School of Law’s Year-Long Series on Brown v. Board at 50
Contemplates What the Future Must Bring to Realize the Dream!

At left, Dr. Dorothy Height talks about her recently released memoir, *Open Wide the Freedom Gates*, in a live interview with Charles Ogletree at the School of Law. See story, page 8.

At right, Barbara Arnwine of the Lawyers’ Committee for Civil Rights Under Law discusses *Brown v. Board* and her group’s recent efforts to enforce *Brown*. See story, page 6.


Inside This Edition of the Advocate . . . .

The Dean's Corner 3-4

50th Anniversary of Brown v. Board of Education Series
— Charles Hamilton Houston Reception w/ Howard Law School 5
— Barbara Arnwine Talk 6-7
— Charles Ogletree Interviews Dr. Dorothy Height 8-9

Symposium: Brown v. Board at 50: The Unfinished Business 10-13
— Congressman John Lewis Delivers the 12th Annual Rauh Lecture 14-17

School of Law Teach-Ins
— UDC Law Review Symposium: Post-9/11 Civil Liberties in the Nation’s Capital 22-25
— The Law and Politics of Capital Punishment 26-29
— UDC-DCSL Innocence Project 30
— Gay Marriage Teach-In 31
— American Constitution Society Teach-Ins 32-33

Liberia Support Group Events 34-35

School of Law News
Prof. Gray’s OAS Law Suit 36-38
Alum/Prof. Stephen Mercer’s Suit 39

Center for Immigration Law & Practice 40-41

Editor in Chief: Katherine S. Broderick
Managing Editor, Layout: Joe Libertelli
jlibertelli@udc.edu; 202-274-7338

Special Thanks to Prof. Will McLain—de facto staff writer for this edition, and copy editors Karen Walker and Toni Mascher, ’04.

University of the District of Columbia
David A. Clarke School of Law
4200 Connecticut Avenue, N.W., Bldg. 38
Washington, D.C. 20008
Phone: (202) 274-7400 Fax: (202) 274-5583

THE ADVOCATE is published by the University of the District of Columbia David A. Clarke School of Law.
I was privileged to travel to South Africa for two weeks in March as a delegate to the People to People Ambassador Law Leadership Program. Our nine-member delegation comprised lawyers and judges active in the American Bar Association and the American Law Institute. We met with a fascinating array of lawyers, including the public prosecutor; the leaders of the Law Society and the Advocates for Transformation; Mervin King, the renowned former Supreme Court Justice who now leads the Law Reform Commission; and the director of the Administration of Justice Agency. Of particular interest to me was the day spent at the University of South Africa (UNISA), the largest university on the continent. A group of law faculty briefed the delegation on the new South African Constitution, the use of Alternative Dispute Resolution, international law concepts, the status of foreign lawyers doing business in South Africa, the effect of AIDS on the legal system, and legal education in general in South Africa.

Our delegation requested the opportunity to visit SOWETO (which stands for South West Township) near Johannesburg, and two other Black townships, Longa and Kialeicha, outside Capetown. We saw the homes of Nelson Mandela and Bishop Tutu. They are the only two Nobel Peace Laureates to live on the same street. We also made a pilgrimage to Robben Island and visited Mr. Mandela’s prison cell.

The highlight of the trip for me was a visit to the Chris Hanni School in Longa Township. The School is run by Maureen Jacobs, an extraordinary woman. She saw that poor and uneducated families from the rural areas were pouring into the townships seeking work. Children were often too old to join mainstream first-grade classes but not prepared to start in age-appropriate classes. She convinced someone to give her a container (from a container ship), which she put into service as a school. In a few (Continued on page 4)
short years, she has recruited teachers and found space in which to teach 550 young people. Our delegation sat in on classes and talked to the children who range in age from five to sixteen. They are learning Xhosa and English, arithmetic, geography, science, and life skills. Ms. Jacobs estimates that it takes about three years for the children to transition into mainstream schools. The children sang a number of songs for us, and every member of the delegation bought the Hanni School CD. Ms. Jacobs has raised enough money for school uniforms and shoes, so the kids no longer have to perform on the streets of Capetown to earn tips for those purposes.

I found South Africa, ten years into democracy, to be a country full of promise, opportunity, hope, and energy, and one facing extraordinary challenges around race, ethnicity, poverty, access to justice, and health care, to name a few. I can’t wait to visit this magnificent country again. The members of our Law Leadership Delegation could not help but see parallels as we reflected on the challenges still ahead in the United States, fifty years after Brown v. Board of Education. Many members of the Delegation are finding ways to celebrate Brown this year, and to consider the work that remains.

At the School of Law this year, we have hosted a series of programs examining the legacy of Brown v. Board of Education. In this issue of the Advocate, please read about the reception we hosted celebrating the Charles Hamilton Houston Symposium, sponsored by the Humanities Council of Washington, D.C., and Howard Law School (at p. 5). Next read about Barbara Arnwine’s kick-off address, Implementing Brown in the 21st Century” (at p. 14). Next, on page 10, read about the Brown v. Board at Fifty: Unfinished Business Symposium which was held in January and featured an eloquent luncheon address by UDC Board Chair, Charles Ogletree and speakers Hon. David Tatel, William Taylor, Judith Winston, and Ross Weiner. Later in January, Professor Ogletree interviewed Dr. Dorothy Height, who discussed Brown v. Board in the context of her memoir, Open Wide the Freedom Gates (at p. 8). Congressman John Lewis, who gave the 12th Annual Joseph L. Rauh Jr. Lecture, also touched on Brown v. Board (at p. 14). Stay tuned next fall when the School of Law will partner with Howard Law School in presenting a two day Symposium tentatively entitled "Houstonian Jurisprudence and Clinical Pedagogy: Developing Social Activist Lawyers in the 21st Century."

— Enjoy this issue!
Celebrating Charles Hamilton Houston:
The Man Who Killed Jim Crow

On Saturday, October 18, 2003, the Humanities Council of Washington, DC presented a day-long symposium on the life, work and legacy of attorney Charles Hamilton Houston, known as “the man who killed Jim Crow.” The symposium was held at the Howard University School of Law where Charles Hamilton Houston served as Vice Dean. A celebratory reception afterward was hosted by the David A. Clarke School of Law, another Washington, D.C. legal institution committed to the Houston tradition of training “social engineers.”

The day’s activities began with a Griot Circle moderated by Houston biographer Genna Rae McNeil, Ph.D. and featured Charles Hamilton Houston, Jr. (son of Charles Hamilton Houston); Charles Hamilton Houston III and Caren Houston (grandchildren of C. H. Houston); Jack Houston (cousin of C. H. Houston); and family of Houston’s clients and associates -- Judine Bishop Johnson (daughter of Gardner Bishop of the Consolidated Parent’s Group – Bolling v. Sharpe); Phyllis Urciolo (niece of Raphael Urciolo – Hurd v. Hodge); Don Murray (son of Donald Gaines Murray – Murray v. University of Maryland Law School); Alana and Kali Murray (grand daughters of Donald Gaines Murray).

