the Faculty of the California Judges Education and Research and facilitator of New Judge Orientation.

Over what type of court to you preside? What type of law did you practice prior to your judgeship?

I have been sitting in a family law department for 13 of my 15 years on the bench. I sat in a probate department for 2 years. [Note that,] in California, commissioners are judicial officers who are hired by the court rather than appointed or elected. Once hired a commissioner is sworn in as a judge and essentially has the same powers of a judge subject to the litigants stipulation that he or she may preside over their matter.

Prior to coming to the bench, I practiced family law for 17 years specializing in child custody litigation, and was the first attorney in our county to receive a contract from the court to represent children in family law cases where the parties were indigent.

In what ways (both positive and negative) does your role in the courtroom differ from that of an attorney? How is your relationship to the law different than before you became a judge? How, if at all, has your perception of law application and rulings changed?

As an attorney I had the responsibility to present the facts that were most favorable to my client's position and interest. The positive aspect of this role was the sense of contest that comes with advocacy and leads to the joy of victory and agony of defeat. In a word it was exciting. On the other hand, the serious nature of the contests caused a great deal of stress. As an attorney I felt a great responsibility to do my job in an honest, respectful and ethical manner. More often than not the client just wanted to win.

"Legal disciplines are so interrelated, like cross-over questions on the bar exam, that every class you take will, in some way, enhance your skills in the area of law in which you will eventually practice."

– Commissioner Thomas H. Schulte

As a judge I am actively involved in the search for the truth. The emphasis is on keeping an open mind and considering all of the facts in a fair and impartial manner. The positive aspect of this process is the enjoyment of applying the law to the facts in a more academic fashion, unconstrained by a predetermined desired result. It is much more like the experience of a law student or professor. Then again, there are times when I really miss the excitement that comes with advocacy. On occasion I would like to step down from the bench and take on the challenge of proving a fact or arguing an issue from one point of view or the other. However, I must admit that those impulses are fleeting as I truly enjoy my role as jurist and have not forgotten the pressures that come with client relations, billable hours and the frustrations of moving my client's cause through a labyrinth of administrative and procedural processes on the way to the playing field.

What issue/debate do you consider to currently be the most important (and possibly controversial) in your area of law?

In family law the most difficult and pressing issue deals with parental rights and the interest of children. How proactive should the judge be in making decisions regarding the children's relationships with each parent? How should the judge's own personal experience, preferences, and even biases play into the decision-making process? When is joint physical custody, where children spend near one-half their time with each parent, appropriate? What school, church or summer camp should they attend? All of these questions have to do with the parents' constitutional right to privacy and to raise their children free from unwarranted governmental interference. On the other hand, the court has a duty to protect children from the harm which often occurs when divorced or separated parents cannot make the decisions together…[A]s a judge you must always be willing to ask [these questions] and apply the law to each particular case in a balanced and reasoned manner.

For whom do you think judgeship is ideal?

I cannot say that there is such a thing as an "ideal" judge. The system needs different kinds of jurists. These varied personalities and experiences create an environment that does not become too sure of itself. Judges often disagree about how a matter should be managed or even decided. This tension between us acts as a safety net [to prevent] the system from becoming stagnated or leaning significantly more in one direction or another. However, it is imperative that an aspirant for the bench desire to serve the public and have a demeanor that garners respect for the office without being overbearing or haughty.

What preparatory advice would you give to pre-law/law school students?

While you may, at this point in your education, feel more drawn toward one area of the law or another, approach each subject with enthusiasm. [Subsequently,] wherever your career takes you, you will have some understanding of the other disciplines involved in the law. Legal disciplines are so interrelated, like cross-over questions on the bar exam, that every class you take will, in some way, enhance your skills in the area of law in which you will eventually practice.

Katherine Howard '07 is a Psychology and Neuroscience concentrator in Quincy House. She is a Managing Editor of the Harvard College Law Journal.

Harvard College Law Society – Speaker Series by raechel jackson

The Speaker Series committee is responsible for all large speaker events for the Harvard College Law Society. We bring in a broad array of legal professionals to give undergraduates an opportunity to learn about all aspects of the law and the career options it provides. This includes attorneys, judges, law students, professors, deans, legal counsels and anything else that can be done with a law degree. After a successful first year, the Speaker Series will continue in 2006-2007.

MAJOR EVENTS OF 2005-2006:

DECEMBER 12 2005 – "THE ROLE OF THE INTERNATIONAL LAWYER"

Speaker: Alex Wong, Harvard Law School '07, United Nations Intern

Alex Wong is an HLS student who spent the summer of 2005 working for the United States Mission to the United Nations. He witnessed international law in action. His notes from the U.N. meeting on Darfur would become confidential messages to the State Department. Alex spoke about the role that diplomatic lawyers play and about the intersection of international law and international relations.

FEBRUARY 16 2006 – KICK-OFF EVENT

Speakers and Kaplan Ticknor Lounge

State Representative Garrett Bradley and District Attorney of Suffolk County, Dan Conley came for a general discussion of what inspired them to practice law, as well as their academic and career experiences.

APRIL 5 2006 – PUBLIC V. PRIVATE PANEL

HCLS invited a distinguished panel of four to discuss what inspired them to pursue their career in either the private or public world of legal practice and to discuss their work in the private and public sectors.

THE PANEL:

KEVIN MOLONEY - private attorney, Barron and Stadfield, P.C.

Kevin Moloney '63 has experience in the public sector covering the U.S. District Court, District of Massachusetts and U.S. State Court of Appeals for the First Circuit.

RACHEL LIPTON - private attorney, Brown Rudnick.

A recent alumnus of Harvard Law School, Rachel Lipton

shared her thoughts on choosing between working in a public or private practice. Practice Area: Litigation

HOLLY BROADBENT - Deputy Chief, Domestic Violence Unit, Suffolk County District Attorney's Office.

Holly Broadbent's public sector experience includes Assistant D.A. in Quincy District Court, Suffolk County prosecutor, prosecuter in the Domestic Violence Unit in Suffolk Superior Court.

JOHN P. OSLER - Attorney-in-Charge, Cambridge Office, Committee for Public Counsel Services.

John P. Osler handles serious felony cases, spanning arraignment in District Court and trial in Superior Court.

APRIL 27 2006 – PUBLIC INTEREST LAW PANEL

This event was co-sponsored by three undergraduate pre-law societies: the Harvard College Law Society, the Small Claims Advisory Service (SCAS) and the Legal Committee. The panel was moderated by Jessica Budnitz, who is a member of the Child Advocacy Program at Harvard Law School.

THE PANEL:

MICHAEL SULLIVAN - U.S. Attorney, District of Massachusetts

MARK NIELSEN - Chief Legal Counsel to Governor Mitt Romney

JOHN REGAN - Partner/Co-Chair Pro Bono Committee, Wilmer Cutler Pickering Hale & Dorr

SHEILA HUBBARD - Assistant Director Bernard Koteen Office of Public

Interest Advising, Harvard Law School

MAY 8 2006 – EAST ASIA DEVELOPMENT PANEL

The purpose of this panel was to discuss the current and future state of business law trends in East Asia. The panel featured speakers with local experience including entrepreneurship in China and law in Korea and Japan.

THE PANEL:

CHIEKO TSUCHIYA - Attorney at Law (Japan)

Chieko Tsuchiya is a corporate attorney for Sakai & Mimura, Tokyo. Ms. Tsuchiya is a graduate form Keio University and holds an L.L.M. from New York University Law School. She is currently a researcher at Harvard Business School.

JEOUNG YOON - Attorney at Law (South Korea)

Jeoung Yoon is an attorney for the South Korean Finance Ministry.

MICHAEL CHIEN - venture capitalist and investment banker with focus on information technology and development in China.

Prior experience spans U.S., Hong Kong and Shanghai including over ten years of in investment banking with Lehman Brothers, Merrill Lynch and private ventures.

Raechel Jackson '08 is an Economics concentrator in Dunster House. She is Chair of the Speaker Series Committee.

HARVARD COLLEGE LAW SOCIETY

The Harvard College Law Society (HCLS) is dedicated to providing Harvard College undergraduates with an opportunity to learn about the field of law and the career options it provides. The society will seek to promote greater awareness and understanding of these opportunities within the field of law by appropriate means such as publications, meetings, seminars, and other educational events. By working with other law-related student organizations on campus, we hope to establish a support infrastructure for pre-law students at Harvard College.

ELECTIONS!

