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Boalt Hall Transcript

Editor

Molly Colin

Managing Editor

Jacqueline Phillips

Staff Writers

Linda Anderberg

Dan Brekke

Abby Cohn

Class Notes Editor

Linda Anderberg

Contributors

Cristina Bautista

Janet Silver Ghent

Leslie A. Gordon

Linley Erin Hall

Colleen Sharp

Contributing Photographer

Jim Block

Design

Patera

Update Your Address

Email: updates@law.berkeley.edu
 Web: www.law.berkeley.edu/alumni/services/updateinfo.html

Phone: 510-642-2591

U.S. Mail: Alumni Center
 University of California, Berkeley
 School of Law
 303 Boalt Hall
 Berkeley, CA 94720-7200

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Dean's Message



There's too little space here to mention even briefly all the recent developments at Boalt Hall. The newest members of our community survived the admissions gauntlet with the dazzling credentials and impressive accomplishments you would expect, and then some. On the faculty front, I'm delighted that four gifted new professors will join us this fall (page 12). Their valuable addition strengthens our curricular and research portfolios in several fields—among them administrative law, corporations, criminal law and immigration. We hope to meet our ambitious goal of expanding Boalt's core faculty by 40 percent over the next few years. After years of budget stringencies, we're committed to enhancing Boalt's research and teaching capacity. The recruitment of these spectacular professors is a stunning success.

Exciting changes and cutting-edge work continue to flow from our centers and programs. Professor Pamela Samuelson has taken over the reins at the Berkeley Center for Law & Technology (BCLT), after a long and extraordinary period of leadership by co-founder Professor Peter Menell. A new executive director has arrived to help Pam and colleagues: Robert Barr, formerly vice president of intellectual property and worldwide patent counsel for Cisco Systems. Microsoft's recent \$1 million gift (page 11) will further strengthen BCLT's preeminence. Elsewhere, we are proceeding with plans to create a Criminal Justice Center, led by Professor David Sklansky; Professor Dan Farber is spearheading a renaissance in our work on environmental law and policy; Professor Harry Scheiber has reorganized his work on the Law of the Sea Institute and the Sho Sato Program to form the new Institute for Legal Research; and I have been working to launch the new Earl Warren Institute on Race, Ethnicity and Diversity.

The faculty leadership of the Berkeley Center for Law, Business and the Economy (BCLBE) is shifting from Professors Bob Cooter and Dan Rubinfeld, who will continue leading the Law and Economics Program. Taking over the BCLBE reins are co-chairs Professor Jesse Fried and Visiting Professor Eric Talley. With Dana Welch '87 as executive director, BCLBE is up and running, pursuing a vigorous agenda that leverages scholarly resources from throughout the Berkeley campus. For example, BCLBE is planning to co-sponsor a conference with BCLT next year that will craft recommendations regarding the IP, bioethical and economic challenges for California's \$3 billion stem cell initiative. (See the related story on Joan Samuelson '77—page 18.)

Our plans for a new building have reached an exciting phase. Moore Ruble Yudell Architects & Planners, designers of the Haas School of Business, worked intensively through early June with teams from Boalt and Haas to develop an exciting concept for an innovative building that will address Boalt's core needs for faculty, classroom, research and student activity space, while also fostering collaboration between Boalt and Haas. (You will hear much more about that project in the months ahead.) Meanwhile, as we await the new building, our Alumni Center, Communications, BCLBE and the Warren Institute will soon relocate to much-needed temporary space in downtown Berkeley.

Boalt faculty continue to produce pioneering research on an array of issues that matter. Professor Marge Shultz '76 is co-author of a multiyear study of the LSAT and alternative predictors for lawyering success (page 22). Other faculty members are conducting work on subjects ranging from legal issues in the aftermath of 9/11 to the regulatory debate surrounding spyware.

I hope to see you at Boalt's All-Alumni Reunion on Saturday, September 24. You'll have an opportunity to reconnect with the school and fellow grads, and to engage in discussions on timely legal issues, as well as Boalt's future.

A handwritten signature in black ink, appearing to read 'C. Edley, Jr.' with a stylized flourish at the end.

CHRISTOPHER EDLEY, JR.
DEAN AND PROFESSOR OF LAW

Letters to the Editor

A description of the once-popular pastime of penny pitching by Boalt students in the Then/Now column in our spring 2005 issue prompted Mel Cohn '40 to share some memories of that bygone ritual.

—Editors

Pitching pennies was a pastime that about a dozen of us used to participate in after lunch when we were early for class. As I recall, of the 168 of us who started the first year in 1937, 73 of us survived the first and second-year massacres and started the third year. As an aside, of the 72 of us who survived, 68 of us or 95 percent passed the 1940 bar exam. The old Boalt Hall had only three classrooms—large, medium and small—and the professors saw to it that each class fit the classroom.

—Mel Cohn '40



Photo courtesy of J. Richard Johnston '39

(left to right) John Martin '40, Nicholas Dubsick '38, Raymond Sherwin '40 and Jack Hayes '39

Letters to the Editor:

Letters may be edited for style and length.

Email: transcript@law.berkeley.edu

Mail: *Boalt Hall Transcript*
University of California, Berkeley
School of Law
205 Boalt Hall
Berkeley, CA 94720-7200

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Death Penalty Clinic Plays Critical Role in High Court's Miller-El Ruling



Acting Clinical Professor
Elisabeth Semel

Professor Elisabeth Semel greets a visitor to her law school office amid a whirl of activity—answering a string of phone calls, emailing documents to Washington, D.C., then fielding more calls. Semel, director of Boalt Hall's Death Penalty Clinic, apologizes and explains she and one of her students, Steven Hicks '06, are preparing information for members of Congress to educate them about a new Senate bill, the Streamlined Procedures Act, that would make it much harder for condemned state prisoners to get federal *habeas corpus* reviews of their cases.

For her, it's the latest front in a career-long fight to give criminal defendants "my fullest, most vigorous representation." It's that commitment which has informed her work for the past four years at the Death Penalty Clinic, which played a leading role in a June U.S. Supreme Court ruling that granted a new trial to a Texas death row inmate.

Clinic faculty and students (Racheal Turner '02, Jessica Simbalenko '04 and Portia Glassman '02), along with the Washington, D.C., law firm Sidley Austin Brown & Wood, wrote a series of *amici curiae* briefs for a group of former federal appellate court judges, a former deputy U.S. attorney general, a former FBI director, former state attorneys general, former assistant U.S. attorneys, and the former district attorney of Boston. All backed the effort to win a new trial for Thomas Miller-El, an African-American defendant convicted of a 1985 murder in Dallas County, Texas. The appeal was sparked by evidence that prosecutors had systematically dismissed African-Americans as prospective jurors.

In a 6-3 ruling, the Supreme Court said it "blinks reality to deny" that the state had barred certain members of the jury pool because they were black. The impact on Miller-El was swift: he won a new trial, though prosecutors have already announced their intention to again seek the death penalty. What's unknown, says Semel, is whether the ruling will have a wider effect in helping end discrimination in jury selection for capital cases.

"One obviously hopes that the impact is going to be broader than just getting relief," she says. "In the process of preparing the briefs in that case, we took a very hard look at whether or not Thomas Miller-El was purely an anomaly. And while the facts in Miller-El's case are probably more egregious collectively than you will find in most cases, there are aspects

of the discrimination in that case that go on in courtrooms across this country every day." *Miller-El* was closely tied to the history of the Death Penalty Clinic, as it was the first case the clinic accepted after it opened its doors in 2001. The clinic is also involved in two ongoing capital appeals in Alabama and California.

Semel says that beyond the crucial work of ensuring that those facing capital punishment get effective counsel, the Death Penalty Clinic offers students a challenging but effective grounding in lawyering skills that will be important in all realms of practice, not just in the service of criminal defendants. "What engages students, what interests them is being part of a legal team, learning how lawyers try to do it right," Semel says. "This includes more than writing a brief—interacting with witnesses, working with experts, developing evidence—the full range of skills [which] we on the faculty hope our students will have when they graduate. The clinic's work gives them a jumpstart to doing that."

And the clinic also prepares future lawyers for the human aspect of the attorney-client relationship. "If the students can feel—and they do—the degree of attachment and professional commitment to our clients, then we can be confident that they will have that same approach with respect to the clients they represent in whatever field of practice they have," Semel says. "And I think we want that for them."

—DAN BREKKE

www.law.berkeley.edu/cenpro/clinical/dpclinic/

EBCLC Helps Formerly Incarcerated People Get New Lease on Life

Ten thousand individuals return from jails and prisons every year in Alameda County and their convictions present obstacles to their reintegration into society. But a state law that allows people to say they no longer have convictions on their records is making a difference in their lives. And the East Bay Community Law Center (EBCLC) is taking a lead in working to give people with criminal records a new lease on life.

“Because of their criminal records, formerly incarcerated people are routinely denied access to basic services,” says Jeff Selbin, executive director of EBCLC and a lecturer at Boalt Hall. “Even minor convictions become, in effect, life sentences for people whose records prevent them from getting jobs, renting apartments or voting.” Kevin Gordon '03, a Perkins Coie Community Service Fellow working on the project adds, “I personally hope that [these remedies] will enhance people’s opportunities for self-sufficiency, especially regarding employment.”

EBCLC, founded by Boalt students in 1988, co-sponsored an expungement summit on April 2 with U.S. Representative Barbara Lee (D-California). With over 80 volunteer attorneys—the majority of them Boalt/EBCLC alumni—and more than 700 formerly incarcerated people in attendance, the summit served

as an effective promotion of the center’s efforts to help the community.

Staff Attorney Margaret Richardson '04 notes that in San Francisco and Contra Costa Counties, the Office of the Public Defender manages these remedies to criminal records. In Alameda County, however, EBCLC is the only provider that assists formerly incarcerated people free of charge. “This is a critical service to be providing at this time,” says Richardson. The dismissal of criminal convictions, as provided for in the California Penal Code, allows people who have completed their sentences to state truthfully on a job application that they have not been convicted of a crime. The convictions are not completely erased and the statute applies only to convictions where no prison sentence was imposed. This remedy provides

greater access to jobs, housing, state licenses and student loans.

After the April summit, EBCLC established a Criminal Records Clinic which assists formerly incarcerated people twice a week at the Wiley W. Manuel Courthouse in downtown Oakland.

Representative Lee actively continues to support criminal justice reform in Alameda County and spearhead the push for further legislation at the federal level. In early April, she urged fellow members of the Congressional Black Caucus to review the expungement policies in their home states and work to make those policies readily available to the public: “We need to make sure

that formerly incarcerated people have all the tools they need to reconstruct their lives and rejoin their communities.”

—CRISTINA BAUTISTA

“EVEN MINOR CONVICTIONS BECOME, IN EFFECT, LIFE SENTENCES FOR PEOPLE WHOSE RECORDS PREVENT THEM FROM GETTING JOBS . . .”

—Jeff Selbin
EBCLC Executive Director

www.ebclc.org

Jim Block



EBCLC staff lawyers Margaret Richardson '03 and Kevin Gordon '03 assist formerly incarcerated people move forward with their lives.

From Small-Town Lawyer

AMPAS

Best Motion Picture of the Year Academy Award winners Clint Eastwood, Albert S. Ruddy and Tom Rosenberg for *Million Dollar Baby*.



The practice it takes to land an Oscar rarely begins in the legal arena. But that was the case for Tom Rosenberg '72. *Million Dollar Baby*, the 2004 film he co-produced, netted Academy Awards for Best Picture (Rosenberg, Clint Eastwood, Albert Ruddy), Best Director (Eastwood), Best Actress (Hilary Swank) and Best Supporting Actor (Morgan Freeman). Eastwood praises Rosenberg as “an excellent film executive” with “a keen sense for the material.”

Speaking more modestly from his office at Lakeshore Entertainment in Hollywood, Rosenberg says: “A legal background helps you in anything you do. It helped me out when I was a small-town sole practitioner [and then] in real estate, and it remains important today. If you're running any sort of company, managing in-house legal people, making decisions that have legal repercussions, a background of law school training and years of practice are very important.

Henry Holmes '69, a Southern California entertainment attorney, agrees. “You need perseverance as a producer to get a

film made,” says Holmes, who is well acquainted with Rosenberg's work. “You have to be unrelenting. The law school experience [with its focus on the Socratic method] prepares you.”

When Rosenberg entered Boalt after teaching public school in his native Chicago, Hollywood was not in his game plan. “I never thought I would do this,” says Rosenberg, whose father was an alderman and a Cook County judge. “I have to say I never had a real plan in my life except I wanted to be a small-town lawyer. With that in mind, the self-described “Mother Earth hippie, back-to-the-lander” drove cross-country after graduation from Boalt

to find a town where he could be its only attorney. He wound up in Willow Springs, Missouri, an Ozarks community where he and his former wife bought an inexpensive piece of property, built a house without power tools, even raised their own food. “I put one foot in front of the other and just kept going,” he recalls. But even in the Ozarks, he began to think big, branching into real estate.

The route from the Ozarks to Hollywood went through Chicago. After five years in Missouri, he returned to his hometown, becoming a prominent real estate developer as well as an attorney and a political organizer. He helped oversee two presidential campaigns and served as a fundraiser-adviser to Chicago Mayors Jane Byrne and Richard M. Daley. “I've known Tom a long time,” says Mayor Daley in an email. “He's a good lawyer and a very smart developer and investor. ... Those are good qualities to have, whether you're developing real estate or making movies. I was delighted when he won the Academy Award.”

Rosenberg, who recently received a Lifetime Achievement Citation from the Windy City, had no idea how his talents would play in Hollywood. But a Chicago friend talked him into

to Oscar-Winning Producer

co-founding a production company in 1989. In 1994 he struck out on his own as founder and chairman of Lakeshore. In addition to *Million Dollar Baby*, his feature films include *Runaway Bride*, *Autumn in New York* and *The Human Stain*. Slated for 2006 is *The Lincoln Lawyer*.

Although many producers don't get involved in the creative side of filmmaking, focusing exclusively on the business aspects, Rosenberg reads books for ideas and even hires actors. After reading the script for what became *Million Dollar Baby*, he sent it to Swank, with whom he had worked in *The Gift*. "I thought it had the potential to be a very good movie, but saw it as a smaller-audience film," Rosenberg explains. "When you think about it, going into it, it's a very tough story with a very tough ending. When Clint Eastwood agreed to be involved and also starred in it, the prospects changed for the film. When you're making a decision to make a film, you're not thinking about Oscars."

Says Eastwood, reached by email: "[Rosenberg] was essential

in putting together the financing and distribution for the film. He was able to offer both creative insight in terms of casting and the business acumen to get the picture made." Holmes, who has had business dealings with Lakeshore, says Rosenberg is an A-list producer running an A-list company. "I'm proud to have gone to the same law school."

These days, the film business fills Rosenberg's 12- to 14-hour days. While he maintains a home in Chicago, last year he sold his share of Capri Capital, his real estate company that was based in that city. Suggestions for Boalt alumni who want to produce films? "It's a very difficult business—and I would just say you have to learn it first. You can't just step in. You have to take your time and learn the skill of producing so that you're competent—take your time and go slowly. It's better to develop a foundation of skill than bluff your way through it."

—JANET SILVER GHENT

www.lakeshoreentertainment.com

Siino Merges Law, Technology and Entertainment at Yahoo!

Joseph Siino's home may be in Berkeley, a city, he says, he'll "never move from," but his workplace is global. Named Yahoo!'s vice president of intellectual property and deputy general counsel in February, Siino '89 is officiating at a marriage between Silicon Valley and entertainment—a convergence that is accelerating rapidly. That's why he closed his Berkeley practice to take on the challenges of the Sunnyvale, California, Web giant that serves more than 345 million users in 25 countries.