Attendees and panelists included Houston’s student and civil rights attorney Oliver White Hill who represented the Prince Edward County, Virginia students of the Moten School (Davis v. Prince Edward County, VA). Mr. John Stokes, one of the student leaders of the Moten School strike, shared his experiences with youth attendees and parents at a High School Forum.

Mary Frances Berry, chair of the Commission on Civil Rights, delivered the keynote speech, and professor J. Clay Smith of Howard Law School delivered the final word on “Houstonian Jurisprudence.”
When Professor William L. Robinson became the first Dean of the then-District of Columbia School of Law, his replacement as Executive Director of the Lawyers Committee for Civil Rights Under Law was Barbara Arnwine. No stranger herself to the School of Law, Ms. Arnwine came back to kick off the Brown v. Board: What the Future Must Bring to Realize the Dream series. She told a number of “war stories” including that of a stirring Lawyers’ Committee case in southern Georgia that dramatically underscored both the continued existence and virulence of racism in America and the value of both the Brown decision and the lawyers who see to it that the law is enforced.

In this case, nearly fifty years after Brown was decided, a small, remote town continued to operate separate but unequal public schools. The Black high school was totally African American, and was grossly under-funded by any standard, but especially compared to the local white school. Eighty percent of the Black school students earned “Graduation Certificates” - while 98 percent of their white counterparts earned bona fide high school diplomas.

After years of seeking attorneys to help them, local citizens succeeded in enlisting the Lawyers’ Committee, which wrote to the school district to inform them that it would soon send a delegation on a fact-finding mission on the alleged discrepancies. When the Lawyers’ Committee team arrived at the Black school, they were greeted with cheers by the entire student body, faculty and staff of the school. Before the lawyers had even arrived, the school system had finally painted the school, replaced the ancient leaky roof with a new one, and had created and outfitted a new computer lab!

Arnwine assured the students in the audience that there was much more of such work to be done, and encouraged students to pursue civil rights work as a profession or to volunteer their time with the Lawyers’ Committee or similar organizations.

Above left, Barbara Arnwine.

At left in foreground, National Equal Justice Works Executive Director David Stern
UDC David A. Clarke School of Law — Brown v. Board of Education Series
What the Future Must Bring to Realize the Dream

Above left, Barbara Arnwine. Above right and below left, Professor Bill Robinson.
At right, Professor Joyce Batipps and Associate Dean Janice Washington in background; students Scott Hannon and Pat Edelin, 06, Dean Broderick and Prof. Derek Alphran.
Dr. Dorothy Height, Interviewed by Charles Ogletree on her Memoir: Open Wide the Freedom Gates

On January 20, 2004, an audience composed of individuals from throughout the University and School of Law communities came out to hear Dr. Dorothy Height, as interviewed by Charles Ogletree.

Dr. Height, adorned, as always, with one of her trademark hats, regaled a packed house with tales from her many decades of activism stretching from her encounters with Harlem Renaissance luminaries like Langston Hughes to her work for First Lady Eleanor Roosevelt to the present.

Particularly enlightening was her personal history of the historic 1963 March on Washington, for which she was the only woman to serve on the Steering Committee—and was still denied the right to address the crowd by her own colleagues. Mahalia Jackson sang, but not a single woman spoke!

Still strong into her 90s, Dr. Height signed books steadily until the last of her long line of admirers had come by!
UDC David A. Clarke School of Law Brown v. Board of Education Series

What the Future Must Bring to Realize the Dream

Opposite Page, at left: Dr. Dorothy Height and Charles Ogletree. This page, top left, Prof. Jim Gray, alumna Nancy Galliard Gordon, ‘81, and UDC Dean Rachel Petty. Top right, Gordon again with former Secretary of Transportation William Coleman; Above left, School of Law Registrar Barbara Green with son Joseph and husband Joe Green. Above right, Dean Broderick with former Councilmember Hilda Mason. Dr. Height and UDC President William Pollard.
On May 17, 2004, the nation commemorated the 50th anniversary of the United States Supreme Court’s landmark decision in *Brown v. Board of Education*. The American Bar Association’s Section on Legal Education recently reported that thus far nineteen law schools and the Association of American Law Schools have either already mounted or plan to hold events in 2004 to observe the half-century anniversary of the watershed ruling, and UDC-DCSL joined that group on February 20, 2004, when the law school presented a program on “Brown v. Board at 50: Unfinished Business.”

The event began with a keynote address by Charles J. Ogletree, Jr., Professor at the Harvard University School of Law, Chair of the UDC Board of Trustees, author of the recently published book, *All Deliberate Speed: Reflections on the First Half-Century of Brown v. Board of Education*, and chair of the American Bar Association’s Commission on *Brown v. Board of Education*. Professor Ogletree’s inspirational lecture emphasized three principal points. First, he noted that *Brown* was not merely a case about racial integration of the public schools; more than that, he said, *Brown* and its companion cases were conceptualized by the lawyers who constructed the litigation strategy as an all-out assault on the entire Jim Crow sys-

 Above, the keynote address by UDC Board Chair Charles Ogletree; below left, William Taylor; below right, U.S. Court of Appeals Judge David Tatel


tem of racial segregation, and on the separate but equal doctrine that supported and rationalized it. Professor Ogletree praised those legal pioneers for their dramatic success in dismantling the legal regime of state-sponsored racial segregation, and for ushering in the modern civil rights movement.

Second, after recounting the extended period of “massive resistance” to *Brown* and describing the current state of the public schools as still segregated and unequal, Professor Ogletree concluded that *Brown* has not fulfilled its pledge of integrated and equal educational opportunity. Finally, Professor Ogletree commented that the country has grown tired of efforts to realize the promise of *Brown* — and of the civil rights movement *Brown* inspired — to eradicate the effects of the nation’s long history of racism. The American people are, he suggested, collectively suffering from a sort of “racial fatigue.” He exhorted the law students in the audience to resist this sense of exhaustion, and to move forward vigorously in the tradition of the lawyers who litigated the *Brown* case a half century ago.

Professor Ogletree’s address was followed by a panel discussion, moderated by UDC-DCSL Professor William L. Robinson, on the subject of “Implementing Brown v. Board of Education: Lessons From the Past, Strategies for the Future.” Panel members were Hon. David S. Tatel, Judith A. Winston, William L. Taylor, and Ross Wiener. Before his 1994 appointment to the United
States Court of Appeals for the District of Columbia Circuit, Judge Tatel was heavily involved in equal educational opportunity issues as the Director of the Office for Civil Rights in the U.S. Department of Health, Education and Welfare in the administration of President Carter, and from 1979 to 1994 as head of the education practice group at the Hogan & Hartson law firm, where he provided representation to school districts, colleges and universities, and educational associations throughout the country. Among other positions, Ms. Winston served as General Counsel for the U.S. Department of Education from 1993 to 2001, with an interruption in 1997-98 when she directed President Clinton’s Initiative on Race. Mr. Taylor, a former General Counsel and Staff Director of the U.S. Commission on Civil Rights, has had a long and distinguished career as a lawyer, teacher, and writer in the areas of civil rights and education, and is presently the Acting Chair of the Citizen’s Commission on Civil Rights and the Vice Chair of the Leadership Conference on Civil Rights. Mr. Wiener, previously a trial

(Continued on page 12)
attorney in the Educational Opportunity Section of the Civil Rights Division of the U.S. Department of Justice, is now the director of policy for the Education Trust.

