

Stanford *Lawyer*



HAS
COPYRIGHT
GONE
TOO
FAR?

The Supreme Court will soon decide whether a new copyright law infringes the First Amendment.

Stanford lawyers are presenting arguments for both sides of the case.

Presenting

THE 2002 RALSTON LECTURE

Stanford Law School has awarded
the Jackson H. Ralston Prize in International Law
to **ROBERT S. MUELLER III**,
Director of the Federal Bureau of Investigation.
He will deliver the lecture on Friday, October 18.



The Jackson H. Ralston Prize in International Law was established at Stanford Law School in 1972 by Opal Ralston to honor the memory of her husband, Jackson H. Ralston, a distinguished international lawyer. The Ralston prize is awarded for original and distinguished contributions to the development of the rule of law in international relations. Mr. Mueller's compelling leadership of the FBI over the past year, his successful prosecution of Panamanian strongman Manuel Noriega, and his dogged pursuit of justice in the investigation of the 1988 bombing of Pan Am Flight 103 demonstrate his personal and professional commitment to the rule of law as a means to achieve international peace and justice, and strongly reflect the spirit in which the lectureship was established.

THE JACKSON H. RALSTON LECTURE IN INTERNATIONAL LAW
5:00 p.m, Friday, October 18
Memorial Auditorium
Stanford University

Tickets required. For information about seating and additional details about the event, please visit
<http://www.law.stanford.edu/alumni/weekend/2002>

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A Discipline of Many Disciplines

BY KATHLEEN M. SULLIVAN

Dean and Richard E. Lang Professor of Law and
Stanley Morrison Professor of Law

IN THE BEGINNING, THERE WAS LAW. Then came law-and. Law and society, law and economics, law and history, law and literature, law and philosophy, law and finance, statistics, game theory, psychology, anthropology, linguistics, critical theory, cultural studies, political theory, political science, organizational behavior, to name a few.

This development makes clear that the vocation of the legal scholar has shifted from that of priest to theologian. No longer is a law professor successful by virtue of well-informed and detached normative prescription directed to those toiling at practice, policy making, and adjudication. No longer is the highest aspiration of the law professor to restate the law or lead the bar. Instead, legal knowledge is perceived to advance through techniques of measurement, explanation, and interpretation, the positive and analytic tools of the social sciences and the humanities.

And yet we continue to owe our jobs as law professors, with our special place and privileges within the university, to teaching lawyers the tools of practice. We still publish casebooks and respond to requests from judges, legislators, and businesses for advice. The analytic techniques of the law school classroom continue to follow the ancient professional folkways of taxonomy and synthesis, analogy and distinction.

We thus live a curiously bifocal existence, viewing law close-up by day, and from an external vantage point by night, both insiders and outsiders to our profession.

To some of those who practice and apply law, this development represents decline and fall. A decade ago, Judge Harry Edwards famously lamented that "many law schools . . . have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy," thus dissociating the legal academy from the legal profession in a centrifugal spiral. To others, especially nonlegal academics, law professors who do interdisciplinary work are practicing social science and humanism without a proper professional license, acting as historians, economists, or political theorists *manqués*.

Stanford Law School's faculty shows why both critiques are wrong. The extreme implication of the first is that law schools ought to be increasingly partitioned from the rest of the university, specializing in practical education with little affinity for other disciplines; the extreme implication of the sec-

ond is that law schools ought to be dissolved as distinct entities and absorbed into the university's various other departments. The far better third alternative, which we put into practice daily at Stanford, is to retain the distinctive institutional place of law schools as postgraduate professional schools within the university, while continuing to lower the barriers to exchange between scholars of law and other disciplines university-wide. Under that approach, the rise of law-and scholarship elevates both our knowledge of how law works *and* our teaching of how to practice it.

Any discussion of interdisciplinary legal studies needs to start with a reminder that law is itself a discipline. Organizational charts of the disciplines often focus on content, or the taxonomy of subject matters studied. Of course, law is a discipline in this sense. Legal rules, documents, and judgments comprise a rich and complicated body of texts distinct from novels, equations, or musical scores. And law involves a rich and complicated body of institutional arrangements that structure and regulate social order, distinct from the institutional structures of markets, cultures, and religions.

A discipline also represents a technique, a method of analysis, a way of working. Here too, law is distinctive. It is a branch of rhetoric that gives normative force to interpretation and analysis. It is a set of interpretive techniques of problem solving that disaggregate and order the messy jumble of facts through which conflict presents itself. And it is an amalgam of argumentative and decisional conventions, engrained through repetition, teachable only through reiterated practice and critique, as with etiquette, musical performance, or sport.

But law, though a discipline, is not and never has been an *autonomous* discipline. The regulation of social order through a variety of authoritative texts necessarily interacts in complex and dialectical fashion with the content and techniques of the social sciences and the humanities. Take criminal law. Its classification of crimes and its hierarchy of punishment reflect a mixture of deontological and utilitarian theories of blameworthiness and deterrence. Similarly, constitutional law enforces

a set of institutional design mechanisms rooted in liberal political theory about how to constrain government tyranny. To teach law necessitates fluency in the disciplines that underlie the law.

For these reasons, even work that some would describe as “doctrinal” in today’s legal literature is rarely simply that. The attempt to explain or rationalize patterns of judicial or administrative decision making necessarily draws upon implicit theories in order to make interpretations, assessments, and predictions. For example, to describe the Rehnquist Court decisions in the areas of federalism, voting law, and associational liberty as expressing an overall tendency to favor decentralized decision making whether by state agencies, political parties, or Boy Scout troops is implicitly to draw upon political or social theory, whether or not Madison or Tocqueville is expressly invoked.

If law is a discipline, that itself draws upon multiple disciplines, then what is the role of the self-consciously interdisciplinary work in law that increasingly characterizes the work of the legal academy? There are three possibilities.

Interdisciplinary work adds to legal knowledge

Interdisciplinary legal scholarship starts from the irreverent proposition that nothing in law need be as it is, and that critical rationality can illuminate whether it’s doing what it claims, and if not, how it got that way.

Broadly speaking, there are two kinds of interdisciplinary approaches that can provide this perspective. The first, positive research, looks at the “is” rather than the “ought” of law, or how the law actually works in practice. Expertise from economics, social theory, or political theory enables legal scholars to describe, measure, and assess how well legal rules, practices, and institutions perform at the functions expected of or ascribed to them. The second, interpretive scholarship, draws on the techniques of philosophy, literary analysis, history, and cultural theory. It does not measure legal outcomes against a preassigned function, so much as seek to articulate the function, including the expressive function or social meaning, implicit in legal materials.

There is nothing mutually exclusive about pursuing these two sorts of interdisciplinary work. The point is that both the positive and the interpretive strands of legal scholarship take a stance outside legal rules, decisions, and institutions in order to describe, explicate, and assess their social role.

Interdisciplinary knowledge improves the teaching of law

The outpouring of scholarship, extending the methods of history, philosophy, literary analysis, political science, psychology, economics, and so forth to law, can improve legal pedagogy. Some techniques of other disciplines that may be taught in law schools provide law students with skills that are directly useful and applicable in legal settings. A law professor fluent in the language of the other disciplines for scholarly purposes will likely convey useful interdisciplinary knowledge in the classroom as well. The teaching of interdisciplinary knowledge also illuminates the tacit theories underlying the mix of statutes, regulations, and judicial precedents that comprise the law.

More subtly, interdisciplinary knowledge that is explicitly conveyed in legal teaching helps students to absorb, as part of the

social practice of law, the deep structure of the ideological and institutional tensions that law helps to resolve. Private law subjects are illuminated as playing out deeper tensions between allocative and distributive concerns in the operation of markets. Public law subjects are situated in broader debates about which topics are, and are not, better decided by majoritarian political processes rather than by private ordering or specialized expertise. The student with an architectonic understanding of the larger debates will subsequently better see how the same tensions reappear in miniature later in practice, as smaller oppositions nested within the larger ones.

Interdisciplinary legal studies benefit the other disciplines

Too often, the non-legal disciplines see law as a planet unto itself, impervious to contemporary trends in thought, or slow to awaken to them after a considerable lag time. But law offers rich material for analysis and reflection by non-lawyers. The continued lowering of walls erected between law and other disciplines out of institutional turf battles, or misguided mutual isolationism, is sure to produce better thought and analysis on both sides.

Interdisciplinary research is increasingly the touchstone in the basic sciences; Stanford University, for example, has ambitious plans to bring biologists, medical researchers, and engineers together to pioneer new insights and techniques in “bioengineering.” No one thinks these three departments ought to merge, or their specialized disciplinary standards be diluted. But the potential gains from collaboration are evident to members of each of these three intellectual communities.

Similar gains from collaboration are evident to the scholars who attend law school workshops in law and economics, law and humanities, law and history, law and environmental science, law and philosophy, and the like.

The law professors at these workshops are as often as not also great lawyers and teachers of legal practice. The non-lawyers in attendance are as often as not well attuned to the particular structures and nuances of law. Legal scholars need not choose between practical and theoretical destinies, nor non-legal scholars be exiled from the precincts of law. To the contrary, an interdisciplinary approach promotes synergy and enlightenment.

This essay is an adapted excerpt from Kathleen M. Sullivan’s Foreword, 100 Michigan Law Review 1217, May 2002. Reprinted with permission. To obtain a copy of the publication, go to www.law.umich.edu/JOURNALSANDORGS/mlr.



LORI EANES

A Ray of Hope

As an Israeli who is a new student in the Stanford Program in International Legal Studies, I found one news brief ["Middle East Mediator," Summer 2002, p. 6] especially interesting. While I disagree with some of the views voiced by Diana Buttu, JSM '00, a legal advisor to the Palestinian Authority, I found it encouraging to learn that she also strongly believes that to solve the Israeli-Palestinian conflict, one must sit at the negotiating table and try to bridge the differences in a nonviolent manner. This view is shared by more than 95 percent of the Israelis. I hope that it will finally prevail and that we will soon see the Palestinians and the Israelis around the negotiating table. I was also glad to read that Ms. Buttu believes in applying creative measures to overcome the hurdles on the way to peace. While it is regretful that Ms. Buttu did not expressly condemn the use of terror against innocent citizens, it is clear that her views, as expressed in the news brief, call for rational peaceful steps toward peace.

I sincerely hope that Ms. Buttu and her colleagues succeed in their mission, and that their future fruitful cooperation with the Israeli delegation will result in a peace agreement that will bring peace and prosperity to both our nations.

Adi Aron-Gilat, JSM '03

Editor's Note: The interview with Ms. Buttu was edited for space. When asked about Palestinian acts of terror, she responded that both sides need to start moving toward a process that protects civilian life, "whether those civilians are Israelis or whether they are Palestinians."

Mendacious Leftists

You describe Ms. Buttu as a mediator, but in truth she is an advocate. And not just any advocate, but one for an organization that, under the leadership of its current chairman, Yasser Arafat, has been branded by our government as incapable and uninterested in achieving a peaceful settlement in the Middle East. Her client has been linked with, and indeed funds, terror organizations such as Fatah, Islamic Jihad, and Hamas which have targeted and killed and

maimed hundreds of Jewish men, women, and children in the past 21 months.

Why give Ms. Buttu who carries with her the baggage of these atrocities a platform to espouse her political views? ("And it does not help that the Israeli team has steadfastly refused to abide by the law"—I guess blowing up school buses is within the law.) The answer is simple. If circumstances were changed and Ms. Buttu represented, say, Slobodan Milosevic or some such miscreant, there would have been no interview and her views would not have found the light of day. But, seeing as how she is representing Yasser Arafat, the darling of mendacious leftists throughout the world, she finds a place in the alumni magazine. I object.

Robert Swartz '79

Shedding Light on Abuse

Indian philosopher Ashis Nandi once wrote: "Our inability to imagine alternatives is the surest guarantee of oppression." Having lived and worked in developing countries for most of the last 18 years, I have often turned to Nandi for inspiration.

But Peter Bouckaert '97, senior researcher for emergencies at Human Rights Watch, is not just imagining alternatives, he tries to make those alternatives happen ["Down a Dangerous Road," Summer 2002, p. 18]. He takes risks to mitigate oppression. In an era of seemingly less emphasis on investigative journalism, the depth and objectivity of Peter's investigations into human rights abuses combined with getting his stories to the media provides invaluable intermediation. The world needs to know. But for Peter, and a very small group with whom he works, these stories wouldn't see the light.

During my three years at Stanford, I have witnessed an increasing interest among students in pursuing international careers: a pursuit that often requires risk taking, creativity, tenacity, and serendipity. I can think of no better exemplar than Peter Bouckaert.

Erik Jensen, Director of Research, Stanford Law School Rule of Law Program, and Senior Advisor for Law Programs, the Asia Foundation

A Badminton Power

I was pleased to learn that the Law School is honoring Sheila Spaeth, the widow of Dean Carl Spaeth ["Charming the Law School," Summer 2002, p. 16]. When Wally and I first moved onto the campus around 1965, we lived on Mirada Street. As we were going to spend the summer in Vermont, our house was up for summer rental. By chance, Mrs. Carl Spaeth was looking for a summer rental for a visitor to the Law School. While she was looking over the house and me, with a critical eye, I noted her charming accent. I found out that she came from Ballater, Scotland; my mother's family came from Tomintoul, only a few miles away. From that bond there grew a friendship that has lasted all these years.

In our eager search for knowledge, we audited a number of classes together. Dan Mandelowitz's art class was one, and I even think we at least dropped in on a very popular course in human sexuality! Our greatest regret is that we didn't audit Sandor Salgo's course on Beethoven.

Another bond was our working together in the foreign students program.

As it happened, our husbands seemed to enjoy verbal jousting matches so we often had dinner with each other.

Somewhere along the line I found that Sheila could play badminton. I was part of a group of "Badminton Girls," who met once a week, played badminton, had lunch, and talked. We invited Sheila to join us. She turned out to be a most powerful player. Even today, this group is more or less intact, a few additions and deletions over the years. Alas, we no longer play badminton, but we do talk!

Mary Stegner

Stanford Lawyer welcomes letters from readers. Letters may be edited for length and clarity. Send submissions to Editor, Stanford Lawyer, Stanford Law School, Crown Quadrangle, 559 Nathan Abbott Way, Stanford, CA 94305-8610, or by e-mail to jrabin@stanford.edu.

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Stanford Lawyer

(ISSN 0585-0576)
is published for alumni and friends
of Stanford Law School.

Correspondence and
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Editor, Stanford Lawyer,
Stanford Law School,
Crown Quadrangle,
559 Nathan Abbott Way,
Stanford, CA 94305-8610;
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Stanford Lawyer is listed in: Dialog's
Legal Resource Index and Current Law
Index and LegalTrac (1980-94).

Issues of the magazine since 1966 are
available on microfiche through William
S. Hein & Co., Inc., 1285 Main Street,
Buffalo, NY 14209-1987. Issues since
Fall 1999 are available online at
www.law.stanford.edu/alumni/lawyer

Printed on recycled paper

E-MAIL UPDATES

In September the Law School
launched Law@Stanford, a monthly
e-brief for alumni that reports
the Law School's latest news
and coming events. If you are
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The Faculty Index

From publishing to poker, here are some numbers that provide both a
personal and professional take on the Law School's professors.

Stanford Law School faculty members: **55***

Median year for joining the faculty among those active today: **1990**

Number of women: **11**

Number of emeriti: **12**

Number of Foundation Press authors from Stanford Law School faculty: **30**

Total number of citations for the nine faculty members in NEQ's list of the
100 most cited law professors: **15,060**

Professor Lawrence Friedman's ranking in citations among legal historians: **1**

Professor Paul Goldstein's ranking in citations among IP professors: **1**

Dean Kathleen M. Sullivan's ranking in citations among law school deans: **1**

Age of the youngest professor (Lawrence Lessig) in the top 100 most cited: **41**

Number of faculty members born in New York: **13**

Number born in California: **3**

Number born in Illinois: **9**

★★★★★★

Number of faculty members who completed this magazine's faculty survey: **36**

Number of respondents who say that they had decided to go to law school
before they turned 18 years old: **10**

Number of respondents who had a lawyer for a parent: **4**

Number of respondents who consider themselves vegetarians: **3**

Number of respondents who play piano: **11**

Number of respondents who play poker with Law School colleagues: **11**

Number of respondents who regularly reread the works of Jane Austen: **2**

Number of respondents who regularly reread *The Lord of the Rings*: **2**

Number of respondents who have met with members of Congress to discuss
policy in the last year: **13**

Number of respondents who argued a case in court or filed a brief in the last year: **11**

Length of commute to office for a majority of the respondents: **15 MINUTES OR LESS**

Number of respondents who bicycled to work last winter: **7**

Number of respondents who ate lunch outside last winter: **26**

Number of respondents who went skiing in the Sierra last winter: **5**

Longest time this summer spent by a faculty member piloting a self-launching
sea plane: **4 HOURS 30 MINUTES (MITCH POLINSKY)**

Professor Robert Weisberg's best marathon time: **3 HOURS 39 MINUTES**

★★★★★★

Number of faculty members who clerked for a Supreme Court Justice: **14**

Number who clerked for Supreme Court Justice Thurgood Marshall: **3**

Professors with PhDs in fields other than law: **9**

Number who graduated from Harvard Law School: **10**

Number who graduated from Yale Law School: **15**

Number who graduated from Stanford Law School: **7**

Number who are or have been affiliated with the Hoover Institution: **5**

Number who are or have been affiliated with the Center for Advanced
Study in the Behavioral Sciences: **5**

Number of survey respondents who subscribe to the *New York Times*: **25**

Number of survey respondents who subscribe to the *Wall Street Journal*: **7**

Percentage of respondents who have cowritten a paper with a Law School colleague: **31**

Percentage who had a Law School colleague review a draft of their most recent publication: **75**

★★★★★★

* Includes emeriti and senior lecturers but not lecturers. Sources: New Education Quality Rankings of U.S. Law Schools,
galley from the forthcoming Stanford Law School facebook, interviews with faculty, and the *Stanford Lawyer*
faculty survey. To view the complete survey, go to www.law.stanford.edu/alumni/lawyer/64/survey/.

The Buck Stops Where?

Fifty years ago the Supreme Court stopped President Harry Truman from extending executive power in a time of crisis. Now, Chief Justice William Rehnquist '52 (AB '48, AM '48), Associate Justice Sandra Day O'Connor '52 (AB '50), and former Stanford President Gerhard Casper revisit that case as the panel on a moot court.

DEAN KATHLEEN M. SULLIVAN was dreading the call. She knew that Chief Justice William Rehnquist '52 (AB '48, AM '48) strongly disapproves of moot courts, yet she had to ask him to do one. It was the end of summer 2001—the magical conjunction of the fiftieth anniversary of the Kirkwood Moot Court competition and his 50-year reunion was a year away—when she got him on the line.

As Sullivan remembers it, she proposed a reenactment of *Marbury v. Madison*, fully expecting to be turned down flat. “That’s a terrible case,” he responded sharply. “It’s too lopsided, and it should have been dismissed for lack of jurisdiction.” Not surprised but crestfallen nonetheless, the Dean was prepared to thank him and hang up the phone, but he interrupted her.

“What about Steel Seizure?” Rehnquist asked.

With that suggestion, the ball was set rolling for the event that is to take place this October 19 at Stanford. For Rehnquist it is a fitting way to mark the anniversary: Not only is it 50 years since he graduated the Law School, but it also is 50 years since the decision in *Youngstown Sheet & Tube Co. v. Sawyer*, better known as the Steel Seizure case, was issued. And it has also been 50 years since Rehnquist was a clerk for Supreme Court Justice Robert Jackson, who wrote an eloquent concurring opinion in the case that today remains one of the most quoted analyses on the constitutional limits of presidential power.



At their 50-year reunion, O'Connor and Rehnquist will revisit the steel seizure case.

Youngstown Sheet & Tube represents the rare moment in American history when the Supreme Court stands up to a president. In a 6-3 decision, the majority decided that President Harry Truman did not have the authority to seize the nation’s steel mills to avert a labor strike, despite his claims that the war in Korea demanded that he exercise emergency powers.

At the time they agreed on Steel Seizure as the 2002 Alumni Weekend moot court case and on the Chief Justice’s participation, neither Rehnquist nor Sullivan had any idea that the questions raised by that case would be so relevant today.

“When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”

—Justice Robert Jackson



Casper is an expert on constitutional limits to executive power.

