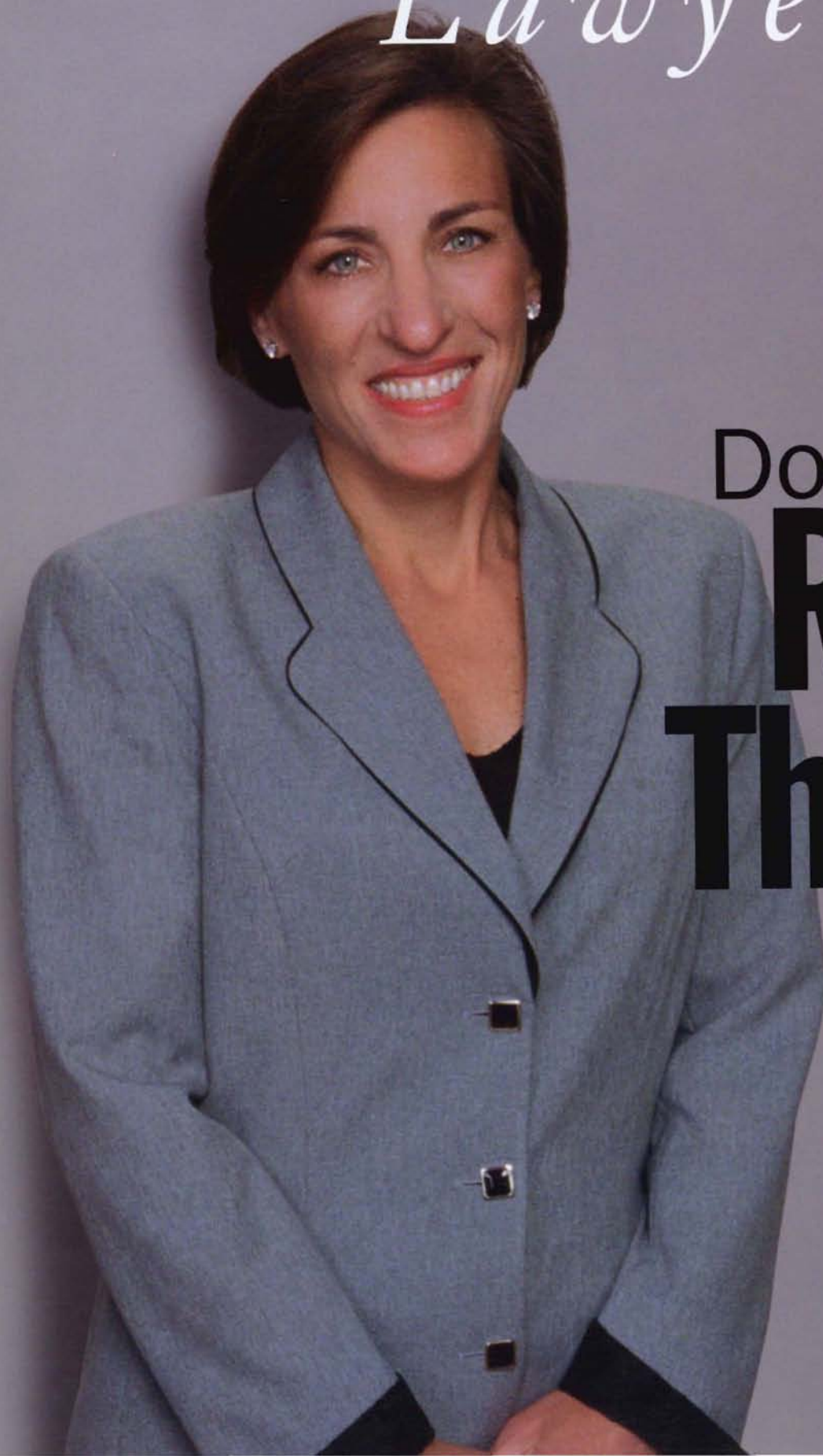


# Stanford *Lawyer*



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**Right  
Thing**

Securities litigator  
Nicki Locker '83  
defends companies  
by improving them.

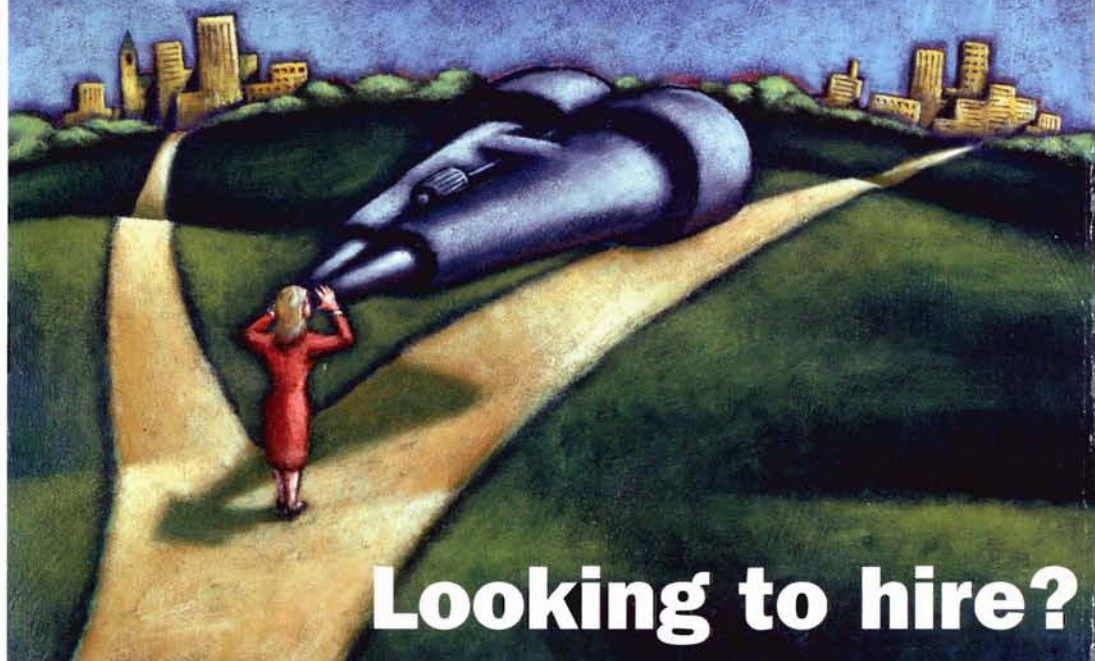


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# Affirmative Action: Looking Forward

BY KATHLEEN M. SULLIVAN

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

**T**he end of June brings a peculiar frenzy to those who follow the Supreme Court. After the long, slow winter months of unanimous rulings and technical cases that only a lawyer could love, the Court, like Hollywood, saves the blockbusters for summer.

This summer did not disappoint. On the final days of the Term, the Court issued two decisions that drew marquee attention. Both were written by Stanford graduates.

In one, the Court, overturning a 17-year-old precedent, declared that the right to privacy bars the state from treating sexual intimacy between consenting adults as a crime, including for those in gay relationships. Justice Anthony M. Kennedy (AB '58) who will be our featured guest at Alumni Weekend 2003, wrote the majority opinion.

In the other, the Court reaffirmed a 25-year-old precedent that had permitted the limited use of race preferences in university admissions, upholding the University of Michigan Law School's admissions policy against an equal protection challenge by rejected white students. Justice Sandra Day O'Connor '52 (AB '50) cast the decisive vote and wrote the statesmanlike opinion of the Court.

There have always been two very different defenses of affirmative action. One is backward looking, and sees race preferences as a remedy for past sins of discrimination. This rationale creates tension, however, if it appears that nonvictims benefit and nonsinners pay.

The other sees racial diversity as vital to the effective functioning of major institutions in society. This rationale, which is more forward looking and functional, was embraced by a host of amici curiae who filed briefs in support of Michigan, from Stanford University and the Association of American Law Schools, to Fortune 500 corporations and retired leaders of the U.S. military.

Justice O'Connor's opinion restated the diversity rationale beyond the contours sketched in the 1978 *Bakke* opinion. She reiterated that "attaining a diverse student body is at the heart of the Law School's proper institutional mission," in part because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when students have "the greatest possible variety of backgrounds."

Anyone who has taught at Stanford Law School can testify to that. Minority students comprise nearly one third of our student body, and *US News & World Report* ranks us among the most diverse of any top law school in its "diversity

index." Our classrooms are greatly energized as a result. And our "alphabet organizations"—BSA, SLSA, NALSA, and APILSA—also produce some of the best and liveliest events in our ongoing public intellectual life outside of class.

But more important, as Justice O'Connor noted, racially diverse students become racially diverse alumni. Diversity, she wrote, is important because universities, particularly law schools, "represent the training ground for a large number of our nation's leaders," and "in order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."

As of course the path to leadership from Stanford Law School well attests. Countless law firms, companies, courts, and government offices have minority graduates of Stanford Law School in major leadership positions. We celebrate this fact each year at our popular Alumni of Color event at Alumni Weekend. And our minority alumni help recruit each new class; we benefited especially this year from the work of devoted alumni who helped us to redress last year's unusual shortfall in the number of African-American male first-year students.

Of course we look in our admissions to diversity in its broadest sense—to all the many ways, not limited to race, in which a portfolio of different backgrounds, talents, and ambitions can produce the best mix of leaders and problem solvers in generations to come.

We could fill the class many times over if we just looked to the very highest numbers. But as Justice O'Connor wrote approvingly of the Michigan Law School, we instead "engage in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." This means that our graduates include Navy SEALs, jazz musicians, teachers, and start-up entrepreneurs, as well as the most accomplished students just graduating from college.

We're very proud of how we do all this. And we're very pleased to have the blessing of the United States Supreme Court in paying attention to diversity while we do it.



L.A. CICERO



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The rise of Nicki Locker '83 heralds a new era in defending companies against securities fraud charges. Credibility is the name of the game.

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Commencement was cause for celebration but also intense reflection: graduates will be entering the profession at a time when many see the rule of law as a luxury.

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## Letters

### Evidence Class instead of Bike Rides

**D**uring the 1998-99 academic year, I was a visiting third-year at Stanford Law School. I heralded from a law school located in the gray climes of New Haven. That said, I have a rather shocking confession to make: after orchestrating a wily escape from the endless Northeastern winter, I actually rebuffed the perpetual California sunshine to attend all (well, nearly all) of my third-year courses.

Why did I forgo scenic bike rides and pickup soccer games when I had a job lined up and my grades didn't matter? Because the teaching at Stanford was first-rate. And right there at the apex was Professor George Fisher's evidence course. [See "Compelling Evidence," Spring 2003, pp. 8-12.]

I truly appreciated the passion that Fisher brought to the subject, the clarity with which he presented the material—yes, even Rule 404(b)—the extensive preparation he devoted to each class, and the fairness and openness that he extended to his students. I was happy to see that he won the John Bingham Hurlbut Award for Excellence in Teaching for the second time in his career. Given the amount of time and energy he devoted to his class, it is a wonder that he was able to write a book and run a clinic "on the side."

*Samantha Graff*

### Seizing Power: 1952 or 2000?

**W**hen I saw the "Seizing Power" headline in the Spring 2003 issue, accompanied by the smiling faces of Chief Justice William Rehnquist '52 (AB '48, AM '48) and Associate Justice Sandra Day O'Connor '52 (AB '50), my first thought was, Aha! Stanford Law School is finally confronting the harsh reality that these two "honored" graduates staged a judicial coup d'état when they and three colleagues stopped the 2000 election and put George W. Bush into the White House.

As I write, in April 2003, the effects of their act of usurpation are emerging with

horrific, literally murderous force. The president, who was rejected in 2000 by most voters but preferred by five judges, now makes war on American constitutional values as well as on the international rule of law, raining death on another people and glorying in America's supposed right to do so.

This, I thought, was a fitting moment for *Stanford Lawyer* and the Law School



to begin a debate on whether we ought so regularly to honor these two judges, these putschists. But alas, no. The seizure of power that was being debated at the Law School and in your pages was the Steel Seizure case of 51 years ago, not the blow to American democracy delivered by our illustrious alumni two years earlier.

*Mitchell Zimmerman '79*

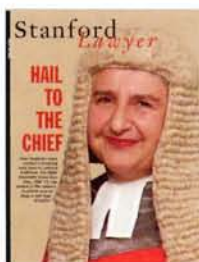
*The author is one of the coordinators of Law Professors for the Rule of Law, a group of 673 U.S. law school teachers who condemned the five justices comprising the majority in Bush v. Gore for "acting as political proponents for candidate Bush, not as judges."*

### No Longer "More England than England"

**T**he cover story about New Zealand Chief Justice Sian Elias, JSM '72 ["Hail to the Chief," Spring 2003, pp. 20-27], conveys both the deep changes in New Zealand law since the 1970s and the personality and skill of the woman who has played center stage.

As an expatriate New Zealander living in Canada, I have mostly seen these





events from a remove, but occasional return visits (often highlighted by relaxing stays with Sian and her husband, Hugh Fletcher) have revealed their significance. As New Zealand loses its "More England than England" character, it seems more self-confident, though perhaps less of a curiosity to outsiders. What appears retained, however, is a sense of fairness and a willingness to experiment with bold new ideas, such as radical tort law reform and proportional representation.

Both as an advocate and a judge, the Chief Justice has helped build the framework around which many changes—especially those affecting Maori—have developed in New Zealand law. Like Canada, New Zealand has started to recognize the customs of its indigenous populations within its legal system. This will be a long and complex process, but not an impossible one if both sides realize the overall gains to be achieved in so doing.

The article's author, Todd Woody, who interviewed me last year for the piece, may overstate my activist credentials, but he does a superb job of capturing the spirit of Sian Elias, a woman whose intellect is matched only by her sense of humor and style.

*Bob Paterson, JSM '72*

#### A Word to the Young

There is the old tune that goes: "California here I come, right back where I started from; California I've been blue, since I've been away from you." Substitute the word "Stanford" for "California," and well, you all will get the point.

