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2003

## The Advocate (Vol. 1, Issue 4)

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### Repository Citation

"The Advocate (Vol. 1, Issue 4)" (2003). *Student Newspaper (Amicus, Advocate...)*. 300.  
<https://scholarship.law.wm.edu/newspapers/300>

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# THE ADVOCATE

VOLUME I, ISSUE FOUR

WEDNESDAY, NOVEMBER 5, 2003

WILLIAM & MARY SCHOOL OF LAW

## LAW-LAW PALOOZA!



Professor Mulroy and the "Write-Offs" perform a rump-shaking rendition of "You Don't Have to Be the IRS with Me" (an original song by Prof. Mulroy)

### Music and Dance at Talent Show

Law students and faculty enjoyed an evening of antics and artistry to raise funds for the Public Service Fund at Law-Law Palooza on Friday, Oct. 24.

Jointly sponsored by Phi Delta Phi and PSF, the annual Talent Show drew an enthusiastic crowd to watch an assortment of acts including the *Chicago* showstopper "Razzle Dazzle" performed by Margaret Riley (2L), Poison's

"Every Rose Has Its Thorn" by Alex Tucci (3L) and Nick Naum (3L), and an original skit entitled "Harry Potter and the Order of the Coif" presented by a group of 3Ls. Professor Tortorice was on hand to emcee the production. Kevin Srebnick (3L) sang an original song, and Nate Doan (2L) and Allison Hatchet (2L) dirty-danced their way through the final performance of the evening to "I Had the Time of My Life."

### Defending Judicial Discretion: David Baugh Visits W&M Law

by Marie Siesseger

"Are you sure you don't have to be here?" guest speaker David Baugh asked a student in the front row. Slightly incredulous at the significant number of students and faculty who piled into Room 124 to hear him speak last Friday morning, Baugh wasted no time in taking command of his apparently unexpectedly large audience, diving directly into his presentation on the crisis in judicial independence.

After quickly disclaiming that he is "not a scholar,"

but a trial lawyer," Baugh explained that he had just filed suit against the Courts of Justice Committee of the Virginia House of Delegates on the grounds that portions of their questioning of judicial nominees and judges who are up for reappointment violates the constitutional requirement of separation of powers. The constitutional protections implicit in separation of powers are "not a technicality," Baugh stated, noting that because of

*Baugh continued on page 4*

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## Dean Jackson: Method to the Registration Madness

by Gary Abbott

Banner registration is good! Your experience with it earlier this week should have been nearly painless. And the odds are that you got the classes you wanted, or at worst you're on a predictable wait list.

This semester's 3L's are the last class that will have the aggravation of the alphabetical cycle of timed registration. Dean Jackson explained that the reason for limiting the number of students for any given time period was an artifact of the old computer system. It could only handle a relatively small number of people online at one time. Banner can handle approximately 300, still a problem for main campus registration, but more than adequate for any single law school class.

Procedural due process and the need for fairness are the reasons that 3L's continued on the old registration plan. The students who had the last time slot a year and a half ago deserved the opportunity to finally have first choice in classes. Similarly, 2L's and all students in years to come will, fairly and equitably, have equal opportunity in the free-for-all

registration with everyone online at the same time.

In practicality, Dean Jackson noted, students generally get the classes they are after without any trouble. A few specialty classes, those with very limited enrollment and with popular professors, will always have wait lists, but Banner has improved your chances for those as well. With apologies to the arithmetic-challenged, it works like this: a class with a limit of 18 is filled and three students are wait listed, students who have then logged off as complete; later in the registration period, five students drop the class, leaving openings; the three wait listed spots are "held" by Banner on the assumption that they are taken, while the other two can be filled; then at add/drop, everybody is made happy.

Dean Jackson offered only one word of caution: CHECK FOR HOLDS, i.e., fines, fees not paid, whatever. The main campus registration office was asked to not add holds within five days of registration so we would have time to clear them, but who knows? Otherwise, she expected registration to go "Smoothly."

## Predicting the Future: IBRL Moot Court Previews Supreme Court Term

by Jeff Mead

If Friday's moot court argument of *Locke v. Davey* serves as an indication of how the U.S. Supreme Court will decide the case later this term, conservatives beware. A panel of journalists and law professors voted 7-2 to overturn a decision allowing Josh Davey, a Washington state college student, to use his scholarship award in pursuit of a theology degree.

The moot court kicked off Friday's portion of the 16th annual Supreme Court Preview, a program sponsored by the Institute of Bill of Rights Law. The conference highlighted

cases on the Court's upcoming docket. Admittedly, the moot court vote reflected a mix between the participants' personal feelings and their thoughts on how the Supreme Court would really vote. Not surprisingly, many think the actual vote will hinge on Sandra Day O'Connor's vote.

"I think O'Connor will side with Davey," panelist Charles Lane said. "I hope you're right," Jay Sekulow, Davey's attorney, quickly replied. Sekulow argued for Davey at the moot court and will represent the student in front of the Supreme Court in December. The state of Washington awards college scholarships to academically superior and economically needy students. A provision of the award, however, states the student may not major in theology. Sekulow contends that "when Washington revoked Davey's scholarship after he changed his major

to theology, it violated the free exercise clause of the First Amendment

Steven Green, who argued for the state, contended that Washington and all states have wide latitude in determining how to spend their resources and that the state's refusal to fund theology doesn't discriminate against Davey's ability to practice his religion. "He can major in theology and take these classes," Green said, "but the state just isn't going to pay for it."

A later panel highlighted the potential future difficulties which may arise in nominating a Supreme Court justice based

on the current friction in the Senate's confirmation hearings for federal judicial appointments to lower courts. The panel unanimously agreed that the main source of the current bickering has its roots in the failed attempt to nominate Robert Bork to the Supreme Court in 1987. "The Senate Judiciary Committee is a lot like the Middle East," panelist John Harrison said. "It has a lack of mutual trust and a long memory."

The Friday portion of the conference concluded with a discussion of the implications of the Court's June 2002 decision in *Lawrence v. Texas* which struck down a Texas anti-sodomy law. Although the Court didn't reach so far to equate same-sex unions with heterosexual relationships, the *Lawrence* panel seemed unanimous in concluding that, for the first time, the Court at least recognized a need for protection of homosexuals' rights.

## THE ADVOCATE

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*The Advocate* will not print a letter without confirmation of the author's name. We may, however, withhold the name on request. Letters over 500 words may be returned to the writer with a request that the letter be edited for the sake of space.

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## Fredricksburg Public Defender

by Erin Kulpa

In my first week of work in the Fredericksburg Public Defender's Office, I had the opportunity to see what a difference an attorney can make in the life of an indigent criminal defendant. I watched a public defender advocate for a therapeutic alternative to active incarceration for a client whose string of larceny offenses masked her underlying drug addiction. After years of bouncing in and out of jail, she received the opportunity to enter Fredericksburg's drug court program and finally treat the problem that lead her to commit crimes in the first place.

I spoke with clients in jail who, with the help of a public defender and the information I gathered in the interview, were able to petition the court to reconsider bond and be released. Public defenders helped clients make educated decisions about plea offers from the prosecution and wade through the laws that would affect them. That first week, I learned that having access to effective counsel could have a significant impact on a defendant's life.

Many client interviews were conducted in the jails, as an inability

to afford an attorney also usually means an inability to post bail. I interviewed clients for information related to bond hearings, trials, appeals, and probation violations. During this process I truly began to understand the role of the public defender. Despite the common misconception that defense attorneys always try to "get their clients off," I realized that their real purpose is to present each and every defendant to the court as an individual.

The judicial system cannot and should not ignore any defendant's particular set of circumstances in meting out justice. The defense attorney is there to present the defendant's story, to argue for mercy, to ask the court to tailor a sentence to a particular defendant. My most important job as an intern was to get this story.

The Fredericksburg Public Defender's Office focuses their efforts on positively impacting the surrounding community. As a member of the team supporting this office, my work this past summer positively impacted the quality of service to indigent criminal clients in the Fredericksburg area.

## Congratulations...

To this year's winners of the

### William & Mary Negotiation Competition

<b>First Place:</b>	<b>Elizabeth Bircher</b>
<b>Second Place:</b>	<b>Emmy Salig</b>
<b>Third Place:</b>	<b>Carlos Alarcon</b>
<b>Fourth Place:</b>	<b>Heather Johnson</b>

**Emmy Salig and Carlos Alarcon will be representing William & Mary at the regional competition on November 15.**

## BLSA Sponsors Blood Drive, Plans Law Day and Thanksgiving Food Drive

by Adrienne Griffin

Eighty-four. That is the number of lives that may have been saved as a result of the blood drive held at Marshall-Wythe on Monday, October 27th. The Red Cross explains that because whole blood can be separated into its various components, each pint of blood donated may save up to three people. Twenty-eight students, faculty, and staff members gave blood on the 27th and their selfless acts may have reached eighty-four people.

The organizing force behind the Bloodmobile's semi-annual appearance in the parking lot is the Black Law Students Association (BLSA).

BLSA's Community Service Chair, Janelle Lyons (2L), explains, "BLSA is community service-focused and driven and giving back to the community has always been an important

part of our mission."

BLSA will once again enable the law school to give to the surrounding community by sponsoring the annual Thanksgiving Basket competition.

Legal Skills firms, classes, and student organizations are challenged to create baskets of non-perishable foods and gift certificates for perishable items like turkeys or desserts.

The assembled baskets must be brought to the law school lobby by 1pm on Monday, November 24th. After faculty and staff judges evaluate the baskets, BLSA will reward the team judged "best overall" with a pizza party. Awards will also be given in the following categories: "most creative,"

"BLSA is community service-focused and driven and giving back to the community has always been an important part of our mission."

- Janelle Lyons

"most abundant," and "best presentation."

Most importantly, the baskets will then be collected by the Williamsburg Department of Social Services for distribution

to families in James City and York counties.

Besides planning these service activities, BLSA has been busy preparing for the 16th annual "Law Day" at William & Mary.

According to BLSA's Vice President, Leasa Woods (2L), "Law Day is designed to expose prospective minority law students to various aspects of the law school process and to provide a forum for honest questions and answers about what the process entails—from a

minority student prospective."

