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SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

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In Brief

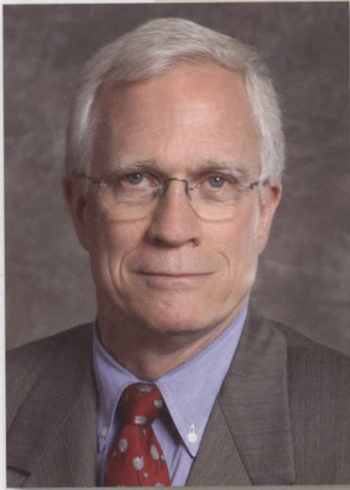
THE MAGAZINE OF CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW

DEATH PENALTY OR LIFE IN PRISON? A DEBATE BEFORE THE SUPREME COURT OF THE UNITED STATES

PROFESSOR MICHAEL BENZA ARGUES BEFORE THE SUPREME COURT OF THE UNITED STATES TO SAVE A MAN'S LIFE

CHARITY BEGINS AT HOME | COMBATING TERRORISM FINANCING | THE CONSTITUTION MATTERS IN TAXATION | THE TRIAL OF RADOVAN KARADZIC

FROM THE DEAN'S DESK



On behalf of our distinguished faculty, able students and dedicated staff, I am pleased to invite you to learn more about Case Western Reserve University School of Law. Having been founded in 1892, we are one of the oldest law schools in the nation and are part of a renowned research university.

We are proud of the many achievements of our distinguished faculty. This past year the university appointed four of our faculty to chairs, a recognition for those who advance legal analysis, encourage debate, and celebrate scholarship and teaching.

In addition to the scholarship and research our faculty contributes to the legal field, they continue to shape the justice system. Most recently, Professor Michael Benza argued a death penalty case before the Supreme Court of the United States. In addition, the Court has cited Professor Paul Giannelli's work seven times, and in *Massachusetts v. Melendez-Diaz* both the majority and the dissent cited his text SCIENTIFIC EVIDENCE.

This law school offers one of the most robust international tribunal externship programs in the country. Two of our students worked for the International Criminal Tribunal for the former Yugoslavia on the trial of Radovan Karadzic. Kevin Griffith '11 was a legal advisor for the defense team and Michael McGregor '11 assisted the judges. I invite you to read more about their work that left an indelible impact on the Radovan Karadzic trial.

Our school also contributes to the local community. For example, we remain deeply committed to our partnership with the Law and Leadership Summer Institute, a pipeline program offering Cleveland high school students an introduction to the legal community and guidance for their future endeavors.

In sum, we are a place where ideas matter and where we care about preparing each student to become a leader in the legal field. We welcome your interest and support, and hope you enjoy the enclosed articles that offer just a small sampling of the work of our alumni, faculty and students.

Sincerely,

Robert H. Rawson, Jr.

Robert H. Rawson, Jr.
Interim Dean

In Brief

APR 29 2011

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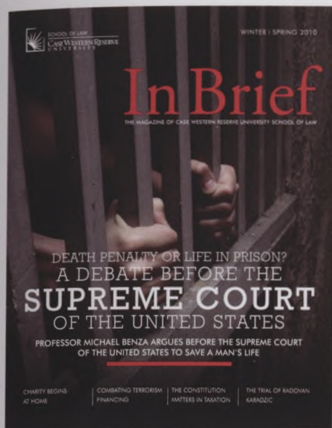

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FEATURES

4 Death Penalty or Life in Prison?
Professor Michael Benza argues before the Supreme Court of the United States to save a man's life

10 What Obligations do Hospitals Have to Provide Charity Care?
Professor Jessica Berg examines this controversial issue

13 Combating Terrorism Financing
Professor Richard Gordon works to identify terrorism financing tactics for the U.N. Counter-Terrorism Implementation Task Force and the World Bank

DEPARTMENTS

FACULTY

17 The Constitution Matters in Taxation
Professors Jonathan Entin and Erik Jensen examine the taxation debate and constitutional limitations for Congress and state legislatures

21 Regulating Firms "Too Big to Fail"
Professor Jon Groetzinger examines suggested causes of the economic downturn and steps to reduce future bailouts of large firms

24 Briefs

STUDENTS

31 The Trial of Radovan Karadzic
Two School of Law students share their experiences working for the defense and for the judges at the International Criminal Tribunal for the former Yugoslavia

35 Working to Help High School Students Realize Their Full Potential
School of Law partners with the Law and Leadership Summer Institute

ALUMNI

38 Alumni Spotlight
From criminal law to the private sector, Michael Cherkasky (ADL '72) (LAW '75) looks back on what made it all possible

40 Prosecuting Terrorist Suspects
As Prosecutor with the Office of Military Commissions, Michael Lebowitz '03, describes the inspiration for his work and the challenges he faces

42 Class Notes

48 Events

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DEATH PENALTY OR LIFE IN PRISON?

A DEBATE BEFORE THE SUPREME COURT OF THE UNITED STATES

PROFESSOR MICHAEL BENZA ARGUES BEFORE THE SUPREME COURT OF THE UNITED STATES TO SAVE A MAN'S LIFE

The case began in 1983 when Frank Spisak was sentenced to death. A memorable trial from the start, Spisak had been appealing his death penalty conviction ever since. Michael Benza (WRC '86) (LAW '92), a Visiting Associate Professor of Law at Case Western Reserve University, who continues to represent death row inmates in state courts and federal habeas proceedings, took on Spisak's case in 2006.

– Michael Benza
Visiting Associate
Professor of Law

Benza focused on two key points in the case. First, whether the closing argument of counsel at the mitigation phase was deficient and prejudicial to the client.

Spizak's original defense attorney had stated in his closing argument, "And, ladies and gentlemen, when you turn and look at Frank Spisak, don't look for good deeds, because he has done none. Don't look for good thoughts, because he has none. And ladies and gentlemen, don't look to him with hope that he can be rehabilitated, because he can't be. He is sick, he is twisted. He is demented, and he is never going to be any different." [1]

Stated Benza, "At no point did defense counsel ever ask the jury to return a life sentence. We argued that the trial lawyer abdicated his role as defense counsel and assumed the role of the prosecutor."

The second issue Benza addressed was whether the jury instructions were misleading in directing the jury to consider mitigation evidence only if the twelve jurors unanimously agreed that the mitigating factor existed.

Immediately after being told to unanimously determine that death was the proper sentence the jury was told "if you find that the State failed to prove beyond a reasonable doubt that the aggravating circumstances…outweigh the mitigating factors, you will then proceed to determine which of the two possible life imprisonment sentences you recommend." (Pet. Apx. I-324a-326a). It must be presumed that the jury would understand the unanimity requirement to apply to every decision since there was never a contradictory instruction (*Mills,* 486 U.S. at 378-379). The totality of the jury instructions were such that the reasonable juror could have understood the charges as meaning that a death sentence had to be unanimously rejected before a life sentence could be considered. [2]

Because Benza believed the jury was repeatedly addressed in the collective and instructed that every decision was to be the decision of the jury he argued, "As a matter of constitutional law, the existence of a mitigating factor is left solely to each individual juror's determination."

Surrounding both issues were significant questions regarding the scope of habeas review under Anti-Terrorism and Effective Death Penalty Act (AEDPA) which was enacted to limit federal habeas review of state court convictions and sentences.

After receiving habeas relief as to the death sentence in the Sixth Circuit, Benza defended his client and the Sixth Circuit's decision before the Supreme Court of the United States on October 13, 2009. It was his fifth case before the Supreme Court, but his first time arguing before the Justices.

Smith v. Spisak was the second case the nine Justices heard on that October morning. Assistant Federal Public Defender Alan Rossman served as Benza's co-counsel and Ohio Attorney General Richard Cordray argued for the state.

As the petitioner, General Cordray addressed the Court first, "Because this case arises under the deferential standards of the AEDPA statute, Mr. Spisak must show that the Ohio Supreme Court's decision was contrary to *Mills v. Maryland* or that it unreasonably applied *Strickland v. Washington*." [3]

When it was Benza's turn to address the Court he stated, "The Sixth Circuit evaluated performance of trial counsel in this case and found deficient performance for three primary areas. First, counsel presented and argued to the jury nonstatutory aggravating factors as reasons to impose the death sentence on Mr. Spisak. In Ohio, the jury is allowed to consider only the statutory aggravator factors, not nonstatutory factors. The counsel specifically identified and argued four reasons to execute Mr. Spisak. He then proceeded to tell the jury what was not mitigating evidence in this case, including factors that have long been accepted as mitigating factors like performance in prison, adaptive skills and the issue regarding his family upbringing and childhood. Finally, the lawyer turned to what he argued was the only mitigating evidence that they were going to be arguing, and that was the issue of the client's mental health…" [4]

Justice Ginsberg asked Benza, "Do you know of any case where the closing, not tied to the way the case was presented at trial, was held sufficient to constitute ineffective assistance of counsel?" Benza replied, "No. And that's because this case is such an outlier. I have been litigating capital cases since 1993. I have never seen a closing argument like this." [5]

Justice Ginsberg stated, "…So you are asking us to take a new tact and inviting arguments focused exclusively on the closing argument, to see if it meets the *Strickland* standard." Benza replied, "Yes, but this Court has already recognized that the Sixth Amendment applies, the right to counsel applies at closing argument. In *Yarborough v. Gentry*…the Court specifically stated that the right to effective assistance extends to closing argument. So this is not a redevelopment or an expansion of Strickland. It's simply an application of the Strickland analysis…" [6]

The Sixth Circuit Court had ruled that there was a Sixth Amendment violation, but the Supreme Court of the United States had never before granted habeas relief based on an ineffective closing argument. On January 12, the Court released its decision and opinion in *Smith v. Spisak* and reversed the Sixth Circuit ruling and reinstated the death sentence. ■

Assistant Federal Public Defender Alan Rossman and Professor Michael Benza

To read the complete transcript of the oral argument in *Smith v. Spisak* visit: http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-724.pdf

To read the opinion visit: http://www.supremecourtus.gov/opinions/09pdf/08-724.pdf

1 Closing Argument on behalf of the defendant. Court of Common Pleas Cuyahoga County, Ohio.

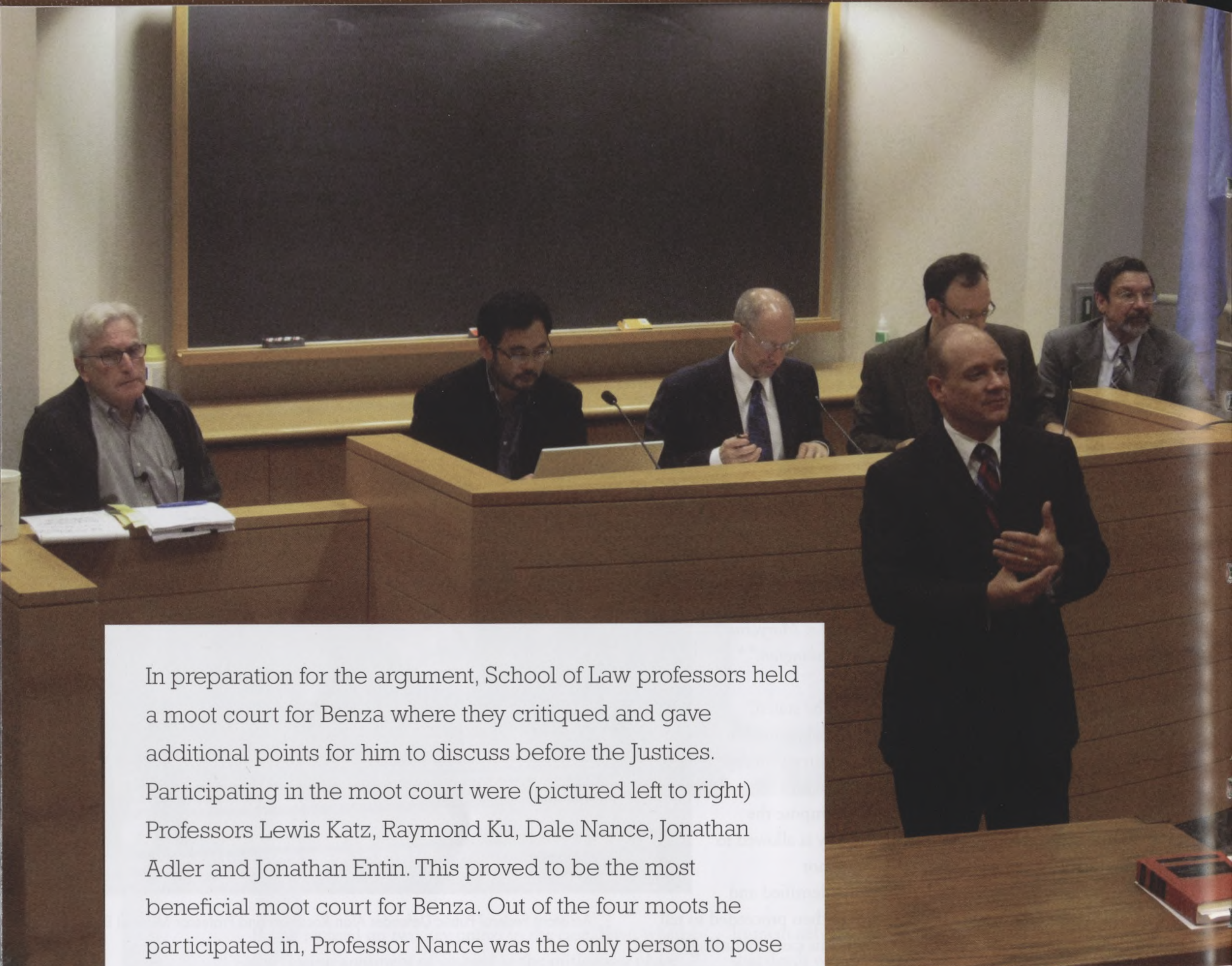
2 Brief in opposition to petition for writ of certiorari at 5.

3 Transcript of Oral Argument at 3 *Smith v. Spisak*, No. 08-724.

4 Transcript of Oral Argument at 20-21 *Smith v. Spisak*, No. 08-724.

5 Transcript of Oral Argument at 24 *Smith v. Spisak*, No. 08-724.

6 Transcript of Oral Argument at 30 *Smith v. Spisak*, No. 08-724.



In preparation for the argument, School of Law professors held a moot court for Benza where they critiqued and gave additional points for him to discuss before the Justices. Participating in the moot court were (pictured left to right) Professors Lewis Katz, Raymond Ku, Dale Nance, Jonathan Adler and Jonathan Entin. This proved to be the most beneficial moot court for Benza. Out of the four moots he participated in, Professor Nance was the only person to pose the same issue Justice Sotomayor raised, questioning how the Ohio Supreme Court's decision was contrary to *Mills v. Maryland* since *Mills* was issued after the State's ruling. The School of Law faculty advised on this and on additional questions that Benza could expect to be raised by the Justices.

School of Law student Andrew Stebbins attended the argument before the Supreme Court of the United States and interviewed Benza for *The Docket,* the student newspaper for Case Western Reserve University School of Law. This is a portion of that interview.

Andrew Stebbins (AS): What is the biggest difference between this and an argument, say, in the Sixth Circuit?

And once you get up there the nerves go away, because this is what we do. We stand in front of courts and we argue.

Michael Benza (MB): The biggest difference between it and the normal Sixth Circuit is the number of Justices and voices you have to keep track of. It comes at you from various points. It's hard to know when you hear a question which Justice asked it, especially if you are looking at the other end of the bench. Although I have argued *en banc* in the Sixth Circuit, which had 15 Judges, but they are further removed from you. That's one thing you don't really realize until you get to the counsel table is that you stand at the podium and see how close they are. It's a very personal interaction between you and the Justices. It was a very congenial argument about the issues. There were heated exchanges between myself and Justice Scalia but that's part of the argument, it was never personal. And once you get up there the nerves go away, because this is what we do. We stand in front of courts and we argue.

(AS): In further regards to judicial interactions, at one point you had a very lengthy exchange with Justice Breyer. He seemed like he was disagreeing with you, but eventually you convinced him on your point. From my vantage point he visibly agreed with you then backed off. What was that feeling like when you saw him shaking his head in agreement then relaxing with the questions, or did you even notice that he had done that?

(MB): I think I know when that is but I didn't notice it. A number of people have told me that's what he did. I do remember a point where he leaned forward very animated and when he sort of interjected and said that this was very helpful. I don't remember feeling that I convinced him I was right, but I did feel good about it because Justice Scalia is yelling at me, which is one feeling, but Justice Breyer is telling me my argument is very helpful. The axiom of oral argument is that you won't win a case in oral argument but you can lose it. To have a Justice tell you that this is very helpful is not something you get all the time. I remember him leaning forward but I don't remember anything else directly to him because at that point I was talking to the rest of the panel. That's what you want to do; you want to address the whole panel, not just one Justice. Although they sit relatively close it's a major head turn to see all of them.

