



Fall 2008

## Environmental Perspectives: Fall 2008

Environmental Law Program  
*George Washington University*

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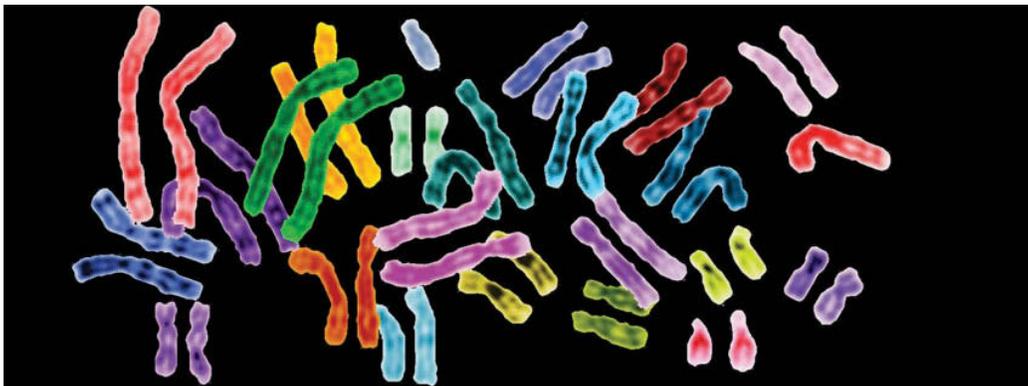
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[ P E R S P E C T I V E S ]

# ENVIRONMENTAL LAW IN THE AGE OF GENOMICS

Advances in molecular biology and genomics are poised to transform current conceptions of “risk” and “injury” in the law of toxic torts. The legal system has yet to anticipate or plan for this emerging reality. If the law remains wedded to conventional notions of injury, it will ignore the fruits of a scientific revolution and may forego new remedial opportunities that could benefit both plaintiffs and defendants in the end.



*This article is excerpted from Associate Professor Jamie A. Grodsky's article “Genomics and Toxic Torts: Dismantling the Risk-Injury Divide,” 59 Stanford Law Review 1671 (2007), in which the author develops an innovative framework for understanding the implications of the genomic revolution for the law of toxic torts. The article was selected by environmental scholars as one of the top five environmental law articles published in 2007 (see page 10).*

## DNA MODULES

An elemental principle of personal injury law is that plaintiffs must demonstrate “harm” in the form of physical injury prior to recovery. The modern world of synthetic chemicals and toxic torts has challenged this bedrock principle. Unlike traditional accidents involving broken bones or other immediate and obvious injuries, toxic exposure may breed diseases whose symptoms take

years to manifest. These delayed effects can create intractable barriers for tort plaintiffs, potentially undermining the law’s deterrent and corrective justice functions. Thus, toxic torts pose the novel question of whether plaintiffs exposed to toxic hazards and placed at significant risk of disease—yet perhaps not physically “injured”—should nevertheless be entitled to some form of legal remedy.

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[ V I E W P O I N T ]

## REFORMING ENVIRONMENTAL GOVERNANCE

**E**NVIRONMENTAL LAW graduates face a different world than that faced by those who earned law degrees a generation earlier. For graduates in the 1980s, cleaning up hazardous waste sites was a primary problem; this was one of the most expensive and complex environmental challenges the country had faced, with tens of thousands of contaminated sites across the country. Cleaning up large sites involved hundreds of millions of dollars. The science both for tracking contamination and alleviating problems was still in the developmental stage. The disruptive effect of contaminated industrial sites on reuse of urban property has been well documented.

Still, the legal tools used to address these hazardous waste sites were not revolutionary.

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JAMIE A. GRODSKY

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In recent years, several nontraditional claims have evolved to help toxic tort plaintiffs overcome traditional barriers to recovery, including claims for “mental distress,” “enhanced risk,” and “medical monitoring.” Courts are now struggling with these developments, some of which serve important fairness and deterrence goals, yet arguably may divert

resources from the truly impaired and unsettle established tort doctrine. Fueled partly by recent asbestos litigation, in which claims by the allegedly “unimpaired” have overwhelmed court dockets, the “latency problem” has emerged as one of the most critical issues in modern tort law. The genomic revolution promises to make this problem even more salient and controversial in the future.

Remarkably, the debate about the tort system’s role in responding to risks of toxic hazards all but overlooks emerging science. While commentators engage in abstract normative discussions of whether the law should remedy for latent “risks” or concrete “injuries,” science may no longer support this conceptual dichotomy. New genomic technologies will strike at the core of the current risk–injury divide.

This is happening because foundational developments in molecular biology, fueled by the application of new genomic technologies since the 1990s, are enabling progressively fine-tuned observation of the effects of toxic substances on the body and the role of genetic makeup in modifying those toxic effects. The identification of new biological markers or “biomarkers” at the genetic and molecular levels has allowed scientists to characterize a number of previously undetectable, intermediate events between chemical exposure and environmentally induced disease. New high-speed, high-volume technologies, such as DNA “microarrays,” are generating new kinds of biomarkers at an unprecedented rate and level of resolution. And as observational techniques evolve, scientists can test for suites of

biological changes, providing more information than the genome alone can reveal. As a result, science may detect evidence that bodily integrity has been compromised long before classic clinical symptoms emerge.

