

Stanford *Lawyer*

Troubled Waters

Law School research shows how fisheries can be saved—before it's too late.

Editor

JONATHAN RABINOVITZ
jrabin@stanford.edu

Communications Director

ANN DETHLEFSEN
(BA '81, MA '83)
annd@stanford.edu

Art Director

ROBIN WEISS
robinwdesign@comcast.net

Production Coordinator

LINDA WILSON
linda.wilson@stanford.edu

Copy Editor

DEBORAH FIFE

Contributing Editors

LINLY HARRIS
JUDITH ROMERO
judith.romero@stanford.edu

Class Correspondents

62 RESOURCEFUL ALUMNI

Editorial Intern

JOSEPHINE LAU
(BA '03, MA '04)

Production Associate

JOANNA MCCLEAN

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Correspondence and
information should be sent to

Editor, Stanford Lawyer
Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
or to:
alumni.publications@law.stanford.edu

Changes of address should be sent to:
alumni.relations@law.stanford.edu

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*"The challenge before
us today is to resist
the fear that leads to
repression and to promote
liberty at the very time
it is under attack."*

—Anthony D. Romero '90,
Executive Director, American
Civil Liberties Union



Honoring a Champion for Freedom

Stanford Law School is pleased to recognize Anthony D. Romero '90 with the inaugural Stanford Public Interest Lawyer of the Year award for his leadership of the American Civil Liberties Union in the wake of the September 11 attacks.

The award will be presented at a banquet, featuring remarks by Dean Kathleen M. Sullivan and Mr. Romero.

Wednesday, November 12

Cocktails: 6:00 p.m.

Banquet: 7:00 p.m.

East Vidalakis Dining Room, Schwab Residential Center
680 Serra Street (between Galvez Street and Campus Drive East)
Stanford, California

To purchase tickets for the event or to obtain additional information, please call the Stanford Public Interest Law Foundation at 650/723-3017, or write to Raymond Bennett '04 at rayb3@stanford.edu.

The Public Interest Lawyer of the Year award is sponsored by the Office of the Dean and the Stanford Public Interest Law Foundation, which distributes grants to worthy public interest law projects as well as to Stanford Law School students working in public interest positions during the summer. The November 12 event will mark the foundation's 25th anniversary and will pay tribute to Karen Chapman '79, who established the organization in 1978.

A reception to launch the Stanford Law School Latino Alumni Association will also be held on Wednesday, November 12, from 5:00 to 6:00 p.m. To learn more about the reception and the Latino Alumni Association, please call the Office of Alumni Relations at 650/723-2730 or write to alumni.relations@law.stanford.edu.

Recalling Representative Democracy

BY KATHLEEN M. SULLIVAN

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

“THE UNITED STATES SHALL GUARANTEE TO EVERY STATE IN THIS UNION A REPUBLICAN FORM OF GOVERNMENT. . . .”

So begins Article IV, Section 4 of the Constitution. Over the years, that sentence has not received much scrutiny, nor inspired fractious public debate, as have, for example, the Constitution’s guarantees of liberty, equality, and separation of powers. Indeed, since the 19th century, the Supreme Court has held that the republican guarantee clause is not even justiciable by the federal courts.

It’s hard to know exactly what the Framers meant by the word “republican.” We know what it does *not* mean: government by monarchy, and government by coup, but rather government by “We the People,” the words that give meaning to the Constitution’s own majestic preamble.

But which people? The people acting directly through plebiscite, or the people one step removed, authorizing representative government and reasoned, deliberate processes for reaching decisions? With the effort to recall a sitting governor in California, the question of the true meaning of the guarantee clause takes on new salience.

For better or worse, California has led the nation in experiments in direct democracy, with the recall contest the latest example. The recall provision, like its siblings, the initiative and referendum, and its half-sibling, the term limit, was born of the state’s turn-of-the-century populism. Good government reformers believed such measures would let good and wise citizens take back control of government from the smoke-filled rooms of political bosses.

“The opponents of direct legislation and the recall, however they may phrase their opposition, in reality believe the people can not be trusted,” declared California Governor Hiram Johnson, a champion of the populists, in his inaugural address in 1911. “[T]hose of us who espouse these measures do so because of our deep-rooted belief in popular government, and not only in the right of the people to govern, but in their ability to govern.”

In contrast, the Framers of the Constitution distrusted direct democracy, and did not provide for any plebiscitary processes. The President cannot be recalled for unpopular policy, but only impeached and removed by the Congress for “high crimes and misdemeanors.” As James Madison wrote in *The Federalist Papers* No. 37: “Stability . . . requires, that the hands, in which power is lodged, should continue for a length of time, the same. A frequent change of men will result from a frequent return of electors, and a frequent change of measures, from a frequent change of men; whilst

energy in Government requires not only a certain duration of power, but the execution of it by a single hand.”

Even constitutional amendments require intervention of the national legislature. In *Federalist* No. 49, Madison wrote, “The danger of disturbing the public tranquility by interesting too strongly the public passions is a still more serious objection against a frequent reference of constitutional questions to the decision of the whole society.”

Yet Madison never foresaw the changes that two centuries would bring: television, cable and Internet technology that enable citizens to be more informed and more directly involved in public decision making than ever before; and widespread disillusionment with representative government and its tendency toward gridlock.

Do such changes, though, argue for more direct democracy? One wonders what a latter-day Hiram Johnson would make of a recall election that unleashes 135 candidates from television comedians and talk-show pundits to a woman capitalizing on campaign publicity to promote on-line sales of thong underwear. Perhaps he would brush aside the circus-like atmosphere and point to the many citizens who, disenchanted by government, have become engaged again in politics. Perhaps he would tinker with the process to erect higher hurdles to a recall. Or perhaps he would newly appreciate the Constitution, with its representative systems and its emphasis on ensuring that decisions would not be rushed.

The question is more than academic for those of us teaching at law schools. The legal profession, beyond any other, is the glue that binds together our republican form of government. Whether as legislators or executives, policy analysts or lobbyists, attorneys are found in all lines of government, and the expertise they develop in law school is vital for their work. Lawyers also protect the interests of businesses and individuals affected by all that government does.

Lawyers have a responsibility, to ensure that government remains effective for and accountable to the people. One of the beauties of the Constitution is that its federalism encourages local democratic experiments. But lawyers are also in a good position to recall that democracy sometimes works best when it works slowly. For deliberation is, after all, a defining feature of what lawyers do.



L.A. CICERO

FEATURES

9 CHARITY BEGINS AT SCHOOL

A new Law School program contributes to the nationwide effort to promote pro bono work.

12 WHEN TIME ISN'T MONEY

There's mounting pressure to mandate a higher annual payout rate for foundations. Professor Michael Klausner warns that this could be robbing from tomorrow's needy to help today's.

18 THE OCEANS' BUFFALOS?

Fisheries are in peril from overfishing, despite government catch limits. Law School research explains why regulators aren't getting the job done and how to fix the problem.

24 THE ANNUAL FACULTY REPORT

Law School professors are publishing extensively. This bibliography offers a sampling of their new casebooks, historical works, and scholarly articles, plus profiles of new faculty members and the latest professor to receive tenure.





BRIEFS

- 6 Let the sun shine in: The Crown Library is reborn.
- 7 The Supreme Court taps graduates to clerk.
- 7 Yale honors a former Law School Dean.
- 8 Faculty and alumni are "Making the Grade."
- 8 A new fellowship in conflict resolution is under way.

DEPARTMENTS

- 1 FROM THE DEAN
- 4 CITES
- 5 OPENING ARGUMENT
Prosecuting the Press
- 33 CLASSMATES
- 65 IN MEMORIAM
- 69 GATHERINGS

Stanford University's Hopkins Marine Station houses scientists whose research is breaking new ground in assessing fish populations. They have joined with faculty at the Law School to found the Stanford Fisheries Policy Project.

On this page: Photo by L.A. Cicero

Cover: Designed by Robin Weiss

“I’ll be a tireless advocate for your agenda and a tight-fisted custodian of the people’s money.”

—JOSH BOLTEN '80, speaking at the May 22 White House news conference in which President George W. Bush announced that he was nominating Bolten to be Director of the Office of Management and Budget. The Senate unanimously approved his appointment on June 26.



LUKE FRAZZA/AFP/GETTY IMAGES

“It’s been a busy day, but it’s great to blog here on Larry Lessig’s blog.”

—HOWARD DEAN, former Vermont Governor and a Democratic presidential candidate, writing on July 14, the first of several days that he took over Law Professor Lawrence Lessig’s Web journal, or blog. Lessig has not endorsed a candidate in the 2004 election, but has invited all of them to participate in online discussions with his readers.

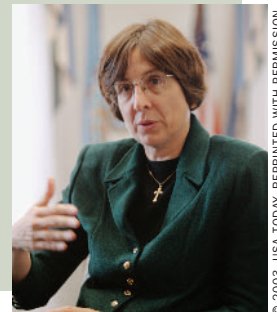


JOHN PETTITT/DEANFORAMERICA.COM

“One of the important things about the commission is that it has accumulated a lot of expertise and experience in analyzing antitrust issues.

“There are a number of ways in which that can be useful for the antitrust bar and the courts. One of them is to use more administrative litigation and another is in the opposite circumstance—where we don’t bring a case.”

—SUSAN CREIGHTON '84, speaking with a reporter from the *Daily Deal* on August 7, her first day as Director of the Federal Trade Commission’s Bureau of Competition. As a partner at Wilson, Sonsini, Goodrich & Rosati in the 1990s, she played a critical role in persuading the government to bring the landmark antitrust action against Microsoft.



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“In an odd way, the military recruits for Wal-Mart by denying gay and lesbian workers one of the few alternatives that they might have to a life in low-end retail. Seen in that light, Wal-Mart’s change in policy, though welcome, has a disturbing, ironic quality.”

—TOBIAS BARRINGTON WOLFF, Visiting Assistant Professor at Stanford Law School and Acting Professor at UC Davis Law School, in an op-ed in the August 6 *San Jose Mercury News*. While commending

Wal-Mart for its policy prohibiting discrimination against employees based on sexual orientation, he notes that its entry-level jobs offer little chance for career development. While the military offers a chance for advancement, openly gay people are barred from enlisting.



TOM BIANCHI

“Is this not a fundamental right of his supporters to have his name there?”

—ROBIN JOHANSEN '77, a lawyer representing Governor Gray Davis, speaking at a news conference on August 4 after she, Michael Kahn '73 (MA '73) (right), and Kathleen Purcell '77 (BA '74) filed a lawsuit charging that it was unconstitutional for Davis’s name to be excluded from the list of candidates in California’s recall election. The state Supreme Court rejected the argument three days later.



JUSTIN SULLIVAN/GETTY IMAGES

Prosecuting the Press

By JOSEPH GRUNDFEST '78, W.A. Franke Professor of Law and Business,
and ROBERT WEISBERG '79, Edwin E. Huddleson, Jr. Professor of Law

COULD THE U.S. ATTORNEY have invited Jayson Blair, the disgraced former reporter for the *New York Times*, to do the “perp walk” for his fabricated stories?

Absolutely. Given the evidence developed in the *Times*’s own investigation, Blair could have been prosecuted for the federal felony of mail or wire fraud. Only the exercise of prosecutorial discretion saved him from joining the parade behind Quattrone, Kozlowski, and Fastow.

What about the First Amendment’s protections of the press? Forget it. Those do not extend to reporters engaged in intentional falsehood. We can debate about where to draw the line that distinguishes intentional lies from more innocent mistakes, but there’s no question that Blair crossed it by a mile. L’Affair Blair serves as a case study illustrating how the Justice Department has gained the authority not only to attack the press, but also to punish almost any dishonesty that offends it.

The mail fraud law was enacted in 1872 to combat Ponzi-type schemes. As it evolved (along with its wire-fraud cousin), it became a malleable tool for converting almost any kind of deceit into a federal felony. The government need only prove an attempt to defraud by means of misrepresentation (with the trivial addition, for purposes of federal jurisdiction, of a letter being mailed or wire communication being made). Lest you think there must be demonstrable economic harm to a defrauded person, well, perhaps that was true years ago, but not any longer.

The turning point in the expansion of these fraud laws came in the late 1980s in a case involving R. Foster Winans, a reporter for the *Wall Street Journal*. He was convicted of insider trading, because he profited from pre-publication knowledge of truthful information about the contents of a column that regularly moved stock prices.

Winans was charged under both the mail fraud and securities laws, but only the mail fraud conviction survived Supreme Court review. Key to that charge was the notion that fraud is a species of theft, requiring the taking of some form of property. The government successfully argued that the taking of intangible property could suffice, i.e., the *Wall Street Journal*’s “property interest” was in maintaining control of the nature and timing of disclosure of its stories; Winans’s behav-

ior infringed on that property interest.

In 1988, the Supreme Court refused to extend the law to an even vaguer social harm called “loss of honest services.” Congress responded by extending the mail/wire fraud laws to anyone who, by a “scheme to defraud,” deprives anyone else of his entitlement to the deceiver’s “honest services.” So the government today can prosecute anyone for any act that might constitute an intentional breach of a contract, or a violation of a workplace rule. Because the government could have argued that Blair intentionally deprived the *Times* of its right to his honest services, he could easily have been prosecuted.

While the government would not have been required to demonstrate specific economic harm, it could have done so—and there was certainly incentive to follow that path. Under the federal sentencing guidelines, Blair’s actual prison sentence would depend on the provable dollar amount of the loss he inflicted. The easiest harm to argue is the cost of his lies to the newspaper’s reputation. Just consider the stock market’s response to the disclosure of Blair’s deceptions. On the first trading day after the disclosure, the *Times*’s stock price was briefly off by 1 percent while the Standard & Poor 500 was up by a half of 1 percent. Although this gap quickly disappeared, a transitory “Blair effect” is plainly visible in stock price data.

The legal distinction between Blair and the latest arrested corporate fraudsters is also gossamer thin. To be liable under the most frequently employed provision of the federal securities laws, a defendant must act with “scienter,” a state of mind that the Supreme Court has defined as “embracing an intent to deceive.” This is essentially the standard that would be used to determine whether a false story crosses the line separating constitutionally protected mistakes from indictable frauds.

Federal prosecutors briefly considered looking into Blair’s case but wisely decided to let it go after *Times* officials declined to cooperate. Journalists, however, cannot count on such discretion in the future. Given the expansive interpretations of the mail and wire fraud provisions, it may be only a matter of time before a reporter faces a felony indictment on such charges.



Briefs

LET THE SUN SHINE IN

After a frenzy of construction, a sparkling remodeled Robert Crown Law Library opens for the fall semester.

LAW SCHOOL ADMINISTRATORS weren't talking about religious awakenings last year when they first discussed Dean Kathleen Sullivan's vision of "bringing students into the light." They were talking about her idea for an overhaul of the library, designed to follow upon the

dowrsers, shamans, and exorcists," Brucato said in July. By the start of classes in September, however, the only shaman involved in the project had been Brucato himself, who led its successful completion as he had the classroom project.

"The library is the most important work space for students at any law school," Sullivan declared September 10 before faculty and students took their first tour. "We already had a great building, a great set of students and professors, and the world's greatest library staff, but we needed a great reading room."

And that's what the Law School now has. The new Robert Crown Law Library boasts a grand first-floor entrance, redesigned study space, wireless Internet connectivity, and a stylish reading room, complete with plush reading nooks bathed in natural light. Inspired by reading rooms at the New York Public Library, Harvard, and Yale, the renovation creates an inviting central academic space that encourages intellectual exchange and collaboration amid the latest Silicon Valley technology.

With its warm oak furnishings and sleek metal lighting fixtures, the revamped 16,500-square-foot space is a dramatic departure from the original's once-groovy, now-gruesome, 1970s palette of dingy browns, garish oranges, and lime greens. Where cramped study carrels and overcrowded bookshelves once lined dark, narrow aisles, a meet-and-greet lounge area now opens up to rows of custom-built wooden worktables and ergonomic Aeron chairs

accommodating up to 120 students in a bright, airy hall. The library's 500,000 books remain, but a mobile-shelving system in the basement now houses rarely accessed volumes to make more room for scholarly pursuits upstairs.

The first floor received the brunt of the jackhammering. Construction workers blasted a new main entrance through a concrete wall, replacing the second-floor entrance and opening the ground level to a flood of outdoor light. They raised the ceiling two feet to give the new reading room an airier feel, and installed seven conference rooms, two with large plasma computer display screens, to encourage study groups. The third floor received a fresh coat of paint and new carpeting.

"Our mission was to relocate books and provide more access for interaction and study," explains architect Steven Kelley of the firm Miller/Kelley, which had redesigned the School's classrooms. "The Dean wanted to bring the students into the light," he says.

—Nina Nowak

WALL CAME A TUMBLIN' DOWN: Frank Brucato, Senior Associate Dean for Finance and Chief Financial Officer, shows off the new entrance to the renovated Robert Crown Law Library. It was created by knocking down the concrete wall on the ground level of the Administration Building. Before the renovation, many denizens of the School didn't know that the library lay on the wall's other side.

Law School's success two years ago in remodeling its 16 classrooms.