AS: One more specific interaction question. Near the end of your argument Justice Ginsburg asked you to move on to the second point of your argument. Were you expecting something like that or was that a pretty unusual thing for a Justice to do?

MB: We had sort of had the structure of our argument and where we wanted to go. We wanted to talk about the first issue more because it was more difficult and had more intricacies. We wanted to start with that issue because if we went with the other issue first we may not have gotten to our first issue. She sort of took me where I was going anyway. The Justices know there are two issues so they do want to give you the opportunity to do both, because they have to. They may not have to decide both issues. It may have been politeness on her part, in her saying this is your chance to switch arguments. Sometimes Justices will do that if they feel like you are getting killed on an issue too, but I didn't get that impression.

AS: I got the impression that she was interested in the second argument, but after moving you on she didn't say anything about the second argument.

MB: I haven't read the transcripts but we knew that part of that issue was going to get swallowed up by the first argument. I got out the merits and then we were sucked into the first issue.

AS: Was it nerve-wracking being in front of such a large audience?

MB: I didn't even notice. You have your back to the audience, and I remember the court room being packed for the first argument, and then there is this mad shuffle after the argument because you don't get a recess or break or anything after the argument. So I got the impression that a lot of people left. I didn't look behind me to see if it was full. It is a pretty small courtroom, but I couldn't hear anyone. I don't know if anyone sneezed, coughed, anything because I was so focused on the argument.

AS: How did it feel when you sat down?

The axiom of oral argument is that you won't win a case in oral argument but you can lose it.

MB: It felt good to sit down, like I'm done now. Then the Attorney General began with his rebuttal. That is always tough because you always want to be the one with the last word. It was good to sit down, especially since the red light had been on for quite a bit.

AS: I noticed that, but you got quite a few questions after the red light turned on.

MB: Yeah I was done. I had closed my folder and was ready to sit down. And that's when Justice Scalia started asking questions and Justice Roberts started asking questions, and I went back and forth with them.

Non-profit hospitals have long been viewed as the safety-net providers in our health care system. But nowadays these hospitals are bringing in large amounts of money, paying their CEOs record amounts of compensation, and engaging in aggressive debt recovery actions. Richard Scruggs, the high profile attorney who spearheaded the litigation against the tobacco companies, has filed a class action lawsuit against non-profit hospitals for their billing and collection practices. With Senator Charles Grassley proposing federal legislation to establish minimum charity care standards for hospitals, and state and local tax authorities scrutinizing community benefit programs, this question has moved to the forefront of health law debates. What obligations do hospitals have to provide charity care? Even with the passage of healthcare reform, charity care remains necessary.

According to the current "Community Benefit Standard", non-profit hospitals must meet certain requirements in order to maintain their tax-exempt status. The requirements, set out in Internal Revenue Ruling 69-545 (1969), do not speak directly to the need for charity care, but rather highlight a series of criteria such as operating a full-time emergency room, providing non-emergency services to all who are able to pay, participating in Medicare and Medicaid, having a representative governing board, allowing staff privileges to all qualified applicants, and reinvesting surplus funds in operations. Interestingly, IRR 69-545 replaced

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WHAT OBLIGATIONS DO HOSPITALS HAVE TO PROVIDE CHARITY CARE?

"Putting the Community Back into the Community Benefit Standard,"

44 Georgia Law Review 1 (2009).

– Jessica Berg
Professor of Law
and Biomedical Ethics;
Associate Director of the
Law-Medicine Center

the old "best of financial ability standard," which required hospitals to provide charity care to the best of their financial ability precisely because of a concern by hospitals that the then new federal health programs (i.e., Medicare and Medicaid) would obviate the need for charitable services. The community benefit standard was designed to broaden the types of activities that would suffice for tax-exempt status. Ironically, hospitals and regulators have focused primarily on charity care expenditures in applying the standard.

We are once again facing significant changes in federal health regulation. And once again we are faced with questions about tax-exempt hospitals and charity care. Bills pending in the Senate have provisions addressing the "community benefit standard" and charity care requirements. But none fully address the underlying problem. In a recent piece entitled "Putting the Community Back into the Community Benefit Standard," 44 *Georgia Law Review* 1 (2009), I argue that the longstanding focus on providing individual charity care to meet the community benefit standard is misguided. Instead, I determine that there are conceptual and practical arguments for requiring hospitals to provide population or public health benefits in order to meet their community benefit requirements. Shifting the focus from individual charity care to population health benefits not only is more conceptually appropriate given the role of the government in providing for the welfare of the population, it has the practical benefit of shifting resources into the underfunded public health arena.

In the article, I offer a detailed analysis for implementing a new standard, and a framework for quantifying community benefit under that standard that may be used at the federal, state and local levels. There are at least five steps necessary to implement the change I propose. These include:

Bills pending in the Senate have provisions addressing the "community benefit standard" and charity care requirements. But none fully address the underlying problem.

1) Alternations in the signals and incentives created by IRS policies and reporting forms to emphasize population over individual health benefits.

2) Creation of a Community Benefit Board to identify and prioritize community health needs, and possibly play an oversight role in ensuring actual community benefits.

3) A shift from measuring monetary outlays (i.e., charity care expenditures) to measuring <u>outcomes</u>. In order to do this we must develop a framework of standard measurements and tools, much of which can be drawn from current public health resources.

4) Changes in the timeline for evaluating community benefit to accommodate a shift to outcome measurement, similar to allowances in other areas of tax law that recognize multi-year reporting.

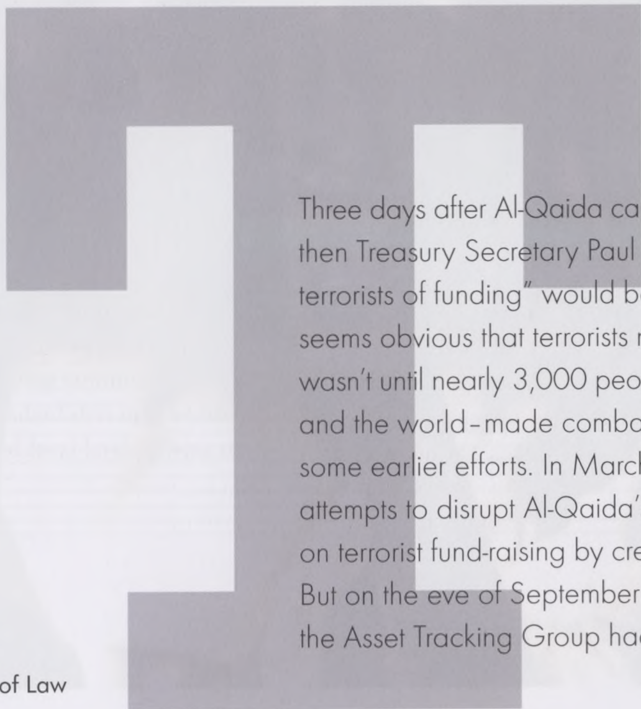
5) State-level legislative changes, some of which have already been implemented in various states.

Rather than focus on ways to reinforce the old charity care requirements, we might think creatively about how to employ the current structure in a way most beneficial to the community, since, after all, that is the purpose of providing tax-exemptions. We cannot continue to use non-profit hospitals as a health care safety net. Inpatient hospital units are generally not well-suited for either delivery of primary care, or overall coordination of care outside the context of an acute episode. But primary care and coordination are the services most needed in the system today, particularly for those individuals who have few health resources or chronic health problems. Relying on hospitals to provide comprehensive uncompensated healthcare is both a disservice to those who need the care, and a misuse of the potential community benefits that could be obtained from hospitals.

Hospitals, as well as local, state and federal authorities, are likely to welcome change, not only because of the difficulties and uncertainties in applying the current standard, but also because of new health system reform. The current "community benefit" standard is not unworkable, but it should be refocused to encourage the provision of population health care instead of individual charity care. Initial steps have been taken by a few states, but more work needs to be done. It is time for others to follow this lead and put the community back into the "community benefit" standard. ■

COMBATING Terrorism Financing

Professor Richard Gordon works to identify terrorism financing tactics for the U.N. Counter-Terrorism Implementation Task Force and the World Bank ▸



Three days after Al-Qaida carried out the terrorist attacks of September 11, 2001, then Treasury Secretary Paul O'Neill declared that from then on "starving the terrorists of funding" would be a major goal of the Administration. But while it seems obvious that terrorists need resources to plot and execute their attacks, it wasn't until nearly 3,000 people were killed in New York and Virginia that the U.S.– and the world–made combating terrorism financing a priority. There had been some earlier efforts. In March of 2000 the Clinton Administration concluded that attempts to disrupt Al-Qaida's money flows had failed and vowed to crack down on terrorist fund-raising by creating a new Foreign Terrorist Asset Tracking Group. But on the eve of September 11, 2001, nearly a year and a half after its creation, the Asset Tracking Group had hired no staff and had no space in which to work.

– Richard Gordon
Associate Professor of Law

Internationally, a few steps had been taken. In 1999 the United Nations Security Council adopted resolutions requiring all states to identify and freeze the bank accounts of Al-Qaida and the Taliban. That year the General Assembly adopted the International Convention for the Suppression of the Financing of Terrorism, which committed signatories to freezing the accounts of all terrorists. But by September 11, 2001, the amount of new assets frozen in the U.S. and worldwide had shrunk. More importantly, many counter-terrorism experts began to believe that the priority should shift from freezing assets to following terrorists' money trails so as to gain intelligence leads. In other words, perhaps the financing itself could be used to uncover unknown terrorists rather than just stopping those who were already identified.

There was some precedent for this kind of thinking: the global battle against money laundering. Many western governments had developed a serious interest in money laundering in the 1980's due primarily to the huge increase in narcotics trafficking. Drug profits generated mountains of cash that had to be introduced into the formal financial system before it could be spent without drawing the attention of law enforcement. One of the first anti-money laundering tools was the requirement that banks identify their customers and report to the authorities whenever one deposited a substantial amount of cash. Over time additional rules were added to help law enforcement identify potential criminals. Each bank was required to create detailed client profiles describing each customer's legitimate transactions; any activity that lay outside the profile would trigger a review by the bank. If on further examination the bank believed the transactions might involve the proceeds of crime, it would have to file a "suspicious activity report" with law enforcement. It would then be up to the authorities to investigate and decide if charges should be brought.

SOON AFTER SEPTEMBER 11 THE U.S. TREASURY DEPARTMENT BEGAN TO PUSH THE WORLD COMMUNITY TO ENGAGE MORE STRONGLY IN THE FIGHT AGAINST TERRORISM FINANCING.

As some countries adopted anti-money laundering rules, criminals simply took their ill-gotten gains to banks in jurisdictions with no such rules. A number of financial centers, most notably the United States and France, took the lead in the late 1980's in pressing for an international anti-money laundering effort. Perhaps the most important of these was the creation of the Financial Action Task Force in 1989, an organization originally composed of the United States and fifteen European countries that has grown to include most of the world's major economies. Less than a year later the FATF published its first set of 40 Recommendations, which provided a comprehensive set of best practices for fighting money laundering. Members of the FATF soon undertook an international effort to convince other jurisdictions to adopt the 40 into their domestic laws.

Soon after September 11 the U.S. Treasury Department began to push the world community to engage more strongly in the fight against terrorism financing. One key strategy was to urge the FATF to include terrorism financing as a central part of the organization's mandate. On October 29th and 30th, the FATF, meeting in an extraordinary plenary session in Washington, adopted eight new Recommendations on combating terrorist financing.

The existing 40 Recommendations required that financial institutions identify and profile clients, monitor their transactions, and report any cash that they suspected represented the proceeds of crime to the appropriate authorities. The new terrorism Recommendations required banks and other financial institutions to freeze the accounts of clients who appeared on a list of known terrorists. But they also required financial institutions to monitor transactions and report any that they suspected might involve the financing of terrorism. Soon the International Monetary Fund and the World Bank adopted these Recommendations as a world standard and drafted a program for assessing compliance by jurisdictions throughout the world (I should note that at the time I was a senior staff member at the IMF and played a leading role in this process).

There was, however, one very big problem: Did terrorists disguise their tracks in the same manner as money launderers? Tactics used by launderers to turn "dirty" money into "clean" had long been studied by both banks and law enforcement. Basically, these tactics involved disguising the illicit origins of the funds, or their true ownership, or both. Examples included breaking up large amounts of cash into smaller bits for deposit and running funds through multiple shell companies with opaque ownership. These typical patterns provided financial institutions and governments with a template against which a customer's transactions could be measured. But was there such a set of typical tactics or patterns for terrorists? After all, terrorism could be financed by clean money as well as dirty.

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A scramble to find out ensued in both public and private sectors. Preliminary inquiries by the U.S. and other governments, the FATF, and the Security Council came up largely negative. Yet the requirement for banks to uncover terrorists, now written into law in most countries, continued.

In the spring of 2008 over 100 academics, U.N. officials, financial institution compliance officers, investigators, and prosecutors from around the world convened at Case Western Reserve University School of Law for an international conference on the financing of terrorism in part to consider this question. [1] While there was some largely anecdotal evidence from law enforcement authorities suggesting a few types of financial transactions that may be common to launderers and terrorists, no systematic study had yet been undertaken. Both banks and governments appeared largely to be flying blind. Either terrorists were going undetected unnecessarily or the entire system was founded on a fallacy. Neither was an attractive option.

EITHER TERRORISTS WERE GOING UNDETECTED UNNECESSARILY OR THE ENTIRE SYSTEM WAS FOUNDED ON A FALLACY. NEITHER WAS AN ATTRACTIVE OPTION.

Soon after the conference Richard Barrett, Coordinator of the U.N. Al-Qaida and Taliban Monitoring Team and the CWRU conference keynote speaker, asked me, Sue Eckert of Brown University and Nikos Passas of Northeastern University (both of whom presented papers at the conference) to lead such a systematic study. [2] In addition to finding if there are any types of financial transactions that indicate the financing of terrorism, the study was to examine costs to financial institutions and, perhaps most importantly, draw conclusions as to how realistic or practical the Special Recommendations on Combating Terrorism actually were.

CWRU agreed to take the lead in investigating cases in the United States. Jeffrey Breinhold, who has been Deputy Chief of the Counter-Terrorism Section and Coordinator of the Terrorist Financing Task Force of the U.S. Department of Justice (and who was also a speaker at the conference) provided us with a preliminary list of 230 cases that he, in consultation with other Justice Department officials, had identified as involving a prosecution that may have involved some form of terrorist activity. [3] From that group, using publicly available information such as Justice Department press releases, news stories, court opinions, and certain other court documents available on line we identified 18 cases as likely involving terrorism financing. [4]

What we then needed were financial transaction records for each of these cases. These can be found in certain affidavits in support of motions, etc., but are mostly in the form of bank records submitted as evidence (any other documents, such as those subpoenaed during an investigation but not submitted as evidence, are strictly confidential.) However, it would have been impossible for us to review the hundreds of thousands of pages of documents held in hard copy by courts or on line by PACER[5] to find those that contained records of financial transactions. As a shortcut we contacted the prosecutors of each case and asked them to help us identify the right documents. With their assistance, plus much leg (and eye) work, we have identified tens of thousands of actual transactions by people and groups we strongly suspected were terrorists themselves or who support terrorism.

As far as we know, this has been the only systematic collecting of such data by anyone anywhere at any time.

Analyzing such transactions in any detail for indicators of terrorism financing has proven a most daunting task and the process is still ongoing. The final report, which will include at least some information from other countries (we have experienced far greater difficulty in obtaining similar information from foreign jurisdictions) will be published by the U.N. Counter-Terrorism Implementation Task Force and the World Bank. With luck it could change the world's approach as to how financial institutions should help in the struggle against terrorism.

While I do not want to predict the report's conclusions, I will note for the readers of In Brief that, so far at least, I have seen little in the way of clear indicators for the financing of terrorism. But maybe something will turn up.

Editor's Note: The final report on terrorism financing will be published this summer. ■

1 The Conference was co-sponsored by the International Society of Penal Law.

2 I had recently published "Trysts or Terrorists? Financial Institutions and the Search for Bad Guys" in the Wake Forest Law Review, which specifically called for such a study.

3 In many of the prosecutions, charges were not brought for either terrorism or support of terrorism but for some other offense, including making false statements, immigration fraud, money laundering, threats other than terrorist threats, air violence, and even some hoaxes. Material witness orders that involved no criminal charge were also included.

4 So far eight CWRU law students have worked as CWRU/World Bank Research Fellows on the project.

5 Public Access to Court Electronic Records provides internet access to court documents filed on line for a charge of $.10 per page.

