

# Stanford *Lawyer*

WINTER 2005



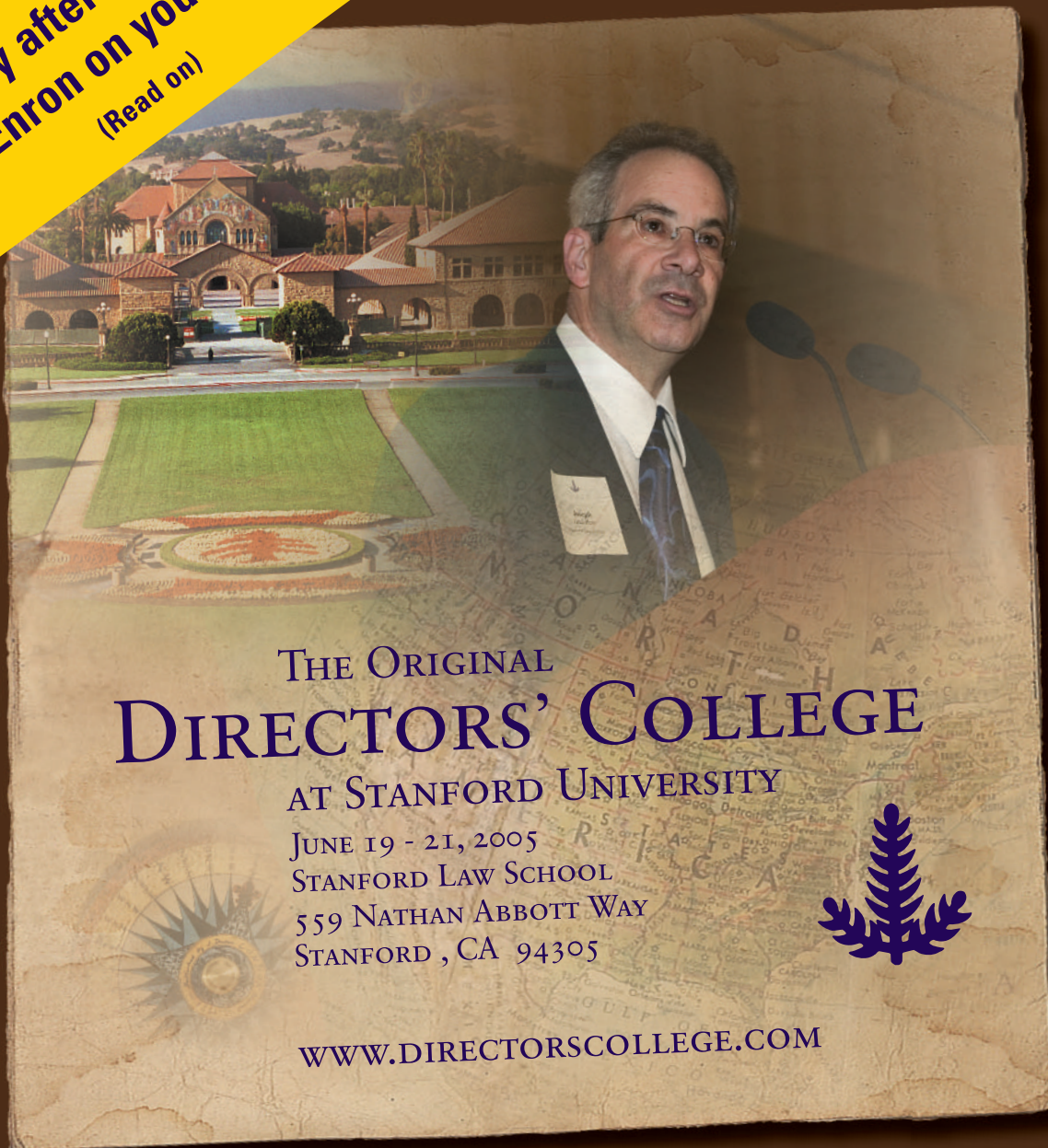
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**Stanford Lawyer welcomes letters from readers.  
Letters may be edited for length and clarity.**

## Letters

### End the Death Penalty

In his insightful essay "The Death Penalty Dance" in the fall '04 issue of *Stanford Lawyer*, Professor Robert Weisberg '79 indicates that various judges and politicians are troubled by our inability to devise a capital punishment system that avoids racial discrimination or other errors. However, political pressures prevent the elimination of the death penalty in the United States. Caught in a dilemma, these public officials make various forms of apologies, institute or push for moratoriums on capital punishment, and continue to tinker with the system.

Although Professor Weisberg does not explicitly say so, there would appear to be considerable hypocrisy or denial in our legal system over the death penalty. Weisberg refers to Justice Harlan's warning in 1971 in *McGautha v. California* about the futility of trying to prescribe standards for the imposition of capital punishment that "can be fairly understood and applied" by judges and juries. Weisberg goes on to discuss the implicit failure of efforts to fine-tune the system in the years since then. He closes by stating that Justice Harlan "might be inclined to mutter a few I-told-you-so's."

Although Justice Harlan may have



been prescient, he certainly was not progressive. In *McGautha* Harlan wrote, "We find it quite

impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." Nevertheless, the Supreme Court concluded in 1972 in *Furman v. Georgia* that such untrammelled jury discretion resulted in constitutionally impermissible arbitrariness and discrimination.

If neither untrammelled jury discretion nor legislative efforts to constrain juries has worked, then the only alternative remaining would seem to be elimination of the death penalty. Even so, Professor Weisberg ominously predicts, "No state death penalty law is going to be abolished in the lifetime of anyone reading this article." One can only hope that the moral qualms underlying the "death penalty dance" will continue to gain traction until abolition of capital punishment can become possible.

DAVID C. BURGESS '81  
*San Jose*



## LAW@STANFORD

A NEWSLETTER FOR ALUMNI AND FRIENDS OF STANFORD LAW SCHOOL

Each month, 75 percent of Stanford Law School alumni receive news of the school and information about upcoming events via the school's e-newsletter, Law@Stanford. To receive your copy of Law@Stanford send your e-mail address to [alumni.relations@law.stanford.edu](mailto:alumni.relations@law.stanford.edu).

If you used to receive the newsletter but have not seen one recently, your firm's or ISP's spam

filter may be to blame. To restore delivery of the newsletter, consult your firm's IT liaison or your ISP's spam protection specifications to learn how to ensure that messages from [alumni.relations@law.stanford.edu](mailto:alumni.relations@law.stanford.edu) will make their way through the filter to you. With most filtering systems, it is as simple as saving that e-mail address to your address book or a "safe" list.



# Creating Interdisciplinary Education

BY LARRY D. KRAMER

Richard E. Lang Professor of Law and Dean

**T**he legal profession today is not what it was even a generation ago. Lawyers now practice from early in their careers in highly specialized areas in which unique tools and knowledge, in addition to traditional training in law, are essential. A lawyer doing corporate transactions needs different skills from a lawyer working on the frontiers of intellectual property. A lawyer working in health law needs a different base of knowledge from a lawyer serving as general counsel to a high-tech firm.

Equally important, an ever-growing number of graduates do not go into law at all. They take their legal training into government service, private sector start-ups, children's services organizations, or a myriad of other fields. This is a wonderful change. It highlights an aspect of law that attracted many of us to law school in the first place—namely, the relevance of legal training to so many areas of society.

But this change underscores a weakness of traditional legal training. We purport to be training young men and women to perform the multiplicity of roles that lawyers play, yet the education we offer remains too narrow and technical. Incoming students and their future employers recognize this shortcoming, and are increasingly demanding programs that provide broader educational opportunities. It is no longer enough to offer survey courses in basic areas of law. Potential students expect law schools to have large international and clinical programs, along with programs in intellectual property, corporate governance, labor, national security, environmental law, and many other areas. They want opportunities to earn joint degrees, study management science, or learn about subjects in other disciplines.

Large law schools have responded to these demands by becoming even larger, supplying all of these programs in-house while adding huge numbers of new students to fund the necessary growth in faculty and support. Some small schools have responded by trying to do the same or by boxing themselves into a niche. The challenge Stanford faces is how to compete in this new environment without losing the smallness and intimacy that has helped make it great.

I believe we can preserve the small size of our student body and faculty while offering students opportunities to explore outside the traditional boundaries of legal education. We can do this by making better use of the resources of the entire university. This will provide students with an unparalleled range of opportunities without having to enlarge Stanford Law School. It will, moreover, allow us to offer law

students these opportunities at a higher level of quality than if we tried to do it all ourselves.

But this is about more than enhanced skills training or keeping up with the Joneses. Lawyers are actors in all of the most important aspects of governing a liberal democratic society. The world needs lawyers who are more than technicians. It needs lawyers with the perspective and vision to make positive contributions to the problems we face, and who can do so with responsibility and comprehension, not merely by settling into the role of lawyer/advocate.

The next generation must find ways to solve incredibly complex problems. It must find ways to preserve our air and water and to supply the resources, food, and energy needed to sustain the

world's population and economy. It must secure peace and international order from dangers that threaten people everywhere. It must find cures for diseases that even

now are wiping out whole portions of the global population. The solutions to these problems do not lie in any single discipline or field. They require understanding and coordination among life scientists and computer scientists, policy makers and legislators, political leaders, religious leaders, businesspeople, bureaucrats, and yes, lawyers.

We have already begun making some changes to create a more interdisciplinary environment at Stanford. We reached an agreement with the Graduate School of Business to cooperate on teaching and course offerings. Faculty at the business school will offer basic financial and business courses for law students, while law faculty will offer basic legal courses for business students. Advanced courses in each school will now be open to business and law school students alike. We hope to reach similar agreements with other schools and departments of the university.

Making interdisciplinary education work will not be easy. To do it right we will need help and thoughtful consideration from all of the stakeholders in our shared enterprise. The faculty and I look forward to your wisdom and good counsel as we embark on this new endeavor.



PHOTO: LINDA A. CICERO



## SCHOLARS EXAMINE HIGH COURT RULING ON SENTENCING

Many of the nation's leading criminal justice experts gathered at Stanford Law School on October 8 and 9 to discuss the impact of the landmark U.S. Supreme Court ruling in *Blakely v. Washington*. The June ruling struck down as unconstitutional Washington State's sentencing system, and, by implication, the federal system as well. *Blakely* set the stage for the Court's January 12 ruling in *United States v. Booker*, which overturned the 17-year-old federal sentencing guidelines.

The two-day symposium, "The Future of American Sentencing: A National Roundtable on *Blakely*," was organized by Robert Weisberg '79, Edwin E. Huddleson, Jr. Professor of Law and director of the new Stanford Center for Criminal Justice. Weisberg used the symposium to launch the new center, which will integrate research, public events, and clinical education in the field of criminal law.

The symposium was held just days after the Supreme Court opened its new term with expedited hearings in *Booker*. The U.S. Justice Department had asked the Court to speed up its handling of this case to resolve the uncertainty over federal sentencing in the wake of the *Blakely* ruling. The timing of the symposium was opportune, allowing attendees to discuss not only what the implications of *Blakely* were for federal sentencing, but what possible remedies the Court and Congress might take to revise them.

"Almost all the participants at our conference predicted that the *Blakely* decision would substantially invalidate the federal guidelines," said Weisberg. "The decision in *U.S. v. Booker* simply confirms the foresight of the participants." The federal sentencing guidelines were designed to constrain the discretion of federal judges in sentencing, and to ensure greater uniformity

in sentencing practices across the country. But the guidelines were controversial from the start. Both criminal defendants and federal trial judges condemned the rigid formulas and mandatory terms they imposed.

In *Booker*, the Justices ruled that if Congress wants mandatory sentencing factors, those factors may have to be decided by juries, not judges. The Court avoided the jury trial requirement by declaring that the guidelines are now merely advisory and not mandatory. "The result of *Blakely* and *Booker* is very ironic," continued Weisberg. "We are back to the kind of discretionary system that the guidelines were supposed to alter. This is likely to be a very unstable compromise. Congress will now explore a wide range of options and is likely to end up constraining judicial discretion all over again."

Among the symposium panelists were the two principal attorneys in the *Blakely* case: Jeffrey Fisher, counsel for defendant, and Michael Dreeben, a U.S. deputy solicitor general who has represented the government in the *Blakely* and post-*Blakely* litigation.

"On the surface, *Blakely* is about assigning determination of sentence to a judge, but it's not about that at all," said Dreeben. "It's not aimed at protecting jury trial either. It's about Justice Scalia's view of judging as opposed to judges interpreting the Constitution. He's saying 'Stop me before I annihilate the jury and give my

lower court colleagues the power to do the same.'"

Introduced as "the man who gave us *Blakely*," Fisher said, "I won because I gave the Court a clear test, and the other side had difficulty giving the Court a test that would restrain egregious violations of the jury trial right."

The *Blakely* symposium was the first in a series of symposia that the new Stanford Center for Criminal Justice will sponsor. In January, the center cosponsored a one-day symposium with the National Council on Crime



PHOTO: MISHA BRUK

**OPPONENTS ENJOY A LAUGH** at the opening session of "The Future of American Sentencing: A National Roundtable on *Blakely*." (Left to right) Host and moderator Robert Weisberg '79, Edwin E. Huddleson, Jr. Professor of Law, Stanford Law School; counsel for the defendant in *Blakely*, Jeffrey Fisher, associate, Davis Wright Tremaine; counsel for the government, Michael Dreeben, deputy solicitor general, Department of Justice; and Rory Little, professor of law, U.C. Hastings College of Law.

and Delinquency on juveniles and the criminal justice system. "Upcoming events will likely include a symposium on reassessing gun control, gun rights, and the Constitution, to be held in the late spring or summer," said Weisberg.

Additional plans for the center are still being finalized. Among the possible activities it will engage in are sponsoring and publishing original research, hosting visiting fellows, running clinical programs, and developing interdisciplinary courses and programs with other parts of the university.

—Judith Romero



## CITES

“Our clients want to pay taxes.”

—KATHLEEN M. SULLIVAN, Stanley Morrison Professor of Law and former dean, during her December 7, 2004, oral arguments before the U.S.



PHOTO: LINDA A. CICERO

Supreme Court. She represented Michiganders who want to purchase wine directly from out-of-state wineries.

Michigan is one of many states that limit the ability of out-of-state wineries to ship wine directly to consumers. There are three consolidated cases at issue, *Granholm v. Heald*, *Michigan Beer & Wine Wholesalers Assoc. v. Heald*, and *Swedenburg v. Kelly*, pitting the Constitution’s Commerce Clause against the 21st Amendment.

“A fundamental part of the problem is that fans are envious of players’ successes and salaries—an attitude exacerbated both by well-publicized player misbehavior and, in basketball



PHOTO: THEODORE H. MOCK

and football, race, where the players are black and the fans are white.”

—WILLIAM B. GOULD IV, Charles A. Beardsley Professor of Law, Emeritus, writing in the *San Jose Mercury News*, on November 26, 2004, following the fight between Indiana Pacers basketball players and Detroit fans. He is a former chairman of the National Labor Relations Board and a former baseball salary arbitrator.

“We can’t wait until the Arctic has melted or until the West is on fire before we seriously push for legislation on climate change.”

—JEFF BINGAMAN '68, Democratic senator from New Mexico, speaking at Stanford University on October 15, 2004. He was the keynote speaker at the fourth annual International Sustainability Days Conference, sponsored by the Stanford Institute for the Environment. Bingaman is the ranking member of the Senate’s Energy and Natural Resources Legislative Committee.

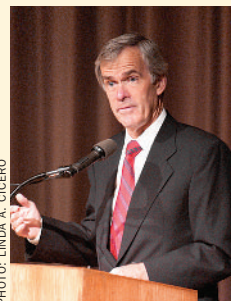


PHOTO: LINDA A. CICERO



PHOTO: ROBERT MARCH

“From the time I voted in 1976 to reinstate the death penalty, we had 25 people on death row. Thirteen had been exonerated by the courts, and 12 had been executed. Now those are lousy odds. I’m a pharmacist. If I filled prescriptions at that rate, I wouldn’t be around very long.”

—GEORGE H. RYAN, former governor of Illinois, speaking on December 6, 2004, at Stanford Law School, about why he went from being a proponent of the death penalty to being an opponent. As governor, in January 2003, Ryan commuted the sentences of all 167 inmates on Illinois’s death row.

“The First Amendment can’t give special rights to the established news media and not to upstart outlets like ours. Freedom of the press should apply to people equally, regardless of who they are, why they write or how popular they are.”

—EUGENE VOLOKH, Edwin A. Heafey, Jr. Visiting Professor of Law, writing in *The New York Times* on December 2, 2004. Volokh argued that bloggers are entitled to the same legal rights as traditional journalists. His blog, *The Volokh Conspiracy*, has more than 10,000 daily readers.



PHOTO: UCLA SCHOOL OF LAW



“We stand at a moment of rare opportunity for the United States in the Israeli-Palestinian conflict. Yasir Arafat’s death makes a comprehensive settlement feasible once again.”

—WARREN CHRISTOPHER '49, senior partner at O’Melveny & Myers and former U.S. secretary of state, writing in *The New York Times*. His December 30, 2004, column, titled “Diplomacy That Can’t Be Delegated,” argued that the Bush administration must take a more active role in brokering peace between Israel and the Palestinians.





PHOTO: MISHA BRUK

**PUBLIC  
INTEREST  
LAWYER  
OF THE  
YEAR**

Peter Bouckaert '97, senior emergencies researcher at Human Rights Watch, was named the 2004 Public Interest Lawyer

of the Year by the Stanford Public Interest Law Foundation. The second annual award was presented at a dinner held at the Stanford campus on November 16, 2004. Bouckaert has played a central role in calling international attention to some of the world's most urgent humanitarian crises. He was featured in a cover story in the summer 2002 issue of *Stanford Lawyer*.

**PERILOUS TIMES**

First Amendment scholar Geoffrey R. Stone spoke at Stanford Law School on November 17, warning that the United States has a long history of sacrificing civil liberties during times of war. Stone, professor of law and former dean, University of Chicago Law School, and former provost of the University of Chicago, recently published the book, *Perilous Times: Free Speech in Wartime*.