Little did Frank Brucato, Senior Associate Dean for Finance and Chief Financial Officer, know that this summer's construction would leave him feeling, at times, as if he were facing tribulations of a Biblical sort, be they flooding, a prolonged wander through the desert, or the distracting clamor of bells. The three-month-long project had to overcome a delay in permits, a series of fire alarms (but no fires), and an accidental sprinkler eruption in the Admissions Office that flooded several rooms in the building.

"If our bad luck continues, we are prepared to bring in Feng Shui experts,



STEVE GLADFELTER (2)



JUST LIKE NEW YORK: Sleek task lamps, based on a classic 1930s design, sit atop custom-made worktables (12' x 5') in the new reading room, which can accommodate up to 120 students in ergonomically correct Aeron chairs. The library overhaul was inspired, in part, by the reading room in the New York Public Library. The redesign also added 60 study carrels, 24 computer workstations, and 7 conference rooms.

HIGH COURT CLERKS

FIVE STANFORD law alumni are slated to clerk at the United States Supreme Court over the next two terms, arriving just as two other SLS grads finished up their clerkships at the high court. Among the seven are [pictured at right] Joshua Klein '02, who will clerk for Justice Sandra Day O'Connor '52 (BA '50) during the 2004–05 term; Alexandra Walsh '01 and Julian Davis Mortenson '02, both of whom will be at the Court in 2003–04, Walsh working with Justice Stephen G. Breyer (BA '59) and Mortenson with Justice David Souter; Robert Hur '01, who in June finished up his term in the chambers of Chief Justice William H. Rehnquist '52 (BA '48, MA '48); and C. Scott Hemphill '01 (MA '01), who will serve Justice Antonin Scalia this year. Not pictured are Roberto Gonzalez '03, who will clerk for Justice John Paul Stevens in 2004–05, and Brian Matsui '99 (BA '95), who served as a clerk to Justice Anthony M. Kennedy (BA '58) in 2002–03.



LAUREN SHAY

KUDOS TO A CONSTITUTIONAL SCHOLAR AND FORMER DEAN

AT THE COMMENCEMENT CEREMONY on May 26 in New Haven, Yale University awarded an honorary Doctor of Laws degree to former Stanford Law School Dean John Hart Ely in honor of his contributions to the field of constitutional law.

Ely, who graduated from Yale Law School in 1963, was described in the *Yale Alumni Bulletin* as the “author of some of the most influential legal writings of the second half of the 20th century.” His book, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980), won an Order of the Coif prize and changed the way that lawyers and scholars think about the Supreme Court’s role: Ely wrote that the Court, instead of serving as an independent source of moral and political values, should primarily concern itself with guaranteeing that our democracy remains open and fair. Many of his other works are considered classics of constitutional law scholarship.

Ely was a law clerk to Supreme Court Chief Justice Earl Warren and became the youngest staff member on the

Warren Commission, which investigated the assassination of President John F. Kennedy. Prior to his current position as Richard A. Hausler Professor of Law at the University of Miami, he was a faculty member at Yale and Harvard Law Schools in addition to being Stanford’s Richard E. Lang Professor of Law and serving as the School’s Dean from 1982 to 1987.

At the Yale graduation ceremony, the citation on his honorary degree was read to the crowd: “Yours is the work that sets the standard for constitutional scholarship in our generation. With forceful argument and impeccable scholarship, you have given clarity to our concept of democracy, by exploring when and how the Supreme Court should exercise its extraordinary power to declare legislation unconstitutional.”



Former Dean John Hart Ely was honored at Yale’s commencement in May.

ROBERT LISAK

FOUR FINE FELLOWS FOR CONFLICT RESOLUTION

Research grants may shed light on ending disputes in India, Kenya, and Latin America.

AS THE FIRST STANFORD LAW STUDENTS to receive their JDs after the September 11 attacks, members of the Class of 2002 were particularly aware of the need for well-trained global peacemakers. So their 3L Gift to the Law School—the Class of 2002 Fellowship in Conflict Resolution—was a

fitting statement of their commitment to ending the cycle of violence.

The new program provides grants, ranging from a few hundred to a few thousand dollars, to Stanford Law students and alumni pursuing research or fieldwork in conflict resolution. The program honors the memory of negotiations instructor Steve Neustadter, who died in January 2002.

The four inaugural fellows were selected last spring. Manuel Gomez, JSM '02, JSD '06, is examining conflict resolution mechanisms for corporate disputes in Latin America. Peter Lamb, JD/MA '05, is studying dispute settlement issues in the stalled \$3 billion Dabhol Power Project in India. Elizabeth Muli, JSM '02, JSD '06, is evaluating government truth commissions, focusing especially on one in her native Kenya. And Mike Woodhouse '03 is writing a simulation based on real-world conflicts to illustrate principles of path dependence in multilateral negotiations.

“Through this fellowship the students become teachers, too,” says Maude Pervere, Senior Lecturer in Law and a Director of the Law School’s Martin Daniel Gould Center for Conflict Resolution Programs, which oversees the fellowship. Indeed, the fellows are required to return to share their findings with the Law School community. “Their research has lots of applications in the classroom,” she adds.

The Gould Center was established on campus six years ago with support from the Joseph B. Gould Foundation.

—Nina Nowak



Elizabeth Muli, JSM '02, JSD '06, Mike Woodhouse '03, Peter Lamb JD/MA '05, and Manuel Gomez, JSM '02, JSD '06, received fellowships.

ON THE DOCKET

Upcoming Law School events*

We the People 2003: Oct. 18

Panel with Justice Anthony M. Kennedy (BA '58) and Law School faculty
www.law.stanford.edu/alumniweekend

Shaking the Foundations: Nov. 7-9

Conference on progressive lawyering
<http://shaking.stanford.edu/>

CyberSecurity, Research, Disclosure: Nov. 22

Conference hosted by the Law School's Center for Internet and Society
<http://cyberlaw.stanford.edu/security/>

Unnatural Selection: Feb. 27

Symposium on whether California should regulate pre-implantation genetic diagnosis; hosted by the Law School's new Center for Law & the Biosciences

Directors' College 2004: June 20-22

Hosted by Stanford Law School Executive Education Program in Law, Economics & Business
www.law.stanford.edu/programs/execed/programs.html

* Advance purchase of tickets or pre-registration is advised for all events.

MAKING THE GRADE

WELCOME TO THE CLUB: Vice Dean **Barton H. "Buzz" Thompson, Jr., JD/MBA '76 (BA '72)** was named this summer to the Environmental Protection Agency's Committee on Valuing the Protection of Ecological Systems and Services. ♦ In August, California Supreme Court Chief Justice **Ronald M. George '64** was elected President of the Conference of Chief Justices.

KUDOS: At a September 25 ceremony organized by the group Public Advocates, **Miguel A. Méndez**, Adelbert H. Sweet Professor of Law, was recognized as a "Voice of Conscience" in honor of the more than ten years he has served as the group's Board Chair. ♦ The American Bar Association announced in August that Law Professor **Lawrence Lessig** will receive its first Cyberspace Law Excellence Award. ♦ The Planning and Conservation League announced in July that it has created an annual **Robert Garcia** Award for Environmental Justice, in honor of the Stanford Law School graduate from the Class of 1979 who is its first recipient.

BENCHED: In a voice vote, the Senate confirmed on July 10 the nomination of **Charles F. Lettow '68** to a seat on the U.S. Court of Federal Claims. ♦ Also this summer, President George W. Bush nominated **Craig S. Iscoe '78** to serve as an Associate Judge of the Superior Court for the District of Columbia and **Carlos Bea '58** (BA '56) to serve on the U.S. Court of Appeals for the Ninth Circuit.

POWER & INFLUENCE: The August issue of *Nonprofit Times* named former Dean **Paul Brest**, now the President of the Hewlett Foundation, to its list, Power & Influence Top 50. ♦ Also in August, Professor **Lessig** was included in *Managing Intellectual Property* magazine's 50 Most Influential People in IP. ♦ Lecturer **Jennifer Stisa Granick**, Director of the Cyberlaw Clinic, was featured as one of 20 women luminaries in *Information Security* magazine.

Charity

The Law School
contributes
to the effort
to promote
pro bono work.

BY
JENNIFER SASLAW '04



HOW CAN LAWYERS BE INSPIRED TO DONATE MORE OF THEIR SERVICES TO THE NEEDY?

That's the challenge Deborah Rhode, Ernest W. McFarland Professor of Law, has been wrestling with for the past six years. In 1997, as the new President of the Association of American Law Schools, she noted that more new lawyers were needed to provide crucial public interest legal services and established the Commission on Pro Bono and Public Service Opportunities in Law Schools. Subsequently, she surveyed 3,000 lawyers and conducted the first systematic national study, which is to be published next year, on the factors that lead lawyers to work pro bono.

Rhode's research doesn't offer a silver bullet solution, but one conclusion that emerged is that law schools have a critical role in cultivating a commitment to pro bono. And so, last spring, responding to a proposal from students and faculty including Rhode, Stanford Law School adopted a policy to not only encourage students and faculty to work pro bono, but also to ensure that the School would work harder to provide meaningful volunteer opportu-

nities. When students began classes in September, many voluntarily took the School's new pledge to do at least 50 hours of pro bono legal work before graduating—and the new Director of Public Interest & Public Policy Programs, Diane Chin [see sidebar below], has pledged to help them reach that goal.

"The American Bar's commitment to provide legal services pro bono expresses all that is best in our profession," remarks Rhode. "Law schools have a unique opportunity and obligation to inspire students to carry on that tradition."

The Law School's program is not an isolated public relations ploy to grab headlines, but part of a growing nationwide effort, reaching from law firms to law schools, to respond to the enormous unmet need for legal services. Recent estimates suggest that a vast majority of low-income people who seek legal assistance are unable to find it. While there are many reasons for this gap, pro bono work has not responded to the increased demand. According to Rhode's research, the average contribution for a member of the Bar is less than half an hour a week.

Leaders of the legal profession are calling for a paradigm shift: to make pro bono work as much of a fixture in the life of law firms as quotas for billable hours. The ABA has issued a challenge to lawyers to perform 50 hours of pro bono work per year. Florida, Nevada, and Maryland now require state bar members to file annual reports on their pro bono work so that the public can see which lawyers are volunteering. And a number of law firms are upgrading their pro bono programs, allowing their lawyers to count pro bono hours toward hourly quotas.

Take the Chicago-based firm Sonnenschein Nath and Rosenthal LLP. The firm's managing partner, Duane Quaini '70, Chair of the Law School's Board of Visitors, announced in July that it had hired a full-time public interest partner to oversee its national pro bono program. Another change is that all partners on the firm's policy and planning committee

will be required to take on a substantial pro bono case, Quaini says. The firm has also doubled its maximum pro bono billable hours for associates to 200 hours, he adds.

Quaini's reforms are at the forefront of the changing attitude toward pro bono. There is a new awareness among law firms that they must shoulder greater responsibility for doing such work. That's quite different from the late 1990s, when many lawyers believed that economic pressures made it impossible to take on pro bono cases. During that time, average hours of pro bono work dropped by one-third (at the largest firms for which information is available). Back then, many lawyers attributed the decline to the economic boom, which had them scrambling to serve paying clients.

What caused many lawyers to rethink why pro bono was in decline was that pro bono hours didn't quickly rebound when the economy stalled. As Rhode notes in her forthcoming study, *Pro Bono: In Principle and in Practice*: "Neither a good economy nor a bad economy is necessarily better for pro bono. Pro bono work is determined less by economic imperatives than institutional priorities." And so over the last few years, some law firms have looked to find ways to make pro bono work as much of a priority as the desire to maximize billable hours. Some, for instance, have revised policies that did not credit public service toward billable hours or toward bonuses.

Law firms' motivation for such changes is practical, as well as altruistic. Strong pro bono programs can, for example, help firms' recruiting and retention efforts. Associate Dean for Career Services Susan Robinson counsels students to look carefully at firms' pro bono policies when weighing job offers.

Pro bono cases can also help firms to give associates some hands-on litigation experience. Shannon Petersen '00, a third-year associate at Latham & Watkins, was able to join with another junior associate in representing a disabled child in a civil trial against his school system. "I took depositions, examined witnesses on the stand, and presented the closing

Preparing Another Generation for Public Interest

A veteran civil rights lawyer joins the Office of Career Services.

DIANE CHIN USED TO BATTLE HATE EVERY DAY. As a staff attorney at the Lawyers' Committee for Civil Rights in San Francisco and founder of its Racial Violence Project, the petite lawyer with the leather jacket and jet black hair stood tall in the face of discrimination, championing clients in cases ranging from unfair housing to police misconduct. Once, when a Hispanic family sought justice against physically harassing neighbors, Chin not only won an admission of guilt, she convinced the neighbors to move.

"Direct representation of victims of hate violence can often produce very concrete remedies," Chin says. "That's not always the case with the law."

On July 1, Chin became the Law School's new Director of Public Interest & Public Policy Programs. Her job is to help the next generation of civil rights advocates to achieve still more concrete results. Already, she is developing new public interest job opportunities for students, coordinating externships, and expand-

argument,” says Petersen. “I never would have been able to do that with a paying client.”

In addition, pro bono improves the reputation of the legal profession as a whole. In one survey of the general public, two-thirds of respondents indicated that greater provision of legal services to the needy was the reform that would most improve their opinion of lawyers. Rhode’s research also shows that participation in pro bono work can help lawyers to overcome the lack of job satisfaction that causes many to leave the profession, as well as improve morale overall at a firm. In an interview for her research, one lawyer elaborated on pro bono’s positive ripple effect: “Everyone feels that they touched a life. . . . No office picnics or parties can give you that.”

At the Law School, Chin is preparing to debut a website with an expanded menu of pro bono opportunities for students. In years past, students volunteered in such programs as StreetLaw and the San Mateo County Legal Aid’s Volunteer Attorney Program, but the School is considering other options that would appeal to both students and lawyers at nearby firms. In recent months, for instance, the Stanford Community Law Clinic, which the Law School opened in East Palo Alto in January, started offering evening hours in which low income people can receive information about housing issues, employment rights, and entitlement benefits from volunteer law students and lawyers.

In the first few weeks of the fall semester, Chin distributed registration forms for the Pro Bono Program advising that the Law School “expects its students and faculty to aspire to provide such service.” As the year progresses, she plans on working individually with students to find pro bono projects tailored to their specific interests. Along with helping to place the students, she will track the hours they work so that those doing 50 hours or more can receive formal recognition upon graduating.

Whether such a change will lead to greater pro bono

participation later in students’ careers remains to be seen. Rhode’s research suggests that well-designed law school programs can have an encouraging effect. In her survey, she found that lawyers who have a positive pro bono experience in law school are more likely to want to engage in pro bono activities in their professional practice.

Rhode’s work, however, does not suggest that any single approach will best ensure a positive pro bono experience in law school. Her survey included alumni of six law schools—two with mandatory pro bono programs, two with voluntary pro bono programs, and two without any pro bono policy. When she looked to see what influence these programs had on their post-graduation pro bono activity, she found no correlation between the type of program adopted by a school and the level of pro bono participation among its graduates.

The Stanford Law School faculty opted for a voluntary program after considerable reflection. While some professors contended that a mandatory program would convey pro bono’s importance, others questioned whether charitable behavior should be dictated. Ultimately, there was a consensus that launching a well-supported voluntary program was the best way to start.

The debate on voluntary versus mandatory pro bono goes beyond law schools. In recent years the ABA has considered—and rejected—requiring members to do a set amount of pro bono work each year. In her study, Rhode observes that lawyers have been reluctant to make pro bono an obligation. Still, she notes that the ABA has stepped up its support for voluntary efforts to promote pro bono. Two years ago, the group adopted a minor language change on its rule guiding pro bono, adding a new sentence: “Every lawyer has a professional responsibility to provide legal services to those unable to pay.”

True, the 15-word provision lacks teeth, but it establishes a principle. And without that, there can’t be a revolution in attitudes.

ing other service learning programs. She comes aboard as the Law School is boosting its public interest programs, with new clinical courses in civil rights and education law, a new community law clinic in East Palo Alto, and a pro bono initiative.