The Constitution Matters in Taxation

Professors Jonathan Entin and Erik Jensen examine the taxation debate and constitutional limitations for Congress and state legislatures

– Jonathan L. Entin
Associate Dean for Academic Affairs, Professor of Law and Political Science

– Erik M. Jensen
David L. Brennan Professor of Law

In policy discussions about taxation, hardly anyone raises constitutional issues. For better or for worse, the assumption seems to be that the Constitution imposes no serious limitations on what Congress or any state legislature can do. That assumption is unwarranted, as we shall demonstrate in this article. We examine several recent situations where the Constitution played, or should have played, a central role.

I. The Proposed "Tax" on Bonuses to AIG Employees

Early in 2009, the House of Representatives passed a bill that, had it become law, would have "taxed" bonuses paid to employees of AIG and other significant recipients of Troubled Asset Relief Program funds. The bill would have taxed a bonus at a 90 percent rate for any employee with adjusted gross income exceeding $250,000, if the company granting the bonus received more than $5 billion in TARP funds.

In policy discussions about taxation, hardly anyone raises constitutional issues. For better or for worse, the assumption seems to be that the Constitution imposes no serious limitations on what Congress or any state legislature can do.

The Taxing Clause of the Constitution (Article 1, section 8) gives Congress the "Power to lay and collect Taxes, Duties, Imposts and Excises," and the House called the charge a tax. End of discussion?
Well, no. If Congress had the authority to claw back bonuses under the Commerce Clause, the Taxing Clause wouldn't have mattered. But some members of Congress were calling this a tax because they weren't sure the commerce power sufficed, and they were hoping the Taxing Clause would provide independent authority for a clawback. For that to be the case, however, the "tax" would really have to be a *tax.*

But the proposed charge did not look like a traditional tax. For one thing, it was clear from the way congressmen were talking that they had punishment in mind, not revenue raising. A tax is typically general in its application, at least in form, and confiscating a well-defined category of property from a small, discrete group of people sounds more like an uncompensated taking of property. The takings-versus-taxation issue was serious enough that it should have made every reasonable legislator nervous.[1] (The legislation died, but not because of this concern.)

II. Geographically Variable Tax Rates

Some pundits have suggested that the federal income tax should take into account cost-of-living differences across the country. A $100,000 income in Cleveland is more substantial than it would be in San Francisco; perhaps the tax rates applicable in the two cities could be adjusted accordingly.

That's a suspect idea on the merits folks in San Francisco can move if unhappy and it's probably a political nonstarter. In addition, it almost certainly would be unconstitutional. The Uniformity Clause (appended to the Taxing Clause) has been interpreted to require that an income tax be "uniform throughout the United States"; the tax must operate in the same way in Ohio that it does in California. A tax drafted in geographical terms would fail the test.

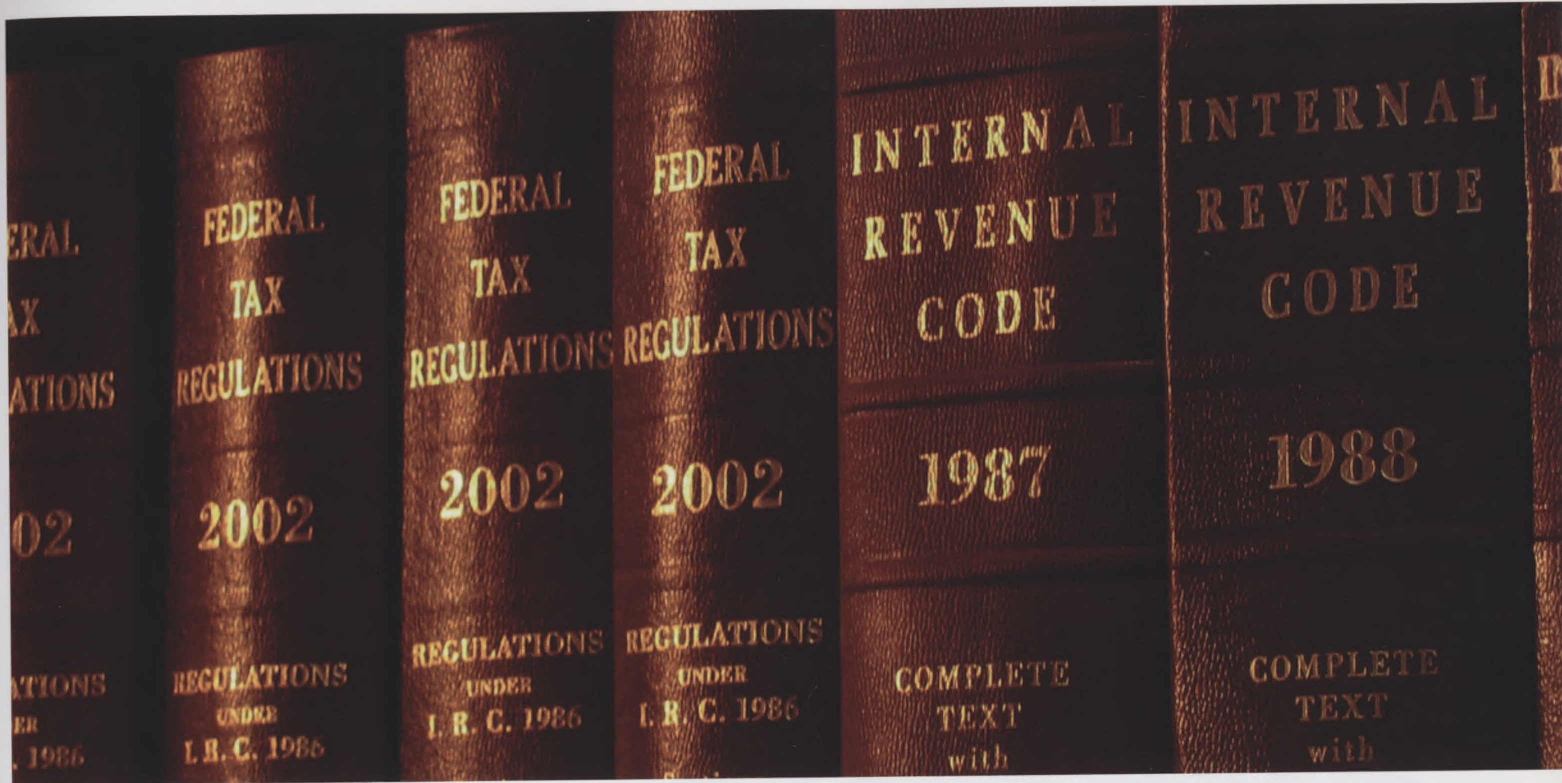
Another example: One proposal advanced during recent healthcare debates would have taxed insurers at rates varying from state to state. When a proposal like that is advanced, the appropriate response is: "Wait a minute. There's a Uniformity Clause problem here." The problem might be handled by artful drafting, but Congress can't ignore it.

III. An Excise on Those Who Fail to Buy Minimum Health Coverage

The healthcare reform bill that President Obama signed includes a provision that will eventually impose an "excise" on persons who don't maintain minimum health coverage. Most commentators think such a levy would be a valid excise for constitutional purposes, as long as it would be geographically uniform.

But there's another constitutional rule that shouldn't be ignored. Two clauses in Article I of the Constitution require that a "direct tax" be apportioned among the states on the basis of population: if a state has one-tenth the national population, for example, one-tenth of the direct-tax liability must come from that state. If the healthcare "excise" had to be apportioned, it wouldn't work: the total collected from a state would have to be based on the state's population, rather than on the percentage of the population not acquiring insurance. This apportionment requirement deters enactment of direct taxes with sectional effects.

(Of course, if a direct tax were enacted and apportioned, it could not be uniform unless it improbably turned out



that population and tax base were distributed proportionately. The uniformity rule, which applies also to excises and other indirect taxes, and the apportionment rule, which applies to direct taxes other than an income tax, are mutually exclusive.)

With one exception, the Supreme Court has defined "direct taxes" narrowly, limiting the category to "capitation taxes," specifically mentioned in the Constitution, and national real-estate taxes. The exception was in 1895, when the Court concluded that an income tax was direct and, because not apportioned, invalid. The Sixteenth Amendment, ratified in 1913, made the modern income tax possible by eliminating apportionment for "taxes on incomes."

So, if the category of "direct taxes" includes little, maybe only capitation and real-estate taxes, what's the problem? It's that serious commentators have said the proposed "excise" has the trappings of a capitation tax. (It certainly wouldn't look like a traditional excise, imposed on articles of consumption.) Is a levy any less a capitation tax because not everyone has to pay it? We don't know the answer to that question, but we do know that it needs to be asked before Congress goes any further.

Maybe the "excise" wouldn't be a tax at all. If it's just a penalty, we can forget about constitutional limitations on taxation and focus on the Commerce Clause. A Commerce Clause challenge stands little chance of success under current doctrine, because the new law deals with economic activity that has substantial effect on interstate commerce. By using the language of taxation, however, Congress seems hellbent on forcing the issue. If this "excise" would be a tax, no one should be assuming that constitutionality is a given.

IV. State and Local Tax Incentives

To this point, our discussion has been directed at *federal* legislation, and what is, as of this writing, *proposed* legislation. But the Constitution can affect state taxing power as well, and in this section we move from the hypothetical to the real, looking at two cases arising in Ohio.

The Sixteenth Amendment, ratified in 1913, made the modern income tax possible by eliminating apportionment for "taxes on incomes."

State and local governments use a variety of tax incentives to encourage business to locate or expand. In *DaimlerChrysler Corp. v. Cuno,*[2] the Supreme Court in 2006 held that taxpayers lacked standing to challenge an Ohio franchise tax credit given to an automobile manufacturer that installed new equipment in its Toledo plant. Local taxpayers had claimed that the credits, as well as a municipal property tax abatement, substantially diminished the funds available to state and local governments and consequently imposed disproportionate tax burdens on homeowners and renters.

The Sixth Circuit agreed with plaintiffs that the franchise tax credits violated the Dormant Commerce Clause by encouraging businesses to expand locally rather than consider out-of-state options. The appellate court upheld ▶

the property tax abatement, concluding that the eligibility conditions did not independently burden interstate commerce. [3]

Without reaching the merits, a unanimous Supreme Court held that taxpayers lacked standing to challenge the franchise tax credit. Chief Justice Roberts explained that taxpayers' complaint was a generalized grievance, shared by the Ohio public at large. Moreover, their alleged injuries were "conjectural or hypothetical"; it was clear neither that the credit would diminish funds available to the state (indeed, the point was to stimulate business that would generate additional revenue) nor how the legislature would respond to any diminution in revenue. Finally, the plaintiffs' status as municipal taxpayers was irrelevant to their challenge to the state credit, because nothing that the City of Toledo might have done had contributed to any injury resulting from the credit.

Every piece of proposed tax legislation isn't automatically suspect under the Constitution, but neither is the Constitution irrelevant. At a minimum, when serious doubts are raised about the constitutionality of proposals, legislators should be paying attention.

The decision on standing means that the Sixth Circuit's ruling on the unconstitutionality of the franchise tax credits isn't authority. But that court's reasoning might still be persuasive; if nothing else, it demonstrates that there are serious issues under the Dormant Commerce Clause with such credits. [4]

A case now pending in the Ohio Supreme Court, *DIRECTV, Inc. v. Levin,* [5] tests the constitutional limits on tax exemptions. Last February, the Tenth District Court of Appeals upheld statutory provisions that exempt cable television service from sales taxation but subject satellite television service to the tax. [6] Satellite providers argued that the disparate treatment violates the Dormant Commerce Clause. Reversing a grant of summary judgment to the providers, the Tenth District applied a deferential standard to uphold the exemption for cable systems but not satellite services.

Relying on cases from North Carolina and Kentucky, the court found that the statutory distinction was based on differences between two modes of interstate business. There was no discrimination against interstate commerce because both cable and satellite services obtain most of their programming from outside Ohio. All the relevant businesses were regional or national companies headquartered out of state. Therefore, the Tenth District reasoned, the statutory scheme simply "places a burden against one form of delivering pay television to consumers." Favoring one form of interstate commerce over another does not discriminate against interstate commerce.

At issue in the Ohio Supreme Court is whether the Tenth District's analysis is consistent with U.S. Supreme Court approaches to the Dormant Commerce Clause. Many cases have found unconstitutional discrimination against interstate commerce regardless of the headquarters of the affected companies. Moreover, the U.S. Supreme Court has upheld differential treatment of companies based on "differences between the nature of their businesses, not from the location of their activities." [7] Cable and satellite services compete with one another, but only cable service requires an extensive local infrastructure. The question is whether this makes cable and satellite services sufficiently different in nature to justify different tax treatment.

Regardless of the outcome in the Ohio Supreme Court, an appeal to the U.S. Supreme Court seems likely. Apart from the narrow question about the significance of the technological distinction between cable and satellite service, some members of the highest court in the land have suggested that the judiciary should leave disputes under the Dormant Commerce Clause to the political process. This case could provide a vehicle for addressing that subject.

Every piece of proposed tax legislation isn't automatically suspect under the Constitution, but neither is the Constitution irrelevant. At a minimum, when serious doubts are raised about the constitutionality of proposals, legislators should be paying attention. ■

Editor's Note: This article appeared in the January 2010 issue of the Cleveland Metropolitan Bar Journal.

1 See Erik M. Jensen, Would a Tax on AIG Bonus Recipients Really Be a Tax?, 123 *Tax Notes* 1033 (2009).

2 547 U.S. 332 (2006).

3 386 F.3d 738 (6th Cir. 2004).

4 The Court denied *certiorari* on the challenge to the property tax abatement.547 U.S. 1147 (2006). That ruling has no precedential effect, but it left intact the Sixth Circuit's rejection of the tax-abatement challenge.

5 No. 2009-0627.

6 181 Ohio App. 3d 92, 907 N.E.2d 1242 (2009).

7 Amerada Hess Corp. v. Director, N.J. Div. of Tax'n, 490 U.S. 66, 78 (1989).

Regulating Firms

"Too BIG to FAIL"

Professor Jon Groetzinger examines suggested causes of the economic downturn and steps to reduce future bailouts of large firms

Most financial crises progress from greed, to fear, to regulation of that which caused the greed and fear. Today we seem to be following a similar course. But the causes of each crisis have varied widely, as have the "fixes" that follow. ▸

—Jon Groetzinger
Visiting Professor of Law,
United States Director
of the Canada-United
States Law Institute

Too Big to Fail. "Too big to fail" has come to summarize, albeit inadequately, the primary cause of our current plight. A company is deemed "too big to fail" if its insolvency would have such catastrophic effects on the national economy that the federal government is forced to finance its continuation at taxpayer expense…Think Goldman Sachs, Citigroup, Bear Stearns, AIG, Bank of America, Fannie Mae and Freddie Mac. Perhaps, however, the Obama Administration's focus on "too big to fail" is misplaced and it should concentrate instead on other behaviors and policies that led to the recent downfall.

Normally firms that get themselves into trouble do so at the expense of creditors and shareholders. The government's bailout of some of our largest firms using taxpayer money is contrary to free market principles. Governmental salvation has propped up failing firms and often the management who made the ill-advised decisions leading to insolvency. Worse yet, it gave poorly managed businesses access to government money at little or no cost, providing a competitive advantage over better run companies. Management of these troubled businesses has heard the message; it is that without regulatory change, they can continue taking unreasonable risks and the government will continue to rescue them if they find trouble again.

The government's bailout of some of our largest firms using taxpayer money is contrary to free market principles.

Optimal Regulation. Washington's typical response to a problem like this is to create new law or regulations. However, regulation of any kind is disruptive to the marketplace, like a stone thrown into a stream disturbing its natural flow. Successful regulation should seek to prevent the causes of an economic downturn, while minimizing inefficiency and cost.

Identification of the true causes of a financial collapse is essential to a successful fix. If causes have not been properly, or only partially, understood, the solution will be imperfect or even harmful. Memories of the failure of the Troubled Asset Relief Program (TARP) funds are still fresh. The monies paid to banks last year increased our national debt without having their intended effect of encouraging large banks to make significant new loans to business and consumers.

Causes of Today's Economic Downturn. What then are the causes of our current malaise, and are the proposed fixes appropriate? I do not intend in this brief note to analyze all the causes or cures, but to cover some of the more notable ones. Depending on whom we ask, the causes include the following:

- During the preceding decade, the Federal Reserve made money too readily available at low rates, causing a real estate price bubble
- Too many risky investments were made by the "too big to fail" firms for their own account
- Rating agencies failed to properly rate risk of securities
- The true value of unregulated derivatives was unknown and possibly incalculable
- Investors eagerly bought those derivatives, thereby seemingly relieving banks and issuers of the risk of default on mortgages and other collateral underlying the derivatives
- Homeowners and consumers received credit that would have been denied if banks had retained the risk of default
- Consumer protection practices were inadequate

Proposed Solutions. There is no shortage of experts who claim to have solutions to our economic state. Unfortunately, each solution comes with a price tag and the risk of unintended consequences.