The attacks of September 11 occurred weeks after their conversation, and only months later began the high-profile debate over whether President

George W. Bush was overstepping the boundaries of his office in waging the new war on terrorism.

Karen Stevenson '98 has a tough road ahead of her. A Rhodes Scholar and an associate in Los Angeles boutique litigation firm Hennigan, Bennett & Dorman, she will be arguing the government's case. "What makes you think I've got the more challenging side?" she laughs. "Just because the government got hammered the first time?" The opposing counsel is Charles Koob '69, the chair of litigation at Simpson Thacher & Bartlett. Presiding over the case, along with Rehnquist, will be Justice Sandra Day O'Connor '52 (AB '50), who is also returning for her 50-year reunion, and Gerhard Casper, Stanford University President Emeritus and a Stanford Law School professor.

Koob agrees that Stevenson's task is difficult, but he adds that her cause may be easier to argue today than in 1952, if one considers the political context. Truman's ratings in the polls had reached an all-time low. The war in Korea was going badly and the economy was sputtering. "Public opinion had turned against him," Koob explains. "Some people think the decision was more directed at Truman than at the power of the presidency."

Neither Stevenson nor Koob would tip their hands on their strategies, but they'll have no shortage of points to discuss. While the government clearly lost, just what the case tells us about the

nature of the presidency—whether there's some reservoir of inherent executive power beyond what's clearly stated in the Constitution and how exactly the limits should be drawn—is far from clear. Each of the justices in the majority wrote a separate opinion, and Justice Felix Frankfurter went so far as to say, "The issue before us can be met, and therefore should be, without attempting to define the president's power comprehensively."

Justice Jackson's opinion was nuanced. He wrote that the Court was obligated to intervene, but that the reality of politics might on other occasions transcend a strict reading of the Constitution's limits on the president's power. "There is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain," he warned.

The decision reached by the Law School panel could be a bit anticlimactic. In deciding the Steel Seizure case, the Court did not necessarily have to consider the constitutional question, as there was an alternative to injunctive relief. For instance, the case could have been sent to the federal court of claims, and the government could have been ordered to reimburse the owners of the steel plants instead of the Supreme Court ruling that the seizure was unconstitutional. "The government had a strong case that there was no irreparable harm and that there was an adequate remedy," Koob says.

Still, Koob and Stevenson agree that it's unlikely that the panel is going to want to spend the time discussing the niceties of injunctive relief, particularly when one of the great issues of the nation's Constitution is before them.

Indeed, Rehnquist was likely present when Jackson was writing his opinion, though Rehnquist has said that it was entirely Jackson's—not his own. When he comes to Stanford and presides over the case, he may well reveal how his views differ from those of the justice for whom he clerked.

Making the Grade

Stanford Law School has taken another step toward producing scientifically savvy environmental lawyers—and legally savvy environmental scientists. The school has started offering a joint JD/MS with Stanford's new Interdisciplinary Graduate Program in Environment and Resources.

One chief hails another. Ronald George '64, Chief Justice of the California Supreme Court, is the winner of the 2002 William H. Rehnquist Award, given annually by the National Center for State Courts. Rehnquist '52 (AB '48, AM '48), Chief Justice of the United States, will present the award to George at a ceremony in the coming months.

Stanford Law Professors Bernard Black and Michael Klausner were among the select group of scholars whose works were listed as the top ten corporate and securities articles of 2001. Black was recognized for "The Legal and Institutional Preconditions for Strong Securities Markets," 48 *UCLA Law Review* 781. Klausner made the rankings with "Do IPO Charters Maximize Firm Value? Antitakeover Protection in IPOs," 17 *Journal of Law, Economics, and Organization* 83 (with Robert Daines).

Mexico's President Vicente Fox named José Cárdenas '77, managing partner at Lewis and Roca, to be a member of the National Council for Mexican

Communities Abroad, which will assist in drafting policies that affect Mexican citizens living outside Mexico.

President George W. Bush nominated L.A. County Superior Court Judge S. James Otero '76 to a seat on the U.S. District Court in Los Angeles.

Carol Lam '85 has become interim U.S. Attorney for the Southern District of California, as she awaits Senate confirmation (see story p. 69) . . . Richard West '71, director of the National Museum of the American Indian, has joined the Stanford University Board of Trustees (see story p. 59).

The Sun Never Sets on Stanford Law School

THEY CAME FROM AROUND THE GLOBE to enroll in the Law School's two new masters programs. Eighteen lawyers, business-people, and government officials comprise the inaugural classes, nine seeking LL.M.s in Corporate Governance and Practice (CG&P), and the other nine seeking LL.M.s in Law, Science, and Technology (LS&T). For the next year, these students, along with 12 other foreign lawyers and scholars in the advanced degree Stanford Program in International Legal Studies (SPILS), will be studying at the Law School. Here's an introduction to a few of the new arrivals.

ANASTASIA GAYDARZHINSKAYA, RUSSIA, CG&P
A lawyer in Moscow for a New York-based firm, she had previously served as the deputy communications manager for World Bank programs at the International Finance Corporation in Moscow.

BAURZHAN KONISBAEV, KAZAKHSTAN, LS&T
A corporate lawyer in Almaty for a New York-based firm, he represents multinational companies in deals in the Eurasian republics.

JOHANNES BUERGI, SWITZERLAND, CG&P
A clerk for the district courts in Erlach and Saanen-Gstaad, he has also worked as a lawyer with Walder Wyss and Partners in Zurich and was a lecturer in commercial law at the University of Bern Law School.

CHANTAL GENERMONT, FRANCE, CG&P
A tax and corporate attorney with Cleary, Gottlieb, Steen and Hamilton, in Paris, she also has co-directed and cowritten a French television sitcom.

DOMINIC AYINE, GHANA, SPILS
A University of Ghana Law Professor, he has defended 30,000 squatters who face eviction from public lands in Accra. "I hope to convince some Stanford Law students who are interested in public interest law to come over and work with us," he says.

VINEET SUBRAMANI, INDIA, LS&T
A lawyer in Mumbai, he specializes in telecommunications and finance. He founded the Legal Services Support Team, an organization that provides legal assistance to NGOs.

ADI ARON-GILAT, ISRAEL, SPILS
A lawyer with the Israel Union of Environmental Defense, she says: "The United States is ten light years ahead of Israel in environmental law. Israeli lawyers see the American legal system as a model, so it was a natural choice to come here."

GABRIELA FALCÃO VIEIRA, BRAZIL, CG&P
A corporate lawyer with eight years' experience and an adjunct professor of corporate law at Candido Mendes University in Rio de Janeiro, she is fluent in six languages. "This is the perfect moment to be discussing corporate governance issues because of Enron and WorldCom," she says. "Brazil has a completely different legal system than the U.S., but the steps the U.S. takes to address this crisis are likely to be a model for the rest of the world."

MAXIMILLIANO ORAZI, ARGENTINA, LS&T
The in-house counsel for Cisco Systems Argentina, he also has worked as a senior associate in the law firm Allende & Brea in Buenos Aires and taught IT contracts at Catholic University of Argentina. "This is the first LLM to specialize in technology that I had seen," he says. "In my career, it's been mostly instincts and practice. Now I can stop the ball for a second and look back and get the academic background and perspective."

Lessons in Litigation

Michelle Alexander '92 will be launching a new clinic at Stanford.

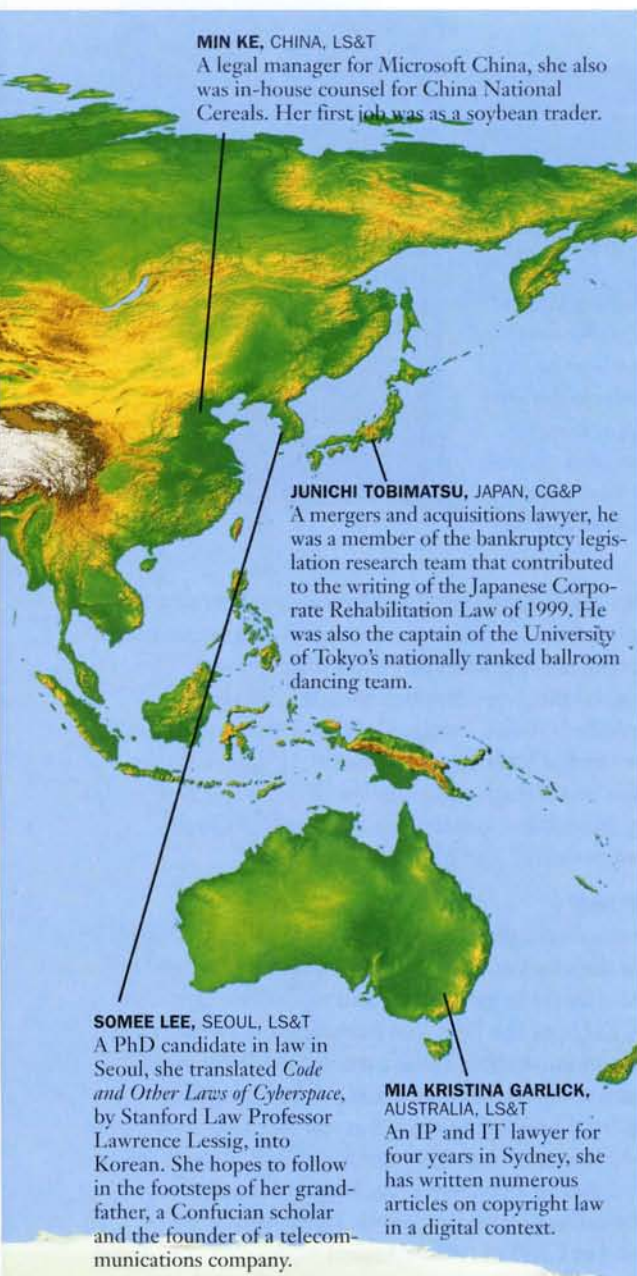


Michelle Alexander '92

IN THE PAST, few law school students received real-world training on big civil rights cases. But starting in January, Stanford Law School students will have the opportunity to do just that.

The Law School has appointed Michelle Alexander '92, previously the director of the American Civil Liberties Union of Northern Cali-

fornia's Racial Justice Project, as an associate professor of law (teaching). She will be developing and teaching a course on civil rights litigation and advocacy, which includes the new Civil Rights Clinic. Vice Dean Barton H. Thompson, Jr., describes her as one of the nation's "leading civil rights attorneys" and a "phenomenal" teacher.



Alexander says that she wants students to learn “how litigation can be used effectively as a tool to achieve social change when it is combined with other tactics, such as media advocacy, lobbying, coalition-building, and grassroots organizing.”

The Civil Rights Clinic will be the Law School's sixth clinic. The others are the Community Law Clinic, which relaunches this fall; the Criminal Prosecution Clinic; the Environmental Law Clinic; the Law and Technology Clinic; and the Youth and Education Law Clinic.

Working at the War Crimes Tribunal

Cara Robertson '97 has helped to define international criminal law.

CARA ROBERTSON '97 NEVER IMAGINED that she would be sitting across from Slobodan Milosevic. But there she was at The Hague in January—an associate legal officer to the Appeals Chamber of the War Crimes Tribunal—listening to the prosecutors' request to consolidate the three indictments against the Serbian strongman into one megatrial.

Robertson was advising the five judges on the panel who had to rule on this particular question. She is one of the few Americans working for the chambers, though a number work for the prosecutors and defense attorneys. (As a lawyer in the prosecutors' office, Sarah Kurtin '99 actually helped research the request to join the indictments.)

The Tribunal's work on this and other cases, arising from the conflicts in the former Yugoslavia and Rwanda, is defining the nature of international law. As part of this mission, Robertson has struggled with some of the challenges firsthand. “So much of this law is unsettled, inchoate,” she explains. “There's very little precedent, and where there is precedent, it's not binding.” Adding to the complexity is the Tribunal's task of fusing civil law and common law traditions into one coherent system of justice.

The appeal to join the Milosevic case highlights the difficulties. It turned on an interpretation of a provision in the Tribunal's Rules of Procedure and Evidence, which is written differently in the English version than in the French version—though both are authoritative. Did the crimes charged in the indictments committed in different places—Kosovo, Croatia, and Bosnia—over almost a decade constitute the “same transaction” under the Tribunal's rules? Milosevic's refusal to participate in the proceedings only added to the question's difficulty. Ultimately the panel decided to roll the charges into one trial, setting the stage for what is arguably the most significant exercise of international criminal law since Nuremberg.

Robertson, who is scheduled to be a visiting scholar at the Law School in 2003, was known at Stanford for her scholarly work on the Lizzie Borden trial, about which she's writing a book for Random House. After Law School, she was a law clerk for U.S. Supreme Court Justice John Paul Stevens. Shortly after her term ended, she stopped by the office of Theodor Meron, who had just been named a judge on the Tribunal. A few minutes into the conversation she realized she was in a job interview.

Robertson has an impressive understanding of U.S. criminal law—a talent that Meron was looking for in an advisor. But she also volunteered to him that she had taken no classes in international law. Still, she may have eased any concerns he had by talking with authority about sentencing challenges under international law. For her fluency on that subject, she credits her Supreme Court coclerk and classmate Allison Marston Danner '97, now a law professor at Vanderbilt, who had shared the draft of an article she had written on the subject. (It appears in *87 Virginia Law Review* 415).

The time Robertson has spent at The Hague has been taxing. “In the last year I have heard in excruciating detail some of the most horrible things that people do to each other,” she says. “The least we can do is listen to these stories and try to achieve some measure of justice.”



Cara Robertson '97

Building a Better Director

The Law School has been holding a Directors' College for years, but it is suddenly more relevant than ever.

BILL LERACH, HIS SIGNATURE SHOCK OF WHITE HAIR SHORN SHORT, moved through the cocktail party crowd on the second night of Directors' College. From the bar, Lerach looked around the packed Bechtel Conference Center at Stanford, soaking up the nervous buzz in the air.

In the center of the room, Securities and Exchange Commission Chairman Harvey Pitt huddled with Munger Tolles Olson partner Ronald Olson. *Fortune* magazine Executive Editor Joseph Nocera leaned into the conversation. In corners and on leather chairs, executives from some of America's largest companies and investment funds noshed finger food over their Merlot or mineral water, talking about issues of keen interest to Bill Lerach.

Lerach is the lead partner in the plaintiffs' law firm most feared by corporate directors, Milberg Weiss Bershad Hynes & Lerach, responsible for more than 70 percent of class-action shareholder suits brought in the United States.

Joked Lerach later: "I'm long Enron."

QUESTIONING CORPORATE PRACTICES

At Stanford Law School's eighth annual Directors' College, a sold-out two-day series of off-the-record seminars on corporate governance, 170 attendees and 60 speakers came from around the country. Organized by Law School Professor Joseph Grundfest '78 and Munger Tolles partner Simon Lorne, the white-shoe gathering in June drew CEOs, directors, lawyers, investment fund heads, academics, and regulators.

The timing was auspicious. On Monday, at the close of the college's first day, the Dow Jones index had dropped 2.2 percent and the Nasdaq 3.3 percent as Tyco International CEO Dennis Kozlowski resigned suddenly in the face of a criminal investigation. Scandal was leaping from company to company, and the lawsuits were mounting. Directors were on the front line.

Directors' College attendees wanted to know how they could arm themselves to raise standards of corporate gover-



CLOCKWISE FROM LEFT: SEC Chairman Harvey Pitt and Arthur Andersen's former CEO Joseph Berardino spoke at the event. Stanford President John Hennessy welcomes the opening night speaker, Walter Hewlett, and his lawyer, Stephen Neal '73.



STEVE GLADFELTER



RUSS CURTIS

nance. Eleven panel sessions and six keynote speakers covered a gamut of topics, from executive compensation and board committees to accounting practices and crisis management. The talks underscored three overlapping categories of abuse that might be remedied: audits, independent directors, and bosses' pay. And this triad of bad corporate practices propped up the public outrage that was spurring regulators and politicians.

"It's very difficult to overstate the crisis of confidence among investors today," said SEC Chairman Pitt.

AUDIT REFORM

While some speakers called for more lawyers, rules, and regulations to assist directors in discharging their duties, few held out hope that the answers to genuine reform would emanate from Washington, D.C., or the Financial Accounting Standards Board. Common sense should take a more prominent seat at the boardroom table, speakers said, and the audit function should move from bright-line rules that can be easily exploited to principle-based reporting that promises shareholders a more transparent picture of a concern's true financial condition.

Joseph Berardino, in his first public appearance since resigning as CEO of Arthur Andersen, decried "accounting principles that have gotten to be like the IRS code." He suggested that accounting firms switch from the current pass-fail audit to a report card-style grading system. That would give auditors more leverage over clients in accounting disputes and also let investors reward companies with high marks and discount those with low.

"Bad accounting follows bad business decisions," Berardino said. "Focus on understanding what is going on in the business and on risk management."

INDEPENDENT DIRECTORS

The need for more independent directors carried through almost every panel discussion and speech. At a minimum,

Directors' College cochair Simon Lorne and plaintiffs' lawyer Bill Lerach



STEVE GLADFELTER

Next year's Directors' College will be June 1 through June 3. For more information, go to www.law.stanford.edu/execed/.

directors needed to be financially qualified to judge a corporate balance sheet, said Roman Weil, professor of accounting at the University of Chicago Graduate School of Business.

Weil reviewed results of his annual multiple-choice accounting exam that many attendees had completed in advance. As in previous years, it was humbling. Most failed. "I don't know if we've made much progress on financial literacy," Weil complained.

The harshest note was sounded in Walter Hewlett's opening night address, when the dissident loser of the bruising nine-month boardroom proxy battle charged that directors who relied solely on management information to vote on the Compaq and Hewlett-Packard merger were guilty of a "dereliction of duty."

"At the very least, boards must be pried from managements' hands," Hewlett said in one of his first speeches after leaving the Hewlett-Packard board.

BOSSES' PAY

Director independence, or lack thereof, lay at the heart of abuses in compensation, speakers said.

Charles Elson, professor of corporate governance at the University of Delaware, called on companies to require that directors be independent, be subject to term limits, and hold on to their shares until two years after they step down from the board. Truly independent directors would prevent bosses from writing their own compensation plans, and holding shares during their tenure would discourage appearances of insider trading, he claimed.

Chatting with Charlie: The Mark Twain of Finance

PRESS-SHY CHARLIE MUNGER, vice chairman of Berkshire Hathaway, generally appears in public only once a year, sipping Cokes at a table with Warren Buffett, fielding shareholder questions at the company's annual meeting in Omaha, Nebraska.

Directors' College attendees enjoyed a rare private session with Munger to kick off their second day. By turns witty and provocative, Munger, a Harvard-educated lawyer, left no doubt where he stands on issues of corporate governance.

ON NEWSPAPERS: "For years I have read the morning paper and harrumphed. There's a lot to harrumph about now."

ON ACCOUNTING STANDARDS: "Proper accounting is like engineering. You need a margin of safety. Thank God we don't design bridges and airplanes the way we do accounting."

ON THE ARGUMENTS AGAINST EXPENSING STOCK OPTIONS: "Quoting Demosthenes, 'For what each man wishes, that he also believes to be true.' I

would rather make money playing a piano in a whorehouse than arguing that no cost is incurred when employees are paid in stock options instead of cash. I am not kidding."

ON THE TRANSPARENCY OF MODERN FINANCIAL REPORTING FOR TRADING DERIVATIVES: "No CEO examining books today understands what the hell is going on."

But after the panel discussion, one director of a publicly traded company countered that he had served on his board longer than a decade and had not taken a vow of poverty. Many in the audience applauded. Forgoing compensation for two years after leaving a board, the director added, would create "a very limited set of circumstances to get a director to serve."

BULGARIAN STOCK MARKET

Bill Lerach brought directors' fears to vivid life. In a panel where he represented the plaintiff's attorney in a mock shareholder lawsuit, he deposed a reluctant director played by Stanford Law Professor Kenneth Scott '56 before U.S. District Court Judge Susan Illston '73. Lerach led Scott over one exploding mine after another.

Lerach conceded he had one goal—settlement. With more than 95 percent of all shareholder suits settled before trial, Lerach said depositions are designed to show directors and executives how embarrassed they would be in a public trial and to make them look ridiculous and evasive. "It was like watching yourself be operated on without anesthetic," said one audience member afterward.

