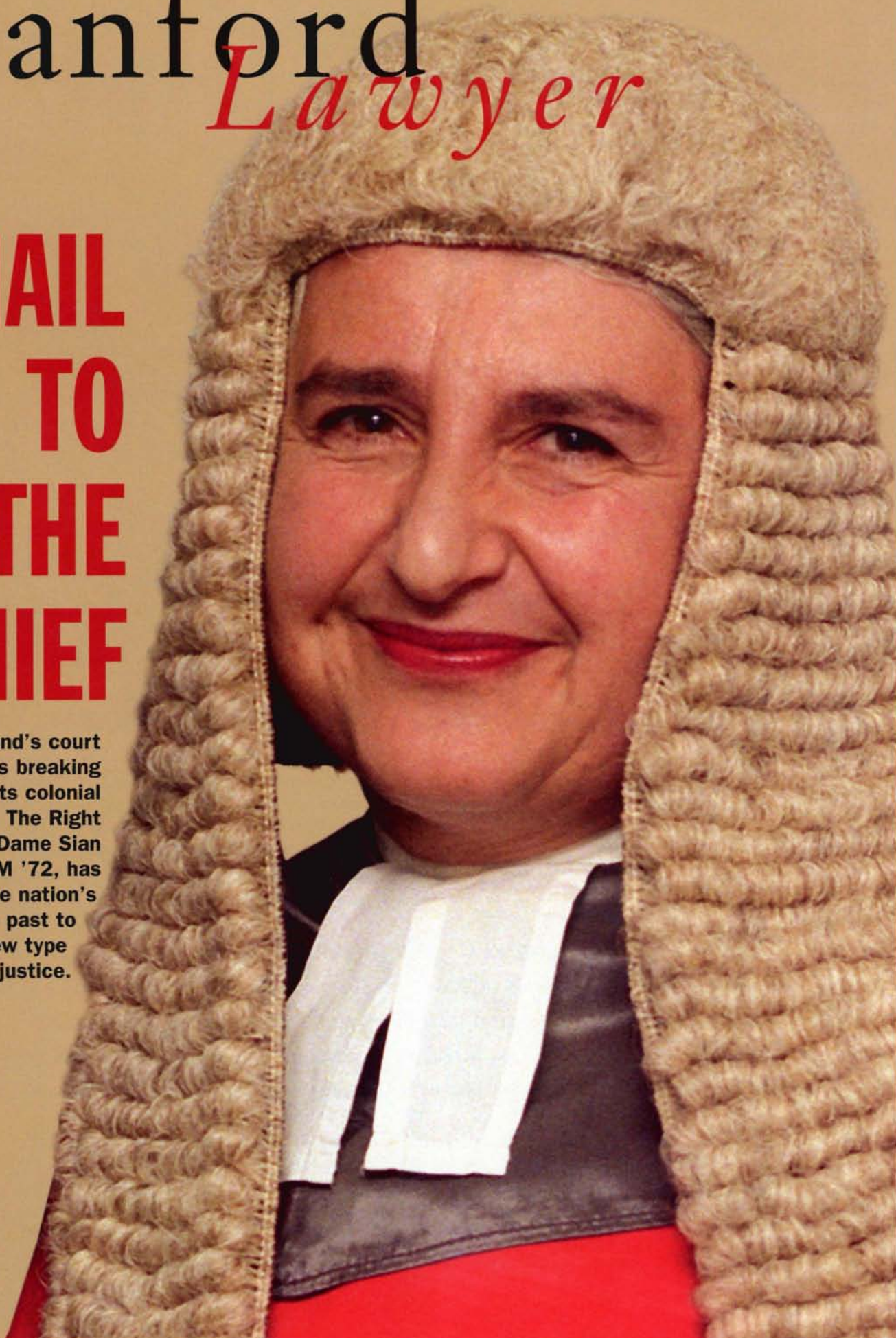


Stanford *Lawyer*

HAIL TO THE CHIEF

New Zealand's court system is breaking away from its colonial traditions. The Right Honorable Dame Sian Elias, JSM '72, has looked to the nation's forgotten past to forge a new type of justice.



"Representing and advising low-income clients from the surrounding communities has made me proud of my chosen profession."

—Marisa Brutoco '04

Practicing What They Teach

The Law School welcomes
the opening of the

Stanford Community Law Clinic

**2117 University Ave.
East Palo Alto
650/475-0560**



THE CLINIC'S LAUNCH TEAM: **Yvonne Meré**, clinical supervising attorney and former supervising attorney, Homeless Advocacy Project, San Francisco; **Peter Reid** (AB '64), clinic director and former executive director, Legal Aid Society of San Mateo County; **Peggy Stevenson** (AB '75), clinical supervising attorney and former executive director, East Palo Alto Community Law Project; **Guadalupe (Lupe) Buenrostro**, legal assistant; and **Gary Blasi**, a visiting professor in clinical law from UCLA.

The Stanford Community Law Clinic began assisting clients in January 2003. Its mission is to serve low-income residents of East Menlo Park, East Palo Alto, Redwood City, and other nearby communities, while providing opportunities for the clinical training of Stanford Law School students. Operated and managed by the Law School in cooperation with the Legal Aid Society of San Mateo County, the clinic will focus on housing issues, workers' rights, and government benefits.

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The Law School Goes Live

BY KATHLEEN M. SULLIVAN

Dean and Richard E. Lang Professor of Law and Stanley Morrison Professor of Law

Two Stanford Law students file a claim for unpaid wages and penalties on behalf of a restaurant kitchen worker who lost his job after his face was burned by oven cleaner and his employer told him to “just wash it off.” Another student wins a motion to quash in federal district court for a client who posts a message anonymously on an internet message board and is subpoenaed by a Canadian pharmaceutical company that says it was defamed (see story, p. 7). A third student wins a summary judgment motion in federal district court that protects a nearly extinct freshwater fish species, the Santa Ana sucker, from destruction of the last areas of its “critical habitat.”

These are just a few examples of how law students represent live clients in the School’s clinical programs, which are undergoing a dramatic expansion in size and scope. According to students, these experiences are exhilarating.

The Law School has long pioneered superb simulated practice courses, from Federal Litigation to International Business Transactions to Deals. But two years ago, the faculty decided that we should build the premier clinical program in the country.

Live client representation, after all, teaches invaluable lessons in practical judgment and ethical responsibility that cannot be learned in the classroom. Law school clinics benefit clients who otherwise would go unrepresented, and remind students that their responsibilities as lawyers extend beyond themselves to society. And, as alumni who worked with such giants as former Stanford Law Professor Anthony Amsterdam well know, working one-on-one with a great lawyer instills lessons that last a lifetime.

To achieve this goal, the Law School recently hired two clinical faculty members and aims to raise that number to five in the near future. Associate Professor Bill Koski has worked for two years with law students in his Education Advocacy Clinic, most notably pursuing a lawsuit in federal district court against a nearby school district for its failure to educate disabled children. Last year the School hired Associate Professor Michelle Alexander ’92, whose new Civil Rights Clinic was immediately oversubscribed. Confirming our views of her legal talent, a lawsuit she filed on behalf of the ACLU of Northern California in 1999 just ended in a settlement limiting racial profiling by the California Highway Patrol (see story, p. 7).

Koski and Alexander joined a clinical program that already offered innovative, popular courses, including the Criminal Prosecution Clinic taught by Professor George Fisher (see story, p. 8), the Cyberlaw Clinic taught by Lecturer Jennifer Granick, and the Environmental Law Clinic taught by Lecturers Debbie Sivas ’87 and Mike Lozeau.

The School continues to develop a clinic focused on civil practice in community law, taught this year by Visiting Professors Shauna Marshall from UC Hastings and Gary Blasi from UCLA. In this clinic, students learn the theory and practice of poverty law.

But a poverty law clinic needs clients. Last year, when the East Palo Alto Community Law Project announced it was closing, we realized that local opportunities to represent indigent clients were in jeopardy. We decided that Stanford should take the lead in creating a new legal services office in East Palo Alto that would provide both clinical experience for students and legal aid for the community.

The Stanford Community Law Clinic, which recently opened its doors in a newly renovated space in East Palo Alto, is the proud result of that effort. In just a few months, Stanford Law School—with the help of the University and the local legal community—funded, staffed, and housed a community legal services organization designed for clinical education.

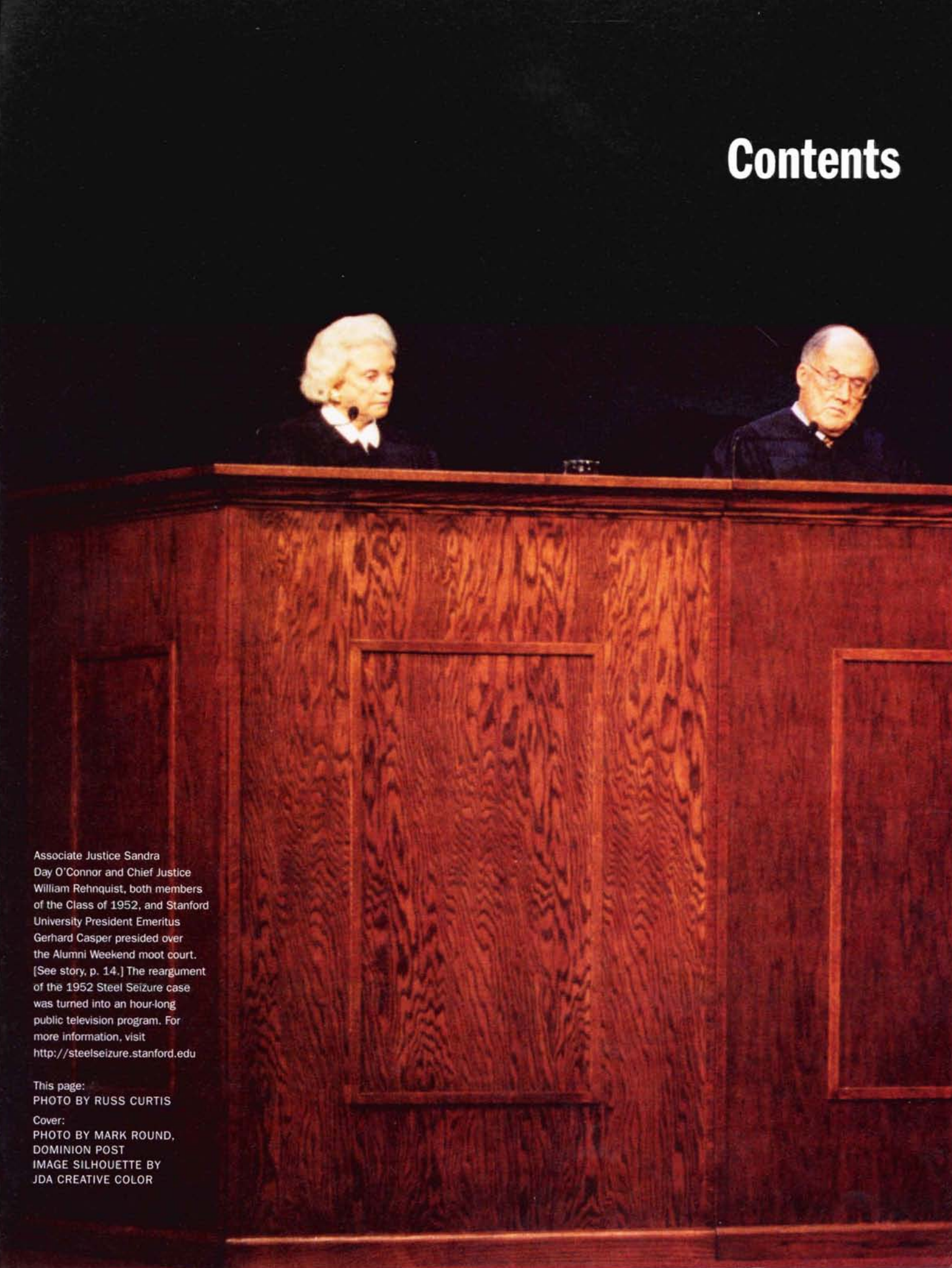
The Clinic is run by an experienced and expert legal staff (see opposite page). Students who work at the Clinic will represent clients who need legal aid with housing, wages, and government benefits. The Clinic will also provide students with pro bono opportunities to help local residents with guardianships, consumer rights, and small business transactions.

As Stanford Law students represent increasing numbers of real clients in courtrooms, council chambers, school districts, and boardrooms, their education will be immeasurably strengthened. We aim, with your support, to make superb clinical training a lasting complement to the excellent training we provide in the classroom.



L.A. CICERO

Contents



Associate Justice Sandra Day O'Connor and Chief Justice William Rehnquist, both members of the Class of 1952, and Stanford University President Emeritus Gerhard Casper presided over the Alumni Weekend moot court. [See story, p. 14.] The reargument of the 1952 Steel Seizure case was turned into an hour-long public television program. For more information, visit <http://steelseizure.stanford.edu>

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COVER STORY

20 UNCOMMON LAW

Chief Justice Sian Elias, JSM '72, has led New Zealand into uncharted legal territory. Can English common law accommodate the spiritual beliefs of her nation's indigenous people?



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14 THE ALL-STAR CAST AT ALUMNI WEEKEND 2002

Supreme Court justices, the FBI director, and a former secretary of state joined the celebrations. Alumni dined under a full moon and toasted the Law School, but only after intense debate over the future of civil liberties in these turbulent times.

28 SCHOLAR, TEACHER, MENSCH

The late Gerald Gunther, the William Nelson Cromwell Professor of Law, Emeritus, was an icon in the study of constitutional law. He shaped the thinking of generations of lawyers and judges, while touching their hearts.

NEWS BRIEFS

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Letters

Declaration of Independence

Your article on the Law School's Directors' College ["Building a Better Director," Fall 2002, p. 10] and accompanying interview with Professor Joe Grundfest ["School for Scandal Prevention," Fall 2002, p. 12] were both interesting and timely in their emphasis on the importance of independent directors.

The rush to enact post-Enron reforms may have overemphasized a "check-the-box" approach to independence, while underemphasizing the underlying personal dynamics: the sociology of independence. Many existing boards are effectively war cabinets—trusted advisors who can huddle and give guidance in difficult times. While efficient, this approach risks a loss of independent judgement, with board members who, may meet technical standards of financial independence, but be reluctant to challenge management head-on.

We have a demonstrated need for boards of directors who can check and balance company executives, while still offering constructive insights and expertise. Moreover, only a meaningfully independent and engaged board will be able to set incentives that truly align management and shareholder interests—solving the principal-agent problem at the heart of many corporate governance issues. It is by influencing the perception of what it means to be a good and responsible board member that Grundfest and the Directors' College may make their most lasting impression.

Kent Walker '87

A Model Democrat?

As a political columnist and strong believer in public service, I read with interest the article about Senator Max Baucus '67 (AB '64), ["Can the Senator Survive Another Montana November?" Fall 2002, p. 14]. Despite the Senator's victory in the fall, the Democrats lost

control of the Senate and also lost seats in the House.