Break 'em up. Paul Volcker, head of the President's Economic Recovery Advisory Board, has advocated clamping down on the "casinolike operations at the big banks." [1] Thomas Hoenig, Federal Reserve Bank of Kansas City President, has advocated dismembering such large firms. [2]

Warren Buffett has offered a variation on the breakup theme by stating that he would not oppose reimposition of Glass-Steagall, a Depression era act that separated commercial from investment banking. [3] Under this proposal, banks that receive a government safety net would not be allowed to trade on their own account, thereby reducing risk at these firms. But was proprietary trading a primary cause of the current downturn? Wachovia, Washington Mutual and Countrywide failed because of bad loans, not because they traded on their own account.

History, moreover, has shown that attempting to break up large corporations is not easy, and the consequences are largely unpredictable.

Therefore, before we consider breaking up the "too big to fail" firms, we should ask whether size matters. Arguably, it does not since size alone is not directly correlated with the degree of risk a firm assumes. A number of European and Japanese institutions are much larger than those in the U.S.

considered to be "too big to fail," [4] but they are not insolvent. Perhaps the Obama Administration's slogan should be "Too Risky to Ignore," rather than "Too Big to Fail."

"Big" may even be good. One-stop shopping for all your business capital needs makes sense in a global marketplace. Imagine if Time-Warner or Boeing had to go to many smaller banks to raise capital rather than visiting just one. Before we begin breaking up our largest banks, we should secure similar policies with nations whose banks compete with our own. Otherwise, companies in need of capital would raise it outside the U.S. where the effort and costs are lower.

But if size does matter, how do we define "too big" and should we limit the policy to the banking industry, or should it be extended to the insurance industry (e.g. to AIG), the auto industry (e.g. to GM) and other companies that might destabilize our economy?

Tax 'em. If breaking up is hard to do, President Obama has recently proposed an alternative: Tax them, that is, tax the nation's largest banks to recoup bailout monies. Better yet, let the banks break themselves up to avoid the tax. Why stop at taxing large banks (aside from the fact that they were so indiscreet as to award themselves large bonuses while many Americans are out of work)? Wouldn't it be fair to also impose a levy on other beneficiaries of taxpayer dollars such as GM, Fannie and Freddie and Goldman Sachs?

Taxing large institutions will likely increase federal revenues. But what about the collateral damage? The S&L's of the 1980's had to pay additional regulatory fees and insurance premiums after their collapse at the very time they needed breathing room to recover. Today many of our banks need to raise capital to become healthy players. Stripping them of cash would make them less desirable to investors, and they would simply pass the new costs along to their customers. Would it not make more sense to defer imposition of such tax until we experience a more robust recovery?

Empower the Regulators. The House and Senate have proposed increasing regulatory supervision over the banks to ensure they meet more stringent metrics, including higher capital ratios, lower leverage limits, and stricter liquidity requirements. [5]

The President has advocated "resolution authority" which would give the Federal Deposit Insurance Corporation the power to wind up large failing banks in an orderly manner, without filing for bankruptcy. In lieu of resolution authority, it has been suggested that we might modify the bankruptcy system to allow it to unwind such large institutions. [6] Hopefully, if we take either action, Congress will provide adequate resources to administer the initiative.

Hit 'em Where it Hurts. Warren Buffett has suggested that the chief executives of troubled banks be penalized or "destroyed financially." [7] The theory behind this punitive approach is that it is too difficult to supervise risk-taking; tapping the wallets of top decision-makers is easier and may reduce excessive risk-taking. This idea has merit — senior management usually pays close attention to matters that affect them personally.

Do Nothing. One other approach that I have not seen in print is to take no new action. If we conclude that the upheaval of the past year and a half would not have happened had the Fed been less generous in offering cheap money, the federal government would not need to further regulate that over which it already has control. Additionally, inaction has the advantage of not causing unintended consequences.

Doing nothing may be unsatisfying to politicians who want to appear proactive. However, whether intended or not, passage of no new regulatory measures may be the outcome in a Senate that is no longer filibuster-proof. Senate Banking Committee Chairman, Christopher Dodd (D., Conn) is reported to be at loggerheads with his counterpart Senator Richard Shelby (R., Ala) over new financial regulations. [8] Passage of legislation will require that the Democrats find one or more accommodating Republicans.

As a nation, we have many strategic options available to reduce the chance of future meltdowns. Choosing among them will be difficult, but making good decisions will determine the extent of our success and a sustained recovery.

Update: The article above was written before healthcare legislation passed. Since then, Congress has turned its attention in earnest to financial reform. Senator Christopher Dodd and Representative Barney Frank have introduced legislation that attempts to forestall financial institutions from becoming too big to fail. While at this point no one can predict the content of the final bill, a few predictions seem possible: 1. passage of some type of financial reform legislation this year is likely, given its political ramifications, and 2. additional regulation of U.S. financial markets may make it less likely that in the future banks will become "too big to fail." However, such regulation won't prevent future government bail-outs of institutions that matter to our economy if we have a repeat of the fall 2008 meltdown. Let's hope Congress addresses the excesses that caused the meltdown and is not tempted in this election year to punish financial institutions in order to appease constituents. ■

1 New York Times, by Jackie Calmes, January 21, 2010

2 iMarketNew.com, by Steven K. Beckner, January 5, 2010

3 FoxBusiness.com, January 21, 2010

4 The American Prospect, Tim Fernholz, October 28, 2009

5 http://govtpolicyrecs.stern.nyu.edu/docs/whitepapers_ebook_chapter_7.pdf, page 34

6 Reuters, Modify Bankruptcy, Not U.S. Financial Rules, by Tom Hals & Chelsea Emery, November 17, 2009

7 Wall Street Journal, by Jonathan Macey, January 12, 2010

8 Wall Street Journal, by Damian Paletta, February 6, 2010

JONATHAN H. ADLER

Professor of Law and Director of the Center for Business Law and Regulation

Publications

"The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences" (with Nathan Sales), 2009 *University of Illinois Law Review* 1497 (2009).

"Business, the Environment, and the Roberts Court: A Preliminary Assessment," 49 *Santa Clara Law Review* 943 (2009).

"Taking Property Rights Seriously: The Case of Climate Change," Social Philosophy and Policy, vol. 26, no. 2 (2009).

Presentations

"Compelled Commercial Speech and the Consumer Right to Know," Property & Environment Research Center, Bozeman, MT, June 22.

"Judge Sotomayor, the Confirmation Process & the Future of the Supreme Court," Columbus Lawyers Chapter of the Federalist Society, Columbus, OH, June 25.

"Conservation without Regulation: Property Rights and Environmental Protection," Federalist Society student chapter, St. Thomas University School of Law, Miami, FL, September 3.

"How Conservative Is the Roberts Court?" Federalist Society student chapter, University of Miami School of Law in Miami, FL, September 3.

"The Leaky Ark: The Failure of Endangered Species Regulation on Private Land," American Enterprise Institute for Public Policy Research, Washington, D.C., September 15.

"Regulation by Litigation" Roundtable, Center for Business Law & Regulation at the Case Western Reserve University School of Law, September 25.

"The Problems with Precaution: A Principle without Principle," American Enterprise Institute for Public Policy Research in Washington, D.C., September 25.

"Eyes on a Climate Prize: Rewarding Energy Innovation to Achieve Climate Stabilization," University of Pennsylvania Law School, Philadelphia, PA, October 23.

"Letting 50 Flowers Bloom: Revitalizing the State Role in Environmental Protection," Federalist Society student chapter, Notre Dame University Law School, November 19.

Media

In the second half of 2009, Professor Adler was cited in numerous media outlets including, *The New York Times, Chicago Tribune, American Lawyer, Los Angeles Times, Baltimore Sun, Crain's Cleveland Business, Newsday,* CNBC.com, *Orlando Sentinel, National Law Journal, Washington Post, Washington Times,* McClatchy News Service, *Boston Globe, Cleveland Magazine.*

Professor Adler also appeared on the PBS Newshour with Jim Leherer, CNN's Lou Dobbs Tonight, and NPR's All Things Considered to discuss the nomination of Sonia Sotomayor to the Supreme Court.

GEORGE W. DENT, JR.

Schott-van den Eynden Professor of Business Organizations Law

Publications

"The Essential Unity of Shareholders and the Myth of Investor Short-Termism," 35 *Delaware Journal of Corporate Law* 97 (2010).

"For Optional Federal Incorporation," *Journal of Corporation Law* (forthcoming 2010).

"The Growing Clash Between Religious Freedom and the Gay Movement," 10 *ENGAGE: The Journal of the Federalist Society's Practice Groups* 7 (July 2009), available at http://www.fed-soc.org/publications/pubid.1509/pub_detail.asp.

"On Marriage, Religious Freedom, Equality, and Homosexuality: A Reply to Professor Huhn," *Akron Law Review: Strict Scrutiny* (2009), available at http://strictscrutiny.akronlawreview.com.

Presentations

In December Professor Dent and Professor Andrew Koppelman (Northwestern University Law School) presented their paper, *Must Gay Rights Conflict with Religious Liberty?*, to a roundtable discussion by a group of scholars at Princeton.

In April Professor Dent organized and supervised the biannual Leet Symposium on Corporate Law with a group of distinguished academics and practitioners on the theme, *Institutional Investors in Corporate Governance: Heroes Or Villains?*

JONATHAN L. ENTIN

Associate Dean for Academic Affairs and Professor of Law and Political Science

Publications

"We Need a Census Director Now," *Plain Dealer,* July 12, 2009.

"Melvyn R. Durchslag: Scholar, Colleague, Mentor, Friend," 58 *Case Western Reserve Law Review* (2008) (published in 2009).

"Spencer Neth: An Appreciation," 59 *Case Western Reserve Law Review* (2009).

"Introduction to Symposium: Access to the Courts in the Roberts Era," 59 *Case Western Reserve Law Review* (2009).

"The Constitution Matters in Taxation," *Cleveland Metropolitan Bar Journal,* January 2010 (with Erik M. Jensen).

"Environmental and Natural Resource Regulation," in Developments in Administrative Law and Regulatory Practice, 2008-2009 (Jeffrey S. Lubbers ed., 2010).

Presentations

Panelist for "Supreme Court Preview: Key Cases to Watch in the 2009-10 Term" sponsored by the Northeast Ohio Chapter of the American Constitution Society on October 28 (with School of Law Professor Raymond Ku and CSU Professor David Forte).

"Litigation or Activism: How Did We Make Progress in Civil Rights?" Lecture sponsored by the University's Office of Inclusion, Diversity, and Equal Opportunity on November 10.

"The Legal Significance of *Jacobellis v. Ohio*" at a November 13 screening of "Les Amants," the movie at issue in that landmark Supreme Court case, on the fiftieth anniversary of the arrest that gave rise to the case.

Activities

Professor Entin has been elected to the board of directors of the Northern District of Ohio Chapter of the Federal Bar Association.

PAUL C. GIANNELLI

Albert J. Weatherhead III and Richard W. Weatherhead Professor of Law

Publications

"The NRC Report and Its Implications For Criminal Litigation," 50 *Jurimetrics J.* __ (2009) (at press).

"Independent Crime Laboratories: The Problem of Motivational and Cognitive Bias," __ *Utah L. Rev.* __ (2010) (symposium; at press).

"Scientific Evidence in Criminal Prosecutions: A Retrospective," 75 *Brooklyn L. Rev.* __ (2010) (symposium in honor of Margaret Berger; at press).

"The National Academy of Sciences' Forensics Report," 45 *Crim. L. Bull.* 1109 (2009).

"Forensic Science: Scientific Evidence and Prosecutorial Misconduct in the Duke Lacrosse Rape Case," 45 *Crim. L. Bull.* 665 (2009).

"The National Academy of Sciences Report: A Challenge to Forensic Science," 24 *Criminal Justice* 4 (Winter 2010).

"ABA Standards on DNA Evidence: Nontestimonial Identification Orders," 24 *Criminal Justice* 24 (Spring 2009).

"Right of Confrontation: Lab Reports," 24 *Criminal Justice* 24 (Fall 2009).

Understanding Evidence (Lexis Co. 3d ed. 2009).

Ohio Trial Objections (West Co. 2009-10 ed.).

"Forensic Identification Science," in Federal Judicial Center & National Academy of Sciences, Reference Manual on Scientific Evidence (3d ed. 2010) (under peer review).

Presentations

Speaker, Department of Justice, National Symposium on Indigent Defense, Washington, D.C., February 19, 2010.

Speaker, Admissibility Issues after the National Academy of Sciences Report, American Academy of Forensic Sciences, Seattle, February 25, 2010.

Speaker, Fidler Institute on Criminal Justice, Loyola Law School, L.A., April 9, 2010.

Speaker, ABA Criminal Justice Section, Prescriptions Criminal Justice Forensics, Fordham L. School, June 4, 2010.

Activities

In 2009, Professor Giannelli was cited in over fifteen cases.

RICHARD GORDON

Associate Professor of Law

Publications

"What Anti-Money Laundering Authorities Can Learn from Tax Administrators" and "International Financial Centres" (with Jason Sharmon) in Money Laundering, Tax Evasion and Tax Havens (David Chaikin ed. 2009).

The Banking System and the Financing of Terrorism (with Sue Eckert and Nikos Passas) (U.N. Counter-Terrorism Implementation Task Force, forthcoming 2010).

Activities

Professor Gordon is leading a collaboration between the World Bank and the School of Law on a project entitled "The Misuse of Corporate Vehicles in Grand Corruption Cases: Unraveling the Corporate Veil." The project is part of the Stolen Asset Recovery or StAR initiative, a joint effort of the U.N. Office on Drugs and Crime and the World Bank Group to recover the proceeds of government corruption and to develop measures to prevent and deter the hiding of corrupt proceeds.

Appointments

Professor Gordon has been appointed Adjunct Associate Professor of International Studies at Brown University for the Spring Term 2010.

B. JESSIE HILL

Associate Professor of Law and Associate Director of the Center for Social Justice

Publications

"Dangerous Terrain: Mapping the Female Body in *Gonzales v. Carhart*," 19 *Colum. J. Gender & L.* (forthcoming 2010).

"Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning over Time," 59 *Duke L.J.* 705 (2010).

"Reproductive Rights as Health Care Rights," 18 *Colum. J. Gender & L.* 501 (2009).

Presentations

"Minors' Rights to Bodily Integrity and the Right to Information," Symposium – Reproductive Rights and the Right to Information, Harvard Law School (October 2009) (sponsored by the Human Rights Program at Harvard Law School and the Center for Reproductive Rights).

Professor Hill spoke at the Case Western Reserve Law Review Symposium on "Reproductive Rights, Human Rights, and the Human Right to Health" on January 22, 2010. She will also be writing the introduction to that symposium in the *Case Western Reserve Law Review.*

Activities

Professor Hill was invited to serve as an expert consultant on pending litigation for the Center for Reproductive Rights (New York, NY).

SHARONA HOFFMAN

Professor of Law and Bioethics and Co-Director of the Law-Medicine Center

Publications

"E-Health Hazards: Provider Liability and Electronic Health Record Systems," *Berkeley Technology Law Journal* (with Andy Podgurski) (forthcoming 2010).

"Preparing for Disaster: Protecting the Most Vulnerable in Emergencies," 42 *U.C. Davis Law Review* 1491 (2009).

"Law, Liability, and Public Health Emergencies," 3 *Disaster Medicine and Public*

Health Preparedness 117 (2009) (with Richard Goodman & Daniel Stier).

"Electronic Health Information Security and Privacy," HARBORING DATA: INFORMATION SECURITY, LAW AND THE CORPORATION, (Andrea M. Matwyshyn ed., Stanford University Press 2009) (with Andy Podgurski).

"Measure for Measure: The Government's Response to H1N1 and Remaining Liability Issues," LexisNexis.com (November 2009).

Presentations

"2009 Update on Anti-Discrimination Legislation"

- Health Law Professors Conference, Cleveland (June 5, 2009)
- AALS Mid-Year Workshop on Work Law, Long Beach (June 11, 2009)

"Preparing for Disaster: Protecting the Most Vulnerable in Emergencies," Emory School of Public Health (August 12, 2009).

"Establishing Standards of Care for Use in Disaster Situations," Institute of Medicine, Washington, D.C. (September 1, 2009).