Credited with helping create the fields of intellectual property management and strategy, he founded his successful Berkeley firm, Siino Law and Technology Group, after he left Brobeck, Phleger & Harrison in 2002. Last year he also became a managing director of Inflexion Point Strategy, an intellectual property investment bank. But then Yahoo! approached him. "Initially, I indicated that I was not interested ... but the company persisted," he says. After meeting with key people, he became an "instant convert."

Siino grew up in Antioch and Pittsburg, California, with an extended Italian-American family in the construction business. He graduated from UC Berkeley with a physics degree and intended to pursue a doctorate. While interviewing at graduate schools, however, he realized that studying physics was very different from living the life of a physicist. "When you're out there, it's no longer about creating exciting inventions and making discoveries" but participating in large projects, he recalls.

Determined to stay on the cutting edge, Siino entered Boalt to combine

interests in law and technology through intellectual property. He didn't specialize immediately in the field after graduation. But he took notice that, during the early '90s, "when most large firms were not doing well," intellectual property was booming. "I recognized that this is going to be a booming field for a long time and I might as well focus on it," says Siino, an adjunct professor of intellectual property strategy at Boalt and an executive council member of the Berkeley Center for Law & Technology.

In Silicon Valley, a key focus of Siino's work with Yahoo! is to "leverage the historic opportunity it now has at the interface of the media and technology worlds. ... My role would be to help Yahoo! optimize its intellectual property assets." Meanwhile, he says, "It feels like 1999 again. We're hiring like crazy in all areas of our business, seeking people who can really produce intellectual property. ... It's a great place for Boalt graduates and UC Berkeley graduates."

—JANET SILVER GHENT

www.yahoo.com



Joseph Siino '89 takes on new challenges.

Fellowships Foster Leadership in Social Justice Arena

Inspired to pursue creative legal approaches to social ills, six recent Boalt graduates have won competitive national fellowships supporting up to two years of work on behalf of underserved people and social justice causes. Terrence Galligan, associate director of Public Interest Programs at the law school, says the six fellowship awards constitute a banner year, demonstrating “the strength of the candidates and the support they get here.” Three of the recent graduates received Skadden Fellowships, two were handed Equal Justice Works Fellowships and one received a New Voices Fellowship. Still other 2005 Boalt graduates received prized in-house fellowships enabling them to launch their careers at public interest organizations.

Some 15 percent of Boalt’s graduates start their careers in public interest and public service. The law school’s commitment to public interest law is reflected in a tapestry of clinical programs and social justice activities, along with a close-knit network of students, faculty and mentors dedicated to such work. In addition to supporting projects addressing societal problems, the fellowships give eager graduates a chance to explore their passions and gain needed experience in a highly selective field of law.

—ABBY COHN

www.equaljusticeworks.org www.skadden.com newvoices.aed.org

RACHAEL KNIGHT '05

Equal Justice Works Fellowship

Rachael Knight '05 says it's a familiar scenario: a child who lives in a shoddy housing project is regularly brought into the ER for treatment of recurring asthma attacks. Sometimes the best prescription, Knight asserts, includes legal advocacy—and not just an inhaler.

“Doctors are constantly treating the symptoms of poverty, not the root causes,” says Knight, noting that the child’s asthma could be triggered by mold or other allergens plaguing a rundown apartment building. Childhood illnesses afflicting the poor often

are aggravated by such external factors as substandard housing, inadequate nutrition or lack of health insurance, she says.

The recipient of an Equal Justice Works Fellowship, Knight, 28, is starting a legal advocacy program on the San Francisco peninsula aimed at remedying underlying causes of ill health among low-income children. Based at Lucile Packard Children’s Hospital in Palo Alto, and the Ravenswood Family Health Center in nearby East Palo Alto, the new Family Advocacy Program is modeled after the Boston-based organization where Knight previously worked. Melissa

Rodgers, directing attorney at the Legal Aid Society of San Mateo County, says Knight’s project will assist disadvantaged families who might not otherwise seek out legal services. “They’re going to bring their children to the doctor,” Rodgers says.

Knight will train healthcare providers to identify their patients’ legal needs and refer patients to her when they suspect nonmedical factors are contributing to a health problem. Her advocacy could consist of writing a letter to a landlord or helping a family get food stamps, health insurance or other benefits. “To me, this is an access to justice issue,” says Knight.





Jim Block

ON THE MOVE: Nora Preciado '05, Rachael Knight '05, Tom Plummer '05 and Yungsuhn Park '05 bring passion and dedication to their fellowship projects.

YUNGSUHN PARK '05

Skadden Fellowship

Yungsuhn Park '05 was in middle school when her family's business was looted in the 1992 Los Angeles riots following the acquittal of police officers accused of beating Rodney King. Those explosive days awakened her political and social consciousness. "I observed what happened and became interested in studying why it happened," she recalls.

As a student at the University of Southern California, she participated in a boycott supporting low-wage Latino restaurant workers in Koreatown in Los Angeles. Although that stand challenged some practices of her own Korean community, Park "wanted to be involved in creating positive social change."

As a Skadden Fellow, Park, 26, will direct her passion for workers' rights to a project at the Asian Pacific American Legal Center (APALC) in Los Angeles.

In 1999 APALC litigated a historic suit resulting in a \$4 million settlement for Thai garment workers found virtually enslaved in an El Monte, California, sweatshop. Park plans to extend the center's successful ongoing advocacy for garment workers to vast numbers of laborers in janitorial, construction, home health and other low-wage jobs.

By increasingly contracting out work, manufacturers and retailers are skirting liability for such workplace abuses as minimum wage and overtime violations, Park asserts. Her project will study the needs of low-wage workers in Los Angeles, and address those needs through impact litigation, policy advocacy and community education.

"Without her initiative and the Skadden Fellowship, we simply wouldn't be able to expand our capacity to deal with this pressing problem," says Julie Su, APALC's litigation director.

NORA PRECIADO '05

Equal Justice Works Fellowship

Nora Preciado '05 knows firsthand the obstacles faced by immigrants who don't speak the language of their new homeland. Preciado, 28, spoke little English when her family moved to Orange County, California, from Mexico when she was 13. This fall she begins a fellowship aimed at ensuring that Spanish-speaking residents in the Los Angeles area get the translation assistance mandated by state and federal law when they seek medical care and other family and children's services.

"There's no impetus [for providers] to comply," says Preciado, who received an Equal Justice Works Fellowship to pursue a community education and litigation project at the Mexican American Legal Defense and Educational Fund (MALDEF) in Los Angeles. While actual compliance figures don't exist, Preciado says a state audit in 1999 revealed that only two of 10 state agencies were aware of the requirement to provide bilingual assistance.

The lack of interpreter services has potentially disastrous consequences, including misdiagnosis or failure to seek

treatment, according to Preciado. In some cases, small children are pressed into service as interpreters, placing youngsters in the risky position of communicating sophisticated details about medical conditions and treatment.

Preciado, who recalls how language barriers kept her parents from attending her parent-teacher conference and school open house when she first arrived in this country, says her own experiences shaped her desire to go to law school and pursue a career as a public interest lawyer. "I think it makes the most sense to help my community out," she says.

TOM PLUMMER '05

Skadden Fellowship

Despite “some really wonderful laws” in California barring discrimination on the basis of sexual orientation, gay youth often face overwhelming hostility in their daily lives, says Tom Plummer '05. Alarming dropout and runaway rates reveal the devastating toll exacted on youngsters who encounter abuse at school or in unwelcoming home or foster care settings.

“Lesbian, gay, bisexual and transgendered youth are still experiencing a lot of harassment,” says Plummer, who graduated with a J.D. and a master’s in social welfare. “Statistics tell us a disproportionate number of youth are running away.”

As a Skadden Fellow, Plummer, 31, will collaborate with San Francisco-based Legal Services for Children (LSC) to offer free legal assistance to gay and questioning youth in the San Francisco Bay Area. Teamed with a social worker to assess the needs of these vulnerable clients, Plummer will act as a legal advocate, bridging a gap “between forward-looking laws and what really is the lived experience of these students,” he says. Plummer will offer educational workshops and direct legal representation to gay youth on such issues as home placement, school discipline and medical care.

After working in a domestic violence shelter in Kansas, Plummer was inspired to pursue a career of advocacy for underserved youngsters and families. “I got the feeling there were enough social workers, but we didn’t have enough lawyers doing that kind of work,” says Plummer.

Shannan Wilber, executive director of LSC, says the project will target services to a population “sometimes overlooked in terms of child protection laws.”

NOURA ERAKAT '05

New Voices Fellowship

As the recipient of a New Voices Fellowship, Noura Erakat '05 is focusing on human rights work on behalf of Palestinians. Erakat was selected to develop a litigation project and serve as a grass-roots organizer for the U.S. Campaign to End the Israeli Occupation. Based in Washington, D.C., the campaign is a coalition of groups seeking to challenge U.S. policies in the Israeli-Palestinian conflict.

“The litigation project is definitely the innovative piece,” says Erakat, 25, of her two-year fellowship. Her Palestine Human Rights Litigation Project envisions taking three legal approaches: using the Alien Tort Claims Act to

prosecute human rights violators, suing U.S. corporations that sell products to Israel for military use, and protecting the rights of pro-Palestinian activists and scholars in the United States.

“I came to law school specifically to look at new ways of building social movements and actually winning victories,” says Erakat, a Palestinian American. As an undergraduate at UC Berkeley, she was active with the group Students for Justice in Palestine.

Erakat originally considered a career as an international human rights lawyer. She concluded, however, she could be more effective in the United States, using her legal skills within the American judicial system to address injustices she believes are committed against Palestinians.

She expects to divide her time equally between creating the litigation project and working as an organizer who trains activists nationally and collaborates with other organizations. The New Voices Fellowship is intended to develop diverse and progressive leaders in social justice movements.



Jim Block

**New Voices Fellow
Noura Erakat '05**

Skadden Fellow
Karen Tumlin '04



Elisabeth Voigt '04

KAREN TUMLIN '04

Skadden Fellowship

Karen Tumlin '04 fears that the rights of all workers are jeopardized when employers challenge the immigration status of foreign-born employees who file discrimination suits and workers' compensation claims. Seeking to protect those rights, Tumlin, 31, will litigate cases nationwide on behalf of immigrant workers as a Skadden Fellow in the Los Angeles office of the National Immigration Law Center (NILC), an organization supporting the rights of low-income immigrants.

Her efforts are a response to what Tumlin describes as an "inappropriate extension" of the *Hoffman Plastic Compounds, Inc. v. NLRB* ruling by the

U.S. Supreme Court in 2002. In that 5-to-4 decision, the Court held that a California company did not have to provide back pay to an undocumented worker who was fired for participating in union activities. "Since then employers have seized on that decision," Tumlin says, applying what she considers a limited ruling to the broader arena of workers' compensation and antidiscrimination protections.

Tumlin will litigate immigrants' claims of workplace discrimination and seek a uniform policy from regional Equal Employment Opportunity Commission offices protecting those claims. She also plans to work with state agencies to restore the rights of injured immigrants to workers' compensation.

Focusing on such "next-destination" states as Nebraska, Kansas and Georgia that have experienced a surge in immigrant populations, Tumlin will represent injured workers in administrative complaints and litigation.

"I believe in what [immigrants] add to the American community," says Tumlin, who earned a master's degree in public policy from UC Berkeley in 2003.

Microsoft Gives \$1 Million to Berkeley Center for Law & Technology

The Berkeley Center for Law & Technology (BCLT) continues its upward momentum with a \$1 million gift from the Microsoft Corporation, a move that secures and advances the center's position as the nation's premier think tank on cutting-edge law and technology policy issues. Both the Microsoft gift and the hiring of renowned patent expert and policy specialist Robert Barr as BCLT's executive director build on Dean Christopher Edley's efforts to catalyze the talent and energy of BCLT faculty and make the 10-year-old center a focus point for translating policy into research. Barr, formerly vice president of intellectual property and worldwide patent counsel for Cisco Systems, joined BCLT in July.

Professor of Law and Information Management and Chancellor's Professor Pamela Samuelson, faculty chair and a BCLT director, hailed the Microsoft gift as a key development for the center. "The exchange contemplated between BCLT scholars and Microsoft lawyers and technologists will be invaluable for deepening our understanding of real-world consequences of legal and policy changes that we wish to recommend, especially now that patent reform is under serious consideration in Congress," says Samuelson, a distinguished expert in the areas of copyright law, software protection and cyber law, and a 1997 MacArthur Foundation "Genius" Award recipient.

The gift will sponsor roughly two BCLT faculty research projects a year. It provides the BCLT brain trust of scholars, whose areas of expertise range from patent and copyright law to cyber law, the opportunity to meet with Microsoft each spring to discuss their research interests for the coming year and for each partner to weigh in on areas they believe are of particular import.

"We are looking forward to the opportunity to interact with such a distinguished group of scholars," said Brad Smith, senior vice president and general counsel for Microsoft. "This collaboration will enable our employees to discuss important issues facing the technology industry with some of the most respected researchers in the field."

Microsoft will give a total of \$1 million to BCLT over the next four years in the amount of \$250,000 annually to provide support for research on forward-looking law and technology policy issues. From the annual contribution, \$100,000 will be available each year to support the research of BCLT faculty and affiliated scholars at UC Berkeley, and \$150,000 will be placed in a term endowment to be spent over a 10-year period. Funds from the term endowment will be used to establish a Microsoft Fellow in Law and Technology.

— STAFF

www.law.berkeley.edu/institutes/bclt

Gifted Scholars Join Boalt Faculty

Ann O'Leary '05 and Nasrina Bargzie '05



Christine Jegan

Boalt's ambitious plan to expand its core faculty by 40 percent over the next few years is moving closer to its goal with the hiring of five new tenured and tenure-track members. Professor **David Sklansky** is an outstanding scholar and teacher of criminal procedure and evidence. He joins us from UCLA, where he became a faculty member in 1994. In 2000, he received that university's top teaching award. Professor **Leti Volpp** is a rising star in the fields of immigration law, citizenship, nationality, and law and culture. She comes to Boalt from American University Washington College of Law, whose faculty she joined in 1998.

On the tenure-track hiring front, leading cyberlaw and intellectual property expert **Molly Shaffer Van Houweling** will join us as an acting professor of law. Professor Van Houweling comes to Boalt from the University of Michigan Law School, where she became a faculty member in 2002. Her teaching and research interests include intellectual property, law and technology, property and

constitutional law. **Kenneth Bamberger** has been counsel with the firm of Wilmer Cutler Pickering Hale and Dorr in Washington, D.C. A 1998 Harvard Law School graduate and president of the *Harvard Law Review*, he clerked for Judge Amalya Kears of the U.S. Court of Appeals for the 2nd Circuit and U.S. Supreme Court Justice David Souter. Professor Bamberger's areas of primary interest are corporations, administrative law and professional responsibility. **Erin Murphy**, a 1999 Harvard Law School graduate, was a note editor of the *Harvard Law Review* and clerked on the U.S. Court of Appeals (D.C. Circuit) for Judge Merrick Garland. She has been a



Herma Hill Kay

public defender in the D.C. Public Defender Service. Her primary teaching and research interests are criminal procedure, evidence and criminal law.

The news is exciting as well in the area of faculty accomplishments. Claire Sanders Clements Dean's Chair Professor of Law

Malcolm Feeley is president-elect of the Law & Society Association. **David Lieberman**, Jefferson E. Peyser Professor of Law and History, is president-elect of the British Studies Association. C. William Maxeiner Distinguished Professor of Law **David Caron** '83 has been elected to chair the Institute for Transnational Arbitration in Dallas. **Daniel Rubinfeld**, Robert L. Bridges Professor of Law and Economics, is president of the American Law & Economics Association. Stefan A. Riesenfeld Professor of Law and History **Harry Scheiber** is president of the American Legal History Association.

