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LEGAL MATTERS

WITH LAWRENCE LESSIG

Getting time with Lawrence Lessig is not easy these days. Apart from a full teaching schedule, he's busy launching Change Congress, a movement to take on what he views as the root cause of much of what ails American politics today—corruption by special interest financing of congressional candidates and the quid pro quo nature of that tainted relationship. • A powerful combination of scholarship and activism are what stand out over the past 10 years of Lessig's career. Known as the "Elvis" of cyberlaw, he went toe-to-toe with the Department of Justice before the Supreme Court in a historic challenge to the 1998 Sonny Bono Copyright Term Extension Act. That case, which he lost, earned him a reputation as someone who was willing to take on corporate interests. In addition, he co-founded Creative Commons, which in turn sparked an international movement for freedom of expression in all forms; he gave hundreds of public lectures on issues of network neutrality, copyright restrictions of creativity, and freedom of speech on the Internet; and he published the seminal works *Code and Other Laws of Cyberspace* (1999), *The Future of Ideas* (2001), *Free Culture* (2004), and *Code v2* (2006).

Last June, Lessig announced that after spending 10 years examining cyberlaw and IP, he was changing his focus to that of public corruption. He credits several individuals for inspiring this change, most notably former vice president Al Gore, whose observation that efforts to address global warming have been stymied by the political process that allows special interests to influence public policy rang true to Lessig.

"We've all been whining about the corruption of government forever. We all should be whining about the corruption of professions too. But rather than whining, I want to work on this problem

that I've come to believe is the most important one in making government work," Lessig noted in a June 2007 blog entry. No ivory tower academic, he recently considered a run for a congressional seat left vacant after the death of Representative Tom Lantos. He met with Electronic Frontier Foundation attorney Fred von Lohmann '95 (BA '90) for this *Stanford Lawyer* interview just days after deciding against entering the race.

"It was February 1994 and I was reading what was then the ninth issue that *WIRED* magazine had ever published. Laurie Anderson was on the cover. John



“We all see the same kind of problem throughout modern America

Perry Barlow’s now iconic article, “The Economy of Ideas,” was inside. When I picked it up, I’d never heard of John Perry Barlow and had no idea that an article by him would literally change my life.” That is how Fred von Lohmann describes what he calls his “conversion moment,” the point at which he knew he would be a copyright lawyer. The inspiration led to a seven-year career as a senior staff attorney with the Electronic Frontier Foundation (the board of which Lessig is a member) during which time he has represented programmers, technology innovators, and individuals in copyright and trademark litigation, including the 2005 Supreme Court case *MGM v. Grokster*.

Von Lohmann is a frequent commentator on PBS, CNN, and network news channels and his opinion pieces have appeared in many of the top national newspapers. He has been recognized by the *Daily Journal* as one of the 100 most influential lawyers and was awarded the prestigious *California Lawyer* magazine’s California Lawyer of the Year award in 2003.

von Lohmann: THERE ARE MANY PEOPLE WHO WOULD SEE THE ARC OF YOUR CAREER—FROM SERVING POST-LAW SCHOOL AS A SCALIA CLERK TO FLIRTING WITH RUNNING AS A DEMOCRATIC MEMBER OF CONGRESS—AND ASK HOW DO ALL THESE THINGS FIT TOGETHER?

Lessig: It doesn’t feel as incongruous as it seems, at least if you identify where I started off as a kind of libertarianism. A big part of what we libertarian lawyers do is about protecting rights against government intrusion. That’s not so different from where I was at the start.

The big difference between what I would have said when I was 19 versus what I would say today is that now I recognize the importance of structures and the value of limited government intervention, at least to remedy a failure of the market. I also now recognize that government has a proper role to effect redistribution.

IT STRIKES ME AS AN INTERESTING VERSION OF AN OLD STORY—THOUGH POLITICALLY YOU’VE MOVED TO THE LEFT.

It feels that way—on the one hand, very strongly supporting rights and on the other hand, finding places to critically cut back on the scope of government. Take the FCC: a massive institution that functions as a protectionist structure for powerful corporate interests. Why is that in our government? Why wouldn’t you want to have vigorous competition among all of the entities now effectively protected by the FCC? You could think of it as a Reaganesque idea. Or, you could think of it as recognizing the ways government fails.

THAT LEADS US TO THE NEW DIRECTION THAT YOU’RE ENTERING INTO, THE PUBLIC CORRUPTION AREA. WHAT ARE YOU HOPING TO CONTRIBUTE?

We all see the same kind of problem throughout modern American life: institutions, skewed by special interest money, that no longer have the luxury to decide issues on the basis of the merits. Law firms are an example of this. The firm of the 1920s and 1930s was a place where lawyers were allowed to say what they thought was true about the law. Today, we see amazingly talented lawyers who can’t say what they believe because of a potential “business conflict” with their firms’ clients. That emaciates the culture of the profession.

There is a similar problem with Congress today. We need to believe that when Congress acts it does so because members studied the issue and believe it’s right for the nation, not because they’re worried about what an AT&T lobbyist thinks about the matter, or whether the decision will affect the ability to raise money.

SO WHAT DO YOU DO TO CHANGE CONGRESS?