HCLS will be holding elections for all positions in December 2006. Check our website, www.HarvardCollegeLawSociety.com closer to the time for details on time and location!

Executive Board Position Job Descriptions:

President
The President leads the Executive Committee. He or she chairs meetings, handles bureaucratic matters, establishes relationships to other clubs (in conjunction with the Publication Committee) and oversees the activities of all committees within HCLS.

Vice President
The Vice President assists the President in running the Executive Committee and works with the daily operations of the club.

Treasurer, Finance Committee Chair
The Treasurer is in charge of the budgeting, fundraising and expenditure for every project within HCLS.

Secretary
The Secretary keeps minutes of every Executive Board meeting and distributes the weekly email newsletter, The Gavel, to inform all HCLS members of any developments and upcoming events.

Advising and Mentorship Committee Chair
This committee focuses on law school selection and admission and includes an advising and mentorship program with Harvard Law School students.

Law School and Admissions Committee Chair
This committee focuses on law school selection and admission provides information about the application process.

Speaker Series Committee Chair
The Speaker Series Committee coordinates with professors, lawyers, judges, and other legal professionals of the public and private sectors to organize panel speaker events for the organization. These events are publicized across campus and open to the public.

Publications Committee Chair
The Chair heads a committee that produces a law journal for undergraduates, featuring articles, academic essays, interviews and careers information relating to law. The Publications Committee is also responsible for any other major publications of the group, and will work closely with the Advising and Mentorship committee to publish a new pre-law careers advice book for Harvard.

Publicity Committee Chair
This director is responsible for all matters of publicity for the society including advertising events, marketing and club image, designing flyers and organizing recruiting drives. He or she will also be responsible for developing and maintaining relationships with other clubs, such as the IOP and SCAS in conjunction with the Executive Board. The publicity director will work closely with the Freshman Liaison as well.

Law Exploration Committee Chair
This is the committee for anyone excited about a new project or idea. The Chair will focus on alternative activities such as courtroom trips as well as panels, study groups, and events designed to focus on specific subfields within law. This Chair often works closely with the Speaker Series and Events Chair and Committee.

Freshman Liaison
The Freshman Liaison is responsible for recruiting freshmen and in spreading awareness of HCLS and its activities among freshman. He or she will work closely with the Publicity Director, specifically ensuring freshman representation and attention. The freshman liaison also actively publicizes the organization to the incoming freshman class, including organizing a table and event for pre-frosh during April's Visiting Program for new admits.

THANKS to the current Executive Board Members of HCLS:

President: **Greg D. Bybee** '07
Vice President: **Jennifer Lan** '07
Treasurer, Finance Committee Chair: **Ben Woodruff** '08
Secretary: **Daniel Foong** '08
Advising and Mentorship Committee Chair: **Edna Choi** '07
Law School and Admissions Committee Chair: **Anna Liu** '08
Careers and Internships Committee Chair: **Jeanne Margaret Nurse** '07
Speaker Series Events Committee Chair: **Raechel Jackson** '08
Law Publications Committee Chair: **Emily Ingram** '08
Law Exploration Chair: **Zack Carpenter** '08
Publicity Director: **Jennifer Popack** '08
Freshman Liaison: **Riley Catlin** '09

Exploring Joint Degrees BY JUSTIN ROSSI

If someone were to publish a list of the hottest trends in legal education, joint degrees would certainly be included. Law schools around the country, including top-tier institutions, are establishing combined degree programs. Several universities, including Vanderbilt, Duke, Florida, Minnesota, and Arkansas, have initiated MD/JD programs in the last seven years alone. Currently, there are nineteen MD/JD programs in the United States, the oldest only 22 years old.

Harvard Law School, already boasting an enormous variety of course offerings ranging from cyberlaw to English law, approved joint degree programs with the Kennedy School as recently as 2003.[1] Frequently asked questions on MD/JD's and JD/MBA's are the current buzz on virtually all law school admissions blogs, while those posing the questions are already contemplating how to get accepted to one of these special programs.

Despite the enthusiasm from both students and institutions of higher education, very little data can be found regarding the usefulness and satisfaction derived from these degrees from either the perspective of graduates or legal employers. The current debate surrounding joint degree programs seems to be fueled by conflicting anecdotal information and the frequent misunderstanding of the variety within joint-degree initiatives.

By focusing on MD/JD and JD/MBA programs, I hope to inform on what these programs entail, present the differing views on the value of combined programs, and illustrate that no two programs are alike.

AN EDGE?

Ambitious pre-law students may have dreams of pursuing specialized career tracks involving law and other professions, such as medicine, business, or academics. Combining legal education with other degree programs may seem like a lucrative way to get an edge over the competition.

The primary benefit of these joint degree programs is that they typically decrease the amount of time and money it would take to obtain both degrees separately. Most MD/JD programs, for example, take only six years to complete while separate degrees would take seven. One can graduate with a JD/MBA from most joint law-business degree programs in only four years, while separately it would take five. Programs also attract students by reducing credit requirements for concurrent degrees. Decreasing the amount of time you have to spend in school consequently decreases tuition costs.

However, these advantages only make sense when comparing joint degree programs to separate degrees. Why should one seek another professional degree in addition to a JD in the first place?

Joint degrees have been able to offer law students the paradoxical opportunities for specialization and flexibility. The MD/JD has been an asset to attorneys who work in specialized areas of healthcare law, medical malpractice, intellectual property law in biotechnology, or for government agencies such as the Food and Drug Administration (FDA) and Centers for Disease Control and Prevention (CDC). With a broad working knowledge of both the legal and medical professions, as well as the distinct analytical skills each requires, dual degree graduates bring a unique perspective and familiarity to fields at the crossroads of law and medicine. In addition to the fields mentioned above, other applicable areas may include forensic pathology, epidemiology, managed care, and health policy.

"Joint degrees offer law students specialization and flexibility."

The joint business-law degree can give an edge to attorneys practicing in specialized business-related fields of law such as mergers and acquisitions, tax, securities, employment, transactional, or antitrust law.

Elizabeth Gallup, MD, JD, MBA, has utilized her education as attorney, physician, and businesswoman to serve as a catalyst for change in the legal world of healthcare. Gallup is a forefront advocate for the formulation of independent physician associations (IPAs), organizations of separate physician practices that unite doctors and empower them to work together for common clinical and economic interests.[2] With her medical and legal background, Gallup has developed, promoted, and directed IPAs, navigating anti-trust laws and the Stark Law, which governs physician self-referral.

Although joint degree grads can target specific careers, they also have an enormous amount of flexibility because their unique perspectives translate into a variety of career options. According to Branch Furtado, a recent JD/MBA grad from Duke, a professional transition is often part of the first few years of any JD/MBA's career. Says Furtado, "I think that the JD/MBA [prepares one] quite well for a career starting with a law firm, as I had great opportunities from

firms that I might not have had as JD only...I think the advantage [of the JD/MBA] comes 2-3 years down the line when [attorneys] start transitioning into business."

The option for flexibility may have its downsides, however. One risk to a job application posed by brandishing a dual-degree is the possibility of appearing non-committed to the field of law. Legal employers invest a great deal of time, effort, and money training associate attorneys, and even the slightest chance of not delivering a return on such an investment could jeopardize one's hire.

"Plenty of individuals have made joint degrees the cornerstone of a successful career…but many—even at top firms—get the job done without them."

Because their curriculum is often highly integrated, joint degree students also have the unique opportunity to take full advantage of what William Hines, President of the Association of American Law Schools, has dubbed one of the biggest changes in legal education over the past twenty-five years: the tremendous "growth in interdisciplinary teaching and research."[4] According to Harvard Law professor Todd Rakoff ('67, HLS '75), dean of the J.D. program at HLS, the joint degrees at Harvard were conceived to enable students to "interrelate what they are learning at each school so they come out with a joint product that represents even more value than each degree taken alone."[5]

At Southern Illinois University, MD/JD students are required take a specially designed set of law, medicine, and health policy electives through the Department of Medical Humanities during the senior year of medical school.

Georgetown's JD/MBA program requires a special 46 credit hour course load in the third and fourth years, entitled the Corporate Law Focus and Public Policy Focus.[6] Thirty-five wide-ranging business law courses, such as "Federal White Collar Crime" and "Fiduciaries: Myths and Realities," are available for the elective portion.[7]

Duke University offers JD/MBA students unique access to its Global Capital Markets Center, a joint venture between the School of Law and the Fuqua School of Business. The Center's programs seek to provide students with the education necessary for "structuring new forms of financial transactions, developing new securities regulations, corporate governance models, or systems for addressing the needs of a global economy."[8] While not limited to JD/MBA students, the Center's courses and research is an impressive example of Duke's strong commitment to a competent and well-organized interdisciplinary program with extensive collaboration between schools.

