



This issue:

Animals of New Orleans,
pg. 3



Professor on call:
Bradley Joondeph
pg. 6



Opinions, pg. 4-5

THE ADVOCATE

School of Law Newspaper since 1970

Volume 27, Issue 1, September 2005

Ogletree Speaks to Race and Justice

Harvard Professor discusses the history, and future, of race and the Supreme Court

By Tobin Dietrich

On Tuesday, September 6, the Center for Social Justice and Public Service hosted the first of two Fall Diversity Lectures. The talk was initially scheduled to be held in room 139 of Bannan Hall. With the cooperation of Law Career Services, the overflowing room was quickly moved to Bannan 142. Despite the added space, students and faculty still lined the walls. The crowd gathered because of Charles Ogletree, Professor of Law and Director of the recently opened Charles Hamilton Houston Institute for Race and Justice at Harvard University.

SCU School of Law Professor Ellen Kreitzberg offered a brief personal introduction, recalling the time she shared with Ogletree in the Washington D.C. Public Defender's Office. Ogletree then launched into an abbreviated

version of his planned remarks, to leave more time for audience questions.

Professor Ogletree began by saying that the Bush Administration may soon be looking for a third or even a fourth Supreme Court Justice nominee. In addition to nominating replacements for Justice O'Connor and Chief Justice Rehnquist, the aging Court could present the Bush Administration with the opportunity to nominate another one or two justices before the next administration takes over in January of 2009. Ogletree then set out his prediction that once the new Supreme Court term begins on October 3rd, the Court will be dominated by the experience and



Professor Ogletree contemplates a student's question during his presentation on Sept. 6.
photo by Krystia Przepiorski

others on the Court sets the tone of the Court. The Rehnquist Court was defined primarily by the swing vote of Justice O'Connor. O'Connor's resignation, and likely replacement by a justice as conservative if not more conservative than Judge Roberts, Ogletree said, would set the stage for Scalia's experience and authoritative, conservative voice to dominate the court.

Professor Ogletree concluded his remarks by discussing the notion of activist judges. While the term is commonly associated with liberals, it is not inapplicable to conservatives. Ogletree said that Justice Scalia has developed a groundwork in his dissenting opinions for future shifts in the Court's direction. He also observed that Justice Clarence Thomas has become increasingly adept at this aspect of dissent writing as well. The strategy is to put forth a line of reasoning

now that the Court, when the Court's ideological balance shifts, can look to for textual support. He pointed to examples from Chief

Justice Rehnquist's early years on the Court when he was frequently a lone dissenter.

Some of the same views that Rehnquist espoused in the late 1980s resurfaced since the mid-1990s in the form of majority

intellectual posturing of Justice Antonin Scalia.

Professor Ogletree clarified his bold assertion, saying that the Supreme Court is seldom defined by the role of the chief justice. He gave examples of the Warren and Burger Courts, which, while known by the names of their Chief Justices were more defined by the thinking and leadership of Justice William Brennan. He argued that the most moderate justice relative to the

The Supreme Court is seldom defined by the role of the chief justice.

— Ogletree, page 8

Tech File **Google Print,** *Innovation or Infringement?*

By Meg vanSteenburgh

"When we talk about organizing all of the world's information, we mean all." boasts Google's C.E.O., Eric E. Schmidt. Well, Google is taking another giant leap towards that goal with

the launch of GooglePrint, an online library that is designed to allow users to browse through books, much like Amazon.com's "look inside this book" feature, then decide whether or not to

— GooglePrint, page 7



Merck: A Pain in the Legal System

By Ahamed Iqbal

On August 19, 2005, a Texas jury held Merck, the makers of Vioxx®, liable for negligence in the wrongful death of Bob Ernst. The jury awarded Carol Ernst, the deceased's widow, a total of \$24.4 million in compensatory damages and \$229 million in punitive damages. The significant damages in this case and the implications they have on Merck, and the pharmaceutical industry, compels a closer look at this case.