In a luncheon keynote speech on the closing day, Lerach said the country was in the "midst of the largest financial fraud since 1929." Without reforms led by directors themselves, he warned, Wall Street would come to "resemble the Bulgarian stock market." And, he added, "A whole generation of investors is going to stay away."

—Lonn Johnston (AB '81)



ON ENRON: "I think Enron is the first shoe to drop. There's a kind of Gresham's Law, where bad conduct drives out good conduct."

ON INDIVIDUAL GREED: "It's amazing the way people have sold out. It's insane."

ON ACCOUNTING FIRMS: "Accounting has steadily degraded over the past 30 years, and accounting firms have sold out time after time."

—L. J.

School for Scandal Prevention

THE ACCOUNTING AND FINANCIAL scandals of the summer meant that Joseph A. Grundfest '78, W. A. Franke Professor of Law and Business, was constantly fielding calls from reporters, trying to make sense of the carnage. Grundfest, a former Securities and Exchange commissioner, was the perfect source, having established both the Law School's Directors' College (see previous page) and the Law School's Securities Class Action Clearinghouse (<http://securities.stanford.edu/>), which tracks securities fraud lawsuits and settlements. He has been widely quoted in the *Wall Street Journal*, the *New York Times*, and other media outlets. At the end of August, he shared some insights with *Stanford Lawyer*:

Q: WHAT DO THE NUMBERS FROM THE CLEARINGHOUSE TELL YOU ABOUT TRENDS IN SHAREHOLDER SUITS?

A: Well, they suggest that class-action securities litigation has been a good business for a long time and is going to continue to be a good business.

Q: BUT WASN'T THE LITIGATION REFORM ACT OF 1995 SUPPOSED TO MAKE IT HARDER TO SUE?

A: When you talk to people about that, you generally find that their answers are highly consistent with their own financial interests. Isn't that a surprise? Plaintiffs' lawyers will swear that the act has contributed to fraud. Defense lawyers will swear that the act had nothing to do with it.

We're finding that, first, the price of settling a lawsuit that isn't dismissed early has increased very dramatically since the act became effective. Second, the number of lawsuits that are dismissed early on has also increased. This pattern is consistent with the courts' dismissal of weaker lawsuits and the courts' operating as a filter: they allow



STEVE GLADFELTER

Directors' education was once a hard sell, says Stanford Law School Professor Joseph A. Grundfest '78.

the stronger lawsuits to move forward while making it even more expensive for plaintiffs to settle the stronger lawsuits. If so, it appears that the Reform Act might be working as some intended.

Q: WHAT DOES YOUR RESEARCH REVEAL ABOUT SHAREHOLDER LAWSUITS SINCE THE REFORM ACT PASSED?

A: If you look at all settlements for \$100 million or more since the Reform Act passed—and we've identified 12 such mega-settlements—the plaintiffs' class-action lawyers rarely discovered the fraud. The fraud is typically either discovered by the press or disclosed by the company itself, through whistle-blower activity or other means.

The other point that we're finding is that when the plaintiffs' class-action lawyers collect a settlement, very little if any of it comes from the individuals who actually committed the fraud. Typically it comes out of the sharehold-

ers' pockets. So what you have is a situation in which you can really ask fundamental questions about the benefits of class-action securities fraud litigation. It appears to have little if anything to do with the mechanisms by which the fraud is actually discovered, and it has very little to do with punishing the individuals who are actually responsible for the fraud.

At the end of the day, it's not at all clear that society benefits optimally from plaintiffs' class-action litigation. Would we be a lot better off if we took the money that society spends to run the private class-action shareholders' business and use that to fund more aggressive enforcement by the SEC? I think a strong case can be made.

Q: WHY DID YOU START DIRECTORS' COLLEGE AT STANFORD?

A: Stanford Law School is to our knowledge the only major law school and perhaps the only law school in the

country that has an organized executive education program designed to address the needs of executives, not lawyers. We actually believe that we have something constructive to say to people who are directors. We believe that if directors of corporations become better educated about the legal environment in which they have to do their jobs, they can avoid problems. And a problem avoided is infinitely better than a problem solved.

Q: HOW HAS DIRECTORS' COLLEGE CHANGED SINCE ITS INCEPTION?

A: Eight years ago we actually had to spend a lot of time and energy persuading people about the "value added." Today everybody says it's an obvious idea. Suddenly, post-Enron, everybody is running around and discovering director education. We want these programs to multiply. In August we cosponsored with Wharton and the University of Chicago Business School a conference for new directors. Our Directors' College will continue to offer a broader set of educational opportunities, to provide greater opportunity to interact with practitioners and directors, and to target experienced directors with more advanced seminars. It is a mission that Stanford Law School has embraced and will continue to push forward.

Q: WHAT OVERARCHING THEMES EMERGED FROM THIS YEAR'S DIRECTORS' COLLEGE?

A: The main theme was a sense of real uncertainty. People were uncertain as to how the regulatory environment was going to change. People were concerned with how bad the problem in corporate America really was. Honest people were uncertain as to the steps that they should take to comply with the new heightened scrutiny that attaches to all publicly traded firms. It's as though the presumption in corporate America has changed. A year ago, the presumption was that if you presented a financial statement, it was the burden of someone to claim that it was wrong; now it's the

burden of management to demonstrate that the financial statement is right. That's quite a shift.

Q: IN YOUR VIEW, WHAT CONCRETE THINGS NEED TO HAVE HAPPENED BY THE END OF 2002 FOR INVESTORS TO HAVE CONFIDENCE THAT REAL REFORM IS OCCURRING?

A: We need to have a set of government enforcement agencies that aggressively go out there and attempt to root out fraud. The public needs to have confidence that we have real cops on the beat, and that they really are in the thick of problems. We have to create an environment in which executives and financial officers expect that if they fool around with the books, there's a high probability they will get caught and that they will have to pay a penalty.

Q: WHAT PENALTIES WOULD BE MEANINGFUL?

A: It has to be an individualized penalty. It has to hit the individual's pocketbook, and people have to serve some jail time. What you can't do is have mutualization of the penalty. You can't have all of the downside covered by an indemnification policy or insurance. At the end of the day, the person who creates the problem has to feel the pain for the problem he or she created.

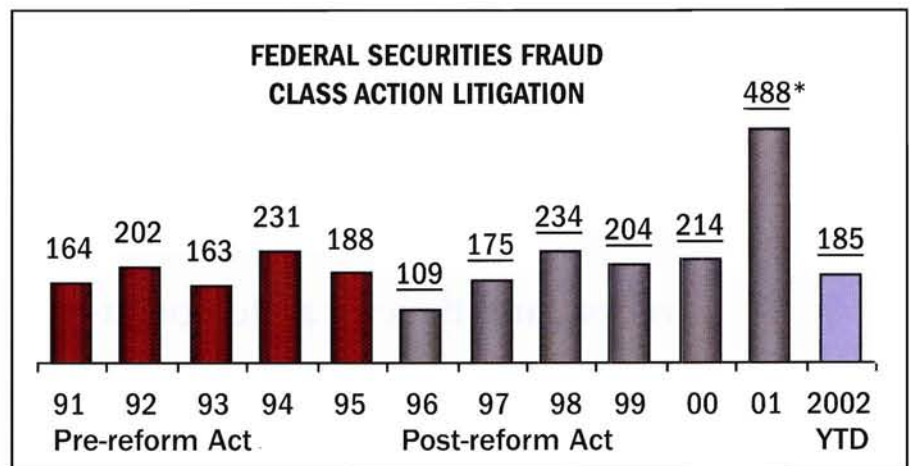
Q: SEC CHAIRMAN HARVEY PITT HAS REQUIRED THE TOP CORPORATE EXECUTIVES AT 947 OF THE NATION'S LARGEST COMPANIES TO CERTIFY THEIR FIRMS' FINANCES ARE ACCURATE. IS THIS MORE THAN A PUBLIC RELATIONS STUNT?

A: This is much more than PR, because what it's done is give executives the great opportunity to do what in the military is called a stand-down. If the military experiences a series of crashes with carrier aircraft, they cease carrier operations for a period of time, review training and safety, and make sure that everybody understands what needs to happen. We've had a series of crashes in corporate America. The SEC requiring these certifications is about as close to a stand-down as you can imagine. It's as though Harvey Pitt waved a red flag and said to everybody, "Go back and look at your books."

Q: SPECULATION CONTINUES TO CIRCULATE THAT JOE GRUNDFEST IS PRESIDENT GEORGE W. BUSH'S FIRST CHOICE AS A REPLACEMENT TO CHAIR THE SEC. IS THERE ANY TRUTH TO THE RUMORS?

A: You might as well speculate that the Queen of England is going to abdicate in my favor.

—L. J.



*This figure includes an unusually high number (303) of IPO allegation cases, which claim wrongdoing by underwriters in the offering process. The data for 2001 can thus be viewed as atypical. Source: Stanford Law School Securities Class Action Clearinghouse

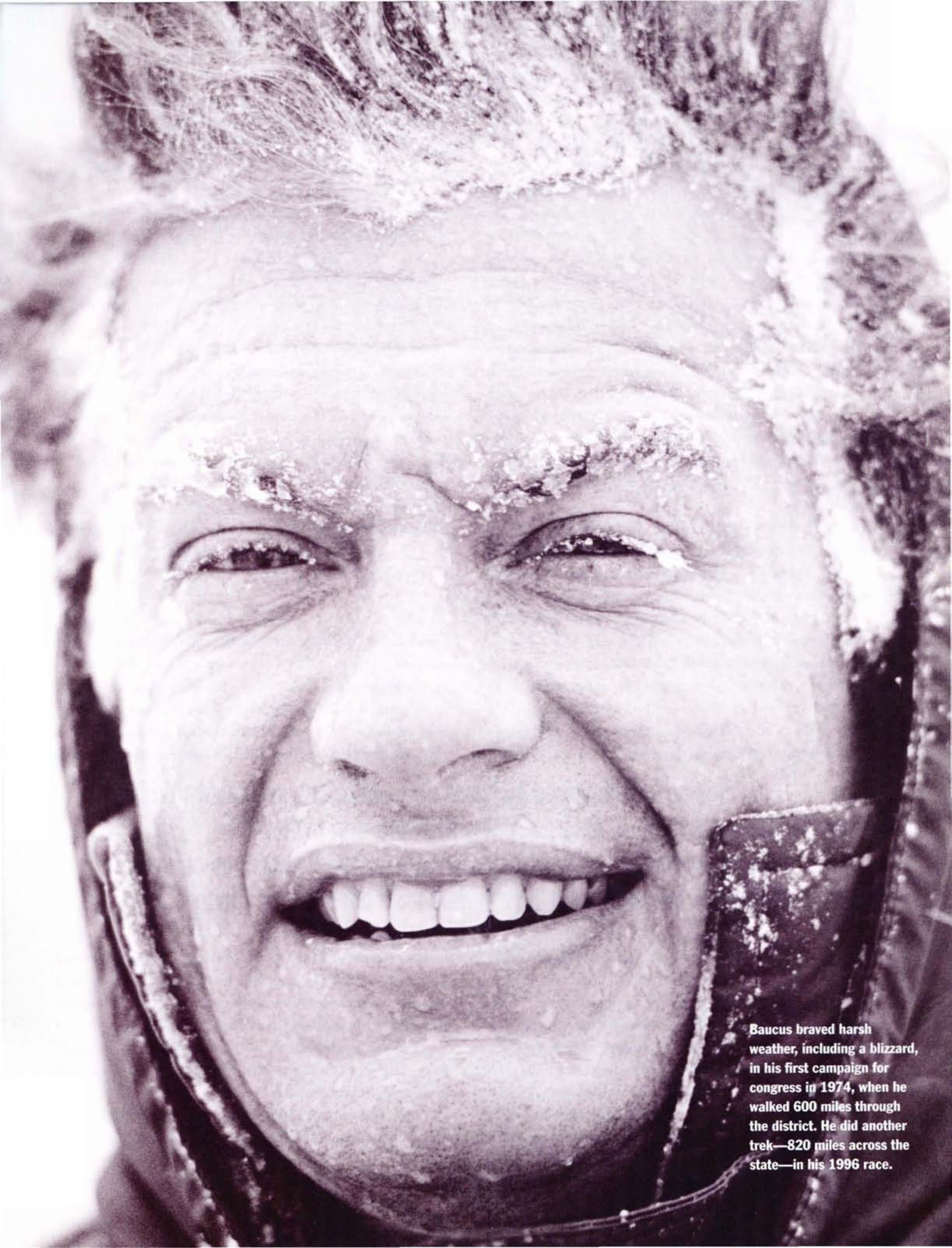
Can the Senator Survive

Another Montana November?

Big Sky Country is a tough place to be a Democrat, but Max Baucus '67 (AB '64) is actually enjoying himself as he runs for a fifth term.

BY JONATHAN RABINOVITZ

LIBERALS ARE ACCUSING Senator Max Baucus '67 (AB '64) of being too pro-business. Conservatives are complaining that he is paving the way toward socialism. There are only a few days left before Congress adjourns for summer recess, and Baucus, a Democrat from Montana, is in a familiar position: trying to craft a compromise on a huge piece of legislation that has divided Congress for years.



Baucus braved harsh weather, including a blizzard, in his first campaign for congress in 1974, when he walked 600 miles through the district. He did another trek—820 miles across the state—in his 1996 race.

MAX BAUCUS '67

This time around it's the bill on Trade Promotion Authority, better known as Fast Track. Baucus, chairman of the Senate Finance Committee, has been negotiating for days with his Republican counterpart in the House, but things are not going smoothly. Baucus favors granting the president more authority to negotiate trade deals, but he insists that the act provide substantial aid for workers and farmers hurt by such agreements. The GOP representative, who has been sequestered with Baucus for hours trying unsuccessfully to gut the benefit package, yells and storms out of the room.

Another senator might have shouted back, packed up his briefcase, and issued a press release about how impossible it is to work with Republicans. Besides, few politicians are expecting that groundbreaking legislation is going to emerge with elections just around the corner. But Baucus doesn't budge. He sits in his chair, waiting for his colleague to return. "Heck," Baucus says to a staffer, "it's his office, and he has to come back sometime."

Indeed, soon the talks resume, and after a couple of all-nighters, the two have hammered out their differences. Baucus, while losing some points, succeeds in getting wage and health insurance subsidies for farmers and workers who are both directly and indirectly affected by trade agreements. Although environmental groups and unions complain that the new law permits deals that will erode labor and environmental standards, there's no question that Baucus has established a precedent with its \$12 billion aid package: it's essentially a statement that while globalism must move forward, the government needs to take care of those left behind.

He had been inspired by Alexis de Tocqueville's argument that lawyers are the nuts-and-bolts of America, doing the work that makes this democracy run smoothly. Law school only fanned Baucus's commitment to seeing how a problem could be viewed from different perspectives.

"Max did fantastic work to get this trade bill through the Senate," declares President George W. Bush several days later, on August 6, at the ceremonial signing of the act at the White House. On the C-SPAN broadcast of the event, it looks like he pulls Baucus to the podium so that they can appear in a picture together. Only a few days earlier in a telephone conference call, Baucus had asked Bush whether he had a nickname for the bill. "Not yet, Maxie," the president said.

At first glance, it seems strange that Bush would be so

chummy with the guy whom the *Washington Post* described last year as "probably the most vulnerable Democrat" in the Senate. Baucus is running for his fifth term, and while his chances at reelection this fall look better today than a year ago, national Republican strategists still see the race as a decent shot at erasing the Democrats' one-vote majority in the upper chamber. Montana has become a much more conservative place since Baucus was first elected to Congress in 1974, and it and the other Rocky Mountain states are now regarded as hostile territory for Democrats.

But Baucus is also Bush's kind of guy. He runs five miles most mornings, has a license to drive an 18-wheeler, and rides his Harley-Davidson—with his wife on back—some 600 miles to the annual Harley gathering in Sturgis, South Dakota. To many in his state, he's not Republican or Democrat. He's just Max, another Montanan who doesn't fit those East Coast categories. The trade legislation, arguably, underscores his pragmatic nature, his independence, and that 28 years inside the Beltway have not caused him to lose touch with Big Sky country. And that message could be the key to his surviving another Montana November.

* * *

Jean Baucus AB '39 did not raise her son to be a senator. If he was being groomed to do anything, it was to take over the family business: the 60,000-acre ranch that can be traced back to his great-grandfather, Henry Sieben, at the turn of the 20th century. Before he turned 12, Baucus had learned to shoot a rifle, hunting pheasant and rabbit. He learned to ride and still

handles a horse well (at a recent parade he quickly reined in a skittish mare that had been lent him by a constituent). As a teenager, he spent his summers stacking hay, and his autumns playing football for the Helena High School team.

Baucus's mother didn't see him as a potential congressman, certainly not a Democrat. "I just thought he was a good healthy Montanan," she says.

Still, like many in Big Sky country, Baucus showed an independent streak. On the one hand, he was an outdoorsy

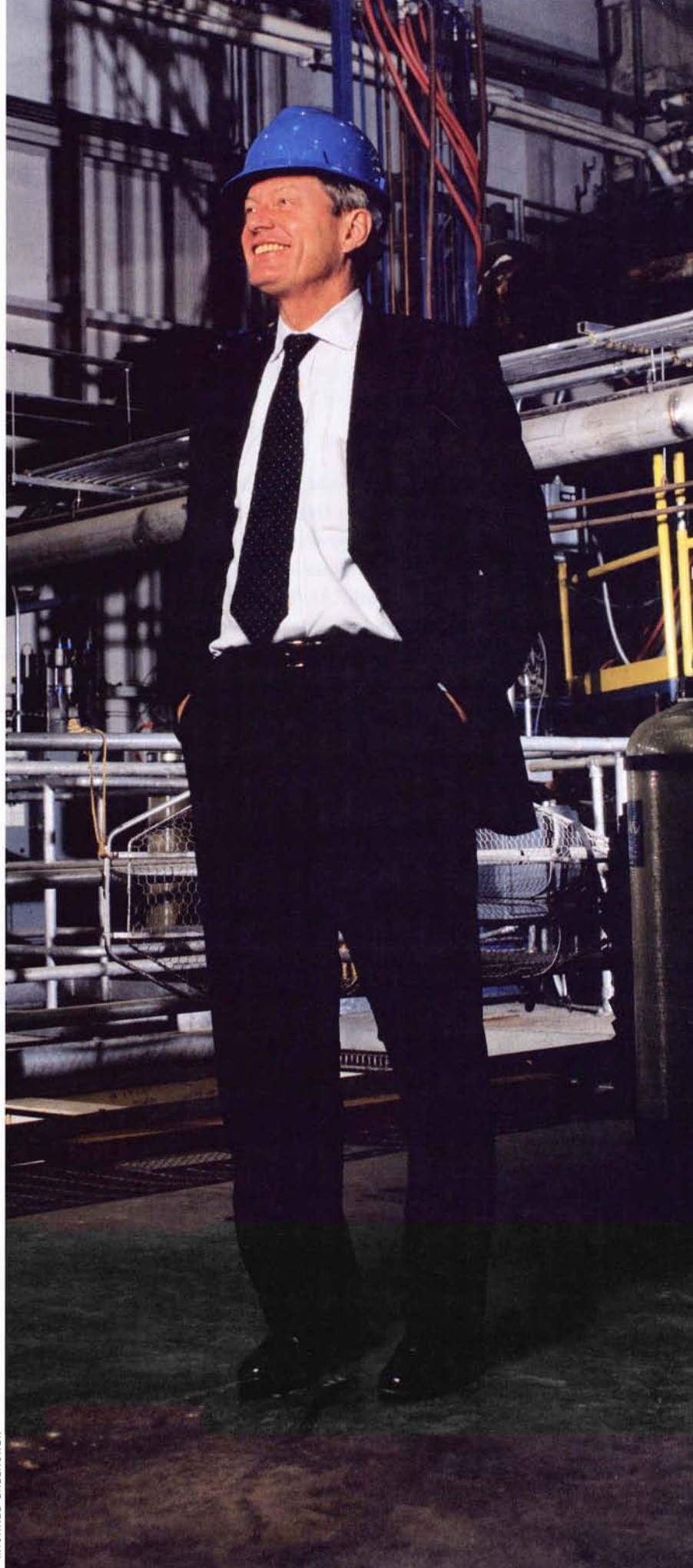
western guy; on the other, he pursued his own interests regardless of what others might think. He was, for instance, an accomplished organist, and initially enrolled at Carleton, a new college with a reputation for being an alternative school. After one year he transferred to Stanford to join friends, but his undergraduate career at the Farm was not conventional: he left campus for a year to travel around the world, though schools in the early 1960s frowned on students taking a year off. He toured Africa and Asia on a budget of a few dollars a day. The trip ended after he wound up in a hospital in the Philippines with a severe case of dysentery. The globetrotting left Baucus physically weak and pencil thin, but it also left him with a fresh appreciation of his own country, a strengthened belief in democracy, and a firsthand understanding of the poverty that many in the Third World face.

