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PATENTS: ECONOMIC ACCELERATOR OR IMPEDIMENT?

Liza Vertinsky explores the role of patent law in facilitating cooperative innovation

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Fostering Innovation: Patents, Communities and Cooperation

"I began to wonder: What role does law play in fostering economic growth? How does law impact cooperation? Can we have democratic and socially-informed innovation policies?"

Liza Vertinsky
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BA, Oxford University, 1991
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PhD, Harvard University, 1997
JD, Harvard Law School, 1997

Scholarly interests: intellectual property, licensing and other intellectual property transactions; international intellectual property issues relating to development; global health and entrepreneurship; law and economics

At first glance it would appear that a drug-dealing gang member from Los Angeles has little in common with a cash-hungry entrepreneur from Silicon Valley. But Liza Vertinsky, who has focused on each of these archetypes in her research, sees distinct connections between these people, their rules, their economies and their communities.

"My research program is motivated by a deep interest in how legal rules influence the way in which individuals and groups organize their economic activities," says Vertinsky, an associate professor of law. "I look at how the rules affect an organization in good and bad ways. It's just different subject matter I'm applying it to."

And just as innovation is the fuel for a start-up company, innovation also is critical to furthering the interests of underprivileged groups.

"I began to wonder: What role does law play in fostering economic growth?" she says. "How does law impact cooperation? Can we have democratic and socially-informed innovation policies?"

Vertinsky has always had a soft spot for the disadvantaged. While growing up in Vancouver near the University of British Columbia, where both of her parents worked as professors, Vertinsky was glued to the television anytime the hero stood up for the rights of the underdog.

"I always watched movies in which the individual fights for equality," she says.

As she grew older, she became interested in the economic side of this story, and how it was that within a developed country like the United States there could be cities and regions that seemed like developing nations. She received her bachelor's degree in politics, philosophy and economics from Oxford University in 1991, then obtained

Excerpt: Patent Remedies with Cooperation in Mind

Patent law, created in response to a Constitutional mandate to encourage innovation, now threatens to impede it. Advances in technology have enabled new ways of pooling knowledge and computational capabilities, facilitating cooperation among many participants with complementary skills and motivations to collectively and openly develop solutions to complex scientific or technological problems. Cooperative processes of innovation can harness new resources, bring multiple disciplines and perspectives to bear on previously intractable scientific problems, and provide competition in key areas of intellectual production. But emerging models of cooperative innovation often run into patent roadblocks.

The problems that patents pose for emerging forms of cooperative innovation are becoming difficult to ignore. The patent litigation wars between major players in the smart phone industry such as Apple, Samsung, Google and Microsoft illustrate the divisive role that patents can play in an industry that relies upon the use of common standards to achieve interoperability, particularly when network effects are important. By some accounts Apple and Google now spend more on patent litigation than they do on R&D. Open source software systems like Linux challenge proprietary products like Microsoft Windows in the market place, only to find their viability threatened by patent lawsuits. Ironically, the open source software community finds it necessary to spend billions of dollars acquiring patents as a way of protecting free software use. Participants in Foldit, an online video game that uses crowd science to solve complex scientific problems, start to worry about patents as the game begins to yield important discoveries.

In this article, I use three case studies drawn from industries that play a critical role in economic growth and competitiveness to illustrate how patent law in its current form may be disadvantaging some kinds of socially beneficial cooperative innovation. I begin with open standard setting in the mobile phones industry, and the corresponding patent litigation wars that are consuming industry energy and research funds. I then look at the open source software movement and the ongoing patent battles between proprietary software companies and supporters of free open source software platforms. Finally, I look at the potential that crowd science has to solve complex scientific problems, as demonstrated by the successes of the online molecular biology game Foldit. Again, I point to ways in which the promise of this type of open, massively distributed innovation might be limited instead of enhanced by patents.

Although the models of innovation in these case studies—open standards, open source software, and crowd science, are radically different in many ways, they share an important foundation. All of these processes rely on cooperation among many participants with diverse motivations and skills to collectively and openly develop solutions to complex scientific or technological problems. The need for cooperation to solve scientific and technological problems is not a new phenomenon. Indeed, it has a lengthy history—although examples of cooperation failures are also numerous in the history of scientific breakthroughs. What is new is the scale and complexity of the problems that need to be solved and the large and diverse group of people who can come together to solve them, often through the use of decentralized, low cost, web based technologies. I refer to these kinds of innovation processes collectively as "cooperative innovation."

Supporting new forms of cooperative innovation has become an area of focus for federal and state government policymakers eager to find new ways of pooling resources and knowledge to overcome economic and scientific hurdles. Scholars of innovation such as Yochai Benkler and Eric von Hippel have challenged us to consider what changes to the design of the legal and institutional system are necessary to sustain cooperative innovation. They have identified intellectual property law, particularly patent law, as threatening the open, inclusive and collaborative nature of these systems. But they and other scholars following in their wake have left the precise contours and magnitude of the patent threat and specific proposals for patent law change for further study. In this article I respond to this challenge by identifying concrete ways in which patent law may disadvantage non-traditional forms of cooperative innovation and by proposing guidelines for fashioning patent remedies that are designed to reduce these problems.

Why might patents sometimes thwart instead of support cooperative processes of innovation? The source of the tension lies in the disconnect between the primary focus of patent law on the right of an inventor to exclude others from use of his or her invention for a period of time and the principles of inclusion and sharing that motivate and sustain open and collaborative models of innovation. Sharing information takes the form of limitations on the duration and scope of patent rights rather than operating as the governing principle of intellectual production. Patent law begins with the assumption that there are individual inventors, or sometimes co-inventors, who work on their own to make a unique discovery that is a discrete, identifiable advance over existing knowledge. These inventors are assumed to know what their inventions are. Patent law works on the premise that creating exclusive property rights for the invention in the form of a patent will provide economic incentives that are necessary to encourage initial inventive activity and/or to disseminate and develop the invention for commercial use. The contours of the patent are assumed to be at least roughly aligned

with the contours of a useful product, component or process that has independent market value, and the patent gives the inventor the ability to appropriate at least some of this value. These assumptions lead naturally to a system of rules focused on defining and protecting the right of the patent owner to appropriate the value of his or her invention, with limited interest in the context of the discovery or the context of use.

