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Notre Dame Law School

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LAWYER



Fall 2008

Living a Vocation:
Why *Notre Dame*
Law School Matters

 UNIVERSITY OF
NOTRE DAME
The Law School

EDITOR'S NOTE



Write Us

We want to hear from you. Send us your letters and e-mails pertaining to material printed in the magazine. The editor reserves the right to determine the suitability of letters for publication and to edit them for accuracy and length.

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Dear Reader,

Notre Dame in the fall is a beautiful place.

There's the gorgeous foliage, the crisp air, and the excitement of a new football season.

There's the bustle of students getting back to class and the fun of reconnecting with friends separated over the summer.

As always, there is the peal of the Basilica church bell offering an audible reminder that we are living and working in a place steeped in faith and tradition, and the roar of the omnipresent construction machines reminding us that we are, at the same time, part of something modern and progressive.

You just know you are somewhere special when you set foot on campus.

Those already associated with Notre Dame understand that well. The 1Ls just dipping their toes in the water will very quickly learn what makes Notre Dame a different kind of Law School.

Perhaps that's the best part about this season—it's an opportunity to welcome a new group of future lawyers into the fold, expanding the Notre Dame Law School family even further. It's an opportunity to educate women and men in a way that only Notre Dame can: by teaching students to think critically and act compassionately through the integration of faith and reason.

At the same time, many alums return to campus to participate in meetings of the Notre Dame Law Association and the Law Advisory Council. Others drop by the Law School after football games to reconnect with one another and to say "hello" to a former professor. Notre Dame Law School is a place to which alums want to return and with which they want to remain connected.

Yes, Notre Dame in the fall is a beautiful place. I hope to see you here.

Regards,

A handwritten signature in dark ink that reads "Melanie McDonald". The script is fluid and cursive.

Melanie McDonald

NOTRE DAME LAWYER

SPRING 2008



UNIVERSITY OF
NOTRE DAME
The Law School

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FROM THE DEAN



This fall our students returned to find campus awash in autumn colors and our magnificent new building near completion. No longer merely an architect's rendering, it stands as the gateway to the University's academic quadrangles and makes a signal statement about the Law School's continuing commitment to be premier within the legal academy while remaining faithful to our religious identity. We will move into Eck Hall of Law in January. We then will begin renovation of our existing building, which we are proud to rename Biolchini Hall of Law in recognition of the wonderful \$15 million gift of University trustee, Robert Biolchini, and his wife, Frances.

Our new and renovated buildings will provide an outstanding platform for the remarkable teaching, research, and service that goes on within our community. It is the people who populate our buildings, however—our faculty and students—who tell our story.

With that thought in mind, this issue of our magazine focuses on our five most recently promoted faculty members: Amy Barrett, Anthony J. Bellia, Jr., Patricia Bellia, Nicole Garnett, and Richard Garnett. These outstanding teachers and prolific scholars bring an intellectual vitality to their work that only the best law schools can attract and, perhaps more importantly, retain.

These young faculty members are committed to conducting their teaching and research at Notre Dame Law School because they are committed to our unique mission: to be Catholic, with a wide spectrum of philosophical viewpoints that eschews a narrow parochialism, and to be a great law school. You will read the reasons they chose to come and why they choose to stay at this special place. You will read about the emphasis placed on both scholarship and teaching, and the way in which the two reciprocally inform and improve each other. You will read about the importance of offering a legal education within a community of faith, a community that sees itself as called to harness our gifts to build the kingdom of God. You will read about the value placed on leading an integrated life.



Great faculty attract great students. Thus, with deep gratitude, we close this issue with the story of how Frank Eck found yet one more way to challenge the Law School even as he left us last December. Beyond the \$21 million gift to underwrite Eck Hall of Law, Mr. Eck left a \$5 million incentive match in his estate to raise new endowed fellowship dollars to fill the corridors of the building that bears his name with some of the very best students in the country.

These are exciting times at the Law School. We begin this new academic year with hearts filled with thanks—thanks to all those who have gone before us and thanks to all of you—for bringing us to this moment, and for supporting our quest to be a premier law school rooted in the Catholic intellectual tradition.

A handwritten signature in black ink that reads "Patricia A. O'Hara". The signature is fluid and cursive, with a large initial 'P'.

Patricia A. O'Hara
The Joseph A. Matson Dean and Professor of Law

Hispanic Law Students Association Bestows Award

BY NATALIE ESCUDERO '09

Each year, Notre Dame Law School's Hispanic Law Students Association (HLSA) bestows an award upon a Hispanic lawyer or judge who best exemplifies Graciela Olivarez's commitment to community service and high ethical and moral standards. This prestigious award is named for Olivarez, the first woman and the first Hispanic student to graduate from Notre Dame Law School (in 1970).



Judge Cecilia M. Altonaga

the same passion and zeal as she once did. Olivarez broke down barriers that existed for both women and minorities—not only at Notre Dame, but nationally—and the annual Graciela Olivarez Award seeks to recognize individuals who continue that effort.

On April 19, 2008, HLSA celebrated the Thirteenth Annual Graciela Olivarez Award Ceremony by honoring Judge Cecilia M. Altonaga. Altonaga was the first Cuban-American woman appointed as a federal judge to the U.S. District Court Southern District of Florida after she was nominated by President George W. Bush in 2003. Prior to that time, she served as a circuit judge in the juvenile and criminal divisions, and has handled appeals from the County Court. As a county judge,

To her colleagues and friends in the Notre Dame community, Olivarez was known as “Amazing Grace,” a fitting epithet for a woman who was a champion of civil rights and a beacon of justice—nothing short of extraordinary.

Through this annual award, Notre Dame Law School and HLSA commemorate Olivarez's legacy and great contributions by honoring those who strive for justice with

she served in the civil, criminal, and domestic violence divisions. Altonaga is a member of the Florida International University Law School Advisory Board and the Eleventh Judicial Circuit Professionalism Committee. She has also served as a member of the National Advisory Committee for Cultural Considerations in Domestic Violence Cases and the First Family Law American Inns of Court. Altonaga's legal experiences have demonstrated a commitment to service and justice. She connects with the Hispanic community, and she encourages young Hispanic lawyers and law students to do the same.

Members of HLSA as well as faculty and staff from Notre Dame Law School and the Institute for Latino Studies gathered to honor Altonaga. The attendees also had the privilege of listening to the remarks of two renowned law faculty, Professor Emeritus Thomas L. Shaffer and Professor Robert E. Rodes, Jr., who personally knew Olivarez, and who shared their fond memories of her as a student and “a different kind of lawyer.”

Altonaga's remarks upon her receipt of the award focused on what the term “Hispanic” means and what it means to be identified as a Hispanic. She noted, “[w]hen we gather to recognize someone as extraordinary as Olivarez, what we should be celebrating as Hispanics is the freedom to each have our own definitions of Hispanic, and our own views on the need or desirability of celebrating the life of a great Hispanic woman. To celebrate the life of a Hispanic woman like Olivarez, you law students and aspiring lawyers should take the time to learn to speak the language well, for otherwise, of what value is it if you cannot be that bridge between Spanish-speaking clients and our Anglo-legal system? Just to be another statistic . . . ?”

The purpose of HLSA is to foster an environment supportive of mutual understanding and fellowship within the University of Notre Dame and the Law School community, and to promote awareness of the achievements and concerns of the Hispanic community. HLSA is also a forum for expression and support for the student body. Together, as an organization and through the Graciela Olivarez Award, we remember what it means to be a Hispanic and how we can forge ahead in the quest for justice.



Natalie Escudero

Summer Stipend Program Supports Public Service

BY SUSIE WINE '10

The Summer Stipend Program is a comprehensive, collaborative program through which alumni, students, legal employers, and various friends provide stipends for NDLS students performing otherwise unpaid legal public interest work around the world. Susie Wine, who began her 2L year in August, describes her summer 2008 experience.

On December 27 of last year, it was a chilly 28 degrees in my hometown of Columbia, Mo. In America's Finest City, however, it was a balmy 59 degrees. During my long-distance interview with San Diego Volunteer Lawyer Program (SDVLP) Managing Attorney Dawn Davis, I could almost smell the sunblock and avocados through the phone line. The amazing description of SDVLP's work that Dawn provided made me very excited to receive one of three summer stipend fellowships provided by the Notre Dame Alumni Club of San Diego and Ross, Dixon & Bell . . . and the enticing, albeit imaginary, aromas of summer in December didn't hurt, either. On May 19, fellow 1L Andrew Smith and I began work at SDVLP.

SDVLP has been in existence since 1983. With a mission of providing free legal services to those who can't afford them, the nonprofit firm reaches a group of San Diegans that tourists rarely see—not those who are seeking handouts on C Street, but those who are living independently on a very meager income, those who are in a rehabilitation facility, and those who are struggling to keep a family together. I worked on the team addressing the unique needs of those members of the San Diego community living with HIV or AIDS. At any one time, our team had over 200 files open—mostly in the areas of estate planning, landlord/tenant relations, and medical benefits. Two SDVLP employees supervise this department—Staff Attorney Cynthia Han and Legal Assistant Evelyn Torres—but well over half of the hours of work spent on these cases is done by volunteers, either in the office or at a clinic.



Susie Wine

By far my favorite part of the work we did was interviewing clients at the Monday night clinic in Hillcrest, which is one of six clinics run by our team throughout the area. This clinic is staffed almost entirely by volunteers: Attorneys, paralegals, notaries, and law students who met with clients in the Sunday school rooms of a church. The setting (teensy chairs, pictures of Bible All-Stars like Noah and Moses) must be very different from the conference rooms at a firm, but the same volunteers come back time after time because they know that they are truly helping someone. Throughout the rest of the week, the other interns and I worked on following up with these clients by doing research, writing letters, making phone calls, and writing more letters. I felt well-prepared for the research and writing aspects of the job (Thank you, Professors Bowers and Edmonds!), and some of the issues presented by the clients were familiar ones from class (The Implied Warranty of Habitability! Misrepresentation!). However, a vast majority of the difficulties presented by clients were totally unfamiliar to me. The clients didn't care if I got an A in Contracts—which I didn't—or if I could successfully

identify a fee simple subject to an executory limitation—which I can. The client cared about getting her disability benefits reinstated or making sure his landlord doesn't go through his belongings.

Working with SDVLP and learning about the other free legal services provided by the Legal Aid Society of San Diego, the Bar Association, and others have made me proud to be a small part of the legal community here in San Diego. Now, as I begin my second year of law school at Notre Dame, I carry with me a wider perspective on the things I learn in class, as well as an undying appreciation for enchiladas verdes.



Notre Dame Law School alumnus Jock Smith delivers the keynote address at the Black Law Students Association anniversary dinner.



Members and guests of the Black Law Students Association mingle before dinner in the Notre Dame Stadium Press Box.

Black Law Students Association's 35th Anniversary

Notre Dame Law School's African American students have been organized as a chapter of the National Black Law Students Association (BLSA) for 35 years. To celebrate this milestone, BLSA hosted events for BLSA members and friends throughout the weekend of April 4–6. The anniversary theme was "The Power to Change," a theme evident throughout the weekend in events ranging from a reception at Judge Roland and Dean Angie Chamblee's home to informational lectures and the annual banquet—held in the Notre Dame Stadium Press Box—which featured keynote speaker and Notre Dame alumnus Jock Smith. Smith is an original founder of The Cochran Firm, named for and founded by the late, famed attorney Johnnie L. Cochran, Jr. Smith upholds Cochran's legacy as the firm's national president.

As an organization, BLSA strives to "articulate and promote the professional needs and goals of black American law students; to foster and encourage professional competence; to focus upon the relationship of the black attorney to the American legal structure; and to instill in the black attorney and law student a greater awareness of and commitment to the needs of the black community."

Hispanic Law Students Association Confers Graciela Olivarez Award

On Saturday, April 19, the Hispanic Law Students Association (HLSA) presented the 13th annual Graciela Olivarez Award to United States District Judge Cecilia M. Altonaga of the Southern District of Florida. Altonaga, a Yale Law School graduate, is the first Cuban-American woman to be appointed as a federal judge in the United States. The Graciela Olivarez Award is given in honor of the award's namesake, the first woman and first Hispanic to graduate from Notre Dame Law School. For more on HLSA and this award, please read "Dateline NDLS" by Natalie Escudero on page 4.

NDLS Tailgater This Fall

The Notre Dame Law Association and NDLS Office of External Relations invite all Notre Dame Lawyers to a tailgate party before the Stanford game on Saturday, Oct. 4. Please mark your calendars! Details are forthcoming.

NBC to Feature Prof. Gurulé in Halftime Spot

Professor Jimmy Gurulé will appear in a two-minute spot on NBC this fall during halftime of a Notre Dame football game. The tentative air date is Sept. 27. Gurulé's is one of five spots scheduled over the course of the season that spotlight various Notre Dame faculty. Gurulé is an internationally known expert in the field of international criminal law—specifically, terrorism, terrorist financing, and anti-money laundering.



Jimmy Gurulé as he will appear on NBC television this fall.

International Conference Honors Prof. Kommers

The Law School and various other units of the University of Notre Dame are sponsoring an international conference in recognition and celebration of NDLS Professor Donald Kommers' scholarly contributions to the University. Kommers also teaches political science, and closed out the past school year by moving to emeritus status after 45 years on the faculty. The conference is titled Church-State Relations and Religious Liberty: Comparative Perspectives, and will be held Sept. 22–23.

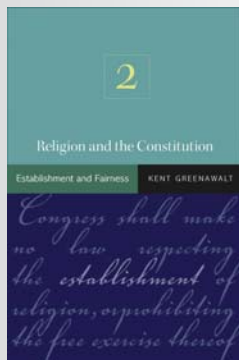
From left to right:
Judge Kazuhisa Kondo, Prof. J. Eric Smithburn, and Yuka Kondo



Prof. Emeritus Donald Kommers

Prof. Richard Garnett to Host Academic Conference

On October 10, 2008, Professor Richard Garnett will host a conference on Kent Greenawalt's recently published *Religion and the Constitution: Volume 2: Establishment and Fairness* (Princeton University Press). Law and religion scholars from across the country will convene at NDLS to discuss the



book, which focuses on the Establishment Clause of the First Amendment to the federal Constitution. Greenawalt, a professor at Columbia Law School, will participate in the conference.

Japanese Judge, Lawyer Visit NDLS

The Honorable Kazuhisa Kondo, judge of the Tokyo District Court, and his wife Yuka Kondo, an attorney, were guests of the Law School during the 2007–08 school year. The Kondos enrolled in two of Professor J. Eric Smithburn's courses, and he arranged several visits for them in the local courts.

CCHR Celebrates 35th Anniversary

This year, the Center for Civil and Human Rights celebrates 35 years at Notre Dame Law School. It is the oldest human rights center associated with an American law school, and now has an alumni network of more than 275 lawyers in more than 75 countries. The Center was founded in 1973 by the Reverend Theodore M. Hesburgh, C.S.C., then-president of Notre Dame and a member of the U.S. Commission on Civil Rights from its inception during the Eisenhower Administration until 1973. Father Ted was able to launch the Center, with a grant from the Ford Foundation, as an institute for advanced research and teaching. While never losing sight of its initial civil rights focus, the Center was inspired by Father Ted's global vision to expand its work to include international human rights.