"Finding A Cure: The Case for Regulation and Oversight of Electronic Health Record Systems," St. Louis Area Health Law Association (September 11, 2009).

Appointments

Professor Hoffman has been appointed to the Board of Directors of the Public Health Law Association for 2009-2010.

Media

"Software Lets Doctors Share Images," *Columbus Dispatch,* August 31, 2009.

"Ideas: Community Health" WVIZ television program, August 27, 2009.

"The Electronic Promise" WKSU Radio, October 5, 2009.

Guest on University of North Dakota's monthly radio program "Why?" addressing "The Morality and Legality of Universal Health Care," October 11, 2009.

"Electronic Medical Records not a Cure-All," the *Washington Post,* October 25, 2009.

Quoted in *Huffington Post* in "Switch to Electronic Records Getting Mixed Reviews at Hospitals, Clinics" (November 24, 2009), "Stimulus Fuels Gold Rush for Electronic Health Records" (November 5, 2009), and "Fuzzy Math: Rising Costs in Government's Digital Health Stimulus" (October 15, 2009).

"DNA Reference To Be Stricken From University Of Akron Hiring Policy," WCPN Radio, December 16, 2009.

DANIEL A. JAFFE

Associate Professor of Law

Publications

OHIO SCHOOL LAW (Balwin's Ohio Handbook Series), (2009-2010 ed., Thomson/West; forthcoming 2009) (with Susan C. Hastings, Richard D. Manaloff, Michael L. Sharb, and Timothy J. Sheeran).

"You Too Can Create a Simulation Exercise (or Even a Course)," *Transactions, The Tennessee Journal of Business Law* (Special Report 2009) (with Praveen Kosuri, Jeff Leslie & James Hogg).

ERIK M. JENSEN

David L. Brennan Professor of Law

Publications

"Murphy v. Internal Revenue Service, the Meaning of Income, and Sky-Is-Falling Tax Commentary," 60 *Case Western Reserve Law Review* __ (2010) (forthcoming).

"The Receipt of Cash for Losses of Personal Rights," 126 *Tax Notes* 103 (2010).

"Parsing the Meaning of Personal Injuries Under Section 104(a)(2)," *Journal of Taxation of Investments,* Winter 2010, at 92.

"The Commerce Clause Can't Trump Constitutional Limits on Taxation,"125 *Tax Notes* 1031 (2009).

"The Constitution Matters in Taxation," *Cleveland Metropolitan Bar Journal,* January 2010 (with Jonathan L. Entin).

Book Review, THE TIMING OF INCOME RECOGNITION IN TAX LAW AND THE TIME VALUE OF MONEY (by Moshe Shekel), 1 *Columbia Journal of Tax Law* __ (2010) (forthcoming).

Presentations

Professor Jensen spoke in Chicago on September 26, 2009, and in San Antonio on January 23, 2010, on panels before the Committee on Sales, Exchanges, and Basis of the ABA Section of Taxation.

Activities

Professor Jensen submitted comments to the Internal Revenue Service on a proposed regulation that would redefine personal injury under Internal Revenue Code section 104(a)(2).

Media

Professor Jensen was quoted on September 15, 2009, in *Tax Notes Today,* and on September 21, 2009, in *Tax Notes,* about the proposed regulation under section 104(a)(2).

LEWIS R. KATZ

John C. Hutchins Professor and Director of the Master of Laws in U.S. and Global Legal Studies program

Publications

"Safford United School District No. 1 v. Redding and The Future of School Strip Searches," 60 *Case Western Reserve Law Review* issue 2 (forthcoming 2010) (with Carl Mazzone).

OHIO ARREST SEARCH AND SEIZURE (Thomson/West 2009 edition).

BALDWIN'S OHIO PRACTICE, Criminal Law (Thomson/West 3d edition 2009) (4 volumes) (with Giannelli, Crocker and Lipton).

OHIO CRIMINAL LAWS AND RULES (Thomson/West 2009 edition) (with Giannelli).

NEW YORK SUPPRESSION MANUAL (LexisNexis 2009 Supplement) (with Shapiro).

Q & A QUESTIONS AND ANSWERS: CRIMINAL PROCEDURE (LexisNexis 2d edition 2009) (with Cohen).

RAYMOND KU

Professor of Law and Co-Director of the Center for Law, Technology and the Arts

Publications

CYBERSPACE LAW: CASES AND MATERIALS (with J. Lipton) (3d ed. Aspen forthcoming 2010).

"Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty," 63 *Vand. L. Rev.* 1669 (2009) (with J. Sung & Y. Fan).

"Unlimited Power: Why the President's (Warrantless) Surveillance Program is Unconstitutional," 41 *Case W. Res. J. Int'l. L* __ (forthcoming 2010) (invited).

"Privacy is the Problem: The Constitutional Guarantee of Reasonable Security for a Web 2.0 World," __ *Widener L. J.* __(forthcoming 2010) (invited).

Presentations

Commentator: Rethinking Free Speech and Civil Liability, Privacy Law Scholars Conference, University of California, Berkeley School of Law, June 2009.

"Unlimited Power: Why the President's (Warrantless) Surveillance Program is Unconstitutional," Symposium: Somebody's Watching Me sponsored by Institute for Global Security Law & Policy, Case Western Reserve University School of Law, October 2009.

"Of Two Minds: Trademark & Free Speech Laws' Differential Regulation of Cognitive Space," Symposium: Signifiers in Cyberspace sponsored by Center for Law, Technology & the Arts, Case Western Reserve University School of Law, November 2009.

IP Infringement or Theft (A debate with Professor Adam Mossoff, George Mason Law School), sponsored by The Federalist Society of Case Western Reserve University School of Law, January 2010.

"A Stranger in a Strange Land," Keynote Address, First Annual Midwestern APALSA Conference, February 2010.

"Privacy is the Problem: The Constitutional Guarantee of Reasonable Security for a Web 2.0 World," Symposium sponsored by Widener Law Journal, Widener University School of Law, February 2010.

"Privacy: It's None of Your Business," Faculty Research Program, The University of Akron School of Law, April 2010.

Awards

Professor of the Year 2009

CWRU Law Alumni Association Distinguished Teacher

JACQUELINE D. LIPTON

Associate Dean for Faculty Development and Research; Professor of Law; Co-Director, Center for Law, Technology and the Arts; and Associate Director of the Frederick K. Cox International Law Center

Publications

CYBERSPACE LAW: CASES AND MATERIALS (with Raymond Ku) (3 ed, forthcoming 2010).

INTERNET DOMAIN NAMES, TRADEMARKS, AND FREE SPEECH (2010).

"Mapping Online Privacy," *Northwestern University Law Review* (forthcoming 2010).

"Bad Faith in Cyberspace: Grounding Domain Name Theory in Trademark, Property, and Restitution," *Harvard Journal of Law and Technology* (forthcoming 2010).

"Video Surveillance and Privacy Law," *Case Western Reserve Journal of International Law,* (forthcoming 2010) (solicited, symposium edition).

"Secondary Liability and the Fragmentation of Digital Copyright Law," 3 *Akron Intellectual Property Journal* 105 (2009) (invited symposium edition).

"Remarks: The Politics of the Internet," published in Proceedings of the 102nd Annual Meeting, American Society of International Law (2008).

Presentations

Professor Lipton presented "Mapping Online Privacy" at the 9th Annual CIPLIT Symposium, DePaul University College of Law, October 15-16, 2009.

Professor Lipton presented "Mapping Online Privacy" at Osgoode Hall Law School, York University, Toronto, Ontario on November 3, 2009 (IP faculty colloquium series).

Professor Lipton presented "Mapping Online Privacy" at a faculty colloquium at the Akron Law School on November 18, 2009. There was a cover story about the presentation in the *Akron Legal News* on November 17, 2009.

Professor Lipton presented "Online Social Networks and Global Online Privacy" at the Cyber Civil Rights Symposium, hosted by the Denver Law Review at the Denver University Sturm College of Law on November 20, 2009.

Professor Lipton presented comments on the role of electronic publishing in the P&T process on a panel at the AALS Annual Meeting in New Orleans, January 9, 2010 (for the Committee on Libraries and Technology).

Appointments

Professor Lipton was appointed to the AALS Research Committee (Three year term, commencing January 2010).

KEVIN MCMUNIGAL

Judge Ben C. Green Professor of Law

Publications

DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS, American Bar Association (2009) (with Peter Joy).

"Defense Counsel and Plea Bargain Perjury" *Ohio State J. of Criminal Law* (forthcoming).

"The (Lack of) Enforcement of Prosecutor Disclosure Rules" *Hofstra Law Review* (forthcoming 2010).

"Are We Blind to Innocence?" Volume 24, No. 1 *Criminal Justice* 49 (2009) (with Peter Joy).

"Amend Rule 11 to require Disclosure" Volume 24, No. 3 *Criminal Justice* (2009) (with Peter Joy).

"Incriminating Evidence — Too Hot to Handle?" Volume 24, No. 2 *Criminal Justice* 42 (2009) (with Peter Joy).

"ABA Explains Prosecutor's Ethical Disclosure Duty," Volume 24, No. 4 *Criminal Justice* __ (forthcoming) (with Peter Joy).

LAURA E. MCNALLY

Associate Professor of Law

Activities

Professor McNally was recently elected to the Board of CLEA (Clinical Legal Education Association).

Appointments

Professor McNally was appointed to CLEA's ABA advocacy committee regarding outcome measures and was also appointed as co-chair of the AALS (American Association of Law Schools) section on Clinical Legal Education's Teaching Methodologies Committee.

MAXWELL J. MEHLMAN

Arthur E. Petersilge Professor of Law and Professor of Bioethics, School of Medicine; Director of the Law-Medicine Center

Publications

Johns Hopkins University Press has offered Professor Mehlman a contract for a new book, DESIGNING OUR DESTINY.

Mehlman, Berg Juengst and Kodish "Ethical and Legal Issues in Enhancement Research on Human Subjects" accepted for publication by the Cambridge Quarterly of HealthCare Ethics.

Maxwell Mehlman and Dale Nance, "Medical Malpractice Reform Can Be Unhealthy," *The Plain Dealer,* November 15, 2009.

"Genetic Enhancement in Sport: Ethical, Legal, and Policy Concerns," in Performance-Enhancing Technologies in Sports: Ethical, Conceptual, and Scientific Issues (T. Murray, K. Maschke, and A. Wasunna, eds. Baltimore: Johns Hopkins University Press 2009).

Media

Professor Mehlman was interviewed about his book, THE PRICE OF PERFECTION: INDIVIDUALISM AND SOCIETY IN THE ERA OF BIOMEDICAL ENHANCEMENT, on Cleveland's NPR station, WCPN "The Sound of Ideas" on September 1, 2009.

Professor Mehlman's book, THE PRICE OF PERFECTION: INDIVIDUALISM AND SOCIETY IN THE ERA OF BIOMEDICAL ENHANCEMENT, was cited in an article published November 18 on LiveScience.com, entitled "Today's Top Athletes: Human or Android?"

Professor Mehlman was quoted in a December 2, 2009 *Tufts Daily* article entitled "Your genes are safe: Congress enacts bipartisan decision to protect individuals from genetic discrimination."

Case Abroad at Home

Bringing the world to our door

Designed to enhance and expand our international law curriculum, the Case Abroad at Home program brings distinguished foreign scholars to the law school to teach intensive mini-courses every summer. Introduced in 2005, this innovative program enables the law school to offer a wide variety of comparative and international law topics to upper level law students. These courses complement our already rich international law curriculum offerings, including a first-year elective in international law, labs, clinics, and a summer study abroad program in The Netherlands.

Each August, the Case Abroad at Home program features at least one international expert focused on issues of law and technology or law and the arts, and one visitor focused on comparative issues in Canada-U.S. law.

Students benefit from the opportunity to interact with and learn from university professors from other countries. Presented at the law school during the week before fall semester begins, the program has hosted 17 international visiting professors from France, Canada, Australia, England, The Netherlands, Italy, Hungary, Argentina, Ireland, and China, among others.

In August 2010, Case Abroad at Home visiting faculty will be: Assistant Professor Peter Mezei, University of Szeged (Hungary, comparative digital copyright); Professor Valerie Oosterveld, University of Western Ontario (Canada, international criminal law/human rights); and Professor Xia Fei, East China University of Politics and Law (China, Chinese criminal law system).

A complete list of past visiting faculty is available at: http://law.case.edu/centers/cox/content.asp?content_id=27#case_abroad

DALE A. NANCE

John Homer Kapp Professor of Law

Publications

"Adverse Inferences About Adverse Inferences: Restructuring Juridical Roles for Responding to Evidence Tampering by Parties to Litigation," 90 *Boston University Law Review* (forthcoming 2010).

"Evidentiary Foul Play: The Roles of Judge and Jury in Responding to Evidence Tampering," 7:1 INTERNATIONAL COMPLEMENTARY ON EVIDENCE art. 5 (2009).

Presentations

On September 4, 2009, Professor Nance presented a paper entitled, "Truth, Trials, and Side-Constraints" at the conference on "Proof and Truth in the Law," held at the Institute for Philosophical Research of the National Autonomous University of Mexico, in Mexico City.

Professor Nance gave a talk entitled, "The Elusive Concept of Evidential Weight," at the Faculty Roundtable for SMU School of Law, on January 25, 2010, in Dallas, Texas.

On March 26, 2010, Professor Nance spoke to pre-law undergraduates of Case Western Reserve University on the topic, "The Evolution of the Jury."

Activities

Professor Nance was a co-signer on two *amici curiae* briefs to the United States Supreme Court in the Fall of 2009, one concerning the interpretation of the "original documents" rule and another concerning the presence and significance of the "prosecutor's fallacy" in testimony offered by forensic scientists testifying about DNA evidence.

CRAIG A. NARD

Tom J.E. and Bette Lou Walker Professor of Law; Founding Director of the Center for Law, Technology and the Arts

Publications

"Legal Forms and the Common Law of Patents," *Boston University Law Review* (forthcoming).

Professor Nard's book proposal, The Common Law of Patents in the Age of Reform, was accepted for publication by the Oxford University Press.

Presentations

Professor Nard was invited to deliver a series of lectures on American patent law at the World Intellectual Property Organization Academy in Torino, Italy in September 2009.

Professor Nard was invited to present a lecture on comparative intellectual property law at Bocconi University in Milan, Italy in September 2009.

Professor Nard was invited to deliver a public lecture at Princeton University on the issue of institutional choice in the development of 19th-century American patent law in November 2009.

Professor Nard was invited to deliver a series of lectures on technology transfer and sustainability at the International Development Law Organization in Rome, Italy in May 2010.

Activities

Professor Nard's interdisciplinary initiative, *Intellectual Property Management and Commercialization of Complex Technologies,* was selected by the Office of the Provost to receive a $65,000 Forward Thinking Interdisciplinary Alliance Investment Grant. Twenty-four proposals were received. The grants, designed to stimulate the work of the university's 11 alliances, were awarded after review by deans and alliance working groups. A faculty committee conducted a final evaluation.

ANDREW S. POLLIS

Visiting Assistant Professor of Law

Publications

Ohio Appellate Practice (Thomson/West 2009-10 edition, with Judge Mark P. Painter).

"Recovering Costs and Damages on Appeal," 2 *Cleveland Metropolitan Bar Journal* 22 (December 2009).

Presentations

Presenter, "Recovering Costs on Appeal," Cleveland Metropolitan Bar Association, Cleveland, Ohio, October 2009.

Moderator, "A View from the Bench: Top 10 Mistakes Attorneys Make in the Courtroom," National Business Institute, Telephonic Seminar, December 2009.

Activities

Professor Pollis drafted proposed amendments to Ohio Rules of Appellate Procedure adding new provision for *en banc* review and corresponding amendments relating to entry of judgment on appeal, in his capacity as counsel to the Appellate Rules Subcommittee of the Ohio Commission on Rules of Practice and Procedure; rules will go into effect in July 2010 unless rejected by the Supreme Court or Ohio General Assembly.

CASSANDRA BURKE ROBERTSON

Assistant Professor of Law

Publications

"Judgment, Identity, and Independence," 42 *Conn. L. Rev.* 1 (2009).

"Beyond the Torture Memos: Perceptual Filters, Cultural Commitments, and Partisan Identity," 42 *Case Western Reserve Journal of International Law* 389 (2009).

Presentations

"Judgment, Identity, and Independence," Law & Society Association Annual Meeting, Denver, CO (May 30, 2009).

Panelist, "Beyond the Torture Memos," Frederick K. Cox International Law Center Symposium, "After Guantanamo: The Way Forward: Four Roundtables on Reconciling National Security and the Rule of Law," Case Western Reserve University School of Law (September 11, 2009).

"Transnational Access to Justice," Junior Faculty Federal Courts Conference, Michigan State University School of Law (October 23, 2009).