In the aftermath of the mid-term elections of 2002, Democrats began to lay blame for the electoral fallout with various pundits favoring a move by the party either to the right or left. Baucus's win in the heavily Republican state of Montana demonstrates that the answer is not for the Democratic Party to move indiscriminately to the right or left, but to recommit itself to the heartland and the Jackson-FDR constituencies. For example, Baucus helped to nix President Clinton's plan to raise mining and grazing fees on federal lands but protested the nomination of John Ashcroft and staunchly supported abortion rights. By doing so, he endeared himself with the constituencies the Democrats need to win back the majority.

Baucus's independence is a good trait. However, at times, he committed the same mistakes the national Democratic Party made prior to the mid-term elections. The Party must stand for something to maintain and aggrandize its base of support. It cannot merely perch itself in the middle on every issue and expect to regain majority status. On some issues, the Party should consider moving right, on others, left. When President Bush proposed his tax cut in 2001, Baucus had the ability to question the cut and its consequences. Unfortunately, like most Democrats, he helped pass the tax cut. As a result, the once burgeoning national surplus has become a national debt.

The Bush tax cut is just one example of an issue that could have resonated with traditional Democratic voters had the Democrats made fighting the cut a priority. Instead, many Democratic leaders were content to find middle ground, at the expense of the Democratic Party's constituency. This faction, in turn, was not as motivated as the Republican constituency when it came to Election Day 2002.

The Democratic Party can learn from Baucus's victory and the party's defeat in the mid-term elections. For their sake, let's hope they learn the right lessons.

Michael M. Shapiro '03

Columnist, www.politicsnj.com

Home on the Range

It was with great interest that I read the profile of Montana's senior United States Senator, Max Baucus, in the fall issue of the *Stanford Lawyer*. I applaud your magazine for presenting a well researched, thorough, and unbiased profile of both the Senator and the political landscape in Montana.

Like others in Montana, I have known the Senator for most of my adult life. The article did a masterful job of capturing the essence of a public servant who, in many ways, defies either simple description or traditional political labels.

Justice W. William Leaphart

Montana Supreme Court

More letters on p. 68

Stanford Lawyer welcomes letters from readers. Letters may be edited for length and clarity. Send submissions to Editor, Stanford Lawyer, Stanford Law School, Crown Quadrangle, 559 Nathan Abbott Way, Stanford, CA 94305-8610, or by e-mail to jrabin@stanford.edu.

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News Briefs

READY, AIM, CALCULATE!

Scholars duel over crime statistics,
guns, and regression analyses.

MORE GUNS LEAD TO LESS CRIME. John Lott, Jr. became the darling of the gun lobby by supplying statistics that buttress that claim. He armed himself with a massive data set spanning three decades, ran the numbers through complex regressions, and reached a startling conclusion: Laws that permit citizens to carry concealed handguns reduce the number of violent crimes.

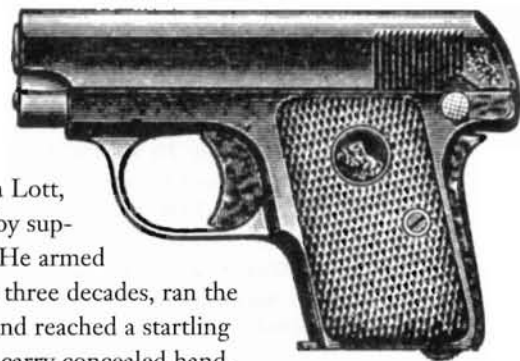
Indeed, according to Lott, "About 1,500 murders and 4,000 rapes would have been avoided" from 1992 to 1997 if the entire country had right-to-carry laws.

Many academics dismiss this research as hokum, but few have had the time and expertise to debunk it—until last fall when John Donohue III, William H. Neukom Professor of Law, and his Yale colleague, Ian Ayres, William K. Townsend Professor of Law, weighed in. They crunched Lott's data, plus a few years, and determined that Lott's results "collapse" under greater scrutiny. One of Donohue's and Ayres's regressions reveals that crime actually fell more sharply in the 1990s in states without right-to-carry laws than in states that enacted such laws. "No longer can any plausible case be made on statistical grounds that shall-issue laws are likely to reduce crime for all or even most states," they write in an article in the April issue of *Stanford Law Review*.

Donohue and Ayres note that Lott has made some important contributions. The data he has compiled benefit all researchers interested in examining the relationship between handguns and crime. And Lott deserves credit for making a convincing case that right-to-carry laws didn't produce bloodbaths, as many gun control advocates had predicted.

Lott, however, is not yielding any ground. In the same issue of *Stanford Law Review*, he dismisses the new criticism. "Ayres and Donohue have simply misread their own results," he writes.

The National Academy of Sciences recently convened a panel to review these and other conflicting studies on guns and crime. Its findings may not put an end to the debate, but it's doubtful that Lott's research is ever again going to carry the same clout.



COURTESY OF FOX BROADCASTING COMPANY

THE LAW SCHOOL'S HOLLYWOOD STAR?

FILM AND TV ACTOR Kiefer Sutherland (left) never pursued legal studies on the Farm, though he owes his 2002 Golden Globe award to someone who did. Sutherland claimed the prize for his role in the television series "24," in which he plays counterterrorist agent Jack Bauer. The co-creator of the character and the show, Bob Cochran '74 (AB '71), has become one of Hollywood's hottest writing stars and last fall got a statue to prove it. Turn to page 42 for the full story.

MAKING THE GRADE

The *Daily Journal* last fall presented its fifth annual list of California's most influential lawyers, including 21 "titans" who have made the cut each year. Among the top 100 are **Mary Cranston '75 (AB '70)**, Professor **Joseph Grundfest '78**, **Beth Jay '72**, **Michael Kahn '73 (AM '73)**, Professor **Lawrence Lessig**, **Stephen Neal '73**, and **Richard Pachulski '79**. Included in the list of quinquennial "titans" are **Warren Christopher '49**, the Hon. **Ronald George '64**, and Dean **Kathleen Sullivan**.

President George W. Bush nominated the Hon. **James Selna '70 (AB '67)** to the federal bench in Los Angeles in January.

Creative Commons, a nonprofit dedicated to promoting the creative reuse of intellectual work, unveiled its first product in December: the free machine-readable copyright license lets copyright holders easily inform others that their works can be copied and used for specific conditions, with no charge. Professor **Lawrence Lessig** is chairman of Creative Commons, which is housed at the Law School. A report on its progress will appear in the summer issue of *Stanford Lawyer*. In the meantime, to learn more, go to its website, www.creativecommons.org.

In October **Shirley Mount Hufstedler '49** and **Seth Hufstedler '49** became the first couple to receive the California Bar's prestigious Bernard E. Witkin Medal, honoring the state's "legal giants."

SLS Librarian **Erika Wayne** won this year's Marsh O'Neill award, given to University staff members who do extraordinary things to support research.

The Law School gave Christie's and Sotheby's competition, as the annual auction, sponsored by the **Stanford Public Interest Law Foundation**, drew a crowd to campus on March 1. A card-board cutout of Dean Kathleen M. Sullivan sold for \$1,200, and a seat at a faculty poker game was a steal at \$1,200! Student organizers estimate that \$50,000 was raised for grants to public interest law projects—about \$8,000 more than last year.

A GOOD LAWYER GOES BEYOND THE LAW

A veteran diplomat warns that international law is "fuzzy."

PRESIDENT BUSH received harsh criticism last year for raising tariffs on steel. But before he acted, the decision was likely backed up with advice from a good lawyer, says Richard Morningstar '70, an ambassador in the Clinton Administration.

Morningstar, who was the Herman Phleger Visiting Professor of Law, taught courses on international law, policy, and trade last fall, and delivered the annual Phleger lecture on December 4. In his remarks, Morningstar explained that if Bush received advice from U.S. Trade Representative Robert Zoellick, it undoubtedly went beyond trade law. Zoellick, whom Morningstar calls a brilliant lawyer, likely considered political ramifications, as well as potential sanctions from the World Trade Organization.

Morningstar notes that this sort of advice is a good example of "the three-dimensional practice of law," a critical way for attorneys in policy-making positions to approach problems. It boils down to a basic lesson he learned at the Law School: "The relationship between interested parties is often more important than the black letter of the law," he says. Morningstar served as Ambassador to the European Union and as an advisor to President Clinton on the Caspian Basin and the new independent states of the former Soviet Union. He believes in international law, but he warns that it is very "fuzzy." For instance, he notes that it's unclear whether the tariff hikes were in accord with the law.

Morningstar says that any good lawyer offering advice on that issue would consider that steelworkers in West Virginia, a critical Bush constituency in the 2002 election, would be furious if tariffs were not raised. In turn, any possible WTO sanctions would not emerge for a while. Also, the European Union would be angry, but its outrage could probably be managed. "Shouldn't a lawyer be restricted to analyzing the law?" Morningstar asks rhetorically. He warns against taking a narrow view. "If you don't understand the full context, you can actually be counterproductive."



Richard Morningstar '70 was Ambassador to the European Union.

A NEW ASSOCIATE DEAN FOR EXTERNAL RELATIONS

Catherine "Rinnie" Nardone brings plenty of experience to the job.

CATHERINE "RINNIE" NARDONE WAS NAMED in December the Law School's Associate Dean for External Relations, responsible for development, alumni relations, and communications. A familiar face to alumni, she is a 10-year veteran of the Law School and worked through the last capital campaign, becoming development director in 1997. Before her latest promotion, she was assistant dean, helping to raise more than \$12 million in cash in the door for each of the last two fiscal years. Her appointment comes in the wake of former Associate Dean Martin Shell's promotion to University Associate Vice President for Development. "Rinnie brings intelligence, energy, professionalism, and an amazing depth of knowledge of the School and its alumni," said Dean Kathleen M. Sullivan. "I feel exceedingly lucky to have her serving in this capacity."



Nardone: an SLS veteran

A CYBERLAW CLINIC VICTORY

EXECUTIVES AT QUEBEC-BASED Nymox Pharmaceutical Corporation wanted the identity of an individual who had anonymously posted anti-Nymox messages on Yahoo's website. A Canadian court ordered that the name be revealed, but Yahoo refused, because the information was on servers in the U.S. So in January, Nymox crossed the border to obtain a subpoena from a federal court in the Northern District of California. Enter the Law School's Cyberlaw Clinic, under the direction of Lecturer Jennifer Granick. She guided Jennifer Elliott '03, as the third-year student argued in court for a motion to quash. Judge William Alsup agreed, finding insufficient cause to overcome the First Amendment privilege of anonymous speech.



Jennifer Granick

A BLOW TO RACIAL PROFILING

THE CALIFORNIA HIGHWAY PATROL agreed in February to adopt new policies to prevent racial profiling as part of a landmark settlement of a class action lawsuit brought by Michelle Alexander '92. While admitting to no wrongdoing, the CHP pledges to cease using stops for minor traffic violations as opportunities to search vehicles and to prohibit officers from asking permission to search vehicles when there is no probable cause. Alexander, previously at the ACLU of Northern California, last year became the Law School's associate professor responsible for its new civil rights clinic.



Michelle Alexander '92

STEVE GLADFELTER

CARDINAL ARGUMENTS ON UNIVERSITY OF MICHIGAN ADMISSIONS POLICY

The Supreme Court received more than 70 amicus briefs for *Grutter v. Bollinger* and *Gratz v. Bollinger*. The petitioners contend that the University of Michigan Law School and its main undergraduate college unconstitutionally used race in considering applicants. Here are some of the Stanford Law School faculty and alumni who have weighed in.

Amicus Curiae	In Support of?	SLS Connection	One-Sentence Summary*
American Law Deans Association	Respondents	Dean Kathleen M. Sullivan, an ALDA board member, is one of the counsel.	"Consideration of race in law school admissions serves multiple compelling interests, including avoiding resegregation, selective admission standards, serving the whole state, and remedying past and present discrimination in public education."
Association of American Law Schools	Respondents	Kenneth and Harle Montgomery Professor of Public Interest Law Pam Karlan is counsel of record.	"A racially integrated system of legal education is critical to American democracy."
Harvard, Stanford, and Yale black law students associations	Respondents	Cheryl Mills '90 is one of the counsel.	"Racial diversity is necessary for elite law schools to fulfill their public mission of training students for leadership positions and integrating the legal profession."
National Association of Scholars	Petitioners	William Allen '56 (AB '48) is one of the counsel.	"There is no consensus among faculty, students or beneficiaries of racial preferences that supports the Law School's admissions policy."
Stanford, MIT, DuPont, et al.	Respondents	Debra Zumwalt '79, Stanford University VP and General Counsel, is one of the counsel.	"The educational benefits of achieving a diverse population of students in the fields of science and engineering are compelling."
Veterans of the Southern Civil Rights Movement, et al.	Respondents	Mitchell Zimmerman '79 is counsel of record.	"The progress in increasing the participation by people of color in higher education over the last forty years rested and continues to rest in large part on affirmative action."
21 law professors	Petitioners	Robert Anthony '57, professor emeritus at George Mason, and Dale Nance '77, professor at Case Western, are among the amici.	"Pursuit of 'diversity' is a euphemism for race-based decision-making."
13,922 current law students	Respondents	193 SLS students are among the amici.	"Justice Powell's opinion in <i>Bakke</i> , holding that diversity is a compelling governmental interest, is controlling and should be followed."

*All quotes from www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/summary.html

COMPELLING EVIDENCE

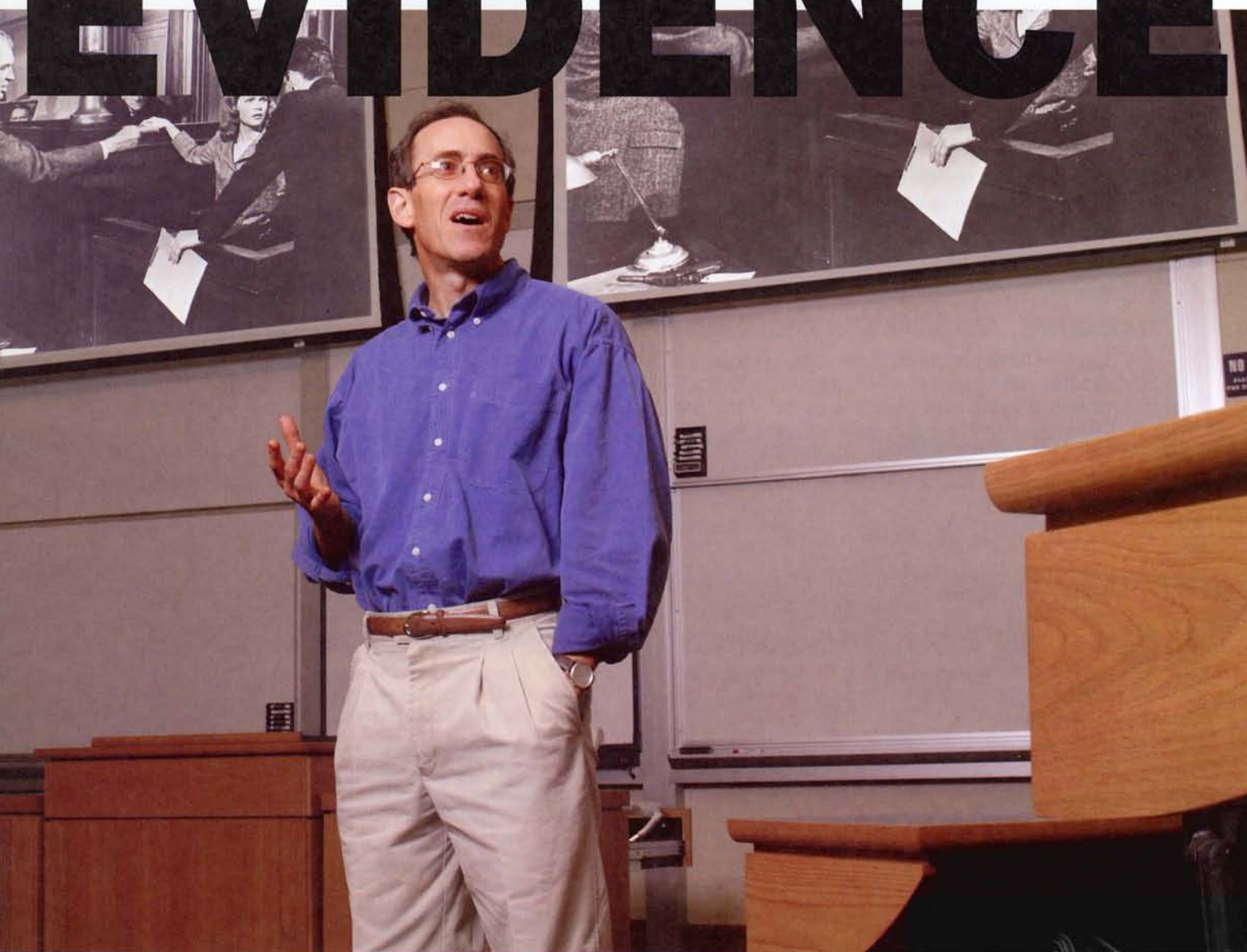


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Many students expect evidence class to be dull, but Law School Professor George Fisher believes it can actually be fun. He talks here about his new casebook, classroom movies, and his just-published book on plea bargaining.