The panelists generally agreed with Professor Ogletree that while Brown succeeded as a catalyst for the widespread legal and social changes that generated the civil rights movement and ended the era of governmentally sanctioned racial segregation, it failed, at the same time, to achieve the more specific objective of ensuring equal educational opportunity. Drawing upon their extensive experiences in the field — particularly, in Mr. Taylor’s case, investigations and research studies prepared during his tenure with the U.S. Commission on Civil Rights — and the administrative enforcement efforts of Judge Tatel and Ms. Winston (at the Department of Education and its predecessor agency, the Department of Health, Education and Welfare) the panel members discussed the history of “massive resistance” to the requirements of Brown, and the contemporary persistence and intractability of racial segregation in public education.

The panel observed that in the Supreme Court’s 1974 decision in Milliken v. Bradley, the Court declined to authorize federal courts to look beyond school district boundaries in fashioning remedies for racial segregation in public schools, and that in 1973 in San Antonio Independent School District v. Rodriguez, and again in 1982 in Plyler v. Doe, the Court likewise declined to declare access to an adequate public education to be a fundamental right under the Constitution. As the consequence of that combination of holdings, they said, the country has been left with continuing racial segregation, but no mandate for proficient education in the public schools.

The panelists also said, however, that it is important not to despair of the possibility of progress and improvement. Mr. Wiener stressed that educators now know that certain
techniques work in the public school setting; the techniques include high expectations clearly communicated to students, competent teaching coupled with parental involvement, and individual and systemic accountability. All of the panel members strongly agreed that, despite obstacles, it is imperative to maintain the national commitment to educational opportunity and excellence for every American.

The event was organized by the law school’s Brown anniversary task force. The group is chaired by Professor Robinson, and members include Dean Katherine S. Broderick and Professors Susan Waysdorf, Derek Alphran, Christine L. Jones, James C. Gray, Jr., and William G. McLain. The task force anticipates that additional Brown commemorative programming will be presented during the fall 2004 semester, in conjunction with the Howard University School of Law.

“All Deliberate Speed is a shocking document that reveals how the great reforms once promised by this landmark decision were systematically undermined. Ogel-tree’s book should force all of us — scholars and general readers alike — to reconsider the sometimes ironic legacies of the civil rights movement and the role of race in the American Legal system.”

— Henry Louis Gates, Jr.

At right, UDC-DCSL Dean Shelley Broderick; above right, Ross Weiner; far right, William Robinson; below left, UDC-DCSL Professor/D.C. Court of Appeals Senior Judge Hon. William Pryor; below right, Judith Winston and UDC Provost Wilhelmina Reuben-Cooke.
On April 12, 2004, the School of Law community listened in wonder and awe as Congressman John Lewis (D-GA) offered a dynamic and moving slice of civil rights and educational equality history for the 12th annual Rauh Lecture.

UDC President William Pollard provided a warm welcome and UDC-DCSL’s Rauh Professor, Wade Henderson — by day Executive Director of the Leadership Conference on Civil Rights — introduced the Congressman. Lewis provided a personal and poignant history of the civil rights struggle, describing the pain, the progress, and the only partially fulfilled promise of generations of activism.

In powerful and eloquent terms, Lewis exhorted the wonderfully diverse crowd of students, staff, faculty, alumni, Rauh family members, and friends, to consider the blood shed for equal educational rights, to keep hope alive and to take up the cause. His ability to bring history to life appeared especially fascinating to the many young adults in the audience.

At right, Wade Henderson; below left, Rep. John Lewis; below right, the assembled multitude; bottom left, UDC President William Pollard; and bottom right, Wade Henderson and Dean Broderick.
Past Rauh Lecturers

- 2003 Marian Wright Edelman
- 2001 Hon. Ruth Bader Ginsburg
- 2000 Charles Ruff
- 1999 featured a film on Joe Rauh’s last case, *The Sleep Room*
- 1998 Jack Greenberg
- 1997 Elaine Jones
- 1996 Father Robert Drinan
- 1995 Rick Seymour
- 1994 Judith Lichtman & Roger Wilkins
- 1993 William Taylor

At left, Prof. Edgar Cahn, Daniel Solomon, Prof. Joe Tulman and alum Rudy Schreiber. Above right, Mrs. Olie Rauh, Prof. Bill and the Hon. Arlene Robinson. Right middle: Betsy Lehrenkamp, Marvin Boethel and friend; at right: U of Texas Law Professors Jack and Terry LeClercq.
Above, Congressman John Lewis exhorting the crowd; below, Dean Broderick, Rep. Lewis, UDC President William Pollard, and DC School of Law Foundation Chair Michael Rauh. Below left, John Lewis receives Dean’s Cup. Below middle, former U.S. Secretary of Transportation William Coleman. Below right, one of the Brown v. Board of Education attorneys, William Taylor.
All Deliberate Speed
Reflections on the First Half-Century of Brown v. Board of Education
UDC David A. Clarke School of Law — Brown v. Board of Education Series
What the Future Must Bring to Realize the Dream

Opposite page: Upper left: Charles Ogletree; Upper right: Wade Henderson; Lower left: D.C. Mayor Anthony Williams; below right: Ogletree after thanking Wade Henderson for the wonderful introductory “eulogy” and expressing appreciation for being alive to hear it.
This page: Above left: UDC President William Pollard listens to Mayor Williams; above right—and left and right—Mayor Williams; below left: Mayor Williams and UDC Board member Eugene Kinlow. Below right: President Pollard welcoming the audience.
Above left, from left, Jesse Sidnor of the Neighborhood Legal Services Program and two colleagues, Brian Koo and Marco Kulich, ’06. Above, and below left: Charles Ogletree. Far left, Neighborhood Legal Services Director Roberta Wright and Marinda Harpole, ’76. Near left: Libby Quatrocchi, ’06. Below, “Los Dos Johnnies” - ACLU-NCA Director Johnny Barnes and Johnny Landon.
Above: Charles Ogletree; above right: Crowd applauds Ogletree. At right: Wade Henderson, Dean Shelley Broderick, Charles Ogletree, D.C. Mayor Anthony Williams, and UDC President William Pollard; below left: Professor Edgar Cahn; below right: Alumnae Nancy Galliard Gordon and Evangeline Covington, '84.
The UDC-DCSL Law Review, in conjunction with the D.C. Affairs Section of the District of Columbia Bar and the American Civil Liberties Union of the National Capital Area (“ACLU-NCA”), sponsored an all-day symposium entitled “In the Aftermath of September 11: Defending Civil Liberties in the Nation’s Capital.”

The program, which was held at the law school on November 21, 2003, focused on post-September 11 civil liberties issues of particular significance and concern to citizens of the District of Columbia, given the city’s unique status as the seat of the national government. New York Law School Professor and American Civil Liberties Union President Nadine Strossen delivered the event’s capstone address, which was preceded by presentations from 26 speakers divided into five topically themed panels.