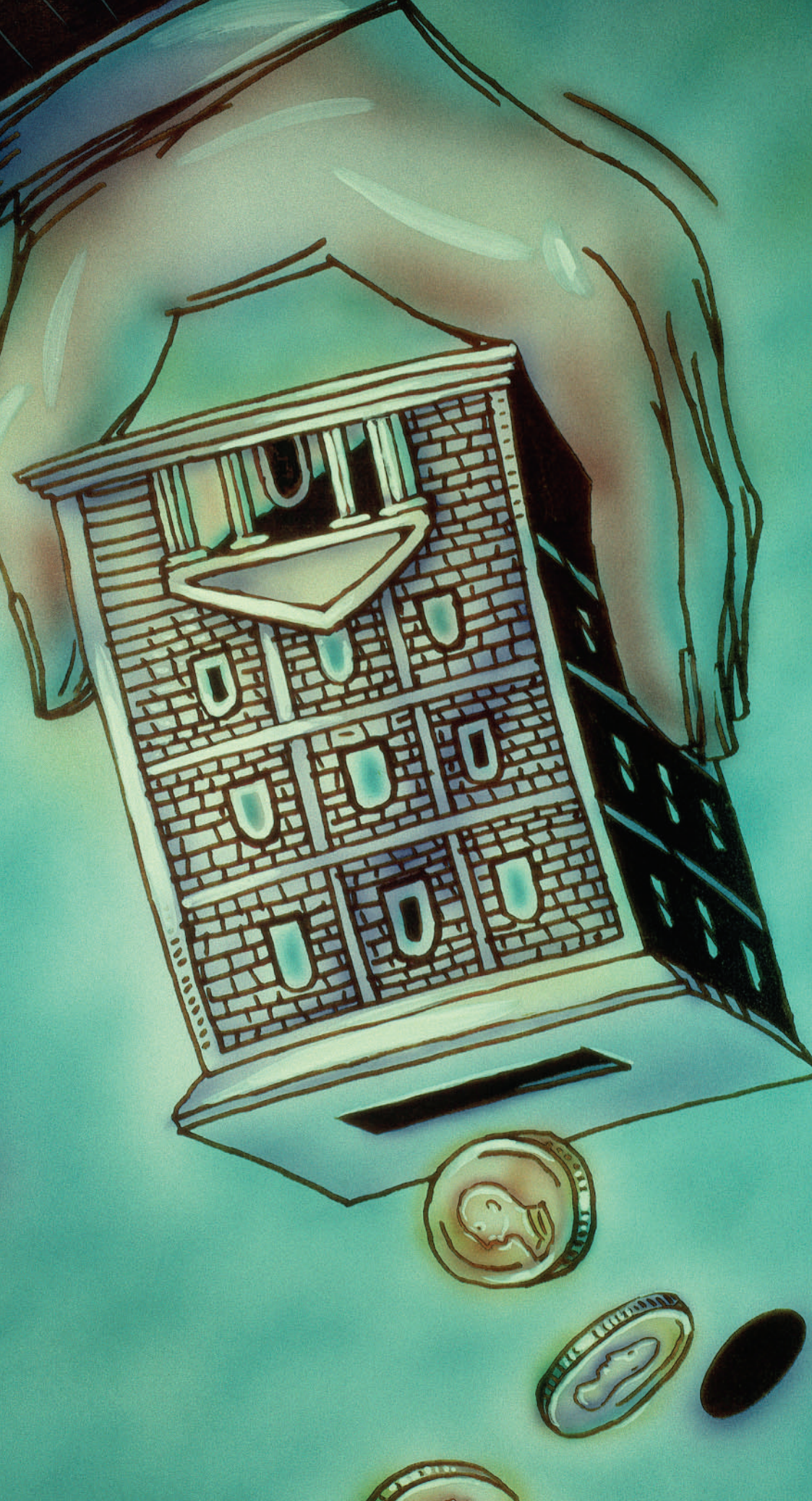
A 1989 graduate of Northeastern University School of Law and former Skadden Public Interest Fellow, Chin spent the last five years as Director of Chinese for Affirmative Action, a nonprofit, civil rights organization with offices in San Francisco and Sacramento. Prior to that position, she served as Senior Trial Attorney at the San Francisco Police Commission’s Office of Citizen Complaints and Staff Attorney at Protection & Advocacy, Inc., in Oakland, in addition to her job at the Lawyers’ Committee for Civil Rights.

“As I’ve gotten older, it’s been inspiring and important to me to work with younger people,” says Chin. “These students are ready to change the world, so let’s give them the tools to do it.”

—Nina Nowak



Diane Chin is the Law School’s new Director of Public Interest & Public Policy Programs.



When Time Isn't Money

FOUNDATION PAYOUTS AND THE TIME VALUE OF MONEY

Forcing foundations
to give more cash
grants each year
may cheat future
generations of their
just desserts.

BY MICHAEL KLAUSNER
Nancy and Charles Munger
Professor of Business and
Professor of Law

Bill Gates has said that when an AIDS vaccine is produced, the Bill and Melinda Gates Foundation will fund the vaccine's distribution around the world even if the foundation has to spend down its \$24 billion endowment. For now, and until the vaccine is found, however, the foundation is distributing funds at about the legally required rate of 5 percent per year.

Recently, strong arguments have been made to foundation managers and legislators that foundations should distribute their assets at a faster rate. In September, Congress seriously considered a measure that would have increased annual foundation payouts before putting it aside. The foundation payout debate has spanned decades, but advocates for a faster payout received a boost last year from an article by McKinsey & Company consultants Paul J. Jansen and David M. Katz, "For Nonprofits, Time is Money," in the *McKinsey Quarterly*. They argued that we should view foundation grants as an investor would view an investment. Just as investors would choose to receive a dollar today rather than a dollar a year from now, so too is a dollar of charity given today worth more to society than a dollar of charity given in the future. That position picked up more publicity when former New Jersey Senator Bill Bradley, now a consultant to McKinsey, joined Jansen in making the same argument in a *New York Times* op-ed, "Faster Charity," on May 15, 2002.

If Bradley and the McKinsey authors are right, the Gates Foundation should reassess its strategy. The foundation would need to discount the social benefit of a future AIDS vaccine to a "present value," just as an investor would discount future investment returns to present value. This discounting exercise would reduce the vaccine's value to a fraction—very likely a small fraction—of the benefit that the

This article was adapted from the Spring 2003 inaugural issue of *Stanford Social Innovation Review*, a journal launched by the Stanford Graduate School of Business to cover best practice and ideas in nonprofit management, philanthropy, and corporate citizenship. To subscribe or purchase a reprint of the original, visit www.ssireview.com or fax 650.723.0516. The article also appears in 41 *Exempt Organization Tax Review* 421 (2003).

A Penny Saved

Foundations have learned from Ben Franklin's last experiment.

In 1785 a Frenchman named Charles-Joseph Mathon de la Cour wrote a parody mocking Benjamin Franklin's American optimism. In the story, a man leaves a small sum of money in his will and after collecting interest for 500 years, it becomes a fortune. Franklin wrote to the Frenchman and thanked him for the inspirational idea.

And so instead of leaving £2,000 to Pennsylvania to make the Schuylkill River navigable, which was his original plan, Franklin left £1,000 (about \$4,500 at the time) each to Boston and Philadelphia with specific conditions that the money could be paid out only after accruing interest for 100—then another 100—years. He hoped that the people of those cities would see his plan as “a testimony of my earnest desire to be useful to them after my departure.” The interest on the money would be earned from loans to “young married artificers, under the age of twenty-five year, as have served an apprenticeship in said town,” to assist them in setting up their business. At the 100-year mark, each city was required to spend some of the money on public works and loan out the rest for 100 years. Two hundred years after his death, Franklin's legacy would, according to his projections, total £4,061,000 (or about \$9 million for each city).

Franklin died in 1790, and his plan was subsequently put in motion, though not exactly as he had hoped. Because the loan program was not administered vigilantly and because the trade and apprentice systems waned with industrialization, neither city's fund grew to Franklin's expectations. After 100 years, Boston's fund had grown to roughly \$391,000, much of which was used to help establish what is now the Benjamin Franklin Institute of Technology in Boston; the remainder was reinvested for the next 100 years.

Unlike Boston, Philadelphia's fund had stuck with the loan program rather than investments in the stock market and by 1907 had grown only to \$172,000. The majority of that was given to the Franklin Institute, a hands-on science education museum in Philadelphia.

By 1990, at the end of the second 100 years, the roughly \$100,000 reinvested in Boston a century earlier had grown to \$5 million, and the \$39,000 reinvested in Philadelphia had grown to \$2.25 million.

The Boston money was again given to the Benjamin Franklin Institute of Technology. The Philadelphia money was divided among city and community foundations throughout Pennsylvania, where it has funded, among other things, scholarships for students attending technical college and pursuing careers in trades, crafts, and applied sciences.

vaccine will produce when it is actually distributed. Thus, more immediate grants to charity would appear more socially valuable in comparison, and to that extent, the McKinsey authors argue that foundations should accelerate their payout rates.

But the McKinseyites are wrong. Their discounted cash flow approach doesn't fit the foundation payout issue. Under certain circumstances, there are good reasons for foundations to favor higher payout rates, and perhaps even good reasons for the law to mandate them. The time value of money, however, isn't one of them.

Current Versus Future Charity

The issue of foundation payout rates comes down to a tradeoff between charity for the current generation and charity for future generations. The lower the payout rate, the greater the amount saved and invested, and hence the greater the amount that can be distributed to future generations. Conversely, the higher the payout rate, the lower the amount available for future distribution. The arguments of those who advocate higher payout rates amount to arguments that foundations should provide more money to current charity and less to future charity. Foundations that resist higher payout rates are in effect arguing for more future charity at the expense of current charity.

The McKinsey authors argue that a foundation dollar distributed to charity today is worth considerably more than a foundation dollar distributed in the future. Consequently, they say, foundations can increase the value of their grant making by increasing their payout rates. They explain that they apply “a standard financial concept known as the ‘time value of money’” to reach this conclusion. This is the same “discounted cash flow” approach that corporations and investors use in deciding whether a current investment is justified by its projected returns. To evaluate a proposed investment, a company projects the investment's future cash flow and discounts it to present value using a discount rate that reflects the company's cost of funds or the rate of return the company can earn from an alternative investment. An individual investor would approach an investment the same way, but in addition, an individual would consider whether he prefers immediate consumption to the opportunity to consume



more in the future when the investment pays off.

The McKinsey authors are not the first to apply the discounted cash flow approach to foundation payouts. The U.S. Treasury Department and Congress implicitly took this approach in the 1960s when the payout rate was initially enacted. They were troubled by the fact that a donor to a foundation takes a tax deduction at the time of the donation but the donated funds might not reach actual operating charities until many years later. Congress and Treasury believed that because of this delay, donors were getting a tax benefit worth more than the charitable benefit they produced. Other advocates for higher payout rates have referred to the time value of money as well.

The McKinsey authors, however, provide the most detailed explication of this argument. They begin their analysis by constructing a hypothetical foundation that will exist for 50 years. [See chart.] Their foundation begins with assets of \$1,000, it earns a 10 percent annual rate of return on its investment portfolio, it incurs administrative costs at the rate of 1 percent per year, and it distributes 5 percent of its assets per year in grants to charity. With these numbers, the foundation makes grants of \$50 in its first year. In its 50th year, its assets will be more than \$5,000 and it will make grants of \$257. The foundation's grants over 50 years will total \$6,355.

Sounds like a valuable social institution to me, but the authors are not so sanguine. They calculate the present value of the foundation's grants to society by discounting the 50-year stream of grants at two alternative rates: the 10 percent rate that the foundation earns on its investment portfolio, and a 15 percent rate that they say the foundation could earn for society by making grants today. Running these calculations, the authors find that the foundation's \$6,355 in grants over 50 years is actually worth *less* to society than the \$1,000 with which the foundation started. (It is worth \$830 using a 10 percent discount rate and \$500 using a 15 percent rate.) They run various scenarios through their spreadsheet to show that foundations that want to increase their value to society should increase their payout rates above 5 percent. But they neglect to point out that under their valuation approach, the best a foundation can do is break even in terms of creating social welfare—and that, with the 15 percent discount rate, the only way a foundation can do even that well is to distribute 100 percent of its assets immediately and to do so without incurring any administrative costs.

The McKinsey authors explain that skilled grant making can offset the ravages of time on a foundation's social worth, but holding the quality of grants constant, their point is simple: Future charity is worth less than present charity, and it is the time value of money that makes the difference.

The McKinsey authors' analysis is simply arithmetic. By

THE HYPOTHETICAL MCKINSEY FOUNDATION

Year	Assets	Grants at 5 percent per year	Present Value of Grants at 10 percent Discount Rate*	Present Value of Grants at 15 percent Discount Rate*
1	\$1,000	\$50	\$50	\$50
2	1,034	52	47	45
3	1,069	53	44	40
48	4,814	241	2.73	.34
49	4,977	249	2.57	.30
50	5,164	257	2.41	.27
TOTAL		\$6,355	\$830**	\$500**

McKinsey's hypothetical foundation begins with \$1,000 in total assets. It then assumes annual disbursement of 5 percent of assets through grants, administrative costs of 1 percent of assets, and a return on the remainder invested of 10 percent. While grants grow to \$257 in year 50, the present value of the grants declines to \$2.41 using a 10 percent discount rate and to 27 cents using a 15 percent discount rate. The present value of all disbursed grants and the remaining principal after 50 years is \$830 at the 10 percent discount rate and \$500 at the 15 percent discount rate.

* Assumes, as McKinsey authors do, that grants are made at the beginning of each year.

** Total includes net present value of remaining principal.

assuming a social rate of return on a foundation's grants (15 percent) that is higher than the rate of return on its investments (10 percent), their calculations would lead the foundation to distribute all its funds immediately. But if a foundation's grants yield only a 9.9 percent return for society, then those same calculations would lead the foundation to invest its cash forever and never make a grant! Something must be wrong with this approach.

The Inapplicability of the Discounted Cash Flow Approach

The McKinsey authors' analysis is flawed, not merely because of the numbers they use, but because the discounted cash flow approach is not an appropriate method for measuring the value of foundation grants made in the future. When the McKinsey authors measure the present value of their foundation, the value of the grants that the foundation makes each year is divided by a discount factor.



STEVE GLADFELTER

Does brunch today equal the value of a year of meals in 48 years? Michael Klausner says that's the mistaken logic of some advocates for increased foundation payouts.

For example, take the value of grants made at the beginning of the 48th year—\$241. Divide that by 1.15 to the 47th power, or 712. (Using the 10 percent discount rate the figure would be 1.10 to the 47th power, or 88.) The result is that the \$241 in grants for year 48 is worth about 34 cents.

Accordingly, if a grant will be made 48 years from now to fund a soup kitchen serving three meals a day for the full year (a total of 1,095 meals), the present value of that grant is just one and a half meals—brunch! If the foundation had a choice of serving brunch today or three meals a day for a full year in 48 years, the discounted cash flow approach would tell us it is a coin toss. This low valuation of the soup kitchen's services is based solely on its clients' hunger occurring in the somewhat distant future rather than today.

There are several reasons why the discounted cash flow approach is irrelevant to the foundation payout issue.

Most fundamentally, by discounting future grants to present value, we would be saying that future grants are worth less to society than current grants. Using the soup kitchen example above, a grant of \$241 in 48 years is worth a lot less than a grant of \$241 today; using a 15 percent discount rate, it is worth only 34 cents today. But why? In the private investment context, if investors can earn 15 percent on their money, they can convert the 34 cents into \$241 in 48 years. To an investor, therefore, receiving 34 cents today and receiving \$241 in 48 years are equivalent.

But when we compare a grant to charity today with one made in 48 years, we are comparing the benefit of helping one group of people today with the benefit of helping another group in 48 years. There is no similar equivalence. Why would 34 cents worth of food to a group of hungry people be worth the same as \$241 of food to a different

group of hungry people simply because the two groups live at different times? By invoking the discounted cash flow approach, the McKinsey authors have adopted what economists refer to as a "pure time preference" in allocating resources over generations. Such a preference is difficult to justify as an ethical or economic matter. Frank Ramsey, who in 1928 was one of the first economists to analyze resource allocation over time, called the discounting of funds allocated to future generations "ethically indefensible and arising merely from the weakness of the imagination."

Secondly, there is no basis for discounting a future grant at the rate of return a foundation earns on its investment portfolio—the 10 percent rate the McKinsey authors use. In the private investment context, the projected cash flows of a proposed investment are discounted at the rate of return available on an alternative investment; by

making the proposed investment the company or the individual would forgo the alternative investment. [See sidebar, p. 17.] A foundation, however, doesn't lose an opportunity to earn a return on its investment when a grant is deferred. On the contrary, as the McKinsey authors recognize, the funds remain invested in the foundation's portfolio, earning a 10 percent return. This step in the authors' discounting exercise amounts to inflating and deflating the foundation's assets at the same rate, which results in a wash—there is *no* loss of value as a result of delay *regardless of the payout rate*.

The reason the McKinsey authors find that the value of the foundation's grants is less than the \$1,000 with which the foundation started is because their foundation incurs administrative costs in making grants. Although they recognize that skilled grant making can produce social gains, their calculations include only the cost of grant making, not the benefit. In the McKinsey authors' calculations, even a penny of administrative costs would render the foundation a net loss to society. The presence of administrative costs, however, is not a *per se* reason to increase payout rates.

Third, the McKinsey authors are correct in recognizing a social opportunity cost in forgoing earlier grant making. The cost of that lost opportunity is the "return" that society could have reaped if the foundation had made grants earlier. The authors recognize that social returns are hard to quantify and that selecting a discount rate is difficult as well, but they select a 15 percent social rate of return as "a conservative estimate for the upper end of our range of rates." They base this claim on work done by the Roberts Enterprise Development Fund (REDF) to measure the impact seven nonprofit organizations had in running business enterprises that train and employ an inner-city population. This figure,

however, is not representative of the social returns generated by the entire charitable sector, which includes art museums, prep schools, soup kitchens, hospices, universities, and innumerable other sorts of organizations. Moreover, although foundations are commonly interested in making grants that will produce a return to society that continues for some period of time, many grants—to the opera, symphony, soup kitchen, and homeless shelter, for example—produce benefits that are better characterized as largely consumption rather than investment.

