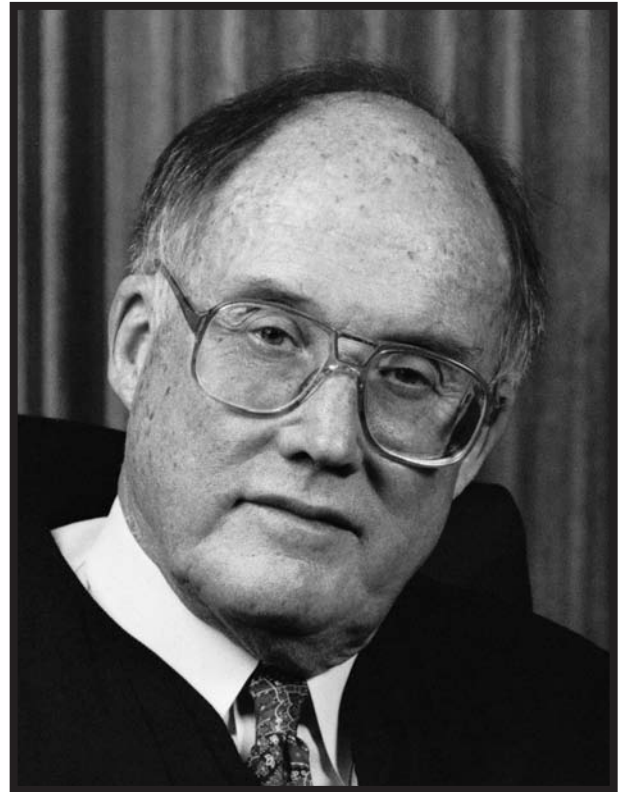
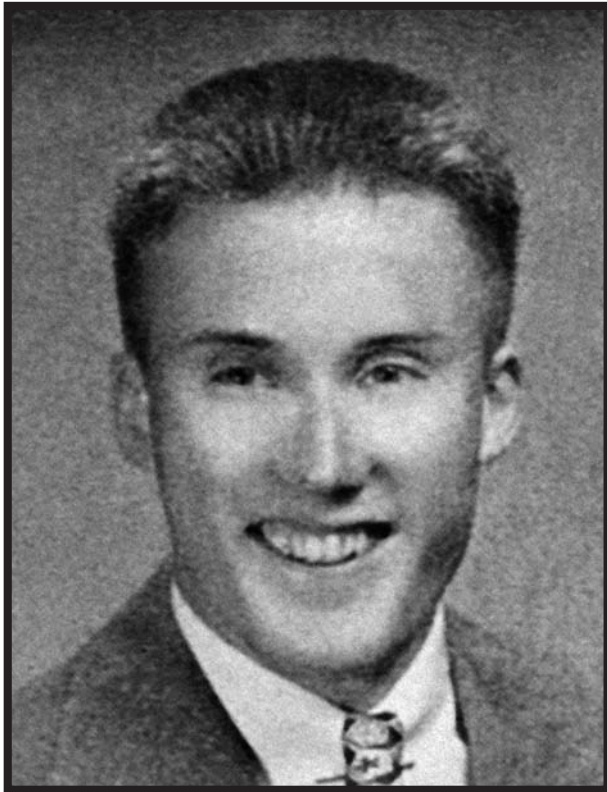


Google's Dirty Little Secret

**Clinical Education**  
Larry Marshall Raises the Bar

Why Some CEOs Are Overpaid

# Stanford *Lawyer*



## THE CHIEF

One-On-One with William Rehnquist '52

Roundtable on His Record

## Remember Stanford...



Above: Thomas Hart Hawley (A.B. History '66, L.L.B. '69) during his junior year at Stanford.  
Below: returning to his roots, Thomas now operates a small vineyard/winery in Carmel Valley under the Blue Heron label.

From his family's apricot orchard in Los Altos Hills, young Thomas Hawley could see Hoover Tower and hear the cheers in Stanford Stadium. "In those days my heroes were John Brodie and Chuck Taylor," he says, "and my most prized possessions were Big Game programs."

Thomas transferred from Wesleyan University to Stanford as a junior in 1964 and two years later enrolled in the Law School, where he met John Kaplan. "I took every course Professor Kaplan taught," says Thomas. "He was a brilliant, often outrageous teacher, who employed humor in an attempt to drive the law into our not always receptive minds."

In choosing law, Thomas followed in the footsteps of his father, Melvin Hawley (L.L.B. '52), and both grandfathers. "I would have preferred to be a professional quarterback or an opera singer," he says (he fell in love with opera while at Stanford-in-Italy), "and I might well have done so but for a complete lack of talent."

An estate planning attorney on the Monterey Peninsula, Thomas has advised hundreds of families how to make tax-wise decisions concerning the distribution of their estates. When he decided the time had come to sell his rustic Carmel cottage, he took his own advice and put the property in a charitable remainder trust instead, avoiding the capital gains tax he otherwise would have paid upon sale. When the trust terminates, one-half of it will go to Stanford Law School.

"After taking care of loved ones, most people enjoy hearing they can save taxes and give back to those institutions that made their lives so much better," says Thomas. "That's one bit of advice I never tire of giving."

Thomas Hawley also is a recognized lecturer and author on estate planning. His amusing, down-to-earth book, *The Artful Dodger's Guide to Planning Your Estate* (published by Adams Media, Boston, February, 2004) is dedicated to the memory of John Kaplan.

*To learn more about bequests and gifts such as charitable remainder trusts and charitable annuities that pay income to donors, please contact us.*

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

## Letters

### The First OMB Director

Looking back to the cover story in your summer '04 issue of *Stanford*

*Lawyer*, "White House Insider," on Josh Bolten '80, the director of the Office of Management and Budget, I thought you might be interested to know of an earlier connection between Stanford and the first budget director.

Under the Executive Reorganization Act of 1939, what was then called the Bureau of the Budget was moved from the Treasury Department to the White House. The bureau (long since given a more accurate name: Office of Management and Budget) had only three or four dozen employees at the time.

In early 1939 President Franklin Roosevelt asked a select committee of three to find him a budget director. They chose Harold D. Smith, my father, who was then budget director for the state of Michigan, and later a founder of the American Society for Public Administration.

President Roosevelt wanted my father right away, so he was sworn in as the first budget director on April 15, 1939, my 10th birthday. Unfortunately, my mother, two younger sisters, and I arrived by car from Ann Arbor, Michigan, on that day too late to attend the swearing in. Otherwise I would have met President Roosevelt.

My father, in effect, built the Bureau of the Budget into what it soon became, the effective right arm of the president. A June 14, 1943, *Time* cover story on my father was titled "Czars may come, and czars may go, but he goes on forever." Every civilian agency set up for the war effort was accomplished by the bureau—and there were many. For example, he had to figure out how to secretly finance the atomic bomb project.

My father came off a 140-acre Kansas farm about 30 miles northwest of Wichita. He and his four siblings all attended Kansas University. My father graduated



with an electrical engineering degree but in the last semester took a couple of courses in public administration. He fell in love with the subject and acquired a master's degree at the University of Michigan. Not long after he was chosen to be the first director of the Michigan Municipal League, and held that position for eight years. When he was asked by Governor Frank Murphy in 1936 to become state budget director, he did.

Harold Smith did not seek the limelight. He left President Truman in June 1946 and became the vice president of the new World Bank. Then, Eugene Meyer, the World Bank's president and owner of *The Washington Post*, quit in a huff because he couldn't get along with the foreigners on his board. My father took over as acting president, a position he held when he died in January 1947, just short of his 49th birthday. James Forrestal, secretary of the Navy, told the city manager of Kansas City, Perry Cookingham, a close friend of the family's, that had it not been for Harold Smith, Washington would have been a total madhouse. The cortege to his grave was reportedly a mile long.

LAWRENCE B. SMITH '57  
*Tucson, Arizona*

# The Necessity of Clinical Education

BY LARRY KRAMER

Richard E. Lang Professor of Law and Dean

Legal education has come a long way since Christopher Columbus Langdell instituted the case method. Plainly, Langdell's idea of teaching law through analysis of appellate opinions remains invaluable and will continue to play a major role in helping students learn to "think like lawyers." But teaching students to be great lawyers and leaders calls for a variety of methods; we need to offer students skill sets beyond those honed by the Socratic method.

My last column highlighted the role of interdisciplinary study in preparing our students for the challenges that await them. This time I want to talk about another imperative: clinical education. Law schools must recognize what other professional schools have long understood—that proper training requires closely supervised, pedagogically driven opportunities to work with actual clients. Experiential learning is and ought to be an essential part of every student's legal education. It provides a crucial bridge between the classroom and the courtroom or boardroom. As our alumni who have worked in clinics often say, traditional classes taught them to *think* like lawyers, but clinical courses taught them how to *act* and *feel* like lawyers.

We cannot and should not rely on employers to provide this vital component of a proper legal education. That's our job, not theirs. Law firms and agencies are set up to serve clients, not teach. They do not choose cases for their pedagogical value. Nor can they purposely maintain low case-loads to ensure that each case is used as an effective teaching tool. No law firm has a weekly seminar in which lawyers meet to reflect on the practical and theoretical lessons gleaned from their work with clients.

Stanford has seven clinical programs providing our students a range of opportunities to work on cases under the supervision of an extraordinarily talented clinical faculty. The law school takes immense pride in their accomplishments. Some of our clinics handle more high-profile cases than others, and in recent months a number of our clinics have made national headlines. But the measure of a clinic's work is not whether it handles newsworthy cases or even whether its clients prevail. The measure of our clinics' success is their educational value to students, which is immense.

We must not rest on our laurels, however. One of the law school's key priorities during the next several years is to enhance the scope and excellence of our clinics: by adding programs in new areas, by increasing staffing so we can

make our clinical offerings universally available, and by improving and expanding our physical facilities.

My optimism about what we can achieve in the clinical arena stems, in large part, from confidence in the vision and leadership of professor Larry Marshall, the new David and Stephanie Mills Director of Clinical Education, who will become our first associate dean for clinical education and public interest programs. Larry has accomplished extraordinary things, having founded and directed the world-renowned Center on Wrongful Convictions at Northwestern University. He has bold and exciting plans for the Stanford clinics, and I am excited about working with him to develop and implement them. [See story p. 14.]

One of those plans recognizes that our current clinics all focus on litigation, despite the fact that most of our students are destined for careers that will not take them into court. Within the

next year, we hope to launch a clinic that represents small businesses, entrepreneurs, and nonprofit organizations that cannot otherwise afford high-quality legal counsel. This clinic will not only provide vital practical training for our students, it will also drive home the lesson that there are plentiful opportunities for pro bono work in nonlitigation settings. We hope that our graduates take this point to heart and that their experience in this, as in all our clinics, will generate a lifetime commitment to pro bono representation.

We have also begun work on renovating our clinical space to make it an effective environment for teaching students and serving clients. The revamped space will allow us to launch several new clinics within the next several years. Construction should be completed this fall, and I hope you will stop by for a tour when you next visit the campus.

Achieving our goals in clinical education will take great effort from many of our constituencies. The same low teacher-student ratios (generally 8 to 1) that make clinical teaching so effective also make clinics very expensive. For many years, law schools concluded that they could not afford to operate robust legal clinics. The truth is, we cannot afford not to.



PHOTO: LINDA A. CICERO



## THE RULE OF LAW IN AN INTERCONNECTED WORLD

International courts and tribunals are playing an increasingly important role in the evolution of international law and the emergence of an international legal system. But international courts still face significant challenges in carrying out their missions, concluded judges at a global jurisprudence conference held at Stanford Law School.

The March conference brought together 11 judges from eight international tribunals to discuss their courts' evolving roles in shaping the rule of law in an interconnected world.

The conference was organized by Stanford Law School faculty, including Allen S. Weiner '89, associate professor of law (teaching) and Warren Christopher Professor of the

Practice of International Law and Diplomacy. "The proliferation of these courts is something everyone has noticed, but the odd thing about them is that there are no formal relationships or a hierarchy among them," Weiner said.

As the number of courts has increased, so have questions about their efficacy. Weiner sees a compelling need for judges to begin a conversation about their work "both with each other and with national courts," if the world is to move toward a true international judicial system.

The case of Jose Medellin, a Mexican national on death row in the United States for the rape and murder of two Houston teenagers, illustrates the complexity of these tribunals' decisions. In a case brought by Mexico, the International Court of Justice (ICJ) in The Hague—the United Nations' high court for resolving country-to-country conflict—said in 2004 that Medellin and 50 other Mexicans on death row were entitled to hearings to consider the impact of the fact that, at the time of their arrests, they were not told of their right to contact Mexican consular officials, as is required by the Vienna Convention on Consular Relations.

The Bush administration agreed on February 28 of this year to follow the ICJ decision by ordering state courts to grant the 51 Mexicans hearings to assess the impact of the lack of consular notification. Then, a week later, it announced that it was withdrawing from the Vienna Convention's optional protocol that gives the ICJ jurisdiction over disputes related to the treaty. The withdrawal would not affect Medellin and the other 50 Mexican nationals, but would affect future cases. On May 23 the U.S.

Supreme Court rejected an appeal by Medellin and the others, saying that the Court wanted to give the states an opportunity to comply with Bush's order to grant new hearings. The Court reserved the right to hear the appeal and to rule on whether international law should be binding on U.S. courts after the cases have gone through the state courts.

Experts around the world are watching the situation closely because of the unique tension the case presents between different branches and different levels of government. Implementing treaties is a matter of interpreting the law, which falls into the judicial arena, yet the operation of treaties affects foreign policy, where the executive branch has special responsibilities. The Medellin case has significant potential to affect how the United States complies with future decisions of international tribunals.

Judge Juliane Kokott of Germany, an advocate general at the Court of Justice of the European Communities, said that her court offers a successful model of jurisdiction over states. The court, which sits in Luxemburg, deals with matters regulated by the European Union such as social, environmental, and patent law. Over the past decades, European jurisprudence has developed so that decisions of the European Court are given automatic and direct effect by the domestic courts of European countries.

The court's success is notable given the trend of increased globalization, in which sovereignty will continue to evolve and relations between domestic and international courts and institutions will grow more interdependent. The close

cooperation of the European Court of Justice with states, and its ability to curtail their power, is one example of an "international case law approach that may one day reign over statutes and treaties," Kokott said.



**Judge Hisashi Owada (Japan), International Court of Justice**



**Judge Patrick Lipton Robinson (Jamaica), International Criminal Tribunal for the Former Yugoslavia**



**Judge Florence Ndepele Mwachande Mumba (Zambia), member of the Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda**

## CITES

“There is a problem when the turnover in the United States House of Representatives is lower than it was in the Soviet Politburo.”

—NATHANIEL A. PERSILY '98, professor, University of Pennsylvania Law School, as quoted in *The New York Times*. The February 7 article, “States See Growing Campaign for New Redistricting Laws,” examined the growing efforts by citizens’ groups and politicians across the United States to reform congressional redistricting laws.



“Certainly if the mouse stood on its hind legs and said, ‘Hi, I’m Mickey!’ we’d be worried. We’d be more than worried.”

—HENRY T. “HANK” GREELY (BA '74), Deane F. and Kate Edelman Johnson Professor of Law, as quoted in *The Christian Science Monitor*. The March 17 article, “A Mix of Mice and Men,” examined the ethical questions of injecting animals with human genes. Stanford University researchers are considering creating mice with brains containing human neurons.



PHOTO: STEVE GLADFELTER

“You’ll be pleased to know that communism was defeated in Pennsylvania last year. Governor Ed Rendell signed into law a bill prohibiting the Reds in local government from offering free Wi-Fi throughout their municipalities.”

—LAWRENCE LESSIG, C. Wendell and Edith M. Carlsmith Professor of Law, writing in *Wired*. His column, “Why Your Broadband Sucks,” attacked the telecommunications industry for trying to prohibit municipalities from offering broadband Internet access.



PHOTO: LINDA A. CICERO

“[The Endangered Species Act] created an unintended disincentive for landowners to participate in recovering endangered species.”

—MICHAEL BEAN, chair of the wildlife program at Environmental Defense, speaking at Stanford Law School. Bean, who was awarded the fourth annual Robert Minge Brown Lectureship, spoke about the creative ways his organization has enticed ranchers, farmers, and other large landowners to protect endangered species.



PHOTO: ROBERT MARCH

“It was a one-off asterisk in the history of claims facilities and alternatives to the torts system.”

—KENNETH FEINBERG, former special master of the federal September 11 Victim Compensation Fund, speaking at a two-day Stanford Law Review symposium, “The Civil Trial: Adaptation and Alternatives.” In his keynote address, Feinberg argued that the circumstances surrounding the \$7 billion September 11 fund were so unusual that even though the process and the results were widely praised, it was unlikely to be repeated.



PHOTO: MISHA BRUIK

“The petitioners in this case are American citizens who took cruises to and from this country . . .” and “were subject to discrimination by respondent [the cruise line], a U.S.-based company, on the land, in the ports, and in the waters of the United States.”

—THOMAS C. GOLDSTEIN, lecturer in law, during his February 28 oral arguments before the U.S. Supreme Court in the case *Spector v. Norwegian Cruise Line*. He argued that foreign-flag cruise ships that enter U.S. ports must comply with the Americans with Disabilities Act. Students in Stanford Law School’s Supreme Court Litigation Clinic wrote the cert. petition the Supreme Court granted in accepting the case. The Supreme Court ruled in favor of Goldstein’s client.



PHOTO: ROBERT MARCH

## Stanford Law Review Article Sparks Controversy

Most law journal articles get scant notice outside of their particular field. That was not the case at the *Stanford Law Review* this year. Quite the opposite; the journal generated a storm of controversy last November when it published “A Systemic Analysis of Affirmative Action in American Law Schools,” by UCLA



PHOTOS: JOHN LESCHORS  
UCLA School of Law professor Richard H. Sander, author of the controversial article on affirmative action

School of Law professor Richard H. Sander.

Sander’s article purports to prove that instead of helping black law students get ahead, affirmative action hurts them. The article’s publication generated a heated debate that quickly moved beyond academic circles and into

the public realm through such media outlets as *The New York Times*, Fox television, and NPR’s *Morning Edition*.

In March, a panel discussion on the topic was held at the law school, attracting an overflow crowd of students and faculty. The panel was sponsored by the Stanford Law Review, American Constitution Society, Asian and Pacific Islander Law Students Association, Black Law Students Association, Native American Law Students Association, and Stanford Latino Law Students Association.

The panel included two proponents of Sander’s thesis, Stuart Taylor, Jr., columnist for the *National Journal*, and Sander himself; and two critics, David Chambers, professor emeritus of law at the University of Michigan, and Rachel Moran, professor of law at the University of California at Berkeley’s Boalt Hall. The panel was moderated by R. Richard Banks (BA/MA ’87), professor of law

and Justin M. Roach, Jr. Faculty Scholar.

The two sides differed over the impact that affirmative action has had on black law students, as well as what impact ending affirmative action would have on blacks. Sanders estimates that ending affirmative action would increase the number of black lawyers produced annually by about 8 percent. Chambers and others say it would have a devastating effect on blacks by reducing the number of black lawyers produced by law schools between 30 and 40 percent annually.

In his introduction to the panel discussion, Larry Kramer, Richard E. Lang Professor of Law and Dean, said, “Stanford Law School and I remain committed to diversity in recruitment and admissions of the student body.” He pointed out that the Stanford Law Review is an indepen-

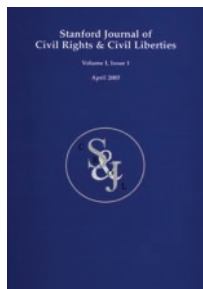


(Left to right) *National Journal* columnist Stuart Taylor, Jr.; University of California at Berkeley professor Rachel Moran; and University of Michigan professor David Chambers engage in heated debate over affirmative action.

dent, student-run organization, and that Sander’s article did not reflect the views of the law review or of the law school. Kramer praised the student organizations for sponsoring the panel. “We can learn much from the debate and from the differing perspectives on this topic that the *Stanford Law Review* will publish in future editions.” In its May issue the *Stanford Law Review* published a series of essays that responded to Sander’s article.