"Transnational Access to Justice," Northeast Ohio Faculty Colloquium, University of Akron School of Law (November 12, 2009).

"Retrospective on *Jacobellis v. Ohio*," William K. Thomas Inn of Court, Cleveland, OH (November 18, 2009).

"The Hague Abduction Convention: Jurisdictional Deference and Precommitment," The Center for International Child Custody & Relocation, Cleveland, OH (February 4, 2010).

MICHAEL P. SCHARF

John Deaver Drinko – Baker & Hostetler Professor of Law; Director of the Frederick K. Cox International Law Center; and Director of the Cox Center War Crimes Research Office

Publications

"International Law and the Torture Memos," 42 *Case Western Journal of International Law* 321 (2009).

"Understanding the Goldstone Report: Controversy and Ramifications," 18 *ILSA Quarterly* 14 (December 2009).

Professor Scharf's book, ENEMY OF THE STATE (St. Martin's Press, 2008) received the 2009 "International Association of Penal Law Book of the Year Award."

Presentations

Professor Scharf lectured/spoke at conferences in Amsterdam (Netherlands), June 19, 2009; The Hague (Netherlands), June 23, 2009; Istanbul (Turkey), September 20, 2009; Kampala (Uganda), December 10, 2009; Amsterdam (Netherlands), December 16, 2009; The American Society of International Law (Washington, D.C.), January 20, 2010; Duke University, January 22, 2010; and Thomas Jefferson School of Law (San Diego), January 29, 2010.

Activities

Professor Scharf was the lead author of an Amicus Brief on behalf of the Public International Law and Policy Group, in the Supreme Court case of *Kiyemba v. Obama* — involving the right of habeas corpus for the Uighurs held at Guantanamo Bay.

Media

Professor Scharf was quoted in *The New York Times* on May 12, 2009; *The Plain Dealer* on May 12, 2009; *The Washington Independent* on May 13, 2009; *Cleveland Jewish News* on August 25, 2009; *Associated Press* on August 27, 2009; *The Sunday Times* (London) on September 20, 2009; *Associated Press* on October 27, 2009; *The Australian* on October 27, 2009; *Macleans* on November 10, 2009; *The Plain Dealer* on November 29, 2009; and he appeared on WCPN Radio on May 11, May 12, and September 9, 2009; on KCBS Radio (San Francisco) on October 28, 2009; on WDOK Radio on January 13, 2010, and on C-SPAN Book TV on February 6, February 7, and March 21, 2010.

CALVIN WM. SHARPE

Galen J. Roush Professor in Business Law and Regulation; Founding Director of the Center for the Interdisciplinary Study of Conflict and Dispute Resolution

Publications

"Issues in Controlling the Arbitration Hearing," 61 Nat. Acad. Arb. Proc. 287 (BNA 2009).

The ATCA As A Tool For Enforcing International Labor Standards: A Door Left Ajar After Sosa v. Alvarez-Machain.

UNDERSTANDING LABOR LAW (3d. edition).

Introduction, *Forgiveness, Reconciliation and The Law Symposium.*

Appointments

Professor Sharpe was appointed as a member of the UAW International Public Review Board — the 52 year old public panel that hears charges brought by union members against the Union. Labor law luminaries such as Professors Ben Aaron (UCLA), Harry Arthurs (Toronto), Willard Wirtz (San Diego), Paul Weiler (Harvard), Jim Jones (Wisconsin) and Ted St. Antoine (Michigan) have all served on the board. Professor Sharpe joins its current members: Professors Janice Bellace (Wharton), Jim Brudney (Ohio State), Fred Feinstein (Maryland), Harry Katz (Dean, Cornell ILR School), and Maria Ontiveros (San Francisco).

Professor Sharpe was also elected to the United States Executive Board of the International Association of Labor and Social Security Law.

GARY SIMSON

Joseph C. Hostetler-Baker & Hostetler Professor of Law

Publications

"Rethinking Choice of Law: What Role for the Needs of the Interstate and International Systems?" LOOKING TO THE FUTURE: ESSAYS IN HONOR OF W. MICHAEL REISMAN (Martinus Nijhoff Publishers 2010) (forthcoming).

TED STEINBERG

Adeline Barry Davee Distinguished Professor of History and Professor of Law

Publications

"Can Capitalism Save the Planet? On the Origins of Green Liberalism," *Radical History Review* (forthcoming).

"United States of Fertilizer," 11 *Hedgehog Review* 55 (2009).

ROBERT STRASSFELD

Professor of Law; Associate Director of the Frederick K. Cox International Law Center; and Director of the Institute for Global Security Law and Policy

Publications

"Emerging Issues in North American Trade—Labor Law (Is It Time for the United States to Be More Like Canada?)" 35 *Canada-U.S. Law Journal* (forthcoming).

ROBERT WAGNER

Visiting Professor of Law

Publications

"A Few Good Laws: Why the Federal Criminal Law Needs a General Attempt Provision and How the Military Law Can Provide One" *University of Cincinnati Law Review* (forthcoming 2010).

Fox Foundation Gift Supports Clinic Post-Graduate Fellowship

The School of Law received a $10,000 grant from The Harry K. Fox and Emma R. Fox Charitable Foundation to fund the Milton A. Kramer Law Clinic's work on the School-to-Prison Pipeline project. "We are hopeful that our grant will help change public policies involving disciplinary policies in public schools which result in far too many students being channeled from school to juvenile court, and too often to state detention centers," says Harold Friedman '59, co-Trustee of the Fox Foundation. This grant will enable the Clinic's "2010 Harry K. Fox and Emma R. Fox Charitable Foundation Fellow" to provide dedicated research support that will shape the advocacy and public phases of the project. We are grateful for this inspiring gift, which pursues an important national issue that we can begin to address in Ohio by leveraging the School of Law's formidable expertise.

Griffith on the first day of the Karadzic trial

THE TRIAL OF RADOVAN KARADZIC

Two School of Law students share their experiences working for the defense and for the judges at the International Criminal Tribunal for the former Yugoslavia

Case Western Reserve University School of Law students Kevin Griffith and Michael McGregor had the opportunity to work on what some call one of the greatest trials of the decade — the trial of Radovan Karadzic. The former president of the Bosnian Serb republic was charged with genocide, war crimes and crimes against humanity, and was tried before the International Criminal Tribunal for the former Yugoslavia in The Hague.

Kevin Griffith '11 worked with School of Law Professor Michael Scharf, who introduced him to Peter Robinson, legal advisor to Karadzic. Griffith then applied for an externship with the International Criminal Tribunal for the former Yugoslavia (ICTY) and was accepted to become a legal advisor for the defense team.

The Karadzic defense team was the largest at the ICTY, and as a second-year law student, Griffith had the opportunity to work with ten other legal interns from Greece, Italy, Serbia, Japan, Ireland, New Zealand and the United Kingdom.

After being assigned to work for the defense, Griffith said he did not question the work he had to do. "In international law, we must show a credible judicial system. Everyone deserves fair representation. I was defending my client's right to a fair trial. As a lawyer, you don't get to pick your clients."

Griffith's work for the defense team was divided into two areas: factual and legal assignments. His factual assignments were internal documents which chronicled the testimony of witnesses or supplemented the past statements of witnesses. The legal assignments included authoring motions to the court and researching jurisprudence.

"The international aspect, and meeting lawyers from all over was incredible. The law is different in every country so the work is never boring. For every legal issue, you had ten different opinions," said Griffith.

McGregor at his desk

McGregor '10 in front of the Tribunal

Griffith '11 outside the Peace Palace with the Sudanese Rebel Army

McGregor with colleagues

Griffith inside the defense room at the Tribunal with other interns

A tumultuous trial from the start, Karadzic boycotted the first day of his trial on October 26, 2009. Griffith recalls their response after the boycott, "We were in the defense room once the trial began. We didn't know what the court was going to do after he boycotted the trial and were curious to see the response of the trial chamber judges. It was a great lesson in being a lawyer and having to respond to the judges," stated Griffith.

He describes the most significant time during his externship as being when he traveled to Bosnia to interview witnesses for the prosecution. He arranged for the interviews and traveled with a Serbian interpreter to a small Bosniak village in the mountains of Northeastern Bosnia.

"Traveling to one of the villages — a place that experienced tragic violence during the war — was a powerful experience. Witnesses were still very fearful and it was an emotional experience for them. One witness was one of only three people who had survived. His brother and father were killed along with a hundred others. At the end of the interviews people were in tears. My job as a lawyer called upon me to question witnesses and victims about what they experienced, and undertaking this job in the setting where the events occurred was a very intense experience," said Griffith.

Griffith outside the Peace Palace

Griffith's passion for international work began while studying in Germany as an undergraduate college student. He went on to serve in the Peace Corps for two years in Uzbekistan, then worked as a volunteer helping with tsunami disaster relief in India before coming to the School of Law. This summer, Griffith hopes to work in Africa or Asia for another tribunal or for the International Criminal Court.

Michael McGregor '10, always wanted to pursue international criminal law and cited this as the reason he chose to attend the School of Law. Having had several friends who were affected by the war, he wanted to help contribute to the reconciliation of the former Yugoslavia.

McGregor was accepted to assist the judges in the Karadzic trial and stated of his work, "On a daily basis, I was usually writing a decision on a motion from either the prosecution or the defense. I would forward those decisions to my supervisors for revisions and then to the judges for approval. Writing the decisions was a very intensive process that involved reading hundreds, if not thousands, of pages of prior testimony or witness statements and pouring over hundreds of exhibits."

McGregor was one of only two law students, among other legal interns, who assisted the judges with the trial and said, "I learned a lot about the difference between civil law systems and common law systems as my team had two judges from each system. When I would draft a decision, the judges would deliberate and ask for my participation in such meetings. This allowed me to listen to the conversations these judges had about the different rules and procedures, and to see how they would eventually come to a resolution based on a lot of compromises."

McGregor said participating in these deliberations made him feel as though he was part of the team and able to make a difference.

When asked what was most challenging about his work, McGregor recalled reading the testimony of witness statements where the victims vividly described what they experienced during the war. "The images that they conjure up are at times heart-wrenching to imagine. If you don't have control over your emotions, then you have a tendency to forget what exactly the Trial Chambers' duties are — to base the verdict in facts and laws and not the emotions that you feel for the victims. It's a difficult line to walk, but in order for there to be real and genuine justice the Trial Chamber must set aside the emotional aspects."

Set to graduate soon, McGregor looks back fondly on his experience and the work he did for the judges and hopes to work for the government or NGO/IGO dealing with humanitarian law or human rights issues.

Said McGregor, "This experience has solidified my view of international law and why it is needed in today's world. It has also reinforced my desire to work on humanitarian issues after law school."

School of Law Professor Michael Scharf, who is also Director of the Frederick K. Cox International Law Center and Director of the Cox Center War Crimes Research Office, said of Griffith and McGregor, "Kevin and Michael were fantastic ambassadors for our law school. To date, forty-five School of Law students have interned during the summer or school year for the several international tribunals. This is far more than any other law school. It's an invaluable chance for them to literally be part of history in the making, and for several it has led to permanent jobs with the defense, prosecutors, and judges of the tribunals." ■

ALUMNI WEEKEND

1960 1965 1970 1975 1980 **1985** 1990 1995 **2000** 2005

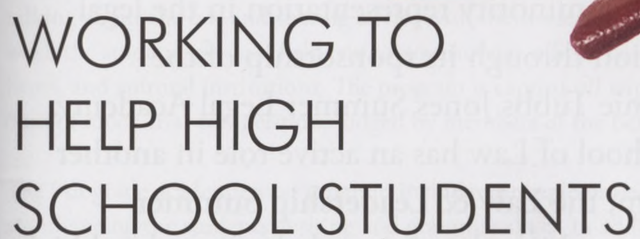
SEPT. 30 – OCT. 3 2010

SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

When you think about the meaningful and influential times in your lives, those memories undoubtedly include your time at Case Western Reserve University School of Law. Although things change and time quickly passes, returning to the law school will provide you with the opportunity to see firsthand that Case Western Reserve University School of Law is still as special today as it was when you graduated.

So, mark your calendars for **September 30 – October 3, 2010**. The law school has a full schedule which will allow you to hear from Interim Dean Robert H. Rawson, Jr., participate in discussions with your favorite faculty on current and relevant legal issues, and catch up with fellow classmates.

The School of Law is celebrating all classes ending in 0s or 5s. We are especially excited to commemorate the milestone classes of 1960 (50th), 1985 (25th) and 2000 (10th). We look forward to welcoming all School of Law alumni back on campus for an unforgettable celebration. If you have any questions regarding the 2010 Reunion, please contact Annie Hetman in the Office of Development and Public Affairs at anniehetman@case.edu or by phone at 216.368.0549. For more information, visit the 2010 Reunion website at www.law.case.edu/reunion.



WORKING TO HELP HIGH SCHOOL STUDENTS **Realize Their Full Potential**

School of Law partners with the Law and Leadership Summer Institute

– Sarah Polly
Associate Dean of Student Services

– Alyson Suter Alber
Assistant Dean

Tenth-grader Malcolm Palmer and Case Western Reserve University School of Law student teacher PJ Brafford '11.

Tenth-graders Davide Boone and Alyvia Bridges at their internship at Squire, Sanders and Dempsey LLP.

Case Western Reserve University School of Law student teacher Jonathan Alexander '11 with tenth-grader Clara Mays during her internship at Thompson Hine LLP.

The Winter/Spring 2009 edition of *In Brief* highlighted Case Western Reserve University School of Law's commitment to increasing minority representation in the legal profession through its sponsorship of the Stephanie Tubbs Jones Summer Legal Academy. The School of Law has an active role in another program, the **Law & Leadership Summer Institute,** which also aims to help foster local high school students to realize their potential, which will hopefully include futures as bright and talented young attorneys.

The purpose of the Institute, which draws students from the Cleveland Metropolitan School District, is "to prepare youth from underserved communities to compete at high academic levels through the use of intense legal and educational programming as a tool for fostering vision, developing leadership skills, enforcing confidence, and facilitating the pursuit of higher education." The Institute seeks to do this through the enhancement of an individual student's writing, research, speaking, and analytical skills, using the study of law as the driving force for this transformation. While the primary focus of the Institute is exposure to law, the overarching theme is the reinforcement of the idea that our students have the capability and capacity to do anything, and a career in law is just one of the many possibilities awaiting them.

Cleveland and Columbus were the two pilot sites for the program in the summer of 2008; Cleveland-Marshall served as the host site for Cleveland. The success of the program in Cleveland and Columbus prompted growth, and the partnership grew to include the Supreme Court of Ohio, the Ohio State Bar Association and Foundation, the Ohio Center for Law-Related Education, all Ohio law schools, and many local bar associations.

In the summer of 2009, the Law and Leadership Institute rolled out the program in six cities across Ohio, including the addition of sites in Akron, Cincinnati, Dayton, and Toledo. Here in Cleveland, the School of Law partnered with Cleveland-Marshall to administer the program with two classes, a new group of rising 9th grade students and the returning 10th grade students. Both schools are now hosting students and are preparing for the third summer with three classes, totaling about 75 students.

The majority of the Institute takes place during the summer for a five week, intensive program; however, there is also an ongoing academic year component to the program. During the 9th grade summer institute, the goal is to provide students with substantive knowledge of criminal law and trial procedure and assist students with the development of critical academic skills applicable across disciplines. Students are taught with lectures, forum discussions and interactive projects. The classroom work is rigorous with tests at the end of each week. In addition, each day begins with a distinguished speaker talking about the law and sharing advice with the students. Once a week the students go on a field trip to government offices, courts, law firms, and cultural institutions. The program is capped off with two days of mock trial competition, judged by members of the bench.

The 9th grade academic year program includes multiple projects aimed at enhancing the students' writing and grammar skills. In addition, this is the second year that the Law & Leadership Institute will enter a team of 9th graders in the Cleveland Mock Trial competition in May.

The students enrolled in the 10th grade program are in their second year with the Law and Leadership Institute. Their summer 2009 program also aimed to impart substantive knowledge and further develop critical academic skills. The curricular focus for the 10th grade program is on contract, consumer, and tort law. The students also had the benefit of advice from a variety of distinguished attorney speakers as well as weekly field trips. The 10th grade summer program also featured one week internships for the students at a number of Cleveland law firms. After the internships, the students returned to the classroom for several days of guided research into potential colleges.

The 10th grade academic year program includes preparation for the Ohio Mock Trial Competition in February. After the competition, the curriculum will focus on constitutional debate with a mentoring component. There is also a Law and Literature section sponsored by the Ohio Humanities Council.