It is the end of April, and tomorrow I am headed south from my home on Whidbey Island in Washington, via Mesquite, Nevada, to Stanford. Once there, I will look up Linda Wilson, the coordinator for class notes, who is the only person I still know on campus 62 years after my graduating. I look forward to the visit, as it will stir many memories.

As my father used to say, "When you are young, you think you have all the time in the world to accomplish life's miracles, but you don't." As I walk the campus, I will think about one classmate who was terminally ill but insisted on continuing with his law studies only to pass on during his second year. I also will remember John Haffner, who finished law school with honors, but lost his life during World War II while operating a tank.

May I pass on to the current future lawyers, now studying at Stanford Law School, the above advice of my father, in paraphrased form: Make good use of all your time.

*Elster Haile '41*

#### EDITOR'S NOTES

Chris Wright '80, a partner at Harris, Wiltshire & Grannis in Washington, D.C., should be added to the list of Stanford lawyers involved in the Supreme Court case on the constitutionality of the University of Michigan's admissions policies ("Cardinal Arguments on University of Michigan Admissions Policy," Spring 2003, p. 7). Wright was counsel of record for the Michigan Black Law Alumni Society and filed an amicus curiae brief on the group's behalf supporting the university in *Grutter v. Bollinger*.

A brief about Stanford Law Professor John Donohue's and Yale Law Professor Ian Ayres's new findings that laws permitting people to carry concealed weapons are not likely to cause a decrease in crime ("Ready, Aim, Calculate," Spring 2003, p. 5) inaccurately attributed the source of a quote from John Lott, Jr., the scholar whose conclusions Donohue and Ayres dispute. Lott's remark dismissing the Donohue-Ayres critique appears in a paper that he coauthored with Florenz Plassman and John Whitley that was posted in January 2003 on the Social Science Research Network website. The quote is not from the April issue of *Stanford Law Review*, which includes a similar comment in an article credited to Plassman and Whitley but not Lott.



The Law School rolled out a newly designed website in April. If you have not already visited, please check out [www.law.stanford.edu](http://www.law.stanford.edu) for the latest news about faculty, students, alumni, and events. Along with streaming video of recent conferences, listings of new jobs, and links to Law School publications, it also offers the exact temperature on campus!



**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](mailto:jrabrin@stanford.edu).**





# “Who Could Resist a World-Class Law School in Paradise?”



—DEAN KATHLEEN M. SULLIVAN






AT THE GRADUATION ceremony in May, we at *Stanford Lawyer* counted at least a half dozen references linking the Law School to paradise, including Dean Sullivan's oft-repeated remark (above), which she first made nearly a decade ago. But do the Law School's students share the same feeling? And can a passion for the Farm coincide with a career outside California? In April and May, the magazine surveyed JD candidates to gauge their sentiments, eliciting the following responses.




Stanford has the best weather I have ever lived in.		NUMBER OF RESPONSES	RESPONSE PERCENTAGE
True		212	74%
False		74	26%



California is the most beautiful state in the nation.		NUMBER OF RESPONSES	RESPONSE PERCENTAGE
Yes		156	55%
No		128	45%





Before applying to Stanford Law School I had been to California:		NUMBER OF RESPONSES	RESPONSE PERCENTAGE
Never		34	12%
One to three times		87	30%
Four or more times		53	18%
I had lived in California for an extended period		115	40%

Being in California was an important reason I chose to come to Stanford Law School.		NUMBER OF RESPONSES	RESPONSE PERCENTAGE
True		213	74%
False		74	26%

I plan to spend my life in:		NUMBER OF RESPONSES	RESPONSE PERCENTAGE
The Northeast		56	19%
The Midwest		17	6%
California		100	35%
No answer		46	16%
Other		70	24%

Since September 1, I have flown to the East:		NUMBER OF RESPONSES	RESPONSE PERCENTAGE
Zero times		76	27%
Once or twice		107	37%
Three or more times		103	36%

Since enrolling at law school, I have interviewed for jobs in Boston, New York City, Philadelphia, or Washington, D.C.		NUMBER OF RESPONSES	RESPONSE PERCENTAGE
True		149	52%
False		139	48%

If you answered "True" to the previous question, how do you think that being at Stanford instead of a law school in the Northeast affected your prospects for the position for which you were interviewing?		NUMBER OF RESPONSES	RESPONSE PERCENTAGE
An advantage		78	41%
A disadvantage		22	11%
No difference		45	23%
No answer		47	24%



# Briefs

## WHAT A DOLL!

**C**HIEF JUSTICE WILLIAM H. REHNQUIST '52 (AB '48, AM '48) has received many honors, but none perhaps as curious as the bobblehead that mysteriously appeared in his chambers in May. Although only eight inches tall, the ceramic figurine captures his likeness, right down to the four gold stripes on his judicial robes and the solemn expression on his face. One of the doll's creators, Ross Davies, describes it as being kind of "cute," while still projecting a stately presence.

Davies, an assistant professor at George Mason University School of Law, is the editor-in-chief of *The Green Bag*, a nonprofit humor journal about the law and the legal profession, to which a number of Stanford

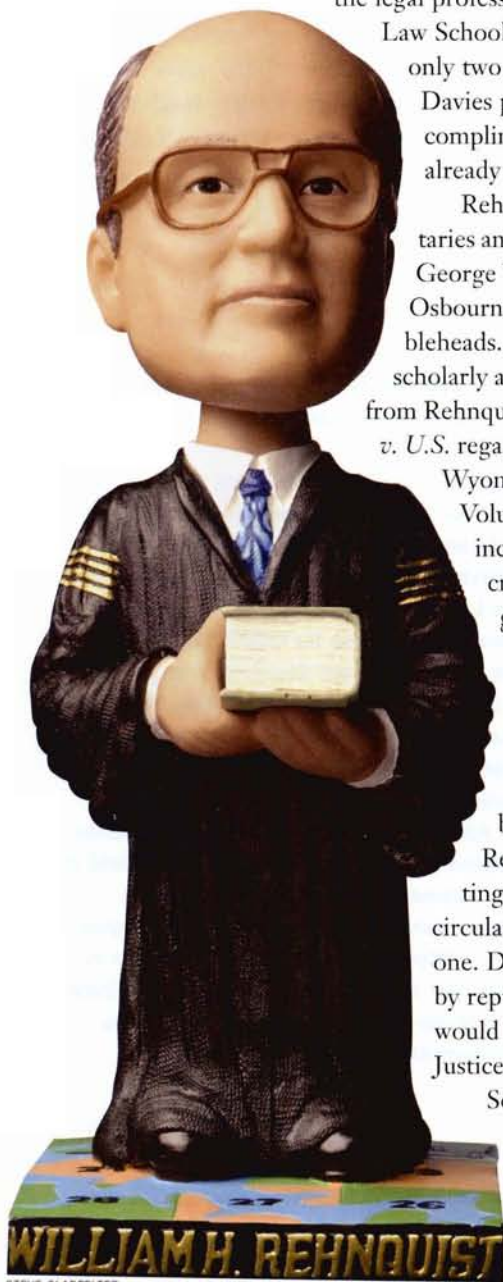
Law School faculty have contributed. As of June, only two prototypes of the doll existed, but Davies plans to produce about 1,000, and send complimentary copies to those readers who already subscribe.

Rehnquist can be added to the list of dignitaries and celebrities—including President George W. Bush, Sammy Sosa, and Ozzy Osbourne—who have been immortalized as bobbleheads. But the Rehnquist doll is unusual for its scholarly attention to detail: its base has a map from Rehnquist's eloquent 1979 opinion in *Leo Sheep v. U.S.* regarding 19th-century railroad easements in

Wyoming; its hands hold a book marked Volume 529 of the Court's reports, which includes a notable Rehnquist ruling on a criminal procedure matter that involved a green bag (it held a brick of methamphetamine); and the Chief Justice is portrayed wearing the tie that he donned to preside over President Bill Clinton's impeachment proceedings.

Davies declines to reveal how the bobblehead suddenly appeared in Rehnquist's chamber, other than admitting that he felt it would be disrespectful to circulate the doll until Rehnquist had received one. Davies was confident that Rehnquist, who by reputation has a good sense of humor, would appreciate it, and indeed, the Chief Justice sent Davies a note of thanks.

So is Davies now finished with the doll business? "Stay tuned" was all he would say. After all, there's another Stanford Law School graduate on the Court who might look quite fetching as a bobblehead.



## ALUMNI SPOTLIGHTS

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Remembering Thurgood Marshall



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Exploring Lake Michigan's Riviera

### 60 Christina Fernandez '78

Working for the Ultimate Judge

## COLE EARNS TENURE

Marcus Cole, a bankruptcy and corporate reorganization law expert, was awarded tenure in March. A National Fellow



at the Hoover Institution, he joined the Law School faculty in 1997 after practicing at the Chicago law firm of Mayer Brown. He teaches contracts among other subjects.

## JUDGES CONFERENCE

More than 30 federal trial judges attended lectures by Stanford Law professors at the Law School in May, hearing about an array of subjects, from cloning to securities fraud. One judge remarked that it was the best seminar he'd attended in 16 years on the bench. The Hon. Fern Smith '75, director of the Federal Judicial Center, the event's sponsor, credited the strong program to Dean Kathleen M. Sullivan, who said, "It's very easy to produce a wonderful program when you have a wonderful faculty."



## SEND IN THE CLONES

**B**EFORE PROFESSOR HANK GREELY adjourned the Faculty Senate's last session of the academic year in June, six self-proclaimed Greely clones—with white wigs, bushy stick-on mustaches, and the striped sweaters that are a Greely trademark—interrupted the meeting. It was a tribute to Greely, the Senate's chair, who is also an expert in the legal and ethical issues of cloning. The disguised professors, all members of the Senate steering committee, had adapted Samuel Taylor Coleridge's *Kubla Khan*. In unison they began:

*In Senate would the Greely clones  
A stately new regime decree  
Where resolutions and reports  
On budgets, majors, rules, and sports  
Would proceed in numbers infinite.*

After several more stanzas, Greely declared, "I'm speechless—and you know how rare that is."

Earlier in the meeting, Greely described the pros and cons of his one-year gig in charge of the Senate, a body that



L.A. CICERO (2)



Hank Greely (left), C. Wendell and Edith M. Carlsmith Professor of Law, served as chair of the Faculty Senate. His leadership inspired a tribute [above] from colleagues.

wields an important influence on academic policy, though it has a limited role in direct University decision making. He observed that the Senate successfully highlighted its concerns on a host of subjects, including the U.S.A. Patriot Act, administrative computing, grading policy, and the system by which faculty salaries are set.

But Greely also noted that attendance "stunk," leading him to worry about the Senate's future. "This public forum—where any question can be put to the president, to the provost, to the administration—is a very valuable thing," he said. "I would hate to see us lose that."

*Based on a June 18, 2003, Stanford Report story*

## MAKING THE GRADE

Stanford Law School was No. 2 for the fourth consecutive year in *US News & World Report's* annual ranking of the nation's law schools.

The **Burton Awards for Legal Achievement** honored SLS in June as the only law school with a student winner for four consecutive years. For 2003, the judges, who select the best works of legal writing, chose an article by **Marcy Karin '03** in the law school category. In the law firm category, they selected a piece by **Cornelius Golden, Jr., '73 (AB '70)**, a partner at Chadbourne & Parke.

**Eugene Mazo '04**, **Anna Makanju '04**, and **Cynthia Inda '05** were awarded Paul and Daisy Soros Fellowships for New Americans in March.

In June, the Legal Aid Society–Employment Law Center gave **Miguel Méndez**, Adelbert H. Sweet Professor of Law, its Tobriner Public Service Award for his commitment to diversity and mentoring new lawyers.

In April, State Controller Steve Westly named **Pamela Karlan**, Kenneth and Harle Montgomery Professor of Public Interest Law, to California's Fair Political Practices Commission.

Dean Emeritus **Paul Brest**, president of the William and Flora Hewlett Foundation, was appointed to Caltech's board of trustees in May.

## THREE NEW PROFESSORS

The Law School is bringing new expertise to the study of comparative and international law with three new faculty members, all to begin teaching in the fall semester.

Amalia Kessler, a legal historian who studies civil law systems and European legal history, and Jennifer S. Martinez, an international law specialist, were appointed assistant professors. Allen S. Weiner '89 was named to the newly established Warren Christopher Professorship in the Practice of International Law and Diplomacy, a joint professorship between the Law School and the Institute for International Studies.

Kessler, with a JD from Yale and a PhD from Stanford, was recently a trial attorney in the Justice Department's honors program. She had been a clerk to Judge Pierre Leval on the U.S. Court of Appeals for the Second Circuit. Martinez, a Harvard Law School graduate, was a research fellow at Yale after working as a clerk to Judge Guido Calabresi on the U.S. Court of Appeals for the Second Circuit, Justice Stephen Breyer on the U.S. Supreme Court, and Judge Patricia Wald at the U.N. International Criminal Tribunal for the Former Yugoslavia.

Weiner was formerly the legal counselor at the American Embassy in The Hague and Attaché in the Office of the Legal Counselor. He is the first to fill the professorship that honors former Secretary of State Christopher '49. It is a rotating three-year position for lawyers who have extensive experience in international law and diplomacy.

## FAREWELL TO SIMON

William H. Simon resigned as William W. and Gertrude H. Saunders Professor of Law, as of June 30, to join the faculty at Columbia Law School. Simon taught at SLS since 1981 and was awarded emeritus status.



## CITES

DARREN BECHTEL/STANFORD DAILY



***"If offering to resign the best job in the world at the greatest law school in the nation helps build the alliance necessary to get it passed, then I am happy to make that offer."***

LAWRENCE LESSIG, Professor of Law, at an April 28 news conference with U.S. Rep. Zoe Lofgren (D.-San Jose) to announce her introduction of legislation, which Lessig had helped develop, aiming to reduce e-mail spam. Lessig promised that if the bill was enacted and did not work, he would resign his Stanford professorship. The Lessig-Lofgren proposal was one of a number of bills over the last few months that gave Congress impetus to stem the proliferation of spam.