## NEW CIVIL RIGHTS & CIVIL LIBERTIES LAW JOURNAL

Students at Stanford Law School have launched a new academic journal—the *Stanford Journal of Civil Rights & Civil Liberties*. The interdisciplinary journal explores civil rights issues, such as affirmative action and women’s rights, and civil liberties issues, including those involving the First



Amendment. It will cover both domestic and international topics.

The first issue of the twice-yearly journal was published in May. The journal took root more than three years ago, when a group of students approached then dean Kathleen M. Sullivan with the idea, said Benjamin Hernandez-Stern ’06. It took until now to raise the money, recruit, and train an editorial staff, and solicit and edit the first group of articles. Forty-two students helped publish the first issue.

Stanford Law School now publishes seven academic journals:

- *Stanford Environmental Law Journal*
- *Stanford Journal of Civil Rights & Civil Liberties*
- *Stanford Journal of International Law*
- *Stanford Journal of Law, Business & Finance*
- *Stanford Law & Policy Review*
- *Stanford Law Review*
- *Stanford Technology Law Review*



## JOHN ROOS '80: LAWYERING TO SILICON VALLEY'S ELITE

It was 1985, the Silicon Valley technology industry was still in its adolescence, and John Roos '80 (BA '77) was itching to get out of Los Angeles. He was an associate in litigation at O'Melveny & Myers, a venerable firm with hundreds of lawyers, but Roos wanted something different. So he took a job at Wilson Sonsini Goodrich & Rosati in Palo Alto, California, then a mere 20 years old and boasting only 50 or so lawyers. Not only did Roos trade south for north, old for young, and large for small; he moved into a new line of practice: corporate securities.

"I thought Silicon Valley was taking off, and I wanted to come back to the Bay Area," said the 50-year-old Roos, sitting behind his desk in his sparsely decorated corner office. "I decided to make the switch so I could work with and advise young entrepreneurs."

During Roos's 20-year tenure at Wilson Sonsini, the firm has added about 500 lawyers and seven branches in cities around the country. "Our practice has grown from representing start-ups to representing multibillion-dollar corporations such as Google, HP, and Pixar," he said. "We've basically grown up with Silicon Valley."

"For many years, Wilson Sonsini has been *the* law firm in Silicon Valley," said Abigail Johnson (BA '77), who runs a Silicon Valley public relations firm and knows Roos from the days when they were both Stanford undergraduates. "It has been pretty instrumental in defining law in tech start-ups."

Roos took a leap of faith in moving to Wilson Sonsini, but it's now clear how right the decision was: early this year, he was named chief executive officer of the firm. Larry Sonsini, 64, who had held that post for more than 20 years, stepped aside. "It's important for

me to stay with the practice and build the firm," Sonsini said. "I need someone who can focus as a real executive. John has the skill set: he is a wonderful communicator and listener, and he is willing to put the time in and step away from his practice."

Roos, the son of college administrators, grew up in San Francisco with dreams of becoming a trial lawyer. He attended Stanford as an undergraduate and liked it well enough to stick around for law school. There were other reasons to stay on the Farm: he had started the Stanford Speech Institute, a three-week summer debate camp for high school students; he also met his wife, Susie Roos (BA '78), at this time.

After graduating and plunging into the demanding world of law firm practice, Roos still found time to volunteer: in 1984, he took a year off to act as special assistant to the national cochairman for Walter Mondale's presidential campaign, and in 2000, he campaigned for Bill Bradley's presidential bid. More recently, he was Northern California finance chair for John Kerry's presidential campaign. Noting that all of his candidates lost their bids and sounding much like a politician, Roos noted, "My record is consistent." Roos has been more successful running on his own. In 1991, and again in 1995, he ran and won a seat on the San Mateo-Foster City School District board.

Ronald Beck '80 (BA '77, MBA '79), a classmate, longtime client, and former roommate, says that Roos's political activism demonstrates his ability to develop strong relationships with

people. "John is extremely well connected," said Beck, a managing director at the private equity firm, Oaktree Capital Management. "He is the consummate business lawyer whom you can rely on for business advice, not just technical advice."

When the tech bubble burst in 2000, Wilson Sonsini deflated along with many of its clients. Today it has 200 fewer attorneys than it did during the boom and records \$377 million in revenue, down from \$450 million in 2000. But Roos said that Wilson Sonsini survived the downturn better than many other firms: "Our firm has a very strong name. We feel very well positioned for the future."



PHOTO: STEVE GLADFELTER

Roos says he plans to recruit more minority attorneys and expand Wilson Sonsini's pro bono practice. He's also exploring opening offices in China, India, and Israel—a development that reflects the changing technology industry, which has moved beyond Silicon Valley. Noting that his ascension to CEO represents Wilson Sonsini's first generational shift, Roos said, "Now we're looking to build the firm on a global basis, capitalizing on our brand in technology. That is the challenge of this generation." —Mandy Erickson

## BIOTECH PATENT EXPERTS GATHER AT LAW SCHOOL

**B**iotechnology patent law is one of the hottest fields in the legal profession, and one of the most challenging. Not only does it require a specialized knowledge of a complex, fast-changing science, but it presents attorneys with particular problems when cases are brought to jury trial.

One of the challenges is picking a jury. Attorneys trying biotech cases find they must employ different techniques

than those used in other patent cases, said Edward Reines, a partner at Weil, Gotshal & Manges in Redwood Shores, California, speaking at the law school's March 11 conference, Biotechnology and Intellectual Property: Current

Controversies. Reines, a member of the panel discussing biotechnology trials, stressed that the voir dire process is crucial to ensure that potential jurors are not predisposed against one's client because of religious or health issues. "You can only mute people's predisposition to a certain extent."

The conference, the second organized by the school's new Center for Law and the Biosciences, convened more than 100 lawyers, judges, and academics from around the nation, all of whom are feeling their way through this emerging area of the law. Nearly 30 panelists covered varied legal issues in biotechnology: licensing, gene patents, the

written description requirement for patents, ethical and policy issues, and standards for trying IP cases.

The complexity of biotechnology science also presents problems at trial. Some of the technologies involved in these cases are so obscure and over the jurors' heads, the panelists said they find they need to step back during a trial to give some background. "The court can help the jurors a lot by pre-instructing the juries," said Judge Ronald Whyte of the U.S. District Court for the Northern District of California. "Attorneys can give interim commentary between witnesses; they can say, 'Dr. Smith will explain,' and introduce the issue."

Daralyn Durie (BA '88), a partner at Kecker & Van Nest in San Francisco, cautioned that a trial has limitations: "You're never going to teach a jury college-level classes in biotech," she said. "You have to teach them only what they need to know."

While expert witnesses may be able to help clarify the science, they can also obscure it, the panelists noted, so attorneys need to be careful with the experts they introduce.

The best witness of all, panelists agreed, is the person who conducted the research. "Probably the most powerful expert you can have is someone who was there doing the work in the field," said Sean Johnston '89, vice president of intellectual property at Genentech, Inc. in South San Francisco.



Mark A. Lemley, William H. Neukom Professor of Law, explains biotech patents.

Besides the ethical issues of gene manipulation, science that jurors—and lawyers—often fail to comprehend, and witnesses who spout questionable data, biotech IP attorneys face perhaps a greater challenge: representing a client who wants to restrict access to a medical breakthrough.

While patent laws exist, of course, to encourage innovation, the lawyers arguing to protect intellectual property sometimes find themselves in an awkward position. "With biotech, there's a public benefit, but you're also attempting to restrict that benefit," Reines said. "You need to come up with a strategy to balance that paradox."

—Mandy Erickson



Sean Johnston '89, vice president of intellectual property at Genentech Inc. (left), and Judge Ronald Whyte of the U.S. District Court for the Northern District of California discuss biotech jury trials.

PHOTOS: JOHN LESCHOFIS

### GOVERNING THE INTERNET

Stanford Law School's Center for Internet and Society (CIS) and Harvard Law School's Berkman Center for Internet and Society have jointly launched an online clearinghouse of information on the governance of the Internet.

Net Dialogue brings together in one site, [www.netdialogue.org](http://www.netdialogue.org), background information, news, and discussion of the issue of Net governance. It is intended for people in government, business, nonprofits, international organizations, the media, and the public at large.

"It is imperative that the technology and international policy-making communities learn each other's languages and values," said Lawrence Lessig, C. Wendell and Edith M. Carlsmith Professor of Law, founder and executive director of Stanford's CIS. "Net Dialogue seeks to foster this understanding as we head into the future networked world."

Net Dialogue is funded by the Lynde and Harry Bradley Foundation.

## WHAT AM I BID?

More than 350 people attended the 13th annual SPILF Auction held March 12 at the law school. The event raised a little more than \$40,000 for the Stanford Public Interest Law Foundation, money used to fund summer grants for students at public interest organizations as well as grants to nonprofits providing legal services to underserved communities. Here are some of the more humorous items offered at the auction.

### WILL WINTER NEVER END?

Aw, quit your griping and consider what a real winter would be like. Consider, for example, what winter is like for Dave's mom out in Minnesota. Now that's winter! Well, if that doesn't make you feel better, I bet three dozen of Dave's mom's homemade cookies will.

### END OF SEMESTER MOVING AND BARBECUE SERVICE

We are seven strapping young lads from the southern reaches of our great nation. We commit to move the high bidder out of his/her habitation using our rippled biceps and tough trucks. Further, we agree to provide a BBQ to the winner, including authentic Kansas City and Ozark Mountain BBQ sauces. We will move shirtless on request.

### WINGWOMEN: GIRLS GETTING GIRLS (FOR YOU)

"The wingwoman is the latest twist on the wingman, that devoted male sidekick who helps a buddy pick up women at bars and clubs." (*The New York Times*, 10/10/04.) Tired of those worn-out pickup lines? Do you look through Craigslist's "Missed Connections" on Sunday mornings? We three women will accompany you and a group of your friends to the place of your choice and do our best to help you all meet the women of your dreams. Women trust other women, trust us!

## PUBLIC INTEREST FELLOWSHIPS

Stanford Law School students and alumni garnered a significant number of public interest law fellowships in recent months, including the following.

### EQUAL JUSTICE WORKS FELLOWSHIP

**Catherine Crump '04** will work with the national office of the ACLU to develop new litigation strategies to combat government restrictions on political dissent and the exercise of free speech. **Monica Ramirez '04** will work with the ACLU national Immigrants' Rights Project to advance the rights of day laborers in California through community education and strategic litigation. **Yael Zakai '05** will work with the Children's Law Center to represent public school students in the Washington, D.C., area who are inappropriately disciplined because of their special education needs.

### SKADDEN PUBLIC INTEREST FELLOWSHIP

**Shakti Belway '05** will work with the Mississippi Center for Justice to challenge institutional barriers to equal education and represent students inappropriately diverted into special education programs. **Karie Lew '04** will work with the Legal Aid Society of San Mateo County, California, to protect and advance the rights of foster children by pursuing programmatic reform and providing individual representation. **Bryn Martyna '05** will work with the National Center for Youth Law in Washington

State to improve placement and relocation policies and the coordination between court-appointed advocates for foster children. **Sharon Terman '04** will work with the Employment Law Center to engage in direct representation, public education, and reform efforts to implement California's new paid family leave laws.

### FRIED FRANK FELLOWSHIP

**Alexis Karteron '04** will spend two years at Fried, Frank, Harris, Shriver & Jacobson LLP, followed by two years at the NAACP Legal Defense Fund.

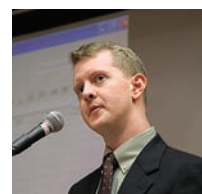
### IRA GLASSER RACIAL JUSTICE FELLOWSHIP

**Ray Ybarra '05** will use this ACLU fellowship to further his ongoing work with migrants in the border area of Arizona and Mexico, focusing on documenting the actions of vigilantes.

### U.S. DEPARTMENT OF JUSTICE HONORS PROGRAM

**Marcy Cook '05** will work in the Civil Division. **Michael Ferrara '03** and **Nicola Mrazek '04** will work in the Criminal Division. **Catherine Wannamaker '03** will work in the Environment and Natural Resources Division.

## Battle of the Brains



PHOTOS: MISHA BRUK

The annual Battle of the Brains contest, held March 4, raised about \$23,000 for the Stanford Community Law Clinic and Stanford Community Action for Human Rights Project. The trivia contest, hosted by all-time *Jeopardy!* champ Ken Jennings (above), pitted teams of students, staff, and faculty against one another. The winning team was (left to right) Michelle Skinner '06, James Darrow '06, Joshua Kaul '06, and David Rybicki '06.



## Clyde E. Tritt '49: Leaving a Legacy

You won't find Clyde E. Tritt's '49 name emblazoned on a Stanford building, or attached to an endowed professorship, but over the years he was one of the most significant fund-raisers in the law school's history. As a trustee of the Joseph B. Gould Foundation, Tritt helped direct more than \$6 million to Stanford Law School. The result was the Martin Daniel Gould Center for Conflict Resolution Programs.

Tritt passed away in December 2004, but his passion for the law school continues in his memory: the Gould Foundation, along with current and retired partners from O'Melveny & Myers LLP—Tritt's firm for over five decades—have pledged more than \$300,000 to establish the Clyde E. Tritt Scholarship. It will award one student about \$15,000 each year.

"Clyde Tritt was a great friend of Stanford Law School," said Larry Kramer, Richard E. Lang Professor of Law and Dean. "We're deeply grateful that his friends and associates chose to honor his memory with this scholarship. It will go a long way toward helping deserving students attend the school."

Tritt's widow, Jane Tritt, said that her husband felt privileged to have gone to Stanford, and for that reason he wanted to support the school. "Everything he was involved with he contributed to," she said. "He was just a giving person."

During his career at O'Melveny, Tritt represented such notable clients as 1940s movie star Gene Autry and Washington Redskins owner Jack Kent Cooke. Another client was the late Joseph Gould, an entrepreneur who invested in oil. Tritt helped Gould set up a foundation and served as a board member from its inception in 1987 until Tritt's death last year.

David Watts, a board member of the Gould Foundation and a former partner at O'Melveny, described Tritt as "extremely confident. . . . That was a trait that made him very effective as a lawyer."

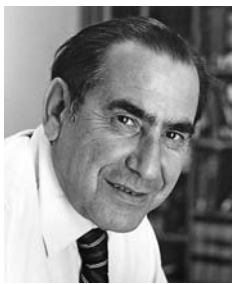
The Martin Daniel Gould Center, named for Joseph Gould's son, who died in 1951, is housed in a historic building that suffered damage in the 1989 Loma Prieta earthquake. The foundation's gifts refurbished the building and underwrites its teaching. Eighty percent of Stanford law stu-



dents take a class at the Gould Center, where they learn to help clients resolve disputes of all kinds, from business contracts to international treaties.

Carolyn Dirks, Joseph Gould's daughter, said that the foundation decided to support the conflict resolution program because "We thought it was a wonderful program and we wanted to be a part of it. There's hardly anything more important than conflict resolution."

As to which school should receive the scholarship endowment, "Stanford was always on the top of his list," said former Secretary of State Warren Christopher '49, partner at O'Melveny. "It is more than appropriate that a scholarship fund be established in his name."—*Mandy Erickson*



## FORMER STANFORD LAW LIBRARIAN DEAD AT 85

**J. Myron Jacobstein, Stanford law librarian and professor of law, emeritus, died after a long illness on March 25 at the Reutlinger Community for Jewish Living in Danville, California. He was 85 years old. A member of the Stanford faculty since 1963, Jacobstein was**

**a popular librarian credited with establishing the Robert Crown Law Library at Stanford Law School.**

**"Mike was the pioneer in creating Stanford's law library," said Larry Kramer, Richard E. Lang Professor of Law and Dean. "Although the number of volumes in the library tripled under Mike's leadership, he was not simply concerned with its size. He created an atmosphere dedicated to service and people."**

**Jacobstein was an influential scholar on legal bibliography. His numerous books and articles include the *Fundamentals of Legal Research* and *The Rejected: Sketches of the 26 Men Nominated for the Supreme Court but Not Confirmed by the Senate*, both of which he coauthored with Roy M. Mersky. Jacobstein was also the recipient of the American Association of Law Libraries Distinguished Service Award in 1987, in recognition of his lifetime contribution to law librarianship and to the association.**

**"Mr. Jacobstein was a true giant in the field of law librarianship," said Paul Lomio, newly named director of Stanford's Robert Crown Law Library. "He led the profession in many ways and was a brilliant visionary. He was also funny, warm, kind, caring, and the gentlest of men." Jacobstein is survived by his wife, Belle; his children, Bennett and Ellen; and three grandchildren.**

## ASIAN AMERICAN ALUMNI CELEBRATE

Twenty years after graduating from Stanford Law School, Carol Lam '85 had no idea how much had changed. "When I heard that the school wanted to start an Asian alumni association," Lam joked, "I thought, 'That's great, but do you really want an alumni association with only seven people?'"

During the decade Lam attended Stanford, the law school produced 37 Asian American graduates. In the last 10 years, 228 have graduated—a difference that prompted Lam to feel "like Rip Van Winkle." Speaking at the association's launch in April, Lam, U.S. attorney for the Southern District of California, added that at law schools in the early 1980s, Asians "were viewed as oddities, as people who couldn't cut it in science. Today, it is an entirely different world."

About 100 Asian and Pacific Islander American lawyers and lawyers-in-training—whose association with the school spans 60 years—gathered in Frances C. Arrillaga Alumni Center in April to celebrate the launch of the Stanford Law School Asian Pacific American Alumni Association. They sipped wine, sampled appetizers and desserts, visited with old friends, and heard from a number of fellow alumni.

Ivan Fong '87, chairman of the

association, said that the goals of the new organization are to increase Asian and Pacific Islander graduates' involvement with the law school and to provide mentoring for new graduates and students. "One valuable asset that's often overlooked are the alumni," he said. "At the same time, our alumni are more diverse. This organization came about because of the confluence of these two factors. We exist to bring together Asian Pacific Americans of the



Hon. Delbert Wong '48, the law school's first Asian American graduate

law school—not only to reconnect to the school but to share experiences."

Hon. Delbert Wong '48, who works as a private judge since retiring from the Los Angeles Superior Court, said that although he was Stanford's first Asian American law graduate, he never



Hon. Carol Lam '85, U.S. attorney for the Southern District of California

felt out of place on the Farm. In the 1940s, when he returned from Europe where he had been a U.S. Air Force navigator during World War II, he was just another veteran seeking an education. "At the time, it really didn't occur to me that I was a minority," he said.

Wong realized what an anomaly he was only after graduating. In the 1950s, when he was trying cases as deputy attorney general in Sacramento, the handful of Chinese American lawyers in California were mostly doing immigration work in San Francisco. "Most people had never seen an Asian American lawyer," he said, adding that when one attorney told him he spoke "pretty good English," he responded, "So do you!" Wong's enrollment at Stanford wasn't the only—or even the most significant—trailblazing of his career: in 1959, he became the first Chinese American judge in the continental United States.

The law school launched the Asian Pacific American Alumni Association as part of a series of alumni associations for minority graduates. It kicked off the Latino Alumni Association in November 2003 and started the Black Alumni Association in May 2004. The school plans to launch a Native American alumni association this fall. Minorities comprised 34 percent of the law school's 514 students this year.