This neglect of the context and the community in which innovation occurs pervades the patent statute and corresponding case law. To illustrate, until recently the owner of a valid patent was presumed to have the right to stop uses of the patented invention by third parties, leaving the users to battle this presumption in court. Defenses to infringement based on special circumstances of creation and use, such as independent discovery or experimental use, remain narrow even after changes introduced to patent law by the America Invents Act to expand protections for prior inventors. Concepts of fair use such as those found in copyright law are missing altogether from the patent statute. Members of a community that contribute non-patentable ideas to the inventor are simply out of luck unless they have the resources and the ability to show that the patented invention was derived from their contributions or that the invention would be obvious to individual community members in light of the combined knowledge and effort of the community. Patent law, both on the books and as applied, is oriented around the ownership rights of the pioneering lone inventor in his or her patentable discovery.

Modern processes of invention and innovation, by contrast, increasingly involve formal and informal collaborations among and incremental contributions by many heterogeneous participants. The lone inventor has moved out of her garage or lab and onto the internet, where she works with other people to share data, pool knowledge and solve problems collectively. In some cases inventions emerge from communities of people who are motivated to solve their own problems, such as scientists interested in improving their scientific instrumentation. In other cases members of the general public self-select into communities of innovation simply because they want to, devoting their free time to issues of social importance or intellectual intrigue such as drug discovery or the evolution of dinosaurs. Contributions of time and ideas are made on a voluntary basis, and ideas are shared freely for the benefit of the group or for the public at large. Prominent examples of open source innovation include Wikipedia, the peer produced encyclopedia, and Linux, a widely used open source software operating system. These systems, which are driven by the free sharing of incremental contributions, stand in stark contrast to the traditional patent law model of the inventor working in isolation to produce a pioneering discovery in response to economic incentives. They offer a powerful alternative to proprietary systems, introducing competition in areas where there otherwise might be none.

In this evolving innovation landscape, I suggest that one of the central functions of patent law should be to facilitate the variety of new ways in which people cooperate to innovate. In some cases patent law may work well to facilitate the kinds of cooperation needed to encourage innovation. But in other cases, such as those I explore in this article, patent law may instead impede socially useful forms of cooperation. The principles of inclusion and respect for collective rights that characterize cooperative innovation may be difficult to reconcile with the assumptions and presumptions of the traditional patent law framework. The incentives that patent laws are designed to further may be very different from the kinds of incentives and motivations that sustain alternative cooperative paradigms of innovation. As a result of this disconnect, patent law may sometimes interfere with mechanisms that are important in sustaining collective intellectual production, such as trust, reciprocity, and norms and customs that support sharing. Patent law should have some way of responding to the needs of these alternative systems of innovation.

To facilitate the coexistence of alternative innovation processes, I suggest guidelines for limiting patent remedies in ways that protect forms of cooperative innovation that are particularly vulnerable to patents. A combination of limits on damages, injunctive relief, and contextualized defenses and exemptions from patent infringement can be used to create flexible boundaries that support the coexistence of alternative innovation regimes. This approach is applied to three case studies to illustrate how patent remedies might be implemented differently if the courts, Congress, relevant agencies and the public all took cooperation more seriously….

I suggest that current approaches to patent law need to be expanded to encompass systems of cooperation that fall outside of traditional market driven modes of production and exchange. This includes processes of intellectual production that rely on collective trust and reciprocity, the pursuit of non-monetary benefits such as reputation and use, and intrinsic motivations such as altruism and the desire to be creative. I suggest ways in which patent law could be adapted to accommodate a richer variety of innovation systems through limited changes to patent remedies. …

Heated debates among policymakers, including public debates among judges, have pushed these seemingly technical questions into the daily news and even into late night comedy, increasing the need for a clear and systematic policy response to patent problems. Designing patent remedies in ways that respect cooperative innovation, but at the same time do not unduly advantage one mode of innovation over another, provides such a response.

—from Patent Remedies with Cooperation In Mind, 41 *Florida State University Law Review* (forthcoming 2014)

her master's in economics from the University of British Columbia in 1992. She went on to receive her PhD in economics from Harvard University and her JD from Harvard Law School in 1997.

"I liked looking at how we could address the problems of people who were economically disadvantaged through use of the law," she says. "Some people are excluded from the normal economic system and so they build their own."

This led to her research on street gangs, which she conducted at Harvard from 1994 to 1997. She continued to pursue this interest during her subsequent judicial clerkship with Judge Stanley Marcus of the Federal District Court, Southern District of Florida who was elevated to the Federal Court of Appeals, Eleventh Circuit, during her time in his office.

Vertinsky's career next took her to the firm of Hill & Barlow, where from 1998 to 2003 she was a member of the corporate department, with a focus on intellectual property transactions. From 2003 to 2007, she continued her practice at Wolf, Greenfield & Sacks, where she worked on intellectual property transactions. During this time in practice, Liza maintained a connection to her research by volunteering with social entrepreneurship programs, including the youth-focused Network for Teaching Entrepreneurship.

"I want to provide recommendations and ideas to help the law respond to the need for innovation, particularly those areas where it is socially important but less economically profitable."

In July 2007, she joined the faculty of Emory Law School.

