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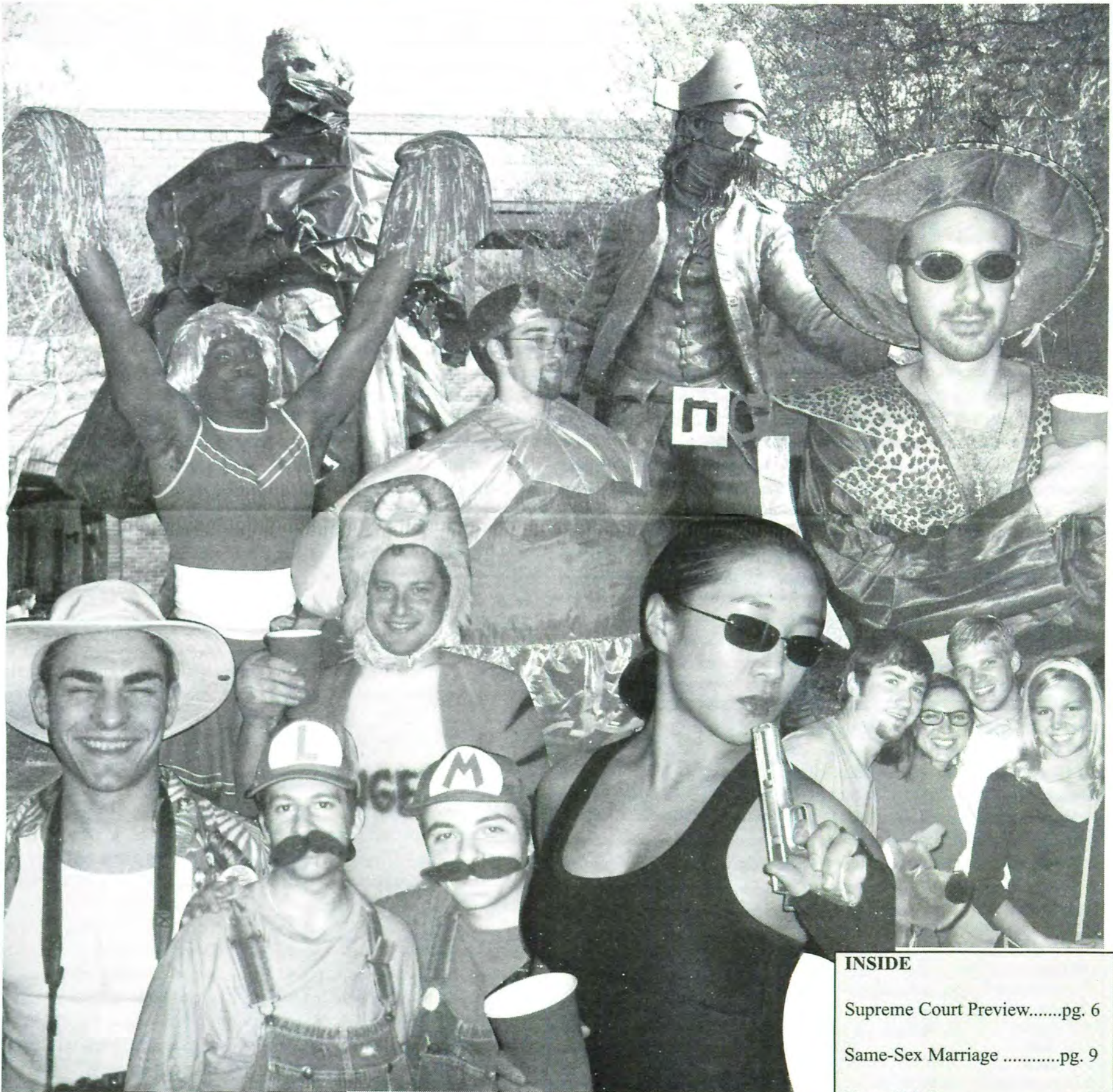
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The Advocate

VOLUME 2, ISSUE FIVE

WEDNESDAY, NOVEMBER 3, 2004

WILLIAM & MARY SCHOOL OF LAW



Marshall-Wythe Students Celebrate in Style at the PSF Halloween Party.

Photos by William Durbin and Marie Siesseger, composite by Nicole Travers

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Feeling Superior? Professor Dwyer Thinks You Just Might Be

by Myriem Seabron

There was a healthy turnout for Professor James Dwyer's delayed Blackstone Lecture (the program announced it as "The 2003/04 Blackstone Lecture"). The gathering was a mix of the young and old(er), students and professors, those eager to entertain Professor Dwyer's premise...and those who were not.

Professor Dwyer earned his J.D. from Yale and a Ph.D in philosophy from Stanford, and on October 28th, he put both to use in delivering a lecture titled "On the Superiority of Youth: Moral Status and Legal Treatment of Children." More informally, the lecture was a fascinating mix of the philosophical and the legal when it comes to views on the place of youth in our society. Joking that perhaps the fliers for this talk should have come with a disclaimer, Dwyer explained that what he meant by youth wasn't chronological age, but rather "all

the traits and characteristics associated with youth." It is possible to be rather up in years and still be considered youthful, if one holds on to those traits associated with younger generations.

But what does any of that matter? Professor Dwyer began by suggesting that youth in our society are traditionally treated as if having a secondary or lesser moral status than others, and that this was perhaps not the best thing. "By having moral status, I'm not talking about being 'morally good,'" he cautioned. Rather, having moral status is the basis for saying that any beings matter, in their own right. To have moral status is to have your interests count, to matter in the moral deliberations of others with such status. Moral status can come in degrees and a being can have more or less moral status relative to another.

"To the extent that one moral being has higher status than another, its interests should matter

more," Dwyer explained, illustrating his meaning with the example of a human and a dog. In that way, our society treats children as having inferior moral status. Children are often treated instrumentally, and parents are given almost total control over their children, even when this may not be in the best interests of the child. In matters of divorce or separation, the child's interests are taken into account only after those of the parents are looked to, and so forth.

Moving on to the example of law students, Professor Dwyer spoke of the authoritarian manner of address (students are often expected to address a professor formally, but a professor may address a student quite informally), and the sense that is promulgated over the course of a legal education that the student's ideas and perspectives on legal issues are secondary to those of "more learned" sources.

All of these things suggest that younger members of our society are of a lesser moral status than older, wiser members of society. But is that necessarily true? To get to the crux of the matter, Dwyer broke down the criteria for determining moral status: 1) Life, 2) Sentience, 3) Higher order cognitive functioning, and 4) Relational Importance.

"It seems clear to me that all the criteria change in strength over the normal lifetime," Dwyer said, getting into his main argument. "And it does seem that, on the whole, most peak early on." Look at what we would consider to be manifestations of life, for example. Growth, mobility, activeness, intellectual enthusiasm, and expressiveness, spiritedness, moral ambition—all of these things are characteristics most closely identified with youth. What of sentience, which is more than just our ability to feel pleasure and pain, but a broader perceptive ability? Aging is associated with the loss of ambition, the loss of choice in one's direction, loss of expressiveness. It's also tied closely to

the loss of our senses (taste, sight, hearing).

Arguably, older people tend towards disengagement and insularity from the world at large. While you might suspect that adults would win the higher cognitive functioning argument, Dwyer suggests otherwise. This criteria only favors older persons if you place some great weight on rationality, but youth have so many advantages in this area that rationality should not outweigh them. Youth is associated with better memory and younger generations are less likely to be tied down by tired dogma. This allows the youthful in a society to come up with new and interesting ideas and solutions to problems.

The inclination to act morally seems to peak in older adolescence, Dwyer continued, offering evidence that younger people seem driven to be more involved in their communities and large-scale "altruistic efforts." Conversely, he posits, "the moral world of older adults seems to sink to their immediate relationships."

Younger generations win out in the higher cognitive functioning area, "because it's not just that we possess moral agency and ability, but it's how we use them."

Lastly, there is relational importance. Dwyer points out many societal assumptions: the mantra of "women and children first!" in the event of emergency, our tendency to view the death of a 21-year-old as somehow more tragic than the death of an 80-year-old, the great familial support and love there is for children and young adults, which slowly seems to fade as one ages. Most all the evidence points to society placing a greater relational importance on youth.

Given that evidence, there is disconnect between the legal treatment of youth and their higher moral status, Dwyer argued. So presuming society would be better off if it yielded to those with superior moral status, how do we

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THE ADVOCATE

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Letters to the Editor may not necessarily reflect the opinion of the newspaper or its staff. All letters to the Editor should be submitted by 5 p.m. on the Thursday prior to publication.

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.

In Trial Run, Moot Court Moves Bushrod to First Year Spring

by William Y. Durbin

With some pushing and pleading, the William & Mary School of Law Moot Court Team made its case for making sure "Bush" is around in late January. No, not *that* Bush.

Citing numerous compelling reasons, including better serving both competitors' and team members' interests, the Moot Court Team and the Marshall-Wythe faculty have agreed to move the Bushrod T. Washington Moot Court Tournament, traditionally held in 2L fall, to the spring of 1L year. The provisional move will be effective in the spring of 2005, placing the next Bushrod Tournament in late January and early February. *Keeping the tournament in first-year spring beyond next year will require approval of the faculty's curriculum committee.*

"Overall I think it's a good move," said Vice Dean Lynda Butler. "Our concern [on the curriculum committee] was that it fit in with Legal Skills, and I think that it will."

In their proposal to Dean Butler and Dean Taylor Reveley, Moot Court Chief Justice Emily Cromwell (3L) and Bushrod Justice Justin Hargrove (3L) considered the impact on Legal Skills among a host of factors. But the two cited the need for a three-hour brief writing course as the primary reason for making the move. Their proposal argued that such a class was needed to allow William & Mary to compete on a national level and that moving the tournament to 1L spring made incorporating the class into the school's curriculum more feasible.

