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TOWARZYSTWO  
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TADIELLI...  
WYSTA NA WALNEM ZGROMADZENIU  
DIA 25-GO LISTOPADA 1920 R. NADAŁO  
W PROF. DR. MICHAŁOWI  
OSTWOROWSKIEMU  
DOWÓD WdziECzności ZA SZCZ  
NĄ ZYCZLIWOŚĆ I POMOC GODNO  
ONKA HONOROWEC  
W KRAKOWIE, DNIA 25 STYCZNIA 1921 R.

INTERNETOWY

PRZEGLĄD

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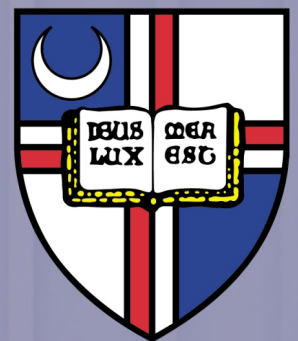
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## **WPROWADZENIE**

Pomysł przeprowadzenia serii wywiadów na temat porównania prawa i kultury prawniczej w Polsce i Stanach Zjednoczonych zrodził się w trakcie zajęć prowadzonych w ramach ósmej edycji Szkoły Prawa Amerykańskiego. Drugi semestr roku akademickiego 2007/2008 był okresem, w którym zarówno Szkoła Prawa jak i Uniwersytet Jagielloński spodziewali się odwiedzin szczególnie wielu znanych i poważanych osobistości - nie tylko wielkich autorytetów w swoich dziedzinach, ale i niezwykle ciekawych ludzi.

Wywiady objęły siedmiu rozmówców, wśród których znaleźli się: Louis Baraccato, Sarah Duggin, Mark Atkinson, Leah Wortham, Richard Tropp, Eric Hirschhorn i Jay Wexler. Szczegółowe informacje na temat ich biografii zamieszczone są we wprowadzeniach do poszczególnych wywiadów, a ponadto, w celu przybliżenia fascynujących sylwetek gości czytelnikom, w wywiadach padają również pytania o ciekawe wydarzenia z ich życia, związane z karierą prawniczą, czy przełomowymi momentami z historii Stanów Zjednoczonych.

Oczywiście, jako że wszyscy rozmówcy są prawnikami, głównym tematem dyskusji były różne aspekty prawa w porównawczym kontekście polsko-amerykańskim, m. in., działalność przedsiębiorstw państwowych, funkcjonowanie i budowa spółek handlowych, reguły dowodowe w procesie, budowa systemu penitencjarnego, stosunki między Kościołem i Państwem, sytuacja mniejszości religijnych, zasady etyki prawniczej, a także: edukacja prawnicza, wybory prezydenckie w USA, administracja budżetem państwa, procedura nakładania embarga, wykorzystanie energii nuklearnej jako alternatywnego źródła energii oraz podłoża kryzysów u wielkich potentatów rynku światowego (Enron, Arthur Andersen).

Myślą przewodnią projektu było z jednej strony zaakcentowanie oraz jak najpełniejsze, twórcze wykorzystanie obecności tych osób w Polsce, z drugiej zaś - uzyskanie pewnego szerszego obrazu o prawie w ogóle. Natomiast głównie dzięki niezwykle otwartemu i przyjaznemu nastawieniu rozmówców, wywiady są także odzwierciedleniem historii siedmiu wybitnych ludzi, z których każdy zaprezentował sobą nieco inną wizję współczesnych Stanów Zjednoczonych.

**Joanna Śliwa**

Kraków, 15 luty 2009

## INTRODUCTION

The idea of carrying out a series of interviews on the comparison of Polish and American law and legal culture first came to be in the course of the eighth edition of the American Law School Program. The second term of the 2007/2008 academic year was a time when both the American Law School as well as the Jagiellonian University itself expected a particularly great number of celebrities – not only undisputed authorities in their fields of expertise but also extremely interesting people.

The series of interviews encompassed seven speakers: Louis Baraccato, Sarah Duginn, Mark Atkinson, Leah Wortham, Richard Tropp, Eric Hirschhorn and Jay Wexler. Each interview is preceded with a biographical note about the speaker. Additionally, in order to familiarize the readers with the different personalities of the celebrities, the texts contain questions about extraordinary events from their career life and breakthrough moments of the history of the United States.

However, due to the fact that all the speakers are lawyers, the main topic of discussion was, obviously enough, law, seen from a comparative, American-Polish perspective. In particular, the speakers elaborated on the functioning of public companies, legal construction of business entities, the content and application of the rules of both civil and criminal procedure, the construction of the penitentiary system, the relations between Church and State, the position of religious minorities, legal ethics, as well as: legal education, the Presidential campaign in the USA, budget management, the scenario of putting an embargo on a country, the use of nuclear power as an alternative source of energy and the origins of the crises that affected world financial leaders such as Enron or Arthur Andersen.

The main goal of the initiative was, on the one hand, to highlight the presence of those extraordinary people in Poland and extract from their visits as much of creative benefit as possible. On the other hand, the texts strive to catch a glimpse of a broader picture of law in general. Simultaneously, thanks to the extremely warm, friendly and open attitude of all the speakers, the interviews tell a story about seven different characters, each of whom presented a unique, his or her own vision of the United States of America as seen today.

**Joanna Śliwa**

Cracow, 15 February 2009

# **GOLD E. LOCKS NOT GUILTY!**

*interview with Louis Barracato*



Professor Barracato came to Poland in April to teach Civil and Criminal Procedure during the American Law School Program 2007/2008. Luckily, he agreed to take part in an interview just before flying off back to the States early the next morning.

Professor Barracato worked as a managing counsel for Neighborhood Legal Service, a part of a nationwide Legal Service Program, in 1966-1970. He was also a legal counsel for the Department of Health, Education and Welfare in 1965. Apart from teaching at the Catholic University of America for thirty nine years, he visited universities in Arizona and Pennsylvania. He is also a proud member of the American Civil Liberties Union, for which he conducted trials, acting as a defending counsel for the minorities.

To tell the truth, I was a little afraid that Professor will call my questions leading or object to them for one reason or another. However, nothing like that happened. We talked about his life and work, education in the USA, differences between American and continental legal systems and about law and ethics. Although a little intimidating for students trying to skip classes or not prepared for them, Professor is an extremely nice and warm person, with a brilliant sense of humor, charisma and an optimistic view of the future. I must say, I really enjoyed the talk.

**Joanna Śliwa:** *Professor Barracato...*

**Louis Barracato:** You know, I don't trust reporters.

## Louis Barracato - Gold E. Locks not guilty!

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**JŚ:** *Well, since I am doing an interview for the first time in my life, I suppose you can hardly call me one. Welcome and thank you for agreeing to answer some questions for ALP. This is not your first time in Poland, is it?*

**LB:** No, it is not.

**JŚ:** *That was a leading question, wasn't it?*

**LB:** Well... a little but not totally. It would be leading to say this is my fourth or fifth visit to Poland.

**JŚ:** *And is it?*

**LB:** Yes.

**JŚ:** *Do you like to come here to teach?*

**LB:** Very much so.

**JŚ:** *Have you noticed any changes in Cracow or in Poland over the years?*

**LB:** The city is filled with many more tourists than initially. There is a lot of fixing up of buildings, which are getting new facades and seem much more fresh and modern, yet maintaining their old look. There are many more restaurants and just the number of people itself! I stay at Floriańska and that street never gets quiet! There are always people there, no matter what time of day...

**JŚ:** *You have been teaching at Catholic University of America and here. Do you notice any significant differences between Polish and American students? What we have already heard is that we don't use laptops so much and the American Professors really do appreciate this, as laptops annoy them very much. You can never be sure what the student is actually doing behind the screen.*

**LB:** Exactly. We are, in fact, engaged now in a faculty debate about whether or not allow students to continue to use laptops in class. When I was a student – and that was many years ago – and also not till long ago, before laptops became really popular, students daydreamed in class for a variety of reasons and it was up to the faculty member to get their attention. The fact that they have a new and more modern device with which to daydream doesn't change anything - you still have to make them focus. I have never had a problem with people not paying attention in class, so it doesn't bother me as much as some of my colleagues. However, the biggest difference between me sitting at my desk and daydreaming and me using a laptop, is that everybody around can see what I am doing and, thus, it is a distraction for other students. And to that extent, I really think



## Louis Barracato - Gold E. Locks not guilty!

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we should do something about it. If we could figure a way in which laptops could be used without causing distraction to others, then I wouldn't be so concerned.

**JŚ:** *I suppose that in a mock trial class there aren't so many opportunities to use a laptop.*

**LB:** Right. The students are performing. But I also teach a course in evidence law and this class has about eighty, eighty five people in it. There, the use of laptops is much more problematic.

**JŚ:** *Do you use the Socratic method in the evidence law class?*

**LB:** I don't believe anyone practices a truly Socratic dialogue. I do work on problems, though. The students get the problems beforehand and they have to work out the answers before they come to class.

**JŚ:** *I think this is the best way for the students to learn. That's how they get to memorize a great amount of the material. The Socratic method is not quite as practiced here, but it seems that the Polish students can manage it pretty well.*

**LB:** That's also what I think. In fact, some students from here came to take my evidence law class in the USA and they did quite well.

**JŚ:** *Lets continue the topic of comparative perspective of teaching. Apart from working at CUA you have also visited universities in other states. Does teaching of law differ much around the US?*

**LB:** Not at all. Most universities today are what we call 'national law schools'. They admit students from every state and expect a student to be able to practice law in every state. They don't teach just local law, and the methods of education are pretty much the same.

**JŚ:** *Even despite the fact that law in every state is different?*

**LB:** Exactly.

**JŚ:** *Does the fact that CUA has "Catholic" in its name influence the teaching in any way?*

**LB:** I wouldn't say so. Especially, as I am an agnostic and there are a few Jewish professors as well. It makes you conscious, however, of where you originate from and who you represent. Thus, if any of my colleagues was strongly Catholic and wanted to express that view I would support him. In fact, the biggest bone of contention between the faculty members in the matter of deity, is whether God is a Republican or a Democrat! The CUA has changed from being conservative at the beginning, through liberal, to moderate

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– just as the American society has done, so now once again, my views are in the minority. However, I have always felt very comfortable there and, since my former students have been elected deans, I've been able to skip the faculty meetings for three years in a row!

**JŚ:** *At CUA you coach teams for trial advocacy competitions to much success. Particularly, in 2001 you beat eight groups before going into the national finals. I noticed that among those groups was the team of the sponsors ...*

**LB:** Yes!

**JŚ:** *How did you manage to do it?*

**LB:** Well, I had four outstanding students on the team and they were probably the best I have ever had. They were dedicated, they did a lot of work and, when they put on their performance, it was absolutely incredible. We have a video tape and a DVD of it and when I look back on it, I come to a conclusion that they were actually better than I remembered.

**JŚ:** *What was the winning case about?*

**LB:** It was a case of a shooting. Some people, including a mother of two children were out drinking and scheming to come in the early morning hours and take the children away from their father who had to take care of them alone because the mother was an alcoholic. He was there to protect his children and when the people came up the stairs, they got into a fight, a gun went off and one of them got shot.

First, we had to be the State and prosecute him for shooting someone and then defend him by way of self-defense. I think we were equally good on both sides.

**JŚ:** *The institution of mock trials is not very widespread in Poland...*

**LB:** It's new in America! It wasn't until the late 1970s when trial competitions started. We got in on the ground floor and we have been continuing ever since but there are still some schools that don't practice it.

**JŚ:** *Could you explain briefly what the idea of a mock trial is about?*

**LB:** You get a case file and, if it is a criminal case, and you have to prepare to prosecute and defend,. Each school does both sides and puts up two students who are prosecutors and two who are defendants. When we prosecute, the two who are defendants are our witnesses and then we switch sides. You than get to do it three times in the preliminary rounds. From the preliminary rounds you advance to the semi finals and the finals. In

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Puerto Rico, we were first, we also advanced several times to the semi finals, we lost one time in the finals. But for the most part, I think we are respected by schools thanks to our solid preparation.

**JŚ:** *What does it take to prepare such a team?*

**LB:** Every weekend! Saturday and Sunday, they practice with me at the law school! They know they're going to give up their weekends during the whole third year, thus, only the people who really want to be there, do it.

**JŚ:** *What, in your opinion, makes a good trial lawyer?*

**LB:** Chutzpa! It's a Jewish term for imagination and nerve.

**JŚ:** *Talking about lawyers in general, do you think it's more important to be able to do research and have a solid background of knowledge, or perhaps to have reflexes and wits?*

**LB:** You have hit the nail on the head because, if you are going to be a research lawyer, you don't need wits and reflexes but, if you want to be a good trial lawyer, you need both.

**JŚ:** *Would you say that trial lawyers are a different breed of lawyers?*

**LB:** Absolutely.

**JŚ:** *You mean, a better one?*

**LB:** A different one. I have some friends who never, ever wanted to be in a courtroom but they are great lawyers all the same. However, to really have fun with the law, you need to be a trial lawyer.

Do you know what Maalox is? Or Pepto-Bismol? It's medicine for an upset stomach. Trial lawyers are always drinking it because they always suffer from stomach problems, while other lawyers don't. It's just a different kind of pressure, due to what's at stake. In criminal cases, it's the man's freedom and that's something you cannot take lightly. In civil trials, it's only money and that's not nearly as important but, still, being a criminal or civil trial lawyer is more exciting for me than being a research lawyer.

**JŚ:** *I suppose it depends on the person. You have to like the feeling of excitement, nervousness and pressure.*

**LB:** That's right. You can be nervous, you just cannot show it!

**JŚ:** *You also worked for the Capitol Hill Moot Court Institute. Can you tell us something more about this initiative?*

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**LB:** It was a program which our clinic put on for elementary school children. A trial of Gold E. Locks took place.

**JŚ:** *What part did you play in the trial?*

**LB:** I was representing Gold E. Locks against the three bears.

**JŚ:** *Was she found guilty?*

**LB:** No, of course not!

**JŚ:** *But she did break into the house, didn't she?*

**LB:** Yes, but we thought she was more of an invitee.

**JŚ:** *How did the children get along with the trial procedure?*

**LB:** They were very much into it. They understood all that went on. Actually, I was standing next to the jury and, this being elementary school children, I brought some candy with me...

**JŚ:** *But that's illegal!*

**LB:** ...and I gave them the candy! Unfortunately, the judge saw me do it.

**JŚ:** *Moving away from teaching into the realm of trials in general, how do you evaluate the jury institution?*

**LB:** I am a firm believer in the jury system. I really think it works, although I can't exactly explain how. I suppose that the collective wisdom and judgment of twelve people is much better than any single one. It is when they get together, they become brighter and more just. They reflect on their role as a jury and they understand how significant it is to get to play it. We have a lot of people in the States who try to avoid the jury duty and would rather spend their time doing something else, but my impression is that the people who did it, whether they wanted it or not, came away with a positive experience. Thus, I am convinced that there's something better out there and I would take the jury system over any other legal system.

**JŚ:** *Unless the situation resembles that in 12 Angry Men, where one person's judgment proves to be better than the judgment of the group. At the end of the day, he manages to convince them, but one may say it was a pretty close call.*

**LB:** Of course, I like the situation with the jury better when I am a defense lawyer – then I have to convince only one person. The fact that, in the film, Henry Fonda talks into it the rest of the jury is all the more glorious but, nevertheless, we don't take a person's freedom unless we achieve unanimity and that's a very important factor.

## Louis Barracato - Gold E. Locks not guilty!

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**JŚ:** *How do people get selected for the jury?*

**LB:** The system has changed much over the years. It used to work in a way that – and that’s why people didn’t like it – when your name was called and you got selected, you had to come in for a full month, every day, Monday till Friday. Obviously, after some time, you got bored with just sitting there, you would prefer to be somewhere else, e.g. making money, as you only received a limited amount of remuneration as a jury. Today, we have something that is called “one trial, one day”. In other words, you get called when your name comes up and you appear for one day. The names of the possible jury members are retrieved from the voters’ registration, although now the scope is going to be broadened to all those in possession of a driving license as there are more people with a driving license than there are registered to vote. If, during that day, you don’t get to sit on the jury, then your name goes to the bottom of the list again. But if you do sit on the jury, you stay there for as long as it takes for that trial to end. Most trials last a day or two. Every now and then there comes a trial which lasts, say, nine months and obviously the jury doesn’t like it, but that’s really rare.

**JŚ:** *What exactly is the compensation for the time spent?*

**LB:** Minimal. I think it’s about forty eight dollars a day and that’s obviously very little.

**JŚ:** *So it’s more like working pro bono for the State?*

**LB:** Right. As a citizen, you have an obligation and you should fulfill it. That’s the way I look at it.

**JŚ:** *What about the jury assessment of expert witness testimony?*

**LB:** The whole idea of expert witnesses is mind-boggling to me. We take twelve people and we tell them that they will have to listen to something that’s surely beyond their understanding. They don’t know anything about the subject, whether it is medical malpractice or electrical engineering and, therefore, each party brings its expert who is to be qualified. After this is done, the experts are supposed to tell the jury what should’ve been done but what hasn’t been done. Now, the jury, previously without any knowledge on the particular topic, is to tell which of the experts is telling the truth.

**JŚ:** *Sounds quite ridiculous.*

**LB:** Doesn’t it? Well, I tell students in my evidence law class the very first day that they should not expect logic to work there because the rules of evidence are more based on historical accident than they are on logic. The expectation that the jury will know what to do in the event of an expert witness testimony is clearly unreasonable. So, I guess, it

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all boils down to the question of believability. Who makes the more creditable witness? Who can talk to the jury in a way that they can understand it?

**JŚ:** *But this way, instead of focusing on the facts and results of the research, more weight is given to the impression the witness or rather the lawyer examining the witness makes on the jury.*

**LB:** That's what the jury trial is all about, anyway. The trial is not a search for truth. Some lawyers would not agree with me on this point and I always end up in the minority, it seems, when discussing this subject. The trial is a search for the appearance of truth. Who appears to be telling a better story? What is more likely to have happened?

**JŚ:** *I suppose it may all depend on what kind of truth we are talking about. Something may be true at that precise moment...*

**LB:** Exactly. The appearance of truth. When they say he ran through the red light, it doesn't mean he really did it, it means only that they thought he did because they believed in that piece of evidence. The merit goes literally to the appearance of the witnesses and lawyers. Are you somebody that the jury can relate to, somebody they like? If not, you've made a bad choice in your career. If you are the kind of person that turns people off, makes them upset by the way you look, you shouldn't be a trial lawyer. The same thing with the witnesses, especially the experts. I hate to admit it, but I think that a good portion of results in our system is based not on what you say, but how you say it.

**JŚ:** *In our system, it's the judge who gets to assess the facts and the creditability of the witnesses. He is supposed to do it in accordance with his experience and the rules of logical thinking, whatever that means. Don't you think that because judges are used to the procedure, they are also more apt for this task?*

**LB:** What did I tell you in class about judges who sit day after day in court? They become emotional cripples! Do you know what that means? They become blasé about what they do, they are not motivated by emotions and, I think, life is an emotion! The jury ought to feel! Your goal as a trial lawyer is not only to make the jury close their eyes and picture what went on. They have to feel it. If you can't make them feel it... you're not doing a good job.

**JŚ:** *Isn't it all about seducing the jury?*

**LB:** Yes. Something wrong with that?

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**JŚ:** *Nothing, I was just wondering... Your trial is very different from ours. It's much more exciting and, so to speak, adversary.*

**LB:** We have an adversarial system...

**JŚ:** *So do we, but somehow it seems not to be the same.*

**LB:** Well, to tell the truth, yours is not very adversarial. The judge basically reads what the witness has to say and the job of the lawyers is done mostly at home. In the courtroom there's nothing but sitting. I'd go crazy.

**JŚ:** *It can get pretty boring, I admit. You have already partially answered my next question but just to be sure – you think that cross-examination of experts is a good idea, despite the fact that it seems to focus not so much on solid research but on the life and personality of the expert witness?*

**LB:** Professor Wigmore from Harvard wrote that the greatest legal engine invented for the discovery of truth is a cross-examination of a witness.

**JŚ:** *Expert witness?*

**LB:** Any witness. Cross-examination is also what sets the Anglo-American legal system apart from everything else and the beauty of being a trial lawyer is to be able to cross-examine somebody, although, this is probably also the single most difficult thing to do.

**JŚ:** *And that's what makes the American movies about lawyers different from all the other movies in the world...*

**LB:** Exactly.

**JŚ:** *Now, another question...*

**LB:** Do you disagree with me on that? Because that's the question I used to ask at my old exams here: "If you had the power to choose where the Polish judicial system would go and to implement any changes, what would they be?" More often than not, the answer was cross-examination. It appeared to be even more popular than the jury system. I personally agree with Professor Wigmore. If you want to get the truth out of somebody, you need to cross-examine him. My children used to hate dinner time because, without realizing it, I used to ask them such questions as on cross. Finally one of them told me: "Do you have to cross-examine us all the time?!"<sup>1</sup>

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<sup>1</sup> For comparison, see: discussion on the jury institution with Mark Atkinson (*Judges are just like all other people.*" *An interview with Mark Atkinson*, p. 34).

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**JŚ:** *There must be something in it. From what I've observed, it's possible to sense a trial lawyer when you see one. I don't know exactly how I should put it... Let's just say that these people are more persistent in getting their point across.*

**LB:** Back in the States, students do evaluation of faculty members and the two words most often used to describe a trial lawyer are: intimidating – that doesn't bother me so much, as it makes the students prepare for class because they don't want to be caught – and arrogant. Now, the latter is something I'm a little worried about, as I never do it purposely. I'm very informal in class, I call students by their first names; if they want to pass, they usually do, I don't pressure them. I'd rather substitute "arrogant" with "confident", but if that's how they see it, they must probably be right.

**JŚ:** *Another big difference between the Polish and American trial is that, in Poland, the prevailing party gets everything, together with the trial costs and the costs of experts, whereas in America...*

**LB:** ...it depends. If it is a contract, you can put it into the body of an agreement that the costs of any dispute are going to be paid by the losing party. If it is a tort, you usually don't get the costs. What happens, however, is that the lawyer takes the case on a contingent basis and he pays the costs upfront and then they get deducted from whatever is won.

**JŚ:** *And in criminal trials?*

**LB:** There the system is different. You pay if you can afford it, if you can't, the court will appoint someone for you but you don't get to select. Thus, the rich can pay for whatever they want, the poor don't have a choice anyway, but the middle class – they're on their own. They really have it at the roughest, as they are not poor enough to get somebody appointed, but at the same time they are not rich enough to get the best. So, sometimes it's better to be poor... No, I take that back. It's never better to be poor. *(Laughter)*

**JŚ:** *Wouldn't you say that paying one's own costs of the trial precludes the way to justice?*

**LB:** It seems that you have to run the risk. That's why Las Vegas is so popular in the States. Love of the gamble! The lawyer can't really guarantee you anything, as there's no way of knowing what the outcome of a trial is going to be. So, you have to tell the client all about the likely costs and ask him if he's willing to gamble, as he might never get the money back. It is a factor that might keep somebody out of court who otherwise deserves to have his claim heard. However, we are such a litigious society that numerous suits are brought all the same. I cannot even imagine that there would be more than what we have now. Obviously the system



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hasn't stopped people from filing claims and we tend to get even the dumbest lawsuits. I, personally, think the lawyers should be sanctioned for bringing some of them.