To that end, a full day of activities is planned for these prospective students, including a moot court demonstration, a Kaplan LSAT demonstration, and a student panel.

Faculty members will contribute to Law Day by giving a mock classroom presentation that, according to Woods, will "give students a feel for being part of a first year class." The prospective students will also have the chance to learn more about Admissions and Financial Aid.

In addition, this year's Law Day will feature the Honorable Gerald Bruce Lee of the U.S. District Court for the Eastern District of Virginia as the keynote speaker. Law Day will be held on Saturday, November 8th, from 8:30am to 4pm.

There will be another BLSA-sponsored blood drive at the law school in April, 2004.



## Baugh Leads Discussion on Judicial Discretion

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the explicit provision in Virginia's constitution for separation of powers, this case was particularly well-suited for trial in this state.

Baugh began his explanation of the erosion of judicial independence with an illustration from the sentencing guidelines. The legislature establishes that a certain crime merits incarceration somewhere within a set range of years and, within those limits, the trial judge exercises his or her discretion based on the facts of the case. An imposition on judicial discretion occurs when the legislature mandates that the judge consider only certain factors when deciding whether to sentence near the upper or lower limits of the guidelines. This sort of impingement on the exercise of judicial discretion, said Baugh, is a major constitutional problem.

Emphasizing that the Constitution is "gospel," and that the principles laid out in it "need to be protected," Baugh stated

that it was the job of the judiciary to enforce constitutional rules and make sure that elected government doesn't run amok. In this respect, Baugh said, the judiciary operates much like an umpire-calling the balls, calling the strikes, but otherwise keeping their opinions to themselves.

The law is eroded when appellate courts get involved in subjective determinations, Baugh said. Pointing to the Judge Judy-esque permutation of the harmless error doctrine into guilt-based harmless error, Baugh stated the judiciary needs to curb its practice of making decisions based on anything but the rules laid out in the Constitution, or risk a wholesale usurpation of its powers by the legislature. When the judiciary is "doing what they want to do," then it is only a matter of time before the legislature decides that "if you [the judiciary] can do what you want to do, you can do what we [the legislature] want you to do," Baugh said. Baugh explained that this tendency can be avoided only

if the judiciary, supported by the lawyers that practice before it, is willing to demand that judicial nominees not be questioned about their politics, but only about their adherence to constitutional principles. The "right to apply discretion is not without bounds," but if judges uphold the constitutional guarantees in their exercise of discretion, then an unpopular opinion poses no threat to freedom, Baugh stated.

To the students in attendance, Baugh offered a brief to-do list: read the Constitution, read the Federalist Papers, and "never refer to the Constitution as a technicality." With these tools, Baugh said that the two competing forces of order and freedom may be reconciled, and freedom preserved without an undue sacrifice of order.

A Richmond-based practitioner with extensive experience in the area of constitutional law, Baugh frequently defends controversial clients in civil liberties cases. Baugh's lecture was jointly sponsored by the Law Library and BLSA.

## Crime & Punishment: Russian Law Lecture

by Susan Billheimer  
and Gary Abbott

The International Law Society and Christie Warren's Comparative Law Class invited Catherine Newcombe to speak about Russian Law on Monday, October 27. Newcombe prefaced her talk with a very large disclaimer that what we were about to hear was her opinion and definitely, definitely NOT that of the DOJ or Attorney General Ashcroft. She then gave an animated and enthusiastic lecture focused on the Soviet-era criminal system and provided a startling look at what can happen when the judicial system is co-opted by a political doctrine.

For openers, while certain professors may rant about the U.S. system of relying on a jury composed of the uneducated masses to decide cases, it sure beats the Soviet system of "telephone justice," in which judges received telephone calls from local communist party leaders telling them how to rule. Add to that the prosecutor-friendly bias generated by the "procuracy" that gave successful prosecution rates in the high 99th percentile and it becomes clear that justice and objectivity took a back seat to communist party objectives during the Soviet era, if indeed they were at all present.

The Russian procuracy was originally developed under Peter the Great and the procurators (akin to our prosecutors) were "the eyes of the Tsar." Under the Soviet regime, they became "the eyes of the State." Under both governments, procurators were at the top of the totem pole and were granted "supervision over legality." Procurators thus had the sole power to determine questions of law, even going so far as to overturn the judge's decision. Rather than going to the magistrate to obtain a warrant, an investigator, the second rung of the legal ladder, would report to the procurator. The procurators

*Russian continued on pg. 7*

## Forcing China to Open Up since SARS

by David Byasse

Lunch with Yale Fulbright Scholar Professor Jie Cheng was no ordinary discussion. A diverse group of W&M law students packed the Dean's conference room for free subs, cookies and Cokes on Friday, October 24, and, as the group went around the table introducing themselves to each other, it was apparent there was significant interest in the topic at hand. Information dissemination within and flowing out of China, post SARS, has been a changing terrain, corresponding directly with the amount of international pressure applied at any given time regarding any given issue.

Undoubtedly moving forward from its old regime of zero governmental transparency, one which fostered an unquestioning public

tradition, China has since taken steps toward opening up channels of communication. One example is the passing of the Regulation on Public Health Emergencies (RPHE) in 2003. RPHE calls for the government to provide timely, accurate and complete information within the respective territory of a health emergency. Unfortunately, as Professor Cheng pointed out, "Wherever there is law, there are loopholes." One particularly glaring loophole in China's enactment of RPHE is that any report of such information must be consistent with China's "Regulation concerning National Secrets and the Classification thereof in Health Administration" of 1991. According to Professor Cheng, the residual effect of this loophole is that "information including explosive epidemic diseases is classified as [a] state secret."

Delving further into this concept of classified information in China, Professor Cheng went into some detail with a couple of examples of Chinese governmental cover-ups and subsequent exposure of public health to crises regarding AIDS and SARS. The lesson learned at the end of the day was that the Chinese "government is learning to calculate [the] cost[s] for closeness and openness."

Professor Cheng is a Chinese lawyer and Associate Professor of Law at Tsinghua University in Beijing and is currently representing two cases against the Chinese government. She is also a Fulbright Visiting Scholar at Yale Law School and welcomes questions regarding the topic of information dissemination. Professor Jie Cheng can be reached by e-mail at: Jie.cheng@yale.edu



## National Center for State Courts: Not Just the Red Brick Building Next Door

by Jennifer Rinker

In conjunction with the Supreme Court Preview sessions on Saturday, October 25, the National Center for State Courts (the National Center) held a luncheon for court reporters and other journalists attending the Preview. Ms. Lorri Montgomery, Communications Manager for the National Center, extended an impromptu invitation to this Advocate staff member.

Although humbled by the company of the 'real' journalists in the room, including representatives from D.C., Pennsylvania, Texas, New York, and Richmond, my inclusion speaks to the willingness and desire of the National Center to further foster connections with the law school. Although our readership is small by comparison, the National Center recognizes it as an important one, nonetheless.

The goals of the luncheon appeared to be twofold. First, the luncheon provided a forum for discussion about the day's events. Second, the luncheon served as a means for staff members to elaborate on current programs and projects in the hope that the National Center will be remembered when journalists need additional resources, expert opinions, or other assistance with court decisions and coverage in their regions.

It is important to know this resource is mere feet away from the law school where we spend so many hours every day. The programs at the National Center are numerous and diverse. For example, one program studies the judicial handling of domestic violence cases. Researchers are currently involved in examining the Full Faith and Credit notion, through which states acknowledge restraining orders issued by another state.

Many of the National Center's programs and projects are driven by statistical analyses of empirical data collected from courts around the country. One such project involves reviewing the

effects of hung juries. Surveys of individual members of the jury are scrutinized to evaluate trends in jury decisions. For example, when one or more members of the jury has a position solidly against the other members, is the trend more to stand down and vote with the rest of the jury or to stand ground and risk a hung jury?

The work the National Center is doing to reform the judicial selection process and state-specific sentencing guidelines is fascinating. Other programs include improving relations between courts and the media, increasing accessibility for self-represented litigants, improving jury system management and trial procedures, reviewing judicial ethics and discipline, developing problem-solving courts, such as drug and family courts, and improving public trust and confidence in the judicial system. Visit the National Center's website at [www.ncsconline.org](http://www.ncsconline.org) for more information about individual projects.

The National Center encourages law students to inquire about internships. In fact, the National Center has benefited in the past from William & Mary law interns in their Research and Knowledge and Information Services departments. "The National Center and W&M Law School have enjoyed a strong partnership with the Classroom 21 project," says Ms. Montgomery. "In fact [Professor] Lederer will be with the National Center in Missouri to help showcase a mobile Classroom 21" the week of October 27.

**The Institute of the Bill of Rights Law and the National Center are co-sponsoring a November 14, 2003, program on Federalism featuring Chief Justice William H. Rehnquist.**

## Meet David Bedenham: Draper Scholar



### Who is David Bedenham?

He is this year's Draper Scholar from the University of London. He is originally from Birmingham, which is about two hours away from London.

### What is he doing at W&M?

He is here to get his L.L.M. He plans to write his thesis on Battered Women's Syndrome and its use as a defense in criminal cases. David has already received a law degree from the University of London and plans to return to England to become a criminal barrister. He will practice out of private defense chambers, but also plans to be on the Crown's rolls, which means he will be called to prosecute criminal cases for the Crown from time to time.

### What will he study?

David says he plans to use his LLM year to focus more on social issues than substantive law. This semester, he is looking forward to taking International Human Rights, Law and Religion and the Death Penalty Seminar. David is especially interested in studying the death penalty because England does not have it. While he is here, he will also be doing an externship with the Williamsburg Commonwealth Attorney's Office.

### What is different about the English law school experience?

In England, a would-be attorney

must join one of the Inns of Court in order to be "called to the bar." David is a member of the Grays Inn. He says it is a great way to bring students together with practicing barristers because you must attend twelve dinners with the Inn members before you are eligible to take the bar. Another major difference is that the bar preparation courses last eight months and cost ten thousand pounds. (Sounds like you'd better pass on the first try.)