Fourth, even assuming that a grant yields a social return—of 15 percent or whatever—the McKinsey authors' application of the discounted cash flow approach assumes that this return will be maintained over the long run—50 years in their hypothetical foundation. When one applies such a discount factor to a grant to be made 50 years from now, one says that the money could be invested today to generate a 15 percent return *for 50 years*. At that level of sustained social gain a grant of \$100,000—say, to fund a college scholarship for at-risk youth, or to support the local symphony—would yield \$108 million worth of gains to society at the end of 50 years. This seems unlikely, and it certainly has no basis in REDF's experience.

Fifth, even if a current grant to charity does yield a long-term social return, unless the return continues *in perpetuity*, applying a discount rate to future charity gets us back to the problem with which I began this analysis: the favoring of one set of beneficiaries over another based simply on the period of time during which they live. As I discuss below, there may be justifications to such a preference, but they are not found in the discounted cash flow analysis.

Finally, if the discounted cash flow approach were applicable to the timing of grants, it would be applicable to the evaluation of grants themselves. To evaluate a grant, a foundation manager would discount its projected social return. The discount rate, at a minimum, would have to equal the rate of return earned on the foundation's investment portfolio—10 percent in the McKinsey authors' hypothetical. This would lead a foundation to forgo grants that are expected to yield social benefits, if those benefits are less than the expected financial return on the foundation's investments. In other words, if grants to a soup kitchen or an opera or a school are not expected to yield what the bank or the stock market will pay, the foundation should not make the grants. This surely is not a proper comparison. To compare the private return available in the market with the social return available in the charitable sector is an error of the apples-and-oranges variety.

Similarly, if a foundation were to follow the discounted cash flow approach, it would have to discount the projected social returns from one grant by the social returns available on other grants. Foundations already do this implicitly when they compare two grants in the same field. But the discounted cash flow approach takes it a step further. If, for instance, a foundation funds research on the history of Western civilization, the discounted cash flow approach would require the foundation to discount the projected social returns from that research by the social return it could achieve with a grant anywhere else in the charitable sector. Such a practice would sacrifice diversity in grant making.

Balancing Current and Future Charity: A Fresh Start

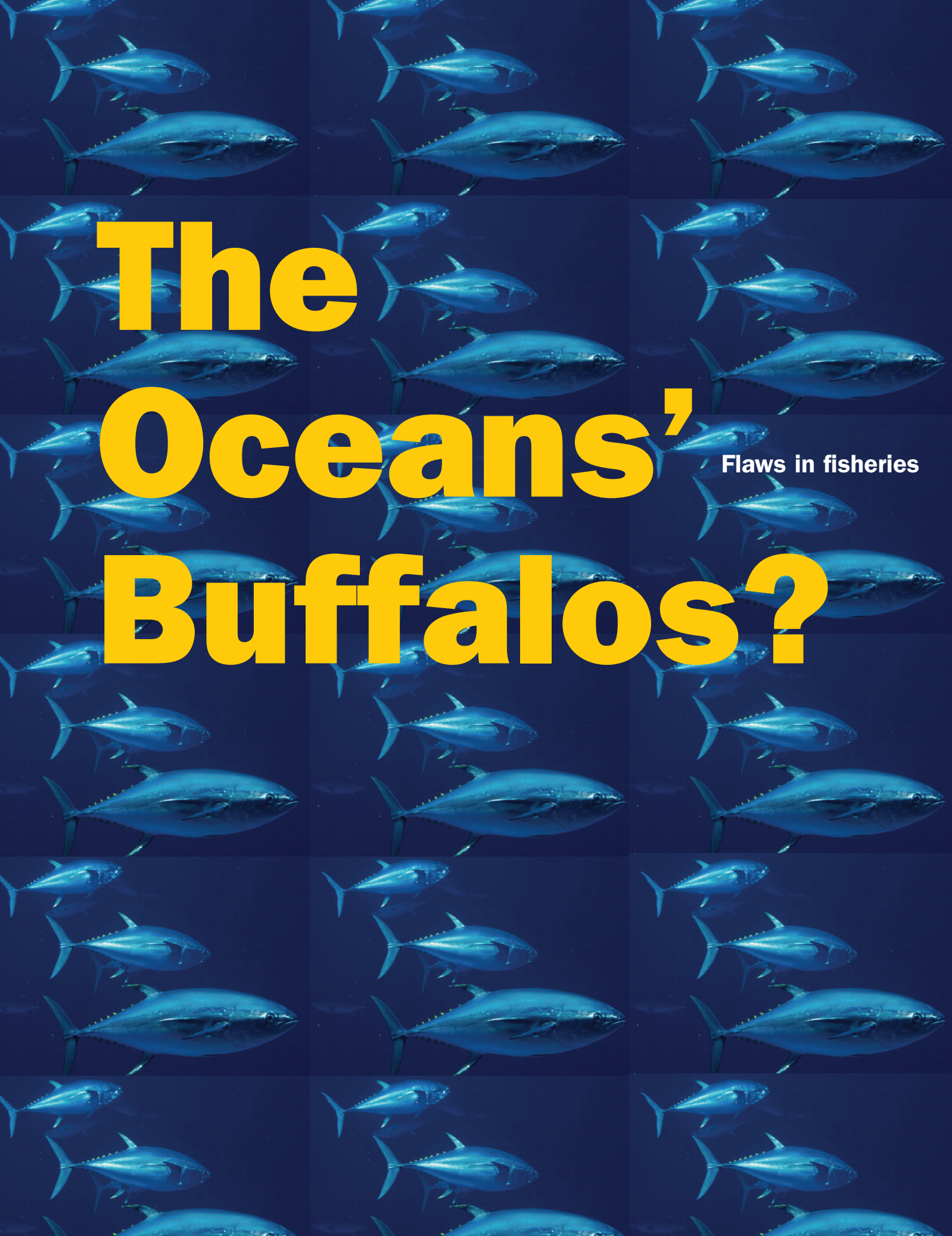
So if the discounted cash flow approach is not useful, how should foundation managers think about the tradeoff between current and future charity?

The tradeoff between current and future charity is a version of a problem with which policymakers, economists, and philosophers grapple when considering very long-term public investments in energy production and environmental protection. How much sacrifice should the current generation make so that future generations can have a cleaner environment, cheaper energy, better health, and longer lives? The question for foundations is similar. How much charity should we withhold from the current generation to provide more charity for future generations?

The challenge of how to allocate resources among generations is fundamentally an ethical question, with economics helping to highlight the tradeoffs. One realization that has come out of the debate over long-term public investment is that the pure timing of a social benefit—whether this generation or a future generation enjoys the benefits—should be irrelevant to its *Continued on p. 67*

How Investors Discount

Discounting helps investors compare investment returns. Let's suppose that an investor looking for a return in five years has the choice of either putting \$100 into an investment that is projected to return \$15 (along with the \$100 principal) in five years or putting the money in a five-year CD at a bank that pays 4 percent interest. To determine whether the investment is a better deal than the CD, the investor would use the 4 percent interest rate to discount the receipt of \$115 in five years, and would discover that the present value of the \$115 is about \$95. If you invested \$95 today at 4 percent, you would collect \$115 in 5 years. The investment is thus a bad deal. It would be equivalent to trading \$100 for \$95 today. Indeed, if you put \$100 in the CD today, it would be worth \$122 in five years, \$7 more than the investment would return.



The Oceans' Buffalos?

Flaws in fisheries

regulations are leading to disaster, warns Professor Buzz Thompson.

BY DASHKA SLATER

Josh Eagle, a Law School lecturer, likes to tell the story of the time he played an ice-breaking game called “Two Truths and a Lie” with a group of volunteers who teach children about the environment. To play the game, each person writes down two true statements about themselves and one false one; the other players then cast votes for the statement they believe is a lie. So when Eagle wrote, “My favorite animal is a tuna,” every single person in the room figured he was lying. After all, what kind of environmentalist chooses chicken of the sea as his favorite animal?

Dashka Slater is a writer in Oakland whose work has appeared in *Legal Affairs*, *San Francisco*, and *Sierra* magazines.



Marine Sciences, studies big fish—tuna, swordfish, sharks. Thompson, a former partner at O'Melveny & Myers who was a clerk to Justice William H. Rehnquist '52 (BA '48, MA '48), heads the Environmental and Natural Resources Law & Policy Program at the Law School. [See sidebar, p. 23.] Few other U.S. universities can bring such expertise to bear on fisheries regulation—Stanford dates its study of fisheries policy back to its first president, the ichthyologist David Starr Jordan—

SCOTT TAYLOR

Off the coast of North Carolina, Stanford Professor Barbara Block (center) prepares to tag a bluefin tuna so she can track the fish as it swims thousands of miles.

But tunas really are Eagle's favorite creature, particularly the Atlantic bluefin. Rare among fish species in being warm-blooded, these ten-foot-long predatory fish are the Olympians of the ocean, capable of diving to a thousand feet and swimming from one side of the Atlantic to the other in less than a month. Still, it wasn't that long ago that Eagle assumed tuna were roughly the same size as the can they come in. His evolution from tuna ignoramus to tuna enthusiast came with the work he began three years ago when he helped to found the Stanford Fisheries Policy Project, an unusual collaboration between Stanford Law School and the University's Hopkins Marine Station near Monterey.

Fisheries policy isn't a subject for intensive research at other law schools, and in 2000 it was barely on environmental policy makers' radar screens. Stanford Law School Vice Dean Barton "Buzz" Thompson, Jr., JD/MBA '76 (BA '72), Robert E. Paradise Professor of Natural Resources Law, doesn't have warm fuzzy feelings about fish. But Thompson, an expert on such environmental issues as water resource policy and biodiversity protection, recalls talking with Eagle about fisheries back then and realizing that the legal challenges in regulating them were likely to create a "perfect storm" of conundrums in the coming decade. What particularly vexed Thompson was the way that regulators ignored the latest scientific research, such as the findings by marine scientists at Hopkins. He was struck by the international jurisdictional dimensions of the problem, as well as the public's lack of awareness that the oceans were in danger of being fished out. Thompson and Eagle arranged to have lunch at the Monterey Aquarium with Stanford Marine Sciences Professor Barbara A. Block, and the Fisheries Policy Project was born.

Block, the Charles & Elizabeth Prothro Professor in

and the David and Lucile Packard Foundation agreed to finance Block's and Thompson's joint effort. The project's goal is to forge a more productive relationship between those who study fisheries and those who manage them, and to answer a thorny question: Why does the United States, which boasts some of the world's most sophisticated marine researchers, have such a dismal record when it comes to managing its own fisheries?

In the past few months, the crisis facing the world's oceans has gotten a fair amount of attention, thanks to a major report from the Pew Oceans Commission in June, a soon-to-be-released report from the U.S. Ocean Commission, and a report published in the May issue of *Nature* contending that fishing has wiped out 90 percent of large ocean predators like tuna, swordfish, and cod.

What hasn't gotten as much notice is the disturbing fact that the U.S. may be doing a worse job managing its fisheries than the world as a whole. Almost 40 percent of U.S. fisheries are classified as overfished, compared with 30 percent worldwide, and the status of more than half of the nation's 959 federally managed fisheries is simply unknown. True, some other countries—the member nations of the European Union, for example—are doing an even poorer job. Still, America's lackluster performance in preserving its fisheries is surprising when one considers how the nation has been on the forefront in environmental regulation and environmental research. Indeed, in a forthcoming study of the agencies that manage the nation's fisheries, Thompson and Eagle write, "Given the strengths of the scientists, one would expect that the U.S. management record would be better and certainly not worse than the worldwide record."

In trying to understand why America's fisheries are

doing so poorly, researchers at the Fisheries Policy Project focus much of their attention on the interaction between scientists and policy makers. Thompson, who in August was appointed to an Environmental Protection Agency advisory committee on assessing the economic benefits of ecosystem protection, says that the project is addressing such questions as: Are fishery managers using scientific information when setting quotas for allowable catches? Are scientists researching the questions managers need answered? And what does science tell us about the best way to manage fisheries? The project's ultimate goal is to translate scientific findings into policy recommendations while reaching a better understanding of how such findings may be distorted or even disregarded as they travel through the regulatory pipeline.

Says Block: "We biologists are very good at gathering data, and deciphering that data, and perhaps coming up with a rigorous answer to a question we're asking, but where we are challenged is when we try to move our science into the arena of policy making."

"Tunacentric" is the word that Eagle uses to describe Block. Her laboratory has big tanks filled with live bluefin, yellowfin, and bonito, which she sometimes dips into to inspect a fish. She is the author of definitive works on tuna physiology. And in the last few years she has done pathbreaking research on the migratory habits of bluefin, the most valuable fish in the world—with a single one typically fetching about \$30,000 on the open market.

Block's work has an urgency to it. The population of adult Atlantic bluefin in the west Atlantic has declined by as much as 90 percent in the past two decades. And evidence suggests that the decline is continuing on both sides of the Atlantic despite quotas limiting the catch. Currently the fish is managed as two separate stocks. The annual quota for the east Atlantic, where mainly European boats fish, is about 30,000 tons. By comparison, the quota in the west Atlantic, where most of the boats are from the U.S. and Canada, is much less, about 2,500 tons, because scientists and regulators believe these waters were overfished for 20 years. Although the European fishermen harvest essentially as many bluefin as they can catch, the North Americans do a better job enforcing their quota. Still, Block's research suggests that this management effort alone is insufficient to stop further demise of the west Atlantic bluefin population.

Using sensor tags that can follow a fish's whereabouts for years, Block and colleagues have spent the last seven years tracking bluefin migration patterns. The data suggest that while the two stocks go to their own respective breeding grounds, the stocks often intermingle freely, traveling back and forth across the Atlantic to feed. One tuna Block tagged during a recent winter off North Carolina swam to the Flemish Cap and the Mediterranean, then a year later was in

the Bahamas, and a little later was recaptured near Spain. If Block's findings are borne out with additional research, it will mean that the tremendously athletic bluefin don't respect the invisible boundaries that humans have set up for them. Many of the fish protected by the west Atlantic quotas are later caught in east Atlantic waters by European fleets. "They are fish of no one country," Block says. "That gets them into legally challenging issues."

Block brought these findings to Thompson, Eagle, Stanford Biological Sciences Professor Joan Roughgarden, and Paul Armsworth, a conservation economist. She pointed out that one of the biggest breeding areas for the Atlantic bluefin is the Gulf of Mexico. Although U.S. fishermen are barred from seeking to harvest Atlantic bluefin in the Gulf, they can keep a set amount of bluefin that they catch accidentally while going after another tuna species, yellowfin. That "bycatch" is significant.

The scholars knew the solution: they had to find a way to protect bluefin in the Gulf during their breeding season. Block and a graduate student, Steve Teo, pinpointed the breeding region and determined that breeding lasted for a two month period. Armsworth calculated the economic effect of limiting the catch of yellowfin, and thus the bluefin bycatch, during the critical eight weeks. Others examined potential legal and diplomatic repercussions. Block says that the resulting proposal, called a "time area closure," is winning support from U.S. bluefin fishermen and conservationists, though implementing such a plan is going to be complicated. And it doesn't help matters that across the Atlantic, the European fishing fleet widely disregards the area's bluefin quotas, while American fishermen generally comply with the one that governs their waters.

Yet the challenge in preserving Atlantic bluefin highlights an even broader problem that concerns Thompson and Eagle: the way that fishing quotas are set. Quotas for Atlantic bluefin are unusual in that a multinational organization (the International Commission for the Conservation of Atlantic Tunas) sets them for all but a few areas, like the Gulf. In the case of most fish caught in U.S. waters, the U.S. government sets the quotas. Still, regardless of who sets them, the quotas frequently permit too big a catch. Thompson and Eagle realized that they needed to understand why quotas are turning out to be too generous if they were going to recommend steps to save the fisheries.

Most people would be hard pressed to name the federal agency charged with keeping the nation's fisheries healthy. Buried deep within the Department of Commerce, the eight Regional Fishery Management Councils that set annual quotas for most of the country's various commercial and recreational fishing stocks are virtually unknown outside of the fishing industry, despite managing a geographic region

roughly the size of the continental U.S. Their very obscurity underscores a big problem with their effectiveness—these institutions see themselves as representing the fishing industry more than the general public. “I could make a good argument that if we’d had no management we’d be better off than we are right now,” Eagle insists. The fishing industry, he contends, has won regulations aimed at growing the industry, starting a cycle that runs counter to conservation. As Eagle sees it, more fishing boats lead to more fishermen losing money, which, in turn, leads to more opposition to short-term sacrifice. He adds, “If conservation is the goal, you wouldn’t put fishermen in charge of regulation.”

But the 1976 Magnuson-Stevens Fishery Conservation and Management Act did just that. Each of the Regional Councils has anywhere from seven to twenty-one voting members, most of whom are chosen by the Secretary of Commerce from candidates nominated by the governors of each council’s constituent states. In an upcoming study of the Regional Councils’ decision-making process, Thompson and Eagle find that more than 90 percent of the Regional Council’s appointed members describe themselves as representing a particular sector of the commercial or recreational fishing industry. “These are organizations which are dominated by the very industry they’re supposed to be regulating, and potential conflicts of interest are quite rampant,” Thompson says. “At the same time, they are exempt from the major conflict-of-interest rules that apply to nearly every federal agency.” Not only can that lead to decisions that aren’t necessarily in the public interest, it also undermines the credibility of the process.