Law students serve as teachers, and last summer Case Western Reserve University School of Law students Jonathan Alexander '11 and PJ Brafford '11 taught the 10th grade class. Mr. Brafford is continuing to teach the 10th graders this academic year along with Daniel Van Grol '09, a recent Case Western Reserve law school graduate who is working as a Social Justice fellow with funding from VISTA.

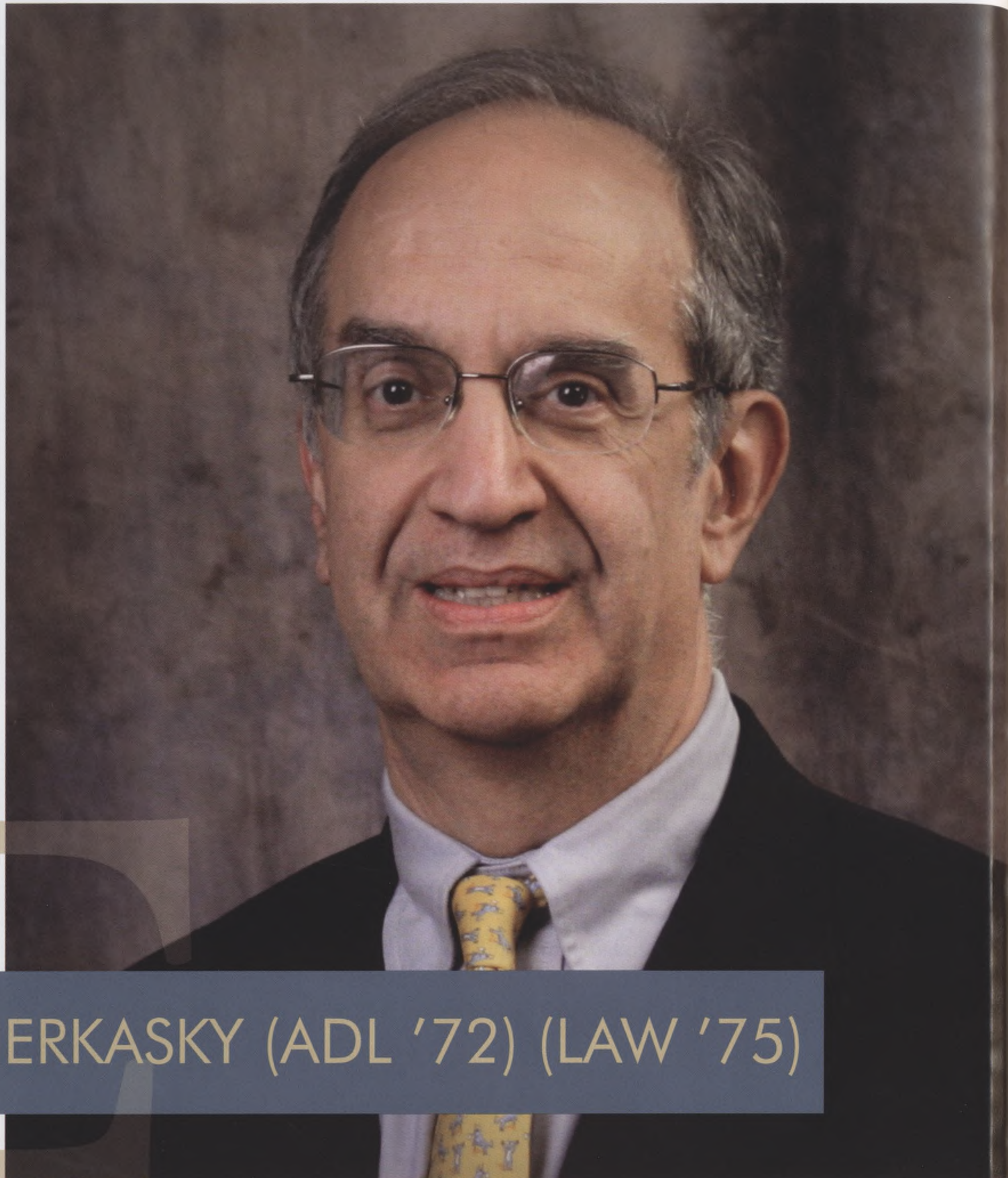
The teachers report tremendous growth in the students thus far. After teaching the 10th grade summer program PJ Brafford observed, "The students stepped up in the most extraordinary way and we were floored by the effort and thought they put into the exams. Of course, there were still issues that needed to be worked on, but the potential really shined through. By the end of the summer program, in only five weeks, the difference between the first exam and the last was truly night and day."

While the primary focus of the Institute is exposure to law, the overarching theme is the reinforcement of the idea that our students have the capability and capacity to do anything, and a career in law is just one of the many possibilities awaiting them.

To date, the reviews of the student participants have been extremely positive. When asked if she would recommend the program to a friend, 10th grader Diamond Donald said, "I would recommend this program to someone because it is fun. It makes you expand your way of thinking.....Law and Leadership has helped me with my writing and increasing my reading level and even math. I really love this program and I love the law. I cannot wait to become a lawyer."

The Law and Leadership program aims to provide as much individualized attention to the student participants as possible. The students are enriched by the relationships they have developed with their law student teachers and with their fellow students. They have also appreciated the involvement of many members of the Cleveland bench and bar in the program. This past year the program benefitted from many attorney speakers, field trip hosts, mock trial coaches, and judges. If you would like to become involved in the program please contact Alyson Alber (alyson.alber@case.edu) or Sarah Polly (sarah.polly@case.edu). Information about the program can also be found at www.lawandleadership.org. ■

Editor's Note: A portion of this article appeared in the February 2010 issue of the Cleveland Metropolitan Bar Journal.



MICHAEL CHERKASKY (ADL '72) (LAW '75)

From criminal law to the private sector, Michael Cherkasky '75 looks back on what made it all possible

He assisted with the prosecution of five mafia families, was the lead trial attorney in John Gotti's second to last trial, and supervised the state prosecutors assigned to the Joint Terrorist Task Force investigating the first World Trade Center bombing. Michael Cherkasky '75 has a resume that reads like a movie script. Currently CEO of Altegrity Inc., one of the largest United States providers of background investigations and employment screenings, Cherkasky continues to thrive. He gives credit to Case Western Reserve University, where he received both his undergraduate and law degrees.

When looking at his upbringing, one would have expected Cherkasky to go into the medical field — his father was a well-known doctor and his mother was a nurse. Yet, growing up in New York at a time when the city was ridden with crime, he was encouraged to follow a different path. Almost 35 years after graduating from CWRU School of Law, Cherkasky discusses his career and what is still yet to come.

The law school is a terrific institution that is important to Cleveland and to the legal community. Law school had an enormous impact on my life.

Cherkasky credits his father, Dr. Martin Cherkasky, a former visiting professor at Western Reserve Medical School, with his decision to pursue criminal law, "He was such a big name in medicine. My sister was a doctor and my mother was a nurse, so I did it differently and became a lawyer. New York used to be very dangerous, so fighting the war on crime was my highest calling and that's what I set out to do."

Looking back, he remembers fondly the time he served as Assistant District Attorney when he prosecuted cases in Manhattan. For the first seven years that he worked for the New York County District Attorney's office, Cherkasky prosecuted rapes, homicides and murders. He then investigated white collar organized crime and investigated all five mafia families including the Gambino crime family.

For the past 25 years, Cherkasky has continued to support the law enforcement community in numerous oversight and policy development roles and was appointed by Governor Paterson as the Chairman of the New York State Commission on Public Integrity and by Cyrus Vance, Jr. as leader of his transition team into Manhattan's District Attorney's office.

"There have been many different phases in my career. The world goes full circle — I helped my old boss, Bob Morgenthau, as he left the District Attorney's office and Cyrus Vance as he transitioned in. I hope to be able to continue to help the state," said Cherkasky.

When asked why public service is so important Cherkasky stated, "My family and my education played a large role. I give credit to CWRU. The idea to do things to make your community better, I think that is what I learned at home and in school. You have to do well for your family. If you have the ability to couple that with continuing to serve your community and fellow humans, then your work becomes important and enriching."

After spending 16 years as a trial attorney, administrator and investigator in the criminal justice system, Cherkasky joined the private sector and believes his previous experience has helped him in his current role as CEO.

"Attention to detail is something a trial attorney needs to have. We learn in law school that everything, every little detail matters. The ability to find out what matters most is very important in the courtroom, in life, and in business. Being able to speak, presenting thoughts coherently, and being persuasive are all premium as a litigator and trial attorney, and important to becoming a leader," said Cherkasky.

Humble about his accomplishments, Cherkasky explained how the law school's demand for excellence and its competitive nature pulled out the most from students and then asked them to give more.

Said Cherkasky, "I say to people I work with, we will never get beat because someone tries harder. Be as prepared or more prepared than your competition. These competitive aspects are what I learned at the law school."

It is lessons like these that led Cherkasky to give back to the School of Law. "The law school is a terrific institution that is important to Cleveland and to the legal community. Law school had an enormous impact on my life. For me, it's a small way to say thank you," stated Cherkasky.

When he was the School of Law commencement speaker in 2003, he gave ten pieces of advice to graduating students, and said that everyone has a chance to make a difference and should never look at the downside.

"There is so much opportunity and so much you can do with a legal education, it is important to take risks and to be optimistic about what you can achieve," said Cherkasky.

His biggest support and inspiration is his wife, Betsy Ottenberg Cherkasky, who continues to play a large role in his success. They married when she was 19 and he was 20, and both attended CWRU.

"I don't remember life without my wife. We met when she was 11 and I was 12. She followed me to CWRU. She is a great partner and everything that we do, we do together. It is incredible to have someone you so completely trust and who is so completely on your side," stated Cherkasky. ■

Prosecuting

Several months ago, alumnus Michael Lebowitz '03, took a leave of absence from his Washington, D.C. law firm after being selected for a position as Prosecutor with the Office of Military Commissions. His current duties are to directly prosecute high-value terror suspects that are slated to remain in the Military Commissions system. In general terms, these suspects are accused and face potential trial for alleged involvement with the 9/11 and USS Cole conspiracies, among others.

This position requires constant education on the inner workings of the terror organizations, in addition to significant interaction among various government agencies. In this article, Lebowitz shares his experiences as Prosecutor with the Office of Military Commissions.

terrorist suspects

As Prosecutor with the Office of Military Commissions, Michael Lebowitz '03, describes the inspiration for his work and the challenges he faces.

Perhaps my most profound law school memory occurred while watching the Today Show in the cafeteria prior to class. A few classmates and I watched on live television as a second airliner crashed into the World Trade Center. Hours later we experienced previously unfathomable realities such as military fighter jets patrolling the skies over Cleveland. Little did I know that eight years later I would take a leave of absence from my Washington, D.C. law firm to prosecute suspects facing war crimes charges relating to the 9/11, USS Cole and other terrorist conspiracies.

Serving as a prosecutor in the ever-evolving Military Commissions process has provided an opportunity to take a lead role in pursuing and shaping the principles of international justice. The construction of a war crimes case is quite fascinating and requires constant education on the inner workings of the terror organizations, personalities, structure, habits and hierarchy. Overall, these cases are more akin to complex civil litigation combined with nuanced mob prosecutions than typical criminal proceedings.

As such, the Military Commissions process poses some very significant and unprecedented challenges. For example, the circumstances leading to the detention at Guantanamo Bay rarely occurred with prosecution in mind. Officials from the CIA and NSA more than once have rightly justified a blotchy photocopy or sketchy chain of custody for an important document by stating that their "mission is to collect intelligence and is not law enforcement." Throw into the mix the FBI, DOD and State Department, and the Military Commissions process becomes even more intricate. As a prosecutor, it is my job to build a viable case while facing the reality that many detainee admissions and even corroborating statements will be deemed inadmissible. Defense counsel certainly has succeeded in keeping evidence derived from various sources out of the proceedings. So if a document in poor condition becomes crucial to compensate for potentially tainted statements, I have no qualms about facilitating travel domestically and overseas to physically obtain an admissible copy.

The prosecution position is unconventional, which seems in line with the asymmetrical nature of the suspects and crimes. Serving as a prosecutor on some of these "terror cases" has required me to employ a wide array of academic and professional experiences. For example, during my time in Iraq, my small unit was tasked with capturing terror leaders and financiers. This has provided a perspective on the realities of the detainees during the point of capture. Also coming into play are private practice litigation experiences in various fields such as military law, intellectual property, and contract law involving domestic and international issues. Overall, serving as a Military Commissions prosecutor is a culmination of these experiences, along with various international and domestic law-related courses. I am now the second CWRU law school graduate to be selected for this prosecution position (Keith Petty '02 was the first). But the root of this motivation and experience to pursue justice comes from that bright Tuesday morning in front of the television during my second year. ■

ALUMNI CLASS NOTES

1956

Daniel B. Roth recently published "The Great Depression: A Diary" based on the life of his father, Benjamin F. Roth (class of 1918). The book depicts life in Youngstown, Ohio during the Great Depression.

1958

Eugene Stevens joined the Cleveland team as Of Counsel at Buckley King, a leading business and commercial law firm. He focuses exclusively on counseling and representing companies on liquor control and related matters.

1960 MILESTONE REUNION

1961

Myron L. Joseph of the law firm Whyte Hirschboeck Dudek S.C. in Wisconsin, was named to "Best Lawyers in America 2010®" in the field of Bankruptcy & Creditor-Debtor Rights Law.

1966

Leon A. Weiss was named to *Super Lawyers* magazine's "Top 100 Ohio Super Lawyers 2010".

1970

Thomas H. Barnard was named to *Super Lawyers* magazine's "Top 100 Ohio Super Lawyers 2010".

Case Connections

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1971

Robert M. Clyde retired from full-time service with the Ohio Legal Assistance Foundation (OLAF) after 15 years of service as the founder and Executive Director. Clyde will assume a part-time role of Senior Counsel and Director of Government Relations.

1976

Patrick T. Sharkey was selected as a "2009 Texas Super Lawyer" by *Texas Monthly* magazine.

Robert J. Valerian was named to *Super Lawyers* magazine's "Top 100 Ohio Super Lawyers 2010".

1979

Randall C. Oppenheimer became a partner at Damon Morey LLP.

1980

The Honorable Peter M. Sikora received "The Spirit of Independence" award from Easter Seals of Northern Ohio. This award recognizes individuals & corporations whose actions and contributions enable children and adults in Northeast Ohio to overcome challenges posed by physical, mental or emotional disabilities and to achieve maximum independence.

1981

Tom J. Horton was appointed to the American Antitrust Institute's Advisory Board.

Rita A. Maimbourg a partner in the medical and pharmaceutical liability practice group, Tucker Ellis & West, was honored by *Crain's Cleveland Business* in "The 2009 Women of Note Award."

1982

John D. Robinett was named to "Best Lawyers in America 2010®", along with 36 other partners at the firm of Schottenstein Zox & Dunn in Columbus, OH.

SAVE THE DATE

Alumni Weekend

SEPTEMBER 30 – OCTOBER 3, 2010

Visit the 2010 Reunion website at www.law.case.edu/reunion or contact Annie Hetman in the Office of Development and Public Affairs at anniehetman@case.edu or by phone at (216) 368-0549.

1992

James F. Contini II was named to *Super Lawyers* magazine's "Top 100 Ohio Super Lawyers 2010".

Lisa Babish Forbes an attorney with Vorys, Sater, Seymour and Pease LLP, was named to *Super Lawyers* magazine's "2010 Ohio Super Lawyers".

Scott A. Volegmeier received the Texas Access to Justice Foundation's "Cy Pres – Impact on Justice Award" for his work in helping more people get legal aid in El Paso.

Jill Miller Zimon was elected to the Pepper Pike City Council.

1993

Robert R. Simpson was elected Treasurer of the National Bar Association's (NBA) Commercial Law Section at the NBA's Annual Convention in San Diego in August.

Andrew A. Zashin a co-managing partner of Zashin & Rich Co., L.P.A. in Cleveland and Columbus, Ohio, founded The Center for International Child Custody & Relocation (CICCAR) in Israel. CICCAR is the first-of-its-kind nonprofit which equips Israeli parents with tools to assist foreign judges to repatriate Israeli-born children involved in international custody disputes.

1994

Bradley I. Dallet an attorney with Whyte Hirschboeck Dudek in Wisconsin was named to "Best Lawyers in America 2010®."

Howard E. Kass was promoted from Managing Director and Associate Counsel to Vice President, Legal Affairs at US Airways.

1995

Andrew Agati joined Hahn Loeser & Parks LLP as a partner headquartered in the firm's Cleveland office. Mr. Agati will also maintain an office in Albany, New York, from which he will work remotely when not in Cleveland.

ALUMNI CLASS NOTES

1973

James B. Irwin of the law firm of Irwin Fritchie Urquhart & Moore LLC in Louisiana was named to "Best Lawyers in America 2010®" in the field of Personal Injury Litigation and Product Liability Litigation.