**JŚ:** *Speaking of representing the poor at trial, in the late 1960s you have worked for Neighborhood Legal Service, an organization which provided legal help at trial for those who couldn't afford it. This was a part of the nationwide Legal Service Program conducted by the Legal Service Corporation, am I correct?*

**LB:** Yes, that was the beginning. We were initially a part of what was then called an Office of Economic Opportunities. The first head of the OEO Legal Services, a man named Clint Berverger, later became dean at CUA. He was the reason I started to teach there. The whole program had just gone off, the first office was at New Haven, Connecticut, the second – at Washington D.C. This was really a brand new phenomenon, people didn't understand how it exactly worked, but I always knew I wanted to represent the poor, so I was immediately into the idea. You see, in 1964 we passed the Civil Rights Act. I then went to Mississippi to register the black voters and that peaked my interest in helping the poor. When I came back, I went straight to Legal Service.

**JŚ:** *Wasn't that a dangerous thing to do, registering the black voters in the South back then?*

**LB:** Yes! But I didn't know it at the time. Only when I got back, I found out about the shooting that occurred with the people from Detroit. We were in some situations when we were called names and threatened but I, myself, never felt really frightened.

**JŚ:** *I think it's great that you did it.*

**LB:** Well, you have to remember that I was a great fan of John F. Kennedy and Robert Kennedy. They were really the first ones to start talking about these things and Johnson carried it through to a wide public. I grew up in a very white Connecticut town, where I had very little contact with black people and poverty. When I went to Washington to law school and saw the poverty, right in the nation's capital, I got motivated, much to the disappointment of one of my professors who was trying to place law students from CUA at major law firms. We were a very small and up-and-coming school at that time – only about thirty five people in my class in early 1965. Person number one was going to work with a very big firm in New York and I, being number two, was supposed to work with a big Washington firm. But I kept saying I want to do Legal Service and he was like: "What?!". He got really upset with me but I was determined. And the guy who was number three – I took him with me!

**JŚ:** *How does voting in the USA look like now?*

**LB:** Only about the third of our population takes the time to vote now and that is really embarrassing. We have reduced the voting age to eighteen but the young people haven't stepped up ... I know a sure-fire way to guarantee their involvement in the affairs of their country! You know what that is? The military draft. Service in the Army or Navy. I assure you that the people would immediately start to protest and say: "I'm not going to fight in this bad war. I'm not going to fight like we did in Vietnam." At the time of Vietnam, there was such a draft and the anti-war movement came from people who didn't want to fight. Subsequently, they generated interest among other people as well. I guarantee you that this is a way of getting the society upset about the fact that we're at war now.

Now, I know Poland is one of our allies and that you've got people there too, but we shouldn't be there. We should never have gone there. We could've been in Afghanistan because there we were really looking for bin Laden but he was never in Iraq! George Bush was just trying to finish off the war his father started and it's terrible! It's the first time I've been embarrassed to be an American. They've lied to us... Do you know the difference between evolutionism and creationism? I've always thought that Darwin was right about the survival of the best and strongest of a kind, but looking back from Washington to George Bush you get a feeling something's gone wrong!

**JŚ:** *That shows we should probably look for some reason underneath... How do you assess the work of Legal Service nowadays? I read that it satisfies only about twenty percent of people's needs.*

**LB:** If that! It all started a little before Ronald Reagan became President. In 1968, there was an amendment put on the OEO Legal Services which said we can no longer do criminal cases. When Reagan became the governor of California, he reduced what they were allowed to do in his state. Later on, as President, he put more restrictions on OEO and cut back the funding. We have been struggling with this approach ever since, except perhaps, for the eight years of Clinton. The truth is that Legal Service now is only a fraction of what it should be.

**JŚ:** *Where does the funding come from now?*

**LB:** From the government. But it's not nearly enough.

**JŚ:** *Moving into the field of law and ethics and the controversial issue of lawyers lying for their clients... I have to admit that all the regulations I've managed to look through: European (also Polish) and American ones, are pretty consistent in that they don't allow a lawyer to make false statements in court and introduce false*

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*evidence. However, what they all underline is that a lawyer can't do it knowingly. At the same time, for instance the Polish rules of professional conduct state that he doesn't have an obligation to check the facts that the clients supply.*

**LB:** That's why a lawyer never asks.

**JŚ:** *But that's ridiculous.*

**LB:** Isn't it? These regulations have been introduced so as not to have a fraud perpetrated in court. The court should be free from fraud. Who's going to disagree with that? It's not that simple, though. Let's imagine that I'm a client. I walk into your office and say: "I killed my wife but want to claim self-defense." You now know the truth so you can't help me put up a self-defense claim. You would have a duty to disclose. Naturally enough, I say: "You're fired.", I go to another lawyer and, being now educated by what has just happened, I say: "I killed my wife in self-defense." He can now get me on the stand and get me deliver my perjured testimony and you have no obligation to go to court and say that I'm lying. So, perpetration is allowed all the same. If this is the case, why should I give up my representation of this person after working so hard to have gained his trust, if some other lawyer is simply going to do the same thing? My friend, who represented me at trial and who wrote a book on this topic, said that a lawyer has not only a right but a duty to lie on behalf of his client.

**JŚ:** *Are you of the opinion that this is true in every situation?*

**LB:** No. Only in criminal cases because, again, of what's at stake. If it all boils down to money, then I don't consider it an important enough reason to make me lie. But it's different when somebody's freedom is going to be taken away. I have to bear in mind that, because of the precedence system, I don't represent only this particular client but all those defendants that come after him and who are going to be charged with the same crime. I want to make sure that our system is going to allow me to represent those people fully.

**JŚ:** *The case you discussed in class about how you pleaded guilty in order to enable your client to escape the threat of capital punishment, although you knew he was innocent...*

**LB:** That was a lie.

**JŚ:** *Yes, but considering the circumstances, one may call it an acceptable lie. I think most people would say you did right. Let's think of another situation that might happen: you know that a person has committed the crime and that, if he is not stopped, he may well do it again.*

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**LB:** If I know that somebody is about to commit a crime and place somebody else's life in jeopardy, I'll disclose. If it comes to my client's freedom versus somebody's life, I would always opt for life. When somebody's already dead because of what my client did and he is not a treat to anybody else – then it's a different scenario.

**JŚ:** *So, in your opinion, it should be left to the evaluation of a particular lawyer in a particular case?*

**LB:** That's right.

**JŚ:** *And what with hiding tools of crime for your client? There was a case, I think, in Virginia in 1967, where a lawyer hid the money and a gun coming from a robbery?*

**LB:** Yes, I remember this one! Well, suppose I get a subpoena that tells me I have to hand those things over. I represent a lot of defendants, so I keep a whole drawer full of guns and I bring to the court the whole box and say to the judge: "You try to figure which one it is!" At least I'm following the subpoena.

**JŚ:** *Do you also have a separate drawer for money?*

**LB:** *(Laughter)* No, unfortunately not. Money, I can't have. But do you know what really happened in that case you mentioned? The lawyer actually asked the Bar Association for an advisory opinion before he hid anything. They gave him the opinion and he simply followed it. Later on, they just changed their minds and said it wasn't really the best solution. So, I think it was most unfair for the lawyer. In yet another case, a lawyer was also subject to a disciplinary punishment for trying to protect his client and, at the same, give some comfort to the families of the victims killed by the client by disclosing the place where the bodies were buried...<sup>2</sup>

**JŚ:** *You are not a member of the Bar right now, are you?*

**LB:** No, I'm not. I got disbarred, although I've paid their dues which they used for wrong purposes. So, when I got reinstated, I realized I didn't want to be a member of this group any more and I've never rejoined.

**JŚ:** *What were the grounds for disbarring?*

**LB:** The technical grounds I was accused of were that I was arguing my cases in press and holding the judiciary up to public ridicule. I was saying what an idiot the judge was. The fact that mattered, though, was that I was doing a lot of other things which were also

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<sup>2</sup>For comparison, see: discussion on lawyers' lies in court with Leah Wortham ("A nation held together by laws." *An interview with Leah Wortham*, p. 48-49).

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violations, but they chose not to look at it. The judge was really not a good one. He later got ranked by the Washington legal magazines as one of the two worst judges...

**JŚ:** *So you were right.*

**LB:** I was! I got quoted a lot in the papers as this was a very controversial case. Probably the Bar didn't want to see me going so public, especially as I was representing poor people. You have to remember that this was the time when Legal Service started and the Bar thought that representing somebody for free equated to taking the money out of their pockets. The fact was that these people couldn't afford legal advice, but the Bar didn't seem to understand it.

At one time, there were around five of us in the Service, all of whom were going through disciplinary proceedings. We were rather controversial. As this was the late '60s, early '70s, the flower children, some of my colleagues would not wear socks, grew their hair long, and so on. But when I went to court, I always looked like every other lawyer. My feeling was that the particular person I'm working for can't afford to go to any other lawyer. He is stuck with me, so when I'm representing him in court I should look right. We even had a little disagreement about it with my colleagues. Judges told me afterwards that some of my colleagues were brilliant lawyers, but it was difficult to get past their appearance and hear what they were saying. They looked awful!

**JŚ:** *What was the controversial case about?*

**LB:** We were going to start representing in divorce cases for people who couldn't otherwise afford to get a divorce. We wanted the court to pay for people to be able to use the court in such situations. We ended up with a Catholic judge who didn't believe in a divorce, anyway, not alone a free divorce! Those were the kind of statements I would make that got me into trouble. The solution of this judge was to appoint me, individually, to every single case that came along. We took it to the court of appeals and we won, of course, because if my colleague was bringing a case pro bono and I was on the other side then no judge ever would've let us do it, due to the conflict of interests! It would be as if two people from the same firm were representing the opposing sides! It was really dumb on the part of the judge to do that.

Unfortunately, at this point of the conversation, my tape recorder stopped operating. The discussion, however, went on.

Once we finished discussing the moral aspect of lawyers lying on behalf of their clients, we moved on to yet another issue which causes much dispute, namely, the

coaching of witnesses. Professor expressed his strong opinion that lawyers should always try to stop witnesses, as well as their clients, from committing perjury. If the jury catches a witness on a lie, no matter how small or insignificant it is, the creditability of a witness is lost. Thus, it is always better to say the truth and then figure out a way of how to make this truth beneficial for the client. Conversely, other kinds of familiarization with witnesses are allowed. A lawyer may go through the questions with the witness, tell him what is likely to happen in court, cross-examine him for a try, indicate in what way the testimony should be given, even explain how the witness should be dressed. As long as the witness is not lying, it is admissible.

I also learned that Professor is a member of the American Civil Liberties Union, an organization founded in the late 1920s to protect the beliefs and rights of the minorities. What many people find surprising, is that ACLU conducted trials also for the most unpopular groups like Ku Klux Klan or the Nation of Islam. Professor Barracato himself took part in trials, protecting the rights of the Nazis and the Black Panthers to freely express their views, much as he dislikes them. After all, the whole point of the institution is to protect all beliefs, in accordance with the motto: "I hate what you think, but I would get myself killed in its defense." This led us to discussing the question why Americans are so impressively aware of their rights. Taking for instance the various lawsuits filed by the religious minorities, one may wonder why the USA differ so much in this aspect from Poland. Professor thinks the reasons lie mostly not within the number of the minorities which, by the way, is truly impressive in America, but within the origins of the country and the fact that the first settlers came here in search of the freedom of mind.

On the topic of separating Church from the State, Professor was of the opinion that the Supreme Court has gone too far in trying to secure religious tolerance. The effect, at times, seems to be quite the opposite to what was initially purported. One of the main elements of most of the religions is the need to practice openly, build a community and voice one's beliefs. The complete ban on the State's involvement in religious affairs makes it impossible for the believers to include religion in the most important moments of their lives. On the other hand, things like the mass at the opening session of the Parliament or the motto on dollar bills: "In God we trust." are simply accepted under the label of ceremonial deism and never questioned. Although Professor Barracato does not agree with Justice Scalia on many points, he thinks that in the case of graduation prayer authorized by the school, Scalia was right to dissent: the requirement to stand up and maintain silence out of courtesy and respect for other people's

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feelings does not immediately indicate participation in the prayer and cannot be considered too big a sacrifice for a conscious citizen.<sup>3</sup>

As for the future, Professor is planning to become a bag-bagger, i.e., a person who never retires and continues to teach until they carry him out of the classroom in a bag. Apart from working on the new case files for his trial advocacy classes, he also considers writing a book. In the meantime, however, he is going on a well-earned vacation to the Arizona desert to play golf!

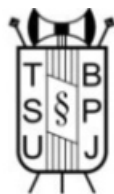
I wish him many precise swings!

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<sup>3</sup> For a more thorough description of the graduation prayer case see: *Free exercise, expensive gas. An interview with Jay Wexler*, p. 95.

# **“WE OUGHT TO LET COMPANIES BE SOCIALLY RESPONSIBLE!”**

*An interview with Sarah Duggin*



Professor Sarah Duggin is Associate Professor and Director of the Law and Public Policy Program at the Catholic University of America. She has experience in many different areas of law, such as corporate law and governance, white-collar criminal defense and complex litigation. Some of the prestigious and responsible offices held by Professor Duggin include Vice President and General Counsel for Amtrak and Chief Counsel of the University of Pennsylvania Health System. She was also a law clerk to the Chief Judge of the US Court of Appeals for the District of Columbia and an editorial assistant to Professor George Haskins. She has recently co-authored an article entitled *Natural Born in the USA*, which has received much attention in the press with regard to the ongoing US presidential battle.

During her stay in Poland in May 2008, Sarah Duggin conducted an engrossing course on corporate law for the American Law School Program during which she impressed the students by her accuracy, precision and pedagogical skills. She also accompanied the students to Warsaw to observe the Negotiation Workshop, one of this year's ALP special projects.

**Joanna Śliwa:** *Could you tell us what Phi Beta Kappa, of which you are a member, is?*

**Sarah Duggin:** It's an honor society for scholars and students in the United States. If you've achieved a certain level in your studies as an undergraduate, you are invited to one of the chapters of the society which is about two hundred years old. It is an honor to be



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invited as a student. The active members strive to ensure the quality of scholarship in universities and colleges.

**JŚ:** *The once secret sign of PBK is three stars and a key. What does that stand for?*

**SD:** The stars represent reaching to heaven and the key is the key of knowledge.

**JŚ:** *It’s not more an underground type of society, is it?*

**SD:** *(Laughter)* No, it’s not secret at all. It has a website where you can gather all the necessary information.

**JŚ:** *While at university, you edited a law review. How do you get selected for such a job and what’s it like?*

**SD:** At the time, I attended the University of Pennsylvania, students who did well in their first year of law school were invited to join the University of Pennsylvania Law Review. This is still the case in most American law schools, although many now also use writing competitions. As law journal staff members and editors, students work on articles submitted by professors and practitioners. These journals are generally published several times a year, and almost every university has at least one. However, what’s specific about the journals in the legal area is precisely the fact that they are published by the students. Following the usual route, second-year students learn how to find sources, how to check if the authors and quotations are correct, and finally, how to edit a piece to make it a little stronger if anything is missing. Third-year students have an opportunity to run for the editorial board. As an articles editor, I read articles submitted by scholars and practitioners to try to figure out whether the law review would be interested in them, and then led editorial teams in preparing articles for publication.

**JŚ:** *You were also an editorial assistant to Professor George Haskins. What did you work on?*

**SD:** Professor Haskins was the author of the second volume of the Oliver Wendell Holmes’ Devise History of the United States Supreme Court. This was a bequest from former Supreme Court Justice Holmes, designed to preserve the history of the Court and make it accessible to a broad audience. Professor Haskins was a well-known legal historian who wrote Part I of the volume about the Marshall Court. Chief Justice John Marshall was perhaps the most important Chief Justice in the history of the US Supreme Court because he established the principal of judicial review and a number of doctrines critical to the development of the law of the United States. As an editorial assistant, I helped Professor Haskins with his task. I had amazing opportunities to work with the original papers of Thomas Jefferson, George Washington and other Founders; I would go to the

special reading room of the Library of Congress and read those. It’s an extraordinary experience to hold those documents and think about the people who wrote them and how they have been passed down through the centuries. Of course, there was also an armed guard peeping over my shoulder to ensure that I didn’t damage anything.

**JŚ:** *I suppose that working as a law editor involves not only some hard work but also responsibility, as the law reviews constitute a respectful secondary law source which gets cited quite often.*

**SD:** They get cited very often indeed, and they are, I’d say, a primary research tool at the secondary source level in US law. They also constitute a source for many new ideas.

**JŚ:** *Let’s move on to your work in Amtrak, the National Railroad Passenger Corporation. First, I wanted to verify some gossip: are there really so many negligence cases brought against the railway business?*

**SD:** No, that’s not true... I mean, every common carrier has a special duty towards its passengers and the railroads cross lots of miles, especially in a country as big as the US. Obviously, there is always the potential for an accident to happen, but negligence actions are neither ubiquitous nor a large part of a general counsel’s work. I served as Vice-president and General Counsel of Amtrak and my job concerned all of the legal aspects of the company’s operations and finance. The negligence cases, although certainly important, took only about ten percent of my time at most. On the whole, I was more occupied with legislative, corporate governance, and financial matters, acquisition of real estate and train sets, environmental matters and construction issues. At that time, we were involved in electrification of the North-East corridor from New York to Boston.

**JŚ:** *Am I correct in saying that the funding of Amtrak comes mostly from the Government?*

**SD:** No, actually only about nineteen to twenty percent of the company’s operating budget! But that still gives the Government enormous influence over the company, particularly because Amtrak was initially created as a mixed ownership Government corporation. This means that, along with the Government, there were also private owners but, over the years, the number of the latter has diminished. Amtrak was created in 1970 by the Rail Passenger Service Act because passenger railway transportation over long distances was dying out in the States as it was not very profitable. Congress allowed existing railroads to cease carrying passengers and turn over their operations to Amtrak. By doing that, they could either obtain Amtrak stock or a significant tax deduction. The

tax write-off was what most of them chose. Consequently, more than ninety six percent of Amtrak’s stock was always held by the Government. Later on, Congress decided that Amtrak would no longer be referred to as a mixed-ownership corporation but a for-profit corporation of the District of Columbia.

I’m not sure that, in reality, it made a lot of difference. Obviously, however, Congress thought that it would. Now, eighty to eighty five percent of Amtrak’s revenues come from what we call fare box revenues, that is, the fees paid, and the remaining percentage comes from the US Government. Still, it’s far less support than that given to railway companies in European countries.

**JŚ:** *Perhaps that’s the source of the financial problems Amtrak is going through at present? In 2006, it is said to have provided services for the biggest number of people ever, so the need for railway transport surely exists. Nevertheless, Amtrak does not seem to be in a good condition.*

**SD:** The reason for this state of things is that Amtrak is not allowed to operate as a normal, for-profit company where decisions are made about which product lines are profitable and which are not. The East Coast routes are extremely lucrative, but some of the other areas of the three-thousand-mile-wide USA definitely are not. Over those long stretches, sometimes the train is the only means of public transportation and, although it’s unbelievably costly, Amtrak must continue to run those routes. From a practical standpoint, if it were to stop, it would create many difficulties connected with possible private funding. Therefore, although the company is supposed to behave like a for-profit company, practically it can’t eliminate the least profitable portions of its services. The other problems are connected with some of the agreements Amtrak had entered and with the employment and waiver issues. In my opinion, there are many wonderful people who work in the company: conductors, engineers, track workers, managers, and many more, but, in reality, some products are only lucrative in specific areas, and the company is always in a money crunch in order to maintain those less profitable routes.

**JŚ:** *I notice many similarities between Amtrak and PKP – the Polish State Railways. PKP has recently gone through restructuring and, in the nearest future, it is to be privatized. I don’t suppose this solution would work in the US?*

**SD:** There are a lot of reasons why it would be extremely difficult to do. Some of them are connected with labor agreements, others with the law that permits Amtrak to run over tracks owned by freight railroads covering most of the country except for the Northeast Corridor tracks which are essentially owned by the Government. Privatization can certainly work well in some contexts, but e.g. the United Kingdom has had many problems

with it. Privatization is not necessarily a good solution for the United States. There are a lot of concerns.

**JŚ:** *Talking about companies, I would like to discuss the structure of a company in general. We distinguish two forms of companies: the European one with a two-tier management which consists of the supervisory board and management board, and the Anglo-Saxon one where the managing and the supervisory directors are all gathered in the board of directors. What were the grounds for this distinction and which system do you consider more beneficial for the shareholders?*

**SD:** First of all, the two-tier framework is an innovation on the basic structure which was the single-tier management. I think there’s a lot to be said for the European structure because it allows for more corporate constituents to participate in the corporate governance. That said, the Anglo-American system seems more efficient. I wouldn’t pick one system alone over the other, though, but I do think that what makes the American company form so successful from an economic perspective is the comparatively neat and clean management system.

**JŚ:** *Could the creation of the supervisory board constitute an efficient way of protecting the rights of minority shareholders who don’t get much say in the matter as far as the closely-held corporations go?*

**SD:** Not necessarily. In close corporations there are relatively few shareholders and management resources are usually stretched thin. So, having two boards instead of one would be like having too many heads and not enough workers. I think that the best solution for the American companies’ approach is to continue to think about constituencies and protect them as the Massachusetts Supreme Judicial Court did in the *Donahue v. Rodd Electrotype* case.

Simultaneously, in any corporation, there’s the idea that it is a financial investment and the minority shareholders do need to be aware that there are some risks attached to that investment which are mostly borne by those who have the biggest ownership share in the company. This is, of course, reflected in the allocation of power within the company. Unfortunately, if the minority shareholders happen to be at odds with the majority, they have very little recourse. Thus, I’d agree with you that it would be nice to give them some protections, but I wouldn’t do that by creating an additional managing board structure. A better way would be to follow the Massachusetts approach and make sure that all the States provide remedies for oppression of minority shareholders.

**JŚ:** *Moving backwards to the subject of bringing the company to life, I’d like to ask whether the Delaware State is really such a paradise for incorporation and, if yes, why.*

## Sarah Duggin - “We ought to let companies be socially responsible!”

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**SD:** It is true that Delaware is the pre-eminent state as far as the incorporation of companies and the creation of other new business forms are concerned. For many years Delaware has been very welcoming to corporations. The state also has a very sophisticated judicial branch. Judges at the Chancery Court and all the way up to Supreme Court are generally very aware of financial and corporate issues. When business issues arise in litigation, Delaware judges are usually experts at dealing with them; they have a great deal of experience. The legislature, too, is focused on the needs of the business development. The laws are predictable, relatively easy to understand and to apply, which makes it really attractive to business people. It has even been said that the adopted solutions are too pro-management compared with other states, but I’m not sure that’s true.

**JŚ:** *So, if anybody from outside the US wanted to start a business, you would recommend this state?*

**SD:** It’s not quite that simple. There are certainly many reasons to choose Delaware, but one also needs to remember that other important issues have much to do with the specific environment in which the company wants to operate. These include the workforce, tax advantages or other kinds of state-sponsored incentives that make it advisable to incorporate and/or operate in a particular state.

**JŚ:** *What about Corporate Social Responsibility nowadays? I think it was Milton Friedman who said that companies are created to make profit and they owe an obligation to their shareholders to multiply the money that has been invested in them. This leaves no place really for CSR as long as this kind of action does not, in itself, create profit.*

**SD:** Milton Friedman was certainly a great economist and a leading voice of the Chicago School. He was also known for his free market approach, i.e., belief in the benefits of the mechanisms of the free market. He really did say that the concept of CSR is subversive in a free society and that the sole obligation of managers is to make profits for the benefit of the shareholders, leaving the issues of charity or other kinds of similar concerns to others. However, Friedman also said that corporate managers need to operate within the rules of the game, meaning that people should be treated fairly, etc. So, I think, he was not against responsible management in general but opposed to the idea of corporate philanthropy and its contribution to the non-profit sector.