Room 290 is dark, except for the two screens at the front of the lecture hall on which Tom Hanks frantically shouts into a pay telephone. The clip is from *Bonfire of the Vanities*, and the 165 students in Professor George Fisher's evidence class are paying close attention to the scene. The lights come on. "So before you came to law school, how many of you were aware of the marital communications privilege?" Fisher asks, seamlessly picking up the discussion that had been going on only a few minutes before he showed the film snippet. While this is his final lecture of the fall semester, students don't appear tired. They're arguing over whether the conversation, in which Hanks's character mistakenly calls his wife instead of his mistress, is covered by the privilege.

Over the last decade, Fisher, who in March was named the winner of the Law School's John Bingham Hurlbut Award for Excellence in Teaching for the second time in his career, has developed a distinctive approach to teaching evidence. In 2002 his casebook on the subject was published by Foundation Press, accompanied by a teacher's manual and a videotape with film clips. Already professors at 15 schools, including Boalt, Boston College, Chapman, and Georgetown, have adopted his approach, attracted by its new selection of cases and its use of charts and films. "His casebook does what a good casebook needs to do," says David Kaye, Regents' Professor at Arizona State College of Law, who chose to use Fisher's instead of updating his own materials. Michael Ariens, a professor at St. Mary's University School of Law in San Antonio, Texas, adds that students approached him—without prompting—to share how much they enjoyed reading it. "That doesn't usually happen," he says. Fisher has accomplished the goal he outlines in the casebook's preface: "To create an evidence book students will love."

Fisher's commitment to making the subject engaging, however, does not come at the expense of serious study. In the casebook and in class, he raises thorny questions, imparts the latest arguments, and demands rigorous scholarship from students—and himself. His latest book, while on a different subject, was just published by Stanford University Press. *Plea Bargaining's Triumph* (see excerpt, p. 12) breaks new ground on the rise of plea bargaining and challenges some prevailing assumptions about this practice. A former prosecutor, he also runs the Law School's Criminal Prosecution Clinic.

The students in Fisher's class clearly are interested in what he has to say. In the break during the final lecture, a small throng forms around Fisher to continue the discussion. An hour later, he concludes the course with a brief but eloquent lecture. "There is a striking disjunc-

tion between our fears of the jury when we screen the evidence that comes before it and the enormous trust we place in jurors when we ask them to go back to their little room and then tell us *what happened*," he says. On the one hand, this trust may be justified because the evidence has been "purified"; on the other, the idea that "jurors can look at people's faces and into their souls" may be wrong. "So maybe we have just been tinkering around the edges," he says, "but it's been fun."

Students stand and clap. Fisher quickly exits. A few minutes later, after the ovation is over, he returns to the room. A couple of students aren't ready for the discussion to end.

In the following interview, *Stanford Lawyer* Editor Jonathan Rabinovitz asks Fisher about his books, his teaching, and how he weaves Hanks, Jimmy Stewart, and Anne Bancroft into evidence lessons.

Q: I interviewed professors at other law schools who say that "evidence" gets a bad rap, that it's viewed as being dull. Why does it have this reputation?

GF: Students come to law school excited to learn about constitutional rights and the debates surrounding affirmative action and abortion. Or they're focused on wetlands preservation or prevention of domestic violence.

Nobody comes to law school hoping to learn about the propensity rule or the endless exceptions to the hearsay rule. A big challenge in teaching evidence is overcoming students' suspicion that there is no good reason to take evidence except that it's on the bar. As it works out, though, evidence is at the heart of every meaningful courtroom dispute. Without a command of evidence law, lawyers can't protect rights or species or welfare benefits.

Q: After you gave me the videotape that accompanies your casebook, I took it home, made some popcorn, and sat down to watch. I enjoyed the clips, but it wasn't immediately apparent how you would use them to teach. Are they demonstrations of lawyers at work or simply entertainment?

GF: I think the best answer is neither. More than anything, the clips raise questions about applying evidence law. Many of them don't show lawyers or courtrooms at all.

Q: So how exactly does a rigorous law school education require watching Mrs. Robinson (Anne Bancroft) calling the police on a distraught Benjamin Braddock (Dustin Hoffman), in *The Graduate*?

GF: I love that film. Benjamin breaks into the Robinson

home hoping to find Elaine, but finds Mrs. Robinson instead. She picks up the phone and, with perfect sangfroid, reports there's a burglar in her home. The question for evidence students is whether the police tape of the call would be barred as hearsay. It's not an excited utterance because Mrs. Robinson was so cool—and the rule doesn't care how a normal person would react on finding a burglar in her home, only how *this* person reacted. But the call may qualify as a present-sense impression.

So why pose this problem on film when it would be quicker just to describe it? I think students respond better to a problem posed by Hollywood than to one devised by me. They know that when I pose a problem, I've made it up. They realize I'm trying to teach a particular lesson, and the whole exercise feels somewhat manipulative. Problems posed on film are more engaging because they weren't contrived as a pedagogical device.

Q: Do you worry that the films dumb down the content?

GF: At first I certainly worried about that—and I'm even a little embarrassed that we're focusing on the films. But in the end, I think it's impossible to dumb down evidence law—it's simply too intricate and demandingly precise for that. Besides, every year my course evaluations read this way: "Q: What did you like best about this course? A: The videos!" "Q: How could this course be improved? A: More videos!"

Q: You've said that Rule 404(b) is the most difficult area of evidence law for practitioners as well as students. What makes it so tough?

GF: Rule 404(b) is hard because it seems to say something it doesn't—and what it does say seems wrong. The rule seems to—but does not—grant permission to offer what is called "propensity evidence." Propensity evidence is evidence that a person has acted before in a particular way, and therefore she probably acted that way on the day of this crime. This kind of evidence appeals strongly to our common sense—that's why we don't hire accountants who have stolen from clients—and so lawyers and judges instinctively think it should come in. They latch onto Rule 404(b), which *seems* to suggest that propensity evidence is admissible in a broad array of circumstances. Unfortunately, that's not at all what the rule says. So the challenge of teaching the rule amounts to this: First you have to persuade students that the rule writers really did mean to exclude perfectly sensible evidence. Then you have to persuade them that the rule-writers never meant to say exactly what Rule 404(b) seems to say.

Q: What do you do to make 404(b) easier to fathom?

GF: Besides the film clips, which help distinguish situations in which the rule applies from those in which it doesn't, I rely on a flowchart in my casebook. [See chart, p. 11.] Up in the top left corner of the chart is a little "propensity box." It represents the one sort of evidence banned by Rule 404—propensity evidence, if used to show how a person acted at a particular time. I hope the chart helps students distinguish between those rare times when the rule actually allows propensity evidence—these are trips *through* the propensity box—from those times when litigants simply manage to evade the rule. The latter are trips *around* the box. As the chart shows, Rule 404(b) is a trip around the box. It doesn't create an exception to the propensity rule. Rather, Rule 404(b) gives lawyers a big hint: if they think creatively about how they present their evidence, they can evade Rule 404 altogether.

Q: Aside from the charts and films, what makes your evidence casebook different from all other casebooks?

GF: Before I taught evidence the first time, I reviewed most of the leading casebooks. I nearly chose Miguel Méndez's, which has its own unique approach. Miguel [Stanford's Adelbert H. Sweet Professor of Law] was a California practitioner, and he's the only evidence teacher around who combines California evidence principles and federal evidence principles in one book. His text is thoroughly clear, and he doesn't confuse his presentation with long case excerpts or other distractions. The first time I saw Miguel teach I realized that he did not write the book for the market, he wrote it for himself. And his teaching is just as clear and straightforward. So I realized that the ideal is to write a casebook that suits your own style. Since I was never a California practitioner, and since I go off on diversions, I started assembling my own materials. It has less law and more diversions—cases, charts, and journal excerpts, including one of Miguel's.

Q: Your book on plea bargaining was just published. I love the wording at one point, where you describe plea bargaining as an "almost primordial instinct of the prosecutorial soul." [See excerpt, p. 12.] Why such powerful language here for a practice that is viewed by lay people as the antithesis of strong prosecution?

GF: In many instances, plea bargaining *is* the antithesis of strong prosecution. One of the chief lessons of the book is that in many cases, prosecutors are weak. They take the quick, effortless way out—the way that lets them eat dinner with a friend instead of studying the case file. Best of all, they still get to mark the case down as a win. So we have the

twin attractions of ease and victory—it doesn't get much more primordial than that.

Q: I'm struck by your casting plea bargaining in such a negative tone. There are some positive benefits to it, no?

GF: It's true that prosecutors' motives in plea bargaining are often selfish and not focused on good law enforcement. But even if we were constructing a criminal justice system from scratch and somehow could wipe out plea bargaining, we might not choose to do that. If every case had to go to trial, we'd have to pour lots more money into the system or tolerate devastating delays or truncate trials by trimming procedural protections. Or—and this is probably the most likely result—we'd simply have to prosecute fewer cases, and that would mean less law enforcement.

Q: The book breaks some interesting historical ground. You point out that plea bargaining was not just a response to burgeoning caseload in the 20th century, that the rise of the practice can be traced back to the late 18th and 19th centuries. Why does this matter?

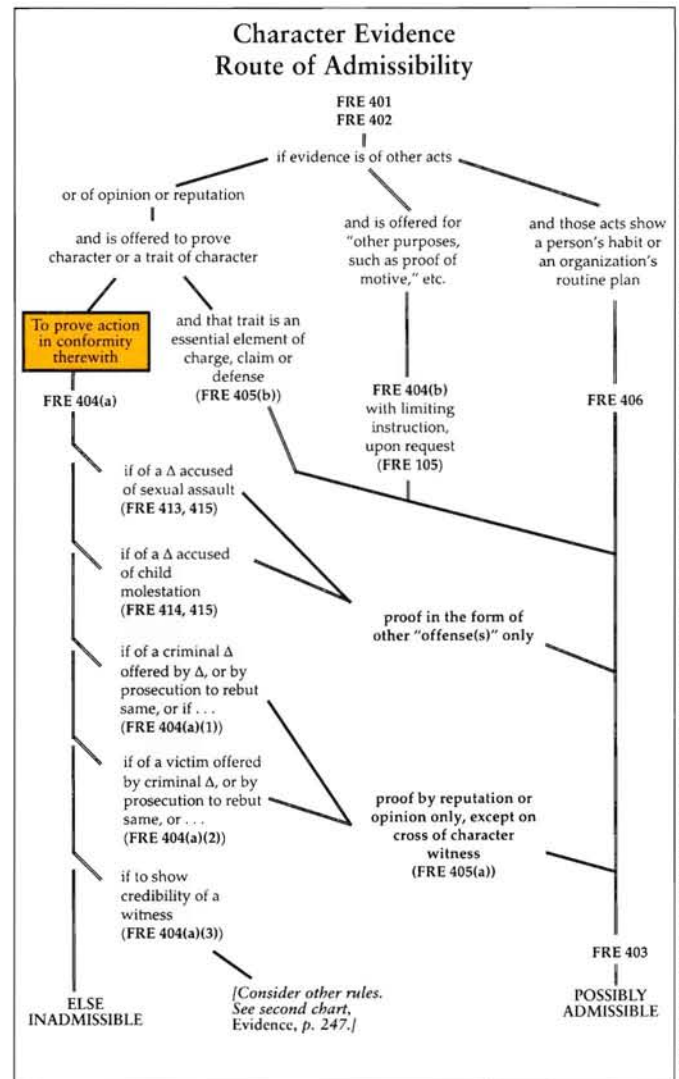
GF: In the end, I think the most important fact about timing is that plea bargaining appeared almost as soon as public prosecutors appeared. In Massachusetts, where I focused my research, the legislature provided for full-time county prosecutors in 1807. By the end of 1808, court records disclose a fairly elaborate form of plea bargaining. You asked me earlier about prosecutors' "primordial instinct." What's significant is that nobody had to teach prosecutors how to plea bargain. All we needed was to have court actors—whether prosecutors or judges—who had both an incentive to bargain and the power to make it happen.

Q: But it took caseload pressure to make it widespread.

GF: That's exactly right. The chief incentive to bargain, for both prosecutors and judges, is and always has been the pressure of overwhelming caseloads. In fact, one of the aims of the book is to suggest that old arguments about caseload pressure, put forward by the very earliest plea bargaining scholars in the 1920s, were right after all—and that more involved, more theoretical explanations proposed by recent historians have simply blurred the picture.

Q: Didn't judges and defense lawyers view plea bargaining as an erosion of their power?

GF: At the beginning, judges did see plea bargaining that way. But then their caseloads, both criminal and civil, began



What determines whether a jury will be allowed to hear about a defendant's criminal record, personal peccadilloes, and other sorts of character evidence? In this flowchart from page 140 of George Fisher's *Evidence* (Foundation Press, 2002), the propensity box—the highlighted rectangle in the upper left corner—appears small, but, Fisher writes, "it drives the entire dynamic of the character evidence rules." For character evidence to be admitted, it must get either through or around the propensity box.

to bury them. Besides, plea bargaining evolved in such a way that in most cases, at least in a formal sense, judges still retain all of their sentencing power. As for defense counsel, those who focus only on the client's interests sometimes like plea bargaining and sometimes don't, depending on whether it works to the client's advantage. Lawyers who focus on their own interests always love plea bargaining. It reduces their workload and multiplies their hourly rate. Many defense lawyers demand full payment in a lump sum up front and make no provision for a rebate if the case settles quickly.

Q: You used to do plea bargaining professionally. Do you miss working as a prosecutor?