Symposium Featured Hesburgh and Former Apartheid Prisoner

Notre Dame Law School's *Journal of Legislation* presented "Tilted Scales: Pursuing Justice Amidst Unjust Legislation" on Thursday, April 17 in the Law School Courtroom. The symposium featured Rev. Theodore Hesburgh, C.S.C., former President of Notre Dame and charter member of the U.S. Commission on Civil Rights; Thulani Mabaso, former prisoner in apartheid South Africa; Bridgette Carr, associate clinical professor of law at Notre Dame; and Paolo Carozza, associate professor of law at Notre Dame and chairman of the Inter-American Commission on Human Rights.

Following opening remarks from moderator Carozza, Father Hesburgh delivered an address and participated in a Q&A session. Mabaso addressed the audience with his story about 16 years of imprisonment and torture by South Africa's apartheid government. "We need to make sure that what happened to us never happens to future generations," said Mabaso.

LIVING A VOCATION

Why Notre Dame Law School Matters

On the pages that follow, Notre Dame Law School's five newly promoted faculty members offer their reflections on why they choose to teach and pursue scholarship at Notre Dame. Each has also selected an excerpt from published research, offering a glimpse into the minds of those shaping modern legal debates and educating the next generation of "a different kind of lawyer."

EDITOR'S NOTE: Learn more about these and other outstanding NDLS faculty under the "Faculty/Staff Index and Profiles" tab on the Law School's website, law.nd.edu.



Amy Barrett

*promoted to associate professor
with tenure*

Reflection Bishop Rino Fisichella, the rector of Pontifical Lateran University, has said that the mission of Catholic universities is to help students “discover their lives as a vocation and [give them] the necessary tools to approach their professional careers in the most coherent way, to fulfill society’s needs wherever their professions lead them. Therefore, that which our universities are asked to fulfill is the intelligent synthesis between study and life, the search for the truth and its existential experience. No discipline that exists within our walls lies outside this responsibility.”

Certainly, the discipline of law does not lie outside this responsibility. I joined the faculty of Notre Dame Law School because it takes this responsibility seriously. We equip our students with the tools they need to practice law at the highest levels. At the same time, we emphasize that this profession is not an end in itself, but rather an instrument to be used for building the kingdom of God. We do this in quite practical ways. Our mission is evident in the curriculum, which offers courses such as Catholic Social Thought and Canon Law alongside courses such as Constitutional Law and Contracts. Our mission is evident in the classroom, where both students and faculty feel free to ask how religious beliefs might bear on matters of law. Our mission is also evident in the community of faith that the faculty works to establish. One of my colleagues leads daily Morning Prayer for interested students. Another, a priest, offers



weekly Mass and counsels countless students on all manner of subjects. Our faculty meetings, like many of our classes, begin with prayer, making manifest our commitment to the integration of faith and reason.

In short, the Notre Dame faculty seeks to do more than train its students in a profession. It seeks, as Bishop Fisichella puts it, to help students “discover their lives as a vocation.” And that is an effort in which I am proud to take part.

AMY BARRETT

Scholarship: PROCEDURAL COMMON LAW

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Footnotes omitted

There has been no shortage of efforts to justify the common lawmaking powers of the federal courts. In the course of these efforts, it is commonplace to underscore three features of the common law that federal courts develop without congressional authorization. First, this law “is truly federal law in the sense that it is controlling in . . . actions in state courts as well as in federal courts.” Second, to the extent that the federal courts proceed without congressional authorization, federal common law is “specialized.” It is confined, at least as a matter of doctrine, to several well-recognized enclaves, such as interstate disputes, international relations, admiralty, and proprietary transactions of the United States. Third, Congress can always abrogate it.

Despite the consistent emphasis on these characteristics of federal common law, a large body of federal common law exists that does not embody them. This body of law can be characterized as “procedural common law”—common law that is concerned primarily with the regulation of internal court processes rather than substantive rights and obligations. With few exceptions, this body of law falls outside of the traditional definitions of federal common law. Procedural common law does not generally bind state courts. Though developed without congressional authorization, it falls outside of the traditionally recognized enclaves of federal common law, and Congress’s ability to abrogate it is often called into question. While the sources of and limits upon federal court power to develop substantive common law have received serious and sustained scholarly attention, the sources of and limits upon federal court power to develop procedural common law have been almost entirely overlooked.

This article analyzes whether the Constitution grants federal courts the authority to develop a common law of procedure. It first develops a theory that tracks the conventional justification for federal common law to include procedure. Federal

procedure, like the traditional enclaves addressed by substantive federal common law, is a matter that the constitutional structure places beyond the authority of the states. Both the Inferior Tribunals Clause and the Sweeping Clause grant Congress the authority to regulate the procedure of the federal courts. If Congress fails to exercise its authority over procedure, the federal courts can regulate procedure in common law fashion. They can only do so, however, until Congress steps in. If Congress chooses to legislate, conflicting federal procedural common law must give way to federal statute.

This explanation has force, but it tells only part of the story. In treating the procedural common lawmaking authority of the federal courts as derivative of and subservient to that of Congress, it fails to account for the fact that power might be distributed differently between the courts and Congress on matters of procedure than on matters of substance. In particular, it fails to account for the possibility that the federal courts’ authority over procedure might sometimes, even if rarely, exceed that of Congress.

Another theory would account for that possibility: the proposition that Article III itself empowers federal courts to adopt procedural rules in the course of adjudication. Article III’s references to “courts” and “judicial power” have long been understood to carry with them certain powers incident to all courts. Authority to regulate procedure, at least in the form of judicial decisions rather than prospective court rules, is assumed to be one of those powers. If federal courts indeed possess inherent authority over procedure, that authority presumably empowers them to adopt procedural measures in common law fashion. This power is not exclusive; on the contrary, Congress has wide authority to regulate it. Nonetheless, there is likely some small core of inherent procedural authority that Congress cannot reach.

This explanation captures the widely felt intuition that federal courts possess some power over procedure in their own right. Inherent procedural authority, however, is limited. As I have argued in prior work, any procedural authority conferred by Article III is entirely local. In other words, Article III empowers a court to regulate its own proceedings, but it does not empower a reviewing court to supervise the proceedings of a lower court by prescribing procedures that the lower court must follow. Instead, Article III vests “the judicial Power” in *each* Article III court. As a result, inherent procedural authority does not enable the development of procedural doctrines that are uniform across jurisdictions.

Standing alone, then, neither the traditional explanation for federal common law nor the argument from inherent authority fully explains the procedural common lawmaking powers of the federal courts. Taken together, however, they provide a fairly complete explanation for what federal courts actually do and have done since 1789. The inherent procedural authority of courts supplements the common lawmaking authority that they can otherwise claim over procedure. The straightforward analogy to the substantive common lawmaking power of federal courts is right, so far as it goes. In the area of federal judicial procedure, as in the substantive areas of constitutional preemption, federal courts can develop uniform federal rules when Congress fails to do so. This procedural common law differs from substantive common law only in that it (like the old federal general common law) does not bind state courts. Federal court power over procedure, however, does not end there. In addition to this common law power to adopt uniform federal rules, each federal court possesses inherent authority to regulate its own proceedings. The resulting body of law is a mix of uniform doctrines largely drawn from general law (much like the law of admiralty or interstate relations) and narrower rules and discretionary measures associated with the inherent authority of individual courts.

These dual strands of judicially crafted procedural regulation are evident in both early and modern cases. In the eighteenth and nineteenth centuries, uniform procedural doctrines were drawn from the general law, which courts understood themselves to apply rather than make. When there were matters that neither the enacted law nor general law governed, courts relied on inherent procedural authority to regulate the proceedings before them. Cases from the twentieth and twenty-first centuries contain the same two threads. The uniform procedural doctrines applied by modern courts are the descendants of the procedural doctrines of the old general common law. Preclusion and abstention, both of which have long historical roots, are good examples. These doctrines resemble the old general procedural common law in both their content—which has, in the main, stayed constant over time—and their development—which now, as then, is mediated by tradition and consensus. Even though modern, positivist federal courts understand themselves to make these doctrines, innovations in them (for example, the abandonment of preclusion’s mutuality requirement) are not usually abrupt departures from traditional principles. Rather, they are usually responses to emergent consensus about the need for change. And when neither tradition, emergent consensus, nor the enacted law governs a particular procedural matter—in other words, when the content of the rule is entirely in the discretion of the adopting court—modern federal courts, like their predecessors, typically treat any action they take as an exercise of inherent procedural authority. Such rules tend to address narrow, isolated topics. For example, the early Supreme Court relied upon its inherent procedural authority to adopt a rule setting forth the procedure for serving process; more recently, the Supreme Court acknowledged the authority of a federal court to adopt a rule governing the time in which a case must be brought.



Anthony J. Bellia, Jr.

promoted to full professor

Reflection Notre Dame Law School occupies a special place in American legal education. It is a preeminent research and teaching institution, uniquely enabled by its Catholic roots to enhance the richness of legal learning and the fullness of legal knowledge.

The Law School physically stands at the center of the University of Notre Dame—a prominent reminder of the central place that law occupies among academic disciplines. The discipline of law stands as an interface between, on the one hand, the demands of reason and the presence of faith, and, on the other, the problems of human persons that warrant authoritative solutions. Our faculty, like any preeminent faculty, comprises a range of scholars—from those with one foot in the Law School and one foot in other academic departments, to those with one foot in the Law School and one foot in the courtroom. Current research involves the legal challenges posed by new information technologies, the potential of law to alleviate problems of urban land use and wealth disparity, the place of international law in the American federal system, the role of religious freedom in a pluralistic society, and the relationship between positive and natural law—to name just some. Through research and classroom instruction, our faculty systematically engages our students in questions of legal method and normative justification. The study of law at Notre Dame implicates the best learning of all academic disciplines—and contributes to it—ever enriching the discipline of law itself. Each year, our faculty bears great fruit in student minds and on academic pages.

In student minds and on academic pages are words that warrant special emphasis: At Notre Dame Law School, teaching and research are complementary, not players in a zero-sum game. The strength of the research program feeds the strength of classroom learning. The strength of classroom learning feeds the strength of the research program. Our faculty's unwavering commitment to teaching excellence continues to attract exceptional students to Notre Dame, indeed some of our nation's (and world's) most exceptional. Incoming students find classmates gifted in intellect and steeped in integrity and sound judgment. The student body of the Law School is a valuable treasure and great hope for the legal profession.

Notre Dame Law School has long provided one of the most rigorous legal educations in the nation—in the most supportive and spirited community that exists in higher education. Our students leave Notre Dame as persons truly learned in law, yet schooled in the practical demands of a practical profession. They are well positioned to practice law with great competence and deep integrity. They take real pride in this institution, and we aspire that they always will. The Law School will continue to strive to integrate the demands of reason with the presence of faith, the realities of practice with the ideals of truth, and the rigors of learning with the blessings of friendship. The Law School has never been content to rest upon the successes of the past, nor is it content to do so now. Today, as it prepares to move into a world-class facility, grow its faculty, and welcome classes as strong as ever, the Notre Dame Law School is well positioned to continue setting the highest standards for integrated legal education for decades to come.

ANTHONY J. BELLIA, JR.

Scholarship: THE ORIGINS OF ARTICLE III “ARISING UNDER” JURISDICTION

Excerpted, with permission, from 57 DUKE LAW JOURNAL 263 (2007)

Footnotes omitted

Article III of the Constitution provides that the “judicial Power” of the United States extends to all cases “arising under” the Constitution, laws, and treaties of the United States. Courts have long regarded Article III not as providing the judicial power that each federal court *must* have, but rather as specifying a limit on the jurisdiction that Congress *may* give. Since 1875, Congress has given federal courts original jurisdiction of cases “arising under” federal law. Courts have long interpreted the federal statute conferring “arising under” jurisdiction upon federal district courts to require that a federal question be part of the plaintiff’s “well-pleaded complaint,” not a question anticipated or raised as a defense. In several cases, the Supreme Court has attempted to explain the nature of a federal question that must be part of the well-pleaded complaint for a federal district court to have statutory “arising under” jurisdiction. The Court has provided less clarification of what it means for a case to “arise under” federal law for purposes of Article III. The Court has explained that “arising under” in Article III encompasses more cases than “arising under” in the congressional grant of jurisdiction. It has declined, however, in several cases, to provide any more fulsome explanation of Article III “arising under” jurisdiction than that. The scope of Article III “arising under” jurisdiction has long confounded judges and scholars alike.

In 1824, in *Osborn v. United States*, the Supreme Court held in an opinion by Chief Justice John Marshall that a case arises under federal law for purposes of Article III if federal law “forms an ingredient of the original cause.” Some judges and scholars have read *Osborn* to mean that “Congress may confer on the federal courts jurisdiction over any case or controversy that *might* call for the application of federal law.” Others have questioned this reading, arguing that it has no meaningful limits, or that it simply miscomprehends *Osborn*.

In the 1980s, the Supreme Court expressly refrained on two occasions from defining the breadth of Article III “arising under” jurisdiction. In 1983, in *Verlinden B.V. v. Central Bank of Nigeria*, the Court had to resolve whether actions against foreign states are cases “arising under” federal law for purposes of Article III. Rather than “decide the precise boundaries of Article III jurisdiction,” the Court resolved that such actions arise under federal law because a court necessarily must determine in each one the federal question of whether the foreign

state has immunity. Six years later, in *Mesa v. California*, the Court confronted the question of whether Congress may give federal courts removal jurisdiction over claims brought against federal officers for actions taken within the course of performance of official duties as cases “arising under” federal law for Article III purposes. Noting the “grave constitutional problems” and “serious constitutional doubt” surrounding the meaning of Article III “arising under” jurisdiction, the Court interpreted the federal officer removal statute to authorize removal only when a defendant federal officer raises an actual federal defense. By invoking the canon of constitutional avoidance, the Court refrained from attempting to define the scope of Article III “arising under” jurisdiction.

Neither courts nor scholars have comprehensively examined the origins of Article III “arising under” jurisdiction. This article undertakes such an examination. The Supreme Court has been mindful of historical understandings in determining the scope of Article III judicial power. Accordingly, the analysis that this article presents is of both historical interest and doctrinal relevance. Even if one does not deem historical practice to be determinative of or relevant to the meaning courts should ascribe to Article III “arising under” jurisdiction, historical practice holds insights into what functions such jurisdiction may effectively serve.

This article argues that early federal courts, invoking principles of English law, limited their function under the Arising Under Clause to enforcing the supremacy of actual federal laws. They did not recognize Article III “arising under” jurisdiction over cases that implicated federal interests but that did not implicate actual federal laws. This article chronologically develops the evidence that bears out this conclusion. First, it describes jurisdictional principles of English law that provide necessary context for understanding early American judicial opinions on the scope of Article III “arising under” jurisdiction. Specifically, it describes how under English law, a party invoking the jurisdiction of a court of limited jurisdiction had to affirmatively demonstrate that the court had jurisdiction over the case. Second, it explains that a key purpose of Article III “arising under” jurisdiction, evident in its framing and the ratification debates that surrounded it, was to enforce the supremacy of federal law. Finally, it explains how the Marshall Court came to rely upon English jurisdictional principles as a means

of limiting Article III “arising under” jurisdiction to cases implicating the supremacy of actual federal laws. Contrary to conventional characterizations of its opinions, the Marshall Court did not deem any case that might involve a federal question one “arising under” federal law. Rather, the Supreme Court explicated the Arising Under Clause in the first few decades following ratification to mean that a federal court may exercise jurisdiction over cases in which an actual federal law was determinative of a right or title asserted in the proceeding before it.