### Has he ever been to the U.S. before?

David has been to the U.S. before because his girlfriend is American. He has visited her in San Francisco and most recently in Boston and Nantucket. Ironically, though, she is studying at Oxford this year.

### What gives him culture shock?

David is currently experiencing culture shock due to the lack of public transportation. He says he misses the British railroad and its cheap prices as well. (This writer agrees: it's a shame that it costs nearly \$200 to spend 7½ hours on a train to NY from here). David has also been surprised by the differences in food here and says it is healthier in England.

### Any last thoughts?

David says he is hoping to "take some good ideas from American practice and integrate them into my own practice back in the U.K."



## Supreme Court Preview Looks Ahead

by Susan Billheimer

The last panel on Saturday looked at a wide range of cases in the pipeline that may be headed for the Supreme Court, including issues ranging from the Second Amendment to assisted suicide and the war on terrorism. The panelists consisted of Moderator Lyle Denniston (The Boston Globe), Walter Dellinger (O'Melveny & Myers), Susan Herman (Brooklyn Law School), Charles Lane (The Washington Post), and Steve Wermiel (American University Washington College of Law). A brief recap follows.

Moderator Denniston kicked off the discussion by noting that the Supreme Court denied review of the 9th Circuit medical marijuana case *Conant v. Walters* before turning to the Second Amendment issue of *Silveira v. Lockyear*. The challenge to California's Assault Weapons Control Act would be the first time since 1939 that the Supreme Court has heard a Second Amendment case.

A number of potential privacy-related issues are percolating in the lower courts. In *RIAA v. Verizon*, Verizon lost in district court on the issue of whether record making companies have the right to demand the identity of music file-sharing downloaders. Another suit is filed against the RIAA by an SBC subsidiary. Missouri's flat ban on telefax advertising was challenged in *Fax.com v. Missouri*. The right of the access to autopsy photos of Dale Earnhard is pending cert. In addition, the Federal Do Not Call

list, which was approved in the 10th Circuit, may be appealed, with the additional issue of possible discrimination because of disparate treatment between commercial and charitable telemarketers.

On the business front, there are two antitrust issues to keep an eye on. The first is a potential appeal of the Microsoft decision. The panelists speculated that the Commonwealth of Massachusetts is currently the only likely contender for an appeal. The second issue, touched on in the *Sotheby's-Christy's* case, is the extent to which plaintiffs from foreign countries can sue in U.S. courts to take advantage of U.S. antitrust treble damages. A corporate tax issue is posed by the State of Maryland in *SYL v. Comptroller of the Treasury*. The issue presented is whether a presence in the state is required for anything other than a sales or use tax, arising after the Comptroller sought to impose income tax on a subsidiary (SYL) of a company (SYMS) that had a presence in Maryland, although SYL did not.

The issue of partial birth abortions may find its way to the Supreme Court following a 4th Circuit judge's blockage of Virginia's law banning partial birth abortions. The U.S. House of Representatives recently voted to pass a similar bill blocking partial birth abortions. If it passes in the Senate, Planned Parenthood, ACLU and Center for Reproductive Rights are poised to challenge the law in various jurisdictions.

*Oregon v. Ashcroft* poses the issue of whether states may (as opposed to must) permit

lethal medication in physician assisted-suicide. Attorney General John Ashcroft argues that the use of controlled substances for lethal matters violates legitimate medical practices. Another case, which could potentially involve separation of powers, is developing in Florida. In *Schindler v. Shiavo*, a husband is arguing for his wife's right to be removed from life-support while the woman's parents are fighting to keep her alive. The state law question posed is whether the legislature can override the court's decision to keep her alive, with the additional issue of the post-*Cruzan* nature of a right to death.

Further civil rights concerns arise in the wake of last term's *Lawrence v. Texas* decision, as the Arkansas Court of Appeals recently ruled that *Lawrence* does not stand for the proposition that two gay people can marry. A federal court recently upheld a ban on prayer at the Virginia Military Institute, raising concern that the ruling will impact similar traditions at the U.S. Naval Academy and other government-supported institutions.

The panelists covered the topic of executive authority in great detail. First, they examined the war on terrorism, and the extent of presidential power to declare U.S. citizens "enemy combatants." In *Hamdi v. Rumsfeld*, a U.S. citizen who was captured in Afghanistan is being detained in Norfolk, without being charged. Jose Padilla was arrested in the United States as a suspect in a plot to detonate a "dirty bomb." Padilla has been incarcerated since May 2002. A federal judge

ordered the Justice Department to permit him to see a lawyer nine months after being incarcerated in the naval brig. The panelists noted the courts are treating these issues gingerly, but queried whether this tentative approach was likely to last and speculated that the court may take a more active role in the near future. A related constitutional issue arises from plans to resurrect military tribunals.

The panelists also opined that the PATRIOT Act will generate similar constitutional concerns about the reach of executive power. In the ACLU's recent attempt to intervene in a §215 order, which places a gag order on librarians and custodians of records prohibiting them from informing targets that information is being sought, it is difficult for targets to know they may have standing. Likewise, they hashed out the separation of powers issues presented by *Cheney v. D.C.* In addition to querying whether Haliburton is really running the country, the panelists noted the case was a strategic maneuver by the president to assert presidential prerogative to perform internal policy deliberation without disclosing information. The panelists pointed to the fact that Bush could have asserted an executive privilege in the case, but did not, just as Congress refrained from issuing a subpoena in *GAO v. Cheney*. The key factor will be whether the Supreme Court determines the task force was an entity that included only governmental officials or whether the task force met with private individuals.

## Man with a Plan: FEC Commissioner Michael Toner

by Nick DePalma

The IBRL Student Division kicked off the roundtable breakfast in the Faculty Room with FEC Commissioner Michael Toner on Friday, October 31. The lighting was cheery, the bagels were tasty, and the coffee was hot. In this atmosphere of camaraderie and fellowship, Commissioner Toner came clean with the students of the law school about his proposal to reform the presidential public

financing system. Basically, he declared that the current presidential public financing system was a "complete dinosaur," and that the serious campaigners refuse to take matching funds in the primaries because it puts their primary campaign spending limits at approximately \$19 million.

To put this in perspective, President Bush refused matching funds and spent \$100 million on his 2000 presidential primary run.

Toner speculated that for the 2004 primary, Dean and Kerry will both opt out of the system along with Bush, making it the first time in history that none of the major parties' candidates accept matching funds. And why should they? According to Toner, Dean and Kerry would be at a severe disadvantage if they did and that is why his proposal is so crucial. Do we actually want contenders to be in the system? Toner had no substantive answer

to that question, saying only, "If Congress voted to abolish the system right now, [he] would be fine with it, but if we are going to have a public financing system, then it should work."

Taking it as a given that having the system in the first place is desirable, this is the crux of the FEC's proposal to keep candidates in the system: dramatically increase the spending limit from \$45 million

*Toner continued on page 7*



## Russian Law Lecture

*continued from pg. 5*

also authorized wiretaps, arrests, and searches. Procurators were ruthless with their power and, as a result, were very powerful not just within the Soviet legal system but within Soviet society. The procurators were appointed by members of the communist party, and thus functioned as a servant to communist ideals and beliefs.

Investigators developed the entire case and, unlike the U.S. system, would also draft indictments against criminals. The procurators and investigators would work hand in hand to bring suspects to trial. Investigations in the civil system were private affairs, not open to the public.

The judge took third place to the investigators and the procurators. It was a ministerial position, with no discretionary power, as judges were told how to decide cases. Sometimes cases would be heard by one judge, while other times two lay assessors, members of the community, would be included. Newcombe said that although lay assessors in other civil law countries, like Germany, provide a voice from the community in the same spirit as our jury system, in the Soviet system such assessors were commonly called "noddies," as they would merely assent to the judge's opinion. The judge could also point out flaws in the procurator's argument, but then grant the procurator time to change the story whilst the defendant waited in prison.

The defense attorneys were at the bottom of the heap and were viewed as enemies of the people, while the other participants were seen as supporting the law and communist ideals. One did not require a law license to act as a defender, who could be a family member or friend. This arose in part from the communist belief in the citizen's ability to participate. Whereas on paper defendants may have had great rights, in reality rights were extremely limited. Defendants were only told they had the right to give testimony,

in contrast to the U.S. right to not say anything. Coercion and torture as a means of extracting confessions were commonplace. Expert witnesses were all court-appointed government officials and with no independent witnesses were permitted.

The passage of a new Russian criminal code in 2001 marked the official end of the Soviet system and implemented numerous changes in the criminal justice system, from the initial police encounter through the appellate process. Judicially authorized warrants are now required for searches and wiretaps. The code explicitly states that "the court is not an organ of criminal prosecution; and shall not take the prosecution or defense side in a case." Without addressing the new reforms in detail, Newcombe indicated that all of the old abuses still exist to some degree but the system is getting better, although it will take time before the results are fully felt. The fact that most of the judges retained their jobs begs the question of how long it will take before these paper changes become a reality.

Newcombe attributed the impetus for reform to the fact that these abuses and high conviction rates were an embarrassment to the new Russian government. The government also found it difficult to promote economic growth with such perceived corruption and abuses. In addition, Putin's ascendancy provided the needed cooperation between parliament and the executive branch to permit the reforms to go through.

Catherine Newcombe participated in international efforts to help reform the post-Soviet era Russian legal system. She studied law at Canada's McGill University and clerked and worked as a tax lawyer before seizing an opportunity to leverage her Russian language skills and work in Russia. She now works on the development of criminal codes for general application in former Soviet bloc countries with the Department of Justice.

## Toner Talks Elections over Breakfast

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to \$75 million for the presidential primaries, double matching funds from \$250 to \$500 million, increase the funds available to candidates in the primaries from \$19 to \$38 million, and finally, tighten eligibility requirements.

Who will benefit most from this proposal? Toner believes that in the long run, (the 2008 presidential run), Republicans will. "In 2008, the shoe will be on the other foot, and Republican candidates are going to have a hard time against Hillary [Clinton], who will be able to raise over \$100 million easily," Toner said. It is obvious the candidates who benefit will always be the ones that lack means to quickly raise huge amounts of private contributions.

