

TRANSCRIPT



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TRANSCRIPT

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FROM THE DEAN



“Two tours of White House duty have left me immune to Potomac fever.”

—Christopher Edley, Jr.
William H. Orrick, Jr.
Distinguished Chair and
Dean

On March 21, about a week before the Regents appointed Mark G. Yudof the next President of the University of California, our faculty voted unanimously to offer him a professorship at Boalt Hall. Several colleagues noted that they would vote to hire Yudof even if he weren't willing to accept the presidency. And with good reason: He is a distinguished scholar (education law, constitutional law), a dazzling teacher, a superb administrator, and a visionary leader in public higher education. That he is also a former law school dean (UT Austin) makes the appointment not just welcome but inspired. On page nine, you can learn more about why Mark is the right person at the right time for the UC system, and why we are delighted and honored that he will be joining the Boalt community.

Some sense of that community is captured in these pages: groundbreaking scholarship; legal, technical, and policy expertise harnessed to engage the big issues of the day; unbelievably talented and committed students; and generous doses of inspiration and amusement from the active and engaged lives of our alumni.

Of course, I cannot send something without making a pitch for the Campaign for Boalt Hall. In this issue, however, I've turned to Laurent Heller, our director of strategic planning. Laurent lays out for you some sobering facts and figures. We simply cannot succeed without your support.

Keep reading, but realize that the great stories about the great work don't even scratch the surface of what we're accomplishing. We're already hard at work on the October issue. Meanwhile, our Web site is an easy way to keep up with us, or at least try.

A few weeks ago I wrote the faculty and staff that I have accepted Provost Breslauer's invitation to start the performance review process required to continue beyond my five-year term, which ends in June 2009. I wrote not to trigger protests—I hope—but to squelch rumors of Mr. Edley going to Washington. Two tours of White House duty have left me immune to Potomac fever, and as I admitted unabashedly in my note, I have fallen completely and totally in love with Berkeley and Boalt. I'm still unpacking boxes, and still trying to find time to sail.





IN BRIEF

NEWS FROM THE BOALT COMMUNITY

Don't Go There: Avoiding Ethical Traps

IN BRIEF: STUDENT PROFILE*

Applicants to Boalt Hall: **6,980**

Median Grade Point Average: ... **3.79**

Median LSAT Score: **167**

Class Size: **269**

Median Age: **25**

Age Range: **20-40**

Students Over Age 30: **9%**

Women Students: **55%**

Men Students: ... **45%**

Students of Color: **38%**

Students Entering with Advanced Degrees: **12%**

Most Common Undergraduate Majors: **Economics, English, History, Philosophy, Political Science**

*STUDENTS ENTERING BOALT HALL DURING 2007-08 SCHOOL YEAR

Dana Welch '87 recalls that while working as general counsel for a large financial company, she was invited to join a committee formed to evaluate the credit strength of potential clients. But the seemingly benign request was an invitation to disaster. "Say a client defaults on a loan and as general counsel you have to initiate a collection action," Welch says. "You'll be litigating about a loan that you had a personal hand in approving."

After she left her job as general counsel of Robertson Stephens, Welch continued research on the ethical issues that bedeviled her work on a daily basis. She discovered that very little attention had been paid to the specific ethical problems of in-house lawyers. Seeing a need and an opportunity, she decided to launch Welch ADR & Training Services, which offers training sessions that focus on SEC reporting rules, conflicts of interest,



corporation as client, and attorney-client privilege, as well as alternative dispute services.

In the wake of the Enron scandal, and investigations into questionable market-timing moves and stock option backdating, in-house lawyers are increasingly targeted by the SEC.

"They face difficult issues, and they're more isolated than a law firm lawyer who can review her concerns with a colleague down the hall," says Welch. She notes that applying the ethical rules and maintaining a separate identity

is hard when you sit next door to the CEO who views you both as the company's lawyer and a good friend. "You're paid by the same people you have to advise," says Welch, "and you interact closely with them, and that environment can lead to situations where it becomes difficult to say no."

Welch was the founding executive director of the Berkeley Center for Law, Business and the Economy, and her training sessions are part of the center's Executive Education program.

—Andrew Cohen

IN BRIEF



Louise Epstein Retires

Louise Epstein, Boalt Hall's assistant dean for advancement, retired in March after more than 13 years at the law school. She led Boalt's fundraising efforts to unprecedented heights, and launched many long-term initiatives to bolster the alumni community.

Her successful programs include Partners in Leadership, reunion class campaigns, the State Bar Admissions Ceremony, and the Scholarship Luncheon. Epstein also coordinated a thriving network of regional alumni chapters.

"Everyone who worked with Louise got caught up in her enthusiasm for where the law school was headed," says Nan Joesten '97, president of the Boalt Hall Alumni Association.

All told, Boalt raised more than \$107 million during Epstein's tenure. "My greatest joy is seeing the development of our alumni community," she says. "It has been a privilege to work with so many thoughtful and dedicated people."

To make a gift in Epstein's name to the Boalt Hall Fund, please visit give.law.berkeley.edu. —A.C.



FISHY BUSINESS: Eric Feldman '89 observes tuna merchants at the Tsukiji fish market.

Scales of Justice: Tokyo's Tuna Court

Selling less-than-fresh fish at the Tokyo Metropolitan Central Wholesale Market, commonly known as Tsukiji fish market, can raise a big stink. And no wonder—it's the biggest wholesale fish and seafood market in the world. Starting at 5:30 a.m., thousands of tons of a dizzying variety of seafood change hands in clamorously competitive auctions. Disputes over freshness and quality can be acrimonious, cause disastrous delays, and breed mistrust and long-standing feuds.

Enter a unique, state-created legal institution, which Boalt alumnus Eric Feldman '89 describes in "The Tuna Court: Law and Norms in the World's Premier Fish Market" (*California Law Review*, v. 94 no. 2, 2006). Feldman's iconoclastic article made a big splash—particularly among students of formal legal institutions—and landed the Law and Society Association's 2007 Article Prize. The paper's startling conclusions contradict the long-held scholarly belief that informal negotiation is more effective than formal conflict resolution when close-knit parties disagree.

A University of Pennsylvania Law School professor and Japanese law expert, Feldman outlined

recurring wrangling among Tokyo tuna merchants over the quality of auctioned fish. Rather than struggle to resolve their feuds informally, they turn to the "Tuna Court," which follows set rules and procedures. Fast and inexpensive, the court doesn't just mete out justice—it strengthens relationships and market cohesion, creating a shared sense of values and success.

The court strengthens relationships and market cohesion, creating a shared sense of values and success.

"I wasn't sure what I had," Feldman says of his initial research. "It was the year before my tenure review, and I didn't want to come up empty-handed. I had a long talk about the project with my former dissertation advisor, [Boalt professor] Malcolm Feeley, and he was unequivocally supportive."

So Feldman went fishing for data. He spent weeks watching the court in action, then weeks more sifting through disjointed records in a small, dank office. By then, Feldman knew he'd hooked something big.

"Nothing had been written about this subject, and it took a while to figure out what exactly was going on," says Feldman. "I'm happy the lessons of the Tuna Court could be told." Happy? How about reeling with delight? —A.C.

Go Ask Alice



For 30 years, Boalt Hall reference librarian Alice Youmans has helped thousands of law students and legal scholars access arcane knowledge and locate elusive sources. Content to see the spotlight shine on those whose studies and reputations she has helped advance, Youmans recently saw it swivel her way by winning the UC Berkeley Distinguished Librarian Award. The honor is given every two years to those who excel in helping campus libraries acquire, organize, interpret, and provide access to information and knowledge.

A college librarian before earning her law degree, Youmans practiced for three years at the UC Berkeley General Counsel's Office. She took a job in Boalt's library in 1978 and has deftly managed technological innovations ever since, transforming the tools of legal research from musty pages to CD-ROMs, online databases, and high-bandwidth networks.

"Not a week goes by that I am not reminded of how incredibly good Alice is at what she does," says lawlibrary director Kathleen Vanden Heuvel. "Her stamp of quality can be seen on a great deal of the legal scholarship written or published at Berkeley over the last 30 years."

Characteristically, Youmans focuses on others. "So much of what I do leaves no lasting record other than a thank-you or the occasional acknowledgement in a footnote," she says. "This



award truly made me realize that what I do is valued by our students and faculty, and by my library peers."

Three cheers. No shushing.

— A.C.

ONE FOR THE BOOKS: Alice Youmans has won the UC Berkeley Distinguished Librarian Award.

Stress Recess

On a Thursday afternoon, just before sundown, 10 or so Boalt students gather in the quiet calm of the Dean's Seminar Room. After chatting briefly about the perils of class rankings, the stress of final exams, and plans for a potluck dinner, the Boalt Hall Meditation Group gets

down to business.

Throughout the next hour, Boalt Scholar in Residence Charles Halpern—yes, *the* Charles Halpern, the renowned public interest lawyer who has guided legal professionals to meditation for years—leads the students through deep breathing exercises and standing meditation. He urges

them to clear their minds, but—knowing that law students are a self-critical bunch—he gently adds, "Don't berate yourself because you're mind isn't clear yet."

Halpern was invited to be a guest speaker five years ago—when the group began as the first law school organization of its kind—and soon started leading its weekly sessions. The group's members, like 2L Matt

Henjum, show their enthusiasm by sticking with it. Henjum has attended the sessions regularly for over a year and says (a tad self-critically), "I know it's valuable and healthy to do, and I feel guilty for not doing more of it."

"I started meditating as a way to relax and anchor myself as part of a series of high-stress jobs," says Halpern, who credits meditation for bal-

ancing the adversarial nature of his work as a public interest lawyer. "But I've really come to see it as a kind of job skill for lawyers and other mind-workers."

For details on Halpern's recently published memoir on his work in law, advocacy, and meditation, *Making Waves and Advancing the Currents*, see page 43.

—Colleen Raspberry



JIM BLOCK (BX)

Seed Money from a Grass Roots Group

“All the attorneys that helped did it in their spare time without charging a dime.”

When he journeyed from Mexico to California at age 20, Catalino Tapia had \$6 in his pocket and a sixth-grade education. “Not exactly the stereotype of a college scholarship philanthropist,” his son Noel Tapia ’99 says with a laugh.

But the Bay Area landscape gardener is a genuine—and unique—student benefactor. When Noel Tapia graduated from Boalt Hall, his father was so inspired that he decided to form the Bay Area Gardeners’ Foundation (BAGF).

With a board comprised of immigrant gardeners, the nonprofit organization gives scholarship grants to selected low-income high school students who meet grade and community service requirements.

“My dad’s plan started as a simple idea to elicit contributions from his customers,” says the younger Tapia, a real estate lawyer for Greenberg Traurig in Los Angeles. “He got a positive response from other gardeners, and within a month they raised \$20,000.”

In 2002, Noel Tapia and Boalt graduate Maribel Medina ’95 helped BAGF prepare its bylaws and articles of incorporation. “We had about 100 people at our first meeting,” says Medina, now special counsel to the Los Angeles Unified School District Board of Education. “It was so gratifying to see that community enthusiasm, and to see Catalino’s passion for education flourish into this wonderful organization.”

Interest and donations blossomed after the *San Francisco Chronicle*, National Public Radio and CBS Evening News all profiled the foundation and Tapia, who in 1981 started his own gardening business after working as a baker and machinist. BAGF offered five \$1,500 scholarships in 2006, nine in 2007, and this year plans to offer 15, with an extra \$1,000 awarded to the two most promising students. The grants are relatively modest, but their impact is significant—many recipients are the first in their families to attend college.

“This experience has been very humbling and very gratifying,” Catalino Tapia says. “All the attorneys who set up the foundation did it in their spare time without charging a dime, and now everyone on our board is an unpaid volunteer. Knowing that so many people want to help these kids makes what we’re doing even more rewarding.”

Anyone who wishes to contribute to BAGF should write to catalinotapia@sbcglobal.net.
—A.C.

RAKING IT OUT: Catalino Tapia tends to a unique foundation that helps low-income high school students.





Angel over Boalt

Joyce Hall's official title was bookstore manager, but Boalt Hall students and staff knew her as the guardian angel. Hall retired in January after 25 years of service to Boalt, and was honored at a packed reception on February 27. Her countless acts of kindness and generous, nurturing spirit made her a legend at the school. According to Hall, it all comes naturally. "I didn't see it as any big deal," she says. "I was just raised that way."

When 1Ls had trouble adjusting to law school life, Hall offered a friendly ear and helped ease their transition. When students could not travel home for a holiday break, she invited them to her family's house for a home-cooked meal. And when professors needed a last-minute babysitter? "I put a bassinet in the bookstore and said 'Bring them on in.'"

Needless to say, Hall will be greatly missed. "When graduates come back for alumni events, one of the first things they do is go see Ms. Joyce," says 3L Armilla Staley-Ngommo. "It just shows how special she has been to Boalt students, and how special they've been to her." —A.C.



Straight Talk on Boalt's Campaign Trail

Anyone who talks to Laurent Heller for more than a few minutes will notice two things: He listens carefully to what you say and thinks before responding. Deliberate, cautious, and thoughtful, Heller is—in short—a reliable source.

Take his hit on the Campaign for Boalt Hall, for example. When Heller says its success is the single most important factor in Boalt's continued growth, you can take it to the bank.

Heller's circumspect candor is a big reason why he serves as a key advisor on Dean Edley's staff, and why he was asked to join the executive team at Boalt in 2005. While in his 20s, Heller worked with Edley for three years at Harvard, managing finances and information technology for Edley's groundbreaking research program, The Civil Rights Project.

Now 31, the boy wonder—as the dean has called him—is the point person for Boalt's strategic planning. While Edley and the Alumni Center development directors are out in the world presenting the vision and making the case, Heller is behind the scenes framing the questions, crunching the numbers, and navigating the most pressing issues facing the law school. "Dean Edley has the vision; I'm just trying to make it a reality," Heller says.

Heller keeps a close eye on all kinds of data that can help steer the law school toward effective strategies for staying at the top of its game. When asked about the campaign's \$125-million goal—an amount nearly 10 times the size of Boalt's last campaign—Heller replies with pointed frankness. "Sure, it's extremely ambitious. But that figure was not arrived at arbitrarily," he says. "It's based on real, numbers-based assessments of where we are now and what we expect to achieve in the future."

For example, Heller notes that raising Boalt's student-to-faculty ratio to competitive levels will cost the school more than \$4 million per year, and that improvements to grants, loan repayment, and other financial aid needs will top \$5 million per year by the end of the campaign.

Another part of Heller's job is keeping tabs on the financial picture of other top schools. It is, he notes, cause for concern. "We're doing great, but so are our competitors," Heller says.

"They're raising funds at unprecedented rates as well. The growth arc in funding, and hence quality, of legal education shows no signs of slowing down. If you were to show these sorts of ambitious numbers to deans 10 years ago, they'd mostly have laughed you (Continued on page 8)

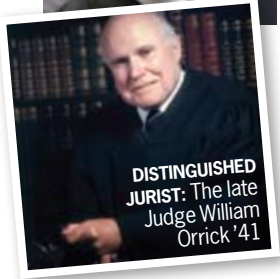
UPHILL BATTLE

Money raised last year by five top law schools*:

Harvard:.....	\$48M
NYU:.....	\$42M
Columbia:.....	\$24M
Michigan:.....	\$18M
Boalt:.....	\$13M

*Rounded approximations

IN BRIEF



Dean Edley Appointed to Orrick Chair

A national leader in civil rights law and public policy, Boalt Hall Dean Christopher Edley, Jr. has been appointed to the Honorable William H. Orrick Distinguished Chair in Legal Ethics and the Legal Profession. He will hold the Orrick Chair, one of 36 endowed chairs at Boalt, for five years.

The late Judge Orrick was Assistant U.S. Attorney General and Deputy Under Secretary of State in the Kennedy and Johnson administrations, worked for over two decades at the San Francisco law firm of Orrick, Herrington & Sutcliffe, and was a longtime federal judge for the Northern District of California.