"I loved the practice of law, but I always knew that I would move to academia," she says.

Vertinsky now teaches first-year contracts, focusing on the transactional program and the real world of contract law, and has added to the curriculum two courses to augment Emory's intellectual property and transactional offerings. One is a seminar on the intersection of intellectual property, economic development and global health. The other is a course on intellectual property transactions that draws from her research and from her prior experience as an attorney practicing in this area.

"I continue to explore new ways of increasing student engagement in critical thinking and problem-solving that focuses on real-world challenges," she says.

Vertinsky's current research at Emory looks at how patent laws and policies impact the organization of economic activities and either facilitate or impede innovation.

"My research illustrates ways in which policymakers may have either misunderstood or ignored the impact of patent law on economic decision-making," she says.

Through her research, Vertinsky hopes to identify innovation policies that can address important social needs.

"I want to provide recommendations and ideas to help the law respond to the need for innovation, particularly those areas where it is socially important but less economically profitable," she says.

Emory, says Vertinsky, is the perfect place for her to explore this idea and see it in action.

"Emory, with its location in Atlanta, is in the midst of opportunity but also in the midst of constant economic turmoil and political crisis," she says. "We run out of water, then we have enough. We have tremendous wealth and terrible poverty. We have high start-up activity and high unemployment. It is the perfect storm, in many ways, for feeling constantly challenged but also constantly fortunate."

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Books

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Articles

Patent Remedies with Cooperation in Mind, 41 *Florida State University Law Review* (forthcoming 2014)

Making Knowledge and Making Drugs? Experimenting with University Innovation Capacity, 62 *Emory Law Journal* 741 (2013)

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Reconsidering Patent Licensing in the Aftermath of MedImmune, 45 *Houston Law Review* 1609 (2009)

Personalizing the Law

What fascinated her most about the law was not the minutiae, but the people. With that in mind, much of Levine's career and research has focused on victims, defendants and prosecutors.

Kay Levine
Associate Professor of Law

AB, Duke University, 1990
JD, University of California at Berkeley, 1993
MA, University of California at Berkeley, 1999
PhD, University of California at Berkeley, 2003

Scholarly interests: criminal procedure, criminal law, regulation of sexuality

The woman needed a ride to the grocery store. She had some money, but her husband had taken her car, along with her sense of peace and personal safety. So Kay Levine gave the woman a lift to the market. It was a simple gesture, but not the sort of thing Levine typically did as a deputy district attorney in Riverside, California in the mid-1990s. She and her colleagues were more often drowning in paperwork and procedure.

But the car ride provided Levine with a moment of clarity.

"It was eye-opening," she says. "The sorts of challenges that defendants and victims face—the stress that goes along with that, I had never experienced. It makes you a much more empathetic person."

She recognized that what fascinated her most about the law was not the minutiae, but the people. With that in mind, much of Levine's career and research has focused on victims, defendants and prosecutors, particularly those connected to sex crime cases. She also has examined the street-level drug economy's effect on women and pondered whether prosecutors can be social workers.

That last question was a big one for Levine, because after she finished her JD at the University of California at Berkeley's Boalt Hall School of Law in 1993, she was certain of just one thing: she did not want to be a lawyer. She wanted to be a social worker of sorts, and serve as a victims' advocate. But she already had secured a clerkship with the Honorable David Alan Ezra, U.S. District Court, District of Hawaii. When she finished her time there in 1994, she went to work at the Riverside County district attorney's office and attempted to split her time between prosecutorial work and victim advocacy.

"It was clear to me, within six months, that this would not work," she says. "So I figured I could be a prosecutor who was a victims' advocate in her work, without the title."

Some of Levine's caseload in the DA's office focused on statutory rape, and the prosecution of a serial offender who was preying on high school girls.

"It became frustrating to me," she says. "We saw the same people over and over again and the same patterns. Many of my colleagues agreed, but they were more consumed with the details of the cases. That's the job, but it was the deeper questions that plagued me as I was working. I felt like I was spinning my wheels."

Levine has been interviewing hundreds of prosecutors in offices across the country to learn about their techniques, strategies and philosophies with the goal of gaining a bird's-eye view of the prosecutorial function.

Some attorneys can lose sight of things, and forget that the people in the case file are people at all, she says.

"But I was not usually one of those people. I had the tendency to be more emotionally involved," she says. "Maybe that's why it bothered me so much."

So Levine went back to school to pursue first her master's degree, and then her PhD, in jurisprudence and social policy at the University of California at Berkeley.

The jurisprudence and social policy-focused studies gave Levine "the foundations as well as an understanding of the social policy effects," she says. "The students come in with a grounding in different disciplines and bring that to the discussion, so it's a much richer way of thinking about law."

This pointed Levine's career toward academia. In 2002 she served as a lecturer at Berkeley's Boalt Hall School of Law and then moved to Emory University School of Law as an assistant professor of law in 2003. A few years later she was promoted to associate professor, and in 2008 she was granted tenure. In 2010, she was named a Distinguished Teaching Scholar, and in 2013, was selected by the student body as Outstanding Professor of the Year.

Levine now teaches courses in criminal law and criminal procedure while serving as associated professor in the women's studies and sociology departments, as well as in the Center for the Study of Law and Religion and in the Center for the Study of Law, Politics and Economics. In 2011, she developed the Colloquium Series Workshop for students interested in scholarly writing and careers in academia.

Levine's most recent research has included an exploratory study of women who seduce adolescent boys. And she has been taking an in-depth look at what it means to be a prosecutor.

She has been interviewing hundreds of prosecutors in offices across the country to learn about their techniques, strategies and philosophies, with the goal of gaining a bird's-eye view of the prosecutorial function.