Many things may be said for Dr. Friedman’s position – if all the people involved in running the company and supplying its funds want to give their money away to charity, they should be allowed to make their own decisions. Also, if the companies do not give something back to the societies that support them, it may be argued that they are not good corporate citizens. Eliminating corporate philanthropy could also have a tremen-

dous impact on the non-profit sector because large companies are often in a position to donate big sums with relatively low impact on the overall entities. If a charity had to go to each shareholder and ask for money, the transactions’ costs could well be prohibitive. So there are many reasons to support CSR in the broad sense. Corporate philanthropy in particular was indispensable after Hurricane Katrina and the tsunami in the Pacific when the world really looked up to corporations and their ability to make those kind of gestures. Another reason why corporations engage in CSR is marketing. People may be more drawn to a company which cares for environment or does not exploit its workers by paying the lowest possible wages. I think that, in general, we ought to let companies be socially responsible and find more innovative ways to promote transparent corporate social responsibility.

**JŚ:** *Would you say that CSR is important for American consumers? Are they willing to pay more in order to obtain services or products of a company that is employee- or environment-friendly?*

**SD:** I do think we’re seeing a trend in that direction, although, on average, people are still interested in getting the products for lowest prices. But there is a decided growth in businesses that represent themselves as environment-friendly, e.g. that serve free-range goods – and it’s increasingly popular to patronize those, even though their prices are often significantly higher. There is also a trend to invest in socially responsible businesses. People who have the money decide to give it to companies which are socially friendly, rather than seek the biggest possible return. On the Internet you may find information about companies’ CSR, for example Ben and Jerry’s, an ice-cream company, different food companies, and even Starbucks, the big coffee company.<sup>1</sup>

**JŚ:** *At the Catholic University of America you are the head of the Law and Public Policy Program. What does the program look like? Are there any practical classes?*

**SD:** We usually have about forty-five students on the program, roughly fifteen in each class, whose main interest is working in the public interest area. As a part of their JD degree program, they take series of special courses that focus on policy maintaining and, in their third year, they write a paper on a policy subject. Those papers are very substantial and a number of them gets published. Students do two internships in the specific part of the non-profit sector in which they’re most interested, usually policy-related jobs. While doing this, they attend classes weekly, in order to discuss current matters with a faculty member. In the second semester of the second year, students take a course which focuses on the key policy-making functions: the legislative and the administrative process. Students also do individual resource and draft papers on it.

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<sup>1</sup> For comparison, see: discussion on CSR with Richard Tropp (“*In search of a human way of doing business.*” *An interview with Richard Tropp.*, p. 67-68).

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**JŚ:** *Speaking about studying law in the US– other ALP professors have been telling us that its negative aspect is the loan the students have to take to finance the studies and, consequently, the huge debt with which they graduate...*

**SD:** Law schools are very expensive and so are colleges in the States. I left the university with lots of loans, so did other people and this is definitely not good, but that’s the reality. Actually, we’ve been working on programs that would help students with loan repayments, particularly students who are focusing on careers in public policy.

**JŚ:** *How big is the salary of a young lawyer who has just started working?*

**SD:** It depends. If you are in the public policy sector the payment may be as low as thirty to thirty-five thousand dollars a year which is not really that great if you have an eighty-thousand-dollar debt. On the other hand, if you are in a private law firm in New York City, it may be as high as one-hundred-and-fifty thousand dollars.<sup>2</sup>

**JŚ:** *You also conducted courses in managing crises – when was that?*

**SD:** When I left law school, I was a law clerk to the Chief Judge of the US Court of Appeals for the District of Columbia; after that I worked for almost twelve years for a big, international law firm – Williams & Connolly – and became a partner there for five or six years. After that I was General Council of the University of Pennsylvania Healthcare System. While working at Williams & Connolly, I handled a lot of complex litigation, including white-collar criminal representation, and helped corporate clients in crisis. This would cover, e.g. a criminal proceeding against a corporation, an environmental accident, or the arrest of a key manager.

**JŚ:** *I notice that Williams & Connolly specialized in different practice areas, such as, among others, intellectual property, torts, securities and financing, national defense and real estate. Which one was your favorite?*

**SD:** Criminal defense – I really enjoyed it.

**JŚ:** *You wrote an article entitled Natural Born in the USA about the right of the American citizens to become President and the relevant Constitutional provision which basically says that the top office is reserved only for those who were citizens at the time of the adoption of the Constitution or who have been “natural born” in the US. What were the origins of that constitutional provision?*

**SD:** Ah, yes... It’s come now to the forefront because one of the Presidential candidates, Senator McCain, was born in Panama. I get a lot of calls from the press, as people have

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<sup>2</sup> For comparison, see: discussion on legal education with Leah Wortham (*A nation held together by laws. An interview with Leah Wortham*, p. 56-57).

got really interested in the matter, although this was certainly not the case at the time I wrote the article. (*Laughter*) Obviously, it has become a hot topic. I wrote the article with a former student of mine, Mary Beth Collins. We went back to the original wording of the Constitution and tried to define what it meant initially to be “natural born” in the US. And this question posed serious difficulties because nobody really knows what the expression means. It was not a term of art when the Constitution was adopted, and there is no clear precedent.

It looks as though the Framers of the US Constitution were worried that, at the beginning of the new country, some of the European monarchs might manage to send relatives over to the States to run for Presidency . They feared that the nation that started as a republic might end up as a monarchy. This fear seems to have been the *raison d’etre* of the provision. Maybe the Framers were thinking that the Europeans might come to America, become naturalized citizens and, subsequently, represent the interests of European nations instead of the ideals of the US. But the wording of the provision makes it almost sound as though it excluded anyone who was not actually born in the United States. If the provision was to be fully applied now, in a country as media-rich as the States, it would be almost impossible for any candidate to succeed without a thorough study of his or her background.

In my view, the natural-born citizenship provision is bad because it creates second-class citizens, especially as many people have come to the US over the years from other countries, and they continue to do so. My grandparents, for instance, came from Ireland. They swore allegiance to the United States and became citizens in every other aspect. Why shouldn’t they have had a chance to be President? Of course, the vast majority of immigrants would never run for office. What counts, however, is the very idea that they wouldn’t be able to do it if they wanted to seek the Presidency. The time has come to eliminate the provision, but the process of doing this is very complicated and tedious.

Some of the most recent controversies have involved Governor Arnold Schwarzenegger of California and Governor Jennifer Granholm of Michigan, who was born in Canada. These people are serious politicians who might one day be viable candidates for President. At present, however, they are explicitly barred from the Presidency by the Constitution. And what about people such as Senator McCain who are the children of Americans serving abroad? I think Senator McCain has a strong argument the he should be considered “natural born” for purposes of the Constitution but, because the Supreme Court has never ruled on such an issue, we cannot say with certainty what the outcome of a legal dispute would be.



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**JŚ:** *I find it particularly strange that those who have been naturalized are not eligible for the office, although naturalization should amount to the same as being a righteous citizen.*

**SD:** You're right. In every other aspect they are treated equally... We are all equal, except with respect to eligibility for the Presidency.

**JŚ:** *In October 2007, you took part in a panel discussion organized by the Georgetown Journal. It happened to be also the twenty fifth anniversary of the Corporate Council Association and, accordingly, the discussed topics encompassed the duties and obligations of a company lawyer and the waiver of the attorney-client privilege in the corporate environment. Could you describe this problem in more detail?*

**SD:** One of the issues in American law thirty years ago was the question whether communication between corporate official and their counsel were subject to the attorney-client privilege and therefore protected from disclosure. This was litigated in the Upjohn Company case in 1981 and the Supreme Court said that the privilege did apply. In this case, the general counsel of Upjohn, following the advice of an outside firm representing the company, set up a questionnaire for Upjohn employees all over the world in order to find out if the company was complying with the tax provisions. The Internal Revenue Service sought to obtain the completed questionnaires, ultimately without success. The Supreme Court ruled that the attorney-client privilege is an important protection available to companies as well as to individuals and a device to encourage the managers and employees to seek legal advice. However, in 1990s, the Department of Justice sought to enlarge its recourses to fight crime and tried to...

**JŚ:** *Get some more information in a relatively cheap way?*

**SD:** ...more or less. But it didn't feel like fighting against Upjohn ruling. What they did instead was to tell the managers that they would be expected to waive the attorney-client privilege if the company was investigated. If they didn't do that, they would be deemed uncooperative. By 1999, Eric Holder, Deputy Attorney General for the Criminal Division of the Department of Justice, issued the famous Holder Memorandum, named after its author. It basically said that the question whether to proceed against the company as a whole should be based, at least in part, on its willingness to waive attorney-client privilege protections. A few years later, after the Enron scandal, Mr Holder's successor, Deputy Attorney General, Larry Thompson, made it mandatory for prosecutors to consider companies' cooperation. Decisions whether

to prosecute corporations were to depend, at least to some extent, on whether the company agreed to cooperate in this particular way. As a result, although the corporations theoretically enjoyed the privilege, they were pressured not to make use of it. This became very onerous, because under US law, a company may be held criminally liable for any act of any employee or agent, no matter whether instructed by a manager or not.

The American Bar Association started to object, and many of us wrote articles saying that a coerced waiver allows the Government to come in and gather the fruit of all the in-house interviews and discussions which took place before litigation, whether or not the company will eventually be found liable. Additionally, in the course of corporate internal investigations, the Government’s waiver policy can cause employees give up their Fifth Amendment protection against self-incrimination and their Sixth Amendment right to counsel, without understanding what they are doing. At the time of the interviews, they might not be aware of the fact that the council was basically working as a Government agent.

**JŚ:** *You mean that the lawyers who conducted those interviews were the very lawyers of the company who, prior to the possible litigation, worked alongside the employees as their colleagues or even friends?*

**SD:** Exactly. Here, the state is extending its power over an individual’s life without the individual realizing it; this has caused a great deal of controversy in recent years. The American Bar Association, the Chamber of Commerce, the Business Round Table, the American Civil Liberties Union and other groups are trying to get Congress legislatively to overrule the Department of Justice’s waiver policy.

**JŚ:** *The McNulty Memo was to change the situation...*

**SD:** It purported to, but it didn’t make any significant changes. Arguably, in some ways, the McNulty Memorandum made things worse.

**JŚ:** *My last question. Which model of conduct do you prefer: the KPMG and the survival of the company that was clearly liable, or the suing of Arthur Andersen, which went bankrupt in no time, despite winning eventually in the Supreme Court?*

**SD:** I don’t think that either is a particularly attractive model. The problems with the Arthur Andersen approach are obvious: the company failed. But I don’t like the KPMG way either, because it involved essentially handing employees over to the Government, and threatening to deprive them of advancement of the attorney fees – the equivalent of a financial ruin – unless they cooperated. I do understand the

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motivation of Government lawyers and what they are trying to achieve, but we simply cannot forget about some of our most important Constitutional rights.<sup>3</sup>

**JŚ:** *Professor Duggin, thank you very much for the interview.*

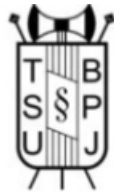
**SD:** You're most welcome. It was my pleasure! Thanks to you and to all the wonderful people here in Cracow.

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<sup>3</sup> For comparison, see: discussion on confidentiality with Leah Wortham (*A nation held together by laws. An interview with Leah Wortham*, p. 45-48) and with Eric Hirschhorn (“...Building a plane while flying...”*An interview with Eric Hirschhorn*, p. 81-82)

# **“JUDGES ARE JUST LIKE ALL OTHER PEOPLE”**

*An interview with Mark Atkinson*



Mark Atkinson started his career as an attorney specializing in criminal, family and civil trial practice. In 1986, he was elected Presiding Judge for Harris County Criminal Court at Law No. 13.

Judge Atkinson has organized and held lectures and discussions for judges on topics such as: handling family violence cases together with the cultural and ethnic diversity issues which they encompass, criminal court docket management, sentencing and supervising criminal offenders, and maintaining dignity and control in the courtroom. He has not only begun a special program for sentencing repeat driving-while-intoxicated offenders, which successfully lent itself to application in drug cases but also developed a creative structure for handling the delicate matter of young people trespassing the law.

His work on numerous fields connected with the probation service has been widely recognized and acknowledged. So far, he has been honored with several awards: the Mexican-American Bar Association Amicus Award and Houston Council on Alcoholism and Drug Abuse Judicial Award, to name but few.

He was also made Judge of the Year by Houston Police Officers Association. Judge Atkinson has been to Poland twice, in 2006 and 2008, as an expert guest of the Public Affairs Sections of the U.S. Embassy in Warsaw and Consulate General in Cracow. During the second stay, he also visited the Jagiellonian University and the American Law School at Larish Palace, where he held a lecture on various aspects of structured sentencing and the functioning of the county court. The discussion that followed and long outgrew the prescribed time focused on the efficiency of creative sentencing, judges' election campaign

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and their independence while holding the office as well as training of people working in the penitentiary service.

Despite the tight schedule, Judge Atkinson agreed to take part in an interview for ALP, for which I am very grateful as it allowed us to get a true glimpse at the functioning of the US justice system from behind the curtain.

**Joanna Śliwa:** *I know you are a great supporter of the jury system. What is it about the jury that makes it so popular both with the judges and the American law professors? Am I mistaken in saying that the jury trial is not all together a truth-finding process but gives the lawyer an opportunity to make the jury see exactly what the lawyer needs them to see in order to win the case?*

**Mark Atkinson:** I’m not purporting that every country in the world should adopt the jury but I must admit I like it a lot. I’m confident about the ability of a human being to make rational decisions. People who sit on the jury panel are, actually, much more sophisticated and cleverer than we tend to think. Of course, this is not to say that every jury verdict is bound to be one hundred percent right but neither are the judges’ decisions! The jury possesses an element of what I’d call common sense analysis, even when the case needs to be decided on a hyper-technical basis. Moreover, they bring a wave of democracy to the court. The latter is decidedly needed, as people in high institutions often consider themselves better, in a way, than everyone else and this is certainly not the idea on which the United States were supposed to be built. We believed that everybody has a brain that they can use, both in their lives and in the jury box.

From what I’ve observed, those who get selected for the jury usually give the job much effort and attention and are really concerned with arriving at the right decisions. The fact that you are an expert in, say, financial matters, does not necessarily mean that you are going to be fair.

**JŚ:** *And would you consider the cross-examination system fair?*

**MA:** We have a lot of leeway about that. If it is a case with an expert witness, the other side’s expert is allowed to be present, ask questions and respond to the answers; one may resort to treaties and books. The lawyers are allowed to ask leading questions but the judge is always there to block the answer, if it is to be information unfit for the jury. In civil cases, the members of the jury get to write their own questions which may then be asked at trial. Hence, I really do think the system is pretty efficient.<sup>1</sup>

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<sup>1</sup>For comparison, see: discussion on the jury institution with Louis Barracato ( *Gold E. Locks not guilty! An interview with Louis Barracato*, p. 9-12).

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**JŚ:** *Leaving the jury trial and coming to your visits to Poland – you were here in 2006. What was the purpose of that stay?*

**MA:** I was on a delegation that met with people who work in the probation region based in Poznań. The delegation also went to Gdańsk and Mielno to participate in conferences and meetings with judges and probation officers. At first, I thought I was invited because of my brilliant knowledge but soon I was proved wrong! (*Laughter*) From what I saw, Poland is doing really great in this specific area, the probation service being in a really good shape. I actually learned a lot just by sitting quietly and listening to the discussions. During this stay, I'm attending a similar conference that is to take place in Piła.

**JŚ:** *Is it possible to compare the probation systems in Poland and the USA? Are there any common spots?*

**MA:** The probation officers both here and there are very professional and they have the same goals, mainly, rehabilitating people who can be rehabilitated and punishing those who need to be punished. We, however, have some significant differences between the country and particular regions, which, I believe, is not the case in Poland.

**JŚ:** *I read that, back at home, you hold lectures for judges on various topics. Are judges willing to learn at all? Can they stand anyone telling them how to do their job?*

**MA:** A very good question but the answer is pretty simple. Judges, at least those elected, are just like all other people: some of them think they know everything and that they don't need to do anything more; some sit in the back row and read the newspaper or sleep. But by far, most of them are eager to learn something new. They go to the conferences and educational seminars and try to find something that they can take with them to their courts to solve a practical problem they happen to encounter.

**JŚ:** *You also conduct classes on caseload and docket management. I suppose this is connected with the great number of cases that arise and how to effectively deal with them?*

**MA:** Exactly. It's all about how to process a whole lot of cases and make good, informed decisions. This is not only the problem of big institutions – also smaller counties in Texas sometimes can't cope because they have too many cases and they're not prosecuting them fast enough. That's essentially what case management is about – how to dispose of cases in a good and timely manner, how to make justice quick but not unjust. From the practical standpoint, this has much to do with the supply of information to the decision makers. Therefore, we are now building up an information system which al-

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lows all participants to access each other's database and discuss them via computers. Considering the importance of this issue we actually have people to do just that: court managers.

**JŚ:** *Still, in the case of a civil procedure, it may take up to several years to have your case heard and then the trial itself can also be dragged out. This is bad enough but usually people's freedom and lives are not involved. In criminal cases, however, there's the unmistakable Constitutional right to a speedy trial. Is it really possible to enforce it nowadays?*

**MA:** When I started working, there were some criminal cases lingering for about a year and a half. Now, if I have a case that's six months old before it gets to the jury trial, I start getting nervous. I think one may honestly say that the situation is being systematically improved. Civil cases depend much on jurisdiction and vary greatly with respect to it. The other thing here is also the fact that, being locked up in civil procedure makes people resort to arbitration and mediation as alternative solutions. Subsequently, the judges who eventually do not want to lose their jobs, start to ponder on what may be changed to improve the system. This way it's all getting faster.

**JŚ:** *You are the author of the DWI – a type of a creative sentencing program involving repeat driving-while-intoxicated offenders. What are the program's main components?*

**MA:** The thing that makes it different from other forms of punishment is that those who undertake to go through the program must be prepared to change their whole lifestyle as opposed to its one element. This makes it more troublesome but at the same time it provides far more deeply-reaching effects. The character of the applied sanctions is combined; we use prison time as well as a series of ninety AA meetings, regular drug and alcohol evaluation and treatment, attendance at meetings of survivors of people killed by drunk drivers, loss of driving privileges and community service hours. Subsequent driving permission is dependent upon installing a special device which requires an alcohol check before each starting of the engine, and forwards the results to the supervising judge. On top of all this, "the patient" has to report to the judge once a month, in the early morning hours in order to look him in the eye and describe the treatment's progress.

**JŚ:** *The program started in the 1980s, and was considered at that time very controversial and got much attention in the press. Despite that fact, it has been working ever since. Have many people signed up for it?*

**MA:** Yes, but one has to remember that it is a very individual matter which depends on the person's choice. My prerogative with DWI is to have a lesser amount of accidents due to drunken driving, whatever it takes to achieve that effect. If this means more jail

time for some people – fine. If they want to do this special kind of probation with a lot of changes in their lives and some more help from the outside – the DWI is there for them. I let them pick because I'm aware of the fact that different things may help different people. Actually, now the program has been expanded and a concept called "drug courts" has recently been introduced. Additionally, some things which have been created earlier are being systematized. DWI certainly does have many requirements and the sentencing is very complicated. That's why people often say: "That's just too much for me; I'd rather take the jail." But, once the program got off by starting to show effects and there were less intoxicated drivers who took DWI returning to their bad habits, it became quite popular.

**JŚ:** *But initially, what exactly did people have against it? Was it the fact that its functioning required a lot of funds?*

**MA:** The biggest problem was the lack of understanding of what really the program was. People thought of it as just a "slap on the wrist" for the offenders – that's a saying meaning: barely punished. They didn't realize that, actually, I was making them go back to jail for some time and that, additionally, they were made to do a couple of other things as well. The moment the society had realized it is not about letting the offenders go unpunished or giving them another free chance, the reception immediately improved and people became supportive.

**JŚ:** *Is there any kind of a similar, special creative sentencing program for the young offenders?*

**MA:** Just to make it clear, in Texas, for the criminal procedure reason, you're an adult at the age of seventeen, although you cannot validly enter a contract until you have reached eighteen years of age.

When I'm dealing with young people, I generally want to involve the family as soon as possible. This comes partially from the fact that I, myself, have brought up four sons and understand how a child's behavior affects the whole family. In trying to figure out what I can do to make this young offender decide: "I've done this for the first and last time in my life.", I need to arrive at some significant solutions. I think it's important, if the youngsters live with their parents, that the mother and father come to court and the young offender can see that his deed has greatly hurt and upset them. With a bit of luck, he starts to wonder how could it ever be fair to do this to them, while they're working their heads off trying to get the bills paid. The problem is, most seventeen-year-olds don't think this way. I tend to ask them: "When you shoplifted all those clothes, were you thinking about your mum and dad? No? Well, you might start thinking about them now, because they're certainly not going to be happy when they get a phone call about their son being in county jail. Do you think your mother cried when she got to know? Of



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course she did. You might want to think about that, too. Do your parents feed you? Buy you clothes? Put a roof over your head? Then how could you possibly do that to them? How do you feel about what you did to your parents? Horrible? Have you told them that? Turn around, look them in the eye and tell them here, right now."

And they really do it. They talk back and forth in court, which has a surprisingly strong, purifying effect. At least the young person is not walking out of this mess, as if nobody knew about it or as if nothing has happened. When the young ones start to cry themselves, I feel there's a good chance for them to come straight and that I've achieved some success. Pray, they won't commit a crime again.

**JŚ:** *Do you get to put all that into practice often?*

**MA:** I do it every day!

**JŚ:** *I'm sure this works in a great number of cases but let's not deceive ourselves; some offenders need more... persuasion. How do you know that it's the time to apply stricter forms of punishment?*

**MA:** There are a couple of things that make particularly those people different. To begin with, they usually have a prior criminal history, the nature of which being as important as the time of the offence. Additionally, one has to consider how serious is the crime committed on the spot. After analyzing these, I might say that I don't care if someone is eighteen or not, what has been done is so bad, it deserves a regular punishment, also for the community's benefit. People should notice that such crimes don't go unpunished. Let's say, someone repeatedly sells drugs at school; he already got caught as a juvenile at sixteen, then seventeen, now he is eighteen and still does the very same thing. At some point, I might not care anymore about putting him on probation. Obviously, his behavior hadn't changed so it's time to try something different in order to put him to rights and this thing is jail. Even if I want to do a supervised sentence, I send him to jail all the same.

**JŚ:** *Are there any golden rules for structuring the sentence? I read that the USA has Federal Sentencing Guidelines but now, after their mandatory status was said to violate the Sixth Amendment, it's not obligatory to apply them, neither on federal nor state level.*

**MA:** Exactly. Those rules do not bind my court. All that we have are rates of punishment for each crime. Sometimes, the legislator is more specific and stipulates that, if it is a repeated event, there's a minimum mandatory jail time that you can't go below but that's all.

**JŚ:** *So, you actually do it almost all by yourself in each case...*

**MA:** I do. It's not like that in every state, though. Some legislations outline explicitly what the punishment must be. I've talked to the judges who didn't like the particular arrangements for a number of crimes. In those situations, after it had been established that the culprit committed the offences, the probation department had to figure out what the exact nature of the punishment will be.

**JS:** *From what I have found out, the most effective punishment is a combined one, which starts with the harsh elements and then moves on to milder means. What are the specific components of such a model sentence?*

**MA:** If you're doing a supervised sentence, in essence, it's going to be stretched over a period of time and it must work as a continuum of sanctions divided in sections. I strongly believe in placing the most serious parts of the punishment upfront. After this is finished, the person will, or will not, know how bad he has behaved. I should also say something for rewarding success, because people don't just respond to punishments, they respond to rewards, too. So, if you start off with the toughest stuff and the culprit has succeeded with respect to the test that you've assigned him, the sentence should be getting a little less restrictive, in order to show that you are awarding good behavior. If he fails the test, you might tighten the probation back up and use the tough means again, to let him know that this is serious. Afterwards, you may lighten it up once more. It's a process; the line goes up and down. If they succeed all the way – it's over, if not –the probation may be finished and then it's just jail time left.