Yet despite these developments, the law clings tenaciously to an older scientific model.

translates to “injury” or disease may become less appropriate or desirable in the future.

Challenging this conventional framework, the presence of intermediate biomarkers suggests a growing “middle ground” between de minimis effects and classic medical symptoms. It follows that certain asymptomatic

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**“COURTS GREATLY PREFER TO DRAW BRIGHT LINES BETWEEN RISK AND INJURY, AND CONTINUE TO PLACE THE BOUNDARY AT PROOF OF CLASSIC MEDICAL SYMPTOMS OR OVERT IMPAIRMENT.”**

Jamie Grodsky

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Although the case law addressing subcellular damage is limited and has not yet addressed the fruits of “whole genome” research, most courts have treated such damage as benign, de minimis, or otherwise legally inconsequential. Courts greatly prefer to draw bright lines between risk and injury, and continue to place the boundary at proof of classic medical symptoms or overt impairment. And indeed, this was fitting in an earlier era, when research tools were insufficient to identify many intermediate effects or to establish their relationship to ultimate disease—giving birth to the metaphor of disease emerging from an impenetrable “black box.” But these traditional legal presumptions about when “risk”

conditions, though perhaps not qualifying as fully developed (and hence fully compensable) “illness” or “disease,” may nevertheless constitute risks or injuries that merit some form of legal recognition. New technologies lend support to this thesis through their ability to identify damage to the body’s repair functions. And so-called “early-stage” disease biomarkers may represent not only risk but the presence of disease itself. Thus, newly identifiable subclinical events may themselves represent substantially enhanced risk of disease or even a “diseased state.”

Not only is the law failing to anticipate emerging science, but it may also be moving at cross purposes. For example, a growing number of jurisdictions require plaintiffs to show separately compensable physical injuries in



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# { WHAT'S NEW }

## GW IS FIRST LAW SCHOOL TO JOIN ABA–EPA LAW OFFICE CLIMATE CHALLENGE

In 2007 the American Bar Association Section on Environment, Energy, and Resources partnered with the U.S. Environmental Protection Agency to create the ABA–EPA Law Office Climate Challenge. This initiative is designed to encourage law offices to take specific steps to conserve

energy and resources, as well as reduce emissions of greenhouse gases—which cause global climate change—and other pollutants. In June 2008 GW became the first law school to participate in the Challenge. Among the 74 other members of the initiative are private firms including Arnold &



Preserving Resources,  
Preventing Waste

Porter, Bracewell & Guiliani, and Hogan & Hartson.

As part of the Challenge, the Law School is participating in the “Best Practices for Office Paper Management” program. GW now uses 30 percent recycled content paper for copying and printing, requests that staff use double-sided copying in most instances, and provides recycling receptacles for all staff with the goal of recycling 90 percent of all mixed office paper. Because the life cycle of one ton of paper results in the release of 11 tons of carbon dioxide into the atmosphere, conserving and recycling paper can help to reduce climate change. These practices also qualify the Law School as a partner in the EPA’s Waste Wise program.

Organizations may also participate in the Challenge by purchasing renewable energy either directly or through renewable energy credits as part of EPA’s Green Power Partnership Program or by reducing energy use to 10 percent under EPA’s Energy Star Program.

More information is available on the Web at [www.abanet.org/environ/climatechallenge/overview.shtml](http://www.abanet.org/environ/climatechallenge/overview.shtml). ★

the form of overt disease prior to recovering for medical monitoring. Yet a defining feature of this cause of action, as it evolved to address the perils of toxic hazards, is that exposed plaintiffs need not prove physical injury prior to recovery. This principle is grounded in pragmatism, as the very purpose of monitoring is to detect the onset of disease and allow for preventive medical intervention. Indeed, preventing disease progression at earlier stages may reduce treatment costs, limit future personal injury claims, and ultimately reduce health care costs for the nation. By forcing plaintiffs to attain late-stage injury, toxic tort law may actually discourage medical interventions that could benefit defendants and plaintiffs alike. Hence, recent legal developments not only undermine the preventive and deterrent functions of monitoring, but run counter to a primary goal of 21st-century medicine, which is to detect, prevent, and treat disease at the molecular level.

Therefore, the judiciary’s retreat from medical monitoring may be coming at precisely the time when increased attention to this remedy is necessary. As research opens up new possibilities for ever-earlier medical intervention, society will need to consider whether a legal system whose remedies depend on unclear and perhaps outmoded notions of “physical injury” reflects sound science or appropriate legal policy. Limited relief for monitoring, where plaintiffs can prove the necessary elements, may appropriately balance deterrence and legal restraint in an age of accelerating scientific change.

In the long term, the blurring of risk and injury in the genomic era ultimately may lead to a convergence of remedies. Where science can not only diagnose but also treat disease at the molecular level, medical monitoring will be converted into the equivalent of a compensatory damage remedy, yet with damages greatly reduced from the damages of today. Indeed, monitoring may prove to be not just an intermediate legal remedy, but a transitional remedy in the law of torts. This future convergence of monitoring and personal injury claims will demand entirely new ways of thinking about tort law’s treatment of “latent” harms.