Among his high-profile rulings: granting female students the same protection from sexual harassment in schools as in the workplace, and ordering San Francisco to stop using race as a factor in assigning students to schools.—A.C.

out of the room. The thing I'm keenly aware of is that 10 years from now, even these current stratospheric levels of investment are going to look like peanuts."

Last year, top law schools reported bringing in record-breaking donations. Harvard brought in \$48 million, NYU raised about \$42 million, Columbia garnered almost \$24 million and Michigan received just under \$18 million. By contrast, Boalt raised \$12.7 million.

"It's a somewhat daunting prospect to be

competing with schools like Harvard, NYU, and Columbia," Heller says. "But the reality is that these are our competition. We have every intention of elbowing out a place for ourselves in their sandbox. Boalt remains a unique, top-10 school and we've taken great strides in recent years. The vital question now is, 'how do we continue to build on this success?' This is our moment, and my suspicion is that five or 10 years from now we'll still be playing, and winning, in the big leagues."

—Jared Simpson & Andrew Cohen

A Boalt Clinic Is Fixing the Vote!

Botched results due to flaws in electronic voting are becoming as common during elections as stump speeches and campaign promises. As a contribution toward rectifying the problem, Boalt Hall's Samuelson Law, Technology & Public Policy Clinic—working with academics and others across the country—coordinated the first thorough review of both the state laws governing electronic voting and academic research on government audits of polling systems. The alarming finding: Most states still cannot ensure the accuracy or security of electronic voting.

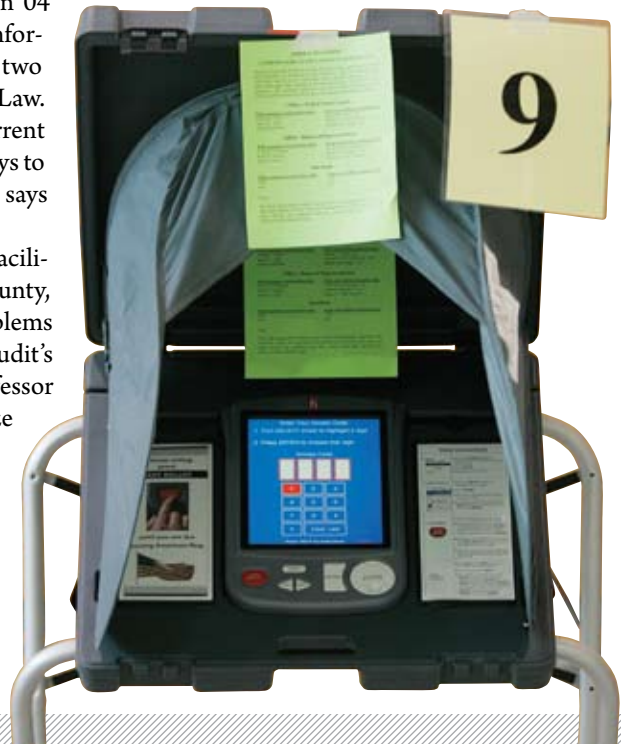
Clinic Research Fellow Aaron Burstein '04 co-authored the review with School of Information Ph.D. candidate Joseph Hall and two colleagues from the NYU School of Law. "We found many clues about why the current equipment is deficient, and outlined ways to help prevent the recurring problems," says Burstein.

Hall and Burstein played key roles in facilitating a massive audit in Cuyahoga County, Ohio, which endured major voting problems in 2004 and 2006. Hall guided the audit's public monitor, Cleveland State law professor Candice Hoke, through the complex maze of the voting system, while Burstein helped her overcome resistance from the county's board of elections—which had initially claimed copyright and trade secret protection—to turning over critical data. Burstein rebuffed the election board's assertions with counterarguments largely derived from a paper he

had written with Clinic Fellow Jack Lerner and two student interns, and auditors gained access to all that they needed.

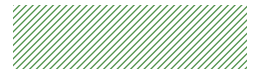
Before long, they had found a minefield of irregularities: uncounted ballots, possible corruption of the vote tabulation database, ballots counted twice, missing or duplicate voting machine serial numbers, and poor physical quality of generated audit reports.

"Each state faces its own challenges," Burstein says, "but no state has surmounted all of them in terms of coming up with consistently reliable procedures." —A.C.



SHAWN THEW/EPA/CORBIS (VOTING)

The Education President



Reflecting on a recent dinner conversation with incoming University of California President Mark Yudof, Dean Edley says that he was continually amazed by Yudof's insight, intellect, and humility. But one comment in particular left him, he says, "awestruck."

"Mark raised the issue of teaching by apologizing that he might not be able to offer a course in his first year," Edley says. "I almost fell out of my chair. The idea that he would even hope to do this had never occurred to me."

But Yudof has always been a committed and passionate teacher. Teaching contracts and constitutional law "is what I do best," he says, and he's always found time to be at the lectern—even during his current six-year tenure as University of Texas System chancellor and preceding five-year stint as University of Minnesota president. Yudof will continue that tradition while serving as UC president. He will hold a faculty appointment at Boalt and hopes to return to the classroom in fall 2009, possibly in the Jurisprudence and Social Policy Program.

Yudof is a nationally renowned expert on constitutional law, freedom of expression, and education law. Each semester, Boalt's Goodwin Liu assigns his students a seminal article penned by Yudof in 1978 on the role of courts in school desegregation.

"It is perhaps the single most insightful and nuanced framing of the problems," says Liu, who was just promoted to tenured professor. "It foreshadowed much of what eventually came to pass, and its themes are still illuminating across many areas

where courts are asked to grapple with social science."

Yudof has written and edited books on free speech and gender discrimination, including four editions of a leading casebook, *Educational Policy and the Law*, with Boalt professor Rachel Moran and two other co-authors.

"I've developed a deep and abiding respect for Mark's intellectual acumen, his outstanding ability to organize and manage complex projects, and his unquestioned integrity and sound judgment," Moran says. "He is precisely the sort of leader that the University of California needs at this moment, and he is precisely the sort of colleague that the law school will justly treasure."

Yudof takes the helm at UC fully aware of the problems facing the system, but he's also well equipped to address (Continued on page 10)

A CLASS ACT: New University of California President Mark Yudof is joining Boalt's faculty and plans to begin teaching in 2009.



IN BRIEF



“Each day we need to work to gain the respect of the people of California. That should not be taken for granted.”

them. At Minnesota, he managed to increase state funds for higher education and substantially increased private support for the school. At Texas, he has successfully guided one of the nation’s largest higher education systems: 15 campuses, more than 194,000 students, over 81,000 employees, and a \$10.7-billion annual budget. He readily admits that in the face of stagnant revenues and continued state budget cuts, presiding over the huge and complex 10-campus system—more than 220,000 students, 170,000 faculty and staff, and an \$18-billion annual budget—will be a major challenge.

“Each day we need to work to gain the respect of the people of California,” Yudof says. “That should

not be taken for granted. Even if you don’t have a son or daughter in the system, how well UC does is critical to everyone who lives in this state. My job is to show that there are many aspects

of their lives that depend heavily on how we discharge our obligations.”

Yudof earned his law degree at the University of Pennsylvania, and has won that law school’s Alumni Award of Merit (2001) and James Wilson Award (2004) for his service to the legal community. He is a fellow of the American Academy of Arts and Sciences, a member of the American Law Institute, and served on the Advisory Board of the National Institute for Literacy at the U.S. Department of Education. Yudof is also a member of The President’s Council on Service and Civic Participation, appointed by President Bush in 2006.

Having spent 26 years at Texas—including a decade as dean of the law school from 1984 to 1994—Yudof says deciding to leave was not easy: “I wasn’t looking for another job and we were quite content where we were. But when push came to shove, it just felt like this was the place to be. It’s hard to imagine a more stimulating job than serving as president of what I view as the premier public university system in the world.”

“Of course, Mark will have his hands full with responsibilities beyond furthering his legal scholarship,” Liu says. “But we certainly have a tremendous opportunity in the appointment of a UC president with intuitive appreciation for the kind of work we do at Boalt.” —A.C.

No Rush to Judgment

Like many domestic violence experts, Boalt Hall lecturer Nancy Lemon was painfully aware that too many California judges deny protective order requests without explanation. “It was alarming,” she says. “Something had to be done.”

As the director of Boalt’s Domestic Violence Practicum—which gives students hands-on experience with real cases—Lemon was in a position to do something substantial. In March

2007, she and practicum student Kelly Burke ’07 filed an amicus brief for statewide domestic violence groups in *Nakamura v. Parker*, after a Superior Court judge denied plaintiff Yuka Nakamura’s request for a protective order against her estranged husband, John Parker.

Despite her allegations that Parker had physically and sexually abused her and that he was having her followed, the judge—with no explanation—denied her request with a rubber

stamp: “The facts set forth do not provide a legal basis to issue the order requested and the application is therefore denied.”

Calling that response “highly imprudent,” a state court of appeal ruled that judges should list their reasons for rejecting a protective order sought by someone who presents written allegations of injuries, threats, or harassment. “The pattern of denying without an explanation or hearing creates more violence,” says Lemon, who

participated in oral arguments during the appeal. “Women feel like the system won’t protect them, and have little incentive to report abuse to police or a judge.”

Victims often seek protective orders without a lawyer, not knowing that denials can be appealed. By publishing the case, the court has ensured that judges will use it as a guide for handling such requests. “With this ruling,” says Lemon, “every protective order request must be treated seriously.” —A.C.

More than 600K
California women
victimized each year

U.S. annual cost in
victims’ lost days of
work: **\$858.6M**

U.S. annual medical
and mental health care
costs: **\$4.1B**

74% of those who
obtain protective orders
report no further
problems

Victims who get
protective orders are
80% less likely
to be assaulted than
those who don’t



FOREFRONT

AT THE
LEADING
EDGE OF
RESEARCH
AND SERVICE

Patent Reform Duel Becomes a Brawl

As change looms, a Boalt think tank weighs in.

Here's the word on the street about patent reform: It's essentially a high-stakes dust-up between Silicon Valley and Big Pharma. But as talk of change has moved from corporate conference

rooms to Congressional committees, research from the Berkeley Center for Law & Technology (BCLT) suggests that the debate over future revisions to the nation's patent laws is a bit more tangled than conventional wisdom suggests.

Robert Barr, BCLT's executive director, sees a clash of competing agendas. "It doesn't divide cleanly, as it did for awhile," he says. Tech companies that license their intellectual property to others in lieu of making and selling products themselves have formed a new coalition that opposes many of the reforms supported by others in the IT industry; universities are voicing their concern over the effect of patent reform on their licensing revenue—and now individual inventors are jumping into the fray. The Web site of the Professional Inventors Alliance (piausa.org) decries the proposed changes to patent laws as 'destructive' and 'anti-American.' What was once a prize-fight now resembles a barroom scuffle.

Round one

The recent push for patent reform began in 2002, when the Federal Trade Commission (FTC) solicited ideas on competition and intellectual property through a series of hearings. (UC Berkeley weighed in, thanks to sessions cosponsored by Boalt and the Haas School of Business.) Incorporating some of the FTC's findings, the Patent Reform Act of 2007 proposed several tweaks to relax the old rules. It would lower the cost to challenge a patent, allow smaller damage



awards, and reduce injunctive relief for those whose patents were infringed. Other proposals sought more sweeping change: The current “first-to-invent” system would make way for a “first-to-file” rule, and give the United States Patent and Trademark Office (USPTO) more power to forge its own regulations.

As Congress began hammering out legislation, the two heavyweights took opposing sides. Pharmaceutical companies feared that loosening the rules would sap revenues, while tech companies hyped a streamlined system as a way of making compliance easier. “A unique characteristic of the patent system is that you can infringe a patent without knowing it,” says Barr. “Most big companies consider it impossible to avoid infringement because it’s a huge effort to read and interpret thousands of patents.” Even if they make that effort, they still won’t know which pending patents could be a problem for them down the road.

Featherweights vs. heavyweights

That initial clash of titans sparked the myth of a two-sided fight, and all but drowned out the voice of the entrepreneur. That’s changing. In 2006 BCLT garnered a grant from the Ewing Marion Kauffman Foundation to investigate the effects of patent law and policy on entrepreneurial activity. “We’re trying to unpack the usefulness of the patent system,” says Stuart Graham, a Kauffman Fellow on loan to BCLT from Georgia Tech. “How it’s working for entrepreneurs is at the heart of the study.” Graham will survey companies less than five years old—a group that typically doesn’t lobby in Washington. “Often, they’re choosing between buying water for the water cooler and

paying the secretary,” Graham says. “They don’t have the resources [to hire lobbyists].”

Boalt at center ring

BCLT plans to conduct its survey online and by mail this spring, with phone follow-ups. The Kauffman-funded research project was unveiled last March at the 12th Annual Symposium on Intellectual Property and Entrepreneurship, a two-day event that attracts intellectual property attorneys, technology firms, venture capitalists, and representatives of the FTC, USPTO, and Congress. BCLT expects to present survey results in Washington, D.C. next fall. In the meantime, expect more research, amicus briefs from individual BCLT professors, and law review articles.

And though research is in its early stages, Graham already identifies another dynamic in the battle over patent reform. “Oftentimes inventors and entrepreneurs are conflated, but I don’t think that’s a proper way to look at it,” he says. While inventors create and license their intellectual property, entrepreneurs build companies. “Their value comes not only in the innovation, but also in their hard work, their business plan, and all the other elements that make up a successful entrepreneur. And as such, patents play a much less pivotal role in their success story.” Except, he says, to give entrepreneurs breathing room—a little something to keep the competition off their backs.

Whatever Graham’s survey ultimately finds, Barr and BCLT don’t have a dog in the patent reform fight. “But we can help facilitate resolution of the issues by adding real research and facts about the entrepreneur,” he says. In an all-out tussle grown complicated and contentious, BCLT hopes to swap out myth for fact. —Fred Sandmark



“A unique characteristic of the patent system is that you can infringe a patent without knowing it.”

— Robert Barr

The Invisible Handoff

Boalt’s newest think tank ponders international legal outsourcing.

Asking lawyers about outsourcing is almost as dicey, it seems, as asking presidential candidates about youthful indiscretions: When the *International Herald-Tribune* asked the 10 highest-grossing U.S. law firms to comment on outsourcing for an August 2007 article, seven of the 10 declined, the newspaper reported.

Outsourcing legal work, mostly to India, is a growing trend, though how fast it’s growing is something of a mystery. Outsourcing is also a hot-

button, divisive topic, according to Madhuri Messenger ’98, executive director of the Institute for Global Challenges and the Law (GCL), Boalt’s newest research center. To proponents, outsourcing is simply one more instance of globalized capitalism—and a logical way to keep legal costs from skyrocketing. To critics, it’s a menace to the profession, a cost-cutting ploy that puts clients at risk by entrusting legal legwork to poorly-paid workers who haven’t learned American law in U.S. law schools.

An open secret

The mystery and controversy swirling around outsourcing have prompted GCL to schedule an April 2008 conference, International Outsourcing and the Legal Profession, to explore the economic, ethical, and quality-control issues raised by outsourcing. “I’ve combed the research,” says Messenger, “and there’s not much out there. So far, outsourcing workshops have tended to be how-to in nature. None of the issues have been explored in depth.”

Messenger has firsthand knowledge of the veil of secrecy. One of her cousins is a young Mumbai attorney who works for an outsourcing firm. Messenger’s cousin can’t say much about what she or her firm does—partly because client confidentiality is carefully protected, but also because information is tightly compartmentalized to protect the firm’s competitive interests.

Some numbers do exist. One Indian source, ValueNotes Database, estimated the 2006 outsourcing market at \$146 million and predicted that figure would increase to \$640 million by 2010. And Boston-based Forrester Research has projected that by 2015, 50,000 or more U.S. legal jobs will have migrated to India. Those are sizable numbers, considering that “legal process outsourcing,” or LPO, didn’t really begin until around 1995. On the other hand, they’re comparative drops in the \$250-billion bucket that is the U.S. legal market.