In addition, the team cited a desire to improve the quality of life of second-years among the reasons for the move. The fall of 2L year can be overwhelmingly busy, with

leadership roles in organizations, cite-checking responsibilities on journals, more demanding Legal Skills work, and summer employment interviewing. As a result, the team has seen declining rates of participation in recent years, and members thought moving the tournament to the spring would draw a larger pool of competitors, ultimately making the team more competitive.

"The number of competitors has been down the past couple of years," Hargrove said. "As the job market has gotten tighter, interviewing became a real beast. Combined with the work 2Ls have for Legal Skills and journals, Moot Court had the hardest spot for tryouts."

The final batch of reasons Cromwell and Hargrove put to the faculty had to do with improving the quality and quality of life of the team. The logistics of running the tournament will be made easier with 2Ls and 3Ls available to serve as judges and organizers. In addition, allowing 2Ls and 3Ls to work alongside each other for a longer period of time will provide more continuity on the team and allow for, in Cromwell's words, "an element of institutional knowledge—an element that is currently absent."

The Moot Court Team began discussing the move late last academic year, soon after Cromwell and Hargrove assumed their leadership positions. Members worked on a proposal over the summer, and they submitted their reasoning to the faculty this fall. The curriculum committee met to discuss the move before the full meeting of the faculty in October. Dean Butler said that, because the move would not add any major academic requirements that would interfere with 1L classes, the curriculum committee approved the move and reported it to the faculty.

Although this move might be the biggest for Bushrod, moving from second-year to the first, moving the tournament on the academic calendar is not unprecedented. The most recent move brought the tournament up to early September to allow 2Ls to know more quickly whether they had made the team. This allowed successful competitors to add the credential to their resumes and gave them an opportunity to fit the necessary brief writing course into their schedules more easily.

Following the move, the Moot Court Team will combine Bushrod with the Institute of Bill of Rights Law's moot court tournament, which takes place every spring. Scheduled to coincide with the IBRL's annual symposium, the final round of the combined Bushrod/IBRL tournament will take place February 21-23.

The IBRL tournament is scheduled so as not to conflict with Legal Skills or any other major law school event for first-year students. Holding Bushrod during this window will also get around the problem of competitors being out of town on job interviews that occur in the fall of 2L year.

"We want to ensure that this is a good decision for the 1Ls both academically and co-curricularly," Cromwell said. "We want to make sure that we are not putting too much pressure on the first-years or taking them away from their studies."

But the IBRL tournament had been used as a sort of practice for Bushrod. With the move, first-years will have fewer opportunities to hone their appellate arguing skills.

"Because Moot Court is one of those activities that could have the greatest impact on our resumes, the team should give us every chance to develop some advocacy skills before taking part in Bushrod,"

said Karen Anslinger, a first-year student considering trying out for the team. "I understand there are good reasons for the move, but if the school's purpose in having tournaments like Bushrod and IBRL is to give us students multiple opportunities to hone our advocacy skills, I think it's somewhat counter-productive to combine the two tournaments."

The Moot Court Team hopes to compensate for these concerns in several ways. First, the team will hold a mock argument argued by 3L members to demonstrate to novices how appellate arguments work. Second, the Bushrod organizers will run the first round of the tournament as a practice round, providing competitors with feedback without taking scores. Third, Bushrod will be open not just to first-years but to second-year students as well. In this way, those who miss the cut on the first try as 1Ls can try again the following year, when they may be more confident and composed. The Moot Court Team expects to guarantee the majority of spots for first-years, but a handful will be open to the best competitors, be they 1Ls or 2Ls.

"The beginning of 2L year is a really stressful time, absent Moot Court responsibilities," said John Pollom (2L), winner of this year's Bushrod. "A lot of people who might have otherwise done really well in the tournament sat out because they didn't have time." Pollom thought that the move would benefit the team and the 2Ls who felt overwhelmed in the fall—the team can still attract strong competitors at a time when they are comfortable competing.

The Moot Court Team plans to hold a meeting for all interested 1Ls and 2Ls to explain the changes sometime in the week before Thanksgiving, and the team will make the problem available over the winter recess.

Confessions of a Trial Team Competitor

by Margaret Riley

"Your Honor, I object! This entire line of questioning is irrelevant under Federal Rule of Evidence 401 and overly prejudicial under Rule 403!" You would probably expect to hear the previous sentence on TV's *Law and Order*, but you're more likely to hear it at a Trial Team competition.

On October 20-24 the William & Mary Trial Team sent four competitors to the Michigan State University Trial Advocacy Competition. The team, consisting of Arista Sims, Chris Burch, Virginia Vile, and myself (all 3Ls), finished fifth overall among twenty-two teams. You're probably wondering what it's like to compete in a trial tournament. Even if you weren't, I'm going to tell you about it!

The competition kicked off Thursday evening, but the team

arrived in beautiful downtown East Lansing, Michigan (that was sarcasm, people) on Wednesday afternoon. We had a full day to practice, prepare, and stress ourselves out.

The four-member team divided into two sub-teams with each pair arguing for plaintiff or defendant. When one side was competing, the other pair would play their witnesses. Each side was responsible for an opening statement, two direct examinations, two cross examinations, and a closing statement. Confused yet? Me too.

In any event, the team performed extremely well. We won all our rounds, except for the first when we went up against the team that would eventually place second in the competition. We advanced into the semi-finals and placed fifth.

Our high finish is even more impressive when one realizes we were the only team in the competition

without a professional coach. As Arista put it, we were the "Seabiscuit" team. We were riding a horse that was too small and our jockey was blind in one eye. Despite the advantages of other teams we ended up placing fifth, the highest William & Mary has ever placed in the MSU competition.

But what is it like being in a competition? Before entering the "courtroom" (in this case the trials were held in classrooms), your heart is racing, your stomach is churning, and you think you might throw up. But once you get through the motions in limine and your first objection, the adrenaline kicks in.

After the competition there is the inevitable rehashing of the entire trial, the complaining/gloating over the other team's performance and the inability to sleep because you are still so wired. Basically you experience four days of alternate highs and lows and no sleep.

Sounds just like law school doesn't it? But way more fun!

Trial Team is not for everyone. You can't rely on memorizing your questions because other teams will throw out objections and strategies you never anticipated. A good trial team member can react quickly without getting flustered and is prepared for anything. Having a certain flair for the dramatic is also helpful, because we are dealing with juries here, and they love that stuff!

In the end, our team worked hard and ably represented our school. At the end of the competition banquet the judges expressed how impressed they were with William & Mary and personally invited us back for next year. Although I won't be here (I am taking the first bus out of here come May), hopefully I have passed on some wisdom to those who will be competing.



Monday 5pm-9pm: Mexican Night

Wednesday 5pm-9pm: Italian Night

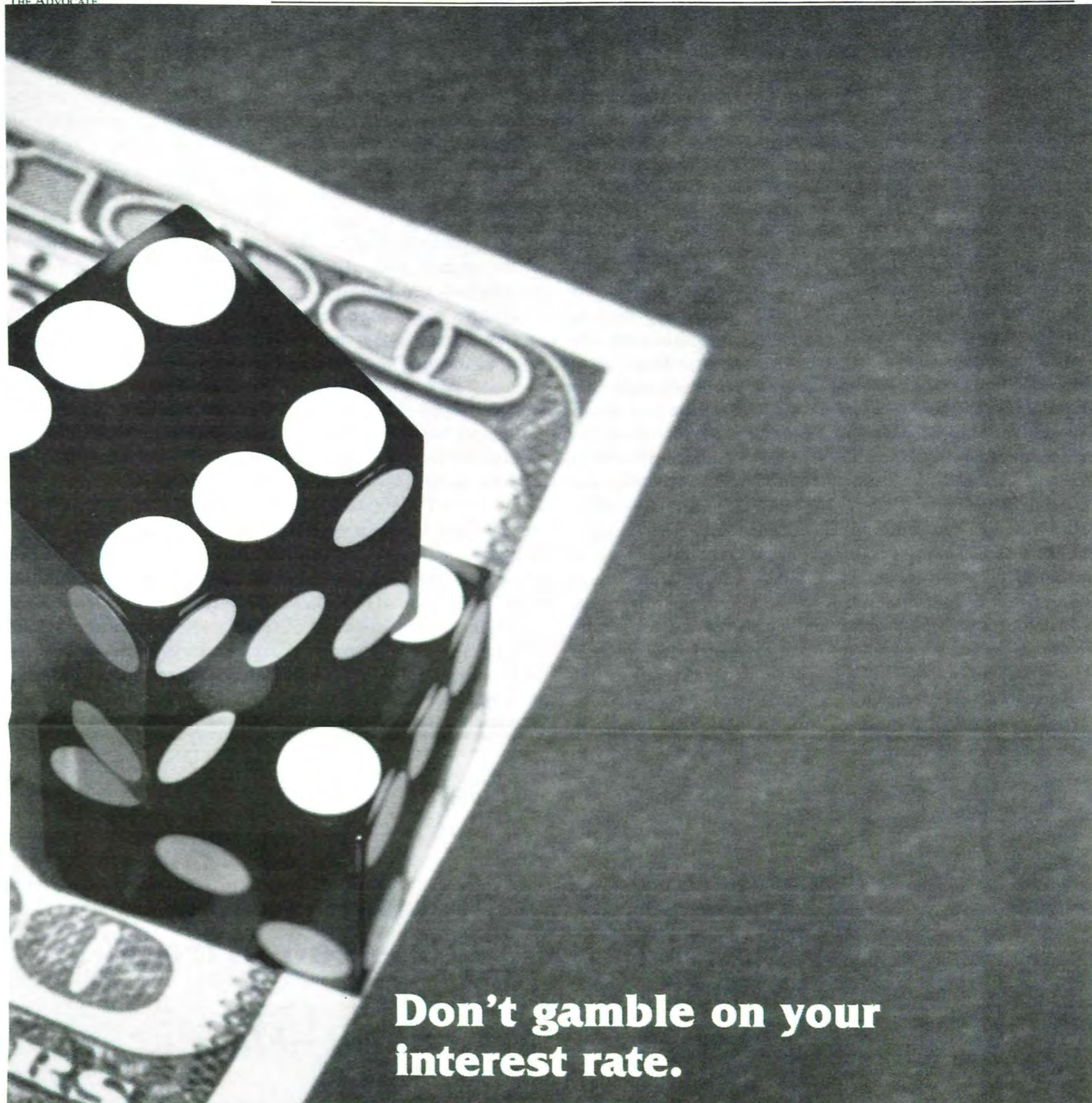
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Supreme Court Preview: Opening Arguments

by Marie Siesseger

This year's Supreme Court Preview, an annual conference for journalists, lawyers, and law professors sponsored by the Institute of Bill of Rights Law, began on the evening of Friday, October 22, with a moot court argument of *Roper v. Simmons*, a case that was recently argued before the Supreme Court. Former Virginia Solicitor General William Hurd argued for the petitioner state. John Blume, a law professor from Cornell and the director of the Cornell Death Penalty Project, presented the argument for the respondent, Christopher Simmons. Law professors and members of the press corps who cover the Court served as justices for the oral argument, and in a five-to-four decision, held for the state, upholding the execution of juveniles ages 16 and 17.