STEVE GLADFELTER



***"Recoveries do not happen without risk taking."***

JOHN CHAMBERS, president and CEO of Cisco Systems, explaining that legislators and regulators have been very constructive in addressing many areas of corporate governance, but that they should be careful not to overcorrect when considering new rules for expensing stock options, because it will impact risk taking. Chambers's off-the-record talk [he graciously agreed to let us print the above remark] was made at the Law School on June 3 as the final keynote address of Directors' College. Other participants in the star-studded event were SEC Chairman William Donaldson, former SEC Chairman Harvey Pitt, Delaware Chief Justice E. Norman Veasey, and California Treasurer Phil Angelides.

***"So by taking these laws off the books, the Supreme Court is making clear that being gay is not being a criminal."***

PAMELA KARLAN, Kenneth and Harle Montgomery Professor of Public Interest Law, discussing the Supreme Court's decision in *Lawrence v. Texas* on the *NewsHour* with Jim Lehrer on June 26. Earlier in the year Karlan had filed a friend of the court brief on behalf of 18 constitutional law professors, urging the Court to strike down the Texas sodomy law at the heart of the case.

L.A. CICERO



***"In short, the pipeline leaks, and if we wait for time to correct the problem, we will be waiting a very long time. At current rates of change, it will be almost three centuries before women are as likely as men to become top managers in major corporations or to achieve equal representation in Congress."***

DEBORAH L. RHODE, Ernest W. McFarland Professor of Law, in the introductory essay to *The Difference "Difference" Makes: Women and Leadership* (Stanford University Press, 2003), a collection of papers edited by Rhode. On April 21, along with Dean Kathleen M. Sullivan, Rhode spoke at the Law School about the book, explaining that women are now well represented in the middle ranks of law firms and corporations, but that more work is needed to bring them into leadership positions.

DARREN BECHTEL/STANFORD DAILY



***"It's a centrist, moderate court that expresses the values of most Americans."***

DEAN KATHLEEN M. SULLIVAN, Richard E. Lang Professor of Law and Stanley Morrison Professor of Law, describing the general philosophy of the current Supreme Court on the *NewsHour* with Jim Lehrer on June 27. In a discussion of the decisions the Court issued in its latest term, Sullivan argued that the two most prominent rulings—its upholding of the use of race in university admissions and its striking down of an antisodomy law—reflect views about racial diversity and privacy that have become widely accepted in the last generation.

L.A. CICERO



***"It's hard to say justice has been done. What happened to Lisa Hopewell was very, very sad, but it's a separate tragedy. Rick spent the past 12 years in prison for a crime he didn't commit."***

ALISON TUCHER '92, as quoted in the *San Jose Mercury News* on June 18, shortly after proving that her pro bono client, Quedillis Ricardo "Rick" Walker, had been wrongly convicted of the murder of Lisa Hopewell in 1991, for which he had served 12 years in prison on a sentence of 26 years to life. Tucher, an associate at Morrison & Foerster who first learned of the case in her last year of law school, established Walker's factual innocence by finding witnesses who said that Walker was not present at the crime, by discovering DNA evidence that placed another suspect at the murder scene, and by uncovering deals that the prosecution made with one witness that tainted the testimony.

ANNE DOWIE





## CELEBRATING A CLINIC AND A PARTNERSHIP

A new Law School venture providing live client services takes root in East Palo Alto.

At the April 2 opening celebration of the Stanford Community Law Clinic, a purple ribbon, the color of Stanford Law School, was wrapped with blue and white ribbons, the colors of East Palo Alto, to signify the intertwining fortunes of the school and the city.

East Palo Alto Mayor Patricia Foster remarked to the crowd of more than 100 students, alumni, local elected officials, and citizens: "If you are coming over here just to help us, don't bother. But if you are coming over because you believe your liberation is tied to ours, welcome!" That thought was seconded by Dean Kathleen M. Sullivan, who observed that if the clinic is to succeed, it must "offer lessons of law that students can't learn in a classroom."

A dozen students began working in the clinic in January, and in its first semester, they handled more than 50 cases involving workers' rights, benefits, and housing issues. Under the direction of the clinic's supervising

attorneys, they conducted administrative hearings, drafted pleadings, prepared discovery, and interviewed witnesses.

In one case, students persuaded a San Mateo County appeals officer to authorize Medi-Cal benefits for a 65-year-old diabetic woman who had been denied such services because her family had bought a house in rural Mexico in 1961 for \$100. In another case, they stopped a car wash manager from forcing his employees to tape their pockets shut to prevent theft, which damaged many of the workers' pants. And the clinic is battling two-for-two in unemployment benefits hearings, twice overturning initial decisions that clients were ineligible.

Already 18 students have signed up to work at the clinic in the fall semester and take the accompanying class.

The excitement about the clinic was evident at the open house celebration. Members of the Law School's



University President John Hennessy, Menlo Park Mayor Nicholas Jellins, Dean Kathleen Sullivan, and East Palo Alto Mayor Patricia Foster celebrate the opening of the new law clinic.

Board of Visitors, who were at the School for the board's annual meeting, were among those touring the clinic's newly remodeled storefront office on University Avenue. Stanford University President John Hennessy, who helped to arrange the clinic's funding, joined in the festivities, as did Mayor Nicholas Jellins of Menlo Park, whose citizens are also served by the clinic. "The services being offered are essential," Jellins said.

## PLANTING FLOWERS, BUILDING BRIDGES

THE CITY OF EAST PALO ALTO lies a few miles east of the Stanford campus, but this community of 29,000, on the other side of Highway 101, is a world apart. Despite its palm trees and sunny skies, it is a 2.5-square-mile pocket of poverty amid the affluence of Silicon Valley.

"What bothers me is how hidden it is from its neighbors," remarks Jenna Klatell '04. "I find myself continually pointing it out to people who don't even know it's there."

To improve awareness of this neighboring city, Stanford

law students on April 26 held the School's annual Building Community Day. On that Saturday morning, about 75 students made the trek to East Palo Alto and joined with residents to clear the new site for a local non-profit, the Ecumenical Hunger Program; to build

Middle school and law school students created a shrine for a deceased 13-year-old girl.

flower boxes and paint hopscotch courts at an elementary school; and to create a memorial to a 13-year-old girl who died in a fire on Christmas Eve.

Klatell helped organize the group that worked on the memorial garden for Lucy Sanft, an eighth grader at the 49ers Academy, a middle school for troubled youth. Sanft's classmates had been grieving her death, says Klatell, who volunteers at the school, and they had decided on their own to make a tribute to her memory.

So many volunteers showed up at the school that day there weren't enough shovels. Some of the middle school students began to dig with their hands. By mid-afternoon, the students' parents and other neighborhood adults were admiring the completed garden.

The projects SLS students tackled in April had nothing to do with law school studies, admits David Kovick '04, an organizer of the workday, but they were a reminder of the world beyond Stanford. "Just because we're studying the law, we don't only and always have to be about the law," he says.



FRANCOIS BRANIC (2)



Shirin Sinnar '03 (left) brought friends with her to an East Palo Alto elementary school, where they planted flowers.



## GOLDILOCKS WALKS

Girl freed despite eating porridge and using beds.

*The following article by Kim Vo appeared in the San Jose Mercury News on Friday, April 25, 2003.*

**G**OLDILOCKS WAS FREE to get lost in the woods again after a jury acquitted her of burglary charges Thursday, apparently buying into the defense's argument that no child would break into a house just to eat Mama Bear's awful porridge.

It was a bitter defeat for the government—Stanford Law School Dean Kathleen M. Sullivan, who delivered the prosecution's closing argument, complained of "jury nullification." Nonetheless, it was also a good lesson for the children participating in Take Your Daughters and Sons to Work Day.

Like many businesses, Stanford invited its employees to take their children to work Thursday, trying to inspire the children to think about careers. Instead of just having approximately 300 kids tag along with their parents, the University developed hands-on workshops on everything from a Junior Iron Chef competition to how to coach athletics.

The law workshop offered a glimpse into the high-profile world of celebrity trials, complete with scandal, rumors of movie deals, and a glamorous suspect. Reporters (children shadowing Stanford News Service reporter Barbara Palmer) sat in the front row, scribbling in small notebooks.

The case of Goldilocks and the three bears has already spawned several books. Goldilocks, a small girl with many ringlets, was lost in the woods when she happened upon a house. She went inside and sampled the bowls of porridge that were set out, sat in various chairs, and tried out the beds

before falling asleep in the smallest one. It was there she was discovered by the bears, who returned home after a walk in the woods.

Annamaria Armijo-Hussein, a 12-year-old member of the prosecution team whose mother teaches religion and rebellion at Stanford, said she thought the team had a strong burglary case against Goldilocks. "They didn't invite her in," she reminded fellow prosecutors.

But earlier in the day, Hussein worried that the jury would sympathize with the suspect. "She's definitely guilty," she said outside the courtroom. "She looks innocent. The only reason they're so nice to her is because she's cute. . . . It's our only weakness."

And things seemed to go badly for the prosecution with the questioning of Mama Bear. Do you make excellent porridge? the prosecution asked.

"Objection!"

What's the basis for the objection?

the judge [Vice Provost LaDoris Cordell '74] asked the defense.

"Who cares?"

It was overruled.

Apparently, the six-person jury—three boys, three girls, all human—did care.

Law Professor Pamela Karlan, donning tiger ears in her role as a defense attorney, argued persuasively that Goldilocks did not come into the house with the intent to eat the porridge. In fact, the defense said that even Baby Bear didn't like it, and Mama Bear was keeping her child malnourished by serving only porridge, instead of the recommended five daily servings of fruits and vegetables.

In a controversial move, Karlan played the species card, saying that Goldilocks didn't flee the house out of guilt, but fear of the animals and their large snouts.

"In many countries of the world, the bears would eat Goldilocks," Karlan said.

Juror Martin Smith, 14, voted for acquittal, saying, "All the events turned out good." Baby Bear didn't have to eat the porridge, and will get a new chair. (It's likely the Bears will pay for the new furniture. Goldilocks has refused to pay any damages or apologize, saying the Bears owned shoddy furniture and hadn't apologized for chasing her.)

But, as with all fairy tales, there may eventually be a happy ending.

Is there a movie deal in the works?

"This was more of a personal family thing," said Mama Bear, played by Zuri Ray-Alladice, 13. "But if Spielberg approaches, we'll move forward."



JESSIE WILCOY SMITH, 1916





# SPEAKING TRUTH TO FRAUD

The board of directors has just learned that its company's numbers aren't adding up. Nicki Locker '83 is ready to defend them, but first they have to come clean.

BY JONATHAN RABINOVITZ



It looked like a routine insider trading case. A flurry of sales in the stock of a software company, Critical Path, had occurred in the hours before the company released a disappointing quarterly statement.

ON TUESDAY, JANUARY 30, 2001, Wilson Sonsini Goodrich & Rosati dispatched Nicki Locker, a 43-year-old partner, to look into the matter for the company, one of the firm's clients. Her first few conversations with employees in Critical Path's San Francisco offices turned up nothing unusual, but then Larry Reinhold, the newly recruited chief financial officer, pulled her aside. He was trembling and told her that they needed to speak privately—on the telephone—as soon as she left.

"Are you sure you're not being hysterical?" asked Locker, a native New Yorker who is known for asking the most blunt questions in the most disarmingly friendly manner. He assured her he wasn't.

A few hours later, Locker understood what Reinhold had discovered. Months later it would be determined that roughly 20 percent of the previous two quarters' reported revenues did not exist. But on that day all Reinhold and Locker knew was that several transactions appeared to be questionable.

Critical Path, a four-year-old dot-com with a market value of nearly \$2 billion, was about to be one of the first companies to enter a new era of securities litigation. And the challenge the case would pose—winning mercy from government lawyers by documenting fraud and restoring good corporate practices—would soon be the priority assignment for Locker and other securities lawyers.

As soon as Locker finished her telephone conversation with Reinhold, she kicked into crisis mode. She is a lean, energetic woman who gets antsy if she hasn't done her morning run of five miles, and over the next 72 hours she barely slept as she prepared the company to take a series of emergency measures, from halting trading in its stock to suspending the executives who appeared to be responsible for a fraud.

The pivotal moment came at the emergency meeting of Critical Path's board of directors that she had organized at Wilson Sonsini's San Francisco office. It started at 3 p.m. on Thursday and lasted past midnight. None of the directors were prepared for Locker's and Reinhold's news: The company's numbers appeared to be false, and immediate action was needed. There were people at the board meeting who asked whether they could have more time to study the problems before alerting the market and regulators, says Reinhold. Locker answered that it was essential to go public with the problem immediately, he adds.

On Friday, February 2, at 9:09 a.m., the NASDAQ

announced it had halted trading in all shares of Critical Path. The company had issued a news release declaring that its previous quarter's results may have been "materially misstated" and that two top executives had been placed on leave. The board had asked Locker to conduct an investigation. The company's existence turned on whether Locker could quickly determine what had happened and correct the problems.

Speaking of her response those first three days, Locker says, "I did what any lawyer would do." But other lawyers disagree. "She was doing post-Enron crisis control in a pre-Enron environment," says Joseph Grundfest '78, W. A. Franke Professor of Law and Business and a former commissioner on the Securities and Exchange Commission. "She was ahead of the curve."

### A New Era

Securities litigators have a different job now than they did a couple of years ago.

Before 2002, they were primarily dealing with shareholder lawsuits and plaintiffs' attorneys, battling to get the claims dismissed and generally settling those that weren't. Today, lawyers like Locker are more concerned with cooperating with the SEC and the Justice Department, conducting internal investigations of their clients, and pushing them to improve governance practices. Enron, WorldCom, and other frauds led to this change in the securities law practice. The biggest cases in 2003 aren't about missed forecasts, but about big financial restatements, accounting irregularities, the handling of initial public offerings, and conflicts of interest.