The make-up of the Regional Councils is predicated on the assumption that fishermen are ideal stewards for the nation’s fisheries, since they have a vested interest in making sure that there are still fish left to catch. But Thompson has found that the incentives work differently in the real world. For one thing, fishing is no longer a career handed down from father to son. “I don’t think that many fishermen see themselves as benefiting from efforts to preserve the fisheries for the long run,” Thompson says. “They don’t want to see the fisheries collapse tomorrow, but most of these guys don’t see themselves as being around in 25 years.”

Like most of us, fishermen also engage in a lot of wishful thinking. Faced with the choice between a certain loss today and a potentially greater loss a few years hence, fishermen tend to take the gamble that the loss down the line isn’t going to be as bad as scientists predict. Thompson points to studies that show that people in risky professions—and fishing is one of the riskiest professions around—tend to make riskier decisions. But he notes that all of us have a tendency to think that uncertain outcomes are more likely to come out in our favor. That’s why the people who own casinos are

richer than the ones who play in them. But when you’re asking fishermen to interpret scientific probabilities, that bit of human nature has potentially disastrous implications.

“People engage in wishful thinking if there’s scientific uncertainty,” Thompson explains. “And scientists play into this, because they’re very conservative about stating what they know. You don’t want scientists to overstate what they’re certain of, but they need to understand that other people will use those uncertainties to reject what they don’t want to hear.”

A big reason members of the Regional Councils tend to choose higher quotas, Thompson and Eagle believe, is that the councils are responsible both for the conservation decision (how many fish can be caught?) and the allocation decision (who gets to catch them?). Since most of the council members come from either the commercial or the recreational fishing industries, these are not abstract decisions. The best way to make certain that each of the competing fishing interests gets a big enough slice of the pie is to increase the size of the pie by setting a higher quota. “The members of the councils are always thinking down the road: ‘How are we going to meet the demands of our constituents?’” Thompson says. “That’s a very difficult issue for anyone to ignore in setting a quota, but it becomes far more difficult if the people who are making the decision are from the industry itself.”

The Fisheries Policy Project’s study of the king mackerel fishery in the Gulf of Mexico provides a good example of the way these factors combine to perpetuate overfishing. In 1985, commercial and sport fishing in the Gulf had left the king mackerel fishery so depleted as to be on the verge of collapse. Still, scientists thought the fishery could recover within a few years if the Regional Council limited the number of fish caught. Thompson and Eagle looked at the quotas set for the fishery over the ensuing 15 year period and compared them with the scientific recommendations. They found that the council consistently chose quotas that were at the high end of the range scientists said was acceptable—quotas that were not likely to help the fishery recover.

In the 1992–93 season for example, the council chose to allow 9.8 million pounds of mackerel to be caught, even though the scientists had told them that this quota had a mere 20 percent chance of meeting the fishery’s rebuilding goals. A lower quota would have required the council to limit the recreational bag limit to one fish per fisherman. So to avoid angering sport fishermen and charter boat owners, the council set the bag limit at two, which in turn meant that the council had to raise the commercial quota to maintain the traditional ratio between the two sectors. Faced with scientific uncertainty and a series of difficult allocation deci-

sions, a council composed largely of fishing interests found it preferable to risk the health of the fishery rather than risk the health of the lucrative sport fishing industry.

"We're substituting the risk preferences of fishermen for those of the nation as a whole," says Eagle. "We know fishermen are going to err on the side of protecting the interests of themselves and their friends."

Thompson's and Eagle's study, initiated and supported by The Pew Charitable Trusts, is scheduled to be released this fall. They will recommend a major restructuring of the way fisheries are managed in the U.S. Yet mustering the political momentum for this change won't be easy, particularly because the problem of overfishing hasn't made it onto the public radar screen the way the plight of whales and dolphins has. After all, it's hard to think of an animal as an endangered species when it's being served with mango salsa at your local eatery.

"We need a sea change in the way the public thinks

about the oceans and the degree to which they care about fisheries," Thompson says. "Because the demand for change is not going to come from the fishing industry, it's got to come from the public." He points to the campaign for dolphin-safe tuna as an example of the obstacles ahead. The new dolphin-safe approach to tuna fishing has limited the number of dolphins that are killed, but at the same time increased the amount of other bycatch—fish that are being caught and killed even though they're not the fish that will be taken to market. So far there hasn't been a public demand for bycatch-free tuna. Fish simply do not capture the public's attention like dolphins and other marine mammals do.

An even greater problem is that most people don't realize a problem exists. "We could see with our eyes what happened to the buffalo, but we can't see when a fishery goes into decline," Thompson observes. "And the oceans look so big—it's hard to imagine that anything we do can have that much consequence for them."

ENVIRONMENTAL LAW AT STANFORD

ONE REASON that Vice Dean Barton H. "Buzz" Thompson, Jr., JD/MBA '76 (BA '72) jumped at the chance to pursue fisheries research is that it requires the type of interdisciplinary approach at which Stanford Law School excels. To master fisheries policy, students and faculty must not only understand environmental, administrative, and international law but also grasp recent scientific research about tuna breeding habits,

bridge diverse interests and approach problems creatively and effectively," says Thompson, the program's head. "That requires an understanding of law, science, technology, economics, politics, and psychology." Law students examine all these fields in their environmental courses, which cover topics ranging from pollution to toxic torts to water resources to biodiversity. Law School faculty also are involved in interdisciplinary research with faculty throughout Stanford on such diverse issues as international watershed preservation, climate change, and managing biodiversity on working landscapes.

Integrated with the program's interdisciplinary approach is a focus on teaching more effective problem solving. Coursework features case studies, clinical education, training in both negotiation and mediation skills, and rigorous analysis. Says Program Director Meg Caldwell '85, "Our goal is to make sure that students leave the Law School already running."

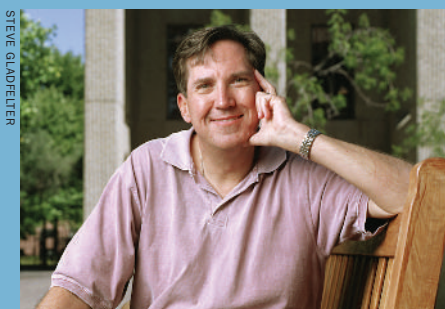
A key difference between Stanford's environmental law classes and those at other law schools is that Stanford relies on situational case studies and simulations, written by Law School staff for Law School students. Students assume

the role of protagonist—such as a private attorney counseling a biotechnology company facing hazardous waste issues, or a federal official seeking to develop an effective fishery management plan. Students then formulate a strategy and defend it to classmates.

The Law School also offers an environmental clinic under the auspices of lawyers from Earthjustice, a nonprofit law firm. From an Earthjustice office at the School, Clinic Director Deborah Sivas '87 works with students on administrative cases and litigation involving such subjects as marine and coastal resource protection, public land management, and water quality.

To supplement its teaching, the program brings leading environmental lawyers and scholars to campus. The Robert Minge Brown Lecture, for instance, has been delivered by Bruce Babbitt, former U.S. Secretary of the Interior, and Dr. Sylvia Earle, former Chief Scientist for the National Oceanic and Atmospheric Administration, among others. The program's Environmental Workshop seminar, which draws leading academics, policy makers, and scientists to Stanford to discuss their work, is the oldest of its kind in the country.

—Nina Nowak



Vice Dean Barton H. "Buzz" Thompson, Jr., JD/MBA '76 (BA '72) heads the environmental program.

the politics underlying disputes between American and European fishermen, and the economics of the fishing industry.

Interdisciplinary analysis is a trademark of the Law School's Environmental and Natural Resources Law & Policy Program. "Environmental lawyers must

The Annual Faculty Report

Law School Professors published extensively this past year on such subjects as tax treatment of venture capital deals, racial profiling, open source software code, and money laundering. Here's a sampling of their work.



Janet Cooper Alexander
(MA '73)

Frederick I. Richman Professor of Law

ARTICLES: "Procedural Design and Terror Victim Compensation," *De Paul Law Review* (forthcoming 2003)



Michelle Alexander '92
Associate Professor of Law (Teaching)

ARTICLES/REPORTS: "The California DWB Report: A Report from the Highways, Trenches and Halls of Power in California," American Civil Liberties Union Foundation (April 2002) • "Overreacting to Racial Profiling: A Response to Presser," *Litigation*, American Bar Association (forthcoming fall 2003)



Barbara Allen Babcock
Judge John Crown Professor of Law

ARTICLES: "Pioneer Attorney's Feminism Ennobled Her Legal Efforts," *L.A. Daily Journal*, pp. 6-7 (February 8, 2002) • "Preserving the Jury's Privacy," *New York Times*, p. A21 (July 24, 2002) • "Tribute to Norman Lefstein: Lefstein to the Defense," *36 Indiana Law Review* 13-15 (2003)



Joseph Bankman
Ralph M. Parsons Professor of Law and Business

BOOKS: *Federal Income Tax: Examples and Explanations*, 3rd edition, with K. Pratt and T. Griffith, Aspen Publishers, 2002 • *Federal Income Taxation*, 13th edition, with W. Klein & D. Shavero, Aspen Publishers (2003)

ARTICLES/BOOK CHAPTERS: "Modeling the Tax Shelter World," *55 Tax Law Review* 455-464 (2002) • "The Engler-Knoll Consumption Tax Proposal: What Transition Rule Does Fairness (or Politics) Require?" *56 SMU Law Review* 83-97

(2003) • "An Academic's View of the Tax Shelter Battle," Brookings Institution (forthcoming 2003) • "The Story of INDOPCO: What Went Wrong in the Capitalization v. Deduction Debate?" in *Tax Stories*, P. Caron, editor, Foundation Press (2003)



R. Richard Banks (BA '87, MA '87)
Associate Professor of Law

ARTICLES/BOOK CHAPTERS: "Intimacy and Equality: The Limits of Antidiscrimination," *38 Harvard Civil Rights-Civil Liberties Law Review* 455 (2003) • "Beyond Profiling: Race, Policing, and the Drug War," *56 Stanford Law Review* (forthcoming October 2003) • "The Story of *Brown v. City of Oneonta*: The Uncertain Meaning of Racial Discrimination under the Equal Protection Clause," in *Constitutional Law Stories*, Michael Dorf, editor, Foundation Press (forthcoming)



John H. Barton '68
George E. Osborne Professor of Law, Emeritus

ARTICLES: "United States Law of Genomic and Post-Genomic Patents," *33 IIC: International Review of Industrial Property and Copyright Law* 779-789 (2002) • "Patents, Genomics, Research and Diagnostics," *77 Academic Medicine* 2039-47 (December 2002)

OF NOTE: *Integrating Intellectual Property Rights and Development Policy*, et al., London: The Commission on Intellectual Property Rights (September 2002)



Bernard S. Black '82
George E. Osborne Professor of Law

BOOKS: *The Law and Finance of Corporate Acquisitions*, 3rd edition, with Ronald Gilson and Robert Daines (forthcoming 2003)

ARTICLES: "Delaware's Takeover Law: The

Uncertain Search for Hidden Value," with Reiner H. Kraakman, *96 Northwestern University Law Review* 521-566 (winter 2002) • "The Non-Correlation Between Board Independence and Long-Term Firm Performance," with Sanjai Bhagat, *27 Journal of Corporation Law* 231-273 (2002) • "The Legal and Institutional Preconditions for Strong Securities Markets," *34 Securities Law Review* 73-147 (2002) • "Institutional Reform in Transition: A Case Study of Russia," with Anna Tarassova, *10 Supreme Court Economic Review* 211-278 (2003) • "The Role of Self-Regulation in Supporting Korea's Securities Markets," *3 Journal of Korean Law* (forthcoming 2003)



Paul Brest
Professor of Law, Emeritus

ARTICLES: "Comments on *Grutter v. Bollinger*," *51 Drake Law Review* 683-693 (2003) • "Preface: How This Symposium Came About," *97 Northwestern University Law Review* 1079-1080 (spring 2003)



Gerhard Casper
Professor of Law, President Emeritus, Peter and Helen Bing Professor in Undergraduate Education, Senior Fellow, Institute for

International Studies, and Professor of Political Science (by courtesy), Stanford University

ARTICLES: "Tribute to Professor Gerald Gunther: Gerry," *55 Stanford Law Review* 647-650 (December 2002)

LECTURES: "Thinking in a Free and Open Space," Commencement Convocation, Graduate School of Arts and Sciences, Yale University (May 25, 2003) • "Rule of Law? Whose Law?" Keynote Address at the 2003 CEELI Award Ceremony and Luncheon, San Francisco (August 9, 2003)

OF NOTE: Appointed Member, U.S. Technology and Privacy Advisory Committee (TAPAC)

A Libertarian Approach to Corporate Restructuring

Professor G. Marcus Cole believes bankruptcy proceedings squander resources.

With scores of Silicon Valley firms undergoing restructuring or closing their doors altogether, Professor G. Marcus Cole feels like a kid in a candy shop. “I can’t go anywhere without encountering people who are interested in my research,” said Cole in early September. “Last week I took my son to his classmate’s birthday party, and three venture capitalists came up to me and asked me about my work.”

That Cole’s work is in demand these days should come as no surprise. A self-proclaimed libertarian, he is examining the dissolution and restructuring of failed technology firms and positing ways to bypass expensive bankruptcy court proceedings, salvaging companies instead through private means. “Enormous societal resources are squandered on the bankruptcy process,” says Cole. “Private parties often know much more about the companies with which they are involved than courts could ever learn.”

Cole, who was a National Fellow at the Hoover Institution on War, Revolution, and Peace from August 2002 through August 2003, was awarded tenure at the Law School last spring. He also holds the titles of Helen L. Crocker Faculty Scholar and Academic Associate Dean for Curriculum. He earned his BS in applied economics at Cornell in 1989 and his JD from Northwestern in 1993, where he was a visiting professor during the 2001–2002 school year. For his latest stint in Chicago, he won the Outstanding First-Year Course Professor Award and was invited to become a permanent member of the Northwestern Law School faculty. But Cole, his wife, and two children decided to stay in California.

As a law student, Cole never imagined that he would pursue a life in academia, let alone become a Stanford professor. Randy Barnett, Cole’s mentor and his 1L contracts professor at Northwestern, recalls how this “tenacious” student, who spent hours with Barnett after class arguing incisively about legal concepts, would balk whenever Barnett encouraged him to become a law professor. Says Cole: “My first

reaction was, I went to law school to become a business lawyer. But Barnett persuaded me that I could do more for businesses as an academic.”

Cole encountered bankruptcy for the first time as a clerk for the Hon. Morris Sheppard Arnold on the U.S. Court of Appeals for the Eighth Circuit in Arkansas. “I was fascinated by the way bankruptcy turned the law as we know it on its head,” he says, noting how in such situations the court acknowledges that not all of the parties’ legal rights can be enforced. In three years as an associate at the Chicago law firm Mayer, Brown & Platt, he continued to be intrigued by this and other academic issues. And so, in 1997, he joined the Stanford faculty. Besides corporate bankruptcy reform, Cole’s interests range from intellectual property and the venture capital investment bust to the possible bankruptcy filing by a Roman Catholic archdiocese.

On campus Cole may be best known for his natty suits and bow ties. Why such sharp duds in the land of California casual? “It reflects the importance of formality in everything we do as lawyers,” says Cole, who grew up in a Pittsburgh, Penn., neighborhood where, as he puts it, “Not every dad went to work in a suit every day.” Cole notes that his own father worked in a steel mill while attending night school to become an engineer. “When he started wearing a suit, our lives changed,” Cole says. “I want students to know it is a tremendous privilege to be a professional, and to dress like one.” As for the bow ties, he admits, “It’s the only thing I know how to tie. I’m scared to death of the four-in-hand knot.”



G. Marcus Cole was awarded tenure last spring.

—Nina Nowak

From Civil Procedure to the French Revolution

New faculty member is a historian and a former Justice Department lawyer.

To Amalia Kessler (MA '96, PhD '01), the legal profession—so fundamentally conservative, so precedent-based—carries the danger of being too closed-minded. The answer, she argues, is to look backward.

“When you study history, you realize that the rules we have now, we don’t have them for the reasons we thought we did,” she notes. “And you understand that there are other paths we could have taken.”

With a PhD in history, a JD from Yale, and two years’ practice with the U.S.

Department of Justice, Kessler will be teaching civil procedure and legal history courses in her first year at the Law School as an assistant professor. She hopes to encourage her students “not to be cogs in the machine of legal institutions. I want them to have a sense of the mutability of everything, to understand the opportunities that are there for them to make a difference.”

Besides teaching, Kessler plans to write about the role of special masters in U.S. courts and about changes in legal reasoning after the French Revolution.

She also hopes to turn her dissertation, which studies an 18th-century merchant court in Paris, into a book. During the 1700s, new commercial practices, such as the negotiable bill of exchange, came into use, and this marked a difficult transition in French society, Kessler says. The arbiters of the court wrote page after page about how uncomfortable they were that merchants were doing business with people they didn’t know personally—people who were often from a different country.

“What impressed me most was how profoundly difficult the shift is from a homogeneous society to an international market culture,” she says. “We ought to remember that pain when we make contact with parts of the world that haven’t made that shift.”

—Mandy Erickson



STEVE GLADFELTER

Amalia Kessler has written extensively about an 18th-century Parisian merchant court.