The mock Court explained their votes after the decision was handed

down. Most of those who affirmed the Supreme Court of Missouri's holding that the juvenile death penalty was cruel and unusual as applied to 16- and 17-year-olds based their decision on the Court's previously articulated Eighth Amendment standard: whether a national consensus has emerged against the imposition of the death penalty on a particular class. Several justices were willing to take a broad view of what constituted a consensus, and Duke law professor Erwin Chemerinsky pronounced the case "indistinguishable from *Atkins*." *Atkins* was a 2002 case in which the Court ruled that the application of the death penalty to the mentally retarded violated the Eighth Amendment's protections.

The majority similarly focused on the consensus requirement, but found that the trend towards social opprobrium upon which the dissenters relied had not yet crystallized. Charles Lane, a reporter for

The Washington Post, explained that although it is a penalty that is very troubling, the Court would be unlikely to find it unconstitutional, in part because of a footnote in *Atkins* that refused to equate the consensus against the death penalty for the mentally retarded to the juvenile death penalty.

Following the moot court, two panels moderated by *Los Angeles Times* journalist David Savage discussed the law under George W. Bush. Several of the significant cases during Bush's tenure "remind us all of the value of checks and balances," said Linda Greenhouse, *The New York Times*' Court correspondent. She noted that the past four years illustrated the "clash of two institutions in major alpha mode" as the Imperial Presidency met the Imperial Judiciary.

John Ashcroft's guidance of the Department of Justice was a principal target for several of the panelists. Professor Chemerinsky

criticized Ashcroft's agenda at Justice, saying that "across the board there has been a claim of unchecked authority."

John McGinnis, a professor at Northwestern Law School and former Deputy Assistant Attorney General in the Office of Legal Counsel, argued that this administration was a good "lesson for advocates of executive powers," in that they need to know when to push, and how to do so. He further said that the OLC needed to reestablish an internal "diversity of opinion" to better equip itself to handle criticism.

Stuart Taylor, Jr., a weekly columnist for *National Journal*, explained the basic framework of the USA PATRIOT Act. He said that the "major premise" is that some of the U.S. civil liberties rules that are appropriate for police searching for drugs might not be right for agents

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Supreme Court Preview: Day Two

by Jeffrey Mead

More than 150 people packed rooms at the law school on Saturday, October 23 to hear panelists discuss the Supreme Court at this year's Supreme Court Preview, sponsored by the Institute of Bill of Rights Law.

Saturday panels focused both on upcoming Supreme Court cases and on larger questions such as what effect international law should have on Supreme Court decision making and which cases the Supreme Court may still agree to hear in the upcoming term.

The international law panel was particularly polarized, due in part to at least two decisions from last term that cite international law as support for a decision. The first line of Justice Ginsburg's concurrence in *Grutter v. Bollinger* states that "[t]he Court's observation that race-conscious programs 'must have a logical end point,' accords with the international understanding of the office of affirmative action." Justice Kennedy's majority opinion in *Lawrence v. Texas* cites a decision by the European Court of Human Rights and relies on the laws of "other nations" as support for overturning the *Bowers* decision.

William & Mary Professor Linda Malone's discussion defending the use of international law and comparative law began with a slide presentation entitled "International law and comparative law for dummies (and some misguided constitutional law professors)." Malone even suggested that conservative Justice Antonin Scalia is a "closet internationalist" based on his dissent in *Hartford Fire Insurance v. California*.

Fellow William & Mary Professor Alan Meese responded by saying that the judiciary is wrong to rely on international law to interpret the United States Constitution. Meese said it is too difficult for justices to pick a single protected right out of the context of a foreign country's "mosaic" of background

principles, morals, and national norms.

Charles Lane, who covers the Supreme Court for *The Washington Post*, suggested that the hype surrounding the use of opinions of foreign courts, international treaties to which the United States is a party, and customs of other countries may be just that—hype. Lane said, however, that "the gloves may come off" in the Court's opinion in *Roper v. Simmons*. In that case, the Missouri Supreme Court—in trying to determine whether a "national consensus" had emerged against the juvenile death penalty—lumped the United States in with Iran and The Republic of the Congo as the only countries that have officially sanctioned the execution of juveniles in the last few years.

Walter Dellinger, Amy Wax, Dahlia Lithwick, and Steve Vermeil discussed cases that many believe the Court will likely hear in the upcoming term.

Lithwick, a senior editor at Slate who received a 2001 Online Journalism Award, discussed *Van Orden v. Perry*, a Ten Commandments case the Court very recently agreed to hear. Lithwick said the Court has declined to hear 10 Ten Commandments cases over the past 24 years.

"It's about time," Lithwick said.

The *Van Orden* case is about a statue on the capitol grounds in Austin, Texas. The statue, which bears the Ten Commandments, was a gift of the Fraternal Order of Eagles and sits alongside other, secular, statues.

Dellinger—the head of the appellate practice at O'Melveny & Myers in Washington D.C., former Solicitor General of the United States, and former law clerk to Justice Hugo L. Black—talked about a right-to-die case that the Court may decide to hear.

University of Pennsylvania Professor Amy Wax, who has argued 15 cases before the Court, discussed possible cases dealing with gay rights and gay marriage.

Steve Vermeil is an associate

law professor at American University Washington College of Law. He also spent 12 years as the Supreme Court correspondent for *The Wall Street Journal*. Vermeil discussed possible partial birth abortion cases that may come before the Court.

Additionally, William Hurd discussed the constitutionality of a Congressional Act designed to give prisoners increased religious freedom.

CASE-SPECIFIC PANELS

The panels focusing on cases the Court has already agreed to hear fall under umbrella topics such as civil rights, criminal procedure, federalism, and business law.

CIVIL RIGHTS

In civil rights, Professor Erwin Chemerinsky highlighted a notable paradox the conservative justices will have to resolve when they hear *Johnson v. Gomez*—a case testing the constitutionality of California's segregation of prisoners based on race. Conservative justices typically give great deference to prison officials, but also embrace a "race blind" Constitution. Chemerinsky suggested that justices may reconcile the two stances by allowing a "race blind" Constitution, except in the context of prison.

Wax discussed the effect one case may have on the enforceability of civil rights statutes, especially by proxy. After the Birmingham, Alabama, Board of Education fired girls' basketball coach Roderick Jackson allegedly for complaining that his girls' basketball team wasn't receiving equal treatment, Jackson sued under Title IX.

"Students are not in the best position to enforce rights conferred upon them," Wax said. "They have to look to mentors and others to sue for them."

Michael Carvin discussed a case concerning the availability of a disparate impact theory of liability to plaintiffs seeking redress for age discrimination under the Age Discrimination in Employment Act of 1967. Carvin, one of George Bush's lead lawyers who

argued before the Florida Supreme Court in the 2000 election recount controversy, suggested that age is different from race and gender in the employment context and that disparate impact should not be available to plaintiffs. The case is *Smith v. City of Jackson*.

Chemerinsky responded by suggesting that the statute in question mirrors another statute that makes the disparate impact argument available to plaintiffs. Chemerinsky also said that because discriminatory purpose is so difficult to prove, a disparate impact argument should be available.

William & Mary Professor Michael Gerhardt discussed possible outcomes in *Tenet v. Doe*, a case in which two former spies sued the Central Intelligence Agency claiming that the CIA failed to fulfill its promise to financially support the spies in return for their Cold War services.

CRIMINAL PROCEDURE

David Savage, who covers the Court for the *Los Angeles Times*, talked about the constitutionality of the federal sentencing guidelines, an issue on which the Court heard oral argument on the first day of the term in early October. Savage thought it possible that the Court would rule the 20-year-old guidelines unconstitutional and that Congress would revert to "the old days" when judges were given much broader guidelines.

"You committed bank robbery?" Savage asked rhetorically. "Then you get 'one-to-forty years' and the judge will decide your sentence."

Cornell Law Professor John Blume discussed two cases on the Court's docket that deal with the Sixth Amendment's guarantee of effective counsel. One case, *Florida v. Nixon*, will decide if an uncooperative criminal client received ineffective counsel when his attorney decided as a matter of strategy to not dispute the client's guilt but instead decided to focus

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Supreme Court's Docket Hot Button Topic

Day Two continued from pg 7

on saving the client's life in the sentencing phase.

William Hurd discussed several immigration and deportation cases before the Court, including one where the lower court in part based its decision on "statutory syntax and geometry."

"I'm not sure what a statute's geometry is," Hurd said.

William & Mary Professor Kathy Urbonya discussed the constitutionality of a drug-sniffing dog's "search" of a defendant's car when the defendant had only been pulled over for exceeding the speed limit. Urbonya said the defendant will likely argue that the dog sniffing around the exterior of the pulled-over car will amount to an illegal search and that even if the Court determines the sniffing to not be a search, that the sniffing constituted an unreasonable delay.