At a conference of financial managers in San Jose in May, Locker was on the keynote panel with one other speaker, Harold Degenhardt, the district administrator of the SEC's office in Dallas. Degenhardt says that the SEC had 262 cases for financial fraud and disclosure in 2002, more than double the number it was investigating in 2001. Today's problems don't come from "the tension between aggressive and conservative accounting, but from legal versus illegal accounting," he says. And he advises the executives in the room that when the SEC invites them in for a chat, they should come in immediately. "We don't like people to miss our message," he says. "It hurts our feelings."

Locker takes the microphone. She is one of the few women in the room, before a Silicon Valley crowd of 150, standing out from the button-down shirts and khaki pants in



her elegant St. John suit, with Peter Pan lapels, that complements her piercing green eyes. Her talk concentrates on the subject that is on everyone's mind: "How to get off the SEC's radar screen." There's no easy answer, she warns, noting that even companies in compliance with Generally Accepted Accounting Principles have found themselves before the SEC. She urges companies to implement systems to detect fraud. That would include, for instance, a quarterly review of all deals in which the company is both buying from and selling to the same partner. And she cautions against Degenhardt's advice to drop by immediately after receiving his call. "You don't go by there until you've done some type of investigation," she says. The company needs to know beforehand how serious the problem is, as well as to demonstrate its intent to get to the bottom of it, she adds.

The respect Locker shows to the SEC is typical of her style—and an important new trait for lawyers handling today's securities cases. The relationship between plaintiffs'

Nicki Locker was certainly bright. She graduated from Yale College summa cum laude in a special major she designed herself (law and ethics in medicine) and was elected to Phi Beta Kappa. In her senior year, it appeared that she would fulfill her mother's dream. She was accepted into the joint MD/JD program at Duke University and was ready to go until she had a sudden revelation. "I didn't like to look at blood," she says.

Locker grew up in Queens, and she has the accent to prove it. Her mother was the general counsel at Queens College. Her father, a mechanical engineer, was a national handball champion. Locker was an all-city field hockey player and a member of the tennis team at Yale. She recently ran a marathon and is now training to do a triathlon.

For law school, Locker decided that she needed to get away from the East and enrolled at Stanford. She was a clerk to Anthony Kennedy, at that time a Judge on the U.S. Court of Appeals for the Ninth Circuit (now a Justice on the

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## **"I think this work is a blast," says Locker**

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and defense lawyers in securities litigation has traditionally been as contentious as any in a profession that has in recent years lost much of its civility. "You see lawyers on both sides making extreme arguments," notes Robert Gans, a plaintiffs' lawyer who has been litigating against Locker for three years in a case involving the company Network Associates. Many plaintiffs' lawyers believe that corporate executives are out to defraud shareholders, and many corporate lawyers see all shareholder lawsuits as frivolous, he says. "Nicki isn't one of those," he adds. "Aside from being an excellent lawyer, she's a straight shooter—she doesn't hide the ball."

Such credibility is of particular importance now, because resolving cases involves a greater amount of collaboration between the two sides. It's no longer enough to simply get the case dismissed or have the insurer pay out a settlement. Increasingly, the company must work with the parties bringing the action to show that it has adopted better practices.

Grundfest highlights this change in a forthcoming article. "Settling entities will have to agree to forms of behavior modification that will promote 'good governance' agendas and provide for active monitoring designed to assure that wrongful conduct does not recur," he says. "The simple injunction commanding 'go and sin no more' will become scarcer in the evolving enforcement environment."

### **An Unlikely Securities Star**

Nicki Locker was not supposed to be a securities litigator. "Every good Jewish mother wants a bright daughter to be a doctor," says Lola Locker, Nicki's mother.

Supreme Court), then joined Wilson Sonsini, where she has stayed her entire career. She married Lionel Boissiere, MBA '85, in 1986, and they have a nine-year-old son, Jacob, and a seven-year-old daughter, Jaye Cori.

Locker's career is unusual in that she started in intellectual property, migrated to commercial litigation, then, as a partner, decided to make her specialty securities litigation, a field in which the firm is renowned. "In lieu of a midlife crisis, she decided to change directions in her career," remarks Boris Feldman, a Wilson Sonsini partner and one of the nation's most highly regarded securities litigators. Few other lawyers, he says, could have done it: She would put her children to bed, then read decisions, briefs, and the statutes into the early morning hours. "In very short order she knew as much as any of us," he says.

Locker insists that she's not entirely sure why she made the switch. She says she was drawn to securities litigation partly because that's where the big cases are, and partly because it seemed like a challenge. "I want to be where the action is," she says. "I like pressure, I like high profile, I like very intense. What can I say? I think this work is a blast." And she makes an admission that would raise the eyebrows of some corporate defense lawyers: "If I weren't at Wilson Sonsini, I'd love to work at the SEC."

The switch only added to her stature within Wilson Sonsini. She has served on the executive and compensation committees and was the co-chair of the member nominating committee, which selects new partners. Larry Sonsini, the firm's chairman, calls her a leader who has a "future in high



level management” at Wilson Sonsini.

What makes Locker’s success all the more remarkable is that securities litigation remains one of the last male bastions in the legal profession. For better or worse, there’s a machismo to the field, and a widespread perception remains that women face a tougher time being rainmakers in such high-stake cases, says Feldman. Locker, however, has managed to build a strong client list, including Agilent Technologies, Guidant, I2 Technologies, Juniper Networks, Networks Associates, and Veritas Software, among others.

### Settling with Reforms

No case has done more for Locker’s reputation for being on the leading edge of securities litigation than a giant shareholder lawsuit charging that the stock prices of several hundred initial public offerings were fraudulently inflated. It involves 309 companies that went public and the 55 brokerage firms that underwrote the offerings. There are dozens of defense lawyers on the case, but Locker represents more issuers than anyone else—50 high-tech companies—and she was one of the two defense lawyers for the issuers who presented oral arguments in the case.

After U.S. District Court Judge Shira A. Scheindlin declined to dismiss the claims, Locker and the other lawyers representing the issuers worked with the insurance companies to hammer out a proposal for an unprecedented settlement, guaranteeing to pay investors \$1 billion if the plaintiffs

Assuming the settlement goes through, it will be a coup for the issuers. The guarantee would average out to roughly \$3.3 million per issuer, to be paid—if at all—by the insurers. “The issuing companies probably view Nicki as a hero,” says Grundfest. “It may get them out of this complex litigation without having to dig into corporate pockets.”

The deal, however, is also significant for what it shows about corporate defense lawyers being willing to step up and reform corporate practice. Whether the issuers publicly accept the plaintiffs’ argument that they should have been aware of the alleged stock manipulations by the underwriters, the settlement places the issuers in the position of adding pressure to the underwriters to improve their practices. *New York Times* reporter Gretchen Morgenson writes that the proposed settlement creates an incentive for the companies to assist the plaintiffs’ lawyers in their action against the Wall Street firms. Locker says it’s too soon to say whether that incentive will lead to any action. But Melvin Weiss, the lead lawyer on the other side, told Morgenson that the agreement would require issuers to provide documents and other support to the shareholder lawyers.

The IPO case is unique among securities cases in its scale and its focus on public offerings. But even in more typical cases, Locker has demonstrated an ability to win for her clients, while also improving corporate practices. Take her representation of Network Associates, a company that had acknowledged problems in its accounting and had restated

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## “The issuing companies probably view Nicki as a hero,” says Law Professor Joseph Grundfest

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do not win at least that much from the underwriters. “This is the mother of all securities settlements,” remarks Jeff Rudman, a partner at Hale and Dorr who serves with Locker on the steering committee of lawyers representing the issuers.

The settlement proposal, which has yet to be approved, is not the work of one lawyer, but Rudman describes Locker as invaluable in working through the “endless negotiations” with insurance lawyers and plaintiffs’ lawyers. “If there’s a semicolon missing on page 42, she’ll find it,” he says. And she made sure that the very complicated formulas in the deal were not obfuscated in jargon, but spelled out clearly. Says Rudman: “Other folks in the room might be abashed at saying, ‘I don’t know what this means,’ but Nicki would interrupt, ‘Look fellows, I know you’re all geniuses, but why don’t you explain it to me, because I know I’m not stupid.’” (One colleague refers to Locker as Columbo with a St. John’s wardrobe.) The problem often wasn’t with Locker, but with a clause that didn’t make sense.

its earnings and revenues.

Locker and other lawyers at Wilson Sonsini aggressively fought a class action lawsuit against their client, and in March they succeeded in having a large portion of the fraud claims dismissed. The briefs highlighted her encyclopedic grasp of the facts. They persuaded the judge, for instance, that the plaintiffs’ confidential witnesses didn’t have the basis to know the information that they had provided the plaintiffs. And the judge was also convinced that the complaint’s allegations weren’t “sufficiently particularized” to state a claim for revenue recognition fraud.

In the past, such a court outcome would have been sufficient representation for a corporate attorney, but Locker did more. She scrutinized the company’s operations, and, in the areas where it did not meet best practices, she worked with the new management to make improvements. Kent Roberts, general counsel at Network Associates, says that the first few times he met her, it didn’t feel like she was working for him,



because she was so tough in her questions. Only now does he fully appreciate what she did. "One of the most important things about lawyering is the ability to change behavior so it's more compliant with the law," he says. "She personifies that ability."

Notwithstanding the court victory, Network Associates' case is far from over. The company's former controller pled guilty in June to charges of securities fraud. That plea would cause headaches for any litigator defending a securities class action, but at least Locker's credibility is still intact.

weekend retreat in Southern California. Over the next few weeks they interviewed 20 more. The team read over thousands of pages of sales contracts and accounting documents.

The moment of truth came on April 18—78 days after Locker first learned that something was amiss—when she presented the findings of her investigation in an informal hearing before six members of the SEC. She laid out all the transactions that need to be restated. She provided the SEC with the number of employees who had been terminated for questionable behavior, described their roles, and then told of

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**"One of the most important things about lawyering is the ability to change behavior so it's more compliant with the law," says a client of Locker's. "She personifies that ability."**

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"The facts in this case have only gradually come to light, but I've always been confident that she is upfront about the basis of her knowledge," Gans says. "And in the process she has done a great job for her client."

#### **Cooperating with the SEC**

Proof that being open can be the best defense is perhaps best seen not in a case brought by plaintiffs' lawyers but when the SEC is knocking at a company's door. And with Critical Path, Locker embraced that approach.

On the day the company's stock stopped trading, Locker knew that if the SEC brought a §10(b)5 enforcement action, essentially a fraud charge under the securities laws, it would be fatal to the company. With the company's blessing, she set out to do an investigation that would satisfy the commission rather than try to deflect its inquiry.

In the past, corporate defense lawyers didn't always conduct an internal investigation when accounting problems were discovered. They didn't want to be doing any work for the plaintiffs' lawyers. In February 2001, the plaintiffs' lawyers were circling Critical Path, but Locker knew that the best thing she could do to defend the company was to air its dirty laundry and clean up its practices so thoroughly that the SEC would see no need to take further action.

"We had to establish our credibility," she explains. "We wanted to hand over the fruits of our investigation and have it wrapped up for them. We needed to show that Critical Path had become a good corporate citizen."

In the first weekend after the emergency board meeting, Locker, with assistance from colleagues, interviewed 30 employees in Critical Path's sales department, who were at a

the new managers who had been recruited. She detailed the new accounting systems that would ensure that revenues would not be counted until sales were fully completed. And she pointed to other changes in corporate governance, among them new internal auditing practices, that would prevent fraudulent practices from occurring again.

The SEC accepted most of Locker's findings. And in February 2002, in return for the company's having owned up to the problems, the agency settled the case with its most lenient cease-and-desist order. No fines were levied, no sanctions imposed.

The result is that Critical Path is alive—an outcome that was once very much in doubt. The company avoided bankruptcy, and it held on to customers who had been understandably wary about buying its products. While it's a much smaller company—in the number of employees and its ambitions—than two years ago, it remains in business.

And Locker's handling of the case now looks like it was a blueprint for the SEC on what to expect from companies under serious scrutiny. Seven months after her appearance before the commission, the agency issued a report on the "relationship of cooperation to enforcement decisions." It says that the commission, when considering enforcement actions, will take into account the company's response to the crisis: "Did the company commit to learn the truth, fully and expeditiously? . . . Did the company promptly make available to our staff the results of its review? . . . What assurances are there that the conduct is unlikely to recur?"

When Locker worked the Critical Path case, she covered every point that the SEC's five-page report lists. Indeed, it's a report that could have been written by Nicki Locker.

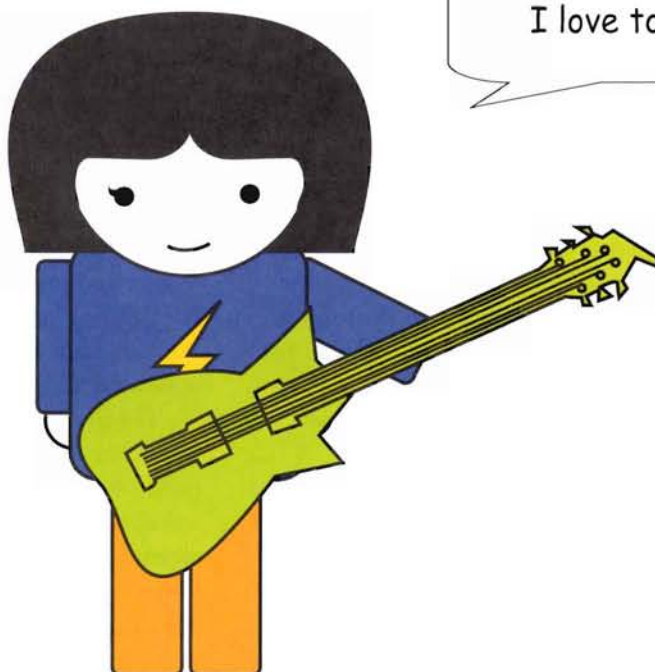


# SOME RIGHTS RESERVED

In the copyright war, Creative Commons seeks the middle ground between total control and total mayhem.

ANITA IS A MUSICIAN WHO LIVES IN NEW YORK. SHE RECENTLY COMPOSED AND RECORDED A SONG CALLED "VOLCANO LOVE."

I love to jam!