Approved for sale in 1999, Vioxx relieved joint pain caused by osteoarthritis. Sales of Vioxx averaged about \$2.5 billion per year from its release until last year. In September of 2004, Merck withdrew Vioxx from the market and informed patients of an "...increased risk for cardiovascular events such as heart attack and stroke."

Ernst testified that her husband took Vioxx, at her suggestion, to relieve his severe osteoarthritis pain. Approximately eight months later, he died from cardiac arrhythmias, or an irregular heartbeat. Ernst asserted that Vioxx influenced her husband's heart attack. Plaintiff presented Merck

emails and Vioxx information cards given to doctors by sales representatives in order to prove both knowledge and insufficient disclosure of adverse side effects.

By a 10-2 decision, the jury decided in favor of the plaintiff; finding defects in both the marketing and design of Vioxx that were 'producing causes' of death. The court defined producing causes as "an efficient, exciting or contributing cause that in a natural sequence produces the injury."

The jury found Merck's negligence was a proximate cause of Ernst's death and that the harm caused resulted from malice. The court defined malice to jurors as "an extreme degree of risk...of which Merck and Co., Inc. had subjective awareness...but nevertheless proceeded with conscious indifference to the rights, safety and welfare of others."

Of particular note, the punitive damages award of \$229 million will likely be reduced to \$1.65 million. A Texas statute limits punitive damages to twice the economic damages plus no more than \$750,000. Economic damages were \$450,000, and therefore, would significantly reduce the

punitive effect of the decision [see Breakdown of Damages, p. 8].

Despite this likely reduction, Merck insists that it will appeal. Merck is considering numerous legal grounds for appeal – including the court "allowing

opinion testimony to be given...by unqualified experts, allowing opinion testimony that was not based on a reliable scientific basis," the allowance of irrelevant and

———— *Merck, page 8*

Laptops in Classrooms

By Jonathan Sip

The law school classroom is markedly different in many ways when compared to those former college lectures. Participation is a must, class time seems to go by faster, and one highly visible difference is the almost unanimous use of laptop computers.

Today, law school students utilize laptops as indispensable tools for note taking and creating outlines. In addition, they also improve preparedness and organization and provide access to online research tools such as LexisNexis and Westlaw.

But, there are some

caveats to the benefits of using a laptop in class. One law student commented on their tendency to be a distraction, "After first semester, or even starting late first semester, after the fear abates, many laptop screens are filled with ESPN, shoe shopping, IM stuff, or solitaire."

Another student said, "I stopped taking my computer to class because I always ended up online and not paying attention ... When I stopped taking my computer to class my grades went up a ton."

One student offered his sobering account of a classmate's use of her laptop. "I remember a 1L student who played solitaire literally through all of the lectures. She seemed to know all the right

answers when the professor called on her. Was she really that brilliant?" the student wondered. "My question was answered after mid-terms. She didn't return to school."

So it seems that laptops coupled with the Internet can be a major distraction. But one student had this to say, "Upside is, when you get called on, everyone else can feed you the answers."

Santa Clara Law School Professor Alan Schefflin did not allow laptop computers in his Law

and Psychiatry Seminar last semester. "I have no doubt they are detrimental to the learning process in general," said Schefflin.

"Laptops encourage

“My concern is that laptop use may in actuality inhibit active learning in law school.”

Vinita Bali

students to take dictation, and they provide a source for diversion and distraction."

Schefflin also remarked that studies at other law schools have concluded that approximately half of the laptops in class are being used for email, IM, games, or other Internet explorations. "Standing in front of the class, it is quite clear which students are more absorbed in Internet activities than they are in learning."

Vinita Bali, the Director of SCU Law's Academic Success Program which focuses on the development of learning skills in law school, added her perspective to laptops in the classroom. "The

———— *Laptops, page 6*

Staff

Editor-in-Chief
Tobin Dietrich

Managing Editor
Adam Heller

Roopali Malhotra
Layout Editor
Steve Jacob

Photographer
Krystia Przepiorski

Staff Writers
Ahamed Iqbal
Jennifer Burbank
Jonathan Sip
Megan vanSteenburgh
Rajan Kalra

Copyright 2005.