—Mandy Erickson

Members of the Asian Pacific American Alumni Association steering committee (left to right): Anthony Kikuta '95, Reuben Chen '03, Leslie Hatamiya '97 (BA '90), Carey Chern '93, Hon. Delbert Wong '48, Ulysses Hui '00, George Yamasaki, Jr. '59 (BA '57), Hon. Carol Lam '85, Ivan Fong '87, and Janet Lee '90.





## MAKING THE GRADE

**KUDOS:** In March, **Michael J. Klarman '83**, professor of law and history at the University of Virginia, was awarded the Bancroft Prize for his book, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*. The Bancroft Prize is one of the most prestigious awards for historians. **Jenny S. Martinez**, assistant professor of law, has received the 2004 Staige D. Blackford Prize for Nonfiction from the *Virginia Quarterly Review* for her essay in the magazine titled, "José Padilla and the War on Rights." Martinez argued the *Padilla* case before the United States Supreme Court last spring. On a lighter note, *Oldman's Guide to Outsmarting Wine: 108 Ingenious Shortcuts to Navigate the World of Wine with Confidence and Style*, by **Mark Oldman '98 (BA '91, MA '93)**, has been named the Georgese Duboeuf Wine Book of the Year. The prize was a jeroboam of Georges Duboeuf Beaujolais Nouveau 2004.

**APPOINTMENTS & ELECTIONS:** In April, **Steven Lowenthal '82** was appointed chairman of the San Francisco law firm Farella Braun + Martel LLP. **Bryant Garth '75** has been named dean of Southwestern University School of Law, effective in July. He takes the helm at the Los Angeles law school after serving as director of the American Bar Foundation, a nonprofit center established by the American Bar Association. **Leslie T. Hatamiya '97 (BA '90)** has been named executive director of the Foundation of the State Bar of California. **Michele Alexander '92**, associate professor of law (teaching), has been named a 2005 Soros Justice Fellow by the Open Society Institute, one of 18 fellows nationwide. She is using her grant to complete a book on incarceration and racial justice. In February, **Lawrence Lessig**, C. Wendell and Edith M. Carlsmith Professor of Law, was appointed a member of the board of directors of the Software Freedom Law Center, a New York organization that promotes open source software. In April, U.S. Supreme Court Chief Justice **William H. Rehnquist '52 (BA '48, MA '48)** was elected a fellow of the American Academy of Arts and Sciences. In March, **Ann Alpers '89** was appointed president and CEO of the S.H. Cowell Foundation.

**THE PRESS ANOINTS:** The January/February issue of *Legal Affairs* asked its readers who America's top 20 legal thinkers are. The winners of the poll included U.S. Supreme Court Associate Justice **Sandra Day O'Connor '52 (BA '50)**, U.S. Supreme Court Chief Justice **William H. Rehnquist '52 (BA '48, MA '48)**, *Slate* senior editor **Dahlia Lithwick '96**, and **Lawrence Lessig**, C. Wendell and Edith M. Carlsmith Professor of Law. In April, *Time* named **Robert Klein '70 (BA '67)**, who spearheaded California's stem cell research voter initiative, to its list of the 100 most influential people in the world in 2005. *California Lawyer* has named **Christopher Ho '87**, senior staff attorney with San Francisco's Legal Aid Society Employment Law Center, and **James Terence O'Malley '75**, a partner at DLA Piper Rudnick Gray Cary, recipients of its California Lawyer of the Year awards for 2004. The February issue of *Black Enterprise* named **Clarence Otis, Jr. '80**, the CEO of Darden Restaurants Inc., one of the 75 most powerful African Americans in corporate America. *Legal Times* has named **William Baer '75**, a partner at Arnold & Porter LLP, one of the top 12 antitrust lawyers in the United States. In March, the *Daily Journal* named **Orly Degani '94**, an attorney at Sedgwick, Detert, Moran & Arnold LLP, to its list of California's best young lawyers, the "Top 20 Under 40." **Zoe Ann Shaub '59**, is listed in the new book *The First 50 Women in Idaho Law*.

## ALUMNUS JOINS FACULTY

**NORMAN W. SPAULDING '97** joined the Stanford law faculty this summer as professor of law and John A. Wilson Distinguished Faculty Scholar. He had been professor of law at the University of California at Berkeley School of Law (Boalt Hall). Spaulding was recently awarded the 2004 Outstanding Scholarly Paper Prize by the Association of American Law Schools for his article, "Constitution as Counter-Monument: Federalism, Reconstruction and the Problem of Collective Memory." This is the top prize given out by the AALS for a paper written by a law professor who has been teaching seven years or less.



PHOTO: JIM BLOCK

## ALUMNA AWARDED PRIZE

**ALEXANDRA NATAPOFF '95**, associate professor of law, Loyola Law School, was awarded the 2004 Outstanding Scholarship Award by the Association of American Law Schools Criminal Justice Section for her paper, "In a Missing Voice: The Silencing of Criminal Defendants."



## ETHICS CENTER LAUNCHED

**Deborah L. Rhode**, Ernest W. McFarland Professor of Law, is the director of the new Stanford Center on Ethics. Rhode (left) moderated a panel at the center's February Moral Leadership Conference, which featured Stanford president emeritus **Donald Kennedy** (center) and president **John Hennessy** (right).



PHOTO: JAMES LOCUS



# Taking Clinical Education to the Next Level



Larry Marshall, one of the nation's top clinical law professors, recently joined the law school faculty—charged with turning the clinical program into one of the best and most innovative in the country.

BY THERESA JOHNSTON

**I**t was in the fall of 1990, just before the Jewish Day of Atonement, that Rolando Cruz came into Lawrence C. Marshall's life. Cruz had been sentenced to death for the 1983 rape and murder of a 10-year-old girl, and some lawyers were asking Marshall to take on his appeal. At the time, Marshall was a young professor at Northwestern University School of Law. "I was not yet tenured and had a heavy publication schedule," he says now.

But as he listened to the well-known passage in the Yom Kippur liturgy—the part that asks, “Who shall live and who shall die” in the year to come?—Marshall remembered thinking, “How can I turn this guy down?”

At the time, Marshall had developed certain views about capital punishment. He believed that it was applied in an arbitrary and racist manner and that the typical quality of trial counsel in death cases was dismal. But like many people, he tended to believe that people on death row almost certainly committed the crimes for which they were convicted. “The Cruz case just shocked me,” he said, “because it was clear to me that there was no way this man was guilty. The evidence was so paltry.”

As the appeal picked up steam, law students at Northwestern volunteered to help Marshall by interviewing witnesses, conducting research, and writing drafts. Cruz finally was freed—more than five years after Marshall became involved—after a sheriff’s deputy admitted that he was in Florida at a time when he had earlier testified he had heard incriminating evidence in Illinois. DNA evidence later showed another man committed the crime.

Marshall and his students soon took on the cases of other wrongly convicted Illinois death row inmates, freeing many over the next 14 years and creating one of the most successful clinics in legal education. Their efforts made national headlines and threw Marshall into a dizzying round of television appearances.

When then Illinois Governor George Ryan made his highly publicized speech commuting the sentences of all prisoners on the state’s death row in 2003, he cited Marshall as one of his chief sources of inspiration. “Larry,” he says now, “helped me see the light.”

Earlier this year, Marshall left Northwestern for Stanford Law School, bringing with him all the energy, passion, and commitment that was so evident in his death penalty work. Now, as professor of law and David and Stephanie Mills Director of Clinical Education, Marshall is on an ambitious mission: to make Stanford Law School’s growing clinical program the best in the United States.

Within the next two years, he hopes, Stanford will be able to provide a quality clinical experience for every law student who wants one. Ultimately, Marshall would like Stanford to be the first top university in the nation to require hands-on training for all its future lawyers.

Sitting in his office in the basement of Stanford Law School, Marshall, 46, is surrounded by souvenirs of his high-profile career, including an autographed photo of U.S. Supreme Court Justice John Paul Stevens, for whom he clerked, and a framed copy of the 1995 *Chicago Tribune* front page announcing Cruz’s exoneration. Marshall knows that building on that success at Stanford won’t be easy—the

school’s clinical program doesn’t even yet rank in *U.S. News & World Report*’s top 30. He understands that supervising students on complex pro bono cases will demand greater resources and face time from Stanford faculty than traditional teaching requires. Yet as he sees it, law schools, like medical schools, have an obligation to provide students with opportunities to integrate what they have learned in the classroom into the realities of practice, under the intense guidance of clinical faculty.

As the genial, bearded scholar explained, “It’s a unique educational experience for a student to watch the progress of a case from the beginning to the end, and it’s a remarkable inspiration for students to recognize the power that they have as lawyers. I’m not going to say that the panacea for all the legal system’s problems is clinical education. But one commonality that all lawyers have is that they’ve been through law school. And that creates a real responsibility for us to find devices to inspire our students about how glorious a profession law can be.”

## RELEVANT EDUCATION

American law schools began to launch clinics in significant numbers in the 1960s, as students demanded more relevant courses and the War on Poverty provided the first federally funded support of legal assistance to the poor. The idea, wrote Daphne Eviatar in the November/December 2002 issue of *Legal Affairs*, “was to teach law students the basics of legal practice by having them handle cases for low-income clients. Under a seasoned lawyer’s supervision, students would represent, say, a tenant fighting an eviction notice or a disabled person filing for Social Security benefits. The cases were about solving someone’s run-of-the mill legal problem, not making headlines.”

During the 1970s and 1980s, clinics mushroomed across the United States and became increasingly popular with students. “Yet they remained at the margins of the legal academy,” Eviatar wrote. Clinical professors—mostly longtime legal aid lawyers who had come to academia after decades in housing, family, or criminal court—were “suspect in the eyes of many academic professors, some of whom practiced little or no law themselves.” Said Wallace Mlyniec, associate dean of clinical legal studies at Georgetown University Law Center, in that same article: “The assumption was always that [clinicians] couldn’t compete with the academic rigor of the rest of the faculty.”

As law school applications dipped in the mid-1990s and rankings pressure mounted, some law schools began to rethink their attitudes toward clinical education. The movement got a boost with the publication of an American Bar Association paper known as the McCrate report. It concluded that much of American legal education was badly out



PHOTO: STEVE CASTILLO

**Lawrence C. Marshall, professor of law and David and Stephanie Mills Director of Clinical Education (right), talking about the clinical program with (left to right) Steven Horton '07, Roshan Shah '07, and T. Preston Bottomy '07.**

of touch with the profession and that law schools weren't teaching students essential skills and values. Today, Eviatar wrote, almost all of the 182 U.S. law schools offer in-house clinics, which are staffed by more than 1,400 instructors and generate around 3 million hours of volunteer student legal work each year.

Stanford first began offering clinical opportunities to complement its regular curriculum during the 1970s under the guidance of law professor Anthony G. Amsterdam. After Amsterdam left for New York University School of Law in 1981, Stanford students participated in a variety of clinics through the East Palo Alto Community Law Project, an independent nonprofit organization launched by Stanford law students that provided legal services to the poor of East Palo Alto and east Menlo Park.

More recently, under the direction of David Mills, senior lecturer in law and then director of clinical education, Stanford launched several in-house clinics taught by full-time faculty. As Kathleen M. Sullivan, Stanley Morrison Professor of Law and former dean, explained, "Previously, we relied on lecturers and adjuncts to give students hands-on clinical training. Launching a full-time clinical faculty consisting of great litigators who also shared deep intellectual interests and passions with the tenure-line faculty was a bold new step for Stanford."

Currently, about 60 percent of Stanford law students participate in one of seven clinics during their three years at the law school. They include the Stanford Community Law Clinic—an in-house version of the original nonprofit Law Project that provides legal assistance to low-income Bay Area clients—and a criminal prosecution clinic in which students work under the guidance of a professor and experienced prosecutors from the Santa Clara County District Attorney's Office.

Other clinics deal with cyberlaw, education, the environment, and Supreme Court litigation; earlier this year, the law school added an immigrants' rights clinic to the list. (Each of the seven clinics is profiled at the end of this article.) Before long, Marshall hopes to develop a transactional law clinic that will give students practice helping small business entrepreneurs and nonprofit organizations, and an intellectual property clinic to take advantage of the law school's Silicon Valley location and strong faculty presence in that field of the law.

Pamela S. Karlan, Kenneth and Harle Montgomery Professor of Public Interest Law and codirector of the Supreme Court Litigation Clinic, is one of many Stanford faculty and students who are thrilled by Marshall's permanent appointment, which she calls "a real coup" for the law school. "Larry is not only an experienced and creative thinker about clinical teaching issues, but also a first-rate constitutional law scholar and Supreme Court watcher," she said. "Everyone I've talked to—both within and outside Stanford, students and faculty alike—thinks he's a great addition to the faculty."

Larry Kramer, Richard E. Lang Professor of Law and Dean, agreed, calling Marshall "a highly respected traditional academic" who is also one of the nation's leading clinical teachers. Under Marshall's new leadership, Kramer said confidently, "we believe we can create a clinical program unlike any other in the country—a program whose quality and reputation matches that of the school generally."

Soon, the clinics will have renovated office space to facilitate their functions. One of the first things Marshall did after taking over the program was to sit down with an architect. Most of the school's clinics are hidden behind office doors along an antiseptic white hallway in the law school basement, and the student workspace is furnished with mismatched hand-me-downs.

Marshall envisioned something better—a high-tech, professionally furnished "mini-law firm" where Stanford law students could greet and interview their clients, discuss strategy with their professors and peers, and write up case briefs and court petitions.

The resulting basement renovation, to be completed this fall, will be more than an exercise in tasteful office decor. "We want to make the statement, both symbolically and actually, that clinics are not some collateral sideshow, but are an integral part of what Stanford Law School is," Marshall said. "And if we're going to build world-class clinics, we need world-class space."

## MENTOR AND TEACHER

Unlike many of his clinical colleagues, Marshall didn't start off his career as an attorney working in the legal trenches.



The Boston native spent his undergraduate years in Israel at a small yeshiva. Then he returned to Boston and worked for a nonprofit agency that brought foreign patients to the city for specialized health care. After graduating first in Northwestern's law class of 1985, he went straight into clerkships for Patricia Wald of the United States Court of Appeals for the District of Columbia Circuit, and for Justice Stevens.

Recruited back to Northwestern in 1987, Marshall started out as a "completely conventional stand-up teacher" offering popular courses in civil and criminal procedure, constitutional law, federal jurisdiction, legal ethics, and appellate practice. "I was producing law review articles and writing and teaching, and enjoying that greatly," he recalled, "but at the same time, I felt it was really important to have at least a finger, if not a hand, in practice, so I could teach my students the realities of what it means to be a lawyer. Being involved in practice also allowed me to show them I embrace the practice of law, and believe it to be an area in which great satisfaction can be had."

By 1990, Marshall had begun working on cases with the Chicago law firm of Mayer, Brown & Platt, then the premiere Supreme Court and appellate group in the country. That's when he got involved in the Rolando Cruz case. Later, another Illinois death row inmate named Gary Gauger wrote asking if Marshall and his students could help with his case, too.

Gauger, a laid-back organic farmer, had been convicted of murdering his parents in 1993 on the family farm in Richmond, Illinois. After the crime, police questioned Gauger for 18 hours without a lawyer, until he blurted out that it was possible he might have committed the murders during a mental blackout. Again, Marshall and his clinical students agreed to take the case, and again their client was exonerated. Federal agents ultimately caught the real killers: two members of a motorcycle gang who killed the couple during a botched robbery.

Today, Gauger is happily married and back on the farm, breeding heirloom tomatoes. He speaks for many when he calls Marshall "a great example of what a human being should do with their life." Before Marshall took his case, Gauger said in a telephone interview from Illinois, "I was really burned out and turned off by lawyers. I'd had two bad attorneys who were just in it for the money. Larry taught me that not all lawyers are shysters."

Students are still chipping away at the death penalty, one case at a time, at Northwestern's Center on Wrongful Convictions, the clinic Marshall founded in 1999. One of his former students, Alais Griffin, called Marshall "an incredible mentor and teacher" who provided her with a model of what a lawyer should be in any specialty. "He told us that

as we read cases in our textbooks to learn various propositions of law, we should always remember that these were cases that involved real people who cared deeply about the outcomes," said Griffin, now a fourth-year associate in the Chicago law firm of Goldberg Kohn Bell Black Rosenbloom & Moritz, Ltd. Northwestern law dean David Van Zandt echoed the sentiment. "He's an excellent classroom teacher and Stanford's lucky to get him," Van Zandt said.

## CONSTANT MOTION

Since moving to Stanford as a visiting professor last year with his family—Marshall's wife, Michelle Oberman, who teaches at Santa Clara University School of Law, and two of his five children (three are grown)—Marshall has been in a constant state of motion. During a recent informational dinner in the law school student lounge, he worked the crowd relentlessly, spreading the word about clinical education to a curious, standing-room-only audience of law students. Even though few are aiming at careers in public service, he told them, "We want you to be exposed to what you can do with your law license and your immense talents, because the world and community need you, and because we're convinced that involving yourself in the needs of the underserved is going to make you happier, better lawyers."

Marshall is often asked why law students should enroll in clinics if they're going to be practicing their whole lives. "The answer," he said, "is that if clinics were simply giving students a fast-forward preview of what they will be doing for 50 years in practice, then we'd have no right to be part of an educational institution. But what our clinics are doing is creating an essential bridge between the class-



**Jayashri Srikantiah, associate professor of law (teaching) and director of the Immigrants' Rights Clinic, welcoming guests at the March 8 reception celebrating the launch of that clinic.**

room—where you have a lot of theory but necessarily not a lot of real world context—and the world of practice, where you won't have the time or opportunity to reflect, to dissect, and to think about the theoretical implications of what you're doing."

Stanford's Youth and Education Law Clinic is a case in point. Founded in 2001, it gives as many as 14 students each semester the chance to work for academic credit on a variety of educational rights and reform cases, including direct representation of youth and families in special education and school discipline matters, community outreach and education, school reform litigation, and policy research and advocacy.

Students are assigned their own cases and work in teams of two, meeting frequently with clinic director William Koski (PhD '03), associate professor of law (teaching), for guidance. Once a week, the whole class meets to review the cases, reflect on the experiences of the past week, and discuss the finer points of education law.

At one late afternoon session, students in the clinic gather around a conference table to talk about their young clients. Gabriel Soledad '05 and his partner Kamali Willett '06 are trying to help an emotionally disabled local high school student who has been disciplined for an incident involving use of the Internet, but they aren't sure what to say in their demand letter to the school district.

Koski suggests some wording and puts some sample letters up on the overhead. But Soledad, a law student from El Paso, Texas, is troubled by a deeper question: Sure, they may eventually get this low-income Latino student back into school with the help he needs. But doesn't a lawyer also have an obligation to make sure the kid actually learns something from the experience?

The question sparks a thoughtful exchange. One student insists that behavioral counseling is not the best use of a lawyer's time. Another says she would focus on warning the young person about the legal consequences of future misbehavior. "I've struggled with this, too," Koski says. Once, he even asked a kid to sign a contract promising that he'd check back with him at regular intervals after the case ended. "It was a miserable failure," he says, to laughter. "A year later I saw him riding his bike in East Palo Alto. He just waved."

Later, in his office, Koski reflected on the lively classroom discussion. "In my mind, that's exactly what clinics are supposed to do—to give students the space to be reflective and think about their lawyering and really meld those bigger, broader ideas into practice. These students are the cream of the crop, so there's always a very insightful conversation."