William Cohen

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

BOOKS: 2003 Supplement to Kaplan, Danelski, and Cohen, *Constitutional Law: Civil Liberty and Individual Rights*, Foundation Press • 2003 Supplement to Barrett, Varat, and Cohen, *Constitutional Law Cases and Materials*, Foundation Press • 2003 Supplement to *The First Amendment: Constitutional Protection of Expression and Conscience*, Foundation Press

ARTICLES: “Tribute to Professor Gerald Gunther: Gerald Gunther,” 55 *Stanford Law Review* 651-652 (December 2002)

G. Marcus Cole [SEE PROFILE, P. 25]

Professor of Law, Helen L. Crocker Faculty Scholar, and Academic Associate Dean for Curriculum

ARTICLES: “Delaware Is Not a State: Are We Witnessing Jurisdictional Competition in Bankruptcy?” 55 *Vanderbilt Law Review* 1845 (2002) • “Limiting Liability Through Bankruptcy,” 70 *University Cincinnati Law Review* 1245 (2002) • “A Modest Proposal for Bankruptcy Reform,” 5 *The Green Bag* 269, 2nd edition (2002) • “Discourse in the Garden of Good and Evil,” 37 *Journal of Blacks in Higher Education* (fall 2002)

LECTURES AND PRESENTATIONS: “Private Dissolution and Restructuring of Failed Technology Firms in Silicon Valley,” Hoover Institution Economics Seminar, Stanford University (May 12, 2003) • “The Quiet Man: Reflections on the Next

Wave Bankruptcy Case and the Next Wave of Regulatory Innovation,” Florida State University Law School (April 8, 2003)



Richard Craswell

William F. Baxter-Visa International Professor of Law

ARTICLES: “In That Case, What Is the Question? Economics and the Demands of Contract Theory,” 112 *Yale Law Journal* 903 (January 2003)



Mariano-Florentino Cuéllar (MA '96, PhD '00)

Assistant Professor of Law

ARTICLES: “The Tenuous Relationship between the Fight against Money Laundering and the

Disruption of Criminal Finance," 93 *Journal of Criminal Law & Criminology* 311 (2003) • "The International Criminal Court and the Political Economy of Antitreaty Discourse," 55 *Stanford Law Review* 1597 (2003) • "Choosing Anti-Terror Targets by National Origin and Race," 6 *Harvard Latino Law Review* (2003) • "Notice, Comment, and the Regulatory State: A Case Study from the USA Patriot Act," *Administrative Law & Regulatory News* (2003)

PRESENTATIONS "The Treatment of Immigrants since September 11," Holmes Debates, Library of Congress (2003)

OF NOTE: Advisor, Report on TopOff II Simulated Terrorist Attack, Center for International Security and Cooperation, Stanford (2003) • Vice Chair, Rulemaking Committee, American Bar Association Section on Administrative Law (2003)



Michele Landis Dauber
Assistant Professor of Law

ARTICLES: "The 9th Circuit Follows," *Legal Times* (August 19, 2002) • "The 9th Circuit Follows: Court's Reversals Stem from Being Too Law-Abiding, Not Too Liberal!" *law.com* (August 23, 2002)



John J. Donohue III
William H. Neukom Professor of Law

ARTICLES: "Book Review: Can Gun Control Work?"

[by James Jacobs, Oxford University Press, 2002], in *The American Prospect* (December 16, 2002) • "Statistics Show Concealed Carry Won't Reduce Crime," *Columbus Dispatch* (Ohio), Op-Ed, p. 9A (June 7, 2003)

BOOK CHAPTERS: "Divining the Impact of Concealed-Carry Laws," in *Evaluating Gun Policy: Effects on Crime and Violence*, Jens Ludwig and Philip J. Cook, editors, Wash., D.C.: Brookings Institution Press, pp. 287-341 (2003)



George Fisher
Professor of Law, Robert E. Paradise Faculty Scholar, and Academic Associate Dean for Research

BOOKS: *Evidence*, Foundation Press (2002) • *Plea Bargaining's Triumph: A History of*

Plea Bargaining in America, Stanford University Press (2003)

ARTICLES: "Power Over Principle," *The New York Times*, Op-Ed, (September 7, 2002)



Richard Thompson Ford
(BA '88)
Professor of Law and Justin M. Roach, Jr. Faculty Scholar

ARTICLES: "Beyond Difference," in *Left Legalism/Left Critique*, Janet Halley and Wendy Brown, editors, Duke University Press (2002) • "Un-natural Groups: A Reaction to Owen Fiss's Groups and the Equal Protection Clause," 2003 *Issues in Legal Scholarship* (online journal), Article 12, Robert Post, editor (2003) • "Bourgeois Communities," *Stanford Law Review* (forthcoming)



Barbara H. Fried
William W. and Gertrude H. Saunders Professor of Law

BOOK CHAPTER: "Why Proportionate Taxation?" in *Tax Justice: The Ongoing Debate*, Dennis J. Ventry Jr., editor, Urban Institute Press (2002)

ARTICLES: "Proportionate Taxation as a Fair Division of the Social Surplus: The Strange Career of an Idea," *Economics and Philosophy* (forthcoming 2003) • "If You Don't Like It, Leave It: The Problem of Exit in Social Contractarian Arguments," 31 *Philosophy & Public Affairs* 40-70 (winter 2003) • "Ex Ante/Ex Post," 13 *Journal of Contemporary Legal Issues* (forthcoming 2003)



Lawrence M. Friedman
Marion Rice Kirkwood Professor of Law

BOOKS: *American Law in the 20th Century*, Yale University Press (2002)

BOOK CHAPTERS: "Changing Times: Technology and Law in the Modern Era," in *Recht Im Wandel Seines Sozialen Und Technologischen Umfeldes*, Jurgen Becker, editor, Verlag C.H. Beck (2002) • "Legality and Its Discontents," in *Legality and Community: On the Intellectual Legacy of Philip Selznick*, Robert A. Kagan, et al., editor, Berkeley Public Policy Press (2002)

ARTICLES: "California Death Trip," with

Paul W. Davies, 36 *Indiana Law Review* 17-32 (2003)



Ronald J. Gilson
Charles J. Meyers Professor of Law and Business

ARTICLES: "Lipton and Rowe's Apologia for Delaware: A Short Reply," 27 *Delaware Journal of Corporate Law* 37-52 (2002) • "Understanding Venture Capital Structure: A Tax Explanation for Convertible Preferred Stock," with David M. Schizer, 116 *Harvard Law Review* 874-916 (January 2003) • "Engineering a Venture Capital Market: Lessons from the American Experience," 55 *Stanford Law Review* 1067-1103 (April 2003)



Paul Goldstein
Stella W. and Ira S. Lillick Professor of Law

BOOK: *Copyright's Highway: From Gutenberg to the Celestial Jukebox*, Revised Edition, Stanford University Press (2003)

BOOK CHAPTER: "Perspectives on Research and Educational Uses in Copyright and Author's Right," in *The Future of Intellectual Property in the Global Market of the Information Society*, Centrum voor Intellectuele Rechten (2003)



William B. Gould IV
Charles A. Beardley Professor of Law, Emeritus

BOOKS: *Diary of a Contraband: The Civil War Passage of a Black Sailor*, Stanford University Press (2003)

BOOK CHAPTERS: "Labor Law," in *Introduction to the Law of the United States*, 2nd edition, David S. Clark and Tugrul Ansay, editors, Kluwer Law International (2002)



Henry T. Greely (BA '74)
C. Wendell and Edith M. Carls Smith Professor of Law

BOOKS: "Genome Research and Minorities," in *Pharmacogenomics: Social, Ethical, and Clinical Dimensions*, Mark A. Rothstein, editor, John Wiley & Sons (2003)

LECTURES: "Ethical Issues in the Use of Human Brain Stem Cells in Mouse

Models, Biomedical Ethics Grand Rounds," Stanford University (October 3, 2002) • "What Matters to Me and Why?" Office for Religious Life, Stanford University (February 12, 2003) • "Medical Malpractice: A Debate (with Richard Epstein)," Federalist Society, Stanford University (February 27, 2003) • "Hi, I'm Mickey: Ethical and Social Issues Raised by the Human Neuron Mouse," Workshop on Interspecific Chimeras, Dalhousie University (April 11, 2003) • "Philosophy Talk: Morality, Immortality, and Bio-science in the 21st Century," Stanford Alumni Day, Stanford University (May 17, 2003) • "Genetics and the Law," Federal Judicial Center, Stanford University (May 24, 2003) • "Legal and Social Issues in the Biosciences," Japan Stanford Association Annual Meeting (July 9, 2003) • "Stem Cells: Policy and Politics," Canadian Stem

Cell Network (September 20, 2003) • "Disability, Enhancement, and the Meaning of Sports," Stanford Sports Law Conference (September 18, 2003) • "Prediction, Litigation, Privacy, and Property: Some Possible Legal and Social Implications of Advances in Neuroscience," AAAS Workshop on Neuroscience and the Law (September 12, 2003)



Thomas C. Grey (BA '63)
Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law

ARTICLES: "Judicial Review and Legal Pragmatism," 38 *Wake Forest Law Review* 473-511 (2003)

LECTURES: "Holmes and Strict Liability in Tort," Annual Meeting of the American Society for Legal History (November 9, 2002)



Joseph A. Grundfest '78
W. A. Franke Professor of Law and Business

ARTICLES: "Give the SEC Its Due: More Money," *Wall Street Journal*, Op-Ed, p. A22 (October 29, 2002) • "Punctuated Equilibria in the Evolution of United States Securities Regulation," 8 *Stanford Journal of Law, Business & Finance* 1-8 (fall 2002)



Thomas C. Heller
Lewis Talbot and Nadine Hearn Shelton Professor of International Legal Studies

BOOK: *Beyond Common Knowledge*, with Erik Jensen, Stanford University Press (2003)

ARTICLES/ESSAYS: "Lawyers and Political Scientists: How Much Common

On the Cutting Edge of International Law

A new assistant professor worked as a tribunal clerk at The Hague.

Four years ago Judge Patricia Wald was looking for a clerk to take with her to the U.N. International Criminal Tribunal for the Former Yugoslavia. Jenny Martinez had just completed a stint as clerk to Supreme Court Justice Stephen Breyer, had an interest in international law, and was looking for a job.

The two hooked up, and Martinez spent a year in The Hague, working, as she puts it, "on the cutting edge of humanitarian justice."

Wald oversaw the trial of Radislav Krstic, a Bosnian Serb general who was charged for a three-day massacre of 7,000 Muslim men and boys in Srebrenica. "It was one of the worst massacres of the Bosnian war," Martinez says. "It was the first major genocide trial from Bosnia."

Martinez spent much of her time sitting in the courtroom listening to testimony. "It was really depressing," she says. "All day you listen to people talk about watching their families being raped and tortured. You have to disconnect from it."

Krstic was convicted of genocide, and was sentenced to 46 years in prison, a life sentence for a man in his 60s.

After her year at the tribunal, Martinez worked at Jenner & Block in Washington, D.C., where she continued to pursue international human rights issues. In one case, she worked on behalf of women who were forced into sexual slavery by the Japanese army during World War II. (A federal appellate court decided in June that U.S. courts did not have jurisdiction to hear the case.)

Last spring Martinez, who received her JD from Harvard, accepted an offer to become an assistant professor at the Law School so she could pursue research on international criminal law, the relationships among the international courts and tribunals, and the interactions between international and national courts. She will also teach civil procedure and international law.

—Mandy Erickson



Jenny Martinez plans to study the relationships among international courts and tribunals.

STEVE GLADFELTER

Art, Italy, and the Law

Professor John Merryman helped the Law School develop a global outlook.

Half a century ago, when John Merryman was a fresh face on the Stanford faculty, scholars of comparative law focused almost exclusively on Germany and France. Merryman saw things differently.

"I took the view that Italy was the source of all of it, because Roman law was the basis of civil law," he says. "I thought it made more sense to begin with the Italian legal system. I sold that to the dean, Carl Spaeth, and my colleagues, and they backed me up."

This year marks the golden anniversary of Merryman's joining the Law School faculty. During those 50 years, Merryman, now Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law, Emeritus, has seen the School evolve from a regional institution to an international one that, in his words, draws "ferociously smart" students.

Merryman's work in comparative law was part of the school's evolution, as were his studies in another field—art and the law. When he was on a Fulbright in Germany in the late '60s, Merryman's wife, Nancy, became involved in art exhibits. American art was all the rage in Europe, and Nancy Merryman started dealing the art of Andy Warhol and Christo—whose sketches grace his office—and other big names.

"Her enthusiasm and evident talent for this stuff was infectious," Merryman said. He and his friend, the late Stanford professor and art historian Albert Elsen, designed a course on art and the law. The two together wrote the leading casebook in the field, *Law, Ethics, and the Visual Arts*, now in its fourth edition.

Regarding his contributions to Stanford, Merryman muses: "The approach to comparative law and the course in art and the law were original and innovative, though neither central to Law School efforts. But they add to what the School has to offer."

—Mandy Erickson



John Merryman joined the faculty in 1953.

Ground?" Max Planck Institute on The Law of Common Goods, Bonn, Germany (2003) • "Carbon Intensity of Electricity Generation and CDM Baselines: Case Studies of Three Chinese Provinces," with Chi Zhang and Michael May, *Energy Policy* (forthcoming) • "Beyond Kyoto: Development and Climate," with P. R. Shukla, Pew Center on Climate Change (forthcoming)



Deborah R. Hensler
Judge John W. Ford Professor of Dispute Resolution

BOOK: *Asbestos Litigation Costs and Compensation: An Interim Report*, Rand Institute for Civil Justice (2002)

ARTICLES: "Suppose It's Not True: Challenging Mediation Ideology," 2002 *Journal of Dispute Resolution* 81-99 (2002)



Pamela S. Karlan
Kenneth and Harle Montgomery Professor of Public Interest Law

BOOKS: *The First Amendment*, 2nd edition, with Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet, Aspen Publishers (2003)

ARTICLES: "Ballots and Bullets: The Exceptional History of the Right to Vote," *University of Cincinnati Law Review*, (2003) (William Howard Taft Lecture) • "Elections and Change Under 'Voting With Dollars,'" 91 *California Law Review* 705 (2003) • "Groups, Politics, and the Equal Protection Clause," with Samuel Issacharoff, *Miami Law Review* (2003) • "When Freedom Isn't Free: The Costs of Judicial Independence in *Bush v. Gore*," 64 *Ohio State Law Journal* 265 (2003)

BRIEFS: *Branch v. Smith*, 538 U.S. (2003)

(brief for appellants) • *Grutter v. Bollinger*, 539 U.S. (2003) (brief for amicus curiae American Association of Law Schools) • *Lawrence v. Texas*, 539 U.S. (2003) (brief for amici curiae constitutional law professors)



Mark G. Kelman
William Nelson Cromwell Professor of Law

BOOK CHAPTERS/ARTICLES: "Law and Behavioral Science: Conceptual Overviews," 97 *Northwestern University Law Review* 1347-1392 (spring 2003) • "Introduction to the Disability Rights Symposium," 14.2 *Stanford Law & Policy Review* 235-237 (2003)



Michael Klausner
[SEE STORY, P. 12]
Nancy and Charles Munger Professor of Business and Professor of Law

ARTICLES: "When Time Isn't Money: Foundation Payouts and the Time Value of Money," *Stanford Social Innovation Review*, vol. 1, No. 1 (2003) • "Institutional Shareholders, Private Equity, and Anti-takeover Protection at the IPO Stage," *University of Pennsylvania Law Review* (forthcoming 2003)



William Koski (PhD '03)
Associate Professor of Law (Teaching)

ARTICLES/REPORTS: "Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the History of Educational Finance Reform Litigation," *Santa Clara Law Review* (forthcoming in Volume 43) • "Fuzzy Standards, Institutional Constraints, and Judicial Attitudes: The

Politics of State Supreme Court Decision-Making in Educational Finance Reform Litigation," unpublished PhD Dissertation, Stanford University School of Education (2003) • "Forward: The Political Construction of Youth Crime and its Policy Consequences," *14 Stanford Law & Policy Review* 1-8 (2003) • "What Educational Resources Do Students Need to Meet California's Educational Content Standards? A Textual Analysis of California's Educational Content Standards and Their Implications for Basic Educational Conditions and Resources," expert witness report, *Williams v. California*, No. 312236, California Supreme Court (2002)

IN COURT: *Emma C. v. Delaine Eastin*, Case No. C-96-4179 (TEH), co-counsel on behalf of plaintiff (2003)



Lawrence Lessig
Professor of Law and John A. Wilson Distinguished Faculty Scholar

BOOKS: *Internet Law*, with Jonathan L. Zittrain, Charles R. Nesson, William W. Fisher III, and Yochai Benkler, Foundation Press (2002) • *Free Culture: How Big Media Uses Technology and the Law to Control Creativity*, Penguin Press (forthcoming 2004)

BOOK CHAPTERS: Introduction to *Free Software, Free Society: Selected Essays of Richard M. Stallman*, GNU Press (2002) • "The Place of Cyberlaw," in *The Place of Law*, Austin Sarat and Martha Merrill Umphrey, editors (November 2002) • "Open Source Baselines: Compared to What?" in *Government Policy Towards Open Source Software*, Robert W. Hahn, editor (2002)

A State Department Veteran Turned Scholar

The Law School welcomes a diplomat to teach international law.