[Early Article III courts came to invoke principles of English jurisdictional law to determine their own jurisdiction.] English law distinguished courts of general jurisdiction from courts of limited jurisdiction. To bring an action in the original jurisdiction of an English court of limited jurisdiction, the plaintiff affirmatively had to plead, as part of the right or title asserted, facts sufficient to show that the court had jurisdiction. English courts of general jurisdiction, however, presumed themselves to have jurisdiction unless the defendant specifically proved otherwise. The distinction between courts of general and limited jurisdiction subsisted in the structures of colonial judicial systems. When Article III courts came to describe themselves as courts of limited jurisdiction, they imported English jurisdictional practice into their own practices. So imported, this was not English practice that the Court deemed inconsistent with the principles of the American Revolution and the Constitution. As John Jay expressed it in 1793, “The English practice . . . [is] more necessary to be observed here than there” in light of the federal structure that the Constitution established.

[The federal structure, as framed and ratified in the Constitution, provided various means to secure the supremacy of enacted federal law.] The proceedings of the Federal Convention demonstrate that the delegates settled on “arising under” jurisdiction as a limited mechanism—more limited than a congressional negative on state laws—to ensure the supremacy of federal law. In ratification debates, participants attributed certain meanings to “arising under” jurisdiction and offered various reasons to justify it. In general, they explained “arising under” jurisdiction as a means of enabling federal courts to enforce and settle the meaning of federal law.

[Post-ratification, federal courts, relying on English jurisdictional principles, used “arising under” jurisdiction only to enforce the dictates of determinative federal law.] By invoking

English jurisdictional principles, federal courts effectuated the founding period vision of “arising under” jurisdiction as a limited means of ensuring the supremacy of federal law. Early federal courts explained that because they were courts of limited rather than general jurisdiction in the sense of English law, they could not take original jurisdiction of Article III cases or controversies unless the party invoking the court’s jurisdiction asserted facts sufficient to demonstrate the court had jurisdiction. For “arising under” jurisdiction, this meant that a party invoking federal court jurisdiction had to aver that a federal law was determinative of a right or title asserted. The Supreme Court applied this principle not only to plaintiffs in original actions but also to plaintiffs in error in appellate actions seeking review of state court judgments.

By 1824, when it decided *Osborn v. United States*, the Marshall Court had resolved that a federal court had Article III “arising under” jurisdiction if the party seeking federal court jurisdiction properly demonstrated that federal law was determinative of a right or title asserted in that proceeding. This applied both to the original jurisdiction of federal courts and the appellate jurisdiction of the Supreme Court to review state court judgments. When, over a century later, the Supreme Court and scholars came to characterize the Marshall Court as reasoning that a federal court constitutionally may hear any case that might involve a federal law question, they misconstrued the effect that, in historical context, the Marshall Court gave to Article III “arising under” jurisdiction. By employing English jurisdictional principles, the Marshall Court limited federal courts to enforcing the supremacy of actual federal laws. The Marshall Court did not assume for federal courts a constitutional jurisdiction to vindicate federal interests divorced from the governing requirements of an identifiable federal law.

* * *

By observing rules derived from English law, federal courts embraced a practice that at once enabled them to ensure the supremacy of federal law but checked the extent to which they would encroach upon the jurisdiction of state courts. There is no question that the breadth of “arising under” jurisdiction, as explained by the Marshall Court, was coterminous with the breadth of congressional power to create and protect justifiable rights and titles. The Marshall Court did not, however, contrary to twentieth-century accounts, assume for itself an “arising under” jurisdiction to protect federal interests unmoored from the governing requirements of an identifiable federal law.

Patricia Bellia

promoted to full professor



Notre Dame Law School provides the space and support for each student to develop a sharp competence and refined conscience. It is well known that Notre Dame is one of the most famous institutions in the world. It is more worth knowing, however, the reality of legal learning at this institution. The Law School draws one of the most national and selective student bodies

Reflection Legal education at Notre Dame has long reflected an enduring yet visionary commitment—a commitment to educating the whole person, a commitment that stems from the very nature of law itself.

Law is a profession *of* persons *for* persons. When people make laws regarding the structure of government or the rights of individuals, the strictures of war or the terms of peace, the investigation of crime or the protection of privacy, they make laws for the good of persons. Those who shape and use law—lawyers, public officials, legal scholars—are called to be thoroughly competent and thoroughly attuned to what is good for persons, systemically and individually. The hallmark of Notre Dame Law School is to take both seriously. It is to recognize that legal competence and developed conscience are not separable traits in a legal mind; they are, rather, complementary and defining characteristics of what a lawyer should be.

in American legal education. Each class is small, carefully admitted on the basis of intellect, judgment, and integrity. Students do not merely hail from diverse places and backgrounds; they genuinely realize the rich experiences and aspirations of their classmates in a supportive student culture. The growing law faculty holds a wealth of experience, a profound array of research programs, and an unwavering commitment to achieve the best learning outcomes in legal education. Notre Dame's roots in the Catholic faith have proven to be a key determinant of its success by any measure. These roots frame and enrich academic discussion to encompass the full realm of faith and reason, enhancing the breadth of competence and depth of conscience.

Notre Dame Law School has never been in a better place—committed to educating the whole person, buoyed by the remarkable achievement of its graduates, and enabled to strengthen its renown by building upon a foundation of values both enduring and visionary.

PATRICIA BELLIA

Scholarship: THE MEMORY GAP IN SURVEILLANCE LAW

Excerpted from 75 UNIVERSITY OF CHICAGO LAW REVIEW 137 (2008)

Footnotes omitted

In March 2007, Google announced a change in its data retention policy: that it would “anonymize” search data in its server logs after eighteen to twenty-four months. For many observers, the policy change was more significant for the past practice it confirmed than for the future practice it heralded. The policy change underscored that since it first launched its search service, Google had stored its users’ search queries, along with the search results on which the users clicked, indefinitely, and had done so in such a way that this data could be tied to the particular computers from which the queries were made.

Although Google’s privacy policy has long stated what kinds of information the company collects and discloses, that policy has never mentioned Google’s data retention practices. Nor does U.S. law significantly constrain data retention practices, whether by the data subject herself or by a third party (such as Google) that transacts business with the data subject. Our surveillance and information privacy laws, in short, contain a “memory gap”: they regulate the collection and disclosure of certain kinds of information, but they say little about its retention. In addition, much of what the law does say about collection and disclosure provides incentives for indefinite data retention.

The law’s memory gap has ever-increasing significance for the applicability of the Fourth Amendment’s warrant requirement to government surveillance activities. When government agents’ direct, ongoing observations of a target’s activities would invade a reasonable expectation of privacy, agents ordinarily must obtain a warrant before engaging in those observations. The reasonable expectation of privacy test derives from *Katz v. United States*, a case dealing specifically with surveillance to collect the contents of communications, but the test applies to other surveillance activities as well. In *Kyllo v. United States*, for example, the Supreme Court applied *Katz* to invalidate agents’ use of thermal imaging technology to acquire details about heat patterns inside a home.

Current Fourth Amendment doctrine, however, takes a dramatically different approach to government agents’ indirect, surveillance-like activities, even when those activities yield precisely the same information as—or more information than—direct observation. More specifically, in its “business records” cases, the Supreme Court has held that the warrant

requirement is not implicated when a third party collects information (even under a statutory mandate) and the government then obtains that information from the third party. In *United States v. Miller*, for example, the Court held that the government did not violate the Fourth Amendment by presenting a subpoena rather than a warrant to compel a bank to disclose records concerning the defendant’s bank accounts—records that the bank was statutorily required to collect.

Because the government can only compel disclosure of that which is retained, the scope of the business records “exception” to *Katz* is deeply dependent on data storage practices, and thus on the legal, technological, and economic forces that drive those practices. Current and developing data retention practices threaten to convert many of the government surveillance activities now subject to a warrant requirement into the sort of “indirect” surveillance at issue in—and unprotected by—*Miller*. This threat is perhaps easiest to see in the context of communications surveillance, where shifts in information storage trends may render *Katz* itself (and the statutes built on its foundation) a dead letter. But other data trends are equally significant. Stand-alone products that generate no data are increasingly giving way to third-party services that do; such services will yield a profile of behavior that could otherwise only be assembled with direct surveillance activities. Similarly, the trend toward “pervasive” computing will produce vast amounts of data that is capable of being stored by third parties and that mirrors data government agents could otherwise obtain only via direct observation.

Information held by third parties has always flowed to government agents in some measure, and so it may be tempting to argue that evolving patterns of data storage raise no new doctrinal or normative concerns. From a doctrinal perspective, *Miller* and its progeny hold that one lacks a reasonable expectation of privacy in items that one voluntarily surrenders to a third party, and so the conclusion that data stored in digital form with third parties is outside of the Fourth Amendment’s protective core is fairly straightforward. From a normative perspective, if one accepts the business records doctrine (either on first principles or on the view that the doctrine is well entrenched), a principled basis on which to distinguish data in digital form from data in other forms is not readily apparent, particularly if one believes that the law should be neutral as to modes or forms of communication and storage.

I argue that the significance of current and developing data storage trends lies in the shift toward an architecture of increasingly “perfect” memory. Fourth Amendment doctrine has always permitted data to flow from third parties to the government. Importantly, however, that doctrine and the laws that supplement it have also coexisted with technological and economic factors that produce surveillance gaps. The dominant architecture of the predigital era was an architecture of forgetting: data about most of our activities could not be captured at all, could be memorialized only imperfectly, or could be retained long term only at significant cost. As these constraints on memory erode, so too will the zones of information privacy they have supported.

* * *

How should we evaluate these trends, and how, if at all, should the law respond to them? . . . [D]ramatic changes in the architecture of memory require that courts applying the Fourth Amendment to surveillance technique controversies and legislatures seeking to implement or supplement the Fourth Amendment attend to the results of communications surveillance as much as to the methods used. Predigital constitutional baselines for communications surveillance serve as a useful starting point . . .

Contents of Communications. [The federal statutes governing prospective and retrospective acquisition of the contents of communications—Title III and the Stored Communications Act (SCA)—treat] such information quite differently. . . . By qualitative measures, however, there is no distinction between communications gathered prospectively and the same communications gathered in one or a series of retrospective collections.

* * *

Communications Attributes. Turning to communications attributes, if we analyze the type of information agents can collect regarding electronic communications, we see that it is a much more expansive category than the phone numbers at issue in *Smith v. Maryland* [which upheld a government agent’s warrantless acquisition from the telephone company of the phone numbers a suspect dialed]. Qualitatively, some information associated with electronic communications may be similar in that it performs the same function of allowing the provider to direct the communication. . . . [I]f service providers can store communications attributes indefinitely, law enforcement officials can draw data from a larger pool and at any time, rather than simply as the communications occur. In quantitative terms, then, communications attributes involve a significant move away from the constitutional baseline of *Smith*.

Transactional Data. Transactional data presents difficulties similar to those presented by communications attributes. Here the constitutional baseline is *Miller*, which at a minimum suggests that business records produced in a customer’s relationship with a transactional partner are not subject to a reasonable expectation of privacy. In terms of whether transactional data is qualitatively equivalent to the records at issue in *Miller*, some such data clearly is analogous. For example, purchase of an item online will generate a record of a credit transaction similar to that generated with a brick-and-mortar store. The record, however, may also include data giving rise to inferences that are simply not otherwise available without direct physical observation. For example, a record of a customer’s interaction with an online bookseller will include not only the items purchased, but also the items browsed. And to the extent that lower standards might be justified on the theory that the data subject has some control over the data trail—for example, by limiting a site’s use of cookies to link information across pages and visits—that control proves to be elusive. Once created or collected, data is treated as being “owned” by the transactional partner, and any ability to control its disposition depends on the data retention and destruction policies that the transactional partner chooses to implement. . . . Finally, the sort of passive data that pervasive computing applications can produce, particularly about events inside the home, will be qualitatively equivalent to direct observations by government agents that are treated as searches under the Fourth Amendment.

* * *

The changing architecture of memory raises fundamental questions about the application of well-entrenched rules for communications surveillance. An underdeveloped conception of societal privacy expectations and narrowly drafted statutes essentially encourage government agents to exploit the new architecture. The law thus underprotects communications that are functionally equivalent to communications that receive the highest protection under our surveillance law regime. And despite the weak constitutional baselines for communications attributes and transactional data, there are strong reasons, related both to the quantity of information available and the inferences that can be drawn from it, to tweak our current surveillance law regimes to provide heightened protection. I do not contend that the changing architecture of memory counsels in favor of high-level and Fourth Amendment–based protection in all cases. Rather, I argue that courts and legislatures cannot gain a full picture of the surveillance law landscape without accounting for the changing architecture of memory, and that the changing architecture of memory should affect that landscape.

Nicole Garnett

promoted to full professor



Reflection

Notre Dame tells prospective students that we educate a “different kind of lawyer.” Given the reputation of the bar

these days, I hope that we hold true to our promise. But, I think that it might be more accurate to say that Notre Dame strives to be a different kind of law school. We begin, as all great law schools, with a commitment to providing the high-caliber legal education that our students need to excel professionally. And, we aim for excellence in scholarship. We have assembled a great group of scholars here who are productive and energetic, and who really enrich and enliven our intellectual environment. Interacting with my colleagues makes me a better teacher and scholar.

But these things are, at Notre Dame, only the beginning. Here, I hope, we are different at the core: Notre Dame Law School is striving to be truly unique. Our faculty cares intensely about the mission and identity of Notre Dame—that is to be both truly great and distinctively Catholic. For us, excellence in teaching and research is necessary, but not sufficient. For example,

imparting the knowledge that my students will need to be good lawyers is only the beginning of my job as a teacher.

Notre Dame’s unique mission demands that I do more—asking me to engage difficult, first-order questions with my students: What are its moral foundations? Is it just? Does it serve the common good? It also asks me to do what I can, inside and outside of the classroom, to encourage my students to view the law as a vocation, and not just a career, and also to exceed their own expectations for themselves, as students, as lawyers, and—most importantly—as people.

At Notre Dame, we also are called to understand scholarly excellence as the beginning, not the end, of our academic aspirations. I am a better scholar because I interact each day with colleagues who share my commitment to the University’s mission. We seek to build a distinctive scholarly community where intellectual inquiry is truly open to all questions, and our shared commitments form a foundation of understanding that enables us to engage important issues more completely than we might elsewhere.

NICOLE GARNETT

Scholarship: SUBURBS AS EXIT, SUBURBS AS ENTRANCE

Excerpted with permission from 106 *MICHIGAN LAW REVIEW* 277 (2007)

Footnotes omitted

Most academic discussions of “suburban sprawl” assume that suburbs are places of exit. According to the conventional account, suburbanites abandoned cities in favor of an isolated, privatized realm. Municipal incorporation laws shield suburbs from city governments that might otherwise annex them; suburban land-use policies exclude otherwise mobile, poor, urban residents who would like to be their neighbors. The exit story is a foundation of land-use and local-government law. Not only is exit considered a primary cause of intra-metropolitan inequality, but growth-control proponents argue that former urban dwellers who exit for the suburbs remain, in important respects, part of the urban polity. Exiters’ historical, social, and economic connections to their center cities are used to justify limiting further suburban expansion.