THE DEBATE

In theory, the benefits of the dual degree are truly impressive. But how tangible are these benefits in the real-world job market of law?

Does the "unique perspective" of dual-degree grads surpass a few years of working experience? It is undoubtedly a difficult question to answer and almost no comprehensive data is available to simplify the issue.

Still, just a cursory evaluation of the biotech intellectual property realm gives some insight into the problem of the enthusiasm with which many universities are pursuing medicine/law joint programs. At Finnegan and Henderson, one the nation's leading intellectual property firms (named the leading U.S. patent law firm in the country in 2005 by *Managing Intellectual Property*), the educational backgrounds of attorneys composing the 33-member biomedical patent team seems to indicate that joint MD/JD degrees may not be as worthwhile as higher education advertises them to be. Of the thirty-three attorneys practicing biomedical patent law at the firm, which has represented companies such as Eli Lilly and Glaxosmithkline, 32 received bachelor's degrees in a pure or applied science, twelve received PhDs in a pure or applied science, and only one had a medical degree in addition to the juris doctor.[9] Out of the 27 attorneys on the biotechnology team at Fitzpatrick, Cella, Harper, and Scinto, a leading IP firm boasting clients such as Novartis and Pfizer, five have PhDs and only one has a medical degree.[10]

Does the apparent dearth of MD/JD's and dual-degree attorneys in these firms undermine the usefulness of the MD/JD? Of course not. What it does indicate, however, is that many attorneys- including those at top firms- are getting the job done without encumbering themselves with multiple professional hats.

Nevertheless, according to Finnegan and Henderson partner Leslie Bookoff, multiple degrees are undoubtedly looked favorably upon in IP firm hiring. The low number of MD/JDs at Finnegan and Henderson, for example, is more than anything a reflection of the reality that attorneys with both medical and law degrees are not commonplace. Says Bookoff, "You have to consider the pool that you're looking at. The number of attorneys having a medical degree is incredibly small." With dual-degree programs on the rise, however, the pool may not stay small for long. Even if low numbers of dual-degree job candidates explain comparatively low representation on firm staff, the effect of an influx of multi-

ple degree attorneys into the job market on firm hiring remains to be seen. Still, Bookoff points out that no two candidates are exactly the same and many factors, not just degrees, play important roles in determining a candidate's hire.

Still, plenty of individuals have made joint degrees the cornerstone of a successful career, and many have found themselves in high-profile positions because of their interdisciplinary abilities. David Kessler, M.D., J.D., (HMS '79), was the commissioner of the Food and Drug Administration from 1990-1997, serving under both Presidents George H.W. Bush and Bill Clinton. Kessler was a point man in the struggle of government against Big Tobacco, playing an integral role in bringing about *FDA vs. Brown and Williamson Tobacco Corp.*[11] Cyril Wecht, M.D., J.D., is arguably the most acclaimed forensic pathologist in the U.S. His most notable contribution testimony before the U.S. Senate that challenged the findings of the Warren Commission regarding the John F. Kennedy assassination.[12]

FREQUENTLY ASKED QUESTIONS

What are typical joint programs like? At Duke, MD/JD students are required to complete the first two years of medical school, which includes basic sciences in the first year and basic clinical disciplines in the second. During their third year in the program, students enroll in the first year of law school. The fourth and fifth years are spent in a combination curriculum, with one and a half years usually spent fulfilling JD requirements (with health law components) and a half year dedicated to a medical research elective. The final year of the program is spent in clinical rotation, equal to the final year of medical school.

"The modern business manager needs immediate access to legal advice."

- Georgetown JD/MBA advertisement

At Georgetown's joint business-law program with the McDonough School of Business, students experience the first year core program of the law school followed by the first year core program of the business school. The third and fourth years are dedicated to the Corporate Law Focus and Public Policy Focus, a specially designed, highly integrated curriculum boasting a wide variety of interdisciplinary courses.

One important thing to keep in mind, however, is that the designation of "typical" can be misleading when talking about joint degrees. Too much emphasis cannot be placed on the variety among programs – both in structure and curricular approach. Northwestern's JD/MBA program, for example, takes only three years to complete. Northwestern boasts a truly joint program that is distinct from its law and business schools—with a complementary curriculum and program structure that is standardized for students, offering only a limited number of co-listed courses. Indiana Law offers a very similar, highly structured 3 year program. On the other end of the spectrum, programs like those at Duke and Georgetown (both 4 year programs) offer greater curricular flexibility and a wider variety of integrated courses.

What are the norms for application to dual-degree programs? Most schools require separate application and admission to both degree-granting institutions, which can be a stressful application process, as both the LSAT and the other relevant standardized test such as the GMAT or MCAT are usually necessary. Be aware that not all business-law programs have this requirement, however. Northwestern's JD/MBA program requires only the GMAT while the LSAT is an optional part of the application. Northwestern also requires only one application to be accepted into the program—not separate applications to both schools.

Also, if you're thinking about going for the JD/MBA, job experience may play a big part in your admission to many business schools. Indiana's JD/MBA program, for example, requires two years of business experience before an application will be considered. But even if such experience isn't necessary, getting it is a good idea--according to Joanna Jordan-Wu, a recent grad of Duke's JD/MBA program. "I would strongly recommend spending at least two years in the workplace," Jordan-Wu says. "That work experience is especially vital to getting the most out of business school, in the classroom and among your colleagues."

Work experience may also benefit prospective JD/MBA candidates by determining whether a joint program is right for them or by discerning career options. Without work experience, JD/MBA grads may find themselves insecure about jumping into the business world, where starting salaries are typically lower than those of corporate attorneys. Many of these individuals get trapped into law, not having the experience to confidently decide whether taking a job in business is worth the financial hit.

"I have seen too many people who...didn't bother to figure out until they were already there that they didn't actually want to be lawyers," Jordan-Wu says. "Then, once they're saddled with a huge debt load, they feel trapped into taking a corporate law job that they can't wait to get out of." It may seem like a few years out of school negates the advantage of the joint programs' shortened length, but the confidence that

an education and a career in either law or business is right for you is priceless assistance to avoiding what could be a costly mistake.

"..The biggest risk to a job application is appearing non-committed…"

What is social life like as a joint-degree student? Says one Duke JD/MBA grad, "Socially, the JD/MBA is great. You have twice as many friends and social opportunities as your average JD or MBA. Both crowds have something different to offer. [Business school] students tend to be a little older, more diverse in their interests and backgrounds, while law students are younger and more academic…We don't really feel isolated as JD/MBAs, although we are very cordial and social with each other because of our shared experiences. The only real social isolation comes in your fourth year, when the classes you started school with have all graduated."

THINGS TO REMEMBER

Before committing, or even applying, to a joint degree program, make sure to do your homework. Despite what the websites and brochures might say, joint-degree programs are not necessarily a firmly established part of all institutions offering them. According to Dr. Steve Michael's analysis of combined programs, "many institutions have no established procedure for regulating, developing, or evaluating joint degree initiatives."[13] On the other hand, many programs such as the combined business-law program at Harvard have been around since 1969.

Also, be aware of the variety in policies governing combined programs. For example, Northwestern's JD/MBA program offers no guarantee that students who decide to withdraw from the joint program will be allowed to continue study at one school. On the other hand, some universities allow students to matriculate in one school and *then* apply to a joint program. At Vanderbilt, for example, medical school students can apply to the JD/MD program at any point in their first three years of medical school. The variety in policies which could have a substantial impact on student life is enormous.

No matter how you slice it, the joint degree will come at a substantial cost of time, effort, and money. Beware trendy or ambitious tendencies that may lead you towards a joint degree for the wrong reasons. Combined programs are not for the faint of heart, and although the joint degree may afford an advantage in some fields of law and options for specialization and flexibility, they are by no means necessary. One issue that remains a problem is the lack of data regarding the usefulness of joint degrees in the job market. This lack of data, however, may be due to the fact that the value of joint degrees is largely determined by the individual. If you are considering a combined program, consider yourself and your goals first- as opposed to what others have done in the past. If you find that the education provided by a combined program will guide you to your niche in law (or even business or medicine), the joint degree may prove to be a useful tool, an enjoyable experience, and a means to a successful career.