One lesson Allen Weiner '89 hopes to instill in his students is that practicing law isn't just about the law. "Dealing with nuances is more the real challenge," he says. "You have to think about politics and personalities."

Weiner's experience with politics extends much further than the usual office conflicts. As an attorney with the State Department and legal counselor to the U.S.

Embassy in The Hague for more than ten years, he's handled disputes with Chile over agricultural imports, claims arising from the Iran hostage crisis, and an African nuclear weapons treaty.

But the most rewarding work, he says, was ensuring U.S. government support for the U.N. International Criminal Tribunal for the Former Yugoslavia. Some U.S. officials were hesitant to push for war crimes prosecutions, especially after reform governments came to power in the Balkans. Weiner took a different view. "We had created a legal institution," he explains, "and we had to treat it as a legal institution. It had to be independent."

Weiner and his colleagues prevailed: "In the end, Colin Powell decided that the United States wouldn't provide assistance to Serbia unless they cooperated with the tribunal," he says. "I'm very, very proud of the way we could use our legal training and energy to promote a positive program of prosecuting these crimes."

As the first-ever Warren Christopher Professor of the Practice of International Law and Diplomacy, Weiner has a three-year-long seat on the faculties of both the Law School and the Institute for International Studies. Not surprisingly, he will be teaching international law. He also hopes to research universal jurisdiction and "the use of national courts to try notorious international bad guys" such as General Augusto Pinochet's prosecution in Spain.

—Mandy Erickson



Allen Weiner '89 is the inaugural Warren Christopher Professor of the Practice of International Law and Diplomacy.

STEVE GLADFELTER

ARTICLES: "Viewpoints: Racing against Time; Freeing Creative Ideas from Copyright Protections That Last Too Long," *CIO Insight* (December 1, 2002) • "A Threat to Innovation on the Web," *Financial Times*, Op-Ed (December 12, 2002) • "The Creative Commons," *RBL*, Tokyo (2003) • "Protecting Mickey Mouse at Art's Expense," *New York Times* (January 18, 2003) • "Governance," *The COOK Report on Internet* (March 2003) • "Spectrum for All," *CIO Insight* (March 1, 2003) • "Wireless Spectrum: Defining the 'Commons' in Cyberspace," *CIO Insight* (March 13, 2003) • "Spamsters Know the Law Will Never Be Enforced," *Philadelphia Inquirer* (May 9, 2003) • "An Information Society: Free or Feudal?" *The COOK Report on Internet* (July-Sept. 2003)

LECTURES/PRESENTATIONS: "Free Culture: The Struggle to Liberate Creativity and the Internet from the Law," Shanahan Lecture, Cooper Union, New York (May 2003) • "Building the Creative Commons," Lazerow Lecture, UCLA (May 2003) • "Protecting a Creative Commons for Knowledge," McGovern Lecture, Medical Libraries Association (May 2003) • "Building the Creative Commons," Judge James R. Browning Lecture in Law School, Missoula, Montana (April 2003)



Miguel A. Méndez
Adelbert H. Sweet Professor
of Law

BOOK CHAPTERS/ARTICLES: "Expert Testimony and the Opinion Rule: Conforming the Evidence Code to the Federal Rules," *37 University of San Francisco Law Review* 411-440 (winter 2003) • "Prueba Pericial en los Estados Unidos de América," en *La Prueba en el Nuevo Proceso Penal Oral*, Rodrigo Coloma Correa, editor, Lexis Nexis (2003) • "Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules," *37 University of San Francisco Law Review* 351 (2003)

John Henry Merryman [SEE PROFILE, P. 29]
Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law, Emeritus and Affiliated Professor in the Department of Art

BOOKS: *Law, Ethics, and the Visual Arts*,

4th edition, with Albert E. Elsen, Kluwer Law International (2002)

BOOK CHAPTERS: "Counterfeit Art and Artists' Rights," in *Creative Ideas for Intellectual Property: The ATRIP papers 2000-2001*, Francois Dessemontet and Raphael Gani, editors, Centre du droit de l'entreprise (2002)



A. Mitchell Polinsky
Josephine Scott Crocker
Professor of Law and Economics

BOOKS: *An Introduction to Law and Economics*, 3rd edition, Aspen Publishers (2003)

BOOK CHAPTERS/ARTICLES: "A Note on Settlements Under the Contingent Fee Method of Compensating Lawyers," with Daniel L. Rubinfeld, *22 International Review of Law and Economics* 217-225 (August 2002) • "Strict Liability vs. Negligence in a Market Setting," in *Economics and Liability for Environmental Problems* Kathleen Sergerson, editor, Ashgate Publishing (2002) • "Fixed-Price versus Spot-Price Contracts: A Study in Risk Allocation," (reprint of a previously published journal article), in *Economic Analysis of the Law; Selected Readings*, Donald A. Wittman, editor, Blackwell Publishing (2003)

LECTURES/SPEAKING ENGAGEMENTS: "Optimal Sanctions When Wealth Can Be Audited," Annual Meeting of the American Law and Economics Association, Cambridge, MA (May 4-5, 2002) • "Remedies for Price Overcharges: The Deadweight Loss of Coupons and Discounts," Law and Economics Summer Institute, National Bureau of Economic Research, Cambridge, MA (August 1-2, 2003)

BRIEFS: *State Farm Mutual Automobile Insurance Company v. Curtis B. Campbell*, U.S. Supreme Court, No. 01-1289 (2002), (brief amicus curiae in support State Farm, with Steven Shavell and the Citizens for a Sound Economy Foundation)



Robert L. Rabin
A. Calder Mackay Professor
of Law

BOOKS: *Torts Stories*, with Stephen Sugarman, Foundation Press (2003)

ARTICLES: "The Fault of Not Knowing," *4 Theoretical Inquiries in Law* 427 (2003) • "Indeterminate Future Harm in the Context of September 11," *88 Virginia Law Review* 1831 (2002)

LECTURES/PRESENTATIONS: "The Sept. 11 Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?" 9th Annual Symposium on Tort Law and Social Policy, After Disaster: The September 11 Compensation Fund and the Future of Civil Justice, De Paul Law School (April 24-25, 2003) • "Reliance on Scientific Evidence in Tort Litigation: The U.S. Experience," Annual International Conference on Civil Law, The Relationship Between Science and Law from the Perspective of Comparative Law, Scuola Superiore, Pisa, Italy (May 22-24, 2003)



Margaret Jane Radin
(BA '63)
William Benjamin Scott and
Luna M. Scott Professor of
Law

BOOKS: *Internet Commerce: The Emerging Legal Framework*, with John Rothchild and Gregory Silverman, Foundation Press (2002 and 2003) • Supplement to *Internet Commerce*, Foundation Press (2003)

BOOK CHAPTERS/ARTICLES: "The Evolution of Property and Contract in the Digital Environment," submitted for a book being published by the Centre for Intellectual Property and Innovation Policy at the University of Toronto (forthcoming) • "Online Standardization and the Integration of Text and Machine," *70 Fordham Law Review* 1125-1146 (2002) • "Can the Rule of Law Survive *Bush v. Gore*?" in *Bush v. Gore: The Question of Legitimacy*, Bruce Ackerman, editor, Yale University Press (2002) • "Incomplete Commodification in the Computerized World," in *The Commodification of Information*, Neil Netanel and Niva Elkin-Koren, editors, Kluwer Academic Press (2002) • "Cloning and Commodification," *53 Hastings Law Journal* 1123 (2002)



Deborah L. Rhode
[SEE STORY, P. 9]
Ernest W. McFarland Professor
of Law

BOOKS: *The Difference*

"Difference" Makes: Women and Leadership, Stanford University Press (2003)

ARTICLES: "Lawyers, Ethics, and Enron," 8 *Stanford Journal of Law, Business & Finance* 9-38 (fall 2002) • "Searching for Balanced Lives," 20 *GPSOLO* 14-19 (January/February 2003) • "Women and the Profession: Defining the Challenges," 88 *Women Lawyers Journal* 15, 21 (winter 2003) • "Air Force Rape: Change the Culture," *National Law Journal*, p. A13 (April 21, 2003)



Kenneth E. Scott '56

Ralph M. Parsons Professor of Law and Business, Emeritus

LECTURES: "The German 2-Tier Board," Federal Reserve Bank of Chicago, 39th Annual Conference: Corporate Governance (May 8, 2003) • "Corporate Governance in the United States," Institute for Law and Finance, Johann Wolfgang Goethe Universitat (June 4-5, 2003)



Jeff Strnad

Charles A. Beardsley Professor of Law

ARTICLES: "Taxes and Nonrenewable Resources: The Impact on Exploration and Development," 55 *Southern Methodist University Law Review* 1683-1752 (fall

2002) • "Some Macroeconomic Interactions with Tax Base Choice," 56 *Southern Methodist University Law Review* 171-199 (winter 2003) • "Taxing Convertible Debt," 56 *Southern Methodist University Law Review* 399-452 (winter 2003) • "Laboring in the Pin Factory: More on Taxing Convertible Debt," 56 *Southern Methodist University Law Review* 471-499 (winter 2003)



Kathleen M. Sullivan

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

BOOK CHAPTERS/ARTICLES:

"Tribute to Professor Gerald Gunther: Memories of Gerald Gunther," 55 *Stanford Law Review* 643-646 (December 2002) • "The New Religion and the Constitution," 116 *Harvard Law Review* 1397-1421 (March 2003) • "Tribute to Laurence H. Tribe," 59 *Annual Survey of American Law* 15-20 (2003) • "Under a Watchful Eye: Incursions on Personal Privacy," in *The War on Our Freedoms*, Richard C. Leone and Greg Anrig, Jr., editors, Public Affairs Books (2003)



Barton H. Thompson, Jr.
JD/MBA '76 (BA '72)

[SEE STORY, P. 18]

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

BOOKS: *Environmental Law*, with James E. Salzman, Foundation Press (2002)

ARTICLES: "Answering Lord Perry's Question: Dissecting Regulatory Overfishing," with Josh Eagle, 46 *Ocean and Coastal Management* 649-680 (2003) • "Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions," 64 *Montana Law Review* 157 (2003)



Robert Weisberg '79

Edwin E. Huddleson, Jr. Professor of Law

ARTICLES: "Norms and the Criminal Law and the Norms of Criminal Law Scholarship," 93 *Journal of Criminal Law & Criminology* 467 (2003) • "Restorative Justice and the Dangers of Community," *Utah Law Review* (forthcoming fall 2003)

BRIEFS: Robert Weisberg, Peter J. Henning, and Lisa B. Kemler, Brief Amicus Curiae of the National Association of Criminal Defense Lawyers in Support of Respondent, *Price v. Vincent*, United States Supreme Court, No. 02-524 (Feb. 24, 2003)

Visiting Professors and Their Classes, 2003-04

Gary Blasi

Professor, UCLA School of Law
Community Law Clinic (fall)

Anupam Chander

Professor, UC Davis School of Law
Property and Contract Go High-Tech (spring)

Cary Coglianese

Associate Professor, Kennedy School of Government at Harvard University
Legislation (spring)
Making Regulatory Policy (spring)

Mark Lemley (BA '88)

Professor, Boalt Hall School of Law at UC Berkeley
Intellectual Property: Patents (fall)
Intellectual Property and Antitrust Law (fall)

Tobias Barrington Wolff

Acting Professor, UC Davis School of Law
Civil Procedure (fall)
Constitutional Law II (fall)
Constitutional Law I (spring)

Eric W. Wright '67 (BA '64)

Professor, Santa Clara University School of Law
Community Law Clinic (spring)

Nancy A. Wright

Associate Professor, Santa Clara University School of Law
Community Law Clinic (spring)

In Memoriam

J. Kenneth Kaseberg '30 (AB '28) of Portland, Ore., died May 18, 2003. He passed the Oregon bar exam a year before completing his law studies at Stanford and, upon graduation, entered private practice. In the 1940s he joined the Department of the Interior and devoted much of his legal career to the Bonneville Power Administration. During his tenure, he was instrumental in the development of BPA's hydroelectric power grid and in making possible the Pacific Northwest-Pacific Southwest Intertie, the largest single electrical transmission program ever undertaken in the United States. He was a primary drafter and lead negotiator for legislation ultimately enacted as the Northwest Power Act of 1980. For his contributions, the Interior Department bestowed upon him its highest honor, the Distinguished Service Award. He is survived by a daughter, Barbara Riper; three grandchildren, Kevin Riper, John Riper, and Alissa Picker; and four great-grandchildren.

William Dienststein '31 (AB '31, PhD '59) of San Francisco, Calif., died February 18, 2003, at the age of 93. A professor emeritus of California State University, Fresno, he enjoyed a lifelong career in education, specializing in sociology and criminology. During World War II he spent time in the Pacific in charge of civilian and military police activity and training, and upon his return to the States, was hired by Fresno State College (now California State University, Fresno) to develop and head a criminology program. He retired in 1974. He wrote three books in the field of criminology and numerous articles on criminal justice, criminal investigation, and the rights of subjects during interrogation. He served as secretary-treasurer, vice president, and president of the American Society of Criminology and was active on the California Governors' Special Study Commission on Juvenile Justice, which resulted in the Juvenile Court Act of 1961. He is survived by his wife.

Frank B. Ingersoll '38 (AB '35) of Seattle, Wash., died July 26, 2003, at the age of 91. A longtime resident of Hillsborough, Calif., until moving to Seattle recently, he was one of the ground-floor members of Carr, McClellan, Ingersoll, Thompson and Horn, a pioneer law firm on the Peninsula. He was an active member of the Hillsborough Town Council and worked on local congressional campaigns for the Republican Party. An avid sports fan, he was an intramural boxing champion at Stanford during his under-

graduate years, and during World War II he served as a captain in the navy. He is survived by his wife, Virginia; his children, Claire, Sandy, and Richard; and several grandchildren.

Richard B. Eaton '38 (AB '34) of Redding, Calif., died July 29, 2003, at the age of 88. A retired Shasta County Superior Court judge, he was known for his vast knowledge of, and love for, Shasta County, and would entertain children and adults alike with historic lore. A World War II veteran, he practiced law in Redding before being appointed to the Superior Court bench in 1951. For many of the 25 years he spent on the bench, he presided over the juvenile courts, and in 1977 the juvenile hall was renamed in his honor. Judge Eaton and his pioneer family—parents, grandparents, and great-grandparents—were honored in 2002 with five commemorative plaques placed in the Shasta Historical Society office. He was also remembered as the man who helped the African-American community record its history in Shasta County.

Oliver M. Jamison '41 of Fresno, Calif., died July 4, 2003, at the age of 86. He served in the army during World War II, and upon his discharge, joined a firm that eventually became Thomas, Snell, Jamison, Russell & Asperger, once the largest law firm in the central San Joaquin Valley. An authority on farm and ranch tax issues, he served on the state bar's board of governors from 1976 to 1979. He was also active in the Fresno community, as a trustee of the Fresno State Foundation and the Fresno Community Hospital and as president of the Fresno Chamber of Commerce and the Kiwanis Club. He is survived by two sons, Stephen and Daniel, and three grandchildren.

Douglas B. McDonald '47 (AB '42) of Sacramento, Calif., died July 26, 2003.

George Livesey, Jr. '48 of Bellingham, Wash., died July 12, 2003, at the age of 78 of complications related to a brain tumor. An undergraduate alumnus of the University of California, Berkeley, he was a member of the California and Washington state bars and served as the attorney for the Bellingham Port Commission for many years. He was a former national director of the Junior Chamber of Commerce and one of the first Whatcom County chairmen of the March of Dimes Association. He is survived by his wife, Margaret; children, Marcia, Brad, Paul, and Rory; six grandchildren; and one great-grandchild.

Hollis G. Best '51 of Fresno, Calif., died August 15, 2003, at the age of 77 of complications from cancer. A U.S. magistrate, he has been serving at the U.S. District Court in Yosemite National Park since 1994. He began his career as a Fresno County deputy district attorney before entering private practice in 1953. He later served as a Fresno County Superior Court judge and as the presiding judge on the Fifth District Court of Appeal before becoming a U.S. magistrate.

Richard W. Bridges '53 of Santa Cruz, Calif., died June 29, 2003, at the age of 83 of emphysema. A highly decorated World War II veteran—Purple Heart, Distinguished Flying Cross, Bronze Star, and Air Medal—who escaped a Hungarian prisoner of war camp, he spent his career as the in-house attorney for the Western Pacific Railroad. He is survived by three sons, Steve, Chris, and Tyler; four daughters, Beverly, Loma, Hilary, and Alison; 12 grandchildren and one great-grandchild; and two sisters, Avel and Peggy.

M. Peter Katsufakis '58 (AB '56) of Tarzana, Calif., died July 28, 2003, at the age of 83 of heart failure. An outspoken and innovative small claims court judge whose handling of small claims cases in Los Angeles Municipal Court in the 1960s and 1970s garnered national attention, he turned down an offer to be the original judge of television's *The People's Court*. Born to Greek parents but raised in the United States, he became a captain in the army during World War II and served in Greece, where he remained for four years after the war to direct the Greek war relief program. He then returned to the States to complete his undergraduate and law school education at Stanford. A former entertainment lawyer with O'Melveny and Myers, he was appointed a municipal court judge in 1965 and was elected for two more terms before retiring in 1977. During his tenure, the Los Angeles Small Claims Court was lauded by the National Institute for Justice as a model court and was considered the "jewel in the court's crown." He is survived by his wife, Martha; two children, Jason and Dana; a brother, George; and a sister, Angie.