Choosing one winner of the Sax Prize for Excellence in Clinical Advocacy each year is a daunting task of selecting from a sea of standouts. The 2005 award went to **Ann O'Leary** '05 for not only helping her client—an Oakland welfare

recipient—but also transforming the case into a legislative effort that will benefit thousands of California welfare recipients. Honorable mention was awarded to clinic student **Nasrina Bargzie** '05 for her outstanding work in drafting state legislation to combat human trafficking as well as an *amicus* brief on the international right to education.

Boalt students shine in no small part because of the dedication of their pro-



Diane Abraham

fessors. In April the law school honored **Herma Hill Kay**, the Barbara Nachtrieb Armstrong Professor of Law, with this year's Rutter Award. The annual recognition is given to a Boalt professor who has demonstrated an outstanding commitment to teaching. Kay has been a part of the Boalt community for more than 40 years, writing extensively on women's rights and family law, and served as dean of the law school from 1992 to 2000.

Also making a difference in the civil rights arena are **Diane Abraham** and the students in her class, Rhetoric of Race and Gender, which looks at diversity in law firms, the courtroom, bar associations and law schools. Their proposal on revising the bar exam to include issues of diversity was published in *Goal IX*, the newsletter of the American Bar Association Commission on Racial and Ethnic Diversity in the Profession.

Boalt's alumni chapters have enjoyed a busy year. More than 130 Boalt graduates gathered in March to hear president and CEO of the Federal Reserve Bank of San Francisco **Janet Yellen** speak on the U.S.

economic outlook. Yellen's talk marked the start of a lecture series sponsored by the Berkeley Center for Law, Business and the Economy (BCLBE) and Bay Area alumni chapters. The events feature leading experts who explore timely issues in the areas of law, business and the economy that directly relate to practitioners. Professor **Jesse Fried** launched the Silicon Valley alumni chapter with a talk that focused on governance arrange-

ments of venture-backed startups. At the talk, BCLBE Executive Director **Dana Welch** '87 outlined some of the center's exciting multidisciplinary projects, which include a conference next spring on stem cell research that it's co-sponsoring with the Berkeley

Center for Law & Technology.

And speaking of corporate governance, Wilson Sonsini Goodrich & Rosati partner **Steven E. Bochner** '81, a recent appointee to the U.S. Securities and Exchange Commission's Advisory Committee on Smaller Public Companies, will assess the impact of Sarbanes-Oxley on small companies. Bochner, a Boalt adjunct lecturer, is the only lawyer from the West Coast serving on the 21-member board. And **Kenneth L. Marcus** '91 has been named staff director of the U.S. Commission on Civil Rights, an independent, bipartisan agency charged with monitoring and protecting civil rights. Recently appointed by President George W. Bush, Marcus serves as the agency's senior executive officer and directs the work authorized by its eight-member panel.

In journal news, the Center for the Study of Law and Society has published two new volumes of papers presented at center conferences. *Institutions and Public Law: Comparative Approaches*, edited by **Tom Ginsburg** '97/'99 and Professor **Robert Kagan**, is a

collection of contributions from the 2003 conference that honored **Martin Shapiro**. *Law & Policy*, edited by Neil Gunningham and Kagan, is a collection of papers from the conference on Regulation and Business Behavior in June 2003. On the student journal front, the *Berkeley Journal of International Law* honored Professor **Richard Buxbaum** '53 (LL.M.) in April with a reception on the occasion of his 75th birthday, and the *Berkeley Women's Law Journal* has changed its name to the *Berkeley Journal of Gender, Law & Justice*.

In other news, Boalt hosted the 9th Annual Latin American and Caribbean Conference on Law and Economics (ALACDE). As secretary of the group, Professor **Robert Cooter** organized the meeting at which Professors **Daniel Rubinfeld** and **Oliver Williamson** were speakers. This was the second time the annual conference was held at Boalt. Past locales have included Lima, Peru; Santiago, Chile; and Bogotá, Colombia.

It's become a rite of spring: the passing of the torch from one Boalt Hall Alumni Association president to the next. This year, in grand style, **Adam Sachs** '86 was sworn in at the Citation Award Dinner in May, taking the reins from outgoing president Dana Welch '87. Nearly 600 Boalt alumni, friends, faculty and students



Adam Sachs

filled the Ritz-Carlton ballroom to capacity for the gala occasion celebrating the distinguished careers and outstanding achievements of **David Andrews** '71 and Professor **Jesse Choper**. The sold-out dinner raised nearly \$300,000 for the law school. Welch has set a high benchmark. Sachs, a magician by avocation, is not only up for the challenge but promises to pull a few rabbits out of his hat.

—LINDA ANDERBERG

“Really, what’s not to like?” asks Zela Claiborne. “It’s low risk—you can put a day or two aside to try to settle, and about 95 percent of cases do settle in mediation.”



Arbitrator Zela Claiborne '82 says ADR offers speedy, efficient—and humane—outcomes.

DISPUTING THE ALTERNATIVE

Even critics admit that alternative dispute resolution is a necessary feature of our legal landscape. But is ADR straining the quality of American justice?

BY LESLIE A. GORDON

When it comes to opinions on alternative dispute resolution, Justice Anthony Kline knows he’s in the minority. “Mine is not the conventional view, even among judges,” concedes Kline, presiding judge of the California Court of Appeal, First District, in San Francisco. Attorneys are

so taken by the notion that ADR eases the pressure on the civil justice system that they may not see that ADR is actually undermining that system, he says. “The opinion of the legal community is mindless. People are not really thinking this through.”

Supporters praise ADR for its flexibility, informality, certainty, confidentiality and ability to produce unique awards not available in traditional courts. But Kline and other critics insist that the ADR system is rife with conflicts of interest, drains talent from the civil justice system and



California Court of Appeal Justice Anthony Kline argues that ADR short-circuits the bench's role in making law on new issues.

Photos by Jim Block

“Perhaps the biggest problem with alternative dispute resolution is that courts can’t perform their traditional role. ... Courts are unable to make the law as it applies to new issues,” says Justice Kline.

usurps an adjudicatory function that should remain public. For better or for worse, ADR has changed the modern litigation landscape.

“It’s quite clear that ADR—[the] privately sponsored, privately paid for dispute resolution forum—is much more widely used now than a quarter century ago,” says Professor Stephen Bundy ’78. He suggests that the chief contributors to the phenomenon of litigants opting out of the civil justice system include the family law mediation movement, skyrocketing costs of business litigation, and employment and tort law defendants facing huge volumes of litigation and risks inherent in the jury system.

Whereas trial work used to be the meaty, career-pinnacle stuff that inspired an *L.A. Law* generation, today some legal insiders refer to “the vanishing trial.” A

2003 American Bar Association (ABA) study first used the term to describe the increasing tendency for litigants to take their cases—including mediation, arbitration, private trials and even custom-designed processes—to ADR. The ABA study reported the number of civil trials in federal courts fell by 21 percent between 1962 and 2002.

Historically, the primary argument for ADR is that it’s quicker and cheaper than courtroom litigation. But ADR skeptics say that comparison means little because it ignores the fact that most cases filed are settled and never go to trial. And the critics question whether ADR is really faster and cheaper than traditional adjudication. For example, arbitration can still entail significant and costly discovery, motions, briefs and hearings. But ADR

proponents insist there’s no question that the alternative approach saves both time and money. John “Jay” Welsh ’65, general counsel of JAMS (formerly known as Judicial Arbitration and Mediation Services), a Southern California-based ADR specialist that’s among the largest in the United States, says the advantage comes from the relative straightforwardness of the ADR process. “You can mediate in three days and there’s no prep for trial or for appeal,” he says. “A well-managed arbitration absolutely costs less and takes less time than a trial.”

One arbitrator, Zela Claiborne ’82, of the American Arbitration Association, sees speed as an essential element of her job. “When I was in private practice, I would get the whole case ready for trial and we couldn’t get a courtroom. It would



“With ADR there’s a consistently high quality of judging,” says Professor Stephen Bundy. “In the courts, it’s a lottery.”

Professor Stephen Bundy ’78 and Lecturer in Residence Henry Hecht study various forms of dispute resolution, including negotiation, mediation and arbitration.

be delayed sometimes three times,” recalls Claiborne. “An arbitration may get put over once but then it goes.” In addition to the American Arbitration Association and JAMS, other major ADR providers include the National Arbitration Forum and the National Conflict Resolution Center.

Another draw for those who take disputes into alternative forums is the ability to handpick their decisionmaker—or “neutral” as the position is called in the ADR business. “Not everyone who retires from the bench gets to work for an ADR provider,” Bundy explains. “These companies carefully select neutrals with a known track record. With ADR there’s a consistently high quality of judging. In the courts, it’s a lottery.” Even better, ADR parties can contract for as much of the neutral’s attention as they want. “The judge doesn’t have to make a decision in 10 minutes before the next case comes along,” Bundy says. “So parties may even spend more in ADR—but it very well may be worth it.”

But questions about ADR range well beyond practicalities like the cost and speed of the process. Critics say ADR can amount to a system of secret justice, one without juries and where the public can’t

hear testimony, read documents or even learn the outcome of potentially crucial disputes. In ADR the decisionmaker doesn’t answer to society, the parties don’t get public vindication and future litigants can’t turn to precedent for guidance.

Juries bring fresh eyes to disputes that private judges can’t, some observers argue. And fewer jury trials mean lawyers and litigants have less intelligence on how juries are likely to decide cases, knowledge that could aid settlement negotiations. “Society’s values are in part reflected by the decisions of juries and the courts,” says Boalt Hall Lecturer in Residence Henry Hecht. “But we don’t really see that with ADR.”

“Perhaps the biggest problem with alternative dispute resolution is that courts can’t perform their traditional role,” Justice Kline says. “A significant number of complex civil cases are going to ADR, so all that superior court judges see today are landlord-tenant and asbestos cases. Courts are unable to make the law as it applies to new issues. To my knowledge, the California Supreme Court hasn’t made a single decision regarding corporate governance in years. The reason, I think, is that those disputes, which are embarrassing to corporate defendants, are

resolved privately. The arbitration decision never becomes precedent. In cases like those, courts can’t fulfill their role in our dynamic common law system.”

Instead of ADR taking place in “the shadow of the law,” as typically described, ADR actually creates “extra-legal” decisions, according to Justice Kline. That means arbitrators may be less faithful to the law than judges, and ADR’s private nature doesn’t promote social regulation of disputes. “ADR can do a lot of things,” he says, “but it can’t decide *Brown v. Board of Education*.”

JAMS’s Welsh says criticisms of ADR are overstated because most arbitrations involve business disputes with little precedential value. He insists that ADR is not having the profound impact on trial activity that critics claim. But either way, he says, “I feel very strongly that people are entitled to resolve their disputes any way they want.”

Bundy argues that some types of cases simply should not be privatized, such as intellectual property and regulatory conflicts that may have broad implications, and disputes in which consent to ADR is nominal (such as when an individual has agreed to ADR as a condition of obtaining healthcare). “ADR brings up concerns regarding the legitimacy and

fairness of the process. Some cases should be subject to public supervision and visibility,” he explains. “Otherwise it’s harder to know whether there’s a systematic problem with a company, an institution, a hospital. When there’s no pattern of jury verdicts, the watchdog community, including regulators and plaintiffs’ lawyers, have a limited idea of what’s going on, where the problems are.”

Skeptics say that ADR robs the traditional legal system of precious human capital and creates new possibilities for conflict of interest on the bench. If a judge’s ultimate career goal is to work in the more lucrative ADR sector, critics suggest, she or he may be less willing to rule against litigants like large insurance companies, HMOs, financial institutions and other entities that provide business to ADR providers.

Detractors also lament the “repeat player” syndrome, in which companies hire a specific ADR provider for multiple disputes. If the dispute resolution provider is not giving the company good results—that is, ruling consistently in the company’s favor—that company might seek out other ADR providers. As a result, the argument goes, there’s a built-in bias in favor of litigants who are repeat players, and these conflicts operate to the disadvantage of individuals and to the advantage of corporations, ADR opponents say.

The repeat player problem can extend to lawyers and law firms that also repeatedly choose an ADR provider. “There are all kinds of repeat players out there, and the idea that ADR providers are more sympathetic to repeat players is a legitimate concern,” San Francisco-based neutral Demetrios Agretelis ’64 says. “But from a practical point of view, it hasn’t

affected anything I’ve done. I make decisions based on what I believe are the merits of the case. If you get a reputation for bias or prejudice or for being influenced by the people bringing cases to your provider, it will affect your reputation for neutrality, which is the most important thing you have as an ADR provider.”

ADR caters largely to parties with deep pockets, and critics see two major problems with that. First, says Bundy, having the wealthy opt out of the civil courts removes the most sophisticated constituency from the system. As a result, he says, ADR “has taken pressure off the courts to make their processes better and stronger.” Second, ADR may be largely beyond the reach of those with modest resources. The American Arbitration Association tries to level the ADR playing field when possible, says Claiborne. “We arbitrators now often award attorneys’ fees or costs. But of course there’s a real problem because how does someone without money even get that far [in ADR]?”

But Ellen James ’69, a San Francisco-area arbitrator for JAMS, sees a “wide range of socio-economic diversity on the plaintiff side,” especially when contingency fee arrangements are involved.

In the final analysis, though, even outspoken ADR critics like Justice Kline accept that ADR is a necessary part of the U.S. legal landscape. “I’m fully aware that the judicial system of this country could not function if certain cases didn’t go to ADR,” Kline says. ADR proponents point to mass tort litigation as the type of case better suited for alternative forums than traditional court proceedings. Steering such cases into ADR preserves courts’ resources for matters that must be formally adjudicated.

Both observers and ADR practitioners also say that alternative forums might work on a human level where courts fall short. Boalt’s Hecht would like to see litigants turn to pure party resolution—that is, negotiation—as the first alternative to court even before mediation and arbitration. “There’s a classic advantage to negotiation: parties know their own interests best,” he says. “With negotiation, you don’t get a winner and a loser. It’s not a binary resolution. You’re customizing the resolution.”

James calls mediation “graceful and dignified.” After serving as a superior court judge and now as an ADR neutral, she believes the majority of cases filed should never go to jury trial. Because of post-trial processes like appeals, trials simply don’t provide the finality that litigants crave. But mediation does. “Really, what’s not to like?” adds Claiborne. “It’s low risk—you can put a day or two aside to try to settle, and about 95 percent of cases do settle in mediation. Even if they don’t settle, mediation can narrow the issues for arbitration or trial. Mediation is such a relief to parties that they often call me later and thank me.”

On balance the rise of ADR has been positive, Bundy believes. “To now have a group of dedicated mediators and arbitrators of the quality available is a terrific thing for litigants who want to avoid the costs, uncertainties and publicity of standard court-based litigation. My sense,” he says, “is that more alternatives are better.”

A former lawyer, Leslie A. Gordon is a freelance legal journalist in San Francisco.

www.law.cornell.edu/topics/adr.html

www.adrworld.com/

A Passionate Advocate for Stem Cell Research, Joan Samuelson '77 Puts a Human Face on the Issue

Some 15 years ago, Joan Samuelson '77 went to Washington and began waking up Congress to the hidden ravages of a devastating illness. Diagnosed with Parkinson's disease when she was 37, newly wed and practicing as a commercial litigator, Samuelson testified repeatedly on Capitol Hill. She walked miles of marbled corridors to tell the story of her struggles and those of more than a million Americans afflicted with the degenerative neurological illness. And she lobbied one powerful politician after another to secure research and funding for a cure.

"We were just getting completely screwed," says Samuelson, mincing no words over her dismay when she discovered that while Congress was swarming with established lobbies representing other patient groups, Parkinson's wasn't getting much attention. "There was no money for Parkinson's," she says, "... and everyone was saying it was the most curable brain disorder."