**JS:** *What about the three major theories of punishment, the individual approach, the benefit of the society in general and the importance of the punishment itself? How should those be combined? Which of those would you name the most important one?*

**MA:** I try to weigh them all in my mind when I'm structuring a sentence. The specific terms, the general terms, rehabilitation and punishment for its own sake should all make sense conceptually. I think that specific means are the easiest to figure out – what does it take for this person not to commit a crime again. It's not as if success was guaranteed on this field but you may at least target. Punishing because something is bad enough that it needs to be punished or because of the repeated conduct – you may figure that out, too. The same with rehabilitation. The one that is really tough is general deterrence. You need to be aware of, e.g. what particularly outrages the society although you are not able to measure it; you are only able to say what should possibly be done, viewing the society in general. To use an example, is probation as a future punishment enough to prevent a juvenile from stealing a car? I don't know. Sometimes, if we decide on all the supervised sentences and no one really gets punished for anything that happens, even for robbery, you may lose the general component, meaning deterring other people from doing the same act.

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**JŚ:** *You are a chair of the American Parole Association which deals with probation and parole service. What does your job there look like?*

**MA:** The organization is of a national scope and mostly made up of probation officers. One of its committees is a judicial one and that's where I work. We organize conferences for the judges to discuss how to deal with probation issues which have actually arose in different parts of the country. We all learn by exchanging experience.

**JŚ:** *What about the organization of the pre-trial service in the States? Is it nationally-based, too?*

**MA:** It's both federal and local. I'll try to explain how it works with the help of the debatable concept of a bond.

Traditionally, a bond in the US is the money you need to pay when you've been charged with a crime and you want to get out of jail before your case has been heard. Let's say that the bond has been set at two thousand dollars, someone pays the bondsman two hundred dollars and promises the bondsman will get the rest in the form of property if a particular person doesn't show up in court. In such a situation, usually the person is let out until the day of the trial. A pre-trial worker appears at an early stage and advises the judge on whether a person is good enough to risk dismissing him from supervision, pending his case coming to trial. Basically, pre-trial service gathers information so that a judge can make well-informed decisions. That information comes in handy not only with the bond question but also later on, when a person is already on probation. It's all mostly about getting people out of jail if they don't really need to be there, provided they don't pose a threat to the society. Being a pre-trial officer is quite a responsible job, involving supervision and direct work with the offenders.

**JŚ:** *Could you tell us something more about the Harris County itself? What's it like from the judge's point of view?*

**MA:** It's a really big area with 6 million people, Houston being the biggest part of it and home to 4 million. There's certainly crime but I don't think it's worse than other places, in fact I think it's better than many. We've had some interesting experience during the city relocation due to the hurricane. It was then possible to compare slightly different approaches to law enforcement in Houston and Los Angeles. The inhabitants of the latter were surprised at the pace within which you might get caught in Houston and at the stricter punishments, once you committed a crime. So, in the aggregate, I think it feels pretty safe here. At least I don't have to lock my door – during the day of course!

**JŚ:** *What is the society's view of the application of capital punishment in Texas?*

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**MA:** Obviously, if people were against it they would've had the legislator repeal it. There always remains the philosophical question, whether the State has a moral right to be taking away life. On the other hand, some crimes are so serious that people do not want the culprit back in the society and they purport to send the message to others: this will happen to anyone who behaves in a certain way. Sometimes it's clear that the society is in the need of such a purifying experience which will restore its balance. No one gets condemned unless the crime level is really high and, usually, there is a lot of prior bad history to go with it.

**JŚ:** *What crimes are barred by capital punishment?*

**MA:** For instance, committing murder together with another felony, like robbery or rape. Also, killing a police officer might be punished in this way.

**JŚ:** *Is it true that capital punishment is comparatively often used in Texas?*

**MA:** I suppose it is. Texas has a sort of a frontier mentality, concentrated on people taking care of their business themselves. The State has also just passed a law that allows everyone to have a hand gun in their car as long as it is concealed, which certainly is not the case with all other states. This has lots to do with the theory that an armed society is a polite one and with the way of looking at the world, typical for the Western regions. If the bad guys are going to be armed than the good guys should be able to carry guns all the more. The other thing is that people in the woods and farming areas usually use guns for a variety of reasons, anyway. Just imagine, your wife or daughter is driving through the country and she gets a flat tire. You want her to be able to protect herself in case of some emergency, don't you?

**JŚ:** *Wikipedia provides us with some history of the capital punishment debate and controversy. The opponents maintain that the accused sometimes do not get proper defense and that lawyers are not always thoroughly prepared. Is it true that once a defending counsel fell asleep right in the middle of the trial, which might have led to the accused being sentenced to death?*

**MA:** We get questioned about that story over and over again. Now, here I am in Poland and, it's unbelievable, it happens to me again! It is true but it happened only this one time, in 1984. We've never had anything like that ever since.

**JŚ:** *I suppose it's just so utterly surprising to read about...*

**MA:** The sleeping guy's long dead by now and the case got remanded many times.

**JŚ:** *I read that afterwards it was said not to have influenced the case as the counsel didn't miss any vital parts of the trial.*

## Mark Atkinson - "Judges are just like all other people"

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**MA:** *(Laughter)* No, seriously, the quality of the defense is really high nowadays.

**JŚ:** *What do you think about the present structure of the US Supreme Court? Is it conservative or liberal?*

**MA:** In my opinion, they are center-right which, honestly, is the mirror of our society. But still, you may never be quite sure what the decisions are going to be like. The US people are often split fifty-fifty with regard to many important issues.

**JŚ:** *Do you have any favorite Justices?*

**MA:** I like Justice Scalia, Thomas and Roberts.

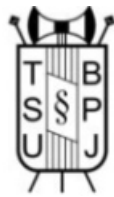
**JŚ:** *And the last question: do you like what you do?*

**MA:** I love the job! Every day, there happens something good, something funny. Step by step, you achieve success. I really enjoy going to work in the morning.

**JŚ:** *There's one lucky man.*

# **A NATION HELD TOGETHER BY LAWS**

*An interview with Leah Wortham*



Leah Wortham graduated from Harvard Law School. Before joining the Catholic University of America in 1981, she worked for the Atlanta Legal Aid Society, as Legislative Assistant for New York Congresswoman Elizabeth Holtzman, as Assistant to the President of the US Legal Services Corporation for Policy Planning, and also as Deputy Associate Director of the US International Development Cooperation Agency.

At CUA she has served as Clinical Coordinator and an Associate Dean. She teaches in the area of Professional Responsibility, Criminal Law, and the externship clinical program. She has cooperated with numerous international organizations, such as the Global Alliance for Justice Education, the Ford Foundation, the Soros organizations, the American Bar Association Central and Eurasia Law Initiative (now the Rule of Law Initiative), the Public Interest Law Institute, European Law Students Association, and the United Nations Commission for Refugees. The list of countries in which she has worked is also impressive and includes Poland, Croatia, Macedonia, Montenegro, Latvia, Hungary, Bulgaria, Russia, Kazakhstan, the Kyrgyz Republic, Ukraine, South Africa, Argentina, India and the Philippines.

She has been very active in the D.C. Bar, it being the third largest in the United States with more than 80,000 members. She has chaired the Ethics Committee, which issues interpretations of the ethical rules governing lawyers. She also chaired the D.C. Bar Rules of Professional Conduct Review Committee. During her membership, this Committee undertook a four-year review of the D.C. ethical rules in light of the work of the ABA Ethics 2000 Commission and proposed amendments to almost every rule and comment. The Committee's report was adopted by the D.C. Court of Appeals, and the new rules became effective in 2007.

In addition, she served as a hearing committee member and chair for lawyer disciplinary cases.

Her longstanding cooperation with the Jagiellonian University has been extensive, as well as profound. In the 1990s, she assisted JU faculty when they created the first successful clinic education program in the Central and Eastern Europe, which has been flourishing ever since. At present, every Polish public law school and several private ones have an active clinic program. Leah Wortham is the CUA director for an LL.M. organized in association with the Jagiellonian University and head of an American Law Certificate Program, in which Jagiellonian and international LL.M. students take part. In June 2008, she received the *Zasłużony dla UJ* medal awarded by the JU Faculty Senate upon recommendation of the University Rector to honor people whose services are considered to be of vital importance to the University.

I must admit, I was very curious – and nervous, to meet the woman who has had such an impact on the development of the lawyers' ethic policy and who was there at the very beginning of the clinic program in Poland. Despite my high expectations, Leah Wortham still managed to surprise me with her extremely friendly, straightforward approach and a lively personality. In the interview, she elaborated on the two above-mentioned areas of her expertise, as well as on the New Law and Development Movement, the differences between the European and American legal profession, the need of dialog between lawmakers and practitioners and the social consequences of people's career choices. Going through the interview, I couldn't suppress the feeling that, had there been more Leah Worthams, the women's movement would never emerge – it just wouldn't be necessary.

**Joanna Śliwa:** *You've given lectures about ethical aspects of the legal profession on the forum of numerous, international entities, such as the United Nations Committee for the Refugees and the Soros organizations. Are lawyers working in those places exposed to any particular moral threats?*

**Leah Wortham:** Some situations, particularly representation of refugees, raise specific problems. For example, the legal representation of refugees often involves a group of people or a family, instead of an individual. Therefore, you need to be extremely careful about the possible conflict of interests. Conflict of interest concerns are also important in a situation when a single organization is the only provider of legal help for a camp of refugees in a given area. Especially, when refugees come from the same country, there may be differing interests based on events that happened in the home country, e.g. hav-

ing been on different sides of an ethnic conflict. Is it possible to represent people with these different interests?

Generally speaking, some issues that arise in a context like refugee clinics are quite specific to that kind of practice, but most of the problems that arise in providing legal services are common to a number of types of practice. In my experience, the issues and question in regulating lawyers and establishing standards for their behavior tend to be the same across cultures. The solutions may differ among countries, but the issues tend to be common ones, e.g. confidentiality, conflicts of interest, rules about contacting potential clients.

**JŚ:** *Confidentiality was to be my next question. Confidential relationships between the client and the lawyer are supposed to be the rule. However, due to the specific kind of legislation that has been emerging lately, such as the famous US Department of Justice's memoranda, this approach has been somewhat eroded. Can confidentiality still be called a rule and, if yes, what are the exceptions to it?*

**LW:** There are three bodies of law which relate to client-lawyer confidentiality in the US. The first one is the attorney-client privilege, evidentiary law that provides what cannot be revealed in court or during discovery. The Supreme Court has referred to its roots in history, but has not given it a Constitutional status. One major policy envisaged behind it is to protect the individual's dignity and freedom by enabling the unhindered communication with the lawyer. For a long time this justification was considered inapplicable in the case of companies and it was not until the *Upjohn* case that the court decided to grant the same privilege also to corporate entities. Cases on corporate privilege stress the importance of unhindered communication in the lawyer's function to assist the client to follow the law.

However, not everything that an employee says to a corporate lawyer is protected. The communication must be between someone seeking legal advice and a person that this advice seeker at least reasonably believes to be a lawyer. Also, if a person seeks legal advice with the purpose of violating the law or if the person uses a lawyer's services to perpetrate a crime or fraud, the privilege doesn't apply.

Another element of confidentiality is the ethical duty of agents and fiduciaries to protect certain information from disclosure. The rules concerning this ethical duty are codified in state rules of conduct, most of which are patterned after the American Bar Association Model Rules of Professional Conduct. These confidentiality rules also are subject to exceptions which, to a great extent, parallel those connected with the attorney-client privilege.



The third body of law related to confidentiality is the privacy of the work product, which concerns materials that are prepared in anticipation of litigation, such as memos, interviews with witnesses and other similar things. Like attorney-client privilege, work product relates to whether information is protected from lawful discovery in a court proceeding. The ethical duty of confidentiality is an obligation of a lawyer to a client, rather than a question of the duty to produce evidence in court. If material is within the attorney-client privilege, the protection is absolute. The protection for “ordinary” work product, e.g. records of witness interviews, can yield if there is substantial need for the materials and they cannot otherwise be obtained without undue hardship. An example I always give to my students is a case of a medical malpractice viewed by two nurses. Three years later, a lawsuit takes place and the plaintiff’s lawyer asks for the statements that the hospital’s lawyer took from the nurses soon after the incident. The plaintiff’s lawyer asked the nurses what happened, but they said they cannot recall the events any more. Because in this context the nurses were only witnesses, not people accused of having done something that could be imputed to their employer, the court ruled that their statements were work product, not privileged communication. As work product, the hospital could be required to produce the nurses’ statements because the plaintiffs’ had substantial need for the nurses’ account of what happened and could not otherwise obtain the information when the nurses said they no longer recalled the events.

All this demonstrates that the confidentiality issue is not as simple as people tend to think. One particular thing about the Holder Memorandum that people found really upsetting was the extreme pressure put on the corporate defendants with respect to ways in which corporate defense was conducted. Due to the specificity of the plea bargain offer, corporations were simply forced to either waive their privilege or end up being faced with much more severe penalties. This was not so much a concern about the law, but rather about the tactics that were used.

Significantly, for a long time, national model rules of conduct did not have an exception from confidentiality for economic injury, as opposed to physical one. Most states had such an exception. Efforts were made to include an exception for economic injury from crime or fraud to the Model Rules, but all failed until the big corporate scandals of Enron and WorldCom. With the pressure of pending Securities and Exchange Commission proposals under the Sarbanes-Oxley Act, the American Bar Association finally added the economic injury exception from a crime or fraud resulting from use of lawyer’s services to the Model Rules. Still, it remained a very controversial issue and lots of people were concerned about it and thought it a threat to the confidentiality principles. I was very much in favor of this solution and that’s what we, eventually, applied in the D.C. Bar.

As I previously said, client crime or fraud using a lawyer's services was already an exception to the privilege, although many lawyers are not aware of that. Some of them assume what I call the 'Tarzan school' of the lawyer-client relations, "Me – client, you – lawyer. Privilege!" This is wrong! Unfortunately, many law schools do not stress attorney-client privilege law in their evidence or professional responsibility courses... Lawyer-client communications related to a client's pursuit or use of the lawyer's services to perpetrate a crime or fraud are not protected! The reason for this lies in the privilege itself, which is supposed to enable free communication between an employee and a corporate lawyer on the topic of, say, something that happened in the past, because then it is a question of the right to defense. The unhindered communication is also needed to help the client comply with the law – but not evade it. However, the case with corporate issues is usually that there are things going on at that very time. As a result, a lawyer may get caught up in between the duty to disclose, based on the lack of privilege, and the ethical rule of non-disclosure. What this usually means is that the lawyers will not be able to provide the right protection for themselves in situations like Enron and WorldCom because they are the only people left with some money in their accounts, about whom assumptions will inevitably be made that they participated or at least were aware of what was going on.

Let's imagine that I represent a client and I have no idea about his misbehavior. I file statements for him, issue opinions, and confirm that what he says is true. If, subsequently, I discover that something is not right I need the possibility to withdraw the documents from the respective institution in order to protect my own potential liability. Until the economic injury rule was introduced, you could disaffirm a previous filing as part of withdrawal from representation, a "noisy withdrawal", but no more could be said. Now, lawyers may go further in disclosure, if they consider it necessary to prevent them from becoming a party to the client's crime. To me, this is not erosion of confidentiality - it's just a positive reconciliation of the legislation. I also consider it the right policy as far as civil law circumstances go. I feel completely different with respect to criminal cases.

**JŚ:** *What about the situations where employees talk with corporate lawyers treating them, for obvious reasons, as their friends and allies? In accordance with what you say, this kind of communication, as not being a clear-cut case of requesting and rendering legal services, might not be subject to the privilege. Isn't that detrimental to the employees?*

**LW:** The point is that, although this communication, more than any other, should be clear-cut, it is sometimes in the companies' business not to make it so. The company may

want the employees to believe it is a friendly situation they are in, which might induce them to say something that the company will later use to fire them and clean itself from accusation. I agree that this is a huge problem but it's more of a separate issue concerning fair dealings with your employees and it does not undermine the whole confidentiality-privilege background.<sup>1</sup>

**JŚ:** *Can a lawyer lie for his client in the court of law with respect to past or future crimes?*

**LW:** The lawyer may never lie. Never can he be knowingly saying something that is untrue. In order to tackle the matter more precisely, we need to differentiate between three situations: making affirmative statements contrary to truth; saying something that is true in itself but is misleading in the context and, finally, remaining silent. These possible ways of conduct, although pertaining to the same topic, are governed by different sets of rules.

Affirmative lying is strictly forbidden on the basis that lawyers should be honest while dealing with people in the course of their professional life. The point where it gets tricky is when a lawyer knows that someone else is not telling the truth. Does he then have an obligation to reveal this knowledge? According to the rules of conduct, in a civil case, if you know that your witness is going to lie, you simply don't put him on the stand, even if your client might not like that. If you don't know for sure but reasonably believe that lying will occur, it's still ethical for you to refuse to accept the statement, although technically, you don't have to do that.

The situation changes dramatically as we move to the area of criminal law. The criminal defendant has a Constitutional right to take the stand – that's something he cannot be deprived of. Many jurisdictions add, though, that a person is not entitled to testify perjuriously. What do you do now? In most situations you wouldn't want the defendant to take the stand anyway, because he would then be subject to cross-examination on prior acts which may be particularly dangerous as your client can already have a criminal record. White-collar defendants, on the other hand, usually would take the stand. The point is that this is the only situation where, despite your soundest knowledge that false statements are to be delivered, you cannot prevent a person from testifying. In addition to the cases of anticipated perjury that we've been talking about just now, there's also the perjury occurred. If a lawyer finds out later that his client has lied, the Model Rules require the lawyer to take "reasonable remedial measures" to correct the falsehood.

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<sup>1</sup>For comparison, see: discussion on confidentiality with Sarah Duggin (*"We ought to let companies be socially liable!" An interview with Sarah Duggin*, p. 30-32) and with Eric Hirschhorn (*"...Building a plane while flying..." An interview with Eric Hirschhorn*, p. 81-82).

The thing I really don't like about this latter set of rules is that lawyers may feel inclined not to ask the people they are representing certain questions which might result in an uncomfortable type of knowledge. When it comes to criminal cases in the USA, it's already very hard for a lawyer to establish an ongoing relation of trust with the client who is usually poor, of different ethnic or social background, often with alcoholic problems, etc. It probably won't help the lawyer much to explain, in the course of the interview, that he will have to report any lie he detects on the client's part. Therefore, in my opinion, this last rule just doesn't work. Defendant's lies in a criminal case are something that should typically be left for the jury to assess. <sup>2</sup>

**JŚ:** *The division of power between state and federal government, so characteristic for the USA, is also visible in the structure of the rules of conduct for the legal profession. The federal American Bar Association Model Rules are voluntary and provide mere guidance, while lawyers have to comply with the rules of the state they practice in. Subsequently, within the state, the question of separation of powers comes into play. Which entity, the legislative, judicial or the administrative one, introduces the rules of conduct?*

**LW:** There are three kinds of regulations pertaining to lawyers' behavior – admission, conduct and discipline and the usual process of enacting professional regulations consists of the appointment of a body of lawyers – volunteers or paid staff, done by the tribunal or the bar and of the inevitable tribunal's scrutiny when it comes to supervision of the work effects. It is the tribunal that makes the decisions, although in practice, the proposals are not much changed by the final review. I purposefully use the word 'tribunal' because it's not only the courts that come into play but also, e.g. the Securities and Exchange Commission and the Internal Revenue Service which, too, have the right to propose and supervise the rules. Therefore, what we are speaking of here is a team of lawyers accompanied by the judicial branch in the broad sense.

In 1969, we encountered the first big movement towards uniformity and it was at that time that ABA adopted the Code of Conduct, which was enacted by most of the states without many changes. However, in the late 70s, there appeared voices of criticism which led to formation of a commission that produced the Rules of Conduct. Their creation was surrounded by a lot of controversy and dispute, the issues that we've just been talking about, the confidentiality and client perjury, being the two most discussed ones. This time, it took much longer for the states to adopt the regulations; it was a more conscious and deliberative process. It did end with the acceptance of the Rules on the part of the majority of the states but subject to numerous changes. The last stage of the re-

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<sup>2</sup> For comparison, see: discussion on lawyers' lies in court with Louis Barracato (*Gold E. Locks not guilty! An interview with Louis Barracato*, p. 16-17).

adjustment was the appointment of the Ethics 2000 Commission, which undertook the task of updating the Rules in accordance with technological and sociological changes and transforming them into state provisions.

**JŚ:** *Were there any other issues of controversy, apart from the ones we've already discussed, while introducing the changes to the D.C. Rules in 2007, based on the works of the Commission?*

**LW:** One more disputable thing was the question of face-to-face solicitation, which is prohibited in most states, but allowed in the District of Columbia, subject to some exceptions, such as people in physical or mental distress. After the D.C. Police decided to publish the accidents' reports which previously were confidential, a whole new profession of the so called runners developed. Runners would pursue accident victims by phone or in person, try and persuade them to instigate legal proceedings, refer them to a specific lawyer, and get paid for it. It came to a point when they became really obnoxious, harassing, even. Of course there's no doubt that harassment is proscribed but, what happened next was that the lobbyists started to pressure the D.C. Bar to get rid of the solicitation issue completely, in order to quickly upgrade the image of the trial lawyers.

I believe that solicitation rules are very important from the historical and from the free speech perspective, and that, for those reasons, they should be maintained. In D.C. we decided to address the problem of harassing runners by abolition of the payment for referring. It was a highly disputed matter at the time.

**JŚ:** *The possibility of advertising legal services is one of the biggest differences between the Polish and American legal professions. According to our rules, it is inappropriate for the lawyer to concentrate on obtaining new clients, which may come at the price of the services' quality. Conversely, in the US the emphasis is put on the free market and the development of competition, which is also to ensure the best legal help available. What is the basis for this variation of the approaches?*

**LW:** The respective rules in the USA are based on a line of important Supreme Court decisions under the First Amendment. A significant precursor of these cases was *Goldfarb v. Virginia*, decided in 1975. That case held that the bar's minimum fee schedule, which required all lawyers to charge a minimum percentage of the cost of a house for preparing closing documents, was a violation of the antitrust laws. A lawyer-plaintiff went to a number of lawyers in Fairfax County, Virginia, all of whom insisted on charging the minimum fee schedule. Subsequently, he filed a lawsuit invoking the provisions of antitrust law, although up to that point, an exception to the antitrust laws had been recognized for "learned professions." The *Goldfarb* case simply did away with this kind

of special treatment. Goldfarb found competition among legal services' providers to be a good thing. The court rejected the notion that price competition will tempt lawyers to provide inferior services, recognizing the ethical obligation and potential civil liability for failing to meet a lawyer's duty to provide quality services. If someone charges the wrong fee, it's a completely individual matter as the adequacy of services from the point of the US law has nothing to do with the amount quoted for them.

Of course, this development of events was followed by a string of advertisement cases because a competitive marketplace requires consumer information to function properly. This, in turn, entailed a whole dispute on how the competitive legal marketplace, being a part of the bigger entirety – marketplaces in general, really works.