The chief opposition to the FEC's new proposal comes from Republicans that do not agree with "public financing" and who,

according to Toner, "want to let the system die." Toner doubts the legislative support to abolish the system is there, though, and therefore it ought to be strengthened. In the future, Toner hopes for the day where the Internet could play an integral role in "real time disclosure [of campaign contributions]," but that appears to be far off on the horizon.

Student responses to Toner's presentation ran the gamut. Emily Tulli (1L) cryptically called the proposal "thought provoking." Adrienne Di Cerbo (1L) remains unconvinced. "I would have liked to see more detail and actual numbers," she said. The obvious question to ask at the end of this breakfast, aside from "Where would all this money come from," is, once more, "Why do we have this system again?"

## First Amendment and Election Law: IBRL Supreme Court Preview

by Jennifer Rinker

The Saturday morning discussion of Supreme Court cases on First Amendment and Election Law issues featured distinguished panelists Steven Green (Williamette), Linda Greenhouse (New York Times), William van Alstyne (Duke), Stephen Wermiel (American University Washington College of Law), and moderator Dave Douglas (William and Mary). Panelist biographies below are excerpted from the IBRL *Who's Who on the Preview* descriptions of participants.

Professor Green is former General Counsel and Director of Policy for Americans United for Separation of Church and State. Professor Green argued before the Supreme Court twice in 2000 and once in 2002 on First Amendment issues.

Ms. Greenhouse is a recipient of a Pulitzer Prize in journalism in 1998, the 2002 American Law Institute's Henry J. Friendly Medal, and has been a beat reporter covering the Supreme Court since 1978.

The Journal of Legal Studies

identified Professor van Alstyne in 2000 as among the forty most frequently cited legal scholars in the U.S. The 1987 and 1991 New York Law Journal named Professor van Alstyne as one the "ten most qualified" people in the country for appointment to the Supreme Court.

Professor Wermiel was the Supreme Court correspondent for the Wall Street Journal for twelve years and is a former Lee Distinguished Visiting Professor of Law at the College of William and Mary and fellow at the Woodrow Wilson Center for Scholars.

Our own Professor Douglas, Director of the Institute of Bill of Rights Law, has a distinguished academic and professional background, is author and editor of several publications, and is a former clerk in the United States Court of Appeals for the Second Circuit. Professor Douglas introduced the morning's topics, including campaign finance reform that segued into a discussion on gerrymandering and the Court's decision to hear

IBRL continued on page 8



## IBRL Panel Discusses First Amendment and Election Law

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the "under God" case, otherwise known as *Elk Grove School District v. Newdow*.

Ms. Greenhouse first offered her insight on the Congressional statute on campaign contribution reform. The main provisions of the statute include limiting soft money and limiting commercial advertising financing by unions and corporations within a certain time frame of election days. Ms. Greenhouse articulated that supporters view the statute as nothing more than an expansion and clarification of a set of amendments from the Watergate era that serve to plug the gaps identified in campaign financing since that time. Opponents feel the statute is an intrusive regulation that serves to disable parties and curb core politi-

cal speech. Ms. Greenhouse reports that the Supreme Court will likely conduct a de novo review despite the 1,600 pages of opinion rendered by lower courts on this matter. Chief Justice Rehnquist, in hearing the case in September, asked some skeptical questions about the First Amendment violations argued by opponents to the statute. Professor Wermiel interjected that the decision will likely be close and predicts a ruling as early as the first part of December.

Recent actions in the Texas legislature involving Republican redistricting and Democratic representatives' flights to New Mexico also surfaced in the discussion. Redistricting attempts here and in many other parts of the country reflect a paradigm shift in the use of the gerrymandering tool. According to some members of the panel, incumbents are winning in

an overwhelming majority of districts, which begs the question of whether gerrymandering attempts are effectively removing the two-party system.

Considerable time was devoted to *Elk Grove School District v. Newdow*, the now-famous "under God" Pledge of Allegiance case. Although, according to Professor Van Alstyne, the religious references do not have the historical roots some ascribe to them, the general public usually appeals to religious fervor in times of national tension, such as now and in the Cold War 1950's, when the "under God" references were added in the first place. Van Alstyne called the case a perplexing one on which he hopes the Court will rule "in a benign fashion."

From a strategic standpoint, Professor Green pointed out that doctor/attorney Newdow was wise to move for the recusal of Scalia be-

cause a 4-4 split of the court would result in the lower court decision being upheld. In that instance, while the 1954 Congressional statute adding the words "under God" to the pledge would remain, the Elk Grove School Board policy requiring the stating of the pledge every morning would be removed.

The opportunity to listen to these scholars and professionals is a rare one offered by the Supreme Court Preview. The Institute of Bill of Rights Law is to be commended for regrouping after the Isabel interruption in making this annual event happen. The quality and prestige of the panelists speaks to the reception in the legal and journalistic community of the Supreme Court Preview and to the pull of the Institute of Bill of Rights Law in attracting them to Williamsburg.

## Professors Tackle Environment, Antitrust at Supreme Court Preview

by Susan Billheimer

IBRL's Supreme Court preview included a Saturday afternoon session on Business Law that looked at upcoming Supreme Court cases addressing issues relating to environmental and antitrust law. Professor Meese started with a quick disclaimer that the fact that both panelists were William & Mary law professors was not due to exclusionary conduct but rather a superior product.

Professor Rosenberg introduced two of the three environmental cases up for review. The first case, *Alaska Dep't of Environmental Conservation v. Environmental Protection Agency*, implicates the core relationships between EPA and state authority under the Clean Air Act. The Court must determine whether the Ninth Circuit erred in upholding the EPA's assertion of authority to second-guess the state of Alaska's decision to issue a permit allowing the largest zinc mine in the world to increase its production levels. After the EPA ordered Alaska not to issue the permit, Alaska issued one, claim-

ing it was within its authority. Professor Rosenberg stated that if the Court finds the decision is solely a state decision, then states with an interest in accelerating economic development might not follow federal policy. Alternatively, such a finding might result in an attempt by the EPA to take back the Clean Air Act's delegation of this authority to the states.

In the second case, *South Florida Water Management District v. Miccosukee Tribe of Indians*, the Supreme Court must determine whether a government agency can take polluted water and put it into pristine water, where it would not otherwise go except for the agency's pumping of the water. The Clean Water Act requires a permit where the "addition" of pollutants from a point source occurs. The Water Management District argues that moving the water around does not constitute an "addition" within the meaning of the statute. There is a circuit split on the issue, with the First and Second Circuits agreeing with the Eleventh Circuits' decision that these pumping systems

fall within the meaning of the Clean Water Act. The D.C. and Sixth Circuits, by contrast, require that the "addition" from a "point source" only occur if the point source introduces the pollutant into the water. The stakes are high, as a finding in favor of requiring permits will mean added costs for organizations involved in water management. Professor Malone, who moderated the panel, commented that the best thing the Supreme Court could have done was to leave the issue alone.

Professor Meese addressed the antitrust issues before the Court. In *Flamingo Industries (USA) Ltd. v. U.S. Postal Service*, the Supreme Court must determine whether the Postal Service can be sued under antitrust laws. The issue is whether the USPS is a "person" under the Sherman Act section 7. If it is, then mailbag-producer Flamingo would have standing to sue in federal court on its claim that the USPS's shift to Mexican mailbag manufacturers is illegal under antitrust law. The Court's analysis will likely involve both a discussion of whether the USPS

has sovereign immunity in this context and whether the USPS is a person. Professor Meese anticipates that the Supreme Court will determine that the USPS is not a person for purposes of Sherman Act analysis.

In *Verizon Communications v. Law Office of Curtis v. Trinko*, the Court must decide whether the court of appeals erred in reversing the district court's dismissal of respondent's antitrust claims. In a class action suit, Trinko alleges that, as a customer of Bell Atlantic, it was directly injured by Verizon's failure to provide Bell Atlantic with equal access to its network. Trinko's assertion relies on both the "essential facilities" doctrine and "monopoly leveraging" doctrine from the Sherman Act section 2. Although the "essential facilities" doctrine has been percolating in the lower courts for 20 years, the Supreme Court has never endorsed this doctrine in the context of a company's refusal to deal with a competitor. Professor Meese predicts the Supreme Court will reverse the Second Circuit holding.



## Sex and the Law

by Shannon Hadeed

While on a call back interview, I was quite obviously hit on by one of the interviewing attorneys during the "recruit" dinner. Had we been two random strangers at a bar, the conversation would not have crossed the line. But that was not the scenario, and it put me in a very delicate position. And led me to start thinking...how can a woman maintain her autonomy and self-integrity in moments like this and still get the job? **In short, what are good strategies to hit up when you are hit on before you get the job?**

I spoke with the directors at Career Services. They in turn spoke with Career Services at Washington and Lee. There was a consensus: women who reported *uninvited advances* or inappropriate behavior at their summer internships to people within the firm did not suffer negative consequences. While I think that's wonderful to hear, I have my doubts. Not only that, it's not possible in every situation for a woman to come forward. Sometimes advances are so subtle. Most women know when the hints are being dropped. So the real question is, what can you do short of reporting?

For the rest of this article, I would like to leave my feminist viewpoints behind. If you are reading this - put your feminist objections aside and just listen. **Warning!** The following information applies only to summer internships and callbacks. Once you have the job, put your high-heeled foot down as strongly as needed! Blow that whistle.

Women are at a disadvantage because men in the workplace - especially those old enough to be hiring -

don't get it yet. I'm not sure any men do. Hormones can't be ignored yet. So, when you are at your summer internship or callback interview remember this: to ourselves we are smart women, to men we are women, smart? Gender first, other attributes second. I know, it's a huge generalization but it's mostly true. Just ask any men you know. Working from that premise, just assume you are going to be hit on. This is a combination of strategies recommended by myself, Caryln Chambers, Professor Grover, and Judge Greg Baker.