Too much of a good thing?

For obvious reasons, many perceive the outsourcing of legal work as a negative trend. But Boalt professor Andrew Guzman, one of GCL’s faculty co-chairs, views outsourcing as a positive trend, on balance. “It’s good for consumers, because they get what they want at a lower cost,” he says. “International trade is good for the U.S. It’s good for India, because people are getting jobs. It’s good for the world, because poorer people are getting a chance to increase their standard of living.” Guzman’s only concern is the potential economic impact if outsourcing causes a mass exodus of jobs.

That’s unlikely, though, if Robert Barr’s experience with outsourcing is typical. Barr, now executive director of the Berkeley Center for Law & Technology, spent a decade overseeing thousands of patent applications for the networking and communications giant Cisco Systems—first as an outside attorney, then as Cisco’s vice-president for intellectual property and worldwide patent counsel. In 2003 and 2004, Barr began outsourcing work on patent applications to India—not to attorneys, but to engineers, who had the technical knowledge



needed to draft applications. Outsourcing the work saved money—roughly 50 percent, Barr estimates—but the bargain wasn’t without its downside. “The quality was inconsistent,” he says. “The biggest problem was the limited contact between the inventor and the drafter.” Barr summarizes his Cisco outsourcing as “a difficult experiment.” Still, he says, “money was tight, and it allowed us to stretch our budget and file more patent applications for the same amount of money.”

Though only recently launched, GCL has its hands full. This fall it inaugurates the International Program for Judicial Studies, which promotes the rule of law around the world by training judges and government officials from various countries. In another initiative, GCL is developing a research and policy agenda focused on regulating corrupt practices and promoting efforts to deter and combat corruption at all levels. Collaborating with the Boalt Hall Robbins Collection and the California Center for Environmental Law and Policy, the Institute is also working to address water governance problems in Sub-Saharan Africa. (See related story on page 40.)

—Jon Jefferson

OPEN SOURCE: Mahduri Messenger '98, is the executive director of the Institute for Global Challenges and the Law.

We the Students

A Boalt group brings the Constitution to high school classrooms.

A high school class can be a tough house to play. Jennifer Gomez '08 and Ben Allen '08 learned that when they stood up in front of a mixed group of juniors and seniors at an Oakland high school to teach constitutional law. "They were bored, distracted, and paid little attention to what we were saying," Gomez recalls. "The problem wasn't them. It was us. We were imitating our law professors instead of catering to our students' actual needs."

Gomez and Allen are members of Boalt's chapter of The Marshall-Brennan Constitutional

Amendment search and seizure issues such as school locker drug searches, and Equal Protection Clause issues such as desegregation, affirmative action, and school financing.

Boalt's CLP is led with boundless energy by Jennifer Elrod, a constitutional law expert who directs the program. Elrod teaches a rigorous seminar for student-instructors; she leads them through analyses of court cases, engages them in weekly teaching practice sessions, and oversees their construction of lesson plans.

Class actions

Student-instructors have wide latitude to tailor their teaching style to each class, using everything from PowerPoint presentations to video clips to mock game shows, and even props.

In an effort to spark discussion about a Supreme Court case in which high school seniors wore black armbands on school grounds to protest the Vietnam War, one Boalt duo walked into class donning black armbands themselves. Faced with the challenge of teaching 10th-graders with learning differences, 3Ls Joanna Chan and Nate Feneis used innovative visual devices and rhetorical questions to draw students' interest and sustain their attention.

"Our law students create so many innovative ways to integrate theory into practice," says Elrod. "The high school students learn core constitutional principles, but they also acquire lawyerly skills like critical thinking, how to unpack a factual situation, and how to build arguments on both sides of an issue."

Boalt has built upon the CLP's initial success at American University, which launched the program in 1999, by bringing on undergraduates. They study cases being prepared in the lesson plans, share knowledge about their recent high school learning experience, and serve as knowledgeable assistants to the student-instructors. At practice sessions, the undergraduates pepper Boalt's teaching tandems with unpredictable questions to help them master the material before bringing it to the high schools. "Until you stand up and teach, you're never really sure how you'll react," Elrod says. "That's why our practice meetings have a hot panel dynamic. It's great preparation."

Rights and responsibilities

Boalt's CLP now visits high schools in Berkeley



A MORE PERFECT CLASS: Boalt student instructors Melissa Price '09, Lynn Wu '08, and Tivonna Jones '08 engage students at Excel High School's Law Academy in Oakland.

Literacy Project (CLP), a groundbreaking program that gives law students the chance to teach high school students about constitutional issues that resonate with their own experience.

After their initial flop, the pair decided to ditch the lectures and passive note-taking and instituted a lively debate format instead. "What a difference!" says Gomez. "We divided the students to argue each side of a case and had them stand when they spoke. They really got into the material, and we took great joy seeing that passion come out."

Teaching an hour-long class each week, Boalt's CLP instructors guide Bay Area high school classes through constitutional principles from case law that addresses public education. Using a course book entitled *We the Students: Supreme Court Cases for and About Students*, classes focus on First Amendment speech, student expression, Fourth



and Oakland and plans to expand due to more law students and school districts showing interest. Beyond illustrating how the Constitution impacts students, their schools, and their families, student-instructors also give valuable advice on applying to college, obtaining financial aid, and charting an academic path after high school.

“Teaching them about their constitutional rights and responsibilities is important, but encouraging them to be engaged citizens and active thinkers is even more important,” says Gomez. “We really enjoy being mentors for these students, and to be honest I think we learn as much

from them as they do from us.”

In particular, Boalt’s instructors enjoy learning that with the right teaching approach, high school students can become riveted and even inspired by the Constitution.

“The great thing about constitutional law is that it’s relevant to our everyday lives,” Chan says. “People just don’t realize it at first. But when you discuss whether high school girls using birth control pills is covered under the 14th Amendment, or if it’s OK under the First Amendment to wear a ‘Bong Hits for Jesus’ T-shirt to school, then students love to voice their opinions.”
—Andrew Cohen



Back to the Future

Maria Blanco comes home and looks ahead.

Maria Blanco ’84 has a long history of tough, fearless work—and of making strategic exits and returns to academia. Blanco graduated from Boalt in 1984, and returned last summer as the executive director of Boalt’s Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity with more than two decades of social justice work under her belt.

It’s not the first time she’s gone back to school to deepen and inform her experience as a litigator and civil rights advocate.

Like so many young students in the 70s, Blanco was impatient to get down to the work of eradicating poverty and racism. Without collecting a diploma, she left her undergraduate program at UC San Diego to become a labor organizer in the garment sector, a notoriously difficult task.

Going with her gut

“Working and organizing among garment workers for three years changed me forever,” Blanco recalls. She developed a profound respect for the hard-working, hopeful women she was organizing while mastering the delicate art of leading people many years her senior. “I learned both humbleness and the potential of my own leadership abilities.” Ultimately, she says, she was able to overcome her inexperience by trusting her gut instinct, which taught her “a certain sense of daring” that has stuck with her ever since.

After a few years of organizing, Blanco recalls, “I was both exhausted and hungry for knowledge of a different type.” She began to feel that her political activism would benefit from the kind of

clout an advanced degree would bring. “I saw the J.D. as a badge that would give me entrée.”

After finishing her B.A. at UC Berkeley, Blanco went to Boalt, and after passing the bar went straight back into the field to work her new credentials: She fought sexual discrimination for seven years as staff attorney at Equal Rights Advocates, served as National Senior Counsel for the Mexican American Legal Defense and Educational Fund, and headed the Lawyer’s Committee for Civil Rights as its executive director. A few highlights from her case file include *Davis v. San Francisco*, which cleared the way for women to join the city’s fire department,

HOME OFFICE: Maria Blanco ’84 has returned to Boalt to head up the Warren Institute.



and *Castrejon v. Tortilleria La Mejor*, which held that undocumented workers are protected by federal anti-discrimination laws.

Back to school

Blanco says she surprised herself when, after more than 20 years away from campus, she decided to make another re-entry into academic life.

“I am again eager to deepen my knowledge of the issues I have worked on for the past 25 years,” she says. As executive director of the Warren Institute, she hopes to combine the on-the-ground legal experience of its eight-member staff with the kind of research muscle and big-picture thinking a university can offer, turning theory into praxis by providing policy-shaping analysis to litigators, community advocates, policy makers and voters. “I want to see Warren become the think tank of the civil rights community.”

Now in its third year, the Warren Institute is patterned after Harvard University’s Civil Rights Project (now at UCLA), which Dean Edley co-founded in 1996 before coming to Boalt. But

the Berkeley version has some California twists, says Blanco, who took the helm in July 2007. Education reform remains a key issue, but the Warren Institute will also focus on the immigration and voting access issues confronted by an ethnically and linguistically diverse population.

While it’s important to produce information, says Blanco, she also wants to get people to talk. For example, she says, the Warren Institute is working on a proposal for restructuring public school financing—a hotly-disputed topic in California politics. Yet, says Blanco, in soliciting discussion of the proposal, “We have been able to convene people in a room that hardly ever speak together,” including student advocates, teachers’ union reps, and state officials.

Blanco has relished being part of that discourse herself. “Already in the short time I’ve been here I’ve begun to do some of what I had hoped to do personally. I’m reading more, I’m thinking more, I’m looking into the issues deeper,” she says. “I really am beginning to feel part of an academic community.”

—Kara Platoni

Death Row Decision

Boalt’s Death Penalty Clinic weighs in at the Supreme Court.

DEATH ROOM:
Execution chamber
at the Louisiana
State Penitentiary in
Angola, Louisiana.



When the members of Boalt Hall’s Death Penalty Clinic returned from hearing the oral arguments before the Supreme Court in *Baze v. Rees* in January, they were dog-tired, but elated. One was nursing a cold. A few hadn’t seen their spouses in ages. Two—students Joy Haviland and Vanessa Ho, both class of ’08—had camped overnight in front of the court to make sure they could get inside.

In September 2007, the Supreme Court surprised watchers by agreeing to review *Baze*, in which two Kentucky death row inmates argue that the state’s lethal injection procedures risk causing pain that would violate the 8th Amendment’s prohibition against “cruel and unusual” punishment. Similar challenges exist in many states, but few had expected the court to choose Kentucky’s, where lethal injection has only been used once.

“Our principal goal is to defend our clients,” says Professor Elisabeth Semel, who has directed the clinic since its founding in 2001. “But a parallel goal is to be engaged in cases where there are systemic issues at stake—something that would

MARK JENKINSON/CORBIS

end up at the Supreme Court. We were surprised, like everyone else, that it was *Baze*.”

Baze does not question the constitutionality of the death penalty, nor of lethal injection itself. Rather, the Court will decide what legal standard states should use to ensure that their lethal injection protocol is constitutional, and may also decide whether Kentucky’s meets those standards. The Boalt team had only six weeks to churn out a complex amicus brief describing how lethal injection executions can—and have—gone wrong.

The clinic’s Eighth Amendment Fellow, Jen Moreno ’06, had already launched a Web site, www.lethalinjection.org, as a resource for attorneys and journalists. It provides in-depth information about the three-drug regimen used for executions in most states—an anesthetic, followed by a paralytic that halts breathing, then a drug that causes cardiac arrest. The clinic’s amicus brief argues that while in theory, lethal injections can be performed humanely, in practice this regimen is often improperly administered by poorly trained personnel, causing inmates to remain conscious and in excruciating pain throughout the execution. This risk of pain, the brief argues, is foreseeable, unnecessary, and much greater than the risk associated with an alternative: a single, massive dose of anesthetic similar to that used in animal euthanasia.

Clinic students combed through records from the many states in which lethal injection has been challenged to find evidence of incompetent administration. “We had to go through thousands and thousands of records, depositions, photographs, pleadings, and orders to figure out which were the most compelling facts,” recalls the clinic’s associate director, Ty Alper.

It was uphill work. “So much of the lethal injection process is shrouded in secrecy, everything from the way the protocols were developed in the first place, to the way that they’re administered, to the qualifications of the people conducting the executions,” Alper says. Some states wouldn’t release records, or had them under seal. Others hadn’t kept them in the first place. Worse, since the paralytic drug masks the dying person’s ability to communicate pain, suffering can go undetected even by watchful record keepers.

True horror stories

Nevertheless, the clinic’s brief contains some horrifying revelations. Among them: In six of the past 11 executions in California, inmates continued breathing longer than they should have after anesthetization, indicating that they were perhaps conscious when the other drugs

were injected. In 2006, it took 90 minutes, and 19 needle punctures, to complete an Ohio execution; the inmate actually lifted his head and complained that the drugs weren’t working. That same year, a Florida execution team mistakenly inserted the IV catheters into an inmate’s soft tissue, rather than his veins, producing foot-



CLINIC OBSERVERS: The Boalt team on the steps of the Supreme Court. Front row (left to right): Ty Alper, Elisabeth Semel, Jen Moreno ’06. Back row (left to right): Vanessa Ho ’08, Mojgone Azemun ’08, Joy Haviland ’08.



TOP: Ty Alper in front of the press briefing. **CENTER:** Elisabeth Semel and Ty Alper. **BOTTOM:** The ticket line for the public.

long, fluid-filled blisters on his arms. Although this failed to anesthetize him, the executioners still injected the second and third drugs, then repeated the entire sequence again.

The likelihood of error, and therefore pain, the brief argues, is exacerbated because executions are often performed by prison employees, not medical experts. They frequently have little experience with mixing drugs or manipulating IV lines and syringes, and do not know how to react when problems arise. According to the brief, workers in some states have never even read the execution protocol.

“Getting to work on something like this has definitely been the highlight of law school,” says student Vanessa Ho. [Editor’s note: On April 16, the Supreme Court upheld Kentucky’s lethal injection procedure in a 7–2 ruling. Justices Ruth Bader Ginsburg and David Souter dissented.] —Kara Platoni

Bullish in China

Boalt alumnus Howard Chao '80 and Boalt's business law think tank have teamed up to tackle China's complex private equity market. By Fred Sandsmark

Everyone knows that China's economy is growing at a phenomenal pace, but Howard Chao's accounts of his first months in Shanghai in the mid-nineties—just a little over a decade ago—drive home how breathtakingly fast the growth and transformation have been. Then a 41-year-old American attorney establishing O'Melveny & Myers LLP's first outpost in the People's Republic of China, Chao found it an imposing task just to set up housekeeping. "Living conditions were much more basic then," he says with the smallest hint of a grin. "We had to deal with a lot of challenges just in everyday life. You couldn't easily get a telephone into your house. You couldn't just use your credit card to buy a refrigerator."

Those were cash-and-carry days in China. Buying a new refrigerator proved an all-day ordeal for Chao: Hours waiting in line at a Chinese bank. Laborious counting and recounting of hundreds of 100-renminbi (People's currency) notes. Toting the cash in a grocery sack to a department store and choosing from a meager selection of bare-bones appliances. Counting out the cash again. And finally, hiring a man with a large flatbed tricycle to deliver the fridge. Today, Chao says, the transaction could be completed in minutes—or done online—and the selection of appliances would be immense.

"China is changing extraordinarily fast in just about every sphere of human endeavor you can think of," Chao says. He should know: As the partner in charge of international law firm O'Melveny & Myers's Asia offices, Chao has a front-row seat view of one of the most dramatic societal transformations in history. For two years running, *Zero2IPO*—a leading online and print resource for the Chinese venture capital,

private equity, and technology community—has recognized O'Melveny & Myers as the leading private equity law firm in the People's Republic. What's more, as China's private equity market begins the transition from an offshore business dominated by international players to an onshore affair with a lively domestic investor community, Chao, O'Melveny & Myers, and Boalt's Berkeley Center for Law, Business and the Economy (BCLBE) are helping to steer the change.