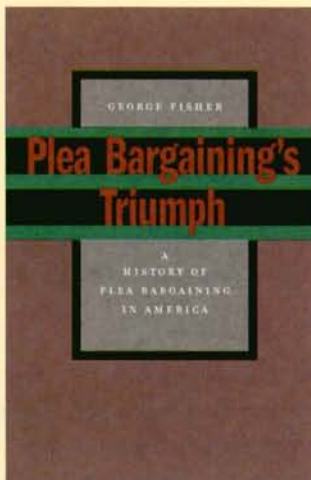
GF: Most of prosecuting is plea bargaining, but the part of being a prosecutor I remember most vividly is going to trial. That's where all the excitement was, but it's also where all the stress was. A huge amount of effort and strife went into cajoling witnesses simply to be on time, and a whole lot more went into planning almost every word you wanted the jury to hear. Most of the strategy of plea bargaining, in fact, was persuading the defense lawyer you were raring to go to trial while inside you were

hoping desperately the case would plead.

So do I miss all this? I do miss those few moments of finally showing up in court when everything was in place and went according to plan. But I still get some of that excitement, vicariously, through the prosecution clinic. Only now, the six students in the clinic do all the stressful parts—cajoling witnesses, scripting arguments, sparring with defense counsel. I get to sit back in the shadows watching them develop the nerve to do it.

Let's Make a Deal, Circa 1808

*In this excerpt from pp. 21-23 of **Plea Bargaining's Triumph**, George Fisher reveals early instances of plea bargaining that occurred during the tenure of prosecutor Samuel Dana, the first county attorney in Middlesex County, Massachusetts (a region that includes Cambridge).*

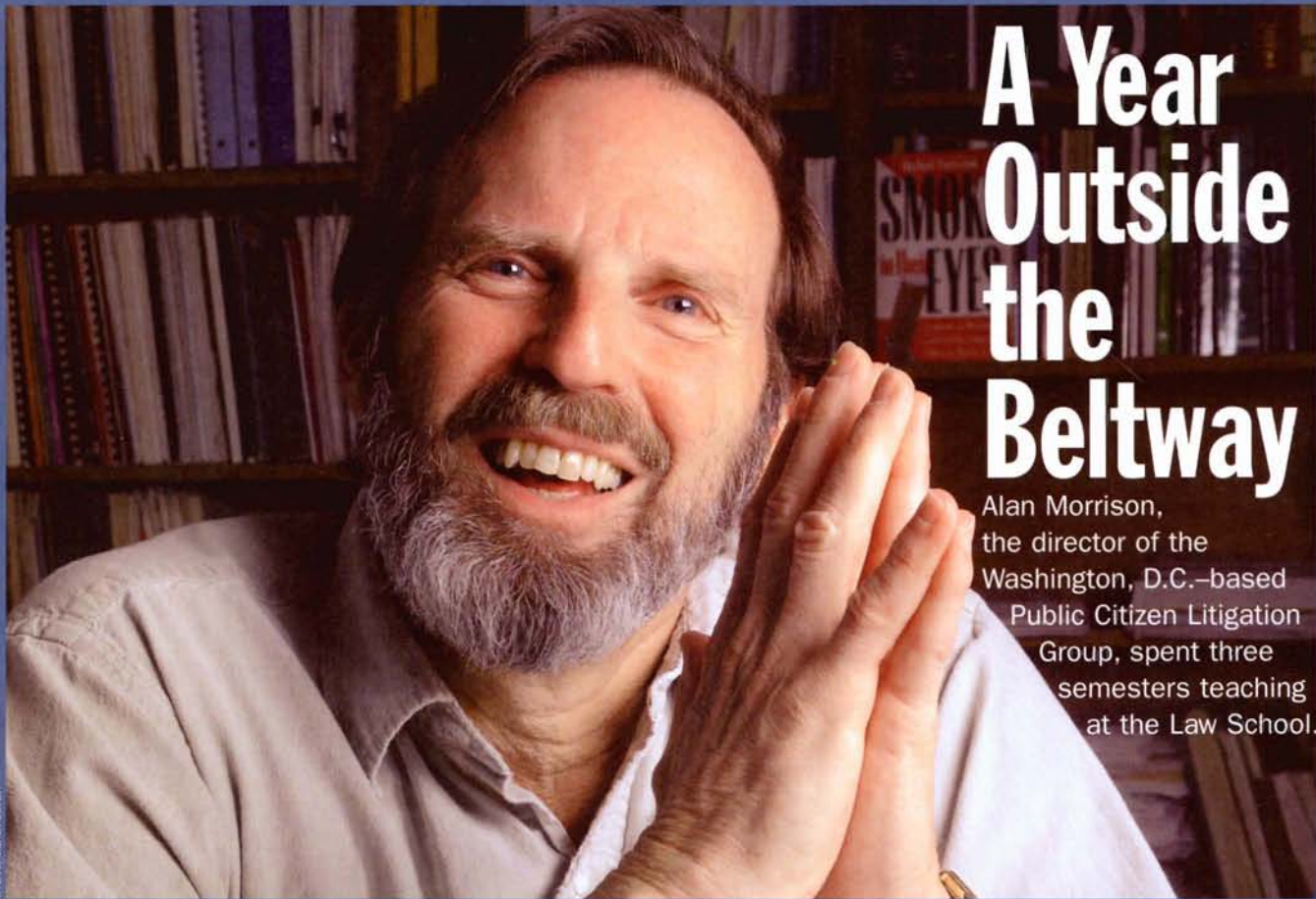


For more information about **Plea Bargaining's Triumph** (Stanford University Press, 2003), please visit www.sup.org.

"For our purposes, Dana's most important legacy [can be traced back to] . . . the December 1808 sitting of the Court of Common Pleas. . . . We find in the records of that term the case of Josiah Stevens of Tyngsborough, who faced prosecution under the state's 1787 liquor license law, which required that alcohol retailers be licensed. The Stevens prosecution was one of Dana's first liquor cases and only the third liquor case to come before the Court of Common Pleas in Middlesex County since that court first started hearing criminal matters in 1804. Dana had drawn up a four-count indictment against Stevens. Count one charged him with being a 'common seller' of alcohol, counts two and three with making particular unlicensed sales, and count four with selling alcohol and permitting the buyer to drink on Stevens's premises. The court's clerk narrated the outcome: '[T]he said Josiah [Stevens] says he will not contend with the Commonwealth. And Samuel Dana Esquire Atty. for the Commonwealth in this behalf says that in consequence of the defts plea aforesaid he will not prosecute the first third and fourth counts against him any further.' In other words, Dana and Stevens had struck a deal: In exchange for the defendant's plea of no contest, Dana dropped three of the four counts of the indictment. On the remaining count, Stevens paid a fine of \$6.67 and \$47.12 for the costs of prosecution.

"Dana prosecuted only one additional liquor case during the rest of his brief tenure as county attorney. In March 1809, he brought a four-count indictment against Nathan Corey, a husbandman of Stow. Count one charged Corey with being a common seller of alcohol, and counts two, three, and four with making particular unlicensed sales. The clerk's account of the result varies from that in *Stevens* only in that Dana lived up to his part of the bargain first. . . .

"Although *Stevens* and *Corey* are among the earliest clear plea bargains to emerge in my survey, they are of a remarkably sophisticated cut. We cannot know Dana's thoughts as he sought these four-count indictments, but today we would say that a prosecutor who brought several charges in the hope of gaining leverage in plea negotiations had 'over-charged' the case. Dana may have had other motives for charging these cases as he did, but given the four-count indictments, he was in a position to threaten the defendants with multiple penalties and then to reward their pleas of no contest by dropping three of the four counts. Stevens and Corey chose not to plead plainly 'guilty' to the remaining count of the indictment. Rather, they would 'not contend with the Commonwealth,' and by means of these pleas of *nolo contendere*, they spared themselves any admission of fault while giving the court the power to convict and sentence them. To winnow the excess charges, Dana employed the *nolle prosequi*, or *nol pros*, which the Supreme Judicial Court only recently had declared to be an exclusively prosecutorial device. Gadget for gadget—multiple-count indictments, *nolo* pleas, and *nol prosses*—these early plea bargains rival some of the best work of modern plea practitioners. And yet they emerged here, only a year into the tenure of the first county attorney, an almost primordial instinct of the prosecutorial soul."



A Year Outside the Beltway

Alan Morrison, the director of the Washington, D.C.-based Public Citizen Litigation Group, spent three semesters teaching at the Law School.

STEVE GLADFELTER

Alan Morrison, one of the nation's premier public interest litigators, handles more Supreme Court cases in a year than most lawyers handle in a lifetime. For three decades, as director of the Public Citizen Litigation Group, he has practiced inside the Beltway: "In a city captivated by influence and impact, Morrison is clearly in the major leagues," the *Washington Post* once wrote. But to understand one of Morrison's less-heralded talents, talk to first-year student Jennifer Chou '05, who had him as a visiting instructor in the fall semester. She made a CD of the procedure class in which Morrison questioned her, in Socratic fashion, on discovery and protective orders, then gave it to her parents for Christmas. "I couldn't think of any better evidence that I'm not wasting my time, just because I decided not to become a doctor," she says.

Dean Kathleen M. Sullivan, who was a student in two classes that Morrison taught as a visiting instructor at Harvard, worked for several years to arrange Morrison's latest stint at Stanford. He had enjoyed a month-long visit to the Law School in 1997, but family obligations prevented him from returning for a longer stay. Still, Sullivan persisted, calling regularly. One afternoon three years ago, after Morrison had just testified before Congress in favor of the proposed McCain-Feingold campaign finance legislation, he crossed paths with Sullivan, who was about to speak against it. She again invited him; this time he was available. He planned on two semesters, but stayed three. "I was having such a good time that I asked if I could stay longer," he says. He liked the students, the faculty—and the weather. (He's a self-described "avid, mediocre" golfer.) In addition to teaching, he wrote several articles and worked on a dozen or so Supreme Court cases, before driving east in January. Would he come back? "Who wouldn't be tempted?" he asks.



At the close of Stanford's moot court, Chief Justice William Rehnquist '52 (AB '48, AM '48), a clerk to Justice Robert Jackson when the Steel Seizure case was argued, remembered the Justice coming back from conference and calling Rehnquist and a co-clerk into his chambers. "Well, boys, the president got licked!" Jackson remarked, according to Rehnquist.



Associate Justice Sandra Day O'Connor '52 (AB '50) told alumni that while President Harry Truman and the Justices frequently socialized, things were "quite stiff" the first time he dined at Justice Hugo Black's house following the Steel Seizure decision. According to O'Connor, it took a few drinks before Truman relaxed and told Black, "Your law is no good, but your bourbon is."



Stanford University President Emeritus Gerhard Casper, a leading constitutional scholar, highlighted what makes the Steel Seizure case such a constitutional conundrum. "There is no reference to emergency powers anywhere in the Constitution," he said.

Seizing

Two Supreme Court Justices marked their 50-year Law School reunion by presiding over an exceptional moot court case: the arguments over President Harry Truman's seizure of the nation's steel mills in 1952 raised all-too-relevant constitutional questions about the boundaries of presidential power in times of crisis.

In times of crisis, friends gather, not simply to find comfort, but to make sense of their troubles. A moot court and other events (see p. 16) during Alumni Weekend 2002 drew hundreds of graduates back to campus to consider how the United States must adjust to this new war on terrorism. And one of the pressing questions they weighed was this: How much should the boundaries on presidential power be extended during an emergency?

The October 19 moot court—a reargument of the 1952 Steel Seizure case (*Youngstown Sheet & Tube v. Sawyer*)—offered insights but no definitive answer. Attracting more than 1,500 people to Memorial Auditorium, the event marked the 50th anniversary of the Supreme Court's Steel Seizure decision, the 50th anniversary of the Law School's Kirkwood Moot Court competition, and the 50-year class reunion of two members of the moot court panel: Chief Justice William Rehnquist and Associate Justice Sandra Day O'Connor. The third panelist was Stanford University President Emeritus Gerhard Casper.

It was a half century ago, during the Korean War, that President Harry Truman seized the nation's steel mills, claiming that he had to act to avert a strike that could cut off critical military supplies. The Supreme Court issued a 6-3 decision that the President's act had gone beyond the authority delegated to him in the Constitution and by Congress. Each of the justices in the majority wrote his own opinion, giving different explanations for the ruling.

Power

such extreme power in all circumstances. What distinguished this "unique" instance from others, he explained, is that Congress had specifically declined to extend Truman the power to seize private property. "Our Constitution demands that this court decline to do what Congress has refused to do," he said.

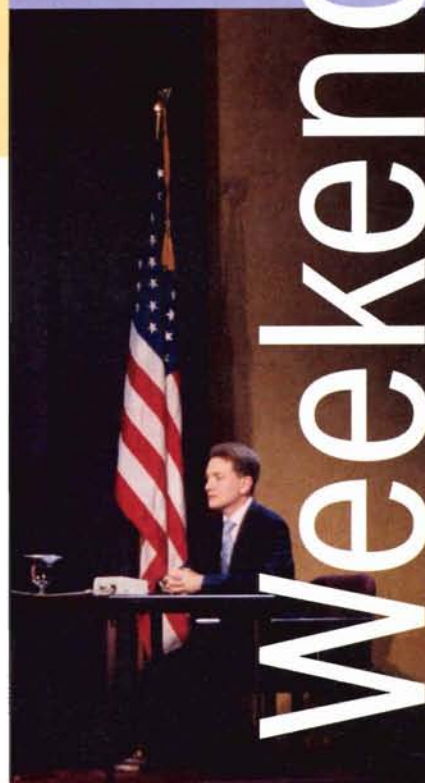
But Karen Stevenson '98, arguing for the Truman administration, disagreed that Congress had placed this seizure off-limits. "The President has invited Congress's input, and Congress has been silent," she said. "If Congress does not act, whether by inertia or unwillingness, the President must have the authority to take action to preserve the union."

So is there any message here for President George W. Bush?

Although none of the panelists issued a decision, they offered intriguing thoughts. Casper essentially said that a president must give Congress great deference: "That agency in our tripartite system that the framers thought of as preeminent has to make the basic decisions about how to deal with emergencies—and that is the Congress." But Rehnquist, who was a Supreme Court clerk in 1952, suggested that the decision could have been different if the government hadn't botched it: federal lawyers got off on the wrong foot by arguing that "the President had all the power that King George III had," he said.

It was O'Connor who summarized the decision in all its ambiguous glory. "One might reasonably conclude that not all emergency actions by all presidents for all times are necessarily foreclosed," she said, but then added, "We can at least conclude as a result of this case that a president acts with some risk in taking action of this type."

The moot court underscored how difficult it remains to draw the line on a president's authority. Chuck Koob '69 argued against the seizure on behalf of the steel industry, but he didn't rule out a president's exercising



The moot court began with a traditional, formal call of "oyez, oyez, oyez" from Ben Horwich '03 (top). Still, a sense of humor and camaraderie prevailed, and at the end, the opposing counsel, Chuck Koob '69 and Karen Stevenson '98 (above), warmly congratulated each other.

PHOTOS: RUSS CURTIS

"We have witnessed in the months since the terrorist attacks widespread racial and ethnic profiling," said Associate Professor Michelle Alexander '92 during the forum "Shifting Ground: Changing Realities in a Post-9/11 World" on the morning of October 18. The panel (right) included Alexander; Laura Donohue, visiting fellow at the Center for International Security and Cooperation (CISAC); Dean Kathleen M. Sullivan as moderator; Stephen Stedman, senior fellow at CISAC; and Dean for Religious Life William "Scotty" McLennan.