Among those attending the speech were three Stanford Law School faculty members who were Stone's colleagues at the University of Chicago. (Left to right) Lawrence Lessig, C. Wendell and Edith M. Carlsmith Professor of Law; Gerhard Casper, professor of law, president emeritus, Peter and Helen Bing Professor in Undergraduate Education, and senior fellow, Institute for International Studies; Professor Stone; and Larry D. Kramer, Richard E. Lang Professor of Law and Dean.



PHOTO: MISHA BRUK

With the Marines in Iraq



PHOTO: U.S. MARINE CORPS

**EVER SINCE ENROLLING** at Stanford Law School, Mike Zummer '06 has been itching to fight for his country—both as a soldier and as a prosecutor.

Zummer, 33, who hopes to work as a trial attorney in counterterrorism at the Justice Department, studied one year at the law school before he received orders to report to Iraq. Zummer spent four years with the Marine Corps after college, and though he had become inactive by the time he enrolled at Stanford, he switched to active duty so he could serve.

"Watching Marines fighting on television is extremely difficult for a former Marine," wrote the captain, now stationed in Al Asad, Iraq, in an e-mail. "I felt that if Marines were fighting, it was my duty to be there."

Zummer, who is training Iraqi police, said that several classmates have kept in touch by e-mail. Elliot Fladen '05, who described Zummer as even-headed and principled, said, "I didn't want Mike to go, but I know he's making a difference where he is. They need talented people there to help run the show."

Zummer added that his experience in Iraq has only strengthened his resolve to prosecute terrorists: "Once I've done my share here, I want to do my part in the courtroom to fight for my country by putting those who would do it harm in prison."

He expects to return to law school in fall 2005 or spring 2006.

—Mandy Erickson



## ROBERT KLEIN '70: A MAN ON A MISSION

Parents of sick children often go to extraordinary lengths to help their offspring, but few can go so far as Robert Klein '70 (BA '67). Klein's fight to help his son, 14-year-old Jordan, who has juvenile diabetes, began with his researching the disease and its treatments. When he became convinced that the best possibility for a cure lay in stem cell research, for which the Bush administration has restricted funds, he wrote California Proposition 71, the \$3-billion stem cell initiative; donated \$3 million of his own money for the campaign; and led the fund-raising drive for its adoption. Prop. 71 passed with 59 percent of the vote on November 2.

Klein, 60, then lobbied for the position of chairman of the new Independent Citizens Oversight Committee (ICOC), which will dole out \$300 million a year over a decade for stem cell research. The 29-member committee, which will oversee the California Institute for Regenerative Medicine, in December unanimously approved Klein for the post. He will serve a six-year term.

"Bob has the experience, organizational and leadership skills, along with the passion and dedication, to make the state's investment pay off in scientific advances that will result in new therapies for a host of diseases," said Paul Berg, Cahill Professor in Cancer Research, Emeritus, at the Stanford School of Medicine. Berg, a Nobel laureate, was on Prop. 71's scientific advisory board. "As president of the ICOC, he will also be an effective interface between the scientific and medical community, and the governor's office and the legislature."

Klein, president of Klein Financial Corporation, a real estate investment banking company with expertise in financing and developing affordable housing, has pursued a number of interests in the public sector. For six years he was a board member of the State of California Housing Finance Agency, and he currently serves on the board of the Global Security Institute, whose aim is to reduce the risks of nuclear weapons. He also helped pass a \$1.5 billion mandatory federal funding bill for the National Institutes of Health to research diabetes.

Klein turned his attention to stem cell research when he

realized that treatments for diabetes were mainly band-aid approaches that stave off blindness, amputations, and kidney failure. Many scientists are placing their hopes for a cure in stem cells, which are found in blastocysts, fertilized human eggs that have divided a few times. Stem cells develop into the various cells that make up the human body.

People with a number of diseases, including Alzheimer's and Parkinson's, and conditions such as spinal cord injuries, may eventually benefit from stem cell research. But much of the research is now focused on diabetes, the most common disease for which stem cells are seen as a possible cure, and one for which physicians have already seen some successes.

The hope is that scientists will be able to coax stem cells into becoming insulin-producing pancreatic cells, then transplant those cells into diabetic patients, who lack the ability to produce insulin. Pancreatic cell transplants from cadavers have worked for diabetics, though side effects from medications taken to prevent organ rejection pose problems, especially for children. Scientists hope they can create insulin-producing pancreatic cells that are compatible with recipients.

Before stem cells can provide transplant material, however, researchers need to figure out how to convince these cells to turn into insulin-producing pancreatic cells. Even if they fail in this endeavor, they still believe the knowledge they gain from stem cell research will help them understand certain diseases better, allowing them to develop new drugs or other treatments.

In 2002, California became the first state to pass a law permitting stem cell research; it is also the first to fund

research on stem cells. Lawmakers from Illinois, Maryland, New Jersey, and other states are introducing bills to support funding for research as well.

"[Klein], having pretty much authored the ballot initiative, understands fully what the initiative promised and what has to be organized and done in order to fulfill that promise," Berg said. "I believe Bob sees and understands the historical significance of what he and California have done, and he is determined not to let that precedent fail or be caught up in bickering or controversy."

—Mandy Erickson



PHOTO: AMANDA MARSA LIS

## LAW AND ECONOMICS PROGRAM RECEIVES \$3 MILLION GIFT

The John M. Olin Foundation has awarded Stanford Law School a final gift of \$3 million, capping off a total of \$8.2 million the law school has received from the foundation for its John M. Olin Program in Law and Economics.

Since its inception in 1987, the John M. Olin Program has provided students and faculty with a keener understanding of the economic impacts of the law. One hundred thirty-five distinguished scholars from the United States and abroad have given presentations at the Law and Economics Seminar, while faculty have produced 296 working papers, most of which have been published in premier journals of law and economics.

In addition, the school has awarded 369 faculty and student research grants, which have supported studies on such topics as the effect of corporate governance on firms' market values, the growth of employment discrimination cases in the 1990s, an evaluation of coupon settlements in antitrust cases, and the role of institutional investors in opposing antitakeover provisions in initial public offerings.

"It would be difficult to overstate the importance of what the John M. Olin Foundation has done for Stanford," said Larry D. Kramer, Richard E. Lang Professor of Law and Dean. "With its support, we have built one of the finest programs in the country in law and economics; this final, very generous gift will help ensure that the future of that program is equally bright."

One of the measures of the success of Stanford's law and economics program is the number of students who have gone on to academic careers. Graduates of the program are now teaching in the economics departments or law or business schools at Columbia, Cornell, Emory, Harvard, London School of Economics, Minnesota, Northwestern, Pennsylvania, Stanford, Texas, University of California at Berkeley, University of Southern California, and Wisconsin.

"The John M. Olin Foundation is really the organization that has caused this to happen," said A. Mitchell Polinsky, Josephine Scott Crocker Professor of Law and Economics and the director of Stanford's John M. Olin Program. "Understanding the relation-



PHOTO: STEVE GLADFELTER

A. Mitchel Polinsky, director of the John M. Olin Program in Law and Economics

ship between law and economics helps lawyers and policymakers think more clearly about the problems they work on. It helps them avoid designing laws that are inefficient and lower the welfare of society."

The program has recently expanded to include more post-doctoral training and to focus on empirical research. Three new appointments on the law faculty reflect this research emphasis: Robert Daines in corporate law, Mark Lemley (BA '88) in intellectual property law, and Alison Morantz in employment law. In addition, Professor Daniel Kessler '93 of Stanford's Graduate School of Business has become a professor, by courtesy, at the law school, teaching antitrust law.

The John M. Olin Foundation, launched in 1953 by the late inventor and industrialist, encourages research on public policy in social and economic fields. It is spending itself out of existence and is expected to cease operations in 2005.

## MEXICAN SUPREME COURT JUSTICES VISIT LAW SCHOOL

A two-day symposium, "Democratic Accountability and Rule of Law in Mexico," brought together Mexican federal officials and supreme court justices, with Stanford faculty and students. The October event was sponsored by the Rule of Law Program, Stanford Law School, in cooperation with the interdisciplinary Stanford Center on Democracy, Development and the Rule of Law.



PHOTOS: JOHN LESCHOFIS

(Far left) Hon. Genaro David Góngora Pimentel, associate justice, Mexican Supreme Court



(Left) Hon. Olga Sánchez de Cordero, associate justice, Mexican Supreme Court

(Right) Jenny S. Martinez, assistant professor of law



(Far right) Thomas C. Heller, Lewis Talbot and Nadine Hearn Shelton Professor of International Legal Studies





## Comparative Law Scholar Passes Away

**MAURO CAPPELLETTI**, Lewis Talbot and Nadine Hearn Shelton Professor of International Legal Studies, Emeritus, died in Italy on November 1. He was 76. A native of Italy, Cappelletti joined the Stanford Law School faculty in 1970, became a senior research fellow at the Hoover Institution in 1985, and was named to the law school's Shelton Professorship in 1987. He became emeritus in 1996.

"Mauro Cappelletti was one of the early European legal scholars to bring to the United States European ideas about American law and to Europe American ideas about European law," said Larry D. Kramer, Richard E. Lang Professor of Law and Dean. "He was an internationally recognized leader in a number of important areas of legal scholarship. Stanford Law School greatly mourns his loss."

Born in 1927 in Folgaria, Italy, Cappelletti attended the University of Florence, where he earned a law degree with high honors in 1952. That same year, he was admitted to the Italian bar and began a three-year clerkship to

its president. In 1956, he earned a second Florence degree, the "libera docenza" (in university teaching), after which he spent two years as a research fellow at the University of Freiburg in Breisgau, Germany.

Cappelletti began his teaching career in 1957 as a professor at the University of Macerata School of Law and moved to the University of Florence in 1962, where he also founded and for 14 years directed the Florence Institute of Comparative Law. At the European University Institute, which he joined as a professor of law in 1976, he chaired the law department from 1977 to 1979, in 1983, and again from 1985 to 1986.

From 1979 to 1985, he directed and contributed to a landmark project that resulted in a multivolume series, *Integration Through Law: Europe and the American Federal*



*Experience*. The project, which consisted of more than 20 coordinated studies conducted by joint teams of European and American scholars, examined similarities and converging trends in the legal systems of the various nations of Europe. He also studied the availability of legal aid to the poor and indigent, the subject of another major project conducted from 1973 to 1979 and published in four volumes as *Access to Justice*.

Beginning in 1978, Cappelletti became, in addition, a member of the Standing Committee to Reform the Italian Code of Civil Procedure. "Research that looks only backward is mere erudition," he was quoted as saying. "Research ripens into scholarship only when it is able to fulfill the important task of contributing to a better understanding of present and actual problems and realities, thus providing a rational basis for building the future."

Honored in many countries, Cappelletti was elected a member of the Royal Academy of Belgium, a fellow of the British Academy, a member of the Academy of Italy, and a member of the Institut de France. His wife, Mimma, died on January 2. He is survived by his daughter, Matelda.

### PROFESSOR EMERITUS BILL LAZIER DEAD AT 73

**William C. Lazier**, Nancy and Charles Munger Professor of Business, Emeritus, died on December 23 in Newport Beach, California. He was 73. A highly respected figure in business and investment law, with decades of corporate experience across a range of industries, the 1957 Stanford MBA graduate was an expert in the law and practice of accounting.

In 1982, Lazier returned to Stanford to lecture at the Graduate School of Business, where he taught management of smaller companies and real estate for the next 11 years. Drawing on his business school teaching experience, he became a lecturer in accounting and small business management at Stanford Law School in 1990, and was named to the law school's Nancy and Charles Munger Professorship in Business in 1993. He became emeritus in 2002. At the time of his death, he was developing a new accounting course for 2005.

"Bill cared deeply about his work, his students, and everything he did," said James C. Collins (MBA '83), a colleague at the business school with whom Lazier coauthored *Beyond Entrepreneurship: Turning Your Business into an Enduring Great Company* and *Managing the Small to Midsized Company: Concepts and Cases* in the 1990s.

"Bill Lazier was a dedicated and inspiring teacher who had an unusual gift for bringing his broad business experience to life in the classroom," said Larry D. Kramer, Richard E. Lang Professor of Law and Dean. "He was also a wonderful and generous person. The many colleagues and students who worked and studied with Bill at Stanford over the past 20 years will miss him."

Lazier was the general partner of Bristol Investment Company, which he founded in 1971. He is survived by his wife, Dorothy; son, David Lazier; daughter Linda Escalera; daughter Ann Mahowald; and nine grandchildren.



PHOTO: LINLY HARRIS

## Brian Morris '92 Scores Seat On Montana High Court

**PLAYING FOOTBALL** has plenty in common with practicing law, according to Brian Morris '92 (BA '86, MA '87). "With both of them you have to learn the rules and figure out how to adapt the rules to your situation," he said without a hint of jest. "To play football you need perseverance and discipline. Being a lawyer involves the same skills."

For Morris, certainly, the two vocations have been intertwined: A full football scholarship first brought him to Stanford, where he played varsity fullback for four years. And his fame as a high school ball player in Butte, Montana, helped win him a seat on the supreme court of Montana, where voters choose their justices. Morris captured the spot in the November 2 election with 56 percent of the vote and took office on January 3.

Morris, who was inducted into the Butte Sports Hall of Fame in 2003, attributed part of his victory to his athletic notoriety: "That helped me," he said. Of course, his appeal came from more than football. He had been state solicitor for four years, so "my name was in the paper a lot," Morris said, adding that his Stanford background also helped.

The retirement of Justice Jim Regnier prompted the 41-year-old Morris to run for the seat. "When an opportunity opens up, you have to seize it or let it go by," he explained. In campaigning opposite Ed McLean, a 58-year-old Missoula district judge, he said, "My youth was an issue, but I was able to neutralize that by talking about the experience I'd had."

After law school, Morris clerked for Judge John Noonan on the U.S. Court of Appeals for the Ninth Circuit and for Chief Justice of the U.S. Supreme Court William Rehnquist '52 (BA '48, MA '48). He then moved to The Hague, where he represented U.S. citizens and businesses whose property had been seized during the 1979 Islamic Revolution in Iran.

Morris headed home to Montana in 1995; there he became a partner at Goetz, Gallik, Baldwin & Dolan in Bozeman and met his wife, Cherche Prezeau, also a lawyer and Montana native. Morris left the firm in 2000, and he and Prezeau, now with two young sons, spent a year in Geneva, where Morris worked for the United Nations Compensation Commission representing people and businesses that had suffered losses during Iraq's 1990 invasion of Kuwait. Morris left that job when he received an offer to become state solicitor; the family returned home to Montana, where a third son soon arrived.

It was at Stanford Law School that Morris first decided he'd like to become a judge. As a research assistant for the late Gerald Gunther, who was writing a biography of Judge Learned Hand, Morris said, "I was exposed to the day-to-

day life of a judge and decided that I could do this some day, that I'd like to try it."

Morris's friends from law school said they weren't at all surprised that Morris ran for—and won—a seat on the Montana Supreme Court. "He's level-headed. He looks at things from a lot of angles," said David Domenici '92, executive director of the See Forever Foundation, which runs a charter school in Washington, D.C.

Miles Ehrlich '92 added that he never thought Morris would be happy as a firm lawyer. "He's a guy who's always wanted to be in the arena," said Ehrlich, a U.S. attorney in San Francisco. He added that he expected the 6-foot-3 Morris to win: "Being a hometown football hero doesn't hurt. He's a big, good-looking guy, but he doesn't come across as arrogant. He's got a nice public presentation."

Campaigning for a statewide seat in a place the size of Montana proved a logistical challenge, Morris said: "It's a huge state. I logged 30,000 to 40,000 miles on my car. In Montana, people still expect to see you if they're going to vote for you."

Morris, though homegrown, had the disadvantage of having left the state for college and law school. His opponent attended the University of Montana School of Law and was able to use the local alumni network. "I didn't have that," Morris said. "But I had the Stanford name, and you'd be surprised how many alumni are here in Montana."

Donations from his law school friends enabled him to run TV commercials, he said. "They provided a source of money my opponent didn't have." A term on the seven-member Montana Supreme Court is eight years. Morris said he expects his life will be "a little more cloistered" on the bench than it was when he was a practicing lawyer. "I'll have less contact with lawyers and colleagues," he noted. "Luckily I have a busy life outside work. I'll do one term and see how I like it."

—Mandy Erickson

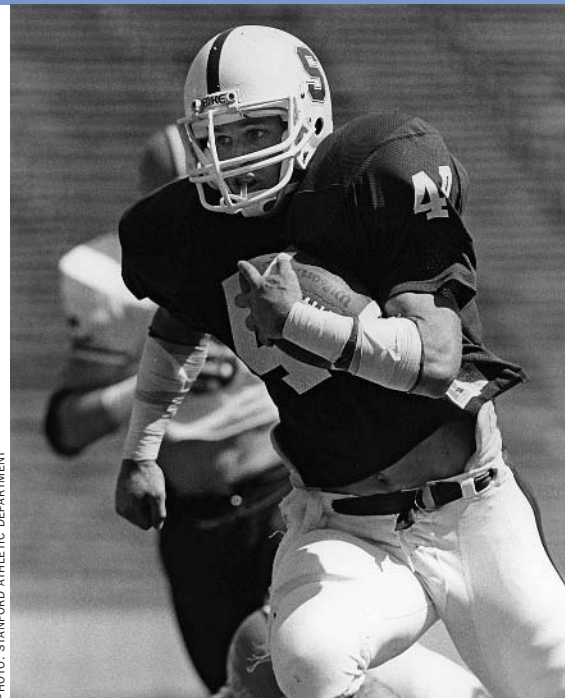


PHOTO: STANFORD ATHLETIC DEPARTMENT

**RUNNING FOR DAYLIGHT:** Brian Morris played fullback for Stanford University from 1982 to 1986.



## MAKING THE GRADE

**JUDGES ON THE MOVE:** In August, U.S. District Court Judge **Vaughn R. Walker '70** took over as chief judge for the Northern District of California. In January, Superior Court Judge **Alden E. Danner '65 (BA '58)** began a two-year stint as presiding judge of Santa Clara County, California. Hon. **Gustavo Gomez '89 (BA '85)** won election in November as a superior court judge, Los Angeles County. In September, Hon. **John Paul Kennedy '66** was appointed to the Third District Court in the state of Utah.