Many alumni say working in the Stanford clinics was the capstone of their legal education. David Gonzalez '99 was enrolled in the Criminal Prosecution Clinic during his



PHOTO: JOE NETO

**William Koski (PhD '03), associate professor of law (teaching) and director of the Youth and Education Law Clinic, discussing a case with clinic students Bryn Martyna '05 (left) and Sara Pappas '05.**

third year of law school. Today he and his wife run their own small criminal defense firm in Austin, Texas. He finds that job candidates who come to his office with clinical experience have a 6- to 12-month advantage over those who don't. Looking back, he said, "The best part of the clinical experience was working with a group of students and a professor to process fact scenarios, legal arguments, and ethical quandaries. I have never been a big fan of group projects or collaborative learning, but it wasn't until I was out on my own that I realized how important it is to have someone to bounce ideas off of or discuss case strategy with."

Marshall confesses that when he first came to Stanford last year as a visiting professor, he didn't think he would stay. "I was so entrenched in Illinois," he explained, "with a community and friends I loved, that in order for me to stay it was going to take an extraordinary sense that this was a once-in-a-lifetime opportunity to be part of something very substantial." But the energy he's felt since then—from the dean, faculty, and students—has persuaded him that "the stars are aligned, and Stanford is on the cusp of becoming a true leader in clinical education."

He smiles and props his feet up on the desk. "I remember one day, maybe a week into my arrival, I made a phone call to someone in the law school asking for a clinic phone number, and the person said, 'I think you have the wrong number. Don't you want the Stanford Medical School?' My dream is that 20 years from now, someone will call up the medical school looking for a clinic. And the person on the other end will ask, 'Don't you want Stanford Law School?'" ■

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*Theresa Johnston (BA '83) is a freelance writer in Palo Alto, California, and a frequent contributor to Stanford publications.*

## Youth and Education Law Clinic

Director: **William Koski (PhD '03)**

Year Founded: **2001**

Number of students per semester:  
**8 to 14**

What it does: **Conducts educational rights and reform work, including direct representation of youth and families in special education and school discipline matters, community outreach and education, school reform litigation, policy research, and advocacy.**

MID-MARCH WAS A TIME FOR CELEBRATION at Stanford Law School's Youth and Education Law Clinic. Students in the program had been working for months with attorneys from Pillsbury Winthrop Shaw Pittman LLP and Legal Service for Children, Inc. on a class-action suit against the Berkeley (California) Unified School District alleging that it had wrongfully removed three minority teenagers from the city's sole high school without proper hearings.

In an out-of-court settlement, the district agreed to revamp its school discipline procedures to ensure fair hearings in the future, let all wrongfully excluded youths return to school immediately, offered counseling and tutoring to help them make up for lost time, and said it would create a plan to reduce the disproportionate number of African-American and Latino students recommended for disciplinary actions.

"I am very pleased with the settlement," the plaintiff's mother Lugertha Smith told the press, "because it not only affects my son, but it will prevent other students from being mistreated in the future."

According to clinic director William Koski (PhD '03), associate professor of law (teaching), the Berkeley suit is just one of a string of interesting advocacy projects and individual cases that students have taken on since the clinic's founding in 2001. Last year, students collected data and conducted local case studies to assess the delivery of mental health services in the California education system. The resulting report influenced the passage of Senate Bill 1895, which mandates better tracking of youngsters with disabilities.

Other students have been trying to help a student Koski refers to as Brian (not his real name), a smart second grader who had a number of behavioral problems stemming from Asperger's syndrome, a form of autism. Rather than providing appropriate

behavioral interventions, Brian's school obtained a judicial restraining order against him to keep him out of school. With the assistance of the clinic and through extensive advocacy and mediation, Brian has been placed in an appropriate educational setting to receive the support he needs.

As Koski explained, "Students working on Brian's case have had an opportunity to do just about everything that a lawyer's going to do, including client counseling, intensive document review, intensive legal research, drafting of pleadings, organization of exhibits for trial, and formal mediation." But he thinks the greatest skill they take from the clinic is something intangible: better professional judgment.

Gabriel Soledad, a third-year law student from El Paso, Texas, calls his time in the clinic "an incredibly rewarding experience" that has satisfied both his desire to learn more about the education system and his sincere wish to help the disadvantaged. "It has forced me to face difficult issues," he added. "Regardless of whether I remain a lawyer or choose to pursue policy solutions to these important issues, the experience I have had in this clinic will be instructive in my thinking."

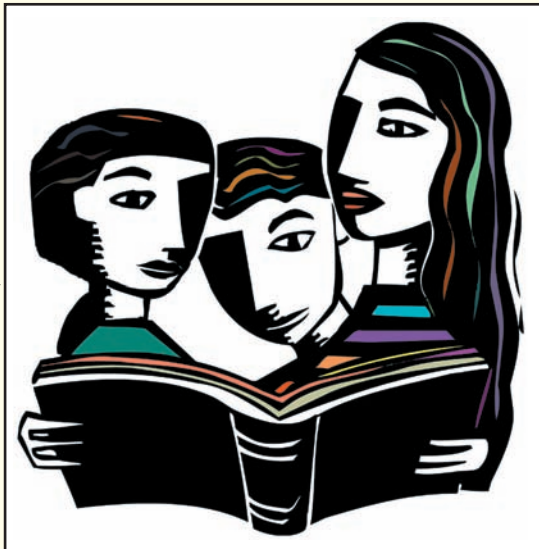


ILLUSTRATION: JIM DANDY © ROYALTY-FREE/CORBIS



## Immigrants' Rights Clinic

Director: **Jayashri Srikantiah**

Year founded: **2005**

Number of students per semester:  
**8 to 10**

What it does: **Represents immigrants in deportation proceedings, cases securing rights for immigrant survivors of domestic violence, community outreach, public education, and policy advocacy.**

SONYA SANCHEZ '06 ISN'T A LAWYER YET. But thanks to Stanford's new Immigrants' Rights Clinic, she is already helping two poor immigrant clients—one from Mexico and the other from Eastern Europe. Both women fled abusive husbands and need Sanchez's free legal assistance to maintain their residency in the United States. "I feel very comfortable with these types of clients," said Sanchez, a New Mexico native who previously advocated for Native American domestic violence survivors in her home state. "It's rewarding to be able to work with such strong women and feel that maybe I can do something to empower them."

To prepare to argue their cases, students in the Immigrants' Rights Clinic interview clients and witnesses, investigate facts, write pleadings, develop strategies, and conduct their own legal research. Some, like Sanchez, are working to secure rights for local immigrant survivors of domestic violence under portions of the Violence Against Women Act passed by Congress in 2000. Others are representing immigrants who face deportation proceedings because of very old or minor criminal convictions.

According to clinic director Jayashri Srikantiah, associate professor of law (teaching), the need for such services is great—particularly in California's San Mateo and Santa Clara counties, where about one-third of the population is foreign-born. "In terms of deportation defense, there are almost no organizations that provide pro bono services, so we really are serving almost a desperate need," said the India-born Srikantiah. "Unlike criminal defendants, immigrants in deportation proceedings are not entitled to free court-appointed lawyers, so they just end up representing themselves. It's often a really sad situation."

In addition to representing clients referred by local immigration agencies, clinic students attend seminars on immigration law and do advocacy work on behalf of local immigrants' rights organizations. Sanchez is busy working on a feasibility assessment for an on-site law project at Next Door, a Santa Clara County agency working with victims of domestic violence. Several students are looking

into prison conditions for immigrant detainees in Northern California.

Two others, Yulia Garteiser '06 and Nicholas Jabbour '05, have been working with Srikantiah and Cristina Valadez, a staff attorney for Bay Area Legal Aid, to create a know-your-rights brochure for elderly, blind, or disabled non-citizens who need public assistance. Valadez notes that both students come from immigrant backgrounds, have keen legal research and writing skills, and "have been eager to develop a quality informational packet that will assist clients for years to come." In return, she said, they'll have "the personal satisfaction of helping a very vulnerable and needy subset of the vast low-income immigrant population in the Bay Area."



ILLUSTRATION: RICHARD MORRIS HUNT © IMAGES.COM/CORBIS

## Environmental Law Clinic

Director: **Deborah Sivas '87**

Year founded: **1997**

Number of students per semester:  
**8 to 10**

What it does: **Provides legal counsel to national, regional, and grassroots nonprofit organizations on a variety of environmental issues, with a focus on complex natural resource conservation and biodiversity matters.**

AT JUST 3 CENTIMETERS IN LENGTH, the Asian clam looks harmless. But since its accidental introduction into San Francisco Bay 10 years ago—probably through the ballast tank of a freighter—the voracious little mollusk has been wreaking havoc on the local ecosystem, carpeting the bay floor and sucking up the food sources of young salmon and striped bass. According to Sarah Newkirk of the San Francisco-based Ocean Conservancy, the problem can be traced to an old Environmental Protection Agency loophole that leaves ship discharges virtually unregulated under the Clean Water Act.

“We believe that invasive species are a pollutant,” Newkirk said, “and that ships are a source.” So last year, the Ocean Conservancy and several other nonprofit environmental organizations teamed up with Stanford’s Environmental Law Clinic to challenge the exemption. Students Peter Morgan ’06 and Bethany Davis ’05 wrote the briefs and were responsible for arguing the case at a January hearing in San Francisco’s Federal District Court—heady stuff for such young practitioners.

When the verdict finally came out strongly in their favor last April, it was “more than we ever expected,” said Morgan, who hopes to stay in environmental law after graduation. “The judge [Hon. Susan Y. Illston ’73] found for our clients all the way down the line. What was most exciting for me was to recognize in the judge’s opinion a lot of the language we used in our briefs and our oral arguments.” The government almost certainly will appeal, he added, “but for now this is a huge victory for our clients.”

The clinic represents a wide spectrum of groups, from large national organizations like the Sierra Club, to small, grassroots local groups with names like Voices of the Wetlands, Friends of Hope Valley, and Coastal Alliance on Power Expansion, notes clinic director Deborah Sivas ’87, lecturer in law.

Some of Sivas’s students have been working to protect California coastal estuaries from the impacts of cooling water systems at power plants. Others have been trying to reduce the

number of endangered sea turtles, sea birds, and marine mammals unintentionally captured by gill-net fisheries. One of the clinic’s lawsuits resulted in seasonal closures and changes in fishing gear to protect certain species of fish. Still others are trying to tighten controls on logging discharges and pesticide runoff in irrigation water. Like the highly publicized ballast water case, Sivas said, “Victories in these cases could have nationwide implications for future management of these pollution sources.”



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## Supreme Court Litigation Clinic

Codirectors: **Pamela S. Karlan, Thomas C. Goldstein, and Amy Howe**

Year founded: **2004**

Number of students per semester: **9**

What it does: **Litigates before the Supreme Court of the United States. Cases are selected for their teaching value from a variety of substantive areas.**

STUDENTS IN STANFORD LAW SCHOOL'S Supreme Court Litigation Clinic have a track record that many law firms would envy. The first four petitions for certiorari they drafted after the clinic's inception last year were all granted by the Supreme Court. Among them was *Spector v. Norwegian Cruise Line*, which asked whether the Americans with Disabilities Act applies to foreign-flagged cruise ships.

Working with clinic codirector Thomas C. Goldstein, lecturer in law and partner at Goldstein & Howe, PC, students did intensive research on marine extraterritoriality, and drafted and edited the brief and reply brief for the petitioners. Then, in February, they went to Washington, D.C. "Despite our valiant efforts, we were not asked to do the arguments for the case," joked Nathaniel Garrett '06 to his classmates during a recent clinic information session. (Students are not allowed to appear before the Supreme Court.)

But the students did help Goldstein prepare for his oral argument, met with the court clerk and reporters, and got a real feel for how the High Court operates. Lauren Kofke '06, who also traveled to D.C., said the best part "was definitely the chance to attend the oral argument. It was fascinating to see how the Court worked and how they addressed the case."

In June, the Supreme Court ruled in favor of the clinic's legal position. That's one of the reasons why Stanford law students are queuing up for coveted spots on this clinic's roster. Unlike Stanford's other clinics, which concentrate on particular substantive areas, the Supreme Court program focuses on a single forum. It also has a reputation for being particularly writing-intensive. "We spend a lot of time learning some of the inside baseball of the Court that you might not pick up in a constitutional law course," said codirector Pamela S. Karlan, Kenneth and Harle Montgomery

Professor of Public Interest Law, "and our cases really run the gamut in terms of substantive area."

Other cases the clinic has tackled include *Rousey v. Jacoway*, which asked whether individuals who go bankrupt can retain funds in their individual retirement accounts, and *Smith v. City of Jackson*, which asked that the court expand the rights of older workers to sue for age discrimination. Karlan argued the *Rousey* case before the Supreme Court, and Goldstein argued the *Smith* case. In both instances the Court issued rulings adopting the legal positions advanced by the clinic.

Sharon Samek '87, a Tampa, Florida-based lawyer who worked with clinic students last year on a case involving the federal money laundering conspiracy statute, says Stanford students provided her with new insights into a case that she had been working on for several years. "The ease with which the students picked up some very difficult concepts was amazing," she added. "As a solo practitioner, I get used to my own way of doing things, but working with the incredible Stanford team taught me new ways. I think I will forever be a better appellate advocate as a result of their hard work."

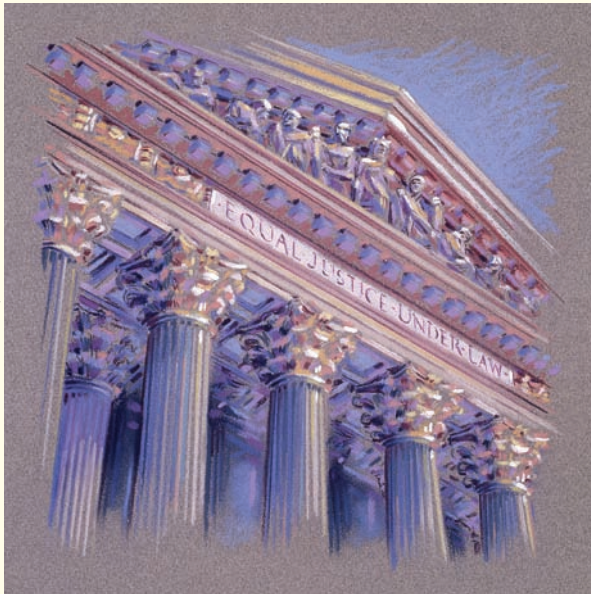


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## Cyberlaw Clinic

Director: **Jennifer Stisa Granick**

Year founded: **2001**

Number of students per semester: **10**

What it does: **Conducts computer- and Internet-related litigation, policy research, and advocacy.**

CYBERLAW CLINIC DIRECTOR JENNIFER STISA GRANICK, executive director of the Center for Internet and Society and lecturer in law, has an unusual thank-you gift sitting in her law school office: a florid pink ceramic pig wearing a yellow vest with the Stanford Law School Frond of Service on its lapel. The present came from a Chinese immigrant client who handcrafts piggybanks and sells them on the Internet. This woman's URL, [www.piggybankofamerica.com](http://www.piggybankofamerica.com), caught the attention of lawyers at that much better-known financial institution, Bank of America, and they threatened to file suit against her for trademark infringement.

But thanks to students in Granick's clinic, Caroline O. (who did not want her last name used) was able to fight the lawsuit. Today, she happily peddles her piggies in peace. "It has been over two years since Bank of America stopped sending me letters," said a relieved Caroline O. "I am very thankful that the Cyberlaw Clinic stood by what is right: protecting small companies."

Students at the Cyberlaw Clinic spend a lot of time thinking about civil liberties and the way they're affected by changes in technology. As Granick explained, "Our cases involve things like free speech, privacy, the right to innovate, and the right to speak anonymously online. We've had cases that

defend fair use and the First Amendment against the expansion of copyright doctrine, and cases where we were working with the ACLU to analyze the provisions of the USA PATRIOT Act and make some determination of whether it has been useful in fighting terrorism, or terrible for privacy and civil liberties."

This semester, one student team is working to defend some cartoonists who posted a Southeast Indian-flavored spoof of *The Simpsons* on their website, much to the annoyance of Fox Television. Another team has filed amicus briefs before the Supreme Court in a case involving the important question of how broadband will be regulated in the future.

Granick says one of the best things about the Cyberlaw Clinic is the opportunity it gives students to practice law in an area without a lot of precedent. James Darrow '06, a student with an interest in intellectual property issues, agrees. "As it turns out, applying old law to the virtual world is very hard, and no one knows how to do it, not even [the instructor] all the time," he said. "It's something we talk a lot about and care a lot about." Darrow said the Cyberlaw Clinic is ideal for any student who's interested "in an extraordinary, very difficult intellectual experience, and spending a lot of time talking about it with smart people." It's also great for students who think they're excellent writers, he said, "because you'll join the clinic and find out you're not really that good." Since he enrolled, he admitted, "my own writing has improved by leaps and bounds."

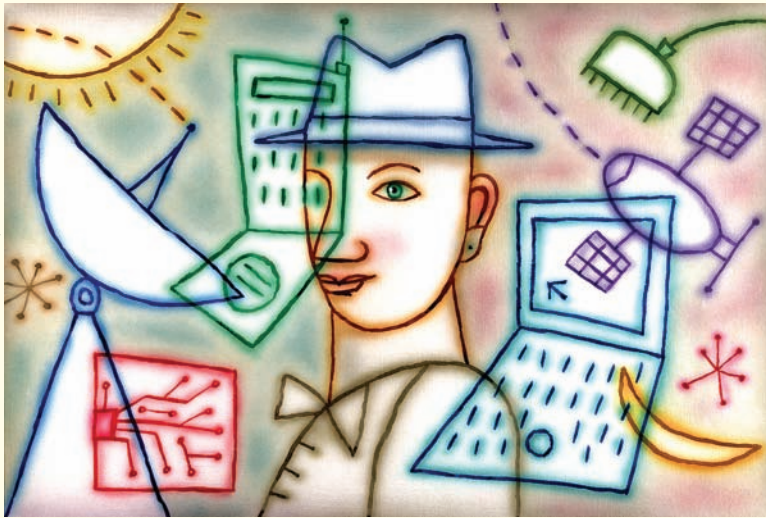


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## Criminal Prosecution Clinic

Codirectors: **George Fisher and Margo Smith '75**

Year founded: **1996**

Number of students per semester: **6 (fall semester only)**

What it does: **Prosecutes cases at the San Jose Superior Court under the guidance of Santa Clara County prosecutors and faculty supervisors.**

STANFORD'S CRIMINAL PROSECUTION CLINIC may be small, but its hardworking students have left a big impression on Santa Clara County District Attorney George Kennedy. "I have interacted with nearly all of the clinic students over the past nine years and have made myself available for informal, candid answers to any questions," he noted. "Having them here is catalytic. . . . I am enormously proud of our association [with Stanford Law School]."

Students in the Criminal Prosecution Clinic learn basic case preparation and courtroom skills on campus in a trial advocacy class, then spend Thursdays and Fridays working on their own cases under the watchful eyes of prosecutors at the DA's office in San Jose, coordinated by longtime prosecutor and clinic

codirector Margo Smith '75. Jennifer Chou '05 likes the prosecution clinic because "unlike school, where we mostly deal with issues of federal law, this is a way of getting down and dirty in the local and state action."

Chou's classmate Cynthia Inda '05 appreciates the close attention she's received. "First, the class is really small, which means you have a lot of opportunity to discuss and exchange ideas with the professor in depth," said Inda. "Second, Professor [George] Fisher sets aside a lot of extra time for us individually. He schedules an hour a week, every week, to meet one on one with each of the students in the clinic. And if any of us has a hearing coming up, he spends even more time with us—even if it means discussing the issues or listening to us practice over the phone late at night on a Sunday!"

According to clinic codirector George Fisher, Judge John Crown Professor of Law, students in the prosecution clinic frequently find themselves confronting ethical issues. Last fall, for example, all six students were assigned cases involving defendants who were trying to have a conviction stricken from their record under the California three strikes law. In several of the cases, the third strike was failing to register as a sex offender. "Most students don't like the three strikes law," he explained, "and most don't like sex offender registration laws either, so this really put them to the test of deciding what they would and would not do."