BY JONATHAN RABINOVITZ

"MMM . . . FREE SAMPLES!"

**F**rom an office in the basement of Stanford Law School, Glenn Otis Brown posted that message on the Web on March 11 to announce his latest project. The goal? To make it easier for the author of a work, regardless of the medium, to give permission to others to reuse that work in a book, a collage, a remix, or a film.

Brown spent the next few weeks preparing a copyright license that automatically permits "sampling." The 226-word first draft was produced with pro bono assistance from Catherine Kirkman '89, an intellectual property lawyer at Wilson, Sonsini, Goodrich & Rosati. It was, in some respects, the sort of technical, legalistic task that makes up the bread and butter of a corporate IP practice. "Subject to the terms and conditions of this license," it begins, "licensor hereby grants you a worldwide, royalty-free, non-exclusive, perpetual . . . license to exercise the rights in the Work as stated below."



ANITA UPLOADED "VOLCANO LOVE" TO HER WEBSITE. SHE ALSO DECIDED TO GET A CREATIVE COMMONS LICENSE TO LET HER RETAIN HER COPYRIGHT WHILE ALLOWING CERTAIN USES OF HER SONG.



ANITA WENT THROUGH THE LICENSING APPLICATION AND ANSWERED THREE SIMPLE QUESTIONS ABOUT WHAT PERMISSIONS AND RESTRICTIONS SHE WANTED FOR HER SONG. THE WEBSITE POINTED HER TO THE LICENSE THAT REFLECTED HER PREFERENCES.

Read a detailed list of [the rights common to all Creative Commons licenses](#). You may also want to read [this](#).

Do you want to:

Require attribution? ([more info](#))

☒ Yes  
☐ No

Allow commercial uses of your work? ([more info](#))

☐ Yes  
☒ No

Allow modifications of your work? ([more info](#))

☐ Yes  
☒ Yes, as long as others share alike ([more info](#))  
☐ No

Select a License

Require attribution? Yeah, I want credit for my song. Allow commercial use? No, I don't want people making money without asking me first. Allow modifications? Sure, as long as they are required to share alike.

But the sampling license then veers off into uncharted territory, becoming almost a Dadaist manifesto expressed in copyright lingo. It essentially gives a green light to those who wish to use the licensed art to create a "derivative work," while denying permission to others who merely are trying to profit from copies. In Brown's eyes, this is more than just another license or an academic exercise: it's a step toward building a movement to protect and to expand the public domain—and freedom of expression.

Brown, a soft-spoken 29-year-old Texan with a Harvard Law degree, is the executive director of Creative Commons, a nonprofit organization that Stanford Law Professor Lawrence Lessig helped establish two years ago. The group aims to build an alternative to what it contends is an increasingly restrictive copyright regime. "Copyright that's moderate," Brown explains in an interview in July. "An alternative to either mayhem or total control."

The interest in developing a sampling license, for example, arises from the difficulties that artists now face in "borrowing" from the works of others. Although incorporating and building on the contributions of previous generations is a time-honored practice, it increasingly requires talking to a lawyer, filling out forms, detailing the use, and paying a fee before approval is granted. Many artists ignore the bureaucracy and take their samples, figuring that such use is permitted under copyright law. Indeed, in many cases, no problem arises. But many others are threatened with lawsuits unless they desist.

"There's this huge gray area that's hard to predict," Brown says. "Are we comfortable with saying that a large percentage of the culture being created today is illegal?"

*Some rights reserved.*

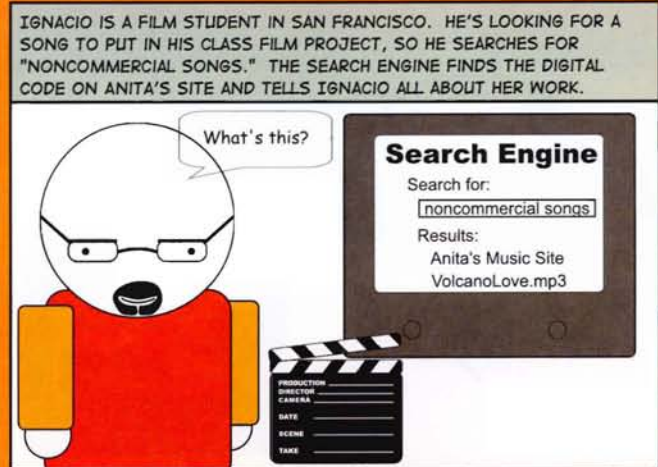
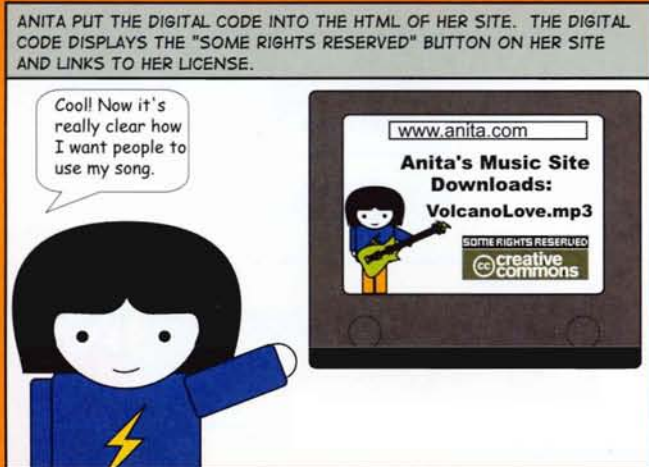
Those three words may be the quickest way to sum up the Creative Commons philosophy. If the battles over down-

loading music for free from the Internet have often turned copyright on its head, Creative Commons is turning copyright on its side. Creative Commons accepts the idea that some people are going to want the full range of protection—"all rights reserved"—while others will opt for no protection at all. Creative Commons seeks to provide a voluntary option for those who fall in the middle.

The group was established in 1999 after Eric Eldred, who had created an online library for texts of books in the public domain, suggested it to Lessig. The cyberlaw expert was already representing Eldred in a challenge to the most recent extension of the copyright term. (The Supreme Court rejected that challenge in January 2003.) But even before that defeat both men had recognized that preventing a longer copyright term was, by itself, insufficient to build a strong public domain. Lessig, who is also the founder of the Stanford Law School Center for Internet and Society, agreed to serve as Creative Commons's chairman.

**Creative Commons allows creators of intellectual property to obtain online a license that they can append to their work. Instead of using the traditional copyright symbol, those who adopt a Creative Commons license mark their work with a circle surrounding two C's. Although these licenses come in various flavors, they all specify ways in which the work can be copied and reused.** And the distinctive licenses not only come in both lay-language and technical-legalese versions, but also in machine code. This means that it will be possible to do a search on the Internet for, say, all photographs of the San Francisco skyline that are available for free reuse.





Creative Commons is not the only group developing such licenses. The Electronic Frontier Foundation has one in place specifically for audio copying. A group at the Massachusetts Institute of Technology has been experimenting with its own version. Creative Commons, however, is probably the biggest effort, having raised \$2 million in grants from the Center for the Public Domain and the John D. and Catherine T. MacArthur Foundation.

So far, roughly one million works have been placed under a Creative Commons license, though the exact number is not known. The group does not charge a fee to those who download a license, nor does it keep a database of the visitors who have done so. Lessig explains that Creative Commons wants it to be easy for the average person to get and use a license. "This has to be a lawyer-free zone," he says.

In fact, getting a Creative Commons license is quick and painless. Upon arriving at the site ([www.creativecommons.org](http://www.creativecommons.org)), one need only click on the "choose license" prompt, then answer a few yes-no questions: Do you want to require attribution? Do you want to allow commercial uses of your work? Do you want to allow modifications of your work? And if you permit modifications, do you want to require that the modified work will be shared under the same rules as this one? The visitor can then obtain a brief tag describing what conditions of reuse he is permitting, along with a link to a more detailed version of the license on the Creative Commons website. (There's an alternative label for hard-copy works.)

The concept is being put into practice by some notable artists and intellectuals. Roger McGuinn, a founder of the rock band The Byrds, has used a Creative Commons license to permit noncommercial copying of several hundred folk songs that he has performed and placed on the Internet as MP3 files. Jerry Goldman, a political science professor at Northwestern University who founded the Oyez Project,

which maintains an archive of recordings of Supreme Court hearings, in June placed several hundred hours of High Court arguments online, using a Creative Commons license to signal that they are available for copying.

But equally important, the licenses are being embraced by artists and musicians who have yet to achieve notoriety. Colin Mutchler, a guitarist, wrote to Creative Commons in July that he had submitted a guitar track, titled "My Life," to an online sound pool, Opsound, with a Creative Commons license that permitted it to be reused and transformed, as long as the work was attributed to him and it was for a noncommercial use. One month after the track had been posted, he received an e-mail from a 17-year-old violinist, Cora Beth, who had added a violin track to his guitar. She called the new version, "My Life Changed."

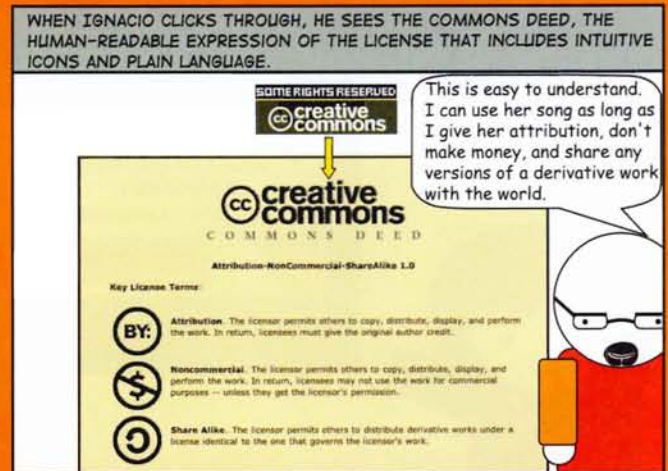
"I think the track is definitely more beautiful," Mutchler wrote. "Maybe eventually we'll add drums and words."

Lessig predicts that by the end of the year more than 10 million works will be under Creative Commons licenses. That's an insignificant number viewed in the context of the billions of works under traditional copyright, but Lessig says it will demonstrate mass support that will encourage Congress to change existing copyright law. He is championing a bill, the Public Domain Enhancement Act, that would require copyright holders to register their works after 50 years if they want them to be protected for the remaining years of the term. All works that are not registered would enter the public domain.

The idea that a grassroots movement is building over copyright may sound odd. As many law school graduates will attest, copyright isn't exactly the most glamorous subject in the curriculum. In writings and lectures, however, Lessig presents the issue as one that cuts to the heart of sustaining free expression and a free culture in the 21st century. While



## SOME RIGHTS RESERVED



many copyright lawyers complain that the problem is pirates stealing music and movies on the Internet, Lessig points to fundamental changes in law, technology, and the economy that have led to what he calls an unprecedented concentration of ownership and control of intellectual property.

"Never in our history has there been a fewer number of actors exercising more control over our culture," Lessig said in his July 2 lecture at the Internet Law conference at the Law School. "This is a fundamentally different creative context than ever before: our free society has become a permission society, our free culture has become an owned culture."

Lessig notes that not only have copyright terms grown longer over the past three centuries (from 14 years to 95 years or the author's life plus 75) but so has the scope. Copyright law now prohibits any "copying," not just commercial republishing. More important, works are automatically covered by copyright at their creation instead of the original system that required creators to register their works to be covered.

Lessig adds that increasing concentration of media ownership—and copyright ownership—leads to even less likelihood of works being shared for free. And this is vastly magnified by the rise of the Internet. Although the Net at first led to widespread disregard of copyright, it now is helping establish even greater control, Lessig says. As society relies more on intellectual property in digital form, intellectual property is increasingly being distributed with embedded codes that make reuse difficult, if not impossible—even when such uses are lawful.

"We're moving from one extreme to another," Lessig declares. "This has become a debate framed by extremists—the people who say copyright controls all rights and the people who say there shouldn't be any at all." But there is also a third, middle group. He explains, "There are people who don't believe in all rights or none, but believe in some."

The sampling license that executive director Brown has been crafting is one of several new licenses that Creative Commons is developing that offer new ways to preserve some rights. The need for a sampling license has grown more apparent in recent years, though decades ago there was little need for it. As Lessig frequently mentions, Walt Disney borrowed from the Brothers Grimm and other artists to create many of his greatest films.

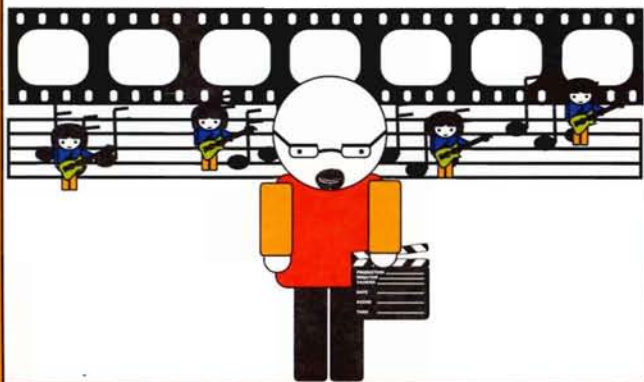
Still, a recent situation involving Bob Dylan demonstrates how sampling is now being mistaken for theft. Dylan is widely known to borrow lines from other writers in composing his own works. But in July the *Wall Street Journal* ran a front-page story suggesting that his song "Floater (Too Much to Ask)" plagiarized a little-known Japanese novel, *Confessions of a Yakuza*. In response to the ensuing controversy, *New York Times* music critic Jon Pareles wrote that interspersing lines from another text into a larger composition is typical of what Dylan has often done: "Writing songs that are information collages." Pareles adds that such a practice was once seldom challenged, but that the widespread availability of music on the Internet had led many copyright holders to react by reaching even further in asserting their rights and restricting sampling.

The challenge for Creative Commons is to come up with a license that accurately stakes out this allegedly imperiled territory. And developing the language so that it can satisfy both lawyers and artists is no easy task. On May 23, Brown launched a discussion about it with a dozen or so people who signed up and shared their comments with each other via e-mail. The review was supposed to have ended four weeks later, but as of mid-July remarks were still flying back and forth.