**KUDOS:** In October, **Marshall L. Small '51 (BA '49)** celebrated his 50th anniversary with Morrison & Foerster. In honor of this achievement, Morrison & Foerster has funded an endowed lectureship in law at Stanford Law School. **Michele Landis Dauber**, associate professor of law and (by courtesy) sociology and Bernard D. Bergreen Faculty Scholar, received a National Endowment for the Humanities fellowship for 2005 to complete her book, *The Sympathetic State*. In December, Hispanas Organized for Political Equality presented **Jenny S. Martinez**, assistant professor of law, with its 15th annual Ray of Hope award. It was announced in December that **Isaac Stein '72 (MBA '70)** would receive Stanford University's Gold Spike award in honor of his service to the university. **Ann Marie Rosas '07** edged out **Howard J. Bromberg JSM '91** to capture first place in the expert class at the inaugural National Law School Chess Tournament held in December. In October, **Stephen D. Easton '83** was awarded the inaugural American Inns of Court Warren E. Burger Prize for outstanding scholarship.

**APPOINTMENTS & ELECTIONS:** In a particularly close and contentious election, **Richard M. Murphy '75** was reelected in November to his second term as mayor of San Diego. In November, **Mark A. Lemley**, William H. Neukom Professor of Law, was named to the Electronic Frontier Foundation's inaugural advisory board. **Kathleen M. Sullivan**, Stanley Morrison Professor of Law and former dean, was appointed of counsel to Quinn Emanuel Urquhart Oliver & Hedges, where she will build a new appellate department in Redwood Shores, California. Former Maine assistant attorney general **John R. Brautigam '91** was elected in November to the Maine legislature, representing the city of Portland. In December, **Clarence Otis, Jr. '80** was named CEO of Darden Restaurants Inc., which owns and operates more than 1,300 Red Lobster, Olive Garden, and other restaurants nationwide. **Ronald J. Gilson**, Charles J. Meyers Professor of Law and Business, was appointed in December to the board of directors of American Century Investments family of mutual funds.

**THE PRESS ANOINTS:** *Business Week* named *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, to its list of top 10 business books for 2004. *Free Culture* is authored by **Lawrence Lessig**, C. Wendell and Edith M. Carlsmith Professor of Law. In December, *The New York Times Magazine's* fourth annual "Year in Ideas" feature listed "popular constitutionalism," as articulated by **Larry D. Kramer**, Richard E. Lang Professor of Law and Dean, in his recent book *The People Themselves*, as one of the most noteworthy ideas of the previous 12 months. **Anthony D. Romero '90** was named by the *New York Post* as one of the "Top 25 Most Outstanding Latinos" of 2004. *The National Law Journal* named **Mary B. Cranston '75 (BA '70)**, **William H. Neukom '67**, and **Deborah L. Rhode**, Ernest W. McFarland Professor of Law, as members of its inaugural editorial board.

## HONORING A LIFETIME OF SCHOLARSHIP

**LAWRENCE M. FRIEDMAN** The



University of Tulsa College of Law and the *Tulsa Law Review* held their fourth annual Legal Scholarship Symposium, focused this year on "The

Scholarship of Lawrence M. Friedman." The two-day symposium was held in Tulsa, Oklahoma, on September 30 and October 1. Friedman is the Marion Rice Kirkwood Professor at Stanford Law School.

**JOHN HENRY MERRYMAN** On October



22, the American Society of Comparative Law gave its inaugural Lifetime Achievement Award to John Henry Merryman, Nelson Bowman Sweitzer

and Marie B. Sweitzer Professor of Law, Emeritus and Affiliated Professor in the Department of Art, Emeritus. Merryman is a director of the society, and was a member of the editorial board of the *American Journal of Comparative Law* from 1963 to 1986.

**JOHN HART ELY** The *Yale Law Journal*



held a two-day symposium, "On Democratic Ground: New Perspectives on John Hart Ely." Leading scholars from across the country met in

New Haven, Connecticut, on November 12 and 13 to present original work inspired by the constitutional scholarship of the late Stanford Law School dean.

During a memorable dinner held on Stanford's Main Quadrangle, Larry D. Kramer was formally installed as the Richard E. Lang Professor of Law and Dean. The Friday program featured remarks by Stanford President John L. Hennessy (left) and U.S. Supreme Court Justice Stephen Breyer (BA '59) (right).



Alumni Weekend opened Thursday with the Dean's Circle dinner. Isaac Stein, JD/MBA '72, who recently retired as chairman of Stanford's Board of Trustees, was the keynote speaker. The topic of his speech was "Does Stanford Need A Law School?" His conclusion, "Yes."



# Alumni Weekend



William H. Neukom '67 (right) took a moment to converse with Sarah Delson and her husband, Larry D. Kramer, Richard E. Lang Professor of Law and Dean.

(Left to right) LaVerne and Hon. Wade H. McCree '84 relaxed during Saturday's tailgate party luncheon with Class Correspondent Nathan E. Arnell '84.





**Alumni Weekend** was once again a smashing success. Over the weekend of October 21 to 24, more than 1,000 Stanford Law School alumni, family, and friends came to campus to renew old friendships, engage in stimulating discussions, and have some plain old fun. And no one who was there will soon forget the Stanford men's swim team who interrupted a Friday afternoon panel on outsourcing by jogging through Kresge Auditorium wearing nothing but Speedos, yelling "Stanford swimming!"

Those attending this year's festivities were also treated to the Stanford Law School Decanal Installation Celebration, at which Larry D. Kramer was formally instated as the law school's 12th dean. Tents were set up on Stanford's Main Quadrangle, a spectacular location for an evening of cocktails and dinner. Stanford President John L. Hennessy and U.S. Supreme Court Justice Stephen Breyer (BA '59) were among those welcoming Kramer to the university.

Befitting the Stanford setting, several engaging and timely panel discussions were held before enthusiastic crowds. The most memorable was the Saturday morning panel on judicial independence, featuring three seated alumni judges from the nation's highest courts and moderated by Kramer. [See article on p. 15.] There was an overflow crowd as well for the Friday morning panel on U.S. foreign policy and presidential politics held at Memorial Auditorium. Coming just weeks before the presidential election, the discussion was at times spirited, with former U.S. secretary of defense William J. Perry (BS '49, MS '50) expressing his support for Senator John Kerry, and former U.S. secretary of state George P. Shultz defending President George Bush's foreign policy.



Hon. Roscoe S. Wilkey '54 (BA '51), and his wife, Norada, celebrated his 50th law reunion.

And it wouldn't have been Alumni Weekend without plenty of time for socializing. The festivities opened Thursday evening with the traditional Dean's Circle dinner. The weekend closed with what for many is one of the highlights of the affair—the reunion dinners—a chance for alumni to get together with members of their class to reminisce and enjoy the evening.

Alex Michael Duarte '84, wife Patricia, and sons Michael and Matthew attended the Stanford football game held Saturday afternoon at Stanford Stadium. Unfortunately, the Cardinal lost to Oregon by a score of 13 to 16.



PHOTO: KEN BARRETT '84

# 2004

The a cappella singing group Stanford Fleet Street Singers entertained diners during the Friday alumni luncheon held in the law school's Cooley Courtyard.







Reunion Chair Stephen M. Ray '79 (left) and Class Correspondent Jeffrey M. Lipshaw '79 enjoy a moment during the volunteer leadership summit.



Assistant Professor of Law Jenny S. Martinez spoke on "The War on Terror: Human Rights vs. National Security" as part of Classes without Quizzes.

Members of the Class of 1974 provided a warm welcome to Larry D. Kramer, Richard E. Lang Professor of Law and Dean. Kramer visited and spoke at each of the 10 class reunion dinners held Saturday evening.



PHOTO: MISHA BRUK



PHOTO: MISHA BRUK

The rain held off for most of the weekend, but on Saturday evening it let loose. Despite the inclement weather, the reunion dinners once again proved to be one of the most popular events of Alumni Weekend.

EXCEPT WHERE OTHERWISE NOTED, ALL OF THE PHOTOGRAPHS FOR ALUMNI WEEKEND WERE TAKEN BY STEVE GLADFELTER.





# JUDICIAL INDEPENDENCE

## THE ROLE OF POLITICS AND THE RULE OF LAW

On the eve of the 2004 presidential election, a standing-room-only crowd of some 1,700 Stanford alumni gathered at Memorial Auditorium to participate in a spirited and stimulating discussion on judicial independence. The panel was moderated by Dean Larry D. Kramer and included three judges, all Stanford alumni, from the nation's highest courts: Hon. Stephen Breyer (BA '59), Hon. Ronald M. George '64, and Hon. Pamela A. Rymer '64.

**Kramer:** The topic today is judicial independence and the role of politics. This has been an issue in American history from the beginning. In the 1780s, before the Constitution was adopted, there were enormous battles in the states over the role of courts, as judges made their first embryonic efforts to exercise something like judicial review. Those battles grew in the 1790s and became one of the central political issues in one of the most divisive periods in American history. The famous case of *Marbury v. Madison*, which is today often mis-cited as the origin of judicial review, was the signal event in the court's retreat from what amounted to a major political assault by the Jeffersonians. That began a series of cycles that have run across American history as judges and legislators and presidents have had at it—whether it was the *Dred Scott* decision in the 1850s, or the fight over the New Deal and FDR's famous court-packing plan.

We're now in the middle of one of these cycles, which began with the decision of the Warren Court in *Brown* in 1954, and has seesawed back and forth ever since. The last 10 years have seen the question of judicial role grow into

a much more important issue, with what academics have started to call the second Rehnquist Court. This was the beginning of a period of activism, striking down federal statutes on federalism grounds, while continuing to exercise the Court's authority on issues of human and civil rights. There have been an equally great number of controversies in the states, such as the fight in California over the death penalty, and the battles in Texas over the elected judiciary.

At the same time, there have been significant developments in international law. Courts around the world have begun to follow the American example in exercising judicial review—in some countries with ease, in others with the same kind of controversy we saw here. The creation of new international courts has thrust courts into the forefront of political fights over the proper role of judicialized justice in bringing about international peace and in bringing international criminals to heel.

On almost every front, then, we're in the middle of a process of trying to figure out what kind of authority we want courts to have. Judge Rymer is on a court that has been

at the center of quite a lot of controversy in recent years, most recently in the Pledge of Allegiance case. Let me put the question to you, Judge Rymer. Do you think judges are too independent?

**Rymer:** Well, we're probably not independent enough of Justice Breyer's court [laughter]. And probably the Chief Justice would say that he's not independent enough of us and our habeas jurisdiction. . . . My activist colleagues would probably say that the judge's primary role is to protect individual rights and to achieve social justice, that social justice is the guiding principle of the judicial branch. And they would say that they should view the Constitution as a set of very broad principles to be interpreted in light of contemporary problems. In my own view, this kind of judicial philosophy leads a judge . . . to behave more like a legislator than like a judge.

My own view is that the judicial model is preferable to a legislative model of judging, where judges bring judgment—as Hamilton said in *Federalist* 78—not will, to bear on discrete issues that are presented to a court for decision in the context of the particular facts in which the case arises. That we make decisions which are channeled by precedent and are constrained by our duty to declare and to apply the law as it is, rather than how we as a matter of personal interest, would prefer that it be. And that the Constitution sets out powers and rights that are to be interpreted on a reasoned basis from a particular constitutional provision, informed by history and constitutional precedent and subtle understanding of what the text of the Constitution means.

**“The courts are divided. The society is divided. Why the majority of nine as opposed to the majority of 250 million?”**

—Stanford Richard E. Lang Professor of Law and Dean Larry D. Kramer

Over time this leads to a more consistent, coherent, predictable development of the law for the jurisdiction. It does have an effect on judicial independence because to the extent that courts behave more like a legislature and make policy decisions to achieve an individual judge's view of social justice, we do begin to traipse on the legislative turf, and that in turn inspires the real legislative body to get a bit upset. . . . It also tends to undermine public confidence in the role of the courts, because it is not acting within our basic confines of making decisions based on judgment.

**Kramer:** Let's talk a little more about what you mean by activism. Does that mean that a conservative judge who purports to be making those decisions based on original intent and text isn't being an activist, even when he or she is striking down laws? Is it only the sort of judge who views the job as trying to achieve social justice that is exhibiting activism, but the other kind of judge is not?

**George:** [Judicial] activism, like many things, is in the eyes of the beholder, and sometimes boils down to whose ox is getting gored. But I would echo the comments made by Judge Rymer with regard to there being doctrinal reasons based on the constitutional doctrine of separation of powers, for judges not overstepping whatever activ-



**“[Judicial] activism, like many things, is in the eyes of the beholder, and sometimes boils down to whose ox is getting gored.”**

—California Supreme Court Chief Justice Ronald M. George '64







**“I do have colleagues I have to convince. I have to get at least four others—that makes five. Five is an important number in my life.”**

—United States Supreme Court Justice  
Stephen Breyer (BA '59)

ism is, [for] not improperly encroaching on the role of the other branches of government. But also, as was her suggestion, there are pragmatic reasons for avoiding overreaching activism. And those involve the fact that the *Federalist Papers* do describe the judiciary as the weakest branch of government. Some would quarrel and say it's the strongest, but regardless, it is the most vulnerable in terms of retaliation by the other two branches. So to the extent that the judiciary is excessively activist, it invites that kind of behavior by the other branches, and then impairs the role of the judiciary as a separate and coequal branch of government.

**Breyer:** One of the problems of judicial independence is how you get a system for identifying some bad apples without threatening the independence of the judges. The answer to that is very complicated. We have life tenure. That's what Jefferson said about the Supreme Court. He said, “They never retire, and they rarely die.” You have that system, too, in the federal courts. And it's worked pretty well.

You [motioning to George] have a somewhat different system. One of the problems in the state courts in America at the moment is, what do we do about elected judges? Think of a very, very unpopular criminal defendant or civil case, what's your reaction going to be? Does that person deserve a fair trial? You'll say “yes.” But if he's unpopular enough you'll say, “But not him.” It's not that easy for a judge to conduct a fair trial if he's up for election next week. That's a problem of judicial independence.

Now, a different problem is what you're calling judicial activism. By judicial activism what you mean is, in part, a judge who doesn't decide it the way I'd like him to decide it. . . . My brother is a federal judge in San Francisco. He says, “You know, it's wonderful. I don't have to convince any colleagues.” Ah, but he's subject to review, by three or by a big panel. And I do have colleagues I have to convince. I have to get at least four others—that makes five—five is an important number in my life. I often say to my wife, Joanna, “I've written a dissent this time that will soon be a majority, because it will convince five.”

Learned Hand pointed [out] when someone asked him that question. He said, “Those books on that wall. It's called precedent. It's called the rules of law.” They don't answer the questions in our court, not many in yours [motioning to George], and few in yours [motioning to Rymer], but they give us a clue, and they try to hold us in check, and they try to define the area where there are legitimate differences. And all I can say is, in my experience, . . . judges whom I've met by and large try. They come to different conclusions, but they by and large try. If too many don't, there will be changes in that complex system that we've built up over 200 years, because it is a democracy, and I would not like to see changes that weaken the independent authority of the judiciary. ■



**“To the extent that courts behave more like a legislature and make policy decisions to achieve an individual judge's view of social justice, we do begin to traipse on the legislative turf.”**

—United States Court of Appeals for the  
Ninth Circuit Judge Pamela A. Rymer '64



# THE TAX MAN

Professor Joe Bankman is one of  
the nation's leading tax law scholars.  
He's also among the most effective—  
helping write a tough new tax shelter law  
that netted California \$1.5 billion last year.

BY NINA NOWAK

**T**he saying, “Nothing is certain but death and taxes,” may have been true when Benjamin Franklin coined the phrase in 1789, but with today’s fancy tax shelters, it sometimes seems as if certainty has been confined to death alone.

Couple an increasingly arcane tax system that can be manipulated by sharp accountants and attorneys with a growing number of wealthy individuals and corporations looking to pay fewer taxes—and it’s no wonder that tax shelters have become big business—so widespread that state and federal governments are losing tens of billions of dollars each year in uncollected taxes.

Joseph Bankman is trying to change all that. Bankman, the Ralph M. Parsons Professor of Law and Business at Stanford Law School, is one of the nation’s leading tax law experts. His scholarly research and writings have had a major impact in academic circles, and his real-world proposals for more severe tax shelter penalties and simplified filing have inspired lawmakers to enact tougher laws and approve a pilot program that might benefit millions.

When California found itself in the middle of a huge fiscal crisis in 2003, Bankman joined forces with two state legislators to author a groundbreaking bill that imposed severe penalties on users and purveyors of tax shelters, along



with an amnesty program for tax shelter users who paid up. The amnesty program has netted the state about \$1.5 billion. The huge take, collected from about 1,000 individuals and corporations looking to avoid hefty penalties, was vastly more than the \$90 million the California Franchise Tax Board predicted would be recovered.

The offer for tax evaders to come clean before the April 15, 2004, deadline was hailed by the *Los Angeles Times* as “one of the most wildly successful programs in memory—an incidence of Sacramento thinking smart.” The program made a noticeable dent in the \$14 billion shortfall the state had anticipated for its 2004–05 budget, and is being offered again for the 2005 tax season. It earned Bankman and his coauthors—Assemblyman Dario Frommer (D-Glendale) and Senator Gil Cedillo (D-Los Angeles)—widespread kudos for foiling the state’s tax evaders, one of whom coughed up a check for \$30 million to cover his abuses.

“The success of the program showed how good he [Bankman] was,” said Frommer. “He rolled up his sleeves, held lots of meetings with different stakeholders, and helped us do this right. We now have one of the toughest penalties in the country, not just for people using tax shelters, but for the promoters of tax shelters as well.”

Bankman was as pleased as anyone at how lucrative the amnesty program turned out to be. But it didn’t exactly surprise him. “It just goes to show how many tax shelters are out there and what a huge market exists for them,” he said.