These were the feelings that Baucus brought with him to Stanford Law School.

Talk about Baucus with his classmates from that time, and you don't get a sense of a young man destined to become one of the nation's most powerful Senators. Down-to-earth and friendly, he was well liked, even charming. His red VW bug attracted more attention than his academic performance. Jack Pettker '67, who was in Baucus's first-year study group, says that neither he nor Baucus would be described as "intellectually quick on our feet." But Pettker was impressed by Baucus's thoughtful nature and his interest in new ideas. And he studied hard.

Unlike many of his classmates, however, Baucus hadn't come to law school with the goal of becoming a practicing lawyer. His motivation was, well, idealistic. He had been inspired by Alexis de Tocqueville's argument that lawyers are the nuts-and-bolts of America, doing the work that makes this democracy run smoothly. Law school only fanned Baucus's commitment to seeing how a problem could be viewed from different perspectives. "He was persistent," explains Pettker. "He continued to chew on ideas long after the exams were done."

Baucus admits to being nervous about his law school studies in his first year, but he didn't let that anxiety deter him. "Like every 1L, he had some



MICHAEL GALLACHER

MAX BAUCUS '67

worries, but Max was also very good at rising above them," remarks James Galbraith '67, another classmate. "He wasn't scared of failure." Indeed, Baucus himself recalls that he volunteered to answer questions in class, a move that in hindsight might seem foolish as he sometimes wound up tongue-tied and ridiculed by professors for his answers. In one instance, after Baucus tried to establish certain points of evidence, Professor John Bingham Hurlbut responded, "Mr. Baucus, all that you've established is that you are a masochist."

Says Baucus: "I just about died."

* * *

But perhaps only a masochist would be willing to run today for the Senate in Montana on the Democratic ticket.

In the first part of the 20th century, Montana was union country, with gold and copper mines in Butte that were then called "the richest hill on earth." In the 1960s the state was solidly Democratic, the home of Senator Mike Mansfield, the legendary majority leader, and Senator Lee Metcalf, a strong supporter of Great Society programs. But even then there were signs that a shift was under way. The mines' output was dwindling, and decent-paying mining and timber work was disappearing. Last year Montana ranked dead last among the states in average wage per job—\$23,037—after having been in the middle several decades earlier. It has become a breeding ground for a right-wing anti-government populism, captured in its most extreme form by the Freemen, a group that forced an 81-day armed standoff with federal agents six years ago.

Baucus first ran for public office in 1972. He had spent a few years in Washington, D.C., at the Securities and Exchange Commission and had returned to Montana to assist in rewriting the state's constitution. He won a seat in the state House of Representatives, but not without creating a bit of a stir in his family. He ran as a Democrat, and his parents were stunned. "This was a traditionally Republican family," says John Baucus, Max's younger brother, who still tends to prefer Republican candidates though he always votes for Max. Members of the clan say that Baucus's political affiliation was a little embarrassing at first—some friends and relatives would avoid talking about him in front of his parents—but the family quickly grew proud of his work.

Baucus ran successfully for a seat in the U.S. House of Representatives in 1974 and was elected to the Senate in 1978. An adversary in Baucus's first race for Congress, Pat Williams, says that Baucus, the centrist in a three-person primary, was—and is—a tenacious candidate, who walked 600 miles across the district as part of his successful campaign. Six

years ago he walked 800 miles across the state. "Max is indefatigable," says Williams, who later represented Montana in the House from 1979 to 1997. "He has been virtually nonstop, day in and day out, for a quarter of a century."

Those were easier days, however, for a Democrat to win an election in Montana. The campaigns have become rougher. Whether fair or not, Baucus's opponents now try to tag him as a liberal. Years back that word might have been less bitter a label, but now it's a mark of being an outsider. The shoe may not fit perfectly—Baucus, for instance, was the key Democrat supporting President Bush's tax cut, a move that was reported to have infuriated Senate Majority Leader Tom Daschle. Still, that hasn't stopped his latest opponent, State Senator Mike Taylor, from suggesting that Baucus is too extreme for Montana.

In the Rocky Mountain West, Baucus is something of an endangered species. "He's the only high-profile Democrat left in the state," says Chuck Johnson, a longtime political reporter for Montana's biggest newspaper chain and the dean of the state capital press corps. Montana went strongly for Bush in 2000, and solidly for Bob Dole in 1996, the same year that Baucus had his tightest Senate race ever. The state's other senator, its one member of the House, its governor, and the majority in the state legislature are all in the GOP.

Baucus's chances for reelection improved late last year when Marc Racicot, a popular former governor who now serves as chair of the Republican National Committee, opted not to challenge him. Williams, the former congressman, also cautions against overstating Montana's Republican leanings, noting that he personally is a liberal and was reelected eight times before choosing to step down. Indeed, as of April, a poll commissioned by the Baucus campaign showed him having a 33 percent lead.

Still, that gap can close quickly. Montana is one of the least-populated states in the nation, and it does not take much money to wage an advertising blitz at the last minute. That happened in 1996; in the final two weeks of the election Baucus saw his lead drop from 18 percent to 4 percent in the wake of a series of ugly attack ads and thousands of calls from out-of-state Republican-financed phone banks. Even Williams concedes that a Republican candidate in Montana gets a certain automatic vote that a Democrat can't count on. Baucus may be the favorite in this race, but he certainly is not taking it for granted. Adds Johnson, the political reporter: "He's the party's last bulwark against Montana becoming completely Republican."

* * *

MAX BAUCUS '67

On a gray March morning, the wind is whistling outside the century-old state capitol, with its majestic copper dome. Spring has started in much of the country, but not here in Helena. With a few staffers trailing behind, Baucus walks into a vaulted hearing room, replete with murals of Indians slaying bison and the explorer Meriwether Lewis perched atop a cliff. He has convened an early morning hearing on the reauthorization of the nation's welfare reform program, and about 100 people—many single mothers with young children, a few older men in cowboy

Montana. He was, for instance, one of the first Democrats in Congress to back the proposal to reinvent welfare in 1996, but he also helped to make sure that a special waiver was approved for Montana that freed the state from some of the more onerous regulations. When the formula for federal highway funding was being rewritten, he made sure that it granted a 60 percent increase for Montana—the average increase for other states was 44 percent. The state receives \$1.73 in federal money for every dollar in taxes that it sends to Washington.

The hearing at the state capitol is particular timely. Bush has proposed to end Montana's welfare waiver, and Baucus is not happy about it. "We're a lot different from New York, Philadelphia, and Boston," he says. "I'm going to fight to keep our waiver."

It's not the sort of battle cry that makes for catchy headlines. He could perhaps punch it up by attacking the president, but Baucus wants to work with Bush, not get into a shouting match. And many in the room, while wishing he would push for bigger welfare checks and even less stringent guidelines, apparently appreciate what he does. Thank you, says one speaker, for winning more childcare money. Another expresses appreciation for a provision in a recent farm bill that is worth millions of dollars to Montana. Even Governor Judy Martz, a Republican, can't avoid a compliment when she appears at the hearing. "In all my years, I have never seen a closer relationship with our delegates in Washington, D.C.," she says. A picture of the event in the next day's *Billings Gazette* certainly conveys that message: it shows the senator and the governor sitting side by side.

The hearing was just one in a series of stops in a whirlwind, four-day, 800-mile plus tour of the state during Congress's spring break. At almost every event, Baucus listens as much as he speaks, and frequently asks questions. Those traveling with

him are exhausted by the pace, but Baucus appears to thrive on it. "I love getting out of the office," he says. The senator comes back to check in with constituents almost every other weekend, even though there are no direct flights between Washington and Montana.

The trip in March, however, has a decidedly political edge. The election is nine months off, but the National Republican Senatorial Committee has already run a commercial in Montana featuring a sound bite from President Bush. While Bush doesn't specifically mention Baucus, the ad's nar-



MICHAEL GALLACHER

"He's the only high-profile Democrat left in the state," says a political reporter. Montana went strongly for Bush in 2000, and solidly for Bob Dole in 1996.

hats, and a number of social workers and ministers—are already there. Several go up to shake his hand, and each one simply calls him "Max."

"Welfare reform is one of the most important issues to come before the Finance Committee, and I chair that committee," Baucus tells the crowd. Most voters don't have a clue about the committee's heavyweight status in Washington, and he can't afford to be shy about communicating what he can accomplish.

Baucus has a history of being in front of issues. His supporters say that he uses that trailblazer status to take care of



MICHAEL GALLACHER

Baucus's support of trade with China, Fast Track, and other free trade issues is not a clear political winner at home.

rator accuses Baucus and four other Senate Democrats of being "partisan" and responsible for bringing down the president's most recent economic stimulus proposal. "Call Max Baucus," the narrator urges in the Montana version of the spot. "Tell him to support the nation's interests, not partisan interests." (A compromise version passed a few weeks later.)

Only the election results will tell whether that attack sticks, but Baucus isn't taking any chances. In an odd coincidence, he had already scheduled time to run his own spot, just as the Republican one began to run. Baucus's ad also features President Bush, but in his the president compliments the sen-

ator for his help last year in getting the tax-cut package through the Senate. The commercial never uses the word Democrat, but ends with a tagline, "Max Baucus, reaching across party lines to do what's right for Montana."

"That was a great ad," says Tom Scott, the chief executive of First Interstate BancSystem, the largest financial institution with headquarters in Montana, at a meeting with Baucus the day after the welfare hearing. Another executive chimes in with a rhetorical question that evokes laughter from all in the room. "Is this the first time a Democrat is running on a Republican's coattails?"

* * *

Many Montana Republicans dispute Baucus's effectiveness in bringing home the federal dollars. The state's other senator, Conrad Burns, a Republican, "is a much more effective advocate for the state," says Matt Denny, the former chair of the state Republican Party. He and others insist that Baucus is out of touch with his constituents after 28 years in Washington.

As part of the campaign to oust Baucus, opponents travel the state in a rusting Dodge Dart—dubbed the Max Mobile and covered with "Ax Max" bumper stickers. It's a 1974 model, and a message, scrawled on its body, points out that 1974 is also when Baucus moved to Washington to join the House of Representatives. In case anyone is unclear about how much time has passed, a big 28 is on the junker's hood, with observations that 1974

was also the year that *The Texas Chainsaw Massacre* was released, that Mama Cass died, and that streaking was popular.

The Republican nominee, Mike Taylor, says that Baucus's campaign war chest—\$5.5 million by June 30, about six times as much as Taylor had raised—is further evidence of his caring more about outsiders than constituents. "One candidate in this race has to wring money out of the D.C. special interests, and it isn't me," Taylor says.

Adds Denny: "The thing that always struck me about Max is that he shows up one year out of six. The rest of the time he's

MAX BAUCUS '67

off gallivanting around Hollywood or New York.” In the 1996 election, Baucus was attacked for “doing the wishy-washy” and being a millionaire. The Republicans called him a closet liberal environmentalist who often changed his mind out of political expediency. Perhaps worst of all for a Montana elected official, Baucus was accused of getting \$100 haircuts.

* * *

Anti-incumbent sentiment could be a problem for Baucus, but it's hard to imagine anyone mistaking him for a member of Washington society. Friends say that he and his wife, Wanda, seldom go out on the town. He drives himself to Dulles Airport in his 1994 Ford Taurus. He likes to eat at Dairy Queen and McDonald's. During his trip in late March, he dressed in the same blue blazer and gray slacks throughout the trip. The threadbare back pocket has a hole the size of a silver dollar. He denies ever getting a pricey haircut.

Perhaps Baucus is vulnerable to such personal attacks, because ideologically he cannot be pigeonholed. While Republicans suggest that he's a liberal, some Democrats complain that he is so conservative that he might as well be a Republican. He voted for a ban on assault weapons in 1994, but more recently voted against restrictions on gun show sales, and the National Rifle Association now supports him. He opposed John Ashcroft's nomination and consistently votes for abortion rights, but he also was one of the first Democrats to cross President Bill Clinton, successfully nixing Clinton's proposal to increase fees for mining and grazing on federal lands. Then, of course, he was the go-to Democrat on the 2001 tax cut after supporting a tax increase in 1993.

Critics complain that Baucus is pandering to voters, but that's a criticism that the political extremes often make of centrists. And Baucus follows some deeply held principles for which he will take risks. Being a “free trader” is one for which he has literally put his body on the line.

At the World Trade Organization's gathering in Seattle in December 1999, Baucus had a meeting scheduled with members of the Chinese trade delegation, who were staying at a hotel across town. (Baucus has been a leading advocate for legislation to normalize trade relations with China.) The rioting had just started in the streets, and Jim Gransbery, a *Billings Gazette* reporter who was accompanying Baucus, recalls that a top officer from the capitol police force refused to provide the scheduled ride, saying it was too dangerous. “Max just said, ‘I guess we'll have to walk,’” Gransbery remembers. When Baucus arrived at the other hotel, the Chinese delegates at first refused to come down to get him, saying that it was impossi-

ble that he could be there. Baucus met with them for an hour, laying out concessions they would have to make to get the law through Congress. By the time Baucus left, it had grown dark. Anarchists were roaming the streets, breaking windows and lighting fires. Baucus, dressed in a suit and tie, led his group back. He even stopped to observe a clash between police and protestors. Gransbery recalls telling him, “Max, we're not really dressed for this.”

Baucus's support of trade with China, Fast Track, and other free trade issues is not a clear political winner at home. Many Montanans are angry about NAFTA, because it has meant that Canadian and Mexican exports are undermining the market for some Montana products. While Baucus does not waver from his belief that increased trade will ultimately benefit Montana and the nation at large, he also understands that it can be abused—and that both rightly and wrongly it can cost some people their livelihoods.

So over the last two years, Baucus insisted that any bill that granted the president fast-track authority also had to include trade adjustment aid for those impacted by the lowered barriers that might result from new deals. Senator Phil Gramm of Texas called health insurance subsidies for displaced workers a “step toward socialism,” but Baucus forced it through. After the legislation passed, even an AFL-CIO policy analyst, Elizabeth Drake, conceded in an interview with the *Christian Science Monitor* that the new benefit package, while not enough by her standards, “does set a precedent.”

Once again, Baucus was trying to find middle ground. He's the increasingly rare lawmaker who believes in compromise and doesn't follow party lines. He wants to be at the table when the deals are cut. “I'm a Democrat, and I'm proud of it,” he says. “But I don't care about labels. I call them as I see them.” He's counting on his iconoclastic take on policies, one that veers from right to left and back again, to sustain his support with independent-minded voters. And in fact, there's one label that he doesn't shy from: He's a Montanan.

During Baucus's tour at the end of March, the state was already dotted with blue and green campaign signs that say simply, “Max: Montana's Senator.” And he wound up most of his talks with the same reminder he used at the end of the welfare hearing. He told the crowd his office telephone number and then repeated it. “I have a policy,” he says. “I take all calls from Montanans unscreened. Just tell them that you want to talk to Max.”

Copyright or

Stanford Law Professor Lawrence Lessig believes that a recent extension of copyright terms is unconstitutional. Now he just has to convince the Supreme Court. The case has involved some of the nation's top lawyers—including faculty and alumni from Stanford Law School.

WHEN LAWRENCE LESSIG COMPLETED HIS FIRST-EVER oral argument before a federal appeals court panel nearly two years ago, he couldn't have been happier. The three judges seemed to understand his contention that a once-obscure law extending the terms of copyrights was unconstitutional. They had kept him on his feet for more than an hour, engaging in just the kind of intellectual exchange that many legal academics dream of but rarely experience. The Sonny Bono Copyright Term Extension Act (CTEA), a law that Lessig, plaintiff Eric Eldred, and many others viewed as an egregious example of Big Media stepping on free speech, would soon be history.

It didn't quite turn out that way. When the Court of Appeals for the Washington, D.C., Circuit handed down its decision four months later, it upheld by two to one a lower-court ruling dismissing Eldred's challenge to the CTEA. Lessig, the head of Stanford Law School's Center for the Internet and Society and the world's most prominent thinker in the burgeoning field of cyber law, was sure he'd blown it. "I was really depressed," says Lessig. "This was a winning case—what had I done wrong?"

But Lessig's depression turned to elation early one morning in February when he was awakened by a call from Geoffrey Stewart, a partner at Jones Day who had been working Eldred's case pro bono. The Supreme Court, to the astonishment of most observers, had agreed to hear the case. The stage is thus set for a dramatic showdown over intellectual property rights in the Internet age—and for the most important argument of Lessig's spectacular and controversial career.

Eldred v. Ashcroft turns on a couple of seemingly simple issues, and on its face has little to do with the Internet. The law simply extends the terms of copyrights by 20 years, something proponents say is necessary to align U.S. copyright laws with European laws and assure filmmakers, musicians, writers, and others a fair return on their creative work. Eldred operates a website, Eldritch Press, that publishes online versions of books whose copyrights have expired, and he wants access to more and newer books.

But for Lessig, Stanford Law School Dean Kathleen M. Sullivan (who is Lessig's co-counsel before the Supreme Court), and a diverse group of free-speech advocates, economists, Internet executives, and renegade artists and lawyers, the stakes are much higher. This group believes that the CTEA, another controversial law known as the Digital Millennium Copyright Act, and the various ways in which existing copyright and patent laws are being applied are subverting the promise of the Internet. Rather than facilitating the free exchange of ideas, new information technologies are being regulated in a way that is fundamentally hostile to free speech.

"Copyright has been expanding in two ways—in scope and in duration," says Lessig. "We now have an incredible concentration of copyrights in a few entities. Never has there been a point where more of our culture has been controlled by fewer people."

To entertainment and media industry executives—and to their allies in Congress

who passed the CTEA and are now considering a raft of new laws to combat online piracy—this is mostly high-minded nonsense. To begin with, they say, copyrights are distributed throughout society, from the largest corporations to struggling artists. The real issue, they contend, is the health of an intellectual property industry that is worth billions of dollars—and that is in mortal peril from digital copying. The recorded music industry is already bearing witness to what happens when copyrights are routinely flouted: worldwide compact disc sales were down 5 percent last year, largely because of illegal copying. Movie executives are terrified that their industry is also about to be “Napsterized.”

“A lot of Lessig’s advocates ought to be a little more sensitive about theft,” says Jack Valenti, the influential chairman of the Motion Picture Association of America. While allowing that he considers Lessig, with whom he has engaged in a series of public debates, to be “a fine lawyer and an extraordinarily graceful and gracious man,” he adds: “There is a thing called private property. We see a lot of people who have scant regard for copyright, and who are disdainful about [the problem of] people taking things for free.”

These two vastly different views of copyright law will be tested on October 9, when Lessig and Solicitor General Theodore B. Olson argue their respective cases before the Supreme Court. The *Washington Post* describes it as “the most important copyright case of our time,” and it has inspired 34 amicus briefs, from a veritable who’s who of scholars, practitioners, and elected officials. While some writers have described the case as Hollywood v. Silicon Valley, the coalitions supporting each side transcend any black-and-white division and have produced some strange bedfellows. Floyd Abrams, a staunch defender of freedom of speech, contributed an amicus brief saying that the CTEA does not violate the First Amendment. So did Senator Orrin Hatch (R-UT) and Representative John Conyers (D-MI), who is not generally considered a friend to big business. In turn, Kenneth Arrow and Milton Friedman, two Nobel Laureate Stanford economists from opposite ends of the political spectrum, joined 15 of their colleagues in a brief supporting Lessig, as did writer Wendell Berry and Phyllis Schlafly, the founder of the Eagle Forum Education and Legal Defense Fund.

The unusual divide can be seen among the faculty and alumni of Stanford Law School, whose lawyers are on the front lines of the case. Jeffrey Lamken ’90, assistant to the Solicitor General and a coauthor of the government’s brief, studied copyright law with the most cited scholar in the field—Paul Goldstein, Stanford’s Stella W. and Ira S. Lillick Professor of Law. Over the summer Goldstein worked with Carey Ramos ’79 in the writing of an amicus brief for the American Society of Composers, Authors, and Publishers; Broadcast Music Inc.; and other groups that support the government’s position. Just up the stairs from Goldstein’s Law School lair is the headquarters for the other side—Lessig’s office, where some of the 30 Stanford Law School students who

Jonathan Weber was the editor of the *Industry Standard*, for which Lawrence Lessig was a columnist.