Don Joyce, a member of an experimental music and art collective called Negativland that composes in "found sound," moderated the conversation. Among the other participants were a singer who says she edited Timothy Leary's last novel,



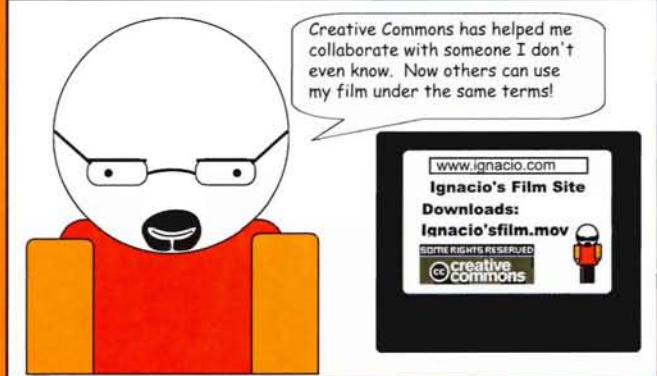
WITH ANITA'S LICENSING TERMS IN MIND, IGNACIO LAYS HER TRACK DOWN OVER A SCENE AND WRAPS UP HIS FILM.



IGNACIO SHOWS THE NEW CUT OF HIS MOVIE TO HIS FILM CLASS AND MAKES SURE TO MENTION ANITA IN THE CREDITS.



IGNACIO UPLOADS THE FINAL VERSION OF HIS FILM TO HIS OWN SITE. SINCE ANITA APPLIES THE SHARE ALIKE PROVISION TO HER SONG, IGNACIO LICENSES HIS OWN MOVIE UNDER THE SAME TERMS ANITA OFFERED HIM: ATTRIBUTION, NONCOMMERCIAL, AND SHARE ALIKE. HE GOES TO THE CREATIVE COMMONS SITE AND GETS THE SAME LICENSE AFTER PERSONALIZING HIS DIGITAL CODE TO DESCRIBE THE MOVIE



a consultant from a multimedia design studio, an anthropology professor, and Kirkman, the Wilson Sonsini partner who helped draft the license and is a self-described “copyright geek.”

One artist raised an objection that a phrase in the license—“highly transformative”—was too vague in describing what a derivative work is. Kirkman answered, “We would go down a legal rat hole trying to define these terms.” And she added, “At some point you end up relying on a reasonable interpretation of the words that you use.” Another participant questioned whether the creator of the derivative work should be required to include an attribution to the artist whose work was borrowed. And then many in the group expressed confusion over what happens in a situation in which a derivative work is placed under the license and then a new derivative work is made. Was the creator of the new work under obligation to identify and get permission from the contributors to the previous work if the previous artist had not done so?

The license and these questions are of more than abstract interest to Joyce. His collective, Negativland, was sued in 1991 by Island Records for sampling a song from the label’s band, U2. Negativland’s recording was pulled from circulation to put an end to the legal wrangling. So for Joyce the discussion goes to the heart of how free expression can be encouraged today. “How much practical use [the new license] will be, we shall see,” he says. At the very least, he adds, “It’s bridging the concept gap.”

Kirkman agrees that this and the other Creative Commons licenses are pushing the envelope. She spends most of her work time developing copyrights for new technology products that will protect private interests. “Those are fine and noble interests,” she says. “But I wanted to be involved in this discussion because it’s on the cutting edge: we’re exploring how to use the copyright

Creative Commons has translated this cartoon into Japanese and Finnish as part of a broader effort to make its licenses available worldwide. The strip is under an “Attribution-NonCommercial-ShareAlike” Creative Commons license. This permits people to copy it for free, without asking, as long as they credit the artists and Creative Commons and do not use it for commercial purposes. Also, the license requires that if someone uses it to create a derivative work, that derivative work must also have a license that allows it to be copied under the same conditions as the original cartoon. For the complete version of this strip, plus another one that explains the different licenses, go to <http://www.creativecommons.org/learn/licenses/>.

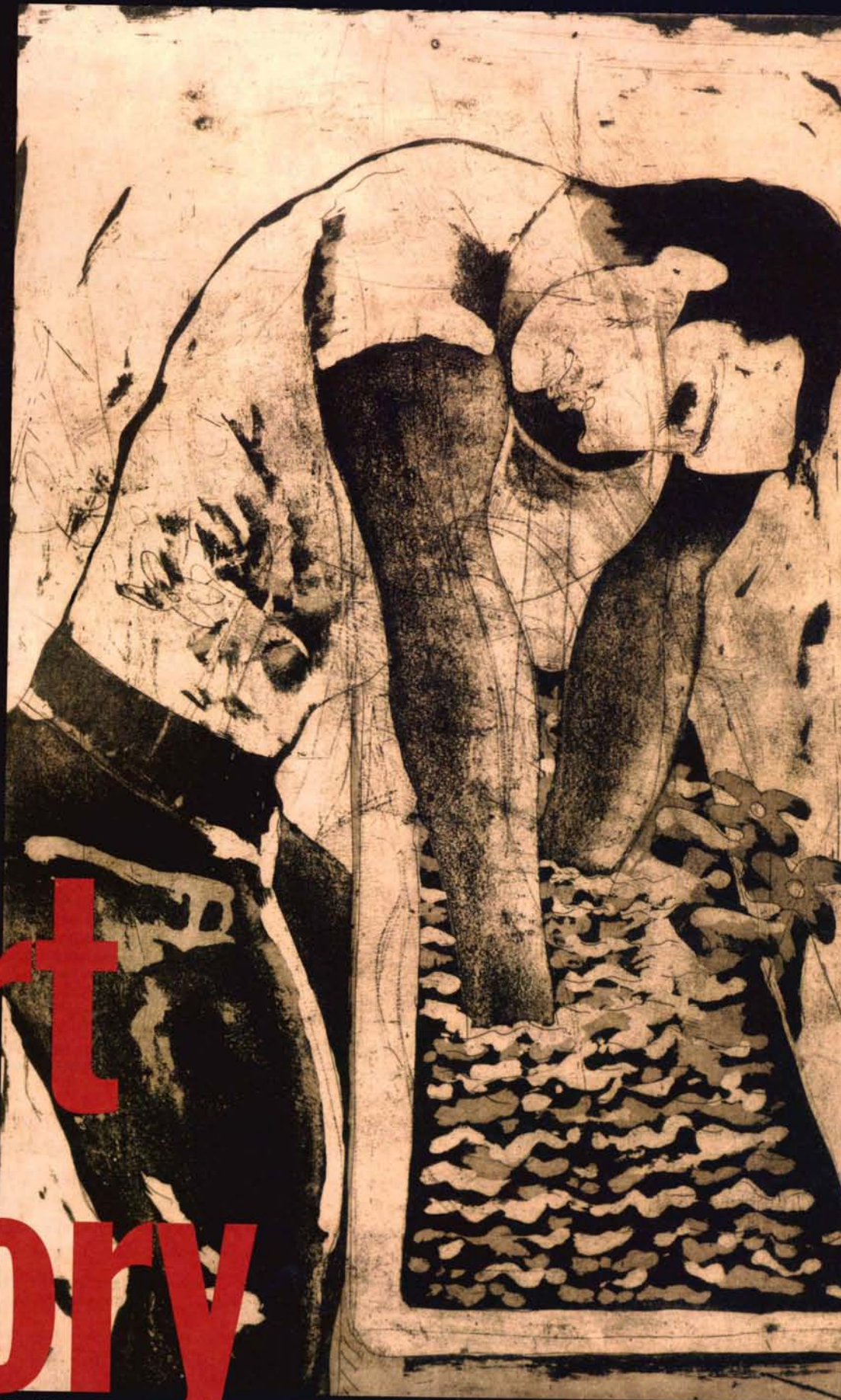
framework for the public interest.”

The new license is expected to be approved by the Creative Commons board by the end of the summer. It may wind up being only of interest to avant-garde artists and copyright lawyers. It could end up little more than a footnote in a future scholarly treatise on the history of copyright.

Then again, maybe Bob Dylan or some other superstar will learn about it and place the double C symbol on his works. And if one such artist takes a stand, then perhaps thousands more will follow.

Besides, there’s nothing lost by thinking creatively.





# A Tort Story

From Professor Robert L. Rabin



*While casebooks present landmark decisions as if the law evolved logically along a linear course, many of the cases that lead to fundamental shifts in the law take strange twists and turns. The recently published book Torts Stories (Foundation Press, 2003), edited by Stanford Law Professor Robert L. Rabin and Boalt Hall Professor Stephen D. Sugarman, presents ten such cases, providing the stories behind the stories: the telling details about plaintiffs, defendants, lawyers, and judges involved in these cases, as well as facts and testimony that were left out of the court opinions. By gaining a more complete picture of these cases, students may better appreciate, in the words of Rabin, “the dynamic character of tort law.”*

Take the chapter [excerpted on p. 25] by Rabin, the A. Calder Mackay Professor of Law, on *Rowland v. Christian*. The case dramatically altered the framework that courts use to consider land occupier liability, but years after the decision Nancy Christian, the case's defendant, still didn't know that her bathroom sink had changed the face of tort law.

Indeed, when Christian picked up the telephone on a mid-November day in 2002, she was unaware that 35 years earlier the California Supreme Court had issued a landmark ruling in the dispute in which she had been a principal player. The caller on the other end of the phone that day was Rabin, and he explained that he was looking for the Nancy Christian of the famous *Rowland v. Christian* case. “There was silence on the other end of the line,” Rabin recalls. “And then she said, ‘Are you sure you have the right person?’”

Only after Rabin described how James Rowland had injured his hand when he visited the apartment of a Nancy Christian in San Francisco on November 30, 1963, did she remember the incident and that Rowland, a friend of a friend, had sued her for damages. Christian said that shortly after he filed his claim, she gave a statement to the lawyer for her insurance carrier. She had not thought about the case since then.

It might appear odd that such a critical ruling could have so little meaning to the defendant. Yet some of tort law's most notable doctrinal breakthroughs have arisen from situations in which neither side in the case had any inkling that they were making legal history, nor had they any interest in doing so.





*Rowland v. Christian* is one in a series of landmark California high court rulings from 1960 through 1980 that, according to Rabin, reshaped “the basic framework of liability for accidental harm to an extent unprecedented in the annals of American tort law.” The *Rowland* decision abolished the categories of invitee, licensee, and trespasser that for more than a century had tied the duties owed by land occupiers to the status of the land entrant who had suffered accidental harm.

The majority opinion, written by Justice Ray Peters, replaced these rigid rules of liability with a general standard for negligence:

A man’s life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values.

The high court’s decision is stunning in its boldness and simplicity, and it becomes even more startling when viewed in full historical context. As the following passage from Rabin’s chapter reveals, neither of the parties in the case, nor their lawyers or the lower court judges, had ever considered such a radical resolution.

—Jonathan Rabinovitz



## A Modest Case Transformed

BY ROBERT L. RABIN

James Rowland had a plane to catch and didn't want to leave his car at the airport if he could avoid it, while he was away from San Francisco in Portland. He went looking for his friend, Bob Kohler, thinking that he might leave his car in front of Kohler's apartment and get a ride from him to the airport. No luck, Kohler was out. But it occurred to him that Kohler might just be nearby at the apartment of Nancy Christian, a mutual friend, whom Kohler had been dating. He had been there once before at a party given by Christian. So he phoned her, only to find out that Kohler was not there. But when he mentioned his reason for calling, Christian offered to give him a ride to the airport.

When he arrived Christian was busy painting the apartment, which she had just moved into a month earlier. They had a drink and then Rowland asked to use the bathroom facilities before they left for the airport. The rest is history—tort history. A cracked bathroom faucet that cut him badly enough to sever tendons and nerves, requiring hospitalization, came between Rowland and his Western Airlines flight to Portland. It was November 30, 1963—just over five years before the California Supreme Court would decide *Rowland v. Christian*.

In his complaint, Rowland avers in standard legalese that “said bathroom fixtures were dangerous to all persons using them, which said fact was well known to the defendants.” Dangerous, perhaps, but no mention is made of whether the danger was concealed. Elusively, earlier in the complaint Rowland asserts that “the cold water faucet on the bathroom sink was cracked and should be replaced”—and he alleged that Christian had knowledge of the crack in the cold water faucet (which she did not dispute). But neither in the complaint, nor in his supporting affidavit, is there even the barest description of the bathroom facilities.

Christian, in turn, does no better in bringing the matter towards joinder. Her answer claims in conclusory fashion that Rowland was “guilty of contributory negligence” and that he failed to use “his natural faculties, including that of eyesight.” Nowhere, however, in her answer or affidavit in support of her motion for summary judgment, does she describe the appearance of the faucet. Neither party makes the factual assertion [of a hidden or concealed defect] that could have been so critical to the appropriate resolution of the motion for dismissal on the pleadings.

Years later, when I interviewed her, Nancy Christian was more revealing about the real-life setting alluded to so obscurely in the written pleadings. The apartment, which

she had moved into slightly more than a month earlier, was “a pigsty”—a total mess, as she recollected. Indeed, she eventually moved out in desperation when an army of cockroaches descended during re-decoration of the upstairs apartment precipitated by the tenant above her vacating the premises.

As to the faucet, the crack wasn't really concealed as she recalls it, but it was caked in dirt and grime. She surmised that Rowland might not have noticed the defective condition. These observations are many years later, of course. Nonetheless, Christian's recollections clearly suggest indifferent lawyering, at best, on the part of Rowland's attorney, whose only realistic hope for avoiding summary judgment, under the circumstances, had been to raise a colorable factual claim that the defect was concealed.

But what motivated Rowland's attorney to sue Christian, a young woman of modest means, in the first place? The answer is at once both unsurprising and surprising. Unsurprising, in that Christian was only a nominal defendant; she turns out to have had renter's insurance. At the same time, it is rather surprising that she had such insurance at all. It was quite uncommon for big-city apartment renters of modest means to carry liability insurance in the early 1960s. In fact, she carried the insurance not out of regard for personal liability concerns, but because she had some valuable sterling silverware that was a family heirloom. Such are the fortuities that led this case to be brought—and launched it on its uncertain path to the California Supreme Court.