One needs to remember that it's certainly not a unified issue. There's a huge difference between complicated services rendered to firms which have a lot of expertise in the matter and which would negotiate very hard with several lawyers to get cheaper services at high quality and the so called standardized services, required by most citizens. Take the refinancing of mortgage. This legal operation requires a title search every four years. Once this has been done for the first time, the next searches are, indeed, very easy. Now, due to the competition and the free marketplace, the charge for this service would be, roughly, two hundred dollars and that is very cheap. Naturally enough, the work is pretty straightforward and is mostly done by paralegals, not by the lawyer himself, but then it is also a part of the legal profession to be able to differentiate between the complicated and simple matters that can be carried out with the help of forms, computers and assistants. The marketplace ensured efficient cutting of costs where this could have been done in the consumers' interest and at no detriment to them, as well as providing a better access to legal help. The latter issue could also be solved by switching to a system that does not require the assistance of lawyers so much, which, in my opinion, is far better dealt with in Europe than in the USA.

There is no doubt that competition comes at a certain cost such as, e.g. aggressive advertising, which probably contributes to the people's dislike for lawyers. We even once had a president of the ABA who was really upset about this side effect and, thus, carried out a series of national hearings throughout the country on the topic of dignity standards. This ended up in an assumption which proved very embarrassing for him as, given the American free speech policy, it's not possible to introduce any standards of that kind.

As far as I'm concerned, there are much worse things that build up a bad picture of lawyers and the aggressive advertisements seem a reasonable price we have to pay in order to maintain other policies. I also think it has lately become very fashionable, from the

political point of view, to criticize the legal profession for whatever it does. This didn't use to bother me that much until I realized that it might end up in the society losing respect for the legal system in general, which would, indeed, be very negative.

**JŚ:** *Do you notice any other big differences between the organization of the Polish and American legal professions?*

**LW:** A significant thing is the nature of the discipline system which, I think, is not quite real in Europe and which didn't use to be real in the US until the 70s, when the US system started to become more rigorous. In addition to that, the US has a very strong civil liability system and those two elements combined strongly influence lawyers' everyday conduct. This simply boils down to the fact that US lawyers must be constantly cautious in carrying out their duties so as to avoid being sued, whereas in many other countries the reality is that the lawyers have leeway to be very unaccountable. Respectively, the US lawyers tend to be more transparent and visible; they take a very active part in the justice system and the political discourse.

Shortly speaking, the legal profession is more significant in the USA than in the civil law countries, which can well be seen in all the lawyers' TV shows and movies. There are different theories about this state of events, but the most persuasive one is that the US is a nation held together, primarily, by laws, as there is not much of a common religious, ethical or historical background to unite us.

**JŚ:** *Moving to the earlier stages of your career, you once worked for Elizabeth Holtzman, one of the first women in Congress, a liberal and a supporter of the Equal Rights Amendment. Can you tell us something more about that?*

**LW:** At the time when Congresswoman Holtzman was elected, the astonishing part was not only that she was a woman but also the fact that she was so young – in her early thirties – and had run against someone much older, more powerful and well-known than herself. The next thing that got her in the spotlight was the Watergate scandal. She was on the judiciary committee which conducted the hearings and which would have impeached Richard Nixon, had he not resigned. All of those hearings were televised, thus earning her a high public profile.

I came just after that and got a chance to do some work on the post-Watergate issues, such as President Ford's pardon of Richard Nixon. However, when I worked for the Congresswoman, she was involved in other issues including the liability of the Nazi criminals who found refuge in the USA during the beginnings of the Cold War, the extension of the time period for amending the Constitution and whether it is necessary from the point of the scrutiny level analysis, and Congressional reversal of the General Electric Co.

v. Gilbert case regarding pregnancy discrimination as gender discrimination. The work on the latter issue evolved into a very interesting project, in which different groups of interest, really preoccupied with what was at stake, presented their opinions.

At one of the respective conferences on approaches to reverse the Gilbert case it became clear to me that people from the legislative and litigation area do not communicate with each other very well, probably due to the fact that they look at the world from different perspectives. I think a good lawyer needs to be familiar with both aspects. What the practitioners usually overlook is that sometimes it may be easier to change the law than to follow it in its present state. On the other hand, those who write the laws sometimes lack experience and knowledge about what will actually happen when the law is implemented. Efficient and successful dealing with the law consists of not only one, but many, various modes of action in the form of simultaneous involvement of litigation, legislative and administrative strategy, as well as public law education.

**JŚ:** *Changing the topic a little bit, could you explain what the Law and Development Movement was?*

**LW:** It started in the late 1950s as funding initiatives carried out by the Ford Foundation and the US Government. It encompassed a couple of areas, with the teaching methods' improvement as one of them, but mainly it was concerned first with the legal systems in general and, later on, with the economic development. The lively financial and academic involvement resulted in a massive literature with respect to the Movement. It then coincided with the Vietnam War and some of the widely criticized moves of the USA. The two issues started to entwine which, in turn, entailed a debate about the legitimacy of the Movement itself.

The notion that was commenced as a response to those events, called the New Development Movement, was focused on efforts to promote democracy and the rule of law. After the end of the communist era, there was a huge wave of interest in the Movement as many countries were considering the changing of the legal framework, although the initiative itself was still surrounded by much controversy. I would say that the Movement has changed much over the years in the sense of becoming more humble towards the crucial problems of different countries in which it had worked. The recent developments of ideas that lie underneath the Movement aim at a conclusion that, perhaps, there is again some common ground for the legal systems and types of legal education which we encounter throughout the world.

The reason of my first visit to Poland was the Ford Foundation's interest in public interest lawyering, not in the role that law schools might play through clinical educa-



tion... The Foundation had not really worked in legal education for some time. But Ford was persuaded to support the clinical programs in Poland. Poland did not have much of a separate, public interest law sector at that time, although, of course, there were private practitioners who did work in that field. Clinical education constituted a step towards improving this situation. I think it was a great way of appropriating the funds and Poland has seen a tremendous and impressive development in the respective area, with its clinic program being an undisputed success.

One value of the development of clinical education in Poland is that the Soros Foundation can now send people from other countries to do internships and learn about clinics in Poland. The value of this cannot be exaggerated as what those people notice is that it's not only the USA that can set up and efficiently maintain such educational forms. Actually the whole idea of the ABA Central and Eurasian Law Initiative, a part of the New Development Movement which operated in the Central and Eastern Europe, was to supply the countries emerging from the communist domination with a variety of choices and ideas for rebuilding their legal frameworks and not to leave them with the sole European solution, which, of course, might be the best option, but, at the same time, doesn't have to be. After all, the key to making the right decisions is a vast amount of information that enables comparison.

And, certainly, from Poland further East, the countries have been more receptive to the US clinics than anywhere else in the Western Europe, except the UK. This approach is strongly related to the history of the particular countries. The ones that don't have the experience of being forced to undergo a dramatic change in the government form tend not to see a reason why they should change anything about their education, especially the legal one. The countries such as Poland and also, e.g. Spain are, on the other hand, more open to new ideas.

**JŚ:** *You sit on the advisory boards of both Polish and Russian clinic programs. Do you have any comparative observations with respect to the clinical experience in those two countries? Do they bear much specificity connected with the place of their origin?*

**LW:** The two organizations function differently and have a different focus, which is defensible in both these cases. The people involved in the Russian foundation are much concerned with the public interest policy, the legal change and the social impact of laws, as opposed to Poland, where emphasis is put on the more specific topics of lawyers' training, pro bono activity, growth of clinics and improvement of their basic quality. Neither way is better or worse, it just reflects the reason why the clinic programs had been set up.

**JŚ:** *Do you notice much competition between the clinics in Cracow and Warsaw? Traditionally, those cities have fought with each other for more popularity, which has had its impact also on the relations between the two main universities.*

**LW:** There's always competition but those entities have cooperated on some important ventures and, in the course of the discussion we are having, it may have already become clear that we, Americans, treat competition as a very positive thing. It has its way of inspiring people to work harder and do better.

**JŚ:** *You wrote a book entitled *Learning From Practice*. One of its chapters is about the proper balance between the professional and private life. According to you, how should this be done?*

**LW:** An important matter in this field is the gender issue and the way in which the career choices influence family lives. There is massive literature written about the notion of an "ideal worker", on which a lot of US employers' assumptions are based. An ideal worker is someone who is able to devote the whole of his energy and free time to the well-being of the company. However, for this to be possible, the worker has to have a domestic partner who will do everything else for him. Consequently, up to the 1960s, there were very few women lawyers and many of the practitioners working in the prestigious law firms had wives who did not work outside the home and could take care of running their households. When I first started law school, there were barely three percent of female lawyers and nine percent of women studying law. It has got much better over the years and the percentage should eventually reach fifty-fifty.

Once you have a two-career family, you definitely need to change your ideas about the ideal worker... For a variety of reasons, the law firms were among the slowest to adapt to this new situation, while even the corporations have done much better. The structure of a law firm resembles, to some extent, a committee, the hourly billing there is still very big instead of being substituted by payment based on the efficiency of the results and a lot of attention is given to the rankings of profit per lawyer. The latter makes a specific kind of lawyers particularly desirable and cuts against anything that seems to be diminishing the overall profit estimation, no matter the reasons.

There are a couple of tips in the chapter about how to achieve a desirable balance between the two life spheres. One of them is intrinsic motivation – sorting out the things that are important to you as a person, as opposed to the extrinsic motivation, including, say, concentrating on money, competition with others and, perhaps, the parents' wishes. There's a group of sociologists in the USA called the Positive Psychology Movement, who promote concentrating on happy, successful people instead of analyzing the

pathologies. The conclusions they draw are very much similar to the things that the sociologists, philosophers and religious leaders have said before: people need for their lives to have meaning. The extrinsic incentives are not really up to this task; they can motivate only to a certain extent and might entail stress and depression. Conversely, the things that truly make people satisfied encompass acting consistently with their system of values, having strong connections with other people and behaving altruistically.

The textbook has been written from the perspective of externships which are a kind of practical classes, but more importantly, being very open and allowing the students to go almost anywhere, should give an opportunity to see what it is like to be a lawyer in a particular area. If, e.g. it is a big family that you want above all, you have to have a career that accommodates this.

The chapter also enumerates some very practical points about how to place yourself in a good position to negotiate desired conditions with an employer, once you've found a job to your liking. One way is to develop a valuable and wanted specialization. A law firm would be less likely to refuse when such a person requests part-time work for some time, compared to a situation when a normal litigator makes the same request, due to the fact that there are so many litigators which makes them easy to switch.

The general conclusion is that you need to be smart about what you are doing, what career choices you make and you should try to avoid deluding yourself with extrinsic incentives, such as competition for competition's own sake. I try, however, in the book to point out the flaws in the structure of legal workplaces that adversely affect lawyers rather than just advising law students about how to accommodate themselves to the existing system.

**JŚ:** *If you could, at this moment, introduce one change to the legal education in the US, what would that be? Would there be anything at all?*

**LW:** Its cost. The problem is not as simple as it may seem, though. The amount you need to pay for the legal education in the US is usually connected with the things that are provided for the students, because most schools are non-profit organizations. Nobody owns those schools and all the financial resources are used only for the institution. Of course, there's the question of appropriating the big overheads from the law departments, as the legal education is very popular and, simultaneously, not so expensive to organize as some other parts of the university. There has been much debate about whether it is legitimate to use those funds to finance the rest of the school.

In my opinion, a good legal education requires full-, not part-time employees, meaning you need to pay them a living wage. American law school professors get paid about as

much as a federal lawyer, which is not enough to make you rich but it's also not that bad. It's certainly less than you would make as a partner in a big law firm; still, we have lots of such partners who would like to become law teachers and have this sort of a nice, independent life. Therefore, making the system cheaper should not go in the direction of diminishing the amount spent on it, but it should rather be based on what has been emerging recently, namely, the restructuring of the loan forgiveness programs.

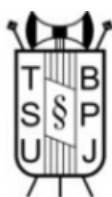
I'm aware of the fact that there are a lot of voices of criticism concerning the American legal education, but the thing that I find really positive about this education is the very vigorous, visible and transparent public debate with respect to it.<sup>3</sup>

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<sup>3</sup> For comparison, see: discussion on legal education with Sarah Duggin ( "*We ought to let companies be socially liable!*" *An interview with Sarah Duggin*, p. 27-28).

## IN SEARCH OF A HUMAN WAY OF DOING BUSINESS

*An interview with Richard Tropp*



Richard Tropp studied political science and economy undergraduate, law in graduate school, theology post-graduate, and has been a military officer. After other policy positions in the U.S. Government, he was a special assistant to the Administrator of the US AID. His private company and he were invited as an advisor to help create the basic legislative and regulatory rules of the securitization in Chile, have helped US and other labor unions to restructure troubled industrial plants, and advised the European Bank on Reconstruction & Development on setting up the first venture capital and private equity investment funds in post-Communist Russia and Eastern Europe. He founded and ran an investment firm which dealt with transfer of capital to developing countries, while also trying to produce an “economic development” effect in those countries.

Mr. Tropp is also an excellent talker, with a rare ability to set forth the most complicated ideas in a straightforward but also very accurate manner. The lively examples he uses make the interview a great piece of reading, which gives a broad picture on relations between private and public investments, tensions connected with functioning of big government institutions and the drawbacks and highlights of adapting to a new local business environment, apart from the interview being a shrewd analysis on such specialized topics as: credit default swaps, organization of a security system or illiquid insolvency.

As Mr. Tropp is unconditionally in love with Cracow, I hope he will have a chance to visit the city once again in the nearest future!

## Richard Tropp - In search of a human way of doing business

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**Joanna Śliwa:** *President Kennedy once said that the United States have a moral obligation of a good neighbor to create an organization such as USAID. I was wondering whether this kind of motivation could be formative of any government's action and, if there were any other reasons, maybe of a more economic nature, which led to the AID's creation.*

**Richard Tropp:** The origins of USAID go back to the Marshall Plan of rebuilding Europe after World War II. The AID evolved in the 1950s under another name, concentrating on individual countries where the USA had some political involvement or affiliation, before, in the 1960s, President Kennedy transformed it into an official program. It was already shaped by then, though, having been in operation for twelve years. In very broad terms, there were three reasons for creating USAID: political significance – it was important for us that certain countries remain politically stable; economic reasons – in countries with which we had investment connections and finally, in some instances, we did it simply because we thought we should... What was it you called it? A moral obligation.

**JŚ:** *So there actually is something like conscience-based political action?*

**RT:** Yes! South Africa is a good example. Then there is Poland: here action was undertaken due to the strong relations between the Polish labor movement led by Lech Wałęsa and its counterpart in America which demanded support for Poland. The other motivation came from the Pope who cared greatly about the situation of small agriculture and asked for resource and technical assistance.

More recently, there are several million Poles living in America, reportedly hundreds of thousands in my city, New York, and probably over a million in the Chicago area. Not to listen to them would now be crazy from both a social and political point of view.

**JŚ:** *The legal basis for creating USAID is embodied in the Foreign Assistance Act. FAA is said to have undergone many policy changes over the years. At first, a lot of power was traceable to the Government which had a lot of leeway when it came to defining the actual ways of help, as those were very broadly set forth. Later on, this flexibility caused accusations that the AID was being used by the Government as a tool of political influence: support was supposed to be allocated under condition of playing along with US policies and goals. This was said to be the case with South America and Yemen. Afterwards, partially because of the accusations, the approach changed once again in order to fall in to the trap of bureaucracy. Given those historical turbulences, what is the present state of FAA?*

**RT:** There are a couple of questions here. First of all, do you know what a barnacle is? That's a plant that grows on ships. If you have too much of it on the bottom, it might literally slow the ship down. The Congressionally mandated bureaucratic restrictions and reporting requirements on each individual project, rather than oversight at the larger program level, are the barnacles of FAA. The Congress has already imposed hundreds of conditions that need to be complied with. Every year it is adding twenty new ones and, curiously, never eliminates any. The main political and institutional issue is, therefore, whether it is the Executive running the AID or is Congress taking it over.

To exemplify it, let's imagine that we (the AID) think a certain country should be given support, or that support ought to be taken away from it and allocated with some other country. Who makes the decision, we or the Congress? Similarly, if we want to spend money on policy reform or economic advice but the Congress considers it more important to pay attention to exports from, say, the Mississippi food industry, it may forbid us to give priority to policy issues. Due to the number of conditions imposed – reportedly over five hundred right now – it has become very difficult, for people actually working within USAID, to make any kind of decisions. Everything that is done has to be justified and that, of course, slows the organization down to such an extent that the Treasury has had problems with its functioning.

What especially struck me based on my previous work before AID in several Federal organizations was the idea of prior “Congressional notification” (“CN”) at the individual project level before AID could obligate funds for any project and begin it. Say, that we think it necessary to run a campaign in South Africa on the topic of family planning and child spacing. Women shouldn't have babies one right after another because, due to this and the lack of proper medical care, they tend to die very young. In order to be able to start off with this program, the AID workers must provide Congress with a fifty-page notification that states exactly the details of the undertaking. And still, the Congress may refuse to accept it! This way thousands of notifications are being prepared by the bureaucrats, some of which get turned down, but most of which are a paperwork formality which can immensely slow down project implementation while not adding value to Congress's oversight process.

Significantly, not all agencies work this way. Usually, the Congress points out a couple of things that need to be done and that's about it.

**JS:** *They're not being checked?*

**RT:** They are, but on a sample basis. It is only the AID that undergoes this amazing amount of scrutiny and has to notify Congress of every individual project beforehand. This re-

sults in introducing political views represented in the Congress to the character of help that is rendered. Naturally enough, the procedure also burdens AID workers with this tedious, time-consuming writing exercise of the CN.

Moreover, some agencies, like the Environment Protection Agency, have what's called, carry-over authority. The amount of money that has been assigned to them needs to be spent over the year, however, if it is not spent, it might be transferred to the next year's budget and used in future. No big deal. With USAID, this is impossible. If you don't obligate the prescribed amount of money, it's gone as far as the AID is concerned – it travels back to the Treasury. The result is, of course, a lot of unnecessary expenditures at the end of the fiscal year. It's not just connected with the reluctance to give the once obtained money back to the Congress, but also with the threat of receiving less money next year. This threat might also come to be if the money has not been spent to Congress's liking. Shortly speaking, it's a very controlled system of which the latest examples are Iraq and Afghanistan. What mattered in those operations was speed in implementation. AID couldn't ensure the required speed due to the numerous barnacles, leaving the President and everybody else unhappy with the result of its work.

Another big issue is the constant toying with the question of how political AID's work should be. To get it straight, people within the organization are not politicians but experts and professionals in different areas. Just as with the Polish labor movement back in the '80s – the reason of it was partially political (AID's relations with the US labor movement), but that doesn't mean that what we actually did there was of a political nature. We allotted the money first to the American labor movement so that it could help the Polish movement organize, we supported agriculture co-operatives and organizations keeping it all very technical. This then boiled down to the fact that, while the experts simply wanted to carry on with their job and not be hindered, the AID itself was supposed to be the part of the US Government and back up its policy.

One more thing worth mentioning here is the extent of focus on specific subjects. Take the support of agriculture systems in Egypt during the mid '80s, substantially wasted! The Egyptians control and keep the food prices in the cities low to sedate the people politically and prevent rebellion which might be particularly dangerous in big urban areas in that region. Needless to say, artificially low food prices stop the farmers from producing, hence the supply problems. The point is there's not much sense in pumping the money into Egypt unless its Government doesn't change the economic policy.

Similar situation takes place with respect to the supply of fertilizer in Egypt by private and government sector. The fertilizer must be put in the ground in a certain, particular time in spring. If you apply it a week later or earlier, it is of no use at all. The private



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sector obviously has a strong incentive to provide the ware at the right time in order to be able to compete, while the government doesn't. Therefore, we would try to persuade the government to take a step back, stop setting the prices and leave the business to private parties as this is one of the things that the government cannot perform well. You cannot expect us to give money for agriculture if it is persistently thrown to the wind. Naturally enough, in Egypt and Africa, the supply of fertilizer also became a means of political control...

**JŚ:** *And let me guess: because of stepping in between the Egyptian government and the private sector the AID was accused of creating undue political influence?*

**RT:** Exactly. When we started to indicate in what way the ware should be allocated, so as to make the best use of it, we were accused by the State Department of Treasury and other parts of the US government of creating too much of a political hassle. On the other hand, we were expected to allocate the money in a way that would make a long-standing difference. We, therefore, strived to follow Congress's and State's conflicting instructions and introduce some economic development by way of achieving a self-sustaining result over time, but that obviously made us too politically involved. As you see, there was no easy way out of this mess.

**JŚ:** *So, would you opt for more freedom for the AID in order to enable it to make its own decisions at least on some levels?*

**RT:** I believe in the US constitution founders' "Federalist" philosophy of separation of powers. The Executive Branch of Government is there to govern and should be allowed to do so. Congress should state broadly what the goals are but, within those goals, there should be much leeway as to the ways of achieving them. Nevertheless, if the appointed people do not manage to bring about some significant changes and effects, they should be fired. The same applies to business and economically related matters: people should be given clear objectives and discretion in doing what they are supposed to do. Then, of course, they should be held accountable. I think the average Aid employee would agree with that, while the average Congress member would say that, sure, this is correct, except for his one particular minor exception. Now, if one hundred senators and four hundred and thirty five congressmen each have "only" one little objection, then you can imagine what kind of efficient guidelines this will produce.

**JŚ:** *What did your job there in the AID look like?*

**RT:** I was a special assistant to the Administrator who runs the Agency. This involved being his personal source for new policy solutions and representing him outside the AID with

respect to politically sensitive issues, e.g. negotiations with the American labor movement, with the White House and the Congress, creating a new economic policy reform program in a major Middle East country which wanted to move away from socialism, dealing with the Vatican on Africa and with the US labor movement on Poland at sensitive points of local, political-economic transition. Also, communication with groups that were not yet governments but were supposed to become ones in the context of changing from dictatorship to democracy, which was the case with Chile or South Africa at the time of shifting from apartheid to a country run by its black citizens. It was all mainly about conceptualizing the development of new relations and handing it over to the AID organization when the things were already pretty much settled.

**JŚ:** *So, the dirty work!*

**RT:** Interesting work would be another word for it, I believe. I was expected to think strategically. Other people tried to figure out what should be done tomorrow, I planned the next two or three years to come and tried to decide what we really want to leave behind, what should be the tangible results of our work.

I remember one case with rehydration therapy. The therapy basically took the form of producing small packets with certain kind of sugar, salt and a few minerals in them. If you give that to the child whose body cannot store water, it will almost immediately rehydrate again. In the Third World, at least in the '80s and '90s, most of the children did not die of malaria or other serious illnesses but because of dehydration. If you could stop that process, you could buy lots of precious time for other treatment of the underlying diseases which had originally caused, and were then being aggravated, by the dehydration. This, almost magical combination of minerals, was developed in our laboratories and it was immediately decided that we have now in our hands something very precious and significantly important, that should be taken out and applied. From a practical standpoint, this was the job of the medical crew, but I was there to check on the effects. I would ask questions such as: how many children got the medicine and were kept alive? How many children got it this month that didn't get it last month? My job was to push the technical experts from concentrating on the process itself to assessing its results.

**JŚ:** *Did you like the work?*

**RT:** Most of the time – yes. Although, I must say, there was a lot of politics involved both of an exterior and interior character. Sometimes I had to encourage the bureaucracy to do things it wasn't always comfortable doing... And it didn't like that.