Levine uses these insights for the betterment of her students, too, so that they'll feel well prepared for the rigors of a career in criminal law.

"As a lawyer, you can take time to be with a victim, to listen to them and answer calls and advocate, and they say 'thank you,' and you know you did something that changed their lives in some way," she says. "I don't have that anymore with client populations or victims, but I have that with my students."

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Book Chapters

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The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload, 55 *Emory Law Journal* 691 (2006)

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Excerpt: Prosecution in 3-D

The sociology of organizations literature suggests that individuals respond in predictable ways to socialization forces on the job. The three most common responses are rebellion (rejecting all organizational norms and values), creative individualism (accepting important norms and values but rejecting the less crucial ones), and conformity (accepting organizational norms and values uncritically). Our interviews with prosecutors reveal that an employee's response to socialization forces is not entirely a matter of individual choice. Instead, the office's particular combination of shape plus hiring preference correlates with the degree of autonomy that the attorneys feel on both horizontal and vertical dimensions. By horizontal autonomy, we mean the degree of independence each prosecutor feels from his colleagues when it comes to making decisions on his own cases. By vertical autonomy, we mean the degree of independence each prosecutor feels from his boss (or supervisor) when it comes to making decisions on his own cases. Prosecutors who work in hierarchical, newbie-oriented offices will be inclined toward group values and low measures of autonomy on both scales; they internalize the perspective embedded in the Weberian bureaucratic model of the office and exhibit a "custodial orientation" that prizes the organization's current values. In contrast, veteran attorneys in flatter offices exhibit high levels of horizontal autonomy and at least moderate levels of vertical autonomy; they conceive of themselves and each other as independent agents, more prone to individualism and resistance.

The team imagery emanating from Metro is palpable in the comments of our interviewees. Whether junior, midlevel, or senior, male or female, Caucasian or non-Caucasian, the Metro prosecutors referred to themselves as members of teams and described their work lives and their social live as bound up with one another. They display very low levels of horizontal autonomy in their professional decision making.

The team identity is manifest in the physical movements of the normal workday. The desks for all Metro misdemeanor attorneys are located in cubicles (not separate offices) on a single floor in the District Attorney's Office. They spend most of each day together across the street in the courthouse, coming and going at roughly the same time, while most felony attorneys spend at least two weeks out of every three working on pretrial matters in their own offices. In addition, all of the Metro misdemeanor attorneys start every workday together in one room, sorting files and going over cases and current issues. They use these morning sessions to discuss, question, confirm, and otherwise monitor each other's decisions in individual cases. A misdemeanor prosecutor explained the reason for these discussions: "It's important that teammates have faith in you. And that they can know ... you're going to be in a position to do the work the correct way and ... make the right decisions."

Beyond having faith in each other, team members hope to become interchangeable with one another as a way to create stability and consistency in busy courtrooms marked by frequent staffing changes. The Misdemeanor Team is organized on a horizontal prosecution basis, such that various attorneys will handle a single case at different stages of the proceeding. In addition to frequent prosecutor reassignments, there is no established roster of judges who staff the misdemeanor courtrooms. Hence, ensuring that every prosecutor on the team will handle the case in the same way eliminates the risk of variation that might otherwise occur with judicial rotation or prosecutor rotation....

"Structured assistance" for new prosecutors in Metro goes beyond just team norms and expectations. Policies and rules, promulgated by the team supervisors and the Elected, simultaneously discourage both horizontal autonomy and vertical autonomy. For example, new Metro prosecutors receive a forty-page manual, updated routinely, which sets forth guidelines for misdemeanor court behavior and "defaults" for case resolutions (that is, standard plea offers). Within this diverse group of office policies, a few amount to hard-and-fast rules, while others are more tentative. Metro lawyers learn pretty quickly that there is no room for discretion when it comes to the hard-and-fast rules (e.g., DUI "refusal" cases must never be bargained down). Deviation will yield a reprimand and could ultimately lead to serious discipline, including loss of one's job, although such punishment rarely becomes necessary. When it comes to the looser rules, more flexibility is allowed as long as attorneys seek approval from the team supervisor in advance or offer a persuasive explanation after the fact....

Even though their autonomy is curbed by both team-level and office- level structures, Metro prosecutors experience their office architecture as promoting sound discretion and professional growth. They feel that their supervisors trust them to develop and exercise judgment, and they generally want to satisfy their bosses. One misdemeanor prosecutor observed fondly that this was akin to a parent–child relationship, in which the line attorneys want to please their supervisor. Consistent with this portrayal, Metro line prosecutors were genuine and lavish in their praise of their team leaders and the Elected, whom most described as incredibly knowledgeable, "full of integrity," and "proud of the work we do."

(continued on following page)

If the Metro pyramid office manifests a strong esprit de corps and a high level of deference to respected authority, the opposite holds true in flat-topped, experience-laden Midway. The Midway misdemeanor prosecutors regard themselves as independent contractors, each assigned a private roster of cases to charge and resolve as she sees fit. They also express a strong sense of independence from their boss, whom they regard as less experienced than themselves and detached from the day-to-day stress of the office's caseload. In this environment, expressions of team imagery or deferential attitudes were few and far between.

The lack of conformity does not mean that Midway attorneys are alienated from each other. To the contrary, they regularly chat with their colleagues about potential strategies and seek advice on thorny issues, and many experience this regular contact as a sense of camaraderie. But there is no framework, formal or otherwise, for the constant checking and cross-checking that goes on in Metro; self-monitoring by the office staff is simply not part of the job.