Fortunately, Fisher added, "The clinic gives students a chance to talk with me about their reactions to the cases they've had. And students help each other with their ethical questions and help each other to come up with solutions." Toward the end of the term,

the classroom focus shifts to an examination and critique of local mechanisms of criminal justice. Among the topics covered: the institutional strengths and weaknesses of the actors in the system, and the impact of race, gender, and class on the quality of justice.

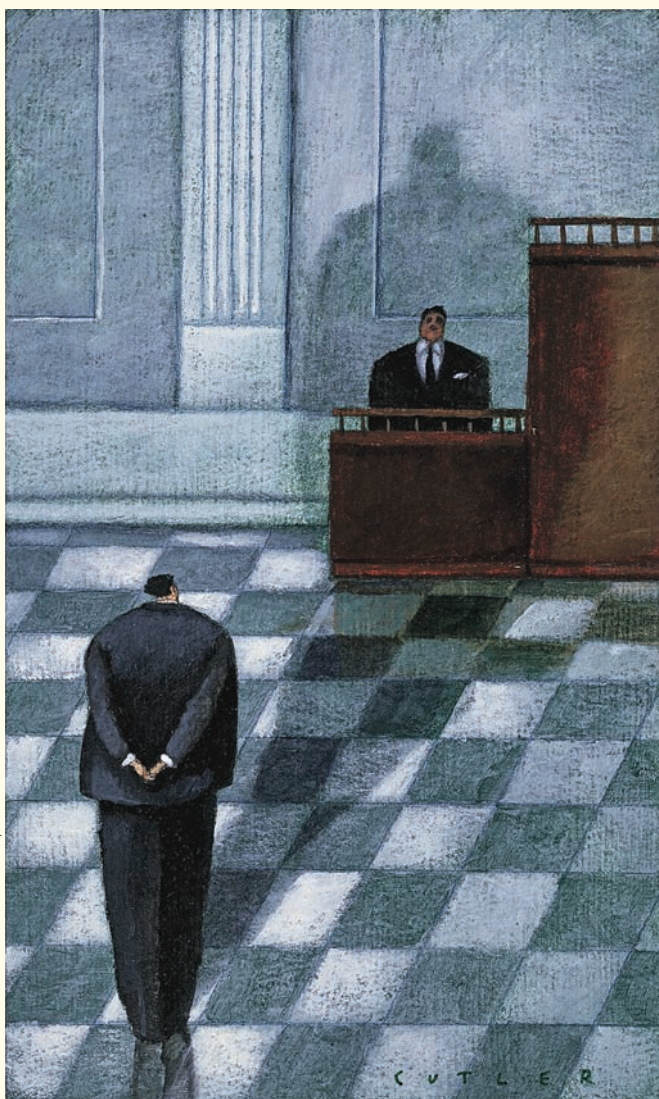


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## Stanford Community Law Clinic

Director: **Peter H. Reid (BA '64)**

Year founded: **2002**

Number of students per semester:  
**18 to 22**

What it does: **Helps low-income clients with landlord-tenant disputes, employment issues, and government benefit claims.**

AS CLAIRE MCCORMACK '05 RECALLS, her first year at Stanford Law School was a bit of a grind. "We'd read, and we'd study, we'd take the tests and learn things," the New York native explained, "but we weren't doing anything with it." Then she enrolled in the Stanford Community Law Clinic on University Avenue in East Palo Alto, where law students earn academic credit while helping low-income mostly Latino and African-American clients.

McCormack found the experience so rewarding that she enrolled again for a second semester—then for a third. "It's definitely been the best experience I've had in law school," said the aspiring prosecutor. "It's just amazing how the little bit of knowledge we law students have—and it's just a little bit—can help people, and what a huge difference we can make."

McCormack's most memorable case involved Mexican day laborers hired for landscaping work. Toiling under the August sun, the men hauled dirt 10 hours a day for 15 days, and all they got was an occasional lunch—no wages. Working under the close supervision of clinic attorney Margaret Stevenson, McCormack attempted to negotiate with the employer for the back pay plus penalties. When that didn't pan out, she helped her Spanish-speaking clients prepare for their day in small claims court.

At first it was frustrating—Nicasio, the eldest worker and de facto spokesman for the group, kept starting in the middle of his story and would skip important details. But after some advice from McCormack, and some practice at home, by the next day "he could tell his story coherently," McCormack recalled proudly. Collecting the judgment took McCormack more months of hard work, but last December, her clients finally got their money. "That was my Christmas present," she said, beaming. "In the end, the system worked for them."

McCormack and other students enrolled in the Community Law Clinic help about 500 clients each year, handling all aspects of their cases from initial interviews through hearing, trial, or other resolution. They're also required to work on projects addressing broader issues that affect the local community, such as unfair business practices in local restaurants and mandatory meal plans in nursing homes.

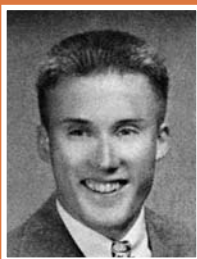
"The students are just incredibly bright, committed, and hard-working," said clinic director Peter H. Reid (BA '64), lecturer in law, who served as executive director of the San Mateo Legal Aid Society for many years. "We learn as much from them as they learn from us." That's good news for people like Marco Cedillo, another Spanish-speaking laborer who received a recent judgment for back wages. As he explains through the clinic interpreter, students working on his case went beyond the call of duty in helping him locate the man who owed him money for his auto detailing work. "I was more than happy," he said, "very satisfied, with the work the students did for me."



ILLUSTRATION: JENNIFER HEWITSON © IMAGES.COM/CORBIS



# ONE-ON-ONE WITH THE CHIEF



**WILLIAM HUBBS REHNQUIST** was born in Milwaukee, Wisconsin, on October 1, 1924. He grew up in a politically conservative household in Shorewood, a Milwaukee suburb. When Rehnquist graduated from high school, World War II was well under way, so he joined the Army Air Corps and served as a weather observer in North Africa. After the war, he attended Stanford University on the GI Bill, earning bachelor's and master's degrees in political science in 1948. Rehnquist went on to Harvard University, where he earned an MA in government, before returning to Stanford to attend law school.

Rehnquist graduated from Stanford Law School in 1952 along with future fellow Supreme Court Justice Sandra Day O'Connor. After graduation, Rehnquist clerked at the U.S. Supreme Court for Justice Robert H. Jackson. In 1953, after completing his clerkship, Rehnquist married Natalie "Nan" Cornell, whom he had met at Stanford. The couple had two daughters and one son.

Rehnquist then took a job with a Phoenix law firm and became active in the Republican party. He was appointed assistant attorney general in Richard Nixon's administration, where one of his responsibilities was to help screen potential Supreme Court candidates. In 1971, at age 47, Rehnquist was nominated to the Supreme Court by President Nixon. He joined the Court on January 7, 1972, the same day as Justice Lewis F. Powell, Jr. When Warren Burger resigned as chief justice in 1986, President Ronald Reagan nominated Rehnquist to the post, a position he has held for the last 19 years.



Photographs of William Rehnquist when he was a student at Stanford University. (Upper left) Rehnquist's senior year photo from the *Stanford Quad* yearbook, 1948. (Upper right) Rehnquist, seated far right, with some of his friends from Encina Hall in 1948. (Lower right) The board of editors of the 1950-51 *Stanford Law Review*. Rehnquist is in the back row, at the far left. Sandra Day O'Connor is in the front row, second from the left.

**O**n a rainy, almost wintry, afternoon in May of this year, Michael Eagan '74 was ushered into the chambers of the chief justice of the United States. Eagan clerked for Justice Rehnquist in the 1976 term, and the two have remained friends ever since. As Rehnquist stood to greet Eagan, "I instinctively remarked about how good he looked," said Eagan. "And he quickly replied with a smile, 'So, did you think I was going to look *bad*?'" The two settled in for an informal conversation about Rehnquist's time at Stanford.

**MIKE EAGAN:** Why did you pick Stanford Law School?

**WILLIAM REHNQUIST:** I'd been back to Harvard for a year at the Graduate School of Government, thinking that I wanted to get a PhD. Then after a year, I decided that wasn't for me. [He was awarded an MA in government from Harvard.] So I took an occupational test that said I should be a lawyer [laughing]. And I'd liked Stanford a lot [as an undergraduate]. To me, Cambridge wasn't nearly as nice a place to go to school in at the time.

I knew you had an interest in government because you received an MA in political science at Stanford. But you weren't really thinking about being a lawyer until you took the test? I think not.

Why did you first decide to go to Stanford as an undergraduate? I grew up in Wisconsin, but when I was in the Air Force, I was stationed in North Africa, where I realized that if you lived in the right place, you didn't have to shovel snow for four months a year. So I sought out a climate in the United States like North Africa to go to school.

And, of course, Stanford had that climate? Yes.

Did the students study quite a bit, or was it more low key? I think pretty much hard work. The first year I was in law school I was a counselor at Menlo Junior College, and the second year I was a resident assistant at Encina. I remember one thing that happened in my first year. Since I was at Menlo College [in nearby Menlo Park], I had to have some way to get back and forth to Stanford. So I bought myself a 1935 Ford. This was in 1949. One day as I was driving along El Camino Real, coming back from law school, the wheel simply came off—not the tire, the wheel. But I managed to get it off the side of the road, get it repaired, and I had that car all through law school.

Did you teach courses in political science at Menlo? No, no. I was just supposed to be there certain evenings to see that they didn't take the roof off the place.

Were you successful? In large part, I think so.

When you say you studied hard, did you work harder than the young men and women do these days? It depended on the person. Basically, the law curriculum came more easily to me than it did to some others. So I probably studied less, but I certainly studied.

When you say it came more easily to you, do you mean the writing or understanding the curriculum? Both.

Were you a good writer in those days? I really don't know. But it seemed easier for me at exam time than it was for some other people.

How old were you when you started law school? I was just about to turn 25.

Were the other students about that age? Some were fresh out of undergrad. I think a majority had seen some service [in the military].

What did you want to do after law school? Did you want to be a litigator? I think so, though I didn't know that much about what lawyers did. I interviewed with a couple of California firms and decided that San Francisco and L.A. were both larger cities than I wanted to live in, so I ended up in Phoenix.

These days, all the law students clamor for summer jobs, certainly between the second and third years, and sometimes between the first and second years. Were there summer jobs in the law back then? If you wanted to work in the summers, you worked construction [laughter]. Law firms didn't take interns then. At least not in California.

So what did you do during the summers? I went to school.

You went straight through law school, and graduated in December, basically two and a half years? Right.

What did you do for fun? I played some tennis, and we would go out at night sometimes for a beer. I'm sure they don't do that anymore.

Were you married in law school, or did you first meet Nan during that time? I met Nan during law school. We got married the year after I graduated.

Where did you live when you were in school? First at Menlo College. Then at Encina. Then I boarded at a Mrs. Allen's house near the campus for one quarter.



PHOTO: JOHN SHERETZ

(Top) William Rehnquist, at the podium, was feted by more than 300 Stanford University faculty and alumni in Washington, D.C., on January 20, 1972, shortly after he was confirmed to the U.S. Supreme Court. (Middle) Rehnquist joined more than 400 Stanford University faculty and alumni in Washington, D.C. on November 17, 1981, to celebrate Sandra Day O'Connor's confirmation to the U.S. Supreme Court; (left to right) Rehnquist, Stanford Law School acting dean J. Keith Mann, O'Connor, and Stanford president Donald Kennedy. (Bottom) Rehnquist spoke with a group of students at the Stanford Law School Board of Visitors meeting in 1983.

**Did you have any favorite courses or favorite professors at Stanford?** I certainly did. Professor John Hurlbut. [For whom the John Bingham Hurlbut Award for Excellence in Teaching is named.] He taught criminal law the first year and evidence the third year. He was just outstanding. I felt that first year generally just enlarged my mind, and he was the one principally responsible for it.

**When you say enlarged your mind, it taught you a new way to think?** Sort of an analytical ability. They say law school sharpens your mind by narrowing it. There's a lot of truth in that.

**Were you friends with Sandra Day O'Connor in those days?** Oh, yeah. She was one of the entering class, but I don't think we really got to know each other until toward the end of the first year. Then I went and visited her at her family's ranch that summer. We dated some in the second year, and then we kind of went different ways.

**Were there study groups back then where people would combine their efforts and study together? Or did everybody pretty much go it alone?** There was one guy with whom I studied regularly the first year. His dad was the manager of Camp Curry [now known as Curry Village] up at Yosemite. We would go up there several weekends in the off season. It was just great. But he was killed in a traffic accident. That was the beginning of second year. So I don't know that I ever resumed studying with any other group.

**Was it difficult to get into the law school when you applied?** After Sandra O'Connor and I had gotten on the Court, a nephew of one of my classmates conducted a survey of how many applications Stanford got in '49, as opposed to how many were admitted. One hundred and fifty were admitted out of 230 applications. So it's almost as if you could write the check . . . [laughing]

**But of the 150, two made it to the United States Supreme Court. That must have been a good 150. It was. It was.**

**Speaking of writing the check, how did you finance law school?** The GI Bill. And when that ran out, I think I got a scholarship, plus I had these resident jobs, and one summer I ran the dining hall at Encina.

**So with the combination of the GI Bill and some jobs, you worked your way through school. Right.**

**Was there such a thing as a student loan back then?** If there were student loans, I never heard about it [laughing].





PHOTO: TOM MCCARTNEY

(Above) The 45th reunion of Stanford Law School's Class of 1952, held in 1997. William Rehnquist is circled in the upper right hand corner. Sandra Day O'Connor is in the front row, fourth from the right. (Below) Rehnquist's official Supreme Court photograph.

But at least you exited law school pretty much debt free. I did.

And did you go right to Phoenix or did you clerk first? I clerked with [Supreme Court Justice Robert H.] Jackson for a year and a half.

That must have been a wonderful experience. It was.

How did you meet Justice Jackson? He came out to Stanford, I think to dedicate the new law school. Phil Neal, who was teaching at Stanford, had clerked for him. Phil [who went on to become dean of the University of Chicago Law School] asked me if I would like to interview with him when he came out. I said, sure. You didn't fly across the country in those days, so you didn't have the opportunity to interview with Supreme Court justices. I interviewed with him, and he said he'd let me know. Come November of 1951, he wrote me and asked if I would come back in February and clerk for him. I said yes.

Any parting thoughts? I just want to express my thanks to Stanford for the legal education that it gave me and the friends that I made. ■

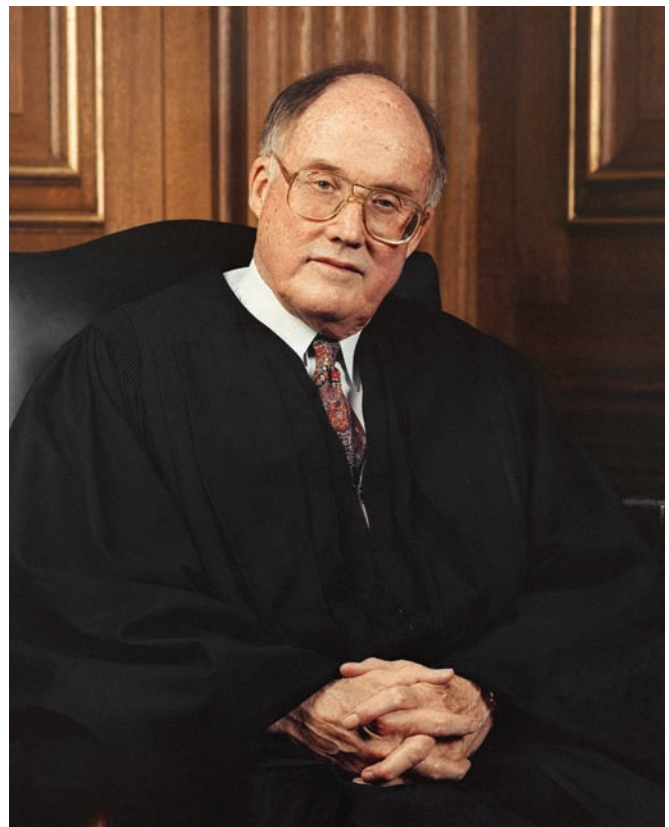


PHOTO: DANE PENLAND, SMITHSONIAN INSTITUTION, COLLECTION, THE SUPREME COURT HISTORICAL SOCIETY.

# THE REHNQUIST COURT

A roundtable discussion on William H. Rehnquist's '52 tenure as chief justice of the United States, featuring five constitutional scholars and Supreme Court practitioners.

**ALAN B. MORRISON**, senior lecturer in law, cofounded the Public Citizen Litigation Group with Ralph Nader in 1972. During his 32 years at Public Citizen, Morrison established a Supreme Court Assistance Project and argued 18 times before the Supreme Court.



**LARRY KRAMER**, Richard E. Lang Professor of Law and Dean, clerked for U.S. Supreme Court Justice William J. Brennan, Jr. in the 1985–86 term. Kramer is the author of *The People Themselves: Popular Constitutionalism and Judicial Review*.



**ROBERT WEISBERG '79**, Edwin E. Huddleson, Jr. Professor of Law, clerked for U.S. Supreme Court Justice Potter Stewart in the 1980–81 term. Weisberg is director of the recently launched Stanford Center for Criminal Justice.



**KATHLEEN M. SULLIVAN**, Stanley Morrison Professor of Law and former dean, has argued many cases before the Supreme Court, most recently *Granholm v. Heald*. She is author of the leading casebook *Constitutional Law*, 15th edition, Foundation Press.



**EUGENE VOLOKH**, professor of law at UCLA, clerked for U.S. Supreme Court Justice Sandra Day O'Connor '52 (BA '50) in the 1993–94 term. Volokh publishes one of the most popular blogs on the Web, *The Volokh Conspiracy*. He was a visiting professor of law at Stanford this past year.

**William H. Rehnquist has had a long association with Stanford University.** He received his bachelor's and master's degrees from Stanford in 1948, and his bachelor of laws degree from the law school in 1952 (along with classmate Sandra Day O'Connor). Despite Rehnquist's affiliation with the law school, we don't have any inside knowledge of the chief's plans. However, it is widely believed that he will step down this summer after the current term comes to a close. Even if Rehnquist stays on, the flurry of debate over the role of the judiciary and the direction of the Supreme Court makes this an opportune time to examine his legacy.

*Stanford Lawyer* gathered an esteemed group of constitutional scholars and Supreme Court practitioners to discuss Rehnquist's 33-year tenure on the Supreme Court, especially his last 19 years as chief. The popular perception is that the Court has moved decidedly to the right under Rehnquist. But the actual record is more mixed.



As this edited transcript of that discussion shows, the chief justice was able to bring his colleagues to his vision of the Constitution in some areas, most notably federalism, but was unable to command a majority of the Court on others, such as affirmative action and gay rights. The panel was moderated by Alan B. Morrison and included Larry Kramer, Kathleen M. Sullivan, Robert Weisberg '79, and Eugene Volokh. (The discussion was held in March at the law school, with Volokh participating by telephone.)

## FEDERALISM

**MORRISON:** There is one area where there can be little doubt of the influence of William Rehnquist on the court, and that is federalism, in particular areas relating to the Commerce Clause, the Tenth Amendment, and Section Five of the Fourteenth Amendment. Larry, can you give us some background about his views both as an associate justice and how he's seen the court change since he became the chief?