At this juncture, we do not know which suites of molecular markers will prove most useful in the courtroom. And admittedly, these transformative technologies will present Herculean challenges for the legal system. As biological evidence moves to the subcellular level, experts, parties, and courts will strenuously debate its meaning. Yet rather than simply retreat from the sheer magnitude and complexity of the challenges presented, each situation must be debated and decided on its own—biomarker by biomarker—within a responsive legal framework. By taking cues from the scientific world, perhaps jurists, scholars, and policymakers can transform the “latency problem” into an opportunity—to promote public health, limit liability awards, and prevent disease, pain, and loss. This transformation is essential if the law is to fully embrace the benefits of the ongoing scientific revolution. ★

# { PROFILES }

## JAMIE A. GRODSKY

*Associate Professor of Law*



JAMIE GRODSKY

A native of San Francisco, Jamie A. Grodsky earned a bachelor of arts degree with distinction from Stanford University, where she double majored in history and human biology/natural sciences. Grodsky went on to earn a master's degree from the University of California, Berkeley, writing her thesis on the biology of deep-sea hydrothermal vent systems on mid-oceanic ridges. She then graduated from Stanford Law School, where she was an articles editor for the *Stanford Law Review* and received the Hilmer Oehlmann Prize for Legal Writing and the Adolf and Olaus Murie Award in Environmental Law. Grodsky later clerked for Judge Proctor R. Hug while he served as chief judge of the U.S. Court of Appeals for the Ninth Circuit.

Grodsky's academic and professional interests are rooted in her lifelong love of nature. In college she rafted the Grand

Canyon with Stanford geology students and faculty and "learned about a year's worth of geology" in the process. She also helped with the first ecological study of Mono Lake, a major saline lake on the eastern flank of the Sierra Nevada Mountains. The study served as the scientific underpinning of the California Supreme Court's landmark ruling that the state must protect the environmental values of Mono Lake and its tributaries under the public trust doctrine. Also while in

important public policy issues surrounding the environment, science, and technology. Following this interest, she moved to Washington and worked as an analyst at the congressional Office of Technology Assessment (OTA), where she wrote about policy issues emerging from advances in science and technology. Her work at OTA pointed naturally to law, and for Grodsky, the law would provide important tools for engagement on a range of top-level legal and policy matters.

Before entering academia, Grodsky served as a counsel to the U.S. House Committee on Natural Resources, counsel to the U.S. Senate Judiciary Committee,

and science and technology law. Grodsky was attracted to GW for many reasons, including the ability to be fully engaged as an environmental scholar while continuing to contribute to policy matters of national importance. "As an environmental scholar, one can pursue both the reflective life of academia and the active life of public policy, and GW is the ideal place to do both," she says.

Grodsky has been recognized as one of the nation's top scholars in environmental law. As noted on page 10, her scholarship has twice been recognized with prestigious awards. She was a co-recipient of a major National Institutes of Health (NIH) grant dealing with the impacts of new biological technologies on environmental risk assessment, law, and regulation. Grodsky is the co-editor of *Genomics and Environmental Regulation: Science, Ethics, and Law*, currently in publication with Johns Hopkins University Press. She is also a sought-after speaker at law schools around the country and participates in major legal conferences nationwide.

Having spent her legal career in Washington prior to entering academia, Grodsky now takes full advantage of her professional contacts to help launch her students in their own environmental law careers. She advises many GW Environmental Law Association students and is known for arranging meetings between her students and practitioners in their areas of interest. In her teaching, she often draws from her experiences at the EPA and on Capitol Hill to emphasize that the law does not follow the linear, textbook process of statutory enactment, rulemaking, and judicial review, but is rather a dynamic and iterative process involving complex feedback loops among the governmental branches.

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**"AS AN ENVIRONMENTAL SCHOLAR, ONE CAN PURSUE BOTH THE REFLECTIVE LIFE OF ACADEMIA AND THE ACTIVE LIFE OF PUBLIC POLICY, AND GW IS THE IDEAL PLACE TO DO BOTH."**

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JAMIE GRODSKY

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college, she was awarded a biological research fellowship from the American Museum of Natural History and conducted a botanical study of overgrazing on the Arizona rangelands, documenting the transformation of grasslands to a desert scrub landscape.

Prior to law school, Grodsky worked as a researcher at the Woods Hole Oceanographic Institution in Massachusetts, where she holds a permanent appointment as a visiting scholar. She originally contemplated a career in field biology but found herself increasingly drawn to the

and the senior advisor to the general counsel of the U.S. Environmental Protection Agency. At the EPA, she was involved in high-priority policy initiatives and litigation, including the novel constitutional challenge to EPA's construction of the Clean Air Act, the *American Trucking* case.

Grodsky was hired laterally by GW Law, joining the faculty in 2006 after serving on the faculty of the University of Minnesota Law School. She teaches in the areas of environmental and natural resources law, tort law,

As a former student noted, “her mastery of the subject is amazing, as is her knowledge of the political process from her impressive work experience.”

Grodsky identifies the GW Law-hosted 2007 National Association of Environmental Law Societies (NAELS) conference as an embodiment of the Law School’s unique opportunities: “The NAELS conference highlighted what I believe to be a key role for GW’s Environmental Law Program, bringing the academic and public policy worlds together at the highest levels,” she said.