FEDERALISM

Kenneth Geller, Lithwick, Tom Merrill, and Stuart Taylor discussed several federalism cases before the Court this term, including a case concerning the constitutionality of state statutes that effectively bar out-of-state wineries from delivering their product to in-state residents; a case involving the interaction of a federal law that

prohibits possession of marijuana and a California state law that permits possession of marijuana when used for medicinal purposes; and a preemption case pitting Texas peanut farmers against herbicide manufacturer Dow Agrosiences.

Geller served as an assistant to the solicitor general and later as deputy solicitor general and has argued more than 40 cases before the Court. Merrill, another former deputy solicitor general, is currently a law professor at Columbia who once served as a law clerk to Justice Harry Blackmun. Taylor is a weekly opinion columnist for National Journal and contributing editor for Newsweek who covered the Court for the New York Times in the mid-1980s.

BUSINESS LAW

Walter Dellinger, Lane, Merrill, and William Van Alstyne talked about several business related cases, two of which had implications in other areas of law. Merrill discussed two cases dealing with eminent domain—*Kelo v. New London* and *Lingle v. Chevron*. The former case deals with government's ability to take private property and give it, in turn, to another private party in hopes of eliminating blight.

Van Alstyne, a recent addition to the William & Mary faculty, talked about First Amendment

implications of a case where cattlemen are forced to give one dollar for every head of cattle they sell to a trade association that purchases advertising promoting beef consumption. The cattlemen sued in part because some don't have the ability to differentiate themselves from generic beef producers. Some cattlemen would like to promote the fact that their beef is hormone free, that their cows aren't fed by-products, and that their cows are domestic and not imported from foreign countries.

Lane discussed *Koons Buick v. Nigh*—a case regarding the Truth in Lending Act.

Dellinger discussed general business cases; the case Dellinger was originally going to discuss was recently denied certiorari by the Court.

The mission of the Institute of Bill of Rights Law is to contribute to

the ongoing national dialogue about issues relating to the U.S. Constitution and our Bill of Rights. One of the guiding philosophies of the Institute is the conviction that our collective understanding of constitutional issues is enhanced significantly when experts from diverse disciplines—lawyers, journalists, historians, political scientists, economists, sociologists, and politicians—are brought together for serious discussion and debate. Following this interdisciplinary approach, the Institute provides a forum for airing and debating matters of law and policy as a means of increasing our understanding of important constitutional issues.

For more information about the Supreme Court Preview, upcoming conferences, or general information about the Institute of Bill of Rights Law, please contact Melody Nichols at ibrl@wm.edu.

Corrections:

In our last issue, we reprinted Dean Reveley's article on the history of William & Mary Law, "W&M Law School Came First. Why Care?" without citing the University of Toronto Law Review, which first published the article. We apologize for the oversight, and thank Dean Reveley for allowing us to reprint his informative article.

Supreme Court Preview
Opening Arguments from pg 6

who are trying to detect terrorists' bombs. "Some [of the] criticisms" of the Act, he said, "could be fixed by rather minor amendments." He further noted that many of the most vocal critics of the Act were people who thought that the government had too much power on September 10, 2001.

The second panel discussed the role of the Supreme Court in presidential elections. Savage quipped that every four years he writes an article stating that this election will be the one to decide the fate of constitutional law for the next

thirty years, and that every time he had been wrong because of the lack of turnover on the Court. Echoing that sentiment, Chemerinsky offered three areas of the law that he believed would change with the inevitable changing of the justices should Bush be reelected: affirmative action, campaign finance, and abortion. If John Kerry became President and was able to replace Chief Justice William Rehnquist, Chemerinsky predicted that federalism and sovereign immunity, aid to religion, and criminal procedure would be the areas of greatest upheaval.

Michael Carvin, a partner at Jones Day and frequent advocate

before the Court, agreed that if Bush won, there would be a "rough equivalent of the status quo," but if Kerry were victorious, there would be "significant change."

Lyle Dennison, a journalist with SCOTUSblog, predicted each presidential candidate's potential appointees to the Court. Dennison emphasized that the "attitude of the President himself" was a critical factor in Court appointments decisions, and that therefore all that anyone could do was to analyze the "consensus of conjecture." In particular, Dennison thought that Bush would be likely to appoint J. Harvie Wilkinson, a current member of the Fourth Circuit, noting

that Wilkinson would be a good choice if Bush decides to "tack towards the middle." Dennison explained that Kerry would be more likely to make a "highly symbolic nomination," and would prefer a Hispanic and/or female candidate, such as Second Circuit judge Sonia Sotomayor. He also said that D.C. Circuit judge David Tatel would be a likely Kerry nominee, in part because, if appointed, Tatel would be the first justice in recent memory with a physical disability.

The lively discussion during the two Friday panels paved the way for a series of six panels on the current term during the Saturday session.

Same Sex Marriage Debate Arrives at W&M

by Nicole Travers

On Wednesday, October 27, the Federalist Society, the American Constitutional Society, and Lesbian and Gay Legal Association joined forces to bring to the law school a debate on the proposed amendment against same-sex marriage. The participants were Professor Teresa Collett, professor of the University of St. Thomas School of Law, speaking in favor of the amendment, and Professor Jacobs, a professor visiting Marshall-Wythe from the Michigan State University College of Law speaking against the amendment.

Professor Collett is a graduate of the University of Oklahoma College of Law. She practiced in Oklahoma City before accepting a faculty position at South Texas College of Law in Houston. She has served as a visiting professor at several universities, including the University of Texas School of Law, the University of Houston Law Center, Notre Dame Law School, and Washington University School of Law. Currently she teaches Bioethics, Professional Responsibility and Property at the University of St. Thomas School of Law. She is active in her support of the amendment against same-sex marriage, and has testified before both federal and state legislative committees on the topic.

Professor Jacobs graduated from the Boston University School of Law, and practiced family law in Boston for six years. She has served as a clinical instructor for Harvard Law School's Hale & Dorr Legal Services Center, and as an adjunct instructor at Boston University School of Law. In addition, she served as a Freedman Fellow and lecturer at Temple University School of Law. She is visiting William & Mary from the Michigan State University College of Law, where she teaches Family Law, Property, Wills and Trusts, and Law and Gender. She is currently teaching Property I and Family Law at William & Mary. In her scholarship, she focuses on family law issues, particularly

the legal rights and obligations of nonbiological parents.

Professors Collett and Jacobs joined Dean Reveley and a large audience of William & Mary professors and students at 7:00 on October 27 to hold a formal debate on the constitutionality of the proposed amendment against same-sex marriage. Before the debate began, Dean Reveley introduced the debate, and made a special comment on the necessity of civility when dealing with such a sensitive issue as the constitutional rights of a minority group. The speakers were introduced by, respectively, President of the Federalist Society Kelly Campanella, and President of the LGLA, and member of the American Constitutional Society Matthew Gayle. Each speaker had fifteen minutes to present her opening argument, five minutes for rebuttal, and a question and answer period to follow.

In her opening argument, Professor Collett professed her belief in the existence of legitimate and loving relationships between same sex couples. She asserted that her support of the amendment against same-sex marriage stems from what she believes is the purpose of marriage—procreation. Marriages, said Collette, can be annulled without question in the absence of consummation, and are necessary to keep biological parents together in the best interests of the children they produce. She claimed that, beginning in the 1960s with the development of no-contest divorce, marriages came to be seen as based on "adult satisfaction," as opposed to procreation. However, she claimed that this view of marriage has not worked, due to the huge number of divorces that occur in America today.

Same-sex marriages, she said, are based not on the ability to procreate, but upon mutual support of one another. States like Hawaii have enacted laws that allow same-sex couples to be "reciprocal beneficiaries" of one another. This allows them to enjoy the same benefits of having legally mutual support without entering the secular state

of marriage, which is necessarily about the children that can result of the biological union between a heterosexual couple. Since same-sex couples cannot have children by accident, Collett, argued, the necessity of a legal bind between the couple is unnecessary, and should be viewed in a different manner than does the legal bind between a heterosexual couple.

Professor Jacobs argued next, both against the same-sex marriage amendment, and for a federal ruling permitting same-sex marriages across the country. She replied to Professor Collett's argument by stating that marriage is not based solely on procreation. She cited cases such as *Turner v. Safley* and *Loving v. Virginia* which state that marriage is a fundamental right under the Constitution, whether those who marry are able to procreate or not. Even Justice Scalia, she argued, agreed in *Lawrence v. Texas* that marriage is a fundamental right. Institutions implemented by states, she said, such as reciprocal

benefits or civil unions are not the same as marriage because they do not entail the federal benefits that a marriage does. Civil unions and other state programs, she claimed, are a salve: essentially "separate but unequal."

To ignore the elements of bias and prejudice in refusing to allow same-sex marriages, Professor Jacobs said, is a mistake. She stated that the amendment against same-sex marriage would be the first time the Constitution would be amended to promote discrimination, by barring fundamental rights to a minority group, rather than remedy discrimination by affirming fundamental rights for a minority groups as did the Thirteenth Amendment.

On rebuttal, Professor Collett emphasized the American populace's stance on same-sex marriage. According to her, Americans are 2 to 1 in opposition to the allowance of same-sex marriage. She insisted that allowing the judicial branch to

Continued on pg. 12

ON THE HORIZON

Selected upcoming lectures, events & conferences at the Law School.
For a complete listing, go to cardozo.wm.edu.

Saturday, November 6:

Brigham-Kanner Property Rights Conference sponsored by the William & Mary Property Rights Project and the Institute of Bill of Rights Law. Contact Kathy Pond (ktpond@wm.edu) to register or for more information.

Tuesday, November 9:

Colonel Fred Borch, U.S. Army, guest speaker sponsored by the Military Law Society. 3 p.m., in Room 124.

Friday, November 12:

Law School's 225th Anniversary Celebration hosted by Dean and Mrs. Reveley. Students, alumni, faculty, staff & friends of the Law School are welcome. RSVP to Kathy Pond (ktpond@wm.edu) by November 4 if you plan to come. 7 p.m.