**JŚ:** *No bureaucracy does...*

**RT:** I was placed between the whole apparatus and the head officer and people just hated the fact that there was a kind of another channel. Just after being appointed, I issued a memorandum entitled Completed Staff Work, which contained the admonition that you don't let any piece of paper go to the Administrator if it hadn't been checked first with every relevant department outside of AID (such as the State Departments' geographic area bureaus, US Treasury, World Bank, and International Monetary Fund) and every other office within AID, that might know something about the pending problem. The first thing that happened afterwards was the issuance of a briefing book about a Central American country which I returned to the originating office and refused to forward it to go to the Administrator simply because it didn't represent all respective issues and, thus, was inaccurate. People would omit certain things not because they were bad people, but simply because it takes time and energy to include everything that's necessary. Needless to say, this created a lot of tension. All in all, I encountered a lot of bureaucratic obstacles and that's one of the reason why I left, eventually, and started my own company. I swore then that I would never be involved with any bureaucratic machine to such an extent again.

**JS:** *One of USAID's theme programs is allotting credit to the developing countries. What are the rules of transferring the capital so that it can be used in the most efficient ways and not destroy local economics?*

**RT:** It is for the Congress to decide, based on average income measures, when a country switches from being a poor country into a middle income one. Then, theoretically, the flow of money should be stopped. However, this is not quite that simple. Take Brazil for instance. Brazil is no longer considered to be poor and much of middle-class São Paulo is certainly not a poor city, but if you look at the rest of the country which is, by the way, bigger than Europe, you will see that 98% of it suffers from poverty. We have been fighting with Congress over these evaluations as we were of the opinion that in such situations the programs should change but should not end. There also arises the philosophical question: when exactly should the money be first supplied? At the moment when the country is very poor or when it is about to "take off"? Actually, if you decide to support the country which has just reached the middle income level, your money is bound to have a much bigger effect.

Other factors, apart from the rate of growth, that need to be considered are: the size of the country, which translates to the number of people you are able to help, the country's internal efficiency of using the money, and the fundamental underlying reality (in the Swiss-German expression: the country's Gestalt). This requires a deeper insight into the country's attitude towards its people and the private sector economy. If the govern-

ment allows the competition's growth and backs up individual initiative instead of trying to maintain too much control, the provided capital might serve a good purpose.

**JŚ:** *Isn't that one of the things that your company was doing? Transferring capital to developing countries? Do principles of such private money allocation differ much from those undertaken by the governments?*

**RT:** The differences are enormous. The first thing that comes to my mind is the problem of overhead, meaning, the costs you have to incur in order to have anything done, e.g. rent for an office or a lawyer to conclude an agreement. When I was working with the AID it was all very simple; if we needed a legal opinion on something, I would go to the agency's General Counsel, tell him that we needed a lawyer and just ask him for one. Being on your own means that there will be a bill for everything; the same with accounting. Typically, when you go into a Third World business, you will see that the accounting books haven't been kept very well, if at all. So, the first thing that needs to be done beforehand in places like, say, Argentina, is to send a person who will go through the books and check the content because what is in the books does not necessarily comply with reality. And every time you use the help of a professional, it will cost you no less than two hundred and fifty thousand dollars. Additionally, you need to go through this painful process more than once, just in order to assess whether a certain company is, or is definitely not, the one you want to do business with.

**JŚ:** *How does it feel when you realize that, after spending that much money on studying a company, you cannot make profit out of the business and therefore shouldn't invest in it?*

**RT:** Terrible frustration and a desire to reach across the table and strangle the local people if they haven't told you something that should've been said at the very beginning.

Another big issue is connected with the necessity for speedy and drastic decisions. Once we were dealing with a successful company manufacturing shirts. Everything was well until we discovered there was a leakage of money somewhere. Subsequently, we got engaged in restructurization until it became clear that one of the directors was secretly gambling away the company's money. Back then, I was convinced that the matter should be dealt with much caution. I saw the main accountant on a Sunday to hear about the problem and arrive at the best solution. In the end, as the director was liked by the union leadership of the workers, we decided to give him another chance and let him stay in the company under the condition that he will undertake treatment. What I should've done, then and there, was to call the local police and put the man in jail. The result was that he stole more money and we had no choice but

to fire him on Christmas Eve. At that very moment, I became a business person and that company, after losing a painful amount of money, went through a critical three months of change.

In the government-run business, such a person would probably be moved to another position where he would still have a salary. Why? Because, all in all, he is probably a nice man and it's not your money you are dealing with but the taxpayers' money. If you run your own business the golden rule is: the first time somebody lies to you – out! If you are not tough, you lose money.

**JŚ:** *But, at the same time, you need to gain respect and trust, so that the local people will want to do business with you and not treat you as an outsider but one of their own.*

**RT:** Absolutely. You need to be human too when doing business. *(Laughter)*

**JŚ:** *z possible at all? Is there any place for a company to care about behaving in a moral way when, according to its definition, it should multiply the profit for the stakeholders? I've already discussed the problem in other interviews but I'm curious what a financialist has to say in this matter.*

**RT:** Basically, a privately-owned company is free to do whatever it wants, whereas, in publicly-held companies, you owe an obligation to the shareholders as the money is not yours to spend. I think CSR is good and possible when it is able to both pursue worthy goals and, at the same time, bring profit to the company.

**JŚ:** *One may argue that it is not CSR any more, just another form of conducting business...*

**RT:** Still, I consider it the best solutions both for the company, itself, and for the other actors that get involved, such as the employees or the environment.

At my own company, we used to spend tens of thousands of dollars on helping small businesses in South and Central America, simply because we cared and, once we obtained the possibility of helping them, we wanted to do something that would make us feel good about what we were doing in our lives. Later on, this might have actually proved profitable because the local big business owners also cared for the microeconomy in the area and, while working on helping the smaller enterprises, we got to meet them on less formal, different occasions than talking about their business. However, we didn't know at the time that our "do-gooding" work would turn out to have positive effects at the larger, strictly business level... Our intentions were pure, so to speak. But, although we never touched the investors' money while

doing this and only used the capital that really belonged to ourselves, some of our advisory board members felt that we were wasting the time that should have been used in a different way.

I'm circling around your question now because I don't like the answer I'm about to give you. Pure CSR is very doubtful and if it's someone else's money you're doing it with, not your own, it shouldn't exist...

**JŚ:** *...Obviously, unless the owners, themselves, would want you to spend their money in such a way.*

**RT:** Of course. But then another question arises: how do you know that? Imagine a company with fifty thousand shareholders of which forty thousand want you to spend the money on helping small agriculture whereas the remaining ten thousand say: "What has that got to do with me?" Are you morally entitled to spend ten thousand people's money when it's their and not yours? I don't really think so.

**JŚ:** *I get an impression that CSR is closely related with the issue of companies and religious motivation. Do you think it is possible for religion to influence business on a large scale?*

**RT:** This is a question I've been wrestling with for over twenty years. The sad answer is that it doesn't really work. Unfortunately. My company's board consisted of members of various religions, all of whom wanted to do some good in the world. That's why, e. g. we started a teaching program in Africa on the management of new, mostly locally-owned, minority businesses we were helping to organize. Our goal was to make local people familiar with efficient ways of conducting business, of how to think about it and analyze it. The program proved to be time-consuming beyond all reason and we spent hundreds of hours on the job. No wonder the advisory board members got impatient and started to ask about the benefits of this local "empowerment" work to the company, itself, while here we were, striving to do something that really should've been done by the Swiss, Dutch or Swedish Aid.

My friend, a head of a big US private equity firm, who is also religious, calls this kind of involvement "a mixed agenda". Taking my experience into account, it cannot be really applied.

**JŚ:** *Did the program in Africa succeed?*

**RT:** On the level of individual local companies with whose management we were working, of course, yes. But then you have to consider what economists call the "opportunity costs",

meaning, what other things could we have been doing at that very time but were not. The opportunity costs of doing good are unbelievably high.<sup>1</sup>

**JŚ:** *To lighten up a bit – a question from a different area. You studied at Yale; can you objectively assess the standard of the famous university? Is it really as good as it is said to be?*

**RT:** Yale is an excellent place. It's relatively small, hence, you can really interact with your most senior professors instead of only with a young student assistant. The people working there love to teach and the standard of the courses is extremely high. However, I am of the opinion that nobody should go there unless he is at least twenty eight, twenty nine years old because only with a certain level of experience and knowledge of what is really important to you, can you appreciate the opportunities the university is giving and maximize what you get out of the environment.

The finance world has an interesting way of handling this maturity dilemma. Big corporations accept people straight after college and get them to work as slaves, seventy, eighty hours a week. In between, the young people really learn how to do financial analysis, they learn the special way of thinking which, with finance, is eighty percent of success. After about five years spent in this way, one really acquires a sense of what he wants to do, what is boring and what he would be good at. Equipped with this precious kind of knowledge one may make a conscious decision if he wants to pursue financial education in the academic form and then come back to the company in a different capacity.

**JŚ:** *Speaking of financial matters and the ways of conducting business, is there anything special about how, from the economical standpoint, the rich Middle East countries are being run? Take Dubai for instance... We constantly hear of the building of new islands on its coast where whole agglomerations are created from scratch, not to mention investments in the manner of Burj Al Arab. Of course, they have the natural resources but I was wondering if there is anything more to it?*

**RT:** All of Dubai's money comes from oil but the young sultan Sheikh Mohamed or "Big Mo", as the Westerners call him not to his face, is a very forward-thinking man. He is aware of the fact that someday the oil will run out. Therefore, it is necessary now to use the money in a cleverly prudent way in order to diversify economy. Dubai is now going through a very conscious process, similar to the one that took place in Singapore a cou-

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<sup>1</sup>For comparison, see: discussion on legal education with Sarah Duggin ( "We ought to let companies be socially liable!" *An interview with Sarah Duggin*, p. 27-28) and with Leah Wortham (*A nation held together by laws. An interview with Leah Wortham*, p. 56-57)

ple of years before. Unfortunately, it does not have the Singapore's respect for education that resembles the Chinese-Confucius model and also other issues, like security, tend to appear, but basically Dubai's government is introducing the right policies.

**JŚ:** *I've heard that it's characteristic for the Middle East to conduct business in a family sort of way...*

**RT:** ...They run whole countries in a family sort of way!

**JŚ:** *It seems to work there, doesn't it?*

**RT:** It is a very effective method at the start, when you are trying to get things going for the first time. It is then good to just have very few people who are making the important decisions and creating a sound vision. As an enterprise gets bigger, a completely new system has to be applied. Dubai is not at that point yet. Sheikh Mo and his brothers still manage to run almost everything themselves but they know that, some day, it won't be possible any more.

**JŚ:** *Moving back to the USA and into your particular area of specialization, could you briefly describe the origins of the securitization system in your country?*

**RT:** It all began with the central banking regulators called the Basel Group. The name is connected with the fact that their seat at the Bank of International Settlement that coordinates among individual countries' central banks their decisions on regulatory policy questions, is in Basel, Switzerland. It was they who set the requirement that banks have to have a certain amount of capital for a given amount of assets. The capital has to be sterilized – put away as a loss reserve – and cannot be used for normal money-making operations such as lending, so that, in the worst case scenario of a loan's collapse, this amount will be immediately available to cover the loss when it happens. This capital is not producing income (only during the last quarter's financial crisis did the US's Federal Reserve Bank begin paying banks' interest for the first time on the loss provisions which they were required to keep at the "Fed" as their Basel regulatory capital); it's just a cushion against loss. That is also what prevents the depositors from getting nervous and drawing all their money every time the bank gets in trouble.

In late '70s, the regulators got worried about a bunch of loan assets going bankrupt and then, all of a sudden, bad things started to happen. There was the Middle East embargo on the USA, prices went up at a great speed, interest rates and unemployment in the States went up to twenty percent, inflation went up to over twenty percent, to get gas you had to queue from like three, four in the morning... it was all a mess. The banks started to get into trouble, as they couldn't raise new capital without selling their shares



at a reduced value, which, of course, they hated. At that point Lewis Ranieri of Salomon Bros. came up with an idea that, during the difficult economic situation, when lots of people stopped paying back their loans, the banks don't really have to raise new capital if, instead, they reduce the assets so as to keep in line with the Basil standards. And this, reducing assets on the balance sheet by securitization rather than having to raise new capital in a distressed market to meet the Basel capital-to-asset regulatory standards, proved to be the solution.

**JŚ:** *An interesting change in the US credit granting can be observed with respect to the housing policy. It was always considered a good thing that people have their own homes and, accordingly, the amount of equity capital needed as an input to obtain the housing loan diminished over the years up to a point where no starting capital was necessary at all. What, in your opinion, should be the policy now?*

**RT:** Twenty percent equity... People need a strong incentive not to walk away from the property. If they have invested some of their money in it, they will be inclined to take better care of it. If they have nothing to lose, there is nothing at stake for them; it's all somebody else's money. That creates a "moral hazard" not to continue paying on their mortgage if their house loses value by more than the diminished amount of their equity.

The mid to late '90s policy of a minimal down payment (rather than the formerly customary 20%) was a social idea, not an economic one. The bigger question here could be whether you can ever decide economic issues based on social policy. The answer is that, however well motivated it is, it doesn't really work. There are now people who own houses although they shouldn't, not for moral but economic reasons. They are simply not in a position to own them. Nowadays, the capital requirement in the USA is going up and some estimations are that it will reach as high as twenty five percent.

**JŚ:** *Let's move on to the field of credit default swaps for a while. Credit default swaps are a financial instrument which allows the risk transfer from the original party to the contract to a third party. The "buyer" pays periodically to the "seller" in exchange for the right to a payoff in case of the debtor's default. How is it possible that, in some instances, upon insuring only the interest, the one who is supposed to bear the risk is also obliged to pay the principle when the maturity date comes?*

**RT:** It's all contractual. The problem is the system's uncertainty – nobody knows how many different kinds of contracts are out there. When the default swaps started, the practice was, don't ask me why, to insure the full principle although what the buyer really cared about was the interest flow in the next couple of years as the sum was usually not due for a long time. There are hundreds of thousands of contracts shaped solely by the will

of the parties and nobody seems to have any idea to what total, notional (principal) value they amount to and how it should be regulated.

**JŚ:** *The solution then would probably be to create one common, comprehensive system of those instruments.*

**RT:** Absolutely. That's what the Federal Reserve is trying to encourage financial institutions who buy and sell these "CDSs" to do just now by indicating that, no matter the content, there should be one, standardized contract in usage.

Another thing that is closely connected to the credit default swaps is the so called netting of capital owed by each of the two parties to one another, in order to protect the regulatory liquidity of banks. Say, I have a default swap with Deutsche Bank, which owns an obligation to me, depending on the payment of the principal by a third party on January 1, 2016. I owe Deutsche Bank the swap equivalent in 2018. The problem with netting is that whichever party receives the money first, the second party is at risk for those two years that the first party will go bankrupt. Nobody thought about it earlier because there was the interbank loan market and big institutions could borrow from it through central banks.

Last summer, all of sudden, first in England and then partially in the US, the banks just ceased this practice when they began getting worried that they might not be able to get their money back from another bank to whom they made an overnight interbank loan. It then became obvious that it is well possible for a big bank to go into regulatory insolvency which basically means that the bank possesses assets which should be able to sell and turn into regulatory "capital", but in today's distressed market, it cannot transfer them to cash at the very moment. Actually, such a bank is illiquid but not insolvent. The regulators now are thinking about changing the definition of regulatory insolvency for it to be more long-term and not to encompass the situations of being illiquid for an hour or one day.

**JŚ:** *That seems reasonable enough. Are there any consequences of labeling a bank as regulatory insolvent?*

**RT:** It has to shut down! That's exactly what happened in Britain. When the banks couldn't borrow the money from one another to fund their obligations, their regulatory solvency became immediately threatened. In the banks' world, it is normal that the liquidity line will rise and fall and there will be many times when a bank will be temporarily short on cash. Regulatory insolvency implies that, if the bank cannot borrow the money overnight to have it ready the next day, it should be closed. This is not the true economic reality, so the relevant bank regulatory accounting rule has got to change as now there's

really no way for the regulators to say how much money has to be pumped into the system to sustain liquidity.

**JŚ:** *Is that what happened in Argentina? All the people wanted their money back at once and the banks ran out of cash?*

**RT:** The question of regulatory insolvency is one that comes to being at the level of an individual institution. What happened in Argentina was that the country, rather than any one single individual bank, was about to lose the ability to pay its obligations in dollars and Mr. Cavallo, the economy minister, circled about freezing people's dollar bank accounts. When the word started spreading in the street that the government fears that there is an insufficient amount of dollars to support the amount of peso, the people turned up at the banks' counters asking for dollars instead of pesos, thinking that the next day they will be able to trade the dollars for pesos at a great advantage. This appeared to be a self-fulfilling prophecy and the banks really ran out of dollars, although, normally, they wouldn't have. The bank accounts were frozen and people panicked. The ironic thing was that, mostly, people had money, they just couldn't get it out of the banks.

When, afterwards, everything unfroze again the value of peso comparing to the dollar was something about four to one. The consequences were awful... Middle class women were forced to go on the streets as prostitutes because this was the only way left to feed the children. A new profession of "ragpickers" developed and the whole families would do that after dark. I was there at the time and the police warned me that it's not safe for me to go on the streets because of all the people there. I asked: "Who are those people? Are they criminals?" "No", the police said, "there are just poor people."

Argentina is a complicated story. It is sad, because the middle class there is so well educated, which gives it the country an extraordinary national potential. However, the system was not transparent, the ethics of the country's business culture were not commensurate with their intellectual quality, and the courts and the privatization system was widely seen as having been completely corrupted. There was no confidence in the institutions and, even though, at the beginning, the dollar was equivalent to peso, people feared a breakdown of the currency followed by an outburst of panic. What is more, Cavallo wanted to maintain a sound peso at all costs and never let it inflate in the natural way which would maintain what economists call the equilibrium national exchange rate. The result was that there was too much import because the dollar was cheap and too little export because the peso was too expensive. Everybody knew the system was artificial and that, at some point, it would crash. What was mostly lacking in Argentina as especially local investors perceived, was the honest business environment.

**JŚ:** *When setting up a securitization system in a country that has never had it before, one has to take into account not only financial matters but also the specificity of the environment in which one is about to work. You were part of a group that was requested and invited to create the basic legislative and regulatory rules of the securitization in Chile. What country-related elements did you have to consider while on the job?*

**RT:** Mainly policy issues, e. g. maintaining the loan servicing human relation between the borrower and the originating lender of that borrower's loan, if the lender sold the loan into the investor markets. From the national point of view, it was important that many people got loans. From the financial standpoint, there also had to be provided means to get as much as possible of the loan repaid, once the borrower got into trouble. At the same time, the seller had to have enough incentive not to turn away from the borrower by repossessing the home, rather than doing a "workout" with the borrower, the moment some difficulties appeared.

I remember when, after arriving in Chile, the Executive branch was telling me the process of creating the system is going to take no more than six months while the head of the Chilean securities commission pulled me aside and said, "Rick, three years." We were expected to approach Chile's Congress and explain the adopted solutions so that the originating lender could always quickly step in and work out the troubled loan with the individual borrower, if something started to go wrong. We needed to get the local people to become comfortable with the social policy of what was happening. Shortly: process versus substance. All the key actors that might be involved later on in the running of the system had to be made aware of what the changes would mean operationally, at the level of individual borrowing families, once their home loan had been sold to someone else besides the bank they knew and which knew them.

For example, one change was on the legal question of obtaining the borrower's consent before transferring the loan. In Chile, just as in Poland, such consent was obligatory but you obviously cannot securitize hundreds of mortgages if you have to have consents from all the individuals. In the end, we managed to get rid of the condition (the requirement for individual consent by the borrower before his lender could sell his loan to investors and get the cash back to use on another new loan), provided that the borrower could always return to the original creditor and work out the individual problems with him. In Chile, their Congress and their regulators very wisely required that original lender remain the "servicer" and maintain the human relationship with the borrower even after the lender had sold the loan.

**JŚ:** *A compromise?*

**RT:** Yes.

**JŚ:** *What did your job in Chile look like on the day-to-day basis? What was the very first thing you did after getting there?*

**RT:** By way of a happy accident I hadn't planned on and thanks to a local friend, I got a Chilean serious girlfriend! And believe it or not, it really helped! I learned the language very quickly, I stayed in the country for the weekends, I got to see very nice and interesting local people, who had nothing to do with my business; they were kind enough to explain many things to me in depth about the culture and history of Chile and to teach me, and after a while, I was seen as one of the locals... and this was the small thing that gave both me, and some of the Chilean government people I was working with, confidence (as well as a lot of amusement).

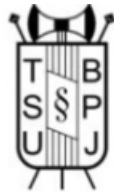
Doing business has much to do with the atmosphere. Instead of being formal in an office I used to turn up for coffee or be invited to a banking executive's house for lunch, where we could really talk things over without twenty bureaucrats peering over our shoulder. In such circumstances, you are not embarrassed to ask questions that you think might make you look ridiculous and, additionally, this way is simply quicker. What I learned there and what the Americans scarcely think about is the fact that informal set of interactions is fifty one percent of getting things done. Especially in a country where they are not used to dealing with the outsiders. Say what you may, but Chile is on the other side of the world, and geographical distance still does create some difficulty in getting past the social distance! Easy, informal access is the key to success for both business parties, but you have to genuinely like being in a particular country for it to work.

**JŚ:** *Considering everything that was said here about the financial instruments, would you agree with what Warren Buffett, an investor, philanthropist and CEO of Berkshire Hathaway said about derivatives, namely, that they are a deadly, financial weapon of mass destruction?*

**RT:** Not inevitably, and certainly not all kinds of derivatives. But the unhedged ones, in particular, those in which a trader is just speculating on some outcome without having any underlying risk exposure which he is hedging by the derivative can well become such a weapon, if not properly risk managed by the trader's institution and by regulators.

## “...BUILDING A PLANE WHILE FLYING...”

*An interview with Eric Hirschhorn*



Eric Hirschhorn graduated from the University of Chicago and from the Columbia University School of Law, where he was a Harlan Fiske Stone Scholar. He has been a lawyer for four decades. His main areas of expertise encompass international law, professional responsibility as well as litigation involving cases with several foreign governments and regulatory matters before the departments of Commerce, Treasury, State, Defense, and Homeland Security.

As deputy assistant secretary for export administration at the U.S. Department of Commerce (1980-81), Mr. Hirschhorn headed the organization now known as the Bureau of Industry and Security, dealing with anti-boycott compliance and export controls. During Jimmy Carter's presidency he also worked on reorganizing the U.S. Government's international trade, public diplomacy, and foreign assistance functions. Since 1986, he has served as executive secretary of the Industry Coalition on Technology Transfer.

Mr. Hirschhorn has been deeply involved also in the ethical aspects of practicing law. He formerly served as a member, vice chair, and chair of the D.C. Bar Legal Ethics Committee and, at present, is chair of the D.C. Bar Rules of Professional Conduct Review Committee, which recommends changes in the D.C. Rules of Professional Conduct.

He is the author of *The Export Control and Embargo Handbook*. His other publications include "Controls on Exports." in *Law and Practice of United States Regulation of International Trade* and "Advance Waivers of Conflicts of Interest." in *The Washington Lawyer*.

Mr. Hirschhorn agreed to an interview for the American Law School Program during his short stay in Cracow in July 2008. We talked about law, US elections, budget management, trade restrictions and attorney-client relationship. I found it surprising to discover that

nuclear power and lobbying doesn't seem so black and white if one looks at them from a slightly different perspective. My talker's accurate reflections on practical matters would constitute a tremendous input to the learning schedule of every law school in Poland.