Keeping a foot in the open door

Howard Chao was a year into law school in 1978 when Chinese leader Deng Xiaoping announced China's version of the Open Door Policy. Though carefully controlled by the government, the move was a major change in China's international posture, and included encouraging trade with, and investment from, the West. "I got very interested in China right when it began opening up," Chao says. His connection to China generally, and the People's Republic in particular, is complicated: Born in Taipei in 1954, his family moved to the United States when he was 4. His parents were eager to assimilate, so Chao grew up speaking English, and his Chinese, he says, "suffered." However, his newfound interest in China while at Boalt spurred him to take Mandarin classes and hire a private language tutor on top of his law studies.

After graduating from Boalt Hall in 1980, Chao joined O'Melveny & Myers, doing general corporate work for many years, including securities, project finance, and mergers and acquisitions. He spent five years in Tokyo after helping to set up the firm's office there in 1987. As he rose through the firm, Chao continued to use his Mandarin in business; in 1994 he



BUSINESS AMBASSADOR: Howard Chao '80 is partner in charge of international law firm O'Melveny & Myers's Asia offices.

convinced the firm to establish a presence in China and to let him run it. Chao first opened a Hong Kong office from which he led the long process of acquiring a license to practice in the People's Republic. The firm's first Shanghai office, opened in 1996, amounted to two men, one desk, one phone, and two chairs in the Portman Hotel.

Chao's careful preparation paid off: The business grew steadily from the start. But it was a painstaking process. "We built the practice lawyer by lawyer," Chao recalls. "We followed the clients and what they were doing." The firm worked in a variety of disciplines for many corporate and financial clients. "We listened to them, figured out what they needed, and developed the skill sets," he says.

World-class players

Being on Chao's team requires well-honed cultural as well as legal know-how. "A lot of things are the same in China as in any major corporate or financial center practice, but many things are different," Chao notes. "You need to have, in many cases, bilingual lawyers, bicultural lawyers. And you need to have a knowledge of the laws of more than one jurisdiction." Chao has assembled a team consisting of attorneys and other experts from Hong Kong, Singapore, England, the U.S., and China—"a very complicated mix of people," says Chao. In addition to its leading private equity practice, O'Melveny & Myers in China has developed expertise in capital markets, real estate, mergers and acquisitions, and dispute resolution; to get the right people, the firm hired a lot of lateral partners. "We've assembled a fan-

tastic team of lawyers—people who are just top practitioners in their respective fields in China right now," Chao says.

The firm has come a long way from its one-room-in-a-Shanghai-hotel phase. It now boasts some 120 professionals in China and its offices occupy two floors in Plaza 66—Shanghai's third-tallest building—and maintains offices in Hong Kong and Beijing. The client list is equally impressive, including most major bulge-bracket banks, dozens of top private equity and venture funds, and a large number of Fortune 100 multinationals in a broad range of sectors. Chao initially downplayed his role in assembling the team that serves this top-drawer clientele, but when pressed he acknowledged his achievement, saying simply, "I built it. No question." After seven years of living full-time in Shanghai, Chao now splits his time between China and an office on Sand Hill Road in Menlo Park, home to Silicon Valley's venture capital community.

Over the last dozen years, O'Melveny & Myers rode waves of activity as China's business climate grew and evolved. At first, the firm represented foreign power plant developers who came to China looking for projects. (That line of business has since gone entirely domestic.) Then they served multinational industrial companies setting up factories and operations. The private equity business soon followed, as investors wanted a piece of China's boom. "We worked with the early wave of venture and private equity investors that came to China in the late 1990s," Chao recalls. Though the players have almost entirely changed since those initial deals, O'Melveny & Myers' private equity business has grown dramatically, both in size and complexity.

Private Equity: A Big Chinese Puzzle

By taking on the legal and structural challenges of the Chinese private equity market, Boalt's business law think tank finds a worthy challenge.

Ken Taymor says that a China-focused program was on the short list of initiatives he hoped to launch as executive director of the Berkeley Center for Law, Business, and the Economy (BCLBE). Even before Taymor came on board in May 2007, BCLBE faculty co-chairs, Jesse Fried and Eric Talley, had been kicking around ideas about a China initiative that would be suitable for the center's mission and goals. Fried was particularly interested because of his contacts with former Boalt students who have become prominent in the Chinese legal community and because he had also been invited to lecture in China.

Says Taymor, "When we talked about

China, we wanted to identify issues that were timely and important, but not susceptible to ready answers. Regardless of the specific project we tackle, our broad mission is the same. We want to put our research and academic muscle in the service of solving difficult and significant problems at the cutting edge of law, business, and economics."

BCLBE's internal conversations eventually led to pinpointing several pivotal areas of importance to both U.S. and Chinese businesses—among them China's nascent private equity market. "The more we looked into private investment in China, the more intriguing it became," says Taymor. As a first step, BCLBE and O'Melveny & Myers's Howard Chao (see

main story) are co-sponsoring two private equity workshops slated for early April 2008. The workshops will bring together a select group of about 50 individuals in Shanghai and Beijing, and will examine the development of the domestic private equity business in China and try to help map out its future.

Taymor notes that along with the immense potential of private equity opportunities in China, there are big, knotty problems that will require careful study, fact-finding, and analysis. "The appropriate role of private equity institutions within the Chinese economy has yet to be defined," says Taymor. "And there is no clear legal framework with transparent regulations that private equity relationships require." He also points out that there is always the prospect that political objections may occur at untimely stages of the investment process and derail time-sensitive deals and delicately negotiated tradeoffs.

Part of the brainstorming about the specifics of BCLBE's China program involved San Francisco attorney Anthony Zaloom, whom Taymor had brought on to direct the China program. A perfect choice, says Taymor: "He has worked in major law firms in both China and Japan for the

The firm closed a staggering 70 private equity deals in 2007.

The Chinese private equity landscape is morphing as fast as the Shanghai skyline, and O'Melveny and Meyer's experience has endowed the firm with the agility and skill necessary to carry out complex negotiations in a constantly shifting financial landscape. Until recently, private equity deals have taken place offshore. For the uninitiated they comprise a bewildering array of multilateral and multinational transactions involving venture capitalists (VCs), buyout firms, growth capital firms, hedge funds, stressed-asset funds, real estate investors, and more. And it's not simply international investors pouring money into domestic Chinese companies; Chao says a deal may involve a Cayman Islands company with a subsidiary in China, with a CEO who's a U.S. citizen born in China. The managers of the investment fund may be Chinese nationals residing in other countries. The cash may come from the United States, Japan, Europe, or even within China. "It's important to note that it's not always clear who's the Chinese side and who's the foreign side in many private equity deals," Chao says.

And though early private equity may have focused on China's burgeoning manufacturing sector, the business now is much more varied. The hot trends and sectors are different than those in the United States. "We have Sand Hill VC investors who are investing in restaurant deals in China," Chao offers as an example. "Now, if you're a Sand Hill investor, you don't invest in restaurant deals. You invest in tech, in Google, in semiconductors, in the next big social network. But we've done several restaurant deals recently. Why? Because investors think that a particular

restaurant business in China is really growing fast. VCs like to invest in a certain type of financial profile. Ultimately, if a company's projections look the same as a hot Internet company, why do they care what it does? It could be selling hotcakes, but that's fine if they're selling like hotcakes."

All ashore

Today, in response to regulatory, policy, and political pressures, the private equity business in China is changing again. "The Chinese government is pushing transactions onshore into China, and they're making it much more difficult for foreign investors to use offshore structures to do deals," Chao says. These regulatory changes coincide with a growing pool of domestic cash that needs a home, resurgent national pride, and a strong domestic desire not to sell the country's economic crown jewels to foreign investors. "The Chinese government is pushing for domestic private equity funds to be formed, and at the same time the domestic stock markets have been booming so the domestic exits [returns on investment] are a lot easier," Chao says.

The move away from offshore deals isn't necessarily unwelcome to international investors. "The foreign capital wants to come onshore—they want to be a part of this," Chao says. "There will be a convergence between how international private equity and domestic private equity in China operate. We'd like to be facilitating that convergence."

To that end, O'Melveny & Myers and BCLBE are co-sponsors of two private equity workshops slated for early April 2008. (see sidebar, *Private Equity: The Big Chinese Puzzle*.)

"We're going to have a substantive discussion with key government players, key private equity investors, and key Chinese law firm partners," Chao says. "We're going to try to make some progress in understanding domestic private equity in China, because these are the decision-makers who will determine how it will evolve."

Chao sees the workshop as a starting point, not an end. Because if there's one thing he's learned from a dozen years of practicing law in China, it's that circumstances change constantly. "What's hot today in China may not be hot six months from now, and what's really hot six months from now may not even be obvious today," he says.

The same goes for what's cool. Take refrigerators. Thirty-five million of them were made in China in 2006, up 25 percent from 2005. (This according to *Appliance Magazine*; they're still tallying 2007 production.) And you no longer need a whole day, a bag of cash, and a man with a big tricycle to get one.

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Fred Sandsmark is a Bay Area freelance writer who covers technology and related topics. He has contributed several articles to Transcript.



"The more we looked into private investment in China, the more intriguing it became."

— Kenneth Taymor,
Executive Director, BCLBE

last 35 years dealing with foreign and outward bound investments, corporate transactions, and litigation. He has also been a regular lecturer at Boalt and at Stanford Law School, so he knows the professional, business, and academic communities very well."

And Howard Chao? "Howard's involvement became a no-brainer pretty quickly," Taymor

says. "His name repeatedly came up in conversations that we had with contacts in the private equity industry and legal community about whom would be best to work with." Luckily, Chao himself had been interested in increasing his collaborations with Boalt. He and Zaloom put their heads together to identify the core issues the workshop should address as well as the key players who should participate. Discussions hit upon the idea of working with Chinese government officials and professionals to explore the value of the emerging private equity industry to the Chinese economy and ways to structure it that would be appropriate for China.

The workshops, which Chao and Zaloom will both attend, will also provide an opportunity for Boalt to begin building relationships with two Chinese law schools, Fudan University Law School and Peking University Law School. These schools are also supporting sponsors of the workshop. "This supports the University's teaching mission as we develop a China law and business program," Taymor says. "We'd like to expand the exchange of scholars, students, and businesspeople." —F.S.

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INTO THE BREACH

How a last-minute comment by a Boalt professor to a Boalt alumnus helped produce one of the most powerful pieces of cybersecurity legislation to date.

By Bonnie Azab Powell

Back in February 2002, a year after being elected to the California Assembly, Joe Simitian '77 arranged a conference call with two trusted legal experts in online privacy. The 11th District's state senator since 2004, Simitian has a master's in urban planning from UC Berkeley in addition to his J.D. from Boalt, and another in international policy studies from Stanford. (When asked whether he wears red or blue to the Big Game, he takes a polite Fifth.) The freshman assemblyman from Silicon Valley had been following the issue as an "interested member of the public," he says, and as a result had volunteered to chair a new Select Committee on Privacy. He was looking for a relatively narrow way to advance consumer protection that would have high prospects of passing as legislation—"a slam dunk," in his words.

Forty-eight hours before the legislative deadline, Simitian had decided on a bill: Entities collecting personal identifying information online from Californians would have to post a privacy policy—

and comply with it. All that remained was to run it past his informal advisers: Boalt Professor Deirdre K. Mulligan, director of the Samuelson Law, Technology & Public Policy Clinic, and Chris Kelly, then at a technology law firm and currently the chief privacy officer of social networking giant Facebook.

Mulligan and Kelly both said the bill was a “good first effort”—and one that had reasonable prospects of passage, recalls Simitian. He asked what else was on their wish lists to improve consumer protection online.

Mulligan immediately suggested that Simitian add a “security breach notification” provision to the proposed bill, which would require companies to notify people in the event of unauthorized access to their confidential personal information. While Mulligan was serving on a 1999 Federal Trade Commission advisory committee on online access and security, she was dismayed to learn about what she termed “real under-investment” in data security in the corporate sector. She knew the situation hadn’t improved—there was no business incentive to spend money on such safeguards without tangible benefits.

Simitian had already considered the breach angle but his discussions with industry led him to believe that it wouldn’t fly. But he figured that by taking Mulligan’s advice, he would have a disposable bargaining chip to help negotiate the privacy-policy requirement’s passage. He then suggested some possible breach notification guidelines and penalties.

A “light touch” would work better, countered Mulligan. “I said it should be a really minimal, low-intervention thing—simply that regardless of the reason for the breach, they would have to let their customers or patients know about it.”

“OK,” the assemblyman told Mulligan and Kelly. “Let’s go for it.” The next day, he introduced Assembly Bill 2297, “The Online Privacy and Disclosure Act of 2002.”

Ignorance is not bliss

As it turns out, the bill was slightly ahead of its time. Back in early 2002, many state legislators weren’t even using email, let alone fretting about the security of personal information stored online. AB 2297 barely garnered enough votes to move on to the next stage—consideration by a California state senate committee. Then, on May 7, officials at the Stephen P. Teale Data Center in Rancho Cordova—one of two major providers of IT services to the State of California—realized that the state’s personnel database had been penetrated. A full month earlier, on April 5, hackers had gained access to the financial information of all 265,000 state workers. As it turned out, the breached files contained personal data for more than 100 California legislators: 80 assembly members and 40 state senators.

“We hit the jackpot, in terms of member interest and attention,” Simitian chuckles.

Senator Steve Peace, a veteran 20-year legislator who happened to be chair of the Senate Committee on Privacy, was among those wondering why it took Teale officials two weeks to notify state employees of the breach. During the lag, there had been several unauthorized attempts to access employees’ accounts, such as changing the address on a credit card. Peace immediately wanted to propose legislation requiring swift notification, but discovered that Simitian was ahead of him in the Assembly with his own version. Nearing the end of his final

term, Peace agreed to a compromise: He and the assemblyman would both “gut and amend” existing bills (that is, strip them of their content and insert new language, thus avoiding the delay required to introduce new bills) so that a pair of identical breach-notification versions, crediting Peace and Simitian as co-authors, would make their ways simultaneously—and quickly—through the California Senate and Assembly.

Still hoping to pass AB 2297, Simitian decided to gut and amend AB 700, a dormant bill regarding digital signatures he had introduced previously. His fellow legislators—now outraged data-theft victims—greeted both Simitian’s retrofitted AB 700 and Peace’s counterpart, Senate Bill 1386, with understandable enthusiasm. “Even Republicans saw this was a train they better get on,” recalls Simitian; they were pleased that the law would apply not only to the private sector, but also to state agencies, hospitals, and universities.

After swift approval, the bills were signed by then Governor Gray Davis as the Security Breach Information Act, which took effect July 1, 2003. California state law now requires “any person or business that conducts business in California” and that “owns or licenses computerized data that includes personal information” to notify all affected California residents in a “timely manner” if that personal information “was, or is reasonably believed to have been, acquired by an unauthorized person.” The state considers sensitive data to be a name plus a Social Security, driver’s license, credit-card, or other financial-account number.

Fundamentally, says Simitian, “Ignorance is not bliss. What you don’t know can hurt you. Consumers can’t protect themselves if they aren’t aware of the fact that they have been put at risk.”

Tales from the encryption

The first achievement of California’s Security Breach Information Act was to motivate companies to take a good hard look at their practices. That came as no surprise to Mulligan. Her seemingly off-the-cuff suggestion to Simitian for light-touch legislation was actually an inspired strategy to get the data collectors to step up. “Rather than government setting guidelines and penalties, industry is in the best position to figure out how they can reduce security incidents,” says Mulligan.

She bases her reasoning on the effectiveness of the Environmental Protection Agency’s Toxic Release Inventory database, which requires companies to report accidental spills or leaks of hazardous materials above a certain threshold into the water, soil, or air. “That law was the most effective thing that had ever happened in the context of environmental policy with respect to getting firms to reduce emissions,” she says. “It’s credited for leading a race to the top. Instead of saying, do X, Y, or Z, it just says, ‘When you don’t perform well, let us know.’ Nobody wants to say, ‘We messed up.’ This motivates companies to constantly reassess their risk and the technology they’re using.”