Thursday & Friday, November 18-19:

50th Annual William & Mary Tax Conference titled "Guiding Privately Held Businesses and Their Owners during the Life Cycle of a Business." Sponsored by the Law School and the School of Business Administration, the Taxation Section of the Virginia Bar Association, and the Taxation Section of the Virginia State Bar. Contact Carolyn Chambers (wmtax@wm.edu) to register or for more information. (site: Kingsmill Conference Center.)

Professor Susan Herman Visits W&M

by Dave Zerby and
Marie Siesseger

On Friday, October 29, Professor Susan Herman of Brooklyn Law School visited William & Mary as a guest of Professor Paul Marcus. In addition to teaching, Professor Herman is highly involved in the American Civil Liberties Union, where she serves as General Counsel, and as a member of the National Board of Directors and the Executive Committee. She specializes in constitutional law and is an expert in criminal procedure.

Throughout the day Professor Herman met with groups of students and faculty to discuss several of her areas of scholarship. Over separate breakfast and lunch meetings, she explained some of the more controversial components of the USA PATRIOT Act. These include sections 205, 215, 218 and 505. Professor Herman's presentation was largely devoid of opinion; as an explanation and survey of the Patriot Act's impact and the ACLU's attempts to mitigate the impact, however, her presentation was quite rich.

Professor Herman highlighted several concerns during her presentations: the enhanced freedom of domestic law enforcement to obtain Foreign Intelligence Surveillance Act information (and, under certain circumstances, information directed at criminal activity) without adequate judicial or legislative supervision, the secrecy with which law enforcement may do so, and broader interpretations of key definitions. Professor Herman used the story of Sami Omar al-Hussein to illustrate the consequences of the Patriot Act's expansion of the definition of "material support." Mr. al-Hussein was a University of Idaho student who devoted some of his time to running webpages. One of the pages which he ran served as a website for Hamas. The state prosecuted Mr. al-Hussein

under a statute prohibiting anyone from giving "material support" to a terrorist organization. Mr. al-Hussein's actions implicated the Patriot Act because the Act re-defines "material support" to include the providing of expertise or assistance. Apparently, Mr. al-Hussein's website work qualified him as lending expertise to Hamas. (A jury later found Mr. al-Hussein not guilty, based on First Amendment free speech grounds).

As Professor Herman's lecture made clear, the provisions of section 215 illustrate the concerns about law enforcement's ability to operate without sufficient review and in secrecy. Section 215 pertains to law enforcement's ability to gather information an agency believes is relevant to terrorist activity. Although section 215 requires the investigators to gain a court order first, the requirement is merely a smokescreen. The same section eviscerates a court's discretion in issuing the order because it mandates that the court fulfill an agency's request; the court does not have the option of refusal. Nor does the section provide any standard by which the court can determine the sufficiency of the agency's evidence. Based on the court order, the agency can then obtain a wide variety of information on an individual, including educational, medical, and library records. The information gathering occurs in secrecy because the organizations from which the information is collected are under a gag order not to tell the suspect. According to Professor Herman, a FBI memorandum argues that section 215 applies to physical objects as well, including keys; if correct, this means that law enforcement can gain access to an individual's apartment by getting keys from management, again in secret.

The ACLU's struggle to contain law enforcement's unfettered ability to obtain information in secrecy came to light as Professor

Herman discussed section 505 of the Patriot Act. Section 505 permits law enforcement agencies to issue national security letters, a device similar to a grand jury subpoena. The letters direct internet service providers to surrender information regarding the identity of their customers and users, including substantive content; at the behest of such a letter, Verizon, for example, would have to disclose the identity of a weblogger whose page Verizon hosted. The kicker for law enforcement is that the agencies may issue the letter without obtaining a court order beforehand, and with no subsequent judicial review.

In an attempt to counter law enforcement's unmitigated powers, the ACLU filed *John Doe and ACLU v. Ashcroft*. Although the plaintiffs had hoped the court would declare section 505 unconstitutional on its face, the judge went only so far as to declare it unconstitutional as applied.

Professor Herman also ex-

plained the significance of section 218, which expands the government's electronic surveillance powers through the simple deletion of the word "the" and the addition of the phrase "a significant purpose." In the context of the pre-Patriot Act statute, the government could search if *the* purpose was intelligence gathering, but could not conduct a search if part of the purpose was to gather evidence of criminal activity. The section 218 revisions, however, alter the standard rather dramatically, explained Professor Herman. Under the revised provision, the government may search if a significant purpose of the search is foreign intelligence gathering.

Professor Herman's lectures were informative and entertaining for all in attendance. She said that the density of the Patriot Act—which weighs in at 342 pages—and the "treasure hunt" nature of many of its provisions are a principal reason "why people don't know what is in it."

Dwyer lecture from pg. 2

go about "reversing the hierarchy"? Professor Dwyer put forth a few suggestions. First, society must begin to take the moral superiority of our youth more seriously. We should pay more attention to their viewpoints and preferences.

Is this an argument for lowering the voting age? We may want to consider it, says Dwyer, but on a less drastic scale, society could make small changes for the better. For example, he says, "much land development today takes place with no consideration of where children will play."

Second, society should begin to consider and explore the ways in which it would be okay to treat adults instrumentally in order to serve the interests of youth. Given the evidence that has been developed that children do better in two-parent homes, society might

place greater obstacles in the way of divorce. More provocatively, society should perhaps look into screening potential parents and determining their worthiness to raise children. If they are found wanting, society should have no issue with "reassigning" a baby to potentially better parents. Which is all by way of saying that children's interests should count for more than comparable interests of adults. But the most important step perhaps, says Dwyer, is that we "stop propelling our children to maturity" and instead act to preserve youth.

So where does that leave those of us who have moved on into our golden age, or even those of us who have been working hard to shed those last vestiges of youthful innocence and childishness? Worry not, says Dwyer with a smile. "There is plenty of evidence that it is possible to preserve youth, and even possible to regain youth after it's been lost."

Jay Sekulow Makes the Lecture Rounds at W&M

by D.G. Judy

The law school has had, recently, a spate of special events. A quick list might include the IBRL Supreme Court Preview, the Fourth Circuit visit, the gay marriage debate, a speech by Virginia's Solicitor General, Professor Dwyer's Blackstone Lecture, and—last but not least—John Marshall in a ninja costume.

The noteworthiness continued Friday, October 29, with a visit by Jay Alan Sekulow, chief counsel of the American Center for Law and Justice (ACLJ). Sekulow has built a very impressive career of advocacy for free speech and religious liberties. He has argued at least a dozen cases before the Supreme Court (including the Lamb's Chapel and Mergens cases) and won the majority of them. Sekulow also teaches at Regent Law School and in the Office of Legal Education at the Department of Justice.

Sekulow spoke for an hour Friday morning to a group of law students and faculty. He then lectured to a session of a law and public policy class, and finished up with lunch with the IBRL student division. I followed him around for what turned out to be a fascinating four hours.

Sekulow shared many details of his own experience arguing before the Court. He said that perhaps the most notable feature of a Supreme Court argument is the intensity of the questioning. During his argument last term in *McConnell v. FEC*, the challenge to the McCain-Feingold campaign finance reform act, Sekulow received 22 questions—"a half-hour's worth"—in ten minutes.

Sekulow argued that case alongside former Solicitors General Ted Olson, Ken Starr, and Seth Waxman. Sekulow succeeded in his portion of the case, persuading the Court to strike the portion of the law forbidding minors from making political contributions.

Aside from very, very extensive preparation, Sekulow said the key to effective oral argument is listening closely to the Justices' questions. He said this is key to figuring out which Justices agree with him, and which he needs to persuade.

Sekulow opined that the next President will appoint from two to perhaps four Supreme Court Justices—and, having kept a close eye on the burgeoning lawsuits over the 2004 election, he also expressed some doubt as to whether we would know who that President will be by

the time this issue of *The Advocate* is published.

Politics were a second great theme of Sekulow's presentations. He discussed the politics of these appointments with some students who had attended the IBRL Supreme Court Preview a week prior. "It all depends on what happens to [S.D. Senator] Daschle," he said, suggesting that a defeat for the Senate Minority Leader would signal constituents' displeasure with the Democratic tactic of judicial filibuster.

Sekulow also addressed the ACLJ's support for the proposed Federal Marriage Amendment, which he doubts will ever pass. "I think it's dead as a doornail," he said, adding that he had supported it because he believes the nation needs to have an extensive public debate on the subject of gay marriage, rather than confining the issue to treatment in courts of law. Sekulow saw some irony in San Francisco Mayor Gavin Newsome's controversial action last spring. "It backfired," Sekulow said, leading to increased awareness and mobilization of gay marriage opponents.

Public debate and discussion are important, Sekulow said, because they allow people to

participate in the issues that most concern them, and they require people to learn more about the issues and engage their opponents. In the absence of extensive public discourse, Sekulow said, politics grow shrill and vitriolic.

Sekulow said lawyers and policy makers have the "essential" duty to maintain civility in the public arena. "You may disagree with someone," he said, "but you can still go out and have dinner with them." As two examples of amiable opposition, Sekulow cited his own friendship with Nadine Strossen (President of the ACLU) and the close friendship of Justices Antonin Scalia and Ruth Bader Ginsburg. In addition, Sekulow said that any of the attorneys he has opposed over the years would, if asked, say that he was their friend.

Such collegiality is necessary, Sekulow said, not only as a matter of human decency. He argued that in the aggregate our country needs to bridge its political divides to face common challenges, in particular terrorism. "Terrorists don't care," he said "if you're a Republican or Democrat, a Catholic or Baptist or a Jew, or for that matter a Muslim—[they care that] you are an American."

A Student's Guide To The Highland Games

by Margaret Riley

On Saturday, September 25, the Williamsburg Scottish Festival and Celtic Celebration was held at the Jamestown Beach Campsites. In case you didn't get a chance to catch the Festival this time around, here is a handy guide to some of the traditions and events represented there.