### THE MAKING OF A TAX WATCHDOG

Bankman, 49, was born in Iowa, the son of a camera store owner who had a passion for business and a belief that everyone ought to pay his fair share of taxes. He went on to earn his BA from the University of California at Berkeley in 1977 and his JD from Yale three years later. The easygoing academic, whose common-sense approach and chummy manner belie the rigor of his scholarship, started his career as a tax attorney in Los Angeles. He joined the law firm of Tuttle & Taylor as an associate in 1980, and soon discovered

an affinity for academia while coteaching a course on tax policy at the University of Southern California. He left practice in 1984 to teach fulltime at USC and in 1989 moved to Stanford Law School, where he has been ever since.

“He [Bankman] is one of a handful of top tax law academics in the country,” said David Weisbach, professor of law and director of the Law and Economics Program at the University of Chicago. “His work has been influential in a variety of fields.”

Reuven Avi-Yonah, professor of law at the University of Michigan, agreed: “He wrote two of the most famous articles in tax law in the past 50 years.” Both articles were coauthored with Thomas D. Griffith, professor of law at USC. The first, published in 1987, was “Social Welfare and the Rate Structure: A New Look at Progressive Taxation,” in *California Law Review*. The second, published five years later in the *Tax Law Review*, was “Is the Debate Between an Income Tax and a Consumption Tax a Debate about Risk? Does It Matter?” Bankman’s reputation as one of the top experts in tax shelters was solidified with the publication of a third groundbreaking paper, “The New Market in Corporate Tax Shelters,” in *Tax Notes* in 1999.

Bankman has found ingenious ways to share his intellectual preoccupations with his two sons—Sam, 12, and Gabe, 9—both loyal San Francisco Giants fans. In 2002, he published a lighthearted op-ed in the *San Jose Mercury News* on a possible baseball strike, suggesting a high tax on teams and players that went on strike. The tax could be avoided—but only if for each game missed, teams offered nickel hot dogs to fans for a game, and players donated money to local charities. He wrote, “I’ve spent my lifetime writing obscure tax articles. This is my one chance to be a hero to my kids. Go Giants!”

### WHAT IS A TAX SHELTER?

Bankman’s work asks the seemingly simple question, “What is a tax shelter?” Some consider any tax-favored investment, such as an IRA or a home mortgage, a shelter. Others say that when a company moves offshore, it is finding a tax shelter. But according to Bankman these transactions don’t qualify as tax shelters. “By investing in an IRA and taking tax benefits, a taxpayer is simply following the incentives that Congress set up. The same is true when a company relocates offshore,” said Bankman.

The types of dealings that Bankman has his eye on are paper transactions, unrelated to a taxpayer’s ordinary business or investments, that involve no real assets and no possibility of economic profit or loss. These deals produce huge tax losses in a manner that is inconsistent with legislative intent and existing case law, says Bankman. Most shelters involve what are called third-party accommodation agencies,

such as foreign banks, whose role as an intermediary in the transaction is required for the elaborate schemes to work.

The shelters allow large companies to play shell games with profits, often channeled through offshore institutions in far-flung locales like Bermuda, the Cayman Islands, or Panama. The Cayman Islands, in fact, are now the fifth-largest banking center in the world, indicating just how pervasive offshore shelters have become, according to David Cay Johnston, the Pulitzer Prize-winning reporter for *The New York Times*, who probed the tax shelter business in his book *Perfectly Legal: The Covert Campaign to Rig Our Tax System to Benefit the Super Rich—and Cheat Everybody Else*.

The demand for tax shelters has exploded in the past two decades. The enormous wealth generated in the 1990s economic boom only fed the hunger. As more people earned more money, they sought new and improved ways—however dicey or inconsistent with the intent or common understanding of the law—to protect their gains, and abusive tax shelters proliferated.

“It’s a little like the ‘perfect storm,’” said Bankman. “The right elements came together at the right time.” As a result, the market for tax shelters has “gone retail,” as he puts it, with schemes so complex, they go over the heads of many of the clients who purchase them. An entire industry has evolved, comprised of accounting firms, banks, and law firms charging a king’s ransom to keep the wealthy one step ahead of the IRS. And the market is growing. Individuals with as little as \$10 million in capital gains to shelter can benefit from these products, which are marketed openly and aggressively. Shelters have outstripped audits as the biggest income generator at some of the nation’s most respected accounting firms, according to reports in *The Wall Street Journal*. A February 7, 2003, *Journal* article on the tax shelter business revealed that, in 2000, BDO Seidman’s tax sales team, dubbed “the Wolf Pack,” managed to rake in more than \$100 million in tax shelter sales, accounting for more than half of the firm’s tax revenue.

### **TAX SHELTERS ARE BIG BUSINESS**

Bankman was the first academic to put a price tag on tax shelter activity. In a 1998 *Forbes* magazine cover story about corporate tax setups, he estimated the government’s lost revenue at \$10 billion a year—the first time anyone had attempted to calculate the overall costs of tax shelter abuse.

Bankman says he wouldn’t have attempted to pinpoint a specific number at all if it hadn’t been for Larry D. Kramer, former law professor at New York University and now Richard E. Lang Professor of Law and Dean of Stanford Law School.

“It was Larry who convinced me to go public with the

\$10 billion figure,” said Bankman, who met Kramer in 1998 while Bankman was a visiting professor at NYU. “He said it would be important for policy purposes, that it would give the issue a kind of relative merit important to legislators, which otherwise would have been tough to get.”

Kramer said he knew politicians would normally “gloss over Joe’s claim as just another academic piece,” if no number were attached to it. Luckily, he says, Bankman possessed just the right mix of modesty and moxie to bridge the disparate worlds of academia and government and get the issue on the table. “Most people manage to get their feet planted firmly in one world or the other, and it’s hard to be taken seriously in both,” said Kramer. “But Joe is a respected academic who also does just as much important work in the policy world—a pretty unusual combination.”

As Kramer predicted, the \$10 billion figure took on a life of its own, earning Bankman high-level supporters, as well as enemies. Lawrence H. Summers, former secretary of the treasury for the Clinton administration and current president of Harvard University, cited Bankman’s figure repeatedly in official speeches and Treasury Department reports, calling shelters the biggest threat to the tax system. But naysayers like prominent Washington, D.C., tax lobbyist Ken Kies also chimed in, attacking the accuracy of Bankman’s figure, saying it underestimated the recent progress government had made in reeling in the most egregious abuses.

For Bankman, who first began pursuing the topic while conducting academic research on the role of accountants in tax evasion, his snowballing notoriety gave him leverage in raising awareness of the issue among legislators. In 2003, he helped California write the first modern anti-tax shelter statute, which substantially increased penalties for transactions that fail to pass muster under existing law.

“In the past,” said Bankman, “corporate shelters were mostly plays on the so-called audit lottery. Taxpayers knew the shelters were unlikely to survive government challenge. They hoped the deals wouldn’t get noticed on audit and knew the worst case outcome was a 20 percent penalty, in addition to the tax they owed.”

The California statute, along with new methods for detecting shelters, make the audit lottery much less attractive. However, the system faces a new challenge. Some courts are throwing out anti-tax shelter doctrines that have been part of the law for more than 50 years. These courts find the doctrines overly vague and inconsistent with a literal reading of the statute on which the taxpayer relies.

“The problem with this approach,” said Bankman, “is that the income tax is riddled with potential loopholes. Without these doctrines, a shelter that is based on a loophole will work. By the time Congress has plugged one loop-





hole, shelter promoters will have found another, which will work until it is plugged. Making the income tax loophole free is like retrofitting all of the buildings in California to make them earthquake proof. There aren't enough resources in the world to do it. And all it takes is one shelter, if it is known ahead of time to work, to siphon off most of the corporate tax revenues."

In the short run, Bankman favors keeping and enforcing existing doctrines as a way to safeguard the public treasury. In the long run, Bankman sees substantial tax reform as the only solution to the tax-shelter problem.

### **SIMPLIFYING TAX FILING**

Whichever direction the shelter battle goes, Bankman isn't stopping there. He is currently helping to devise a simplified tax-filing plan for California, called Ready Return, which he says will eliminate the headaches associated with tax form preparation for more than 3 million Californians. Many individuals, especially those for whom the mere mention of April 15 induces a cold sweat, are sure to like Ready Return. It's a safe bet, however, that tax preparation firms won't like it because it would cut into their fees.

"Filing a tax return now is difficult even for taxpayers with simple returns," said Bankman. "The taxpayer has to save the W-2 and 1099s, find the right return to file, and so on. A large portion of the population cannot even understand the instruction booklet that accompanies the forms."

Bankman's solution is a tax filing system designed for

wage income earners who do not itemize deductions. With the Ready Return, the state wouldn't wait for those individuals to send in a tax return. Instead, it would send them a bill, which they could simply pay.

Since the state already keeps track of income from employers as well as past filing information, it already has a pretty good idea of what these individual taxpayers owe, even before they fill out all the tedious paperwork. With the Ready Return, the state would calculate the tax liability for each of these taxpayers, and send each one a return with the amount of tax owed, or refund due, already filled in. The taxpayer would then have a number of options. He or she could sign and return the form, use the form as a starting point from which to calcu-

late his or her tax liability, or give the return to his or her preparer to check.

The proposed system, which would also be available online, would be voluntary. If a taxpayer preferred, he or she could simply throw away the Ready Return and file a traditional form instead. Bankman says the system would be cheap for the state to maintain, and would not pose any privacy concerns, because it relies only on information the state already has on file.

Bankman helped convince the state tax authority to allocate \$200,000 on a pilot program to test the proposal. Ten thousand taxpayers will get a Ready Return during this filing season; another 10,000 similarly situated taxpayers will serve as a control group to measure the impact of the program. The pilot program was opposed by Intuit, maker of TurboTax and other tax preparation programs. Intuit argued that the program interferes with private enterprise, and is expected to oppose any full-scale enactment of the Ready Return.

But Bankman has been through this sort of thing before. His battle with accounting and law firms over tax shelters has provided him with a wealth of experience in the rough-and-tumble world of public policy. And he remains mostly upbeat in spite of it all. "I think the folks in the pilot program are going to love the Ready Return. And if our survey data shows this is true, we've got a pretty good chance of getting the state to move forward," said Bankman. Once that happens, one can be sure that he will turn his sights on yet another part of the tax system that needs fixing. ■

# DECONSTRUCTING THE TAX CODE

Professor Joe Bankman explains what's wrong with the federal tax code, why a consumption tax makes more sense than an income tax, and why corporations shouldn't pay any federal taxes at all.

## Editor: What's wrong with the federal tax code?

Bankman: The common perception that it's too complicated is correct. The complaint that a lot of complexity hurts business is also correct. Most of the complaints about the tax code are correct, although the payoffs for the cure are usually exaggerated.

**What's wrong with complexity?** It's expensive for business to deal with complexity, and it drives the average citizen nuts. It fosters a sense of paranoia. If you can't understand a provision, you assume that someone else must be taking advantage of it. Sometimes that might be true, but other times it's not. Finally, to the extent that we treat similar transactions differently because of the complexity in the law, we're going to discourage productive investment and invest unwisely. All else being equal, complexity is an evil.

**Complexity also adds to the cost of complying with, and collecting, taxes. How much does it cost to collect income taxes?** Around 15 percent of the tax rate is a ballpark figure. So if we raise a trillion dollars, the cost of raising that is at least \$150 billion. This includes the value of everyone's time when they do their taxes, everything they pay to have taxes done, everything business pays to have taxes done, along with the cost of running the IRS and other government agencies.

**That is a huge number.** Yes. On the other hand, all taxes are expensive to maintain. Even a sales tax, or VAT [value added tax], costs about 10 percent. It isn't enormously cheaper because you've got to have a huge bureaucracy to collect the sales tax, and you've got to have all the merchants collect the sales tax. Look at Europe. They've got lots of different VAT rates, and every new product that's introduced has to be evaluated to see what rate it qualifies for. There was a case several years ago involving Head & Shoulders dandruff shampoo—was it a cosmetic or a medicine? If it's the former, it's taxed at a high rate. If it's the latter, it's taxed at a low rate. When you go to a European accounting firm or law firm, you still see lots of tax lawyers, even though they have a VAT. The income tax is more expensive to comply with, but all taxes are expensive to maintain.

**So complexity costs money.** Yes. And it also distorts investment. That's another important cost—maybe more

important. Current tax law discourages investment because we tax investment, and it distorts the decision to invest in one area rather than the other.

**Doesn't complexity also make it easier to slip in a tax break for a special interest?** Probably true. And some of the tax breaks are not to corporate America, but to individuals with a cause. So you might have a tax break for higher education or for teacher supplies.

**Doesn't complexity also make it easier to devise tax shelters?** That's right. You can think of a tax shelter as someone interpreting the language of a law to produce a result that's never intended. Today, we have to worry about whether any of these tens or hundreds of thousands of rules can be misinterpreted. If you have a simpler system, you don't have so many points of vulnerability.

## What are the alternatives to our present tax code?

There's only one main alternative with different varieties, to tax consumption rather than income. There are several reasons to do this. It is easier to measure consumption than income, which makes it simpler to enforce, and less expensive to comply with and administer. A consumption tax also lets individuals and businesses invest without the distortive effects of tax laws. And by not taxing investment there is reason to believe that the economy will grow faster. How could you tax consumption? One way is the value added tax, which, as I've already explained, is complex to implement. A simpler way is to create what is in effect an unlimited IRA. You can deduct anything you put into it—\$3,000 or \$3 million. You're only taxed when you take money out, and you can take the money out whenever you want. Then, by definition, we'd only be taxing consumption, because you wouldn't withdraw money until you wanted to spend it. It's a cash flow tax, and the way to do it is to have an unlimited IRA for everyone.

**Are there other forms of consumption tax?** We now have two forms of IRAs—the “regular” IRA and the Roth IRA. In a Roth IRA, you get no deduction for contributions, but you're never taxed on your investment returns. It turns out, for reasons I won't go into here, that the two forms of IRAs are equally advantageous for taxpayers. In one, taxpayers get a deduction going in but are taxed later on; in the other, there's no deduction going in, but no tax later on. We could



have a consumption tax based on the Roth IRA model. It would look just like a graduated payroll tax. I think we're less likely to adopt this form of consumption tax.

**Why is that a consumption tax?** Because it has the same effect. If one IRA leaves taxpayers in the same position as the other, then by definition we can say you're in the same position if we have an explicit consumption tax or this odd form of payroll tax.

**But wouldn't a payroll tax have a much greater impact on wage earners? And how would other forms of compensation, like stock options, be treated?** You've pointed out two important things. Comparing an unlimited IRA consumption tax to a payroll tax shocks people, because they say, "Well, a payroll tax, we're just taxing the working stiff. We're not taxing the wealthy as well." In fact, any form of consumption tax will raise distributive concerns. The people who will benefit from an unlimited IRA are the people who are making an investment. They'll benefit by getting a deduction going in. If you're poor, and you don't invest anything because you don't have any money to invest, you get none of the break, and you'll be bearing a proportionately larger share of the tax burden. It's also true with the Roth IRA. Both are going to favor the wealthy, and under plausible circumstances, both favor the wealthy just as much. The second point you make is quite correct and quite subtle, that we can't really distinguish income from labor and capital. A good example is someone in Silicon Valley who gets stock options. That is why we're more likely to implement a consumption tax through an unlimited IRA than a payroll tax. And if we want a progressive consumption tax, we're more likely to have an unlimited IRA than a VAT. With an unlimited IRA consumption tax, we can have progressive rates, so that somebody who spends \$1 million a year pays a higher tax rate than someone who spends \$20,000 a year.

**Aren't there ways to mitigate the impact of a sales tax on lower income people?** The most obvious thing to do is what Europe does, by having different rates on different goods, so that luxury goods get taxed at a higher rate. The problem is that you've got to classify every good sold on whether it's a luxury or necessity. And the fact of the matter is, even Bill Gates drinks milk, maybe, and even poor folks in Houston need air conditioning. So that turns out to be a messy and expensive way of building progressivity in, and it doesn't do a very good job. You could give a rebate to people with low incomes for the sales tax they pay. The problem with that is then you really have two tax systems. You have the new sales tax system, and you have to maintain an income tax to know whether you get the rebate. My guess is

that it's more likely we would simply go the unlimited IRA route rather than adding on a federal sales tax.

**How would businesses be treated under a consumption tax?** If you had a consumption tax, what's the proper level of tax on corporate income? The answer is zero, because corporations don't consume. Imagine putting your auto supply business inside this IRA, metaphorically. Everything you put in is deductible off your salary income. The auto supply business can make a trillion dollars, but you won't be taxed until you take that money out of your IRA to spend it. That would simplify life for business taxpayers. It simplifies life, though, by effectively getting rid of the business tax.

**What percent of federal taxes is provided by the corporate income tax?** Maybe 15 percent or 20 percent, when you consider other sources of income that individuals get from investment. But the vast majority of what we're getting comes from salary, so the argument in effect is, let's just write off the business income. That would reduce the aggregate amount of money we spend on tax planning, because it's more expensive for businesses than for individuals. It would help our economy because businesses would no longer invest in one arena rather than the other for tax reasons, because effectively we're not taxing them anymore. And it would lead to a greater pie over the long term because reducing the tax on business income to zero would stimulate investment. It has the unfortunate effect, for some of us, of concentrating most of the gains at the very top end. But economists agree that we get a bigger pie with the consumption tax. If anything, that's understated because economists consider mostly the fact that investment is going to increase, and don't count the payoff from getting rid of complexity—the tax planning costs and the tax planning distortion. So you have to ask the question, would you like a society where the pie is much bigger for the top 2 percent, and a little bigger for a lot of people, but the pie is more unequally divided?

**Isn't there a way of getting rid of complexity that doesn't put the tax burden more on the mass of people?** There probably isn't. If all we care about is helping people at the bottom with complexity, there are lots of things we can do. But if what we're talking about is reducing the aggregate cost of collecting taxes, there doesn't seem to be a way of doing it that doesn't benefit the wealthy more. So there's a trade-off between efficiency, getting the biggest pie, and what some people would call equity, having the distribution of the pie the way you want it. Most everybody would rather come up with a tax reform plan that gave us all the payoffs of a consumption tax, and benefited just the middle class and the bottom, but it's just not in the cards. ■

# TACKLING A TOUGH TURNAROUND

After helping build Kirkland & Ellis into a top-notch corporate law firm, Bill Kirsch '81 left to take on one of the toughest CEO jobs in America—turning around the once high-flying insurance company Consec.