The Advocate is the student news and literary publication of Santa Clara University School of Law, and has a circulation of 1,000. Bylined articles reflect the viewpoint of the authors, and not the opinion of *The Advocate*. *The Advocate* is staffed, including writing and layout, by law students. Printing is contracted to Profess Printing, Inc. of San Jose, California.

Submissions to *The Advocate*, including Letters to the Editor, are encouraged and welcomed. Contact the Editor in Chief by phone or e-mail about format requirements and submission dates. Submissions are subject to the printing and editing discretion of *The Advocate*.

Santa Clara University
School of Law
500 El Camino Real
Santa Clara, CA 95053-0426
(408) 554-4839
editor@theadvocate.us



Speaking for the Animals

A "Voice" for the animal victims of Hurricane Katrina

By Jennifer Burbank

One important aspect of being a law student and future lawyer is advocating for the rights of others and speaking for those who, for some reason or another, are unable to speak for themselves. This duty includes not only being the "voice" of fellow human beings, but also speaking out for animals when they are in need.

Many people who have ever owned a pet have experienced the unconditional love and companionship that animals show to those who care for them. Unfortunately, many have also felt the terrible heartache that comes from the loss of a pet, which is just like losing a friend. This feeling, among many others, is one that the human victims of Hurricane Katrina have also had to endure.

In addition to the human victims, thousands of animals have been affected by Hurricane Katrina. It is safe to say that the majority of people know about the human side of this tragedy, where thousands of people have lost their homes, jobs, and even loved ones. However, it is easy to forget that the hurricane has also had numerous animal victims as well, many had to be abandoned by their owners, were displaced from their homes or shelters, and injured or killed in the storm.

Some animals that have survived are still trapped in buildings or homes, but there are many animals that have been safely

evacuated and reunited with their owners or relocated to staging areas and temporary shelters.

Although there are too many to form a comprehensive list, numerous animal welfare organizations have joined together to help with the relief effort of animal victims.

To name a few, there is the Humane Society of the United States (HSUS), the American Society for the Prevention of Cruelty to Animals (ASPCA), United Animal Nations (UAN), and several organizations located



Rescuers save several dogs endangered by hurricane flood waters.

photo provided by www.fema.gov

"I would like to thank everyone at Santa Clara Law for the outpouring of concern for the citizens of the communities affected by the hurricane and for the many suggestions about what we can do to assist them."

*Dean Donald J. Polden
e-mail dated Sept. 2, 2005*

missions to evacuate as many animals as possible that are stranded, trapped, or left behind. Also, they are assisting with the care of animals at staging areas and temporary shelters, where the

safely-evacuated animals are given food, water, medical attention, and a place to sleep.

All the people from the animal welfare community are desperately trying to rescue animals still in danger, provide aid to animals that have been safely evacuated, reunite animals with their owners, and find homes for those who have either lost their owners or come from shelters and humane societies that were destroyed in the hurricane.

To help with this effort, Petfinder.com, the organizations just mentioned, and many others, have compiled a comprehensive database, providing a way to connect all those involved in the animal relief effort. This database enables human victims to post the locations of their pets, which helps rescuers to find them and save them, rescuers to post photos and descriptions of pets, which makes it easier for owners to locate them, and volunteers to post their offers for foster care, which owners can search and find temporary care for

their pets, while they attempt to rebuild their lives.

In this time of crisis, please don't forget about the animal victims of Hurricane Katrina. The animal victims and the organizations fighting to save their lives are in desperate need of help. The best way to assist in the disaster relief effort is to donate to the animal organizations involved. What matters most is not the organization to which one chooses to donate, but that one chooses to donate at all, to help save as many animals as possible.