James F. Koehler was named a partner in the Cleveland office of Buckley King, a leading business and commercial law firm. He specializes in securities litigation and broker-dealer representation.

The Honorable James M. Petro former Ohio Attorney General, has joined Roetzel & Andress as Senior Counsel in its Columbus, Ohio office.

Miles J. Zaremski a principal at Zaremski Law Group in Chicago, IL, was featured in *Chicago Lawyer* magazine's January 2010 issue for his work in health law. *Chicago Lawyer* is a monthly magazine on major legal issues and trends and is distributed throughout the Chicago and metro legal markets.

1974

Stephen V. Freeze was named to *Super Lawyers* magazine's "Top 100 Ohio Super Lawyers 2010".

Timothy D. Johnson became a partner at the law firm of Cavitch, Familo, Durkin & Frutkin.

Alan M. Petrov stepped down from his nine-year position as Managing Partner of the Cleveland law firm, Gallagher Sharp. He will continue to practice law as a member of the firm's Professional Liability and Insurance practice groups.

Send recent accomplishments for Class Notes to lawalumni@case.edu

CONNECT WITH US

1983

Mark D. Arons was selected for New England and Connecticut Super Lawyers. Mark concentrates on personal injury litigation in Westport, CT.

Irene M. McDougall was elected Partner at the Cleveland office of Tucker Ellis & West. She is a member of the Real Estate group.

1984

Marc B. Merklin was named to *Super Lawyers* magazine's "Top 100 Ohio Super Lawyers 2010".

Anthony J. O'Malley was named to *Super Lawyers* magazine's "Top 100 Ohio Super Lawyers 2010".

William R. Weir was recognized by Chambers USA 2009 as one of Ohio's leading lawyers in the area of Real Estate law. Chambers USA also recognized his firm, Porter, Wright, Morris & Arthur, LLP as having one of the leading Real Estate practices in Ohio.

1985 MILESTONE REUNION

Robert K. Jenner of the Baltimore law firm of Janet, Jenner & Suggs, LLC, was one of several lawyers named as the 2009 Trial Lawyers of the Year by the Maryland Association for Justice.

J. Bret Treier has been announced as one of Ohio's "Top 100 Ohio Super Lawyers 2010".

1986

David J. Tocco was named to *Super Lawyers* magazine's "Top 100 Ohio Super Lawyers 2010".

David H. Wallace was named to *Super Lawyers* magazine's "Top 100 Ohio Super Lawyers 2010".

1987

John F. McCaffrey of the litigation firm, McLaughlin & McCaffrey LLP, became a Fellow of the American College of Trial Lawyers, one of the premier legal associations in America. He was also named to *Super Lawyers* magazine's "Top 100 Ohio Super Lawyers 2010".

T. Anthony Swafford was ranked no. 2 in Labor and Employment, being named in the "2009 Chambers USA: America's Leading Lawyers in Business."

1997

Laurie J. Avery Managing Partner at Reminger Co., LPA, was selected by *Toledo Business Journal* magazine as one of its "20 Under 40" Leadership Award honorees.

1999

Jude B. Streb was elected as a member of Day Ketterer Ltd. in Canton, Ohio.

2000 MILESTONE REUNION

K. Isaac de Vyver was named partner at Reed Smith in their Pittsburgh, PA office.

Bryan J. Farkas from Vorys, Sater, Seymour & Pease LLP, was named a"2010 Ohio Rising Stars" by *Ohio Super Lawyers* magazine.

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ALUMNI CLASS NOTES

Mark J. Skakun was named to *Super Lawyers* magazine's "Top 100 Ohio Super Lawyers 2010".

Neil D. Traubenberg Vice President-Corporate Tax for Sun Microsystems, Inc., in Broomfield, Colorado, was elected President of Tax Executives Institute.

Alan H. Weinberg managing partner of Weltman, Weinberg & Reis Co., L.P.A, was re-elected as Education Chair for the Ohio Creditor's Attorney Association for 2010.

1975

Steven S. Kaufman was ranked as one of America's Leading Business Litigation lawyers by Chambers USA. He was named to "Best Lawyers in America 2010®" in the area of Commercial Litigation, and selected for inclusion as one of the Top 50 Cleveland Area Super Lawyers by *Ohio Super Lawyers* magazine in 2009.

Donald S. Scherzer was named to *Super Lawyers* magazine's "Top 100 Ohio Super Lawyers 2010".

Peter H. Weinberger of Spangenberg Schibley & Liber LLP, whose focus is in Personal Injury and Medical Malpractice, was named to "Best Lawyers in America 2010®". He also made the "Top 100 Ohio Super Lawyers 2010" list in *Super Lawyers* magazine.

Mary K. Whitmer was named President of the Cleveland Bar Association.

Gary J. Zimmer of the law firm of Zimmer & Bunch LLC in Oregon, was named to "Best Lawyers in America 2010®" in the field of Family Law. Zimmer has made the list for 20 years.

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1988

Gretchen A. Farrell was named Senior Vice President, Human Resources and Compliance by Lincoln Electric Holdings, Inc. In her new role, she will continue to lead the human resources function and will add responsibilities for building and expanding Lincoln's global compliance program.

Geralyn M. Presti Senior Vice President, General Counsel and Secretary, Forest City Enterprises, Inc., was named the 2009 recipient of the St. Thomas More Award of the Catholic Lawyers Guild of the Diocese of Cleveland.

Abigail M. Price has accepted a new position as Deputy and National Legal Services Director for Kids in Need Defense (KIND), a nonprofit organization based in Washington, DC.

1989

H. Alan Rothenbuecher partner and coordinator of Schottenstein Zox & Dunn Company's Trade Secrets, Restrictive Covenants and Unfair Competition Practice area, has been named secretary to the board of directors for the Manufacturer's Association of Plastics Processors.

1990

Richard C. Haber was named to *Super Lawyers* magazine's "Top 100 Ohio Super Lawyers 2010".

Suzanne P. Land was named to "Best Lawyers in America 2010®", along with 62 other attorneys at the firm of Greenebaum Doll & McDonald PLLC in Kentucky.

Christian R. Patno was named to *Super Lawyers* magazine's "Top 100 Ohio Super Lawyers 2010".

2000

Carol A. Metz became an attorney in the Cleveland office of Buckley King, a leading business and commercial law firm.

2001

Matthew R. Rechner became a new associate attorney at McDonald Hopkins LLC.

2002

Lt. Cmdr. Richard E. Batson was appointed Executive Officer of the U.S. Coast Guard Maritime Intelligence Fusion Center located at Dam Neck, Virginia

John N. Neal became an attorney in the Cleveland office of Buckley King, a leading business and commercial law firm.

2003

Michael J. Lebowitz was selected to serve as a prosecutor with the Office of Military Commissions to prosecute various high-level terrorism suspects currently being held at Guantanamo Bay, Cuba.

Daniel C. Wolters joined the firm Cavitch Familo & Durkin as an associate.

2004

Chad E. Burton of Leppla Associates in Dayton, was re-appointed to chair the Young Lawyers Section of the OSBA and was appointed to serve as a member of its Council of Delegates. He is also a member of the Dayton Bar Association Board of Trustees, and past chair of its Young Lawyers Division.

2007

Christopher Y. Chan was elected President of the Asian Pacific American Bar Association Educational Fund by its Board of Directors. He is also currently an associate with Finnegan Henderson Farabow Garrett & Dunner in Washington, DC specializing in pharmaceutical and biotech patent law.

Michael J. Cook joined the firm of Dickson Wright as an associate in their Bloomfield Hills, MI office.

ALUMNI CLASS NOTES

2008

Kathleen B. Gibson is working for Addameer, a human rights NGO that does legal aid and advocacy for Palestinian prisoners and detainees.

Gillian G. Lindsay became a new associate attorney in the Cleveland office of the national law firm, Baker & Hostetler LLP.

Will S. Randall, II serves as the Director of Policy of the Canadian Association of Energy and Pipeline Landowners Association.

John C. (Chazz) Weber an attorney with Ulmer & Berne LLP, was appointed to Vice-Chair of the Volunteer Lawyers for the Arts Committee of the Cleveland Metropolitan Bar Association (CMBA).

2009

Nathan DeVries joined the firm Warner Norcross & Judd LLP as one of their newest associates working in Grand Rapids, Michigan.

Julie A. Hein is studying for the Vermont bar exam and doing a clerkship at the Burlington Public Defender's Office in Burlington, VT.

Emily W. Ladky has joined Hahn Loeser & Parks as an associate in their Cleveland office. She will focus her practice in the firm's Creditor's Rights, Reorganization & Bankruptcy Area.

S. Colin G. Petry became a new associate attorney in the Cleveland office of the national law firm, Baker & Hostetler LLP.

Kathleen E. Rudis joined Bingham Hale as an associate in the firm's litigation department in Indiana.

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Stay connected with classmates and colleagues and keep current on programs and news from the law school by joining the School of Law's group on LinkedIn. We have also created a new sub-group for alumni, professionals, and students interested in international law. This sub-group will serve as a focused place to share news, advice, and opportunities in international law.

Ashely L. Sheroian became a new associate attorney in the Columbus office of the national law firm, Baker & Hostetler LLP.

Sara L. Witt became a new associate attorney in the Cleveland office of the national law firm, Baker & Hostetler LLP.

LL.M. in United States & Global Legal Studies

2003

Dr. Sultan Almasoud received his Ph.D. from the University of Hull, United Kingdom in July 2009. His doctorate thesis was on regulation of electronic commerce. Sultan now works on an e-Government project under Ministry of Information and Technology in Riyadh, Saudi Arabia. He also works with Norton Rose law firm and teaches a course in the law department of Prince Sultan University.

2005

Tao Huang has a new position as Chief Counsel for ADP China (Automatic Data Processing) in Shanghai.

2007

Siranush Iskandaryan has a new position as Expert Staff for the European Union Advisory Group in Armenia.

2008

Khamjohn Juthathipayakul works as Legal Officer for the Hemaraj Land and Development Public Company Limited in Bangkok, Thailand.

Naoto Noishiki is a professor at Osaka-Gakuin University where he teaches tax law.

2009

Harsh Chandola has joined the law firm of Lall & Sethi Advocates, a boutique IP firm in New Delhi.

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Cuyahoga County Court of Common Pleas

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Moscarino & Treu, LLP

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Tucker, Ellis & West, LLP

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U.S. Attorney's Office

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Howrey LLP

Suzanne Kleinsmith Saganich '86
Partner
Roetzel & Andress

Renee L. Snow '97
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Illinois Attorney General's Office

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Cuyahoga County Court of Common Pleas

Amy Cheatham Tye '96
Staff Attorney
Eighth District Court of Appeals

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*Executive Committee Members

Become Involved

The Career Services Office thanks all alumni who have participated in career-related workshops and programs during the past academic year. By assisting with events such as Practice Area Panel Discussions, Brown Bag Lunches, Networking Receptions, and Mock Interview Saturday, alumni provide students with valuable advice and assistance in making career development decisions.

We welcome participation from all alumni, whether local or national. The CSO meets with alumni to obtain information and advice for students as they conduct their job searches and can arrange a visit to your office. If you are interested in meeting with the CSO in your city please contact the Career Services Office at lawrecruiting@case.edu or (216) 368-6353.

JOIN OUR FALL INTERVIEW PROGRAM FOR 2010!

There are many ways to recruit our law students, including our off campus interview programs in Chicago, Washington, D.C., Boston, Los Angeles, and New York. We invite employers to interview or collect resumes from our students. For more information or to register, please contact the CSO at lawrecruiting@case.edu.

Professor Henry T. King, Jr. believed that an "individual can accomplish the most good for society through the building of institutions."

In honor of this tireless champion of international justice and the special Canada-United States relationship, CWRU School of Law has established the Henry T. King, Jr. International Law Studies Honorary Fund. This fund will support Canada-U.S., international law, and scholarship programs. Visit giving.case.edu

In Memoriam

In Memoriam includes names of deceased alumni forwarded to Case Western Reserve University School of Law in recent months.

Mr. Robert R. Augsburger '50
Mr. Vincent K. De Melto '71
Mr. Robert A. Decatur '51
Hon. Michael A. Di Santo '66
Mr. Robert N. Dineen '62
Ms. Catherine M. Durkin '48
Mr. Robert V. Fullerton '41
Mr. Bernard S. Goldfarb '40
Mr. William B. Goldfarb '56
Mr. Mark Gene Greable '07
Hon. C. Kenneth Henry '51
Mr. Philip Jay Hermann '42
Mr. Richard K. Jacob '70
Mr. Raymond R. Kail '48
Mr. Edward C. Kaminski '59
Mr. Alvin M. Kendis '42
Ms. Mary Bone Kunze '49
Mr. Mark A. Losey '94
Mr. Gordon B. Loux '56
Ms. Paige A. Martin '78
Ms. Corinne Katz Moore '91
Mr. Raymond Sylvan Morris '40
Mr. Marvin Neben '48
Ms. Stephanie E. Pardo '81
Mr. Donald A. Powell '65
Mr. Arthur M. Schwartz '61
Mr. Robert Hart Stotter '73
Mrs. Charlotte M. V. Van Stolk '66
Mr. George J. Vanek '46
Mr. Charles A. Vanik, Jr. '36
Mr. Ivan H. Wolpaw '60
Mr. Sheldon Mike Young '62

Forty-Seventh Annual Meeting of the Society of Benchers

On Friday, September 11, 2009, the Case Western Reserve University School of Law inducted new members into the esteemed Society of Benchers. Established in 1962, membership into the Society of Benchers is based on an individual's extraordinary dedication to community welfare and enduring commitment to the highest principles of the legal profession. Each member of the society is expected to provide assistance, counsel, and leadership to the Dean, the President of the University, and the Law Alumni Association. The society also admits distinguished members of the Case Western Reserve University law faculty and encourages, in a limited number, the inclusion of attorneys and judges who are not graduates of the school.

Inductees: (pictured left to right)

Steven M. Dettelbach
Charles B. Zellmer, Class of 1972
Robert H. Rawson, Jr.
Sheldon I. Berns, Class of 1960
Lt. Governor Lee I. Fisher, Class of 1976
Suzanne Kleinsmith Saganich, Class of 1986
Stephen J. Knerly, Jr., Class of 1976
Jack T. Diamond, Class of 1983
Michael J. Benza, Class of 1992
Erik M. Jensen
Mary K. Whitmer, Class of 1975

The 2009 Annual Alumni & Faculty Luncheon Highlights

From left to right: Professor Raymond Ku, Melanie Shakarian, Robert Storey and Interim Dean Robert H. Rawson, Jr.

Held Friday, November 20th at the Silver Grille in downtown Cleveland, Interim Dean Robert H. Rawson, Jr. hosted over 320 attendees for an outstanding program that featured Catherine M. Kilbane '87, Senior Vice President, General Counsel and Secretary for American Greetings Corp., as the alumni speaker. Emceed by Professor Lewis Katz, Alumni Association awards were distributed to Melanie A. Shakarian '03 (Distinguished Recent Graduate), Professor Raymond Ku (Distinguished Teacher) and Robert D. Storey (Centennial Medal). Law Firm Giving Challenge Awards were also presented. New Law Alumni Association Board (LAAB) members were confirmed, along with new officers of the Executive Committee.

Barristers Golden Circle Dinner

FRIDAY, OCTOBER 23, 2009

From left to right: Mary L. Fuerst, Gerald E. Fuerst, Tanny Cosiano, Ralph V. Cosiano, Nancy Friedman, Harold E. Friedman

The Barristers Golden Circle is a long-standing tradition at the law school, which honors and recognizes those men and women who have been graduates of the School of Law for fifty years or more.

Mark Your Calendar

SCHOOL OF LAW'S RECEPTION AT THE OSBA ANNUAL CONVENTION
Dayton,OH
May 6, 2010

BARRISTERS GOLDEN CIRCLE BRUNCH
June 19, 2010

"LAWFARE!"
Friday, September 10, 2010
War Crimes Research Symposium presented by the Frederick K. Cox International Law Center. Daylong event, webcast live, CLE credit will be available, pending approval, to lawyers who attend

SOCIETY OF BENCHERS ANNUAL DINNER
September 11, 2010

ALUMNI WEEKEND
September 30 – October 3, 2010

ALUMNI & FACULTY LUNCHEON
November 12, 2010

SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

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Cleveland, Ohio 44106

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THE MISSION OF CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW

The Case Western Reserve University School of Law seeks to achieve and be recognized for excellence in preparing leaders in the practice of law, public and community service, and commerce; providing enlightenment to the profession and the global legal community; and fostering an accessible, fair, and reliable system of justice.