

A Conversation with Professor Rochelle C Dreyfuss

by

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This is the fourteenth interview for the Eminent Scholars Archive with an Arthur Goodhart Visiting Professor of Legal Science.

This interview was held by video link. Professor Dreyfuss was at the Goodhart Lodge, Cambridge.

Questions in the interviews are sequentially numbered for use in a database of citations to personalities mentioned across the Eminent Scholars Archive.

Interviewer: Lesley Dingle, her questions are in **bold type**.

Professor Dreyfuss's answers are in normal type.

Comments added by LD, [*in italics*]. Footnotes added by LD.

1. Professor Dreyfuss, you are the 14th Arthur Goodhart Visiting Professor of Legal Science to be interviewed for the Eminent Scholars Archive and you are currently the Pauline Newman Professor of Law and co-director of the Engelberg Center on Innovation Law and Policy, both at the New York University School of Law where you've been since 1998. You're currently—

Actually, I started teaching at NYU in 1983.

2. 1983, thank you. You've been the Visiting Goodhart Professor here from 2019 to 2020 and we're very grateful for your agreeing to share some reminiscences of your fascinating career firstly in research chemistry and pharmaceuticals and then in law, and particularly the field of intellectual property. So, could we start with your early life? You were born in Brooklyn, New York, in 1947 and I wonder if you could tell us something about your parents, your early life and how your parents influenced you?

My father was a rabbi but he died when I was ten and my mother remarried an engineer when I was 12. When my father got sick, she went to graduate school and received a Master's degree and then a PhD in psychology so I was very much influenced by her. I knew that I wanted to have a career and understood that I could do that even when I had children. My stepfather, the engineer, kind of pushed me into sciences so that's how I wound up in chemistry.

3. Very interesting. So your early years would have been in the early fifties through to the sixties and a time of the cold war and a very confident, booming United States, and I wondered if this shaped your outlook on life.

I don't know about that. I do remember practicing for a nuclear attack when I was in school and had to hide under my desk and wear dog tags during the Korean War. So I don't think I felt like the United States was a pre-eminent power; I thought that, if anything, we were likely to be attacked, but I don't think I thought about it very much at all, frankly.

4. Where did you go to school?

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Elementary school?

5. Yes.

I went to public school until 3rd grade, then to Bialik School, a Jewish school, until 8th grade, and then to a high school called Yeshivah of Flatbush.

6. You did chemistry at college when you matriculated, and I wondered whether you were inspired by some of your high school teachers to make this choice.

Well, I really liked math when I was in high school and I thought maybe I'd go into math but in freshman year of college I took chemistry and I liked the application of math to an actual science, so then I went ahead with chemistry.

7. What made you choose Wellesley College³ in Massachusetts?

Wellesley is one of the Seven Sister colleges⁴. When I went to college, Harvard and Yale and most of the Ivy League were only for men, and then there were these women's colleges called the Seven Sisters. I don't think I particularly thought about going there. I had thought I would probably go to a college closer to New York. I was thinking, first of all, of Brooklyn College, which was free in those days, and of Sarah Lawrence, where a friend of mine had gone. But my high school principal wanted to show the world that his students could get into a Seven Sister college so I was told to apply to Wellesley. He just handed me a card. All the students that had done well in high school got these cards, which gave the name of a school they had to apply to in order to show that students from Yeshivah of Flatbush could be admitted to these places. So I applied to Wellesley because I was told to.

In those days you had to go for an interview, much as you do at Cambridge. In the US you don't do that anymore, but then you did. I went to the interview with my mother and it was a day that was snowing. Wellesley is in New England and has a beautiful campus. It looks a little bit like King's, really, with these very old-looking buildings, built much more recently, of course, but built to look old. It was just absolutely gorgeous and my mother turned to me and she said, "If you get into this place, you're going." So I did. My school was appalled because I wasn't supposed to go there. I was just supposed to get in and then I was supposed to stay around New York, but I chose to go there and it was a wonderful place to go to college.

8. You graduated from there in 1968 and then became a graduate student of chemistry at the University of California, Berkeley. This was a major relocation, did you aspire to life in California?

I think it's more common in the United States than it is here to go away when you're in college and graduate school. I mean, that's just considered something that one does, so I went to Massachusetts for college and then I thought it would be fun to go out to California. I don't know if I thought I would stay there. If you go to graduate school, then afterwards, you apply for a job and that could be anywhere in the country. So, no, I don't think I particularly thought I'd go live in California forever.

9. After two years you took a post at Vanderbilt in Tennessee, that's another physical translocation.

³ <https://www.wellesley.edu/>

⁴ Consortium of East Coast liberal arts colleges for women, originally included Mount Holyoke, Vassar, Smith, Wellesley, Bryn Mawr, Barnard, and Radcliffe colleges. Today, five of the Seven Sisters remain women's colleges.



What actually happened is that I met my husband; he was the boy in the lab next door at Berkeley and we got married. At that point it was very hard to get academic jobs in chemistry. But that's what he wanted and he got offered a job at Vanderbilt, so we wound up in Tennessee. I could have stayed at Berkeley but I didn't want to begin my marriage long distance so I went with him to Tennessee.

10. You ended back near where you started your life in New York at the Department of Genetics, the Albert Einstein College of Medicine⁵.

We lived in Tennessee for a few years and we didn't like it at all. We really hated it. It turned out all the people we became friends with were also people who hated it. So we were looking to leave and my husband got a job at a college in New York. By then my son was born and so I only wanted to work part-time. My uncle was a professor at Albert Einstein Medical School and he helped me get a part-time job there.

11. Then you were able to follow, in this way, a progression in a prospective medical academic research career because your next post.....

It was a natural progression. I had worked at Vanderbilt in the Pharmacology Department, so that's where I started doing research in the life sciences.

12. Your next post was in commerce with Ciba-Geigy⁶ where you stayed from '75 to '78 in the Department of Drug Metabolism. What made you switch to commercial research?

I worked at Albert Einstein when my daughter was born and then I took some time off to stay home with both children. Then I saw a job advertisement in pharmacology. At Albert Einstein, I was in the genetics department but did work that was applicable pharmacology. So this job seemed like a good fit for me: not only in a field I already worked in, but it was also right near where we lived and close to my children's paediatrician as well. So it was a handy place to work.

13. Very interesting, because presumably this succession of posts over the ten years gave you a deep insight into the way that IP affected medical innovation and development.

Yes. That wasn't the point, I was a chemist in all these posts. But, yes, I did learn a lot and it was helpful later on in my career, that's true.

14. That brings us then to the beginning of your legal career. In 1978 you made a major career change and you entered Columbia Law School. I wondered what the basis was for this fundamental shift?

When I was in college I really couldn't decide whether to go to graduate school in chemistry or to law school. It turned out that in graduate school they gave you a stipend and you made money, but law school was very expensive and I would have had to rely on my parents. I didn't want to do that, so that's part of why I went to graduate school. But I had always in the back of my mind that maybe I really should have gone to law school instead.

Then, when I was at Ciba -Geigy (now Novartis), the guy in the lab next door was going to law school at night. He'd come in and he'd tell us about the cases he was reading and the questions at the end of the cases. I'd say, "I think this is the way the questions should

⁵ <http://www.einstein.yu.edu/departments/genetics/>

⁶ Merged with Sandoz to form Novartis in 1997. HQ in Basel.



be answered,” and he’d say, “No, that’s just totally stupid.” Then he’d come in the next day and he’d say, “My professor said exactly what you said. You ought to go to law school.” In addition, my work was in the drug metabolism department, where the goal was to generate data for the Federal Food and Drug Administration, the FDA. I had to interface with lawyers who were preparing the FDA submission. They said I was the best liaison they’d ever had and that I should go to law school.

So I was hearing it from many different places. I didn’t have my PhD and really I wasn’t going to get anywhere in chemistry without my PhD. So basically I had to either go back to school in chemistry or do something different. Everybody was saying go to law school - so I went to law school.

15. Well, you graduated in 1981, but even while you were still an undergraduate you published a 1980 note on ‘Vindication of Civil Rights’⁷. I wondered what attracted you to this topic at this early stage.