JD/MBA PROGRAM PROFILES

Georgetown School of Law

- Joint School: McDonough School of Business (Georgetown)
- Years: 4
- Admission: LSAT and GMAT/ simultaneous admission required
- Required Credits: 123 (75 law, 48 business)
- Structure: Year 1 Law, followed by Year 1 Business; 2 years Corporate Law Focus and Public Policy Focus
- Advantage: Highly integrated curriculum, wide variety of interdisciplinary courses
- Interesting Courses: Antitrust Economics and Law, Counseling the Corporation in Crisis

Duke School of Law

- Joint School: Fuqua School of Business (Duke)
- Years: 4
- Admission: LSAT and GMAT/ simultaneous admission
- Required Credits: 72 law, 65 business
- Structure: Year 1 of law *or* business, followed by Year 1 other school; 2 years interdisciplinary study
- Interesting Courses: Structuring Commercial and Financial Transactions, Corporate Reorganization and Bankruptcy, Trademark Law
- Advantage: Access to the Global Capital Markets Center; highly active JD/MBA student network

Vanderbilt Law School

- Joint School: Owen School of Management (Vanderbilt)
- Years: 4

- Admission: LSAT and GMAT/ simultaneous admission

- Required Credits: 49 business

- Interesting Courses: Mergers and Acquisitions Deal Dynamics, Media Industry's Digital Future

- Advantage: Interdisciplinary courses co-taught by Law and Business School faculty, intense real-world training with case study groups that include legal components

Northwestern Law School

- Joint School: Kellogg School of Management

- Years: 3

- Admission: GMAT only required/ LSAT optional

- Required Credits: 16 business, 72 law

- Structure: Year 1 Law (includes summer), Year 2 Business, Year 3 combined school courses

- Interesting Courses: Intellectual Capital Management, Legal Issues in Healthcare Delivery, Business Law

- Advantages: shortest available program, one exam required, a "true joint program" with its own application and established curriculum

JD/MD PROGRAM PROFILES

Southern Illinois University School of Law

- Joint School: SIU School of Medicine

- Years: 6

- Admission: LSAT and MCAT/ simultaneous admission required

- Required Credits (law): 76

- Structure: Year 1 Law, Year 2 Law with health law concentration requirements, 2 summers of law courses mandatory, 3 years medical school, 4th year combined curriculum (14-week full-time medicine, law, and health policy program)

- Advantage: oldest MD/JD program in the nation (22 years), carefully structured interdisciplinary curriculum (through Medical Humanities Department)

Duke School of Law

- Joint school: Duke Medical School

- Years: 6

- Admission: LSAT and MCAT/ simultaneous admission encouraged but not required/ post-matriculation admission to joint program from either law school or medical school possible during first 2 years

- Required Credits (law): 72

- Structure: Year 1 Medical (basic science), Year 2 Medical (clinical disciplines), Year 1 Law, Year 2 Law, 1 year clinical electives/ 2 summer sessions of research

- Advantage: You can apply to the joint program from *either* school within 2 years of matriculation.

P. Justin Rossi '09 is a History concentrator in Kirkland House.

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13 Michael & Balraj at 2.

Kaplan-Sponsored Insider Event Fills Prospective Students in on Law School Experience

BY ELISHA JACKSON

On July 20 2006, approximately 100 prospective law students packed into Starr Auditorium of Harvard University's John F. Kennedy School of Government. Armed with pens, paper and a genuine curiosity about law school, they listened intently to the advice and experiences of five panelists who spoke on everything from the Law School Admission Test and the application process to the law school experience. According to Kaplan Test Prep and Admissions, which sponsored the event, the goal of the program was to "give attendees an advantage over other law school applicants."

The event panelists included admissions officers, law school alumni, and a current law student. In order to appreciate the viewpoint from which the advice was provided, it is important to know where each panelist stands on the law school spectrum.

Joan Horgan is the Dean of Financial Aid and Admissions at Boston University School of Law.

Lori Welch is the Assistant Admissions Director at Suffolk University Law School.

Jolie Siegel is a graduate of the University of Pennsylvania Law School and a Senior Associate at Choate, Hall & Stewart LLP.

Jeffrey Jamison is a 2006 graduate of Harvard Law School with seven years of work experience as Professor Laurence Tribe's Litigation Assistant. He is also currently preparing for the Bar Examination.

Kristie Blunt is a rising third year student at the University of Pennsylvania Law School and a Summer Associate at Wilmer Cutler Pickering Hale and Dorr LLP.

Photo By Elisha Jackson

(Left to Right) Jeffrey Jamison, Joan Horgan, Kristie Blunt, Jolie Siegel, and Lori Welch

Prompted by questions provided by event moderator Kandace Kukas, Kaplan's Regional Marketing Director and a graduate of Suffolk University Law School, these five panelists offered useful information to a lecture hall full of eager students.

THE LAW SCHOOL ADMISSION TEST

Kandace began the LSAT portion of the discussion by providing important basic information about the examination: test dates are offered in June, October, December, and February and that it is best to take it as early as possible. She then asked the panel to share any relevant information about the LSAT. Joan stated that the LSAT and undergraduate grade point average are the two most important components of an applicant's application, and that those two factors are considered in relation to one another, in a sort of combination package. When asked about really low LSAT scores and how they affect an applicant's chances for admission, Joan said that much of the application process is a "sheer numbers" game. Therefore, at a school such as Boston University School of Law which receives over 6,000 applications for less than 300 spots, an extremely low LSAT score will certainly not increase your chance of admission. She did concede that the LSAT is not a very good predictor of how a student will perform in law school, but she clarified the importance of the examination by saying that the LSAT in combination with GPA can often be used to effectively forecast student performance. Law schools want to admit students who will succeed and ultimately be able to pass the Bar Examination.

The next inquiry requested the panelists' opinions on the American Bar Association's recent vote in favor of law schools reporting the LSAT data for their entering classes by informing on the highest scores received by the students instead of on score averages, as they do now. Lori started by saying that the ABA's suggestion would not really affect Suffolk's admissions policies. Joan said that, by and large, the proposal will most likely be good for applicants and an incentive for students to take the examination more than once. She also suggested that students not get too involved with constantly chasing higher scores and reminded the

Students converge on the panelists after the event. Photo by Elisha Jackson

crowd that, even under the new proposal, law schools will continue to see every score that applicants get on the test. Jolie said that the keys to the LSAT are becoming familiar with how you are as a test taker, and completing practice exams. She suggested that prospective law students not take the test repeatedly. Jeff then brought up the possibility of cancelling LSAT scores within a certain number of days of the test administration (if you feel that you have not performed well), and shared a personal story of how he struggled with the keep-or-cancel decision for twenty-four hours before deciding to keep the score.

THE APPLICATION PROCESS

The application process begins with deciding to which schools to apply. Joan suggested that students start their search by considering the geographical location in which they would like to study. She mentioned that there are over 180 American Bar Association-Approved law schools, and that students should not feel as though they have to attend law school in the same area that they would like to practice or live in after completing their degrees. Lori then added that, after narrowing the search by location, students should then begin to consider school specialties and concentrations. Despite this advice, the panelists agreed that it is absolutely not important to commit to a specific type of law at this point in the process. The important thing to decide now, they suggested, is that law school is definitely what you would like to do with your post-undergraduate years. Be sure to make a thoughtful decision, as law school is a quite a big commitment, both in time and in money.

Kandace started a discussion of the numerical factors attributed to law schools by explaining some common statistics. Being that the LSAT and undergraduate grade point average are the two most important aspects of the law school admissions decision, she advised that students consider the LSAT and GPA 25th-75th percentiles listed for each law school in making decisions about where to apply. She explained that those statistics represent the scores of the middle 50% of the entering class for that school, and she made sure to remind the crowd to not be too discouraged if their numbers do not quite fall squarely into the range, as they must also remember that 25% of students had below that range and 25% scored above. Lori said the GPA is used to gauge how well prospective students were able to perform in their classes, and Joan added that admissions committees often pay attention to what level classes were taken and how difficult they were. Lori also mentioned that any graduate courses that students happen to take between their undergraduate careers and their applying to law school will not be calculated into undergraduate GPAs.