### The Strategic Plan

**Pre-emptive Strike.** Although we would like to be autonomous and not have to rely on any man (real or imaginary) to protect us from other men, sometimes we must sacrifice. To just put the message out there - you can wear a wedding band or an engagement ring. If you are asked about the wedding band, I recommend you tell the truth - you wear it to prevent unwanted advances. As for the engagement ring, you can state that reason, or make up a fiancé. That leads to my second suggestion: **CREATE A BOYFRIEND/FIANCE.** The great thing about imaginary fiancés and boyfriends is that they are so easy to get rid of. You just break up with them. Here are some things you need to consider. The person will need to seem real, so think up some attributes, or just slip a friend of yours into the boyfriend slot. Talk about him. Not too much, but enough so that everyone knows how madly in love you are with IB (Imaginary Boyfriend). Here is a little mix and match list I thought up to help you. You can take this article home and circle the traits you like.



Grimm

<b>Height</b>	<b>Eyes</b>
Tall	Blue
Medium	Green
Short	Hazel
	Blue-Green
	Grey
<b>Size</b>	
Large	
Medium	<b>Hair</b>
Small	Black
	Brown
<b>Build</b>	Blonde
Deisel	Dark Brown
Skinny	Dirty Blond
Muscular	Red
Sinewy	
Compact	<b>Ethnicity</b>
Chubby	African
	Asian
<b>Activities</b>	Arab
Football	English
Baseball	German
Basketball	Irish
Soccer	Indian
Running	Latino
Golfing	Mixed
Tennis	
Swimming	<b>Profession</b>
Hiking	Construction
Boozing	Doctor
Sex	Lawyer
Smoking	Businessman
Drama	Engineer
Singing	Teacher
Painting	Military
Photography	Journalism
Loving You	F/T Nanny

Have some fun. Obviously, this is not an exhaustive list, and keep in mind that if you have any pictures to display, try to tailor your description to fit the picture. Then put the picture on your desk, and keep a copy of it in your wallet.

Next, once the conversation turns personal, and you have already told him you are not interested in dating anyone right now, or you are dating someone and the unwanted advancer still doesn't get it, here are some techniques.

### Defensive Strikes for Callbacks

This is a bit different from a summer internship, because you only have to put up with it for so long.

**Ignore It /Play Stupid-** This strategy only works for a short period of time and has some real potential to back fire. On the other hand, it's easy (passive aggressive) and sometimes it works. Also, try mentioning your IB again - maybe your next date or your last one. This can also be used in summer internships, but it depends on

More Sex on page 10



## More Sex and the Law

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the situation and has a greater potential to escalate.

**Mention the Firm's No-Association Rule-** If they don't have one, you should say you do. In fact, you won't even date other law students because you think it is unprofessional and has the potential to be disastrous. **This works well at summer internships.**

**Get up to go to the bathroom and come back and sit somewhere else or kill time-** Dumb isn't it? But sometimes it works.

**Tell him he is making you feel uncomfortable-** Yeah, this can be tricky. But sometimes it's necessary.

### Defensive Strikes for Summer Internships

**Ignore/Play it Stupid-** Be very careful with this one. Because over the summer it can only escalate. So, I recommend trying it for a little while, then, if it doesn't work, try another strategy.

**Watch how he interacts with other females-** Is it just you, or is it just him? It's important to access the situation by looking at how he treats other females in the office. And ask around. Does he have a reputation among the women for being obnoxious? Be subtle when you go on your information expedition.

**Watch what you wear-** Remember, these guys are Neanderthals. They're from a time when women's suits were men's suits, only smaller. Bowties, ties, and high collar shirts were once the rage - so once you are hired, feel free to dress to impress. Until then, however, it is an unfortunate technique that women have used for centuries to ward off unwanted attention; make yourself unattractive. I know, I know, how can I be saying this? I told you, I checked my feminism out at the beginning of this article.

**Let other people at the firm know you are not interested-** This is the passive aggressive at work again. This way he will hear from other people that you are not go-

ing to return his advances.

**Ask him to help you pick out a birthday present for IB or fiancé -** This way you are taking him into confidence and at the same time letting him know you are not available.

**Make up a story about another lawyer who is coming on to you and ask for his advice (don't name any real names)-** Maybe he will think twice.

**Find a female mentor-** Again, be careful. If you ask her who you can trust at the office and she says everyone, you can't trust her. Avoid people who answer your inquiries with generalizations like that one. If you can find a mentor, let her know what is going on, and see if she can advise you of how to proceed or if she can tell whoever at the office that needs to know.

**Report it-** Again, a delicate situation, but I highly recommend telling it with a disclaimer to the effect of "I feel uncomfortable, and I am concerned that if I talk about what is going on it will negatively affect my job opportunities here." Apparently however, according to W&M's career services, Washington & Lee's career services, and Judge Greg Baker (who had his own firm and did a considerable amount of hiring), it really only works in your favor. It shows you know how to handle a delicate situation with aplomb and that you have gumption.

It would be nice if we really did live in a gender-blind society - at least when we are trying to get hired. But we don't. Is it wrong to be put in these situations? No doubt. Do you even want to work at a place where that kind of behavior goes on? Don't blame the firm for one man's actions. Plus, I hate to break it to you, but it's probably the same elsewhere. Finally, don't forget that once you have the job you can pulverize those advances into dust.

## House of Haiku: Basho's Lessons for the Legal Aesthete

by Jeff Spann

**Kobe looking up,  
Prosecutor asleep at the wheel,  
Huge waste of money?**

(I have no idea whether Kobe Bryant did or did not rape his accuser. I am absolutely certain, however, that he will see no jail time. Barring a last minute pinch hitter for the prosecution team, we will bear witness to the courtroom equivalent of Little Bighorn. In the end, the hapless prosecutors will appear out-manuevered, under-prepared, and more than a little foolish. The only mystery is how much taxpayer money will be spent in the process.)

**The "do not call" list,  
Marketers in transition,  
Licking envelopes**

(The "do not call" registry is a go. No more dinner interruptions. No more Saturday morning wake-up calls. Three times the junk mail. Cause and effect.)

**Terry Shiavo,  
Feeding Tube Reinserted,  
Right-to-die quashed**

(Right-to-die cases are never pleas-

ant, but the fight over Terry Shiavo's future is particularly unnerving. After Jeb Bush's eleventh-hour intervention has been studied, after the courts have issued their opinions, and after the spokespeople of the various moral perspectives have voiced their suggestions and concerns, there will remain more questions than answers. Unfortunately, there is no Rosetta Stone or other primer to help us. All we have is best guesses, crossed fingers, and faith.)

**Halloween Party,  
Broken table, empty kegs,  
And a couple boobs.**

(It is always amusing to witness the creative energies law students muster in pursuit of entertainment. This year's Halloween bash was three parts Bacchus, one part Waldo, and a pinch of alternating current. There was a troop of rednecks, a gaggle of girl scouts, and some Spidemen. There was a particularly impressive Ron Jeremy, and a couple of boobs dressed as medical malpractice exhibits. Put simply, there was fun had by all—including Williamsburg's finest.)

## Brain-Teasing Word Search

V	Z	W	D	K	F	F	G	H	R	W	S	H	J	F
D	K	K	L	F	L	E	N	T	I	L	S	F	A	W
E	O	P	J	L	D	F	Z	C	B	D	G	E	R	D
H	U	N	E	D	G	O	H	U	N	G	E	R	Z	W
V	A	G	O	I	T	E	R	C	B	D	L	L	G	O
F	G	A	W	D	E	F	I	B	C	T	E	G	O	G
G	Y	X	W	P	A	J	C	G	O	I	P	T	E	R
D	P	A	J	A	M	A	E	A	C	E	H	D	A	X
B	U	X	O	B	U	T	T	E	R	P	A	D	F	J
G	L	V	A	S	D	E	F	E	R	E	N	S	F	G
I	U	W	V	W	Y	K	L	K	H	F	T	G	K	E
J	L	D	K	A	N	G	A	R	O	O	B	W	D	I
M	A	R	G	I	N	A	L	B	E	N	E	F	I	T

Goiter  
Ego  
Butter  
Elephant  
Marginal Benefit

Pajama  
Rice  
Vas Deferens  
Hunger  
Kangaroo



## Actual Justice for the Actually Innocent: Taking Seriously our Duty to Execute only the Guilty

by Visiting Professor  
Steven J. Mulroy ('89)

The death penalty is one of those topics which tends to generate more heat than light. Like abortion or affirmative action, the arguments on both sides are so well-rehearsed and familiar, the passions so intense and entrenched, that discussions of it often result in nothing more than an ideological parlor game. So when the *Advocate* staff (of which I am a proud alum) asked me to write something on the topic, I recognized the challenge of adding value to law students' thinking here.

I'm by no means an expert on the death penalty, but I have helped litigate a few pro bono death penalty appeals, and I've written some on the subject. I've also prosecuted some (noncapital) criminal cases. The experience has confirmed for me much of the conventional wisdom about the flaws of the capital justice system in this country, and raised a few additional concerns as well. To try for more light rather than the heat, I'll focus on one area where pretty much everyone agrees in general: the execution of the innocent.

Anyone reading the papers in recent years is aware that our capital justice system has frequently placed innocent people on Death Row, and has probably actually executed innocent people as well. In Illinois, more Death Row inmates were freed as wrongly convicted (13) than were put to death (12) during the last 20 years, prompting the Republican governor to first place a moratorium on executions, and finally to pardon all remaining Death Row inmates. During the 1990s, law students at Cardozo law school's Innocence Project exonerated over 100 wrongly convicted felons, many of whom were on Death Row.

You can spin this as a success story-the system works!-but it's more accurately seen

as a chilling indictment of the system. People's lives should not depend on the private volunteer efforts of overworked law students (no offense). The concern over executing the innocent has gotten so strong, that even dyed-in-the-wool conservatives like George F. Will and Justice Sandra Day O'Connor have mused publicly about ending (or suspending) the death penalty.

What can be done? Certainly, state-funded DNA testing needs to be more widely available. The recent high-profile cases of innocent prisoners going free tend to involve such testing. While some States still require too high an evidentiary burden from the defendant before they will spring for a test, the trend is positive here.