As befits her nominal presence in the case, Christian had virtually no relationship with her attorney. John Healy was a small-time insurance defense lawyer who was handling the case for her insurance carrier. Christian's sole contact with him was in the preparation of her affidavit and deposition testimony. In a surprising twist, however, she was in fact a good friend of Rowland's attorney, Jack Berman—a good enough friend in fact that two months into the case, when Berman moved to a new office, he gave Christian his carpeting to help along her continuing efforts to make her apartment more livable! Indeed, it is only a short step, although not certain from this point in time, to conjecture that Rowland retained Berman, who was primarily a criminal defense lawyer not a personal injury practitioner, as his attorney on the suggestion of Christian, who had known Berman socially for some time before the case arose.

Jack Berman and John Healy were “street lawyers,” as an attorney who knew both of them well back in the 1960s described them to me. He was not speaking pejoratively. Berman was a well-known figure in the criminal courts, and indeed something of a colorful San Francisco character,



according to news accounts and the reminiscences of surviving friends. But he was not primarily a plaintiffs' lawyer and by all accounts he was not an appellate lawyer who took cases to the state Supreme Court. Healy seems to have been more in his element, at least before the trial court, in defending what appeared to be a routine premises liability case. But he, too, was not an appellate practitioner. In short, these were not test case lawyers—and this is transparent in the written record, which Justice Peters and his colleagues had before them when they decided to hear an appeal in the case.

But that written record can only be understood in the context of a closer look at the obligations owing to a social guest when James Rowland had his fateful encounter with the cracked faucet. Like every other state, California at the time subscribed to the tripartite invitee-licensee-trespasser framework. Significantly, however, California appeared to do so in the most begrudging fashion. To be sure, as far as entrants on *business* premises were concerned, the California Supreme Court, in *Oettinger v. Stewart*, had followed the step taken by most states in broadly recognizing an obligation of due care, without reference to the particularities of whether the proprietor stood to recognize an economic benefit from the entrant's presence. If Rowland's injury had occurred in the bathroom at his neighborhood café, he would have been owed a full obligation of due care, even if he stopped in solely to use the facilities.

Social guests in a private residential setting, however, were another matter. Here, confusion reigned among the lower appellate courts and the California Supreme Court had done virtually nothing to clarify matters. A number of appellate court cases suggested that the social guest took the premises as he or she found them; in other words, that the land occupier had no obligation to take safety precautions beyond whatever seemed personally adequate for the immediate family. Translated into a rule of conduct applicable to licensees, this was frequently taken to mean that the land occupier in California owed no duty beyond avoiding willful and wanton injury to a visitor.

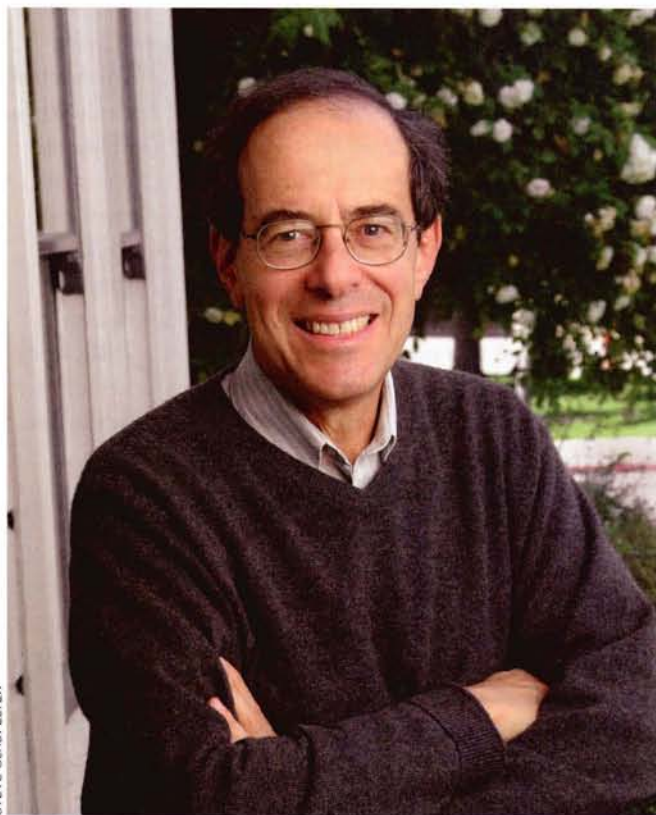
By contrast, the vast majority of states required a warning to a social guest whenever the host had knowledge of a danger that he had reason to expect would not be discovered, a rule enunciated in the Restatement Second of Torts, §342. In short, the Restatement required warning of known concealed dangers, without reference to a standard of concealed risk created by the land occupier's conduct that bordered on reckless misconduct.

The confused state of the law in California, and indeed the uneven doctrinal developments in other states as well, frequently boiled down to definitional haggling over what constituted a "trap." In earlier times, and in contemporaneous California decisions, the illustration often relied on was a spring gun—surely suggesting a far more limited obligation from premises occupiers than if they had to concern themselves about a range of "traps" including obscured banana peels in the front yard and slippery spots on the dining room floor. But for William Prosser in the edition of his authoritative treatise on torts contemporaneous with Rowland, "trap" had taken on a new, and more expansive, meaning:

[Trap] originally was used in the sense of presenting an appearance of safety where it did not exist; but the significance which gradually became attached to it was not one of intent to injure, or even of any active misconduct, but was merely that the possessor of the land was under an obligation to disclose to the licensee any concealed dangerous conditions of the premises of which he had knowledge.

Prosser's reference at this point is to the above-mentioned Restatement Second of Torts, §342—Prosser, it might be noted, was the Reporter on the Restatement Second—for what he characterizes as "the overwhelming weight of authority."

This, then, was the battlefield on which Berman and Healy clashed. Berman, unsurprisingly, was disabled immediately—the trial court granted summary judgment to defend-



STEVE GLADFELTER

Robert L. Rabin, A. Calder Mackay Professor of Law



dant on the pleadings—through his failure to allege what would have been the baseline requirement even in a majority rule jurisdiction: a concealed defect. Undaunted, he appealed on behalf of Rowland, steadfastly sticking to his guns in his statement of the case in the California court of appeals: “Defendant knew that the handle was cracked and realized that this constituted a dangerous condition.” Once again, there is no averment on Rowland’s behalf that the crack was concealed. But then, almost as an afterthought, in the argument section of the brief, which runs less than two pages in its entirety, Berman for the first time suggests that “the only question with which this court is faced is whether the crack qualified as a concealed danger or deceptive condition.” If so, Berman continues, there is nothing to stop the court from adopting “the trap exception to the rule of non-liability”—an exception that he inexplicably fails to define in the handful of succeeding paragraphs in the argument.

And so, the terms of engagement were set: Healy, in his reply brief, argued that California had never adopted Restatement Second, §342, and that the “so-called” trap exception, “[o]utside of deliberate, willful ‘entrapment,’ such as the maintenance of spring guns and other hideous devices . . . is largely a myth.” Berman, in turn, in a reply brief hardly over a page in length, rejoins that there is nothing to stop the court from adopting §342 in the case at hand. And there the matter ends—not a word urging the court to venture beyond clarification of the meaning of hidden defect to reconsider the legitimacy of the categories.

The court of appeals set its sights on the arguments in the briefs, and quickly rehearsed three possibilities for addressing the trap exception: that it was no part of California law at all; that it had the narrow meaning suggested by defendant’s counsel; or, that it had the broad meaning suggested by plaintiff. And then, not surprisingly, the court held that it need not decide the question at all—although its sentiments quite clearly ran to a narrow obligation, if any, on the part of social hosts—since “[no] source in the record contains any allegation, factual or conclusory, which describes the faucet, its appearance, its location, the lighting, the bathroom, or . . . any other fact which would support the conclusion that plaintiff was injured by a concealed danger.”

If, in hindsight, the dominant theme, as the case wound its way to the Supreme Court, was tunnel vision, the petition for a hearing before the high court served as the capstone. A word of context is necessary. At the time *Rowland* was decided there was no independent briefing before the Supreme Court; the Court reviewed cases *de novo* on the basis of briefs filed in the court of appeals—and the petition for a hearing (which could run thirty pages or more). Should the request for a hearing be granted, then, it is critical to

note that the petition and reply constituted the final moment for the contesting parties to frame the issue, as they conceived it. True to form, Berman argued exclusively for adoption of §342, and Healy, taking his cue from the court of appeals decision, replied narrowly that there was no baseline averment of a concealed defect that would warrant reconsideration of the summary judgment in defendant’s favor. Neither submission reaches four pages in length, and not a word is devoted to the possibility that the categories might be abandoned.

Might the possibility of abandoning the categories have been introduced at oral argument? Perhaps, but I can only offer speculation, since oral arguments before the Court were neither transcribed nor recorded at the time. My interviews with court clerks from the *Rowland* era suggest that, in most cases, when oral arguments were heard a draft of the final opinion had already been prepared and circulated by the Justice to whom opinion-writing had been assigned; in short, that oral arguments were viewed as a formality for the most part. Very likely then, if the prospect of abandoning the categories arose at all during oral arguments, it was on the initiative of the Justices rather than the parties. Whatever the case, the battle in the trenches in *Rowland v. Christian* confirms in singular fashion that this was a court prepared to refine and reformulate tort law according to its own lights, a proactive court extraordinaire.

### The Aftermath

After the Supreme Court remanded the case for trial under the newly-enunciated standard of ordinary care owed to all land entrants, Berman referred the case to a San Francisco firm of plaintiffs’ litigation specialists, Walkup, Downing, Wallach & Stearns, who quickly settled the matter. In keeping with the modest particulars of the case, surviving attorneys in that firm recall a settlement figure of under \$10,000. Apparently, Rowland’s injuries had healed without any lasting difficulties. In fact, the major problem in getting the case settled, as one former Walkup attorney recalls, is that Rowland had moved out of the state, and once located, was annoyed about having to make a brief return appearance in a matter that was now far behind him. Nancy Christian herself entirely lost interest in the case once her insurance carrier’s lawyer, Healy, had finished deposing her, and never even bothered to inquire as to its outcome. Nor did she ever see Rowland again. None of this diminishes the significance of the case, of course. Some landmarks of the law have lasting impact on the lives of the immediate parties; others, like *Rowland v. Christian*, take on a life of their own, and the parties get on with their personal affairs with hardly a glance backwards.



# The Rule of Law is Dead! Long Live the Rule of Law!



## WHAT HAPPENED ON SEPTEMBER 11, 2001, TO THE ROLE OF THE LAWYER IN OUR DEMOCRACY?

In this year's graduation address, Law Professor George Fisher [above] considered that question, and recalled how on that tragic day he sat with one eye on his television and the other on his computer screen, trying to prepare for an evidence lecture and wondering whether he could persuade his students that "evidence law remained somehow relevant" as "the world came undone."

The next day, as Fisher and his students struggled to push aside the shock and focus on their class, he felt a nagging fear that a fundamental change had occurred. "I worried that lawyers and law could never again claim their central role in guiding and shaping culture," he said.

Almost two years after that class, many of those same students were in the audience on May 18 in Memorial Auditorium, wearing black gowns and mortarboards and ready to enter the legal profession. Whoops and screams came from the crowd of 1,600, when graduates from the Class of 2003 crossed the stage one by one to shake Dean Kathleen M. Sullivan's hand. Among those participating in the ceremony were 188 candidates for the degree of Doctor of Jurisprudence (JD); 18 for the degree of LLM, with 9 focusing in the area of Corporate Governance & Practice and 9 in Law, Science & Technology; 14 for the degree of Master of the Science of Law (JSM); and 5 for the degree of Doctor of the Science of Law (JSD).

For many, it was a moment to celebrate the end of three intense years—champagne, focaccia sandwiches, and strawberries and cream were served in the courtyard beneath Hoover Tower. But the joy did not overshadow the seriousness of the



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PHOTOGRAPHY: STEVE GLADFELTER, GRADUATION; ROBERT MARCH, GRADUATION RECEPTION, SATURDAY NIGHT

occasion, or the questions about whether threats to the nation's security have forever undermined the country's commitment to the rule of law.

Dean Sullivan, the Richard E. Lang Professor of Law and Stanley Morrison Professor of Law, told the graduates that they were well prepared to demonstrate how vital lawyers are to society, especially in such troubled times. "We have tried to inspire you to welcome the challenges of law, to revel in its difficulty, to love its complexity and its nuance and depth," she said, adding later, "You know, better than many law school graduates before you, how greatly the world needs lawyers — that group of people whose job is to anticipate, prevent, and manage conflict."

Class Co-President Sarah Nancy Lindemann also struck a hopeful note in her commencement speech and cited East Timor and Sierra Leone as two examples of places where lawyers have recently made a difference, helping establish new institutions that seek to provide justice and order to the citizens of those nations. And she added that here in the United States, "Lawyers are bringing increased scrutiny to the application of the death penalty." She exhorted her classmates to "go forth as lawyers, looking for our own ways of contributing to hope and progress."

Fisher joined Lindemann in urging the graduates to uphold and advocate for the rule of law, but he warned them that they would be practicing at a time when concerns about safety had led many to compromise civil liberties and due process.

In the graduation's keynote address, Fisher, whom students had selected to win the 2003 John Bingham Hurlbut Award for Excellence in Teaching for the second



time, remarked that in the 20 months since the 9/11 tragedies, some of his worst fears have come true. "We have passed through an era in which law and lawyers have withdrawn to the sidelines, and our military and security institutions have taken center field," he said. "This has been an era of war, and in times of war, as Cicero said, the laws fall silent."

Fisher's pointing to the many ways that the law has been changed or evaded in the quest for security was not meant "to indict our leaders," but rather "to lament our loss," he explained. "We have learned that when our very survival is at stake, the legal terms of that survival may become negotiable."