"We do not target individuals or groups by reason of their country of origin or nationality," Robert Mueller III (right), director of the Federal Bureau of Investigation, said when he gave the Jackson H. Ralston Lecture in International Law on the evening of October 18. In introducing him, Dean Kathleen M. Sullivan said that few people exemplify the ideals of the rule of law better than Mueller. The event would not have occurred without the assistance of Peter Folger (AB '67), Michael Kahn '73, and John Levin '73 (below, with Mueller), partners at the firm of Folger Levin & Kahn.

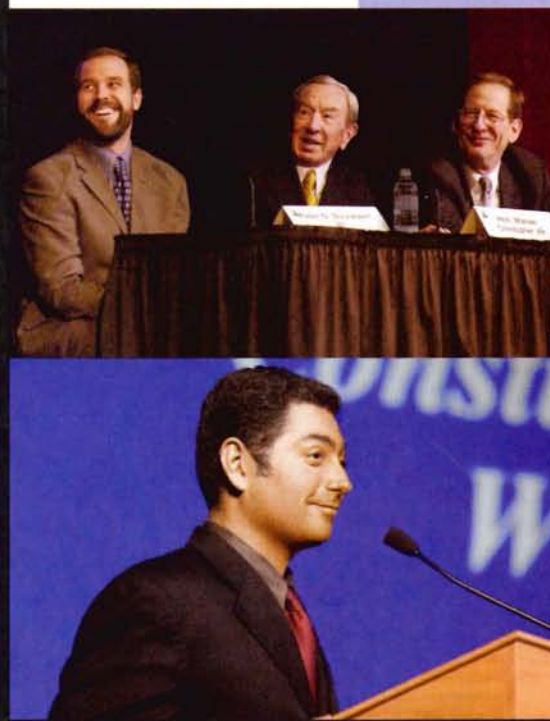
PHOTOS: RUSS CURTIS



Taking Liberties?

Former Secretary of State Warren Christopher '49 (upper right, center) recalled his personal experiences seeing Japanese Americans being moved out to internment camps in 1942 and then, years later, as a diplomat in Buenos Aires, meeting mothers whose sons had "disappeared" at the hands of Argentina's military. "Those snapshots make me wonder about our current practices," Christopher said, referring to the detention of people of Arab ancestry after the September 11 attacks. He was on the panel "War, Peace, and Civil Liberties: American Constitutionalism in the Wake of Terror," on the afternoon of October 18 with Peter Bouckaert '97 (top right, left), a senior emergencies researcher at Human Rights Watch, and Richard Morningstar '70 (top right, right), former U.S. Ambassador to the European Union. Assistant Professor Mariano-Florentino Cuéllar (lower right) was the panel moderator.

PHOTOS: L.A. CICERO



The FBI has wrongly singled out hundreds of people simply because they are of Middle Eastern descent, Associate Professor Michelle Alexander '92 said as part of a panel discussion on the first morning of Alumni Weekend. Roughly 12 hours later, Dean Kathleen M. Sullivan stood before an intimate gathering of alumni, faculty, and friends and praised the judgment and integrity of the agency's director, Robert Mueller III.

Three events on October 18—including a lecture by Mueller—examined whether civil liberties are being compromised by the war on terrorism. The issue threatens to cause an ugly rift in our country, but it didn't divide the Law School, despite the sharp differences. Instead it allowed alumni to come together to engage in the sort of robust, thoughtful debate that the Law School espouses.

Mueller was the day's headliner. As the recipient of the Law School's Jackson H. Ralston Prize in International Law, he lectured to an audience of 1,500 in Memorial Auditorium. His talk acknowledged that balancing aggressive investigations and respect for civil liberties is a difficult challenge today, and that the Palmer raids of 1919 and the internment of Japanese Americans during World War II show that "our nation does not have an unblemished record of protecting constitutional freedoms during times of crisis." Still, the FBI today is succeeding at providing greater national security while upholding civil liberties, he said, adding, "I do not believe they are mutually exclusive."

There were questions from the floor, some admiring, some critical, most notably a sharp exchange between Mueller and Peter Bouckaert '97, senior emergencies researcher for Human Rights Watch and a participant in the previous panel that day on civil liberties. Bouckaert told the FBI director that Human Rights Watch had documented numerous cases in which the FBI had singled out and intimidated people of Arab descent, including one case in which an agent had pressured a man into making untrue statements.

That man, said Mueller, "praised the competence of that FBI agent and the way he was treated."

"The agent forced him to confess to something he didn't do!" Bouckaert responded, to applause.

"I am comfortable that every action we undertook to detain individuals in the wake of September 11 and in the course of our investigations was appropriately done," Mueller answered, to applause.

Earlier in the day, former Secretary of State Warren Christopher '49 and former Ambassador to the European Union Richard Morningstar '70, on the panel with Bouckaert, also expressed concerns about the treatment of detainees. But moderator Assistant Professor Mariano-Florentino Cuéllar wondered whether they would still worry about tougher law enforcement practices if a terrorist set off a dirty bomb in a major city, causing tens of thousands of casualties.

At a dinner after his lecture, Mueller thanked the Law School for honoring him. He also commended the Law School graduates who have served the nation—including those who challenge him. "I want to thank the individuals who stood up to ask questions," he said. "Those are questions we need to answer and questions we need to understand."



Classy Celebrations



On October 19, the final night of Alumni Weekend, Willbur Field was magically transformed into the Law School's very own Tavern on the Green (above). Lanterns and Christmas lights flickered like fireflies in the pleasant fall evening, with a full moon shining silver in the darkening sky. Each reunion year dined in its own pavillon, and Dean Kathleen M. Sullivan traveled from class to class to salute alumni. "This is a world-class law school, and you're the ones who make it happen," she said at the Class of 1982 reunion. She stopped to greet Marcia Kemp Sterling '82 (opposite page, lower right) senior vice president and general counsel of Autodesk, and her husband, Nathaniel, and thanked them for attending. "Please keep coming back," the dean told alumni. "And you don't have to wait another five years!"

The Alumni Weekend festivities began on October 17 with the Dean's Circle Dinner honoring annual donors of more than \$10,000. Joseph Grundfest '78 (left, seated), W. A. Franke Professor of Law and Business, took a break from the meal to catch up with Jim Koshland '78, a partner in Gray Cary's Palo Alto office. During the evening, they heard Gail Block Harris '77, the chair of the Law Fund, discuss the School's recent achievements, then Peter Thiel '92, who talked about the trials and tribulations of his successful start-up PayPal. Later in the weekend, Charles W. Crockett '92 (right), a partner at Ascend Venture Group, brought his daughter Christina to the annual tailgate party, where burgers and hot dogs were served, along with Popsicles (bottom). The weekend's good mood received an added boost from the Cardinal's football victory over Arizona. A celebrating Crockett said he was glad to have traveled across the country from New York for his 10-year reunion. "It's a fabulous class," he said. "And many of my best friends are from it."



Upon entering the Class of 1952 reunion celebration, on October 19, Dean Sullivan heralded its members as "the great generation, without whom we wouldn't be here today." Throughout the weekend, law school students and graduates angled for an opportunity to meet and pose for a picture with the class's most prominent members, Chief Justice William Rehnquist and Associate Justice Sandra Day O'Connor. The two members of the Supreme Court (left) shared a table at the moot court breakfast with former SLS professor Judge Joseph Sneed of the United States Court of Appeals for the Ninth Circuit. Later in the evening, when speaking to the Class of 1997, Sullivan urged them to start a pool over which two of them would be members of the Supreme Court in 45 years.

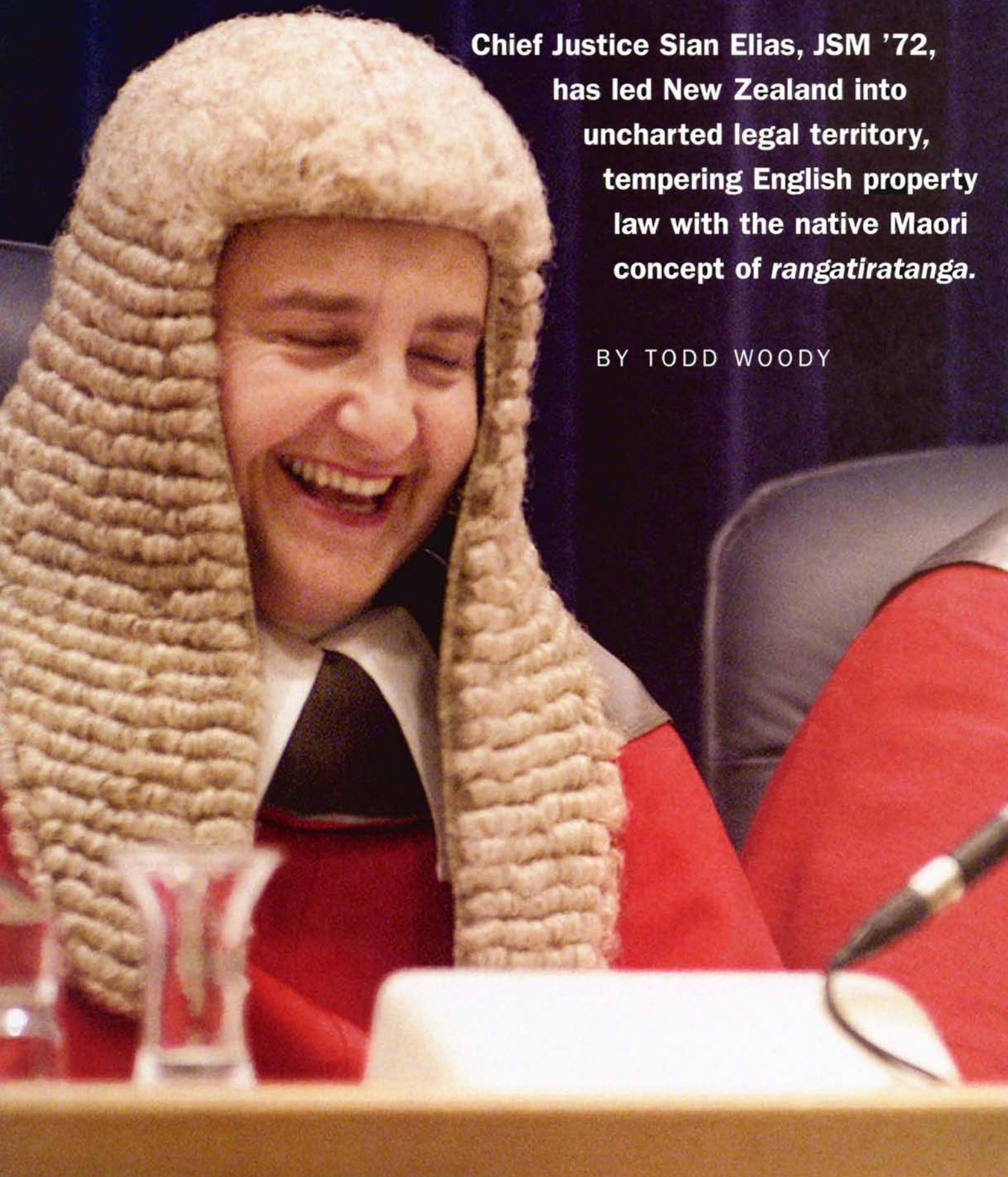


PHOTOS: RUSS CURTIS

Uncommon Law

Chief Justice Sian Elias, JSM '72,
has led New Zealand into
uncharted legal territory,
tempering English property
law with the native Maori
concept of *rangatiratanga*.

BY TODD WOODY





A NEW ORDER IN THE COURTS: Elias, at the swearing in of high court judge Paul Heath, wears the customary British judge's wig and gown—but not an imperial attitude.

PHOTO BY WAIKATO TIMES NZ

In his 1975 novel *Ecotopia*, Ernest Callenbach imagines an early-21st-century environmental paradise; a woman-led, “green” nation carved out of Northern California and the Pacific Northwest after the region secedes from the United States. Spend some time in New Zealand and you’ll begin to wonder if Callenbach’s utopian fantasy was not so much far-fetched as geographically misplaced.

As I stroll through downtown Auckland on an antipodean winter’s day, the larger-than-life visage of Helen Clark, the country’s liberal, mountain-climbing prime minister, stares down from billboards and bus shelters. An election is under way during my visit last July and the hot-button issue is genetic engineering. On Auckland streets Green Party campaign billboards directed at the country’s indigenous Maori voters read “GE: *Kaua e whakato*” (roughly “Genetic Engineering: Don’t Play God”). Maori leaders meanwhile warn that tinkering with New Zealand’s DNA will violate deeply held spiritual beliefs.

That Maori worries about genetic engineering are of concern to the country’s political elite speaks to the changes in New Zealand society over the past two decades. The transformation is apparent the moment I board my Air New Zealand flight. “Kia ora,” chirps the flight attendant, using the Maori phrase for hello. Turning on the evening news in Auckland, I hear the same greeting from the preternaturally perky blonde anchorperson. Readers routinely encounter Maori words and cultural references in their daily newspaper.

Todd Woody, a Sydney-based journalist, has written for *Wired*, the *New York Times*, and the *San Francisco Chronicle*.

THE MATRIARCHY: Women hold the top positions in New Zealand's legal and political establishment, including Attorney General Margaret Wilson, Prime Minister Helen Clark, Governor-General Silvia Cartwright, and Elias.

JOHN NICHOLSON, DOMINION POST



The revival of Maori language is but one sign of the far-reaching changes occurring in New Zealand's social order, fostered in no small part by the woman sitting in the chief justice's chair, Sian Elias, JSM '72. An immigrant who married the scion of one of New Zealand's most storied families, Elias spent much of her career as an attorney battling governments both left and right on behalf of the Maori. In a series of landmark cases, she helped establish the legal framework that has revolutionized relations between European and Maori New Zealanders.

"The respect she has built among Maori as a result of that work is of lasting importance for us all," said then-Prime Minister Jenny Shipley in 1999, when announcing Elias's elevation from a High Court judge to chief justice.

That Elias is the first woman to lead the nation's courts—and one of the world's few female chief justices—is not altogether novel in New Zealand. After all, women serve as prime minister, attorney general, and governor-general (the titular head of state who represents Queen Elizabeth II). The matriarchy extends to the leadership of many of New Zealand's political parties, its capital city, and the country's largest corporation. Rather more remarkable is that a conservative prime minister tapped one of the country's leading liberals to shepherd New Zealand's tradition-bound judiciary into the 21st century. Imagine if you will, George W. Bush replacing Chief Justice William Rehnquist '52 (AB '48, AM '48) with Laurence Tribe.

In the coming years, Elias's mark on New Zealand society is likely to grow even deeper. She is presiding at a defining historic moment: after 160 years, New Zealand is about to cut the cord that binds its courts to Mother England. It will be the last of the major former British colonies to establish a judiciary entirely on its own. For the better part of two centuries, the Privy Council, a group of mainly British judges

sitting in London, has served as the court of final appeal for Kiwis. For decades many New Zealanders have wanted to sever this tie to the so-called Law Lords. But some Maori (along with businesspeople and others) opposed this move, seeing the Council as a more impartial body to mediate their disputes with the country's Europeans. The Maori opposition to judicial independence relented last year, and in December 2002 the government introduced legislation to establish, at long last, an independent New Zealand Supreme Court as the highest court in the land. Elias will play a pivotal role in shaping the new legal system, which must meld two very different traditions and reconcile age-old grievances.