The exit story accurately describes much of the history of American suburban development. The suburbanization-as-exit phenomenon began as early as the late nineteenth century and reached its zenith after World War II, previously stable urban enclaves finally unraveled. In recent years, minorities have become exiters as well. During the 1990s, in fact, minorities were responsible for the bulk of suburban population gains in many major metropolitan areas. A majority of Asian Americans, half of Hispanic Americans, and nearly forty percent of African Americans are now suburbanites.

The exit story, however, has reached its denouement. For a majority of Americans, suburbs have become points of entrance to, not exit from, “urban” life. Suburbs are the only “urbanized” areas most Americans have ever known. Most suburbanites are “enterers”—people who were born in, or migrated directly to, suburbs, and who have not spent time living in any central city. By the 1960s, more Americans lived in suburbs than in central cities; the employment balance shifted to the suburbs by the 1980s. By 1990, the United States had become a majority

suburban nation. As a result, many suburban residents likely are second- or third-generation exiters. Perhaps their parents or grandparents left the old neighborhood, but their own experience is an entirely suburban one. Others lack any historical connection with the center city closest to their suburban homes. For example, the nation’s fastest-growing suburbs—on the fringes of “New Sunbelt” cities—benefit from domestic migration from other parts of the country. In other words, they may absorb more Rust Belt than hometown exiters. Finally, two groups of suburbanites—new immigrants who increasingly bypass city centers for new immigrant gateways, and domestic migrants from depopulating rural areas—lack social and historical connections with any major U.S. urban center.

By tying the fortunes of center cities to the selfish actions of surrounding suburbs and their residents, the “exit story” provides a powerful normative justification for growth limits. Demands to remedy the “inequitable” distribution of fiscal resources within a metropolitan area are most powerful if those benefiting from the inequities helped create them by abandoning their former neighbors. Similarly, proponents of regional government can most plausibly assert that a metropolitan region is, in reality, a single polity when the residents of outlying areas share social, economic, and historical connections to the region’s anchor city and to one another. When the exit account is stripped away, however, regional-government and growth-control proponents must fall back on utilitarian arguments: Our system of fragmented local government is inefficient, suburban fortunes stand or fall with the fortunes of center cities, and so on. Not only are these arguments challenged by economists who argue that metropolitan fragmentation is efficiency enhancing, but they may also ring hollow with suburban enterers who have little or no affinity for (or connection to) urban life.

Moreover, and in my view, most importantly, efforts to curb suburban growth raise distributional and transitional fairness questions that are especially acute because the final chapter of the exit story is a minority success story. The debate over the distributional consequences of growth-management strategies is a familiar one: Skeptics' concerns stem from a very simple economic calculus—restricting land for development will increase its price. And if the price of land rises, the price of things built on it—including, importantly, housing—will rise as well. Michael Schill succinctly summarized the problem as follows: “[t]he Achilles’ heel of the ‘smart growth’ movement is the impact that many of the proposals put forth by its advocates would have on affordable housing.” Regional government proponents respond that centralizing control over development policy might actually increase the affordability of regional housing, both by curtailing local governments’ exclusionary tendencies and by incorporating planning tools designed to increase the supply of affordable housing.

While empirical evidence on the price effects of existing regional planning programs is mixed, the transitional fairness questions raised by suburban growth restrictions are not limited to concerns about regional housing affordability. Even if a regional development strategy succeeded in holding constant the overall cost of housing, most affordable housing will likely continue to be found in center cities and older suburbs. After all, comprehensive growth-management strategies aim to channel new development into built-up areas. Yet, as Robert Bruegmann highlights in his recent history of suburban sprawl, urban life has always been most difficult for the poor. Today, smokestacks and overcrowding are no longer poor city dwellers’ primary concerns—crime, education and employment are. As a result, suburbs still represent the urban poor’s hope for a better life, as suburbs have throughout the modern industrial

age. The reality is that suburbs offer the good schools, economic opportunities, and environmental amenities that wealthy urban dwellers can afford to purchase and poorer ones cannot.

Moreover, and in my view, most importantly, there is something slightly unseemly about dramatically curtailing suburban growth at a time when racial minorities are responsible for most new suburban population gains. For example, anti-immigration groups have jumped on the anti-growth band wagon, some going so far as to run ads linking immigration with sprawl (and suggesting immigration limits might solve the sprawl problem). Efforts to channel development into the urban core could also jeopardize the promising trends toward suburban racial diversity. It is difficult to avoid concluding that changing the rules of the development game at this time is tantamount to pulling the suburban ladder out from under those late exiters who previously were excluded from suburban life by economic circumstance, exclusionary zoning, and intentional discrimination. A new regime may directly benefit many individuals who have perpetrated, or at least benefited from, this past exclusion: that is, current suburban homeowners will enjoy the economic and environmental amenities that attend growth management.

None of this is to suggest that the entrance story requires unfettered suburban growth. Municipal boundaries are arbitrary, intra-metropolitan inequality is troubling, and self-interested suburbanites do impose externalities on their neighbors. The exit story, however, is an outdated rhetorical flourish that tends to oversimplify the case for, and camouflage the complexities of, suburban growth controls. There remain strong reasons to worry about our patterns of development, but a recognition of the entrance story, and a more nuanced understanding of modern suburban demographics, demands careful consideration of both the benefits and costs of suburban sprawl.

Richard Garnett

promoted to full professor



Among my goals as a scholar and teacher is to encourage my students to value and to live not only a “balanced” life but also an *integrated* life. As we all know, there are many unhappy lawyers. And while there’s no silver-bullet solution to the problem, surely one cause is a tendency—or, perhaps, the pressure—to disintegrate our lives in the law, to separate too sharply what we do from what we care about. It seems to me, though, that a “Notre Dame

Reflection Since joining the faculty of Notre Dame Law School, I have been blessed with inspiring mentors, stimulating colleagues, and gifted students. With their help, I have pursued the goals of enriching and shaping those conversations of which I am a part, contributing to the administration of justice and my fellow citizens’ understanding of the nature of the legal enterprise, and helping this University become what the world needs it to be.

It is worth remembering that, at the end of the day, most law schools and most universities—indeed, most institutions—don’t *really* matter. Many do very good work, of course, but they are, for the most part, fungible and replaceable. The University of Notre Dame, though, is different; it does matter, and it matters because it aspires to do and be something interesting and distinctive: a university that is engaged, open, critical, and great precisely by being Catholic. It is a good thing for the academy, for society, for the Church, and for the legal profession that Notre Dame has taken on the challenge of mattering.

lawyer” should try to hold together, in a rich and reinforcing way, his or her work, neighborhood, polity, family, and faith community. And so, I try to challenge my students to live their lives in the law as *whole persons*. Inspired by the work of my colleague Tom Shaffer, I urge them to resist the temptation to “check at the door” their commitments, histories, ideals, relationships, and identities. I propose to my students that they regard being a lawyer as a *vocation*, and not merely as a well-paid occupation. This way of framing the legal enterprise has, I believe, profound implications: Students are pushed to evaluate their own practices and goals in light of the common good, not just their own status or advancement; to regard the law’s substantive content not simply as a given set of tools, but as the manifestation of the larger and continuing human project of trying to order well our lives together; and to take up the challenge of being teachers themselves, by instructing their friends, families, and fellow citizens about those principles and values that are essential to the health of a community that aspires to live under the rule of law.

Where better to do all this than at Notre Dame?

RICHARD GARNETT

Scholarship: RELIGION, DIVISION, AND THE FIRST AMENDMENT

Excerpted from 94 *GEORGETOWN LAW JOURNAL* 1667 (2006)

Footnotes omitted

Nearly thirty-five years ago in *Lemon v. Kurtzman*, Chief Justice Warren Burger declared that state programs or policies could excessively—and, therefore, unconstitutionally—entangle government and religion, not only by requiring or allowing intrusive public monitoring of religious institutions and activities, but also through what he called their “divisive political potential.” Government actions burdened with such “potential,” he reasoned, pose a “threat to the normal political process” and “divert attention from the myriad issues and problems that confront every level of government.” Chief Justice Burger asserted also, and more fundamentally, that “political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.” And from this Hobbesian premise about the intent animating the First Amendment, he proceeded on the assumption that the Constitution authorizes courts to protect our “normal political process” from a particular kind of strife and to purge a particular kind of disagreement from politics and public conversations about how best to achieve the common good.

This article provides a close and critical examination of the argument that observations or predictions of “political division along religious lines” should supply the enforceable content or inform the interpretation of the First Amendment’s Establishment Clause. The examination is timely, not only because of the sharp polarization that is said to characterize contemporary politics, but also because of the increasing prominence of this “political division” argument. Justice Breyer, for example, in his crucial concurring opinion in one of the recent Ten Commandments cases, identified “avoid[ing] that divisiveness based upon religion that promotes social conflict” as one of the “basic purposes of [the Religion] Clauses.” He then voted to reject the First Amendment challenge to the public display at issue in part because, in his view, to sustain it “might well encour-

age disputes” and “thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.” Justice Stevens went even further, referring to “Government’s obligation to avoid divisiveness and exclusion in the religious sphere.” In another arena, a prominent young scholar has offered both a diagnosis of and a cure for our “church-state problem”—namely, that we are “Divided by God.” This problem, he warns, poses a “fundamental challenge to the project of self-government.” In a similar vein, the religion-related cover story of a recent issue of one of our leading newsmagazines reported, “Divided, We Stand.” It appears that the political-divisiveness argument is and will for some time remain at the heart of our discussions about religious freedom and the First Amendment.

But what, exactly, is “religiously based social conflict”—or, as the Court put it in *Lemon*, “political . . . divisiveness on religious lines”? What, exactly, is the relevance of such conflict to the wisdom, morality, or constitutionality of state action? How plausible, and how normatively attractive, are the political-divisiveness argument and the “principle” it is thought to vindicate? How well do this argument and this principle cohere with the relevant text, history, traditions, and values? And what does the recent resurfacing of this argument in the Establishment Clause context reveal and portend about the state and trajectory of First Amendment theory and doctrine more generally?

Working through these questions, I am mindful of John Courtney Murray’s warning that we should “cherish only modest expectations with regard to the solution of the problem of religious pluralism and civic unity.” Accordingly, while I hope this article will contribute to our conversations about the role of religious expression, belief, believers, and institutions in public life, my more specific goal is to identify and analyze—critically, carefully, and contextually—a specific and salient line of constitutional argument.

At the end of the day, this article offers a reminder that—again, in Murray’s words—“pluralism [is] the native condition of American society” and that the unity toward which Americans have aspired—*e pluribus unum*—is a “unity of a limited order.” Those who crafted our Constitution believed that both authentic freedom and effective government could and should be secured through checks and balances, rather than standardization, and by harnessing, rather than homogenizing, the messiness of democracy. It is both misguided and quixotic, then, to employ the First Amendment to smooth out the bumps and divisions that are an unavoidable part of the political life of a diverse and free people and, perhaps, best regarded as an indication that society is functioning well. It is, after all, not a failure, but—as Justice Brennan observed—a “function of free speech under our system of government to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”

* * *

Few epithets in contemporary discourse are as wounding, yet tedious and vacuous, as the charge that a person, claim, argument, proposal, or belief is “divisive.” The term—like “controversial,” “extremist,” and “partisan”—often does little more than signal the speaker’s disapproval, and his desire that the offending target either be quiet, or change his tune. The point of this article, again, is to investigate, in a precise way, the claim being made about the relation between what is asserted or assumed to be a real-world fact—that is, “political fragmentation on sectarian lines”—and the constitutionality of challenged state action.

James Madison acknowledged, in *The Federalist No. 10*, that “[t]he instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished,” and he conceded that the “violence of faction” was such governments’ “dangerous vice.” The solution, though, was not and could not be the suppression or elimination of disagreement and faction. He explained:

The diversity in the faculties of men . . . is . . . an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors ensures a division of the society into different interests and parties. . . .

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society.

The widely discussed and regretted divisions that run through our politics and communities make appealing to many a more managerial approach to politics and public life. But division and disagreement about important things is, this side of Heaven, a fact. In any event, Madison’s warning remains as powerful as ever: “Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.”



\$5 Million Law Fellowship Challenge

“This can really make a difference.”

—Frank Eck, Jr.

Of those who aspire to attend law school, many of the world’s best and brightest aim for admission to Notre Dame Law School. “It is a shame that some of those prospects can’t attend Notre Dame because they can’t afford it,” says Frank Eck, Jr., who just announced that his late father, Frank Eck, Sr.—through his estate—designated \$5 million for student fellowships. The benefaction challenges Law School alumni, parents, and friends to contribute \$5 million as well. Until December 31, 2009, the Eck Estate will match, dollar-for-dollar up to a total of \$5 million, all new gifts and pledges designated for endowed law fellowships.

In 2005, Frank Eck, Sr. gave \$21 million to finance construction of the Eck Hall of Law, a world-class facility that almost will double the size of the existing law school. After making this historic gift, Eck, Sr. delivered an inspirational address to

the Law School Advisory Council during which he challenged council members to provide the remaining funding needed to bring the new building to fruition. His speech proved to be a critical catalyst. Funding for the project was completed during the following year, due in large measure to council members generously answering the call for assistance.

“The funny thing is that my father was never that fond of attorneys,” says Eck, Jr., who graduated from Notre Dame Law School in 1989 and currently serves on the Law School Advisory Council. “In his own personal experience as a businessman, he found that lawyers could be more of a hindrance than a help. But Notre Dame’s model—educating a different kind of lawyer—resonated with him, and he wanted to be a part of bringing those into the profession who would make society a better place.”

As delighted as Eck, Sr. was to participate in the groundbreaking for the new building in July 2007, he emphasized that much work remained to be done on the Law School's behalf during the *Spirit of Notre Dame* campaign. In articulating this belief, he drew upon an earlier experience in his remarkable philanthropic journey with Notre Dame.

In 1994, as the result of a significant gift from Eck, Sr. and Advanced Drainage Systems, Inc., Frank Eck Stadium opened its gates on the Notre Dame campus. While this sparkling new facility furnished the foundation for the baseball team to pursue its competitive aspirations, it was only part of that gift. Eck, Sr. understood that additional resources were needed to create scholarships that would bring talented student-athletes to Notre Dame. Consequently, he also funded grants-in-aid for the baseball program that enabled it to recruit top-echelon players. The combination of a first-rate facility and scholarships proved to be a winning formula, as evidenced by the baseball team's numerous Big East championships, consistent appearances in the NCAA tournament, and a trip to the College World Series.

With the fellowship challenge, Eck, Sr. and his family have reprised the approach that fostered a championship baseball program at Notre Dame. By providing a compelling incentive for members of the Law School community of alumni and friends to make gifts for law fellowships, the Eck family has helped to ensure that for years to come, deserving students of modest means will get the financial help they need to attend Notre Dame. Earlier this month, Eck, Jr. spoke to the Law School Advisory Council. In a moment that was reminiscent of his father's moving appeal in 2005, he encouraged the council and the entire Notre Dame Law School family to participate in the challenge by supporting law fellowships to the greatest extent possible. His remarks were an eloquent testimony to the Eck family's continuing commitment to Notre Dame's quest to be a premier law school that never loses sight of its distinctive Catholic identity.