Grodsky has had her share of intriguing life experiences as well. Immediately after her undergraduate years at Stanford, she put on a backpack and worked and traveled across the United States for one year. She worked in a house for the poor in the Bowery of New York City, lived with coal mining and tobacco sharecropping families in Appalachia, working on farms along the way, and walked from California to Utah—over the Sierra Nevada Mountains and across the Nevada desert—with Native American tribes concerned about energy issues. ★

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### JAMES HOLTkamp (J.D. ’75)

*Partner, Holland & Hart; Adjunct Professor of Law, University of Utah S.J. Quinney College of Law*

James Holtkamp was born in Albuquerque, N.M., and lived in Houston, Texas, until the age of 10 when his father accepted a teaching position at Brigham Young University and moved the family to Utah. Holtkamp met and married his wife, Marianne Coltrin, in 1973 while attending GW Law. They have lived in Salt Lake City since 1977 and have five

children and two grandchildren.

Holtkamp earned his undergraduate degree in political science from Brigham Young University in 1972 with the intention of going to law school. He chose GW for many reasons, including an excellent financial assistance package and prime Washington, D.C., location.

More than anything, however, Holtkamp says he was attracted to GW because of the long tradition of Utahans who had gone before him. Utah senator Reed Smoot, who served from 1902 to 1932, worked hard to recruit young men from Utah to go to GW’s law or medical schools. Holtkamp was drawn in particular to Ernest Wilkinson (J.D. ’26), one of the “Smoot recruits” who was president of Brigham Young University while Holtkamp was a student there.

During his Law School days, Holtkamp was a member of the majority staff of the U.S. Senate Watergate Committee. He met his wife in Washington while she was working for Sen. Wallace Bennett of Utah, the father of current senator Robert Bennett. After graduating, Holtkamp worked for the Department of the Interior in Washington, and shortly after the Department transferred him to Salt Lake City in 1977, Holtkamp joined a Salt Lake City law firm, launching his career in private practice handling natural resources and environmental issues. Reflecting on more than 30 years of practice in environmental law, Holtkamp says, “Environmental work is a happy combination of interesting issues; dedicated people in the agencies, companies, and public interest groups; and an end result that is good for society and the environment.”

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**“ENVIRONMENTAL WORK IS A HAPPY COMBINATION OF INTERESTING ISSUES; DEDICATED PEOPLE IN THE AGENCIES, COMPANIES, AND PUBLIC INTEREST GROUPS; AND AN END RESULT THAT IS GOOD FOR SOCIETY AND THE ENVIRONMENT.”**

JAMES HOLTkamp

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During his career, Holtkamp has represented a wide variety of clients in virtually every aspect of environmental and resources law. Currently he focuses on air quality and climate change issues. One of his most interesting clients is a nonprofit foundation, Pax Natura, which is devoted to avoiding deforestation in Costa Rica. He represents Pax Natura in negotiating agreements with the government of Costa Rica to sell the credits derived from



JAMES HOLTkamp

carbon sequestered in rain forests on private lands. The proceeds from the sale of the credits are returned to the government, which then pays the landowners

not to cut down the forest cover. The program, called the “Payment for Environmental Services,” is intended to protect watershed, biodiversity, aesthetic values, and sequestered carbon. The Foundation is preparing to enter into similar agreements in South America and East Africa.

Holtkamp is currently a partner and manager of the Global Climate Change Group at Holland & Hart in Salt Lake City. Until recently, he was also the manager of the firm’s Environmental Compliance Practice Group. He is an adjunct law professor at the University of Utah S.J. Quinney College of Law, where he teaches Law of Air Pollution Control and Law of Climate Change. Earlier this year, Holtkamp received the Peter W. Billings Excellence in Teaching Award. He has published widely on air quality and climate change issues and is a frequent presenter at conferences throughout the United States and overseas. Holtkamp is a contributing author to *Harnessing Farms and Forests in the Low-Carbon Economy*, published by Duke University Press in 2007. ★

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# { PROCEEDINGS }

## GW FOCUSES ON SUSTAINABILITY

As he completes his first year at the University, GW President Stephen Knapp's focus on fostering leadership in environmental sustainability is taking shape.

Following nine months of intensive discussions, GW's Sustainability Task Force presented its recommendations to President Knapp and the GW's board of trustees in June. Associate Dean for Environmental Law Studies Lee Paddock was one of the 17 members of the Task Force that included students, faculty, and administrative staff.

The Task Force found that sustainability offers one of the central challenges and opportunities of the 21st century. The world is facing a suite of environmental, social, and development issues of unprecedented scale and complexity. The best organizations in the private sector, government, and education are tackling these problems as a market necessity as well as a moral obligation. In the process, they are finding opportunities to do more with less, attract better people, solve important problems, and discover new possibilities.

In the simplest terms, no institution of GW's size and standing can avoid recognizing the environmental implications of its actions, nor can one avoid the obligation to contribute to solving the problems of sustainability.

### RECOMMENDATIONS

#### 1. INSTITUTIONAL COMMITMENT:

To be a leader, GW needs to embrace environmental sustainability at all levels and in all departments. There is enormous institutional opportunity to unlock, and it will be incumbent on everyone to contribute. Bold leadership will be required at many levels, but equally important will be a willingness to fund sustainability-related initiatives and encourage participation and ideas from every facet of the University.

#### 2. OFFICE OF SUSTAINABILITY:

Establish a new office with the leadership, funding, and clout needed to influence University decisions and coordinate with both the faculty and administrative staff tasked to implement sustainability initiatives. This office will provide a central and visible focal point to ensure the University delivers on its potential to be a sustainability leader. Properly funded, this office should serve as a clearinghouse for best practices, new programs, and competing budgetary priorities.