In October 2003, just months after the new law took effect, the California Office of Privacy Protection, working with industry, state, legal, and consumer representatives, released a set of “recommended practices” governing data collection and breach prevention, preparing for a notification in case of a breach, and the actual notification. Among the guidelines, which were updated in April 2006 and February 2007, is the recommendation that

businesses collect only enough sensitive data “to accomplish your business purposes, and retain it for the minimum time necessary”—and to use data encryption wherever feasible. (The new law exempts businesses from having to notify consumers if the data obtained during a security breach, such as a stolen laptop, is unusable by the perpetrator.)

In December 2007, the Samuelson Law, Technology & Public Policy Clinic released a study of the effects of California’s and similar laws authored by Olive Huang ’07 and supervised by Chris Jay Hoofnagle, senior staff attorney at the Samuelson Clinic. The study is part of a comprehensive research initiative regarding chief security officers (CSOs) that is now under way at the Samuelson Clinic led by Mulligan and BCLT fellow Aaron Burstein ’04. It was a companion piece to a study of chief privacy officers (CPOs) headed by Mulligan and Boalt professor Kenneth A. Bamberger.

All of the seven CSOs interviewed by Huang (one at a nonprofit and six at publicly held companies) told the researchers that despite the minimal bite of the California law, it worked. It has, for example, prompted many more organizations to adopt data encryption, a technology that had previously been seen as too expensive. It has also reoriented many organizations’ approach to privacy away from solely focusing on compliance toward risk management of a valuable asset.

Security breaches, and notifying consumers about them, end up costing companies a lot of money. A 2005 Ponemon Institute study found that direct costs from breaches at 14 companies surveyed totaled nearly \$70 million, or \$50 per lost record. Indirect costs—such as time, effort, and other organizational resources expended—bring that rate to \$64 per lost record. Costs can include those incurred by setting up call centers, hiring legal counsel and defense services, and compensating victims—as well as lost business opportunities.

That certainly makes encryption look more attractive financially. A research group cited in the Samuelson study estimates that an encryption appliance for protecting large data-processing systems (100,000 or more customer records) would cost \$500,000 for initial setup, or about \$5 per account for the first year, then drop to \$1 per account per year in recurring costs.

The cost of a breach, while significant, is not the primary

motivation for an organization to get tough about its security, the Samuelson report finds. The biggest incentive is fear of the potential damage to its good name. “No one wants to have their organization on the front page of the newspaper,” the report quotes the interviewees as saying unanimously and almost verbatim.

“It’s a huge reputational hit,” agrees Barbara Lawler, CPO at the financial software and services company, Intuit. Lawler, then CPO at Hewlett-Packard, helped draft the California Office of Privacy Protection’s recommended breach notification practices. “Until these laws came into play, it was certainly more comfortable to think, ‘Well, that’s not going to happen to us.’ Technology and processes work, but occasionally they don’t; as long as you have humans involved, you have to be prepared.”

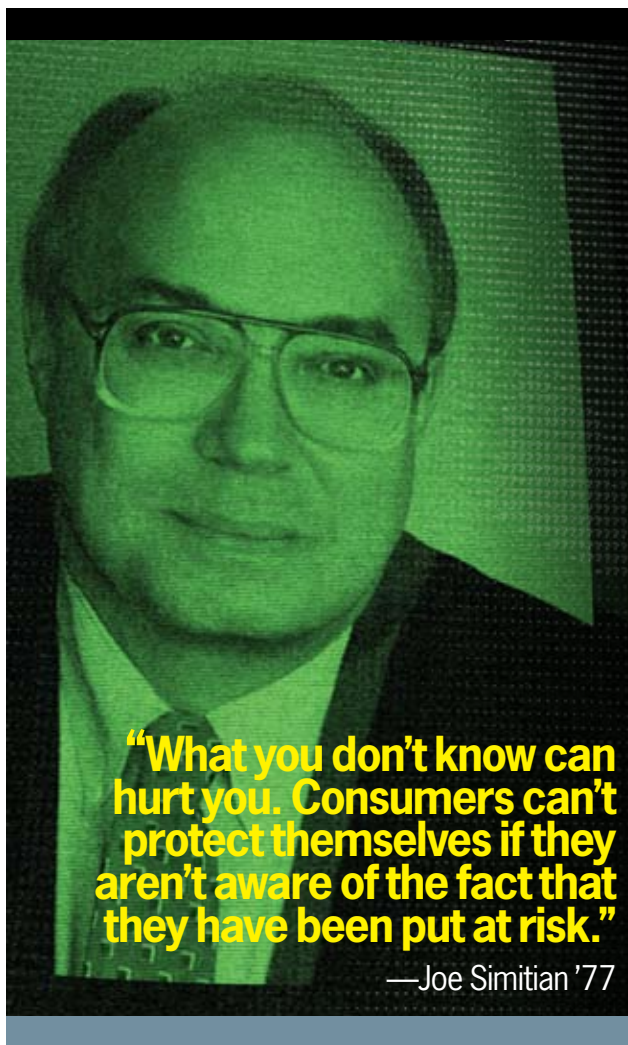
And in fact, it has been human error—not hackers—that has caused some of the biggest breaches in recent years. In February 2005, for example, the data collector ChoicePoint accidentally sold the personal information of 145,000 people to a criminal enterprise. And in May 2006, a laptop containing 26.5 million veterans’ data was stolen from a Veterans Administration employee’s home.

The national trust

California’s simple notification law has had an enormous

impact across the country. Thirty-nine states, plus the District of Columbia, have since followed the trail that California blazed and enacted some form of breach-notification laws, with more in the pipeline. “About 25 percent look just like California, but the other 75 percent have a different twist,” says Lawler. The laws in Illinois and Delaware, for example, apply to anyone who handles, collects, or otherwise deals with personal information, while Georgia’s applies only to a much smaller subset covered under its definition of “information brokers.” The baseline for what is considered a breach vary from state to state, and some require notification only if there is what they deem a high or reasonable probability of identity theft.

Widespread adoption of the Internet as a business platform means that most companies and organizations now operate nationally and as a result find themselves sorting through and attempting to comply with a hodgepodge of state laws. Some simply set and try to meet the highest possible standard and send



out notifications even when doing so might not be necessary—which can be a problem in itself. Too many notices can lead to “envelope fatigue” on the part of consumers, and cause them to fail to act to protect themselves even when a serious breach occurs. Doing the minimum can backfire as well. In the heavily publicized ChoicePoint incident, the company first disclosed the breach only to California residents, even though it later revealed that residents in other states were also affected by the sale of their data to the criminal organization.

“A national standard would provide consistency for business and also pull in those edge riders so that everyone is obeying the same standard,” says Lawler, Intuit’s CPO. “It would mean that companies could act faster after a breach, which is absolutely a benefit for consumers.”

The Samuelson Clinic’s researchers agree—some-what. The CSO report concludes that while California’s Security Breach Information Act was an excellent first step for companies to get serious about protecting their data, more legislation is critically needed to standardize requirements to disclose a breach, ensure that consumers are notified in a clear, actionable manner, to centralize data collection on the nature and severity of the breach, and to make the data available to the public—so that industry and government can learn from each others’ failures and the public can assess which companies are doing a better job protecting their sensitive data.

On the federal level, six Senate (including one by California senator Diane Feinstein) and six House bills were introduced last year dealing with information security breaches. Three of them, all purporting to help prevent and mitigate identity theft, have made it out of committee and are on the Senate’s legislative calendar for debate.

Hacks to the future

Simitian and Peace have received national recognition for their pioneering role in cybersecurity. Both were named among *Scientific American’s* 50 most outstanding leaders in science and technology in 2003; Simitian also received the 2007 Excellence in Public Policy Award at the 2007 RSA cybersecurity conference.

Simitian has introduced Senate Bill 364, which would once again put California on the cutting edge by addressing the

Samuelson CSO report’s last two points. SB 364 seeks to amend the existing breach-notification laws to require companies to report such breaches in plain English. (The Samuelson Clinic is collecting and studying notification letters, finding that many are written in legalese that may confuse consumers and even obscure the seriousness of a breach.)

“After five years, we’ve learned that the law works well but that there are some improvements that would make a good law even better,” Simitian told his fellow legislators in late January. “They are very simple: Provide greater clarity about what ought to be in that notice, and make sure that news of that security breach

also is reported to the state. The benefits: greater ability by consumers to protect themselves, greater clarity for businesses [...] and the ability of law enforcement, looking at a central repository, to understand if there are patterns or practices that they should identify and pursue.”

If passed, Simitian’s new bill would mandate that breach-notification letters include, at a minimum, some basic commonsense information: the toll-free telephone numbers and addresses of the major credit reporting agencies, the name and contact information of the reporting agency, a list of the types of information compromised; the dates of the breach, its discovery, and its notification; and the estimated number of people affected. SB 364 also requires companies to notify not only consumers, but also California’s Office of Information Security and Privacy Protection.

A section establishing a Web site to make all such notifications publicly available was excised due to budgetary pressure.

At press time, the amended bill had passed the California State Senate and was awaiting consideration by the Assembly. If the Assembly votes aye, and the governor signs it, Simitian and the Samuelson Clinic will have another feather in their caps in their quest to protect consumers.

“Technology changes. The law has to keep pace,” says Simitian. “And we learn by experience. What we learn then gets folded into the next generation of legislation.”

Oakland freelancer Bonnie Azab Powell has written about the technology business for Red Herring, The New York Times, and Corporate Board Member, and about food for various national publications.



“Rather than government setting guidelines and penalties, industry is in the best position to figure out how they can reduce security incidents.”

—Professor Deirdre K. Mulligan

NAMING AND SHAMING

A Boalt research fellow exposes major institutions' failure to protect customers.



“Until banks are forced to report the truth, identity theft will continue to fester in the dark.”

—Chris Jay Hoofnagle

Representatives from major banks and telecommunications corporations woke up on February 27 to a public-relations nightmare. That’s when a brand-new report titled “Measuring Identity Theft at Top Banks (Version 1.0)” began making headlines, thanks in particular to several eye-catching charts. A number of the biggest names were reported as having failed spectacularly at protecting consumers from financial fraud, including Citibank, which has run a popular, humorous ad campaign touting its identity-theft protections. Among top banks, ING Direct, a “virtual bank” subsidiary of a Dutch conglomerate, emerged as having the lowest number of identity theft events.

The findings are just the first name-and-shame salvo in one man’s battle to measure the size and scope of identity fraud in this country. Given the proper tools, consumers can “vote with their feet and choose safer

institutions,” says Chris Hoofnagle, a consumer-privacy expert and senior fellow at the Berkeley Center for Law & Technology (BCLT).

No one knows how many billions of dollars are lost each year, because businesses aren’t legally required to disclose such losses. “Until banks are forced to report the truth, identity theft will continue to fester in the dark,” Hoofnagle argued in a 2007 *San Francisco Chronicle* editorial.

The Federal Trade Commission’s (FTC) policy had been to release only general trend data; the agency had never before identified institutions. Frustrated, Hoofnagle filed a Freedom of Information Act request with the FTC, settling for three randomly chosen months of 2006, with data on 88,560 complaints submitted by identity fraud victims.

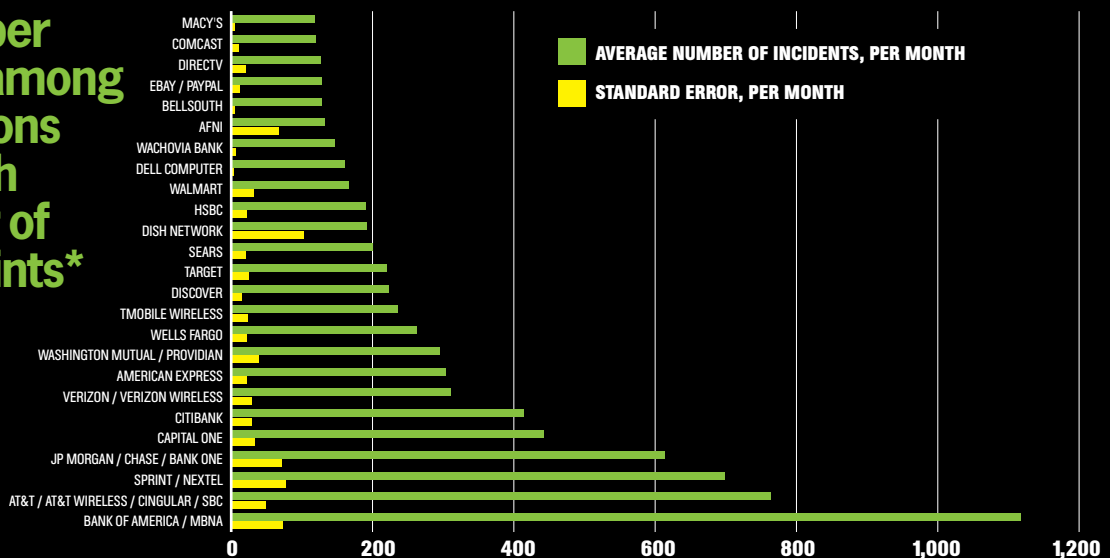
The FTC’s data also doesn’t capture synthetic-identity theft, which may account for as much as 88 percent of all identity-related fraud, according to Hoofnagle. Syn-

thetic fraud differs from more familiar forms of such scams because consumers may never realize that they are victims. The con artists construct a fictitious identity by combining personal data from one or more consumers—typically a real Social Security number—with invented names, addresses, or other data. In their rush to grant instant credit, many institutions do not adequately check up on such red-flag mismatches.

Which is why Hoofnagle’s next target is the credit card companies. He predicts that credit unions will come out looking the safest in the new study. “The bigger banks are engaged in broader, and thus much riskier, marketing strategies,” he explains, pointing out that the institutions aren’t just exposing themselves to risk: taxpayers end up subsidizing fraud losses through lenders’ write-offs against their taxable income. “They need an incentive to heed the red flags.” —B.P.

Events per month among institutions with high number of complaints*

*Average Events for Jan., Mar., Sept. 2006

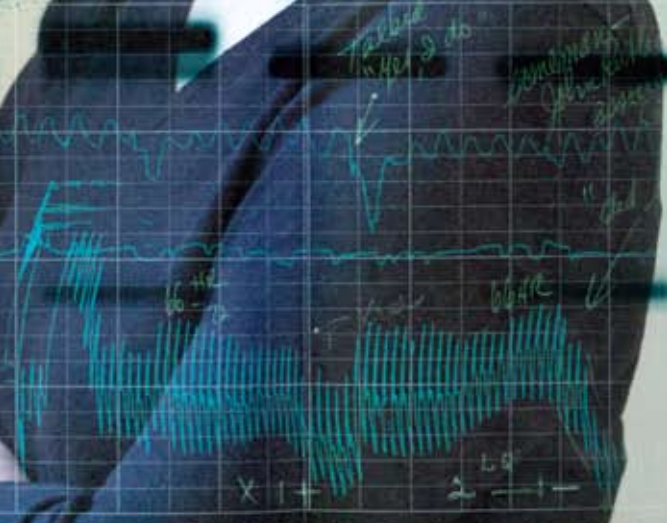


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Cold Hits Meet Cold Facts: Are DNA Matches Infallible?

Boalt Assistant Professor Erin Murphy argues that the new forensic gold standard could be just as prone to tarnish as old-fashioned techniques.

By Jon Jefferson

Guarding the south wall of Erin Murphy's Boalt Hall office is a knight on horseback. It's a poster-sized blowup of the logo of the Washington, D.C. Public Defender Service, where Murphy spent five years battling for low-income clients. Signed by her colleagues, the poster was a going-away gift when she left D.C. to join the Boalt faculty in 2005. The knight's lance points skyward, its tip glowing like a star.