**KRAMER:** I think his views on federalism and the proper role of Congress vis-à-vis the states were fully developed when he went on the bench, and I don't think they ever changed a whole lot. It was the Court that changed around him. What changes appear in his ideas were small and were mostly a product of getting other justices to join his opinions. So when *Garcia* overturned *National League of Cities*, he wrote a dissent in effect saying: "Time will tell. It's so obvious that this is wrong." He did everything but attach an actuarial table to say how long Brennan and Marshall were going to still be there.

Similarly, his Eleventh Amendment jurisprudence is pretty much the same today as it was in the beginning. He went to the bench in '72 and wrote *Edelman* in '74. So all that happened was that, eventually, he found other justices on the Court who agreed with his positions. This itself was a reflection of a significant change that occurred in national politics between 1972 and 1994, as the country shifted to the right and became more conservative.

**VOLOKH:** I agree. There's been something of a sea change in the country related to federalism. For me, the best example of that is the Schoolhouse Rock cartoon from the '70s that's become something of a cult item recently—the one about legislation, in which the congressional bill sings "I'm only a bill." I think most people don't focus on what the bill was, which was a requirement that all school buses stop at railroad crossings. It was given as an example of something uncontroversial as a proper federal bill in the '70s, because after all, who's against school buses stopping at railroad crossings?

Today, I think many more people would say "Wait a minute, should Congress be telling local school buses what rules of the road they should be following?" Even if the bill might be constitutional post-*Lopez*, people would at least think more about the federalism issues the bill raises.

I do think there's been something of a change, but I wonder to what extent the decisions of the Rehnquist Court have fostered it, except purely symbolically. I really don't see virtually any of the decisions, with the likely exception of *City of Boerne v. Flores*, having that much of a substantive impact. I think that's true even with regard to the Violence Against Women Act decision. My understanding is that the Violence Against Women Act was not a heavily litigated statute; even with the Violence Against Women Act struck down, all that has changed is who does the prosecution, and who hears any civil tort law claims.

Likewise with the state sovereign immunity cases: they do affect some litigants, but not in a huge way. If you put together *Lopez*, *Morrison*, and *Boerne*, they've cut back federal power from say 100 percent to 95 percent, just to choose some arbitrary numbers. There's been a lot of sound and fury, but I don't know how much direct practical effect it has had.

**SULLIVAN:** Undoubtedly, Chief Justice Rehnquist's federalism revolution will be remembered as one of his great legacies. It used to be thought after the New Deal that Congress could regulate anything it wanted that had any conceivable connection to interstate commerce, and that it could make civil rights laws that regulated far more broadly than simply protecting people against actual violations of civil rights by the states. And it used to be thought that courts should defer to Congress pretty substantially on civil rights matters and anything tied to commerce. And the Court under Rehnquist said, "No, we're going to impose real judicial review."

That's a real change. It used to be that the Court struck down an act of Congress as rarely as once every several terms. Now it's striking down acts of Congress up to five times a term. The Court is standing up to Congress and restraining its powers on the ground that it has exceeded its powers under the Commerce Clause, or exceeded its powers under Section Five of the Fourteenth Amendment, or interfered with reserved state autonomy by commandeering the states.

I agree with Eugene that such review might not have as much effect on litigation as some people make out, but it might also function as a reminder to Congress that it shouldn't willy-nilly pass, for example, a local crime bill just because it is popular in an election year. If it's harder to get a bill to stand up in court, it makes that bill harder to pass, and so greater review in the name of federalism may have



had some restraining effect on Congress. So I do think it's been a significant revolution.

What's more, the Court under Rehnquist's leadership has rolled back habeas corpus petitions, in which prisoners

*Lopez* and *Morrison* and a suggestion in *Morrison* that maybe the Court will draw a bright line and say that noncommercial activity can't be aggregated for purposes of federal regulation. If and when they take that step, whole areas of federal



could appeal to federal courts to overturn state criminal convictions, and has gotten the federal courts largely out of the business of running the public schools in the desegregation cases. Those decisions may have an even bigger effect in getting the federal government out of state life in the long run.

On the other hand, the interesting thing is, why hasn't the Rehnquist Court gone even further to resurrect states' rights and restrain the overweening power of the federal government? Despite Larry's correct reference to Rehnquist's promise that time would kill off the liberal justices and states' rights would come back—his promise in 1986 that the Court would bring back *National League of Cities* and overrule *Garcia*—they haven't done that.

The justices haven't brought back an affirmative defense of state autonomy that can trump a congressional statute even if it's within the commerce power because it's connected to interstate economic effects. They also have not overruled *South Dakota v. Dole*, which allowed Congress to issue funds with strings attached, such as conditioning highway money on raising the drinking age.

And they haven't overruled *Ex Parte Young*, which allows people to go into court and at least sue state officials, if not sue the states, to at least obtain injunctive relief against state violations of civil rights. What ought to have been the three biggest marks for the Court to shoot at if they were aiming at a federalism revolution, *Garcia*, *South Dakota v. Dole*, and *Ex Parte Young*, they haven't overturned any of them yet.

**KRAMER:** I would qualify Kathleen's comments with "yet." When we look at things historically, we tend to telescope, to forget that it takes years for the Court to produce serious change. Take the *Lochner* era. It began a good 10 or 15 years earlier than the *Lochner* decision itself. And *Lochner* didn't have any real bite until after 1919—that's a 20- or 30-year period. The Rehnquist Court has been at this for less than a decade. It's wrong to think they are done.

Take the recent Commerce Clause cases. We've got

law could become unconstitutional—including, for example, many environmental laws.

Plus, the Court hasn't needed to limit federal power on constitutional grounds. Instead, what they've done is use their constitutional cases to create a rule for interpreting statutes narrowly that effectively undoes federal power. Both *Jones* and *SWANCC* are cases in which the Supreme Court used *Lopez* to say we won't read these statutes to do something that *might* be unconstitutional, and they cut federal power back—especially in *SWANCC*.

With respect to the Tenth Amendment, they didn't really need to overrule *Garcia*. When Rehnquist wrote *National League of Cities*, I suspect he thought the prospects of cutting back the commerce power directly were pretty close to nil. So while *Garcia* overturned *National League of Cities*, *Lopez* and *Morrison* accomplished to a larger extent what Rehnquist was hoping to do in *National League of Cities* in the first place.

**SULLIVAN:** What's striking about the Rehnquist Court's approach to states' rights is that it's really a structural reading of the Constitution, which more often has been associated with liberals. There is nothing in the original text of the Eleventh Amendment that speaks directly to the principle of federalism that is being articulated by the Court. It's really a structural principle that says the federal government shouldn't be able to bankrupt the states.

The Court came clean on this when they held that federal agency adjudications can be reached under the same principles, a situation never contemplated by the framers. It's really an unenumerated "Eleventeenth Amendment," as former acting solicitor general Walter Dellinger has called it. It's fascinating to see that some justices are labeled "judicial activists" for finding an unenumerated right to privacy, but it is rarely observed that finding an implied state sovereign immunity principle to limit federal power, as the Rehnquist Court has, is just as much judicial activism in defense of states' rights.

**VOLOKH:** Just a couple of words of caution. There were 32 cases striking down federal statutes in the first 14 years of the Rehnquist Court. Of those, half were on Bill of Rights grounds. Eleven of these were free speech clause cases, and another five related to the takings clause, the Seventh Amendment, the self-incrimination clause, and such. Of the remaining 16, 11 were about federalism and five were non-federalism cases, involving things like separation of powers and the export-import clause.

Note, by the way, that there are a lot of liberals voting to strike down federal statutes as well. The idea that “the federal government is our protector against state overreaching,”

before Rehnquist became chief it became something of a cliché, at least among American academics, that this hadn’t happened. Indeed, the perfectly titled book on this subject is *Burger Court: The Counter-Revolution That Wasn’t*.

Essentially none of the big Warren Court criminal law decisions has been overturned. At the same time, there has been a fair amount of chipping away at them—most obviously *Miranda*. The decision that captures these currents is *Dickerson v. United States* in 2000, where the Court was presented at least the opportunity to flat-out overrule *Miranda*. *Dickerson* is a rare, rare instance of Rehnquist voting with the defendant in a criminal case.



which may have been something of the sense in the ’60s, has lost a lot of credibility. So to say that the conservative revolution is leading to federal statutes being struck down several times a term may be something of an overstatement.

**KRAMER:** From 1994 to 2004 the Rehnquist Court struck down 30 federal statutes. That’s 10 more than the Warren Court did during its most activist decade, and more than the *Lochner* Court did as well. If the Rehnquist Court struck down 11 statutes on federalism grounds, that’s compared with none for the six decades prior to that. Striking down that many laws in so short a period has a tremendous effect throughout the political system—in terms of how Congress reacts, how the states react, how politicians campaign, and so forth. That’s where the real effect is.

## CRIMINAL LAW

**MORRISON:** Let’s turn to another area where, when he was associate justice, William Rehnquist was often in dissent, and that’s criminal law. Bob, how successful has he been at moving the Court’s criminal law decisions in a different direction from the way they were under the Warren Court, to take an extreme example?

**WEISBERG:** If anything in the public mind captured the image, particularly the negative image, of the Warren Court, it was criminal law, particularly *Mapp* and *Miranda*. It was expected that ultimately the Burger Court, and then the Rehnquist Court, would undo the Warren Court. But even

His decision to affirm—if I may put it that way—*Miranda* has the kind of tone that you’d associate with somebody holding a horrible dead fish at some distance and saying “Well, it’s not the worst dead fish I’ve ever seen.” It’s basically a begrudging acknowledgement that the relatively strict criteria that must be met for violating *stare decisis* aren’t quite met here. It contains a side argument that enough limitations have been placed on *Miranda* that it’s not so harmful a decision anymore, and that in fact the police can deal with it pretty easily.

So *Dickerson* captures a lot of things. The big decisions basically still stand, most obviously *Mapp* and *Miranda*. It’s a reminder that the supposed bifurcation between the Warren and Burger/Rehnquist Courts on criminal law is somewhat exaggerated.

Now, switching to Rehnquist himself, in a way the pattern is simple and rather odd at the same time. It’s simple in the following sense: William Rehnquist virtually never votes for the defendant in a criminal case—I’m defining criminal case here to exclude Commerce Clause cases and the like, or even free speech cases that happen to involve criminal statutes. I’m talking about cases about constitutional criminal procedure, under the Fourth, Fifth, and Sixth Amendments, along with Eighth Amendment cases about the meaning of “cruel and unusual punishments.”

But he doesn’t have a particularly interesting methodology or jurisprudence of criminal law independent of the outcome. You can’t find a philosophical jurisprudence of the kind you would associate with Justice Scalia, which has

caused Scalia to vote for the defense in some criminal cases, like *Blakeley* and *Booker*, and leads him in a kind of libertarian direction in some search and seizure cases.

Rehnquist seems to be just checking in on criminal cases, rather laconically voting with the state or with the federal government, writing the opinions in some cases, though they're not terribly important opinions in terms of wider methodology. Either he thinks he can't win at a higher level of generality, or he's simply unconcerned with criminal law as a distinctly important area philosophically.

**KRAMER:** What that points out is that there is a big change in Rehnquist once he becomes chief. This goes back to something Kathleen said, which is his sense of the role of the chief justice and of the Court. When he was an associate justice he would go off on his own, and his most extreme views emerged, because he was willing to express them. Once he becomes chief, you see a tempering. There are a lot more cases in which the result may be something he agrees with, but he writes an opinion that's less extreme than he would have written as an associate justice. I think that's part of what's going on in some of the cases Bob refers to.

**MORRISON:** When he was an associate justice, he wrote an average of 16.6 majority opinions a year, and 16.3 dissents a year. He dissented in about one out of every 8.5 cases. Now that he's become the chief, and particularly in the last 11 terms, he's dissenting much less—less than four times a term. The numbers are something in the order of one in 20 that he's dissenting in. His concurring opinions, which is the other point you made, have dropped off also, suggesting maybe that he views his role as the chief differently.

decision, in which he carried eight justices and left Justice Scalia alone in dissent, is a perfect example of his trying to set a statesmanlike leadership tone once he became chief that he didn't show when he was an associate justice.

On rare occasions, the old tone resurfaces, for example in his 1992 dissent from the Court's refusal to overrule *Roe v. Wade*, which said in unusually bitter terms that the Court had overruled important post-*Roe* cases while purportedly upholding *Roe*, leaving *Roe* just a "judicial Potemkin Village."

## SOCIAL ISSUES

**MORRISON:** Let's turn to the area that Kathleen just got us into, the so-called hot button social issues—abortion, affirmative action, sodomy laws, religion, women's rights, and other equal protection claims. Has Chief Justice Rehnquist been able to lead the Court on those issues, Kathleen?

**SULLIVAN:** No. The chief's most dramatic area of failure to lead the Court in his direction is in the unenumerated right to privacy, under which the Rehnquist Court has struck down a criminal ban on consensual sexual practices, just as the Court had earlier struck down bans on access to abortion and access to contraception. Rehnquist has been very consistent in opposing that entire line of cases. He was one of only two justices to dissent in 1973 in *Roe*, and has maintained his opposition to *Roe* and to any analogue to *Roe* ever since.

He has failed to keep the Court from extending the right of privacy one more level, from control over reproduction to sex itself in *Lawrence v. Texas*, which in 2003 struck down a law against sodomy. Likewise, he was unsuccessful in leading the Court to announce an equal protection principle that would stop affirmative action, or the use of race prefer-



**WEISBERG:** He's written relatively few dissents in the criminal cases that his side has lost. He tends to let somebody else write a dissent, like Scalia or Thomas.

**SULLIVAN:** A dramatic example of that is the decision he wrote for the Court during his first term as chief, upholding the independent counsel statute against a separation of powers challenge, under a loose totality of the circumstances test, that doesn't sound like the old Rehnquist at all. That

ences to include traditionally excluded minorities in public programs. If he wanted to lead the Court to get rid of *Roe v. Wade* and affirmative action—two important planks of the Republican Party platform—he did not deliver on those two ideological goals.

Religion is the one social area where you have to say that he has had major success. In the '70s, the Court struck down most forms of financial aid to parochial schools. In *Mueller v. Allen*, in 1983, as associate justice, he led a bare



majority to say that public subsidies to religious schools can pass Establishment Clause muster because a public subsidy to religion that is included in a general program of public subsidies for a purpose like education is not a preference for religion, it's just an equal treatment of religion. As chief he later drove that home by a series of cases culminating in *Zelman v. Simmons-Harris*, the Ohio case upholding school vouchers, in which he delivered the opinion of the Court limiting the Establishment Clause as a barrier to the inclusion of religion in public programs. His position, which was once the loner position, now becomes the Court's position. That has to be counted as a major success on his part.

**KRAMER:** The way the initial question was framed is a little unfair to Rehnquist, in the sense that chief justices don't lead Courts. That has never been the case. Consider the Marshall Court. Marshall didn't lead that Court in the sense that it did what he wanted and followed his preferences. Marshall wrote all of the constitutional opinions, so his is the voice that we are familiar with, but what went on internally was more complex.

There were other very strong personalities on that Court, and they had their own views, and Marshall accommodated them as best he could. The question is what kind of coalitions formed, and whether there was a coalition of

a far-right conservative. But in a sense he was ahead of his time, because conservatism was very much moving in his direction. Today, Scalia and Thomas are much more conservative than Rehnquist. I think Rehnquist's position has remained roughly the same. A lot of what looks to us like tempering is simply that others on the Court are willing to take positions that make Rehnquist look less conservative.

**MORRISON:** If we shouldn't hold him accountable for not having moved the Court on social issues, then perhaps we should not give him as much credit for having moved the Court on other issues.

**KRAMER:** I agree. Why does *Lopez* happen? It's not because of Rehnquist. It's because other people are appointed to the Court who actually agree with him, and suddenly he goes from one to five votes.

### FIRST AMENDMENT

**MORRISON:** Eugene, can we turn now to the last major grouping, the First Amendment issues?

**VOLOKH:** Rehnquist has been identified with three broad positions on the First Amendment. It looks like he's pretty



people in significant enough agreement about important issues to carry something along over time. The same thing is true for the Warren Court.

So on the hot button social issues of abortion, sexual orientation, and such, Rehnquist failed. The problem is simply that the Reagan/Bush presidents haven't quite gotten their coalition all the way there. It hangs by a narrow thread. *Lawrence* comes out the way it does only because of a weird quirk in Justice Kennedy's jurisprudence, which they probably weren't aware of when they appointed him. So, too, with *Roe v. Wade*. It's too soon to say what will happen in these areas, on the one hand, and too much to ask Rehnquist to have been the person to single-handedly have moved the Court to overturn these decisions, on the other.

Much that has gone on can be understood and explained by thinking about how the country has shifted politically over time. When Rehnquist was appointed in 1971, he was

much won one and one-half of them. On the Establishment Clause he has taken two views—actually he's taken many views, and some of the early ones were quite theoretically interesting. But one thing with which he has been strongly identified is the view that generally available subsidies can include religious people and institutions within them.

So the GI Bill, which allowed returning soldiers to get a higher education at any university, whether secular or religious, public or private, would be perfectly constitutional. Rehnquist would use that as a classic example of where the subsidy—being a broad, evenhanded subsidy—is not to be treated as a subsidy to religion, but rather a subsidy for education, which includes religion. He's won on that; he's won by only one vote, so who knows what will happen with a change in personnel, but at least for now he has won.

The second aspect of the Establishment Clause for which he has fought, and generally lost, is government

religious speech, things like the Ten Commandments postings which are now before the Court. There, the liberals, plus O'Connor and occasionally Kennedy, have generally prevailed. Rehnquist has come close, but he has ultimately failed. My guess is when he looks back on it, he'll probably say, "Look, I'll gladly sacrifice religious symbolism in favor of the more substantive questions related to the participation of religious institutions in evenhanded funding programs."

As to free exercise, Rehnquist was the first modern voice against the compelled constitutional exemption regime of *Sherbert* and *Yoder*. He was the one who first argued in the *Thomas* case that nondiscriminatory laws should be constitutionally applicable even to religious objectors. And he worked his way up from one vote, to two votes when Justice Stevens adopted this view a few years later, and then ultimately to a majority in *Employment Division v. Smith*.

On the free speech side, I'm not sure it was a failure of Rehnquist's, but he has lost. I think he has reconciled himself to losing. In the '70s he fought quite tirelessly in favor of a less speech-protective viewpoint on a wide range of subjects, including government speech subsidies, commercial advertising, and a variety of other things. And there, the Court has moved, if anything, into a more speech-protective position with the votes of Kennedy, Thomas, and Scalia. Justice Kennedy has taken the most broadly speech-protective view of any of the justices. Interestingly, the one justice who has a quantitatively similarly speech-restrictive perspective to Rehnquist—he doesn't necessarily vote the same way in every case, but if you count the number of cases he's voted against the free speech claimants, it's roughly the same number as Rehnquist—is Justice Breyer.

Up until the late '80s, I don't think there was a single nonunanimous free speech case in which Justice Rehnquist voted for the free speech claimant, except for campaign finance cases, where he has long taken a moderate libertarian viewpoint. But since then there have been quite a few cases in which it looks like Justice Rehnquist has reconciled himself to broad free speech protection.

So a loss for him on free speech, a win on free exercise and on the generally available funding program side of the Establishment Clause, and a loss on the government speech side of the Establishment Clause. Does he think the glass is half full or half empty? You'll have to ask him.

**SULLIVAN:** Eugene's wonderful summary of the First Amendment cases reveals the limits of Rehnquist's conservatism. While he is willing to strike down a number of congressional statutes, whether for federalism reasons or for rights-related reasons, he's much more deferential to the decisions of the states, sometimes even if they might seem somewhat liberal. For example, he writes *Madsen v. Women's*

*Health Center* upholding at least some of the restrictions on abortion protests outside an abortion clinic, even though he's a dissenter from *Roe* itself.