Most people think of heavy athletic events when they hear the Scottish Festival is coming to town. Picture huge (and I mean HUGE) men in kilts throwing really heavy stuff. Also, picture lots of whisky. I mean, we are talking about Scottish people here.

The most popular Scottish athletic event is the **caber toss**, also known as "turning the caber." The caber is a log that participants flip end-over-end. That's right folks, they are throwing frickin' trees. One word of warning: stay standing if you choose to observe this event from close up. There really is no telling where the caber could land, and you may need to run away to avoid being hit.

Other events one shouldn't miss at the Festival are the **sheaf toss** (20 lb. bags of hay tossed over a bar with a pitchfork) and the **war hammer throw** (participants throw really big hammers). For those who

want their sport with a little more finesse, don't miss the **ladies' clan team haggis toss**. Little old ladies sporting their clan tartans stand on stumps and throw haggis (unfortunately, not at one another).

Athletic events not to your taste? Not to worry! The Festival also provides calmer activities such as the **sheep dog demonstration**, where one can sit on a piece of grass and watch little black dogs chase sheep around a field. These dogs are quite impressive and can respond to a large number of spoken and whistled commands.

The Festival also might provide a chance to connect with your

cultural heritage. In the **clan tents** people wander around looking for the names of their ancestors, and upon finding them, sign up for pointless mailing lists. If your surname is Bruce, Gordon, or MacKenzie, this is the place for you! If you are a Calabiano or Krzymanvich this may not be what you are looking for.

Finally, the Scottish Festival lets you sample the **traditional food and drink** of Scotland. Emphasis on the drink. Let's face it, Scottish cuisine is not famous for being good. Haggis, the most "popular" Scottish food, is sheep's stom-

Continued on pg. 12

News Briefs

Law School's 225th Birthday to be Honored November 12th.

According to Dean Reveley, "It's a big deal to get to be 225 years old. To celebrate, the Law School is going to have a very nice party. Hundreds of people—alumni, faculty, students, friends of the school—will be on hand. Thomas Jefferson and George Wythe will greet us at the door. There will be good food and drink, music, and elegant flowers. Virginia's Lieutenant Governor and its Attorney General will make a few remarks, as will President Sullivan. Jefferson and Wythe will talk about the law school they created. True, you have to put on a uniform to join in the festivities, but this is only fitting when you come to a 225th birthday party, especially one for your law school."

If you plan to come, please RSVP with Kathy Pond at ktpond@wm.edu.

—David Byassee

Fourth Circuit Hears Arguments in McGlothlin Courtroom

The Fourth Circuit heard oral arguments in four appeals on Friday morning at William & Mary Law School. Circuit Judges Diana Gribbon Motz and H. Emory Widener, Jr., were joined by District Judge Glen E. Conrad from the Western District of Virginia, who was sitting by designation, to make up the three-judge panel.

The first case of the day was *United States v. Gregory Johnson*, a case involving a suppression motion and the propriety of ordering restitution from a criminal defen-

dant to a victim. The questions from the bench focused on harmless error and whether suspects could reconsider their decision to waive their right to counsel. Arguments in *United States v. Rita Ann Farrell*, a supervised release case, followed.

In *United States v. Daniel David Garcia*, a search and seizure case, the government argued that the totality of the facts known to the arresting officer gave him more than a "good hunch" that Garcia had been involved in the armed robbery of which he was later convicted. After intense questioning from the bench, government counsel refused to waver from his position that the officer had formed the reasonable suspicion required to make a *Terry* stop, despite a rather limited number of ambiguous facts in support of that conclusion.

The sole civil case of the day was *Limbach Co., LLC v. Zurich American Ins.*, a dispute over the applicability of an exception to an exclusion clause in a commercial insurance contract. At issue was the scope of the "damaged work" language in the exception clause. Counsel for the respondent met with incredulity from the bench when he suggested that language in the contract that was difficult to understand should not be construed against the drafter.

After the arguments, the judges gave advice to aspiring appellate advocates. Judge Motz told students that their preparation for appellate arguments should be such that they know the case better than anyone else in the courtroom. Judge Widener echoed that sentiment, saying that lawyers should know the record forward, backward, and sideways. Continuing the theme of thorough preparation, Judge Conrad extolled the virtues of moot court practice prior to arguing appeals.

-- Marie Siesseger, additional reporting by William Durbin

Same-Sex Marriage Debate Continued from pg. 9

decide whether same-sex marriage should be lawful would be essentially violating Americans' most important right—self-governance. Professor Jacobs countered, once again citing *Loving v. Virginia*, which rendered all anti-miscegenation laws unconstitutional. According to Jacobs, 72% of all Americans opposed the end of anti-miscegenation laws when the court decided *Loving*. However, she said, the court had done America a service by protecting the liberty of all of its citizens, despite public opinion.

After rebuttal, Dean Reveley opened the floor to questions from students. Many concerned the technical aspects of leaving an issue like same-sex marriage to the states, and how the Full Faith and Credit Clause and the Defense of

Marriage Act would affect any state ruling on the subject. There were also several questions for Professor Collett regarding the issue of infertile couples wedding, same-sex couples adopting children, and other elements of her theories on the purpose of marriage. After student questions, the speakers, professors and students retired to the lobby for a reception, where the audience members were able to discuss their views on the debate with each other, and ask speakers more questions on an individual basis.

Though both speakers and students alike had very divergent opinions on this sensitive issue, it was a credit to the law school that all were able to attend the debate and express their opinions with candor and civility. Despite the outcome of the amendment proposal, we may still hope that an open dialogue between the differing viewpoints can continue as it has here.

Highland Games from pg. 11

ach filled with boiled and minced sheep's lung and heart mixed with oatmeal. And the black pudding? It ain't chocolate, it's blood.

After quickly walking past the haggis, one really should stop in the pub tent for beer. Or better yet,

head straight to the most Scottish area of all, the **Whisky Tasting Society's tent**. Most people tend to congregate here at some point during the day for a little conversation and dehydration.

Now you know what to expect from the Scottish Festival next year. See you there!

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Marshall-Wythe Represents at Intramurals

by Jennifer Rinker

Thanks to some sporty law student informants, the following has been assembled for some of the law school teams participating in Intramural Sports on campus. We are well aware that this is somewhat incomplete. *The Advocate* must rely on you to get us the rest of the information. Please let *The Advocate* know of any results not included here or of upcoming games in case any loyal fans want to come cheer you on or see law student teams pitted against each other in what are sure to be competitive displays of athletic talent.

Some final results:

Tennis

2L Chris Bauer won the singles championship. Bauer and 1L Rhys James won the doubles championship beating the Club Tennis undergrads in the finals.

Softball

The championships just ended with co-ed team the Tom Jackson

Project losing in the finals to undergraduate team the "Softies."

In the Men's League, Tristan's Team lost in the "B" league finals by a score of 40-8 (not a misprint, 40-8) to the championship undergraduate team. The same undergraduate team beat the Posse in the bottom of the 6th 12-11.

On-going events:

Floor Hockey

Men's "B" League team, Sam's Bar, comprised of 1L's, 2L's and 3L's, is 3-1-0 this season. Sam's Bar won the quarterfinal game 11-1 under the mercy rule. The team was triumphant in the semifinals thanks largely to Dave Stern's winning goal in the last seven seconds "completing his second consecutive playoff hat trick," according to team member and first line player Steve del Percio.

Many of these all-law student teammates have been playing together since their 1L year. In 2003, Sam's Bar went 2-1-1 and lost in the playoffs to VIMS. Last year, the men went 3-0-1, losing to VIMS again in the championship game. Sam's Bar faces their

archrival VIMS on Tuesday night (results posted in the next issue). Sam's Bar's 3Ls, in particular, plan to "leave everything they've got out on the rink" said del Percio.

Basketball

In men's "A" League basketball, defending champs the Tom Jackson Project bested the 3L "A" League team Sunday October 24th. The Tom Jackson Project beat the current 3L team twice during last year's intramural season, rounding out an overall 3-0 record over the past two years. Tom Jackson Project held the 3Ls to 4 points in the half during one of last year's games, eventually leading to a 40+ point slaughter rule victory. The two teams will face off again November 14th at 9pm. The Tom Jackson Project will also play November 7th at 10pm. All basketball games are played in the Miller Gym at the undergraduate Rec Center.

The law student representation is so solid that TWO men's "B" League teams also have been assembled. Both men's teams, the Therapists and BDA, are comprised of 2Ls. The law school head to

head for these two teams resulted in a BDA triumph with a score of 69-45. BDA is currently 2-0. Their upcoming games are on November 4th at 8PM and November 11th at 8PM.

The Therapists are 0-2. Captain Evan Wooten excuses their poor performance, claiming "old age, alcohol, and self-loathing are by far our most difficult opponents." The Therapists play again November 4th at 9pm and November 11th at 8pm. Wooten hopes they are not up against "spry young underage undergrads who are missing the crippling after-effects of law school."

The Tom Jackson Project Co-Ed "A" League Basketball team is now 2-0 and is scheduled to play again on November 3rd at 9pm and November 10th at 10pm.

Soccer

Men's "A" League team "Old School" starts the season with their first game this week. Games are played at Busch Field. The co-ed "A" League returning champs "Old School" won their first game this year 4-0.

TEAM ROSTERS

(If you don't see your name, or it is incorrect, let us know who you are!)