BY JONATHAN WEBER

Copywrong?

ELDRED V. ASHCROFT



Stanford Law Professor Lawrence Lessig says that Congress has abused its constitutional power to extend copyright terms, giving vast control of our culture to a select few.

helped research his arguments often gather. Elsewhere in the building sit Sullivan and another author of the petitioner's brief: Alan Morrison, a visiting fellow at the Law School and cofounder of Public Citizen Litigation Group in Washington, D.C. The list goes on and on.

All see this case as a turning point for copyright law. Those who favor the government's position fear that a system they believe has benefited the country is about to be turned on its head. Lessig and his supporters describe that same system as a monster out of control. Do we live in an era of unprece-

ented access to a wide range of information, or one of ominous threats to long-held free speech rights? Lessig believes the balance between copyright and free expression—a tension long recognized in Congress and in the courts—has recently tipped dramatically in favor of protection. He is determined to tip it back.

In the wake of the dot-com boom and the dot-com bust and the corporate world's on-again, off-again obsession with all things technological, it's almost hard to remember that the Internet was for many years viewed as a noncommercial medium. Born in academe, it came of age under the tutelage of people who saw in it the opportunity to rearrange the information power structure. Anyone—not just those who owned transmitters or printing presses—might be a broadcaster or a publisher. "Information wants to be free," or so the saying went, and the tools to make it so were available to everyone.

These noble sentiments—which still dominated Internet culture as late as the mid-1990s—were brushed aside during the dot-com gold rush. But they never really went away, and those who viewed the Net as something bigger than a business tool have retained more than a little influence. Organizations such as the Electronic Frontier Foundation and the Electronic Privacy Information Center, nonprofit projects such as the Internet Archive and Eric Eldred's Eldritch Press, websites such as Slashdot, and count-

less mailing lists and Web "blogs" have kept the debate alive, arguing for policies and protocols that they believe uphold the rights of individual and noncommercial users of the Net.

Lessig, soft-spoken and scholarly, would not have been the most obvious champion for this crowd. His first forays into public policy were as the head of the Pennsylvania Teenage Republicans; as a sophomore at the University of Pennsylvania he was managing an important state Senate campaign (his candidate lost). His political views had begun to change by the time he got to Yale Law School, but he still

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clerked for two of the country's most renowned conservative jurists—U.S. Supreme Court Justice Antonin Scalia and federal appellate court Judge Richard Posner.

Lessig began to build a name for himself in cyber law as a professor at the University of Chicago Law School. But his first 15 minutes of fame came when he was appointed special master in the Microsoft antitrust case, only to be abruptly dismissed from that post after Microsoft dug up e-mail messages that allegedly showed bias. In 1999 he published *Code and Other Laws of Cyberspace*, a highly original work that cemented his reputation as a creative thinker on some of the most important new issues in the legal field—and made him a star in the fractious world of new media policy.

In *Code*, Lessig argued that the regulation of technology is taking place through the way in which software is written and hardware is constructed. In effect, the (software) code is the law, and we'd better start paying attention to how that code is built. These arguments were music to the ears of people who worry that the Internet—and technology in general—is being shaped (read: warped) by large corporations that want control and ownership and that fear the messiness that would come from real creativity.

In his second book, *The Future of Ideas: The Fate of the Commons in a Connected World*, Lessig builds on his earlier argument, contending that corporations are using the code—as well as the legal and legislative systems, or “East Coast Code”—to stamp out innovations that might threaten their commercial interests. The latest incarnations of copyright law, in his view, are part of a broad and dangerous trend.

The CTEA was enacted in 1998, thanks to a strong push from the entertainment industry and a big shrug from almost everyone else. Proponents, led by Disney (whose copyright on Mickey Mouse stories was about to expire), argued that the United States needed to align its copyright terms with those of European countries, lest one of the nation's biggest export industries be damaged. The Clinton administration, which had close ties to the entertainment industry and a broader agenda for harmonizing intellectual property laws around the world, strongly supported the bill.

Lessig, then a professor at Harvard, immediately saw an important case in the making. With the support of Geoffrey Stewart and Jonathan Zittrain, now an assistant law professor at Harvard, he set out to find someone involved in public domain publishing who could mount a legal challenge. Meanwhile, on an Internet mailing list devoted to electronic publishing, a similar discussion arose. Eric Eldred volunteered to be the plaintiff. Before long, he and Lessig found one another.

Initially, Lessig saw the case revolving solely around the copyright clause of the Constitution, which authorizes Congress “To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Congress has used that authority many times, first establishing a copyright term of 14 years, and extending it repeatedly over the years. Lessig believed that the repeated extensions meant that Congress was violating the “limited times” requirement, and that the retroactive extensions that were part of the law meant it was not “promoting the progress of science.”

But there is another important dimension to the case, one first suggested by Dean Sullivan. A longtime admirer of Lessig, she had been trying to recruit him to the Stanford faculty, and the two were lunching together at the Charles Hotel in Cambridge when she raised the idea that there was a First Amendment issue in the *Eldred* case. Traditionally, the courts have held that the First Amendment does not trump copyright. In upholding the CTEA, the appeals court—relying on an important 1985 case in which the Supreme Court ruled that *The Nation* had no First Amendment right to publish the memoirs of Gerald Ford—stated that copyrights are “categorically immune from challenge under the First Amendment.” But Sullivan, and Lessig, believe that finding is wrong.

It's the free speech argument that gives the *Eldred* case so much resonance among the liberals and libertarians in the Internet community. The Net was supposed to enhance the free flow of information. Instead, they fear, a host of laws and proposals, not just the CTEA, are stemming it. The Digital Millennium Copyright Act makes it illegal to crack any encryption scheme, and thus any use of an encrypted, copyrighted work—even one traditionally permitted, such as making a personal copy for later viewing or listening—is now a crime. Entertainment companies are now pushing Congress to mandate copy-protection technologies for all electronics products. They're challenging the right of TV watchers to use recording devices such as Replay TV and TiVo, contending that it may be a crime to skip commercials. They're even proposing that companies be permitted to hack into the computers of alleged copyright infringers.

“It used to be that every general consumer-level use of a work was outside the scope of copyright law,” says Fred von Lohmann '95 (AB '90), senior attorney at the Electronic Frontier Foundation. “If I bought a book, I could resell it, or rip the pages out of it, I could read it as many times as I wanted, and copyright law would have nothing to say about it. Now copyright is invading a consumer's life like never before.”

ELDRED V. ASHCROFT

If the CTEA originally passed without much fanfare, the same cannot be said for the Supreme Court case. Lessig was profiled in September in *Wired* magazine, was the subject of a cover story in the *Los Angeles Times* Sunday magazine, and was cited in dozens of other publications. The Stanford Center for Internet & Society is among the petitioners, and so is Harvard's Berkman Center for the Internet and Society (where the case was born). Yale Law School recently tried *Eldred v. Ashcroft* in a moot court (Eldred won). Ad hoc groups, such as "53 intellectual property law professors" and "15 library associations," have formed to submit amicus briefs supporting Lessig's case. There's even a website that teasingly proclaims "Free Mickey!"—and another that offers "Free the Mouse" bumper stickers.

There is plenty of legal firepower on the other side, too. Working on the brief with Stanford Law Professor Goldstein and Carey Ramos, a partner at Paul, Weiss, Rifkind, Wharton & Garrison, was Yale Law Professor Drew Days III, the former Solicitor General who is also of counsel to Morrison & Foerster (as is Goldstein). A host of other Stanford lawyers have weighed in, including Karl ZoBell '58, who worked on an amicus brief on behalf of his client, Dr. Seuss Enterprises. Most copyright law practitioners—as opposed to law professors—come down on the side of the government, to the point where the American Bar Association's intellectual property section at one point proposed that the group weigh in to defend the CTEA. (That effort was quashed in the wake of vociferous objections from anti-CTEA forces.)

Goldstein and other defenders of the CTEA believe there are already plenty of free speech protections built into the copyright law, protections that are unaffected by the term extension. "This picture that some critics of copyright create, of an impermeable vessel that offends the First Amendment, is totally false," says Goldstein, whose article, "Copyright and the First Amendment" (70 *Columbia Law Review* 983 [1970]), framed many of the key issues that are still being debated today. "One looks at copyright law and sees any number of safety valves."

Most important, Goldstein notes, copyright does not protect ideas, only the expression of ideas, and thus can hardly be said to impede the free flow of ideas. There are also exceptions for "fair use"—they allow a book to be quoted by a book reviewer, for example, or a TV show to be recorded for later viewing—and for educational uses of copyrighted material. In the music business there is a whole regime of compulsory

licensing, which assures that copyrighted works can be used by others on a non-discriminatory basis.

"Copyright, over more than 200 years of its history, has grown up alongside the First Amendment—the concerns that underlie the First Amendment are the same ones that underlie copyright," says Goldstein. "It's an ongoing balance that Congress seeks to maintain. . . . In historical terms, it has worked out reasonably well." He does allow, though, that certain provisions of the Digital Millennium Copyright Act are problematic.

Ralph Peer (MBA '68 AB '66), chief executive of the music publishing company Peermusic, notes that this is not just an academic discussion. His company was planning a new push to popularize the music of Hoagy Carmichael, for example; that project would not go forward if the CTEA were struck down.

"I would argue that works in copyright enjoy a greater chance of dissemination than works in the public domain," adds Peer. "The idea of the public domain is that works can be disseminated without charge. But the mere posting of a work doesn't get you very far."

Lessig, he notes, chose to have his latest book published by Random House, a commercial publisher owned by the German media conglomerate Bertelsmann. "He knew full well that by going with a commercial firm it would be much more widely disseminated than if it was just posted on a website."

Easy access to public domain works is a major issue no matter what happens to the CTEA, and that's the impetus behind a new nonprofit organization known as the Creative Commons, which Lessig, Eldred, and other leaders in cyber law helped to establish (it is housed at Stanford Law School). The group's aim is to reinvigorate the public domain by making it easier for creators to share and disseminate their work, and easier for the public to find and use it.

Something like the Creative Commons, Eldred says, is what he was after all along. "If I win, it's not like me winning," he says. "It will free everyone to make derivative works, and to use the Internet to share."

If the media coverage is any guide, Lessig is way out in front in the public relations war over free speech and the Internet. Nearly all the reviews of his books have been favorable. Numerous publications, including the *New York Times* and the *Washington Post*, have editorialized against the copyright term extension. And Lessig has achieved a level of personal notoriety that is rare for any lawyer this side of Johnny Cochran.

Websites extol his brilliance. Students clamor to offer him research assistance. Dean Sullivan considers stealing him from Harvard and keeping him from Yale to be one of the signature achievements of her tenure.

There are some who consider Lessig an ivory tower intellectual who blithely ignores the practical importance of copyright law—and there are some, inevitably, who are jealous of his extraordinary success. He is popular among students, though like many intellectuals he can be impatient and

demanding. He does not cut an imposing figure around campus, where he often can be seen wearing black jeans and a rumpled oxford shirt. What he is, by all accounts, is very, very smart, and a truly creative legal thinker. Geoff Stewart, accustomed to massive legal egos, wonders: “How can a person be so nice and also be so brilliant?”

Of course, niceness and brilliance in themselves don’t cut much mustard with the Supreme Court, nor does favorable press coverage. Media industry lawyers remain confident that the CTEA will be upheld, and it’s not hard to see why. The Copyright Clause, after all, does seem to give Congress the authority to establish copyright terms, and Congress has used that power many times over the past two centuries. The courts have rejected the argument that the “to promote progress” phrase in the Constitution’s Copyright Clause limits the kind of term that can be established, and the appellate court in *Eldred* went further, holding that CTEA could indeed be found to promote progress if that were required.

The First Amendment claim is also anything but a slam dunk for Lessig and his team. Their argument is that any law that limits speech must be held to a higher standard of scrutiny, and that the government thus must show that the CTEA both satisfies a compelling state interest and is the least restrictive way to satisfy that interest. In the past, though, the courts have held that the idea/expression distinction, combined with the fair use doctrine, have essentially removed the First Amendment from any discussion of copyright. And even if the high court revisits that issue and agrees that the CTEA must be subject to



Stanford Law Professor Paul Goldstein points out that copyright and free expression have co-existed for more than 200 years, with Congress deftly balancing the two interests.

“intermediate scrutiny,” it would still need to find that the law was too onerous a means of addressing a real policy issue.

Still, the fact that the court decided to hear the case is certainly a good sign for Lessig, Sullivan, *Eldred*, and company; if the justices didn’t see any merit in the arguments they could easily have let the appeals court decision stand. And Sullivan suggests that the ideological makeup of the court might work to her side’s advantage. “This is a wonderful case for uniting different factions of the Supreme Court,” she says. “The originalists and the states’ rights advocates should be concerned about Congress exceeding its powers. The liberals ought to be drawn to the First Amendment arguments.”

A Supreme Court victory is the ultimate achievement for a constitutional lawyer, but even a win would leave Lessig and his allies with many battles yet to fight. Congress, always eager to curry favor with those who own TV stations and movie studios and printing presses, seems more inclined than ever to tighten the screws on copyright. Civil libertarians have a lot of issues on their plate, and copyright doesn’t arouse a lot of public passion. Legal wins are one thing, and political wins are something else again. Lessig will have to figure out how to succeed at both.

Intellectual Property Rights

ONE SIZE DOESN'T FIT ALL

The world has been moving toward uniform standards for patents and copyrights.

A new study warns that the poorest nations are likely to suffer unless that trend is stopped.

BY SHEILA KAPLAN

EIGHT YEARS AFTER THE URUGUAY ROUND of trade talks, there's a growing sense that the developing nations cut a bad deal, particularly on intellectual property rights. The latest critique comes from a high-powered commission, chaired by Stanford Law School Professor John Barton '68, that calls on the World Trade Organization (WTO) to extend the deadline for the poorest Third World countries to have adopted these rules—by at least 10 years, to 2016 at the very earliest.

That's just one of several dozen recommendations from the Commission on Intellectual Property Rights, an independent task force established and financed by the British government. Its report, issued in September, quickly created a buzz among top trade officials, with the director generals of both the WTO and the World Intellectual Property Organization (WIPO) attending the publication's official release in Geneva. The report's overarching theme is that the world's intellectual property rights system needs to take account of development concerns and that the present arrangement often costs more than the benefits it produces for the poorest nations.

It's too soon to say what impact the commission's research will have, but its work includes some strong remedies. For one, the report suggests that poor nations have not been well advised on the flexibility that they have in enacting copyright and patent laws, and that they do not necessarily have to use the United States and Western Europe as models. "Many developing countries are not aware of the options they have under these rules," says Barton, the George F. Osborne Professor of Law. The commission believes that developing nations still need to adopt IP regimes, but not the cookie-cutter approach that has been followed.

A case in point is patenting in agricultural biotechnology. While most developed countries permit this, the report recommends that the poorest countries, at the very least, should restrict such patenting. And the report adds that developing nations can do this and still be in compliance with the Uruguay Agreement on Trade-Related Aspects of Intellectual Property Rights, or TRIPS, which developing nations are supposed to have implemented by 2006.

Of course, some argue that loosening such rules will slow the spread of new technology. Take the corporate giant Monsanto, which refuses to sell certain of its patented bioengineered cottonseeds in India, out of concern that Indian law allows them to be replicated. "It's a detriment to us to take the technology there if there isn't a legal system," says Gary Barton, a company spokesman (not related to Stanford's Barton).

This business perspective heavily influenced the talks in Uruguay, but the evidence that John Barton has helped to marshal reveals that a rigid global standard actually hinders technological growth in the Third World. The report points out that the United States in the 19th century, while it was developing into the most technologically advanced nation in the world, did not play by Europe's intellectual property rules (printers, for instance, were permitted to copy freely foreign books and sell them throughout the country). Similarly, South Korea and Taiwan, during their growth years, had few restrictions on producing knock-offs of imported high-tech items.

The recent scandals involving the unaffordably high prices of patented AIDS drugs—while the disease reached epidemic proportions in Africa, Asia, and Latin America—have already changed the way the rules are followed. A consensus has recently emerged that in the event of medical crises, patents should be waived, and countries encouraged to buy cheaper generic versions of brand-name drugs. Now Barton and his colleagues on the commission, comprised of an Argentine economist, a top Indian government official, a leading British barrister, and two British scientists, are essentially recommending that the envelope be pushed a bit further.



The British asked John H. Barton '68, George E. Osborne Professor of Law, to chair the Commission on Intellectual Property Rights.

Barton is no stranger to contentious international debates. He has been an arbitrator in dumping disputes between Canada, Mexico, and the United States. He has overseen studies for the World Bank on intellectual property and biotechnology. And he has researched the legal implications of the trade of genetically engineered rice. He was, however, surprised when Clare Short, a member of parliament and Britain's Secretary of State for International Development, asked him out of the blue to join the commission and be its chairman. Over the last 18 months, he has overseen the commission's work, which includes running a series of workshops with leading scholars, reviewing working papers, and interviewing top officials in at least seven nations as well as representatives from WIPO, WTO, the European Union, business groups and nongovernmental organizations. (The report, titled *Integrating Intellectual Property Rights and Development Policy*, is available at www.iprcommission.org)

The commission ultimately concludes that the TRIPS agreement may not always be in the best interest of poor countries. In

addition to highlighting ways that TRIPS and other international arrangements can be friendlier to the Third World, the report also suggests that developing countries be given more time to adhere to the First World's IP regimes. They were cheered on in their work by the WTO's new director general, Supachai Panitchpakdi, who told them that he was troubled by the "conspicuous similarity" between the language in the final TRIPS agreement and the language that was submitted by private associations and corporations.

In an interview, Barton does not focus on the role of the business lobby, but acknowledges that international IP negotiations often have one side with vastly more resources than the other. That apparently happened in the Uruguay round. "A lot of the countries didn't realize many of the details of what they were signing," Barton says. "I don't think many of the people realized how much is at stake." The new report aims to level the playing field, and regardless of its effect, officials in the Third World will have been warned to be very careful when negotiating future deals.

The pace of change in our legal system

"went from a walk, to a run, to travel on a supersonic jet,"
writes Professor Lawrence M. Friedman in his new book,
American Law in the Twentieth Century.

By 2000, the country needed the law more than ever.

A NATION OF

This article is excerpted from the Introduction, pages 6–12, to *American Law in the Twentieth Century* (Yale University Press, 722 pages) by Lawrence M. Friedman, © 2002. Printed by permission. For more information about the book, visit www.Yalebooks.com.

THE TWENTIETH CENTURY WAS THE CENTURY OF THE "LAW EXPLOSION."