BY ERIC NEE

**Most attorneys would probably say** that William S. Kirsch '81 had it made. After 23 years, he had risen to the top of Kirkland & Ellis, one of the nation's most highly regarded and profitable corporate law firms. Better yet, Kirsch loved what he did—helping pull together intricate deals for leading private equity firms, including Madison Dearborn Partners, where he was general counsel. He was so engrossed in his work that “if he's working an 80-hour week, it's because he took two days off,” said Madison Dearborn CEO John A. Canning, Jr.—only half kidding.

He had a life outside of work as well. Kirsch, 48, and his wife of 17 years, Dawn, lived in a large home on the shores of Lake Michigan in the affluent Chicago suburb of Lake Forest, with their two boys and two girls, ages 9 to 16. He sat on the boards of Northwestern University and the Children's Inner City Educational Fund, among others, and even found time to coach his kids' baseball team.

In short, Kirsch had constructed the sort of life many lawyers only dream about. Then, less than one year ago, the world that Kirsch had created was turned upside down. In early August, he was vacationing in Palm Springs, California, when he got a telephone call that would dramatically change his life. It was R. Glenn Hilliard, the





executive chairman of Conseco, Inc., asking him whether he would like to be considered for the job as CEO. Kirsch was taken by surprise. “It was sort of an out-of-body experience,” he recalled.

During the previous two years, Kirsch had spent numerous hours helping Conseco through bankruptcy. Since September 2003, he’d even been executive vice president, general counsel, and secretary of the company. But Kirsch still had no inkling that the existing CEO was going to leave, or that the board would consider offering him the job.

And what a job it was. For most of the 1990s Conseco was a poster child for the business boom, right up there with the likes of Cisco, WorldCom, and Amazon. But a disastrous \$6.7 billion acquisition of Green Tree Financial Corp. in 1998 sent the company tumbling into Chapter 11—the third largest bankruptcy in U.S. history. Conseco emerged from Chapter 11 in 2003, but much remained to be done. As if the job weren’t tough enough, Kirsch would have to commute from Chicago to Conseco’s headquarters in Carmel, Indiana, just outside Indianapolis.

Given the choice between staying with something he had mastered and trying out something entirely new, Kirsch took the leap. “I felt it was the ultimate call to duty. I wanted the challenge,” said Kirsch. “I knew the company. I was comfortable with the team. And I thought we had the opportunity to transform the business.” Kirsch took over as CEO in August and quickly began implementing a series of initiatives that, if successful, will put Conseco on course to get back its “A” rating from A.M. Best, the premier insurance industry rating agency.

How’s he doing? “I think he’s done an exceptional job,” said Hilliard. “He has all the great qualities we were hoping for: a great work ethic, strong principles, the ability to make decisions, and he’s a quick study.” As for the turnaround, “I think we’ll surprise a lot of people.”

### **Rise and Fall of Conseco**

The story of Conseco’s meteoric rise and fall has all the drama of a soap opera. The company was founded in 1979 by Stephen C. Hilbert, a former insurance and encyclopedia salesman. In the stodgy insurance industry, Hilbert stood out as someone willing to take risks—sometimes big ones.

The insurance industry is chock-full of small companies, and soon after starting Conseco Hilbert started buying them up. Over the next 20 years the company bought 43 insurance firms. Many of them were small, and were consolidated under the Conseco Insurance brand. But there were a few large acquisitions as well. These included Bankers Life and Casualty Co., a 125-year-old firm that uses its own agents to sell supplemental health and life insurance to older, middle-class Americans. Then there was Colonial Penn Life

Insurance Co., a 45-year-old firm that sells life insurance using direct mail, television, and the Internet.

Hilbert’s strategy was a classic roll-up. He bought up small companies in a highly fragmented industry, merged them together, and gained efficiencies by consolidating operations. For many years the strategy worked. In 1986, Conseco stock was listed on the New York Stock Exchange. And between 1991 and 1997 the stock split two-for-one on four separate occasions.

Lots of people made lots of money, not the least of whom was Hilbert. He lived an extravagant lifestyle, marrying a former exotic dancer named Tomisue, his sixth wife. He purchased a 22,000-square-foot home in Carmel, Indiana, dubbed Le Chateau Renaissance, and an 18,500-square-foot oceanfront home on St. Martin, in the Caribbean, dubbed Le Chateau des Palmiers.

Hilbert also spent money lavishly on corporate accommodations. “When I first interviewed for a job, the executive suite was beyond belief,” said Scott Perry, chief operating officer at Bankers Life. “It was the kind of opulence you might see at a Wall Street firm, but not what you’d expect at a Midwestern insurance company.”

But Hilbert’s ambitions got the best of him. In 1998, he struck a deal to buy the mobile home lender, Green Tree, for \$6.7 billion. The acquisition began to sour almost as soon as the ink was dry. It turned out that there was very little synergy between the insurance business and the lending business. To make matters worse, Green Tree’s business wasn’t all it was thought to be, saddling Conseco with mountains of debt.

Hilbert stepped down as CEO in April 2000. The company went through several reorganizations and two CEOs before filing for Chapter 11 bankruptcy in December 2002. William J. Shea was brought in as CEO to help steer Conseco through bankruptcy and by all accounts did a good job. With the assistance of Kirsch and other attorneys at Kirkland & Ellis, who had been brought in to help with the reorganization, Shea sold off numerous assets. These included New York’s GM building, which Conseco owned with Donald Trump—another legacy of Hilbert’s deal-making—for a record \$1.4 billion. With Kirkland’s assistance, Shea also refinanced Conseco’s debt and struck new deals with state insurance regulators. Conseco emerged from Chapter 11 in September 2003 with a clean balance sheet and most of its insurance operations intact.

And that’s where Conseco stood when Kirsch received the phone call in Palm Springs. While it surprised more than a few people that Kirsch took the offer, it wasn’t really that out of character for him to have done so. In fact, one might almost say that Kirsch had spent his life preparing for this very challenge.

### Growing Up in Chicago

Kirsch may have trained as a lawyer, but he had an early affinity for business. He grew up in Highland Park, Illinois, a Chicago suburb not far from his current home in Lake Forest. His mother, Mildred, taught school in Chicago, and his father, Dan, was a businessman. "I grew up in a house that was focused on business," said Bill Kirsch.

Dan Kirsch started out as a salesman, then began a small clothing manufacturing business, and soon after opened his first clothing store. His company, Dan Howard Industries, went on to operate about 200 stores throughout the United States and Canada under the Mothertime, Maccona, PlusBoutique, and Dan Howard Maternity brand names. In 2001, Dan Howard Industries was sold to Mothers Work, Inc., for about \$20 million.

When it came time for Bill Kirsch to attend college, he didn't stray far from home, attending Northwestern University in nearby Evanston. "I could live on campus and come home when I wanted to. I liked that," said Kirsch. He majored in philosophy and played wide receiver on the Northwestern Wildcats football team, which at the time sported one of the worst win-loss records in NCAA history. "It was a character builder," he said facetiously.

Kirsch would have liked to join his father's business, but "he wanted me to go to law school and work for a couple of years before I did anything for him," recalled Kirsch. It came down to the University of Chicago and Stanford law schools. "I had a dream one night about going to the University of Chicago," said Kirsch. "I was in a closed stone room, with a teacher in a black robe standing behind a podium. It was an oppressive perspective on education, where the teachers were disseminating information, and the students were good pupils absorbing it all." Needless to say, he chose Stanford.

"I really liked the small class size, and if you can get a first-class education in a beautiful spot, why not?" said Kirsch. "It was the first time in my life where I was surrounded by people who were very well-rounded and intensely smart. It really helped me raise my game mentally."

### To the Top at Kirkland

After graduating from Stanford, Kirsch planned to work at one of Chicago's most venerable law firms, Winston & Strawn. Just before joining, he changed his mind. "I was recruited to Kirkland by my classmate John Quigley [JD/MBA '79], who was already at Kirkland," said Kirsch. "Quigley convinced me that Kirkland was the place to be. I respected his judgment implicitly, and the fact that he was already there made it easier."

"I thought Bill would be a good fit," recalled Quigley, who now runs his own investment firm, Kewco, in Prince-

ton, New Jersey. "Kirkland was a freewheeling, can-do sort of place. A meritocracy where aggressive people could do well and move up fast. And Bill was that kind of person."

Landing a job at Kirkland was also a bit of a personal coup for Kirsch. His father's father had once operated a barbershop in the basement of the building that housed Kirkland & Ellis in Chicago, no doubt giving regular trims to many of the firm's top attorneys. "It was kind of a big deal to get a job at Kirkland in our family," said Kirsch.

Kirsch joined his friend Quigley in Kirkland's private equity group. It turned out to be one of the best decisions he has ever made. The group was led by Jack S. Levin, the godfather of Kirkland's private equity practice, and by all accounts the smartest and most entrepreneurial attorney at the firm. Being one of "Jack's boys" meant putting in long hours, but it also paid off. "When you worked for Jack, it quickly became apparent whether you were adding value and getting the job done," said Quigley. "Those who were, moved up quickly."

Kirsch was one of Levin's most talented protégés, working on a wide range of deals. He soon developed a reputation as one of the most driven and competitive attorneys at a firm known for having more than its share of Type A personalities. "He's brilliant, dogged, very hardworking, and has an intuition for a deal that is second to none," said Kirkland partner Richard Porter.

Kirsch made partner at age 30 and went on to become one of the company's top managers. He was a member of the finance committee, compensation committee, admissions committee, and committee of committees (yes, there really is one). Kirsch was well compensated for his efforts, becoming one of only three partners to reach the pay cap, reputed to be \$5 million per year.

Kirkland's private equity group grew into one of the top practices in the country, with about one-quarter of the firm's approximately 1,000 attorneys now working in the area. Kirkland may not be as well known on the left and right coasts as some of its competitors, but in the Midwest it is the premier private equity law firm.

"Every investment is transformational," explained Kirsch about what attracted him to the area. In private equity, "you represent people who hunt for value," like venture capitalists, banks, and private equity managers. "I always put my heart into it, because I felt like I was part of the team. I had very close relationships with my clients." He developed such a close relationship with one of the firm's biggest clients, Madison Dearborn, that he became its general counsel even while he remained at Kirkland. The Chicago company is one of the country's largest private equity investors with some \$8 billion under management. "In addition to being a great deal and transaction lawyer, he knew our firm inside and out,"



said Canning, Madison Dearborn's CEO. "He had MDP blood flowing through his veins."

One of the biggest deals Kirsch worked on was Madison Dearborn's \$3.7 billion leveraged buyout of the Irish packaging company, Jefferson Smurfit Group, in the summer of 2002. It was the largest private equity deal in Europe that year. "Bill and I were in Ireland for about a month working almost constantly," recalled Rick Campbell, a partner at Kirkland. "The financing scheme that Bill put together was very aggressive and very favorable to his client." Jefferson Smurfit, still owned by Madison Dearborn, is the largest producer of cardboard boxes in the world.

Kirsch was in the middle of helping Madison Dearborn put together another big deal, the acquisition of the timber and forest products company Boise Cascade, when he was offered the job as Consecos CEO. He began working at Consecos in August, but kept working on the Boise Cascade deal right up to the day it closed in October. "That's the kind of guy he is," said Canning.

### Consecos's Turnaround

On August 12, 2004, Consecos announced that Kirsch was taking over as CEO. The next day the company's stock dropped 8 percent to \$15.74. It was not an auspicious beginning, but it didn't phase Kirsch. "I've spent 23 years dealing with tense situations, and I'm pretty accustomed to them," he said. As to why the stock dropped, "The market doesn't like surprises. I didn't view it as a reflection on me." Since then, the stock has recovered, closing at \$19.48 on February 2.

One of the reasons that investors' confidence in Consecos has risen is that Kirsch has been very explicit about his plans for the company. Chief among these are the five initiatives that he has launched, all focused on getting Consecos an "A" rating from A.M. Best. "We're on a quest for an 'A' rating," explained Kirsch. "We've been told it could come in 12 to 36 months [from last summer]."

An "A" rating will make it easier for Consecos to sell insurance. The company relies on independent agents to sell Consecos brand insurance, and many agents will not sell insurance from a company with less than an "A" rating. In addition, many insurance products are sold to employees at the workplace, and most corporations will not give insurers with a low rating access to their employees.

While getting the "A" rating is important, the process of getting the rating is just as critical. That's because the conditions that A.M. Best imposed on Consecos to boost its rating are also ones that are vital to the company's health. And that's where the five initiatives come into play. Each initiative is focused on one of the areas that A.M. Best has said needs improving: increasing sales, tightening expenses, com-

plying with Sarbanes-Oxley rules, consolidating IT systems, and improving operations.

"These aren't new ideas," said Perry. "But what Bill has done is bring a sense of urgency and focus to the company that wasn't there before. If you talked to the top 50 people at the company, they could all rattle these five off."

It's one thing to develop priorities, but it's another to actually do something about them. "In the five months since Bill took over, we've made major progress in each of these areas," said Perry, who was elevated by Kirsch to the COO job at Bankers Life in October. At Bankers Life, for example, sales of new annualized premiums were up 8 percent in 2004, and much of that increase occurred at the end of the year. That was because Perry set to work fixing back office operations—faster underwriting of new policies, better customer service, improved claims processing.

"The company is responding well to Bill," said Hilliard. "He's the first really effective CEO they have had." Shea had done a good job restructuring Consecos's debt and leading the company out of bankruptcy, but he wasn't the best person to lead the operational turnaround of the company.

Perry, for one, recognized Kirsch's talent and passion right away. Impatient with the pace of the turnaround, Perry had already planned to leave Consecos when it was announced that Kirsch was taking over. Shortly after the announcement, Perry met with Kirsch and told him he planned to resign. "He said, 'No you're not.' And he kept on me until I agreed to stay. He won't accept defeat," said Perry. "Just that experience inspired me."

This is the same sort of bulldog behavior that Kirsch exhibited when he was at Kirkland. "He knows how to get to the goal line," said Canning. "We had him involved in our most difficult issues and transactions, knowing that he would figure out how to get it done."

The energy and passion that Kirsch brings to Consecos is good for the company, but it may also be unsettling to some people at the firm. "He's very demanding," said Perry. "He sets high expectations for himself and the people around him. He runs at a very fast pace. The people who want that will gravitate toward it, and others won't. But that's okay. It's better if people who don't want that leave."

Consecos could have easily ended up as one of the numerous casualties of the postmillennial economic bust. Instead, the company stands a good chance of becoming one of the era's most dramatic business recoveries. "The turnaround on the balance sheet was quicker than anyone could have anticipated, and the operational turnaround will be just as quick," said Hilliard. "A lot of people will be shaking their heads and asking, 'How did they do that?'" If Consecos rebounds, the short answer to that question will almost certainly be—by hiring Bill Kirsch. ■

# Nuclear Proliferation

A discussion with the director general of the International Atomic Energy Agency



**MOHAMED ELBARADEI**, director general of the International Atomic Energy Agency (IAEA), came to Stanford University for two days of discussions with students, faculty, and visitors in early November. His visit was cosponsored by the law school. As head of the IAEA, ElBaradei enforces provisions of The Treaty on the Non-Proliferation of Nuclear Weapons and related nuclear arms control agreements. It was the IAEA that conducted U.N.-mandated inspections of Iraq before the U.S. invasion, and that attempted to monitor North Korea's nuclear program before it was expelled from that country in 2002. Following a speech, ElBaradei sat down to talk with Allen S. Weiner '89, associate professor of law (teaching) and Warren Christopher Professor of the Practice of International Law and Diplomacy.

**Weiner:** Lee Feinstein and Anne-Marie Slaughter, in an article called "A Duty to Prevent," argued that the international community has a legal obligation to prevent states from acquiring nuclear weapons, but that this obligation should apply only with respect to certain states. The states aren't named, but they focus on those that, while avoiding formal breach of the non-proliferation treaty, have continued to pursue the nuclear option and that have repressive forms of government where efforts to pursue nuclear weapons are not subject to democratic checks. Feinstein's view is that we shouldn't treat Iran the same way that we treat, say, Sweden. What is your view about the viability of a set of international legal rules that would treat states differently?

**ElBaradei:** Well, the short answer is [that any such system is] absolutely nonviable. . . . I cannot see how on earth you would be able to say Sweden would be treated differently from country X or Y or Z, unless there are objective conditions for such differentiation. If countries are similarly situated, if countries are sovereign, if their behavior is exactly the same, I cannot say that because they speak Swedish [in one] and Farsi [in the other], I will treat them differently. It just would not work. In fact, it would reinforce the perception of a schism based on certain superiority, which we are trying very hard to avoid. I would agree that there is of course a duty to prevent [the] spread of nuclear weapons, but the duty to prevent [applies] to all. . . . A system that's



saying “We are the good guys,” or “We are the early birds. We can eat the worm, but nobody else,” is not sustainable. It could have been possible 10, 20, 30 years ago. What we have seen now . . . [is that] the technology is out. [We have to create a] fact-based system. And that system has to be saying that we are all going to destroy ourselves if we continue on that path. We are all going to honor the commitment we entered into in 1970 . . . to move toward nuclear disarmament. We might not be able to do it today, but we certainly need to demonstrate commitment and we certainly need to destroy some of the 30,000 warheads that we have. We certainly need to make sure that we do not develop new nuclear weapons. . . . Then we have the moral authority to hit hard on North Korea, on Iraq, on whoever is violating the rules. But you cannot . . . dangle the cigarette from your mouth and tell everybody else not to smoke. It is not doable.

**Weiner:** Many people perceive that the retention of substantial nuclear arsenals by countries that already had them when the nuclear non-proliferation treaty was signed, and the development of new technologies in some countries, is one of the causes for the persistent proliferation efforts. But aren't regional conflicts, like those in the Middle East and between India and Pakistan, a more prominent cause of proliferation? And if those are the primary causes, do we really think that accelerating nuclear disarmament efforts among the permanent five states would help?