If Samuelson had doubts about her chances waging what started as a one-woman advocacy campaign in the early 1990s, she didn't let on. "There's something about getting a diagnosis of a big, serious illness that's terrifying," recalls Samuelson, who had been living in Santa Rosa, California, at the time and had recently left litigation work because Parkinson's-induced tremors were interfering with her court appearances. "I desperately needed a strategy just to live with this."

Today, observers say, that strategy has amassed a remarkable record of achievements for Samuelson and her efforts to raise visibility—and money—for Parkinson's. "She's one of the best lobbyists I've ever known," says U.S. Representative Henry Waxman (D-Los Angeles). A fortuitous call to Waxman's office about 15



Jim Block

FIGHTING

years ago landed Samuelson an invitation to testify in Washington, D.C. Waxman's staff had been looking for a patient advocate to support his push to lift a funding ban on fetal tissue research by the first Bush administration. "These guys had no human face connected to it," says Samuelson of the early reaction in

Congress to reports that transplanted fetal tissue might help reverse Parkinson's symptoms. "I went back to testify, and it was magical." Ruth Katz, former counsel to the House Subcommittee on Health and the Environment, has a similar recollection of Samuelson's presence. "When she testified before Congress, a pin could



Living in California's wine country is inconvenient for her dizzying travel schedule but Joan Samuelson '77 says that's the price to live in paradise.

her operations, Samuelson is founder and president of the Parkinson's Action Network (PAN), a leading education and advocacy organization. An effort that began in her home in 1991 has mushroomed into a recognized Washington, D.C.-based program with a 10-member staff. "I think I was always the sort energized by having something to do," observes Samuelson, as she stops for a muffin and orange juice one recent spring morning at a cafe off Healdsburg's town square.

Lawmakers, patient advocates and scientists credit PAN and Samuelson with helping to unleash tens if not hundreds of millions of dollars for federal research into Parkinson's. One success is the creation in 1997 of a nationwide network of Morris K. Udall Centers for Parkinson's Research. Samuelson also coaxed actor Michael J. Fox to testify before a Senate subcommittee in 1999 about his personal battle with the disease—an appearance that captured

ease to the 29-member governing board of California's new \$3 billion stem cell initiative, a historic enterprise expected to fuel a new era in biomedical exploration and discovery. "Being a patient advocate requires a unique mix of training, talent and compassion to fight disease—and Joan Samuelson is a heroic example," says Robert Klein, chairman of the initiative's Independent Citizens Oversight Committee (ICOC), in an email.

Samuelson hails as "just stupendous" the program created by voter passage last November of Proposition 71, the California Stem Cell Research and Cures Initiative. Optimistic that research using stem cells will spur medical breakthroughs for Parkinson's, diabetes, Alzheimer's disease and a host of other illnesses, Samuelson signed on to the campaign early. "It was absolutely the best thing to do—to take this new technology and get the benefit of it now, rather than later," she says. Stem cell research offers great potential for medical advances but also has generated controversy because it involves the use of embryos left over from in-vitro fertilization clinics. For

THE GOOD FIGHT

have dropped in the room and you wouldn't have heard a sound," says Katz, dean of the School of Public Health and Health Services at George Washington University in Washington, D.C.

Now 55, single and using the wine-country town of Healdsburg, California, as an unlikely—if pastoral—home base for

unprecedented media attention for Parkinson's. "It was such a home run from the moment the hearing began," beams Samuelson, still savoring the memory of the throngs of TV crews, photographers and others jammed into the hearing room.

Most recently Samuelson was appointed as a patient advocate for Parkinson's dis-

Samuelson the argument is simple: discard the tiny bits of frozen tissue or harness them for lifesaving research. "I don't see any issue at all," she says emphatically, noting that pro-life Senator Orrin Hatch (R-Utah) is a leading stem cell proponent.

Since being named to the initiative's oversight committee, Samuelson is riding



Courtesy of Joan Samuelson

(Left photo) Joan Samuelson testifies before a Senate subcommittee hearing on federal funding for Parkinson's research in 1999. (Right photo) The same year Samuelson and the late Senator Paul Wellstone (D-Minnesota) (center) join actor and Parkinson's activist Michael J. Fox to introduce the Michael Fox Foundation.

a nonstop wave of travel, activity—and enthusiasm. “It’s really a full-time job,” she says of the 30- to 50-hour weeks she devotes as the ICOC sets up the California Institute for Regenerative Medicine, the organization that will disburse stem cell research funding. In one recent three-day stretch, Samuelson traveled throughout California, attending a Parkinson’s advisory meeting in Sunnyvale, speaking at UC Davis about Proposition 71 and flying to Fresno for an all-day ICOC session. Back at PAN’s Healdsburg office, assistant Allison Teixeira doubts she could maintain her boss’s furious pace. “And I don’t have Parkinson’s,” she notes.

Sandy-haired and clear-spoken, Samuelson finds it hard to be patient. In the 15 years since she became politically active with the Parkinson’s cause, she says, “I’ve lost friends, watched people suffer and struggled myself. There’s a lot at stake.” She’s grateful that her illness, which she has lived with for 18 years, appears to be progressing slowly and responds, for now, to daily medication. Still, she says, “My body fails me a lot.” Samuelson refers to those episodes as “downtime.” When they strike, she’s incapacitated by stiffness, shaking and sometimes an outright inability to move for 30 minutes to 10 hours at a stretch. “I’m kind of a prisoner

of my body and it’s miserable,” says Samuelson, an athletic woman who once enjoyed jogging and hiking. These days Samuelson stays physically active tending the garden outside her Healdsburg bungalow and practicing a Chinese martial art called Liuhebafa. She also plays classical piano. She moved to Healdsburg in 1997 when her marriage ended. Though the picturesque town is inconvenient for her

travel schedule, “I see it as the price to pay for living in paradise,” she says.

Close friend Lois Salisbury ’75 is awed by Samuelson’s stamina and spirit. “Joan is remarkable in how much she can do,” says Salisbury, who has known Samuelson since 1976. “This is no easy road.” Parkinson’s patient A. J. Wasson and her husband, Greg, both active in PAN, admire Samuelson. “Joan is really seen as a hero in

Boalt, Berkeley Experts Study State’s Investment in Stem Cell Research

On September 24, Joan Samuelson ’77 will join a panel of experts at Boalt’s All-Alumni Reunion addressing the sweeping implications of California’s \$3 billion stem cell initiative. Moderated by Professor Eric Rakowski, the discussion will explore legal, economic and intellectual property questions arising from the ambitious state program.

The initiative is also a leading subject for Boalt’s Berkeley Center for Law, Business and the Economy (BCLBE). BCLBE has formed an interdisciplinary working group led by Professors Eric Talley and Pamela Samuelson, composed of multidisciplinary scholars from throughout the UC Berkeley campus. They will investigate the myriad questions posed by the stem cell research program and its major investment in the state’s economy. “Economic, legal and bioethical policy has to be shaped with respect to this groundbreaking technology,” says Dana Welch ’87, BCLBE’s executive director. “Berkeley has the thinkers to make a real contribution.”

Next March the Berkeley Center for Law & Technology and BCLBE will jointly sponsor a symposium focusing on the initiative’s legal and policy challenges. The conference will draw together leading experts to provide insight and recommendations on such matters as intellectual property rights, bioethical issues and how the state of California can recoup its investment in the program.

—A.C.

“Being a patient advocate requires a unique mix of training, talent and compassion to fight disease—and Joan Samuelson is a heroic example,” says Robert Klein, chairman of the stem cell initiative’s Independent Citizens Oversight Committee (ICOC).

the Parkinson’s community,” she says.

For Samuelson the first symptom of Parkinson’s was a stiff left knee that developed in 1986. Samuelson, who grew up in rural San Diego County, chalked up the pain to running on concrete and her devotion to Jane Fonda workouts. After arthroscopic knee surgery and then a mistaken diagnosis of multiple sclerosis, Samuelson was told in 1987 that she had Parkinson’s. “There’s something about just being told [that], especially when you’re in the mid 30s, that just changes you forever,” she says.

If the diagnosis was initially devastating, it also proved empowering. Becoming a Parkinson’s advocate “gave me a way of fighting for myself,” Samuelson says. An early partner in that fight was Anne Udall, whose father, the late U.S. Representative Morris K. Udall, was suffering from Parkinson’s. Samuelson approached the lawmaker’s daughter, seeking her help with the fetal tissue battle. Udall, who became PAN’s founding chair and now serves as its current chair, says she and Samuelson would sometimes meet with four or five politicians in a single day. “People had told us we weren’t going to have any luck,” says Udall. “And we did.”

Defying predictions, Congress approved lifting the prohibition on fetal tissue research in 1992 but faced a veto from the first Bush administration. After taking office in 1993, President Clinton signed the measure into law. “Joan, along with maybe three or four others, took an issue that people said could not be won, and, in my opinion, were the ones who turned the tide in the Congress,” Katz says. Curt Freed, M.D., director of the Neural



Samuelson celebrates graduation day with Boalt classmates in 1977.

Transplant Program at the University of Colorado at Denver, likens Samuelson’s role to that of Jimmy Stewart in the film *Mr. Smith Goes to Washington*.

Samuelson gravitated toward politics and public policy while still in college. As an undergraduate at UCLA, she interned for former Senator John Tunney and became a coordinator in his San Francisco office after graduation. Samuelson then set her sights on law school. “I’d seen the importance of having a law degree in politics,” she says.

Entering Boalt in 1974, she encountered a formidable and unfamiliar intellectual challenge. “I got a splendid education,” she says. “It gave me exactly what I needed to do this.” After graduation Samuelson practiced commercial litigation for five years with Petty, Andrews, Tufts & Jackson in San Francisco before serving from 1982-84 as the first execu-

tive director of the nonprofit Berkeley Law Foundation. She later did litigation and alternative dispute resolution in Palo Alto, Los Angeles and Santa Rosa. Increasingly she was struggling with Parkinson’s. When she developed tremors in court appearances, Samuelson recalls, “I would start sitting on my hand so people wouldn’t notice.”

Samuelson never could have predicted the path she blazed after Parkinson’s entered her life. Her advocacy work, she says, is “the best job I ever had. To watch policy being influenced by my story and the story of others and to make a difference—to really make a difference—was about the most exciting thing I’d ever done.”

Abby Cohn is a staff writer.

www.parkinsonsaction.org

www.cirm.ca.gov.

WHAT MAKES FOR

A
MULTI-
YEAR
STUDY
LOOKS
BEYOND
THE
LSAT



Jim Block

Sheldon Zedeck and Marjorie Shultz '76 question whether standard law school application steps can predict success in the classroom and as a lawyer.

GOOD LAWYERING?

Several hours filling in bubbles and writing an essay on the LSAT. Collecting transcripts and letters of recommendation. Agonizing about GPA and the personal statement. Every attorney's career begins the same way: sending off applications to law schools and hoping to receive big envelopes rather than small ones.

In recent years, both law schools and attorneys in practice have begun to question whether these application procedures are adequate to predict success not only in law school but also as a lawyer. Lawyering involves many skills not currently considered in the admission process. A six-year study in three phases, headed by Boalt Professor Marjorie Shultz '76 and Sheldon Zedeck, UC Berkeley professor of psychology, has identified 26 factors that contribute to lawyering effectiveness. The researchers are now developing tests to predict these factors—tests that one day might be administered with the LSAT as part of the admission process.

"Law schools choose the nation's lawyers," says Shultz. "Entry into the schools whose graduates fill important judicial, political, economic and advocacy roles is the narrowest point in the pipeline. If you asked people whether society should choose those lawyers almost entirely on school smarts and cognitive ability, most people would say no. But to a large extent, that's what happens."

The LSAT is a cognitive exam that uses multiple-choice questions to measure logical and analytical reasoning skills as well as reading comprehension. The test also includes an essay portion that is not graded but is sent to law schools. In recent years, college ranking systems such as that employed by *U.S. News and World Report* have elevated the importance of the LSAT score, according to Beth Cobb O'Neil, former vice president and associate executive director of the Law School Admission Council (LSAC), makers of the LSAT. "Rankings are very important to students, and *U.S. News* uses [the] average LSAT score as a major factor in such rankings," O'Neil explains. "Thus schools are more likely to take anyone with a high score."

The LSAT does not, however, predict success as a lawyer. Rather it predicts law school performance and is only partly effective at that. LSAT scores account for roughly 25 percent of the variance in the grades of first-year students. The applicant's undergraduate grade point average (GPA) also suggests the likelihood of success in the classroom rather than the courtroom. "The numbers tell you one thing but they don't tell you everything," says Edward Tom, director of admissions at Boalt.

Yet LSAT score and undergraduate GPA are generally the two

most important factors in admission decisions, in part because they're readily available and easy to use. For the class of 2007, Boalt had more than 7,600 applications for 270 seats. In 1961, 776 students applied for a class of the same size. Similar increases in law school applications for a limited number of seats are occurring nationally; LSAT scores and undergraduate GPAs are often used to weed out applicants.

Then there's the issue of diversity. "A lot of data show that whites and some Asian subgroups perform better by a significant degree on school-based, cognitive, paper-and-pencil tests than underrepresented minorities. If we admit mostly on the basis of those criteria, then we tend to admit whites and Asians who excel in school," says Shultz, who has worked in the area of race policy and justice for the past decade.

Shultz also understands discrimination in admissions and financial aid firsthand. Earlier in her career, she was granted admission but denied a fellowship to pursue a Ph.D. in history because she was female and married. The school strongly encouraged her to earn a master of arts and teaching rather than try for a doctorate. And that's what she did. Only later, after working in the development office of Antioch School of Law and typing her husband's doctoral dissertation on the ethical socialization of law students, did she decide to apply to law school. She graduated from Boalt in 1976 and began teaching there the same year.

In 1998 Shultz was part of the faculty committee (originally chaired by Malcolm Feeley, the Claire Sanders Clements Dean's Chair Professor of Law) that decided additional ways might exist to predict eventual success as a lawyer. To find them, Shultz teamed up with Zedeck, an industrial and organizational psychologist with more than 30 years of experience in selection and assessment in the world of work. Their six-year study composed of three two-year phases has been running since 2001. The LSAC funded phases I and II, which will wrap up this summer. To complete the third phase of their research, Shultz and Zedeck seek \$300,000 in additional funding to pay for test development, data gathering and doctoral student assistance.

In the first phase of their research, Shultz and Zedeck focused on factors that are important to lawyering effectiveness (see sidebar). To create the list, they conducted individual interviews and multiple rounds of focus groups with Boalt lawyers, judges, faculty and students. The researchers also spoke with clients about what was important to them in choosing a lawyer. "We're not looking at typical measures of success such as money earned or verdicts won,"

BY
LINLEY
ERIN
HALL

Zedeck says. “If you look at the 26 factors, you’ll see that the focus is on behaviors that make for effective lawyering in a variety of contexts.”

Another round of focus groups generated a list of nearly 800 examples that illustrate poor to excellent performance on the 26 factors. More than 2,000 alumni responded to an Internet survey asking them to rate subsets of these items. Using those alumni ratings, Shultz and Zedeck created a set of scales that could be used by an observer to evaluate the effectiveness of an attorney. “Attorneys can recognize what good performance is even if it’s not their area; a tax attorney,” notes Zedeck, “can see effectiveness in a criminal lawyer.”

When Shultz and Zedeck began their work in 2001, they expected that once they identified the lawyering effectiveness factors, they could pull existing tests off the shelf to predict who would be good at those behaviors. They found in the second phase of the project, however, that only three tests—the Hogan Personality Inventory (HPI), the Hogan Motives, Values and Preferences Inventory (MVPI) and the Hogan Development Survey (HDS)—have potential and could be used as is. “All the other tests we’re writing from scratch or adapting from existing tests,” Shultz says. “We’re not sure if we can predict all the factors but we’re trying.”