Yes. The American law school system. First of all, law school is a graduate school so everybody has already done an undergraduate degree. If you do well your first year then you’re elected to the Law Review. It’s like being in a different world. The third-year students run the Law Review and you do what they say. Some third-year student said, “You will write a note on attorneys’ fees in civil rights cases”, and so I wrote on attorneys’ fees in civil rights cases. It was a good topic. They’d given me a different topic at first, but there was already a substantial literature on it. The civil rights issue was better because there was a very recent statute on attorney’s fees in civil rights cases. The statute was about five years old and nobody quite knew how to interpret it. There were several cases and I thought the question might ultimately go to go to the US Supreme Court. There wasn’t a lot of other articles to read because it was such a new statute. That’s especially good because there isn’t a lot of time to read the literature when you’re in law school. Besides, if the issue went to the Supreme Court, my article would be there. It was also an interesting topic.

16. You had two terms of clerking. First in 1981 for Chief Judge Wilfred Feinberg⁸ of the US Court of Appeal Second Circuit, and then 1982-3 Chief Justice Warren E Burger⁹ of the US Supreme Court. I wondered what your take away was from these experiences?

Clerking is a lot of fun because it’s not a real job. It’s going to last only a year or two years. You don’t feel like you’re auditioning for partner at a law firm or a professorship or something—it’s a year or two whether you are doing it well or poorly. It’s also fun and you feel like the world is really on your shoulders, that what you say is going to make a difference. In fact, your judge is deciding the cases, but it feels like you’re deciding them. So in that way you feel like you really have an effect on the law. What did I take away from it? I learned a lot about Supreme Court practice and how to think about cases strategically and I learned about how cases wind up at the Supreme Court. Knowing the Court from the inside provides you with insights that you don’t get by just looking at the docket and what they’ve decided; you have a much better sense of what’s going on there, what they’re thinking about, how they’re thinking about the cases, how they’re thinking about the arguments in the cases. So I think I have quite a lot of insight into the workings of the Court.

⁷ 1980. Note, Promoting the Vindication of Civil Rights through the Attorneys’ Fees Awards Act, 80 *Colum. L. Rev.* 346

⁸ Wilfred Feinberg (1920-2014), Judge & Chief Judge of the US Court of Appeals for the Second Circuit (1966-91, 1980-88), District Judge of the US District Court for the Southern District of New York (1961-66).

⁹ Warren Earl Burger (1907-1995), 15th Chief Justice of the United States (1969-86).



17. You wrote an appreciation of Chief Justice Burger in 1984. Was he something of a mentor for you?

No, Judge Feinberg, my Court of Appeals judge, was my true mentor. Because I was older when I went to law school, my husband and I already owned a house in the suburbs where we were raising two children. It turned out Judge Feinberg lived in the same suburb and he had children that my kids' friends knew, and my friends knew his wife. So he became somebody that I was extremely close to. And he was a Democrat and a liberal and I'm a Democrat and a liberal so, he transmitted to me his attitudes towards thinking about justice, thinking about doing justice between the parties, thinking about how law is to be interpreted. Even things like how I keep my files in my office is similar to the way he did it. Justice Burger was very far to the right; he was a true conservative. He liked to have a liberal law clerk every year because he wanted to hear the opposite point of view, but his way of doing things is not mine and never did become mine.

18. Interesting. So, in 1983 you joined the New York University School of Law. I wonder if you could tell us the circumstances of this appointment. It was a critical point in your career since you've stayed there ever since - 37 years to-date.

My husband had a job in New York and my kids were going to school in New York, so although Americans tend to move all over the country for their jobs, I didn't feel that I could do that; I didn't want to uproot him. He came to Washington for the year I clerked at the Supreme Court, but he didn't want to move permanently and my kids wanted to go back to their friends. And we had a nice house which we didn't want to sell. So it was obvious I had to look for a job in New York. So I interviewed at Columbia but I didn't really want to go back to Columbia because it's hard to go back to the school where you were a student. You're always a student - you always feel yourself that way, so I wanted to go someplace else. There are several schools in New York, but NYU made me an offer so I took that.

19. Your initial duties, the subjects that you taught?

The way things worked then—it doesn't work this way anymore, but the way it worked then—was that you were allowed to choose one subject that you wanted to teach it and they would let you teach it, and then everything else, they chose. Now, when people begin teaching, they already have done a lot of writing, so their subject is set. But in those days you went straight from clerking to teaching and you didn't have any real experience. You hadn't written very much and so they could tell you what to teach.

The course I wanted to teach was civil procedure. I thought the most fascinating thing I'd learned in law school was about the court's authority over people, the court's authority over the case, and who obtains access to courts and under what terms. I also thought these procedural questions were the most interesting issues I dealt with when I was a law clerk. So the course I asked to teach was civil procedure.

What they gave me originally was environmental law because I'd been a chemist and environmental law deals with the effects of pollution and things like that. They thought that was perfect for me. But around two weeks after I started, the person who taught intellectual property law was diagnosed as having terminal cancer. So someone came into my office and said, "You're it". So I ditched all those books about environmental law, and I bought all these books about intellectual property law. I sat in on the other professor's classes until he died and then I took over.

I'd never taken a course in intellectual property so it was trial by fire. Of course, it was good because I had done chemistry and, as you said, I knew a great deal about how



innovation happens and what creative people need, so it was a perfectly good match. But it wasn't what I was originally expecting.

20. Very interesting. So it was at this point that your interest crystallised in intellectual property.

Right. Not very many people did it then, it was a very unpopular subject. I would say in the United States there were maybe three other people who taught it full time. Three very nice guys who helped me a huge amount, but it really was not a particularly popular course with students. Most law schools either didn't teach it at all or they had a practitioner who came in for an hour or two hours a week and taught it. But the field exploded after I got into it. So it became a terrifically great area to be in, but it was pure dumb luck that I was involved.

21. Your earliest paper in IP law was in 1986, “Dethroning Lear: Licensee Estoppel and the Incentive to Innovate.”¹⁰ Then you also published a paper on, “The Creative Employee and the Copyright Act.”¹¹ I was wondering what moved you to write these, the first in a long and very impressive line of contributions to IP literature?

Thank you. As to the first one, “Dethroning Lear,” the professor who knew he was dying—an incredible, wonderful person named Alan Latman¹² who is still considered one of the all-time great intellectual property lawyers—chose that topic for me. He knew he was dying; he knew I had to take over; he knew I knew nothing about intellectual property. He also knew I was interested in civil procedure and so he found a topic that was a combination of procedure and patent law. It was a perfect topic. I knew enough about the procedure part and I could gently move into the other part. It was also a good topic because it enabled me to learn patent law over the summer before I had to teach it.

So that first topic was one chosen by Alan Latman. The other one I chose. It was the very first piece I actually chose myself! I was very interested in what motivated people to be creative, how they felt about the legal system that I was learning; what they considered good about it, and what they did not like. I had a student who was a PhD in English literature and she said, “There are all these authors who have written about that, why don't you read some of their stuff?” She found me the first few pieces and I supplemented with things written by scientists. It was really a nice way to move in and think about the other side, not just what the legal community thought was needed, but what the creative community actually wanted.

22. In 1988, five years after you started at NYU, you were elevated to the Pauline Newman Professor of Law.

Originally, I was appointed to a simple full professorship. Several years afterwards, Judge Newman financed a Chair. The natural progression (if you are lucky) is a Chaired Professorship five or 10 years after becoming a professor. I became a professor in 1988, but I was chaired a few years later.

23. Right. So when you took the Chair did your duties change?

At some schools that might be the case, but at NYU it's not. Private American law schools are self-funded. Part of the money comes from tuition, but much of the support comes from donations. One of the ways schools attract donations is to offer to name a Chair

¹⁰ 1986. *Dethroning Lear: Licensee Estoppel and the Incentive to Innovate*, 72 *Va. L. Rev.* 677

¹¹ 1986. *The Creative Employee and the Copyright Act of 1976*, 54 *U. Chi. L. Rev.* 590

¹² Alan Latman, (1930-1984) Walter J. Derenberg Professor of copyright and trademark law, NYU Law School, Founding partner of the New York law firm of Cowan, Liebowitz & Latman.



after the donor or someone the donor wishes to honor. At our school the donation basically amounts to budget relief for the school; it makes no difference in the professor's life except that getting a Chair is an honor. And I can now sign my name 'Pauline Newman Professor of Law'.