But most criminal cases, including capital cases, don't involve the kind of DNA evidence that can be used for a DNA test. Especially where rape isn't involved, the police don't often recover and save the kind of DNA evidence needed. In the rare case where a new trial is granted or a conviction overturned on factual grounds, it's more commonly because a witness recants, or exculpatory evidence gets discovered (or was withheld by the prosecution). My first capital case fell into this category.

In these run-of-the-mill, non-DNA cases of newly discovered evidence of innocence, it's very hard to get the record reopened. Very often, the defendant needs to show that in light of the new evidence, no reasonable jury could have convicted; or, in more lenient jurisdictions, that it is more likely than not that the jury would have acquitted. But the defendant ought not to have such a heavy burden, especially when life is at stake. I have argued for a lesser standard, where the defendant need merely show a "reasonable probability" (less than a preponderance) that one juror would have seen reasonable doubt if

shown the new evidence.

Even more troubling is that State law rules can keep the newly discovered evidence claim from being litigated at all. Often, such claims need to be raised within a month, or several months, of the conviction, and these procedural hurdles are strictly enforced.

You might think that regardless of how strict the State law rules are here, the federal courts would not sit idly by and allow colorable claims of actual innocence to go unheard; after all, that's what federal habeas corpus is for. You would be wrong in so thinking. In 1993, the Supreme Court held in *Herrera v. Collins* that "actual innocence" is not a reason for getting out of procedural rules which would bar someone from filing a habeas corpus petition, even where the defendant is facing execution. Unless you can point to some constitutional procedural error in your trial, the Court said, your evidence of innocence cannot help you with a missed deadline, a failure to raise your claim in a previous habeas petition, or some other procedural bar.

For all our talk of concern regarding the innocent, then, we seem to be using a system which is strangely unreceptive to actual, specific defendants with significant evidence of innocence. If we're looking for an area to start to fix our broken capital justice system, we might try here.

Of course, some people familiar with the system are not very hopeful about the system's fixability. One member of the Illinois commission set up to investigate that State's problems was Scott Turow, the author of the legal thriller *Presumed Innocent* and the classic real-life law school horror story *1L*. Turow has now written a new book arguing that the system can't be fixed, advocating the abolition of the death penalty.

My own capital litigating

experience certainly generates some sympathy for this view. Capital litigation is expensive, protracted, and high-profile, creating unusual pressures on law enforcement to win at all costs. And of course, once the execution takes place, it's too late to correct mistakes.

Take that first capital case I mentioned above. The most persuasive bit of newly discovered evidence in that case was medical evidence which had been withheld by the prosecution. Although the Tennessee court accepted my argument for a more lenient "reasonable probability of acquittal" standard re: newly discovered evidence, it ruled against the defendant on factual grounds, giving this newly discovered medical evidence insufficient weight. The defendant would have been executed last month had it not been for a last-minute stay of execution by the governor-the third such execution-eve reprieve this defendant has experienced over the last 22 years of his case.

The stay apparently came because of yet more doubts regarding law enforcement, this time more bizarre than before. Back around the time of clemency proceedings in the case, amidst public criticism that the state's medical examiner had faked misleading medical tests, the M.E. made a bizarre claim that he had been attacked and tied up with barbed wire. Just last month, to explain its decision to stay the execution, the State admitted that federal prosecutors were conducting a grand jury investigation into whether the M.E. had faked the whole attack, including tying himself up in barbed wire. This M.E. has worked on just about every major felony case in West Tennessee for the last couple of decades, including just about every death penalty case.

Perhaps Scott Turow can use this in his next novel.



## Abortion and Life: Inconsistency Left and Right

by Rajdeep Singh Jolly

I think I've spotted a contradiction: While liberal policymakers seem pro-life toward humans outside the womb (as evidenced by efforts to feed, house, educate, employ, and insure the vulnerable masses), such liberals do not seem pro-life toward humans inside the womb. Conversely, while conservative policymakers seem pro-life toward humans inside the womb (as evidenced by efforts to make abortions illegal), such conservatives do not seem pro-life toward humans outside the womb—unless, of course, you're fabulously rich or irreversibly comatose. Most people claim to have high regard for the sanctity of life, but this high regard rarely finds full expression. Does consistency demand that we become consistently pro-life? I suppose the answer depends on our definition of *life*.

If anything with Godly residue in it counts as life, then being consistently pro-life demands that we respect the universe and everything in it. Of course, there is something unsettlingly weird about sanctifying comets and fingernails. Alternatively, if all reproducing entities count as life, then being consistently pro-life demands that we respect a wide range of biological entities. Again, there is something unsettlingly weird about sanctifying mushrooms and bacteria. Alternatively, if all entities capable of experiencing pain count as life, then being consistently pro-life demands that we oppose war, the factory farming of animals, the shafting of investors, and the peddling of public policies endorsed by the inimitable Rick Santorum, who aristocratically pronounced that "making people struggle a little bit is not necessarily the worst thing."

To avoid the murkiness of *life*, I propose that we characterize ourselves as *pro-flourishing* and *anti-pain*. The pro-flourishing aspect of my twofold test avoids problems that arise when we condemn only pain. One such prob-

lem: Suppose that an unscrupulous doctor happens upon a reversibly comatose man without dependents of any sort. Suppose further that the doctor pulls some poison out of his pocket and kills the man to save the world some air and space. Suppose even further that no one else finds out. In so killing, the doctor causes no physical or emotional pain to anyone and thus cannot be condemned under the anti-pain criterion. Even still, such a hypothetical offends our sense of justice because stifling an individual's future chance to flourish shouts monstrosity.

Significantly, the pro-flourishing aspect of my twofold test creates a problem for supporters of abortion rights because one can strongly analogize fetuses and the reversibly comatose: both emerge from a state of substantial unconsciousness; in most cases, both do not feel pain; both drain resources; both can start building motor skills and memories from scratch; both have potential to flourish. If justice demands that we afford reversibly comatose loners the opportunity to flourish, why deny the same opportunity to fetuses?

One obvious and crucially important distinction between fetuses and reversibly comatose loners is that the latter don't implant themselves in the wombs of other people. At this point, I offer a modest proposal: As a practical matter, since women bear the burdens of incubating us at the dawn of life, I say all decisions about the legality of abortion should be left to mothers. Males should have no voting or decision-making power with respect to abortion; their input should be limited to informing the debate. Better still, they should invest their energies in crafting and advancing policies that promote flourishing and minimize pain for those of us who've exited the womb. Such policies would make the world more welcoming for future people and possibly diminish the frequency of abortions thereby.

## A Reply to Hallway Chatter: Gay Marriage

by S.L. Rundle

In the last *Advocate*, R.S. Jolly asserted that he could conceive of no basis for condemning homosexual acts. ("I cannot think of a satisfactory objection to homosexual marriage *per se*.") Jolly should consider the following, which is, to my best ability, the teaching followed by orthodox Roman Catholics in every nation of the world.

Homosexual acts are evil for the same reason that any sexual act is evil which occurs outside of marriage's bounds and in which the actors intentionally interfere with or prevent the creation of new life. That is, the purpose of sex is twofold: procreation and the sacramental bonding of a man and woman who have completely donated their selves to each other. When either purpose is frustrated by conscious choice, grave guilt follows. Taking someone of the same sex into the marriage bed fails this test on several counts.

This understanding of sexual morality was, additionally, the unified position of the Christian, Islamic, and Jewish faiths until 1930 when Margaret Sanger cracked the edifice by persuading the bishops of the Church of England to reverse their teachings on artificial contraception. The social consequences of Sanger's victory were not immediately apparent. Now, any first year constitutional law student can connect the dots between the Supreme Court's opinions, starting soon after the 1930s, striking down laws against birth control for married couples, then for single people, then for single minors, then striking laws against fornication, pornographic this and that, and, most recently, sodomy. Whether this line of cases represents a positive trend is, one might

say, viewpoint relative.

One can fairly argue that upon the concession of the moral acceptability of artificial birth control, there is no principle from which to argue the immorality of specific sexual acts aside from the "principle" of selective Bible quoting.

If the use of the word "evil" in the second paragraph seems harsh, let it be tempered by this: most people of any faith or no faith, myself included, who attempt to order life around the virtue of chastity, fail to some extent. Sometimes the failure is quite a spectacle to behold. This failure under the moral law, however, is quite different than failure by consciously denying the existence of a moral law. Our society will never again embrace the laws that once controlled sexual behavior, let there be no mistake. There will always, however, be a minority of men and women for whom the old rules are controlling, and Jolly must take them into consideration before broadly denying the existence of a rational basis for opposing gay marriage.

Think of Homer Simpson, in one episode delirious from cabin fever, telling Mr. Burns, "I have powers. Political powers!" Here's one better. We have powers. Sexual powers. Much misery comes from our abuse of this power: broken marriages, sexual diseases, post-abortion grief, fatherless children, impoverished women, inability to trust, scandalized friends and family. To this list, a self-professed bisexual friend of mine has added the heightened tendency toward drug abuse and domestic violence in homosexual relationships. My challenge to Jolly is this: what flows from unlimited sexual freedom to counterbalance this catalogue of human misery?

**Got Opinions?**

**Email them to [pdrush@wm.edu](mailto:pdrush@wm.edu)**



## The Death Penalty: A Written Conversation

*The following discussion is an exchange between two law students, Rick Fasolino and Jason Baxter debating the death penalty. Jason Baxter (JB) is opposed to the death penalty and Rick Fasolino (RF) is in favor of it.*

**RF:** We are assuming the guilt of a hypothetical individual charged with a capital crime in this discussion. Objections to the death penalty based on its mistaken or unfair application are a different concern. The moral, religious and policy bases of the death penalty in the abstract are what is at issue here. I believe there are those individuals who "need killing" but unlike my colleague I respectfully disagree that this is not the province of the State.

**JB:** We are an angry blood thirsty nation eager to go to war, promote violence in all types of entertainment, and we constantly kill each other on the streets. The death penalty exists as one more focus for that barbaric nature. The fact that the state sanctions, and performs murder is an endorsement for people to use as justification when they feel justified in committing murder. Abolishing the death penalty would be a step in the right or maybe I should say left direction towards becoming more civilized and rational as a society.