Generally, Lori said, the most easily accessible applications are online. She also said that applying early is always better and that most schools start accepting applications sometime in the fall. She said it is best to prepare the materials as soon as possible so the process does not have to be rushed and applications can be completed thoughtfully and carefully. Joan pointed out that law school admissions are done on a rolling basis so, unlike many undergraduate institutions, admissions officers start reviewing applications as they are completed and then start sending decisions as soon as they have been made. Jolie divulged her plan of action: she took the LSAT during the summer, then compiled her resume, lined up recommendations, and chose schools. Kristie took two years off before applying, and insisted that prospective law students not underestimate the amount of time that the application process takes. Jeff sent his application to Harvard Law School in on January 15th (January is the month during which law schools receive the most applications), but cautioned against waiting too late as many schools have a set number of students they can admit and applying late can serve as a disadvantage.

As far as letters of recommendation are concerned, Kandace insisted that students choose recommenders who know them well and are familiar with their work. Joan suggested that students who have taken time off from school between

their undergraduate years and entering law school try to obtain a letter from a professor who taught one of their college classes. For students planning to attend law school right after graduation, getting two recommendations from professors is the best course of action. Also, stay away from asking family friends to write recommendations – they will not carry much weight with the admissions committee. Jolie insisted on being very strategic about who writes the recommendations, while Jeff maintained that one recommender will probably fail in one way or another (often by not submitting recommendations on time), so it is better to ask one or two extra people for letters. Also, as Kandace reminded the crowd, it is important to note that recommenders are under no obligation to show the recommendation to the student for whom it was written. The student does not own the letters, and therefore has no rights to them.

The personal statement is a very important part of the application. Lori said that the statements are generally no more than three double-spaced pages, and that it is very important that they are readable. She suggested that applicants put ample thought into the way they approach the personal statement, as it is the one real chance to speak in a unique and individual way. Joan insisted that prospective students not send theses or papers written for various undergraduate classes, as they typically are not read by admissions committees. Kandace said that students should use the personal statement to tell the committees why they should be accepted to their law school, and to give evidence for the claims. Jeff believes that the personal statement is actually the most fun of the whole application process. It is good to stand out, he said, but make sure it is done "in good balance." Also, take the time to have many people proofread the statement (for grammar, not substance). Kristie suggested that students show passion for something in their personal statements and Jolie divulged that she made sure to demonstrate that she was not applying to law school because she did not know what else to do after college.

The panelists then embarked on a discussion of work and volunteer experiences. Kandace suggested that students join and stay thoroughly committed to one or two school groups, as that shows extended commitment. It is also good to let the admissions committee know about volunteer experiences. Both Lori and Joan declared that résumés are not required as part of the application to their law schools. Joan continued by saying that undergraduate grades are more important than clubs, so it is best to be very balanced about the clubs chosen. She also said that Boston University Law School's incoming classes are usually evenly divided between people who start right after their undergraduate years and those who have taken time off and worked. Work experience can be very important if students decide to step into the 50% who take time off, although she was sure to point out that the work does not necessarily have to be law-related.

THE LAW SCHOOL EXPERIENCE

After a lengthy discussion on the ins and outs of applying, the panelists were asked to discuss their favorite parts of law school. Jolie said that she most enjoyed law school because she was surrounded by intelligent, hardworking people. She also learned while there that, although law school is challenging, there is more to life than just studying. Jeff categorized his time in law school as some of the best 3 years of his life. He referred to it as an "absolutely amazing experience," saying that he also enjoyed studying with a great group of people and made some of the closest friends he has ever had. He also told the crowd to be on the lookout for opportunities, because law schools offer many of them. Kristie began by advising potential law students to try not to put too much weight on the rankings when making the decision of which school to attend. She also recommended that applicants not put all of their hopes on one school and that they should go to law school only if they want the experience of actually being in law school. The last insight she communicated to the crowd is that each year of law school is radically different from the next, but that the different experiences add up to a great time.

All in all, those who attended Kaplan's Insider Event were exposed to a great deal of useful information about law school. The panelists were willing to answer openly and honestly every question that was asked of them, and their eagerness to share their own personal experiences made this event interesting and worthwhile. Through this forum, Joan, Lori, Jolie, Kristie, Jeff and Kandace made tips about the LSAT, the application process, and the law school experience available to a large number of grateful students.

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When Interning at Class Action and Securities Litigation Firms, See the Bigger Picture BY GENNA ABLEMAN

Bernstein, Litowitz, Berger, & Grossmann LLP (BLBG) is a largely class-action law firm based in New York City. While the firm has proven successful in a wide range of cases, it specializes in the litigation of class-action securities cases and discrimination against employees and consumers. In pursuing major securities cases, BLBG represents many public pension funds and other institutional investors, providing asset protection services by monitoring their investments and investigating potential claims. To this end, BLBG combines the skill of financial analysts and attorneys to achieve large monetary awards for their clients, as well as redefine laws to protect investors from fraudulent acts by major companies.

An internship in a firm specializing in securities law can be a fascinating experience for anyone interested in the crossroads of law and finance. Some of the most interesting work that interns may take part in involves the investigations of fraudulent companies. The seemingly monotonous work of compiling spreadsheets is often made more appealing by the opportunity to investigate clients' portfolios and shareholdings in various companies or search the filings of the Securities and Exchange Commission. Despite the inability to see the larger quantitative picture, and thus whether or not the company one is investigating is committing unlawful acts, the feeling of participating in a meaningful aspect of the legal process is inescapable.

BLBG has proven highly successful in the area of securities litigation, winning four of the seven largest monetary recoveries in history. *Chambers and Partners' 2006 Guide to America's Leading Lawyers for Business* ranked BLBG the number one firm in the field of plaintiff securities litigation. The firm's reputation skyrocketed with the WorldCom case, one of the largest securities fraud cases in history, in which BLBG recovered $6.5 billion for investors after four weeks of trial and three years of litigation.

The firm has also distinguished itself in workplace and marketplace discrimination cases, protecting both the rights of employees and consumers. In *Roberts v. Texaco*, an employment discrimination case on behalf of the African-American employees at Texaco, BLBG won a settlement of over $170 million for their clients – the largest per capita in a race discrimination case. More importantly, the case resulted in the creation of a task force to oversee Texaco's human resources department, which set a model for other companies to do the same.

While the typical tasks for a summer intern assisting attorneys in these types of cases are filing, recovering, and organizing documents for attorneys, it is important to take the initiative to examine the files and understand the details of the case. Even though you may not be required to do so, negligence in this area could jeopardize the value of the internship. In civil action and securities litigation, the importance of the firm's work extends far beyond the financial analyses and the monetary compensation for clients. The potential impact of cases in the regulation of securities fraud and in the battle against discrimination is enormous. Going above and beyond the daily requirements of the summer intern and keeping one's eyes open is the only way to grasp the bigger picture of the impact of class-action law and to see the role one is playing both in the legal realm and the world at large.

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SLOUCHING TOWARD CONSUMPTION: BAD POSTURE FOR AMERICAN DEMOCRACY

BY ALICE G. ABREU*

MICHAEL J. GRAETZ and IAN SHAPIRO. Death by a Thousand Cuts: The Fight over Inherited Wealth. Princeton: Princeton University Press. 2005. Pp. 392. $29.95

Death By a Thousand Cuts: The Fight over Taxing Inherited Wealth, by Michael Graetz and Ian Shapiro, is a scary book. It is also provocatively, but opaquely, titled. Only the graphic design of its dust jacket, a picture of the Capitol sliced into several pieces, reveals what the book is really about: killing government. The book documents how a small but intensely committed group of individuals has mounted a concerted attack on the fiscal structure of the United States. Most importantly, the book alleges that the group has only just begun to fight.

The words of the title do not convey the magnitude of the claim. The authors, one a professor of law and the other of political science, have collaborated to produce a book that is important in ways that go far beyond the words they used to title it. Although the references to death, inheritance and taxation accurately signal that the book will discuss the demise of the federal estate tax, that is neither the heart of the book nor what makes it scary. What is scary is the revelation that estate tax repeal is only the most visible part of a concerted attempt to shift the U.S. tax base from income to consumption and to exempt all capital from taxation. Those now working to kill what has come to be known as the death tax have as their ultimate objective the death of progressive taxation, and, to a significant extent, the death of government itself.