**3. CURRICULUM:** GW's greatest opportunity for impact lies in the classroom. The University should expand the variety and quality of sustainability-related courses, programs, and



GW's SUSTAINABILITY TASK FORCE (LEFT TO RIGHT): LEE PADDOCK, SARAH TUNTLAND, MAGGIE DESMOND, TRACY SCHARIO, EMILY KESSLER, JOSH LASKY, KAREN GREENWOOD, LEW RUMFORD, NANCY GIAMMATEO, DOUG SPENGLER, CASEY PIERZCHALA, DIANE ROBINSON KNAPP, JONATHAN DEASON, AND MARK STARIK

degrees offered. GW should also create new opportunities for interdisciplinary study.

**4. RESEARCH:** Leverage GW's location and other strengths to create a preeminent, interdisciplinary sustainability research

institute that is anchored by endowed faculty, that engages students in sustainability-focused research, and that contributes to local, national, and international sustainability policy development.



**5. ENERGY AND RESOURCES:** Conserve natural resources we use including energy, water, and materials to help achieve the University's goal of climate neutrality. Energy conservation opportunities are plentiful, but GW must invest in or finance energy-saving infrastructure for cost-effective savings and to accomplish its goal of sustainability leadership.

**6. RECYCLING:** Dramatically enhance GW's recycling system to encourage broad participation and the reuse of a wide variety of materials.

**7. BUILDINGS:** Create a process that assures all new buildings and major remodeling projects will meet advanced Leadership in Energy and Environmental

Design (LEED) standards. At a minimum, all new developments should strive for LEED Silver status and all GW campuses should be exemplary in their use of trees, landscaping, and other natural elements.

**8. PURCHASING:** Establish an environmentally preferred purchasing system to ensure GW's acquisition of recycled content materials, energy-efficient equipment, and items produced locally.

**9. COMMUNITY:** Partner with local and regional governments, businesses, and institutions to raise awareness, host sustainability-related events, and promote community sustainability projects. Engage alumni, neighbors, local businesses, and community organizations to encourage their participation and to exchange ideas for mutual benefits.

**10. TRANSPARENCY AND ACCOUNTABILITY:** Make information accessible so that the challenges, goals, and progress of the University's environmental focus can be observed, understood, challenged, and celebrated by everyone. There may be disagreement on goals and methods, and not every attempt will succeed, but GW must be a place where the free exchange of information and ideas on sustainability is supported and where debate and inquiry are the norm. Where there is transparency, there will be accountability, and that integrity is essential.

**11. PRESIDENT'S CLIMATE COMMITMENT:** Ensure that the University meets its responsibilities as agreed to in this national pledge and achieves its commitment to be a climate-neutral campus in a timely manner.

**12. FUNDING:** Becoming a leader in sustainability will require significant investments by the University. The success of the envisioned sustainability research institute and other initiatives will depend in part on the University's ability to seek corporate, government, and foundation funding as well as individual gifts. For administration and operations, our vision is that the effort be supported at minimum by a self-imposed tax on energy use equal to 10 percent of this year's energy budget, and that the commitment extends to at least five years. Regardless of the funding approaches adopted, this effort will require budget choices and must be viewed as a priority.

Decisions on how these recommendations will be implemented by the University are expected to be made by early fall 2008. ★

For more information, visit [www.law.gwu.edu](http://www.law.gwu.edu).

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**BELINDA HOLMES (J.D. '87)***Attorney, Environmental Protection Agency*

BELINDA HOLMES

Belinda Holmes was born and raised in the small western Kansas town of Plains, population about 900. After several false starts, including working at the Topeka State Mental Institution while completing three semesters at Washburn University in Topeka, Kansas, she landed a full-time job as a proofreader at the University Printing Service in Lawrence, Kansas, and began attending Kansas University in 1980. Her KU degree was awarded with highest distinction and departmental honors in political science in 1984. Holmes lives in Lawrence with her dog, Ursula. Her hobbies include cycling and playing the piano.

During her undergraduate career, Holmes took several environmental studies and earth sciences courses which fired her interest. The environment was a hot issue at the time, and she began talking to her advisor about going to law school and wanting to practice environmental law. Though her advisor was supportive, he warned her that such jobs were in high demand and may be

difficult to land. Undaunted, Holmes began investigating law schools that offered environmental law programs and chose GW. “I think I really enjoyed my educational experience all the more because it didn’t come easy, and I was pursuing something that was really interesting to me,” she says.

Having completed an undergraduate degree in political science, Holmes was drawn to GW Law’s location only a few blocks from the White House. One of her assignments in Civil Procedure class was to view an appellate-level proceeding, so she and a friend took the Metro over to the Supreme Court and watched oral arguments. “It was a real thrill for me to see these justices, some of whom I had read about in *The Brethren*, questioning the attorneys on their relative positions,” Holmes says.

Her decision to focus on the environment led her down a path she hadn’t expected, Holmes says: “When I entered law school, I had idealistic notions about the law being a tool for shaping national environmental policy and thus engineering social change. My career turned out to be very different than I had imagined, but no less satisfying than I had hoped.”