**RF:** It is not that our nation is more or less bloodthirsty, violent etc. than other nations because that propensity to violence is a general condition of humanity as a whole, as born out by the bulk of human history. Instead, as the most free nation that has ever existed, the price we pay for that freedom is a higher than average degree of social anarchy, of which homicides are a symptom. However, the fact that the State can utilize capital punishment is not an endorsement of that practice to private citizens. There are a great many things that the State can do that the citizen may not, such as levy taxes or wage war, and no reasonable person would claim that those activities by the State somehow endorse the same behavior by private citizens.

**JB:** The other reason that I oppose the death penalty is that the justification used by the state is laughable. In order to understand why the death penalty is not a deterrent you have to take a moment to seriously reflect on who kills. Murders are usually committed by someone who knows the victim. When a husband beats his wife to death he is just not going to be dissuaded

by possible consequences. The act of taking another life is so final and emotional a decision that killing itself is the only deterrent. When a hitman, or a serial killer is planning a crime he/she is concentrating on not being caught. As long as a person believes that he/she will get away with killing there can be no deterrence. After some quick research on the net, the national homicide "solve rate" is somewhere around 65%, which should have a much bigger impact on the decision to kill than how harsh the consequences are.

**RF:** It is true that the best deterrent to homicides, or any crime for that matter, is a high degree of certainty that the wrongdoer will be caught. However, the degree of the punishment is also part of the calculus of many criminals. The lesser the penalty, the higher the certainty of punishment would have to be and vice versa. Of course there is likely a certain portion of murderers for whom even absolute certainty of being caught and of absolute punishment, i.e. death, being meted out would not be enough to deter them from killing. This group, however, is almost assuredly in the minority and, at any rate the deterrence of some, be they a greater or lesser percentage, is still preferable to the deterrence of none.

**JB:** Punishment is another ridiculous justification. The only difference in punishment in this country is the amount of time someone is punished for, and clearly if the person is killed they get less punishment.

**RF:** This is debatable. In any event, the objective degree of punishment, as

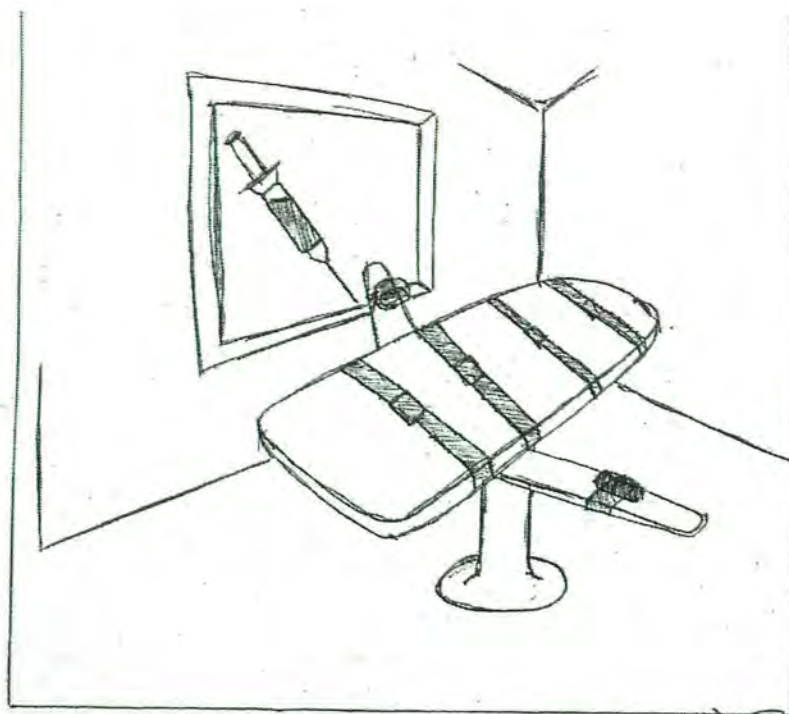
if it could even be ascertained, is less relevant than the perceived degree of punishment. And as to the perceived degree of punishment, death is clearly perceived as the greater. It is the "ultimate" punishment.

**JB:** Retribution. What can be said for retribution? When I was five I really believed in pay back, but as I've gotten older I've realized that you can't spend your life worrying about correcting past wrongs. What we do in the future is what really matters. Everyone makes mistakes and the criminal justice system in this country should be more concerned with making this country a better place to live, rather than executing the mentally retarded and the criminally insane. I don't mean to say that we should forgive murderers, but we should work on improving them convincing them that murder is wrong. What a great country we would live in if murderers were turned to good rather than murdered themselves. The very reason for the state prosecuting cases is to prevent the victim from determining punishment at a time when they can't forgive, and don't have the emotional capacity to make a rational decision.

**RF:** Everyone makes mistakes like being rude to someone, not helping when they should, etc. Everyone does not make the type of mistakes that are involved in capital crimes. In fact, a very tiny fraction of us do. There are certain acts, use your imagination for the gory and sinister details, that simply remove the evildoer from the realm of the protection of his kind. He is in a certain sense no longer human and as such does not deserve our protection

or even our sympathy. The best way to understand this is to make it personal. Picture in your mind those you care about most in this world. Now imagine someone doing the worst type of torturous harm to them. Do you still feel sympathy for this animal or do you want them to suffer and die as they made your loved one(s) suffer and die? If you still have sympathy, rest assured you are in the minority (and also let me know so that we can put your name in for sainthood). The people who do not feel sympathy for the murderer of their loved ones are NOT bad people. They are simply experiencing a very ancient emotion which is hardwired into our very humanity. The need for retribution is far older than law or policy or anything of that sort. It goes to the essence of humanity. Something has been unbalanced in the cosmic ledger and must be corrected. "An eye for an eye, a tooth for a tooth." This is why it is almost a cliché when we hear of otherwise good, law abiding people who take the law into their own hands and kill the murderer of their loved ones. Since the State will never be able to remove this inherent need for retribution from the people, the best the State can do is to regulate and fairly administer retribution on the people's behalf. After all, the State is supposed to represent us and the best way to do that would be to put itself in our shoes and act accordingly. This way, the innocent family and friends of the slain victim will not be made to also become victims by either suffering the anguish of inaction while the perpetrator of the heinous act is allowed to live or by taking the law into their own hands thus becoming criminals themselves. Their simple grief is already enough for these unfortunates to bear. The real guilty parties should bear the full weight of their acts and the State should not help to shift some of this burden onto the innocent.

**JB:** The state is in a position to curb the natural instincts of individuals just as it does with every other urge such as prostitution, drug use, or fighting. Retribution is not a good thing and the fact that the state takes it away from the individual shows its inherent evil nature. The issue should not be who gets to kill, but the very fact that killing an individual is evil. The real issue and justification is retribution, but the state should be the better man and lead its citizens by showing some compassion and forgiveness even when the killer did not.





## A New Career Path: The Law Student Turned Sticker Salesman

by Tim Castor

Given my longtime desire to construct a full-scale replica of Shea Stadium's mechanical apple using Granny Smiths and a bucket full of caramel, I am in search of a career that will transform me into a cash cow. Although my entry into the legal profession may eventually satisfy my financial goal of attaining a fistful of Washingtons, Lincolns, and Hardings (You didn't think they made bills this large, did you?), I have also considered the possibility of pursuing a career that facilitates the accumulation of immediate wealth: hot cake selling.

As we all know, ever since Duncan Hines mustered the courage to ask out Betty Crocker, hot cakes have been flying off the shelves like hot ca— . . . damn. Given the incredible selling power of the hot cake (for some reason the lukewarm streusel never lived up to the hype), any individual fortunate enough to obtain a position as a hot cake seller has been guaranteed fame, fortune, and, at least at one time, a cameo appearance on *Charles in Charge* (even a widespread retro fad cannot salvage the career of Scott Bao).

Unfortunately, a lack of hot cake selling credentials bars me from entering the hot cake selling profession (I am guessing my falling out with the Pillsbury Dough Boy did not help matters). I recently realized, however, that I could enter a business that has proven as lucrative as hot cake selling. As of Monday, therefore, I will place my law career on the back burner of life and begin to reap my fortune as a vendor of OBX stickers.

Now, you might be wondering why it took me so long to realize that selling stickers would represent my ticket out of this one-horse town (actually, Williamsburg is more of a one-well-lit-street-lamp town). As embarrassing as such an admission may be, one reason why I failed to recognize the marketability of the OBX sticker is because, for a long while, I did not realize that OBX stood for "Outer Banks." Given I was just learning the proper spelling of "phat," I thought OBX was simply the hip new way to spell "box."

Once I learned what OBX signi-

fied, it still took me time to appreciate the magnitude of the sticker's popularity. Until recently, I never even contemplated the notion that people would voluntarily fork over cash in exchange for a tiny sticker symbolic of a location that has about as much name recognition as any band that schedules a set within the borders of Virginia. Rather, I thought that people primarily sought out other types of stickers, such as those referring to universities or the accomplishments of pre-K honor roll students (apparently, only those youngsters who managed to make it through a half-day of preschool without producing a doodie met the preliminary qualifications for the honor roll).

I certainly recognize the benefits one reaps by placing a William & Mary Law sticker on his or her vehicle, as the sticker will mildly impress a host of colonial history buffs, retirees, and small children who have been brainwashed into believing that the butter churning reenactment on DOG Street is one of the feature attractions at Busch Gardens. Conversely, unless BarBri declares that owning an OBX sticker will enhance one's performance on the bar exam, I cannot articulate a benefit that results from possessing an OBX sticker (due to the fact that seemingly every law student mindlessly accepts BarBri's rhetoric, I dread the day BarBri representatives serve Kool-Aid in the law school lobby).

Despite my inability to comprehend the motives underlying one's decision to display an OBX sticker, I am keenly aware of its burgeoning popularity and am not reluctant to profit from said popularity. At the same time, however, I would not respect myself as a vendor of stickers if I only peddled the identical sticker sold by the great OBX sticker salespeople who preceded me. To both honor my predecessors (who persevered through the years in which the Shrinky Dink outsold the scratch-n-sniff sticker) and establish myself as a meaningful contributor to the sticker-selling profession, I plan to unveil a new sticker that will prove equally trendy, if not more so, as the current OBX sticker.