The book chronicles the triumph of appearances and ignorance. It documents how individuals who would not be subject to the estate tax came to represent the justice of its repeal, and shows how the change in terminology from estate tax to death tax was crucial to the success of repeal.[1] As one Congressional staffer explained, "Estate tax sounds like it only hits the wealthy but 'death tax' sounds like it hits everyone. They focus-grouped this a lot, and people viewed a 'death tax' as very unfair. You don't have to be really rich to be worried about a death tax." Graetz and Shapiro also tell of an early organizer who created a "pizza fund" with fines he levied on staff who spoke of the "estate tax," and describe a member of Congress who admitted that although his constituents would not be subject to the tax, whenever he felt his support waning he would promise to get rid of the "death tax" and was rewarded by cheers, so he reasoned: "Why should I try to educate them?" Although referring to estate and inheritance taxes as death taxes is hardly new – the term is used in the Code itself[2] and references to death taxes date back to the nineteenth century,[3] – the way in which the term was captured and used to shape the outcome of the repeal effort bodes ill for any would-be tax reformer who does not employ a linguist and an army of spin doctors.

Most disturbing is the central premise of the book, that the current fight over the estate tax is just a step on the road to replacing the income tax with a consumption tax and getting government "down to a size where I can drown it in a bathtub." That phrase is reportedly a favorite of Grover Norquist, the Harvard educated president of Americans for Tax Reform, who has been described as "The V. I. Lenin of the anti-tax movement," and "acknowledged as a major and continuing force behind the reorientation of the Republican Party and an important player in the George W. Bush administration." Graetz and Shapiro reveal that because the objective of individuals like Norquist is not repeal of the estate tax *qua* estate tax, attempts at compromise have repeatedly failed.[4]

By aiming to repeal the estate tax while also aiming to convert the current hybrid income tax into a cash flow consumption tax, Norquist and his followers have charted a course that will deliver a one-two punch to the U.S. fiscal structure. Capital will not be taxed when received, and it will not be taxed when passed on. Only labor will be taxed. Moreover, by slithering toward that result they prevent robust public debate on its merits. Even advocates of consumption taxation should take offense. The one-two punch ignores the lessons of foundational scholarship on consumption taxation. As Professor William Andrews demonstrated in his seminal 1974 article in the Harvard Law Review, the question of what type of personal tax system is best (income or consumption) can, and should, be analyzed separately from the question of whether and how capital and its accumulation should be taxed.[5] Andrews supported consumption taxation but he recognized that such a system existing alone would "operate to create a kind of unearned original disparity in wealth."[6] He did not endorse the creation of such a disparity and his work relies on the existence of a transfer tax system to prevent it.[7] Such a disparity is undemocratic. We could, as Graetz and Shapiro warn in their

Epilogue, "become Brazil." But forewarned is forearmed, and Graetz and Shapiro have performed laudable public service by doing both.

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1 The Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 reduced the federal estate tax in the years between 2001 and 2009, repealing the tax in its entirety for the year 2010. The estate tax was repealed only for decedents who die in 2010 and will apply to decedents who die on or after January 1, 2011. Congress has repeatedly attempted to make estate tax repeal permanent, to no avail. *See e.g.* Edward J. McCaffery, *A Look Into the Future of Estate Tax Reform,* 105 TAX NOTES 997 (2004) and sources cited therein. However, on June 19, 2006 rising budget deficits and the declining popularity of the President who championed repeal resulted in the introduction of legislation that repeals repeal and replaces it with a significantly increased exemption amount ($5 million per person, or $10 for married couples) and reduced rates (15% for estates up to $25 million and 30% for estates larger than that). *See*, *Permanent Estate Tax Relief Act of 2006*, H.R. 5638. The legislation passed the House of Representatives on June 22, 2006. It awaits introduction in the Senate. *See,* Wesley Elmore, *Estate Tax, Pensions, and More Await Lawmakers After Recess,* 112 TAX NOTES 119 (2006).

2 The term is used in the Internal Revenue Code as a generic reference for a variety of taxes imposed by state or foreign governments at the time of death and allowable as a credit against the federal estate tax (until 2004 in the case of state taxes). IRC §§ 2011,2014, 2015.

3 Ironically, the term death tax was also used in the title of articles published by scholars who supported estate taxation, including scholars who supported estate taxation as an adjunct to lifetime consumption taxation. *See* Jerome Kurtz and Stanley S. Surrey, *Reform of Death and Gift Taxes: The 1969 Treasury Proposals, the Criticisms, and a Rebuttal*, 70 COLUMBIA L. REV. 1365 (1970); William D. Andrews, *What's Fair About Death Taxes*, 26 NAT'L TAX J. 465 (1973); Gerald M. Brannon, *Death Taxes in a Structure of Progressive Taxes,* 26 NAT'L TAX J. 451 (1973).

4 The exception is the *Permanent Estate Tax Relief Act of 2006*, H.R. 5638, passed by the House on June 22, 2006 and pending in the Senate. *See supra* n. 1.

5 William D. Andrews, *A Consumption–Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113 (1974).

6 *Id* at 1172.

7 Professor Andrews not only supported the use of the transfer tax system in conjunction with a cash flow consumption tax, but he devoted considerable time and intellectual energy to thinking about the taxation of gratuitous transfers, becoming the reporter for the ALI Accessions Tax proposal. *See* William D. Andrews, *Reporter's Study of the Accessions Tax System*, in AMERICAN LAW INSTITUTE, FEDERAL ESTATE AND GIFT TAXATION 446.

Taming the Electoral College

REVIEW BY CHARLES R. DRUMMOND IV

ROBERT W. BENNETT. Taming the Electoral College. Stanford: Stanford University Press. 2006. Pp. 270. $21.95.

Every four years presidential candidates ask to be sent to the White House, usually with some variation on the words, "vote for me." Yet nestled in this plea is a tension that often escapes casual observers of elections. The American people do not "vote" for president, the electoral college does. Normally the popular vote of the nation agrees with the electoral vote, but under our winner-takes-all system, this is not always the case. Since the winner of a state's popular vote ordinarily wins all of a state's electoral votes, a candidate can win in the electoral college while losing the popular vote, as evidenced in 2000.

However, electing a "wrong winner" is only one of the many things that Northwestern University Professor Robert Bennett sees as a problem with the electoral college. Bennett's new book *Taming the Electoral College* is (thank God) not a diatribe about the Florida recount and *Bush v. Gore*, but a reflection on the clash between our nation's democratic ethos and the undemocratic nature of the electoral college. While this overarching issue *was* highlighted in the 2000 election and (to a lesser extent 2004), the sometimes-cumbersome machinery of the electoral college has faltered in the past and will likely break down again in the future.

Looking toward the past, Bennett is at his strongest. His research is extensive, and he has a deep knowledge of the motley story of elections in the U.S. Discussions of major events in the history of the electoral college are well done and detailed. Of particular note is his retelling of the important election of 1800 that provoked the single most comprehensive reform that the college has ever witnessed—the Twelfth Amendment, which separated voting for president and vice president. While sensitive to all the subtleties of the election of 1800, Bennett is equally careful when treating more obscure moments in history such as the election of 1872 when several electors voted for a dead Horace Greeley, the Democratic candidate for president who happened to die between Election Day and the day the electors met.

Nevertheless, the main thrust of *Taming the Electoral College* is prescriptive rather than descriptive. Advocating a "finely grained approach" to electoral college "taming," Bennett eschews the naively simple solution of electing the president by popular vote. Such a drastic change would require a constitutional amendment, and few states would likely sign on to a new system since it remains unclear whether the current situation helps large-, medium-, or small-sized states. Bennett's restraint in proposing non-constitutional solutions is laudable, and his proposals are often quite clever. But at times his comprehensiveness becomes slightly disconcerting. As he paints his picture of the complex modern workings of the electoral college, Bennett shows instance after instance of how things might go awry. Taken together these dire warnings coalesce in the mind of the reader into a perfect storm of electoral disaster. Those who dislike reflecting on disturbing scenarios will likely be turned off by this gloominess. For me, however, this made the book all the more interesting—like a cross between an episode of the West Wing and a Tom Clancy novel.

To fix the electoral college Bennett would like to do several things, including an ingenious plan to increase the size of the House of Representatives (and therefore the electoral college) by one, so as to decrease the chance of a tie. With an odd number of electors (539 instead of the current 538) the possibility of a tie between two candidates would be greatly curtailed. Also interesting is his "contingent procedure" to make it more difficult for third party candidates to garner electoral votes. Overall, Bennett's plan is multifaceted, comprehensive, and provocative. While broadly deferential to the Founding Fathers, Bennett has no time for unbridled praise of their "wisdom" (at least on the matter of the electoral college).