Maori leaders undoubtedly draw comfort from knowing that Elias will be at the helm of the new court. Four years ago, at Elias's swearing-in ceremony, a Maori elder opened the proceedings with a *karakia*, or prayer. Elias donned a Maori feathered cloak over her judicial robes to take the oath of office. "We must respond to the diversity of cultures and interests through the community by ensuring that our procedures, language, and methods are accessible and not alienating," she told an overflow audience of European and Maori New Zealanders. The courts need to hold on, she explained, "to what is good in the inherited legal tradition we value, while developing a voice that is truly our own."



New Zealand began to speak—loudly—in its own voice 18 years ago, when this island nation of nearly 4 million declared itself nuclear-free and banned U.S. atomic warships from its harbors, determined to chart its own course independent of America. Roughly the size of California with a landscape of unblemished beaches and pristine snow-packed peaks, New Zealand prides itself on its "clean and green"

environmental policies and compassionate social welfare system. One of the most serious challenges to Prime Minister Helen Clark, the head of the liberal Labour Party, doesn't come from the right; it's from the Green Party, co-led by an organic farmer named Jeanette Fitzsimons. (The main conservative party, meanwhile, has seen its prospects plummet since it replaced its veteran female leader with a less-experienced man.) During last July's election campaign, controversy swirled around Clark's intention to lift a moratorium on the release of genetically engineered (GE) organisms. A Green Party television spot depicted a dystopian future if such genetically modified plants and animals are let loose in this land of untouched wilderness.

The left-leaning politics of the country should not be overstated. The country went through its own version of Thatcherism in the 1980s. The largest party today, Labour, has held power by moving to the center and governing with the support of a small party that is moderately liberal.

Elias is a poster child for the new New Zealand that is emerging. For ceremonial occasions she dresses comfortably in the full regalia of English magisterial finery—scarlet robes and a shoulder-length horsehair wig—and appears every bit the part of the Right Honorable Dame Sian. (She became a dame, the female equivalent of being knighted, shortly after assuming her current post.)

Her grand title aside, Elias has earned a reputation as something of a people's chief justice. She walks to work in Wellington, New Zealand's capital, and lunches alongside the cubicle dwellers and bureaucrats who frequent the harborside city's cafes. "She hasn't changed a bit," says Maui Solomon, a leading New Zealand attorney who once served as junior counsel to Elias. "She'll see you on the street and say, 'Hi! How are you?' There are no airs or graces about her. Sian has brought a breath of fresh air to the judiciary."

Elias's youngest son, Ben Fletcher, recalls when his mother hosted a group of visiting chief justices from other British Commonwealth countries. "These people are used to being treated as royalty," says Fletcher, a 26-year-old lawyer. "Mum trotted them all out to our farm, which is very basic. It was an hour and a half drive on a dirt road, and I think they got the shock of their lives."

Accustomed to American judges who often operate at an Olympian remove, I get a bit of a jolt myself upon meeting the chief justice last July, when she casually strolls out of her office for our interview and ushers me into her spacious chambers. "Welcome to New Zealand," says Elias, wearing a chic knee-length black-and-gray jacket, gold bracelets jangling. At 54, she bears a resemblance to the folk singer Joan Baez and exudes an easygoing warmth. All the same she chooses her words carefully, speaking with a formality befitting the highest judge in the land.

Elias is now a member of New Zealand's upper crust, but she was born in London to a Welsh mother and an Armenian physician father. She immigrated with her parents to New Zealand as a toddler, attended an Anglican girls' high school, then enrolled at the University of Auckland, where she received her law degree in 1970. The prospect then of a female chief justice must have seemed remote. The first woman had been admitted to the New Zealand bar in 1897—four years after the country became the first in the world to grant women the vote. But the law remained overwhelmingly a male preserve in 1970. Fewer than 2 percent of New Zealand attorneys were women and it would be another five years until the country saw its first female judge take the bench.

If London was still swinging and San Francisco grooving at the dawn of the 1970s, Auckland, New Zealand's largest city, remained a relatively staid redoubt of British puritanism. Until 1967, bars shut their doors promptly at 6 p.m. "An Australian model, returning to Sydney after a week in New Zealand, when asked what it was like, replied, 'I don't know: It was closed,'" wrote Kiwi historian Keith Sinclair.

Elias did what countless other young New Zealanders did: she left. She had been accepted into a postgraduate program in the U.K. That plan changed abruptly when she married Hugh Fletcher (MBA '72) whose family ran what was then one of New Zealand's most powerful corporations. Fletcher was set to attend Stanford's Graduate School of Business so Elias submitted a last-minute application to the Law School's JSM program. "It wasn't really a choice," she says. "It was an accident, a very lucky accident."

For Elias, her time at Stanford would have a lasting influence. "American jurisprudence is very principle focused. I've become a big fan of American jurisprudence," she says. "I think that's [given me] a different perspective than many of my colleagues who haven't had that experience. It helped me to think differently."

As significant was the shock of being suddenly transplanted into the political maelstrom of early 1970s America. Bob Paterson, JSM '72, a classmate and compatriot of Elias, remembers her as a keen observer of the era's turmoil, if not one who necessarily took to the streets, as he did, to protest the bombing of Cambodia and to march with César Chávez. "Someone like Sian was able to pick the best aspects of the American system and take them back to New Zealand," says Paterson, now a law professor at the University of British Columbia. "We grew up in a system where law was just rules to be applied." At Stanford, he says, they learned law could be employed for social change.

Elias explains: "Going to the States was just much more challenging on a social level. It was the first wave of feminism, and that was eye-opening. It was quite difficult return-

ing to New Zealand in '72 for that reason."

Moving back to Auckland, Elias struggled to find work as one of the country's few female barristers. Under New Zealand's British-style legal system, barristers depend on solicitors to refer cases to them. It was the ultimate boys club, and in the 1970s most of the boys didn't play with the girls. Elias made do with odds and ends—a commercial case here, an environmental case there—sometimes appearing in court with one of her two young sons in tow.

Elias's big opportunity came in the early 1980s. Under New Zealand's founding document, the Treaty of Waitangi, the British annexed the country in exchange for guaranteeing Maori the possession of their lands. That promise was not always kept. Inspired by the U.S. civil rights movement, young Maori activists demanded that the government fulfill its obligations under the treaty and return tribal lands. Elias began representing Maori arrested during the land protests. Through this work she met Maori elders who subsequently asked her to represent them before the Waitangi Tribunal, which the government had set up to hear claims and make recommendations for their resolution.

Elias represented them well. In 1988, the government anointed her a Queen's Counsel, one of the first two New Zealand women to receive the honor usually reserved for somber, gray-suited members of the legal fraternity. Seven years later she was appointed to the High Court, which acts like federal district courts in the U.S. In 1999, she was tapped to become the nation's chief justice. Her promotion was welcomed by politicians of every stripe and persuasion.



Rangatiratanga. The word rolls off Elias's tongue as if it were just another Latin legal phrase, like *quid pro quo* or *habeas corpus*. It is one of dozens of Maori words that pepper her speech, each one enunciated with patrician precision.

She does not use the Maori language just to appear politically correct. Maori terms such as *rangatiratanga*—which embodies Maori authority over their land and obligation to care for it—defy direct English translation.

The Maori constitute about 15 percent of New Zealand's population. They lag behind New Zealanders of European ancestry in health, wealth, and education, but have claims to vast tracts of land. In comparison with indigenous peoples in other former British colonies, they wield significant political clout. It was not always this way.

A Polynesian people, the Maori first journeyed to New Zealand a millennium ago. They called their new home Aotearoa, the Land of the Long White Cloud. The British began settling there in the early 1800s, but they found themselves vastly outnumbered by Maori warriors. So when Queen Victoria annexed New Zealand in 1840, she did so

not as a conqueror but as a petitioner, signing the Treaty of Waitangi with Maori chieftains. In exchange for Maori recognition of British rule over New Zealand, the British Crown promised the Maori they would retain ownership of their lands.

But the Pakeha, as the Maori call European New Zealanders, didn't always keep their end of the bargain. Over the next century, the Maori found their ancestral lands slip-

PROGRESS? In the 1980s Elias (opposite page, in a recent photo) represented Nganeko Minhinnick (below, 2002), who had spent years trying to stop the pollution of a river sacred to the Maori. "I don't know if she had a 100 percent understanding of the spiritual and cultural values," Minhinnick says of Elias, "but she certainly had far more than any other lawyer I had met in those days." Despite Elias's victory in that case, Minhinnick says the river remains dirty.

ROBERT TAMARUA





ANTHONY PHELPS, DOMINION POST

ping away as disease, war, and theft took their toll. Despite the Treaty of Waitangi's status as the nation's founding document, it had become something of a historical relic by the mid-20th century, invoked annually on the anniversary of its signing but pretty much ignored the rest of the year.

If the treaty had faded from the consciousness of European New Zealanders, so too, to some degree, had the Maori, who tended to live in rural areas. "If you grew up in the city, like I did, you never saw Maori," says Paterson, Elias's classmate. While Elias also had little exposure to the Maori during her early years in Auckland, one childhood memory remains indelible: the day her mother took her to the Auckland foreshore to witness a Maori encampment being forcibly removed. "They said that it was too untidy to have the settlement right on the waterfront," Elias recalls, shaking her head. "That was the attitude then."

By the early 1980s when Elias began to represent the Maori, however, that mind-set was being questioned. Elias

calls it "unbelievable" that she had never read the treaty until that time—even though her dissertation was on New Zealand constitutional law.

The treaty itself consists of only five paragraphs. But the cultural divide between the English and Maori translations of those 500 or so words loomed large. Maori tradition eschews Western notions of private property, and so Elias found herself grappling with such concepts as *rangatiratanga*.

For Elias and a small cadre of attorneys, the early treaty cases represented labors of love, done pro bono or for token pay. "I think a lot of her colleagues would have turned their noses up at taking on such highly political cases," says Shane Jones, a Maori leader who met Elias in the early 1980s. "But her willingness to take cases unpopular with the legal community enabled her to show her brilliant legal mind."

Says another Maori leader, Archie Taiaroa: "She was able to fit in very well with what the thinking was by the Maori. She was very open to knowing the situation of colonization in New Zealand and the feeling that something had to be done."

Ben Fletcher remembers that during his childhood his mother would take him and his older brother to ceremonies at Maori meetinghouses and to her Waitangi Tribunal hearings. "Mum feels their pain," Fletcher says. "The stories of what it meant to the tribes to have their lands taken away from them will affect Mum until the end of her days."



One story in particular touched Elias and set her off on a legal crusade that resulted in a groundbreaking ruling for the Maori in 1987. Nganeko Minhinnick, a Maori activist, had spent years battling a local planning board over the pollution of a river sacred to her people. The planners rejected her pleas to take into account Maori spiritual and cultural values when they were deciding whether to approve sewage discharges into the Waikato River, contending that the law did not permit such considerations. "Whenever we got ill my parents would walk 10 kilometers to the Waikato River because it was spiritually healing," Minhinnick says. "Everyone else just seemed to view it as a place to dump rubbish."

Elias filed a suit on Minhinnick's behalf and took the case to the High Court. "I don't know if she had a 100 percent understanding of the spiritual and cultural values," Minhinnick says of Elias, "but she certainly had far more than any other lawyer I had met in those days."

Elias's approach was unusual: She maintained that under the Treaty of Waitangi, Maori spiritual concerns must be considered regardless of whether the treaty was referenced in any particular piece of legislation. It was the first time Elias, then 37, had argued the treaty in the High Court. She was nervous and had good reason to be so. The courts had been disinclined to apply the treaty to domestic law. But as

Elias researched the historical record, she discovered this was not always the case. "The early decisions in the courts acknowledged that common law picks up customary law wherever it goes and that applies to Maori custom," she says.

The High Court agreed. "Maori spiritual and cultural values cannot be excluded from consideration if the evidence established such links to a particular and significant group of Maori," the court held on June 2, 1987. The ruling would become a cornerstone for consultation with Maori on everything from urban planning to genetic engineering. Says Elias, "That was probably the biggest personal satisfaction I ever had in any of that litigation."

But there was no time to rest. In the 1980s New Zealand was undergoing a gut-wrenching upheaval as the government moved to dismantle the country's state-dominated economy—"the most extreme of the government-slashing, privatizing regimes of the time, out-Thatchering Thatcher," as a writer for the *New Statesman* put it. With land claims piling up before the Waitangi Tribunal, Maori feared there would be little property left for compensation as the government divested itself of its holdings. Elias, working under the lead of an attorney who would later become a High Court judge, sued to block the government from disposing of the national patrimony until provisions for protecting Maori interests could be put in place.

It was an audacious undertaking financed on a shoestring. At night Elias would slip into her husband's six-floor office building and do photocopying for the case, moving from floor to floor, leaving jammed copiers in her wake. "The next day they knew it was me," she says. The trash bins were full of papers with Maori names on them.

Late in 1987, New Zealand's Court of Appeal, the country's highest domestic tribunal, affirmed the Treaty of Waitangi's importance as the nation's founding document. For New Zealand, the impact was the equivalent to *Brown v. Board of Education*. "The duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable," a unanimous court held. "This means that where grievances are established, the State for its part is required to take positive steps in reparation."



If Elias's advocacy on behalf of the Maori had a radical consequence, her legal arguments were essentially conservative—reaching back into the nation's judicial history to support the application of the Treaty of Waitangi to contemporary laws. "We had forgotten so much of our own history," she says. "It has taken us a long time to rediscover it, but it's there in our beginnings." And once the history was recalled, New Zealanders embraced some of the nation's founding

principles. "There's been a revolution in attitude, and in quite a short time," she adds. What seemed extreme 20 years ago is taken as conventional wisdom today.

Not as accepted is the growing number of Treaty of Waitangi Tribunal petitions that have multiplied in the wake of Elias's earlier advocacy. To detractors, what began as a noble effort to right past wrongs has spawned a multimillion-dollar "claims industry," enriching lawyers and some Maori at the expense of others. Maori claims for wider swaths of New Zealand have triggered a backlash from some conservative politicians and calls for a cap on treaty payouts. A Maori petition now before the Waitangi Tribunal asserts Maori rights over indigenous plants and animals—a claim that could immensely complicate efforts to accommodate Maori concerns over genetic engineering. The Labour Party won reelection and has pledged to lift in October the ban on releasing genetically modified organisms in New Zealand. Inevitably, some of these disputes will reach the Court of Appeal and, in the future, New Zealand's new Supreme Court, expected to be up and running in 2004. Reconciling the interests of Pakeha and Maori will prove a delicate balancing act for the Elias court. "She now has to think in a much more global sort of way," says classmate Bob Paterson.