**Joanna Śliwa:** *For a start, let's talk about your experience with learning the law. Did you, yourself, have many types of practical classes like moot courts or law clinics?*

**Eric Hirschhorn:** Actually, no, although it's been quite a while since I went to law school – I graduated almost forty years ago. I say sometimes that the only thing I've been taught there was to argue and brief cases in the appellate court which is something you'd probably do once a year. While I was in law school, I worked for Legal Aid, the public system providing legal help to poor people but this was just an additional job I did part-time. It was a great experience but there was not much teaching going on, you just did what the lawyers needed to have done. Therefore, it's been great to see the rise of the clinics in the last twenty years. I enjoyed law school very much – as opposed to some people – but the truth is that you really learn law in practice.

**JŚ:** *There are some critical voices, indicating that the clinic programs, successful as they are, do not have much impact because they are not compulsory and, thus, it is actually possible to graduate from law school without any practical experience. Would you make those kinds of courses, or at least some of them, obligatory if you had the chance to change something in the US legal education?*

**EH:** I think that would be a good idea. Practical classes are just as important as regular, analytical courses. Perhaps not everybody would have to take the same class – it would be better to have a choice among the clinic programs, but they should definitely constitute at least a quarter of the legal education. The first client I ever had was Puerto Rican and didn't speak English at all. Nevertheless, she knew more about what was going to happen in her case than I did and that's a sad summary to make about three years spent in a fancy law school.

**JŚ:** *I think this is exactly the problem with the Polish teaching system. As far as law goes, you may never say that you've learned it all and it's no use trying to. It's better to see how the problems are solved than to learn the solutions by heart. Law students sometimes wait with starting practice until they are in their fourth or even fifth year in order to be sure they have the right amount of knowledge. At that time, it's just too late to make full use of the experience they're getting.*

**EH:** Still, once you start practicing, you learn very quickly and, as you said, you never learn it all, even while working. I practice law in several different areas and every day I need to look things up, even though I know the respective areas pretty well by now.

Another reflection based on my own legal studies would be that you graduate with a sense that the law is what governs; if you know what the law is, you just fit in the facts and you get a ready, clear-cut solution. That's not really how it works. It's usually the facts that really matter! If they speak for you, most courts will find a way to rule in your favor. Frankly speaking, this is the key to winning a case but no one in law school ever taught me that, I had to figure it out myself.

One more thing which could be changed is the attitude that, if you find "the law," there it is. In Washington, at least, we spend a lot of time trying to get the agencies and then the Congress to change the law, if it's contrary to our clients' interests. The rigid approach of "Oh, that's the law, let's just abide by it." does a lot of damage.

**JŚ:** *Sometimes it may even be easier to change a bad law than to try to comply with it.*

**EH:** Correct. Of course, the law didn't get that way by accident. Every now and then you come across some obvious cases where you notice that this simply doesn't make sense and the agency, after taking a look at it, would say: "We know what you mean." but mostly you will hear: "It makes sense, you just don't get it." In those situations, there might have been some other forces, which wanted the law this way, at work.

**JŚ:** *Speaking of those forces, I'm curious about your opinion on lobbying. I've read two contradicting statements about this specific topic. One said that lobbying has a huge potential for corruption and the other that it is a natural and healthy way in which a group of people is becoming more aware of its own interests than the rest of the society. Which opinion do you consider closer to truth?*

**EH:** I think they're both true. If you step back and look at law in any country as an overall, you'll come to a conclusion that it is designed, more or less, to protect the status quo. In order to change it, you have to go and convince somebody. We have a clause in the First Amendment that protects lobbying – the right to petition for redress of grievances. The question is, what's the difference between you as a citizen, writing a letter to a Congressman saying that a particular law is bad and doing that by US steel company, which makes contributions to political campaigns and which knows the Congressmen and Senators. In a sense, this is the same thing. What may be corrupt about it is that people with money have more advantage than the rest but, on the other hand, that's just how it works in a society: the rich ones have big cars and houses and play golf with the judges. It's not exactly fair but, still, it may also be viewed as a way of bringing about change.



## Eric Hirschhorn - "...Building a plane while Flying..."

Of course, it also can get utterly corrupt just as our presidential campaigns. You get elected through raising money and who has the money? Those who already are very influential and powerful and who want to reduce taxes and get rid of social programs which they deem unnecessary. There's this old song that goes like this: "The rich get richer and the poor get poorer..." and the lobbying system often reflects that. However, since the distinction between the rich and the poor will always exist, I don't think you can do much about it.

**JŚ:** *Often, lobbying is invoked not with respect to its moral assessment but in order to make the political opponents look bad in the eyes of the society.*

**EH:** Barack Obama says that he will never take money from lobbyists and he won't even let lobbyists raise money for him because, he maintains, there's corruption connected with lobbying. In truth, lobbying is not really inherently corrupt. The American Civil Liberties Union has lobbyists – does it automatically mean they're doing a nasty job? I am a great fan of Obama, and my wife and I have been supporting him for a long time, but I find it a little hypocritical not to take money from lobbyists but perhaps take it from the lobbyists' wives or grown up children. As you said, it's more of a political slogan to say that there won't be any lobbyists in his administration. There's going to be plenty of them, just as they were in all the other administrations.

**JŚ:** *Do you think that this slogan helped Obama defeat Hillary Clinton?*

**EH:** In my opinion Obama is much more inspiring than Hillary Clinton although they're both extremely smart. He is just a better politician than she is.

**JŚ:** *Who do you think will win the elections?*

**EH:** If you're asking about my personal preferences, I hope it's Obama. However, there's still the racism issue, whose level is hard to judge. I think that the people who won't vote for him because he's black mostly won't be Democratic voters anyway. The war in Iraq and generally the very bad job that Bush has done is something that McCain has to carry on with himself and that's a heavy load. Also, age is an important factor – some people might not vote for McCain simply because he's old. Apart from that, I don't think he is so good on his feet either. Nevertheless, a lot can happen in four months and some external factors could play a big role. If another terrorists' attack took place, people might want McCain to protect them, instead of having a young, less experienced guy in charge.

**JŚ:** *Do you think racism is still such an influential problem in the USA?*

**EH:** Certainly, the issue has decreased greatly over the last thirty years... How old are you?

## Eric Hirschhorn - "...Building a plane while Flying..."

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**JŚ:** *Twenty three.*

**EH:** My children are about the same age and they see no color, it's not part of their generation's consciousness, although it is a part of mine. I hope those young people will be out there voting more than usual this time and that the black voters will do the same. I also think that people are just sick of the Republicans and are willing to take their chances but you can never really be sure until it actually happens<sup>1</sup>.

**JŚ:** *I know it's not only the politicians that are elected by way of a campaign involving fund-raising but it's also the same with judges in some states. What do you think of that?*

**EH:** I'm not crazy about it. Still, a judge is going to be political one way or another, you cannot quite avoid it. If he is not elected in a campaign then a governor or a senator will appoint him. Isn't that political? Therefore, I'm not sure if the elections are such bad a choice. At least it's still democracy.

**JŚ:** *Are there any better options?*

**EH:** The thing is that, once elected, the judges are usually not bothered and don't encounter many problems with re-election. In some states you have retention elections, meaning that at the end of the term a judge doesn't have to run against another candidate as the first vote is to assess if the judge should stay in. More often than not he would be retained. Another solution would be simply to have them for life, whether appointed or elected – just like federal judges.

One thing is sure, if there's corruption, it's much more visible in a judge's campaign than in any other. Promising to lock up anybody who breaks the law is still a very popular move with the candidates.

**JŚ:** *Coming back to the main topic, what is now the scope of the term "lobbyists"? I read that in 2004 there was a proposition to widen it so that it would encompass every petition, also that from a private party, to any member of the Congress. Eventually, however, the term became less broad.*

**EH:** "Lobbying" comes from standing in queues outside Congressmen's offices in order to be able to talk to them. The definition has been changed a couple of times but this didn't really influence the phenomenon itself. It's really a very old profession and an old problem. There is some correspondence of Daniel Webster, a famous

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<sup>1</sup> For comparison, see: discussion on the elections' outcome with Jay Wexler (*Free exercise, expensive gas. An interview with Jay Wexler*, p. 91).

XIX century Senator and a lawyer, to his bank saying: "Your retainer is late." Nowadays, it would be unthinkable for such a politician to get a retainer from a bank. Of course, it can get corrupt when the lobbyists go behind closed doors and write the legislation together with the members of the Congress but, theoretically, anybody could do that. It's the financial system where the Congressmen and Senators have to raise money to run for office that's at the core of the corruption issue. A person who donated one hundred thousand dollars for your campaign and wants to have the law changed might get different treatment than someone that comes in from the street.

**JŚ:** *Can you think of any solution to that?*

**EH:** There are a couple of available solutions, such as a shorter campaign or public financing. I just don't know how effective and practical they would prove. The First Amendment has been ruled to enable you to spend as much of your private money on your own campaign as you want so, without a change in the Constitution or a definite shift in the views of the Supreme Court, I don't think that much could be done. The sole shortening of the campaign would be very problematic. The First Amendment, again, doesn't allow stopping Obama from saying in January 2007 that he's going to run for President in November 2008. Respectively, the campaign has been going on for seventeen months now and there are still four more months to go. It's terrible! I saw Obama some time ago: he looked completely exhausted and I told him so. He answered: "Well, what am I supposed to do?!" I just hope that, being so tired, he won't make any mistake.

**JŚ:** *Could you explain what "grass-root lobbying" means?*

**EH:** Instead of hiring Washington lawyers to do the job you convince local people to write letters and, e.g. go to see their Congressmen.

**JŚ:** *What are the legal conditions that the lobbyists need to comply with?*

**EH:** They have to register and state who they represent. They also need to report their contacts with the Congressmen and Senators and, theoretically, set forth what they have been talking about, but this last one can be kept pretty general. And, of course, the money! It should be disclosed how much money the lobbyists get for their lobbying. All this information may be found in the public records, free for everybody to check. If you don't work for anybody and don't get paid, you needn't register as a lobbyist or file lobbying reports. Representing yourself is not subject to any conditions.

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**JŚ:** *I know that in your legal practice you also deal with some controversial, ethical issues. What is your opinion on the problem of the attorney-client privilege and the three respective memoranda: Holder's, Thompson's and McNulty's? The last memorandum was supposed to clear the air but actually it is said to have created even more confusion.*

**EH:** We even call it the McNothing memorandum! However, it's not legislation but the Department of Justice's policy which indicates to a company under suspicion that, if it renounces the attorney-client privilege of itself and its workers, if it doesn't pay for the defense lawyers and basically turns the employees down, it will be treated better. Otherwise, it will be deemed to be uncooperative and will be subjected to the most severe penalties. In the KPMG case, Judge Kaplan decided that the kind of situations where the employees are deprived of their right to counsel is unconstitutional, however the particular problem of the attorney-client privilege is not that clear-cut. It may or may not comprise a constitutional privilege, while it is for sure an evidentiary one and, therefore, of a slightly lower rank with a couple of exceptions. It's also not as broad as people tend to think. The privilege does not encompass all the things said between a client and a lawyer. First, there has to be a request for legal advice and the rendering of legal advice. If you're only getting business advice, it's not confidential. By the same token, if the communication concerns an ongoing crime or fraud, the protection doesn't apply either. Still, it is quite strong a right.

Also, one needs to be very careful not to get into a conflict of interests while representing both the employee and the company. It's not as if there's bound to be something wrong with that – the employee may have really nothing to do with the issue at stake and serve just as a witness so that there's no adversity between the parties. Nevertheless, it may suddenly turn out that an employee, who seemed just a bystander, is actually deeply involved in the case. That's the reason why, at our law firm, we try to avoid such ambiguous situations of possible conflict which I describe as having one foot on the boat and one on the dock. It goes without saying that it's a very difficult position.

Yet another important thing is the very broad corporate criminal responsibility in the USA. Just about everything an employee does with the intention of benefit for the company, even if it clearly violates all the company's policies, can constitute the basis for corporate liability. I've been involved in negotiations with prosecutors when I would say: "Look, the guy was a rogue, he was all on his own, the company

had nothing to do with it..." and the prosecutor would ask: "Did the company take the revenue? Yes? Well, then the company will take the blame".

**JŚ:** *Bearing in mind Arthur Andersen's example, are you of the opinion that companies as a whole should be sued?*

**EH:** I think there should be a possibility to go after the corporations. In some of them one can really encounter a culture of corruption that goes all the way to the top. What one hopes will happen in such situations is that the stockholders of the respective business will wake up and sue the management. Consequently, a question arises, how easy should it be for the stockholders to do this? The answer is, I think, that it should be pretty easy. It's the stockholders who are the owners of the company, not the managers, but the latter tend to forget that. We've seen a lot of those corporate corruption cases where the management runs the business into the ground and, in the meantime, gets itself shower curtains for six thousand dollars.<sup>2</sup>

**JŚ:** *Staying in the corporate area, together with Leah Wortham you wrote an article where you describe the outcomes of Sarbanes-Oxley Act and the policy of Corporate Social Initiative with respect to the lawyer-client relationship. Do the two elements pose any threats for those who seek legal counsel?*

**EH:** SOX does tend to put the lawyer in a position of a gatekeeper much more than he used to be and there is a tension between this act and the attorney-client privilege. Indeed, some bars like the D.C. Bar, in which both Leah and I were very active at the time of drafting the new rules, don't go as far as SOX or as far as the Securities and Exchange Commission would like. SOX basically introduces a kind of independent responsibility for the lawyers who can no longer defend themselves by saying that the client told them that two plus two is five and they saw no reason to question that. However, I think that, on the whole, the gatekeeper initiative with respect to financial issues is the one where lawyers have been left out. The Department of Justice and the Department of Treasury are reluctant to burden lawyers with obligations while banks, casinos and all kinds of institutions who might handle suspected transactions have to report them. Lawyers are required to report cash transactions of ten thousand dollars or more, but they needn't say what the nature of their representation is. Thus, their duty is ver when such restrictive

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<sup>2</sup> For comparison, see: discussion on confidentiality with Leah Wortham (*A nation held together by laws. An interview with Leah Wortham*, p. 45-48) and with Sarah Duggin (*"We ought to let companies be socially liable!" An interview with Sarah Duggin.*, p. 30-32).

regulations might be applied to lawyers and his answer was: "Not before I retire". The tradition and the Bar in the US is simply too strong for that.

**JŚ:** *Moving on to your book, *Export Control and Embargo Handbook*, has the US nuclear policy been significantly modified following changes in the official bodies and basic regulations?*

**EH:** It all started with the 1946 and then the 1954 Acts, which are still the fundamental legislation today, although many changes were introduced in 1978 when the approach was tightened up. Probably the restrictions strongly supported by Senator Glenn from Ohio went too far at that time. The proliferation of nuclear weapons is one thing but it needs to be taken into account that the same technology is used for nuclear power plants, which are basically a bomb going off very slowly with graphite rods to control the chain reaction. Nuclear power is indeed dangerous, thus the respective controversies in the USA, but so is burning coal! The scientists are even assessing that many more people are dying of fossil fuels coming from oil and coal than from nuclear materials.

I think that now people are starting to reconsider the issue despite being still scared of it – partially because radiation is invisible. Of course, it's nicer to get the energy from the waterfalls or sun but not everywhere can you do it and that technology is not so environment-friendly either; building solar panels requires much energy and materials. Everything has its drawback. I think the answer to the problem, at least to some extent, would be to stop wasting so much energy. Senator Obama has spent much time talking about those issues. Natural or, as they call it, renewable energy is not enough to support our industrial society, hence, we have to find some alternative sources. If it's not coal then most probably it would be nuclear power, we just need to figure out the safest way to use it.

**JŚ:** *Your book relates widely also to international security matters. Could you explain the procedure of putting an embargo on a country?*

**EH:** The International Emergency Economic Powers Act, which dates back to the 1970s, entitles the President to declare any emergency he deems necessary. This is a very broad, almost unlimited sort of power. Respectively, when the export control legislation ran out, the President declared an emergency due to the fact that the Congress hadn't yet passed a new law. In case of emergency the President may also put an embargo on a country and even seize its assets in the USA. At present, we have full embargos on Cuba, Sudan and Iran and a partial embargo on Burma. There are also limited embargos on Syria and North Korea, meaning that you need a license to send goods and technology but not services. Those limited embargos are very easy to impose and they cause many problems for

the business. If I have a contract, say, for ten years to supply country X with goods and after two years an embargo is introduced...

**JŚ:** *What do you do in such a situation?*

**EH:** Most of the time you have to accept a loss. What you may try to do, except when it is a case of North Korea, is to establish a subsidiary in e.g. Poland, which will be able to do business with the country X. Such a subsidiary still cannot send US goods to X but it may send French goods. We've adopted this amelioration following a strong push-back from European allies in the 1980s when we had put a ban on doing business with the Soviet Union with respect to the pipeline, because of Afghanistan. Therefore, the embargos instituted after 1982 exclude foreign subsidiaries as long as the parent isn't financing, approving or guaranteeing the transactions. However, what we are speaking about now are mostly "unilateral" embargoes, meaning that other countries' exporters may send their goods to country X without restrictions. This may be well compared to damming half of the river – it makes you feel as if you did something, but in reality, it doesn't have much effect.

**JŚ:** *The next question is more connected with your work at the Office of Management and Budget. Are earmarks, the money that Congress assigns directly to specific projects without the interference of agencies, still a bone of contention in the US economy?*

**EH:** There's always been tension between the Executive and Legislative branch in the USA. The Executive's rationale in connection to this topic is that money should go to projects conducted by the agencies and then they will decide on the assignment of the funds to the particular program employing their best professional knowledge, instead of an influential Senator building a bridge to nowhere for twenty million dollars. However, the Congress has a Constitutional right to legislate and appropriate money, despite the fact that a thousand earmarks might not be a beneficial thing for the State.

**JŚ:** *So, we have yet one more example of an ongoing battle between the Executive and the Legislative in the US.*

**EH:** Our Constitution was designed to make it difficult to get things done and, in that sense, it works well.

**JŚ:** *What is the supreme point of interest at the Office - management, budget or managing the budget?*

**EH:** It's the management of the budget that's the first and most important function of the Office. Given how many agencies there are in the federal government, you have to have someone who pulls it all together for the President. Subsequently, however, other

functions were added like federal contract compliance and reviewing new regulations so that they are consistent with the others. When Jimmy Carter was elected, he put a reorganization function into OMB – that’s where I worked, in the National Security, Intelligence and Foreign Affairs area. We managed to change some things: we moved part of the duties and foreign commercial service to the Commerce Department, we also tried to reorganize the Intelligence service to make it really strong but without much success – the Defense Department unceremoniously shuffled us out and closed the door.

Additionally, the Office does a very important job by way of rationalizing. If every agency got what they wanted, there wouldn’t be money left for anything else and the budget would be ten times bigger. Therefore, decisions need to be made on the broad financial issues, which are just as crucial as the policy questions.

Yet another big thing which I have already mentioned and which the Office has to handle is to centralize the legislation that comes from the various departments and agencies in order to be able to check whether it is consistent with the President’s policy. Of course, people still “go through the back door” sometimes, but at least their public statements should support the position of the President.

**JŚ:** *Did you like the job?*

**EH:** No. Mine was a new function when I started and it wasn’t given much support even within the Office of Management and Budget itself, which considered it too political for their neutral policy. Also, they didn’t like the additional management-reorganization tasks and wanted to stick to the budget. Nobody knew where we fit so it was a little like building a plane while flying it. It was very frustrating.

**JŚ:** *A job that you perhaps liked more was working for Bella Abzug. According to the information I gathered, she was a successful lawyer, opponent of Nixon and the Vietnam War, she did litigation for civil rights in the South and was one of the founders of the women’s movement. Apart from all that, she is said to be a terrific person. What did your job there looked like?*

**EH:** I was her legislative assistant so the job involved researching various legal issues like those connected with the War but also, e.g. with getting money for the New York subways. Going back to the beginning of our conversation and the role of facts in a lawyer’s job, it was mostly Bella who taught me that, if you’re right, there’s always a way and you should never assume something can’t be done until you’ve tried it. Actually, it’s surprising how true this is. Bella had a volcanic character which, at times, made her difficult to work with but she cared deeply for the really important topics and she was the boss



## **Eric Hirschhorn - "...Building a plane while Flying..."**

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that I probably learned most from. Another thing is that this knowledge came at a great cost – I've never worked so hard in my life as at that time, not even on Wall Street!

**JŚ:** *In Poland, we seem to have some significant problems with producing good law. Do you have any tips for efficient creation of a legislative framework?*

**EH:** The problem with the parliamentary system is that it's usually the same people who come up with the proposition of a new regulation and who then work on it. The law-making process is pretty straightforward. In the USA, on the other hand, it takes much time to cook up an act and many different people and committees are required to look at it, except, of course, for the emergency situations. If anything, the law is looked at for too long, but by the time this is finished, you are at least sure that everyone who had something to say about it, already did it. I think that most of the legislation problems are connected with the fact that law-making process takes place in a hurry, which leaves no opportunity for everyone who's potentially affected by it to improve it or at least comment on it. Nevertheless, it's not that our regulations are perfect, far from it, but usually instead of amending them or introducing new law, we have the courts or the agencies interpret the existing law and shift it a little one way or the other.

**JŚ:** *So, you find it beneficial that every person can place their comment with respect to the provisions that are being introduced?*

**EH:** I do, but at the same time it immensely slows the process down. Well, everything has its price.

## FREE EXERCISE, EXPENSIVE GAS

*An interview with Jay Wexler*



Jay Wexler is Associate Professor at Boston University School of Law. From February to July 2008 he stayed in Poland as a Fulbright Scholar, teaching a course on the U.S. Church-State law at the Jagiellonian University. During that time, he managed to bewitch the students with his extraordinary, slightly surrealistic sense of humor, profound and multi-dimensional knowledge of religious issues, as well as a very open and warm personality.

Prior to pursuing his law education, Jay Wexler studied Chinese philosophy and Japanese history and religion at Harvard University. He has worked at the very top of the United States' justice system by serving as a law clerk to Supreme Court Justice, Ruth Bader Ginsburg (July 1998–July 1999) and by carrying out the functions of an Attorney-Advisor at the U.S. Department of Justice (August 1999–June 2001). Apart from the matters of religion and state, he conducts courses on administrative, environmental and natural resources' law.

He has made several appearances on radio and television and was quoted in numerous American newspapers, including The New York Times and Chicago Tribune. In addition to his passion for the Far East, his broad interests encompass oil painting and writing fiction. So far, he has published over thirty short stories and humor pieces in various online and print journals.

Professor Wexler is now working on his first book which will concern the ongoing clashes between Church and State in the USA and will be based on interviews with participants of the most famous and influential Supreme Court cases from the First Amendment area.

You can find more information about Jay Wexler, together with a full list of his academic publications, broadcasts and a gallery of his paintings at [www.jaywex.com](http://www.jaywex.com).

**Joanna Śliwa:** *Have you ever read Harry Potter?*

**Jay Wexler:** No, I'm waiting for my son to start to read them, then I can keep up-to-date with him.

**JŚ:** *Do you know that the Catholic Church criticized the books? It seemed strange to me as the series actually promotes very Christian values.*

**JW:** Maybe the criticism explains its success. Probably, though, the funny round glasses had more to do with it.

**JŚ:** *You served as a Supreme Court law clerk to Ruth Bader Ginsburg. We've heard from our American Law School Professors she's got, quote, "these huge brains" but had to work twice as hard as the others trying to get on the bench, being both female and Jewish. What sort of person is she?*

**JW:** She certainly is unique! She's very quiet and... not always easy to understand because of the particular way in which she speaks: she makes a lot of long pauses so there's no way of telling whether she's finished. The pauses in the middle of the sentence can last up to two minutes so it's really strange to have an interview with her. I remember, once, there were these two cases with almost the same names: Agiular and Aguillard. Justice Ginsburg asked what I thought of the Aguilar case while I thought she wants to discuss Aguillard. Consequently, I talked about the latter for at least ten minutes. She never interrupted and only after I had finished my speech did she politely indicate that that was not what she meant. I think this gives a good idea about her personality.