Holmes began working for the EPA during the summer after her first year of law school. She tells the story of getting her foot in the door as follows: A friend had applied to several federal intern jobs, including some at the EPA. When he was called in for an interview with the EPA he decided he didn’t want to go as he’d already accepted a different position. He told Holmes, and she called the EPA contact and went in for her friend’s interview. She was offered the position on the spot, began as an intern in May 1985, and has been with the EPA ever since.

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**“IT WAS A REAL THRILL FOR ME TO SEE THESE JUSTICES, SOME OF WHOM I HAD READ ABOUT IN *THE BRETHREN*, QUESTIONING THE ATTORNEYS ON THEIR RELATIVE POSITIONS.”**

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BELINDA HOLMES

Her first job with the EPA was in the Office of Air (Mobile Sources) and involved defending EPA recall orders for cars that didn’t meet in-use emissions standards under Title II of the Clean Air Act. She later transferred to the Office of Enforcement and Compliance Assistance and began doing Superfund work as well as working with the Resource Conservation and Recovery Act (RCRA).

Her current position is an attorney–advisor for the EPA Region 7 office in Kansas City, Kansas, where she transferred in 1989. Her regional work involves a lot more casework and less policy work than her headquarters job. Her focus over the years has been primarily on judicial and administrative cases under Superfund and RCRA, but she’s also handled judicial and administrative cases under the Clean Air Act. Holmes was recently promoted under a reorganization plan approved by headquarters in early August. She will be the senior counsel in the Chemical Management Branch, which handles casework and counseling under RCRA, the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), and statutes dealing with lead paint and asbestos.

“Sometimes the procedures, reporting, and politics of a government job can be frustrating, but these frustrations are far outweighed by the satisfaction of taking on interesting, challenging

work,” Holmes says. “I learn something new almost every day, and I work with bright, talented, and interesting people. I have been working for EPA since May 1985, and I have loved my job from day one.”

Though Holmes has handled many cases, all of which present different challenges, there is one in particular that stands out: *Harmon Industries, Inc. v. Browner*, 191 F.3rd 894 (8th Cir. 1999). The case began in September 1991 when the Region filed a RCRA administrative complaint against a circuit board manufacturer in Grain Valley, Missouri, claiming that the facility had been illegally disposing waste solvents by pouring them on the ground behind the facility. When the case didn’t settle, the EPA prepared for an administrative hearing and it ended up being about much more than the illegal disposal of waste solvents.

Because the State of Missouri and Harmon had initiated settlement negotiations before EPA filed its administrative case, Harmon challenged the EPA’s action on the basis that RCRA precludes EPA action when a state has taken an action addressing the same violations. After EPA had filed its administrative case, but before EPA obtained an administrative adjudication, a settlement between Harmon and Missouri was entered in Missouri state court

addressing the same violations. EPA asserted that RCRA allows EPA to pursue such actions, and prevailed on this issue both at the administrative hearing and in an appeal filed by Harmon, heard by EPA's Environmental Appeals Board.

However, Harmon appealed the resulting decision, and both the Western District of Missouri and the 8th Circuit Court of Appeals ruled that RCRA precludes "overfilling," a term used to describe the federal government taking action for violations addressed by a state adjudication. The 10th Circuit has disagreed with the 8th Circuit's decision [see *U.S. v. Power Engineering Co. et al*, 303 F.3rd 1232 (10th Cir. 2002)], but the Supreme Court has yet to decide the issue.

For Holmes, shepherding this case through the system from beginning to end was the experience of a lifetime that will always stand out in her career.

The views expressed in this article do not necessarily represent the views of the Environmental Protection Agency or the United States government. ★

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### MICHAEL SARETSKY (J.D. '09)

*Law Clerk, Air Enforcement Division of U.S. EPA's Office of Enforcement and Compliance Assurance*

Michael Saretsky is a 26-year-old native of Dallas, Texas, living and working on the East Coast. He has a variety of interests including making and playing music, cinema, sustainable development, natural resource conservation, and space exploration.

Saretsky earned his undergraduate degree in sociology and French from the University of Pennsylvania. During his senior year, he became involved in community development and

capacity-building activities through a group his friend started called Juntos. Juntos serves Philadelphia's Latino immigrant population via community cleanup work in immigrant neighborhoods. Involvement in this group spawned his interest in engaging in meaningful public interest work.

After graduating, Saretsky served as a paralegal in a D.C. law firm specializing in immigration and employment law. After two years with the law firm he enrolled at GW Law in 2005 with the intention of exploring multiple areas of legal practice. He was, and still is, particularly interested in focusing on emerging areas of law and cross-cutting legal issues. Accordingly, he has chosen to concentrate his legal studies on two fields of law, environmental law and space law. He believes both fields will be intellectually challenging and rewarding as his career unfolds.

Saretsky is pursuing a joint degree with GW's Elliott School of International Affairs. His focus at the Elliott School is on international science and technology policy with a concentration on space policy. Because space law is a relatively new topic, it is currently more of a "soft law" practice, meaning it is policy-oriented and still in the implementation stage. GW has given Saretsky exactly what he was looking for, a stimulating but relaxed academic environment and a thriving student community, and has provided numerous opportunities to explore legal practice both in and out of the classroom. He is the pro bono coordinator for the Environmental Law Association (ELA) and also participates in moot court events.

"Having D.C. as the backdrop for my legal studies has also been a major asset, as the city has afforded me incredible networking and extracurricular possibilities," he says.