Some of the newly created tests measure situational and practical judgment. Since the tests are intended for law school applicants, they will not require legal knowledge. Rather they will examine the potential for performing effectively on the 26 factors, based on situations and experiences more familiar to students. A sample question might ask the applicant to take the role of a team leader at a company. Because of frequent employee tardiness, the head of the company has decided that anyone who comes in late will be fired. One of the applicant’s team members, the smartest and hardest worker in the group, arrives five minutes late a few days later. What does the applicant do? Most of the test

questions don’t have a right answer. Formats vary, with some asking for a ranking of the options or for the best and worst choices. Some may even be open-ended questions requiring a sentence or two in the applicant’s own words.

The third phase of the research, slated to begin this fall, involves administering the new tests to practicing lawyers. Their supervisors and peers will then evaluate these lawyers on a subset of the 26 effectiveness characteristics. Researchers can determine the answers that an effective lawyer would choose by comparing ratings of an attorney’s performance on a factor to that same attorney’s answers to questions predicting that characteristic. “We hope that it’s not often obvious what the ‘right’ answer is because the best [one] is based not on general knowledge but on what very good lawyers say they would do in that situation,” Shultz says. “Of the lawyers who rate highly on integrity, what do they select as the best answer to a complex question related to integrity?”

Law schools are not the only entities interested in finding better ways to predict who will succeed in a profession. Administrators of the Medical College Admission Test (MCAT) are trying to develop a tool to measure oral communication skills. A test of situational judgment is under review for inclusion on the Graduate Management Admission Test (GMAT), which prospective MBAs take. “All of these high-stakes testing groups are looking at other ways to measure success in these fields,” says Zedeck. “Although cognitive ability is important, other components are important as well.”

The new tests should not only improve the ability of law schools to identify the applicants most likely to become effective lawyers but also create more diversity in law school classes. This is particularly important in California, where the passage of Proposition 209 in 1996 prohibited voluntary race-or-gender sensitive decisionmaking in admission to public institutions.

26 Effectiveness Factors

Analysis and Reasoning

Creativity/Innovation

Practical Judgment

Researching the Law

Passion and Engagement

Questioning and Interviewing

Influencing and Advocating

Writing

Speaking

Integrity/Honesty

Able to See the World Through the Eyes of Others

Self-Development

Organizing and Managing Others (Staff/Colleagues)

Negotiation Skills

Networking and Business Development

Building Client Relationship and Providing Advice and Counsel

Organizing and Managing (Own) Work

Developing Relationships

Evaluation, Development and Mentoring

Problem Solving

Stress Management

Fact Finding

Diligence

Listening

Community Involvement and Service

Strategic Planning

Shultz and Zedeck's research will likely improve diversity not through race-conscious evaluation but by using (empirically validated) methods to predict the complex and varied factors that make a lawyer outstanding. "The subtext of Proposition 209 is that we should not be using affirmative action but admitting solely on merit—but no one has defined merit," Tom says. "If Marge's project gets off the ground, it would allow law schools to look at a wider range of factors and to reexamine their own definitions of merit." The research project is also attractive to law firms and other employers of lawyers because it may help employers evaluate their own attorneys. Hiring is currently based mainly on grades, which say little about whether a lawyer will be any good at advising or litigating or whether that attorney will still be with the same firm or organization in five years.

"People have talked for decades about how to define merit in high-stakes decisions. They have argued in theory but no one has had a system that enables them to do it," Shultz says. "If we are

successful in establishing methods that project general lawyering effectiveness or specific tests that predict factors or clusters of factors important to being an outstanding lawyer, then the LSAC or another testing organization could do further work and make these tests available for use by various law schools in ways that suit their priorities and missions."

[Shultz and Zedeck seek Boalt alumni as volunteers to take a battery of tests and be evaluated for effectiveness by their supervisors and peers. The researchers are working with Boalt and employers so that a participant's time could be considered pro bono work, or eligible to earn continuing education credit. Lawyers or firms interested in participating may email Marjorie Shultz at m_shultz@law.berkeley.edu.]

Linley Erin Hall is a Berkeley-based freelance writer.

www.lsacnet.org, www.law.berkeley.edu/faculty/

EXPANDING THE DEFINITION OF MERIT

Law schools not only choose law students, they also choose the nation's lawyers. Despite frequent and heated disputes about admission practices in legal education, that fundamental fact is rarely noted. Legal education is unusually stratified, and schools at the upper end of the hierarchy produce a disproportionate number of the profession's most privileged and influential members. Because a very high percentage of graduates from elite law schools such as Boalt pass the bar, it is the entry into law school rather than bar passage that is the narrow point in the professional pipeline. In that important sense, choosing law students is tantamount to choosing the country's leading attorneys.

Law schools aren't particularly responsive to that gatekeeper role. Most make no organized effort to assess likely *professional* competence; their admission decisions are dominated by narrow criteria intended mainly to predict *academic* performance. This lack of congruity between function and means arguably undermines professional quality and certainly raises questions about justification. Although other professions also rely on academic predictors, they pay attention to assessing professional potential as well. Medical schools explicitly consider whether an applicant will make a good doctor, placing substantial weight on noncognitive abilities such as motivation and human interaction skills. Business schools seek students with work experience in business, evaluating multiple essays to determine clarity of career goals and

placement potential. But law schools, particularly elite law schools, assess applicants mainly on the basis of who will make a good law *student* rather than who will make a good *lawyer*.

Of course, good law students and good lawyers have important things in common, but treating the two roles as co-extensive or interchangeable is inappropriate. Test scores and past grades are arguably the main way to predict students' likely excellence in similar academic endeavors. But practicing lawyers need a much wider range of competencies and commitments.

Another comparison fuels skepticism about current admission practice. Law schools are professional schools. The vast majority of their graduates practice law or take jobs that rely on their legal training. But in making admission decisions, law schools depend more heavily on academic test scores than do many graduate departments. The irony is that most graduate departments train people primarily for academic as opposed to professional careers.

Law school admission practices appraise an even narrower set of qualities than might be generally assumed. The LSAT measures the applicant's ability to read and understand complex materials, analyze facts and relationships, and reason logically. The test allows a probabilistic prediction that one applicant will get better first-year grades than another applicant. Together the LSAT and undergraduate grade point average (UGPA) predict approximately 25 percent of the variance in first-year grades. Much more limited research suggests that LSAT scores correlate with overall law school GPA.

BY
MARJORIE M.
SHULTZ '76

Some evidence suggests that law schools de facto place even greater weight on LSAT scores than their official policies state. When William Kidder '01 analyzed 1998 admission data for University of California law schools, he found that even a slight shift in LSAT scores dramatically affected applicants' odds of admission. In 1998 applicants to Boalt Hall with GPAs of 3.75+ and 168-173 LSAT scores had an 89 percent chance of admission, but students with the same grades and 162-167 LSAT scores were admitted only 44 percent of the time. At UCLA, applicants with 3.75+ GPAs and 160-164 LSAT scores had a 66 percent chance of admission, but students with the same grades and 155-159 LSAT scores gained admission only 10 percent of the time. Yet these LSAT differences are within the statistical margin of error for comparing two individuals' scores and therefore as a psychometric matter do not warrant the emphasis in admissions results.

These rather startling results could occur unintentionally.

When people face difficult choices and want to make good decisions, numerical



Because a very high percentage of graduates from elite law schools such as Boalt pass the bar, it is entry into law school rather than bar passage that is the narrow point in the professional pipeline.

factors that appear precise and “objective” exert disproportionate influence even when neither logic nor statistics validates that impact. The absence of persuasive alternatives to traditional standardized tests intensifies the effect. “Soft” factors found in personal statements, letters of reference or interviews do play a role—but judgments about them are mostly ad hoc, and particularly when contrasted to LSAT scores, they are primarily subjective and potentially arbitrary.

Disputes over the nature and indicia of “merit” are heated not only in legal education but virtually everywhere that assessment and selection take place. Although some debaters seem to think otherwise, “merit” and “qualification” are not self-defining concepts that can be abstracted from context or purpose. Merit and qualification are not character traits. A person is “meritorious” *in regard to some goal*, or “qualified” *with respect to some purpose*. If we recognize that law schools choose not just students but also future lawyers, predicting lawyer performance as well as academic success should be relevant to admission.

The cognitive skills tested by the LSAT are a start. Those skills not only show a consistent statistical relationship to first-year law school grades but are also important to being a good lawyer. Beyond that, however, no studies even address the prediction of lawyering performance. Employers of lawyers necessarily evaluate them but both the definition and measurement of excellence in

lawyering performance remain difficult. Many would question whether such prediction can be done.

Five years ago, a Boalt faculty committee sought assistance from UC Berkeley psychology professor Sheldon Zedeck, an expert in employment selection and assessment, regarding whether professional capacities could be projected at the time of admission. Eventually we developed a study designed to fill the void of empirically valid predictors beyond the LSAT and UGPA by developing predictors of effective performance as a lawyer. Funded for the past four years by the Law School Admission Council (LSAC), in phase I (2001-03) we investigated what makes a lawyer effective. Before we could identify tests that might predict good lawyering, we had to understand what constitutes good lawyering. In personnel research terms, our first task was to do a “job analysis” to identify the tasks, duties, knowledge, skills and abilities necessary to perform the job.

To conduct that analysis, we worked with five constituencies affiliated with Boalt (alumni, faculty, students, judges and clients), drawing participants from widely varied practice fields and set-

tings, and from different career stages. We held multiple interviews and several rounds of focus groups, asking how do we know that a given lawyer is or is not effective. Stepping away from traditional criteria (income, trials or settlements won, prestigious credentials, positions held), we questioned interviewees about what they would look for if they needed a lawyer for an important task. How could they tell an average lawyer from an outstanding lawyer, an adequate lawyer from one less effective? A key component of the method is to get people thinking in concrete and behavioral terms rather than making judgments based on proxies such as salary or partnership status. Gradually our participants identified 26 factors they believed important to effective lawyering. The factors passed through several iterations of explanation and validation with multiple participating alums.

Even with these factors as guides, measurement of lawyer performance is very difficult. As much as possible, appraisals need to be reliable (consistent among raters), based on adequate and accurate observation and recall, protected from “halo” or other bias effects, and sufficiently varied to allow meaningful distinctions. Research on evaluation systems (e.g., graphic rating scales, employee comparisons, rating checklists) has led many experts to conclude that a system of “behaviorally anchored rating scales” (BARS) best minimizes these problems. Once we had functional agreement about the factors important to lawyer performance, we

Disputes over the nature and indicia of “merit” are heated not only in legal education but virtually everywhere that assessment and selection take place.



moved next to develop BARS so evaluators could use a common framework to appraise the effectiveness of many individual lawyers.

Developing BARS is time consuming and labor intensive. We convened multiple alumni focus groups in the Bay Area, Los Angeles, and Washington, D.C., to develop specific examples of behaviors that would illustrate high, medium or low effectiveness on each of the 26 factors. For example, one of our factors is practical judgment. We asked practicing lawyers and judges for specific and concrete descriptions of behavior that would show below-average, average or above-average practical judgment in a lawyer. Retaining terminology from group members and requiring specificity in examples increase common understanding and lead to more reliable ratings.

After we finished developing examples, more than 2,000 Boalt alums participated in an online survey assessing levels of effectiveness (scale of 1-5) for those examples. Statistical analysis of the responses allowed us to choose examples with high levels of rating agreement. Next we constructed scales that raters can use to assess the performance of any attorney on a particular effectiveness factor. Together the 26 factors and the performance appraisal scales provide a way to define and measure effective lawyer performance. More simply, we now have a set of materials derived from 2,000 lawyer participant-respondents that tells us what good lawyers should do and how well particular lawyers actually do it.

In phase II (2003 -05) we began the search for tests that could predict the 26 dimensions of performance. We examined a wide array of existing test instruments, choosing some, revising some and writing others from scratch. We and our testing consultants chose questions we think will be predictive of effectiveness. Because the tests will eventually be given to law school applicants, they do not have legal content. Rather, like the LSAT, they aim to predict potential effectiveness.

The final phase of the project (beginning fall 2005) will again involve hundreds of alumni and student volunteers. We will ask participants (as stand-ins for applicants who would be the eventual target group) to take our new tests. The tests include measurements of personality traits (e.g., ambition, interpersonal sensitivity, prudence, stress tolerance, sociability); motives and values (e.g., risk tolerance, competition, service, problem solving, etc.); and tendencies associated with dysfunction and disruption in career progress (e.g., arrogance, excitability, caution).

Other questions will require judgments about practical situational problems related to our effectiveness factors. We are also considering measures of capacity for recognizing and responding to emotions (including nonverbal expressions) and assessments of

self-monitoring behavior. We expect to ask for structured reporting of past accomplishments keyed to our factors, and will also inquire about various biographical experiences.

Participants who take our tests will also be asked to identify a supervisor and a peer familiar with their work, who will be asked to evaluate the participating lawyer's effectiveness on selected factors (using the BARS described above). Once we have a lawyer's scores on our tests and assessments of performance on our scales, we will correlate those scores with other data: UGPA, LSAT score, law school grades, demographic factors. All information will be confidential and kept anonymous immediately after collection. We will then be able to determine which of our tests validly predict eventual effectiveness as rated by supervisors and peers. We would discard tests that were not valid and perhaps gather others into clusters of items showing relevance to particular lawyering performance factors.

At that point, we hope to make recommendations about tests that could be used to predict various aspects of lawyering performance, and to suggest further research about the methods we used. We hope that eventually a body such as the LSAC might adopt and administer this type of test, making scores available to law schools that wish to consider data about projected professional performance along with LSAT data about cognitive skills.

Selecting prospective lawyers on the basis of a broader range of competencies should improve the quality of the profession. In addition, these methods might also increase the racial diversity of law school entrants. Although there is rather consistent disparity between racial groups in performance on academic (school-type) tests, available research shows that job performance by underrepresented minority groups is substantially similar to that of whites. To rely very heavily on a narrow subset of academic skills (in which the performance of racial groups most diverges) while ignoring a broad array of competencies important to professional effectiveness (in which racial groups perform rather similarly) unfairly advantages white applicants. Because we believe consideration of professional competencies is both principled and justified, we are attempting to develop an empirically valid and feasible way to make that possible. We ask all Boalt alumni to assist us in this significant effort to improve the way law students, and lawyers, are chosen.

Professor of Law Marjorie M. Shultz '76 is a principal investigator with UC Berkeley psychology professor Sheldon Zedeck on this empirical research project.

The “War Against Terrorism” and the Rule of Law

BY DANIEL A. FARBER

The unprecedented attacks of September 11, 2001, have prompted far-reaching responses by the United States. As part of these efforts, the Bush Administration claimed that the U.S. military was authorized to detain suspected Al Qaeda and Taliban supporters as unlawful combatants, indefinitely and without legal recourse.