The gains of the past two decades notwithstanding, some Maori remain skeptical that the legal system can effect real and lasting change. The pioneering court decisions of the late 1980s reaffirmed the principals of the Treaty of Waitangi but do not necessarily guarantee that Maori will prevail in their claims. When Nganeko Minhinnick talks about how the Waikato remains polluted 15 years after the milestone ruling on its behalf in the High Court, her voice betrays a weariness born of her half-century fight to protect the river. "I can't see one place we've managed to save from all the court cases we've done," says Minhinnick in a phone interview, above the chatter of her grandchildren.

For Elias, the Treaty of Waitangi offers no surefire blueprint for the two peoples who in 1840 agreed to build the country of Aotearoa New Zealand. Rather, it provides principles for coexistence that benefit both Pakeha and Maori.

The afternoon sun streams into Elias's chambers, reflecting off New Zealand's silver beehive-shaped Parliament building, visible through the windows and framed by the green canopy of a steeply wooded hillside. We're talking about *rangatiratanga*. The Maori concept of sovereignty implies not just ownership of land but the authority and responsibility for its stewardship. By way of example, the chief justice brings up one of her favorite cases, a 1993 Waitangi Tribunal claim that was one of the last she took on before joining the bench. She represented an *iwi*, or tribe, that for a century had been petitioning for the return of the Whanganui River, which they considered a sacred ancestor.



DOMINION POST

MARCHING TO A DIFFERENT DRUMMER: Elias (below) leads justices from the New Zealand Parliament's formal opening session last August. She dons the horsehair wig and scarlet robe only for ceremonial occasions, and on the day she was sworn in as chief justice in 1999, she added a Maori feathered cloak (left) to the ensemble. Her advocacy for Maori causes won her recognition as a brilliant legal thinker, but her fame is not accompanied by any airs. An outdoors enthusiast, she remains down-to-earth and approachable: there's no hesitation (above) in accepting a greeting from the family dog.



CRAIG SIMCOX, DOMINION POST

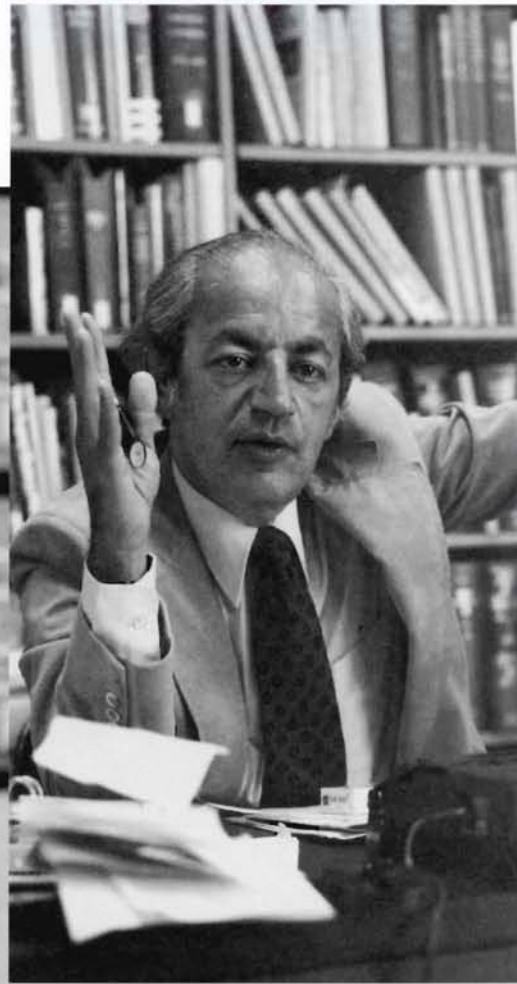
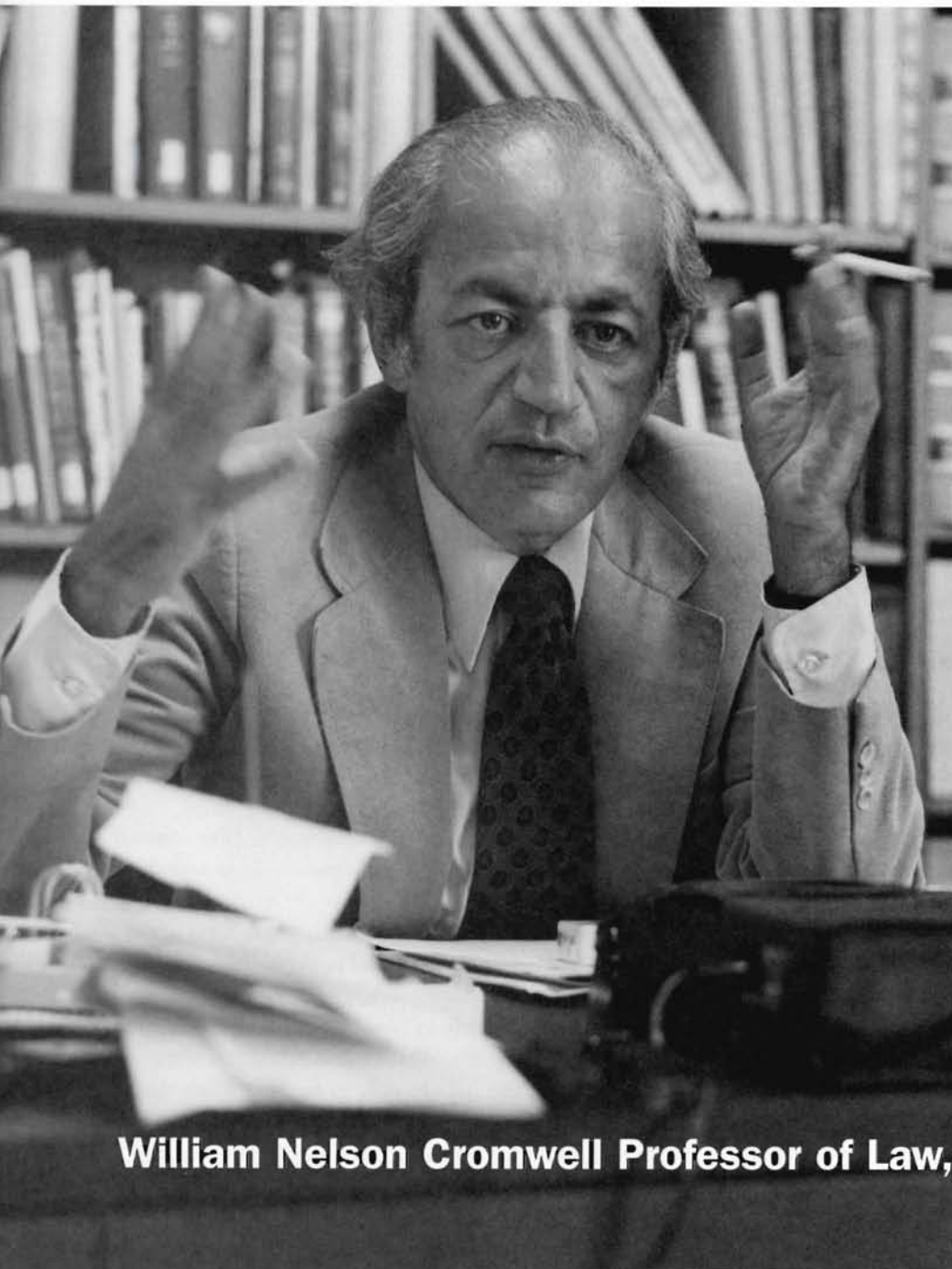
"It was not property," she notes. "In fact, one of the arguments is that our concepts of property are inadequate." Rather, to the Maori the river has a life of its own intimately connected with the *iwi*. The river, as Elias suggested to the tribunal, might well be considered a legal entity, a claimant in its own right, in other words. It's a notion that may strike those steeped in Western legal tradition as bordering on the bizarre—but surely no stranger than the American custom of considering corporations to be legal "persons" entitled to many of the rights and privileges of flesh-and-blood litigants. "I don't think it is beyond the common law to recog-

nize that interest," Elias says of *rangatiratanga*. The tribunal agreed, recognizing in 1999 Maori *rangatiratanga* over the Whanganui River.

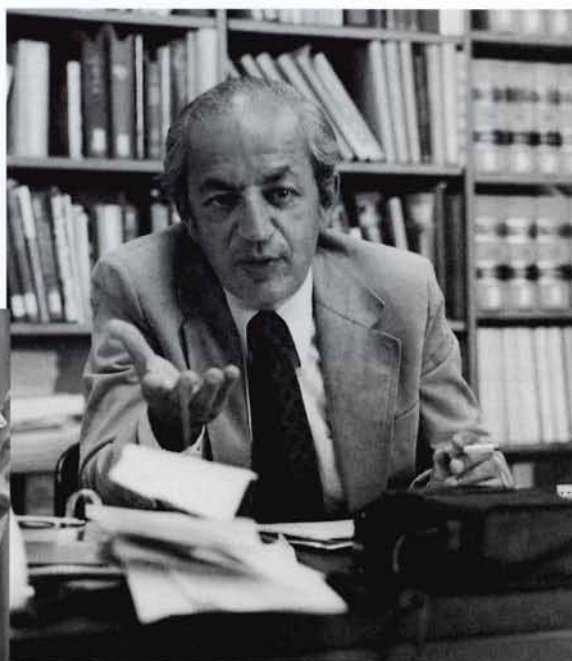
The Maori worldview of the interconnectedness of the human and natural worlds is echoed in the beliefs of Native Americans, Australian Aboriginals, and other indigenous peoples. Perhaps uniquely in New Zealand, those concepts are finding their way into Western law. Still, Elias recognizes that the law can only go only so far in fulfilling the promise of the Treaty of Waitangi. "Working out how that is achieved, well, that probably takes the life of a nation."

Scholar, Teacher, Mensch

Gerald Gunther



William Nelson Cromwell Professor of Law, 1927–2002



PHOTOS: LEO HOLUB

A conversation with Gerry Gunther was “a cross between a performance of Wagner’s *Götterdämmerung* and a walk through an old quarter of a European city with a very knowledgeable resident,” recalls Dan Tarlock ’65 (AB ’62). “It could be a bit long, a bit repetitious (although Barbara was often there to intervene to urge him to focus), but most of all, it was great fun, edifying, uplifting, and a little ‘edgy.’”

One of the most revered constitutional law scholars of the 20th century, Gunther was more than a deep and probing thinker: he was a force unto himself, lifting thousands of students, colleagues, and friends in his tornado of arguments and ideas, passion and wit—then gently setting them down on higher ground. He channeled his energy into writing a profound biography of Judge Learned Hand (see p. 31) and a constitutional law casebook that is the bible of the field. But even as he relentlessly pushed himself in a professor’s often solitary quest for knowledge, he always sought out other people, whether it was to help a perplexed student, offer advice to another faculty member, or just schmooze.

It is the first year at the Law School since his death on July 30, and his absence is still felt intensely. The national debate on the latest nominees to the federal bench cries out for his unerring insight. As Dean Kathleen M. Sullivan pre-

pares lectures for her constitutional law course from the casebook she joined him in editing, she often imagines what he might be telling her. Pat Sheeler, his longtime assistant, misses the sound of his feet shuffling down the hallway. His circle of fellow soccer fanatics find themselves waiting for his anguished shouts whenever his favorite team, the Chelsea Football Club, permits a goal.

Hundreds attended his memorial service on campus October 4 or sent remembrances to the Law School. They recounted how as a child in Nazi Germany, he stood tall in the face of anti-Semitism (see Gunther’s own memories, p. 30), before fleeing with his family to the United States. Some who survived that experience might have grown to distrust all Germans. Instead, he judged every person as an individual, harshly rebuking those who refused to face the past but embracing those from his homeland who honestly searched for the truth.

Gunther had high ideals, and his writings and mentoring changed the world. In the days after his death, Supreme Court justices spoke of how he shaped their thinking and their careers. He will long be remembered as an influential philosopher of jurisprudence. Still, today there is another side that the Law School and his family miss even more. In her eulogy at the memorial service, Kitty McCarthy, his 20-year-old granddaughter, talked of the time he spent with her as a young child. “He was an expert at goldfish faces and monkey lips,” she remarked, “and he was always just good at being silly and funny and at my level, no matter what that level was.”

Gerald Gunther was an intellectual in the best sense of the word, but he was much, much more: he was a caring soul, a principled teacher, and a great human being—a true mensch.

A Painful Lesson

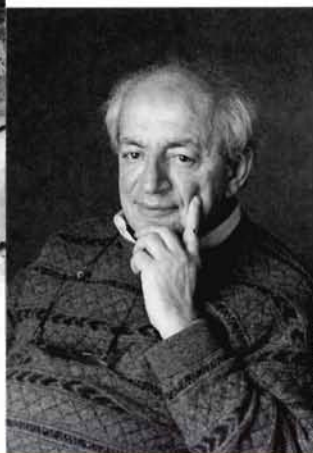
Gerald Gunther grew up in Usingen, a small town in Germany, where his family had lived for at least 300 years. In 1933, one week into his first grade, the longtime teacher was replaced by the local Nazi leader, who then had Gunther's class for the next two years. In the following edited excerpt from a talk Gunther gave in 1989 at Stanford, he describes his early school years as a "searing experience."

"The Monday he walked in, he turned to me and said, 'Du Juden sau, setz dich da hin.' ['You Jew pig, you sit there.'] He sent me to the rear corner of the room with a row separating me from the 'Aryan' students, and said, 'We don't want you to pollute the rest of the room.' He preached Nazi theory in a way no other teacher in that school could have done. Every day there was an oral drill. He would throw out the names of very early German kings of the fifth, sixth, seventh, and eighth centuries, and you had to shoot back the years they reigned. He would then follow that up with long lectures about how these kings were great heroes in trying to preserve the race, while the race had gotten polluted by Gypsies and Jews.

"My way of getting back at him and of preserving I guess, subconsciously, some form of my own sense of autonomy and dignity in a very hostile environment was to memorize those charts of German kings with absolute perfection. And the routine we would go through was this. He would say: 'All right, time for the drill. *Koenig Otto* [King Otto].' Then I would raise my hand. He would walk up to me, and then facing my 'Aryan' classmates, would say: 'This is disgusting! The Jew pig in the corner has his hand raised. You don't have your hands raised. You're desecrating the race!' And I would get my kicks, in part by seeing his big fat neck get redder and redder, and there would be a vein throbbing at the side of his neck. Then, when he got through with his diatribe, he would turn around and say, all right, Jew kid, or whatever, what's the answer, and I'd rattle off the dates."



PHOTOS COURTESY OF BARBARA GUNTHER



STEVE GLADFELTER

NEWS AND PUBLICATION SERVICE, STANFORD UNIVERSITY

1938
Immigrated to
New York City

1950
Received MA (Public Law and
Government), Columbia University

1954
Became law clerk for Chief Justice
Earl Warren, U.S. Supreme Court

1927
Born Gunther
Gutenstein,
Usingen, Germany,
May 26

1949
Received AB,
Brooklyn College,
and married
Barbara Kelsky

1953
Granted LLB, Harvard Law School,
and began clerking for Judge
Learned Hand, U.S. Court of
Appeals for the Second Circuit

1955
His son
Daniel
is born

1956
Joined Columbia
Law School faculty



DAVID HATHCOX

Wisdom for Judges

Supreme Court Justice David Souter came to California for only the second time in his life so he could speak at Gerald Gunther's memorial service. He hailed Gunther's Learned Hand: The Man and the Judge and described himself as "one of [Gunther's] judicial students." Here is an edited excerpt from his remarks:

"If I had the power, I would see to it that no judge in America entered office without reading Gerry's life of [Judge Learned] Hand. . . . The book is

much more even than a great biography in the way it gives good counsel to judges of all times and places, and particularly to appellate judges like me, in the place where I am sitting at this very time.