Currently a law clerk in the Air Enforcement Division of the U.S. Environmental Protection

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## "HAVING D.C. AS THE BACKDROP FOR MY LEGAL STUDIES HAS ALSO BEEN A MAJOR ASSET, AS THE CITY HAS AFFORDED ME INCREDIBLE NETWORKING AND EXTRACURRICULAR POSSIBILITIES."

MICHAEL SARETSKY

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Agency's Office of Enforcement and Compliance Assurance (OECA), Saretsky has been working principally on civil enforcement actions responding to Clean



MICHAEL SARETSKY

Air Act violations by stationary sources of air pollution.

"I have been fortunate to gain insight into numerous areas of environmental legal practice—environmental litigation and administrative settlements, general administrative process and procedure, environmental regulation and policymaking, and legal problem-solving with respect to environmental dangers," he observes. "Environmental law is, for me, a matter of conscience. I am alarmed by the accelerating rate of global environmental degradation and believe that, in addition to lobbying and activism, the law is an effective and powerful tool for attempting to ensure that our world remains ecologically and environmentally sound." ★

Saretsky was a semi-finalist in the Pace National Environmental Moot Court competition in spring 2008. His team was in the top 9 out of 70 teams.

His legal studies and career have provided Saretsky with some memorable experiences. In summer of 2007 he was an intern with the Center for International Environmental Law in Geneva, Switzerland, enabling him to attend meetings and group discussions at UNCTAD, WIPO, and the WTO. The topics of discussion included the effects of existing international trade, investment, and intellectual property regimes on state environmental and human health regulations, the fragmentation of international environmental law in international dispute resolution, and the development of international human rights approaches to environmental law. This experience taught Saretsky a lot about international law and was one he says he will never forget.

This summer, as a clerk with the EPA/OECA, Saretsky has been fortunate enough to sit in on internal policy discussions on the emergence of a regulatory framework to control greenhouse gases, one of the world's most pressing environmental problems. "Though talks of a regulatory framework to combat this problem are nascent, it has nonetheless been interesting to observe the Agency's initial approach to policymaking in this area." ★

continued from page 1

The Comprehensive Environmental Response, Compensation, and Liability Act involved a clever combination of by-then standard command and control regulatory techniques—defining what constitutes a hazardous substance and allowing the government to order remediation—with traditional tort liability concepts of strict liability. Environmental lawyers could successfully ply their craft by understanding the traditional tort law system and by a thorough understanding of how environmental regulations are promulgated, implemented, and enforced. Addressing problems will not be that simple

for the next generation of environmental lawyers.

Today's pressing environmental issues—addressing climate change, restoring impaired waters, reducing urban ozone and particulate problems, rehabilitating fisheries, dealing with the nanotechnology revolution, rethinking energy generation—require a much broader set of legal skills. Yes, tort liability, administrative law approaches, and law enforcement will remain central to environmental problem solving, but the next generation of environmental lawyers will need even broader knowledge. The next generation of environmental problems will be very expensive to

resolve, requiring resources well beyond traditional government programs, and will often require changes in societal values. The responses to these problems are likely to be an essential element of business decision making rather than solely the result of an external mandate. For example, the cost of cleaning up the Chesapeake Bay exceeds \$25 billion, the Great Lakes more than \$20 billion, and changes to limit greenhouse gas emissions will cost a great deal more, requiring public funds and support.

Environmental lawyers will have to understand how markets function to master the climate trading system. Of course, many lawyers understand financial markets, but this has not been a core skill for environmental lawyers.

Many of our environmental problems today are being addressed through elaborate networks that involve government, the private sector, and NGOs. This will require the next generation of environmental lawyers to develop finely tuned collaboration skills in addition to more traditional litigation skills. Internal economic considerations are becoming far more important in how companies approach environmental decision making. Environmental performance plays a role in reputation, access to markets, shareholder relations, product differentiation, community and government relations, the cost of insurance, the availability of capital, and employee recruitment and retention. Lawyers advising businesses will need to understand these factors to provide the best possible advice.



LEE PADDOCK

Finally, globalization is a major factor in environmental decision making. Lawyers need to know European Union law in addition to U.S. environmental law. Many need to understand China's environmental law. They should be familiar with the requirements of trade agreements and, at least in some cases, may need to understand links such as the interconnections between environment and human rights.

While we still need to teach our students the basics of environmental law, our challenge is to introduce them to the many other facets of environmental problem solving they will need in order to lead the field in the first part of the 21st century. ★

Lee Paddock  
Associate Dean for  
Environmental Legal Studies



## IN PRINT

### JAMIE GRODSKY WINS SECOND TOP-FIVE AWARD FOR ENVIRONMENTAL LAW SCHOLARSHIP

Associate Professor Jamie Grodsky's "Genomics and Toxic Torts: Dismantling the Risk-Injury Divide," 59 *Stanford Law Review* 1671 (2007), was selected as one of the top five environ-

mental law articles published in 2007 by environmental law scholars. Articles were evaluated by a 60-person peer review panel including leading scholars in the field. The three-step process included a search through the legal indices for all environmental law articles published in 2007. The panel then selected the top 20 articles out of 400 chosen for final review. Fifteen of the most senior scholars in environmental law selected the top five articles. These articles, along with the top five in land use, will be reprinted by West Publishers and circulated to environmental scholars and policymakers around the country in a special edition of *Land Use and Environment Law Review*.