There seem to be two factors, beyond the flat office structure, that reinforce this heightened sense of horizontal autonomy at Midway: the stability of courtroom assignments and the prior experience level of the staff. The Midway judicial center houses seven misdemeanor courtrooms, each with its own permanently assigned judge. "Each courtroom is its own universe," says Prosecutor 930. Two prosecutors staff each courtroom on a long-term basis, and they must learn and tolerate the whims of their particular judge to succeed in that environment. These regularly assigned prosecutors follow their judge's lead more than the lead of any colleagues in the office, treating consistency within each courtroom as a higher priority than consistency between courtrooms.... Just as the stability of courtroom assignments and prior experience render the Midway prosecutors horizontally independent of each other in important ways, those factors also reinforce their sense of vertical autonomy, or detachment from the administration. In contrast to the Metro prosecutors, who spoke with admiration about their supervisors and the Elected, our Midway subjects frequently commented on the inexperience of the Solicitor General and his chief assistant. Before the election, neither had prosecuted misdemeanors or supervised other prosecutors. After taking office, neither maintained an independent caseload or appeared in court except in unusual circumstances. For this reason, the experienced line attorneys tend to discount the administration's policies and instructions. In the words of Prosecutor 960, "[t]hey are too far removed from the gunfire ... too comfortable in their offices with the air conditioning on" to give advice that makes sense.

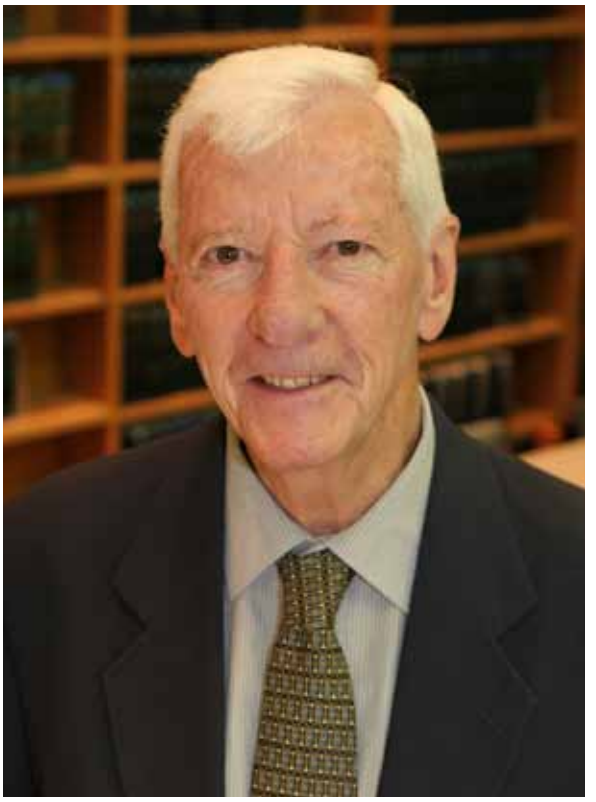
The line prosecutors' experience of vertical autonomy also leads in some situations to outright resistance of office leadership. As the Solicitor General settled into his post during the year after his election, the Midway line attorneys began to witness the slow encroachment of office policies onto what was otherwise a wide-open landscape, characterized by the original command, "Here are your cases, go forth and prosecute them." The Midway prosecutors experienced this gradual layering of office policies as an unwelcome intrusion on their previously unlimited discretion. As a result, resistance to these policies happens "all the time." As Prosecutor 935 says, "There are a lot of rules, but people pick and choose which ones to follow." Nearly every person we interviewed in Midway admitted not just to knowing about the resistance techniques of others, but to personally using such techniques on a regular basis.

In sum, the Midway office is the antithesis of the Weberian bureaucracy that scholars conventionally use to describe the prosecutor's office. This office instead presents an absence of hierarchy and specialization, and its veteran attorneys manifest a high degree of independence on both horizontal and vertical dimensions. Prosecutors express a strong desire (and a high level of confidence in their ability) to run their courtrooms without oversight from their officemates or boss. Interventions from the administrators are seen as ill-advised, inspiring line attorneys' frequent conversations "about how to get around protocols, in order to make life workable."

Reflecting on the comments of attorneys in these offices about their professional roles, it seems that autonomy has two dimensions, which we might call objective and subjective. Objectively, a prosecutor's actual level of autonomy is circumscribed by the structures imposed at both the office and the team levels. Every office installs some of these basic structures—wooden beams in our architectural metaphor—but some offices supplement these basics with additional layers of review or protocols that further restrict attorney movement inside the space. The number of these objective constraints, however, does not alone determine how employees understand their own independence on the job. Prosecutors instead experience autonomy based on how salient these objective structures become in their day-to-day lives. Moreover, the past experiences of an attorney set her expectations for the appropriate level of autonomy prosecutors should have. Thus, for some attorneys working in some places, the architectural constraints become more visible, while for others they recede from view and become less important.

—from Prosecution in 3-D, 102 *Journal of Criminal Law and Criminology* 1119 (2012) (with Ronald Wright)

Advancing Human Rights in Theory and Practice



"Much more has to be done before South Africa will become a country living up to the standards of its constitution."

Johan D. van der Vyver
I.T. Cohen Professor of International Law and Human Rights
Senior Fellow, Center for the Study of Law and Religion

BCom, Potchefstroom University, 1954
LLB, Potchefstroom University, 1956
BA, Potchefstroom University, 1965
LLD, University of Pretoria, 1974
Diploma of the International and Comparative Law of Human Rights, International Institution of Human Rights in Strasbourg, 1986
LLD, honoris causa, University of Zululand, 1993
LLD, honoris causa, Potchefstroom University, 2003

Scholarly interests: international human rights, international criminal law, humanitarian law, law and religion, right of the child

Johan D. van der Vyver, at the insistence of his father, enrolled at Potchefstroom University for Christian Higher Education in South Africa for his undergraduate and law degrees. The university had a strong historical commitment to Christian scholarship based on the teachings of John Calvin.