A panel comprising D.C. Councilmember Kathy Patterson, George Washington University National Law Center Professor Mary Cheh, former ACLU-NCA legal director Ralph J. Temple, and Partnership for Civil Justice litigator Mara Verheyden-Hilliard discussed the effects of the war against terrorism on the exercise of First Amendment rights in the District of Columbia, and the handling of mass protest demonstrations by the city’s police department in the last several years. The panel, which was moderated by UDC-DCSL faculty member and Uni-
University Provost Wilhelmina Reuben-Cooke, was generally critical of the police department’s recent management of demonstrations, which has been marked — as illustrated by the police response to the September 27, 2002, protests against the International Monetary Fund — by repeated allegations of infiltration of protest groups by undercover police officers, preemptive sweep arrests without probable cause, excessively prolonged detentions of demonstrators under abusive conditions, and other questionable or unconstitutional police practices.

(Chief Charles H. Ramsey and other officials of the Washington, D.C., Metropolitan Police Department declined invitations to appear and participate in the symposium.)

Surveillance cameras in the District of Columbia and other privacy issues were examined by a panel consisting of moderator and UDC-DCSL Professor Susan Waysdorf, ACLU-NCA Executive Director Johnny Barnes, Catholic University Columbus School of Law Professor Clifford S. Fishman, Cedric Laurent, policy counsel with the Electronic Privacy Information Center (EPIC), and Robert Toone, Senate Judiciary Committee counsel to Senator Edward M. Kennedy. Mr. Laurent framed the discussion by noting that since September 11, law enforcement agencies have placed nearly 500 surveillance cameras throughout the city; the cameras, with face recognition capability and a range of 360 degrees, operate 24 hours a day, seven days a week. Several panelists contended that privacy values are severely threatened by such constant and ubiquitous governmental surveillance, while Professor Fishman, a specialist in the law of wiretapping and electronic eavesdropping, defended the practice as a necessary security measure that will not undermine civil liberties if properly regulated.

The post-September 11 treatment of immigrants residing in the city was

(Continued on page 24)
the subject of a panel moderated by Marshall Fitz, Associate Director of Advocacy at the American Immigration Lawyers Association. Panel participants included Katherine Culliton, an immigrants’ rights advocate with the Mexican American Legal Defense and Education Fund; Elliot Mincberg, Legal and Educational Policy Director of People for the American Way; Sarah Kendall, Chief of the National Security Law Division for the U.S. Immigration and Customs Enforcement Agency of the Department of Homeland Security; Michael Hethmon, a staff lawyer with the Federation for American Immigration Reform; Denyse Sabagh, an immigration law practitioner and former president of the American Immigration Lawyers Association; and Michael Rolince, a Federal Bureau of Investigation Special Agent in Charge. Panel members vigorously debated questions such as the effects of the USA Patriot Act on immigration law and procedure; the extent of ethnic, racial, and religious profiling practices since September 11; whether excessive secrecy has surrounded the detention and treatment of alleged immigration law violators; and whether, in the wake of September 11, individuals have been selectively singled out for deportation on the basis of their political beliefs.

Another panel, moderated by UDC-DCSL faculty member Joyce Batipps, considered the impact of September 11 on the First Amendment, job security, and collective bargaining rights of the many thousands of federal government employees who live and work in the Washington, D.C., metropolitan area. Panel members were Mark Roth, General Counsel of the American Federation of Government Employees of the AFL-CIO; Donald Wasserman, former Chairman of the Federal Labor Relations Authority; Douglas Hartnett, ’97, staff attorney with the Government Accountability Project and UDC-DCSL adjunct faculty member; and Arthur Lerner, a member of the design team for the Department of Homeland Security’s new personnel system. Messrs. Roth and Hartnett observed that various provisions of the USA Patriot Act strip large numbers of government employees of civil service and merit system protections; those actions demonstrate, they asserted, that the Bush administration is exploiting the war against terrorism as an excuse to deprive employees of their First Amendment associational right to participate in labor unions, and to silence whistleblowers. Mr. Lerner strongly disputed those claims, while Mr. Wasserman contended that government employee collective bargaining rights are wholly compatible with national security needs.

The relationship between the federal and District of Columbia governments in times of crisis was the topic of a final panel, moderated by ACLU-NCA Executive Director Johnny Barnes. Participating were Chris Voss of the District of Columbia Emergency Management Authority; James Austrich of the District of Columbia Department of Transportation; D.C. Appleseed Center Executive Director Walter Smith; and Thorn Pozen, co-chair of the D.C. Affairs Section of the District of Columbia Bar.

The symposium also featured a luncheon presentation by Georgetown University Law Center Professor David D. Cole, who discussed and responded to
questions about his recently published book, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*. Professor Cole said that after September 11, the federal government has detained over 4,000 foreign nationals, engaged in ethnic profiling and guilt by association tactics — and conducted searches and wiretaps without probable cause of criminality — measures that have been marketed to the public on the ground that they affect only foreign nationals, not American citizens. Professor Cole asserted that in balancing the needs of security against the values of liberty and freedom, the government has consistently relied on a double standard, imposing measures on foreigners that would not be tolerated if they were applied more broadly to all Americans. Professor Cole warned that while such a double standard is politically easy (since the 20 million non-citizens living in the United States cannot vote,) it is constitutionally suspect, counterproductive as a security strategy, and ultimately illusory, inasmuch as history shows that popular acceptance of such mistreatment of outsiders paves the way for similar measures against American citizens.

Law Review Editor-in-Chief Henry Gassner, 04, told The Advocate that the program’s success was gratifying, particularly because the event exemplified the Law Review’s central mission of service to the city through relevant and provocative scholarship. Mr. Gassner said that the symposium was an opportunity for the entire University and the at-large community, as well as the School of Law, to learn about important and timely legal issues, and that it also provided a forum for the city’s policymakers to clarify their thinking about those issues through interaction and dialogue with others who are engaged with similar questions.

Law Review members expressed appreciation to UDC-DCSL Dean Katherine S. Broderick, faculty advisors Prof. Joseph Tulman and Helen Frazer, Associate Professor William G. McLain, Library Director Brian Baker, and Patricia Chisley and Joseph Libertelli of the UDC-DCSL staff for contributions to the planning and coordination of the symposium. Members also thanked the American Constitution Society, the Federalist Society, and the National Lawyers’ Guild for assistance in obtaining participants for the program.

Mr. Gassner said that he expects the symposium issue of the Law Review to be published in July 2004.
On October 30, 2003, UDC-DCSL hosted a forum on “Capital Punishment: Current Issues and Perspectives.” The event — which was jointly sponsored by the UDC-DCSL chapters of the American Constitution Society, the National Lawyers Guild, and the International Law Students Association — was divided into two panels, one of which discussed

“The View From the Front Line of Litigation,” while the second addressed “The View From the Front Line of Activism.”

The litigation panel was moderated by UDC-DCSL Dean Katherine S. Broderick, and the participants were Stephen Bright, director of the Southern Center for Human Rights in Atlanta, Georgia; George Kendall, ’79, of the law firm of Holland & Knight, previously with the NAACP Legal Defense and Education Fund, Inc.; William P. Redick, a Nashville practitioner and former director of the Tennessee Capital Case Resource Center; and Joseph Teefey, ’94, a Virginia criminal defense lawyer specializing in capital case trials.