It's a depiction of an idealistic crusader—not a bad description of Murphy. Recently, the young assistant professor of law has been wielding her lance to poke holes in the supposed certainty of DNA—some-

HARD RESEARCHER: Assistant Professor Erin Murphy's research casts doubt on the belief that DNA is surefire evidence.

STEVEN PLETZNER/GETTY IMAGES (DNA), CORBIS (POLYGRAPH), LUCATO/STOCKPHOTO (MRI)

times called genetic fingerprinting. Her research has led her to believe that the almost total acceptance of DNA matches as certain proof has been far too hasty, and that it is already causing great injustice. For example, Murphy cites a case that occurred in 2007 in the United Kingdom, where a 26-year-old man was charged with rape solely because his DNA profile partially matched a hair found in the victim's ring. The man—short, slight, and white—was arrested despite the victim's description of her assailant as large and black. The accused spent four months wearing a tracking device before a judge declared him "a wholly innocent man, who might have been the victim of a gross miscarriage of justice."

Another case that alarmed Murphy was the Michigan trial of Gary Leiterman, convicted in 2005 and sentenced to life imprisonment for the 1969 murder of Jane Mixer. Mixer, a University of Michigan law student, was shot twice in the head; her killer also tied a nylon stocking around her neck. The deed itself was terrible, but so, to Murphy, is the knowledge that the case against Leiterman—who protested his innocence and denied knowing Mixer—was based on questionable DNA evidence.

The Leiterman case embodies both the promise and the pitfalls of what is called "cold hit" DNA identification: matching the DNA in blood, semen, and other bodily traces left at a crime scene to one of the more than 5 million DNA pro-

files compiled by state police and the FBI. In 2003, forensic technicians managed to extract DNA from stains on Mixer's pantyhose, and in 2004, a cold-hit search matched that DNA to the genetic profile of Leiterman, a 62-year-old Michigan nurse who had once been arrested for forging painkiller prescriptions.

But while the DNA from the pantyhose zeroed in on Leiterman, a second sample pointed to someone else. According to the state crime lab, a drop of dried blood found on the back of Mixer's hand matched the genetic profile of John Ruelas, a state prison inmate who was convicted in 2002 of bludgeoning his mother to death. So was Mixer killed by both Leiterman and Ruelas?

Almost certainly not. At the time of Mixer's murder, Ruelas was only four years old.

One likely explanation is laboratory contamination, since the crime lab was profiling Ruelas's DNA at the same time it was analyzing the blood scraped from Mixer's corpse decades earlier. But to Murphy, the contamination theory raises as many questions as it answers, especially since the prosecution and the crime lab rejected that theory without offering any plausible alternative. One of the most fundamental questions, clearly, is "are we putting too much faith in DNA typing?" In a provocatively titled *California Law Review* article—"The New Forensics: Criminal Justice, False Certainty, and the Second

A UC Berkeley geneticist weighs the odds on the DNA gamble

PARTNERS IN CRIME: Renowned UC Berkeley population geneticist, Professor Montgomery Slatkin and Erin Murphy have formed a unique collaboration.

To carry out her research, Erin Murphy has had to immerse herself in the heady science and statistics of genetic evidence. She's found a valued collaborator in Montgomery Slatkin, a UC Berkeley population geneticist who grasps both the numbers and the uncertainties in DNA matches.

In the O.J. Simpson trial—many Americans' first exposure to the mind-boggling statistics of DNA—prosecution witnesses spent days explaining the astronomical odds (170 million to 1, by one calculation) against Simpson's DNA randomly happening to match the DNA in blood found at his ex-wife's murder scene.

The statistical cornerstone for such staggering numbers is known as the "product rule." Flip a coin once, and the odds of getting heads are 1 in 2. Flip it twice, and the

odds of getting heads both times are 1 in 4: the product obtained by multiplying the two probabilities, $1/2 \times 1/2$. Three flips, and the odds of a heads-only streak dwindle to 1 in 8: $1/2 \times 1/2 \times 1/2$. And so on, *ad infinitesimal*.

Statistically speaking, DNA boils down to a huge series of biochemical coin tosses. Each "rung" on the twisted ladder of DNA is spliced together from a pair of chemical bases, and only four combinations of those base-pairs occur. With a 1-in-4 chance of any given base-pair occurring at any given rung, the product rule decrees that there's only a 1-in-16 chance of two adjoining rungs being identical, and a 1-in-64 chance ($1/4 \times 1/4 \times 1/4$) of that same base-pair splice showing up three times in a row. As the number of rungs or base-pairs rises, the numbers zoom so high that geneti-

cists and forensic experts speak of products as large as a quintillion (1 followed by 18 zeroes), or—conversely—of random-match probabilities (RMPs) as low as 1 in a quintillion.

But is DNA's structure really as reliably random as a coin toss? Slatkin isn't certain. "The product rule was developed long ago," he says, "and it was tested on only a small number of DNA samples." Moreover, he notes, even a 13-locus test examines only "an infinitesimal portion" of the genome. Why not, he asks, do what an expert panel on DNA evidence has recommended: test more loci?

"I'm not sure they [cold-hit advocates] are wrong," Slatkin says, "but I'd like to be more convinced. If you're going to use a cold hit to send somebody to the gas chamber, you need to be really sure." —Jon Jefferson

JIM BLOCK

Generation of Scientific Evidence” (June 2007)—Murphy fired an impassioned opening salvo in what is sure to be a fierce battle over high-tech forensic evidence.

High-stakes mistakes

Murphy worries that CSI-style evidence is not as infallible as prosecutors claim and jurors believe. In fact, she argues, DNA and other “second generation” technologies (another is the functional MRI, a new, neuroscience-based version of the lie detector) are just as susceptible to error and abuse as fingerprinting, polygraphs, ballistics, and other old-school forensic techniques. Flawed forensic evidence is a contributing factor in 63 percent of false conviction cases, second only to faulty eyewitness testimony. “I don’t think anyone can say with a straight face that the way our criminal justice system uses scientific data is unimpeachable,” she says. What’s worse, the system—which has difficulty detecting and correcting the failings of ordinary forensic evidence—is even more poorly equipped to find and fix high-tech evidentiary problems.

And DNA evidence is mighty high-tech. It hinges on complex science and statistics, and even though contamination and confusion can occur easily, the results appear certain and unassailable. “The average prosecutor or defense attorney—even the judge—won’t have the skills or resources to properly evaluate every aspect of DNA evidence,” Murphy says. “Even

a superb attorney would be challenged.”

Murphy should know, having spent five years in what she calls “one of the best public defender offices in the nation.” The D.C. Public Defender Service created a Forensic Practice Group to grapple with the growing number and complexity of DNA-related cases. The work of that group sparked Murphy’s interest and fueled her skepticism, especially about cases built on a single piece of genetic evidence. She notes that already five exoneration cases have emerged in the wake of convictions based on faulty DNA evidence, and she expects more. “We’re placing too much faith in a new technology whose limitations and uncertainties we don’t yet fully understand,” she says.

Murphy readily concedes that DNA testing is deeply entrenched in criminal prosecution, especially rape and murder cases. Proponents of DNA evidence claim the technology offers virtually 100-percent accuracy and certainty. What’s more, DNA technology and cold-hit searches have breathed new life into old, unsolved cases, such as Jane Mixer’s murder. By October 2007 the FBI’s national offender database—the Combined DNA Index System (CODIS)—had grown to include well over 5 million genetic profiles, and had yielded nearly 59,000 cold-hit matches. One state-level statistic illuminates the rapid rise in cold-hit cases: “Whereas it took Virginia nearly eight years, from 1993 to 2001, to reach its first

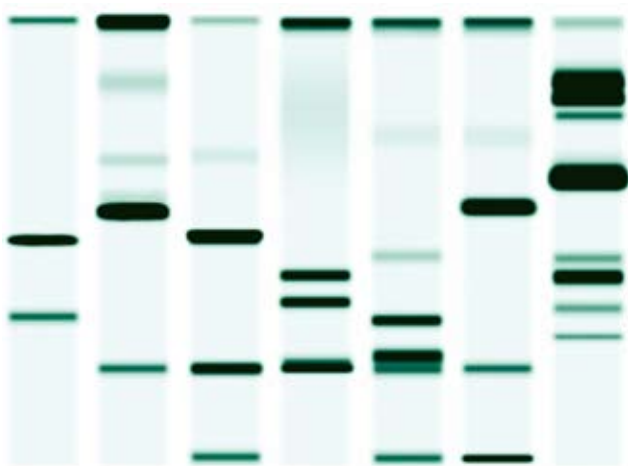


“If you’re going to use a cold hit to send somebody to the gas chamber, you need to be really sure.”

—Montgomery Slatkin

“We’re placing too much faith in a new technology whose limitations and uncertainties we don’t yet fully understand.”

—Erin Murphy



1,000 ‘cold hits,’” writes Murphy, “the state reached its second 1,000 in a matter of 18 months.” The largest state offender database is California’s, which contained nearly 900,000 offender profiles as of October 2007. After working through a backlog of evidence in 13,000 old cases, the California Bureau of Forensic Services now averages one cold hit per day.

One of those matches led to a murder charge against a California prison inmate—and sparked a unique cross-disciplinary collaboration at the frontiers of forensic evidence.

The nine-locus solution

Across Bryant Street from San Francisco’s monumental Hall of Justice, a half-dozen bail bonding companies make neon-hued promises of freedom. Incongruously tucked among them, Caffe Roma offers mere caffeine and baked goods. Inside, Murphy scans the faces for Bicka Barlow, a San Francisco public defender. “I’m not sure I’d recognize her even if I saw her,” Murphy admits. “It’s been several years since we’ve talked in person.”

She spots a woman who looks up from a laptop, consults a watch, then scrolls down a cell phone’s display. Murphy studies the woman, pulls out her own phone, and hesitates. Suddenly the door swings open and the dilemma ends. “Sorry I’m late,” says Barlow, extending a hand.

Like Murphy, Barlow—a UC Berkeley alumna—is outspoken in her criticisms of cold-hit DNA evidence. The two first met at a public defenders’ conference, back when Murphy was still with the PD’s office in D.C. They stayed in touch, and when Murphy moved west, she sought out Montgomery Slatkin, a UC Berkeley population geneticist, for a scientist’s take on cold-hit evidence. In Slatkin, she found both a collaborator and a kindred spirit. (“There aren’t many places in the world,” she says, “where an untenured law professor can cold-call a renowned geneticist and end up with both a new co-author and friend.”)

Barlow, in turn, looked to Slatkin for expert testimony to challenge DNA evidence against her client, a California state prison inmate named John Davis who had been linked by a cold hit to a rape-murder that had occurred in San Francisco in 1985. It was “a classic cold-hit case,” says Barlow. “The only evidence against him was the DNA, plus the fact that he’d lived in the area at the time.” His genetic profile had entered the state’s offender database after he was arrested for robbery as an adult; the cold-hit match occurred after DNA was eventually extracted from semen found on the body of the murder victim.

The cold-hit match held good across 13 different sections, or loci, each of which included hundreds or thousands of bits of genetic coding. A 13-locus match seemed unassailable, but Barlow wondered.

For years, DNA experts had held that even a nine-locus match was definitive. But Barlow—who has not only a law degree but also a master’s degree in genetics—had recently learned that Arizona’s offender database contained two people whose genetic profiles matched at nine loci. She filed a subpoena seeking more data from Arizona, and in November 2005 she received a report that showed that Arizona’s offender database contained genetic profiles of 65,493 offenders. Within

that pool, 122 pairs of people had DNA that matched at nine loci. What's more, 20 pairs had profiles that matched at 10 loci, one pair matched at 11 loci, and one pair at 12. (The 11- and 12-locus pairs who matched were siblings.)

Barlow was stunned. Prevailing statistical wisdom held that the odds of a random nine-locus match would be roughly one in a billion. She immediately posted the report on a Web site, as a resource for other defense attorneys involved in cold-hit DNA cases, and she put Slatkin, the UC Berkeley geneticist, on the stand to testify about the need for additional statistical analyses. She also subpoenaed the California Department of Justice, seeking to compel the state's crime lab to analyze how common such unexpected pair matches were in the California offender database.

Barlow soon realized that she had touched a hidden nerve. "The FBI sent out a nationwide alert [to state crime labs] saying, 'notify us if you get any requests like this,'" she says. "The day before I went on maternity leave, the Arizona Attorney General faxed me a letter from CODIS that said basically, 'if you don't take this [Barlow's Web posting] down, we'll bar your state from participation in the national database.'" And the California Attorney General's Office fought her bid to access the DNA database, calling it a "fishing expedition" and protesting that the analysis would require shutting down the database for months.

Not so, counters high-tech ally Slatkin. The analysis could be done on a backup data set, he explains, adding, "I back up my computer every night. I would hope the government does the same." Although he estimates it would take six months or so to develop the statistical tools and analyze the data, Slatkin says the task would be within the capability of a graduate student—and would make a nifty thesis project.

While testifying in support of Barlow's motion to access the DNA database, Slatkin was asked by the trial judge if the analysis would be likely to contradict the assumptions used to calculate the odds of random DNA matches. "I had to say I didn't know," Slatkin concedes. "I said answering the question was the point of the research."

The San Francisco judge denied Barlow's probe of the California DNA database. What's more, an Arizona judge barred her from circulating the eye-opening report on that state's number of dual matches. "I'm the only attorney in the entire country who can't give out this document," notes Barlow. Despite the setback, she's hoping a breakthrough will emerge from the California Supreme Court, which is currently hearing an appeal in a cold-hit case that's similar to the Davis case. In December 2007, 56 scientists—including Sir Alec Jeffreys, the British geneticist who pioneered DNA fingerprinting—filed an amicus brief in the Supreme Court appeal. Cold-hit cases "raise profound and important scientific questions," wrote the scientists, adding, "We encourage the California Supreme Court to address the lower court's imperfect appreciation of the interplay between law and science."

Slatkin finds the judge's Davis ruling and the government's guardedness both puzzling and disturbing. "When the government works very hard to hide something," he says, "it suggests that they have something to hide. I don't see why they wouldn't want to open the databases to researchers. You'd think the gov-

ernment would want to be more certain about these things."

He's dubious about the prospects that any trial motion will force access to state-level databases or CODIS, since even though the database could remain up and running, the trial itself would grind to a halt for months. But legal leverage might not be the only way to pry open the data. "All it would take," Slatkin muses, "would be for one relative of one legislator to be identified by a cold hit, and you'd see things turn around overnight."

Perhaps surprisingly, Murphy is not completely opposed to the use of genetic evidence in court. "Actually," she says, "I'm a fan of DNA evidence, under the right circumstances. If the investigation finds several kinds of evidence, including DNA, then fabulous. But I'm not comfortable with DNA being the only evidence, and certainly not when the DNA is compromised in some way. Our system demands proof beyond a reasonable doubt."

Tilting at technology

DNA isn't the only new technology on which Murphy has trained a dubious eye. Another is high-tech monitoring of offenders. GPS tracking bracelets are the best-known example, but these days, it's also possible to harness remote biotelemetry to sound an alarm in the event of alcohol ingestion by an offender (an alcoholic, for instance, who has been convicted of vehicular homicide, and whose sentence or probation forbids drinking). Murphy has recently joined the debate over high-tech monitoring, with an article in the *Duke Law Journal*, "Paradigms of Restraint" (March 2008). Although the article's title sounds sedate, its conclusions do not, warning that Big Brother technologies pose a "significant threat to liberty" if overused.

"If I thought GPS tracking would lead to a one-to-one displacement," she says—that is, if for every convicted criminal fitted with a GPS tracking device, the U.S. prison population shrank by one inmate—"I'd be all for it. But what I think we'll see is the use of the technology to monitor or restrain people who would otherwise not be going to jail. It's so easy and seemingly cost-free, it could really get out of hand, and we could end up GPS-monitoring too many people for too long, and to no one's benefit."