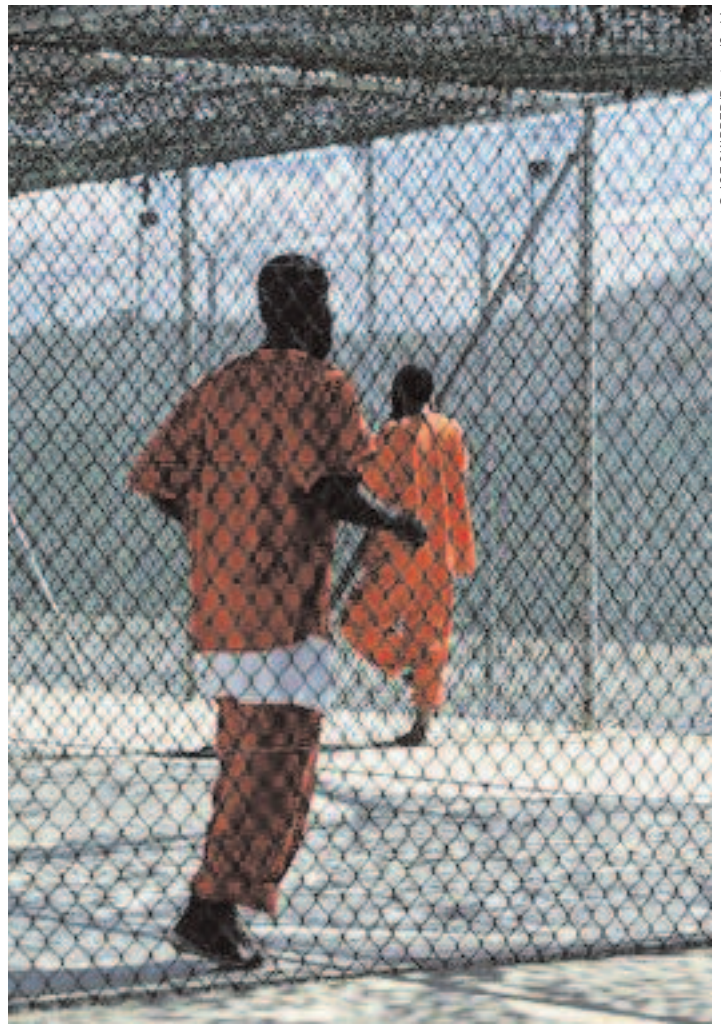
U.S. treatment of “unlawful combatants” raises critical questions of international law and constitutional law, such as how the Geneva Conventions apply in this situation. But the most fundamental question was raised by the claim that military detention was not subject to *any* legal constraints. In a series of memoranda and presidential decisions, the Bush Administration attempted to clear a law-free zone for the actions against Al Qaeda and its allies.

In effect, these claims attempted to dislodge a key aspect of the rule of law: the availability of impartial legal forums to replace the “rule of men” with the “rule of law.” Without the right to notice and a hearing before an impartial decisionmaker, individuals are essentially subject to the whim of executive officials and, in a real sense, are outside the law entirely.

It is a familiar view, and not without empirical support, that law goes silent in the face of battle. The view that law falls out of the picture during dire emergencies has a respectable intellectual pedigree (and not just from apologists for dictatorship). In the immediate aftermath of 9/11, it seemed likely that the “War Against Terrorism” might become a case in point. The fact that it has not is a tribute to the stubborn efforts of certain civilian and military lawyers, the resistance of the courts, and the influence of domestic and international opinion.

Detainees at the U.S. Naval Base Guantanamo Bay, Cuba, exercise in July 2000 as preparations neared completion on the base for war crimes tribunals, the first held by the United States since the World War II era.

In two key decisions, the Supreme Court insisted on legal protections for detainees. In the first decision, *Hamdi v. Rumsfeld*, the government claimed the right to detain indefinitely an American citizen captured in Afghanistan as an “unlawful combatant.” There was no majority opinion, though there was a strong consensus against the government’s position. Four justices, led by Justice O’Connor, held that Hamdi was entitled to some form of due process hearing. (The critical vote for Justice O’Connor’s position was Justice Breyer, commonly considered a member of the liberal block. Chief Justice Rehnquist, a strong conservative voice, also allied himself with O’Connor’s centrist



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It is a familiar view,
and not without
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views.) Four other justices, in two different opinions, maintained that Hamdi's detention was squarely unlawful with or without a hearing. Only Justice Thomas agreed with the government's position.

Hamdi was a resounding defeat for the government's effort to evade the rule of law through creation of a law-free zone. Justice O'Connor's opinion made clear in no uncertain terms that the rule of law continues to apply: "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those time[s] that we must preserve our commitment at home to the principles for which we fight abroad."

The second decision, *Rasul v. Bush*, held that the prisoners in Guantanamo were entitled to access to U.S. courts for *habeas corpus*. Not only did the Court find *habeas* jurisdiction, but it did so on unexpectedly broad grounds. To complete the government's misery, the Court also made clear its view of the legal sufficiency of the complaint. A footnote to the opinion states: "Petitioners' allegations ... unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'"

Justice Scalia's dissent gives an indication of the seriousness of the government's loss. He complained that, "[f]rom this point forward, federal courts will entertain petitions from these prisoners, and others like them around the world, challenging actions and events far away, and forcing the courts to oversee one aspect of the Executive's conduct of a foreign war."

As litigation in the lower courts has continued, most district judges have applied *Rasul* and *Hamdi* with great vigor. Lower courts have extended *habeas* jurisdiction even beyond Guantanamo; they have demanded compliance with the Geneva Conventions, and they have questioned the government's compliance with due process. Only a single judge (in *Khalid v. Bush*), who seemed determined to interpret away the Supreme Court's rulings, has ruled for the government in a substantial way. It remains to be seen what the D.C. Circuit and the Supreme Court will do on appeal.

In the meantime, the Administration has, however, reluctantly conceded that it is not above the law. In his confirmation hearing for Attorney General, Alberto Gonzales referred specifically to the *Hamdi* decision: "We in the executive branch, of course, understand that there are limits upon presidential power; very, very mindful of Justice O'Connor's statement in the *Hamdi* decision that 'a state of war is not a blank check for the President' of the United States with respect to the rights of American citizens."

The question remains whether, in some extreme situations, the executive branch should be empowered to act without regard for normal legal constraints. Whatever may be said about that question as a theoretical matter, at the very least the executive branch would have to make a convincing case that the dire nature of the emergency required an extralegal response. The government's failure to make such a case is evidenced by the skeptical responses of so many federal judges, many of them in general political sympathy with the Administration. Indeed, it is notable that Chief Justice Rehnquist, a stalwart conservative and often a strong supporter of presidential authority, rejected the government's position in *Hamdi*.

It is a familiar saying that "the law is a seamless web." The events discussed here suggest that we might want to amend that phrase. Law is not only a seamless web but a sticky one, difficult to shake loose. Stickiness is not absolute, and under sufficiently extreme circumstances perhaps the web can be brushed away. But centuries of legal evolution have left behind a dense network of adhesive threads, and escaping their entanglement is no easy task. In short, the rule of law has proved unexpectedly tenacious. Fortunately for all of us, the rule of law did not turn out to be among the victims of 9/11.

Sho Sato Professor of Law Daniel A. Farber directs Boalt's Environmental Law Program.

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Let's Try Performance-Based Regulation to Attack Our Smoking and Obesity Problems

BY STEPHEN D. SUGARMAN

“**P**erformance-based” regulation is a legal strategy that seeks to avoid the shortcomings of traditional “command-and-control” regulation. By the latter, I mean the conventional approach by which government demands certain inputs, hoping that they will yield the socially desired outcomes. Some simple examples are the requirements that autos have air bags to reduce crash fatalities, and pollution control devices to improve air quality. The problems with command-and-control regulation are that government may inefficiently insist on the wrong input mechanism, and that the enterprises being regulated have an incentive to figure out cheap ways of technically complying that fail to accomplish the social objective.

Some experts offer “deregulation” as the solution to these shortcomings, imagining that market pressures alone best achieve society’s goals. But given inadequate consumer information, concentration of market power, and the potential of harm to people and the environment—neither of which are in a market relationship with the enterprises that could cause the harm—deregulation will often be a very imperfect strategy. After all, market failures are typically the justification for command-and-control regulation in the first place.

“Participation” is a different strategy. Here the idea is that if, for example, workers are given a real voice in setting workplace practices, their participation may achieve higher workplace safety levels than can be achieved by either the Occupational Safety and Health Administration (OSHA) or an imagined market in safety in which workers trade off dangers and wages. Putting consumer representatives onto corporate product development teams or putting “public” outside directors onto corporate boards are other examples in which participation is used in pursuit of the public interest.



“Performance-based” regulation is yet another approach. Here government tells the enterprise that is being regulated what outcomes are required and holds it accountable for achieving those outcomes, leaving the individuals in charge of the enterprise to figure out for themselves how to reach the goals.

In the field of public education, the No Child Left Behind Act (promoted in the Clinton Administration and embraced by President Bush and his team) reflects this strategy. Schools are told that they need to bring children from all races and ethnic groups up to certain performance standards, meeting specific benchmarks over time. Schools are allowed to figure out for themselves how to meet their targets, and the law imposes penalties on failure that are meant to stimulate earnest effort at compliance. Some air quality improvement strategies are also in this vein. For example, operators of power plants in a geographic area

The basic idea
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may be told, as a group, that they need to improve air quality by X percent. They then have to figure out how to reach that target, and in doing so they are allowed to buy and sell emission reductions among themselves via so-called “tradeable permits” to pollute.

Strict liability in tort law is also something of a performance-based strategy. Those who dynamite to clear sites for construction, for example, are not told how to blast. Instead they are told that if they cause any harm, they must pay, thereby giving them a strong incentive to figure out how to blast in a careful manner.

In two recent articles, I proposed using performance-based regulation to attack two extremely serious public health problems—smoking and obesity. As for smoking, my proposal is situated in the context of the federal government’s RICO case against tobacco manufacturers. The Department of Justice has accused the leading cigarette makers of a vast and long-term conspiracy to dupe the public and ensnare generations of addicted smokers. Even if the government were to win the case on the liability side, an important puzzle is what the legal remedy should be. Most tobacco control advocates have talked of command-and-control solutions—such as forcing the defendants to end certain advertising practices, offer free smoking cessation services, and cut off supplies to retailers who sell cigarettes to children.

By contrast, in an essay in *The National Law Journal* (February 7, 2005), I proposed a performance-based solution. I assume that, without the past misconduct of the industry, smoking prevalence rates in the United States would not be around 20 percent as they are today, but instead would be under 10 percent. Therefore, the tobacco companies would be ordered to bring smoking rates down to single digits and keep them there. Put simply: over, say, seven years, each firm would have to cut in half the number of people who smoke each of its brands (or else buy and sell reductions from other firms if others are better at achieving these results). The basic idea is that, since tobacco companies are so good at convincing people to start to smoke, they are best positioned to persuade people to the contrary.

Failure to achieve the performance-based target would result in a substantial financial charge based upon a multiple of the estimated future profits a firm would earn from having more smokers of its brands than their target. In this way, tobacco companies

would have a financial incentive to have fewer, rather than more, customers—at least down to their target. Although my proposal was launched in the context of litigation, it could be adopted by Congress through legislation.

Even more aggressively (in the January 10, 2005, issue of *Legal Times*), I proposed trying to use performance-based regula-

tion to deal with America’s growing obesity problem. Some want to deal with obesity through changes such as limiting advertising to children, getting Cokes and Pepsis out of public school vending machines, forcing McDonald’s to reduce its portion sizes, and insisting that Taco Bell inform consumers of the calories in the food it serves. Others think the key is more exercise, and they are pushing to force schools to re-emphasize physical education, and to require communities to offer bike paths and safe parks where children can play.

My approach is to require the food and beverage industry to solve the problem by setting targets for them and then holding them accountable for results—leaving them to figure out how to achieve the socially desired outcomes. For example, I propose that those who supply the calories that yield weight gain be required to reduce childhood obesity rates in the United States to what they were 30 years ago, which is about half of current levels. As with “tradeable permits” to pollute, food and beverage companies could trade among themselves, thereby seeking to reduce obesity in the most effective and efficient manner. Just how the responsibility would be allocated and how success by each firm would be measured are difficult problems, and I am at work on trying to solve them. For example, suppose that Coke were held responsible for reducing childhood obesity in Atlanta (where it is headquartered)—or perhaps it would be all of Georgia—once we decide Coke’s fair share of the responsibility.

If nothing else, the general rhetorical point behind both of my public health proposals is that our society should insist that the enterprises whose products cause the problems take responsibility for remedying them.

Stephen D. Sugarman, Agnes Roddy Robb Professor of Law, is associate dean of the J.D. Program.

www.law.berkeley.edu/faculty/sugarmans

Spyware: The Latest Cyber-Regulatory Challenge

BY DEIRDRE MULLIGAN

Spyware. Adware. Unwanted software. There are various names for the programs that mysteriously appear on your computer, spirit away your personal information and hound you with pop-up advertisements that make surfing the Web unbearably *tedious*. Usually lumped together as “spyware,” some of the programs are more spy-like than others. Some software is designed to sneakily install itself on a user’s machine, hiding its location and purpose, and then monitor, track and report to third parties sensitive information, including financial account numbers, Social Security numbers and other data that enable identity theft and financial fraud. Other software, typically bundled with another program that consumers do want to use, is less nefarious but nonetheless intrusive and annoying. For example, it may track websites visited and repeatedly deliver pop-up ads regardless of whether the program it was bundled with is off or disabled or has been removed.

Still other software may monitor and report on a user’s Internet activities in a manner that intrudes less on privacy—for example, without attributing activity to a particular individual. It will, however, degrade system performance, making Web surfing and other basic computer functions intolerably slow. While each piece of software is distinct in important respects, all the programs lack transparency—they are installed surreptitiously, make their behavior difficult to assess and avoid, and are difficult to remove. Similarly, the programs all undermine users’ control over their computers and network connections.

Given the various problems spyware causes, it is no surprise that it is a source of numerous consumer complaints. Unfortunately, many of the complaints are directed at computer and software vendors and Internet service providers who have nothing to do with the spyware program causing the problem. It’s difficult for a consumer to figure out what program is causing an advertisement to



appear or a computer's performance to steadily decrease.

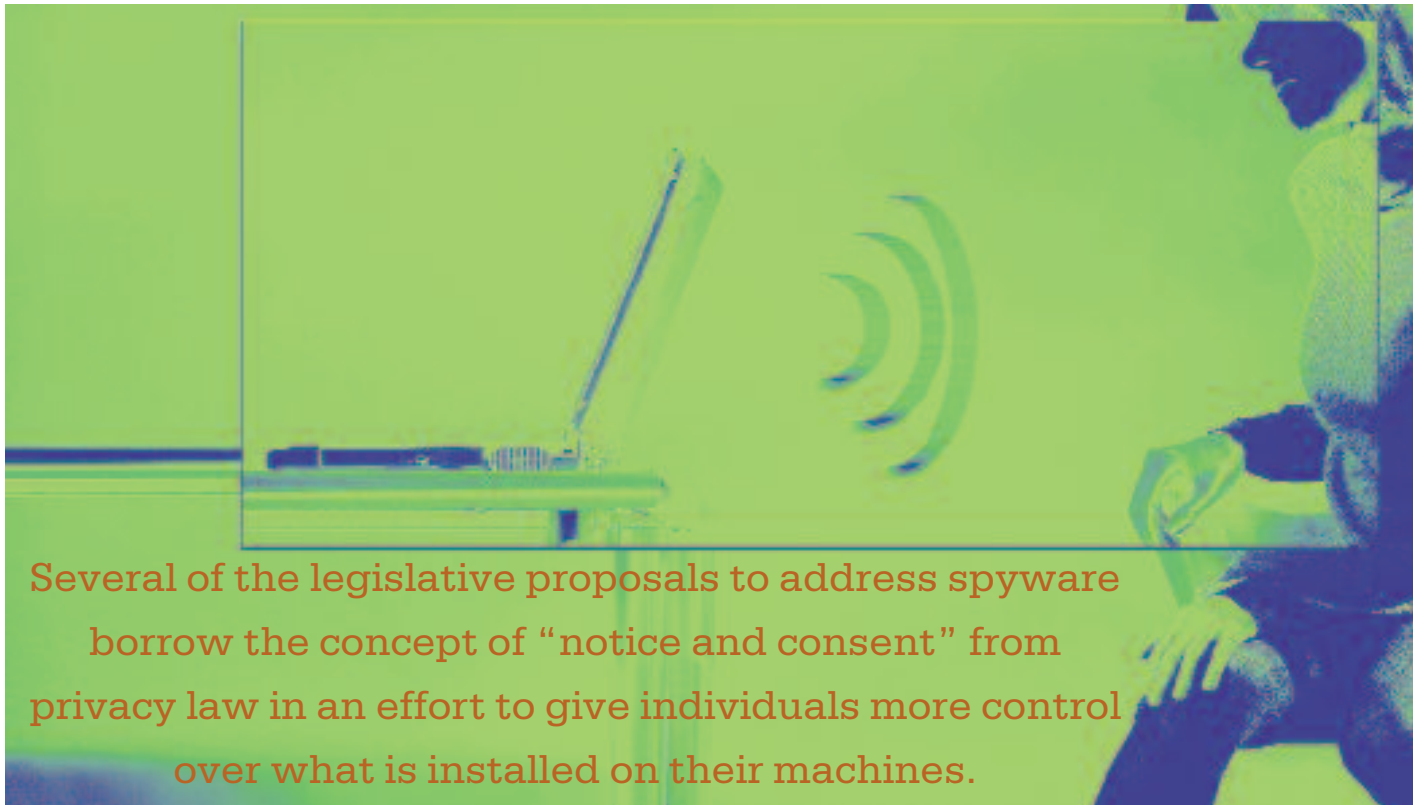
Many consumers have turned to anti-spyware products and curtailed their Internet activity in the hope of reducing their exposure to spyware. Anti-spyware programs block software that meets internally developed criteria or garners substantial consumer complaint. They prevent these unwanted spyware products from installing on a user's computer.