All donations to the above organizations will go to temporary shelters and rescue efforts; donations will purchase needed items, such as food, water, medical supplies, carrying crates, leashes, and bedding. Any donation made will aid the thousands of animal victims of Hurricane Katrina, and help give those who have lost almost everything, a friend to stand by their side and let them know they are not alone.



— Columns, Opinions, —
— and Humor —
Confirmation Hearings

Jam Senate Proceedings

“Will you obey the law, and not make it?” Senator Orrin Hatch leans to the microphone and asks, his face red with religious zeal.

Across the senate chamber, in a banana chair provided for the hearings, sits the president’s appointee for head of the new Office of Homeland Justice. Homeland Justice? What’s that you ask? It’s the new cabinet making department. President Bush felt it intergral [sic] to the protection of our nation’s nucular [sic] peanut butter supplies to create a new department designed to do nothing but criticize carpenters.

Personally I say leave the woman alone, she’s anemic (That’s anorexic Mr. President) after all, she wouldn’t even eat the nucular [sic] peanut butter if you gave it to her. That is, of course, if the Office of Homeland Justice approves the joint work on that cupboard.

Why, some have asked, is President Bush reallocating such valuable assets as the FBI, the CIA, and the CSI to comb over every piece of hair on Dick Cheney’s balding scalp? The answer is simple: Jenna and Barbara found the liquor cabinet. Not only that, but the last carpenter Bush hired to hide the unprotected spirits from his charmingly inebriated daughters got distracted by the glare off the vice president’s pate, misfired his nail gun, and killed two secret

service agents. As a result the country’s terror alert level skyrocketed to puce.

Advisors to the president maintain that the new Office of Homeland Justice is a response to liberal judges who have legalized everything from gay marriage to women’s suffrage to sliced bread.

The latter is of utmost concern, according to Condoleeza Rice, Secretary of State. She said, “Unless this nation interdicts the influx of sliced bread, we may face a nucular [sic] disaster of unprecedented proportions.” Of course, as everyone knows, nucular [sic]



Steve Jacob

peanut butter is only dangerous when mixed with sliced bread and a dangerous chemical commonly referred to as “jelly.”

The CIA found evidence of several attempts to ship the illegal “jelly” compound into the United States. These attempts, Rice said, are perpetrated by our comely neighbors to the North. She finished her statement by re-emphasizing the danger of sliced bread and asked that anyone seeing said bread contact their local carpenter.

Of course many voices across the kitchen proclaim this is a Republican ploy to further grow the corrosive mold that is our government. They are not alone. Protests, too, have erupted across the nation. In San Francisco picketers marched with signs that read: “Sliced Bread is a Hoax,” “What’s the Next Best Thing?” and “Keep the Government out of the Kitchen.”

Life in the S.C.:
Episode One: “Your Mom is a Tort”

[Disclaimer: The following material contains quips and witty pop culture-laden references. The content may not be suitable for the overly serious and/or those over the age of 25]

I’m learning how to be an alcoholic...

Wait! How can I convey that thought in a funnier, more indirect way?!

I’m studying to be a lawyer; welcome to a world of long hours, cocaine addiction, alcoholism, caffeine and Red Bull induced rages, and paralyzing self-doubt.

The weak at heart may not find their anxiety eased at Santa Clara.

The sideshow that is the faculty, students, and administration can be quite intimidating to some, but SO entertaining to those who know what to look for: Just walk around campus.

On any given day you’re likely to run into the Law School’s most notorious professor. Don’t worry. You’ve seen him before, you may recognize him as an extra in Michael Jackson’s “Thriller” music video or maybe as Charlton Heston’s body double at the end of “The Ten Commandments.”

Dean Polden recently won a WWF heavyweight championship, following his Howard Dean-esque meltdown in response to the Law School’s drop in national ranking. In response to allegations that an unnamed law school hired a PR firm to boost their rank, Polden has been cast as the lead male in “Gigli 2.” His performance will include all-too-natural jumping up and down on a couch like a 12 year old girl, and selling his soul to the church of Scientology.