Stephen Bright began the discussion by identifying systemic problems in the administration of the death penalty, such as the substantial racial and geographic disparities that typify infliction of the state’s ultimate punishment. Mr. Bright particularly stressed the pervasiveness of inadequate representation of defendants in capital cases, and he noted that on December 8, 2003, his fellow panelist, George Kendall, was to argue before the United States Supreme Court on behalf of Delma Banks, a Texas death row inmate, in a case that raises important Sixth Amendment ineffective assistance of counsel issues.

Mr. Kendall then provided a dramatic recounting of the history of Mr. Banks’ case (including, at one juncture, a stay of execution entered by the Supreme Court just ten minutes before Mr. Banks was scheduled to die by lethal injection). Mr. Kendall explained that the case presents significant questions of prosecutorial misconduct in addition to ineffective assistance of counsel claims, which is a specific combination of issues that characterizes many capital cases — as evidenced by, among others, the Tennessee case of Abu-Ali Abdur’Rahman, in which another panel member, Mr. Redick, has appeared as lead counsel.

Mr. Redick next detailed the circumstances and the pending Sixth Cir-
The Court of Appeals en banc review of Mr. Abdur’ Rahman’s case (which has become an emblematic one for popular opposition to the death penalty in Tennessee). Mr. Redick said that prosecutorial misconduct and incompetent defense lawyering frequently are inextricably linked in capital cases, exactly because defense ineptitude often directly enables, and may even encourage, abusive overreaching by police and prosecutors.

Joseph Teefey concluded the first panel’s discussion by observing that while Messrs. Bright, Kendall, and Redick are principally postconviction specialists who perforce must attempt at the “back end” of cases to rectify potentially fatal mistakes made by defendants’ earlier lawyers, his own work occurs at trial and is directed toward avoiding the imposition of death sentences initially at the “front end” of cases. In his thirteen capital cases to date, Mr. Teefey’s clients have escaped the death penalty on each occasion — a record which, he com-

(Continued on page 28)
(Continued from page 27)

mented, underscores the emphasis by other panelists on the often dispositive importance of competent representation at the outset of capital cases.

All four panelists urged law students to “get involved.” Mr. Teefey cautioned that not all lawyers are suited for death penalty work, but Mr. Kendall exhorted students that “whatever you do, don’t go to work for rich people. They have enough lawyers!”

Participants on the second panel, which was moderated by UDC-DCSL As-
sociate Professor William G. McLain, acquainted law students with a wide range of opportunities to get involved immediately in the campaign against capital punishment. Panelists included Brian Roberts, acting director of the National Coalition to Abolish the Death Penalty; Josh Noble, coordinator of Students Against the Death Penalty, a program of the American Civil Liberties Union’s Capital Punishment Project; Georgetown University Law Center student Tamara Chellam, representing the Innocence Project of the National Capital Region; and John F. Terzano, ’99, current UDC-DCSL adjunct professor, and President of The Justice Project.

Professor Terzano observed that just as lawyers frame the questions that are addressed in litigation, they likewise set the paradigms that define the terms of public discourse about issues of social justice. For many years the debate about capital punishment has been reduced to a simplistic argument between enthusiastic advocates and implacable opponents of the death penalty, with the point of division between the two camps principally marked by disputes about conflicting and irreconcilable conceptions of morality; as a result of this polarized ideological deadlock, he said, the political movement to abolish the death penalty has been sluggish and stagnant.

Professor Terzano suggested that anti-death penalty activists must move their agenda forward by changing the terms of the debate, which means that they must first identify and then exploit common ground and areas of agreement between themselves and capital punishment supporters. He noted that everyone can agree, for example, that the capital punishment system should be fairly administered, and that most citizens believe that, in fact, innocent people are not condemned to death. The reality, however, is very different, he said. With the advent of DNA technology, science has demonstrated that erroneous convictions are not uncommon; indeed, since 1973 more than 110 people have been released from the death rows of 25 states with evidence of their innocence demonstrated by DNA testing or other new evidence discovered after conviction. Professor
Terzano said that reframing the debate about capital punishment to focus on such mistakes opens a window on the administration of criminal justice which shows — and which has the potential to persuade skeptics — that the death penalty system is not merely flawed, but fundamentally and irreparably broken.

The October 30 forum ended on a proactive note: at the conclusion of the program, a group of UDC-DCSL students announced their intention to work for death penalty reform by establishing a law school chapter of the Innocence Project. (A related story about the Innocence Project at UDC-DCSL appears elsewhere in this issue of The Advocate.)

Editor’s Note: On February 24, 2004, the Supreme Court in a 7-2 decision vacated Mr. Banks’ death sentence on the ground that prosecutors deliberately concealed exculpatory evidence that would have made jurors less likely to impose the death penalty had they known of it. Our congratulations to George Kendall, ’79, and colleagues!
On February 11, 2004, the UDC-DCSL faculty unanimously voted to recognize a chapter of the Innocence Project of the National Capital Region (“IPNRC”) as an officially sanctioned student organization at the law school.

The chapter’s first student officers are Deborah C. Anderson, ’05, President; Christine Spurgeon, ’06, Vice President; and Carlos Piovanetti, ’06, Secretary/Treasurer. Associate Professor William G. McLain and Library Director Brian Baker are the group’s faculty advisors, assisted by Colin M. Dunham, a member of UDC-DCSL’s adjunct faculty and a former president of the D.C. Superior Court Trial Lawyers Association, and by Peggy G. Bennett, a D.C. practitioner who specializes in criminal defense work with the firm of Coburn & Schertler, LLP.

IPNRC was formed by a group of Washington metropolitan area lawyers in May, 2000, to seek the exoneration and release from incarceration of persons who have been convicted of crimes they did not commit, and who are serving prison terms or awaiting execution of sentences of death in the District of Columbia, Maryland, and Virginia. IPNRC provides pro bono investigative and legal assistance through a network of law students and lawyers to prisoners whose innocence can be demonstrated by DNA testing or other newly discovered evidence.

IPNRC was created in response to the growing body of evidence that the criminal justice system is failing in its most critical functions — the reliable conviction of the guilty, and the exoneration of the innocent. Over the past decade, the availability of DNA testing has enabled groups such as the Innocence Project at the Cardozo Law School (the first organization of this kind) to reexamine cases and reevaluate the validity of criminal convictions, and the result has been the exoneration, often through DNA evidence, of more than 125 individuals nationwide who had been found guilty and had their convictions upheld at each level of appellate court review. Some of these exonerations have occurred in the national capital region.

Law school chapters of IPNCR have been established at American University’s Washington College of Law (which also houses the parent organization), Catholic University’s Columbus School of Law, and the Georgetown University Law Center.

The catalyst for formation of the UDC-DCSL chapter was a forum on capital punishment held at the law school on October 30, 2003. Expressions of student interest during and after that program culminated in a January 23, 2004, meeting attended by IPNCR director Misty C. Thomas, IPNCR board member and American University law professor Binny Miller, UDC-DCSL Dean Katherine S. Broderick, Professors McLain and Baker, and Ms. Anderson as a representative of interested students. Participants agreed that after an initial period devoted to preparation and planning, the UDC-DCSL chapter of IPNCR would begin to work actively on cases in the first semester of the 2004-05 academic year, with a particular focus on convictions occurring in the District of Columbia.