Policymakers have begun to respond to consumer complaints as well. The Federal Trade Commission (FTC) recently brought an action against a company that was surreptitiously installing spyware on individuals' computers and then profiting from the sale of an anti-spyware program to get rid of it. This fact pattern presents an easy legal case under the FTC's "deceptive practices" jurisdiction. Still, lots of spyware ends up on consumers' machines because they "choose" to install it, narrowing the FTC's potential enforcement authority. In such instances, spyware is bundled in with other software. When consumers begin the installation process for the other program, the presence of the spyware is disclosed. Typically the disclosure is made in Terms of Service (TOS) or End User Licensing Agreements (EULA) that consumers must click through during the installation process.

Congress and many state legislatures are considering bills to address spyware. The legislative proposals vary widely. While spyware is a source of industry and consumer complaints, there is a surprising lack of consensus about the best approach to regulate it. The unease lies primarily around the issue of adware—software that displays advertising without user authorization and typically without clear attribution to the source of the ads. In some cases, adware may also install code that collects and transmits information about the user. Adware is a common source of consumer complaint and can cause noticeable performance degradation. Given that the existence of the programs is often disclosed in the service agreement terms during the installation process, that programs and websites regularly request information about users, and that profile-based advertising is common, it is difficult to draw lines separating spyware from advertising activities "legitimate" advertisers rely on. Several of the legislative proposals to address spyware borrow the concept of "notice and consent" from privacy law in an effort to give individuals more control over what is installed on their machines.

Spurred by the legislative, regulatory, litigation and private sector activity directed at addressing the problems caused by spyware, the Berkeley Center for Law & Technology sponsored a conference in April 2005 to explore the vast range of legal issues spyware has raised. Panelists included companies such as Microsoft and Google; spyware vendor Claria; litigators, regulators and academics. The limits of current privacy, intellectual property and consumer protection laws in addressing spyware were explored. Vigorous debate ensued about whether spyware would be best addressed through the marketplace versus state or federal legisla-



tion, or some mix of the three. Participants and attendees left with a deep understanding of the complexity of crafting regulatory approaches to tackle the multitude of behaviors and business practices at issue in the spyware debate.

This spring the Samuelson Law, Technology & Public Policy Clinic undertook an ecological study of user behavior to examine whether providing individuals with information about the system performance and privacy effects of secondary software bundled in with a program they were installing would alter the rate at which spyware was installed. We watched 30 users—UC Berkeley undergraduate students—install five different software programs. In some instances, we warned users that secondary software was being installed; in others we provided brief, clearly worded summaries (short notices) of the softwares' data collection practices and effect on system configuration and performance.

Our initial research yielded several interesting findings. Our tentative conclusions may provide important input for policymakers drafting spyware legislation, companies trying to aid consumers in regaining control over their computers, and entities seeking to successfully convey information about privacy and security to consumers.

First, the users we studied have a very limited understanding of the content of TOS or EULA documents and little interest in reading them. Study participants stated that the “font was too small” on the documents, which were “too long” and “full of legal mumbo-jumbo.” When informed after the fact what a EULA or TOS contains, many users admitted regret over the decision to install certain programs. Users presented with our short notices demonstrated an improved understanding of the installed software's functionality. The short notices, however, did not alter the behavior of users in a statistically significant manner despite their frequent regret about installing the spyware on their computer. The lack of statistically significant change could be based on the installation procedures of some users who load all programs and then examine them to determine which to remove; on the overwhelming need or desire for the program (for example, a file-sharing program in our study) with which the spyware is bundled; or on other factors.

If the information about software functionality is available when users are choosing between two programs with similar functionality, our research suggests that users will choose the one they believe to be less invasive of their privacy and less damaging



to their online experience. The ability of users to compare products, however, is hindered by the lack of common agreement over what functionality should be disclosed and by inconsistent terminology. In fact in the absence of standards, software vendors who do a better job of disclosing their practices may not only suffer in the marketplace because their disclosure looks “scarier” but may also invite heightened regulatory scrutiny. Our findings propose that information about data collection practices and machine performance can influence which products individuals install if:

- information is provided when users are comparison shopping, rather than during the install process;
- there is agreement about what must be disclosed, and consistent terminology is used to describe behavior across products;
- there are competing products with different practices. Where there is no competition between products with similar functionality—i.e., all file-sharing programs bundle in adware—then consumers will download software despite its negative effect on their privacy and the performance of their computer.

From our research, we’ve drawn some tentative conclusions that are relevant to the debate about how best to tackle the spyware problem. First, disclosures are important. In our study, some users read them up front; when presented with our short notices at the end of our study, users reported liking them; and users who received the short notices prior to installation exhibited less regret about their install decisions. Yet if we want users to load less spyware on their machines, it seems that disclosure and consent mechanisms alone won’t achieve this goal. The technology and regulatory community has been focused on trying to create a more user-friendly way to talk about privacy. “Usable” information about privacy and security are hot topics in human computer interaction and computer science, as well as in law and technology policy circles.

Our research suggests that usable privacy and security may not actually deliver better privacy protection; even with usable information about privacy, users install spyware. Given the concerns raised by some economists about our ability to rationally assess privacy risks, relying on better disclosures of poor data practices seems unlikely to yield privacy protection or lower the prevalence

of spyware. Creating better interfaces and improving the language of TOS or EULA documents don’t address the reasons people undervalue privacy. Such tactics may, in fact, just make it easier to waive expectations of privacy and make it clearer that the user has done so. Considering the relationship between technology, business practices and legally cognizable privacy expectations under the Fourth Amendment, we should be especially wary of this particular risk.

Second, the connection between “free” software programs and bundled spyware may make it worth asking whether part of the problem is the free distribution of such programs. Many products that bundle spyware are free to consumers. They impose, however,

costs on third parties—complaints and technical support calls to Internet service providers and computer manufacturers, for example—who have no relation to the transaction. We might ask whether addressing the externalities spyware imposes requires us to depart from the market model. Perhaps these externalities should push us to consider other requirements that might better force the parties in the transaction to internalize the costs. For example, we could require the software that crashes a computer to declare itself; we could require pop-up ads to clearly indicate the software popping them up and

potentially other information about their origin.

More broadly this preliminary research suggests that there is an argument for rethinking both the market model that dominates privacy discourse and the anything-goes landscape of the click-wrap case law. The reason for doing so is based on the economic effect of consumers’ privacy choices on third-party businesses. While the costs are becoming evident and the effect is felt by third parties, the broader issues of whether privacy is appropriately valued in arms-length market transactions and, if not, what the long-term consequences are, are worthy of further consideration.

Acting Clinical Professor of Law Deirdre Mulligan is the director of the Samuelson Law, Technology & Public Policy Clinic.

www.law.berkeley.edu/cenpro/samuelson

While spyware is a source of industry and consumer complaints, there is a surprising lack of consensus about the best approach to regulate it.

Governing Through Crime

The War on Crime and the Transformation of America 1960-2000

BY JONATHAN SIMON

Americans at the turn of the 21st century are in the midst of reinventing the way they govern themselves at almost every level of society. The passing of the “welfare state,” the “Fordist” management regime of corporations, the “bureaucratic” form of institution from the state, and the “patriarchal” family over the past three decades has led to a revolution in how Americans are ruled, and rule themselves. One dimension of this, sometimes described by the slogan “reinventing government,” involves the transfer of authority for solving public problems from state officials to private individuals and organizations. Another dimension involves making individuals responsible for managing more and more of their own risk in areas as central to contemporary existence as medical insurance, retirement benefits, higher education financing, mortgages and bankruptcy. Both dimensions involve an extraordinary expansion of freedom of choice.

Ominously paralleling the undeniable rise in freedom of choice (from retirement fund options to lifestyle choices, such as sexual orientation and abortion), has been an unprecedented buildup of mechanisms of punitive confinement and supervision. More Americans than ever before find themselves confined in prisons, jails, detention centers and detention spaces within schools. It is perhaps not too much of an exaggeration to say that more Americans find themselves in a state of legal unfreedom at the dawn of the 21st century than at any time since the abolition of slavery.

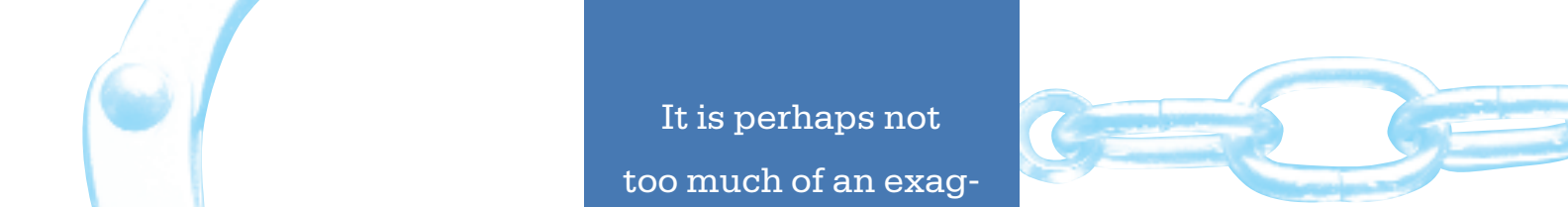
These two seemingly contradictory trends in American society have coalesced around the problem of crime since the 1960s. In that decade, against a background of a rapid rise in some forms of violent crime and other dramatic examples of social disorder (such as urban race riots), the American public came to feel that crime was altering the experience of everyday life, and political leaders of the center left and center right began to talk about and build a

governmental commitment to a “war on crime.” Since then, across four decades with varying degrees of dominance, crime as a problem for government has hung like a specter over the late 20th century revolution in American public and private life.

My forthcoming book of the same title as this essay (Oxford University Press 2006) tells the story of how crime became an influential template for reshaping governmental authority in America since the 1960s. It also describes the consequences of that restructuring on the way American institutions operate in the early years of the 21st century. The constellation of such changes in how those who govern in America know of and act on their subjects, from the president down to parents, is what I call “governing through crime.”

The book challenges the view that high crime rates lock American institutions into their current fixation on crime as a model problem, and that sustained declines in crime, such as occurred in the 1990s, presage a decline in governing through crime. There are at present some signs that the enormous expansion of the prison population is becoming a recognized problem and that some political leaders are considering the wisdom of laws that mandate a strategy of mass imprisonment. Such signs should be most welcomed by all who care about the quality of democrat-





It is perhaps not too much of an exaggeration to say that more Americans find themselves in a state of legal unfreedom at the dawn of the 21st century than at any time since the abolition of slavery.

ic life in America. For reasons developed at length in the book, however, the model of crime has become so deeply implicated in how governing authorities know of and act on their subjects that its influence no longer turns on the vicissitudes of crime or imprisonment rates.

The claim that we are “governing through crime” in contemporary American society can be refined into three somewhat more precise assertions about the work of governing in American institutions and how it has changed since the 1960s.

First, across all kinds of institutional settings, governing agents are most broadly seen as acting legitimately when they are perceived as taking action against crime or other troubling behaviors that can be analogized closely as criminal. This gives the claim of fighting crime a strategic value for both governing agents and subjects who want to invoke their intervention. Under such conditions, we can expect people charged with governing to redefine their role to include more responsibility for crime issues (and necessarily less for other issues that may have more vulnerabilities).

Second, for the same reasons, we can expect people charged with governing to deploy the category of crime to legitimate interventions that have other motivations. Thus Congress recently enacted legislation (signed into law by President Bush in April 2004), making an assault on a pregnant woman that causes death or harm to the fetus she is carrying a distinct and separate federal crime from the assault on the woman herself. The measure (and similar measures enacted by states in recent years) is widely seen to be a move in the long struggle over abortion rights but one that can achieve majority support despite polarization on that issue because it is presumptively about crime and directed at criminals.

Third, and independent of the degree to which institutional problems are seen as crimes or close analogies thereto, the technologies, discourses and metaphors of crime and criminal justice have become more salient as tools, narratives and mentalities of governing; in short they increasingly shape how governing agents know and act on their subjects. Thus it is not a great jump to go from treating students primarily as potential criminals or victims, to treating academic failure as a kind of crime that someone must be held accountable for whether it be the student (no more “social

passing”), teachers (pay tied to test scores) or whole schools (disband schools with failing test scores).

My polemic against “governing through crime” is one that I believe should win assent from both left and right within contemporary American political ideology. In discussing crime, both sides typically emphasize a cluster of preferred values in the always symbolically rich territory of crime and punishment. I hope that, once they confront the effects of “governing through crime,” both liberals and conservatives will recognize the

danger to their preferred visions of governance. The left will find most disturbing the hardening of inequality formed by “governing through crime,” whether in racially concentrated prisons or gated communities. The right will find that across a whole range of dimensions, “governing through crime” subverts its mandate of responsible independence at the level of the firm and family.

There are times when the most important question of all is not what should we do, but how should we think. I believe we are in such an epoch on the question of crime. Already the events of 9/11 have created a kind of social amnesia where a quarter century of fearing crime and securing public spaces has been suddenly recognized, as if for the first time, only to be misrecognized as a response to an astounding act of terrorism rather than a generation-long pattern of political and social change. Just as we now see the war on terrorism requires a fundamental recasting of American governance, the war on crime has already wrought such a transformation (which may now be retroactively legitimized as a response to terrorism). Failing to recognize this could make it even more difficult to rethink our commitment to “governing through crime” and perhaps lead us to mismanage our fight against terrorism.

[Professor Simon's research includes: Introduction, “Crime, Community, and Criminal Justice” 90 California Law Review 1415-1422 (2002). “Megan's Law: Crime and Democracy in Late Modern America” 25 Law & Social Inquiry 1111-1150 (2000).]

Professor Jonathan Simon '87/'90 is associate dean for the Jurisprudence and Social Policy Program.