24. Were you the first incumbent?

Yes. Pauline Newman¹³ is a judge on the United States Court of Appeals for the Federal Circuit. This is the court that handles all patent appeals in the United States and certain trademark cases as well. She's still an active judge on the court, so in some ways, this is an odd thing. Most chairs are given in honor of someone who is deceased or retired. But with us, it's different. I write about her court and she is on the court and sometimes we're both invited to give papers on the same topic. I take one side and she takes the other side and my slides come up, "Rochelle Dreyfuss, Pauline Newman Professor of Law," and her slides come up, "Pauline Newman". But she is wonderful about tolerating my views even when they are different from hers.

25. Your earliest book chapter was written during this time, 1989, "A General Overview of the Intellectual Property System," in, "Owning Scientific and Technical Information."¹⁴ You wrote specifically on your medical specialty in the jurisprudence of genetics. Has the position moved on much since you did this type of research, years later?

To be honest, I can barely remember the piece. I think the debates on the use of genetic information to decide disputes have changed a little bit, but they haven't improved very much. There is still a tendency among courts to take scientific information and use it to decide what the just position is. But science isn't about justice. To do justice, other considerations must be taken into account. So that article was very critical about the use of genetics in a dispositive way and I think it is sometimes still used that way now. To be sure, recent trends in the United States may be moving in the opposite direction, towards denying that scientific expertise has any relevance at all—that would be equally bad. However most of what I write now is more about the use of genetic information as a research input—that is, use by geneticists or by other scientists, rather than by the legal system.

26. Very interesting. That brings us then to the Engelberg Center on Innovation Law and Policy, 1998 to the present.

You just skipped probably the article that I'm best known for. It was an article about "expressive genericity." I think it's called "Trademarks in the Pepsi Generation"¹⁵. That was the first article I wrote after I was tenured. At the time trademark lawyers were really pushing the limits of trademark law and essentially claiming that every time a trademark was used in speech, it was an infringement. I pushed back against that and said people use trademarks for all kinds of reasons, including for expressive reasons. For example, there's a book by Barbara Kingsolver¹⁶ with a character named Barbie in it¹⁷. The mark is used to

¹³ Pauline Newman (b. 1927), Circuit Judge of the US Court of Appeals for the Federal Circuit (1984-). Special Adviser to the US Delegation to the Diplomatic Conference on the Revision of the Paris Convention for the Protection of Industrial Property (1982-84).

¹⁴ 1989. General Overview of the Intellectual Property System, in *Owning Scientific and Technical Information*, Vivian Weil & John Snapper (eds), Rutgers University Press.

¹⁵ 1990. Expressive Genericity: Trademarks as Language in the Pepsi Generation, 65 *Notre Dame L. Rev.* 397

¹⁶ Barbara Kingsolver (b. 1955), American novelist, essayist and poet. <http://www.kingsolver.com/>

¹⁷ *Pigs in Heaven* Harper Collins 1993



show how the character has been influenced by this very materialistic society. In the article, I argued that we have to think differently about trademarks when they're used in ordinary language. It's probably my most cited article.

I don't really do very much trademark law, but the piece was written right after I was tenured, and it was the first time I could write whatever I felt like writing. The Supreme Court had decided a case about the Olympic trademarks¹⁸ and I thought, "This is interesting. I'm just going to go off on a tangent and write this thing." As I said, I've probably been asked to do more talks on this paper than any other.

27. I shall look forward to looking at this paper, thank you very much for bringing that up for the record, I'm really grateful to you. That sounds like a fascinating paper, actually, a fascinating topic.

Yes. It was a fun paper to do, yes.

28. You were made the Co-Director of NYU's Engelberg Center on Innovation Law and Policy and can you tell us anything about this appointment, what it entailed and perhaps the type of research?

Originally I was the Director because I was, basically, the only person at NYU doing intellectual property. Al Engelberg,¹⁹ who gave the money for Center, had known me (and about my having worked at Ciba-Geigy) from our joint service on the Patents Committee of the Bar Association of the City of New York. I didn't really know him very well. But he'd gone to NYU as a law student and so when he decided to create a centre, he decided he would do it at NYU. He wanted more research into intellectual property, especially patents. He is a very interesting guy. He made his money by challenging the validity of pharmaceutical patents. When the generic drug industry started up, he offered to challenge patents on any pharmaceutical the new generics firms were interested in producing. They had no money to pay him, so instead, he offered to take a percentage of their future worth. At the time, these companies were worthless so they said sure. He invalidated some valuable patents and now these are some of the biggest generic drug companies in the world. So as I understand it, the money just comes rolling in and he wants to use it to give back. His main interest is in pharmaceuticals and why the prices of pharmaceuticals in the United States are so high. Of course, he's also interested in questions of access to medicine more generally. That's one of my focuses too, so our interests line up pretty nicely.

29. I counted that prior to 1998 you had published one book, five book chapters, 24 papers, and since 1998 you've added a prodigious 12 books, 24 book chapters and 54 articles which suggests that the centre has been a source of great inspiration to you.

Until you asked, I had not thought of my career that way, but I think you're absolutely right. One of the things that happened was Engelberg gave us money that had to be tied to intellectual property and most especially patents. I was able to bring in people to give talks and to go and see what other centres were doing and to start working with people who were in, not exactly my area, but areas adjacent to it. So the funding allowed me to learn about the world and what was going on. It was also a very interesting time for intellectual property because in 1994 the World Trade Organisation (WTO) was created. Part of its Framework

¹⁸ San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522 (1987).

¹⁹ Alfred B. Engelberg, Chemical engineer (Drexel University 1961), patent examiner (1961), patent agent (1962-1965), patent attorney US Justice Department (1965-1968), member of a law firm (1969-1985) representing the generic pharmaceutical industry. Created Center at NYU (1994)



includes the TRIPS Agreement²⁰ on intellectual property protection.

There are international agreements on intellectual property which were concluded at the end of the 19th century, the Berne Convention [1886] and the Paris Convention [1884], but they include very minor obligations regarding patents and they aren't enforceable, so a country could join and then not fulfil its commitments. When intellectual property protection fell under the auspices of the WTO, suddenly intellectual property obligations were enforceable through the WTO's dispute resolution system. The patent obligations were also much more stringent. This was all new for the international intellectual property system so it was an ideal topic for the very first conference of the Engelberg Center. I knew almost nothing about the system and neither did most other intellectual property lawyers because TRIPS had been largely negotiated by trade people. So the conference brought together two groups—the trade and intellectual property communities—who previously did not know each other. It created a wonderful opportunity for discussion and for an interchange of ideas. I think a lot of what I've written since has been based on the international aspects of intellectual property, all of which I began to learn about from pulling that conference together. At the time, there weren't many people who knew patents and knew trade law, so those of us who did fielded many calls from governments asking what they could and couldn't do.

Because I had the centre, and because that was our first conference, I think it was a very rich experience and brought me to a whole new area where there was room to make a mark.

30. That is fascinating. Speaking of the international component which had now come into your world, you had quite a few visiting professorships spanning '91 to 2009 at Chicago, the Max Planck Institute, Washington School of Law, University of Singapore. Is there anything you'd like to say about these?

I think what happened when I was trying to figure out what that first conference should be, was that somebody said, "You should do international work because you get such good trips." That was true. I was invited to many interesting places, including the Max Planck Institute in Munich, Germany; the National University of Singapore; the University of Tasmania and Swinburne University in Australia; the University of Copenhagen, Oxford University, and now here. If you do international work there's just nothing better than to be able to spend some time in other countries and to learn how other people do things.

I was in Australia a few years ago and they were grappling with some cases that were very similar to US cases. It was interesting to see how they were thinking about the US cases because it was very different from how we in the US think about them. Being able to spend time at Oxford prior to Brexit was also fruitful because I was able to learn much more about EU law. I think I was invited to these place because I had moved into the international field when it was relatively new for intellectual property scholarship. And I benefitted from the invitations because I learned a great deal about these new issues that I was thinking about.