Over time, that education sparked in his own mind an intense critique of the government's racial policies, which brought him into conflict with both government and his university. He spoke out strongly against the injustices of apartheid and the way in which supporters of racial discrimination twisted moral principles to justify a particular political ideology.

He explored this criticism further in his doctoral thesis on *The Juridical Meaning of the Doctrine of Human Rights*, conducting part of his research in the United States. This exposure to the American system of human rights heightened his support for the legal enforcement of human rights—at a time when the idea was regarded as blasphemy in South African government circles and in the Calvinistic community.

Due to his persistent criticism of the status quo, he was ultimately compelled to resign from the law faculty of Potchefstroom University in 1978, after having served there more than 20 years—including two years as dean.

The transformation of South Africa in 1994 brought promising change in his home country and van der Vyver came to be respected for the views he expressed at a time when they were

Excerpt: Time is of the Essence: The In-Depth Analysis Chart in Proceedings Before the International Criminal Court

The International Criminal Court (ICC) has … spent much time and energies in finding a solution to the lengthy duration of proceedings before the Court. On December 6, 2010, the President of the ICC, Judge Sang-Hyun Song, informed the Ninth Session of the Assembly of States Parties of the ICC of an important development designed to promote the expediency of prosecutions and to uphold the right to a fair trial of the accused:

> In 2008, the Pre-Trial Chamber introduced an innovative legal tool called *in-depth analysis chart.* It directs the Prosecutor to link every piece of evidence with a specific element of the crime and mode of liability as contained in the charges, making the review of evidence more efficient and enabling the judges to organize the presentation of evidence in an expeditious manner….

The Office of the Prosecutor [has] questioned the legal foundation of the Court's insistence on an in-depth analysis chart, claiming that it was put in place by a decision that was not requested by either party or established by the ICC Statute. It accordingly maintained that there was no legal basis for imposing on the Office of the Prosecutor this additional administrative burden in either the ICC Statute or the Rules of Procedure and Evidence. It laid stress on Rule 81(1) of the Rules of Procedure and Evidence, which stipulates that "[r]eports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure."

It is submitted, though, that Rule 81(1) merely endorses that which in the United States has come to be known as the "work product doctrine" and which in civil and in criminal cases protects from disclosure materials prepared in preparation of litigation. The work product doctrine accordingly excludes from disclosure materials, charts, notes prepared from a client interview, or conversations and investigations directed toward preparation of a case. In the leading case dealing with the work product doctrine, the U.S. Supreme Court referred to information assembled by a legal representative and sifted to distinguish what the legal representative considers to be relevant from irrelevant facts, and doing this in the process of preparing his or her legal theories and planning a strategy for promoting the client's best interests. It shelters "the mental processes of the attorney, providing a privileged area within which he [or she] can analyze and prepare his [or her] client's case" without needless interference.

Trial Chamber III rejected the Prosecution's submissions based on Rule 81(1), holding that the sole purpose of a disclosure chart is to ensure transparency of the Prosecution's case and that the order "to identify the relevant passages within the items of evidence relied upon cannot be considered to entail the kind of internal analysis that would be protected by rule 81(1) of the Rules."

The Trial Chamber based the competence of the Court to subject the means of disclosure to an in-depth analysis chart on Article 64 of the ICC Statute, which defines the functions and powers of a Trial Chamber, Rule 134 of the Rules of Procedure and Evidence, which among other things authorizes rulings by a Trial Chamber "on any issue concerning the conduct of the proceedings," and Regulation 54 of the Regulations of the Court, which affords to a Trial Chamber the competence to "issue any order in the interest of justice" relating to, among other things, the disclosure of evidence.

The legality of the in-depth analysis chart can also be based on other provisions of the ICC Statute and the Rules of Procedure and Evidence, for example Article 61(3) of the ICC Statute, which authorizes a Pre-Trial Chamber to "issue orders regarding the disclosure of information for the purposes of the [confirmation of charges] hearing," and Rule 121(2) of the Rules of Procedure and Evidence, which provides that "the Pre-Trial Chamber shall take the necessary decisions regarding disclosure between the Prosecutor and the person in respect of whom a warrant of arrest or a summons to appear has been issued," and that "[t]he Pre-Trial Chamber shall hold a status conference to ensure that disclosure takes place under satisfactory conditions."

Controversies centered upon the introduction of a system of disclosure in ICC criminal proceedings based on an in-depth analysis chart again highlight the almost insurmountable obstacles confronting those who seek to promote expediency within the perimeters of a criminal justice system which by its very nature is extremely protracted and costly in human and material resources. Having noted provisions in the ICC Statute "mandating time-consuming procedures" and the absence of statutory rules "encouraging haste," Jean Galbraith proposed that instead of conducting international prosecutions, the ICC "should aim to influence and monitor local justice mechanisms" in transitional societies. The strategy of "positive complementarity," which has now become official ICC policy, seeks to do exactly that by shifting the emphasis of the ICC's endeavors to empowerment of national criminal justice systems in order that prosecutions in the ICC will eventually become unnecessary.

In a recent document outlining the Prosecutorial Strategy for 2009–2012, ICC Prosecutor Moreno-Ocampo referred to "the positive complementarity concept" as denoting a proactive policy of cooperation aimed at promoting national proceedings. The positive approach to complementarity, said Moreno-Ocampo, "entails a commitment of the Prosecuting Office to encourage genuine national proceedings where possible," by "relying on various networks of cooperation…"

"Positive complementarity" places the burden on States to conduct investigations and prosecutions and seeks to uncover ways and means by which national authorities can be empowered to do exactly that. It promotes, through capacity building, a national infrastructure for the prosecution of ICC crimes. It thus reflects a constructive relationship between the ICC and national criminal justice systems designed to empower national States, instead of the ICC, to bring perpetrators of the crimes within the subject-matter jurisdiction of the ICC to justice. When Mr. Luis Moreno-Ocampo was reinstated as Prosecutor of the ICC in 2003, he proclaimed:

> As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.