Tom Jackson Project Co-Ed "A" League Softball Roster

Matt Barndt (2L), Chris Bauer (2L), Casey Ewart (2L), Christine Dealy (3L), Heather Hopkins (2L), Mike Ioffredo (2L), Catherine Ladino (girlfriend of Bauer), David Morrison (2L), Kelly Street (3L), Michael Sweikar (2L), Roxie Stutz (fiancé of Sweikar), Tristan Tyler (1L)

The Posse Men's "B" League Softball Roster

David Baroni (2L), Chris Bauer (2L), Patrick During (2L), Brian Flaherty (2L), Chris Johnson (2L), Brian Levy (2L), David Morrison (2L), Ryan Riesterer (2L), Brett Rudduck (2L), Michael Sweikar (2L), Matt White (2L)

Tristan's Team "B" League Softball Roster

Matt Dobbie (1L), Rhys James (1L), Adam Long (1L), Mike Spies (1L), Tristan Tyler (1L), Harry Clayton (1L), Matt Purdy (1L), Ryan Wertman (1L)

Sam's Bar "B" League Floor Hockey Roster

Coach: Sam Olive (3L), who suffered a career-ending injury in the spring, has been called "a wizard behind the bench"

First line:

Steve del Percio (3L), Dave Stern (3L), Rich Hadorn (3L), Matt Widmer (3L),

Second line:

Theo Lu (3L), Matt Dobbie (1L), Brian Levy (2L), Chris Schiflet (1L)

Third line:

Ryan Pedraza (3L), Andy Teel (3L), Carl Neff (3L), Mike Merolla (3L), Ryan Dolan (3L).
Goalie: Sony Barari (3L)

Tom Jackson Project Men's "A" League Basketball Roster

Matt Barndt (2L), David Baroni (2L), Chris Bauer (2L), Steve Feinour (2L), Scott Hetterman (1L), Michael Sweikar (2L)

The 3L's Men's "A" League Basketball Roster

Sony Barari (3L), Mike Broadus (3L), Ryan Dolan (3L), Theo Lu (3L), Mike Merolla (3L), John Owen (3L), Chris Nagel (3L)

Tom Jackson Project Co-Ed "A" League Basketball Roster

Chris Bauer (2L), Rebecca Packett (Grad student), Becca Ray (Grad student), Michael Sweikar (2L), Roxie Stutz (fiancé of Sweikar), Evan Wooten (2L)

BDA Men's "B" League Basketball Roster

Patrick During (2L), Ryan Riesterer (2L), Brett Rudduck (2L), Joe Fonlon (3L), Drew

Louis (2L), Chris Johnson (2L), Matt White (2L), Brad Booth (2L), Brian Flaherty (2L)

The Therapists Men's "B" League Basketball Roster

Josh Baker (2L), John Cox (2L), Nirav Desai (2L), D.G. Judy (2L), Jess Mekeel (2L), J.T. Morris (2L), Patrick Speice (2L), Evan Wooten (2L)

Old School Men's "A" League Soccer Partial Roster

David Baroni (2L), Jason Hobbie (2L), Mike Kaufman (2L), Theo Lu (3L)

Old School Co-Ed "A" League Soccer Partial Roster

David Baroni (2L), Theo Lu (3L), Kelly Street (3L)

Sex and the Law: When Cheaters Attack

by Nicole Travers

Let's talk about relationships. Every relationship is different and special, like unique snowflakes, fingerprints, and the genetic material staining dorm room extra long twin mattresses the world over. And every person, in or out of a relationship has their own ideas of what their relationship should be. So there are times when elements of relationships are categorized when they should be examined more closely.

Take, for example, cheating. Many of us would say that yes, they have been guilty of cheating, or at least wanting to cheat. But questioned further, every individual's definition of cheating is very different. When I asked friends and acquaintances both in and out of the law school what they thought cheating was, their answers were all very different. However, most of them fell into six distinct categories.

A. You can cheat on someone emotionally, just by having an attachment to someone else, even with no physical contact.

B. You cheat if you have intimate physical contact, like kissing, with someone else.

C. It is cheating when you have several physically intimate encounters with someone else.

D. It's only cheating when you are intimate with someone else with whom you feel emotionally involved.

E. Sex is cheating, even if it happens once without attachment.

F. Only emotionally involved and/or frequent sex is cheating.

The best answer I received upon asking someone about cheating is that you cheat when you share

things that are normally exclusive to a relationship with someone who is not in your relationship. So your definition of what is exclusive to your relationship will necessarily determine your definition of cheating. It's a subjective, rather than objective standard of review.

When considering your own definition of cheating, keep in mind that you don't have to feel *bad* about cheating for it to actually be cheating. This is because, as many cheaters discover, being a cheater¹ is a lot like being an alcoholic. Once the cheater has cheated on his first relationship, it becomes nearly impossible for her not to cheat on subsequent relationships. No matter how happy the cheater is in her relationship, the compulsion to cheat is always in her subconscious. It takes a day-to-day effort not to cheat, even when, in her heart, she doesn't even want to do it.

Even though the cheater doesn't necessarily feel bad about her cheating, it helps to know when her significant other will actually view her actions as cheating, rather than a forgivable indiscretion. In the absence of actually asking the S.O. what his or her definition is,² it is important to use an objective standard of review. If you're a cheater, ask yourself, what would an ordinary, reasonable person in your relationship consider cheating? Once you determine that your actions do constitute cheating, you have several options to choose from.

First, you could come clean to your significant other about your indiscretions. Arguably³, admitting that you have cheated may help to "mitigate the damages" of your actions. You've come clean and been honest, and you've laid yourself at

the mercy of your Other. After the fur⁴ flies, perhaps he (or she) will understand that you've come to him for help, for support, and because he is the one you are truly in love with. In reality of course, this will never happen. Unless your Other is extremely comfortable with your having gotten intimate with another (or several others), he or she will probably dump you like the gradplex garbage bin at 5 a.m. on a Sunday.

Your next option is to not tell your significant other, and wait it out. Whether we like it or not, there is a statute of limitations on cheating. The act of cheating last week is somehow more horrifying than the act of cheating four years ago. The reasons for this are fairly obvious, but when you think about it, even discovering your S.O. cheated a few years ago may be evidence that he or she is a cheater, and doing things now that you *don't* know about. No matter whether he or she says things like "it was so long ago" or "I'm a different person now," don't believe it. Once a cheater, always a cheater, and no statute of limitations is going to prevent that compulsion from resurfacing.

Fortunately for you all, I am here to help. As a reformed cheater myself, I've come up with a self-help method for preventing any further cheating on your happy relationship. All the cheater needs to do is follow these three simple steps.

1. Admit that you are a cheater.

This is vitally important. Many cheaters are in denial of their cheater status. They can justify any kind of cheating. Even if they cheated on the luscious Prince Edward with his frightening father, they can give you a perfectly reasonable explana-



tion as to why they did it.⁵ So think on your past indiscretions, and use the objective standard of review. Be honest with yourself. If a reasonable person in your situation would not cheat on their relationship, but you did, you're likely to be a cheater.

2. Talk to your significant other.

Once you've admitted your cheater-dom, it's time to have a discussion. Tell your S.O. about your *cheater status* (after first assuring him/her that you do not want to ever cheat on him),⁶ and discuss your definitions of cheating together. In this case (as opposed to my previous example), your S.O. may appreciate your honesty, and become a willing participant in your journey to ending your cheating ways.

3. Make an effort not to cheat, every day.

With the new day comes a new challenge, and you must be prepared to face it head-on. Obstacles like hot new interns, intriguing classmates, and flirtatious clients are a constant danger to your new non-cheating persona. The best way to avoid temptation is to make

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¹ A cheater is not simply "a person who cheats." This is a person who compulsively cheats on most or all of her relationships. Cheating once or twice for good cause will not make you a cheater. If you cheat while happy in a relationship, not because you want to, but because you can, you're a cheater.

² Which, admittedly, might clue the significant other into the fact that the cheater *is* cheating.

³ When I say "arguably," this means that it's not true in the slightest.

⁴ And maybe, if you're lucky, chocolate pudding.

⁵ Hopefully it has nothing to do with the ears.

⁶ Do this only if you plan to follow through, because in my experience, going back on this particular statement is the death knell of your S.O. ever paying for dinner and a movie again.

Fall Stress-o-Scopes

by Mephistopheles the
Horiscope Monkey (as told to
Rob Engurt)

(Ed Note: Taking over the horoscopes this week is Mephistopheles the Monkey. Through his human interpreter, Rob the Boy Who Speaks to Monkeys, Mephistopheles will divine the truths you yourself are too blind to see. Oh boy . . . what, we couldn't find another foreign student or visiting prof to interview?)

With finals rapidly approaching, the all-knowing Mephistopheles now foretells how some of you might respond to the impending slaughter. Good luck kids!

ARIES (March 21 – April 19)

Mephistopheles: Ooh ooh aah aah
ooh ooh.

Rob TBWSTM: Mephistopheles says, “You are going to freak out and give yourself a Mohawk. Don’t worry though . . . everyone will love your new “Mr. T” look. And, hey, you’ve already got the gold necklace thing going on. But our favorite will be when you whip out the old Rocky III quotes. Your prediction for the exam? : ‘My prediction? Pain.’ Priceless.”

TAURUS (April 20 – May 20)

Mephistopheles: Eee eee aah aah oh.

Rob TBWSTM: Mephistopheles proclaims, "Listen, human, it's going to happen so don't say Mem the Mo didn't warn you. But, you're destined to run through the school naked, making sure to sit in every comfy chair in the lobby. You'll never feel better. Just donate some disinfectant spray to the administration office, thanks."

GEMINI (May 21 – June 21)

Mephistopheles: Aaaaaaaaaah
eeeeeeeeee wah.

Rob TBWSTM: Mephistopheles declares, "You will abandon your studies due to an irrational craving for grilled cheese sandwiches ...even going so far as to seize control of the Cheese Shop and declaring yourself Le Grande Fromage. Will your Cheesiness please save us some gruyere? Mmmmmm, Mephistopheles hearts gruyere."

CANCER (June 22 – July 22)

Mephistopheles: Oooh meee aaaah
aaaah aaaaah.

Rob TBWSTM: Mephistopheles signals, “!rorroh eht ,rorroh ehT ...ydaerla gnineppah s’tl !doG ym hO .esrever ni raeppa lliw daer uoy gnihtyreve ylnedduS”

LEO (July 23 – August 22)

Mephistopheles: Waaaaaaah
eeeeeeee oh oh oh

Rob TBWSTM: Mephistopheles portends, “You’ve got an immature streak that you can’t seem to shake and mean you’re often the life of any gathering. But be careful, your torts study group doesn’t find the word “duty” as funny as you do. In fact, it’s just disgusting . . . unless you are a monkey like me, and then it’s very funny.”