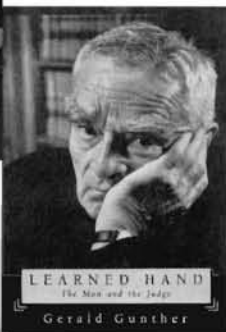
"Its lesson begins in a biographical paradox. . . . When I was in college, I saw Learned Hand on the street one afternoon, . . . seeming indeflectable as he walked along, like a granite statue moving down the sidewalk. Later I read some of his opinions . . . marshalling law and fact with a confidence nothing short of command. Then, after many years, I read Gerry's book, and found out what Hand was actually like: indisposed to call the wall facing him black or white, judging with a diffidence near to fear sometimes, deciding a case only because he had no escape. . . . [P]artway through [the book], we're apt to think what a misalignment of mind and duty.

"Then we read some more, and the man and the job seem to reconcile. . . . The chronic evenhandedness compelled the judge to come out and say what he was really choosing between; the torment of competing reasons forced him to face the very facts that placed his principles in tension; and not just face the facts, but heft them and feel their weight until finally the needle of his mind moved off dead center. . . . [A]s that understanding emerges in our minds, it comes with a companion question: If Hand is the prototype good enough for Gerry Gunther . . . why not for every judge who reads the book?

"There's no mistaking Gerry's answer, that Learned Hand's necessities are every judge's common obligations: suspicion of easy cases, skepticism about clear-edged categories, modesty in the face of precedent, candor in playing one worthy principle against another, and the nerve to do it in concrete circumstances on an open page. Gerry is still Learned Hand's old law clerk urging us to hunt for 'general guidance from close examination of the particular,' telling us that details spark the intuition and real judging gets done from the ground up."



JOHN SHERETZ



PHOTOGRAPH BY PHILIPPE HALSMAN



1962

Joined Stanford Law School faculty

1975

Became sole author listed on the casebook *Constitutional Law* (Foundation Press, 9th edition)

1958

His son Andrew is born

1965

Produced his first version of the casebook *Constitutional Law* (Foundation Press, 7th edition) and was listed as coauthor with the previous writer, Noel T. Dowling

1972

Published "In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," *Harvard Law Review*, which becomes the most-cited legal article published over the next four decades. Named William Nelson Cromwell Professor of Law at Stanford

Remembering Gerry

The most important person in his life was my mother, Barbara, to whom he was married for 53 years, a marriage as loving and lovingly contentious this year as it was when I first marveled at it over 40 years ago. Once at the age of three or four I asked my father who his best friend was, and he smiled and said softly, seriously, unhesitatingly, "Your mother." That feeling never changed.

DANIEL GUNTHER

Gerry Gunther was to me first, as he was to many of the hundreds of thousands who first encountered him through his monumental casebook, simply an icon. There was Prosser on torts, Williston on contracts, Gunther on constitutional law. Whereas other casebooks carried the names of two authors, or three or four, the heavy blue volume from Foundation Press that changed my life permanently bore but one strong, simple, alliterative, and authoritative name, Gerald Gunther. It didn't occur to me that he could possibly be called Gerry.

DEAN KATHLEEN M. SULLIVAN

I remember vividly the first time I ventured a comment, and the result of that venture was that Gerry used that awesome intellect, that breadth and that depth of intellect, to cut my comment apart like a scalpel through butter. But—and this was very important and it was 100 percent characteristic of Gerry Gunther—he did so with no condescension, with no meanness, but with a helpful here's-where-you-went-wrong approach



to setting me right. The result of that was that I was emboldened to keep trying, as opposed to silenced for the rest of my education by Gerry.

DUANE C. QUAINI '70, *Chairman, Sonnenschein, Nath & Rosenthal*

Gerald Gunther was my teacher, my adviser, my friend, our nation's leading constitutional law scholar and judicial biographer. His commentary and counsel . . . will continue to guide me through all my days on the bench.

JUSTICE RUTH BADER GINSBURG, *as quoted in the New York Times, August 1, 2002*

It was, I think, Gerry's lack of pretentiousness and his openness, a combination of his hunger for life and his pleasure in seeing it accurately, finely, and, if possible, humorously expressed, which gripped my heart. Though he was gentle, a gentleman, this did not exclude a tough, critical, ironical, even curmudgeonly and sarcastic streak. Gerry struck me as one of those people who was—to use what may seem to some as a raddled, antiquated word—good. He was clearly a good man, a man who was himself all the way through, what Horace must have meant by *integer vitae*, a person of singular completeness, one built not from the surface down but from the inside out. As a sugar cube is sugar all the way through, so Gerry was totally Gerry.

RICHARD STERN, *Helen A. Regenstein Professor of English and the Humanities, University of Chicago, and Gunther's high school classmate*

The above quotes are from talks at the Law School's memorial service for Gerry Gunther, unless noted otherwise. To download the full text of these remarks and additional tributes, go to <http://lawreview.stanford.edu/content/vol55>. Bound copies of remarks and tributes were published by *Stanford Law Review* and are available for \$5. Send checks to: Stanford Law Review, Crown Quadrangle, 559 Nathan Abbott Way, Stanford, CA 94305. The Law School webpage where others have posted their memories of Professor Gunther is at <http://www.law.stanford.edu/gunther.remembered/>.

1982

His first grandchild, Kitty McCarthy, is born

1994

Published *Learned Hand: The Man and the Judge* (Alfred A. Knopf)

1987

Named as best-qualified choice for U.S. Supreme Court in *National Law Journal's* poll of scholars, judges, practitioners, and government officials. His grandson, Joseph Gunther, is born

1997

Published 13th edition of *Constitutional Law* (Foundation Press), with Kathleen M. Sullivan, passing the torch to the next generation of constitutional scholars

2002

Died at Stanford, July 30

Letters

Continued from p. 4

Top Talent from Abroad

Thank you for including a colorful map of the world ["The Sun Never Sets on Stanford Law School," Fall 2002, p. 8] with brief biographies of 13 of our master's students. These programs draw amazing scholars and practitioners from all corners of the globe, and I wanted to mention some of the others who enrolled this year.

In addition to the students you identified, our new LLM Program in Corporate Governance and Practice also includes Yanchun Bai, the founder and senior partner of the law firm King & Wood in Beijing, China; Kyung Yoon Lee, a South Korean attorney with Kim and Chang; Gani Nassimoldin, a lawyer with LeBoeuf, Lamb, Greene & MacRae in Kazakhstan; and Ying (Violet) Qian, chief in-house counsel for Praxair Investment Co. in China.

Our new LLM Program in Law, Science and Technology also includes Hitomi Iwase, an associate with

Nishimura & Partners in Tokyo, and Claudio Magliona, a Chilean lawyer at Carey y Cia in Santiago and the author of numerous articles on cyberlaw and e-commerce issues.

Finally, additional graduate students in the Stanford Program in International Legal Studies include Jordi Agusti-Panareda, an accomplished scholar with the Socio-Legal Studies Group in Barcelona, Spain; Hirotomo Akaiwa, a senior official in Japan's Ministry of Home Affairs; Il Jang, a senior associate at Kim & Chang in Seoul, Korea; Valerie Junod, an associate in the law firm Junod, Guyet, Muhlstein & Levy in Geneva, Switzerland, specializing in contract, banking, and commercial law; Héctor Lehuédé, a senior tax associate at the Santiago law firm of Carey y Cia and an advisor to the Chilean Ministry of Finance on taxation law and policy; Amichai Magen, legal counsel in the Attorney General's office of the Israeli Ministry of Justice; Catalina Perez-Correa, a scholar at the Centro de Investigación y Docencia Económicas (CIDE) in Mexico City; Luis Perez-Hurtado, a professor of law at

Universidad de Monterrey Law School, where he teaches international negotiation; Arianna Sánchez-Galindo, legal advisor in the Mexican Department of Justice and a scholar at the Center for Research and Development at the Autonomous Technological University of Mexico; Yong Wang, a Chinese lawyer and journalist, who was a reporter and editor for *China Daily*, managing editor of *China International Business*, and a 2001-02 Knight Fellow at Stanford University; and Pei Yee Woo, who recently received her LLB from the National University of Singapore as the number one student in her class, and who worked as an attorney at the Singapore office of Baker & McKenzie and published articles on corporate law issues in her country.

We are proud to have these accomplished foreign lawyers and scholars here with us at Stanford in our master's programs this academic year. Their participation deeply enhances the international dialogue, learning, and understanding within our law school community.

*Jonathan D. Greenberg '84
Director of International Graduate
Studies, Stanford Law School*

HOW TO GET CUTTING-EDGE LAW SCHOOL NEWS



Half of SLS Alumni Are Plugged In.
Are You One of Them?

A CONFERENCE WITH top government officials. The sad news of an alumnus's death. Notice of the deadline for registering for an executive education program. The Law School's e-mail newsletter, Law@Stanford, keeps you up to the minute with such information and other developments. To be in the know, send your e-mail address to alumni.relations@law.stanford.edu. The bulletins come out roughly once a month. Join the 3,500 alumni, faculty, and friends who already subscribe!

YOUR NAME IN PRINT!

Time is running out.

Ensure that your most up-to-date contact information appears in the **Stanford Law School Alumni Directory 2003**. To verify that your listing is accurate, to correct errors, to make additions, or to request that certain information not be published, please:

- Return the questionnaire that was recently mailed to all alumni
- Respond via the Web at www.publishingconcepts.com/stanfordlaw
- or
- Call Publishing Concepts at 1-800/982-1589

Listings in the printed and on-line directory will include class years, home and business addresses, phone and fax numbers, e-mail addresses, and legal specialty. Directories are available only to Stanford Law School alumni. For those who respond before the May 1 deadline, special pre-publication prices are available: \$56.95 (softbound), \$59.95 (hardbound), \$59.95 (CD-ROM), and \$79.95 (hardbound and CD-ROM). Purchases may be made by returning the printed questionnaire, by visiting the above website, or by calling the above phone number. Thank you!



FAMILY TIES: Kate Johnson (right), the wife of the late Deane Johnson '42 (AB '39), hosted a November 7 event for the Stanford Law Society of Los Angeles and welcomed dozens of alumni, including U.S. District Court Judge Christina A. Snyder '72, to her home in Beverly Hills.

PHOTO BY MARK FELLMAN



GETTING TO KNOW YOU: Kevin Stogner '04 chatted with Barbara Babcock, Judge John Crown Professor of Law, and Tiffany Hill '05, at the First-Year Welcome Reception on September 4 at the Law School. PHOTO BY STEVE GLADFELTER



OVER THE BAR: On December 19 at the Law School, at the swearing-in ceremony for alumni who survived July's California Bar exam, Judge LaDoris Cordell '74 (above, top), now Vice Provost and Special Counselor to Stanford President John Hennessy, administered the state oath, welcoming them into the profession. Stephanie Zeller, Liliana Coronado, Eric Boyd, Mark Poe, Aileen Aponte, and Peter Levinson (above, middle) and Randolph Gaw and Serena Alvarez (above), all members of the Class of 2002, took the pledge.

PHOTOS BY STEVE GLADFELTER



STILL STANDING: Only a few hours after appearing before the Supreme Court on October 9, Professor Lawrence Lessig (above, left) spoke again on the case, *Eldred v. Ashcroft*, to the Stanford Law Society of Washington, D.C. William Allen '56 (AB '48), a retired partner at Covington & Burling, and Peter Winik '80 (AB '77), a partner at Latham & Watkins, listened carefully to Lessig's argument. PHOTOS BY CHARLIE PRUETT



SOUNDS LIKE SALSA: The Stanford Latino Law Students Association, or SLLSA (pronounced salsa), presented its inaugural law and public policy conference, "Whose Eye on What Prize? Understanding Latinos in the Face of the Law" on October 5, and then the next day hosted the sixth annual National Latino and Latina Law Student Conference. To kick off the events, the group honored Fred Alvarez '75 (center, wearing tie), the head of Wilson Sonsini Goodrich & Rosati's employment law litigation practice, with its first-ever Latino alumni award. He was toasted by Araceli Campos '04, Barbara Llanes '04, Bianca Sierra '04, Monica Ramirez '04, Dean Kathleen M. Sullivan, Robert "Luke" Guerra '04, Vanessa Frank Garcia '03, Marisa Fortunati '03, Lisa Blanco Jimenez '04, and Juan Ramos '04. PHOTO BY STEVE CASTILLO



THE NEXT GENERATION: Dean Kathleen M. Sullivan was the featured speaker at a reception on October 3 organized by the Stanford Law Society of San Diego. Among those attending were recent graduates Matt Holian '00, Nadia Bermudez '01, Tim Scott '00, and Michele McKenzie '00.

PHOTO BY ALAN DECKER



AN INTERNET LAUNCH: Peggy Radin, Wm. Benjamin Scott and Luna M. Scott Professor of Law, and Gordon Davidson '74 (BS '70, MS '71), chairman of Fenwick & West, celebrate the October opening of Stanford Law School's Center for E-Commerce. Radin is the director of the Stanford Program in Law, Science, and Technology, and Davidson is chairman of the program's advisory board. PHOTO BY STEVE CASTILLO

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Remember Stanford...



Henry "Hank" Wheeler '50 and
Joan Tompkins Wheeler

Henry "Hank" Wheeler was a Harvard graduate and a Marine Corps fighter pilot when he showed up at Stanford Law School in 1947. He had met his share of hard-nosed college professors, flight instructors, and the like, but he hadn't met Stanley Morrison.

"I had heard about Professor Morrison," Hank recalls. "He had a reputation for being pretty tough. Well, two days after I arrived on campus, I saw my name on a note on a bulletin board. 'Henry Wheeler,' the note read, 'See Professor Morrison!' My God, I thought, what have I done?"

"I met with Professor Morrison the next day," Hank remembers, "and the first thing he said was, 'I understand you're married to Joan Tompkins.' My jaw dropped. It turned out he was one of my father-in-law's best friends—his roommate at Andover and Yale. Before long he'd become my friend, too, as well as my mentor."

Stanley Morrison was tough and demanding in class, but it was the professor's nurturing side Hank remembers best. "Joan and I with other classmates and their wives often spent Sunday afternoons with the Morrisons," Hank recalls. "Those were some of the best years of our lives."

In 1996, Hank and Joan created the Stanley Morrison Professorship in Law at Stanford. The gift was memorable, not only because of the man they chose to honor, but also because of the way they chose to fund it—with a charitable lead trust.

Instead of giving appreciated assets directly to their heirs through their wills, the Wheelers transferred those assets to a trust, which began paying a set sum to Stanford and in turn funds their Professorship. After a fixed term of years, the trust will terminate and the remaining assets in the trust will be transferred back to the Wheelers' family. This technique will allow much of the value of the assets, including any appreciation, to pass free of estate and gifts taxes to Hank and Joan Wheeler's heirs.

For an explanation of complex planned gifts such as the charitable lead trust, which help address tax problems associated with wealth transfer, and for information on life income gifts such as charitable remainder trusts and gift annuities, please contact us.

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