31. Which brings us to the Goodhart professorship. What were the circumstances of your invitation to Cambridge for this position?

I have zero idea. I was sitting at my desk when I received an email saying, "Would you like to be the Goodhart Professor?" A friend of mine was a former Goodhart Professor,

²⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, 15 Apr. 1994, 33 I.L.M. 81 (1994) (TRIPS Agreement).



Jane Ginsburg²¹, I don't know if you interviewed her. She had been the Goodhart Professor at a time that I was writing with her [2004-5], so I was actually here in this very room that I'm sitting in right now, working on a book with her. I think I was here for maybe two weeks at the beginning of her tenure and then almost two weeks at the end. So I was here close to four weeks. I never imagined they'd ask me, but when I received the email, I knew exactly what the house looked like; I knew what this room looked like. I was very excited so I said yes.

The email said that the professorship would start in three years and that's the way it had been for Jane too, she was offered it in one year and then it started three years later. We do that too, we offer appointments to Global Law Professorships very far in advance so that the appointees can arrange being away. But I never heard another word after saying yes, just nothing, so I thought perhaps they were asking me if I wanted to be *considered* for the professorship but that I hadn't gotten it. Then, about a year later, Richard Fentiman²² emailed me to ask whether I would mind changing years with the next professor, as he would like to come in 2019 to 2020. That's the first time I realised that I actually did have the professorship. So I said, no, I didn't want to switch. In retrospect (given the Covid lockdown) maybe it would have been good to switch, but I didn't. As to who recommended me, I suspect Lionel Bentley²³. Every few years they ask him for recommendations because Jane and he are very good friends and she was a very popular Goodhart. So. I assume it was him.

32. Of course, your time at Oxford gave you a very good sense of the unique Oxbridge collegiate system which, of course, puts the faculty to one side, really, I mean, centre stage is the collegiate life. How do you find this collegiate system?

It's so different. It's incredibly interesting and incredibly interestingly different too. At my own institution the people I know best are on the law faculty. We have lunch together three times a week and at lunch we talk about law issues and from time to time we think of something worth writing together. We don't talk much about other academic subjects. Here the people you know best are the people at your college and there are only maybe two other law people so you hardly ever see them and instead you have all these fascinating conversations about things that are utterly unrelated to your area. High Table is fascinating and it really opens your mind and you wind up reading things you would never have known existed or that you'd be interested in reading. However, it doesn't lead to collaboration on any new articles. So it opens you up but doesn't lead you to a new scholarly project. So it's very different, very interesting. I'm thrilled to have the experience.

33. Is your area of IP law well represented at Cambridge in the teaching faculty?

Yes. I'm extremely lucky about that. When I was at Oxford there were not very many people doing intellectual property. Here there's Lionel, there's Henning Grosse Ruse-Khan²⁴,. Henning does both trade and intellectual property, so he's probably the person I'm closest with, but then there are also all the life sciences people (Kathy Liddell, John Liddicoat).

²¹ Jane Carol Ginsburg, (b. 1955) Morton L. Janklow Professor of Literary and Artistic Property Law Columbia Law School, Goodhart Professor (2004-05).

²² Richard Fentiman, Professor of Private International Law, Fellow of Queens' College.

²³ Lionel Bentley, (b.1964) Herchel Smith Professor of Intellectual Property, Emmanuel.

²⁴ Dr Henning Grosse Ruse-Khan, Reader in International and European Intellectual Property Law



34. I know that Dr Kathy Liddell²⁵ is working on the complexities of stem cell research which, perhaps, is in your line of interest up to a point?

Her group includes people that I know from things that I've done, but the truth is I came here wanting to work with Henning so I've been doing much more on international law than life sciences. Hers is in a larger group with people at the University of Copenhagen and in Tasmania, where I was a couple of years ago. So I have been doing work on the issues she's been looking at for a while. But I hadn't had the chance to work with an international person, so that's why I really wanted to work with Henning. That said, Kathy ran a conference right before the lockdown and I presented a paper there so we've certainly had interactions.

35. What courses have you taught here?

The Goodhart Professor doesn't necessarily have to teach a course, but Henning was going on leave so I taught his course, which is international intellectual property.

36. Any projects that you've been able to complete while here?

I've actually done quite a few things and, of course, now with the Covid 19 lockdown, time is infinite. I did a short project which I presented at Oxford on recent international agreements and their impact on intellectual property. I gave a talk at the Lauterpacht Centre on technological inequality and ways to think about trying to help developing countries become more technologically sophisticated and inventive in their own right. That would allow them to produce and benefit from intellectual property protection rather than enduring a net outflow to access innovations coming from elsewhere. Eyal Benvenisti and the Lauterpacht people gave me several good ideas on how to improve that paper. I'm busily rewriting it.

37. I had the pleasure of interviewing Professor Bill Cornish²⁶ for this archive a few years ago and, as you know, of course, he was the inaugural Herschel Smith Professor and he'd been a collaborator with the Max Planck Institute starting in 1978, as you did in 1998. Did you have much to do with Bill in earlier years?

Yes, back in the day when he was very active yes, I talked to him a lot. As I said, when I began in intellectual property law, there were not that many people in it and he was one of the guiding lights so I certainly read everything he wrote. I was thrilled the first chance that I met him, and all the times I've met him since. When I was at Max Planck I rented his apartment. He had an apartment there which he kept permanently and I rented that apartment and I used his office, so even in absentia I had a lot of contact with him.

38. Apropos the interview I did with him, Professor Bentley in Bill's festschrift, said, and I quote, that Bill was, "The father of intellectual property teaching and scholarship in the UK," and that Bill had been urged by Professor Kahn-Freund²⁷ to take up IP while he was at the LSE in the late sixties. So IP law should be taught in the UK via a German émigré and I wondered what is the analogue in the United States?

²⁵ Kathleen Liddell, Herschel Smith Senior Lecturer of Intellectual Property Law, Director of the Cambridge Centre for Law, Medicine and Life Sciences

²⁶ William "Bill" Rodolph Cornish, QC (1937-), Herschel Smith Professor of Intellectual Property Law (1995-2004), Professor of English Law LSE (1970-1990), Director Centre for European Legal Studies Cambridge, 1990-2004).

²⁷ Otto Kahn-Freund (1900-1979), Professor of Law, LSE (1951-64), Professor of Comparative Law (1964-70), Goodhart Professor (1975-6).



I guess that's true there too. When I tell my students about how I wound up in intellectual property, because Alan Latman was dying, they say, "Why would you take the job of somebody who's dying?" But it was the same story with Alan; the person before him Walter Derenberg.²⁸ He was the guiding light of IP at that time. When he was diagnosed as dying, Alan took his job. So there's been two rather similar handoffs. Derenberg was born in Germany and received his Doctor of Jurisprudence degree in Hamburg, so he was very influenced by the Germans. He was an IP lawyers' IP lawyer, and then Alan became that as well. So, yes, I think American academic IP law was fairly heavily influenced by the Germans too.

39. Since you've been here in Cambridge two major political events have occurred, both towards the latter stage of your tenure. First of all, Brexit is now a reality after three years, and currently we're assailed by the coronavirus crisis. I wondered if you had any comments, as a foreign neutral, on the way that Cambridge and the UK in general have reacted to these important events?

What's the expression? You're asking the pot to call the kettle black, is that the expression? I don't think the UK has reacted well to any of this, but being an American I can hardly say that, since Donald Trump is bungling the US response to the coronavirus as well. So if I weren't here I'd be in a country that prepared even more poorly and is in even worse shape than here. As far as Brexit goes, for an American it's a very hard thing to understand. I think our strength has always been in being a big country with a large market and room for people to move around and find the right place. I think young people in the UK thought that was their future too, so it's really hard for me to understand Brexit at all.

40. Well, Professor Dreyfuss, that brings us to your published work. Are you happy for us to continue or would you like to take a break?

Fine to just continue, but if you want to take a few minutes. In fact let me just go and get some more water.

41. Right. Thank you. Resuming then with your published work. You have a prolific record of publication and it's therefore only possible to obtain a brief overview of your output which spans 1980 to the present, 40 years.