Apart from that, she has her heart in the right place and, as far as I'm concerned, she makes correct decisions about most of the moral issues. She's very smart and doesn't really need the help of her law clerks – which is partially why the job there is so good. Of course, she reads thoroughly the opinions and memos given to her but she's very determined and usually knows upfront what she is going to do. She can be tough, too, when there is a need for it and gets annoyed by people who try to push their views through aggressively. Some judges like it when you tell them: "you're wrong" or "we shouldn't do it". Justice Ginsburg is not like that. You could certainly tell her your side and she would listen to you even if she didn't agree with you but you really could do that only once. While other judges would go down to their clerks and yell at them or argue some points, she would rather stay quietly in her room, talk to us over the phone and stay a bit remote.

**JŚ:** *What do you actually do as a law clerk?*

**JW:** In the Supreme Court, each Justice has four clerks, who divide among themselves the cases admitted throughout the year. Respectively, you get to work on twenty cases by way of writing a bench memo, about ten to twenty pages long, in which you research the issues, form your opinion and set forth your recommendations as to how the matters should be dealt with. You may also write some questions to be asked at the oral argument. At that point the Justice would scare you by buzzing you on the phone and asking you questions about the case.

The second thing to be done is drafting the opinion after the Justice has heard the case and provided you with an outline of his or her position. The draft travels back and forth between the clerk and the Justice, who makes some remarks and respective adjustments.

Additionally, the clerks work for the court as a whole. They get to sort out the petitions that come from people who plead for their case to be heard. The Supreme Court gets about seven thousand of those, out of which usually eighty to a hundred are accepted.

**JŚ:** *That's called the Cert pool, isn't it?*

**JW:** Exactly. A clerk needs to write five or six memos every week summarizing what the cases are about, what the parties say and, finally, recommending whether the court should take on a particular case or not.

**JŚ:** *So, it's not the clerks who get to decide on the acceptance of the cases? That would be a grave responsibility, wouldn't it?*

**JW:** Luckily, they just make recommendations. Obviously, a great number of cases will get rejected, as the Supreme Court only hears cases of a specific nature, for instance, those where the lower court are split on an issue or a where a federal statute gets into question.

**JŚ:** *How difficult is it to qualify a case for acceptance?*

**JW:** Most of the issues are obvious denials, very few are obvious accepts. I say the worst thing that can happen to a clerk is to recommend a case, have it accepted by the Supreme Court and then have the Court realize there is a small procedural issue that dismantles the whole business so that, in turn, the Supreme Court procedures need to be interrupted and the case has to be dismissed on the grounds of being improvidently granted, i.e., DIGging a case – Dismiss-Improvidently-Granted. Every year, the Court DIGgs a few cases and the thing you really don't want is to have your case handled this way.

**JŚ:** *A sort of a vocational death?*

**JW:** Within the Court's community, yes, it is quite embarrassing. Therefore, the safest practice is to deny every single case, which is what I mostly did, of course after reading each of them thoroughly. Deny, deny... *(Laughter)* The worst scenario then is that the case is granted hearing after all. When it was a close one, I would just say: "probably denied".

**JŚ:** *I read your unique New York Times article about the sense of humor in the Supreme Court and what I have learned is that Justice Scalia is sixteen times funnier than Justice Ginsburg. Despite that fact, or maybe because of it, they seem to like each other.*

**JW:** They really do! Their families even spend some holidays together. However, the point of that article was that none of the Justices is really funny!

**JŚ:** *That's not true! I think Justice Scalia is funny, much as I don't like his views.*

**JW:** Is he? Well, I don't really know... He certainly thinks he's funny. And he is probably the funniest of them all but I'm not sure that this means he's actually funny.

**JŚ:** *I loved the piece about Justice Thomas... How was it that you described him? Good, but... conservative?*

**JW:** I think I might have compared some of his ideas to those descending from the Dark Ages. But he is a good guy although his views on law are terrible. All the clerks consider him a very nice person and a really kind man. Due to the fact that he never talks at the oral arguments, some people think he's stupid but that's certainly not true. He just happens to have the wrong views, that's all. *(Laughter)*

**JŚ:** *Actually, his silence has become legendary by now.*

**JW:** When I was a clerk, he spoke once. We were all sitting there, during an argument and, suddenly, someone spoke. At first we were extremely confused as we didn't know who the voice belongs to; we've never heard it before! And not only did Justice Thomas ask a question but he started drilling the lawyer for about fifteen minutes. Something simply interested him very much.

**JŚ:** *You also worked as an Attorney-Advisor at the Department of Justice. Is it the closest you ever got to politics?*

**JW:** I suppose so... Except for the time in 2003 when I volunteered to make phone calls for John Kerry, trying to persuade people from Iowa to vote for him, but I don't suppose that that really counts.

I worked in the Department of Justice at the time when Clinton was leaving and Bush administration came in. The very first thing they set their minds and hearts to was undoing all the small things significant for their predecessors, such as, in particular, all the issued pardons and national monuments' building. So, you may just as well say that I saw some sides of politics. The funniest thing about it that I can remember was the meeting of the incoming Attorney General, one of the most important people of the United States at the time, John Ashcroft. We were all lined up to greet him and, when he came up to me, I introduced myself saying simply, "Jay Wexler". He shook my hand and said "Thank you!". It made no sense at all.

**JŚ:** *Am I correct in saying that you are also anti-George W. Bush? I got the idea from the fact that you moderated a Cambridge Forum discussion on impeaching him.*

**JW:** Well, I don't think we should really impeach George Bush, but I am certainly no fan of him and I can't wait until November to see him leave. It will be glorious.

**JŚ:** *Who do you think will win in the elections?*

**JW:** It's too early to make predictions. Let's just hope America doesn't turn out to be more racist than we think it is.

**JŚ:** *Surprisingly, these are almost exactly the same words Eric Hirschhorn used when I asked him about the elections' outcome.<sup>1</sup> I though the USA had left those days far behind.*

**JW:** The people who will probably decide on the ultimate result of November will be blue-collar workers from the middle of the country: Ohio, Pennsylvania, Missouri, who always tend to vote democrat because of their unions' position but who might be more racially biased than one wants to expect. I don't think they will vote for McCain but they simply might not vote at all. I would be really glad if they proved me wrong, though.

**JŚ:** *I was surprised to learn that, apart from your interest in the Church and State relations, you have also worked with environmental, security and insurance law... Actually, your résumé on the Web is quite impressive; you press the down-button and it goes on for about three minutes!*

**JW:** Isn't that obnoxious? I should definitely make it shorter. I still teach environmental law, which I find very interesting, although much different from the religious issues. The latter is a very out-of-statute sort of law while the former is strongly codified – it en-

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<sup>1</sup> See: "...Building a plane while flying.."An interview with Eric Hirschhorn., p. 78-79.

compasses two hundred and eight statutes! When one gets to talk about environmental law, it's always like this: how does section 43 part 2, little b, little 1 interact with the other parts of the respective statute? I must secretly admit that this approach also has a special kind of appeal for me.

As far as national security goes, I did some of that when I was working at the Department of Justice. Once, I dealt with a high security matter and, in order to make respective phone calls between the White House and DOJ, I needed to go to this futuristic, behind-giant-lead-door, impervious-to-nuclear-attack places. The door closes behind you making the weirdest sound and you are suddenly surrounded by sparkling TV screens. It was quite amazing. I also worked on an opinion concerning the use of force by the US President in Kosovo despite the lack of Congress's approval. The Executive branch does a lot in terms of reformulating and arguing, even though it doesn't take the outcomes to court that often.

**JŚ:** *You are the author of an article entitled *The uniqueness or non-uniqueness of environmental law*. Which of the two theses is true?*

**JW:** Environmental law is a little bit different from other types of law due to its specific topic and there are some people who think that, respectively, it should be treated in a different way. A famous piece of writing from Georgetown Law School embraces this approach. I do not agree with it and my article is a response to that position. When all is said and done, environmental law is just a branch of administrative law. It shouldn't be considered different from the judicial point of view and the means to decide a case from that area should be the same as any others. Of course, the field of law is specific and so would be the policy questions.

**JŚ:** *The title of yet another article of yours: *Technology and the revenge of unintended consequences* sounds very much Thoreau, would you agree?*

**JW:** Actually, I, myself, am a little like Thoreau; I don't own a cell phone... or a microwave for that matter. The article, which was written as a review of a book with the same title, describes how undertakings to promote health or regulate sub-healthy environment cause other, unpredictable side-effects. Take cigarette restrictions, a big thing in the US right now. The goal might be to reduce the number of smokers and help them kick the habit but it might just as well result mainly in rendering damage to the respective business entities which would move their activity to other places, e.g. China. Then, you have fifteen million people more smoking because of the enormous market scope at issue. The case is similar with getting rid of cloth diapers, the washing of which consumed much time and energy, in exchange for disposable ones. The latter, however,

damage the environment and take ages to decompose. This is also comparable to removing asbestos, the dangerous substance, from the walls of the buildings, by workers who stirred it and got infected themselves. Risk trade-offs, that's the short name for all those nuances.

**JŚ:** *Speaking of environmental and society matters, I understand that there was once an idea to slightly change the national parks in the USA by providing gym facilities. Why did you oppose to the idea?*

**JW:** I was really scared by it! The reason you go to a national park is to escape the city buzz with all its noise and people running about to get ahead in the rat race. You want peace in a park, you contemplate the nature and, I admit, it's nice to get exercise while doing that, but the latter simply isn't the most precious thing. What I thought would be very bad, was to have people go to a national park to run the marathon or try to climb the highest mountain faster than the others, which would change the parks into those competitive places where you do exactly the same things that happen in the city, only in a nicer atmosphere. It's not that I'm opposed to exercises in general or even to exercises in the parks, it's just that I don't think the government should set about pushing people to "get into shape" in places that are primarily designed for something else.

**JŚ:** *In addition to all your interests, you also write fiction. Did that help you in your law career?*

**JW:** Actually, it didn't. It was more likely to get me into trouble while I was finishing my law degree.

**JŚ:** *I notice that you are very media-friendly. I certainly had no difficulty with finding information for the interview. To be frank, you're all over the Internet! You also appear on radio, television and in the press. I consider that a very positive thing. Do you think lawyers should try to "tame the beast" and be on more speaking terms with the media?*

**JW:** I think that more different lawyers should do that. Only a few people make appearances and these are the same people over and over again; I'm sure it's the same in Poland. This ought to change as, generally, it's beneficial that lawyers explain things from their domain to non-lawyers. I certainly like to do it. I also have this book coming out next spring and I hope to be able to make some publicity for it.

**JŚ:** *I like the title: Free Exercise, Expensive Gas: a Church-State Road Trip.*

**JW:** The title is gone by now.



**JŚ:** *Why?!*

**JW:** The title is not up to me, it's up to the firm which publishes the book. I give them my hints, but still, they can decide otherwise. They are of the opinion that what I've proposed was too technical. While for a lawyer the phrase "free exercise" is common, maybe not everyone knows what it exactly means. The firm might have a point there.<sup>2</sup>

**JŚ:** *Have you already visited all those people you meant to interview for the book?*

**JW:** Yes!

**JŚ:** *What are your impressions? Who was the most interesting one?*

**JW:** The two Santaria priests I talked to were very interesting. Their religion requires sacrificing animals and they maintain there's nothing different between that and eating hamburgers, which I think they are right about. However, they get prosecuted, as everybody seems to want to prove them wrong. They've been carrying on this fight for religious freedom for over twenty years.

There was also the Amish guy... The Amish oppose all technology development and put much emphasis on the simplicity of life. We were having a really long and fascinating conversation about the core of the Amish religion and why it should be protected and, suddenly, I heard a familiar sound. "Sorry" said the Amish guy "that'll be my cell phone..."

**JŚ:** *Will the book be funny?*

**JW:** It's not written for the sole purpose of providing entertainment but, yes, it is meant to be funny at least at some points. Some of the really funny pieces were taken out by the editor, e.g. my painting of Justice Alito with a little bunny peeping over his shoulder. I'm going to place the painting on the Web, and make a reference in the book, anyway.

**JŚ:** *Continuing our discussion of religion, what is your position on the relationship between Church and State?*

**JW:** I believe in giving lots of freedom to religious exercise but I'm also opposed to any endorsing of religion.

**JŚ:** *Does that make you a conservative or a liberal?*

**JW:** The same as American Civil Liberties Union, that is, a moderate liberal; Church and State should be separated, but religious expression should not be subject to hostility.

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<sup>2</sup> The book will ultimately be published under a new title: Holy Hullabaloo. A Road Trip to the Battlegrounds of the Church/State Wars.

**JŚ:** *Isn't the separation of Church and State in the USA going too far in the sense that, if some worshippers cannot publicly acknowledge their religion and if they are not able to get with other people and pray during moments that are important to them, it is the same as if they were not allowed to follow their faith at all?*

**JW:** But they can follow it! The point is that they just cannot get the State involved in it. People can pray in schools and in front of Washington D.C. state building, if they have the mind to do it; what is forbidden is to make the Government say prayer is good or have it instigate prayer. This is a very common source of confusion.

**JŚ:** *In the graduation prayer case <sup>3</sup>, a certain kind of religious expression was prescribed. It was only Justice Scalia who defended the other side. Do you think the outcome was correctly decided?*

**JW:** The coercion argument about infringing people's right not to pray by making them stand up and listen to the prayer made no sense to me but, apart from that, I think the result is lawful, as it is unconstitutional to have the government invite a rabbi to conduct a prayer. That's clear endorsement. Still, if the students wanted to organize such a religious event themselves or if the government just introduced a moment of silence to the schedule, it would be perfectly fine.

**JŚ:** *It's strange that in all those endorsement cases where children or youths were involved, there was no evidentiary material on what the children thought and felt while being put in the questioned situations. Children have constitutional rights as well and when you are fourteen years old you should be well able to evaluate your own reception of certain action. Besides, it's not the age that matters but the capability of assessment.*

**JW:** The study of the enforcement test<sup>4</sup> does not involve the children's feelings that much, because the test is meant to be objective and have the same impact on a number of other actors like adults, community and the State. Nevertheless, I fully agree that it would be very interesting to conduct the research you're talking about from the coercion point of view.

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<sup>3</sup> Lee v. Weisman , 505 U.S. 577 (1992) – a United States Supreme Court decision concerning school prayer. It was held that a prayer conducted by a religious authority during a public high school graduation ceremony violates the Establishment Clause of the First Amendment.

<sup>4</sup> Endorsement test – proposed by Justice Sandra Day O'Connor, asks whether a particular government action amounts to an endorsement of religion. According to Justice O'Connor, a government action is invalid if it creates a perception in the mind of a reasonable observer that the government is either endorsing or disapproving of religion. This understanding of the establishment clause was expressed by Justice O'Connor in the 1984 case of Lynch v. Donnelly; Source: firstamendmentcenter.org

I mention in my book that I went to a Catholic high school where there were only seven of us Jews. We called ourselves The Jew Crew. (*Laughter*) I never participated in prayers but I also never felt coerced to do so. I knew that I could just stay silent while the others were praying and I never thought that someone else would think I'm praying. I bet most of the other kids felt the same way. But still, even if the majority didn't deem themselves coerced, you would all the same want to protect the few who did.

**JŚ:** *In one of your writings, you look for the perfectly structured religious law, comparing Title Seven of the Civil Rights Act and the Religious Freedom Restoration Act. Which of them is better?*

**JW:** Title Seven is definitely not very religion-protective. It states that employers have to accommodate the religious needs of their employees, unless it is unreasonable to do so. The provision might just as well say that they don't have to do it at all. The Religious Freedom Restoration Act, on the other hand, has been very successful.

**JŚ:** *Knowing that, what does it take to construct a good religious clause?*

**JW:** You have to be very clear about protecting religion above some other interests that might appear. If you let judges decide about the interest evaluation on a case-by-case basis, religion will often end up being forgotten or devalued.

**JŚ:** *There have been many voices of criticism with respect to the endorsement test. Do you find any of those arguments persuasive?*

**JW:** Basically, I consider the endorsement test a good thing. What might cause problems is the fact that it introduces the perspective of a reasonable person (worshipper). A Christian or a Jew will find it very difficult to assess what a reasonable Buddhist or atheist might think about a given problem. Religion is to some extent based on irrationality, how then are we supposed to make the right decisions? Nonetheless, I will be very worried if we lose the test, which will probably happen in future.

**JŚ:** *I wanted you to compare two lines of cases represented by Yoder <sup>5</sup> and Smith <sup>6</sup>. They are both pretty similar: there is the law that is said to fulfill the neutrality condition from the endorsement test and the parties, who, for some reasons seek an exemption from it. Only the outcome of the cases is totally different, as in Yoder an exemption is granted, in Smith not. Since the cases are so alike, someone must be wrong.*

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<sup>5</sup>Wisconsin v. Yoder, 406 U.S. 205 (1972) – a decision in which the US Supreme Court adjudicated that the Wisconsin Compulsory School Attendance Law infringed the Free Exercise Clause of the First Amendment by rendering school education beyond the 8<sup>th</sup> grade obligatory for Amish children, contrary to the religious views of their parents.

**JW:** I think it was the Smith court that erred in its decision. In my opinion, the best way of interpreting the First Amendment is to recognize exemptions from neutral laws that burden religion. People who believe things very deeply should not be penalized for those beliefs by general regulation. Of course, this doesn't mean that there would be no possibility for the government to win such a case, which it should be able to do by showing a compelling interest so that, e.g. people won't be allowed to kill because their religion tells them to do so.

**JŚ:** *Where's the borderline then?*

**JW:** Yes, well, you see how hard it is? Luckily we have the judges to draw the lines. Take polygamy for instance. Why are we so preoccupied by polygamy? I think that, if you have a religious reason to practice it, you should have an exemption from the general law. However, the Supreme Court was worried about the anarchy problem that might subsequently arise because of treating this crime as legitimate behavior in some situations. What is more, Justices like Scalia don't think much not only of anarchy but also of judges' balancing tests and separate, independent solutions in all cases. They like clear, broadly applicable rules. Unfortunately for them, Church and State law is the area where you do need to be explicit but you also have to apply judicial balancing to give people their rights while still maintaining order in the society.

**JŚ:** *I notice you have a great interest in East Asia; you did a major in this area and you wrote your thesis about the philosophy of Chuang-Tzu <sup>7</sup>, a man who, shortly speaking, believed in nothing. Was that the moment of your life when you decided to work in the field of religious law?*

**JW:** I recommend everyone to read Chuang-Tzu. He is absurd but also funny. I find his works appealing especially because he has the same skepticism in rationality as I do. I don't maintain that it is possible to live your life like Chuang-Tzu did, not if you have a kid at any rate...

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<sup>6</sup> Employment Division v. Smith, 494 U.S. (1990) – US Supreme Court decided that “The Free Exercise Clause permits the State to prohibit sacramental peyote use and thus to deny unemployment benefits to persons discharged for such use.”

<sup>7</sup> Chuang-Tzu or Chuang-tze (c. 369-c. 286 BC) – Chinese Taoist writer. Little is known about his life. The collection of essays attributed to him, called the Chuang-Tzu, is distinguished by its brilliant and original style, with abundant use of satire, paradox, and seemingly nonsensical stories. Chuang-Tzu emphasizes the relativity of all ideas and conventions that are the basis of judgments and distinctions. In his opinion, freedom in identifying with the universal Tao, or principle of Nature, is the solution to the problems of the human condition. Source: The Columbia Encyclopedia, Sixth Edition.

**JŚ:** *It would be hard on the kid...*

**JW:** Very hard, yes. But, for some time, I was under a strong influence of “chuang-tzunism”; I read a lot on the subject, spent some time in China and liked it immensely.

**JŚ:** *How was your legal practice in China?*

**JW:** It wasn't really a practice as it happened before I went to law school. I applied for a job with an American law firm in Shamen. It turned out that it was run by a shady character who disappeared for days and never mentioned what he was doing during that time. Our office didn't have that much work so we just went from door to door introducing ourselves in case anybody needed legal advice...

**JŚ:** *A lot of doors to cover...*

**JW:** You're right; there are a lot of doors in China. Still, we worked on a couple of bigger things; once a businessman from Los Angeles wanted to put up hot-dog stands in every part of China so we had to go around with him to see various places in town and talk to the city officials about the zoning and real estate issues. Yet another time, we had to prepare a joint venture agreement but we didn't have any computer at the office so I had to ask the client if I could go and print the thing out at his place. I wasn't paid that much, if at all while on the job.

**JŚ:** *Coming back to the United States, do you think schools should introduce a separate, voluntary course on different religions and their approach to crucial issues such as the beginnings of the world? In a panel discussion about evolutionism and creationism on the Pew Forum on Religion & Public Life you mentioned that teaching just intelligent design as an alternative to creationism wouldn't suffice and would only blur the picture.<sup>8</sup>*

**JW:** It is very important to teach about religion at school. In the USA most schools don't do it due to the lack of understanding of the Supreme Court Cases on Church and State matters and due to the idea that every mention of religion in a public school is prohibited. Also, there hasn't been any great material to help the teaching, even if the schools

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<sup>8</sup>Evolutionism – scientific theory of biological evolution by natural selection or genetic drift. Creationism – religious belief that humanity, life, the Earth, and the universe were created in their original form by a deity. Creative design – assertion that “certain features of the universe and of living things are best explained by an intelligent cause, not an undirected process such as natural selection.”, a modern form of the traditional theological argument for the existence of God, modified to avoid specifying the nature or identity of the designer. Source: Wikipedia.

wanted to do it. If you graduate from high school without having any idea whatsoever about religion I don't know how you are going to understand anything that's going on in the world.

**JŚ:** *The evolutionism-creationism debate is the main theme of the film *Inherit the Wind*, where Council for the Defense who wanted evolutionism to be taught in schools was presented as an enlightened scientist while the prosecutor who opposed it seemed as if he had come all the way from the Dark Ages. The film is based on true events, namely, the Scopes trial<sup>9</sup>. However, in reality, the topic of the debate is not so black and white, just as the characters appearing in the actual trial were not so easy to judge.*

**JW:** The film is an oversimplification, that's for sure, although it gets most of the facts right. The prosecutor, William Jennings Bryan was very religious and he, indeed, wanted religion to be taught in schools. The council, Clarence Darrow cross-examined him and, some people thought, made him look a little foolish but that didn't mean that a big victory of science over religion took place. Actually, as an aftermath of the trial, evolutionism was mostly removed from the teaching schedule. What is more, the pro-evolutionism side was not necessarily anti-religious but rather pro-academic freedom, at least some of them, like American Civil Liberties Union. True life is always much more complicated than the film.

**JŚ:** *Do you think embracing evolutionism as an idea could have some serious consequences, such as treating Darwin's theory of survival of the fittest as a policy to be followed? Apparently, that was one of the worries of the prosecutor in the Scopes trial.*

**JW:** I don't really think so. In certain historical circumstances it might have but hopefully not today.

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<sup>9</sup>Scopes Trial or Scopes Monkey Trial (Scopes v. State, 152 Tenn. 424, 278 S.W. 57 [Tenn. 1925]) – a case concerning the problem of teaching evolutionism in schools. It proved very significant for the creationism-evolutionism debate which was going on at that time in the USA. The trial involved two prominent characters: three-time presidential candidate, Congressman and former Secretary of State, William Jennings Bryan, who was the prosecutor, and the renowned trial attorney Clarence Darrow, acting in the capacity of the defense council. As a result of the trial, the defendant John Scopes was found guilty of violating the Tennessee state law but the conviction was ultimately set aside by the appellate court due to procedural flaws.