It's both apt and ironic that the crusader on Murphy's office wall is a warrior five centuries out of date. Murphy describes herself as a "troglodyte" when it comes to technology, but she is actually a creature of cutting-edge research. Her crusade against the uncritical embrace of new technologies might appear quaintly quixotic, but she discusses the statistical arcana of random-match probabilities and 13-locus profiles with ease, and her papers' copious footnotes (316 in her "New Forensics" article, 413 in her "Restraint" article) abound with links to scientific journals and cyberspace.

The young professor may be challenging a formidable high-tech foe, but that's not a lance she's brandishing—it's more like a light saber.

Jon Jefferson is a writer and documentary producer. He has co-authored—with renowned anthropologist Bill Bass—three crime novels and two nonfiction books on forensic anthropology.



TROPHY RIDE: Jess Jackson '55 after his champion thoroughbred, Curlin, romped to victory at the 2008 Dubai World Cup on March 29.

Maverick Jess Jackson bucks convention. *Again.*

The former attorney, winemaker, and self-made billionaire wrangles with corruption in horse trading. By Jon Jefferson

The year was 1939. In Europe, Adolph Hitler attacked Poland. In Washington, D.C., President Franklin D. Roosevelt received a letter from Albert Einstein describing the possibility of an awesomely powerful weapon. And at Bay Meadows racetrack, just south of San Francisco, a 9-year-old boy named Jess perched atop his uncle's shoulders and cheered a

racehorse named Seabiscuit to victory in a home-stretch duel.

Today, at 77, Jess Stonestreet Jackson '55 owns a horse that has the potential to become another Seabiscuit: a champion tough enough for the long haul rather than just one season of speed. That same description fits Jackson himself pretty well. In the half-century since earning a law degree at Berkeley, Jackson has battled to the front of the pack repeatedly: as a real estate lawyer, as the founder and patriarch of Kendall-Jackson Wineries, as a self-made billionaire, and as a racehorse owner. Now Jackson is fighting for major reforms in

the rarified world of thoroughbred racing.

Jackson owns an 80-percent share of Curlin, the 4-year-old stallion that's currently ranked best in the world. For a relative newcomer to the blueblood world of thoroughbred racing, Jackson—like his horse—has raced past his competitors with phenomenal swiftness.

But he's not content with collecting trophies and winning purses. Even before stepping into the winner's circle with Curlin, Jackson was stepping forward as a crusader—as the leading crusader, in fact—for reforms in the ways thoroughbred horses are bought and sold. In doing so, he's taking on a small but corrupt subculture, one that profits by secret sales commissions and kickbacks, trumped-up auction bids, concealed veterinary records, and injury-masking anabolic steroids.

Jackson doesn't pull punches. "It's a damn interesting industry, and a lot of fun," he says. "But some of the biggest names in

the industry are also the biggest crooks.”

Such bluntness isn't calculated to curry favor in racing's darker corners, but frankly, Jackson doesn't give a damn. Fact is, the man's got more maverick in him than any of his horses do. Even back in his law-school days, he was already headstrong and bucking convention.

The law and the profits

One morning in his second year of law school, Jackson arrived late for an 8 a.m. class. He was wearing a plain T-shirt, and his pants were drenched in blood. The shocked professor, William Ferrier, sent him straight to the equally startled dean, William Prosser, a noted scholar (“Prosser on Torts was the

ing; Prosser didn't force the issue; and whenever their paths crossed after that, Jackson thought he detected a slight smile on the dean's face.

After graduating, Jackson did a stint in the California attorney general's office, then worked as a lawyer for the California Department of Public Works, acquiring land for freeways. There he learned the details of real estate law and gained courtroom experience, which served him well when he opened a private practice specializing in real estate and property rights. The firm flourished, and Jackson built an impressive track record. In one land-use case, he argued before the U.S. Supreme Court, and won.

But he grew frustrated and disillusioned, especially after a string of cases in which he believed judges had abused their powers. By the mid 1970s, he was feeling burned-out and miserable.

To hang onto his sanity, Jackson bought an 80-acre farm near Lakeport, Calif., and turned weekend farmer. “It was an escape from San Francisco,” he says, “from judges and trial lawyers. There was no TV and no phone up there. I tried to keep it as pure as I could. I drove three or four hours to get there every Friday, as early as I could get away from the office, and I stayed till Monday. We raised pears, walnuts, cows, geese, corn. It was just like Old McDonald's farm.”

Jackson's real-estate clients had included several California vintners, and one of them persuaded Jackson to plant a vineyard. It was a family affair from the get-go:

Jackson, his first wife (Jane Kendall), and their daughters, Laura and Jennifer, all pitched in. “We planted our own vines,” he says. “I drove my own tractor—I still have a stiff neck from bouncing around on that tractor. My dad sat on a barrel and watched as my mother and I stomped our first batch of grapes.”

Kendall-Jackson Wineries was born. It remained a small family operation until 1983, when the company's Vintner's Reserve Chardonnay won the first platinum medal ever awarded by the American Wine Competition. The chardonnay was also touted by newspaper columnist Herb Caen as Nancy Reagan's favorite wine. Sales skyrocketed.

Jackson had rejected the advice of several consultants when he chose to produce a blended chardonnay, rather than single-grape varietals, but the sweet, fruity blend—and the consistency from year to year that blending made possible—won legions of loyal consumers. Kendall-Jackson sold 16,000 cases of the first year's chardonnay; in 2007, it sold a whopping 2.3



NO SWEAT: Champion Curlin shakes off water while being washed down after an early morning workout.

Bible in those days,” recalls Jackson); and a stern disciplinarian. Prosser demanded an explanation.

Jackson said that he worked nights as a Berkeley police officer. The previous night found him at the scene of a suicide attempt. “I saved the man's life,” he told the dean, “but by the time I got back from the hospital, it was time for class, and I didn't want to miss class.”

“This is very serious,” Prosser admonished. “The policy at this university that no one can work—you have to be a full-time student.”

Jackson protested, but the dean held firm.

So did Jackson. “My parents can't afford to pay for law school,” he said. “They're both ill, and I have to send money back home to help.”

Prosser glared. “You violated an important policy,” he finally said. “Never do that again. Never come to class late again, and never wear work clothes to class again.” Jackson kept work-

million cases of the wine.

In the process of building Kendall-Jackson into one of America's top wineries, Jackson has taken on some big opponents. In 1996 he sued the industry's goliath, Gallo, charging that Gallo's Turning Leaf label and bottle had unfairly copied those of Kendall-Jackson's popular chardonnay. A federal court later ruled in Gallo's favor, but the case kept Kendall-Jackson's name prominent—and cemented Jess Jackson's reputation as a fearless scrapper.

In a less showy but strategically important case, Jackson threw his weight and his money behind the Coalition for Free Trade, an array of smaller wineries that's spent years challenging "three-tier" state laws, which prohibit wineries from shipping directly to consumers and retail outlets. Such laws—on the books in 24 states—allow only state-licensed wholesalers to sell to retailers. The stakes are immense: Just at Costco, Sam's Club, and Trader Joe's alone, wine sales total some \$1 billion a year; bypassing wholesalers could lower consumer prices—and pump more revenue directly into the coffers of Kendall-Jackson and other wineries.

In a major victory for Jackson and the other free-traders, the U.S. Supreme Court in 2005 struck down New York and Michigan laws that prohibit direct sales by out-of-state wineries while allowing direct sales by in-state vineyards. In a 5-4 decision, the justices called the prohibition an unconstitutional barrier to interstate commerce.

Wine racks to race tracks

Sixty-nine years after he cheered Seabiscuit to victory atop his uncle Luke's shoulders, Jackson returned to horseracing in a big way. That year Jackson began buying horses. *Lots* of horses: 150 thoroughbreds at auctions between 2003 and 2005, ranging from broodmares to stallions and yearlings. He also bought large horse farms in Kentucky and Florida to house a breeding operation. "We started with the broodmare band," he says, "but we began buying colts in hopes we could compete at the black-type [highest stakes] level."

Jackson's pivotal purchase came in February 2007, on Superbowl Sunday. The afternoon before the football game—which was held in Miami that year—an untried 3-year-

"I know pedigrees well, but I also have an instinct for an athlete—animal or human. I've played all kinds of ball, and I know how athletes move.

The way this horse moved, I could tell he had great potential."

old stallion named Curlin romped to a 12-length victory at nearby Gulfstream Park. John Moynihan, a bloodstock agent working for Jackson, watched the race on television in Tampa. "Moynihan saw the film and said, 'wow,'" Jackson recalls. "I saw the film a few hours later and I also said wow. I know pedigrees well, but I also have an instinct for an athlete—animal or human. I've played all kinds of ball, and I know how athletes move. The way this horse moved, I could tell he had great potential."

Jackson told Moynihan to buy the horse, and Moynihan began trying. By this time, though, Saturday had turned to Sunday, and the horse's owners had headed to the Superbowl. "Moynihan jumped in the car and drove down to Miami in a torrential rain," Jackson recalls. "He found the owners and closed the deal on a handshake at 2:30 a.m." For the reported sum of \$3.5 million, Moynihan arranged to buy an 80 percent share of the horse from William Gallion

and Shirley Cunningham, Jr., the two Kentucky lawyers who owned the horse. "By the next morning, they got an offer for twice that amount," says Jackson. "To their credit, they honored the handshake deal they'd made with us." (Ironically, in August 2007, Gallion and Cunningham—who turned down millions to uphold a handshake—were indicted for defrauding clients of tens of millions of dollars from a class-action settlement; both are in jail awaiting trial, with Gallion's bond set at \$52 million and Cunningham's at \$45 million.)

After winning his maiden race in Florida, Curlin next raced in Arkansas, at the Rebel Stakes in March and the Arkansas Derby in April. He won both of those as well, before heading to Kentucky for the first leg of a Triple Crown bid. "I saw the Rebel, the Arkansas, the Kentucky Derby, the Preakness, and every race he's been in ever since," says Jackson. In January 2008, Curlin—who won six of his nine races in 2007—was overwhelmingly voted racing's "Horse of the Year." In accepting the award, Jackson confirmed his maverick status by announcing that he would not send the horse to an early, safe, and profitable retirement at stud. "This is a sport that needs more and more heroes," he said. "We've decided to race Curlin again this year."

Jackson is taking "a huge risk" in running the horse for another year, says Joel Turner, a Lexington lawyer who handles

transactions for high-profile horse buyers. “[Jackson] could probably make 10 to 20 million the first year if he put the horse out to stud right now,” says Turner. “Instead, he’s putting at risk an asset that’s worth probably 50 million dollars, and he’s doing it to build goodwill, to showcase this horse, to develop a fan base, and to do things that are in the best interests of the industry rather than his own best interests.” But on March 29, at the 2008 Dubai World Cup, Jackson’s plan looked mutually beneficial: Curlin electrified fans with a spectacular 7-plus-length win, and Jackson returned to California with a \$3.8-million purse.

Kickbacks and speed traps

Curlin’s stellar success is only one chapter in the saga of Jackson’s horseracing career. Since his fast-track entry into the world of thoroughbreds, Jackson has taken it on himself to shine a spotlight into some of the darker corners of the industry. One of the most promising broodmares he bought back in 2004 was named Maggy Hawk. She came from a family of champions, and her pedigree didn’t come cheap: Jackson paid \$750,000 for Maggy Hawk—but in the spring of 2005 he learned that the mare’s true selling price had been only \$600,000. That meant Jackson had unwittingly paid a \$150,000 markup—above and beyond an agreed-on fee—to Emmanuel de Seroux, the bloodstock agent who had brokered the deal. “They call it commission,” Jackson says of such undisclosed payments to dual agents—brokers paid by both sides—“but it’s really a kickback.” (One creative agent, sued by a buyer for taking a secret payment from a seller, described the \$95,000 as an “expression of appreciation.”)

Kickbacks aren’t the only scams practiced on unwary horse buyers. Because bloodstock agents make their money on commissions (generally 5 percent of a horse’s selling price), a dual agent reaps double benefit if the price of a horse can be nudged upward. In one case, an Arab sheik found himself in a multimillion-dollar bidding war for a promising 2-year-old stallion. The sheik dropped out at \$16 million; some horseracing insiders believe the winning bidder had intended only to drive up the price the sheik would have to pay, but instead got “caught speeding”—as horse traders say—and ended up snared



“I sometimes find myself kicking at meadow muffins and stirring up flies and worms. That’s just the way it is.”

in a \$16-million trap of his own making.

The subculture of duplicity rankles Jackson. “They call it horse trading and they call it tradition,” Jackson says. “But there’s a tradition that trumps that tradition, and it’s ‘thou shalt not steal.’” He’s not tarring everyone in the thoroughbred industry with the brush of corruption. “The vast majority of people in the horse business are honest,” he says. “But it’s the good-ole boy syndrome: Some of the good ole boys are bad ole boys, and they have a lot of power.”

As Jackson has shown in his prior careers, he’s not intimidated by power and he’s not afraid of legal wrangling. After learning he’d been misled about the price of Maggy Hawk, he spent months investigating prices he’d paid for horses in Kentucky, Argentina, and Chile. Then Jackson sued de Seroux, four other individuals, and two companies, charging that he’d been defrauded out of \$3 million in the course of buying some \$60 million worth of thoroughbreds. He also charged that he’d been tricked

into overpaying \$2.5 million for his Kentucky farm—another deal in which de Seroux had served as a dual agent. Eventually three of the defendants paid substantial sums to settle Jackson’s suit: de Seroux paid \$3.5 million, trainer Bruce Headley paid \$900,000, and agent Brad Martin paid \$250,000.

But Jackson wasn’t content with merely recouping his losses. He also became the most outspoken crusader for legislation in Kentucky and California to ban what he considers the industry’s root problems, including undisclosed dual agency, hidden ownership interests, and concealed veterinary records. “Right now you can find out more information about a puppy you want to adopt than about a horse you want to buy,” Jackson says. Case in point: Another wealthy owner, Earle Mack—a real estate developer and former U.S. ambassador to Finland—bought a horse in Florida that he later learned had undergone surgery. A law in New York, where the horse was previously sold, required disclosing such information to a buyer. But Florida, where the horse was quickly resold to Mack, did not require similar disclosure, and although Mack’s agent asked about the horse’s medical history, he wasn’t told about the surgery. An indignant Mack lobbied the Florida legislature for a law to require disclosure of veterinary records, and he got it.



EASY RIDER: Curlin kicks off his second year of racing by dusting a world-class field in Dubai on March 29.

In Kentucky, Jackson scored an important victory in 2006, when then-Governor Ernie Fletcher signed into law a bill prohibiting undisclosed dual agency. The Kentucky law also requires a written bill of sale documenting a horse's purchase price—and it provides for treble damages and attorney's fees if an agent is caught taking an undisclosed commission.

Racing for reform

Now Jackson's setting his sights on additional reforms in Kentucky, California, Florida, and New York. Besides opposing dual agency, he's crusading for greater transparency in ownership and veterinary records. One medical issue he feels strongly about is misuse of steroids—a problem for animal athletes just as it is for humans. "If you put a horse on steroids," he says, "he's gonna look great when he walks into the auction ring, but a month later he's gonna deflate, and then he may end up crippled if the steroids were masking an injury."

Attorney Joel Turner, who's also a thoroughbred owner and a former trainer, applauds Jackson and his crusade. "We need more Jess Jacksons in the industry if it's going to survive," he says. "People who see how far it's fallen; people with a will and the willingness to try to help turn it around."

Mack, too, praises Jackson's efforts. "Jess Jackson is fighting the good fight," he says, "and he sticks to his guns. He has a vision for transparency and change within the horse industry, and he's made an impact at every level."