Yet, while avoiding the error of adulation for the Fathers so common among conservative commentators, Bennett veers off toward the opposite extreme. Rather than attempting any apotheosis of the electoral college or its creators, he instead shows too little respect for the words of the Constitution. Bennett rejoices not in the black and white of the Constitution's text but in the interstitial "wiggle" room (Bennett's own term) where he would implement his own reforms. A good example is when Bennett tries to find some justification for curbing "faithless electors" in the Twelfth Amendment. "If we could reify the author of the Twelfth Amendment," Bennett tells us, and then update him on what has happened since, then he would (of course) agree with Bennett in "allow[ing] states to forbid elector discretion." While this "reifying" strikes me as laughable, Bennett manages to make this whole line of analysis even stranger by adding "if he resisted any such bow to the modern world, we would have to send him back to his bygone era." Nevertheless, if some of Bennett's proposals are slightly untenable and overwrought, it is because of his great passion to make the electoral college a more democratic institution. It is a passion that more should share.

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Active Liberty REVIEW BY ALEXANDER W. MARCUS

STEPHEN G. BREYER. Active Liberty. New York: Alfred A. Knopf. 2005. Pp. 161. $21.00.

In the introduction to *Active Liberty: Interpreting Our Democratic Constitution*, Supreme Court Justice Steven Breyer uses Learned Hand's comparison of a statute with a musical score to explain how judges think and work. "No particular theory," writes Breyer, "guarantees that the interpreter can fully capture the composer's intent. It makes sense to ask a musician to emphasize one theme more than another. And one can understand an interpretation that approaches a great symphony from a 'romantic' as opposed to a 'classical' point of view." Breyer's thesis, as evidenced by his subtitle, is that "courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts." Therefore, just as a musician might interpret a musical score, "so might a judge pay greater attention to a document's democratic theme; and so might a judge view the Constitution through a more democratic lens."

When Breyer writes about "Our Democratic Constitution," he is referring to active liberty. Borrowing from the political philosopher Benjamin Constant, Breyer dissects liberty into both active and modern liberty. Modern liberty, he writes, serves "to protect the individual citizen from the tyranny of the majority." Active liberty, on the other hand, "refers to a sharing of a nation's sovereign authority among its people." What makes the Constitution democratic is precisely its commitment to active liberty.

Awareness of active liberty "can affect a judge's interpretation of a constitutional text." A judge has six main tools at his disposal: language, history, tradition, precedent, purpose, and consequences. The way in which a judge rules oftentimes depends on which of these approaches he wishes to stress. "Emphasis matters in respect to the specialized constitutional work of a Supreme Court Justice," notes Breyer, and the presence of active liberty in the Constitution leads Breyer to believe that judges must be especially attentive to purposes and consequences. He writes, "focus on purpose seeks to promote active liberty by insisting on interpretations, statutory as well as constitutional, that are consistent with the people's will. Focus on consequences, in turn, allows us to gauge whether and to what extent we have succeeded in facilitating workable outcomes which reflect that will."

Based on the Tanner Lectures on Human Values that Breyer gave at Harvard University in the fall of 2004, *Active Liberty* is well structured, like a good lecture. This structure, along with Breyer's affable style, makes *Active Liberty* readable and renders his complex topic accessible to a lay audience, such as this reviewer. Breyer starts by explaining precisely what he means by active liberty, and then goes on to give six examples of its application: speech, federalism, privacy, affirmative action, statutory interpretation, and administrative law. He concludes by defending his thesis against possible criticism.

The high point of Breyer's six examples is his illuminating discussion of affirmative action. He refers to 2003's high-profile case of *Grutter v. Bollinger*, in which the Supreme Court reviewed the University of Michigan Law School's admissions policy. Breyer presents the two opposing interpretations of the Equal Protection Clause that emerged from this case: the dissenting, or "color-blind" view, which sought to overturn Michigan's brand of affirmative action, and the majority, or "purposive" view, which upheld it. The "color-blind" view maintained that, in light of the Equal Protection Clause, "The Constitution abhors classifications based on race." On the other hand, the "purposive" view used history and intentions more heavily in its interpretation: "The Civil War amendments sought to permit and to encourage those 'long denied full citizenship stature' to participate fully and with equal rights in the democratic political community. Experience suggested that a 'color-blind' interpretation of those amendments, while producing a form of equal opportunity, was insufficient to bring about that result." In other words, "The grounds for accepting the second interpretation [of the Equal Protection Clause] might have involved the claim that past discrimination against minorities can justify special efforts to help members of minority groups today. This claim rests upon consideration of *equality*. And equality, of course, is the underlying objective of the Equal Protection Clause." As such, consideration of active liberty suggested that it was necessary to go beyond the text of the Equal Protection Clause and instead emphasize its motivation.

Towards the end of *Active Liberty*, Breyer modestly writes, "I hope that those strongly committed to textualist or literalist views—those whom I am almost bound not to convince—are fairly small in number. I hope to have convinced some of the rest that active liberty has an important role to play in constitutional (and statutory) interpretation." The decision is unanimous: he has.

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HOW PROGRESSIVES REWROTE THE CONSTITUTION

REVIEW BY CHARLES R. DRUMMOND IV

RICHARD A. EPSTEIN. How Progressives Rewrote the Constitution. Washington, D.C.: Cato Institute. 2006. Pp.156. $15.96.

For all the bravado of the title, this book is remarkably staid. That is not to say that it isn't polemical (and controversial), but the *language* in which University of Chicago Professor Richard Epstein argues his position is elevated and restrained. Although Epstein's new book *How Progressives Rewrote the Constitution* is erudite and well argued, most readers will be genuinely appalled by what they read. Epstein, however, is comfortable in his role as a gadfly; he has been attacking what he describes as the "orthodox reading" of the Constitution for decades. For readers unfamiliar with his unpopular opinions, there is no attempt by Epstein to sugarcoat his beliefs. Only four pages into the preface of *How Progressives Rewrote the Constitution*, he boldly affirms that he stands by most of the positions he took in 1985 with his famous book *Takings*. Both then and now Epstein believes that "minimum wage laws, antidiscrimination laws (in competitive markets only), collective bargaining laws, and Social Security requirements" are "unconstitutional."

This is a book, however, not solely about Epstein's beliefs, but also about his understanding of an important era in modern American History: the turn from the economically liberal "Old Court" to the progressive New Deal Court. Epstein would have it that the New Deal Court wrenched the Constitution from its former moorings, moorings put in place at the very beginning of the Republic. The Old Court with its more "nuanced and sensible" line of interpretation let individuals alone in the economic sphere, except in the cases of "tortious harm" and "monopoly." Then entered FDR onto the scene, with his "Court-packing scheme" in which he sought to expand the conservative Old Court by appointing six new, presumably progressive, members. This "switch in time that saved nine," ushered in a new progressive paradigm. Cowed by an overweening executive trying to shove through his own program, i.e. the New Deal, the Court donned the progressive mantle of government regulation of nearly everything—prices, the relations between employers and employees, and industries in general. The restraint of the Old Court, and perhaps even the age of chivalry, for that matter, quickly came to an end. So, in a nutshell, is the main argument of Epstein's book. Progressives, with all of the best intentions, "disagree[d] with the text of the Constitution," and implemented new avenues of interpretation that transformed "the tenor and purpose of" the Constitution. The overall contours of Epstein's account seem fairly certain to me. The New Deal Court *did* radically break from the jurisprudence of the Old Court (although this does not mean that "progressives rewrote the Constitution"). But the real heart of this book is not a narrative of the transformation of the Court, it is Epstein's reaction to this transformation. It seems as if Epstein's quarrel with the progressive shift in the Court is based upon two principles. First, the New Deal Court broke with the spirit of the Constitution. Second, the New Deal Court broke with economic liberalism. To Epstein, the two are inextricably linked.

While it is easy to dismiss Epstein's plea that the U.S. rid itself of *any* trappings of a managed economy, there is something beautiful (if perhaps misguided) about Epstein's vision, beyond the apparent ugliness of his rejection of many of the laws that are most commonly deemed humane and necessary. As Epstein sees it, his goal as not so much an "unregulated America" but as an entirely new legal order. In fact, the U.S. Constitution is only one part of Epstein's vision, which is actually a comprehensive worldview in which "competition and free trade" are the governing concepts of "all areas of human endeavor." Using the lens of Adam Smith's "invisible hand," Epstein pushes for "classical liberal" principles of competition in all areas of life. But Epstein makes his own conception of the "classical liberal synthesis" accomplish a bit too much for him. His contention "that the Constitution is unambiguously in the classical liberal camp" is true, for the most part, but it ignores the diversity of economic theories held by the Framers and by others in the early Republic. Mercantilism was not yet dead, and many of the Founding Fathers could scarcely be called laissez-faire.