It will evidently take time for States to develop the resources, and the will, to fully bring this ideal to fruition. Until that happens, the ICC remains duty-bound to uphold the commitment articulated in the Preamble to the ICC Statute that "the most serious crimes of concern to the international community as a whole must not go unpunished." The ICC must honor that commitment with complete diligence toward the rights of the accused to a speedy trial and the demands of procedural expediency. Disclosure of evidence through the medium of an in-depth analysis chart is but one of many strategies designed to facilitate that responsibility—for the time being only, it is to be hoped, until positive complementarity has come to full fruition.

—from Time is of the Essence: The In-Depth Analysis Chart in Proceedings Before the International Criminal Court, 48 *Criminal Law Bulletin* 601 (2012)

not popular. Potchefstroom University even awarded him an honorary doctorate in 2003. It is commonly said today by his former critics that in those early years "you were ahead of your time."

Van der Vyver began his career at Emory University in 1991, receiving tenure in the School of Law in 1995 as the I.T. Cohen Professor of International Law and Human Rights. He served as Human Rights Fellow at The Carter Center and represented The Carter Center in proceedings that culminated in the creation of the International Criminal Court in 1998. He continues to be an active member of the NGO Coalition for the International Criminal Court.

Although South Africa has made significant strides in protecting human rights, van der Vyver says "there is tremendous corruption in government, so although the South African Constitution of 1996 is probably the best of its kind in the world today, its implementation in practice leaves much to be desired. The human rights ideology was imposed on the peoples of South Africa from the top down and does not really conform to the mindset and practices of many South African communities. The struggle therefore continues to create a human rights ethos in the hearts and minds of the people. Much more has to be done before South Africa will become a country living up to the standards of its constitution."

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TORT LAW

Shaping the Future of Legal Education

"The future of legal education ... will make demands that we cannot predict. We will have to be more aware that our students need the tools to thrive in a changing world."

David F. Partlett
Asa Griggs Candler Professor of Law

LLB, University of Sydney, School of Law, 1970
LLM, University of Michigan, Law School, 1974
SJD, University of Virginia, School of Law, 1982

Scholarly interests: torts, judicial remedies, professional liability, child mental health

She had an inkling—some faint idea that something bad had happened in her past. But her therapist pulled the details from the recesses of her mind, piecing together a story of childhood trauma, and giving the girl the opportunity to share her story in a courtroom.

But the concept of a "recovered" memory is a tricky thing—raising questions that David F. Partlett, Asa Griggs Candler Professor of Law, has studied closely over the years.

As co-author of the book *Child Mental Health and the Law* and an article entitled "Recovered Memories of Child Sexual Abuse and Liability: Society, Science, and the Law in a Comparative Setting," Partlett has dissected this difficult topic and delved into its implications in the legal arena.

The social and scientific complexities surrounding children's recovered memories have heavily influenced the courts' approach to such claims, Partlett says. In particular, there is the difficulty of so-called "false memories," and the potential liability of therapists who help to induce them.

For Partlett, the resolution of these seemingly insoluble difficulties turns on fundamental questions of justice. "I have a keen sense of justice that comes from the privilege of being born and raised in a fair and open society," he says.

Partlett was born in Sydney, Australia and educated in the city's schools before attending the University of Sydney, where he graduated from law school in 1970. He then left to collect experiences overseas, attending the University of Michigan Law School, and later the University of Virginia School of Law, where he earned his SJD in 1982.

Partlett then returned to Australia, to work in the office of the Attorney General, with a focus on drafting legislation on human rights and racial discrimination.

"I was working at the center of those important developments," he says. "While doing that

Excerpt: "Teaching Remedies As A Capstone Course"

We suggest that reforms to the law curriculum should begin with a touchstone. They should recognize the inherent strengths of American law school education and its traditions and the economic constraints that make brave, whole-canvas reforms too utopian. Thus we propose a capstone course in Remedies that involves a significant step towards showing our students how their early doctrinal learning can be integrated, and how they, as future lawyers, can operate in the changing and unpredictable world of practice. It is a parsimonious suggestion for reform and thus is more likely to find success in the modern law school.

So, how does a Remedies course help bridge the divide between theory and practice? In terms of doctrine, Remedies as a course is unique, and daunting for the teacher, because it cuts across the boundaries of the law school curriculum. Instead of dealing with a defined legal subject, Remedies teachers are challenged to wade into the content of a range of Torts, Contracts, Property, Constitutional, Criminal, and Administrative Law courses (as well as a host of other subjects) during a single class. Public law is conjoined with private law….

Because of the multi-doctrinal nature of Remedies, a course in Remedies provides a way to integrate both theory and practical skills into a single class and to teach theory through both academic and practical lenses. In our view, this is the best way to teach law. Students need to acquire both doctrine and skills, but there is no essential or critical reason why skills should be taught in specialized classes. Practicing lawyers rarely have the luxury of choosing to focus on just "theory" or just "practical skills." Necessarily, as they practice law, they utilize both doctrine and skills. A Remedies course is a powerful antidote to the artificial division of theory and practice; it allows the teacher to provide both doctrine and skills training simultaneously.

One skill that students can learn in a Remedies class is how to evaluate a case. Part of the problem with legal education is that students focus on particular subjects, and view the law through the lenses of those subjects…. The practice of law is never so neat or tidy…. A client may come to a lawyer with a pitiful story and dump a pile of facts on the lawyer's desk. Sometimes, the lawyer's analysis can be complicated by the fact that the client expresses a great deal of emotion. The lawyer's task is to sift through the facts and decide how to proceed. What causes of action are possible? What remedies do those causes of action produce? Perhaps, indeed, the remedy may be extra-judicial given the inefficiencies of the judicial remedy. Self-help is the most ancient of remedies and, as students learn early, may be the most efficient provided that social peace is not disturbed.