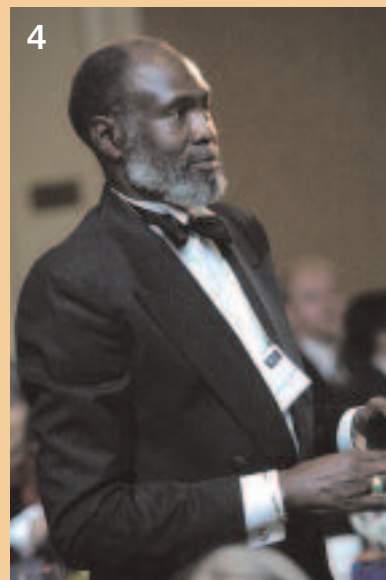
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HONORING ACHIEVEMENT

Citation Award Dinner



Gala Evening Celebrates
the Brilliant Careers
of David Andrews '71 and
Professor Jesse Choper



1 Danelle Rosati. 2 2005 Citation Award recipient David Andrews '71. 3 Frank Jelinch '68 and 2005 Faculty Lifetime Achievement Award recipient Professor Jesse Choper. 4 The Honorable Henry Ramsey, Jr. '63.



5 Henry Holmes '69 (foreground). 6 Beverly Green and alumni association board member Avril Ussery Sisk '87. 7 Ellen Reinstein '03, Professor Robert Berring '74 and his wife, Leslie. 8 Dean Christopher Edley and Justice Kathryn Werdegar '62.



www.law.berkeley.edu/news/2005/CAD2005.html

1 Nyoki Sacramento celebrates with her children Nikko, Mikio and Kiali. **2** Cody Hoesly displays his unique style while awaiting the announcement of his name. **3** Cari Sakashita reflects on final memories as a Boalt student. **4** Jiayan Li (J.S.D.) accepts his hood from Professor Richard Buxbaum '53 (LL.M.).



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5 Patricia Svilik expresses her delight.
6 Noura Erakat and Nora Preciado receive the Francine Diaz Memorial Award for their commitment to social justice. 7 Jacey Glassman leads her classmates in the procession to the Greek Theatre stage. 8 Professor Angela Harris exhorts new graduates to pursue their passions. 9 San Francisco Mayor Gavin Newsom emphasizes the importance of courage and risk taking. 10 Dean Christopher Edley proudly sends off Boalt's class of 2005.



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9



7

“YOU HAVE AN
OPPORTUNITY TO
NOT ONLY BE A DREAMER
BUT TO BE A DOER.”

—San Francisco Mayor Gavin Newsom,
honored guest speaker



10

EVENTS

Death Penalty Clinic Guest Speaker



Jim Block

Distinguished defense attorney George Kendall discusses his career defending indigent death row prisoners at a lecture sponsored by Boalt's Death Penalty Clinic. In the April talk, he described how private law firms and public-interest organizations can provide necessary defense services for indigent persons facing capital punishment. Kendall began his career as a capital defender in private practice, and then worked with the ACLU in Georgia. He subsequently spent 15 years at the NAACP Legal Defense Fund in New York. He has represented individuals facing the death penalty since 1980.

Los Angeles Alumni Chapter Talk

Judge John Wiley '80 (right) offers a view from the bench along with (left to right) Judges Kelvin Filer '80, Ann Jones '84 and Diana Wheatley '74 at the Los Angeles Alumni Chapter event in April.



Richard Hartog

Class of 2005

Campaign Kick Off



Jim Block

(left to right) Chester Day, Elizabeth Miles '05, Deirdre Bourdet '05 and Leslie Caccamese kick up their heels at a spirited gathering in January to kick off the class campaign for 2005 graduates.

Old Friends Reconnect at Golden Circle Luncheon



Jim Block

Dick Johnston '39 (center) introduces Javier Rivera '05 to Fran Newman (widow of the former dean and professor Frank Newman) while (left to right) Alec Cory '39 and Bill Blanckenburg '39 look on. The classmates returned to Boalt for the Golden Circle luncheon in April to meet current students and learn about changes at the law school since their days as students.

Class of '65 Reunion in Ojai



Joe Miller '65, Tony Glassman '65, Richard Hirsch '65, Bill Whiting '65 and Mike Tarlton '65 chum around at the Class of 1965 reunion weekend in Ojai, California, in May.

In Memoriam

Adrian Kragen '34

BY PROFESSOR BABETTE BARTON '54, ADRIAN A. KRAGEN PROFESSOR OF LAW, EMERITA

Photo courtesy of Robert Holmgren



Adrian Kragen: A legend in his own time.

Professor Emeritus and Vice Chancellor (1960-1964) Adrian A. Kragen '34 died peacefully in his sleep at age 97 once his beloved Bears basketball team had ended its current season. As always he remained an optimistic and unreservedly enthusiastic fan. His infectious love for Cal and its athletic program—women's teams as well as men's—began in his student years at the university and never wavered throughout the decades of his extraordinary career.

Adrian was quick to admit that he was better suited for the sidelines at athletic events than as a participant. He reveled in his role as avid spectator, and particularly on those invited occasions when he joined a team on the bench as an honorary coach. All the umpires and referees must surely have come to recognize his voice (blended as it was with that of his true love, Billie Kragen, who cheered with him throughout a glorious 53-year marriage).

Throughout his tenure on campus as revered Boalt professor and vice chancellor, and on during retirement years, Adrian delighted in doing what he could to encourage young students and athletes. His generous financial backing was matched with invaluable counseling. He succeeded in persuading many to pursue graduate study, and often at his beloved Boalt.

It was Adrian's own incredible career that was such an inspiration. His was the tale of a high-school dropout who had succeeded in business by age 19 and only then returned to school. His professional and academic career soared. Along the way, great men identified his genius, became his mentors and eventually became close friends. Roger Traynor '27 was just such an early force. Long before his renown as the intellectually towering and fabled Chief Justice of the California Supreme Court, Professor Traynor's instruction in an undergraduate constitutional law course at Cal became the abiding inspiration for Adrian's devotion to [tax] law.

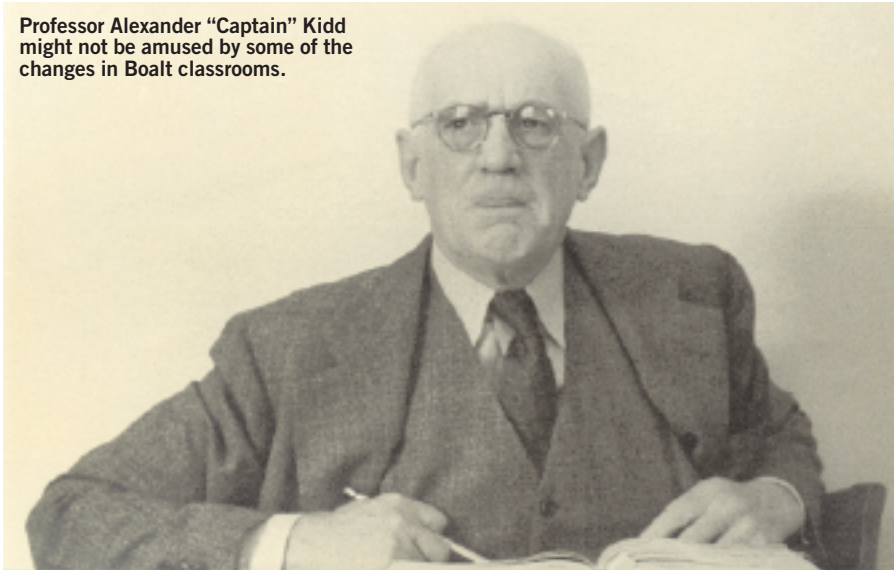
Several years after law school graduation, Adrian joined the staff of then State Attorney General Earl Warren '14, and thereafter maintained a close association when Warren went on to become California's governor and eventual Chief Justice of the United States Supreme Court. UC President Robert Gordon Sproul became another formative influence and friend. Adrian's friends and associates were from all backgrounds and ethnicities, from legendary Hollywood actors and moguls he represented in his law practice, to Nobel laureates on campus who sought his legal advice, to young and not yet established teachers whose careers he routinely went out of his way to encourage. Everyone he knew was, in his mind, a special friend.

Most special of all to him, however, were his children, Robin and Ken, their spouses, his grandchildren and great grandchildren. And second only to his family was his loyalty to, and fondness for, Boalt Hall—his colleagues there and its alumni.

Adrian's academic career was a remarkable success. He garnered many of the most prestigious awards that the university could confer: official commendation with the Citation Award at the time of his retirement, as well as his selection as Boalt's Alumnus of the Year. That honor, to his great delight, was eventually capped in 1998 with his selection and honorary designation as the Alumnus of the Year of the Berkeley campus. His former students also paid tribute to his academic contributions by joining with other friends, family and colleagues in spearheading a drive that culminated in endowing an honorary chair to perpetuate his name, the Adrian A. Kragen Professorship of Law.

Adrian was routinely heralded as a legend in his own time, and now is fittingly remembered as timeless in his contributions to the university and the world.

Professor Alexander “Captain” Kidd might not be amused by some of the changes in Boalt classrooms.



include viewing porn in class, sending sarcastic email messages about other students (or about the instructor), or tweaking your laptop to bleat rude beeps.

What, one wonders, would a crusty martinet like Alexander “Captain” Kidd say about these cyber-barbarians howling at the gate?

But *has* unchecked technological progress led to a coarsening of civility in Boalt Hall classrooms? Lest you fear that Boalt is careening toward perdition in the proverbial hand basket, be assured that long before the FSMers in Sproul Plaza made free speech free, Boalt students were already filling the air with more barbs than the longbows at Agincourt. We offer

Boalt Hall Law School Archives

We’ve all experienced it: the sweaty palms, the racing heart, the frantic attempt to pull words out of thin air. It’s the panicked agitation of the side-show conjuror whose rabbit wriggles out of a hidden pocket and heads for the door just as the curtain rises. Students have felt it for ages. In law school it usually happens on the one day in the entire semester when you have slunk into your assigned seat appallingly unprepared. Smelling fear, the professor pounces, and you clutch wildly at the few flimsy straws of legal terminology whirling in your head. “Yeah, uh ... detrimental reliance ... uh ... consideration ... uh ... *International Shoe*.”

Boalt students can quite literally pull words out of thin air (technologically speaking), now that the law school complex has gone wireless. Students equipped with a laptop and an Ethernet card can have access to the Internet in most classrooms thanks to a network using IEEE standard 802.11b/g wireless LAN technology which employs DSSS modulation operating in the unlicensed 2.4-GHz band. Some of us, though, prefer to imagine a wizard unfurling his cape of moons and stars to grant magical powers

Codes of Civility Procedures

to everyone under its sheltering spell.

The idea of law students with magical powers did at first give some Boalt professors night sweats. One warned that email checking during lectures might lead to “unexplained and disconcerting outbursts of laughter in class.” Another shared his experience of visiting a major East Coast law school, where he sat in the back of a lecture hall and was startled to witness what undulated across the screens of some student laptops. “It wasn’t pretty,” he reported grimly.

Neither prudes nor Luddites, a few professors merely doubted their ability to make the estate tax provisions of the IRS Code seem as seductive as HotBabes.com. They were assured that in other law schools, an informal netiquette has developed in which students generally agree on what is taboo in the wireless classroom, and take vigilante action against breaches by their peers. Examples of discouraged behavior

Long before the FSMers in Sproul Plaza made free speech free, students in Boalt classrooms were already filling the air with more barbs than the longbows at Agincourt.

in evidence the following excerpt from the October 1963 issue of *The Writ*, a glossy newspaper once published by the Boalt Hall Student Association:

“When we in the third year were in our first,” one writer reminisces, “Prof. Cole, whom some of us had for torts, was not observed to have led with his chin until late in the spring term. His Waterloo occurred in the following brief exchange at the beginning of one of the classes: “Prof. Cole: ‘Today we are going to begin a discussion of defamation.

Mr. Kempfsky, suppose you are walking along the corridor out here and you overhear someone say to some students, “That Prof. Cole is a bastard.” Do I have a cause of action in defamation?”

“Mr. Kempfsky: ‘Uh, I may be anticipating a little, sir, but isn’t truth a defense?’”

No doubt Robert Cole wished at that moment that he could make the impertinent Mr. Kempfsky magically disappear. 🐾

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Invited!

Register
for alumni events and obtain
additional information at
www.law.berkeley.edu/alumni/
[events/calendar.html](http://www.law.berkeley.edu/alumni/events/calendar.html) or call
510-643-6673 or email
rsvp@law.berkeley.edu.

September 9-11

Class of 1955 Reunion Weekend
Alexander Valley, California
Contact Alumni Center
510-643-6673

September 12

BCLBE Speaker Series (1 MCLE)
“Current Issues in Representing Biotech
Companies”
Speakers: Barbara Kosacz '88, partner and head
of Life Sciences practice, Cooley Godward
and Marya Postner '96, partner, Cooley
Godward
Boalt Hall
Contact BCLBE
www.law.berkeley.edu/centers/bclbe

September 19

The Brennan Center
Thomas M. Jorde Symposium
Commentators: Larry D. Kramer, Richard E.
Lang Professor of Law and Dean, Stanford
Law School and Robin L. West, Professor of
Law, Georgetown University Law Center
Boalt Hall
Contact Boalt Hall
www.brennancenter.org
510-642-6483

September 22

San Jose Alumni Chapter Kickoff Luncheon
San Jose
Contact Alumni Center
510-643-6673

September 23

Class of 1980 Reunion Dinner
Berkeley
Contact Jennifer Bergovoy '80
bergovoy@cox.net

Dean's Society Reception
(For annual donors of \$10,000+)
Berkeley
Contact Alumni Center
510-643-6673

September 24

All-Alumni Reunion
Special dinners for the classes of
1955, 1960, 1965, 1970, 1975, 1980,
1985, 1990, 1995 and 2000
Boalt Hall
Contact Alumni Center
510-643-6673

September 26

BCLBE Speaker Series (1 MCLE)
“Representing the Emerging Growth Company”
Speakers: Deborah Ludewig '91, partner,
Pillsbury Winthrop Shaw Pittman
Boalt Hall
Contact BCLBE
www.law.berkeley.edu/centers/bclbe

September 30

Class of 1950 Reunion Dinner
Emeryville, California
Contact Alumni Center
510-643-6673

October 10

BCLBE Speaker Series (1 MCLE)
“Parallel Proceedings: A Case Study in Defend-
ing a Client Facing Prosecution from the
SEC and DOJ—and Civil Litigation, Too”
Speaker: Robert Van Nest, partner, Kecker
& Van Nest
Boalt Hall
Contact BCLBE
www.law.berkeley.edu/centers/bclbe

October 11

D. Lowell Jensen Public Service
Award Luncheon
Las Vegas
Contact Alumni Center
510-643-6673

October 14

Class of 1949 56th Class Reunion Luncheon
Berkeley
Contact Alumni Center
510-643-6673

October 19

Silicon Valley Chapter
Entertainment and New Media Law Lecture
“Indirect Copyright Liability:
From *Betamax* to *Grokster*”
Speaker: Professor Peter Menell
Palo Alto, California
Contact Alumni Center
510-643-6673

October 21

Class of 1960 Reunion Dinner
San Francisco
Contact Alumni Center
510-643-6673

October 24

BCLBE Speaker Series (1 MCLE)
“Cross-Border Transactions: Livedoor and
Nippon Broadcasting System—the First
Hostile M&A Takeover Attempt in Japan”
Speaker: Ken King '87, managing partner,
Skadden, Arps, Slate, Meagher & Flom
Boalt Hall
Contact BCLBE
www.law.berkeley.edu/centers/bclbe

November 7

BCLBE Speaker Series (1 MCLE)
“Anatomy of a Business Lawsuit, from Filing
to Trial: the View from the Bench”
Speaker: Judge David Flinn '63, Contra Costa
County Superior Court
Boalt Hall
Contact BCLBE
www.law.berkeley.edu/centers/bclbe

December 9

State Bar Admissions Ceremony
Boalt Hall
Contact Alumni Center
510-643-6673