**EI Baradei:** It would help, but I agree with you, that it is not the primary reason for proliferation efforts. The primary reasons for proliferation efforts are regional insecurity and instability. If you look around, where do you see [the] most proliferation efforts? It's the Middle East, it's northeast Asia, [the] Korean peninsula, and the Indian subcontinent—areas where you have chronic disputes that have been festering for decades. Not in Scandinavia. We're not worried about proliferation efforts in Scandinavia, but ask yourself why. It's not that the Swedes are inherently superior. The Swedes are not threatened by the Finns, while Israel probably feels threatened by its neighbors. Iran feels maybe threatened by its neighbors. North Korea feels threatened by its neighbors. Whether you agree or disagree with the sense of insecurity, there is a sense of insecurity you have to address. Why do you have a sense of insecurity? Again, it could be some of these conflicts. It could be the oppressive government you have. It could be the denial of human rights. It could be the schism between the rich and the poor. In all these parts of the world, people are not able to express their views through the ballot box. They have governments that are repressive, and they feel a sense of global injustice because of the

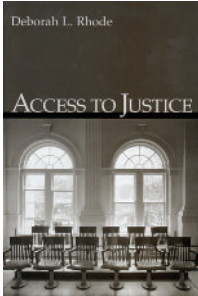
conflict that does not want to go away. These are really the drivers for proliferation efforts. . . . But we live in an environment, still, where nuclear power is perceived to be a source of power, a source of prestige, and ultimately a source of deterrence. It is not without notice that the five permanent members of the Security Council are the five nuclear weapon states. There is an environment that, if you have a nuclear weapon, you are treated differently. North Korea has, whether we like it or not, been treated differently from Iraq. I hope that's not because they have a nuclear deterrent, but that's part of it, let us face it.

**Weiner:** Under the traditional view of international law, states are not allowed to use force in self-defense until an armed attack occurs. That's the formulation under Article 51 of the U.N. Charter. There is, however, an older, customary law notion based on the *Caroline* case, which many people feel now is the proper way to interpret the U.N. Charter, that would allow states to act in anticipation of attack. In view of the proliferation of nuclear weapons, do we need to adjust the *Caroline* standard to take into account the gravity of the risk of nuclear attack?

**EI Baradei:** You cannot interpret Article 51 of the Charter in a conventional way, in the Webster definition, that, “I have to wait for a missile with a nuclear warhead coming over the Empire State before I act.” . . . In 1945, that meant probably armed vehicles crossing the border, but I can't obviously do that [today. The question becomes] how to adjust the rule without really making it a recipe for every country to say, “We can anticipate an armed attack, and therefore we will have to prevent it.” . . . You definitely do not want to give that right to every single country to exercise unilaterally, because then it's a recipe for a disaster. . . . I would authorize, or I would see as legitimate, certain cases of preemption, but it has to be collective preemption. It has to be preemption authorized by the Security Council. . . . I personally believe, unless I see an imminent danger of a possible aggression using weapons of mass destruction, I should try every possible way, diplomacy and verification. . . . If it doesn't work, if the use of force is the only and the best alternative, and if the international community decides that way, we should go for it. Obviously there will be extreme cases when countries will have to rely on unilateral defense, when they might not be able even to wait for the Security Council to make a decision. But I'm also saying at the same time that [the] Security Council needs to organize itself in different ways. [The] Security Council has become quite impotent in many situations, and it needs really to take its responsibility seriously. ■

# Opening the Courthouse

BY DEBORAH L. RHODE, Ernest W. McFarland Professor of Law



*The U.S. Constitution guarantees everyone accused of a crime the right to counsel, but what passes for counsel in many jurisdictions today is a disgrace, says Deborah L. Rhode in her recent book, *Access to Justice*, Oxford University Press, 2004. In this essay, Rhode examines the reasons for the inequities and suggests several reforms that would go a long way toward fixing the problem.*

The ideal of equal justice is deeply embedded in American legal traditions, and routinely violated in daily legal practices. Our nation prides itself on its commitment to the rule of law, but prices it out of reach of the vast majority of its citizens. We have the world's highest concentration of lawyers, but one of the least accessible systems of legal services. Our Constitution guarantees effective assistance of counsel in criminal cases, but what is held adequate to satisfy that standard is a national disgrace. Court-appointed defense lawyers for the poor are not required to have any experience or expertise in criminal defense; they do not even have to be awake. In civil matters, the law is least available to those who need it most. Primary control over the legal process rests with the legal profession, the very group with the least self-interest in reducing its expense.

At the most fundamental level, the problem involves a mismatch between what the public needs and what the system of justice delivers. Americans generally want legal services and dispute resolution procedures that are fair, efficient, and affordable. For most individuals, the system falls well short. At a minimum, procedural fairness requires opportunities for meaningful participation before a neutral tribunal. That, in turn, typically requires access to some form of competent legal assistance or well-designed self-help process. Those who need but cannot realistically afford lawyers should have opportunities for government-subsidized services. We remain a considerable distance from those goals.

Money may not be the root of all evil in our legal processes, but a lack of money is surely responsible for much of it. Americans do not believe that justice should be for sale, but neither do they want to pay for an adequate alternative. Less than 1 percent of the nation's expenditures on legal services goes to civil legal assistance

for the poor. And less than 3 percent of its law enforcement budget supports indigent legal defense. America spends only about \$2.25 per capita on civil legal aid for the one-seventh of its population that is eligible. That funding level is one-sixth to one-fifteenth of that of other countries with comparable legal systems, such as Canada, Australia, and Great Britain. Criminal defense programs average only one-eighth of resources per case available to the prosecution, and their lawyers sometimes must juggle over 700 felony matters a year. The fees available for court-appointed counsel are often capped at ludicrous rates, which in complex cases can easily dip below the minimum wage. In many jurisdictions, adequate preparation is a sure route to financial ruin.

At these funding levels, not much due process is available. More than 90 percent of indigent criminal defendants plead guilty without trial, typically before any significant efforts are made to investigate their cases. Civil legal aid programs operate with similarly crushing caseloads, and state and national bar studies estimate that more than four-fifths of the individual needs of the poor remain unmet. Those estimates do not include millions of Americans of limited means who are above financial eligibility limits but who cannot afford lawyers. Nor do the estimates encompass collective problems that public interest lawyers could help address.

The inadequacy of financial support is compounded by restrictions on the kinds of cases and clients that federally funded programs may handle. Politically vulnerable groups that are most in need of legal assistance are least likely to receive it. Congressional restrictions exclude from coverage matters such as those involving prisoners' rights, school desegregation, and undocumented aliens. Legal services organizations that receive federal subsidies are also barred from activities



such as lobbying, community organizing, or class action litigation. Yet these are the very strategies that are most likely to help poor communities help themselves, and to address the root causes of poverty, rather than its symptoms.

Part of the problem is the lack of public understanding that there is a serious problem. Four-fifths of the public believe, incorrectly, that the poor are entitled to counsel in civil cases. Three-quarters believe that too many defendants get off on technicalities, a view reinforced by celebrity trials and Hollywood screenplays in which zealous advocacy is the norm. But a wide gap remains between law in prime time and law in real time, and most Americans have no realistic sense of what passes for justice among the have-nots. Few defendants “get off” for any reason; felony acquittal rates average less than 5 percent in both state and federal courts.

The prescriptions follow obviously from the diagnosis. The government needs to increase funding for civil and criminal legal assistance and expand the groups that are eligible. Many other countries have systems that could serve as models for reform. Typically, they allocate aid on a sliding scale so that individuals of limited means can receive at least partially subsidized services. Rather than excluding broad categories of unpopular causes and clients, other countries focus on the merits of the claim. Does the individual have a reasonable probability of success? What would be the likely benefits of providing aid and the harm of withholding it? In criminal cases, all jurisdictions should aim for what American bar commissions recommend: reasonable caseloads, compensation structures that permit adequate preparation, and a rough parity of resources between defense and prosecution.

The costs of such a system would scarcely be prohibitive. The annual federal budget for the one-seventh of the population poor enough to qualify for civil legal services is now only \$338 million. Tripling that amount would still cost a bit more than \$1 billion. For a nation that is spending upward of \$120 billion to safeguard the rule of law in Iraq, a modest additional investment in the rule of law at home should not be unthinkable. There are, moreover, ways to expand legal assistance budgets that would be more politically palatable than a general tax increase, such as a surcharge on lawyers’ gross revenues or court filing fees.

### Pro Bono Service

More pro bono assistance from the bar would serve similar ends. Although some lawyers are extraordinarily generous, the average estimated pro bono contribution for the profession as a whole is shamefully inadequate: less than half an hour a week and half a dollar a day. Moreover, much of the work that passes for pro bono does not assist the poor. Only about 10 percent of lawyers accept referrals from legal services or bar-sponsored programs for low-income groups. What attorneys define as “pro bono” often ends up benefiting relatives, friends, or clients who fail to pay their bills.

The inadequacy of bar involvement in public service reflects a missed opportunity for both the profession and the public. Lawyers’ pro bono work has made a major contribution to every important social justice movement of the last half-century. And attorneys themselves benefit from work that can enhance their skills, contacts, reputation, and public image.

The profession could, and should, do much more to promote pro bono service. The most obvious strategy is for bar ethical codes, legal employers, or courts (under their inherent powers) to require some modest contribution in time or money to legal aid or public interest programs. At the very least, these requirements would support the many lawyers who would like more pro bono involvement, but who are in workplaces that fail to provide adequate resources or credit for such work. My own study—relying on a national sample of some 3,000 lawyers graduating from six different law schools—found that the majority were not satisfied with the amount of time that they were able to spend on pro bono activities or were not satisfied with the support or credit that their employers provided for such work.

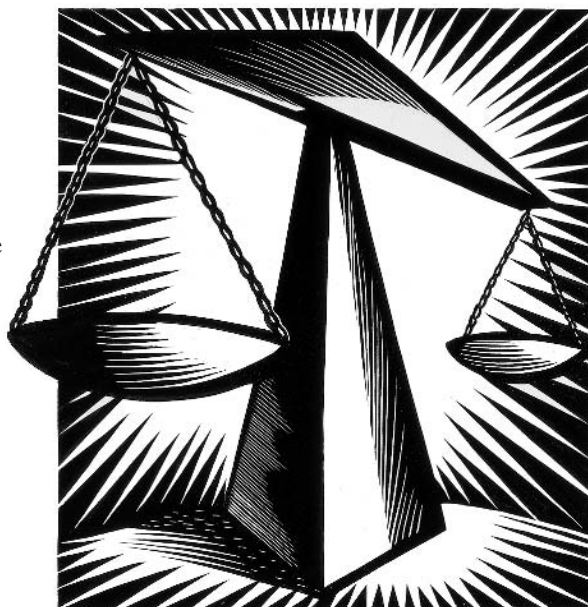


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A less controversial alternative would be to require that lawyers report the contributions that they make to legal aid and public interest causes. Experience to date indicates that such reporting rules have led to modest increases in the resources available to poverty law organizations. Further improvements might result if contribution rates were widely publicized, and if clients, colleagues, and job candidates began paying more visible attention to employers' pro bono records.

Even without changes in the rules governing pro bono work, a wide range of strategies is available to legal employers and educators to encourage charitable commitment. They can adopt formal policies, impose service requirements, and provide greater resources, rewards, and recognition for pro bono activities. It is a disgrace that most law students graduate without a pro bono legal experience. On issues of public service, the profession can and must do more to translate its public service principles into practice.

### **Structural Reforms**

A second cluster of strategies should focus on structural changes that would improve the functioning of dispute resolution processes and the delivery of legal services. Access to law is not an end in itself; the goal is justice, and representation by lawyers or reliance on court proceedings as traditionally structured are not always the most effective way of addressing legal concerns.

One priority should be the redesign of judicial processes to reduce costs and increase accessibility. In most states, small claims courts are too limited in jurisdiction, hours, location, and enforcement power, and assistance for self-represented litigants in these and other proceedings is inadequate at best. The tort system is inconsistent and inefficient. Relatively few accident victims can afford it, and, according to studies by the Rand Institute for Civil Justice, 50 to 60 percent of the payouts by defendant insurance companies end up compensating lawyers. In other contexts, particularly those involving families and petty offenses, overburdened trial courts lack the time, resources, and remedial options to address the underlying problems. Alternative models are readily available. Promising innovations include: automated document preparation and personalized pro se services; simplified forms and procedures; evening hours and community sites for hearings and legal assis-

tance; expanded jurisdiction for small claims courts; no-fault compensation for certain specialized areas; and collaborative problem-solving tribunals that partner with other social service providers.

Comparable innovations are necessary for the delivery of legal services. In essence, Americans need a wider range of choices in law-related assistance and better regulation of the choices that are available. Less protection should be available for the professional monopoly and more for individual consumers. Sweeping prohibitions on the unauthorized practice of law and multidisciplinary partnerships (MDPs) should be replaced with more narrowly tailored ethical rules and regulatory structures. A wide array of research concerning the performance of lay experts here and abroad makes clear that they typically can provide at least as effective routine services as attorneys. Consumers need protection, but states could meet this need through appropriate ethical standards, licensing requirements, and proactive enforcement systems.

### **Accountability**

A final set of strategies should focus on increasing the accountability of the legal profession and the legal process. More oversight is necessary both for individual lawyers and for the systems that structure their services. Courts and bar disciplinary agencies should impose more frequent and significant sanctions for frivolous claims, excessive fees, and incompetent representation. National data banks should provide ready access to information about such sanctions and other performance-related factors. Standards governing ineffective assistance of counsel in criminal cases also must be strengthened. It is appalling that courts allow cases to proceed and convictions to stand when counsel are drunk, dozing, or demonstrably ignorant of the relevant law or facts.

Courts and legislatures must also assume greater responsibility to ensure adequate legal services for the poor. In civil cases, courts should be more willing to appoint counsel or strike down eligibility restrictions where fundamental rights and substantial due process concerns are at issue. In criminal cases, courts should demand a funding structure that ensures adequate compensation and resources for indigent defense lawyers, and an independent oversight body to monitor their qualifications and performance.



Finally, government funders, bar associations, legal service providers, and academic researchers should all join forces in compiling greater information concerning access to justice. We need to know more about the effectiveness of specific strategies, and we need to do more to educate lawyers and the public about how the justice system functions, or fails to function, for the have-nots.

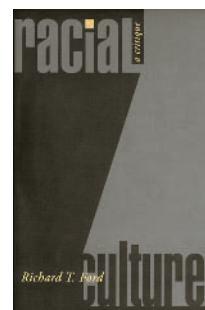
The stakes in this reform agenda are substantial. Public dissatisfaction with lawyers and legal

processes is increasingly visible, and public image ranks high among the bar's own concerns. At last count, a Google search recorded some 800,000 results under "legal humor," and the frequently unflattering content of those underscores the need for reform. Our aspirations for an equitable legal system are deeply rooted in American ideals. "Equal justice under law" is what we pledge on courthouse doors. It should also describe what goes on inside them. ■

This article is based on an essay that first appeared in the December issue of *The American Lawyer*.

## Race and Culture: A Conversation with Professor Richard Thompson Ford

*Richard Thompson Ford, George E. Osborne Professor of Law, has written a new book titled Racial Culture: A Critique, published by Princeton University Press, 2005. In this provocative, rigorous, and sometimes even humorous book, Ford takes direct aim at one of the tenets of contemporary academia—multiculturalism. Is there such a thing as black culture, or Latino culture, or women's culture? Ford concludes that by and large, there isn't. To take just one example, there are numerous, and ever-changing, subcultures within black America that vary by income, geography, interests, and education. To impose a single "black culture" on such a diverse group of people is not only inaccurate, but also counterproductive. Ford argues that the growing popularity of this form of multiculturalism hurts individuals within these groups just as much, if not more, than it helps them. And attempts to enshrine these cultures into law pose even greater risks. Stanford Lawyer Editor Eric Nee sat down with Ford to discuss the book and his views on race, discrimination, and culture.*



**What inspired you to write this book?** In 1999 I was asked to write a paper about race in the 21st century. At that time, the idea that questions about racial differences and questions about cultural differences could be answered in the same way, was—as it still is today—a popular idea. It's dominant in the legal academy, and in other parts of the academy as well, and increasingly so even in the rest of society. But in the back of my mind I'd always had misgivings about an approach to racial difference and race relations that emphasized the idea of cultural difference. It created litmus tests for racial belonging that I thought were quite destructive for me.

**But these social categories do exist.** Social categories like race do exist, they have an impact on people's lives, and they have to be dealt with. Race is certainly one of the categories that matter

in today's world. It would be naïve and dangerous to say otherwise. But there's a difference between recognizing that and concluding that the categories in fact describe significant differences between people. There's a difference between believing that the categories exist, and believing that the categories are accurate as categories. [Kwame] Anthony Appiah says it well when he says "One need not believe in witches to recognize that women were burned at the stake as witches, and hung as witches, and drowned as witches in colonial Massachusetts."

Now, I don't want to make the extreme statement that there are no differences between the various races. There are differences. People can observe what an anthropologist would call cultural differences that roughly divide racial groups. You can make some generalizations, but what's important is that they're just that—generalizations.

And these cultural differences are socially produced. They're not intrinsic to the group.

Exactly. And to the extent racial cultural differences exist they can best be described in terms of generalizations. The more specific one tries to get, and the more one looks at individuals, the less valid these generalizations are. Black culture



ILLUSTRATION: LISA HENDERLING © IMAGES.COM/CORBIS

is fragmented into subcultures itself, and it overlaps in many significant ways with the cultures of other racial groups. It borrows heavily from any number of other racial groups and other subcultures borrow from it—"soul food" for instance, is an awful lot like Southern cooking generally.

Once that's recognized, you start to get a complicated picture and it's difficult to say, "these practices belong to this race and those practices to that race."

**Does race have any scientific basis, or is it a social construct?** My view is that race doesn't have a biological or genetic basis. It's a social construct that was invented during the colonial era that ultimately served to justify the exploitation of some people. I'm not a scientist, but my reading of the literature is that this is a widely shared consensus view among biologists and geneticists—that there are no biological or genetic races. What happened in race discourse in the late '80s and the '90s is that the discredited idea of race as a biological fact was underwritten by the idea of race as a cultural fact. Once one basis for belief in races was discredited, another one rushed in to fill its place, and that was culture.