I've looked at three books and one paper to try and gain a sense of your work. I've looked at your 2012 'Neofederalist vision of TRIPS'²⁹, your 2014 'Balancing Wealth and Health'³⁰, 2018 'Oxford Handbook of Intellectual Property'³¹, and your 2018 article on Brexit and intellectual property³².

Just some general points. I've noticed that in your books you have fruitfully collaborated over the years, particularly with Professor Graeme Dinwoodie³³, Professor

²⁸ Walter J. Derenberg. Obituary <https://www.nytimes.com/1975/09/10/archives/prof-walter-j-derenberg-dies-lawyer-was-copyright-expert.html>

²⁹ 2012. Dinwoodie, Graeme B & Dreyfuss Rochelle, *A Neofederalist Vision of TRIPS: Building A Resilient International Intellectual Property System*, OUP, 267pp.

³⁰ 2014. Balancing Wealth and Health: the Battle Over Intellectual Property and Access to Medicines in Latin America (OUP) (Editor, César Rodríguez-Garavito).

³¹ 2018. Dreyfuss, Rochelle E.; Pila, Justine (Eds) *The Oxford Handbook of Intellectual Property Law*. OUP.

³² 2018. Dinwoodie G B & Dreyfuss R C. Brexit and IP: the Great Unravelling? *Cardozo Law Review*, 39, 967-994.

³³ Graeme Dinwoodie, Global Professor of Intellectual Property Law at Chicago-Kent College of Law (2018-), Professor of Intellectual Property and Information Technology Law Oxford (2009-18), St. Peter's College, Professor in Intellectual Property Law, Queen Mary College London (2005-09).



Katherine Strandburg³⁴, and Professor Jane Ginsburg. Perhaps this harks back to your time in science where the work, by definition, was collaborative and you are comfortable with a sense of, perhaps, kinships and collaboration?

I guess that's right. I do like writing with other people - people who know something somewhat different from what I know. I think it has something to do with trying to span more than one field. If I was just writing about the details of some legal doctrine I could do that myself, but because I'm trying to do international and domestic law or science and law it really helps to know people to expand the knowledge base for the article. I've worked with Graeme many times. He used to teach at Oxford, that's how I got to Oxford, because of Graeme. Somebody asked me to write about Brexit and I thought well, I really should do it with somebody from the UK, so that's how I wound up with Graeme. We both have a very similar attitude towards what international law should accomplish and similar attitudes toward what's called deep harmonization (that every country have the same law). I think both Graeme and I have this really fundamental sense of what's wrong with that view. There are good reasons why countries should be able to experiment, but to have some areas where they converge in order to coordinate international activity. But in our view, it's not absolutely necessary for countries to have the same law. Countries are different. They have different creative strengths; they have different cultures; they have different back stories; they have different legal regimes in areas outside of intellectual property. So we've always had this feeling that the world system ought to think about things the way the United States thinks about itself, as a federalist system where every state has power, but there are some places where they agree to stay together in order to be able to create the right level of exchange. That's why we called it neofederalism; it's not a federal system like in the United States, which is one country, but rather a conglomeration of different countries that agree to agree on some issues, but also agree to disagree in some places too. Before the book, we wrote several articles and then somebody suggested that it would make a good book and we thought, okay, we'll just put together the chapters. But, of course, it doesn't turn out that way at all. We had to write the whole thing from scratch, but we didn't know that when we started.

42. So, if I may just ask you a few more questions about the book written with Professor Dinwoodie. You said in the preface that you worked on this while you were at St Catherine's College. Were there any particularly specific advantages to being at St Catherine's while you were working on the book?

Well, he was a professor at Oxford then so it was very advantageous for me to be there while I was on sabbatical. He found out about the Thomas Christensen Fellowship and helped me get appointed. So that's how I wound up at St Catherine's.

43. Apropos TRIPS. The shift in lawmaking from WIPO³⁵ to the WTO³⁶, doesn't this place the TRIPS procedure at the mercy of the fortunes of the WTO?

It is turning out that way. I think people thought that the WTO was on very solid ground and they were delighted with the move because prior to the WTO, international intellectual property lawmaking was in the World Intellectual Property Organisation (WIPO). But all WIPO does is consider the law on patents, trademarks, copyrights, and related forms of exclusivity. Those who wanted to move the system forward had no ability to exchange stronger protection for other benefits. A country that didn't want to have strong IP protection could just said no and that was the end of it. But in the WTO trades are possible. A country

³⁴ Katherine Jo Strandburg, Alfred B. Engelberg Professor of Law, NYU

³⁵ World Intellectual Property Organisation

³⁶ World Trade Organisation



can say, “Okay, if you give us stronger protection then we’ll open our market for more of your manufactured goods,” for example. So it provided a better way to create exchange and to move international IP law forward. Also taking into account the WTO dispute resolution system, people thought the creation of the WTO would put the intellectual property regime on a very solid international footing. Now there is stasis at the WTO and an inability to appoint new judges to the Appellate Body, so the entire system is in doubt. But, hopefully things will improve. There are some glimmers of light at the end of the tunnel in terms of negotiations. What’s going to happen to the Appellate Body I don’t know, but it’ll be interesting.

44. Interesting. Yes.

President Trump believes in bilateral agreements just between two countries, not multilateral arrangements. Almost nobody else believes that bilaterals are better and his term will end eventually. Then things will hopefully go back and the world will become more cooperative. Maybe Covid-19 will do that too by making people realise how integrated the world economy actually is and how much we have to work together. So maybe things will change.

45. Speaking of which, in your view of TRIPS as a neofederalist system, in chapter five of your book, which states, “Retain discretion to experiment with their own laws.” Do you see the EU as one state, or a federation within the worldwide federation?

I think the EU doesn’t know the answer to that question, so I don’t know. If you think about intellectual property I think there is a large group of people who would like to have a much closer association within the EU. They did create an EU trademark. That is, traders can obtain a trademark in the UK that is good in the UK; a mark France and is good in France; and one in Germany that is good in Germany. But a trader can also obtain an EU trademark and then it’s good throughout the EU (though of course, no longer in the UK). So this is an example of the EU becoming a single market and the people who like that may be thinking of doing it on a broader basis. Maybe countries that are not in the EU could join the EU trademark regime; I think there are quite a few countries who might like to. There is also an attempt to create an EU patent. That effort has been going on for many years, but it’s much more controversial than an EU trademark: many people think that the European Patent Convention, which examines patents that can be validated in EU member states, is enough harmonization on the patent front.

Copyright is automatic, so in some ways it doesn’t matter if you have a UK copyright and a French copyright and a German copyright because they’re all automatically created. Still I think there’s a lot of people who would like to see a single EU copyright. But not everybody agrees with these things and if you can’t get the EU to agree, you’re never going to get the whole world to agree. So true, deep harmonization is a long way off.

46. You speak in chapter six of your book about the phenomenon of fragmentation that can produce, and I quote, “Cacophony,” and this reminds me of the interview I had with Professor Martti Koskenniemi in 2009-10³⁷ and his observations on the fragmentation of international law. Do you see parallels in the breaking of an ostensibly large body of law into almost competing subsets?

Yes. Martti teaches at NYU sometimes, so before I came here he gave me all kinds of pointers about the Goodhart Lodge and things that were broken and to be careful about. But

³⁷ <https://www.squire.law.cam.ac.uk/eminent-scholars-archive/professor-martti-koskenniemi>



what I really learned from Martti is about legal fragmentation. He's the person who has done the most to figure out how the international system can work together, even though it is fragmented into agreements on separate—but interrelated—topics. He's shown how one can learn from different agreements and has identified ways to decide disputes under one agreement in a way that is consistent with what other agreements require. He's done a tremendous amount of work along those lines and I have cited him liberally in many of the things that I've written.

47. Which brings us to your book written with Professor Rodriguez Garavito, “Balancing Wealth and Health: The Battle over Intellectual Property and Access to Medicines in Latin America.” I found a review³⁸ by Aurelia Schultz who is Counsel for Policy and International Affairs at the US Copyright Office and she says the book is, and I quote, “Chock full of primary research, interviews with key players and first-hand accounts. It’s not just a collection of essays but a wholly integrated approach. It is a cohesive volume.” I thought that was very high praise. It’s difficult to achieve this with multi authors. How did you reach this?