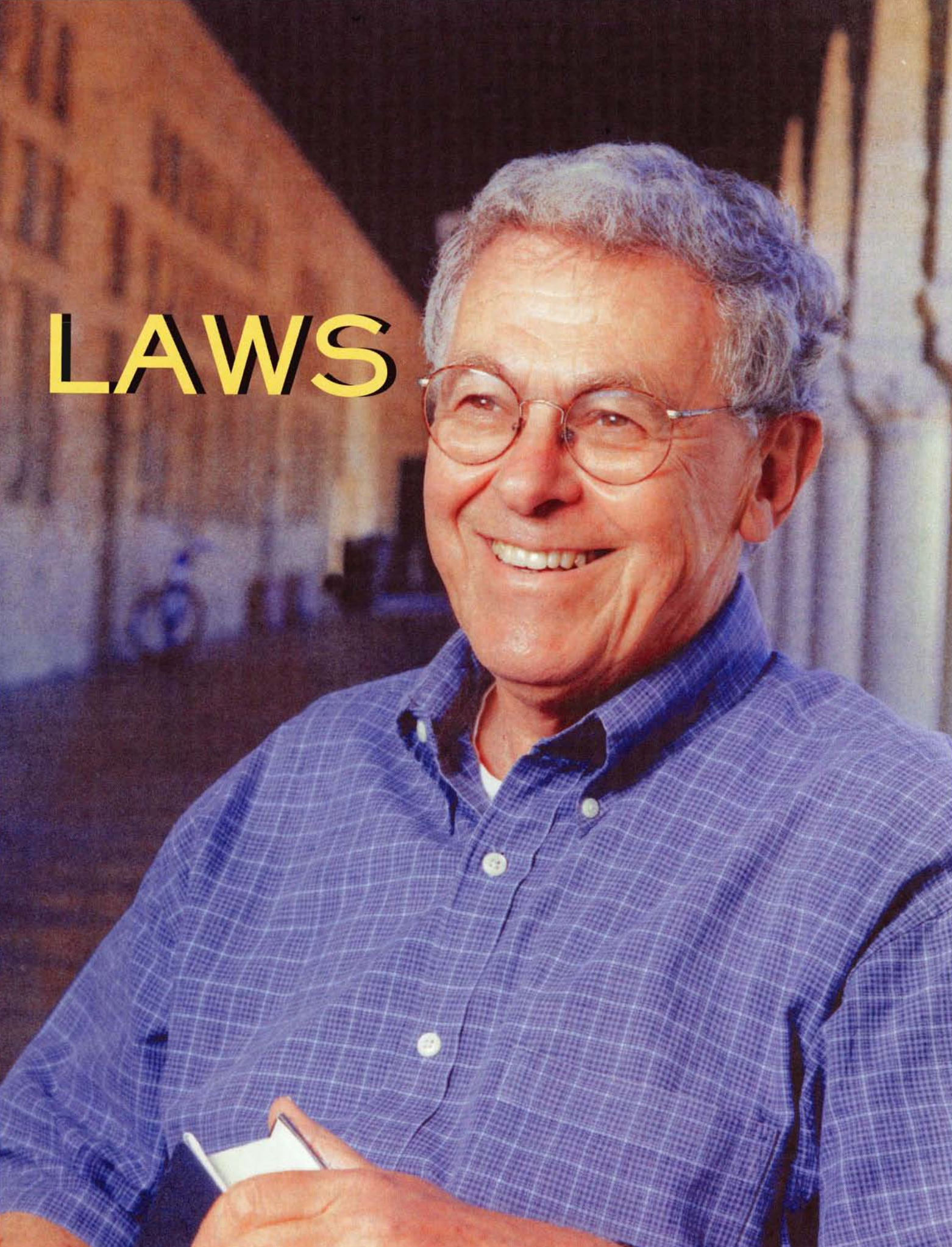
The sheer size and scale of the legal system grew fantastically. In some ways, it is awfully hard to measure a legal system.

Law is more than words on paper, it is an operating machine, a system; and its full meaning in society is too elusive to be easily captured. Still, there are some crude ways at least of getting an idea of the total dimensions; and wherever we look, we see signs of elephantiasis.

Take, for example, the Federal Register. Since the 1930s, all federal notices, orders, proposed regulations, and the like have to be recorded in the dreary pages of this yearly book. The Federal Register is truly monstrous in size; it has sometimes run to as many as 75,000 pages a year. This is probably a greater quantity of sheer legal *stuff* than the combined statutes and regulations of all the states, and the federal government, in, say, 1880. Meanwhile, every state, city, and town, as well as the federal government, is busy churning out new laws, ordinances, and rules. The books of reported cases, federal and state, are also growing faster than ever before; there are thousands and thousands of volumes on the shelves of the law libraries, and millions of bits and bytes in cyberspace.

A reviewer in the *Boston Globe* calls Lawrence M. Friedman, Marion Rice Kirkwood Professor of Law, "the nation's preeminent legal historian," whose "writing still shines, glittering with droll comments." Friedman's *American Law in the Twentieth Century* comes 30 years after his landmark, *A History of American Law*.

LAWS



LAWRENCE M. FRIEDMAN

What brought all this about? Why is there so much “law” in the United States? Is there more “law” in this country than in other developed countries—Japan, for example? Possibly. But the growth in legal stuff is pan-Western, and probably global. Changes in legal culture account for a lot of the growth. The supply of law is bigger because the demand is bigger.

We have to point a finger of blame at technology. Our fancy new machines help boost the demand for law. Consider the automobile. At the beginning of the century, they were rare—toys for the rich. John D. Spreckels paid a \$2 fee for registering his White steamer in 1905 in California—the first in the state. In 1914 there were 123,516 automobiles registered in California; in 1924, 1,125,381, plus nearly 200,000 trucks. By the end of the century everybody had a car, except the very, very poor (and some city dwellers, particularly in Manhattan). The suburban family was, typically, a two-car or three-car family. And the streets were crowded with buses, vans, “sports utility vehicles,” motorcycles, taxicabs—this was, no doubt, an automotive society.

What impact has all this had on the law? To begin with, there is traffic law: a tremendous presence in our lives, something we encounter every day—parking, speed limits, rules of the road. There were traffic rules in the horse-and-buggy days, but they hardly amounted to much. Today, in each state, there is a vast traffic code. There are driver’s license laws, and laws about drunken driving. There are laws about registration and license plates. There are rules and regulations on safety in the manufacture of cars. More recently, we find seat belt laws (and helmet laws for motorcycles). The indirect influences are even more vast: what the automobile has meant to mobility, to suburban growth—and to American culture and aspirations.

Technology affects law in manifold obvious ways. First of all, there is overt regulation—control of the airwaves, the Civil Aeronautics Board, rules about cyberporn, and so on. But the impact is more subtle and pervasive. It is obvious that “the pill” and other ways of preventing babies has had an effect on the so-called sexual revolution. But in less obvious ways, so did the washing machine and the stall shower. They made nudity an everyday affair. Poor people, in the past, had rarely undressed or changed clothes. Above all, the affluence that technology helped bring about has had the greatest impact on society, and hence on the law. Affluence meant bigger homes, and more privacy. It fostered individualism. It made leisure available to everybody; because of this, fun industries—industries of leisure and entertainment—grew to be among the largest in the country. The media and the leisure industries also helped produce a celebrity culture. And this culture in turn helped create the imperial presidency.

In the last third of the twentieth century, there were constant complaints about a “litigation explosion.” Rigorous scholarship was more cautious on this point; but no matter—the public was convinced of it. And, to be honest, smoke means at least *some* sort of fire. *Some* kinds of litigation had indeed exploded (though other kinds had quietly, even stealthily, faded away). And these exploding types—like medical malpractice, or sex discrimination cases—were noisy and controversial, and socially significant to boot.

The liability explosion in the field of torts—mostly cases about personal injury—was real enough. The niggardly, narrow rules of the nineteenth century were dismantled in the twentieth, and replaced with more “liberal” rules. Products liability,

A Friedman Sampler

American Law in the Twentieth Century offers sharp, concise takes on highlights and lowlights in the evolution of the nation’s legal system. Here are a few nuggets.

THE DRY YEARS: Prohibition is held up as the textbook example of an “unenforceable law.” It may have been, in fact, more effective than most of its critics admit. City people, particularly rich ones, guzzled away in their speakeasies; but there were many dry strongholds in rural areas and small-town districts. . . . Even though millions violated the law, the law had an impact on the time, manner, and amount of violation . . . [Still] in the end, Prohibition was a political failure . . . Millions hated it from the start, and the ranks of the wets gained more and more

political recruits as the decade dragged on. Looking back, we tend to see Prohibition as the last gasp of the dour anhedonic culture of old-line America. (pp. 104-105)

NO-FAULT DIVORCE: What brought about the no-fault revolution? What was the underlying cause? Companionate marriage lay at the base of consensual divorce: marriage as partnership. But there was an even more “advanced” concept of marriage, a concept that went beyond companionate marriage: marriage as an aspect

of the journey toward self-realization, a stage on the road to individual fulfillment. A person’s job in life is to choose a course that is personally satisfying; and he or she has the right to change the course of life, if necessary for personal growth. If that means molting spouses like a lizard molts skin, so be it. (p. 441)

THE NEW DEAL: Roosevelt was the spirit behind the New Deal, and its political genius; but, of course, he was not the man who wrote the laws or defended them in court or carried out the

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which hardly existed in the nineteenth century, and medical malpractice, which was quite rare, now were common enough to induce real panic among businesspeople and insurance companies, and in the conclaves of the healers. The media were full of horror stories about frivolous lawsuits. Egged on by those who had a money stake in the matter, legislatures (and some courts) began to rein in liability. But despite this reaction, the *scale* of liability litigation was still enormous in 2000, measured by the standards of 1900.

One explosion was undeniable: the explosion in numbers in the legal profession. The crowd of lawyers grew steadily throughout American history; but in the period after the Second World War, it was runaway growth. It says something about our country that by now we have nearly a million lawyers—and that the ratio of lawyers to the population is twenty times or more that of Japan. There has been a kind of ballooning in the size of law firms, too. In 1950 a firm of one hundred was considered a giant. In the 1990s the largest firms had more than a thousand lawyers on their rolls. The profession *looks* different, too. It is no longer (since the 1960s) almost exclusively white, and almost exclusively male.

The Bill of Rights was added to the Constitution in the late eighteenth century. But the way courts and people *understand* the Bill of Rights is something that changes over time; and dramatically so. The Supreme Court did not decide a single important case on freedom of speech before the time of the First World War. The first key cases grew out of hysteria against leftists during the war (and as a response to the Russian Revolution). The power to censor dirty books was not seriously questioned in the Court until the 1950s.

In the early part of the century, civil rights cases, too, were rare. In 1896, in *Plessy v. Ferguson*, the Supreme Court, in one of its more dismal moments, put its stamp of approval on the doctrine of “separate but equal”; this meant full steam ahead for American apartheid. White supremacy ruled the South, and the legal system, federal and state, hardly uttered a peep in opposition.

American law in the nineteenth century was inward-looking and domestic. America had grown into an empire; but it was strictly a domestic empire. Even the native peoples were defined as “domestic dependent nations.” There were dreams of expansion into Nicaragua or Cuba, but nothing came of them. Hawaii was annexed and turned into a territory; it was not overtly colonized. The Spanish-American War changed this situation. Once the United States grabbed Puerto Rico and the Philippines, it became a true empire; for the first time, it held territories that it did not intend to groom for statehood. These regions were something truly new and different; they were not “territories” in the classical sense; they were colonial possessions.

This colonial legacy, and the masses of immigrants who poured into the United States in the late nineteenth and early twentieth century, brought on a

American LAW in the 20th Century

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policies. The New Deal, among other things, was a full-employment deal for liberal lawyers; they flocked to Washington to do the spadework for the New Deal. Never before had government lawyers been quite so important. They came from all over to take up positions in the capital, the place where the action was. (p. 152)

THE END OF LEGAL SEGREGATION: The Supreme Court, for its part, never wavered or turned back. It hacked away at segregation, wherever it found it. [*Brown v. Topeka Board of Education*] was a case about schools . . . But the Supreme Court made it clear that any official segregation was unlawful, school or no school. Unlike many earli-

er civil rights cases, *Brown* was not destined to stand alone. The NAACP and its allies kept up the pressure; and the Supreme Court seemed almost eager to make decisions that put nail after nail in the coffin of legal segregation. (pp. 293–294)

GUNS: The canonization of the right to bear arms is, in other words, a form of late-twentieth-century rights consciousness—a bastard cousin of the civil rights movement. Politically, of course, there is no relationship at all between people who are passionate about guns, and those who are passionate about prisoners’ rights, affirmative action, abortion rights, and

the like. But on one level, these passions derive from the same social source. (p. 242)

THE SUPREME COURT TODAY: The Court is fractured politically; but it is also fractured in another, perhaps, deeper sense. The Court as an institution has changed a lot in the twentieth century. It is less a collegial body than it is nine separate law offices. Oliver Wendall Holmes, Jr., once described the Court as nine scorpions in a bottle. Today it is much more like nine scorpions in nine bottles. Each justice runs his or her own little show. (pp. 532–33)

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kind of identity crisis; or perhaps a culture war, which left its mark all over the legal system—in criminal law, family law, and above all the law of immigration and citizenship. Nativism and isolationism had always been elements of the culture. Now the old-line Americans felt threatened. Many of them wanted to pull up the drawbridge and retreat into the castle. But how could they? The United States was part of the world, and became more and more so. It took part in the two world wars in the twentieth century. After the first one, the country did turn its back on the rest of the globe (or tried to); it also experienced one of its worst episodes of xenophobia—not to mention the revival of the Ku Klux Klan. Another triumph of nativism was the 1924 immigration act. In the nineteenth century, laws were passed to keep out the Chinese; the twentieth century added the quota system, shutting the gates as much as possible on riffraff from the south and east of Europe. What was wanted was solid, Protestant immigration from the north of Europe; and nothing else.

After the Second World War, isolation was finally completely impossible. The United States was so obviously a big power, so grown-up, so much a part of the world system that there was no way to crawl back into its shell. Some mental habits of fortress America did survive. Chauvinism was alive and well. There were even those who thought the United Nations—its headquarters was in New York City—was part of a communist plot. This was the era of McCarthyism, and cold-war paranoia. But while the storms of the cold war raged, the world was shrinking all around; distances melted into insignificance; the world was becoming a single entity, a single *system*.

The world system included people of all races and religions and cultures. The United States was diverse to begin with, and became more diverse. Isolation was doomed. The United States did not abandon the United Nations; instead, it dominated it, and tried to bend it to its own American will. The tight immigration laws had to give way. The system of national quotas ended in 1965; the laws that kept out Asians were repealed. In the last part of the century, the “teeming masses” of immigrants consisted not of Europeans but of millions of people from places like China, Korea, Vietnam, India, not to mention Samoa and the Philippines; and from Mexico, the Dominican Republic, Nicaragua, Haiti, and all over Latin America. *Illegal* immigration became, for the first time in American history, a major political and legal issue; it focused attention mostly on the porous southern border.

At the end of the century, there were signs of a new (or modified) form of culture war. What *was* America, as the door to the new millennium opened? What did it stand for? Who owned its soul? This was the age of what we might call *plural equality*.

At one time, there was a single strong, well-defined majority: white Protestants. And, of course, within the ranks of white Protestants, it was the men who called the tune. This majority believed in a kind of freedom; it was much more permissive than the ruling classes of most European countries. Minority religions, for example, were tolerated. The word is important: tolerated. Tolerated means allowed—and not much more.

That was then. Then came now. Now the country no longer had that kind of majority. Now it was a country made up of minorities. The civil rights movement, from 1950 on, changed America in a deep and permanent way. The movement found an ally in the Supreme Court, under Earl Warren, and in (most of the) federal courts. White supremacy lost its foothold in the law. So did male supremacy, somewhat later. All sorts of groups that had been suppressed and ignored, the deviant or the silenced, came out of the closet or the basement and demanded rights, a share of power, and, above all, legitimacy. The parade of subordinated people seemed to have no end. It included Hispanics, Asians, the native peoples, students, gay people, old people, deaf people, illegitimate children, prisoners. There were more and more of these groups clamoring for a place in the sun; they became more and more assertive; they fought battle after battle, mostly of the legal sort. The final chapter is still to be written—of course. There were plenty of instances of resistance and backlash. But the net result was a different America, a more plural America, an America made up of a rainbow of cultures and colors and norms.

The phrase “plural equality” does not begin to capture the essence of what had happened in America. In the first days of the civil rights movement, one of the prime goals was integration—what black people wanted, in a way, was assimilation, or at least the right to assimilate. The cry was: take us into the mainstream. We want to eat in your restaurants, sleep in your hotels, work in your factories, play on your ball teams, sing in your operas. We want our share of America. This was the basic program; and the other minorities, of whatever stripe, wanted something analogous—whether it was the right of a woman to be a big-league umpire or to work in a coal mine, or the right of a guy in a wheelchair to ride in everybody else’s bus.

Partly because of a sense of disillusionment, and partly because of other, more deep-seated causes, the goals shifted drastically over the years. Now the theme was no longer simply assimilation or political and economic equality: open the door and let us in. No longer were the “others” saying: we are like you, we are like everybody, treat us accordingly. Now the theme was: we are different; we are ourselves; we are a separate nation, a separate culture. Now one began to hear people say black is beau-

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tiful, and there was gay pride, and deaf pride, and women who said that women were better than men (more caring, more tolerant, more intelligent); and one was told, too, that old people do too have sex and maybe better sex than young people, and they are *not* doddering fools; and then, also, there was a kind of resurgence of native religions and customs and languages and ways of life. The word *nation* in “queer nation” or the “Woodstock nation” was not just a metaphor. There was a sense of nationhood, a sense of personal sovereignty, behind the metaphor; and the nationhood of these and other groups was, for many people who bound themselves to the group, all too real.

Many Americans, of course, were horrified to see their flag ripped into shreds, as it were; horrified to see the mirror of American unity shatter into splinters of glass. They longed for the days when there was unity and harmony. Of course, in many ways those days never really existed; but people overlooked that fact, or were simply unaware of it. The horrors (real or imagined) of the present blotted out the horrors of the past. Backlash translated itself into political action: the English-only movement, for example; the campaign against affirmative action; immigration controls; the revolt of the Christian Right. So far, all that has happened is a certain nibbling around the edges of pluralism. Affirmative action is definitely in bad odor, legally speak-

ing. The courts are chipping away at prisoners’ rights. Still, despite what some people say, there is never any end to the historical process; history is a river that never dries up; it always flows on, and its currents are full of swirling surprises. Where all the ins and outs, the reactions and counterreactions, will lead in the end is anybody’s guess.

But whatever the path, one thing has been and continues to be a clear, obvious, and bedrock fact: the law, and the use of law, is here to stay. All conflicts, disputes, compromises, arrangements, movements—all aspects of society, high and low—express themselves and are expressed through law, at least to some degree and in some fashion. All modern societies, in fact, are law-ridden societies. Even countries like Japan, which claim they are not. Whatever their differences, all modern states govern by and through law: whether the materials are laws, court decisions, decrees, regulations, administrative guidelines—the informal gives way to the formal, custom is replaced by law; old understandings and consensuses melt away, and the result is what we see, today, and probably tomorrow, in the United States: a society of law and of laws.

First in Its Class

The Law School library’s huge reclassification effort makes its debut with *American Law in the Twentieth Century*.

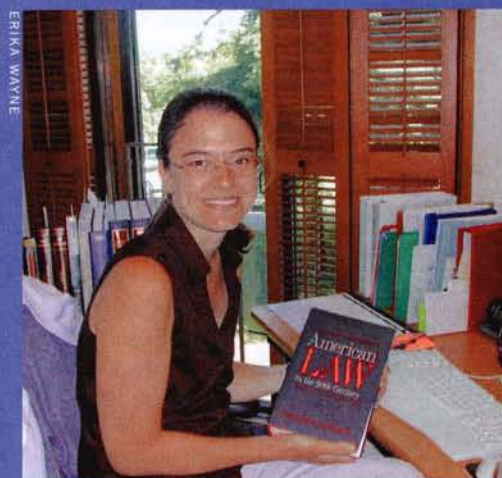
Lawrence M. Friedman’s opus on the last century marks the start of a new one at Stanford’s Robert Crown Law Library. In June it became the first work in the Law School’s collection to be classified with a Library of Congress call number.

The reclassification effort, which is expected to take several years, will move the library from its homegrown system, developed in the 1960s, to the catalog listings that are increasingly being adopted by law schools nationwide. It is a huge undertaking, and Stanford librarians say that Friedman, with his heavy use of the collection and the reference desk, seemed like a fitting author to inaugurate the changeover.

In the Preface to *American Law in the Twentieth Century*, Friedman credits the librarians with going the “extra mile” to help find arcane sources and “odd bits of information” that even accomplished researchers would have trouble finding. “There are bigger law libraries than Stanford’s, but I doubt there are better ones,” Friedman writes. In turn, librarians say that they took a particular delight in fielding Friedman’s queries. Librarian Erika Wayne says that she and others on the staff relished getting questions like, “What can you find out about *The Red Kimono?*” (The 1925 film, which led to a lawsuit, is discussed in Friedman’s book.)

The new call number was stamped on the book in a rather understated ceremony. There were no speeches, no champagne. Friedman was out of town. Wayne took some pictures to document the historic moment for the library’s archives. Friedman later thanked her for the honor, while admitting that he was sad to see the phasing out of a classification system he had used for so many years. He wondered if he’d be able to find his book.

Of course, the next generation of students and scholars will have no trouble tracking it down.



Julie Kremer, a member of the library staff, prepares Friedman’s book for its new call number.

The Annual Faculty Report

The faculty produced substantial research and scholarship over the last year. Here is a select guide to their work, on subjects ranging from asbestos litigation to venture capital.