Eck, Sr. graduated from Notre Dame in 1944 with a chemical engineering degree, and earned his MBA at Harvard. He

worked for more than 20 years in the petrochemical industry before joining Advanced Drainage Systems in Columbus, Ohio, in 1973 as vice president for sales and marketing. He soon was appointed president of the firm and took it from a small regional manufacturer serving the agriculture market to the world's largest producer of plastic drainage pipe used primarily in the civil engineering industry.

"The sad thing is that he won't be here to see the end result of his gifts to the Law School," says Eck, Jr. of his dad, who died December 13, 2007, at the age of 84. "He has given money for

so many other buildings and programs at Notre Dame, but he took particular pride in his gifts to the Law School because of the tremendous potential they have to really make a difference in the educational experience of students."

On learning of the \$5 million Eck fellowship challenge, Dean O'Hara remarked: "When Mr. Eck died last December, I stated that his many benefactions to Notre Dame, including Eck Hall of Law, would stand as a concrete testament to his legacy, but that no building could ever capture the breadth of his spirit, the depth

of his commitment, or the transforming effect of his generosity. In speaking these words, I never anticipated that in addition to the magnificent structure currently taking shape that will bear his name, Mr. Eck would find a way to help us fill the building with

outstanding students seeking our distinctive legal education for generations to come. In death as in life, Mr. Eck continues to smile on us, while at the same time challenging us to be a premier law school grounded in the Catholic intellectual tradition. He was truly a giant. We will work hard to make our efforts match his generosity and double the impact of his estate gift for our students."

For more information about the fellowship challenge, contact Glenn Rosswurm, 574-631-7609, Glenn.J.Rosswurm.3@nd.edu, or Jill Donnelly, 574-631-7609, Jill.E.Donnelly.18@nd.edu.



Frank Eck, Sr.

"He took particular pride in his gifts to the Law School because of the tremendous potential they have to really make a difference in the educational experience of students."

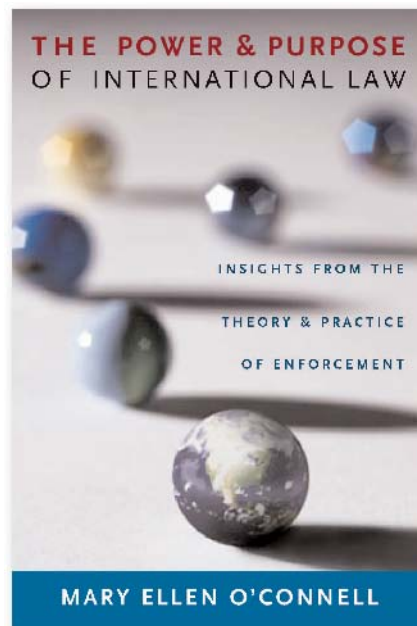
— Frank Eck, Jr.

Two Notre Dame Law School professors have written books, each one tackling timely and controversial subjects: international law and global terrorism. Here is an excerpt from Mary Ellen O'Connell's *The Power and Purpose of International Law* followed by an abstract from Jimmy Gurulé's *Unfunding Terror: The Legal Response to the Financing of Global Terrorism*.

The Power and Purpose of International Law (Oxford University Press, August 2008), Mary Ellen O'Connell

This book has been written at a time of transition for the United States and the world. Many Americans want the United States to recover its standing, to again be a leader in responding to the globe's most pressing problems. O'Connell believes that the way forward will be found in a renewed commitment to international law, by the United States and all states. She concludes in the *Introduction* (pp. 14–16):

International law has deficits, yet it persists as the single, generally accepted means to solve the world's problems. It is not religion or ideology that the world has in common, but international law. Through international law, diverse cultures can reach consensus about the moral norms that we will commonly live by. As a result, international law is uniquely suited to mitigate the problems of armed conflict, terrorism, human rights abuse, poverty, disease, and the destruction of the natural environment. It is the closest thing we have to a neutral vehicle for taking on the world's most complex issues and pressing problems. International law has been attacked by post-modern critics for failing to be inclusive and for perpetuating the very power advantages that hegemonic realists say it thwarts. Other critical scholars point to the meaninglessness of all law owing to the meaninglessness of the words we use to try to express legal concepts. These criticisms, like those of the ... realists, weaken international law and our best means of creating a better world for all.



Such overwhelming critiques can lead to despair and retreat until we realize that the critique is exaggerated and inauthentic. People everywhere believe in law, both domestic and international. We *are* able to communicate across and within cultures. We can search for the ways to do this more effectively ... The revolutionary moments in international law have typically come from the ideas of scholars such as Grotius, Lauterpacht, Kelsen, and Henkin. They have often been inspired to write in response to those who would tear down international law out of a false sense of promoting the national interest.

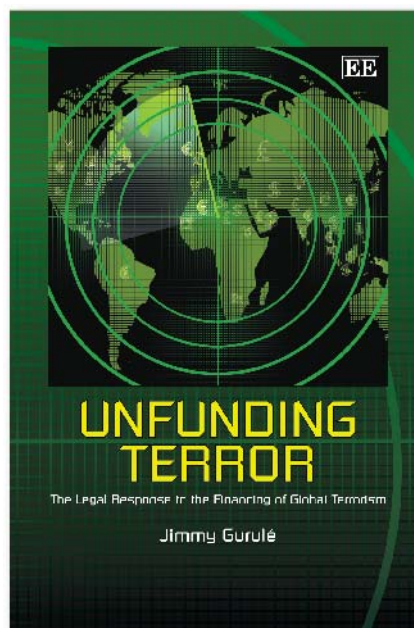
... Th[is] book's general conclusion is that sanctions play a significant—if not essential—role in why international law has power to bind both nations and individuals. The real basis of international law's authority is not the sanction *per se*, but the international community's acceptance of law regardless of

sanctions. Sanctions play a role in signaling and reinforcing acceptance, but we fundamentally accept the binding power of international law for the same reason we accept all law as binding. Our acceptance of law is part of a tradition of belief in higher things. To this tradition we have added positivist and legal process theory. We can now see the emergence of a new classical theory of international law that revives the best of what has come before, adapted to the needs of the international community today. It is a theory that supports not the hegemony of a few, but the flourishing of all of humanity.*

**Footnotes omitted.*

Unfunding Terror: The Legal Response to the Financing of Global Terrorism (Edward Elgar Publishing, December 2008), Jimmy Gurulé

According to the FBI, the September 11, 2001 terrorist attacks against the World Trade Center and the Pentagon that claimed the lives of 2,973 innocent civilians required as much as \$500,000 to stage. At the time, al Qaeda, the jihadi terrorist organization responsible for the mass killings, was operating on an annual budget estimated at between \$30 and \$50 million. However, despite the obvious fact that terrorists need money to support their terrorist operations and organizational infrastructure, prior to 9/11, preventing the financing of ter-



rorism was not a priority for the United States or the international community.

Unfunding Terror: The Legal Response to the Financing of Global Terrorism (*Unfunding Terror*) makes the case for the importance of following the money trail and dismantling the financial network of foreign terrorist organizations. *Unfunding Terror* further examines the legal framework that has evolved following the 9/11 terrorist attacks. The principal legal components of that strategy include: (1) freezing the assets, both domestically and internationally, of terrorists, terrorist organizations, and their financial sympathizers; (2) implementing regulatory measures to prevent terrorists from using banks and other financial

institutions as a conduit to facilitate terrorist financing; (3) international standards to prevent the financing of terrorism; (4) criminal prosecution of terrorist financiers and their front entities; and (5) private civil actions against the financial aiders and abettors of terrorism, including banks and corrupt charitable organizations. The book further analyzes whether the legal regime has been effective in disrupting and depriving al Qaeda, the Taliban, and affiliated terrorist organizations of funding. Specifically, *Unfunding Terror* identifies important successes in the global counter-terrorist financing campaign such as the designation and order to freeze the assets of over 40 Islamic charities suspected of providing financial assistance to al-Qaeda and affiliated terrorist organizations, and the implementation of federal regulations making it more difficult for terrorists to transfer money globally using the international financial system. At the same time, the book highlights several disappointing and embarrassing Department of Justice prosecutions that resulted in jury acquittals or a hung jury, and the declining relevance of the United Nations economic sanctions program to deprive terrorists of funding. Finally, *Unfunding Terror* proposes several recommendations to strengthen the legal framework to shut down the flow of money needed to wage a global jihad, acquire weapons of mass destruction, and launch a major terrorist attack on a scale of what occurred on 9/11.

Ximena MedellÀn

Center for Civil and Human Rights Postdoctoral Research Associate

BY MELANIE McDONALD



It's not often that a transplant from a major metropolitan city—especially one in a warm climate—thinks South Bend is an ideal destination. “It’s nice to take a break from the big city,” explains Ximena MedellÀn of Mexico City, Mexico, a postdoctoral research associate in the Law School’s Center for Civil and Human Rights (CCHR). “I would spend three hours in the car getting to and from work each day. Now, it takes eight minutes,” she says with a contented smile.

MedellÀn gives the impression that she could be happy just about anywhere as long as she is doing the work she loves—human rights law. She chose Notre Dame to pursue her LL.M. in International Human Rights Law because “it was very clear that Notre Dame valued me as an individual. I got calls from Sean [O’Brien, CCHR assistant director], and he could converse with me about the work I was doing. It was important for me to be recognized and appreciated for my scholarship.”

MedellÀn earned a Licentiate in Law from the Universidad Iberoamericana in Mexico City in 2004, and her LL.M. from Notre Dame Law School in 2007. Before pursuing her law degree at Notre Dame, she was an associate professor of human rights law at the Universidad Iberoamericana. In addition to teaching, she was a full-time researcher

“I believe we are born as lawyers,” says MedellÀn of those who choose the profession. “It is demanding on so many different levels, but it’s in our blood, and we have to pursue it.”

"I am convinced that this is the only [LL.M. program] that, after you graduate, you really feel like you belong to something important."

at the Human Rights Program of the Universidad, leading their International Criminal Justice and International Humanitarian Law Programs.

Currently, Medell n is the lead researcher on a book commissioned by the Due Process of Law Foundation and the United States Institute for Peace titled *Compiling Latin American National Jurisprudence on International Crimes*. A number of Notre Dame LL.M. students will have the opportunity to assist Medell n in her research and contribute to the project.

"The book will identify, systematize, and analyze national jurisprudence issued by Latin American Courts concerning crimes under international law, such as genocide and war crimes, and other related topics like immunities, statutory limitations, and universal jurisdiction," explains Medell n. "Through this research, the CCHR joins a concrete effort to strengthen national judicial systems around Latin America, which is one of the most effective tools for fighting crimes against humanity and ensuring the protection of human beings," she adds.

In addition to her research, Medell n is responsible for advising LL.M. students. "I am devoted to helping them in any way, whether advising them on their thesis or offering help networking, getting an internship or a job, etc.," she says. "It has come full circle for me, and I want to give the same level of attention to my students as my advisor gave to me."

Medell n comes by her work naturally. "When I was 11 years old, I told my parents that I wanted to be a lawyer," she says. "They said, 'sure, sure, we'll talk about that later,' as if it was just something kids say," she recalls with a laugh. "But I believe we are born as lawyers," says Medell n of those who choose the profession. "It is demanding on so many different levels, but it's in our blood, and we have to pursue it."

Growing up, Medell n says, she had a privileged education and a great deal of family support, but learned through her parents that others had much less. "My dad and mom have devoted their lives to working with people in rural communities outside of Mexico City who were struggling to make ends meet," says

Medell n. "I joined them on their trips to these communities as a child, and it impacted me."

As a teenager, Medell n joined a group of young "civil missionaries" who worked within impoverished Mexican communities for a few weeks each year. "I became very close to a family that made shoes for a living," remembers Medell n. "They were victims of fraud and had to start over again with nothing. Some of the other student volunteers and I wrote messages to the mother in a Bible and gave it to her. She later told us that when things were hard, she would read our writing 'because it made me realize there are good people out there.' It was then that I understood how one person really can make a difference."

Professionally, Medell n has consulted for the Mexican government on a report regarding the status of civil and political rights in Mexico to be presented before the United Nations Human Rights Committee in Geneva. She has also had the opportunity to closely collaborate with international institutions such as the International Committee of the Red Cross, and has trained academics, journalists, diplomats, and military personnel in international criminal justice. In addition, Medell n has worked directly with victims of human rights violations in Latin America. Particularly significant was her participation on the legal team advising Argentinean victims of a military dictatorship in the 1970s and 1980s. The case resulted in the first-ever successful extradition of a military official to stand trial based on the legal principle of universal jurisdiction.

Her overarching areas of interest include international criminal justice, humanitarian law, the inter-American system for the protection of human rights, national implementation of human rights, and national cooperation with international bodies. "Last October, I went to Washington, D.C., with NDLS Professor Paolo Carozza for a meeting of the Inter-American Commission on Human Rights, and there were Notre Dame LL.M. alumni from seven different graduating classes there, working in various capacities for the commission. It was amazing and impressive," says Medell n.

"There are lots of great LL.M. programs out there, but I am convinced that this is the only one that, after you graduate, you really feel like you belong to something important: a large family, an important mission," says Medell n.

FACULTY SCHOLARSHIP AND HONORS



Amy Coney Barrett published *Protesting the Court*, 83 **NOTRE DAME LAW REVIEW** 1147 (2008), and *Procedural Common Law*, 94 **VIRGINIA LAW REVIEW** 813 (2008). *Federal Jurisdiction*, an

entry in **THE ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES**, is forthcoming in 2008.



Matthew J. Barrett published *Sarbanes-Oxley, Kermit the Frog, and Competition Regarding Audit Quality*, 3 **JOURNAL OF BUSINESS & TECHNOLOGY LAW** 207 (2008), and the combined 2008 supplement to the unabridged and concise versions of the fourth edition of Barrett's **ACCOUNTING FOR LAWYERS** casebook (co-authored with David R. Herwitz, published by Foundation Press).

Barrett also worked closely with Ellen Aprill, the associate dean for academic programs and the John E. Anderson Professor of Tax Law at Loyola Law School (Los Angeles) and attended a meeting at the Treasury Department in Washington in order to discuss a request for guidance that ultimately led to Revenue Ruling 2008-34. The ruling holds that loans under law school Loan Repayment Assistance Programs generally meet the requirements in section 108(f)(1) of the Internal Revenue Code, such that participants can exclude from gross income any amount that a law school discharges because the participant worked for a certain period of time in a qualifying law-related public service position.



Anthony J. Bellia, Jr. has two forthcoming publications: *The Federal Common Law of Nations*, 109 **COLUMBIA LAW REVIEW** (2009) (with Bradford R. Clark), and a book titled **FEDERALISM** (Aspen Publishers, 2009).



Geoffrey Bennett published *Criminal Procedure and Sentencing*, **ALL ENGLAND LAW REPORTS ANNUAL REVIEW** 2007 (London: Butterworths, 2008): 145-165, and **DAVIES ON CONTRACT**, 10th edition, with R.V. Upex, (London: Sweet & Maxwell, 2008).

Bennett also delivered a talk titled "The Law Relating to References" at the European Network for Ombudsmen Annual Conference, London, 2008.



Margaret Brinig published *Are All Contracts Alike?*, 43 **WAKE FOREST LAW REVIEW** 533 (2008). *Legal Status and Effects on Children*, **EMORY LAW JOURNAL**, is forthcoming in October.