Dean Broderick said, “I am thrilled that students have initiated an Innocence Project here at the School of Law. Their work will follow directly in the footsteps of many of our heroic alumni — including Andrea Lyon, ’76, George Kendall, ’79, Marshall Dayan, ’86, and Joe Teefey, ’94, among others — who have dedicated their legal careers to saving lives by fighting against the death penalty throughout the United States. I am grateful to Debbie Anderson for her energetic organizational efforts, and to Professors McLain and Baker for their willingness to help make this aspiration a reality.”

Additional information about IPNCR can be obtained at the group’s website, http://www.wcl.american.edu/innocenceproject/
Gay Marriage Panel

Following last year’s well-received “teach-in” on affirmative action issues then before the Supreme Court in the case of Grutter v. Bollinger, UDC-DCSL faculty members participated in another “teach-in” tutorial on April 9, 2004, this time devoted to the constitutional and other legal questions raised by the current controversy over same-sex marriage. The event was sponsored by OUTLAW, a UDC-DCSL student organization focusing on matters affecting the gay, lesbian, bisexual and transgender community, and the UDC-DCSL chapter of the American Constitution Society.

As moderator for the program, Professor William L. Robinson began the discussion by recounting the history of the same-sex marriage debate over the last decade, and by outlining the various statutory and constitutional questions presently pending before courts and legislatures. Professor William G. McLain followed with an examination of full faith and credit and other constitutional questions posed by the 1996 enactment of the federal Defense of Marriage Act, and a discussion of the separation of powers and federalism issues presented by the proposed Federal Marriage Amendment to the Constitution. Professor Susan L. Waysdorf then addressed relevant substantive due process and equal protection issues in light of the 2003 decisions by the United States Supreme Court in Lawrence v. Texas and the Supreme Judicial Court of Massachusetts in Goodridge v. Massachusetts Department of Health. Finally, Professor Laurie Morin sharpened the focus on the District of Columbia with a discussion of the D.C. Court of Appeals’ 1995 rejection of a constitutional challenge to the local marriage statute in Dean v. District of Columbia, and how the equal protection analysis in that case may have been affected by the Supreme Court’s decision one year later in Romer v. Evans and other developments.

At the conclusion of their initial remarks, faculty members answered questions and responded to comments from students in attendance. The exchanges were lengthy and lively!

Professor Will McLain told The Advocate that he hopes that interactive “teach-ins” to explore current legal controversies will become regular events at the School of Law.
The UDC-DCSL chapter of the American Constitution Society for Law and Policy (“ACS”) has sponsored a diverse range of programs and speakers during the 2003-04 academic year.

“Meet Your Professors” Programs

In September 2003, the ACS held the first in a series of lunchtime presentations aimed at giving students the opportunity to know the “real person” behind the professor in the classroom. The initial “Meet Your Professors” event featured Professors William L. Robinson (Employment Discrimination, Race and the Law), Joyce Batipps (HIV/AIDS & Public Entitlements Clinic), and William G. McLain (Constitutional Law I, Conflict of Laws, and Federal Courts). In March 2004, Professors Joseph B. Tulman (Juvenile/Special Education Clinic), Christine L. Jones (Lawyering Process), and John F. Terzano (Legal Reasoning) participated in a second program. The faculty members talked about the unique life experiences that led to their legal careers and shaped their perspectives of the United States Constitution; students were fascinated by the professors’ personal and professional backgrounds, and by their thoughtful views of the role of the Constitution in American society.

The Law and Politics of Capital Punishment

In addition, the American Constitution Society co-sponsored a forum on the law and politics of capital punishment in October, 2003, which is more fully described in a separate article on page 26 of this issue.

Wrongful Conviction Cases

Criminal justice issues were also the focus of a program held in March 2004, when the ACS hosted a lecture by Scott Christianson, author of *Innocent: Inside Wrongful Conviction Cases*, a book recently published by the New York University Press.

Guantanamo Prisoners Program

In January 2004, the ACS presented a panel discussion of *Rasul v. Bush*, the case in which the United States Supreme Court has granted certiorari to determine whether the federal courts have jurisdiction to decide challenges to the legality of the detention of the some 660 “enemy combatant” prisoners presently held at Guantanamo Bay, Cuba. Since the attacks of September 11, 2001, the Bush administration has asserted the executive authority to declare American citizens and non-citizens alike to be “enemy combatants,” and, on the strength of that unilateral designation, to imprison them secretly, indefinitely, without charge, without trial, and without access to family or lawyers. The administration also contends, centrally, that the judicial branch has no power to review the legality of those policies, or the specific executive decisions made under them.
Professor Will McLain began the January 9 discussion with a detailed analysis of *Johnson v. Eisentrager*, the 1950 Supreme Court decision relied upon by the Bush administration to support the proposition that the courts are powerless to review the lawfulness of executive branch actions at Guantanamo Bay. Professor McLain explained that, from the domestic law perspective, the significance of *Rasul* is that the outcome of the case will likely determine whether the judicial review doctrine of *Marbury v. Madison* will remain robust and vital during the extended campaign against terrorism. Justice Black’s dissenting opinion in *Eisentrager* said that the overarching issue there was whether we would have (or not) “an independent judiciary with authority to check abuses of executive power and to issue writs of habeas corpus liberating persons illegally imprisoned.” Professor McLain observed that *Rasul* similarly presents fundamental and profoundly important questions about the “wartime” role of judicial review in a separated powers scheme of constitutional government. Professor James C. Gray, Jr., then examined the Guantanamo Bay controversy from the perspective of international law, with a particular focus on relevant provisions of the 1949 Geneva Convention on Treatment of Prisoners of War. Finally, attorney and civil liberties activist Elaine Cassel concluded the discussion by summarizing what she characterized as the Bush administration’s “law-free zone” in the war on terrorism.

Founded in 2001 at the Georgetown Law Center as a progressive alternative to The Federalist Society and comprising law students, lawyers, judges, and legal academicians, the ACS is a legal organization committed to fostering an inclusive vision of the law based on fundamental principles of respect for human dignity, protection of individual rights and liberties, genuine equality, and access to justice. The UDC-DCSL chapter of the ACS was established in 2002.

Professor McLain, the group’s faculty advisor, complimented the chapter’s membership and current officers — President Karen Walker, ’04, Vice President Deborah C. Anderson, ’05, Secretary Lee Lucas, ’05, and Treasurer William G. McLain IV, ’05 — for their energetic work in staging a stimulating series of programs during the 2003-04 academic year.
The advocate's School of Law and the Robert F. Kennedy Memorial Center for Human Rights is enormously important in this post-civil war time, and because of the historic relationship between the U.S. and Liberia."

"The current government, which is composed largely of the former combatants, and a minority from civil society and the political parties, is dominated by warlords and members of the former government, many of whom are guilty of severe human rights abuses," said David Peterson.