Guy Blase '58 ('51) of Palo Alto, Calif., died July 5, 2003, at the age of 73 of cancer. A former naval officer who served aboard a destroyer during the Korean War, he helped found the Palo Alto law firm Spaeth, Blase, Valentine & Klein

(now Ritchey Fisher Whitman & Klein) in 1965 and remained a partner, specializing in corporate law, until he retired. In recent years he spearheaded a fund-raising drive for the \$23.5 million Opportunity Center, a Palo Alto development that will provide affordable housing and support services to the homeless. An enthusiastic Stanford alumnus, he was a member of the Stanford Institute for Economic Policy Research, the Stanford Center on Conflict and Negotiation, and Stanford Associates; he also chaired the reunion fund drive for his law school class's 40th reunion in 1998. He served on the board of the Children's Health Council and the Community Working Group of Palo Alto. He was also an avid horseman and belonged to Los Rancheros Visitadores, a prestigious Santa Barbara men's riding club. His first wife, Noel, died in 1994. He is survived by his wife, Bobbi; two daughters, Cece and Leslie; three grandchildren; and a sister, Joan.

Howard L. Schwartz '59 (AB '55) of Piedmont, Calif., died August 20, 2003, at the age of 69 after a long illness. An Alameda County judge for 22 years, he retired from the Superior Court bench in 1992. He served with the navy for two years aboard an aircraft carrier, then attended and graduated from Stanford Law School and joined the Alameda County district attorney's office. He spent seven years in private practice before being appointed to the Alameda County Municipal Court in 1970 by then California governor Ronald Reagan. From 1976 to 1980 he served on the California Commission on Judicial Performance, and in 1980 was elected to Alameda County Superior Court. He was active in the California Judges Association and served on the boards of the Boys & Girls Clubs of Oakland and the Oakland Alameda County Coliseum Foundation. He is survived by his wife, Marion; three sons, Michael, Bryan, and Douglas; and five grandchildren.

Richard Allan Hicks '65 of Honolulu died March 29, 2001 at the age of 60. He was a partner at Cades, Schutte, Fleming & Wright specializing in banking, private international law and financing. After law school, he studied Japanese at Columbia, then moved to Japan, where he worked for Anderson, Mori & Rabinowitz and met and married his wife, Kazuko

Itakura. He moved back to the States in 1971 to Honolulu, when he joined Cades, Schutte. He did charitable work for the Episcopal Diocese, for which he served as treasurer for fundraising campaigns to renovate a children's camp and restore a cathedral. He also served on the board of the Honolulu Symphony Orchestra. He leaves his wife and two children, Sarah and R. Anton.

David H. Fox '67 of Sherman Oaks, Calif., died July 8, 2003, at the age of 60 of a heart attack. A former top aide to Governor Jerry Brown, he was appointed director of the state Department of Real Estate in 1976 and served for five years. Subsequently he developed seminars in real estate ethics and earned a master's degree in marriage and family counseling. At the time of his death, he was president and chief executive officer of Professional Achievement Success Systems, a company he founded to provide study materials, seminars, and small-group training to prepare students for state licensing exams in family therapy. He is survived by two children, Susanne and Kevin; his father, Fred; and a brother, Alan.

Harry Wartnick '72 of San Francisco, Calif., died July 7, 2003, at the age of 55 of heart failure. A respected San Francisco lawyer, he gained national prominence as a pioneer in asbestos litigation, taking on such industry giants as Fibreboard Corp. and Johns-Manville Corp., and was instrumental in negotiating national settlements for thousands of victims of asbestos-related diseases. After graduating from law school, he joined Boccardo, Blum, Lull, Niland, Teerlink & Bell in San Jose, handling workers' compensation claims primarily. In 1974 he joined Cartwright, Slobodin, Bokelman, Borowsky, Wartnick, Moore & Harris in San Francisco, commencing his ground-breaking work in asbestos claims and rising from associate to name partner. Plagued by a long history of heart problems, he underwent bypass surgery in 1987 and cut back on his trial work. In 1995, he and four other partners formed Wartnick, Chaber, Harowitz, Smith & Tigerman, gaining recognition for record verdicts against the tobacco industry. He is survived by his wife, Joan; two stepsons, Stuart and Daniel; his mother, Lillian Raen; his stepfather, Julius Raen; and a brother, Rick Reiss.

William A. Bolger '73 of Gloucester, Va., died June 7, 2003, at the age of 55 of cancer of the liver. Executive director of the National Resource Center for Consumers of Legal Services for more than 20 years, he was president of William A. Bolger and Associates, a consulting firm that designed and implemented a legal services plan for the AARP, Aircraft Owners and Pilots Association, and American Association of School Administrators, among others. He was also president of Bolger Group Legal, LLC, which operated the national legal services plan of the AFL-CIO. He designed his first legal services plan in 1972 as president of the Stanford Law School Legal Aid Society, and campaigned successfully for student funding of the plan to cover all students. He was commodore of the Ware River Yacht Club and, a nascent boatbuilder, had nearly completed his third wooden boat, a 20-foot custom camp cruiser. He is survived by his wife, Anita; two children, Timothy and Sarah; two brothers, Thomas and Benjamin; and two sisters, Rebecca and Constance.

Margaret Wilz Gruter, JSM '73, of Portola Valley, Calif., died August 2, 2003, at the age of 84. Founder and president of the Gruter Institute for Law and Behavioral Research in Portola Valley, she was an intellectual crusader and accomplished businesswoman who helped pioneer the study of neuroscience in law and economics. Under her leadership, the Gruter Institute has fostered multidisciplinary research in law and the behavioral sciences, including evolutionary biology and economics. She was the author of numerous books and articles, including *The Sense of Justice: An Inquiry into the Biological Foundations of Law* (1992), *Law and the Mind: Biological Origins of Human Behavior* (1991), *Ostracism: A Social and Biological Phenomenon* (1986), and *Law, Biology and Culture: The Evolution of Law* (1983). Born and educated in Germany, she emigrated with her husband and young daughter to the United States in 1951, and for two decades was involved in a number of enterprises, including a mink ranch, a Christmas tree farm, and a nursing home, before moving to California, where she earned her master's degree and subsequently founded the Gruter Institute. She is survived by her daughter, Vera; her son, Oliver; and four grandchildren.

FOUNDATION PAYOUTS

Continued from p. 17

social value from either an ethical or economic perspective. So, for instance, if greenhouse gas regulation today improves the lives of people living 100 years from now, the mere fact that the benefit will be enjoyed by people living so far in the future doesn't make its social value smaller. The same is true of the future benefit that comes from a foundation's decision to adopt a low payout rate today to support charity in future generations. There may be a temptation to care more about the current generation than about faceless generations in the future. But the philosopher John Rawls observes, "The different temporal positions of persons and generations does not in itself justify treating them differently."

Those advocating higher payout rates legitimately point to a dire need for current charity. As a matter of advocacy, this approach is understandable. But as a matter of analysis, we need to recognize that current charity comes at the expense of future charity, and that the mere timing of a generation's presence on this planet is not relevant to the social value of charity provided to that generation. Moreover, because charity deferred to the future earns a return in the foundation's investment portfolio, a dollar withheld from the current generation can be expected to yield more dollars of charity for future generations. Ben Franklin appreciated this aspect of the tradeoff and chose to hold off giving a few thousand dollars to Boston and Philadelphia in 1790 so that his gift would amount to several million dollars in 1990. [See sidebar, p. 14.] This is surely not to say that we should sacrifice all current charity for the future—in perpetuity. The challenge is to find an approach for analyzing the tradeoff between current and future charity.

That tradeoff presents three issues for a foundation to confront in determining how much to save and how much to give. The first two reflect the goal of maximizing aggregate social welfare across generations. The third reflects a goal of intergenerational equity—a notion that there is a limit to what we can ask one generation to give up in favor of another generation for the sake of maximizing total welfare.

The first issue that a foundation should consider in setting a payout rate is how cost-effective a grant to current charity would be, compared with future charity, in providing a charitable service. Despite the fact that a dollar of today's charity comes at the price of many dollars of future charity, certain kinds of charity today will be more cost-effective; current *and* future generations will be better off if these charitable services are provided sooner rather than later. For example, if a foundation's goal is to preserve open space, doing so sooner may be better than doing so later, when the choice of open space to preserve will be more limited. The

same may be true of efforts to reduce population growth in an overpopulated region or to cure an infectious disease. It may be true as well of some educational programs, but only if one expects the benefits of current education to have indirect effects on the descendants of current students in perpetuity. If current charity in areas such as these, and surely others, produces benefits that compound in perpetuity at a higher rate than assets in the foundation's portfolio, then not only will the current generation benefit from a grant today but future generations will be better off as well.

Before salting its money away for future generations, a foundation should also ask itself whether future beneficiaries of its mission are likely to be better off than current beneficiaries. For example, perhaps with continued economic growth over the generations, art aficionados of future generations will be wealthier than the art aficionados of today. If so, there is less reason to save today to support the arts in the future. In addition, economic growth over the generations is likely to mean more donations to the nonprofit sector in the future. More immediately, some expect a massive flow of funds to the nonprofit sector as the baby boomers pass on their wealth over the next 20 years. If the charity sector of the next generation will have more funds than the sector has today, then there is less need to sacrifice current for future charity. Or perhaps the needs that a foundation serves will be less severe in the future. A problem may be solved, or a service now in short supply may be abundant. If, for any of these reasons, future generations of charitable beneficiaries are expected to be better off than the current generation, then a foundation should put a thumb on the scales of the current generation. This does not amount to discounting the future generation because it will arrive on the scene in the future. Rather, it is a matter of giving resources to those who are worse off rather than those who will be better off.

The third issue, intergenerational equity, provides a basis for a foundation choosing to give a dollar of charity today rather than more dollars in the future. In contrast to the first two, this is not a matter of maximizing welfare across generations. It is a potential reason to favor the current generation at the expense of future generations. This principle weighs against the goal of maximizing aggregate welfare in the charity sector over the generations. As an ethical matter, there must be a limit to the extent of sacrifice any generation can be asked to make for future generations, even if further sacrifice would lead to net gains in the future.

There also may be situations in which certain members of the current generation have a particularly strong ethical basis for deserving something more than members of future generations (and more than others in the current generation). Innocent victims of a war waged by the current gener-

ation, for example, may have an ethical claim to funds that the current generation has accumulated for charity.

Ideally, each foundation would strike a balance between equity and wealth maximization, as it deems appropriate for society as a whole. Just as foundations distribute their funds across the charitable sector as they choose—focusing on maximizing social returns or on other ethical considerations—they should do the same with their distributions over time.

So how does the Gates Foundation's AIDS strategy look under this approach? First, Gates should not worry about discounting the value of lives saved in the future as a result

If there is a flaw in the Gates Foundation strategy, it is that there may be more philanthropic dollars available to support the delivery of an AIDS vaccine when it is developed. At the margin, Gates Foundation funds may better the lives of more people if used sooner. That, however, is also the type of judgment that must be left to foundation donors and executives.

of an AIDS vaccine. The foundation's strategy should be analyzed based on the cost-effectiveness of providing less now and more later to combat the disease. Delivery of the vaccine, even to the next generation (or the one after that), may well be more beneficial to society over time than adding yet more Gates Foundation funds to the AIDS effort today. This is the type of judgment that individual foundation donors and executives must make. If there is a flaw in the Gates Foundation strategy, it is that there may be more philanthropic dollars available to support the delivery of an AIDS vaccine when it is developed. At the margin, Gates Foundation funds may better the lives of more people if used sooner. That, however, is also the type of judgment that must be left to foundation donors and executives.

The Mandatory Payout Requirement

If there is not necessarily a downside to society for a foundation to favor future charity over current charity, then why do we need a mandatory payout rate? It is not because there is a mismatch, as Congress believed in 1969, between the value of the tax deduction and the value of charity given in the future. As explained above, future charity is not necessarily worth less than current charity. Furthermore, since future charity benefits from compound growth, the tax deduction for a donation to a foundation is equal to the present value of the foundation's future grants.

So why not allow foundations to distribute less now and defer more resources to future generations?

If foundation managers were guided entirely by social welfare considerations in setting their payout policies, then no minimum payout law would be needed. Foundation man-

agers, however, seem to be influenced by the prestige associated with large endowments, and foundation donors seem to be influenced by notions of immortality associated with perpetual existence. Consequently, donors and managers seem to have a personal bias toward lower payout rates.

The minimum payout requirement responds to this self-interest in a fairly moderate way. It basically allows a foundation to maintain its principal and to make grants in perpetuity at the 5 percent rate. This allows donors immortality and forces foundations to treat current generations at least equally with future generations. In the long run, the mini-

num payout requirement is expected to hold foundation endowments constant, so it inhibits foundation executives from vying for prestige by growing their endowments.

Should the minimum payout requirement be increased as some advocates have urged? This depends on the behavior of foundation managers.

If the personal biases of foundation executives play too strong a role in allocating funds between current and future charity, an increased payout requirement might be reasonable. Of the factors discussed above, the one that might push in favor of a higher payout requirement across the board is the comparison between the resources and needs of charity today versus charity in the future. If, as some expect, there will be a large flow of funds to the charitable sector over the next 20 years, and if we expect society to grow wealthier and charitable donations to increase with wealth over the generations, then perhaps foundations should anticipate this new money and devote more funds to current charity. On the one hand, from a policy point of view, there is no problem with foundations spending themselves out of existence as new foundations take their place. On the other, increasing the payout requirement to a level that would place foundations' perpetual existence in substantial jeopardy could make the establishment of foundations less attractive to donors, which could result in less charity for present and future generations.

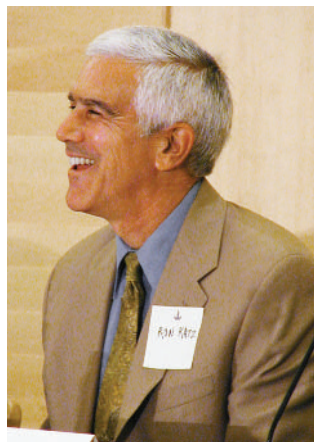
Reaching a conclusion about whether to up the payout rate will involve considering a host of factors, but not the one that's been getting the most attention: discounted cash flow analysis. That approach amounts to a pure preference for the current generation over future generations with no ethical or economic basis.

The allocation of charity across generations must be understood in much the same way as the allocation of environmental resources across generations. There may be justification for favoring current charity over future charity in some situations, but not as an absolute matter.

THE SECOND ANNUAL DIRECTORS' CONSORTIUM drew 110 senior executives and board members from major companies across the nation to Stanford Law School. The August 20–22 event sold out a month in advance as applicants jumped at the opportunity to spend three days studying corporate governance and the responsibilities of board service. The consortium, which last year was the subject of a front-page *New York Times* story, is sponsored by the Law School, the University of Chicago Graduate School of Business, and the Wharton School of the University of Pennsylvania. CLOCKWISE FROM TOP LEFT: University of Chicago Graduate School of Business Professor Steven N. Kaplan gave a lesson on corporate finance, with tips on how directors can better determine their company's economic position. Law School Professor Emeritus Kenneth E. Scott '56, a frequent commentator on corporate governance, offered some choice thoughts in group discussions. Wendy Lane, a former Tyco director, was a featured speaker. Credit Suisse First Boston Vice Chairman Steven Koch posed questions that every board member should weigh when evaluating a proposed merger. Bernard S. Black '82 (left), George E. Osborne Professor of Law, and Ronald J. Gilson, Charles J. Meyers Professor of Law and Business, discussed the sessions they were teaching.



STEVE GLADFELTER (5)



"YOU CAN'T SUE ME (HERE)" was the title of a June 25 panel that examined a critical legal question raised by the advent of the Internet: Who has jurisdiction over what in the global marketplace? The discussion, which featured top lawyers from some of the biggest high-tech companies, was sponsored by the Stanford Law Society of Silicon Valley, the Stanford Center for E-Commerce (Stanford Program in Law, Science & Technology), and the Churchill Club. CLOCKWISE FROM LEFT: Paul Goldstein, Stella W. and Ira S. Lillick Professor of Law, the event's moderator, was joined on the panel by Mark Chandler '81, Cisco Systems Vice President of Legal Services and General Counsel. Another panelist, Ronald S. Katz, a partner in the Palo Alto office of Manatt Phelps & Phillips, has written on pharmaceutical patents, as well as on the Digital Millennium Copyright Act. Jon Sobel, Yahoo! Senior Vice President and General Counsel, brought his experience negotiating many of his company's technology deals to the panel discussion. Jay Monahan, eBay Vice President and Deputy General Counsel, chatted with Dean Kathleen M. Sullivan before taking a seat on the panel. The audience was filled with some of the area's leading attorneys, including (left to right) Bingham McCutchen partner and Silicon Valley Law Society co-chair William Bates III '74, Fenwick & West partner Tyler A. Baker III '75, and Milbank, Tweed partner Douglas A. Tanner '77 (BA '75).



ROBERT MARCH (5)

Stanford University
Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

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