BARBARA ALLEN BABCOCK

Judge John Crown
Professor of Law

BOOKS: *Civil Procedure: Cases and Problems*, 2d edition, with Toni M.

Massaro, Aspen Publishers, 2001

LECTURES: "Inventing the Public Defender: Trial Stories," Arthur W. Fiske Memorial Lecture, Case Western Reserve University School of Law (April 4, 2002)



JOSEPH BANKMAN

Ralph M. Parsons Professor
of Law and Business

BOOKS: *Federal Income Tax: Examples and Explanations*, 3d edition, with Thomas D. Griffith and Katherine

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R. RICHARD BANKS

Associate Professor of Law

ARTICLES: "Race-Based Suspect Selection and Color Blind Equal Protection Doctrine and Discourse," 48 *UCLA*

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JOHN H. BARTON

George E. Osborne
Professor of Law

ARTICLES: "Antitrust Treatment of Oligopolies with Mutually Blocking Patent Portfolios," 69

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"Research-tool Patents: Issues for Health in the Developing World," 80 *Bulletin of the World Health Organization* 121 (2002) • "Environmental Regulation for Agriculture: Towards a Framework to Support Sustainable Intensive Agriculture," with David Adelman, 21 *Stanford Environmental Law Journal* 3 (2002) • "The Economics of TRIPS: International Trade in Information-Intensive Products," 33 *George Washington International Law Review* 473 (2001) **OF NOTE:** Chairman, UK Commission on International Property Rights [see story p. 28]



BERNARD S. BLACK

Professor of Law

BOOKS: *A Guide to the Russian Law on Joint Stock Companies*, 2d edition with Reinier Kraakman, Anna Tarassova, and Vasilisa

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GERHARD CASPER

Stanford University
President Emeritus
and Professor of Law

BOOKS: *Futuro da Universidade*, with Wolfgang Iser, Rio de

Janeiro: Editora da Universidade do Estado do Rio de Janeiro, 2002 **ARTICLES:** "Die Karlsruher Republik," *Zeitschrift für Rechtspolitik*, 214 (May 2002), translation as "The Karlsruhe Republic," appeared in 2 *German Law Journal* (December 1, 2001) • "Die Idee einer Universität," *Jahrbuch 2000/2001*, Wissenschaftskolleg zu Berlin (2002) **KEYNOTE ADDRESSES:** "Four Essential Qualities of the Successful Research University," Chinese-Foreign University Presidents Forum, Beijing, China (July 24, 2002) • "Die Karlsruher Republik," State Ceremony Celebrating the 50th Anniversary of the *Bundesverfassungsgericht* (Federal Constitutional Court), Karlsruhe, Germany (September 28, 2001)



WILLIAM COHEN

C. Wendell and Edith M.
Carlsmith Professor of Law,
Emeritus

BOOKS: *Constitutional Law: Civil Liberty and Individual Rights*, 5th edition, with

David J. Danelski, Foundation Press, 2002 • *Constitutional Protection of Expression and Conscience: The First Amendment*, Foundation Press, 2002

**G. MARCUS COLE***Associate Professor of Law***ARTICLES:** "Delaware Is Not a State: Are We Witnessing Jurisdictional Competition in Bankruptcy?" 55 *Vanderbilt**Law Review* (forthcoming November 2002)• "Limiting Liability Through Bankruptcy," 70 *University of Cincinnati Law Review* (forthcoming Summer 2002) • "A Modest Proposal for Bankruptcy Reform," 5 *The Green Bag* 269 (2002) • "Discourse in the Garden of Good and Evil," 37 *Journal of Blacks in Higher Education* (Fall 2002) • "The Venture Capital Investment Bust: Did Agency Costs Play a Role? Was It Something Lawyers Helped Structure?" with Joseph Bankman, 77 *Chicago-Kent Law Review* 211 (2001)**RICHARD CRASWELL***William F. Baxter—Visa International Professor of Law***ARTICLES:** "In That Case, What Is the Question? Economics and theDemands of Contract Theory," 112 *Yale Law Journal* (forthcoming December 2002) • "Kaplow and Shavell on the Content of Fairness," *Journal of Legal Studies* (forthcoming 2002) • "How We Got This Way: Further Thoughts on Fuller and Perdue," 1 *Issues in Legal Scholarship* (2001)**MARIANO-FLORENTINO CUÉLLAR***Assistant Professor of Law***BOOK CHAPTERS:** "Past as Prologue: International Aviation Security Treaties as Precedents for Inter-national Cooperation Against Cyber Terrorism and Cyber Crimes," in *The Transnational Dimension of Cyber Crime and Terrorism* 91, Abraham D. Sofaer and Seymour E. Goodman, editors, Hoover Institution Press, 2001**MICHELE LANDIS DAUBER***Assistant Professor of Law***BOOKS:** *Helping Ourselves: Disaster Relief and the Origins of the American Welfare State*, University

of Chicago Press (forthcoming)

**JOHN J. DONOHUE III***William H. Neukom Professor of Law and Academic Associate Dean for Research***BOOKS:** *Foundations of Employment Discrimination**Law*, 2d edition, Foundation Press (forthcoming) **ARTICLES:** "The Search for Truth: In Appreciation of James J. Heckman," 27 *Law and Social Inquiry* 23 (2002) • "The Schooling of Southern Blacks: The Roles of Social Activism and Private Philanthropy, 1910–1960" with James Heckman and Petra Todd, *Quarterly Journal of Economics* 225 (February 2002) • "The Impact of Race on Policing and Arrests," with Steven Levitt, *XLIV Journal of Law and Economics* 367 (October 2001)**GEORGE FISHER***Professor of Law***BOOKS:** *Evidence*, Foundation Press, 2002 • *Plea Bargaining's Triumph: A History of Plea Bargaining in America*,

Stanford University Press (forthcoming February 2003)

**RICHARD THOMPSON FORD***Professor of Law***BOOKS:** *Local Government Law*, 3d edition, with Gerald Frug and David Barron, West Group, 2001**BARBARA H. FRIED***Professor of Law and Deane F. Johnson Faculty Scholar***ARTICLES/BOOK CHAPTERS:**

"Proportionate Taxation as a Fair Division of the Social Surplus: The

Strange Career of an Idea," *Economics and Philosophy* (forthcoming 2002) • "If You Don't Like It, Leave It: The Construction of Exit Options in Social Contractarian Arguments," *Philosophy & Public Affairs* (forthcoming 2002) • "Robert Hale," *Routledge Encyclopedia of Philosophy* (2001) • "Why Proportionate Taxation?" in *Tax Justice Reconsidered: The Moral and Ethical Bases of Taxation*, Joseph J. Thorndike and Dennis J. Ventry, Jr., editors, Urban Institute Press (forthcoming 2002)**LAWRENCE M. FRIEDMAN***Marion Rice Kirkwood Professor of Law***BOOKS:** *American Law in the Twentieth Century*, Yale University Press, 2002[see excerpt, p. 36] • *Law in America: A Short History*, Random House, 2002**RONALD J. GILSON***Charles J. Meyers Professor of Law and Business***ARTICLES/BOOK CHAPTERS:** "Engineering Venture Capital Markets: Lessons from the AmericanExperience," *Stanford Law Review* (forthcoming), reprinted in *Global Markets, Local Institutions*, C. Milhaupt, editor (forthcoming) • "Catalyzing Corporate Governance: The Evolution of the American System in the 1980s," in *The Ecology of Corporate Governance: The East Asian Experience in Context*, Vol. II, Thomas Heller and Lawrence Liu, editors (forthcoming 2003) • "Understanding Venture Capital Structure: A Tax Explanation for Convertible Preferred Stock," with D. Schizer, *Harvard Law Review* (forthcoming) • "Lipton & Rowe's Apologia for Delaware: A Short Reply," 27 *Delaware Journal of Corporate Law* (forthcoming) • "Globalization of Corporate Governance: Convergence of Form or Function," 49 *American Journal of Comparative Law* 329 (2001) • "Sales and Elections as Methods for Transferring Corporate Control," *Journal of Law and Theory* (2001) • "Unocal Fifteen Years Later," 26 *Delaware Journal of Corporate Law* 491 (2001)**PAUL GOLDSTEIN***Stella W. and Ira S. Lillick Professor of Law***BOOKS:** *Copyright, Patent, Trademark and Related State Doctrines: Cases and Materials on Intellectual**Property Law*, 5th edition, Foundation Press, 2002 • *Copyright*, 2002 Supplement, Aspen Law & Business (2001) • Arabic translation of *Copyright's Highway* (Hill & Wang, 1994) **BOOK CHAPTERS:** "U.S. Copyright Law" in the multi-volume German copyright treatise, *Quellen des Urheberrechts [Sources of Copyright]*, Metzner • "The Norms of Author's Right," in *Copyright: Yesterday, Today, Tomorrow* in *GRUR International*, Verlag

C.H. Beck (2002) **IN COURT:** Coauthored amicus brief for US. Supreme Court Case (co-counsel for composers and music publishers), *Eldred v. Ashcroft* [see story, p. 22]



WILLIAM B. GOULD IV

Charles A. Beardsley
Professor of Law, Emeritus
BOOKS: *A Primer on American Labor Law*, 4th edition, MIT Press (forthcoming 2003) •

Diary of a Contraband: The Civil War Passage of a Black Sailor, Stanford University Press (Fall 2002) • Editing with Robert Flanagan, compendium of papers presented at the Conference on International Labor Standards (organized by Gould and Flanagan), Stanford University Press (forthcoming 2003) **ARTICLES:** "Labor Law in a Global Economy: The Uneasy Case for International Labor Standards," *Nebraska Law Review* (forthcoming)



HENRY T. GREELY

C. Wendell and Edith M. Carlsmith Professor of Law
BOOKS: *Cloning Californians?*, principal author, issued by California Advisory

Committee on Human Cloning, 2002 **ARTICLES/BOOK CHAPTERS:** "Genome Research and Minorities," in *Pharmacogenomics in Practice: Social, Ethical, and Clinical Dimensions*, Rothstein, editor (forthcoming 2002) • "Cloning and Government Regulation," *Hastings Law Journal* (forthcoming 2002) • "Neuroethics?" *Health Law News* (forthcoming, Summer 2002) • "Ethical Issues in the 'New Genetics'," in 7 *The International Encyclopedia of Social and Behavioral Sciences* 4762, Elsevier, 2001 • "Ethical Issues in Human Population Genetics," 35 *The Annual Review of Genetics* 785 (2001) • "Pharmacogenomics: Promise, Prospects, and Potential Problems," 9 *Medical Ethics*, 1 (Winter 2002)



THOMAS C. GREY

Nelson Bowman Sweitzer
and Marie B. Sweitzer
Professor of Law

LECTURES: "Judicial Review and Legal Functionalism," Wake

Forest Law School, conference celebrating the 200th anniversary of *Marbury v. Madison* (forthcoming October 2002) • "The New Formalism," Lockhart Lecture at the University of Minnesota Law School, October 2001 [forthcoming in *Minnesota Law Review*]



JOSEPH A. GRUNDFEST

W. A. Franke Professor of Law and Business

ARTICLES: "When Does Insider Selling Support a 'Strong Inference' of Fraud?" with Paul A.

Griffin, *Asian Journal of Finance and Accounting* (forthcoming 2002) • "Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation," with A.C. Pritchard, 54 *Stanford Law Review* 627 (2002) • "More Questions Than Answers and a Friendly Wager: Observations on the Third Circuit Task Force Report on the Selection of Class Counsel," 74 *Temple Law Review* 821 (Winter 2001) • "The Future of United States Securities Regulations: An Essay on Regulations in an Age of Uncertainty," 75 *St. John's Law Review* 83 (Winter 2001) [see interview, p. 12]



THOMAS C. HELLER

Lewis Talbot and Nadine Hearn Shelton Professor of International Legal Studies

BOOKS: *The Ecology of Corporate Governance: The East Asian Experience in*

Context, Vol. II, editor, with Lawrence Liu (forthcoming 2003) **BOOK CHAPTERS:** "Lawyers and Political Scientists: How Much Common Ground?" in *The Law of Common Goods*, Engel and Heritier, editors, Max Planck Center, Bonn (Fall 2002) • "Sovereignty: The Practitioners' Perspective," with Abraham Sofaer, in *Problematic Sovereignty*, Steven Krasner, editor, Columbia University Press (2001) • "Change and Convergence: Is American Immigration Still Exceptional?" in *Citizenship in a Global World*, Atsushi Kondo, editor, Palgrave (2001)



DEBORAH R. HENSLER

Judge John W. Ford
Professor of Dispute Resolution

ARTICLES/BOOK CHAPTERS/REPORTS: "As Time Goes

By: Asbestos Litigation

After *Amchem and Ortiz*," 80 *Texas Law Review* 1899 (2002) • "Patients in Conflict with Managed Care: A Profile of Appeals in Two HMOs," with Carole Gresenz, David Studdert, and Nancy Campbell, 21 *Health Affairs* 189 (2002) • "Suppose It's Not True: Challenging Mediation Ideology," *University of Mississippi Journal of Dispute Resolution* 81 (2002) • "The New Social Policy Torts: Litigation as a Legislative Strategy—Preliminary Thoughts on a New Research Project," 51 *De Paul Law Review* (2001) • "The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation," 31 *Seton Hall Law Review* 883 (2001) • "Revisiting the Monster: New Myths and Realities of Class Action and Other Large-Scale Litigation," 11 *Duke Journal of Comparative and International Law* 179 (2001) • "Beyond 'It Just Ain't Worth It': Alternative Strategies for Damage Class Action Reform," with Thomas Rowe, 64 *Law & Contemporary Problems* 137 (2001) • "In Search of 'Good Mediation': Rhetoric, Practice and Empiricism," in *Handbook of Justice Research in Law*, Joseph Sanders and V. Lee Hamilton, editors, Kluwer Academic/Plenum (2001) • *Asbestos Litigation in the U.S.: A New Look at an Old Issue*, with Stephen Carroll, Michelle White, and Jennifer Gross, RAND (2001)



PAMELA S. KARLAN

Kenneth and Harle
Montgomery Professor of Public Interest Law

BOOKS: 2002 supplement to *Civil Rights Actions: Enforcing the Constitution*,

with John C. Jeffries, Jr., Peter W. Low, and George A. Rutherglen, Foundation Press, 2002 • 2001 and 2002 supplements to *Constitutional Law*, 4th edition, with Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet, Foundation Press (2002) • *The Law of Democracy*, revised 2d edition, with Samuel Issacharoff and Richard H. Pildes, Foundation Press (2002) **ARTICLES:** "Disarming the Private Attorney General," *University of Illinois Law Review*, Baum Lecture (forthcoming 2002) • "Erasing

the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases," 43 *William & Mary Law Review* 1569, Cutler Lecture (2002) • "Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment," *McGeorge Law Review* (forthcoming 2002) • "Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket," 82 *Boston University Law Review* 669, Moffett Lecture (2002) • "Nothing Personal: The Evolution of the Newest Equal Protection from *Shaw v. Reno* to *Bush v. Gore*," 79 *North Carolina Law Review* 1346 (2001) • "Unduly Partial: The Supreme Court and the Fourteenth Amendment in *Bush v. Gore*," 29 *Florida State University Law Review* 589 (2001) • "When Freedom Isn't Free: The Costs of Judicial Independence in *Bush v. Gore*," *Ohio State Law Journal* (forthcoming 2002) **IN COURT:** *Warner v. West*, before the Virginia Supreme Court (counsel for Governor Mark Warner) • *Branch v. Smith* (counsel for voters in Mississippi)



MARK G. KELMAN

William Nelson Cromwell Professor of Law

ARTICLES/BOOK CHAPTERS: "Problematic Perhaps, But Not Irrational," 54 *Stanford Law Review* 101

(2002) • "Ideology and Entitlement," with Gillian Lester, in *Left Legalism/Left Critique*, Wendy Brown and Janet Halley, editors, Duke University Press (forthcoming) • "Behaviorist Gains and Behaviorist Perils," *Northwestern University Law Review* (forthcoming)



MICHAEL KLAUSNER

Professor of Law and Bernard D. Bergreen Faculty Scholar

ARTICLES/BOOK CHAPTERS: "Institutional Shareholders' Split

Personality on Corporate Governance: Active in Proxies, Passive in IPOs," 28 *Directorship* (January 2002) • "What Economists Have Taught Us About Venture Capital," with Kate Litvak in *Bridging the Entrepreneurial Finance Gap: Linking Governance with Regulatory Policy*, Michael J. Whincop, editor, Ashgate (2001) • "Do IPO Charters Maximize Firm Value? An Empirical Study of Antitakeover Protection in IPOs," with Robert Daines, 17 *Journal of Law, Economics & Organization* 83 (2001)



WILLIAM KOSKI

Associate Professor of Law (Teaching)

PUBLICATIONS: "Educational Opportunity and Accountability in an Era of Standards-Based

School Reform," 12 *Stanford Law & Policy Review* 301 (2001) **IN COURT:** *Emma C. v. Eastin*, C96-4179, 2001 U.S. Dist. LEXIS 16099 (co-counsel for parents of children with special needs who are suing the state of California and Ravenswood School District)



LAWRENCE LESSIG

Professor of Law

BOOKS: *The Future of Ideas: The Fate of the Commons in a Connected World*, Random House, 2001

ARTICLES: "Privacy and

Attention Span," 89 *Georgetown Law Journal* 2063 (2001) • "Copyright's First Amendment," 48 *UCLA Law Review* 1057 (2001) • "Architecting Innovation," 49 *Drake Law Review* 397 (2001) • "The Internet Under Siege," *Foreign Policy* (November 1, 2001) **LECTURES:** "Code as Law in Cyberspace," The Fate of Law and Ethics in Information Society, National Program for Information Technology and Law, Amsterdam, The Netherlands (June 2002) • "The Creative Commons," Dunwoody Distinguished Lecture, University of Florida Levin College of Law (April 2002) • Philip A. Hart Memorial Lecture, Georgetown University Law Center (April 2002) • "Innovating Copyright," Tenzer Distinguished Lecture in Intellectual Property at Cardozo University (February 2002)

IN COURT: *Eldred v. Ashcroft* (lead counsel for Eric Eldred) [see story, p. 22]



MIGUEL A. MÉNDEZ

Adelbert H. Sweet Professor of Law

BOOKS: *Evidence: The California Code and the Federal Rules*, 3d edition, West Group (forthcoming 2003) **ARTICLES:** "Solving California's

Intoxication Riddle," 13:2 *Stanford Law & Policy Review* 211 (2002) • "Toward a Statistical Profile of Latina/os in the Legal Profession," 13 *Berkeley La Raza Law Journal* 59 (Fall 2002)



JOHN HENRY MERRYMAN

Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law, Emeritus

BOOKS: *Law, Ethics and the Visual Arts*, 4th edition,

with Albert E. Elsen (forthcoming)

ARTICLES: "Cultural Property, International Trade, and Human Rights," *Occasional Papers in Intellectual Property from Benjamin N. Cardozo School of Law*, Number 9 (2002)



A. MITCHELL POLINSKY

Josephine Scott Crocker Professor of Law and Economics

ARTICLE/BOOK CHAPTERS: "Corruption and Optimal Law Enforcement,"

with Steven Shavell, 81 *Journal of Public Economics* 1 (July 2001) • "Law: Economics of Its Public Enforcement," with Steven Shavell, in 12 *International Encyclopedia of the Social & Behavioral Sciences* 8510, Elsevier (2001) • "Aligning the Interests of Lawyers and Clients," with Daniel L. Rubinfeld, *American Law and Economics Review* (forthcoming) • "A Note on Settlements Under the Contingent Fee Method of Compensating Lawyers," with Daniel L. Rubinfeld, *International Review of Law and Economics* (forthcoming)



ROBERT L. RABIN

A. Calder Mackay Professor of Law

BOOKS: *Regulating Tobacco*, with Stephen Sugarman, Oxford University Press, 2001 **ARTICLES:** "The

Tobacco Litigation: A Tentative Assessment," 51 *DePaul Law Review* 331 (2001)

• "Indeterminate Future Harm in the Context of September 11," 88 *Virginia Law Review* (2002) • "Achieving Fairness in Compensating Victims of September 11," *Cleveland State Law Review* (2002) • "The Torts History Scholarship of Gary Schwartz: A Commentary," 50 *UCLA Law Review* (2002) • "The Fault of Falling Short: A Comment," 3 *Theoretical Inquiries in Law* (2002) **LECTURES:** "Achieving Fairness in Compensating Victims of September 11," Principal Lecture (also gave two others on aspects of tobacco regulation), as Visiting Scholar, Cleveland-Marshall College of Law (March 2002)