"The hundreds of millions of dollars in international aid that is expected for Liberia cannot fall into the hands of these people, who will either steal it for their personal use or direct it to further their own political ambitions," he continued.

"Most human rights advocates are calling for a war crimes tribunal or some other judicial mechanism to end the cycle of impunity. The upcoming elections could well reinstate a government composed of most of the elements of the Taylor regime, only without Taylor," he concluded.

"U.S. policy toward Liberia failed to adequately support a democratically elected government in 1997 and then focused more on its dislike for the leader of that government than on the basic needs of Liberia's 3.5 million citizens who, by the way, revere the United States," said Lester Hyman.

"The unintended consequence of this policy has been four more years of horrific civil war in which hundreds of thousands of innocent civilians have been

(Continued on page 35)
Liberia Support Group Hosts Gibson Kuria

The School of Law was pleased to host a reception for Liberian civil rights attorney **Gibson Kamau Kuria** after a lecture he delivered last fall. Dr. Kuria, a Robert F. Kennedy Human Rights Laureate, is a renowned Kenyan legal scholar, leader of the Kenya Bar and the East Africa Federal Bar, and major participant in Kenya’s pro-democracy movement. Dr. Kuria seeks to bring about social change through the Kenyan judicial system. He is one of 31 Robert F. Kennedy Human Rights Laureates from 17 countries who have been named laureates for their moral courage and opposition to tyranny, achieved often at great personal risk.

(Continued from page 34)

The Dean and faculty have participated with the Liberia Support Group as it lobbied State Department and congressional leaders for financial assistance to enable Archbishop Francis to continue to operate the only independent Liberian radio station, Radio Veritas, and to support the Justice and Peace Commission which he chairs.

The partnership with the RFK Center is expected to provide opportunities for faculty and students to assist Liberia in developing democratic processes and to study and teach in Liberia.

Dean Broderick Speaks at Women’s Nat’l Democratic Club

Last fall, UDC-DCSL **Dean Shelley Broderick** spoke at a Women’s National Democratic Club Luncheon on the School of Law’s work in cooperation with the Robert F. Kennedy Memorial Foundation Center for Human Right’s Liberia Support Group. **Todd Howland**, the Center’s Director, introduced her and participated in the question and answer session.

The District’s public law school has partnered with the RFK Memorial to aid Human Rights Laureate **Archbishop Michael Kpakala Francis**, who has visited the United States three times this year seeking assistance in peace building, national reconciliation, and sustaining civil society in Liberia. The Dean and faculty have participated with the Liberia Support Group as it lobbied State Department and congressional leaders for financial assistance to enable Archbishop Francis to continue to operate the only independent Liberian radio station, Radio Veritas, and to support the Justice and Peace Commission which he chairs.

The partnership with the RFK Center is expected to provide opportunities for faculty and students to assist Liberia in developing democratic processes and to study and teach in Liberia.
The Commission also concurred with petitioners’ argument that the United States’ refusal to permit Washingtonians to elect members to either chamber of Congress violates Article II of the American Declaration, which states that “[a]ll persons are equal before the law, and have the rights and duties established in [the American Declaration] without distinction as to race . . . or any other factor . . . .” Although the Commission expressed concern about “the possibility that the absence of Congressional representation for the District of Columbia has had a disproportionately prejudicial impact upon a particular racial group, namely the African-American community residing in the District,” it concluded that the record was not sufficient to permit a specific determination of racial discrimination. The Commission found an Article II violation nevertheless, inasmuch as District residents are, by reason of their place of residence, denied a right to vote for congressional representatives that is equal to the right enjoyed by similarly situated citizens elsewhere in the United States.

Even though the United States is a signatory to the American Declaration of the Rights and Duties of Man, the OAS does not have the power to compel compliance with the Commission’s decision. As the New York Times noted, however, in an article reporting on the Commission’s action, the ruling “brings the moral authority of a major international organization — one the United States belongs to and helps finance — to bear on Capitol Hill, which for 200 years has rebuffed proposals to give congressional seats to Washington.”

The 45-page decision can be found on line at the OAS website under the Human Rights Commission as Report No. 98/03, Case 11.204, Statehood Solidarity Committee v. United States (December 29, 2003) at http://www.cidh.oas.org/annualrep/2003eng/USA.11204.htm
“One Small Step” for DC Voting Rights: The OAS’ Human Rights Commission Tells the United States to “Do the Right Thing!”

by Professor James Gray

On April 1, 1993, a group of 23 District of Columbia citizens filed a petition with the Organization of American States’ Human Rights Commission complaining about the absence of meaningful representation in Congress for District residents. Nearly eleven years later, at the close of 2003, the Commission issued a report acknowledging that the petition was admissible, the claim meritorious, that even constitutionally authorized practices are not immune from review for compliance with modern standards of human rights, and that the residents of the District were entitled to be represented in their national legislature.

This group of 23 citizens, known as the Statehood Solidarity Committee, was organized by DC voting rights activist Tim Cooper. The Committee included in its ranks then DCSL student Charles Mayo, ’94, former DCSL faculty member Mauro Montoya, and the late long-time District rights activist Josephine Butler. Tim Cooper and I arrived at the strategy for going to the OAS after a talk Tim gave as a guest of the DCSL chapter of the National Lawyers’ Guild. Over the past eleven years, I have served as advisor and counsel to the petitioners. Shortly after we filed the petition, the Human Rights clinic at American University, under the direction of Professor Rick Wilson, asked to join with us and came on board as co-counsel.

Most D.C. and Washington metropolitan area residents know quite well that District residents have no one representing them in the US Senate and that the District’s lone delegate in the House of Representatives has no effective vote on matters affecting her constituency. Beyond the metropolitan area, however, one suspects there is very little knowledge about the District’s “peculiar” status as a federal enclave without federal representation. While the District is graphically small, its population of nearly 600,000 residents is greater than that of Wyoming and just slightly less than the populations of Delaware and Vermont. Indeed, there was a time when the District’s population exceeded or approximated those of some half-dozen states.

The Declaration of Independence in 1776 described representation in the legislature as a “right inestimable [to the citizens] and formidable to Tyrants only.” Eleven years later, the framers of the new U.S. Constitution fashioned a federal system that had no provision for the permanent residents of the federal District to have any form of representation in the Houses of Congress.

During the Confederation, the Congress in Philadelphia was surrounded by a mob of disgruntled Revolutionary War veterans and the members of Congress found they could not rely upon the local officials to protect them. Because of this experience the Framers of the Constitution thought it wise to have the seat of government in a place controlled by Congress and free from undue influence by local officials. To achieve that objective, the Framers included in the document a provision for a separate capital district and entrusted its governance to Congress pursuant to the “District clause” of Article I, Section 8. The District was organized by the Congress in 1801 after Congress accepted the cession of land from Maryland and Virginia.

Since 1801, the issues of representation in the national government and responsibility for the conduct of local matters have been a recurring theme in the interplay between the government of the United States and the individuals residing in the District who are subjects of that government. Over the years, D.C. residents have attempted in a number of lawsuits to challenge what they see as the injustice of this situation. These lawsuits have all foundered and gone down on the shoals of the “District Clause.”