VIRGO (August 23 – September 22)

Mephistopheles: Arrrrrrgggggh-
hhh.

Rob TBWSTM: Mephistopheles ...
 “Halloween will have been over for a while when finals arrive ... but you’ll still be wearing that pirate eye patch. Yes, we agree that Colonial Williamsburg needs pirates ... but not pirates who wear ONLY eye patches. Do you even own pants anymore? It’s a family destination you know.”

LIBRA (September 23–October 22)

Mephistopheles: Raaaa eeoh ooh
ooh eeoh.

Rob TBWSTM: Mephistopheles predicts, "I once knew this Rhesus monkey that some lab genetically engineered to be obese. After being released into the wild he kept trying to climb trees, but the branches kept snapping under his enormous girth. My friend, your Estates class is the obese monkey and you are the branch. *SNAP!*"

SCORPIO (October 23–November 21)

Mephistopheles: Ooo eee, ooo ah ah
ting tang walla walla, bing bang

Rob TBWSTM: Mephistopheles sings, "I told the witch doctor I was in love with you, I told the witch doctor you didn't love me too. And then the witch doctor, he told me what to do: He said that Ooo eee, ooo ah ah ting tang walla walla, bing bang, Ooo eee, ooo ah ah ting tang walla walla, bing bang. I told the witch doctor you didn't love me true, I told the witch doctor you didn't love me nice. And then the witch doctor, he game me this advice: He said to ... Ooo eee, ooo ah ah ting tang walla walla, bing bang, Ooo eee, ooo ah ah ting tang walla walla, bing bang. "

SAGITTARIUS (November 22–December 21)

Mephistopheles:

Aaaaaaaaaaaaaaaaaaaaaah
eeeeeeeeeee.

Rob *TBWSTM*: Mephistopheles chides, "It's one thing for people to talk to monkeys, we kind of like it . . . it's another thing, though, to let a monkey write your Legal Skills memo while you work on your outlines. I mean the memo had a 24 page discussion section on Chiquita versus Del Monte bananas. Come on, that totally had nothing to do with the Question Presented! If you're going to ask who would win in a fight between the orangutan from *Any Which Way But Loose* and a flying monkey from *The Wizard of Oz*, you better make sure you provide an answer."

CAPRICORN (December 22–January 19)

Mephistopheles: Heeeeeee
oooooooooooo aaaaaaaah.
Phhhddddddddd.

Rob TBWSTM: Mephistopheles dictates, "If you're going to go nuts and start photocopying your hairy bottom, you can save yourself money if you use the ELPR copy card. Spend your dinero on something more worthwhile, like a razor . . . I'm a monkey and I've NEVER seen anything like that. Yuk."

AQUARIUS (January 20—February 18)

Mephistopheles: Waaah eeeeeee
ooooooooh ah ah ah

Rob TBWSTM: Mephistopheles states, “Just because you lost a few marbles and started wearing a cape and mask doesn’t make you the Phantom of the Law Library. It makes you a stupid dork. And that’s coming from someone who talks to monkeys.”

PISCES (February 19–March 20)

Mephistopheles: Ha ha ha ha ha
ha ha ha ha ha ha ha ha ha ha
ha ha ha ha ha ha ha ha ha ha
ha ha ha ha ha ha ha.

Rob TBWSTM: Mephistopheles laughs, "Dude, you just got *The Advocate* to publish horoscopes written by a monkey. Have a beer and relax . . . this is as good as it gets."

Sex from pg 14

it perfectly clear that not only are you in a relationship, but that you are very happy in it. This involves talking about your significant other every chance you get,⁷ and making out with him/her in public at the drop of a hat. With luck, this will get the point across to people who do not want to get involved with someone in a relationship, and make you so annoying to the others that nobody will want to have sex with you anyway. As a bonus, whenever you have the desire to sleep with someone other than your S.O., turn around and sleep with your S.O. instead. This will leave you so sexually exhausted that you won't even have the energy

to cheat. Congratulations! You are now lousy with fidelity, and your relationship is saved.

I think the most important point of this particular column is the necessity of communication. Whether you're using a subjective or objective standard of review when considering your cheating, it's always best to have the added bonus of knowing what your S.O. considers as well. With any luck, and a little help from my advice, you'll get over your desire to cheat until your mid-life crisis kicks in, and any defenses you've built thus far have scattered to the winds. Just make sure you have a cute and discrete secretary in your employ when the time comes. It makes things a lot easier.

⁷ Remember my first column? Here's where you employ those tactics.

The Flu and You (though we hope not)

Vaccine Shortage Affects Campus

by William Y. Durbin

Add the College of William & Mary to the list of victims of the nationwide flu vaccine shortage.

Chiron Corporation, the British company responsible for supplying roughly half the influenza vaccines to the United States, contracted with the Commonwealth of Virginia to provide flu shots for the state's university system, including William & Mary. Because Chiron's vaccines were found to be contaminated with bacteria, those who counted on vaccines coming from Chiron, including the College's Student Health Center, have found themselves without any flu shots to administer.

With the shortage, the Centers for Disease Control and Prevention have enacted a plan to re-route what flu shots are available to those most at risk for serious flu complications—the very young, the very old, and those with chronic health problems such as asthma.

The upshot for William & Mary students, who generally fall outside those categories, is that they will not have access to the normal flu vaccines.

"College health centers are not where the vaccine is needed most," said Dr. Gail Moses, MD, who is the director of William & Mary's Student Health Center. "The concern is getting the right people immunized."

Dr. Moses said that those who are most at risk for flu complications can consult the Hampton Public Health Department to find places offering vaccinations. She said that Ukrop's and MedExpress had obtained some vaccines and would be offering clinics for those at-risk individuals.

"We would advise those who do not meet the high-risk criteria not to aggressively seek out the vaccine," Dr. Moses said. "From an ethical perspective, it's better to leave what vaccines are available to those who need it most."

For those students who wish to be inoculated but cannot obtain a flu shot, the relatively new "flu mist" vaccine is available. This method of vaccination, which employs a nasal spray for delivery, is less preferable to the injection because it contains a live but weakened virus. This often causes some flu-like symptoms and is inappropriate for high-risk individuals.

Last year, Dr. Moses said, when students had the choice between the mist and the injection, they almost universally opted for the latter. If students were interested in the mist vaccination option this year, Student Health Services could make it available.

Outside of the mist, students' best bet for staying healthy is good self-care.

The CDCP makes the following recommendations:

- Avoid close contact with people who are sick. When you are sick, keep your distance from other to protect them from getting sick too.
- Cover your nose and mouth with a tissue when you cough or sneeze—and dispose of the tissue afterward.
- If you don't have a tissue, cough or sneeze into your sleeve.
- Wash your hands after you cough or sneeze—with soap and warm water, or an alcohol-based hand cleaner.
- If you get the flu, stay home from work or school. You will help prevent others from catching your illness.

Flu Tips

compiled by Nicole Travers
and
William Y. Durbin

The weather's growing colder, and flu season is upon us. The whole nation is abuzz due to the dearth of flu vaccines. Unfortunately the scarcity of the vaccines means that William & Mary's health center will not be able to give flu shots to students this year. Since we law students have more important things to worry about than getting sick, The Advocate has compiled a list of tips to help our fellow students diagnose their symptoms, and how to treat what they've caught.

First, you want to figure out whether you have a cold or the flu, so you can treat it accordingly. Sometimes it is difficult to figure out, because flus and colds both involve stuffiness, cough, and sore throats. However, the flu has a few unique symptoms. It's the flu if...

1. You have a high fever, lasting 3-4 days
2. You have a prominent headache
3. You have severe body aches and pains
4. You feel extremely fatigued, weak, and exhausted

If you don't have any of these symptoms, it's probably a cold. How to treat the flu:

1. Drink plenty of liquids. Water, juice, and soup will all help to flush out your system and thin the mucus produced by the flu. Certain drinks, like ginger tea with honey, can help soothe a sore throat. (It's easy to make: just put some thinly sliced ginger in hot water, and add honey.)
2. Blow your nose often (but not too hard, or else you might get an earache).
3. Gargle with salt water. This tastes gross, but it will relieve a sore throat by moistening it.
4. Stay warm and rested. Though

it's hard for us law students to conceive, we might have to miss a day or so of class if we get some really bad symptoms. It's better for you to stay in bed under a blanket than to try to get to class, so get someone to take notes for you and go back to sleep.

5. Take a hot bath or shower. This will help clear your nasal passages, and will probably help clear your headache.

6. Sleep with an extra pillow. Keeping your head elevated will help to relieve congestion.

7. Don't smoke. This will dry out your nasal and throat membranes, making symptoms even more uncomfortable.

8. Don't drink (too much) alcohol. Alcohol will also irritate your nose and throat, and dehydrate you. However, we can bend the rules a little for an old fashioned cold and flu remedy: a hot lemonade with a shot of whiskey¹ or bourbon. Delicious, and helps you sleep... but limit yourself to one.

And finally, how *not* to get the flu. It's easy to avoid getting colds or the flu by taking a few simple precautions:

1. Wash your hands as often as possible.
2. Don't touch your face if you can help it, especially your nose and mouth.
3. Keep tissues handy. If you or someone else has to sneeze or cough, DON'T cover your mouth with your hands. Use a tissue, and throw it away immediately. If you have no tissues, turn your head and cough or sneeze away from people.
4. Drink orange juice and eat yogurt. Vitamin C won't help the flu, but might help prevent a cold. Yogurt has beneficial bacteria, which some scientists believe may help bolster the immune system. Hopefully with a few precautions most of us students can stay happy, healthy and miss as few classes as possible.

¹Editor's note: No, this isn't a typo. We're differentiating between whisky (which is ONLY from Scotland) and whiskey (a general name for the beverage).