**But interestingly, the people who did that were largely progressives.** And there's the rub. Many progressives feared that the attack on the idea of biological races would potentially undermine the basis for things like antidiscrimination law and affirmative action. The fear was that once you don't have races anymore, how can you have a law

that's based on protecting races from discrimination, or ensuring that a particular racial group is appropriately represented in college admissions? I think it was a mistake to imagine that you had to prop up the idea of races in order to justify these programs. Because for the reasons we've already mentioned, you don't have to believe in races to believe in racism.

**And then we had the *Bakke* decision.** So *Bakke* comes along and more or less eliminates the possibility that the university can defend affirmative action as a response to racism generally, because Justice Powell's opinion is clear that the attempt to remedy what he calls "societal discrimination" does not constitute for constitutional purposes a compelling state interest sufficient to allow the university to consider race. Race can only be considered when remedying specific instances of discrimination. But diversity did constitute a compelling governmental interest. Universities were then faced with the choice of either going through the effort of identifying specific instances of discrimination and perhaps even announcing and unearthing their own past discriminatory practices, or opting for diversity. It's pretty easy to see that it's advantageous for the university to go with diversity.

After *Bakke*, diversity emerges as the rationale for affirmative action. If you look at the speeches of university presidents all the way up to the present, it's "diversity, diversity, diversity. That's why we're doing affirmative action." Cultural difference seemed to provide an example of that kind of diversity. So yes, *Bakke* had the effect of pushing culture to the forefront. And this is happening at the same time that multiculturalism is happening at the university—the important insight that other cultures besides those of Western Europe are worthy of study. Combined, these two things—*Bakke* and academic multiculturalism—did a lot to advance the idea that racial difference is largely a matter of cultural difference.

**But society was dominated by a European male culture.** Yes, there was a time in American history in which cultural conformity and a belief in a very narrow range of acceptable lifestyles and ideas was a serious problem in the United States. To some extent it still is. But the risk of the identity politics approach is that we're reproducing that same



kind of cultural domination, but we're just giving each group its own version of it. You don't have to be Ward Cleaver, you get to be the stereotypical black person or the stereotypical Latino. You get that rammed down your throat instead. That may be a little better, but not much.

You also make the point in the book that it is risky to use those cultural stereotypes as the basis for law. There have been movements at various points to advance the idea that antidiscrimination law should protect the cultural traits of the various protected groups. My worry is that subtly, and maybe not so subtly, we would have now an official account of a group cultural practice that's part of the published opinion of the federal judiciary. One of the dynamics of membership in the various, what I call "canonical" social groups, is a concern—one might even say an obsession—about authenticity. Are you an authentic member of our group? That concern about authenticity, by its very nature, seeks out authoritative accounts of group memberships so that you can test people—if you're really one of us, you'll do this or that. So then you get a federal opinion that says the reason the employer can't have this particular workplace rule is because it discriminates against this group's culture. Now we have an official account of the group's culture—a published federal opinion that says black culture is the cornrow hair style, or black culture is out-of-wedlock pregnancy, as was suggested in one of the cases I cite in the book. I find that troubling. It has the potential to begin to lock in ideas about what it means to be an authentic member of a racial group that will be hard to contest once the federal Court of Appeals or the Supreme Court has said "this is your culture." Of course it would also encourage people to adopt the behavior because now it's legally protected.

And how could you possibly codify these cultural traits as they change? The EEOC would have to triple or quadruple in size to keep track of all of these things. So there are technical problems with it. It also strikes me that there are political problems that are probably even more insurmountable. What's forgotten is that Title VII was an act of Congress, and it requires popular support. To the extent that it goes too far in front of popular opinion, it's likely to be reformed by Congress. So the idea that you can expand Title VII to cover

"cultural discrimination"—basically discrimination based on behavior—is unrealistic. If the vast majority of Americans think, "that's not race discrimination," that's a relevant consideration.

What is the best way of implementing antidiscrimination laws and affirmative action without creating the kind of problems you have articulated? The correct way of dealing with both of them is to focus on racism and racial discrimination—and discrimination against other groups—that focuses on the motivations and the state of mind of the discriminator and the effect on the social condition of the protected groups, but not on the characteristics of the person who's arguably being discriminated against. The concern is to eliminate practices that are based on or reinforce racism. For affirmative action, it's a similar solution. The reason affirmative action is an important program is because it responds to the various effects of discrimination in society. In my view *Bakke* was wrongly decided because institutions should be able to have policies to remedy societal discrimination. I think Justice Powell was wrong in *Bakke* to close that off as an avenue.

But how can a university or any other institution deal with these issues while still conforming to the law? The university should take seriously the discussion of diversity in *Grutter* [the recent Supreme Court opinion upholding the University of Michigan Law School's affirmative action program]. I think Justice O'Connor's opinion there purposely avoids requiring universities to focus on cultural discrimination. I think she is purposely ambiguous about the status of diversity, and that her opinion allows universities to say that a particular group of people has had an experience with discrimination and that's what we're concerned about when we consider race in admissions. It's particularly obvious in the context of the law school, in which we're talking about racial issues in constitutional or antidiscrimination law. It's easy to see the way that classroom conversation can benefit from the perspective of people who've been the targets of some of these discriminatory practices. That's the pragmatic answer. The longer answer is that I support a litigation strategy that seeks to reopen the societal discrimination rationale for affirmative action—but that's a bigger question and obviously comes with some risk. ■

# Outside Directors' Liability: Have WorldCom and Enron Changed the Rules?

BY MICHAEL KLAUSNER, Nancy and Charles Munger Professor of Business and Professor of Law, Stanford Law School; BERNARD S. BLACK, professor of law, University of Texas Law School; BRIAN R. CHEFFINS, professor of law, Cambridge University

*Until now, it was rare for an outside director to have to pay money out of his or her own pocket to settle a shareholder lawsuit. The recent multimillion-dollar payouts by former directors of WorldCom and Enron may have changed all that, but probably not by much.*

In January of this year, former outside directors of WorldCom and Enron agreed to pay a total of \$31 million out of their own pockets to settle securities class action lawsuits stemming from two of the largest corporate governance scandals in U.S. history.<sup>1</sup> Directors' and officers' insurance paid an additional \$36 million to settle the WorldCom suit, and \$155 million to settle Enron. While there is nothing unusual about the insurance payments, the directors' out-of-pocket payments—\$18 million in the case of WorldCom and \$13 million with Enron—are extraordinary, and surely have outside directors and those considering board seats thinking twice about the desirability of these positions.

We consider here the following key questions that these settlements raise. Why has out-of-pocket liability for outside directors been so unusual? Do WorldCom and Enron signal a sea change? Will these settlements have a salutary effect on the incentives of outside directors to be vigilant? Will the settlements lead to a counterproductive exodus from the boardroom? The ways in which public pension plans and other institutional investors respond to the WorldCom and Enron deals will influence the answers to the last three questions. We conclude by recommending a response to these issues that we believe will strike a reasonable balance.

## **Why Is Out-Of-Pocket Liability So Unusual?**

Outside directors of public companies face a daunting array of legal obligations. Under federal securities law, directors are potentially liable whenever a company makes misleading public statements. Under corporate law, they can be sued for

failure to adequately oversee management. Under pension law, directors can be liable if the company's retirement plan suffers markedly as a result of overinvestment in the company's own shares.

Nonetheless, outside directors almost never end up paying out of their own pockets. Plaintiffs are often successful in obtaining settlements in cases where outside directors are named as defendants. There are even occasional trials in which directors are held nominally liable, in the sense that the directors lose, but all damages and legal expenses are paid by the company and/or directors' and officers' (D&O) insurance. The famous 1985 case of *Smith v. Van Gorkom* is one example, and a 2004 Delaware case, *Emerging Communications*, is another. Damages, however, almost never come out of the outside directors' pockets. Prior to WorldCom and Enron, our research uncovered only one shareholder suit in which outside directors made an out-of-pocket payment as part of a settlement.

The details of settlements are generally kept confidential, so we may have missed a few instances of out-of-pocket liability. We don't think so, however, because the rarity of out-of-pocket liability for outside directors is a predictable result of legal rules, the terms of D&O insurance policies, and plaintiffs' incentives to settle rather than try cases.

To start, substantive and procedural rules governing corporate and securities law claims make it difficult for a plaintiff to survive an outside director's motion to dismiss, and cases that get beyond that threshold still face liability and damage rules that protect outside directors. Take, for instance, lawsuits brought under Section 11 of the



Securities Act of 1933 for misstatements in offering documents, where outside directors arguably face greater risk than in any other type of litigation. In a lawsuit brought under Section 11, a corporation's outside directors will be sued along with the corporation itself, the inside managers, and often other parties such as the company's investment bankers and auditor. The applicable law makes the outside directors the least attractive of these defendants. Their damages will be based on their relative culpability, which is unlikely to be high since they are not involved in day-to-day management decisions. In addition, the company is strictly liable whereas the outside directors (along with other individual defendants) have a due diligence defense. As a result, plaintiffs generally have little reason to pursue outside directors other than to pressure the company to settle.

Of course, outside directors confronted with a lawsuit will incur legal costs even if a case is ultimately dismissed, but except in cases of serious misconduct the company will indemnify the outside directors for their expenses, and the company's D&O policy will protect them as well. Between indemnification and D&O insurance, amounts the outside directors pay in settlement would likely be covered as well. While indemnification is subject to a "good faith" condition, D&O insurance is not. Furthermore, D&O insurance is available when a company is insolvent.

The primary limitations on D&O coverage are policy exclusions for claims in which a defendant engaged in "deliberate fraud" or received "illegal profits." These exclusions rarely apply to outside directors, given their lack of managerial responsibilities. Gaps in outside directors' coverage have arisen—such as nonseverability when the actions of management have rendered a policy void. But as those gaps open, D&O insurers write new policies that close them, for a price.

A pivotal byproduct of the set of protections just outlined is that plaintiffs, defendants, and insurers all have strong incentives to settle suits before trial on terms that leave outside directors' personal assets untouched. Except in rare cases, a company's assets and D&O insurance are the pots of gold targeted in a lawsuit. Especially when a trial could expose them to a risk of out-of-pocket liability, directors will welcome a settlement that is entirely funded by the company and the insurer. Plaintiffs and their lawyers, who work on a con-

tingency fee basis, will be similarly inclined since a trial is risky and time-consuming—particularly if there are appeals, which there surely will be if outside directors face an out-of-pocket payment.

If a company is insolvent, and thus unavailable to pay damages directly as a defendant or to indemnify directors, a plaintiff's incentive to settle within D&O policy limits increases. If a case goes to trial, the D&O policy funds both sides' expenses through appeals and final judgment. Thus, taking a case to trial will substantially dissipate the principal "deep pocket"—the D&O policy—from which a plaintiff hopes to collect.

Insurers, in turn, will likely go along. Due to legal rules and a fear of alienating future customers, they rarely reject a settlement to which the plaintiff and the defendant directors have agreed. Indeed, we know of no shareholder suits since 1990 (as far back as we looked) in which insurers have forced a defendant to go to trial.

At least until WorldCom and Enron, the logic that emerged from this complex of legal rules and insurance coverage was one in which cases virtually always settled with no money coming out of the pockets of outside directors. The window of vulnerability for outside directors, where this logic did not hold, required the following conditions: significant evidence of director culpability; an insolvent company; inadequate D&O insurance, either because the insurer can plausibly deny coverage or because damages greatly exceed the policy limits; and outside directors who are wealthy enough to justify the risks to a plaintiff of taking a case to trial.

Without this "perfect storm," outside directors had little reason to fear that they would have to pay personally as a result of litigation. Rather than going to trial to try to recover amounts above the insurance policy limits, and hence put outside directors potentially at risk for out-of-pocket liability, plaintiffs instead settled for amounts within the D&O policy. The question of the day is whether the WorldCom and Enron settlements reflect a change in this logic.

### **Do WorldCom and Enron Signal a Sea Change?**

WorldCom and Enron appear to meet the conditions constituting a perfect storm: while the outside directors did not participate actively in any of the frauds, their oversight seems to have been seriously inadequate; the companies were insol-

vent; although the companies had large D&O policies, the potential damages far exceeded the coverage limits; and the outside directors were collectively wealthy. Because of these factors, the plaintiffs could have credibly threatened to go to trial with a reasonable chance of getting a judgment exceeding the policy limits, and bankrupting the outside directors.

In both Enron and WorldCom, however, there was more—namely an explicit agenda on the part of plaintiffs to get outside directors to pay out of their own pockets. In Enron, the rationale for extracting personal payments was to retrieve trading gains from outside directors who sold Enron shares during a time in which share prices were high as a result of the fraud. The moral of that settlement may thus merely be that irresponsible outside directors must disgorge profits unwittingly gained from a fraud they failed to detect or deter.

In the case of WorldCom, the goal was more ambitious. The lead plaintiff wanted to send a general “message” to outside directors to do their jobs properly, or else. In announcing

the settlement, Alan Hevesi, Comptroller of the State of New York and trustee of lead plaintiff New York State Common Retirement Fund, stated: “The fact that we have achieved a settlement in which these former outside directors have agreed to pay 20 percent of their cumulative personal net worth sends a strong message

to the directors of every publicly traded company that they must be vigilant guardians for the shareholders they represent. We will hold them personally liable if they allow management of the companies on whose boards they sit to commit fraud.”<sup>2</sup>

Hevesi’s approach to the WorldCom settlement, if it becomes widely adopted, could significantly change the litigation landscape for outside directors. While the elements of a “perfect storm” must still be present to some degree, a plaintiff that sees independent value in having outside directors pony up will be more willing to risk a trial than plaintiffs focused purely on maximizing the recovery in a particular case. Consequently, even if some of the ingredients of a perfect storm are absent (e.g. the evidence against the directors is fairly weak, or outside directors are not all that wealthy), such a plaintiff can credibly threaten a trial, in which case outside directors will feel pressure to settle for an out-of-pocket payment.

If other lead plaintiffs share Hevesi’s motives, more outside directors will have to make the difficult choice between a significant out-of-pocket settlement payment and a potentially bankrupting judgment after trial. An increase in out-of-pocket liability risk for outside directors would necessarily follow.

#### **Will WorldCom and Enron Have a Beneficial Effect on Outside Directors’ Incentives?**

Some have praised the WorldCom and Enron settlements, predicting that directors’ fears will induce greater vigilance in the boardroom. Outside directors may indeed worry more about how good a job they are doing. But outside directors already have incentives to be vigilant for reasons other than liability. They generally own stock, which will be worthless if the company becomes engulfed in a scandal. Indeed, WorldCom’s outside directors reportedly lost \$250 million as a result of the company’s collapse. Outside directors also have reputations at stake. If a scandal occurs on their watch, they will suffer socially and professionally. A lawsuit will compound the problem, regardless of whether the directors bear out-of-pocket liability or not. Moreover, being a defendant in a lawsuit entails considerable time and aggravation.

Outside directors fearing financial ruin will no doubt be more careful than directors feeling immune to out-of-pocket liability will be. But by how much? We simply don’t know. And there can be too much of a good thing. With jittery directors at the helm, prudent caution can readily transform into counterproductively defensive decision making and even paralysis in the boardroom.



ILLUSTRATION: ERIC GIRAY © IMAGES.COM/CORBIS



### **Will the Settlements Deter Capable People From Serving on Boards?**

Despite the importance of outside directors and the considerable amount of time now required of them, directors' fees are not very high by the standards of people who generally take these positions—about \$140,000 for the largest companies and a lot less for smaller ones. Perceived liability risk would not have to increase much to induce attractive boardroom recruits, such as chief executives of major public companies, to decline directorships.

Outside directors already overestimate the likelihood of out-of-pocket liability, and frequently cite the fear of liability as a reason not to serve. According to surveys we have conducted, even prior to the WorldCom and Enron settlements outside directors believed on average that out-of-pocket liability occurs in about 5 percent of shareholder suits. The actual number is far lower—only a few instances out of several thousand cases—but it is the perception of liability risk that affects directors' willingness to serve.

The WorldCom and Enron settlements will increase liability fears among outside directors. This would be a natural consequence of any high-visibility out-of-pocket payment. The perception of liability risk in the wake of WorldCom and Enron, however, is compounded by the political overtones associated with the lead plaintiffs' being public entities. Even if politics played no role in these cases, one can reasonably be concerned that political considerations unrelated to corporate governance will cause lead plaintiffs in the future to insist on personal payments by outside directors. Especially in light of the praise for the Enron and WorldCom settlements, others making litigation decisions on behalf of public entities may think "If Alan Hevesi made the outside directors pay in WorldCom, I'll look pretty bad if I don't do so as well."

### **What Public Pension Plans Should Do Now**

The ideal outcome of the WorldCom and Enron settlements would be an enhancement of incentives for outside directors to be vigilant, without

scaring capable people away from boards. For this to happen, public pension plans and other institutional investors must refine the "message" of these settlements.

At this point, getting a precise fix on the WorldCom and Enron settlements is difficult. Were they exceptional deals well tailored to exceptional failures of oversight? Or do they signal a general desire on the part of lead plaintiffs to go after the personal assets of outside directors whenever a management failure has gone undiscovered? Or is the "message" even one of leniency? After all, the WorldCom and Enron directors' personal payments left all of the directors with considerable wealth, and some Enron directors did not pay at all, despite the fact that an adverse judgment probably would have bankrupted each and every one of them.

Given the central corporate governance role outside directors play—a role that institutional shareholders are largely responsible for placing them in—public pension plans should not allow this uncertainty to persist. Instead, they should articulate explicitly their stance on out-of-pocket liability.

In our view, the position they take should be as follows. First, plaintiffs should go after the personal assets of outside directors only in cases of deliberate self-dealing or egregious failure of oversight. Second, while in cases of deliberate self-dealing there should be no limit as to what they seek from the directors, in cases of lax monitoring, plaintiffs should—as in Enron and WorldCom—demand out-of-pocket payments only in amounts that leave personal wealth substantially intact. Precisely what the limits should be we leave for another day.

For now, the key is for public pension funds and other institutional investors to formulate and publicize a basic settlement strategy that provides some scope for out-of-pocket liability for outside directors but makes due allowance for the legitimate fears of those serving on the boards of public companies. With this sort of follow-up, the Enron and WorldCom settlements could indeed foster better corporate governance. ■

1. The deal struck was subject to judicial approval. At the time of writing, no ruling had been made.

2. Press release, Office of the New York State Comptroller, January 7, 2005, <http://www.osc.state.ny.us/press/releases/jan05/010705.htm>. At press time, two former directors were still negotiating with the plaintiffs.