When creating my sticker, I con-

## Sideshow Bob was Right (or Why I No Longer Own a Television)

by Kevin Gross

Recently, I read that significantly fewer men 18-34 are watching network prime time television this fall than in past seasons. Conjecturing as to the reason, a Nielsen ratings spokesman stated that there are far fewer programs airing in network prime that appeal to young males. This may be true, but regardless of demographic, what prime vehicles are really worth watching? Some might pique our interest more than others, but are these shows of such caliber that to abstain from watching is akin to intellectual suicide? Where is the inherent value in watching mediocre shows about a zany husband/father or about the wacky exploits of a group of friends?

Let's take this discussion a step further. What's the point of watching any television? Is the benefit we receive from watching daytime, afternoon, evening, or late night vehicles any greater than that received from prime shows? And what about the costs involved? Suppose a person spends two to three hours a day watching television. That's 14 to 21 hours per week that could have been spent doing something more productive. Right now, for example, I'm writing this article instead of watching television.

What if television helps you unwind after a busy day? What if you come home and just want to relax? I think there are other, more

effective and productive ways to mitigate stress and relax after a hard day. Go for a walk or a run. Read a book for pleasure. Cook a favorite meal. You will find that the utility of television is relatively low when compared with the alternatives.

What about the news? I'm willing to concede that some television news is not without value. It allows us to see things in a manner impossible to replicate. Problems arise, however, when sound bites become more important than stories and when "entertainment" becomes involved and yields soft, sloppy, and misrepresentative news. Additionally, other sources of news should not be overlooked - newspapers, magazines, and reputable Internet websites. They can provide us with almost all that television can and some things it cannot, such as in-depth coverage versus a cursory review.

Rather than cut back on my viewing hours, I found it easier to completely eliminate television from my daily diet. Television is a cruel temptress, and once you start watching, it can be difficult to break away. Occasionally, I will tune in and watch something, but it is the exception rather than the rule. I have found I have more time to do things and am quite content with my decision. I urge and challenge you to go one week without watching any television. I think you'll discover the beginnings of a whole new way of life.

sidered the notion upon which the designers of the OBX sticker relied: people have a genetic predisposition to buy stickers featuring abbreviated versions of places such as countries, towns, and popular vacation destinations. Amazingly, it was during this period of reflection when I finally uncovered the motivation underlying people's tendency to obtain these stickers. I realized that one purchases OBX and similar stickers because, by associating oneself with a location, he or she feels a sense of pride or belonging. Equipped with this Hallmarkian insight, I designed a sticker that relates to a location that all individuals embrace.

The place to which I allude is the

Interstate 95 rest stop, for every individual has sped down the highway in a desperate search of the nearest lavatory or large bush. When one finally comes upon the rest stop, the prevailing emotion is always euphoria, even though profound frustration later arises when he or she does battle with the unruly faucet sensor. Given that every person can feel a sense of pride by associating him or herself with the beloved Interstate 95 rest stop, I excitedly inform you that the I95TP sticker will be available for purchase in the near future. Until then, I encourage everyone to continue both collecting OBX stickers and eating those scrumptious hot cakes.



## Movie Review: Tensing Norgay

by Marie Siesseger

Renowned professor of tax law William Anderson and filmmakers Joel and Ethan Coen agree on one very important point, that wooing cannot be equated to widgets. Anderson puts a fairly fine point on the subject in a pithy footnote to his casebook: "The marriage relationship can hardly be deemed an income-producing activity." The Coens strike an equally emphatic note in their recent release, *Intolerable Cruelty*.

While the Coens' aims are admittedly far removed from unraveling the mysteries of tax law, *Intolerable Cruelty* gives more than a passing nod to the legal community. On the contrary, this slick screwball comedy aims every possible potshot at its *objet du jour*, L.A. lawyers.

Miles Massey (George Clooney), a preeminent divorce attorney known for having crafted the impenetrable "Massey Prenup" (a work so brilliant that "they spend a whole semester on it at Harvard"), is at the top of his game on the divorce court circuit. Accompanied by his trusty sidekick associate, there is seemingly no spousal spat he can't spin into a quick buck or two million for his firm. He employs a take-no-prisoners approach to representation, and takes a dim view of the emotional effluvia that got his clients into these predicaments. But wait! Who's that raven-haired vixen sitting in the witness stand, weeping profusely at the very thought of her elderly, and obscenely wealthy, hubby (Massey's client, Rex Rexroth) having an affair?

Enter Marilyn Rexroth (Catherine Zeta-Jones), a woman so fabulously beautiful and obviously clever that you have to stop and wonder, "what was she doing with that bozo in the first place?" What, indeed. To no one's great surprise, Miles finds the answer in a concierge who is more than happy to divulge Marilyn's peculiar request that he find her a wealthy moron to marry.

Her secret exposed, Marilyn is left with no alimony, no Malibu mansion, and no choice but to ply

her trade in troths again. Before the ink is dry on the divorce with Rex, Marilyn appears at Miles' office, ready to engage her erstwhile enemy in the business of drafting a prenup for her upcoming marriage to the dopey and doting oil heir Howard Doyle (Billy Bob Thornton). Miles, of course, is beside himself—the woman who he cannily admits "fascinates me," appears ready for a repeat performance of marrying another rich oaf.

As this mutant cat-and-mouse game spirals madly and marvelously out of control, it's hard not to get swept up in the sheer mad-cap lunacy of it all. At every turn the film bears the unmistakable stamp of its crazed creators, the Coen brothers. It's on the intestine-less senior partner, wheezing and glowering at Miles while he spouts pearls of lawyerly wisdom: "We honor the law. We respect the law. And, sometimes, we even obey the law." It's on the wall behind the podium at the national divorce attorney conference in Las Vegas, whose acronym is "N.O.M.A.N." It's on the deliciously devious (and thoroughly incompetent) assassination attempt made by the appropriately breathless mafia man, Wheezy Joe. And it's on the gleeful abandon with which private eye Gus Petch (Cedric the Entertainer) "nails" the adulterous derrières of those he's been hired to snitch on.

Although *Intolerable Cruelty* isn't much of a mutual admiration society for attorneys, it's comforting to see a human face (it doesn't hurt that it's Clooney's, either) superimposed on a Hollywood-created lawyer. Perhaps it is even a compliment that the Coens picked lawyers to lambaste. After all, the brothers have a pretty good track record of creating authentic and thoroughly human characters out of roles that have their genesis in crackpot caricatures. In the hands of less apt filmmakers, *Intolerable Cruelty* might have lived up to its nominal promise. Instead, it's an irreverent romp through the trials and tribulations of the rich and famous, punctuated by virtually seamless performances and witty repartee, to boot.

## Culture Watch

by Adrienne Griffin

Law students often criticize Williamsburg for being too small, too boring and too provincial. While I whole-heartedly agree that Williamsburg does not offer opportunities on the scale of Washington, Richmond, or even Norfolk, as someone who has lived here for seven of the past ten years, I like to do my best to dispel the myth that there is absolutely "nothing to do" around here. Before I begin, however, I must ask you to repeat after me: "There is culture in Williamsburg, there is culture in Williamsburg."

One thing Williamsburg does especially well is music. On October 21, 2003, I was lucky enough to attend a concert sponsored by the Chamber Music Society of Williamsburg. This concert featured the Chester String Quartet, who performed music by Dvorak. The program included "Cypresses," an arrangement for string quartet of an earlier set of 12 songs by Dvorak. The highlight of the program was his "American" String Quartet, which features several folk melodies and more successfully evokes the American landscape than his more well-known "New World Symphony." The Chamber Music Society sells its tickets by subscription, but those without season tickets can gain admission on a stand-by basis. The concerts are held at the Williamsburg Library and upcoming programs include the Amadeus Piano Trio on November 18th and the Jacques Thibaud String Trio on February 3, 2004.

Classical music fans will also want to experience at least one of the many "candlelight concerts" at Bruton Parish Church, on DoG Street (or Duke of Gloucester for the uninitiated). November's offerings include many organ recitals, as well as a performance by the William and Mary Women's Chorus on November 8th. For further details, see the concert series web site at <http://www.bruntonparish.org/candleli.htm>.

Also found on DoG Street is the Kimball Theatre. Over the past two months, I have seen two films there that were easily the two best movies I have seen all year: *Whale Rider* and *I Capture the Castle*. You may

be shocked to hear that these two films were not Hollywood blockbusters. Neither featured a single "tween" star. Instead, both movies are adaptations of books of identical names. *Whale Rider* is a film set in New Zealand, and based on the 1985 novel by Whiti Ihimaera. It features a rural New Zealand community waiting for a promised descendant to come and lead them out of their current troubles. When a young girl challenges the expectations of her grandfather and the entire clan, the results are extraordinary. This beautifully acted film has just been released on video, but I am glad I had the chance to see it on the big screen at the Kimball.

*I Capture the Castle* is based on the novel of the same name by Dodie Smith, an English woman best known for writing the children's books that eventually became the *101 Dalmatians* franchise. *Castle* is narrated by 17 year old Cassandra Mortmain, whose family does indeed live in a (rented) castle. Her father is a writer who has not published in years and is the nominal head of a crumbling family unit. The arrival of the young man who has inherited the castle complicates the lives of Cassandra, her sister, and the entire family. Although set in the 1930's and costumed as a period piece, this film often feels more like a fractured Jane Austen-ish tale (similar to what *Cold Comfort Farm* did to the Brontes). In short, it is well-acted, beautifully shot, and at times, hilarious. It will be available on video December 23.

The Kimball Theater is a short walk from the law school, at Merchant's Square. Ticket sales are a bit unpredictable - twice in the past year I have arrived relatively early, only to find the show is sold out. Luckily, you can buy tickets in advance either by telephone (1-800-HISTORY), or in person at the Colonial Williamsburg ticket booth at the corner of South Henry and DoG Street. There's even a student discounted price of \$5.50 per ticket.

If you'd still like to contest the fact that there is culture in Williamsburg, I'd be happy to debate. On the other hand, though, I'll probably be too busy enjoying what this town has to offer.





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