Grodsky's "Genetics and Environmental Law: Redefining Public Health," 93 *California Law Review* 171 (2005) was selected as one of the top five environmental law articles published in 2005.

For more information, visit [www.law.gwu.edu](http://www.law.gwu.edu). ★

# { ON THE AGENDA }

## NEPA AT 40

### GW Law to Host Examination of the National Environmental Policy Act

GW Law School will host an in-depth examination of the National Environmental Policy Act (NEPA) on the occasion of its 40th anniversary in Spring 2009. The event, co-sponsored by the President's Council on Environmental Quality and the Environmental Law Institute (ELI), is part of the ELI-GW Series on Environmental Governance. The agenda will include the following topics:

**Back to the Future: The Authority and Effect of NEPA:** This session will address the substantive impact of NEPA, even though the courts have held that its requirements are only procedural, and will address the question of whether future changes need to be made to bolster the substantive impact of the law. A background paper

exploring the research on the substantive impact of NEPA will be prepared prior to the program.

**NEPA and Public Involvement in Decision Making:** This session will explore whether the stakeholder involvement process in NEPA has resulted in real changes in proposed projects and examine whether public involvement mechanisms require further refinement.

**NEPA Implementation Practices:** Cumulative impact, among other implementation issues, has become a central question in the implementation of NEPA. This session will discuss key implementation issues including how NEPA should be used in assessing cumulative impacts such as those associated with climate change.

**NEPA in Long-Term Planning:** During the past few years, the applicability of NEPA to agency plans has been brought into question by both Congress's determination that NEPA does not apply to statewide and metropolitan transportation plans and the Forest Service's determination to categorically exclude national forest management plans. What are the legal and practical implications of pulling NEPA analyses away from important agency planning processes?

**Ensuring NEPA Compliance:** Issues continue to be raised about whether agencies are properly implementing NEPA. The two principal compliance options—CEQ oversight and lawsuits—both have serious limitations: staffing in the case of CEQ and the cost and sporadic nature of lawsuits. This session will address whether new or different compliance mechanisms are needed to ensure proper implementation of NEPA.

**NEPA's International Revolution:** This session will review how NEPA concepts have evolved as they have been adopted by other countries and in the development finance context. Particular emphasis will be placed on lessons learned from these international environmental review processes.

**Lessons from the States:** This session will examine leading-edge environmental assessment practices from the states and discuss what lessons learned may be applicable to NEPA practice.

**NEPA's Fitness to Tackle Today's and Tomorrow's Environmental Issues:** NEPA arguably set out a sustainable development agenda almost a decade before that term was first used, and certainly long before it gained traction in the United States. This session will discuss whether NEPA has a broader role to play in environmental policy than simply through environmental review. ★

## NANO GOVERNANCE 2008

### Innovative Approaches to Nanotechnology Environmental Governance

In February, GW Law hosted a conference to address the difficult question of how to ensure that nanotechnologies are developed in an environmentally responsible manner. Porter Wright Morris & Arthur and the Environmental Law Institute (ELI) co-sponsored the event.

The full-day conference had more than 80 registrants and 18 speakers and was divided into two sessions. The morning session featured several speakers

on prominent issues surrounding the environmental regulation and governance of nanotechnology. The afternoon session was a panel discussion with audience participation focusing on whether it is possible or desirable to merge existing approaches to create a comprehensive environmental governance regime for nanotechnology.

Speakers included representatives from the U.S. Environmental

Protection Agency; DuPont; Meridian Institute; U.S. Chamber of Commerce; British Standards Institution; International Organization for Standardization; the White House; the American Bar Association Section of Environment, Energy, and Resources; Organization for Economic Co-operation and Development (OECD); Institute of Nanotechnology; Woodrow Wilson International Center for Scholars; International Center for Technology Assessment; Environmental Defense; NanoBusiness Alliance; GW; and the ELI.

Highlights from the morning session included presentations from the EPA on its new Nanoscale Materials Stewardship

Program, the OECD regarding international coordination of nanotechnology environmental research, and an industry perspective on the responsible development of nanoscale materials from DuPont.

The Meridian Institute led the afternoon session with a discussion regarding the use of facilitated stakeholder dialogues in resolving governance issues, which led into a panel discussion on nanogovernance issues.

Conference materials and the speakers' PowerPoint presentations are available at [www.nanogovernance.com](http://www.nanogovernance.com). ★

## SUMMER PUBLIC SERVICE AWARDS AND SCHOLARSHIPS

Through the generosity of several individuals and organizations, GW Law was able to provide more than \$230,000 in funding to support 56 public interest internships this summer. Environment-related internships qualify for many of the awards. Awards ranged from \$3,000 to \$5,000 for students who worked full time over a 10-week period. More than half of the students who applied for the public interest subsidies received awards.

The awards and scholarships for which environmental public interest work qualify include the



STUDENT ALEXANDRA HOLLINGER INTERNEED AT EARTHJUSTICE IN SPRING 2008.

Shapiro University Public Service Awards (20 awards), GW Law Public Interest Scholarships (20 awards), Shapiro University Awards (two awards), and Sonnenschein Scholars (two awards).

Each of these awards and scholarships include positions that involve the use of law to protect the environment, wildlife, and domestic and/or international human rights and civil liberties.

For more information on the Law School's summer programs, visit [www.law.gwu.edu](http://www.law.gwu.edu). ★

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