If you think back to the young man who supported Barry Goldwater, it's interesting that he picked up on the idea of federalism and deference to the states as useful devices in democracy and checks on the overwhelming power of the national government. But he doesn't pick up on the libertarian strand of Goldwater republicanism which might have been reflected in the opposite view on anything from abortion to gay rights, as well as school vouchers. So he may be a little bit libertarian, as Eugene implies, when it comes to access to school vouchers, but he's not libertarian or Goldwateresque on a whole lot of other things.

**MORRISON:** Listening to Eugene reminded me that even when you try to enunciate the chief's position, you get a decision like *Locke* from the state of Washington last year in which he said that the person who wanted to get a free religious education had gone too far, and the state was not obligated to give him one just because it's obligated to give him a scholarship to do other things. Similarly, in the Medical Leave Act case where he wrote the opinion saying that it wasn't a violation of the Eleventh Amendment. So in some sense he's temporizing his position and kind of ending up in the middle.

**WEISBERG:** His work is not done yet, though.

**SULLIVAN:** We should not forget Rehnquist the person in this discussion. Although he can be a fierce presence on the bench, and can intimidate advocates who stand before him by cutting them off in the middle of a "the" if they hit the red light on their oral argument time, he is an immensely genial person in the private life of the Court. He's a raconteur, he has a great sense of humor, he loves to tell jokes. The force of his personality as chief is probably a factor in the leadership he has shown on the Court, and that's a side that the public doesn't see very often. They see the public person who forced himself to show up on the Capitol steps for the second inauguration of President Bush, who has a tremendous pride in national institutions—the pride that led him to sew four gold stripes onto his chief justice's robe—but also a tremendously informal, genial, and almost raffish sense of fun outside the Court. I think that private personality is a big part of his public success.

**WEISBERG:** Kathleen used the terms "force of his personality," but in fact it's the nonforce of his personality. He's a disarmingly affable and unaggressive personality, and this surely must have served him well in managing the Court. ■

# Private Lives: Families, Individuals, and the Law

By LAWRENCE M. FRIEDMAN, Marion Rice Kirkwood Professor of Law

*Laws about family are increasingly laws about individuals and their right to make their own, sometimes contentious, choices. That is the underlying theme of Lawrence Friedman's most recent book, Private Lives: Families, Individuals, and the Law, Harvard University Press, 2004. This essay is based on the book's introduction, "Family Law in Context."*

Modern life, like life in all human societies and at all periods of time, is family life. But the family today is far different from the family of yesterday. It is essentially a coming together of individuals; it is an arrangement of individuals, for individuals; it is much more brittle, malleable, friable than in the past. And the family, as such, no longer has much legal status or meaning. Family law is still a vital, significant field of law, but it has become a law about individuals—individuals, to be sure, as they exist in relationship to other people, that is, to their “families.” And because family law is a law about individuals, it is also a law that stresses the primacy of choice, of free and voluntary actions.

In traditional societies, the legal and social situation was radically different. Traditional societies differed in many ways from each other, and it is easy to reduce them to cartoons. But generally speaking, in these societies, a person's rights and duties flowed from his or her status in society or within the family. Men and women, old and young, noble or commoner, son or daughter, mother or father: these were only some of the many relevant categories. The family, clan, or extended family—rather than the individual member—was often the real locus of rights and duties. Very often, too, the father or the senior male in the family had overwhelming power over the other members; this was true in the older strata of Roman law, in which the oldest male ancestor had total control over all of his descendants: nobody under his jurisdiction, male or female, could marry without his consent. This was an extreme case, but in the law of many other peoples and societies, the father or male head of the family had awesome authority.

Modern society has traveled a long way in

the other direction. What is the master trend in the history of family has also been, arguably, the master trend in the history of law in general, or even perhaps the history of society. That is, the family as a legal unit dissolves, and the individual members rise to power. In the middle of the nineteenth century, Sir Henry Maine, in his classic study *Ancient Law*, described the movement of law in “progressive societies” as a movement “from Status to Contract.” Rights, in other words, no longer depended on gender, birth order, rank, or caste. They were now, according to Maine, matters of individual choice, of voluntary behavior. Individuals—men, women, and children—had rights; families or groups did not. Society was made up of atoms, not molecules. Each of these atoms was, in important ways, legally equal. Family law, law in general, and indeed society as a whole rested on this foundation of equality. And voluntary agreements, or choices, rather than inborn status were at the core of social behavior.

Of course, this statement is something of an exaggeration, and was even more so when Maine wrote his book. Most of us find it hard to describe nineteenth-century England as a country made up of people with equal rights. England was a monarchy, and although the queen was not particularly powerful, she was in some ways at the apex of society. In any event, the nobility, the landed gentry, and the great merchants owned the land and the wealth; they ran the country; they dominated public and private life. Women did not vote, did not hold office, and were shut out of most occupations. Legally and socially they were subordinate to men, and this was particularly true of married women—their property was under the control of the men they were married to. Generally speaking, they had no right to





enter into contracts, to buy and sell property, to make wills and testaments. Until deep into the nineteenth century, religious minorities had no vote; indeed, the vote belonged chiefly to men of property. Property was king. In the United States, women were perhaps a bit better off than they were in England, but married women in most states had the same disabilities as those in England until the latter part of the century.



FAMILY AT PLAY BY UNKNOWN AMERICAN ARTIST. IMAGE © GEOFFREY CLEMENTS/CORBIS

Constitution, and public opinion, allowed people to exercise their religions freely. But toleration is not the same thing as partnership. The public, official culture was drenched with the spirit and the substance of Protestant Christianity. The schools were so partisan, so Protestant, that Catholics felt obliged to set up their own school system. Most Americans took it for granted that public life did and should reflect the values of the majority. Other people were, so to speak, guests in a house they did not own.

By the late twentieth century, the situation had changed considerably. True legitimacy was now defined much less narrowly. Symbolic power was extended to other races, religions, and ways of life. Officially, at least, the United States has become multicultural. The president sends greetings to his Moslem, Jewish, and Buddhist countrymen on their sacred days. Public life includes many symbolic gestures of this kind; Jewish, black, Chinese, and gay citizens hold office, even high public office. Remarkable changes have also taken place in the relationship between women and men. The old doctrines of subordination are gone. Women vote and sit on juries; women serve in the state legislatures, in Congress, and occasionally even in the governor's mansion. Women flock to the medical profession and are beginning to penetrate the upper echelons of finance and big business. A quarter of all lawyers are women. There are two women justices on the United States Supreme Court. Civil rights laws insist on equality of the sexes in the workplace, in education, in the law. According to law, men and women are totally equal.

Only somebody very stubborn or naïve, however, would argue that there is gender equality in society at large. And women have perhaps made the least progress toward equality inside their families. They still have to shoulder the main burden of housework and child care. Most women work, and millions of women have to drag themselves home to their second job: the family. For middle-class people, the husband's job or career usually takes priority over the wife's, though this is somewhat less so than it was in the past. Women still suffer from domestic violence, from sexual harassment and abuse. But if we look to the past, we have to admit that the changes in gender relations are tremendous, far-reaching, and important. And they are changes, in the main,

### The Rise of Plural Equality

The situation today is dramatically different in England, in the United States, and indeed in all of the developed countries. One of the most striking trends of the late twentieth century, in the United States and elsewhere, has been the rise of what I have called plural equality. By this I mean the collapse of the notion of a single dominant ethos, a single dominant race, culture, code of morality. During most of the history of most nations, a fairly clear structure of social dominance was in place. This was true even of the United States, even though America was extremely democratic in nineteenth-century terms, as De Tocqueville and other observers recognized. In the United States, too, there was freedom of religion, and there was no established church. Minority religions were tolerated; people could build churches, mosques, and synagogues as they liked. The

that go in the direction of plural equality.

It is a huge job—maybe impossible—to try to explain why these changes occurred. A few factors are obvious. A free market system; technological and scientific developments; the huge, well-off middle class in Western countries; leisure time; urbanization; the mass media; the rule of law—all of these have been important elements of change, and they are linked in complex chains of causation. These factors have produced the kind of society that prevails in the developed countries of Europe and North America, and in such countries as Japan and Australia. Of course, no two of these countries are the same. Finland is not France, and France is not Japan. But there are similarities, and the similarities are probably more striking than the differences. These countries all share a common legal culture, the culture of modernity. One social and legal trait that they hold in common is the one I have described: the rise of the individual as the locus of duties and rights.

### **The Primacy of the Individual**

Everything in modern society conspires to buttress the primacy of the individual, and his or her wants, desires, aspirations, and habits. Nothing, for example, is more characteristic of modern society than advertising. Our days and nights are drenched with it. Advertising surrounds us every day, in our homes, on the streets, in our newspapers, and on television. It pops up on the Internet. It screams at us in public places. It even appears at times as writing in the sky. Advertising is a core feature of capitalism, of a market system. And advertising, whatever the product, whether cars, breakfast cereal, the services of lawyers, or a new kind of shoe polish, conveys a double message. One is a message about the product; the other is unspoken, but crucial and essential. It is the ideology of consumption, of private wants and desires. The message is aimed at an audience of individuals, each watching in his or her own private space. It tells you what to buy and what to use; which products will make you stronger, more beautiful, sexier; which soap will make your clothes whiter, which toothpaste will brighten your teeth; and so on, endlessly.

Modern law, including family law, evolves along with society, and in the Western countries, the developed countries, it evolves along with that peculiarly modern brand of individualism I

have mentioned. This statement, naturally, papers over a great deal of complexity and a great deal of variation, from generation to generation and from country to country.

The paths of change are nonetheless clear. Family law has indeed moved from status to contract—in the sense, as Milton Regan has put it in *Family Law and the Pursuit of Intimacy*, first, that the “law is more willing to enforce agreements that tailor family life to individual preference”; and second, that “the law is more solicitous in general of individual choices in family matters.” The modern laws of marriage—and divorce—are worlds apart from traditional marriage and traditional ways to end a marriage. Marriage was once a matter for the kinfolk to decide, not the woman and the man. In many traditional societies, the family arranged the marriage, fixed the price, made all the preparations. Often the bride and groom never laid eyes on each other until their wedding day. Families were often involved in ending marriages as well as in beginning them. In some societies, marriages cannot be dissolved at all. In others—for example, in traditional Islamic societies—men, but not women, can end a marriage easily. In still other societies, any decision to end a marriage has to involve the families of husband and wife. (Matters of dowry or bride price, for example, have to be worked out.)

Most young people in the developed world would find a system of arranged marriages both incredible and intolerable. Nothing could be more individual, more personal, than choosing a life partner. Young people usually hope parents will approve of their chosen partner, but if not, the marriage takes place anyway. After all, it is not the parents who are getting married. This seems completely self-evident to us, but the situation is different in societies where marriage joins two families, not two individuals.

Nowadays marriage is supposed to be, above all, a matter of partnership and love. Of course romantic love, and love marriages, are not modern inventions. They have always been staples of literature. Novels, plays, poems, and songs all depend on love and love stories, perhaps more than any other theme. What could be a purer romance than Shakespeare’s sixteenth-century tragedy *Romeo and Juliet*? The two “star-crossed” lovers meet, fall hopelessly in love, marry secretly, and are united in the end in death. Yet it is a

feud between the lovers' two families that sets the tragedy in motion; Juliet's father had chosen a husband for her, never dreaming that she had already pledged herself to a man, and an enemy of the family at that. The story pivots on the tension between the customary way of arranging marriages and the reality of a passionate, overwhelming love.

Law follows custom and reflects social understandings: this much is obvious. The power of parents to choose mates for their children has vanished from modern Western society and, indeed, from legal norms. Parents do not have to approve of the mates their children choose, unless the children are underage. In the United States, in general, the power of parents even over young people has been shrinking. In some states, if the bride and groom are minors, the parents must consent. For grown children, there is not a hint of parental control remaining in the law of the United States and, indeed, of Western countries generally.

### **The Primacy of Choice**

This right to choose a life partner is only a piece of a larger right—the right to choose a basic style of life and to make major life choices freely, without society, or the state, interfering. In family law, this leads to what Milton Regan has called the “optional family”—that is, a menu of choices: staying single, cohabiting, or marrying; and, whether married or not, deciding whether or not to have children. He also speaks of the “negotiated family”—that is, the fact that “family relationships are less likely to be organized around common expectations of behavior”; each family, each couple, each person works out the principles, desires, and behaviors that will constitute their own family life. What is “optional” is of course a matter of pure choice; what is “negotiated,” however, implies other people—a partner, spouse, children. This term reminds us that one person's choice affects, and is affected by, others.

The primacy of choice, nonetheless, has to be emphasized. And some aspects of choice, in American law and in the law of certain other systems, are given the somewhat incongruous and misleading name of the right of privacy. This right is linked closely to choices about sex and marriage. It may seem strange to talk about the decision to use a condom or take a birth control pill, or the right to be openly gay, as a matter of

privacy. What is involved, of course, is the right to make private choices—free from the interference of the government. In the law, disputes over this kind of privacy relate, above all, to issues of sex, family, and reproduction.

Privacy and family are related, too, in an even more organic way. The home is the seat of the family, and the home is the seat of private life. “A man's home is his castle” is one of the most famous slogans of the older common law. When this axiom was first enunciated, a man's home was a castle mostly for people who actually lived in castles (or at least in mansions). The poor had no privacy. The legal slogan actually has to do with searches and seizures, arrest warrants, and the like, but it does express an important idea: the home is the haven, the island of immunity, the place of private life. For the average person, this became so only in the nineteenth century. The nineteenth century was the century of the home, the family, the private sphere. In the bosom of the family, too, people learned (as they always had) the norms of society—how to live, how to govern their impulses; they learned what was right and wrong behavior. Private life was the foundation of public life.

### **The Right to Privacy**

In the twentieth century this situation changed radically. The family lost its monopoly on the power to train, mold, and socialize children. It lost this power not only to schools, but also to radio, movies, and television, and to the peer group. The outside world came bursting into the home. A man's home was no longer a castle; it was open, porous—it was, above all, an entertainment center. The media blurred the boundaries between the public world and the private world. The family was transformed; so, too, was the very concept and meaning of privacy. The right of privacy means the right to be left alone, the right to a private life, the right to some kinds of secrecy and seclusion. But it also means the right to make personal choices—about marriage, sex, babies—choices that may be, and often are, anything but private.

The privacy issue is tied to the family in yet another way. The traditional family once had a kind of state monopoly. Men and women could have sex legitimately only if they were married—that is, if they formed a family. Only “families”



in the traditional sense could have babies. If you wanted sex, and if you wanted babies, you were supposed to get married.

Of course, not everybody played by the rules. There was sex outside of marriage, and there were babies born outside of traditional families. But official society sharply condemned illicit sex and illicit children. The modern concept of the right of privacy (including choice of lifestyle, sex partners, and whether to have children) has helped to burst open the notion of family, remolding the family and destroying its monopoly on babies, sex, and intimate life. Sex and reproduction, after all, are at the very heart of marriage and divorce, and family law in general. But modern society and modern law have gone a long way to uncouple sex and reproduction from traditional marriage. In a way, the “privacy” cases of the Supreme Court—cases on contraception, abortion, gay rights—are a new branch of family law, and an essential one at that.

But at every step of the way there has been opposition and conflict, and this too is part of the story. Moreover, choices do not take place in a vacuum. What I choose for myself has an impact on other people. A married woman, for example, in most states today has the right to end the mar-

riage. This is her choice. But what if her husband would choose not to? Her choice trumps his choice. There are, in modern law and life, many instances of this sort of conflict. A divorcing husband and wife may both want custody of their child. An adopted child may want to find her birth mother; the birth mother may not want to be found. “Choice,” then, does not mean a lack of conflict. Conflict is everywhere, in every society. Only the terms and conditions of conflict change over time and space.

The story should not be read as an account of the decline and fall of the family. The family has not dissolved. It has changed and broadened. It has become more elastic. In some ways, it is a much weaker institution. But it still has a vast reservoir of strength. This can be seen even—or especially—in the demand for gay marriage. Many conservative people read this demand as a sign of moral decay. But it is testimony to the idea and ideal of the family. It is simply a demand for a more elastic definition of legitimate marriage. And, paradoxically, it is a demand for the right of two people to give up some of their rights of free choice: the right of two men, or two women, to put themselves under a legal and social yoke that they are now quite free of. ■

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## The Good, the Bad, and the Lucky: CEO Pay and Skill

By ROBERT M. DAINES, Pritzker Professor of Law and Business, Stanford Law School; VINAY B. NAIR, Assistant Professor of Finance, Wharton School of the University of Pennsylvania; and LEWIS A. KORNHAUSER, Professor of Law, New York University School of Law

*In sports, the best-paid players are also the most skilled. The same can't always be said about business. Are business CEOs highly paid because they are skilled, because they capture the board of directors, because they set their own pay, or because they are just plain lucky?*

Very few business topics are as hotly contested as the salaries of chief executive officers of public firms. The amount that CEOs are paid and the structure of their pay is frequently debated in the popular press, television programs, proposed legislation, political campaigns, magazine cover

stories, and academic research. Outrage over CEO pay has forced important changes at major firms: Jack Welch of General Electric was forced to give back part of his pay when investors complained it was excessive, and Richard Grasso of the New York Stock Exchange was forced to resign alto-

gether when the details of his pay were revealed.

One obvious reason for the interest in CEO pay is its striking increase. In 1992, the average CEO of an S&P 500 firm earned \$2.7 million. By its peak in 2000, average pay for these CEOs had grown to over \$14 million—an increase of more than 400 percent. The increase in CEO pay is even more striking in relative terms. Twelve years ago, CEOs at major U.S. corporations were paid 82 times the average earnings of a blue collar worker; last year they were paid more than 400 times the average earnings of a blue collar worker. This huge increase in executive compensation has been especially controversial because CEOs are sometimes paid large sums even as the firm's results deteriorate; CEOs at WorldCom, Tyco, and Enron collected over \$100 million on average in the year before scandals broke at the firms or the firm collapsed.

These facts and the spectacular governance failures at important firms have caused many to conclude that the process for setting CEO pay and, more generally, the governance of public firms is badly broken. Critics conclude that CEOs are overpaid because they have too much influence over the board of directors who should be monitoring them on the shareholders' behalf, and too much influence over the committee that sets their pay. And that independent directors and consultants hired to advise the board have relatively little interest in safeguarding shareholder interests. In this view, CEO pay is the product of badly functioning corporate governance. Such arguments also suggest that cases of excessive CEO pay reflect a systematic social problem of "fat-cat" CEOs skimming money at shareholders' expense.

Others are more sanguine, arguing that the process for determining CEO pay works generally well, and that the problems arise from a few bad apples. Some argue that any problems with CEO pay have not erased the comparative advantages of the U.S. system, given the relatively good performance of the U.S. economy. Others argue that any pay distortions reflect the perceived impact of accounting and tax rules rather than governance flaws. In this view, compensation problems reflect breakdowns in particular firms, but do not indicate a general problem in compensation or in public firm governance.

Which version of CEO pay is accurate? Prior

attempts to distinguish between these competing views examined whether CEO pay changed as the firm's performance changed. The idea is that CEO pay should be linked to changes in a firm's value in order to align managers' interests with shareholders' interests. However, lots of things affect a firm's value, including industry and market trends that the CEO has no influence over. One shouldn't confuse CEO brains with a bull market.

Surprisingly, for all the research on CEO pay, there is little evidence on the basic question: Is CEO pay related to CEO skill? Are highly paid CEOs better than their more poorly paid peers? That question is not only important in evaluating the appropriateness of CEO pay levels, but also in evaluating whether the governance of public firms is badly broken. If pay and skill are related, high salaries will not necessarily be evidence that fat-cat CEOs have captured the board. Just as sports teams may decide to pay high salaries to attract or retain valuable players, boards may also pay more for especially talented managers. If, on the other hand, CEO pay and skill are unrelated, the process for setting CEO pay is likely to be badly broken, and highly paid CEOs may be overpaid, indicating more general problems with the governance of public firms.