Indeed, one of the time-consuming issues before the OAS Human Rights Commission was whether Petitioners had exhausted their domestic remedies. We argued that the existing case law, and the futility of challenging the status quo because of the “District Clause,” demonstrated that we had no effective domestic remedies through the American legal system. Demonstrating what we considered to be excessive caution, the Commission deferred action while the Adams v. Clinton law suit was brought, challenging non-representation directly, and made its way up from the U.S. District Court to the U.S. Supreme Court. Like earlier challengers, the Adams plaintiffs, however, could not steer around the “District Clause.”

In the end, the Commission concluded that the exclusion of District residents from full-fledged participation in the national legislature represented an ongoing violation of contemporary standards of human rights. One member dissented, but (Continued on page 38)
(Continued from page 37)

his opinion makes clear that this exclusion would be unacceptable today as part of a modern constitutional government; in effect, his dissent centers on whether the status quo should receive deference as a historical anomaly of constitutional origins.

The Commission’s decision has answered the fundamental question of whether the ongoing exclusion of more than a half-million American citizens and residents from congressional/senatorial representation complies with modern standards of human rights. The Commission’s answer, simply put, is “No!” In determining that the status quo fails to meet modern standards, the Commission has not set out a particular remedy or a particular timetable for curing the violation. It has, however, emphatically declared that the United States needs to “Do the Right Thing” by the District’s 600,000 residents. Of course, the question before us now is whether the United States will respond with positive action.

The Human Rights Instruments

A number of international human rights instruments endorsed by the United States make clear that the right to take part in the government of one’s country, directly or through freely chosen representatives is an important human right.

The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Declaration of the Rights and Duties of Man all identify political participation in the life of one’s country as an essential human right.

Specifically, Article 20 of the 1948 American Declaration of Rights and Duties of Man provides that:

Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.

Article 2 of the Declaration states that:

All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

[The American Convention on Human Rights also includes provisions to this same effect. The U.S., however, has not ratified this convention.]

Why Congressional Representation is Important

by Professor Will McLain

Some may consider congressional representation as not amounting to the traditional conception of an important human right, particularly when compared with gross violations of human rights such those which occur when a government engages in torture, “ethnic cleansing,” and genocide. But such a view ignores the importance of having a collective say in the day to day governance of one’s life.

Members of Congress have inordinate power over the lives of the population of the District but have no accountability to the population governed. The relationship of the District to the federal government is sui generis—there is no constituent responsibility. Residents of states have representatives in both houses of Congress. D.C. residents do not. Within a state, residents of cities and towns have representatives in the state legislature to look after citizens’ interests. While the District’s lone delegate in the House of Representatives can interface with her colleagues, she has been denied even a symbolic vote on matters affecting her constituents.

At the initial hearing before the OAS Commission, we placed before the Commission members a complete set of the U.S. Code Annotated, and pointed out that these laws were enacted with no meaningful “say” by District residents or their congressional representatives. The presentation also included the rolls of the war dead from the District during the various wars fought during the history of this country.

Citizens of the District have no voice whatsoever on the issue of going to war or on matters that require the advice and consent of the Senate (judicial nominations, treaty ratifications, etc.). The interests of the citizens of the District on taxes, health care, and myriad other laws are not represented in the Congress, other than through the D.C. delegate’s ability to speak (but not vote) to her colleagues in that body and as a visitor to the other body.

No other constitution in the Americas creates a federal district without representation in the national legislature. The constitutions of the federal republics of Argentina, Brazil, Mexico, and Venezuela provide for full voting representation in the national legislative body for residents of their respective federal districts. The citizens of the District of Columbia are the only citizens in the hemisphere disenfranchised because they live in their nation’s capital. There is no other constitutional system in the world which excludes a substantial block of citizens from representation in the national legislature based upon their place of residency.
The Horridge litigation follows an earlier case, Doe v. Montgomery County, in which Professors Mercer, Sandler, and McLain obtained a favorable settlement last year for a child and his adoptive parents after a Maryland trial court ruled that a state social services agency had a duty to protect the child, when he was six years old and in the parens patriae legal custody of the state, from severe and sustained physical and emotional abuse by his natural father and the father’s lover.

Professor McLain told The Advocate, “Professor Mercer’s argument to the Court of Appeals was excellent, but the ultimate result in the Horridge case is hardly certain. Even if the case is lost, I won’t consider our work on it to have been a waste of time.” Professor McLain noted that in its 1978 decision in In re Primus, the Supreme Court recognized that a lawsuit can be an important method for communicating useful information to the citizenry, which means that the informing function of litigation in a self-governing society can be effectively fulfilled quite independently of the particular outcomes of cases. Professor McLain said, “the Horridge and Doe cases have generated considerable publicity and news media attention in Maryland, and in that way they have already contributed to increased public awareness of the urgent need to improve the performance of government agencies charged with the protection of our most vulnerable children. Whether it’s won or lost, the Horridge case was well worth doing for that reason alone.”

The Court of Appeals is expected to issue a decision in the case before the beginning of its summer recess in July, 2004.

On February 10, 2004, Adjunct Professor Stephen B. Mercer, ’94, argued before the Maryland Court of Appeals in Horridge v. St. Mary’s County Department of Social Services, a case that presents important questions about the rights of children and whether people harmed by the government will be afforded a judicial remedy.

Each year the State of Maryland learns of approximately 20,000 children, about half of whom are seven years of age or younger, who are being neglected or physically abused. These vulnerable children depend on the state’s protection for their health and safety, and for some of them, timely intervention by the state represents their only chance of survival. The issue in Horridge v. Department of Social Services is whether the state owes a duty of care to reported victims of child abuse and neglect.

Collin Horridge was an 18-month-old child who lived with his mother and her male companion in St. Mary’s County, Maryland. From a series of telephone conversations with the mother, Collin’s father — who resided in Texas — concluded that Collin was being physically abused at home. Over a three-month period, Mr. Horridge made eight reports of suspected abuse to a state social services agency, which also received a corroborative report from a neighbor of the mother. Even though an agency social worker observed bruising on Collin during a belated and perfunctory visit to the mother’s residence, the agency did not remove Collin from the home, did not have him examined by a physician, did not further monitor his home environment, and did not take any other actions to protect him. When Mr. Horridge made another report of possible abuse to the agency shortly after the home visit, a social worker told him that the case was closed, and ordered him not to call the agency again with reports of abuse. Eight days later, Collin was beaten to death in the home.

Professor Mercer and his law partner Rene Sandler, ’94, also a member of the law school’s adjunct faculty, with consultative assistance from Associate Professor William G. McLain, have represented Collin’s father in what will be, for Maryland, a precedent-setting wrongful death action against the social services agency and its employees. The principal (and, in Maryland, novel) issues now sub judice in the Court of Appeals are whether Maryland’s comprehensive scheme of child protective statutes creates a duty on the part of the state and its officers to protect children identified to them as suspected victims of child abuse, and whether tort liability may be imposed on the state for negligent performance of that duty.
The Advocate
University of the District of Columbia
David A. Clarke School of Law
4200 Connecticut Avenue, NW
Building 38, 2nd Floor
Washington, D.C. 20008