Brinig presented the Legal Status paper about the well-being of kids in formal status relationships with their parents to the Federalist Society at Case Western Reserve Law School and at the American Law and Economics Association annual meeting at **COLUMBIA LAW REVIEW**. She also presented two papers—*Is Marriage a Contract or a Covenant?* and *Are Parents Fungible?*—at the University Pompeu Fabra in Barcelona, Spain, in April, and gave a presentation on joint custody to Louisiana judges at their annual educational conference in Sandestin, Fla., in June.



Alejandro Camacho published *Learning from Glen Canyon Dam: The Challenges of Adaptive and Collaborative Ecosystem Management*, 8 **NEVADA LAW JOURNAL** 101 (invited) (2008), and *Can Regulation Evolve? Lessons from a Study in Maladaptive Management*, 55 **UCLA LAW REVIEW** 293 (2007).

Camacho presented "Smart Growth and Public Participation in Regulatory Decisionmaking" at Tulane Law School's International Legislative Drafting Institute on June 20, 2008 in New Orleans, and "Adapting Governance: Climate Change and the Great Lakes" at the Michigan State University College of Law symposium titled *A Climate of Disruption: Legal Measures for Adaptations and Mitigation* on Feb. 15, 2008.

In addition, Camacho is chair-elect of the American Association of Law Schools' Section on Natural Resources; a member scholar at the Center for Progressive Reform; a peer reviewer for **LAND USE AND ENVIRONMENTAL REVIEW**; and a member of the Assisted Migration Working Group (funded by the National Science Foundation and Cedar Tree Foundation).



Paolo Carozza published *La comunità sovranazionale dei giudici e il significato del diritto*, in **LA VERITÀ, IL NOSTRO DESTINO** (Giorgio Vittadini, ed., Mondadori, 2008).

He also delivered the following talks: "They are our Brothers": the Origins of the Human Rights Tradition in Latin

America" at the conference on Latin America and The International Human Rights Project: Yesterday, Today And Tomorrow, in Rome, Italy, May 2008; *Constitutional Traditions, Democracy, and International Human Rights Law: Accounting for American Differences*, a paper presented at a George Washington University Law School faculty colloquium, March 2008; and *The "Art" of Democracy and the "Taste for Local Freedom": International Human Rights and American Constitutional Difference*, a paper presented at a Georgetown Law School faculty colloquium, March 2008.

Alexander L. Edgar (adjunct faculty) was selected as a 2008 Indiana Super Lawyer by **INDIANAPOLIS MONTHLY AND LAW AND POLITICS**. Only five percent of Indiana lawyers earn this distinction, which is based on peer recognition and professional achievement. Also, Edgar earned recertification in business and consumer bankruptcy law in February 2008 by the American Board of Certification.



Barbara Fick published *Apportioning the Burden of Proof for "Reasonable Factors Other than Age" in an Age Discrimination Lawsuit: An Analysis of Meacham v. Knolls Atomic Power Laboratory*, 35 **PREVIEW OF**

SUPREME COURT OF THE UNITED STATES CASES, 348 (April 14, 2008); and *A Case of Statutory Interpretation: Does 42 U.S.C. §1981 Prohibit Retaliation? An Analysis of CBOCS West, Inc. v. Humphries*, 35 **PREVIEW OF SUPREME COURT OF THE UNITED STATES CASES**, 204 (Feb. 19, 2008).

Fick was also a panel member for the Evaluation of ILAB Matrix for Monitoring International Labor Standards, conducted by the Institute of Labor and Industrial Relations, University of Michigan, pursuant to a grant from the Department of Labor (March-May 2008).



Nicole Garnett presented *The Order-Maintenance Agenda as Land Use Policy* (draft book chapter) at the 2008 Property Works in Progress Conference, University of Colorado Law School, June 14, 2008.

She was also a visiting scholar at Stanford University's Hoover Institution, June 2-6, 2008.



Rick Garnett

published the following articles:

Do Churches Matter? Toward an Institutional Understanding of the Religion Clauses, 13 **VILANOVA LAW REVIEW** 101

(2008); *Students, Speech, and the "Mission" of Public Schools*, 12 **LEWIS AND CLARK LAW REVIEW** 45 (2008); *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 **ST. JOHN'S JOURNAL OF LEGAL COMMENTARY** 515 (2007).

He also published the following book notes:

Briefly Noted, **FIRST THINGS** (March 2008) (reviewing PHILIP BESS, *TILL WE HAVE BUILT JERUSALEM: ARCHITECTURE, URBANISM, AND THE SACRED* 2006).

Briefly Noted, **FIRST THINGS** (Oct. 2007) (reviewing PATRICK M. GARRY, *WRESTLING WITH GOD: THE COURTS' TORTUOUS TREATMENT OF RELIGION* (2007)).

Garnett also presented the following:

"Recent Constitutional Controversies Over Religious Liberty," Law and Religion Conference, Program in Law and Public Affairs, Princeton University (May 29, 2008) (invited speaker);

"Judicial Interference with Community Values," Federalist Society Student Symposium, University of Michigan Law School (March 7, 2008) (invited presenter);

"Religion, Citizenship, and Multiculturalism," Harvard Law School (Feb. 29-March 1, 2008) (invited participant).

Garnett was also named to the National Board of Academic Advisors for the William H. Rehnquist Center on the Constitutional Structures of Government.



Jimmy Gurulé

was recently appointed by Chief Judge Frank H. Easterbrook, U.S. Court of Appeals for the Seventh Circuit, to the Seventh Circuit's Committee on Pattern Criminal Jury Instructions. Gurulé

lectured in March 2008 on "The International Response to Financing Terrorism" at Ave Maria Law School. On April 11, 2008, he spoke at the World Conference on Combating Terrorist Financing, sponsored by Case Western Reserve University School of Law. On April 22, 2008 Gurulé delivered a digital video lecture on globalization and terrorism that was broadcast in Algiers, Algeria. The audience included leading government financial contacts, journalists, law-enforcement officials, and policy makers.

Gurulé was also invited by the Manhattan Institute for Policy Research to speak to a group of

senior-level Los Angeles police officers about terrorist financing. His talk was sponsored by the Center for Policing Terrorism, recently established by the Manhattan Institute to educate and assist state and local law enforcement.

This fall, he will be the subject of a two-minute television feature on NBC during halftime of a home Notre Dame football game, tentatively scheduled for Sept. 27.



Sandra Klein

served as a panel moderator for the Acquisitions Forum at the 16th Annual Innovative Users Group Conference, April 27-30, 2008 in Washington, DC.



Lloyd Mayer

published *What Is This 'Lobbying' That We Are So Worried About?*, 26 **YALE LAW & POLICY REVIEW** 485 (2008). He also presented the following: "The Participation by Nonprofits in Democ-

racy," as part of a panel at the American Association of Law Schools' annual meeting on January 5, 2008; "Electing Faith: The Intersection of Law and Religion in Politics Around the World" at the Boston College Law School Law & Religion Program Symposium on March 18, 2008; and "Public Benefits, Private Benefits, and Charities" at a Harvard University Nonprofit and Philanthropy seminar on March 19, 2008, and at a faculty colloquium at University of Illinois College of Law on April 9, 2008.



Jennifer Mason McAward

's article *Congress's Power to Block Enforcement of Federal Court Orders* is forthcoming in 93 **IOWA LAW REVIEW** (2008).



Mark McKenna

presented a paper titled *Modern Trademark Law and the Right to Make Derivative Works* in August at Stanford Law School's Eighth Annual Intellectual Property Scholars Conference.



John Nagle

served as a Fulbright Distinguished Scholar at the University of Hong Kong Faculty of Law (HKU) during the spring 2008 semester. Nagle taught and lectured at numerous venues through-

out Hong Kong, China, and southeast Asia. At HKU, he presented several guest lectures to classes studying international environmental law and sustainable development. Elsewhere in Hong Kong, he was the featured speaker for two meetings hosted by the American Chamber of Commerce's sections on intellectual property and environmental law issues, and he was invited to speak at events hosted by the two other law schools in Hong Kong. Nagle gave ten lectures to students and faculty at six universities in China, discussing topics ranging from climate change to Internet pornography to election law. At the Universiti of Malaysia Sarawak, Nagle talked about the role of the law in protecting biodiversity, and he interviewed four governmental and NGO officials in Hanoi about wildlife preservation and pollution control in Vietnam. Nagle also spent three days helping to teach poor Cambodian children about environmental health in villages near Phnom Penh.

In addition, Nagle published two casebooks this year: the second edition of his **PROPERTY LAW** with Aspen Press, and the first edition of **THE PRACTICE AND POLICY OF ENVIRONMENTAL LAW** with Foundation Press.



Sean O'Brien

published *The United Nations and Multinational Corporate Responsibility: Legally Binding Standards or 'Principled Pragmatism'?* (co-authored with Douglass Cassel), in Oliver F. Wil-

liams, ed., **PEACE THROUGH COMMERCE: RESPONSIBLE CORPORATE CITIZENSHIP AND THE IDEALS OF THE U.N. GLOBAL COMPACT**, University of Notre Dame Press (forthcoming 2008); and *Defending Pakistan's Constitution* in **NOTRE DAME MAGAZINE** (spring 2008).

O'Brien presented the following:

"Assessing the Roles of the International Criminal Court and the U.S. in Darfur" at a May 1, 2008 Law Day panel called The International and the United States Response to the Crisis in Darfur at John Marshall Law School. The panel was sponsored by the John Marshall Law School, the Illinois State Bar Association, and the Decalogue Society of Lawyers.

O'Brien traveled to Guatemala on a fact-finding mission in March 2008 to follow-up on the

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investigation into the assassination of Bishop Juan Gerardi, and to Colombia in June 2008 to represent the CCHR at the General Assembly of the Organization of American States.

O'Brien was named vice-chairman of the Illinois State Bar Association's Human Rights Section Council by the president of the Illinois State Bar Association in May 2008, and was named legislative liaison for the Illinois State Bar Association's Human Rights Section Council.

Lastly, O'Brien serves as counsel for a Nepalese teenager seeking political asylum in the United States, and is co-counsel for the following:

Twenty-five former United States diplomats as *Amici Curiae* in *Boumediene v. Bush* and *Al Odah v. United States*, Nos. 06-1195 and 1196 in the Supreme Court of the United States, 2007. Cases were orally argued in December 2007, and were decided in June of this year; the Gómez Paquiyauri family in *Gómez Paquiyauri v. Peru*, before Inter-American Court of Human Rights, 2006 (involving compliance with reparations judgment of the court, in the torture and murder of two brothers); and certain prisoners in the case of *Hugo Juarez Cruzatt et al. v. Peru*, before the Inter-American Court of Human Rights, 2005 to date, Judgment on Merits, Nov. 25, 2006 (involving military massacre of unarmed prisoners). The case is now at compliance stage.



Mary Ellen O'Connell published *THE POWER AND PURPOSE OF INTERNATIONAL LAW*, Oxford University Press 2008. She also presented the following:

"The Power and Purpose of International Law," Roundtable in Public International Law and Theory, Jan. 18-19, 2008, Washington University in St. Louis;

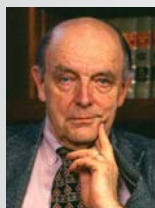
"International Law: Natural Law, Positive Law and Process, Is There a Higher Law? Does It Matter?" Feb. 21-22, 2008, Pepperdine University School of Law;

"Responsibility to Peace," Panel on Just Peace Governance, International Studies Association, San Francisco, March 27-28, 2008;

"Medellín v. Texas," sponsored by the Notre Dame International Law Students Association and Human Rights Association, April 17, 2008;

"Sovereignty, International Law, and Christianity," International Law and Theology Working Group, Center for Theological Inquiry, Princeton Theological Seminary, May 29-30, 2008.

In addition, O'Connell was chosen as one of the *Irish Voice's* "Legal 100," which celebrates the top 100 lawyers of Irish heritage in America.



Robert Rodes

published *On Lawyers and Moral Discernment*, 46 *JOURNAL OF CATHOLIC LEGAL STUDIES* 259 (2007); *On Marriage and Metaphysics*, *NATIONAL CATHOLIC BIOETHICS QUARTERLY*, (Winter

2007); and *The Heart and the Wall, Courty Love and Christian Courtship*, 34 *COMMUNIO* 535 (2008). *On Marriage and Metaphysics*, a critique of same sex marriage, won the Catholic Press Association's award for the Best Scholarly Essay of 2007.



Tom Shaffer

published *Business Lawyers, Baseball Players, and the Hebrew Prophets*, 42 *VALPARAISO LAW REVIEW* 1063 (2008). He presented "On Being a Business Lawyer" on March 27, 2008 at Val-

paraiso University as part of a program called A Look at How People and Institutions Help Businesses Fulfill Their Ethical Obligations; "On Being a Christian and a Lawyer" at the spring luncheon series on Law and Christianity at the University of Chicago, May 17, 2008; and "Fighting Over the Pickle Crock: Mediation in Estate Planning" with Michael Jenuwine during Reunion 2008 at Notre Dame Law School. In addition, Shaffer was awarded an honorary doctoral degree (LL.D.) by Valparaiso University in May 2008.



Joseph W. Thomas

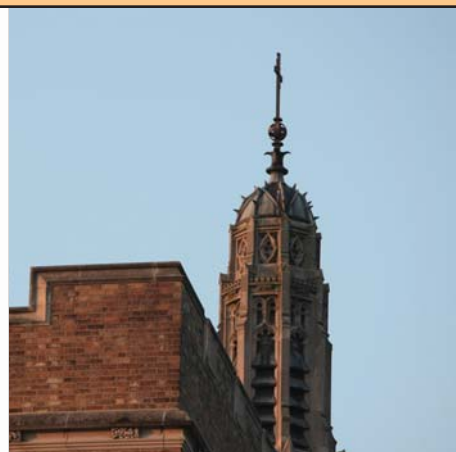
was awarded the 2008 Renee D. Chapman Memorial Award for Outstanding Contributions in Technical Services Law Librarianship at the American Association of Law Libraries

annual meeting on July 13, 2008 in Portland, Oregon.



Jay Tidmarsh

published *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 *WESTERN STATE UNIVERSITY LAW REVIEW* 193 (2007).



STAFF NOTES



Terri Welty, administrative assistant to Associate Dean for Library and Information Technology Ed Edmonds, celebrates 30 years with the Law School on September 11, 2008.



Melissa Fruscione

has been named assistant director of admissions, a new permanent position, after serving in that position for two years under a term contract. A graduate of the University of Notre

Dame, Fruscione earned her bachelor's degree in history. She earned her juris doctor degree from the University at Buffalo Law School with a concentration in criminal law. Fruscione is admitted to the New York Bar. Prior to joining the Notre Dame Admissions staff, she served as the director of recruitment in the Office of Admissions at the University at Buffalo Law School.



Carly Nasca has

recently joined the Law School as assistant director of the Career Services Office. Nasca is a 2003 graduate of the Law School and has an undergraduate degree from

Washington and Lee University. After law school, she spent three years working as assistant corporate counsel for the New York City Law Department and then served as a trial attorney for the United States Department of Justice.



A Confession

BY GREGORY M. SHUMAKER, PRESIDENT, NOTRE DAME LAW ASSOCIATION

I have a confession to make—I did not grow up liking Notre Dame. That's right. As a youngster, I did not dream of attending class under the Golden Dome. I did not think about getting married in the Basilica. I did not walk around in a Joe Montana jersey. I did not beg my parents to go to a game in The House That Rockne Built. And, no, I did not know the words to the fight song.