Yet Fisher cautioned against too much pessimism. Even as the law's influence waned in some areas, it waxed in others. He cited the successful challenges to racial profiling, discriminatory lending practices, executions of the mentally retarded, corporate fraud, and new security measures put in place since September 11 as evidence that the rule of law remains vibrant. He expressed, in particular, the hope that the Supreme Court would repudiate its 1986 ruling in *Bowers v. Hardwick*, which essentially allowed states to outlaw homosexual sex. (His hope came true a few weeks later when, on June 26, the Court reversed itself in *Lawrence v. Texas*.)

"The rule of law cannot cure all the world's evils," Fisher said. "But it can cure some."

And he concluded: "When you leave here today, I hope you will go out there resolved to cure those evils that are within the law's power to cure. We will be here, waiting while the world decides whether the rule of law retakes its place as the arbiter of social progress. You will be out there, working to regain the day in which law, and not fear—law, and not force—will shape our world."

A couple of hours before the graduation ceremony Associate Dean for Student Affairs Catherine Glaze '85 (AB '80) received a call on her cell phone from a frantic student. He had forgotten his gown and did not have time to go back to San Francisco to retrieve it. Glaze quickly found a replacement, defusing yet another crisis for a member of the Class of 2003.

It's this sort of troubleshooting—along with being a constant source of advice, solace, and humor—that earned Glaze the Staff Appreciation Award from the graduating students. "She's the glue that holds the students and administration together," Brian Gustafson, Class Co-President, said, when introducing Glaze at the ceremony. Glaze became Associate Dean a few weeks after the Class of 2003 first enrolled, and she "quickly won the trust of both students and faculty," Gustafson concluded.

Glaze then walked to the podium and remarked that the best way to show her appreciation for the honor was to quickly get to the two words that every parent in the audience wanted to hear: their child's first and last names.

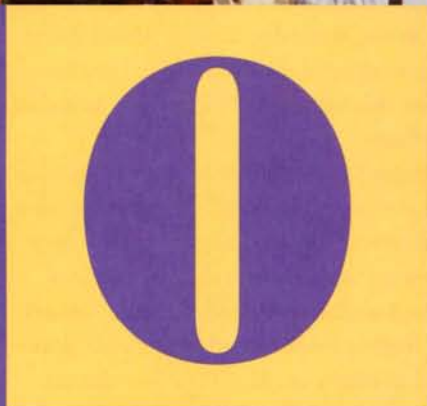
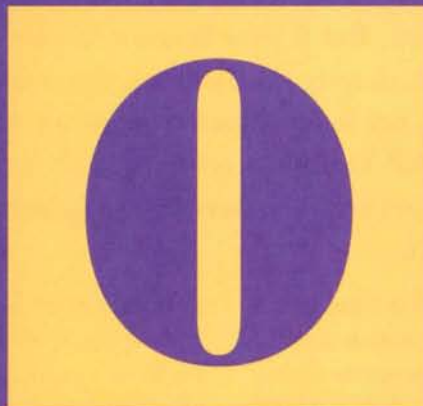


At the graduation ceremony, Associate Dean for Student Affairs Catherine Glaze '85 (AB '80) [above (behind the podium)] recited more than 200 names, avoiding a twisted tongue as she perfectly pronounced Asian, African, Anglo, European, and Latino surnames. Glaze, who won the Class of 2003's Staff Appreciation Award, spends a few hours practicing before the big day and consults with students when necessary. She says that none of the names in this year's event match in difficulty the one she recited when she was Associate Dean at Golden Gate University School of Law. That student told her not to bother with his full name, but Glaze can still rattle it off: Unalota Halamehi Aholelel-Aonga. After the ceremony was finished, Jonathan Rackoff '03 [top] received a congratulatory kiss from his wife, Alexandra.





CLOCKWISE FROM RIGHT: John Querio, Daniel Kirschbaum, and Ryan Spiegel, all members of the Class of 2003, celebrate their graduation on Sunday, May 18. Amy Tovar '03 was the flag bearer leading the procession entering Memorial Auditorium. At the Class of 2003 reception the night before the ceremony, Dawn Smalls '03 introduced her brother, Gerald Mitchell (AB '01), to her classmates and professors. After the ceremony, Emily Chen '03 received an added mark of distinction: a lei. At the reception on Saturday night, Peggy Radin (second from left), Wm. Benjamin Scott and Luna M. Scott Professor of Law, and Dean Kathleen M. Sullivan mingled with students from the graduating class.



ABOVE: Chantal Genermont of France and Gabriela Falcão Vieira of Brazil received their LLM degrees in Corporate Governance and Practice. They and seven others are the first class to receive such a degree from the Law School.

LEFT: Matthew Kahn '03 (third from left), with his father Michael '73 (second from right) was one of three members of the Class of 2003 who are the second generation in their families to graduate from the Law School. The other father-son Law School duos are Walter ('72) and James ('03) Melendres and Donald ('72) and John ('03) Querio.



# The Dorm - of Champions

BY ERICA GOLDBERG '05

HOME IS WHERE THE HEART IS. But if your home is Crothers Hall, your heart had better make room for the mosquitoes. Yet, despite the asbestos, the ecosystem that inhabits my carpet, and the constant clanging of pipes, my fondest memories of my 1L year all occurred in the Law School dorm. While Professor Mitch Polinsky's economics class taught me that the free market maximizes social welfare, Crothers Hall taught me that there is great joy in sacrificing comfort.



A recent conversation I had with two of my dormmates started me thinking about the importance of the Crothers experience for law students. We were sitting on the only patch of my carpet untouched by exam prep materials and eating Chinese food out of the tins. As usual, the discussion eventually turned to life after law school. "I'm not sure I need to work

for a firm," I said. "I don't even have expensive tastes." My friends assured me that after dining with co-workers at fancy restaurants and attending swanky parties, I would develop them.

But if a luxurious lifestyle quickly becomes an acquired necessity, why was I so thrilled to reside in the cheapest, most meager dorm offered to Stanford graduate students?

It had to be more than the close proximity to all my classes. It wasn't simply the opportunity to have guitar sing-alongs, coupled with debate about substantive due process, at 2:00 a.m. It couldn't just be the ease with which I could climb through my window if I ever forgot my keys. It had to be that there was something personally satisfying about existing without the extra frills of one's own kitchen, or the extravagance of privacy. I actually enjoyed the creativity and fortitude necessary to thrive, let alone survive, on a diet of peanut butter, milk, and tuna fish—the only three items in my microfridge.

Crothers Hall provides the law student with a much-needed refuge from the world he or she is about to enter, a world of suit jackets, wing tips or high heels, and apartments with screens covering the windows. Life in Crothers teaches

a critical lesson: that maximizing convenience often occurs at the expense of opportunity. If I had lived in a suite, I might be watching television in a normal-sized bed instead of wrestling in the hallway. For a little more space and my own bathroom, I would have missed the spontaneously erupting dorm parties, the late-night study sessions, and the professor impersonation contests. Whenever I needed to get away from law school woes, ironically, the law school dorm community provided a wonderful diversion. The Crothers residents who recognize this value return for a new round of masochistic bliss each year.

A law degree can beget material amenities unfathomable to the debt-strapped law student. Although eating at a restaurant that uses actual silverware now seems posh, there may come a time when I can no longer stomach soup out of a vending machine. Once I acclimate myself to "firm" dollars, I may even think that finding moths in my underwear drawer is disturbing instead of hilarious. At this not-so-distant point on the road to my future, I already remember my "roughing it" days in Crothers with a sense of pride and nostalgia. Even now, as I type words with one hand and scratch bug bites with the other, I realize how pleasant it is to be less than fully comfortable.

Of course, comfort is a relative term. I recently braved the dark corridors of the Crothers basement to look for a study room. To my surprise, there were dorm rooms down there. When I passed by a student leaving his room, I asked him if he actually lived there, and what that was like. "When I look out my window, I see a cement wall," he said. "But I'm hoping to move up to Crothers first floor next year."

At that moment I realized how pampered I was: I had a room with a view.



STEVE GLADFELTER (2)



**WORLD PREMIER:** The Law School held a Feb. 4 advance screening of *Seizing Power: The Steel Seizure Case Revisited*, a coproduction of Stanford University and San Jose public TV channel KTEH in association with San Francisco public TV channel KQED. During the reception [LEFT], John Levin '73 (AM '70), chairman and managing partner at Folger Levin & Kahn, which helped to finance the documentary, spoke with former Stanford University President Gerhard Casper, who appears in the show as a justice in the moot court hearing of the case. Across the room [BELOW], Dean Kathleen M. Sullivan thanked Emilie Munger Ogden '89 (AB '81) and her husband Douglas (AB '81) for attending the preview.

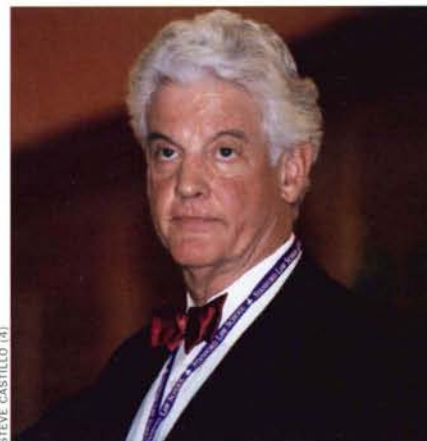


**PLAYING CATCH-UP:** At the Stanford Law Society of New York's March 13 reception [LEFT], Dean Kathleen M. Sullivan caught up with Josh Wallenstein '02 and Matthew Raben '02. The event was hosted by Rise Norman '88 and Simpson Thacher & Bartlett.



JOE PINEIRO

**ACROSS GENERATIONS:** [CLOCKWISE FROM RIGHT] The featured speaker at this year's Class of 2003 dinner on April 2 was former Executive Vice President of Law and Corporate Affairs for Microsoft Corporation William Neukom '67. Now a partner in the business practice group at Preston Gates & Ellis, Neukom encouraged students to strive for personal fulfillment—not glory—throughout their careers. William Bates III '74, a partner in Bingham McCutchen's Silicon Valley office, and his wife, Kay, joined Neukom and a few dozen other alumni at the annual event, sponsored by the School's Board of Visitors during its annual meeting. Laura Chavkin and Suzann Moskowitz, both of the Class of 2003, chatted with Ivan Fong '87, Chief Privacy Leader and Senior Counsel of General Electric Company. While the gathering helps students meet notable alumni, it's also a chance for graduates to get better acquainted with fellow alumni from different parts of the country. Bruce Toth '80 (MBA '78), partner at Winston and Strawn, and William Barnum, Jr., JD/MBA '80 (AB '76), general partner at private equity firm Brentwood Associates, came respectively from Chicago and Los Angeles, while Douglas Tanner JD/MBA '77 (AB '75), a managing partner at Milbank, Tweed, Hadley & McCloy, had a short trip from his Palo Alto office.



STEVE CASTILLO (4)





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STANFORD LAW SCHOOL

# ALUMNI WEEKEND 2003

Thursday to Sunday, October 16 to 19



*The weekend will feature exciting panels; gatherings for alumni, faculty, and students; special recognition of volunteers; the Stanford vs. Washington State football game; and much more.*

## "We the People 2003"

Cosponsored by the Stanford Alumni Association

Who are we the people in 2003? In a globalized world, instantly networked through new information technologies, what are our constitutional freedoms and obligations? What role do we the people now play in electing our local, state, and national governments? What do the constitutions of other nations have to teach us as we reflect upon those freedoms and obligations?



The **Honorable Anthony M. Kennedy** (AB '58), Associate Justice, United States Supreme Court, will join **Kathleen M. Sullivan**, Dean and Richard E. Lang Professor of Law and Stanley Morrison Professor of Law, Stanford Law School, and fellow renowned constitutional scholars **Pamela S. Karlan**, Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School; **Lawrence Lessig**, Professor of Law, Stanford Law School; and **Jack Rakove**, Coe Professor of History and American Studies and Professor of Political Science, Stanford University—of Election 2000, *Eldred v. Ashcroft*, and Pulitzer Prize fame respectively—for this vibrant panel discussion.

## Stanford University Roundtable Forum: "Power of Influence, Influence of Power"

Cosponsored with the Stanford Alumni Association and the Stanford Graduate School of Business

No nation in history has wielded as much economic, military, and political power as the United States does today. However, there is a corresponding accountability that comes along with that power, including the ethical, moral, and environmental implications of decisions. How do we balance these important issues while continuing to promote capitalism in a global economy? Who are the new geopolitical players? How much should people be able to expect from those in positions of power?

Join distinguished Stanford University faculty, including **David W. Brady**, Bowen H. and Janice Arthur McCoy Professor of Political Science and Ethics, Stanford Graduate School of Business, and Senior Fellow and Associate Director for Research, Hoover Institution (moderator); **Judith L. Goldstein**, Professor of Political Science and Director of International Relations and International Policy Studies, Stanford University; the Law School's own **Joseph A. Grundfest '78**, W. A. Franke Professor of Law and Business; and **Stephen H. Schneider**, Professor of Biological Sciences, Stanford University, and Senior Fellow, Institute for International Studies, for an engaging roundtable discussion of these important issues.

## Dean's Circle Dinner

A gala dinner to honor members of the Dean's Circle—annual donors of \$10,000 or more. By invitation.

## All-Alumni Reception

A festive reception for all alumni and their guests, faculty, and students. Reunion classes will have the opportunity to gather together.

## Reunion Dinners

Members of the classes of 1953, 1958, 1963, 1968, 1973, 1978, 1983, 1988, 1993, and 1998 will gather with classmates for an evening of fine dining, socializing, and good times in elegant pavilions near the Law School.

## Volunteer Leadership Summit

Dean Kathleen M. Sullivan will recognize current and prospective volunteers, and discuss the current state of the School.

## Tailgate Party

Gather for fun and delicious fare. Children are welcome and entertainment will be provided for them. Reunion classes will have the opportunity to gather together.

*For additional information about these and other exciting Alumni Weekend 2003 programs and reunion activities, or to register, visit our website at <http://www.law.stanford.edu/alumni/events/>.*