**MARGARET JANE RADIN**

Wm. Benjamin Scott and Luna M. Scott Professor of Law

BOOKS: *Internet Commerce: Doing Business in the Digital Era*, with John Rothchild

and Gregory Silverman, Foundation Press (forthcoming 2002) **ARTICLES/BOOK CHAPTERS:** "Can the Rule of Law Survive *Bush v. Gore*?" in *Bush v. Gore: The Question of Legitimacy*, Bruce Ackerman, editor, Yale University Press (2002) • "Online Standardization and the Integration of Text and Machine," 70 *Fordham Law Journal* 1125 (2002) • "Commodification in the Computerized World," in a volume edited by Neil Netanel and Niva Elkin-Koren, Kluwer International (2001) • "Response: Persistent Perplexities," 11 *Kennedy Institute of Ethics Journal* 305 (2001)

**DEBORAH L. RHODE**

Ernest W. McFarland Professor of Law

BOOKS: *Professional Responsibility and Regulation*, with Geoffrey Hazard, Jr., Foundation Press,

2002 • *The Difference Difference Makes: Women and Leadership*, editor, Stanford University Press (forthcoming 2003) • *Access to Justice*, Oxford University Press (forthcoming) • *Gender and Law: Theory, Doctrine and Commentary*, with Katharine T. Bartlett and Angela P. Harris, Aspen, 2002 • *Legal Ethics*, 3d edition, with David Luban, Foundation Press, 2001 **ARTICLES/REPORTS:** "Legal Scholarship," 115 *Harvard Law Review* 1327 (2002) • "The Profession and the Public Interest," *Stanford Law Review* (2002) • "Balanced Lives," 102 *Columbia Law Review* (2002) • "Law, Lawyers, and the Pursuit of Justice," 70 *Fordham Law Review* 1543 (2002) • *Balanced Lives: Changing the Culture of Legal Practice*, Report Prepared for ABA Commission on Women in the Profession (2002) • *Sex-Based Harassment: Workplace Policies for the Legal Profession*, report prepared for ABA Commission on Women in the Profession (2002) **OF NOTE:** Chair, American Bar Association Commission on Women and the Profession

**KENNETH E. SCOTT**

Ralph M. Parsons Professor of Law and Business, Emeritus

ARTICLES: "Does Bank Regulation Retard or Contribute to Systemic

Risk?" *The Independent Review*, (forthcoming Winter 2002) **OF NOTE:** Fellow in residence, American Academy in Berlin, September–December 2001

**WILLIAM H. SIMON**

William W. and Gertrude H. Saunders Professor of Law

BOOKS: *The Community Economic Development Movement: Law, Business,*

and the New Social Policy, Duke University Press, 2001 **ARTICLES:** "Fear and Loathing of Politics in the Legal Academy," 51 *Journal of Legal Education* 175 (2001) • "The Belated Decline of Literalism in Professional Responsibility Doctrine," 70 *Fordham Law Review* 1881 (2002) • "The Professional Responsibilities of the Public Official's Lawyer: A Case Study from the Clinton Administration," 77 *Notre Dame Law Review* 999 (2002) **LECTURES:** "Who Needs the Bar: Professionalism Without Monopoly," Mason Ladd lecture, Florida State University Law School (March 2002)

**KATHLEEN M. SULLIVAN**

Dean and Richard E. Lang Professor of Law and Stanley Morrison Professor of Law

BOOKS: *Constitutional Law*, 14th edition, with Gerald

Gunther, Foundation Press, 2001 **ARTICLES/BOOK CHAPTERS:** "Constitutionalizing Women's Equality," 90 *California Law Review* 735 (2002) • "Foreword: Interdisciplinarity," 100 *Michigan Law Review* 1217 (2002) [see p. 2] • "Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term," 28 *Pepperdine Law Review* 723 (2001) • "Justice Scalia and the Religion Clauses," 22 *University of Hawaii Law Review* 449 (2001) • "Freedom of Expression in the United States: Past and Present," in *The Boundaries of Freedom of Expression and Order in American Democracy*,

Thomas R. Hensley, editor, Kent State University Press (2001) **LECTURES:** "War, Peace and Civil Liberties," The Tanner Lectures on Human Values, Center for Ethics and the Profession, Harvard University (Nov. 7–8, 2001) **IN COURT:** *Pharmaceutical Research & Manufacturers of America v. Concannon*, 249 F.3d 66 (1st Cir. 2001), cert. granted, 70 U.S.L.W. 3798 (2002) (counsel for PhRMA) • *McConnell v. FEC*, No. 02-582 (pending, D.D.C.) (co-counsel for Senator Mitch McConnell) • *Eldred v. Ashcroft*, (2002) (co-counsel for Eric Eldred) [see p. 22] • *Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037 (9th Cir. 2002) (counsel for City and County of Honolulu) • *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (co-counsel for Eric Corley)

**BARTON H. THOMPSON, JR.**

Robert E. Paradise Professor of Natural Resources Law and Vice Dean

ARTICLES: "Providing Biodiversity through

Diversity," 38 *Idaho Law Review* 355 (2002) • "Conservation Options: Toward a Greater Private Role," 21 *Virginia Environmental Law Journal* 245 (2002)

**ROBERT WEISBERG**

Edwin E. Huddleson, Jr. Professor of Law

BOOKS: 2002 Summer Supplement to Kaplan, Weisberg & Binder, *Criminal Law: Cases and*

Materials, Aspen 2002 **ARTICLES:** "Values, Violence, and the Second Amendment: American Character, Constitutionalism, and Crime," 39 *Houston Law Review* 1 (2002) • "Civic Oratory in *Lawyerland*," 101 *Columbia Law Review* 1782 (2001) **LECTURES:** "Values, Violence, and the Second Amendment: American Character, Constitutionalism, and Crime," Endowed Frankel Lecture, University of Houston Law School (November 15, 2001) • "The Meaning of Literary in Law," presentation at Conference on Law and Literature, University of Frankfurt-am-Maine, Germany (October 8, 2001)

Professors in Print

Excerpts from faculty commentaries in the press



The other night on TV, I saw an actual jury deliberating in a real case. It happened in an Arizona court that allowed discreetly placed cameras and microphones to record “the secret world of jury deliberations,” as they were described on the court’s Web site. Drastically edited (three days down to 15 minutes), the deliberations were a dramatic highlight in each episode of “State v.,” an ABC series, produced by the news division, that aired nationwide for five weeks this summer.

As an old trial lawyer, criminal procedure teacher and lover of the American jury, I worry about cameras in the jury room. Recording deliberations could change the nature of the jury in unpredictable and perhaps unconstitutional ways. And while post-verdict interviews of individual jurors by the media and others are also problematic, filming the deliberations as they occur—and then airing them on nationwide TV for entertainment purposes—raises these concerns to a new level.

The Bill of Rights guarantees that a group of ordinary citizens stands between the state and a criminal defendant. The resulting system is far from perfect, and any particular jury’s mistakes are all too visible. Yet most people who have experienced juries directly, and most scholars who have studied the institution, believe in the jury system. They see it not only as a historic symbol of democracy but also as a practical institution that performs its job well.

But to function in its intermediary role, a jury must be completely independent: of the state, of the parties and of the community itself. It comes together as a group of strangers, ignorant of the case and its participants. It meets only on this one matter, never to be officially reconstituted, and it will never be held accountable for its verdict. An equally important aspect of the jury’s independence is that it deliberates in secret and need not defend or justify the process by which it reaches its decision.

BARBARA BABCOCK, Judge John Crown Professor of Law, “Preserving the Jury’s Privacy,” *New York Times*, July 24, 2002

No baseball in September? That could well happen, with the strike deadline approaching and owners and players engaged in a high-stakes game of chicken. A strike would cost each party plenty of money, and it would break the heart (again!) of the die-hard fan. I’m thinking in particular of the hearts of my sons Sam and Gabe, who are praying that the Giants eke out a victory in the wild-card race.

It doesn’t have to be this way. A simple change in the tax law could prevent the strike—or at least reimburse the long-suffering fans for their losses. I propose that for each game missed, the owners face a tax of 80 percent on all revenue received in a post-strike game. Miss one game, the tax applies for the first post-strike game; miss two games, the tax applies for the first two post-strike games. And so on.

As with any good tax law, there’s a loophole. The tax due to missed games can be avoided—but only if the team sells snacks and drinks for a nickel apiece.

Hopefully, this threat of reduced concession revenue would produce an agreement. If not, well, at least we’d get to munch on nickel hot dogs, as it would be cheaper to offer bargain snacks than to pay the 80 percent tax. If we must survive an October without baseball, we can take solace in next summer’s discount dinners in the bleachers.

JOSEPH BANKMAN, Ralph M. Parsons Professor of Law and Business, “Nickel Hot Dogs or Else,” *San Jose Mercury News*, Aug. 25, 2002

Leave aside the doubts that many strategic experts have about whether an attack from Iraq is imminent; instead, perhaps we should be cautious about insisting that a country’s saber-rattling is enough to justify a lawful war. Because come to think of it, if we stretch the meaning of “imminent attack,” it starts to sound as though Iraq would be justified in responding to our country’s war preparations.

That’s the irony: The more we try to enlarge international law to justify an attack on a nation that has not yet attacked us, the more we may legitimize its own (or another

nation’s) response to warnings of attack. The truth is our country likes having international law on its side, which is why we invoked it in Nuremberg to punish Nazis, and after Sept. 11 to justify our attack on Afghanistan as self-defense. Our country often acts as though our power comes from what we stand for and not just from the heat we pack.

If the Bush administration really thinks it is worth invading Iraq without considering international law, it should say so. The problem is that the moral high ground is central to our national narrative. Any leader who wants to risk losing that ground had better have a pretty good reason. When it comes to Iraq, though, the administration acts as though the time for reason has just run out.

MARIANO-FLORENTINO CUÉLLAR, Assistant Professor of Law, “If You Don’t Like the Law, Do You Still Have to Obey It?,” *San Jose Mercury News*, Sept. 10, 2002

[W]hile it is frequently reported that 17 of the 24 active judges [on the Ninth Circuit] were appointed by Democrats, this sly insinuation about the politics of the court is simply mistaken. Of the 24 active judges, 12 are clearly conservatives, six are moderates, and only six could fairly be characterized as liberals.

In practical terms, this means that in order to defend a “liberal” opinion reversing a death sentence due to serious constitutional infirmities against an effort to reconsider the case en banc, the defense must hold all the votes of the liberals and garner all the votes of the moderates—most of whom favor the use of capital punishment. Conversely, reconsideration of a “conservative” opinion requires the votes of all the liberals, all the moderates, and a defection by one conservative. These nearly insurmountable odds ensure that the Ninth Circuit is no liberal court.

Moreover, those few remaining liberals on the Ninth Circuit are no more likely to be reversed than their conservative colleagues. For example, in the Supreme Court term just ended, the unrepentant liberal

Judge Stephen Reinhardt was reversed twice, but so was über-conservative Judge Alex Kozinski. In the 1999–2000 term, the Supreme Court granted certiorari in 10 of the circuit's cases, half of them authored by conservatives, and reversed in nine. The only judge to be reversed twice during that term was conservative Judge Diarmuid O'Scannlain, who was, ironically, one of the leading proponents of breaking up the Circuit to reduce its reversal rate.

Neither the size nor the illusory "liberal bias" of the Ninth Circuit explain its frequent reversal. Indeed, we can stop searching for the reason that the Ninth Circuit is so often "wrong," because the problem is not that the Ninth Circuit is "wrong" and the Supreme Court "right." The problem is that we are living in a time when the constitutional terrain is rapidly shifting. The Supreme Court is discarding many landmark precedents that have enjoyed decades of adherence.

MICHELE LANDIS DAUBER, Assistant Professor of Law, "The Ninth Circuit Follows," *Legal Times*, Aug. 23, 2002

The military says openly lesbian, gay or bisexual recruits threaten "unit cohesion." On the battlefield, this justification is merely improbable; in a [Judge Advocate General's] Corps law office, it is absurd. For decades America's top law firms and law schools have banned discrimination on the basis of sexual orientation. Nowhere has collegiality or reputation suffered as a result.

For America's law schools, this is a matter of educational policy. They welcome all viewpoints and all thoughtfully expressed opinions. Yet the military's "don't ask, don't tell" policy discriminates against certain students precisely on the basis of expression.

Law schools have two goals: to teach students how to interpret and apply the law, and to teach them how to stand in defense of it. For years law schools have stood in defense of the anti-discrimination principles they teach. Now the military is forcing them to bend their principles — and the cost falls not on the schools but on their students.

GEORGE FISHER, Professor of Law, "Power over Principle," *New York Times*, Sept. 7, 2002

Since Sept. 11, the Bush administration, like previous administrations in times of national security crisis, has claimed that exigency trumps ordinary procedure. True, we have seen no mass quarantine of Middle Eastern immigrants, nor yet the use of military tribunals to do civil courts' work.

But we have seen immigrants placed in secret deportation proceedings, and American citizens suspected of terrorist ties denied counsel and placed in military brigades. We have watched as Congress sped to approve new antiterrorism measures that increased surveillance of e-mail messages and expanded the power of a secret foreign intelligence court to approve wiretaps. We have heard government lawyers argue for dramatic expansion of the category of enemy combatants.

Such measures draw little public outcry, for swift and decisive action against amorphous danger is naturally popular, and civil rights and liberties seem a luxury reserved for safer times. But constitutions, like diets, are meant to restrict us most when temptation is greatest. And our constitution, unlike many others, contains no emergency clause providing for its own suspension.

In a series of bold decisions, federal judges have acknowledged as much and sought to enforce traditional constitutional values—opening deportation proceedings to the press, requiring access to counsel and questioning the foreign intelligence justifications for domestic surveillance.

Such decisions, if upheld, offer us a chance to break the cycle of excessive deference to executive prerogative in national emergencies. A continuous constitution is our greatest protection from terrorism in the first place, and now is the time to hold true to its principles.

KATHLEEN M. SULLIVAN, Dean and Richard E. Lang Professor of Law and Stanley Morrison Professor of Law, "Reflections on an America Transformed," *New York Times*, Sept. 8, 2002

It would not be difficult to rejigger the Moussaoui case as a RICO prosecution. Al-Qaida is an "enterprise" by any fair reading of the precedents. It has what courts call an "ascertainable structure" and a clear organizing purpose. And the dead or distant

hijackers and planners themselves committed RICO predicate acts. If Moussaoui can be shown to have committed two crimes himself to help further al-Qaida's goals, or by appropriating any of al-Qaida's resources, he could be guilty of a "substantive" RICO count. That's obviously a problem if not one of the steps taken by Moussaoui was itself a crime.

But RICO's infinite magic goes further. Even though RICO itself looks like a conspiracy law, there's a separate crime of *conspiring to violate RICO*. Call it double-counting or legalistic mysticism, but so long as Moussaoui in some way "adopt[s] the goal of furthering or facilitating the criminal endeavor" (to quote the Supreme Court in *Salinas v. United States*), he is guilty of conspiring with someone else's RICO violation and through those always available leveraging rules he can be guilty of every crime committed by any co-conspirator committed to furthering the goals of al-Qaida. And, with a bit more leveraging, the death-penalty-eligible acts of the (now dead) hijackers can be imputed all the way back to Moussaoui.

So why hasn't the government used RICO in the terror trials? Perhaps prosecutors thought merely invoking the mobster/racketeer imagery of RICO would have trivialized the crimes of Sept. 11. Perhaps they feared that the transparent utility of RICO in easing their case might backfire, might cause the jurors to spit in the face of Congress for making things too easy for the government. But calling al-Qaida a RICO enterprise would add color to an already dramatic case, and it might just help the government sprinkle the magical federal conspiracy dust on an even wider group of characters. Congress has supplied a special instrument to combat large, conspiratorial organizations; the government should try to sell it to jurors. At the very least it would be preferable to indefinite detentions or secret tribunals.

ROBERT WEISBERG, Edwin E. Huddleson, Jr., Professor of Law, "RICO Suave: Using Federal Racketeering Law to Prosecute al-Qaida," *Slate*, July 9, 2002

Gatherings

STANFORD LAW SOCIETY OF LOS ANGELES

OUR MAN IN THE HOUSE: The Honorable Xavier Becerra '84 (AB '80) spoke on the September 11 attacks' impact on domestic concerns in Los Angeles in May. Becerra (D-CA) told alumni that important domestic issues have been put on the back burner as the Bush administration devotes little energy to any issue beyond the war against terrorism.



MARK FELLMAN



MARK FELLMAN

DOMESTIC TALK: Professor Pamela S. Karlan led the formal discussion, but afterward she, Becerra '84, Andrés F. Irlando '98, Karen L. Stevenson '98, and David P. White '00 continued the discussion on whether domestic affairs were being wrongly overshadowed by foreign policy issues. White and O'Melveny & Myers sponsored the event.

STANFORD LAW SOCIETY OF CHICAGO

A WINDY CITY WELCOME (BELOW): Joseph A. Kroeger '00, Allen A. Drexel '00, and Hosea H. Harvey III '00 (AM '97) chat with Dean Kathleen M. Sullivan during her visit to Chicago in June. A number of young alumni attended the event at which the Dean discussed the Law School's new clinical opportunities as well as improvements being made to the Law School's established clinical programs.



BRUCE POWELL



BRUCE POWELL

ROOM AT THE TOP: Duane C. Quaini '70 (far right) and his firm, Sonnenschein Nath & Rosenthal, sponsored the welcome event on a top floor in the Sears Tower. His companions include his wife, Chris, and Steve Neumer '65 and his wife, Susan.

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Alumni Weekend 2002

Thursday to Sunday, October 17 to 20



"Presidential Power in Times of Crisis: The Steel Seizure Case Revisited"

Cosponsored by the Stanford Alumni Association and the Stanford Graduate School of Business
A reargument of this landmark case with Chief Justice William H. Rehnquist '52 (AB '48, AM '48), Justice Sandra Day O'Connor '52 (AB '50), and Stanford University President Emeritus Gerhard Casper presiding. See story on page 6 for details.

PROGRAM UPDATES

Dean's Circle Dinner (by invitation)

This gala dinner will honor members of the Dean's Circle—annual donors of \$10,000 or more.

Featuring:

- **Peter A. Thiel**, *Chairman and Chief Executive Officer, PayPal, Inc.*

The Jackson H. Ralston Lecture in International Law

Featuring:

- **Hon. Robert S. Mueller III**, *Director, Federal Bureau of Investigation*

"Shifting Ground: Changing Realities in a Post-9/11 World"

Cosponsored with the Stanford Alumni Association

Join Dean Kathleen M. Sullivan for a dynamic discussion featuring:

- **Michelle Alexander '92**, *Associate Professor of Law (Teaching), Stanford Law School*
- **Laura K. Donohue**, *Visiting Fellow, Center for International Security and Cooperation, and Acting Assistant Professor of Political Science, Stanford University*
- **Rev. William L. "Scotty" McLennan, Jr.**, *Dean for Religious Life, Stanford University*
- **Stephen Stedman (AB '79, AM '85, PhD '88)**, *Senior Fellow, Institute for International Studies, and Codirector, Center for International Security and Cooperation, Stanford University*

"War, Peace, and Civil Liberties: American Constitutionalism in the Wake of Terror"

Warren Christopher '49, *Senior Partner, O'Melveny & Myers LLP, and former U.S. Secretary of State*, will join a distinguished panel of experts to explore the constitutional, human rights, national security, and foreign policy implications of the nation's response to terrorism. NPR's Legal Affairs Correspondent **Nina Totenberg** will moderate. Additional panelists include:

- **Peter N. Bouckaert '97**, *Senior Emergencies Researcher, Human Rights Watch*
- **Mariano-Florentino Cuéllar (AM '96, PhD '00)**, *Assistant Professor of Law, Stanford Law School, and former Senior Advisor to the Under Secretary of the Treasury, Enforcement Division*
- **Hon. Richard L. Morningstar '70**, *Herman Phleger Visiting Professor, Stanford Law School, and former American Ambassador to the European Union*

For additional information about Alumni Weekend 2002 programming and to register, visit <http://www.law.stanford.edu/alumni/weekend/2002/>.