To some (perhaps many) reading this, that is blasphemy. Why would someone who had so little affection for Notre Dame as a child and young adult choose to attend law school there? And perhaps more importantly, why would someone like that ever become president of the Notre Dame Law Association?

Fair questions. And I have the same answer for both: I chose Notre Dame, and got involved with the NDLA, because of people like you. People who read the Law School's magazine twice a year to see what's going on at the school; people who stay in touch with their classmates; people who proudly wear their ND sweatshirt in the fall no matter what the football team's record might be. Sure, there were, and still are, other variables—the majesty of the Notre Dame campus, its outstanding academics, the University's sense of purpose. But the deciding factor was and continues to be the passion of the Notre Dame alumni. In my mind, any institution whose alumni base has such conviction about its alma mater is one I want to be a part of.

This palpable sense of pride in being a part of the Notre Dame family is what makes us as alums so different. This pride binds us—and indeed brands us—as “Domers.” It prompts others at times to challenge us. It motivates us to look out for each other—at sporting events, on campus, in crowded bars, and in the business world. Think of the reaction you often receive when someone you're speaking with finds out you went to Notre Dame. The conversation instantly turns into a dialogue about going to Catholic grade school, or a discussion about the merits of *Rudy*, or a referendum on what's wrong or what's right with the football team. It's this visceral response the mention of Notre Dame provokes that makes me so proud to be a part of it.



And it is this pride that can make a profound difference in the lives of so many prospective and current Notre Dame law students and graduates. The Notre Dame Law Association is about this passion, providing a convenient vehicle for all of us to remain involved with our Law School. We can stay connected in so many ways: Making the Law School

aware of outstanding applicants for admissions; reaching out to NDLS students with advice or a job tip; urging the hiring partners at our firms to participate in on-campus interviewing; interviewing and hiring NDLS graduates; mentoring NDLS students at our workplace; passing on information about job opportunities, public interest positions, and judicial internships and externships to our NDLA regional representatives; supporting the Law School with financial contributions, large and small; joining the St. Thomas More Society; and, yes, even just sharing our enthusiasm about the place when someone asks “what was it like to go to Notre Dame?”

On behalf of the entire NDLA board of directors, thank you for all you do on the Law School's behalf and in particular for your continued enthusiasm as alums. You never know when that enthusiasm will convert another Saul on the way to Damascus. If you don't believe me, feel free to ask one of my kids. And don't be surprised if, when you do, they also sing you the fight song. Because they know all the words. By heart.

“Cheer, cheer for old Notre Dame . . .”

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Board Presents McCafferty Award

Prof. "Tex" Dutile "Deeply Touched"



On April 25, 2008, the Notre Dame Law Association (NDLA) presented Professor Fernand N. "Tex" Dutile with the Rev. Michael D. McCafferty, C.S.C., Award. The award is presented to Notre Dame lawyers, or members of the Notre Dame Law School faculty or administration, who have rendered distinguished service to the University. Because this is a very special award, it is not presented on an annual basis, but only on those occasions when the NDLA Board deems someone worthy of receiving this award.

Board President Frank Julian presented Dutile with a plaque and a Waterford crystal lighthouse. The plaque reads: "For his extraordinary and special service to the University of Notre Dame, the Notre Dame Law School and the hundreds of students whom he has taught and mentored." The lighthouse symbolizes three things: Father Mike, who always liked Waterford; Dutile's home state of Maine, which put a lighthouse on the back of its state quarter; and Dutile's service to Notre Dame, which has served as a guiding light to so many people at Our Lady's University and Her Law School for 37 years.

EXCERPTS FROM 2007–08 BOARD PRESIDENT FRANK JULIAN'S AWARD PRESENTATION TO TEX DUTILE

...Tex's distinguished professional career began shortly after his graduation from the Law School. In 1965 and 1966, he worked for the Civil Rights Division of the U.S. Justice Department, investigating civil rights violations in racially troubled Alabama and Mississippi. One of the cases on which he worked was the murder of three civil rights workers, a case made famous by the movie *Mississippi Burning*. In fact, upon his arrival in Mississippi, Tex was told by Sheriff Cecil Ray Price that he would "be OK as long as he behaved." I'm sure Tex "behaved" in the only way he knew—to ensure that justice was done.

In 1971, Tex returned to Notre Dame to join the Law School faculty as an associate professor. During the past 37 years, Tex has taught criminal law, criminal procedure, and the law of education to hundreds of students. But his service to the Law School and to the University goes well beyond the classroom.

Tex served as associate dean from 1976 to 1979, and assistant dean from 1988 to 1991 and 1993 to 1999. He codirected the London Programme in 1991 and, from 1991 to 1993 was acting dean of the Law School.

Tex has served on the Law School Dean Search Committee, the Provost Search Committee, the Executive Committee of the University Academic Council, the University Promotions Committee, the Provost's Advisory Committee, and as chair of the Law School Committee on Faculty Status.

He served as the faculty editor of the *Journal of College & University Law* from 1986 to 1994, and has been a member of that publication's editorial board for 22 years.

In 1982, a very wise third-year class voted to award Tex the Distinguished Law School Professor Award. He delivered a fantastic acceptance speech. In 1990, then-First Lady Barbara Bush was asked to give the commencement address at Wellesley College. Ed McNally, a member of the Class of '82, was a White House speechwriter at the time, and was assigned the task of writing Mrs. Bush's speech. With Tex's permission, Ed reworked Tex's 1982 speech into Mrs. Bush's Wellesley address. The speech received wide national acclaim. In its Millennium Edition, *USA Today* listed the 100 greatest speeches of the 20th century, and it ranked this speech as number 47!

It is fitting that we present the McCafferty Award to Tex. Tex and Mike were colleagues on the faculty for many years. Tex always remembered Father Mike for having discriminating and elegant taste in all areas of life, and was the only priest Tex knew who might, at Mass, send back the wine!

On behalf of the Notre Dame Law Association, it gives me great pleasure to present the Rev. Michael D. McCafferty, C.S.C., Award to Tex Dutile.

EXCERPTS FROM DUTILE'S ACCEPTANCE SPEECH

Receiving the McCafferty Award is, for me, a giant thrill, and in large part because the award associates my name with Father Mike's. In his too-brief tenure at Notre Dame, Father Mike established himself as a real presence in the Law School. Father Mike's deep faith, intelligence, charisma, dedication to students, and self-effacing humor remain imbedded in the memories of all of us who knew him. Father Mike taught, of course, many areas of the law. But most of all, he taught us how to live and, still more impressively, how to die. The courage and faith he displayed during the lengthy and awful illness that so prematurely took his life continue to edify us beyond measure. So I am deeply touched to receive an award named after him.

A great philosopher—I think it was Lou Holtz—once said that in choosing a career you should determine what you really enjoy doing, and then find someone who will pay you to do it. I did just that! How incredibly lucky I have been to spend virtually my entire career at Notre Dame—doing work I love for an employer I love. Where else but at Notre Dame would I have been able to work with such good students—and I use the

word "good" here not only, or even primarily, in the academic sense. My colleagues here, administrators, faculty, alumni, and staff make this a warm, friendly place to work.

As I have said before, Notre Dame is truly unique. To be sure, there are other great educational institutions, but all have their rough counterparts. For Harvard, there is Stanford; for Michigan there is Cal-Berkeley; for Army there is Navy. But no other place delivers Notre Dame's uncanny combination of spiritual focus, academic excellence, athletic prowess, and national appeal.

It has been said of some true Notre Dame giants that "their blood is in the bricks." Despite my many ties to Notre Dame, and despite having spent so much of my life here, it would be wildly presumptuous of me to claim that *my* blood is in the bricks. But I can confidently say that these bricks are in my blood. Thanks so much for this wonderful honor. It's one that I will treasure always.

Commencement 2008

Law School Dean Patricia O'Hara awarded diplomas to 210 graduates on an unseasonably chilly afternoon on Sunday, May 18 at 4:00 p.m. in front of the Hesburgh Library reflecting pool. Faculty and staff were on hand to celebrate the major milestone with the graduates and their families and friends.

Preceding the diploma ceremony, an ecumenical prayer service and hooding ceremony took place in the

Basilica of the Sacred Heart. Rev. John J. Coughlin, O.F.M., professor of law at Notre Dame, presided. Notre Dame's President, Rev. John I. Jenkins, C.S.C., also attended.

During the diploma ceremony, Anthony J. Bellia, Jr., selected by the Class of 2008 as Professor of the Year, shared some of his wisdom and advice with those in attendance. An excerpt of the talk is on the next page.





AN EXCERPT FROM
“Reflect a Great Light”

NOTRE DAME LAW SCHOOL
 DIPLOMA CEREMONY ADDRESS

*Anthony J. Bellia, Jr.,
 Teacher of the Year*

May 18, 2008

You will find many ways in your professional lives to reflect brightly the same light that Notre Dame aspires to reflect, pointing the way for others to do the same. Some ways are grand, and you have rightly been reminded today of the noblest aspirations of the profession. Some ways, however, are more modest, and it is worth reflecting on them as well.

When you recognize the value of doing a task right rather than valuing the need for recognition, you reflect a great light.

When you embrace the tedium that can mark aspects of this profession, rather than despairing of it, acknowledging the systemic benefits to society from the ordered processes you are performing, you reflect a great light.

When you realize that you have the power to make the work of others more fulfilling and worthwhile, and you make it so, without realizing any gain to yourself, you reflect a great light.

When you discern that you have been called to something in life other than

what you are currently doing—that there is another good toward which you could more fruitfully direct your energies—and you pursue that calling, perhaps a humbler one, rather than lament complexities that keep you from doing so, you reflect a great light.

These are small things, to be sure. For many, however, these small things mark the difference between a satisfying and an unsatisfying professional life.

Of course, no matter what you do professionally, you will have multifaceted callings, rich lives of which the law is only some measure. The physical arrangement of this very event is beautifully symbolic of this richness. You have in front of you the faculty of the Law School, symbolic of your pursuits in law that lie ahead. You have behind you people who have always been behind



you—families and friends. Especially those among you who are first-generation lawyers: Do not ever leave behind the wisdom and goodness of those who have lived to serve your well-being.

When you appreciate what many of those behind you well appreciate—that there will always be people above and below you on the ladder of career success, but that as far as your children are concerned, you (and perhaps only you) hold the very ladder of their lives—you reflect a great light.

When you do not allow your shine in the legal field and with the jury box to sanitize you from the grime of the soccer fields and the sandbox, you reflect a great light.

When you do not allow your trials as first chair to insulate you from the trials of a parent confined to a wheelchair, you reflect a great light.

When you lack the kinds of relationships that you presumed you always would have—with parents, children, spouse, or other loved ones—because of death or other all too real circumstances of life, and you replace despair with a love and commitment that enables you to live a life that transcends in value anything you initially envisioned for yourself, you reflect a great light.

Read this speech in its entirety by visiting
law.nd.edu/news/518-professor-of-the-year-commencement-address



2008 Commencement Awards

ALI-ABA Scholarship and Leadership Award

David Timothy Raimer
San Mateo, California

Edward F. Barrett Award

Joseph George Fiorino
Winnipeg, Manitoba, Canada

Kyle David Smith
Elk Grove, California

Joseph Ciralo Memorial Award, Jessup International Moot Court Award

Benjamin Capen Runkle
South Bend, Indiana

The Farabaugh Prize

Andrew James Soukup
Holland, Michigan

The Colonel William J. Hoynes Award

Joshua D. Dunlap
Vassalboro, Maine

International Academy of Trial Lawyers Award

George Franklin McDonnell, Jr.
Leawood, Kansas

Jessup International Moot Court Award, The Judge Joseph E. Mahoney Award

Krishna Anita Thomas
South Bend, Indiana

Conrad Kellenberg Award, Dean Konop Legal Aid Award, David T. Link Award

Daniel P. Cory
South Bend, Indiana

William T. Kirby Award

Eric Parker Babbs
West Lafayette, Indiana

Matthew Robert Dornauer
Tiffin, Ohio

Clinical Legal Education Association Outstanding Student Award

Geoffrey Francis Gasperini
Richmond, Virginia

The Jon E. Krupnik Award

Annabelle Mary Therese Pereira
Charlotte, North Carolina

The Arthur A. May Award

Nicole Renee Tlachac
Grand Haven, Michigan

Captain William O. McLean Law School Community Citizenship Award

Connor M. O'Brien
Seattle, Washington

The Dean Joseph O'Meara Award

Aaron James Rogers
Rockwall, Texas

The A. Harold Weber Moot Court Awards

Sherene Walid Awad
Jerusalem, Palestine

Akia Aisha Haynes
Indianapolis, Indiana

Jeffery Robert Houin
Plymouth, Indiana

Matthew James Morrison
West Hartford, Connecticut

The A. Harold Weber Writing Award

Nicholas James Nelson
Owatonna, Minnesota

Reunion 2008, May 29–June 1

From five years out to 55 years out, NDLS alums both young and, well, not as young, converged on campus to reminisce, enjoy camaraderie with fellow alums, and marvel at the changes taking shape on campus, including progress on construction of the Eck Hall of Law, scheduled to open for classes in January 2009.

Among the many weekend activities were a Mass for Law School alumni on Friday—celebrated by NDLS alum Rev. John Riley, C.S.C.—followed by a lively reception, dinner, and program, including a moving toast by Ann Merchlewitz on behalf

More Than 100 in Attendance

of the class of 1983 to Patricia O'Hara for her nine years of service as dean. On Saturday, professors Charlie Rice, Bob Jones, Jr., Tom Shaffer, and Mike Jenuwine engaged groups of CLE participants in lectures on natural law, representing clients with diminished capacity, and mediation in estate planning, and alumni and their families enjoyed a continental breakfast and open house in the Law School.

The offices of External Relations and Law School Development wish to

thank each of the class secretaries for volunteering their time to help make this a successful reunion by promoting attendance and contributions to the class gift.





CLASS OF 2003

“Walking back into the Law School, it was hard to believe that it has been five years since we graduated. I still have such vivid memories of our three years together. With the addition to the building in progress, next time I’m back, I’m sure it will seem like an entirely different school. So, it was good to relive memories one last time in the old building. The campus was gorgeous as always and has undergone a dramatic facelift of its own. It was great to reconnect with friends, meet new faces, and talk with some class favorites, including Professors (now Dean) Robinson and Dutile! This was also our son Luke’s first trip to Notre Dame and it was so great to experience the weekend with him. Highlights for Luke included a trip to the Grotto, where he heard an owl, and a visit to the Notre Dame Fire Department! Leaving campus, I knew that coming back for the Reunion was time well spent. Go Irish!”

—LAWRENCE A. WARD, III, SEATTLE, WASHINGTON

In Their Own Words

CLASS OF 1953

“There is a sense of awe about being on the campus of Notre Dame. The University and the Holy Cross order make it special. I had a great time being together with other alums, especially my roommate Dick Hodges and friend Bob Barry, and enjoying so many memories and seeing what’s going on with the growth of the Law School ... it’s overwhelming. Reunion was, for me, a really significant event. I feel very lucky for having been admitted to the Law School. I think I’ve done well being a Notre Dame Lawyer.”

—THOMAS MEANEY, EUCLID, OHIO



1950s

A. Samuel Adelo, '47 B.A., '54 J.D., was named among the "Men Who Matter" by *The New Mexican* for his work helping Spanish-speaking people navigate the courts, understand the charges against them, and make their case.