I hadn't seen that review so thank you for drawing it to my attention, and I'm happy that she said that because we certainly worked hard on it. César³⁹ was originally trained as a sociologist but he is now a law professor, and actually he's at my institution this year as a visitor; he normally teaches in Colombia. He did the major organisational work on the book. He found researchers who would study each of the individual Latin America countries. I was very interested in this question of how countries take these international requirements and then implement them to their own country's laws. Also, why some countries are very successful at implementing them in a way that brings their own interests forward and fulfills them and other countries just let some crazy American write law for them that's just totally incompatible with their needs. So that's what I was interested in. It happened he's interested in that too, but he knew how to do things like devise surveys. He knew all the people; I didn't know any of the people in Latin America but he found people to conduct the empirical research. We chose the countries together. We didn't want to do the entire lower half of the western hemisphere so we tried to choose some small countries, some bigger countries, no country that was too tightly connected to the United States. That's why we didn't do Mexico. After we chose the countries, he found the researchers.

He had a lot of sessions of putting together the questions they would ask, who they would talk to and how they would write this up. Then we met with all of them, all together once, but separately in groups several times. They each wrote up their report on what they had done. Some of these were in Spanish. We hired somebody to translate them, but not somebody who was a good translator, unfortunately, so I wound up rewriting all the chapters. That's why it looks as cohesive as it does, for better or worse, it's a little bit of my voice in all of the chapters. One exception was the chapter on Central America, which was written by an American, actually. Her parents were from one of the countries, so hers didn't need to be rewritten. She's also the person who thought of the title, “Wealth and Health.” Everybody else worked with a script for initial questions and what they should follow up on—César did virtually all of that, drawing on standard sociological research techniques. But for the most part, the researchers were not intellectual property scholars, so the issues addressed by the

³⁸ Aurelia J Schultz. An exploration in local and international factors in balancing wealth and health. *Jl. Intellectual Property Law & Practice*, 2015, 10 (1), 71-72.

³⁹ César Rodríguez Garavito, Associate Professor of Law, founding Director of the Program on Global Justice and Human Rights at the University of los Andes (Colombia).
<https://www.dejusticia.org/en/responsible/cesar-rodriguez-garavito/>



questions were things I suggested. So it required a huge amount of hands-on effort to get that book the way it was. So I'm glad somebody appreciated it.

48. In the preface, written by Professor Kingsbury⁴⁰ and Professor Stewart⁴¹, it states that, "In the 11 countries covered in this book the powerful north has divided and dragooned the developing Central and South American countries into making agreements with TRIPS, CAFTA⁴², etc, which increased local prices of pharmaceuticals without incentivising local production capacity or investing themselves to combat major diseases other than those occurring in rich countries." Do you think this is a fair summary of your conclusions?

Yes, that's an interesting question. So the reason they wrote the introduction is because the book was done under the auspices of their centre, which is the Institute for International Law and Justice (IILJ⁴³). They had actually gotten the funding that we used to do the study. I think the Engelberg Center provided some of it, but mostly it was their funding, so that's why they wound up writing the Introduction. The book is part of a series of books that the IILJ has on different areas of law and the impact of the law on different countries.

Mostly what I'd say we were looking at in that book was how countries that don't have a lot of money provide for access to patented pharmaceuticals. So that was the question that we were asking; it wasn't our conclusion - it was more of a question. We knew that these countries are going to have access problems, we wanted to find out how they dealt with those access problems. We didn't ask a question on whether they going to become innovative in their own right. That's what I'm working on now. At that time the question is can they figure out how to relax the strict requirements of the TRIPS Agreement in a way that will enable them to get the benefits of modern medicine for use in their own countries? Some were better at this than others and the question was why that happens.

Some countries had very strong generic drug industries that supplied research to the legislature showing them what would happen if they met all of the demands of the United States and, to a lesser extent, the EU, and how the price of medicine would go up and also help them to find ways to not do the worst for their countries. Other countries, like Argentina, had a generic drug industry too but they distrusted it; they thought the medicines were fake and so nothing that the industry said was listened to. So Argentina wound up with a very different regime at the end of the day because the expertise they relied on was different. Some countries had welcomed non-government organisations, like Doctors Without Borders, for example, into them. Doctors Without Borders helped these countries think things through; other countries had some of these NGOs at the very beginning when they were negotiating the agreement, but not when they were implementing it, so they negotiated a pretty good deal and then they implemented it badly. So that's what we were looking at. The question was how is access produced and how well did these countries manage to withstand demands from all of the developed countries and the pharmaceutical industry to raise prices.

So we were looking for NGOs, how they affected local decision making, how the generic drug industry affected it, and how doctors performed. For some doctors it was all

⁴⁰ Benedict Kingsbury, (b. 1961). Murry and Ida Becker Professor of Law NYU Law School; Director, Institute for International Law and Justice. Born in Holland and raised in Hamilton, New Zealand. Rhodes Scholar in 1982.

⁴¹ Richard B. Stewart, John Edward Sexton Professor of Law, Director of the Center for Environmental and Land Use Law, both NYU Law School.

⁴² Central American Free Trade Agreement.

⁴³ Institute for International Law and Justice



about them making money, for other doctors it was really about helping their patients. These differences were the sort of things we were looking for in the book.

49. In your experience is this state of affairs also representative of the situation in, for example, Africa or some of the poorer South East Asia countries?

I don't know because I haven't done the research, but I think that some of these countries don't have a generic drug industry. It makes a big difference: having a generic drug industry means that the country already has scientists; it is already making some money from these pharmaceuticals. All this local expertise, as I said, helped in some of the countries we studied. For some of Africa, much of that expertise must come from abroad. South Africa is, of course, different. But some African countries may be in a worse situation than Latin America, where we were looking.

50. Just coming to your conclusion in the book, chapter 14, "Balancing Wealth and Health in a Transnational Regulatory Framework," you say that the promise of TRIPS was largely illusory in raising living standards and improving the quality of life. Here you're dealing specifically with pharmaceutical companies and medicines, but in your experience has TRIPS in general failed across the whole IP board in South America?

I don't know that it's failed across the board. The book is based on actual research. As to the rest of IP, I'm just speculating. I think it's different for copyright, for example, because a lot of countries have a very vibrant music industry or a very vibrant film industry. So you've got Bollywood in India, and Nollywood in Nigeria. With big film industries, there is a very positive story on the copyright side. Many of these countries have music industries that are doing really, really well. So on the copyright side it's not quite the same as it is for patents.

However, it can be the same for things like computer programs and medical textbooks and even elementary school textbooks. Developing countries can have trouble paying for those things and so they have the same problems that you see for medicines. But they are also getting benefits from the system so it's way better than on the patent side. For trademarks, trademarks have not been as controversial as the other forms of IP because everybody has trademarks, every consumer needs some way to decide what product is the one they want to buy and every marketer needs to be able to have a line of communication with their customers and have their rivals not use their marks. So as long as you have a market you need trademarks. Trademark protection has not been particularly fraught in those same terms.

51. Interesting. You mention corruption, on page 324, and in fact this comes up several times in your piece and I wondered whether you thought that overall this is a significant factor in the problems that you discuss and is there anything that can be done to counter it legally or is it a cultural issue?

Yes, the IILJ, the centre for which we wrote the book, also has a big project on corruption so that was something they actually asked us to look at. Corruption comes up in the context that we were looking at because in some of these countries the higher the price of pharmaceuticals, the more government officials can skim off the top. So, they don't have a strong incentive to enact laws that would keep prices down because they will personally make money from keeping the prices up. So corruption is a problem in the pharmaceutical sector. Now, do I think it's going to go away? I'm living in the United States, not right at this minute, but I'm an American and I live in the United States and at least some of the money that's supposed to be going to small businesses to ease the problems caused by Covid-19



appears to be is going to big companies that were not the targets of the legislation. So corruption seems to go on everywhere and it may be increasing not diminishing. Given the problems in the US, I can't comment on corruption in other countries.