Epstein is perfectly correct in saying that the "watchwords" useful in viewing the "American constitutional experience" through the prism of the "classical liberal" tradition are "limited government, private property, and freedom of conduct." But the "classical liberal" tradition can only get you so far. Invoking the general "procompetitive bias" of the Constitution does not suffice for analysis and does not justify a reading of liberal economic theory into our nation's laws. The Constitution is not just an elaborate footnote to *The Wealth of Nations*, and Constitutional principles need not always be in accord with "classical liberal" economic theory.

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Why People Obey the Law

REVIEW BY CHINH H. VO

TOM R. TYLER. Why People Obey the Law. Princeton: Princeton University Press. 2006. Pp. 320. $24.95

Originally published in 1990, *Why People Obey the Law* describes a study conducted by New York University psychology professor Tom R. Tyler found people obey laws if they believe they are legitimate, not because they fear punishment. The book ultimately concludes that the public is most interested in fairness and justice when dealing with authorities. Influential in its original publication, this updated paperback version includes an afterword by Tyler that takes into account new research over the past fifteen years and offers fresh reflections on the book's implications. This is an important book, and this new edition is long overdue.

Tyler begins the book explaining the need to understand why people obey the law and then moves on to a discussion of the logistics of his study. A random sampling of approximately 1,500 Chicago residents was chosen to participate in telephone interviews in which they were questioned on their views of the law and their experiences with police and courts. About half of the participants were interviewed again one year later to examine how contact with police or courts in recent months may have impacted or changed their previous attitudes toward the justice system. (Tyler provides in the book's appendix complete copies of the questionnaires used in both phases of the study).

From this relatively simple study, Tyler is able to reach insightful and often surprising conclusions. The first part of the analysis focuses on contrasting instrumental/normative perspectives with Tyler's conclusions on why people follow the law. Ultimately his study suggests that legitimacy, or the fairness of laws to citizens, is what drives compliance, rather than any instrumental or normative evaluation based on the efficacy of punishment. The second part of the analysis considers what citizens expect in their experiences with authorities such as the police and courts. The study shows that fair and decent treatment from authorities is regarded with utmost importance, implying that procedural justice trumps a favorable outcome. The final part of the analysis attempts to explain procedural justice, or how citizens define what is fair. Here the study does not illuminate any definite litmus test; it merely concludes that the basis for judging fairness develops during the process of cultural socialization, as people acquire basic social and political values.

Throughout the analysis, Tyler provides an ample collection of tables and charts along with hard figures to support his conclusions. This quantitative strength of the book may seem like a weakness to the layperson, since the heavy statistical methods with which Tyler analyzes his data can be confusing. Fortunately, Tyler concludes each chapter with a generously qualitative summary of his findings to complement his quantitative analysis. The book is written in clear and understandable style, even if Tyler's prose can be slightly dry.

The study is meticulously inclusive in analyzing the viewpoints of people from different ages, races, and genders. However, the study could have considered the drive behind more serious crimes. The study's questionnaires focused on crimes such as petty theft and littering; the most serious being driving while intoxicated. Nevertheless, the study's conclusions provide much insight into the mindset of ordinary citizens, if failing to take into account those who have committed more serious violations. Authorities and lawmakers would do well to consider the findings of this book if they hope for their decisions and rules to be accepted and obeyed voluntarily by the public.

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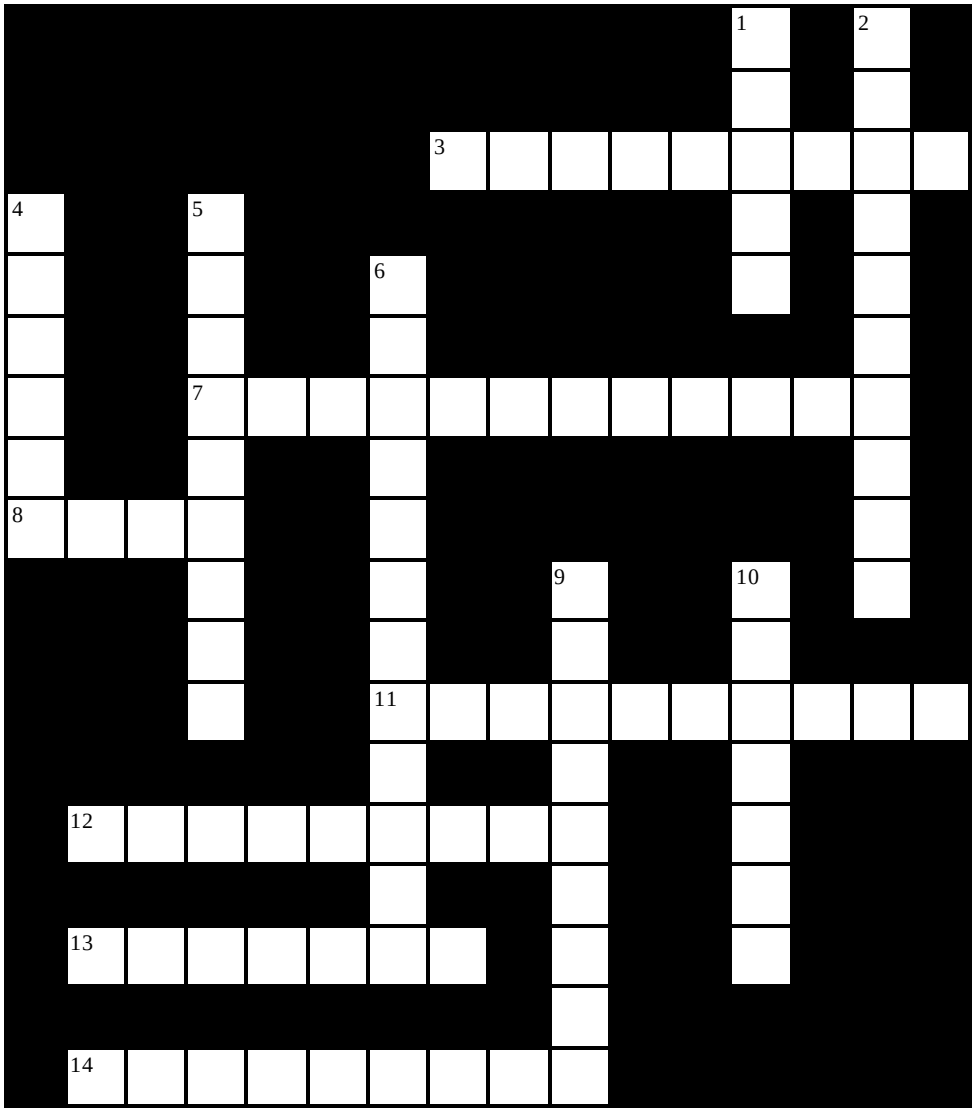
LEGAL TERMS:

How Well Do You Know Them?



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ACROSS

3 Marked by or having equity; just and impartial

7 A violation, as of a law, regulation, or agreement; a breach

8 Damage, injury, or a wrongful act done willfully, negligently, or in circumstances involving strict liability, but not involving breach of contract, for which a civil suit can be brought

11 A writ from a higher court to a lower one requesting a transcript of the proceedings of a case for review

12 The legal right granted to an author, composer, playwright, publisher, or distributor to exclusive publication, production, sale, or distribution of a literary, musical, dramatic, or artistic work

13 To differ in opinion or feeling; disagree

14 The party against which an action is brought

DOWN

1 A deception deliberately practiced in order to secure unfair or unlawful gain

2 An assertion made by a party that must be proved or supported with evidence

4 A grant made by a government that confers upon the creator of an invention the sole right to make, use, and sell that invention for a set period of time

5 The party that institutes a suit in a court

6 The right and power to interpret and apply the law

9 Opposing or intended to regulate business monopolies, such as trusts or cartels, especially in the interest of promoting competition

10 The finding of a jury in a trial

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(DOWN) 1. Fraud 2. Allegation 4. Patent 5. Plaintiff 6. Jurisdiction 9. Antitrust 10. Verdict