# Social Security Privatization: A Disaster

BY MICHELE LANDIS DAUBER

Associate Professor of Law and (by courtesy) Sociology and Bernard D. Bergreen Faculty Scholar

Opponents of Republican proposals to privatize Social Security must contend with a painful irony: It was not George W. Bush, but Franklin D. Roosevelt, who first popularized the notion that workers have an individualized, proprietary stake in Social Security. It was FDR who planted the bomb, in the form of the workers' portion of the payroll tax, which now threatens to explode Social Security's identity as a social insurance program.

In 1935, Roosevelt overrode strong opposition to the payroll tax from advisors who argued it was regressive, saying, "I guess you're right on the economics, but those taxes were never a problem of economics. They are politics all the way through. We put those payroll contributions there so as to give the contributors a legal, moral, and political right to collect their pensions and their unemployment benefits. With those taxes in there, no damn politician can ever scrap my social security program." It was this decision to tie benefits to worker contributions (along with subsequent developments, like annual Social Security "statements" mailed to beneficiaries) that gives Bush's privatization proposal its political appeal. When the president tells workers that they should be able to invest their own money, he is only telling them what they already know: it's their money, after all.

Turning Roosevelt against himself is a clever move by proponents of private accounts, one that helps explain the popularity of a plan that all analysts agree will be incredibly expensive and complicated to implement. We would be wrong, however, to abandon FDR as a guide to the political defense of Social Security. Roosevelt also reached for another analogy, one that is ideally suited to counter the press for privatization and at the same time to support proposals to make Social Security stronger and more equitable.

Roosevelt and the New Dealers cast Social Security as a disaster relief program, with the goal of protecting Americans from what FDR termed the "hazards and vicissitudes" of old age. New Dealers frequently drew an analogy between fires, floods, and hurricanes, and "economic earthquakes" which, they said, could strike without warning, wiping out savings and leaving the elderly unable to fend for themselves. Roosevelt repeatedly asserted that the government had an obligation under these circumstances to "aid those overtaken by disaster."

The "hazards and vicissitudes of life" that Social Security guards against are just as threatening today as they were in 1934. The transition from a manufacturing to a service-

oriented economy, globalization, the outsourcing of middle class jobs, the rising cost of higher education and housing that is depleting the ability of the middle class to save for retirement, fears of being a burden to children, lingering illness, and extended widowhood—all of these things strike the same chords of panic today that they did in 1934.

The market is still a potential disaster for those without time to wait out its fluctuations. Even those retirees who have the means to invest for their own retirement face widely divergent outcomes based on the state of the equity and debt markets during their working lives and retirement. Compounding this uncertainty is the potential "disaster" of outliving one's retirement savings.

What would happen if we were to move to a fully or semiprivatized Social Security system? The history of federal disaster relief is instructive in this regard: from the early days of the republic, payments to disaster victims have been broadly politically popular and regarded as something akin to entitlements. The rare politician—most famously Herbert Hoover—who has opposed relief for blameless disaster sufferers, has faced repudiation at the polls and in history books.

Faced with widespread shortfalls in retirement income security as the result of market conditions (e.g., the collapse of the Internet boom), a future Congress and president would almost certainly accede to widespread calls to aid retirees and bail out the program. This is made more likely by the fact that benefits paid by the program are crucial to the vast majority of Americans. The choice is therefore not whether to insure the elderly against market forces, but what form that insurance should take: a predictable, orderly system for providing a basic level of retirement subsistence, or an unpredictable series of reactions to market events.

Moreover, linking Social Security to disaster relief clarifies that Social Security's strongest political appeal is in sheltering retirees from the winds of economic chance, not in serving as an all-purpose vehicle for retirement savings. Private savings [perhaps in a tax subsidized vehicle such as a new, universal 401(k) program] is the appropriate method for supplementing this base level of support, not replacing it. Providing every American with a base level of protection from disaster, plus the opportunity to save beyond that, is a far more appealing program than betting old age economic security on the vagaries of the market.

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(A longer version of this essay first appeared on September 3, 2004, at [www.americanprogress.org](http://www.americanprogress.org).)



# In Memoriam

## ALUMNI:

**Remington M. Low '39 (BA '34)** of Atherton, Calif., died September 27, 2004, at the age of 92. A pioneer in insurance defense law, he started his own law firm in the 1950's, known later as Low, Ball & Lynch. He served as president and CEO of B.M. Behrends Bank in Juneau, Alaska, until retiring at the age of 80. He is survived by his son, Remington, and three grandchildren.

**Clyde E. Tritt '49** of Glendale, Calif., died in December 2004 at the age of 84. A World War II veteran, he was a revising editor of the *Stanford Law Review* and was elected to the Order of the Coif. He retired as a partner from O'Melveny & Myers, where he specialized in tax law and was chairman of the firm's tax department for 10 years. He also was director of a number of companies, including California Sports, Inc. and Maltby Company. He was also a trustee of the Joseph B. Gould Foundation and a board member of the Gene Autry Western Heritage Museum. He is survived by his wife, Jane; daughter, Michel; and son, Scott.

**William N. Willens '51** of Rancho Palos Verdes, Calif., died September 11, 2004, at the age of 78. The World War II veteran practiced law for over 40 years and taught arbitration at Northrop Law School. He is survived by his wife, Rita; daughters, Alisa and Veronica; son, Daniel; and six grandchildren.

**Phillip E. Brown '52 (BA '49)** of San Rafael, Calif., died November 9, 2004, at the age of 77. He served in the U.S. Marine Corp. from 1945 to 1947 and was a partner at Hoberg, Finger, Brown & Abramson for over 36 years. An active member of the legal community, his professional associations included serving as president of the San Francisco Bar Association and of the American Board of Trial Attorneys. He is survived by his brother, Rowland; daughters Deborah and Emily (AB '83); sons Christopher, Michael, and Tim; and 12 grandchildren.

**Robert E. Sanderson '52 (BA '49)** of Stockton, Calif., died October 7, 2004, at the age of 79. A World War II veteran, he contracted poliomyelitis while stationed in the Philippines. He was an attorney for the Franchise Tax Board in San Francisco and served on the board of directors of the Mechanics Bank for

over 25 years. He was also on the board of Cerebral Palsy Association and a member of the World Affairs Council, the Commonwealth Club, and the Bar Association of San Francisco. He was active in his community through his involvement with St. John's Chamber Orchestra Festival, Children's Home of Stockton, and St. John's Episcopal Church. He is survived by his sister, Jean, and brother, George.

**William P. Irwin '53** of Fresno, Calif., died November 7, 2004, at the age of 77. He was an attorney for 50 years.

**Douglas T. Foster '56** of Sacramento, Calif., died October 30, 2004, at the age of 77. He served four years as a lieutenant in the Navy and was an attorney for Farrand, Fisher, and Farrand Law Firm in Los Angeles. He also served as legal counsel of what was formerly known as McClatchey Newspaper and Broadcasting Company until he left to pursue private practice in 1982. He was a member of Rio del Oro Tennis Club, the Arden Arcade Rotary in Sacramento, the Sutter Club of Sacramento, and the Seattle Yacht Club. He is survived by his daughters Jane and Stephanie, and four grandchildren.

**James R. Moore '56** of Santa Ana, Calif., died July 27, 2004, at the age of 77. He established his legal career at Rutan & Tucker LLP, where he specialized in real estate law.

**Lester W. Blodgett '59** of San Carlos, Calif., died November 11, 2004, at the age of 73. After graduating from law school, he worked for Ampex Corporation, a San Carlos technology company that paved the way for modern video recording. He retired after 35 years at Ampex. He is survived by his wife, Linda; daughter, Laura; son, Kevin; and three grandchildren.

**Frederick S. Prince, Jr. '62 (BA '59)** of Salt Lake City, Utah, died September 4, 2004, at the age of 67. A member of the Utah Bar Association and American Bar Association, he practiced law with Prince, Yeates & Geldzaher in Salt Lake City for 20 years, where he became senior partner. He entered the hotel business in 1981, building and operating the Stein Eriksen Lodge in Deer Valley, Utah, as well as many others, and he later founded a brokerage firm in South Laguna, Calif. He is survived by his daughters Krys, Kimberly, and Patricia; sons Seaton and Kenneth; and stepdaughter Christina.

**Richard C. White '62 (BA '60)** of Corona Del Mar, Calif., died August 2004, at the age of 70. A West Point graduate, he joined the Marine Corps in 1954 and served on both coasts and in Asia. He entered Stanford Law School in 1959 and returned to active Marine duty the next year, reaching the rank of captain. He helped open the Orange County office of O'Melveny & Myers in 1979 and led the office's labor and employment law practice until he retired in 1992. An active community member, he served on the boards of a number of non-profit organizations, including the Equal Employment Advisory Council, Junior Achievement, and the Orange County Performing Arts Center. He is survived by his wife, Beverly; daughter, Anne; sons Richard, William, and Chris; and five grandchildren.

**Kenneth G. Griffin '64 (BA '63)** of Glendale, Calif., died October 21, 2004, at the age of 64. A distinguished Los Angeles business attorney and commercial litigator for over 35 years, he specialized in the representation of Japanese companies and was fluent in both spoken and written Japanese. He also wrote a series of practical books aimed at helping Japanese businessmen better understand American legal culture. He lectured frequently in Japan, including at the Japanese International Commercial Law Association in Tokyo, the Japanese Institute of International Business Law, and the Kaigai Chuzai Executive Salon. He is survived by his wife, Shirley; sons, Glenn and Winston; mother, Evelyn; sister, Priscilla; and brother, George.

**John L. Patterson '66** of Seattle, died September 9, 2004, at the age of 63. He had lived and practiced law in Seattle since 1970, specializing in real estate and real estate lending. His professional associations included the American College of Real Estate Lawyers and the California Bar Association. Diagnosed with cancer in 1982, he was the longest-surviving recipient of a bone marrow transplant, then in the early stages of its development. He counseled new patients at the Fred Hutchinson Cancer Research Center. He is survived by his mother, Margaret, and sister, Jane.

**Daniel L. Hoffman '84** of Berkeley, Calif., died in December 2004 at the age of 44. He worked as an associate at Akin Gump Strauss Hauer & Feld after law school graduation, before moving on to run his own

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## In Memoriam from page 88

legal placement business, Hoffman Legal Search. He recently founded an entertainment business, Full Circle Enterprises LLC. In his spare time, he worked with World Neighbors, a nonprofit organization supporting long-term sustainable development in Africa, Asia, and Latin America. He is survived by his son, Ian, and daughters Lauren and Ella.

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### FACULTY:

**Mauro Cappelletti** died November 1, 2004. See obituary page 9.

**William C. Lazier** died December 23, 2004. See obituary page 9.

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### FRIENDS:

**Carl M. Franklin (MA '35)** of Los Angeles died on September 6, 2004, at the age of 93. Having received his master's degree in economics at Stanford, he established the Carl Mason Franklin Prize in International Law and, with his wife, the Carolyn C. and Carl M. Franklin Scholarship Fund at the law school. He joined the University of Southern California Law School faculty in 1953 and served in a number of capacities during his five-decade career at the university, including vice president for financial affairs and chief legal officer. He also served as president of the Association of Independent California Colleges and Universities, and was a trustee of a number of philanthropic foundations. He is survived by his brother, Glen; daughter, Priscilla; and sons Craig, Sterling, and Larry.

**Leah L. Kaplan** of Stanford, Calif., died August 24, 2004, at the age of 83. A graduate of the University of Minnesota and Smith School of Social Work in Massachusetts, she served in various staff positions at Stanford University for over three decades, including assistant dean of student affairs from 1974 to 1979 and ombudsperson for the university from 1984 to 1996. She was also the founding director of the Stanford Help Center. She was honored with the Lloyd W. Dinkelspiel Award in 1980 for her dedicated service to the students and staff of the university. She is survived by her sister, Shirley; daughter, Ann; son, Paul; and two grandchildren.





PHOTO: STEVE CASTILLO

**IN SILICON VALLEY:** Reception cohost Jill Freidenrich (BA '63) (left) was thrilled to welcome former Stanford Law School dean Thomas Ehrlich to her home.



PHOTO: CHARLIE PRUETT

**IN D.C.:** D. McCarty "Mac" Thornton '72 (BA '69) (left) caught up with classmates (left to right) Leonade Jones, JD/MBA '72, Mary Beth West '72, and Edward Hayes '72 at an SLS reception hosted by Thornton's firm, Sonnenschein Nath & Rosenthal LLP.



PHOTO: MIKE COOPER

**IN PHOENIX:** Dick Snell '54 (BA '52) (left) and Alice "Dinky" Snell (BA '54) opened their home to Dean Larry D. Kramer and local alumni.

**IN SAN FRANCISCO:** Orrick, Herrington & Sutcliffe LLP hosted the Stanford Black Alumni Association (left to right, front row): Afam Onyema '07, Che Banjoko '07, Jerusha Stewart '83 (BA '79), Brandi Davis '06, Cassandra Knight '94 (BA '91); (left to right, back row): Jasmine Guillory '02, Tommie Pollard '01, Dianne Millner '75, Marissa Lackey '04, Tony West '92, Leah Williams '00, Dean Larry D. Kramer, Eugene Clark-Herrera '01, Andrea Manka '07, and Deborah Baker '05.



PHOTO: TAMMY SPATH



PHOTO: TRUDIE HARGRAVE

**IN CHICAGO:** Alvin Katz '77 (left) greeted Windy City alumni Eileen McChesney Kelly '86 and Gerard Kelly '86, at an SLS alumni reception hosted by Katz's firm, Mayer, Brown, Rowe & Maw LLP.



PHOTO: JOE PINEIRO

**IN N.Y.:** Dean Larry D. Kramer (left) is welcomed by Vaughn Williams '69, partner at Skadden, Arps, Slate, Meagher & Flom LLP, which hosted a reception for the law school's Big Apple alumni.



PHOTO: ROBERT MARCH

**SWEARING-IN:** Recent Stanford Law School graduates who passed the California Bar in July were sworn in on December 13 during the annual ceremony by Hon. Amalia Meza '79, Superior Court of California, County of San Diego, who administered the state oath; Hon. S. James Otero '76 of the U.S. District Court, Central District of California, who administered the federal oath; and Professor Robert Weisberg '79, who moved their admission to federal court. Raising their right hands (left to right): Lisa Chen '04 (BA '99), Timothy Gustafson '04, Mary Cain '04, Alisa Mall '04, and Lindsay Gordon '04.

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# UPCOMING EVENTS

## AT STANFORD

### **“Beyond Black Letter Law: Bridging Critical Disparities Confronting Contemporary Black America”**

*Saturday, February 19, 8:00 a.m. to 10:00 p.m.*

The Black Law Students Association will present panels on topics such as “Forging Alliances Across Borders: Issues Confronting the Black Diaspora,” and “Confronting Corporate Politics: Balancing Private Sector Success with Public Sector Commitment,” as part of a university-wide celebration of Black Liberation Month. Registration is required. [blsa.stanford.edu/events/springconf/2005/](http://blsa.stanford.edu/events/springconf/2005/)

### **“Looking Back & Moving Forward: Commemorating the Civil Rights & Voting Rights Act”**

*Saturday, February 19, 9:00 a.m. to 5:00 p.m.*

Leading faculty and legal practitioners from across the country will convene for this working symposium to reflect on the Civil Rights Act and Voting Rights Act. This conference is approved for five hours of MCLE credit. Registration is required. [www.law.stanford.edu/programs/pip/2005symposium/index.html](http://www.law.stanford.edu/programs/pip/2005symposium/index.html)

### **“Biotechnology and Intellectual Property: Current Controversies”**

*Friday, March 11, 8:30 a.m. to 5:00 p.m.*

A one-day conference bringing lawyers, judges, and scholars together to discuss emerging legal issues in biotech patent law. Sponsored by the Stanford Center for Law and the Biosciences, a center of the Stanford Program in Law, Science & Technology. Registration is required. [lst.stanford.edu/biotech/](http://lst.stanford.edu/biotech/)

### **“Environmental Workshop”**

*Every Monday through May 2, 3:45 to 5:25 p.m., Room 271*

The Environmental and Natural Resources Law & Policy Program will present a series of speakers from the sciences, history, anthropology, business, and law. To confirm attendance, contact Meg Caldwell, program director, at [megec@stanford.edu](mailto:megec@stanford.edu). To obtain seminar readings, or to be added to the program’s email list, please contact Jackie Mamayson at [jmamayson@law.stanford.edu](mailto:jmamayson@law.stanford.edu). [www.law.stanford.edu/programs/academic/enrlp/workshop/](http://www.law.stanford.edu/programs/academic/enrlp/workshop/)

## AROUND THE COUNTRY

**Philadelphia:** Wine Tasting with Mark Oldman ’98 (BA ’92, MA ’93) *Sunday, February 27, 2:30 to 5:30 p.m.*, LaCampagne Restaurant, 312 Kresson Road, Cherry Hill, N.J.

Featuring Mark Oldman, author of *Oldman’s Guide to Outsmarting Wine*, and cofounder and copresident of Vault, Inc. Sponsored by the Stanford Club of Philadelphia. Contact Jackie Metzler at [jmetzlervmd@netzero.com](mailto:jmetzlervmd@netzero.com).

**Los Angeles:** “Human Stem Cells: Science, Policy, and Politics”

*Saturday, March 5, 3:30 to 5:30 p.m.*, Mayer Auditorium, USC Health Sciences Campus, 1975 Zonal Avenue, Los Angeles

Featuring Hank Greely, Deane F. and Kate Edelman Johnson Professor of Law and director of the Center for Law and the Biosciences; and Irving L. Weissman, Karel and Avice Beekhuis Professor of Cancer Biology and director of the Institute for Cancer/Stem Cell Biology and Medicine. Sponsored by the Stanford Law Society of Los Angeles, Stanford Alumni Association, and Stanford Medical Alumni Association. [www.stanfordalumni.org/event.html?LASstem cell](http://www.stanfordalumni.org/event.html?LASstem%20cell)