### Tackling the Question

To examine whether CEO pay and skill are linked, we introduced a new measure of skill. The intuition behind our measure of skill is straightforward: firms run by good CEOs should consistently do better than firms run by bad CEOs. If a firm has been performing poorly relative to its peers, a skilled CEO will consistently be more likely to reverse the firm's fortunes, while a bad CEO will be more likely to continue the poor performance.

If, on the other hand, a firm has been performing well relative to its peers, a good CEO will consistently be more likely to continue the good performance, while a bad CEO will increase the chance of a bad outcome. Thus, using our definition of skill, good CEOs will reverse poor performance and continue positive performance. Bad CEOs will continue poor performance and reverse positive performance. And lucky CEOs are highly paid, but perform no differently from their lower-paid peers.

This methodology has a number of significant

advantages over prior methods. We control for the firm's past performance to be sure that we compare CEOs with other CEOs in the same position. Because a firm's opportunities may be a function of past performance, we avoid comparing a CEO who is in charge of a firm that performed well in the past with another CEO who is in charge of a firm that performed poorly.

One reason that there has not been research on the relationship between CEO pay and skill is that it is very difficult to factor out the effect of the CEO. Our methodology allows us to better isolate the effect of the CEO for reasons we explain in the full paper. Another advantage of our methodology is that we can make some initial conclusions about overall pay levels, something generally difficult to do. We conclude that highly paid CEOs are overpaid if their performance is consistently worse than their lower-paid peers, because in this case there is no justification for the higher pay.

Our basic research strategy was straightforward. In a well-functioning labor market, skilled CEOs should earn more because they have more valuable outside opportunities and will earn more rewards. Therefore, we first measured the pay of every CEO for whom we could get pay data. We measured their total pay in year one, including cash, bonus, and the value of any options granted. We then looked at the firms' performance in later years to see if the pattern was consistent with the idea that highly paid CEOs are more skilled. We defined high pay as those CEOs paid more than the median in each industry.

### CEO Skill and Pay

We found evidence that highly paid CEOs are in fact more skilled when firms are small or when the CEO has relatively greater ability to affect the firm's performance, due to reduced regulatory or industrial constraints on managerial discretion. This link between pay and skill is especially strong if there is a blockholder (an individual or firm that owns a significant block of stock) with the incentive to monitor management.

By contrast, we found that highly paid CEOs who operate in large firms subject to environmental constraints perform worse than their more poorly paid peers. These CEOs are more likely to continue poor performance, and, surprisingly,

even to reverse good performance. This negative relation between pay and skill is exacerbated in the absence of a large shareholder to monitor management. This suggests that in large firms without blockholders or where the CEO has relatively less ability to affect the outcome of the firm's performance, there is less reason to pay a high wage. Firms that nevertheless pay high wages in these instances may also suffer from governance problems that produce poor performance.

In addition, we found that a new CEO who receives higher pay than the departing CEO is more likely to reverse prior poor performance relative to CEOs who are paid similarly or lower than the departing CEO, if the pay package has high incentive pay. Strikingly, if the highly paid new CEOs pay lacks incentive pay, the CEO is more likely to continue prior poor performance.

Finally, we show that being able to spot a skilled CEO is very valuable. We created equal-weighted stock portfolios that hold firms with highly paid CEOs and short firms with poorly paid CEOs. When pay and skill are related, we found that such a portfolio generates an annualized abnormal return of 8 percent between 1994 and 2001. When pay and skill are unrelated, there is no such abnormal return. The mean return of firms in which pay and CEO performance are linked exceeds the mean return of firms in which pay and CEO performance are not linked by almost 8 percent. ■



ILLUSTRATION: DYNAMIC DUO STUDIO © IMAGES.COM/CORBIS

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This article is from a longer paper that is available at the Social Science Research Network: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=622223](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=622223).



# Let a Thousand Googles Bloom

BY LAWRENCE LESSIG  
C. Wendell and Edith M. Carlsmith Professor of Law

Last month, Google announced a partnership with major research libraries to scan 20 million books for inclusion in Google's search database. For those works in the public domain, the full text will be available. For those works still possibly under copyright, only snippets will be seen. The potential of this project is only beginning to be understood, and it is likely to bring about the most dramatic changes in the nature of research and the spread of culture since the birth of Google itself.

But the excitement surrounding Google's extraordinary plan has obscured a dirty little secret: it is not at all clear that Google and these libraries have the legal right to do what they propose. For work in the public domain, the right is clear enough. But for work not in the public domain, Google's right to scan—to copy—whole texts to index is uncertain at best, even if it ultimately makes only snippets available. When permission has been given by the copyright holder, again there's no problem. But when permission has not been secured, the law is uncertain. If lawsuits were filed, and if Google and its partner libraries were found to have violated the law, their legal exposure could reach into the billions.

Google, to its credit, has decided to accept these risks. It can afford to fight the lawsuits, and the benefit to society and Google from such access apparently outweighs its potential costs.

But not everyone is Google. Not every library can afford the risks that Google can. And so before we accept a world in which only a Google can build valuable, network-based digital libraries, we should ask whether the system that produces these profound uncertainties is one that we should change.

The basic problem is simple. A copyright is a property right. Yet our particular system of copyrights is insanely inefficient. Rights get created easily enough—a copyright is automatic; you need do nothing to secure it. But tracking who owns the rights is astonishingly difficult. There is no Google for determining which works are protected by copyright; there is no Google for tracking down current copyright holders. The law creates a property right, but leaves it practically impossible to respect that property right for older, out-of-print works.

For example, in 1930, 10,027 books were published in the United States. In 2001, 174 of those books were still in print. That means 9,853 books were out of print, but still presumably protected by copyright. "Presumably," because in the United States, the protection of copyright reaches

back to 1923. But only presumably, because for works created before 1978, a copyright had to be registered to be secured and then renewed for the author to enjoy a full term of copyright protection. At least half of all works published at that time never took the first step; almost 90 percent never took the second.

The vast majority of creative work published in 1930, therefore, is in the public domain. But it is extremely costly to find out which works fall into that category. And for those works that remain under copyright, unless new editions containing the latest copyright information become available—a reprint of an old book, say, or a DVD of an old movie—tracking down the current owners can require hours of detective work that may prove fruitless.

The solution is obvious enough: clean up the copyright system. As with every other federal intellectual property regime, all copyrights should be registered. As was the American tradition for almost two centuries, there should be simple techniques for filtering out works that have no continuing need for copyright protection. No doubt, the law should protect creative work when protection does some good, but that protection should end when it serves no purpose.

How would it work? One proposal calls for copyrights to be renewed every five years—a process that today could be made technically quite simple and that would create an accessible database as well as quickly clear away unneeded copyrights. Clarifying the system, however, has been universally opposed by the content industry—Hollywood, book publishers, and the like. It fears that any reform would weaken Congress's resolve to strongly protect intellectual property. So while it insists upon increased regulation to protect commercially valuable work, it works to block reform that would enable a wide range of creative work to be efficiently built on by others.

Google's gamble shows that it is time for Congress to listen to both the content industry and the digital entrepreneurs. Our culture should be available for anyone—not just a deep-pockets Google—to build on and spread, consistent with the purpose of copyright law. The law's inefficiencies should not block that opportunity. Reforms designed to clarify copyrights would allow Google to do more with our cultural and intellectual past without legal worries. They would also allow others, at very low cost, to do the same.

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(A version of this essay originally appeared in *The Los Angeles Times* on January 12, 2005.)

# In Memoriam

## ALUMNI:

**Albert L. Denney '34 (BA '31)** of San Rafael, Calif., died March 2, 2005, at the age of 94.

**Howard W. Campen '40 (BA '37)** of San Jose, Calif., died March 31, 2005, at the age of 90. He was an executive for the county of Santa Clara and served on advisory committees such as the State Intergovernmental Board on Automated Data Processing. He was also involved in the State Office of Criminal Justice Planning and the County Supervisors Association of California.

**Avis Winton Walton '45 (BA '44, MA '63)** of Atherton, Calif., died in January 2005 at the age of 82, of Alzheimer's disease. She received a master's degree in education and worked in local schools for several years before returning to the law, practicing in Redwood City. She is survived by her ex-husband, Charles; daughters, Wendy and Kathy; sons, Todd and Steve; and five grandchildren.

**Jess Port Telles, Jr. '47** of Los Banos, Calif., died December 16, 2004, at the age of 84. He and his brother formed one of the largest Central Valley agricultural operations, farming over 40,000 acres' worth of crops. An expert in water and agriculture law, he helped create the San Luis Reservoir and became a founder of the San Luis Water District, acting as their general counsel for more than 50 years. He was also an accomplished pilot, making transcontinental flights and accumulating tens of thousands of miles in the air. He is survived by sons, Jess, John, and James; ten grandchildren; and three great-grandchildren.

**Ward B. Saunders, Jr. '48** of Oakland, Calif., died February 19, 2005, at the age of 85. He served in the Navy during World War II and later joined the legal department of Kaiser Aluminum. He then moved over to the international division and was involved with Kaiser's interests in the United Kingdom, Germany, Australia, Jamaica, and Bahrain. He was most closely associated with Kaiser's involvement with the Volta Aluminum Company (VALCO) in Ghana, where the Ashanti named him an honorary Nana or "chief." He is survived by his wife, Elaine; son, Douglas; daughter, Myra; and grandchildren, Hannah and Benjamin.

**James E. Denebeim '49 (BA '47)** of Belvedere, Calif., died February 27, 2005, at the

age of 81, of pneumonia. A World War II veteran, he co-founded Liberty National Bank (subsequently acquired by the Standard Chartered Banking Group) and The Pacific Bank. He served as president of both banks, in addition to serving as president of the First National Bank of Vista, Chartered Bank of London, and Union Bank. He is survived by his wife, Helene; daughters, Ellen and Suzanne; sons, Mark and Steve; and grandchildren, Melina, Evelyn, Rachel, and Dashiell.

**William L. Maltman '49** of Seattle, Wash., died July 16, 2004, at the age of 83. He practiced law in Seattle for more than 40 years and was an initial partner of Hennings, Maltman, Weber and Reed (today Reed, Longyear, Malnati & Ahrens, PLLC). He was admitted to practice before the U.S. Supreme Court, and he created and taught in a unique bar review school for many years. He is survived by his wife, Mary; daughter, Anne; sons, John and Robert; and grandchildren, Catherine, Doug, and Jamie.

**Lewis L. Fenton '50** of Carmel Valley, Calif., died February 10, 2005, at the age of 79, of heart failure. A World War II veteran, he established the Hoge & Fenton law firm in 1952, and he also helped found the York School, a coed day school for grades 8-12 in Monterey. He was a member of the Board of Visitors at Stanford Law School and taught at Stanford, Hastings College of the Law, and the University of San Francisco School of Law. His community involvement included serving as founding director of the Monterey Jazz Festival. He is survived by his wife, Gloria; daughters, Juanita and Pamela; sons, Daniel and Lewis; brother, Norman; and seven grandchildren.

**George E. Paras '50** of Sacramento, Calif., died April 16, 2005, at the age of 80. A World War II and Korean War veteran, he was named to the Sacramento Superior Court in 1969 by then governor Ronald Reagan. He was named to the appellate court in 1974. After leaving the court, he became a partner in the firm of Greve, Clifford, Diepenbrock and Paras. He later left the law practice and became a private judge, handling arbitration, mediation and trial counseling. He is survived by his wife, Mary; daughter, Danae; and granddaughters, Amelia, Maia, and Demetra.

**Harry O. Van Petten, Jr. '50 (BA '47)** of Downey, Calif., died February 5, 2005, at the age of 84. He served in the military as an Army staff intelligence officer from 1942 to 1946 and practiced law for 51 years, including many years at the firm of Van Petten &

Holen. An active member of the Democratic Party, he was the party's nominee for the U.S. House of Representatives in 1964. He is survived by his wife, Ione; daughter, Sima; son, Peter; and brother, Gaynor.

**Catherine "Kitty" L. Lee '53** of Palo Alto, Calif., died February 5, 2005, at the age of 76, of amyotrophic lateral sclerosis, also known as Lou Gehrig's disease. An editor of the *Stanford Law Review*, Lee began a part-time law practice while raising a family and eventually established a solo practice, specializing in estates and trusts. She was a dedicated mentor to young attorneys and was working on a tax law case at the time of her death. Lee was an avid fan and supporter of Stanford basketball and the Preservation Hall Jazz Band. She is survived by daughters, Dorothy, Amy, and Margie; sons, Paul and Ted; sisters, Elizabeth and Florence; brothers, Bill and John; and five grandchildren.

**John "Jack" D. Miller '53 (BA '50)** of Long Beach, Calif., died December 30, 2004, at the age of 77. A Korean War veteran, he was appointed by Ronald Reagan to the California Law Revision Commission, serving as member and chairman. He also served as partner for Miller, Bronn, Brummett & Porter. He was active in his community, serving on the board of trustees for St. Mary's Hospital and working with the Boys & Girls Clubs of Long Beach. He is survived by his sons, Thomas and Timothy; daughters, Jennifer and Karen; and five grandchildren.

**Lloyd H. Mulkey, Jr. '53 (BA '50)** of Chico, Calif., died January 28, 2005, at the age of 77. A Korean War veteran, he went into private practice after earning his law degree and later served as deputy prosecutor of the Butte County District Attorney's Office. He also served as a defense attorney before becoming Butte County Superior Court Judge in June 1980. He additionally served as president of the Butte County Bar Association and president of the Northern California Judges Association. He is survived by his wife, Jayne.

**Duncan P. Davidson '54 (BA '52)** of Fremont, Calif., died February 17, 2005, at the age of 77. He worked as a Workers Compensation Judge for the State of California for 25 years. He is survived by his wife, Anne; daughters, Janet and Patty; son, Duncan; and four grandchildren.

**William W. Stover '55** of San Diego, Calif., died April 22, 2005, at the age of 75, of heart failure. He was chief of staff for Senator George Murphy and an assistant to President

## In Memoriam

Richard Nixon. He is survived by his brother, Alan.

**James Dutch Kowal '59** of Palos Verdes, Calif., died in April 2005, at the age of 69. He established a career with ARCO Products Company for more than 20 years, where he held such positions as vice president of ARCO's marketing company. He was named the first executive director of The 2000 Partnership, a non-profit company concentrating on quality of life issues and civic problems in Southern California. Additionally, he served for several years as a volunteer state bar court hearing referee.

**Peter A. Chang, Jr. '61 (BA '58)** of Santa Cruz, Calif., died December 11, 2004, at the age of 67. He was the youngest district attorney in the United States when he was elected at the age of 29 and the first Asian American to hold that position. He prosecuted some of Santa Cruz County's most notorious homicides in the 1970s and later won an appointment to the faculty of the National Association of Criminal Defense Lawyers. An accomplished trumpet player, he was passionate about music and played with Louis Armstrong at the age of 14. He is survived by his partner, Anne Mitchell; sister, Beulah; daughter, Catherine; sons, Christopher and Peter; and two granddaughters.

**Kenneth Bart Koeppen '62** of Minneapolis, Minn., died November 15, 2004, at the age of 71. He served as a visiting professor at the University of California at Davis from 1973-1974 and as a law professor at University of Minnesota from 1968-1996. He is survived by his sister, Joy.

**Robert E. Lazo '90 (MA '90)** of Berkeley, Calif., died December 31, 2004, at the age of 41, of cancer. He spent several years handling cases for the Law Offices of Arnold Laub in San Francisco and was the founder of San Francisco's Employment Lawyers' Group, specializing in workplace discrimination and harassment cases. He is survived by his wife, Gina.

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### FACULTY:

**J. Myron Jacobstein**, Stanford law librarian and professor, of Danville, Calif., died March 25, 2005, at the age of 85. See p. 10.





PHOTO: LAUREL HUNGERFORD

**IN ORANGE COUNTY:** Russ Allen '71 (left) welcomed Dean Larry Kramer at a luncheon held for the dean and local alumni at the Balboa Yacht Club in Corona Del Mar, California.



PHOTO: MISHA BRUK

**AT STANFORD:** (Left to right) Michael Abate '05, Eric Feigin '05, and Noah Phillips '05 at the Kirkwood Moot Court Competition finals held in the law school's moot courtroom. Abate and Feigin were awarded "Best Brief," and Phillips was named "Best Individual Oralist."

**IN SAN FRANCISCO:** (Left to right) Gregory Mandel '96, Jeff Lefstin '00, and Marc Peters '00 exchange ideas at a reception sponsored by Stanford Law School at the Association of American Law Schools annual meeting.



PHOTO: COURTNEY EWING

**IN WASHINGTON, D.C.:** Rick West '71 spoke to more than 100 guests gathered at a Stanford alumni event held at the National Museum of the American Indian, where he serves as director.



PHOTO: AMY COPLEY



PHOTO: MISHA BRUK

**AT STANFORD:** Hon. LaDoris Cordell '74, vice provost and special counselor to the president for campus relations (left), met with Barbara Arnwine, executive director of the Lawyer's Committee for Civil Rights Under Law. Arnwine was the keynote speaker at the Stanford Black Law Students Association spring conference.



PHOTO: MARK FELLMAN

**IN LOS ANGELES:** Dean Larry Kramer (left) was welcomed by Larry Stein '85, partner at Latham & Watkins, which hosted a reception for the dean and local alumni.

**IN SAN FRANCISCO:** Michael Merriman '04 (left) and Greg Wright '04 enjoy themselves at the Stanford Law School Young Alumni Happy Hour held at Fuse, a North Beach nightclub.



PHOTO: TAMMY SPATH



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# Stanford Law School ALUMNI WEEKEND 2005

The weekend will feature exciting panels; gatherings for alumni, faculty, and students; special recognition of volunteers; class reunion celebrations; the Stanford v. Arizona State football game; and much more.

**Special events include:**

**STANFORD UNIVERSITY ROUNDTABLE FORUM “NATIONAL SECURITY: AT WHAT COST?”**

Friday, October 21

Cosponsored by Stanford Law School and the Stanford Alumni Association

This forum will offer a broad look at the issue of national security and what it means to be an American today. Faculty and alumni experts from areas of government, international policy, law, and social science will discuss the impact that world events and the threat of terrorism have on our lives.

**Additional Program Highlights**

**Dean’s Circle Dinner**

Thursday, October 20

A gala dinner to honor members of the Dean’s Circle—annual donors of \$10,000 or more. By invitation.

**Volunteer Leadership Summit**

Friday, October 21

Dean Larry Kramer will recognize current and prospective alumni volunteers.

**Classes Without Quizzes**

Friday, October 21

An invigorating learning experience in the law school’s state-of-the-art classroom building. Immerse yourself in a favorite topic, taught by one of Stanford Law School’s renowned professors, and relax—there won’t be a quiz.

**Alumni Reception**

Friday, October 21

A festive reception for all alumni and their guests, faculty and students.

**Tailgate Party**

Saturday, October 22

Gather for fun and delicious fare. Children are welcome and entertainment will be provided.

**Reunion Dinners**

Saturday, October 22

Members of the Classes of 1955, 1960, 1965, 1970, 1975, 1980, 1985, 1990, 1995, and 2000 will gather with classmates for an evening of fine dining in elegant pavilions near the law school.

A special dinner will also be held at the law school for the Class of 1950.



## Thursday to Sunday, October 20 to 23

For additional information about these and other exciting Alumni Weekend 2005 programs and reunion activities, visit our website at <http://www.law.stanford.edu/alumniweekend>.