Carl Eiberger, '52 B.S., '54 J.D., received the Lifetime Achievement Award from the Denver Notre Dame Club for his 60 years of service to the University, the Law School, and the local ND Club.

1960s

Russell Lovell, '66 B.B.A., was honored by Iowa Legal Aid with the Excellence in Service Award for his work "to promote justice and ensure that society becomes more hospitable to low-income people."

Robert J. Sidman, '68 J.D., was recognized as one of the top practitioners in the country for bankruptcy and restructuring by the publication *Chambers USA: America's Leading Lawyers for Business*.

1970s

Nelson "Nellie" Vogel, Jr., '71 J.D., a partner in the South Bend office of Barnes & Thornburg LLP, has been named a Fellow of the American College of Tax Counsel for 2008.

Jerry Fenzel '72 B.A., founded AIRTIME-Manager, a business that develops software applications for PDAs that capture billable hours for attorneys working on a Blackberry or other similar device.

John Suthers, '74 B.A., attorney general for the State of Colorado, received the Distinguished Service Award from the Denver Notre Dame Club.

John T. Sperla, '75 J.D., a member of the Grand Rapids, Mich., law firm of Mika Meyers Beckett & Jones PLC, was recently appointed to serve on the Cascade Township Board Planning Commission. Sperla litigates in the areas of land use and zoning, personal injury (with special emphasis in auto negligence

and premises liability matters), general commercial litigation, construction, and criminal law.

Judge Ann Claire Williams, '75 J.D., was honored by the American Bar Association's Commission on Women with the Margaret Brent Women Lawyers of Achievement Award. The award was presented at the 18th annual Margaret Brent awards luncheon on Sunday, August 10, 2008 in conjunction with the ABA's annual meeting in New York City.

Patrick A. Salvi, '78 J.D., purchased the Gary SouthShore RailCats, a minor league baseball team, with his wife, Lindy. Salvi, who practices law in Chicago, is an adjunct professor at NDLS and sits on the Law Advisory Council.

Dean A. Calland, '79 J.D., of Babst, Calland, Clements and Zonnir, P.C., was named by *Pennsylvania Super Lawyers* magazine as one of the top lawyers in Pennsylvania for 2008.

Margaret (Peggy) M. Foran, '76 B.A., '79 J.D., has been appointed executive vice president, general counsel, and corporate secretary of the Sara Lee Corporation.

1980s

Bruce Baty, '82 J.D., joined the Kansas City office of Sonnenschein Nath & Rosenthal LLP as a partner in the firm's Insurance Regulatory Practice Group on June 24, 2008.

Paul Lewis, '80 B.A., '83 J.D., was appointed director of the Office of Legislative Counsel (OLC) at the Department of Defense and promoted into the Senior Executive Service on June 22, 2008. OLC is the interface in the Pentagon for all legal issues affecting Capitol Hill. Lewis is also an adjunct professor of ethics at Georgetown University.

Anne Marie Finch, '86 B.A., '89 J.D., serves as the chair of the Labor and Employment Section, is vice-chair of the Intellectual Property Section, and has been named to the Executive Committee of Godwin Pappas Ronquillo, LLP in Houston, Tex.

John Eustermann, '87 B.A., '89 M.B.A., is favorably ranked in the category "Natural Resources and Environment" in the new edition of *Chambers USA: Guide to America's Leading Lawyers for Business*.

Don C. A. Parker, '88 J.D., of Spilman Thomas & Battle, PLLC in Charleston, was named a Super Lawyer in West Virginia in Insurance Coverage Law. *Law & Politics*, a publication of Key Professional Media, Inc., performs polling, research, and selection. The methodology includes a statewide nomination process, peer review by practice area, and independent research.

Michael J. Whitton, '89 B.B.A., '92 J.D., managing partner of the San Diego office of the law firm Ross, Dixon & Bell, was quoted in the *San Diego Daily Transcript* regarding a story about the firm's upcoming merger with Troutman Sanders.

Judith A. Hagley, '90 J.D., was awarded the prestigious Arthur S. Flemming Award for Exceptional Federal Service for 2008. Hagley is a trial attorney with the Tax Division of the Department of Justice. Past recipients of this award include Neil Armstrong and Elizabeth Dole.

1990s

Eileen M. Martin, '91 J.D., was promoted to partner in the Buffalo, N.Y., office of Hodgson Russ LLP. Martin is a member of the firm's Immigration Practice Group.

Mark Wattley, '91 J.D., former vice president and legal counsel of human resources for Walgreens Health Services, has been promoted to divisional vice president for Walgreens.

Susan W. Gelwick, '94 J.D., was promoted to partner at the Boston office of Seyfarth Shaw LLP, where she concentrates on commercial and business litigation.

Zhidong Wang, '94 J.D., recently traveled to China at the official invitation of the All-China Federation of Returned Overseas Chinese meeting with high-level Chinese officials.

Elizabeth VanDersarl, '95 J.D., has been named vice president of government affairs for The American Forest & Paper Association. VanDersarl will manage the Association's advocacy efforts in Washington, D.C., state capitals around the country, and international venues.

Matthew Schechter, '96 J.D., was named senior counsel at McManis Faulkner & Morgan in San Jose, Calif., where he practices employment law and business litigation.

Diana von Glahn, '96 J.D., is hosting and producing a new travel show, *The Faithful Traveler*, concentrating on Catholic shrines and places of pilgrimage throughout the United States.

Jerri Ryan, '94 B.A., '97 J.D., is now a partner with Thorp Reed & Armstrong, LLP in their Commercial and Corporate Litigation Practice Group.

Jeff R. Heck, '91 B.B.A., '98 J.D., has rejoined Baker & Daniels LLP as counsel in the firm's litigation practice. He spent the last two years at Tuesley Hall Konopa LLP, after practicing the first eight years of his law career at Baker & Daniels.

Tom Johnston, '98 J.D., was promoted to partner at Porzio Bromberg & Newman, PC in Morristown, N.J. Johnston represents public- and private-sector clients for labor and employment law matters.

Ha Kung Wong, '99 J.D., has been elected partner at Fitzpatrick, Cella, Harper & Scinto's New York office, practicing general intellectual property law.

2000s

Timothy Connors, '00 J.D., is director of the Manhattan Institute's Center for Policing Terrorism, recently established to educate and assist state and local law enforcement in securing their cities post-9/11.

Scott R. Williams, '00 J.D., is now a partner with Sidley & Austin LLP in their Chicago office, practicing corporate law.

Xiaosheng Huang, '00 LL.M., recently traveled to China at the official invitation of the All-China Federation of Returned Overseas Chinese and led the Overseas Chinese Lawyers Delegation in Beijing.

Youn-Jae, '01 LL.M., accepted a position as legal team leader for AIG Investments in their Seoul, Korea, office.

David P. Krupski, '02 J.D., has joined Lewis and Rocca LLP's Phoenix office as an associate in their Product Liability Department.

Christopher R. Zorich, '91 B.A., '02 J.D., returns to Notre Dame Athletics as manager of student welfare and development.

Mark Juba, '03 J.D., and his wife, Nicole, '03 J.D., are happy to announce the birth of their first child, Benedict Charles Juba, born May 2, 2008.

Barton Christian Walker, '04 J.D., and his wife, Dr. Robina Walker, are pleased to announce the birth of their second child, Robina Josephine Walker, born Feb. 23, 2008.

Jason Prince, '05 J.D., has been appointed by U.S. Secretary of Commerce Carlos M. Gutierrez to serve a four-year term on the Idaho District Export Council.

Julie Recinos, '08 J.D., begins work in September as a junior staff attorney for the Inter-American Court of Human Rights in San José, Costa Rica.

Walter Neyerlin '53, a resident of Niagara Falls, N.Y., died on June 19, 2008. He was active in the practice of law until he was hospitalized in May 2008. Neyerlin is survived by his wife, Jean, six children, and several grandchildren.

Henry M. Shine, Jr., '51 J.D., died on June 20, 2008 at the age of 87. Shine, who attained the rank of captain in the Judge Advocate General's Corps of the U.S. Navy Reserve, became an Eagle Scout in 1938 and was a life member of the National Eagle Scout Association. Shine held numerous positions over the course of his career, in both the government and civilian realms. He was assistant staff director for the U.S. Commission on Civil Rights, legislative director of the National Association of Home Builders, and executive director of the California Bankers Association. He was a world traveler and visited all 50 American states. His last role was as a member of the Secretary of the Navy's 2008 Retiree Council.

Andrew "Andy" Steffen, '48 B.A., '50 J.D., passed away on April 4, 2008 at the age of 83. Steffen worked as an attorney with the Indianapolis law firm McHale, Cook and Welch from 1988 until his retirement in 2003. Prior to that, he was a senior vice president at Ameritech's headquarters in Chicago. An active Indianapolis philanthropist and volunteer, Steffen was honored as a Sagamore of the Wabash by three Indiana governors: Matthew Welsh, Evan Bayh, and Joseph Kernan. Steffen served in the U.S. Army Infantry during World War II, and was awarded the Bronze Star Medal for Heroic Achievement while in France in 1944. At NDLS, Steffen served as editor-in-chief of the Notre Dame Law Review.

James R. Sweeney, '50 B.S., died on July 10, 2008, of complications from Alzheimer's disease. Sweeney was 80 years old. He practiced patent and intellectual property law for nearly 50 years, and for five years oversaw the teaching and study of law at John Marshall Law School. Sweeney, who lived in Chicago, was president of the Patent Law Association of Chicago in 1974 and held various posts with the Chicago and American Bar Associations. His wife, Rhonda Sweeney, is a Cook County judge.

Existing Law School Building to be Renamed Biolchini Hall

\$15 Million Gift Paves the Way for Renovation



Robert F. Biolchini, a member of the University of Notre Dame Board of Trustees and partner in the Tulsa, Okla., law firm Stuart, Biolchini & Turner, and his wife, Frances, have made a \$15 million gift to the University to help underwrite the renovation of the current Notre Dame Law School building.

Announcing the gift immediately prior to the spring trustees meeting, University President Rev. John I. Jenkins, C.S.C., said, "This unanimous benefaction will play an integral role in our concerted and strategic plan to enhance in every

way the legal education that is distinctive to Notre Dame. Bob and Fran have contributed their valued time, counsel, and resources for more than 25 years, and we are tremendously grateful for this latest and most extraordinarily generous gift."

After a comprehensive renovation, the existing Law School building will be renamed Biolchini Hall. It will house an expanded Kresge Law Library, two 50-seat classrooms, new space for *Notre Dame Law Review*, and new offices and work space for admissions and career services. The exterior of the building, including masonry, windows, and roofing, also will be restored.

A covered archway will link Biolchini Hall to the adjacent Eck Hall of Law, a three-story, 85,000-square-foot building that is currently under construction on the site of the former campus post office. Eck Hall is scheduled for completion in January 2009. At that time, all Law School operations will move into Eck Hall, and renovation of the existing Law School building will begin. The entire project is expected to be complete in June 2010.

"The combination of Biolchini and Eck Halls will give Notre Dame one of the outstanding law school facilities in the country," said Dean O'Hara. "On behalf of all Law School faculty,

students, and alumni, I want to offer my deepest thanks to Bob, Fran, and their family."

A 1962 Notre Dame graduate, Biolchini has served on the Notre Dame Board of Trustees since 2001. He was a member of the Law School Advisory Council for the previous 19 years, and he and Frances endowed the University's Biolchini Family Chair in Law in 1995. Their combined gifts to Notre Dame now exceed \$18 million.

Biolchini earned his law degree from George Washington University. He is a member of the Oklahoma and Michigan bar associations and has served since 1981 as a temporary appeals judge for the Oklahoma Supreme Court.

Active in the Catholic Church, Biolchini is a Knight of the Sovereign Military Order of Malta and of the Holy Sepulchre and recently served as chair of the Diocese of Tulsa's Fund for the Future. He also served as chair of the board of trustees of Gilcrease Museum and Monte Casino School in Tulsa.

Biolchini serves as president and chief executive officer of PennWell Corp., a privately owned, Tulsa-based media company founded in 1910 that publishes 75 international weekly and monthly business-to-business magazines and conducts more than 60 business-to-business conferences and exhibitions on six continents. He is chief executive officer of Bancshares of Jackson Hole (Wyo.), Valley National Bank, Lake Bancshares, and Ameritrust, and is a director of American Business Media. He also has served and currently serves on several private and public corporations in the oil and gas and electronics industries, and is a member of Lloyds of London.

Frances Biolchini, a graduate of Trinity College, is active in several Tulsa community organizations, including the Girl Scouts, the Gilcrease Museum, Catholic Charities, and other civic and charitable projects.

The Biolchinis are the parents of six children, five of whom are Notre Dame graduates. Their gift is a component of the \$1.5 billion *Spirit of Notre Dame* capital campaign, the largest such endeavor in the history of Catholic higher education.

IRISH ONLINE

Stay involved. Stay connected. Stay Irish!

Even when you're away from the Notre Dame campus, you can stay connected through Irish Online, the Alumni Association's online network. Through Irish Online, you can:

Stay in touch with other ND alums through the online directory. Search by name, class year, degree, city, and many other criteria, or use the customized "Notre Dame Lawyers" search.

Update your profile—address, e-mail, career, and other information.

Share major milestones in your life—career achievements, weddings, and births—by posting them online.

Network with other alums using the career resources.

Access the Ticket Consignment Board, where you can buy and sell tickets to Fighting Irish home football games. This service from the Alumni Association is the only authorized reseller of ND football game tickets.

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FALL 2008 CLE

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SEPTEMBER 6

8:00 a.m.

Judith Fox, Associate Clinical Professor of Law,
Emerging Topics Related to Mortgage Lending

9:00 a.m.

Thomas L. Shaffer, Robert and Marion Short Professor Emeritus of Law,
Lawyers and Randy Cohen's "Everyday Ethics"

SEPTEMBER 13

8:00 a.m.

Ed Edmonds, Associate Dean for Library and Information Technology Professor of Law, **The NFL and Broadcasting—An Antitrust Perspective**

9:00 a.m.

Christine M. Venter, Director, Legal Writing Program
Part I: How Writing and Arguing the Standard of Review Can Make a Difference in the Outcome of Your Case
Part II: Retaining Women Associates: What Recent Studies can Teach Us About Women in the Law

Note: No ethics credits are offered on this date.

SEPTEMBER 27

8:00 a.m.

Charles E. Rice, Professor Emeritus of Law, **Natural Law**

9:00 a.m.

Jill R. Bodensteiner, Associate Vice President and Senior Counsel, Office of the General Counsel, **Title IX**

NOVEMBER 1

8:00 a.m.

Timothy J. Flanagan, Associate Vice President and Counsel, Office of the General Counsel, **Tag—You're IT: Current Legal Issues Related to Information Technologies**

9:00 a.m.

Michael Jenuwine, Associate Clinical Professor of Law,
Abuse of Statistics in Legal Settings: Overview of Basic Tenets

Note: No ethics credits are offered on this date.

NOVEMBER 22

8:00 a.m.

Michelle Shakour, Director, Gift Planning, University of Notre Dame, and Adjunct Professor, **Charitable Remainder Trusts**

9:00 a.m.

Rev. John J. Coughlin, O.F.M., Professor of Law,
Professional Responsibility/Legal Ethics

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