Something that strikes me is that people think there’s one thing that’s obviously wrong. When you start untangling the issue, it’s not clear what exactly *is* wrong. There’s a whole movement to get transparency between contributions and politicians. And I think a large part of that effort is motivated by the idea that some day we’re going to get the formula that predicts corruption, i.e., if you get a thousand dollars from X, you’ll be swayed to vote Y. That thinking comes from the mindset of the “evil actor,” the corrupt politician. But the best work gets you to see that it’s not about the corrupt politician; it’s not about a bad person. It’s actually about how they live inside a system that corrupts its own product. The point is to see the social norms that have developed around our institutions as responsible for much of the problem. The system itself allows—even encourages—good people to become corrupt.

Take lobbyists. I think they’re great people: smart and hard working. Many of them are lawyers. They work within a system, quite legitimately. However, we know they change public policy priorities and we know they are influencing Congress and therefore the laws of the land. If everyone had them, one lobbyist and one vote, then maybe there wouldn’t be the same sort of problem. But ordinary Americans don’t have lobbyists working for them.

SO THE SYSTEM IS SKEWED.

Of course it is. I got into intellectual property recognizing the public domain didn’t have a lobbyist, but Mickey Mouse did. There are a million issues like that. Not only esoteric issues

fe: institutions, skewed by special interest money. . .” LAWRENCE LESSIG

like intellectual property are affected by corruption. Critically important issues too. Global warming is an example. Here is the most important issue—global warming—but the government screws it up fundamentally because the system can't filter through the junk science that's been produced by big lobbyists. Politicians consciously create a blindness toward corruption. The system that has developed requires so much money to get elected, they can't afford not to.

I use the analogy of the alcoholic: the alcoholic who is losing his job, losing his life, losing his liver—those are the most important issues to him in a certain sense. But the first issue he's got to solve before any of those is alcoholism itself. That's why this corruption thing is the first issue—it's our alcoholism.

SO LET'S TALK ABOUT YOUR RECENT TEMPTATION TO RUN FOR CONGRESS. WHY DID YOU ENTERTAIN THIS RUN?

I blogged the fact that Lantos died. Five minutes later somebody posted a 'Run Larry Run' note. But I put that thought aside. And then I made this last speech about free culture during which I mapped out a strategy of what I thought could address one part of the corruption problem—to change Congress. I stated it's not going to come from the top down; it's going to come from people building from the bottom up. And the best way to do that is to build a movement—a parallel to Creative Commons in the political space—to certify candidates as anti-corrupt. After I articulated that strategy there was a very big push for me to run. I thought if I ran and I demonstrated that you could actually convey these ideas, I'd prove the concept. I took it very, very seriously and paid a private pollster the equivalent of one year's college tuition to see whether there was any possibility of success. There wasn't—I'd be running against the most popular politician in Silicon Valley, and 30 days to get my message across was not enough time. I would have lost by a wide margin and that big of a loss at this critical juncture, when the Change Congress movement is just launching, would have been self-defeating as a real goal.

YOU'VE PROPOSED ASKING POLITICIANS RUNNING FOR CONGRESS TO ADOPT A THREE-PRONGED PLEDGE: NO PAC MONEY, ABOLISH EARMARKS, AND PUBLIC FINANCING OF ELECTIONS. ARE YOU ASKING FOR THE EQUIVALENT OF UNILATERAL DISARMAMENT?

The goal is for this grassroots movement, Change Congress, to develop and spread to the point that politicians feel encouraged and pressured to make the pledge. It should become an "Emily's List" for reform. We'll channel donations. We'll target congressional races with Change Congress

candidates and focus our energies on getting them elected. We'll say, "Here are the three or five or 10 races that we really think we can win and we need your help to do it." The goal is to get as many politicians as possible to take the anti-corruption pledge.

HOW DO YOU DISTINGUISH BETWEEN A GRASSROOTS APPROACH LIKE EMILY'S LIST AND A PAC?

I don't think in theory there's anything wrong with PACs. The problem is in practice. There are two very different categories of PACs. There are those that are effective aggregators of the wishes of a certain population, unions or their equivalent. Then there are other PACs, like a Microsoft PAC. There's no plausible way for this second kind to claim that what they're doing is just facilitating the aggregation of the wishes of their stakeholders. It's a short circuit to raising money versus raising money in a new way, which is what Obama is doing. The most important thing about his campaign is the fact that a million people are supporting the campaign. He is demonstrating what the best possible public financing of a campaign can be, namely not through huge PAC money but through individual contributions.

LET'S SAY A COUPLE OF WORDS ABOUT YOUR SUPPORT FOR BARACK OBAMA. WHY DO YOU THINK HE IS THE RIGHT PERSON RIGHT NOW?

I knew him when he and I were colleagues at the University of Chicago and I admired the extraordinary life he had as a civil rights lawyer in Chicago's south side, his experience with politics in community service, and teaching at the University of Chicago. I had—and still do have—a clear understanding of his integrity as a person. There is nothing inauthentic about him. This is somebody who is able to articulate issues and inspire people to the idea of changing the way Washington is functioning. I also believe that the longer you've been in Washington, the less likely it is that you're going to be able to do anything to change it.

GETTING BACK TO CHANGE CONGRESS, THIS IS ONE INSTANCE WHEN YOU ARE VOICING HUGE OPTIMISM THAT WE CAN CHANGE WASHINGTON. HOW CAN THIS MOVEMENT GET OFF THE GROUND WHEN THERE IS SUCH APATHY, A FEELING THAT THE SYSTEM CAN'T BE CHANGED?

That's a big part of it, of Americans feeling there's nothing they can do. But the solution is to get people from both sides to recognize that they have an interest in avoiding this corruption—in looking at what creates the inevitable temptation, and changing it. Changing Congress. **SL**