52. On page 343 you speak about the confrontation between IP hardliners and domestic interests on access to medicines and it's almost become a war with activists mobilising on both sides of the issue. You say that there's very little customary international law to turn to, although human rights law is progressively coming to the rescue. I wonder where the ICJ stands and whether a case has ever been mooted or would fly on the issue of a right to health?

Before the TRIPS Agreement there was the Berne Convention [1886] and the Paris Convention [1883], both of which are currently administered by the World Intellectual Property Organisation which is an agency of the United Nations. So in theory if you had a problem under either of those agreements you could take it to the ICJ. In theory it has power over Berne and Paris which also cover copyrights, patents and trademarks, but nobody has ever brought an IP case before the ICJ; it's just never happened. In part I think the reason is that countries have to agree to be brought before the ICJ and the feeling is no country would agree to a case about IP in the ICJ. Nobody has ever tried it. So the ICJ doesn't do that. The European Court of Human Rights has had a few IP cases and increasingly the Court of Justice of the European Union has had a few cases that have involved human rights and IP. And the US Supreme Court, of course, has considered the relationship between freedom of expression versus copyright (we don't generally call it human rights; we call it the protection provided by the Bill of Rights). So there have been some cases both in national courts and European Court of Human Rights. It's an increasing development that people are beginning to see the human rights side of these problems.

53. In summary, the picture that you paint is actually quite bleak that if the larger South American domestic pharmaceutical companies which are capable of doing research on local disease, if they were to be given UN funding would that not help them to produce specific drugs that South America needs? Would that be a way of circumventing some of the problems?

People talk not so much about South America, but about India, because India has maybe the strongest generic drug industry in the world and has ambitions to start becoming an originator country themselves. There's a big difference though between being a generic drug company and being an originator and it's turning out not so easy to make that shift. US originator companies have been trying to get into the generic drug business also, and shifting that way is also not so easy. They're just two completely different industries.

I think if anything good comes out of this pandemic it will be recognising the need for building up the capabilities of some of the countries from which these pandemics come. I think China has actually done a huge amount of work on Covid-19 and on viruses more generally, on spotting them and on finding and vaccines for them. Some of the other countries in Asia too, where quite a few of these seem to start. So Indonesia has a virus lab. I think that as we realise that no one country can do it on their own, I am hopeful that we'll start realising we've got to fund people in many different countries to make sure that we're all safe. I'm hoping we're right. I think there are smart people all over the world. Besides, some countries—India is an example—when they decided they wanted to have a bigger presence in the pharmaceutical field, they brought people trained elsewhere back. The people I worked with at Ciba-Geigy, several of them were Indians and some of them went back. Countries recollect their diaspora and put them into the labs there, and that's how things



might change.

54. We come then to your “Oxford Handbook of Intellectual Property Law,” which you edited with Dr Justine Pila⁴⁴. This was a rolling online format of the Oxford Handbook. I wondered how this format was conceived?

Not by me. This also came out of my having been at Oxford because Justine is a Fellow of St Catherine’s, which is where I was. Oxford University Press is always looking for interesting things to publish and they had suggested this book to her. They have a big Handbook series, not in law particularly: history and sociology and many other fields have these Handbooks and OUP was considering the possibility of having ones in law subjects. Justine agreed that if they moved in that direction, she would consider doing one in IP. So they said yes and we decided to edit it together. But putting together a book like that is like herding cats. There were many different authors: we needed authors from all over the world because many of the chapters are about IP laws in specific countries or regions, including the Arab countries and Asian countries. We also had chapters on specific areas in IP and the relationship between IP and other issues, such as the environment. We had, I think, originally something like 40 authors. Everybody worked at his or her own pace. Some people met our timeline and turned their chapter in on time; others were as much as two years late. It’s really horrible for the early authors because by the time the book is ready to publish, change have happened and they must rewrite. OUP was very nice and posted the chapters on line before the book came out. That was really nice. It wasn’t our idea - it reflected the fact that there were so many different people from so many different places.

55. What a difficult job it must have been to organise the authors.

Yes. It really was something. We didn’t wind up with 40 authors, some people just never handed their pieces in and in some cases it was on a really important issue and we convinced somebody else to write it. Unfortunately one person died before publication, but we were able to include her piece.

56. Still on this book. Are you concerned – I’m referring to page 11 – that some new actors and institutions modify IP law. For example the Convention on Biological Diversity says that genetic resources such as medically-important plants are not the common heritage of mankind, but of the country where the plants are found. Is this of some concern to you?

Well, I’m concerned in two different ways about that. The impulse to allow countries to own their genetic resources is that so far, the TRIPS Agreement has been unfair to developing countries because it’s raised prices, but these countries are not innovative in the ways that are protected by intellectual property. So we need to think about how to protect their contributions to the world’s knowledge base. The idea was to give them these rights over genetic resources and also traditional knowledge and traditional cultural expression, such as songs and carpet designs and things like that. The problem is that I don’t think it returns enough to them. I don’t think it’s really a fair trade; I think it’s kind of a sop. So I’m worried about that - that it’s not really giving them what they need to overcome the costs we’ve imposed on them.

The second problem is that these new rights normalise the idea that everything is owned by somebody. If you see something, somebody has to own it. I always say to my

⁴⁴ Justine Pila,, University Lecturer in Intellectual Property Law; Research Fellow, Institute of European and Comparative Law, Oxford. St Catherine’s College



students, my next door neighbours have a beautiful garden. I get to look at their garden and I don't have to pay. They don't have the right to keep me from looking at the garden. So much of what we enjoy in the world is free to us and the idea that we're going to commodify everything really upsets me greatly. So in both those ways I worry about trends like the CBD. I think the altruistic impulse in it is just mis-founded and all that it does is normalise the idea that everything can be commodified and we can charge for everything. Nobody gets anything for free.

57. That's a lovely analogy with the garden, enjoying a garden.

Yes. I tell it to my students and you can see the half of them who want to be practitioners, thinking, "Your neighbor should charge for that garden."

58. Page 16 of the Introduction of this very comprehensive compilation mentions that Australia and New Zealand both inherited an English law system, but modified it to reflect local circumstances and indigenous communities. Can you say something about this and also perhaps how Canada has adapted a mixed modern common law and civil law to provide its IP regimes?

Justine, although she teaches at Oxford, is actually Australian, so she's the one who wrote that. New Zealand, in particular, has really modified its IP law to better recognise the interests of the Māori in a really serious way. So, for example, trademarks. There's a commission that looks to make sure that Māori signs and Māori belief system is not turned into somebody's trademark rights. So under New Zealand law, the Māori have some say in trademark registrations.

The fact of the matter is that they have done it for long enough so the trademark holders in New Zealand don't want to misuse Māori marks. They now understand that that's a bad thing and the public won't like it. So they've really elevated the trademark interests of the Māori and also the interest in Māori cultural expression. They have in the end, managed to create a system within New Zealand where there is a fair return on the use of all of that material. Now it's partly special to New Zealand because the war between the English and the Māori resulting in the Treaty of Waitangi [1840] which has very particular promises in it about the Māori and about their culture and about how it's going to be respected and that the people have rights. Also a lot of Māori go to law school so they know what they're asking for.

Australia is a little bit different because the Aboriginals were not respected in the same way that the Māori were, although there have been some important Supreme Court cases in Australia that protect Aboriginal land. Once you start protecting Aboriginal land you start recognising that they might have different attitudes towards ownership of things. There's no single owner of Aboriginal land; it's owned jointly and the same thing is true of designs for rugs and all of Aboriginal culture's jointly owned. Once they started recognising rights in land, it was fairly easy to move forward and also recognise rights in cultural property. There have been some very important cases in Australia about intellectual property rights in Aboriginal material. There are pictures that reflect Dreamtime, which can be sacred within their system but which people were using to make carpets. That doesn't happen anymore. Now, it is relatively easy to know when designs you see in Australia are genuine Aboriginal designs, approved for sale.

Canadian indigenous peoples—First Nations—are also relatively well organised. They have also had fair success regarding their land, I think a little bit less on their cultural property. I don't think that shift that Australia was able to make, Canada has managed to make, and of course the United States is close to hopeless.