If Jackson has his way, he and Curlin will leave a twofold legacy in thoroughbred racing: Jackson's reforms and Curlin's ruggedness. "We want to prove his durability and stamina by running him through his fourth year," says Jackson. "If we do that, and he does well, we change the industry." While many racehorses are bred for one season of speed, Jackson sees Curlin as a long-run champion. "Durability, stamina, bone, cardiovascular endurance—he's got it all. His DNA is badly needed in the industry. By proving him and then breeding him, we put more of those qualities back into thoroughbreds."

Jackson's own family is in horseracing for the long haul, he says, which is one reason he wants to clean up abuses. And although he closed his law practice a quarter-century ago, he's still served well by his legal training and his passion for justice. "I've not left the use of law," Jackson says, "just the everyday practice of it. The echoes of legal right and wrong still resonate with me. I sometimes see the emperor has no clothes, so I find myself kicking at meadow muffins and stirring up flies and worms. That's just the way it is."

And as long as Jackson's still in the saddle, that's the way it's likely to stay.

Jon Jefferson is a writer and documentary producer. He has co-authored—with renowned anthropologist Bill Bass—three crime novels and two nonfiction books on forensic anthropology.



ON THE MOVE

BOALT
STUDENT
ACTION
FIGURES

Water Worker

There's a saying that Flynn Coleman '08 likes to tack onto her outgoing emails: "Life isn't about waiting for the storm to pass. It's about learning to dance in the rain."

Coleman's recent semester in the parched West African nation of Senegal didn't offer any opportunities for dancing in the rain. But it did make her realize that humanity's most basic need—water—is also one of its knottiest legal problems, and that she wants to help do something about it.

As a research assistant for Professor Laurent Mayali on a project for the Institute for Global Challenges and the Law, Coleman plunged into the treacherous currents of water resource governance and its legal underpinnings in sub-Saharan Africa. Working with Senegalese water experts and law professors, she teased out the intricate tangle of Islamic, customary, and statutory laws that can make an already scant resource even scarcer. "Water crises affect millions of people, with a disproportionate impact on those most vulnerable," the 3L student says.

In the capital city of Dakar, Coleman saw the water routinely shut off without explanation. She lobbied both public agencies and private companies for answers. "There are many obstacles to advocating for a recognized right to water because the issues are tied up in politics and class. I had to accept that I was a visitor in a place foreign to my own perceptions of

how legal research works, and that I had to form relationships before I could get helpful information."

What she did learn was hard to swallow. Each year, more than 2.2 million people in developing countries die from preventable diseases linked to lack of access to safe drinking water and inadequate sanitation. More than 40 percent of sub-Saharan Africans are forced to use unsafe drinking water, and improving that alarming statistic won't be easy. "The legal structures surrounding equitable water rights there are very fragile," Coleman says. "There are no quick fixes, and people must continue to drink from the only sources they have."

Coleman's African sojourn was not her first brush with social injustice. As a 1L, she worked with Boalt's California Asylum Representation Clinic to help a Guatemalan human rights activist gain refuge. In year two, she drafted an appeal decision before

the International Criminal Tribunal for the former Yugoslavia. Like those experiences, Coleman says her stint in Senegal—where she took courses in both Islamic and Senegalese constitutional law—was powerfully moving and "an incredible learning opportunity." Coleman is a past co-director of the Boalt Hall Committee for Human Rights, a student organization, and remains active with the group.

"We may take fair access to safe water for granted here in the West," she says, "but in many parts of the world it's truly a matter of life and death."

—Andrew Cohen



Flynn Coleman, '08



CURT CARNERK/WORLDBANK, JIM BLOK (FLYNN COLEMAN)



Carmen Atkins, '08

Flight and Fight

Even when it succeeds at redressing old evils, restorative justice can be a traumatic experience. Carmen Atkins '08 wants to help ease the pain experienced by families of Guatemalan death squad victims who seek reparations before the Inter-American Court of Human Rights.

Atkins' family history in Latin America is a complex schematic of flight: running from Nicaragua's civil strife in 1978, Colombia's ongoing terrorism in 1990, and the war between Ecuador and Peru in 1995, when authorities suspected her father of being a spy. It was a childhood steeped in the fear of capricious justice.

And while Atkins escaped the insecurity to attend college in the States, she couldn't shake the urge to fight back. The summer after her first year at Boalt, she returned to Ecuador, working with a human rights organization standing up for street kids routinely persecuted by cops. "It opened my eyes to how privileged I am," Atkins says.

Now, the intrepid 3L is preparing for a trip to Guatemala, the next step in a case that could strengthen the rule of law there. But even as she's figuring out the

mechanics of videotaping depositions and helping to forge a pleading, Atkins is fretting over the plaintiffs' potential trauma, sparked by reliving the horror of their death squad experience.

The depositions are part of the effort to hold Guatemala accountable for disappearances by its security forces in the 1980s, a particularly grisly aspect of a civil war that lasted more than three decades. Working with the

human rights organization *Fundación Myrna Mack*, Atkins is part of a team representing family members of 27 of the 183 victims of executions logged by the mili-

tary. Last October, Atkins presented arguments before the quasi-judicial Inter-American Commission on Human Rights, the first step in a process that she hopes will end at the Inter-American Court of Human Rights in Costa Rica, which has the power to issue reparations.

For Atkins, arguing for the families goes well beyond the technical. "For the victims, it's so hard to deal with the emotions that surface when you're conforming to those rules of procedure," she says. This is advocacy with the ring of the personal. —*John Birdsall*

"For the victims, it's so hard to deal with the emotions that surface when you're conforming to those rules of procedure."

A Prince of a Regent

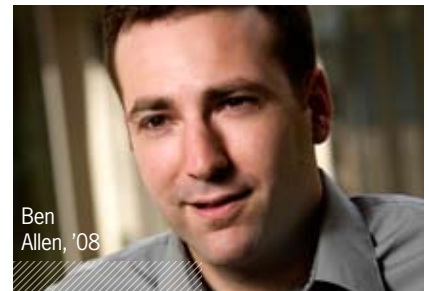
The seemingly tireless Ben Allen '08 has a confession: "Being the student representative for the UC Board of Regents is exhausting." But he hastens to add that the sleep deprivation is worth it. "I'm advocating for students and carrying their voice to the highest levels of the UC system. If that means burning the candle at both ends, so be it."

Judging from his résumé, the 30-year-old Allen has gone through a lot of candles: Parallel with a stellar academic career, he has done stints as a Latin American development assistant, community organizer, communications director, assistant magazine editor, judicial clerk, and human rights organization senior fellow.

His time as a law student and regent, however, has been uniquely gratifying. "I came here to learn about the nexus of law and public policy," says Allen, a Harvard graduate with a Latin American Studies master's degree from Cambridge. "This regent experience couldn't have offered more in that respect."

Being chosen from among 73 applicants for the student regent position is an honor, but not honorary: Allen is a voting member who attends two-day meetings every other month and works intensely on board business the entire school year. He has focused on public-interest loan forgiveness programs, community college transfer support, environmental sustainability efforts, and graduate program diversity, as well as raising the profile of student and alumni affairs at the Regents' table.

Adding to the challenge is that his one-year term coincides with a daunting state budget crisis. When he joins the Santa Monica office of international firm Bryan Cave this fall, Allen will closely monitor how public education is affected. "It's disheartening to see something like student mental health services on the chopping block," he says, "But it also makes you fight harder to find solutions." —A.C.



Ben Allen, '08



ON THE SHELVES

NEW AND NOTABLE WORKS FROM THE BOALT COMMUNITY

BOOKS: LEGAL THRILLERS

Mystery Loves Company

Lawyer and mystery writer Jeremiah Healy has speculated that a big reason that non-lawyers read legal thrillers is to learn from insiders how the law works—and doesn't work. As usual, Boalt offers a superior education: four alumni authors who explain *and*

entertain with gripping novels dripping with legal details. (At press time we learned there's a fifth, John Poswall '69! See page 47.) Here is a list of each author's most recent book and an introduction to their fictional legal-beagles.

—Jared Simpson & Colleen Raspberry



Pamela Samuels-Young '90

Most recent book: *In Firm Pursuit* (January 2007)

Main character: Vernetta Henderson

Location: Los Angeles

Young, gifted, and black: Vernetta Henderson is a savvy and tenacious African-American attorney whose attempt to make partner at her prestigious all-male firm uncovers a tangled web of corporate corruption and sexual misconduct. Samuels-Young decided to bring some much needed diversity to the genre: "I didn't see any characters that looked like me," she says. "African-American characters were essentially non-existent, and I wanted to change that."



Sheldon Siegel '83

Coming soon: *Judgment Day* (May 2008)

Most recent book: *The Confession* (June 2004)

Main characters: Mike Daley and Rosie Fernandez

Location: SF Bay Area

Siegel describes criminal defense attorneys and ex-spouses Mike Daley and Rosie Fernandez as "the most honest and trustworthy people I can imagine. It's said that everybody has a list of two or three people that they would call if they got into serious trouble. Mike and Rosie would be at the top of my list. I think they're heroes and I try to portray them as such."



Robert Tanenbaum '68

Coming soon: *Escape* (April 2008)

Most recent book: *Malice* (Hardcover September 2007; Paperback February 2008)

Main characters: Butch Karp and Marlene Ciampi

Location: New York City

On the East Coast, the volatile, crime-fighting Karp family—upstanding District Attorney Butch Karp, his vigilante wife, Marlene Ciampi and their polyglot progeny, Lucy—take the law into their own hands to battle terrorists and murderous criminal syndicates in New York City.



Jonnie Jacobs '91

Most recent book: *The Next Victim* (February 2007)

Main character: Kali O'Brien

Location: SF Bay Area

Bay Area attorney Kali O'Brien is "a smart, world-weary heroine who can kick butt and take names when she needs to." Is Jacobs anything like her character? "We share an appreciation for the irony in life and an irrepressible curiosity (all right, nosiness) about people."



BOOK: DARIUS GRAHAM

All Booked Up

Writing a book may not be on most 1L to-do lists, but even when neck-deep in his first year at a top-10 law school, Darius Graham '09 still found time to pen *Being the Difference: True Stories of Ordinary People Doing Extraordinary Things to Change the World*. The book profiles 13 individuals who have helped others in unique and often moving ways.

As an undergrad at Florida A&M, Graham founded Books All Around—a nonprofit group promoting youth literacy—and began reading about other volunteers. “I was overwhelmed by their stories and wanted to write about some of them,” he says. “Starting a medical clinic in Africa, running an arts program for urban kids . . . these people blew me away.”

In college, Graham founded the Honor Student Association, captained the mock trial team, and hosted a public affairs radio show. At Boalt, he is editor in chief of the *Berkeley Journal of African-American Law & Policy* and a member of the *California Law Review*.

“When you hear about a problem, you don’t have to wait for someone else to deal with it,” Graham says. “That’s what this book is about, regular people doing something to improve their communities.” —Andrew Cohen

Being the Difference: True Stories of Ordinary People Doing Extraordinary Things to Change the World

By Darius Graham
BookSurge Publishing, 2007



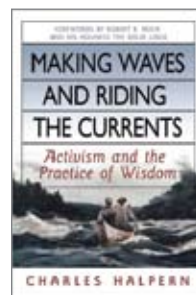
WORLDLY GOODS: Darius Graham '09 has written a book about extraordinary volunteers around the world.

BOOK: CHARLES HALPERN

A Mindful Master

The buttoned-down, gray-flannel denizens of Dupont Circle firms were pretty much impervious to the flood of countercultural currents of the late 1960's. Charles Halpern, then a junior partner at Arnold & Porter, was an exception. In 1968, the man who would bring meditation into the legal world had yet to experience leg cramps from sitting in the lotus position. In *Making Waves and Riding the Currents*, Halpern—presently a Boalt scholar in residence—recalls his remarkable and highly unlikely transformation from up-and-coming corporate lawyer to one of the nation's most respected voices of environmental and social activism.

Although he was already an idealist while at Yale—like many he'd been inspired by the civil rights division of Bobby Kennedy's Justice Department—Halpern's real metamorphosis began when he served as lead counsel in *Rouse v. Cameron*, in which plaintiff Charles Rouse challenged the adequacy of the treatment he received while involuntarily confined in a mental hospital. Halpern's deep sympathy for Rouse's plight put him in touch with his own deep compassion and



unleashed his pent-up desire to use his legal skills to promote positive change and, in his words, “reorient his life.” Soon thereafter he began what became in part a spiritual quest.

As co-founder of the Center for Law and Social Policy and first dean of the City University of New York Law School at Queens College, Halpern helped to forge a humanistic legal approach that draws on Buddhist

meditation and self-awareness as much as case law.

Making Waves charts Halpern's 40 years of advocating law and public policy steeped in contemplative practice. Twin forewords by the Dalai Lama and Clinton Labor Secretary Robert Reich hint at the influence of the author's compelling personal journey from pin stripes to meditation pants. —John Birdsall

Making Waves and Riding the Currents: Activism and the Practice of Wisdom

By Charles Halpern
Published by Berrett-Koehler Publishers, Inc., 2008



INSIGHT:

Living and Dying by the Billable Hour



BY JEFF BLEICH '89

Sadly, one of the first things law students ask about a law firm today is how many hours they'll have to bill. A generation of lawyers has come to believe that their worth is measured solely by how many hours they work. This isn't just demoralizing; it's destructive. Lawyers and law firms did not always live by the billable hour, but, unless we change, they could die by it.

"We are reaching the outer limits of human endurance and the upper reaches of client tolerance."

SOME HISTORY. Billing by the hour is not inevitable; it's relatively new. Twenty-five years ago, a typical lawyer submitted a bill based on his or her judgment about how long and hard they worked, their success or lack of success, and the client's expectations and ability to pay. Management consultants fretted that the lack of accountability could lead to inflated costs. But their solution, tracking and billing hours, has done the opposite: It made litigation more expensive, largely eliminated accountability, and has infected legal practice in the bargain.

HIGHER COST, LOWER ACCOUNTABILITY. The author Scott Turow describes a candid disclosure by an attorney who bills by the hour as follows: "If you hire me, I promise that my billing system will reward me for solving your problems at the slowest possible pace, with as much duplication of effort as possible, and that I will face real economic penalties for exercising any judgment that limits or focuses our work." Although good lawyers resist these perverse incentives, they still cast a shadow over the choices we make: Lawyers are frequently accused of unnecessary discovery, delays, needless motions, and padded fees. Did a firm resist settlement only because the deal was bad, or was it that they'd earn far more—win or lose—if they went to trial? Was a broad discovery demand designed to get at critical facts, or to keep a lot of high-billing associates busy?

Skyrocketing legal costs confirm that the current system does not save money; nor are lawyers truly accountable. Billing based on hours rather than the value of the work puts lawyers at odds with their clients. In-house attorneys fly-speck the bills, or seek budgets, or ask for discounts based on assumptions that bills are already slightly padded or rates were increased to absorb the discounts. The entire process fosters distrust and skepticism—precisely what you don't want in an attorney-client relationship.

THE HUMAN TOLL. It's new lawyers who bear the brunt now that firms have only three ways to make more money—work longer hours, increase the number of lawyers, or raise rates. Predictably, firms have been doing all three. Instead of the 1,700-hour annual average of the 1970s, new lawyers now typically bill around 2,100 hours. Those additional hours come out of two places—evenings and weekends. That means less sleep, and fewer opportunities for outside interests—in short, less time to enjoy life. New lawyers often have less client contact, less ownership of a case, and fewer chances to actually practice law. Worst of all, they have less time to be just and to offer their talents to the neediest in our society.

The economic pressure to keep the current system is strong, but we will eventually reach the outer limits of human endurance and the upper reaches of client tolerance. We must begin seriously considering alternatives, such as fixed-fee arrangements with performance-based bonuses. The status quo makes us both richer and worse off. To preserve the vitality and integrity of the profession, we need to find a better way.

Jeff Bleich '89 is a partner at Munger, Tolles & Olson. He is president of the California State Bar, vice-chair of the California State University Board of Trustees, and has been an adjunct professor at Boalt since 1992.