In the process of answering these questions, students can be taught many practical skills. For example, an essential skill is fact development and investigation. Most law students find this foreign. Students are hardly at fault. Throughout much of their law school career, students study law through the Langdellian prism of appellate opinions. While appellate opinions have value, especially as a way to analyze and understand the law's development, they present an artificial view of the practice of law because the facts in those opinions have been distilled and synthesized by the lawyers, the trial court, and the appellate court. Moreover, as judges write their opinions, their desire to be persuasive causes them to include or omit facts depending on whether they support or detract from the judge's conclusions. As a result, newly-minted lawyers are not prepared to deal with a client who comes in and dumps a large quantity of facts on their desks. So, one thing that we try to do in Remedies is to help students understand the importance of fact investigation….

[T]he Remedies course offers students the opportunity to work with the law in context. Particularly effective are problems that take the student to a set of facts that have no predetermined categorical boundaries. At the end of the semester, either in class or in a final exam, it is possible to give students problems that force them to actively engage themselves in a case. For example, students can be presented with hypothetical facts:

Your client owns an heirloom pocket watch that was given to him by his father as a graduation present. The watch is stolen by Jonathan Baird (Baird broke into your client's home and took the watch along with other things). What remedies are available to the client?

The answer to the problem may seem obvious. Since the watch is an heirloom, one might assume the client would like to have the watch back, and therefore the student might have a tendency to focus on restorative remedies. Of course, even a case like this provides the teacher with the opportunity to discuss the lawyer's role, and the fact that the lawyer is charged with achieving the client's objectives. If (as one might guess) the client wants the watch back, the lawyer will have several options available to him/her. On the other hand, if the client prefers damages, the case might proceed in an entirely different way. In a final exam context, we will sometimes offer our students the opportunity to do practical things, such as interviewing the client. This can come in the form of a traditional sit-down interview, or could be done simply by email in which the lawyer asks the client

(continued on following page)

(with, perhaps, the professor serving as a surrogate for the hypothetical client) questions about the facts, as well as about his/her desires related to the outcome of the case.

Of course, the next step for a lawyer is to ascertain the facts, and to decide how to litigate the case.

As noted earlier, one of the problems with legal education is that students are used to being presented with pre-synthesized facts, and are rarely taught to engage in fact investigation. The stolen watch problem can give students the opportunity to work with fact development. If, for example, the client wants the watch back, the client must attempt to find out who has the watch and where it is located. The thief might still have the watch, but the thief might have given or sold the watch to someone else. It might have been accidentally destroyed. Even if the client wants damages, discovery will be necessary. Suppose that the thief is insolvent, but the thief sold the watch to a pawnshop or another individual. It might be helpful to know whether the purchaser paid value for the watch, and whether the purchaser bought the watch with notice of the theft….

The range of scenarios and the range of possible actions are endless. Much depends on what the client wants and how the facts play out. As a result, an essential next step in a Remedies course is to give students the opportunity for fact investigation.

—from Teaching Remedies as a Capstone Course, 57 *Saint Louis University Law Journal* 609 (2013) (with Russell L. Weaver)

exciting work, though, I was asked to teach law on an adjunct basis, at the Australian National University. And I was bitten by the academic bug."

He served as a lecturer and reader at the university, and later as the associate dean of the faculty of law. From there, Partlett accepted appointment as a visiting professor at the University of Alabama's School of Law, and, in 1988, as a professor of law at Vanderbilt University School of Law.

Twelve years later, he was selected as the new dean of Washington and Lee University School of Law. And in 2006, he was appointed dean at Emory, as well as the Asa Griggs Candler Professor of Law.

"Emory has, in its ranks, a remarkable group of scholars," he says. "It is the very best of academic climates for strong scholarship."

In his own scholarship—in addition to the subjects of child mental health and recovered memories—Partlett has focused on free speech and defamation in the modern era, on the misuse of genetic information, on professional negligence, and on torts.

"Over the course of my career, I evolved as a scholar. I have been interested many areas of the law of torts, and indeed I even taught and published in corporate law at one stage." In recent work, this broad range remains in evidence. In a forthcoming book chapter from Oxford University Press, he aims "to show how the law of torts reflects Christian values in the growth of the law of negligence."

Partlett is also keenly interested in how we can best educate the world's future lawyers. "The future of legal education, with its pressures to educate for the profession, will make demands that we cannot predict."

By focusing on his students and the learning that will best prepare them for success, Partlett hopes to help shape that future. "The most important impact we have as professors is with our students," he says. "For me, it is the part of my work that brings me the greatest satisfaction."

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Robert B. Ahdieh

Vice Dean and Professor of Law

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Frank J. Vandall

Professor of Law

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Alexander "Sasha" Volokh

Assistant Professor of Law

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Laurie Blank

Director, International Humanitarian Law Clinic

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Morgan Cloud

Charles Howard Candler Professor of Law

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Paul J. Zwier II

Professor of Law and Director, Center for Advocacy and Dispute Resolution

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"People participate in innovation processes for many reasons, and with many different kinds of motivations. Understanding the relationship between law and innovation requires understanding many facets of human behavior, as well as understanding the institutional environment, the politics, and the economics, of innovation and economic growth."

—Liza Vertinsky, professor of law

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FEATURED SCHOLAR

What role does law play in fostering growth? **Liza Vertinsky** examines how legal rules influence the way in which individuals and groups organize their economic activities.