59. In a country like China, is it possible to claim copyright, can an individual author obtain copyright?

Under Chinese law? No, I don't know enough about Chinese law. I think they do have copyright. They belong to the WTO so they must, yes.

60. The final work we look at this afternoon is your paper with Professor Dinwoodie, “Brexit and IP: The Great Unraveling”, in the *Cardozo Law Review*, recently published. Here you venture into UK politics. It's a very intriguing piece. It's very topical, of course, for us and specifically the field of copyright. Am I right in gathering that the UK would probably gain more than it loses and it would be able to adopt a US style copyright act apropos a “narrow, compensation-free private copying exception”?

The background for that piece is there's a libertarian society at NYU and they're all very pro-Brexit people. Prior to Brexit, they decided to do a conference on how wonderful Brexit was going to be. It was going to change all of UK law; the UK was going to be able to have so much better law because it was no longer going to be part of the EU. They asked some people to give papers on specific topics and they asked me to do this one. Not knowing very much UK law I asked Graeme to do it with me.

Our analysis was that things weren't going to change very much; that the UK is still going to have the EU as its biggest trading partner. Since that paper was written, the UK basically said it's going to accept all of EU law until it's time to think about changes, but then when you start thinking about what changes they can make, there's not a lot. They're stuck by what the WTO requires so they can't go outside of that; they're stuck by what the Berne Convention requires, they can't go outside of that, and they still have to do business with the EU. So our conclusion was that there were a few things that they could change. For example, there are some decisions of the CJEU that most everybody thinks are wrong. There's a case called *L'Oréal against Bellure*⁴⁵ about rights over trademarks, everybody thinks that's wrong. So the UK will almost certainly change that. A few other places where they will be able to change things, but the great bulk of the law—it's unlikely to change drastically, at least not for a long time.

What happened at this conference was all of the people who were asked to give individual papers about specific areas of the law were coming to the same conclusion and the organizers decided that's not what they wanted to hear. They wanted to hear that the UK would change. So we were the only ones who actually gave our paper on a specific legal field at that conference. Of course, they disagreed with every word we said, but I think our general conclusion is right: there's going to be less change than the great Brexiteers wanted.

61. Interesting. Despite the fact that some of the judgments, the UK judges were rather unhappy and nevertheless had to apply. You mentioned the shapes and colours and the lax EU registration rules.

Yes, so that area. This is really more Graeme than me, but they'll slowly move back. A case will come along and they'll chip away. Probably they're not going to announce, “Hey, EU, we're ditching everything, forget about us.” They'll slowly chip away. The UK judges are very good judges and they're very persuasive and it wouldn't be terribly surprising if they took the EU along with them a little bit so that the law actually stays similar, but possibly a little more influenced by what the UK wants it doing.

⁴⁵ ECJ. C-487/07 - *L'Oréal and Others. L'Oréal SA, Lancôme parfums et beauté & Cie SNC and Laboratoire Garnier & Cie v Bellure NV, Malaika Investments Ltd and Starion International Ltd.*



62. With patents the situation is different, because these laws fall under the European Patents Convention. But you hinted that the Remainers might thwart the UK's blocking its falling under the ECJ. Do you know what the current state is of this impasse?

This is a really sad thing. I said before that there's been this move to create an EU-wide patent and to make it work, they were also going to create an EU-wide patent court. So an inventor would just go to the European Patent Office to obtain a patent and it would be good throughout the EU. There would be a special court system, the Unitary Patent Court, where patent cases would be litigated.

These two things were regarded as completely dependent on each other; that the patent wouldn't work unless you had the courts. Who were going to be the judges on the courts? Well, they were going to train some new judges, but the most important judges were going to come from the UK and Germany. Originally they thought that the UK could still become a member of this court. The only thing that the UK was going to have to do was agree on the very few issues where the CJEU, the Court of Justice, would have power to review. Most of patent law is not EU law, it's the law of the European Patent Convention (which is not an EU system), but there are a few EU laws, such as the Biotech Directive, which the CJEU could review. What the UK was going to have to do was to agree to abide by the decisions of the CJEU in those few areas. But even those few tiny areas were too much for Boris Johnson and his pals, so they have now said "No go". So I think the whole thing might be dead.

63. Good heavens.

They can't easily go into it once the UK isn't there. It's just much less attractive to everybody, first because the UK is a big market and everyone wanted a patent that would cover that market, second, because they wanted the judges. We wrote this two years ago and the proposal is still languishing.

64. Re the overall picture in IP law on p. 977. You say that the UK would be better off harmonised with the EU. In a nutshell, what are the benefits?

Of harmonisation? The UK market is big relative to most of the countries in the European Union, but it's small relative to the United States, China, Japan, India. Although at some level it shouldn't matter how big your own market is as long as you can sell to the whole world, it does seem to turn out that it does matter; that having a large very accessible market is hugely helpful to innovators for reasons that people understand a little bit, but not entirely. Perhaps innovators are better at knowing what the local market is interested in. If UK innovators no longer have that ready market, it could be a problem.

Look at the countries that are not in the EU but they are in the EEA. Norway, for example. Or think of Switzerland. These countries often go along with EU law because they want the market. I don't think the UK is that much bigger than these other countries that they're going to be able to do things much differently, but what do I know?

65. Well, your Goodhart term is almost complete and I wondered what, looking back, you would consider as the highlights of the stay in Cambridge?

It's too bad we've been quarantined for the last, what, eight weeks. But I really enjoyed getting to know the people at King's College, where I have been a Visiting Fellow. I wanted to be at King's in part because I've always listened to the Christmas Eve broadcast, which goes out all over the world, for at least 20 years so I wanted to be there. That was definitely a highlight - actually sitting in that beautiful chapel and watching it. I would have



liked to have watched the Easter service but, of course, it's not happening or it didn't happen.

I very much enjoyed getting to know Eyal Benvenisti⁴⁶, who's at the Lauterpacht Centre. He used to be partly at NYU, so it's been very nice being able to see him again. Henning, even though I knew him, I didn't know him as well as I know him now. So that was a total pleasure. What I like best is always the people and getting to know the people. But it's also interesting to see the different ways they do seminars and the different ways they handle students. These are all learning experiences. They do a set of workshops with the students, we don't do that, I think it's a great idea. I'm going to try it when I get back. But on the other hand, they don't really get to know the students' names, that doesn't seem to be something they do, but which we think is important.

66. When you return to New York are there any projects to complete that have grown out of your time here?

Well, I think the paper I'm doing with Henning will not be complete, so I'll be finishing that. We were supposed to have a conference at the end of May on the contours of international law. I think we'll probably have it on Microsoft Teams, but my paper won't be finished, so there'll be that. As I said, the paper I gave at the Lauterpacht Centre will be rewritten to incorporate the ideas they gave me. I'm busy rewriting that paper now and I'll probably still be rewriting it when I go back.

But I do feel very grateful to have this house and to be able to self-quarantine in this beautiful house with a gorgeous garden rather than in my tiny apartment in New York City and to be in relatively safe in Cambridge rather than in relatively unsafe New York City. So although it's too bad that my year was partly marred by this, on the other hand I can't imagine a better place to be if I'm going to have to be semi-quarantined.

67. Well, all that remains is for me to thank you so sincerely for such a wonderful interview in these trying times, in less than ideal circumstances. I know that it will be of great interest and value to our audience, which is widely consulted by the Cambridge diaspora and extra-UK legal fraternity. It's very important to keep this record of the illustrious Goodhart incumbents speaking. It's very important to keep it going because it provides our archive with a window on the legal world as it is and, of course, today becomes the past tomorrow. So this facility, which began with Martti, adds to the faculty's histories along with the reminiscences of past scholars. I'm extremely grateful to you for such a wonderful account. Thank you very much.

Well, thank you very much. I mean, you've read my stuff so carefully, I feel sorry for you and bringing things to my attention that I'd never thought about, so it was a great experience for me too. Thank you.

68. It's a real privilege. Thank you very much.

⁴⁶ Eyal Benvenisti (b 1959). Whewell Professor of International Law (2016-), Professor of Human Rights Tel Aviv University (2002-16).