Then, there’s this Mac Player character. Much to my disappointment, he did not have a

perm, nor was his pinkie nail any longer than his other nails.

The Santa Clara intimidation isn’t limited to the law school campus. If you happen to be a black man passed out on a bus station bench, surrounded by cops wearing black gloves, look around, because Vinita Bali is likely to be around, checking out the scene.

Come back to Bannan Hall and hang out in the lounge where Santa Clara’s version of Suge Knight* is likely to be around, cruising for 1L girls.

Speaking of girls, did you hear? They’re letting women be lawyers now. The next thing you know they’ll want to be doctors, and maybe even senators. Quality law school alpha males, on the other hand, are in such short supply that when a decent 1L is in the library, he is immediately ravaged by cougars-in-training, 2L and 3L girls, ready to exchange outlines for services.



Rajan Kalra

Start your outlines! Learn how to brief early! Don’t fall behind! Sit, study, socialize, and get married to the study groups to whom the law school has promised your first born child! Get involved!

Attend the bar reviews! Be afraid of Steinman! Every teacher thinks his class is more

important than the others on the schedule! Take advantage of ASP! Lexis is better than Westlaw! Westlaw is better than Lexis! Finkel is Einhorn! Einhorn is Finkel! It’s time to make decisions! It’s time to make the BIG decisions.

::Sigh::
Welcome to a world of long hours, cocaine addiction, alcoholism, caffeine and Red Bull induced rages, and paralyzing self-doubt.

*In no way does the mentioning of Suge Knight imply that I would like to be hung upside down from a balcony.



What Happened to My Summer Break?

An interesting phenomenon happened at the end of summer. We began to get calls from 2005 graduates saying their employers were asking them to cut their post-bar vacations short in order to begin work in August. Not surprisingly, they were asking us how they could gracefully say “no thanks,” and keep their originally agreed upon September or October start dates. This, combined with the largest number of employers in our fall recruiting program that we have seen since the downturn began in 2001, demonstrates that the Bay Area legal job market is showing more promise. With the frantic pace of the fall recruiting season and numerous application deadlines for judicial clerkships and the DOJ, we find that students are feeling overwhelmed and left behind. If you’re feeling that summer was eons ago you are in good company.

More importantly, if you haven’t done anything for your job search yet, don’t despair! Around

the middle of September after OCI is well underway, we often hear that students feel they’re starting the search “too late” and all of the “good jobs” must be gone. No matter what you hear in the library or hallways, it is never “too late,” and there are always “good jobs”

available. The key is to make regular time for your career and remain flexible.

We have a few new faces at LCS and Public Interest Law Career Services (PILCS) to serve your career development needs. Matthew Wayman ('96) is our new Assistant Director for Law Graduate Employment. Matthew works exclusively with graduating students and recent graduates as they pursue their first legal job. Peter Castle and Braeden Sullivan



Alexandria Bullara

are our new Public Interest Career Coordinators.

We also launched our Student Summer Employment Network. This will provide students with a useful list of employers, practice area ideas, and an opportunity to connect with other SCU law students who worked for employers in which you are interested. If you haven’t completed our survey, we

encourage you to do so. Just visit our

homepage at www.scu.edu/law/careers for a link to the survey. The new Student Summer Employment Network is a result of student feedback. If you have an idea we encourage you to contact us or SBA President Roy Stanley.

For many of you there is no well-defined career path. For others, your career path will take you in directions you never considered before coming to law school. LCS and PILCS exist to help you figure out where you want

to go and then help you get there. With that in mind, we encourage you to stop by our new location in Loyola Hall. If you know what you’re looking for and can’t find the information, please ask. If you don’t yet know what you’re looking for, please talk to us.

Upper-division students are welcome to make advising appointments at any time, even during OCI season. Making an appointment is easy. Go online and visit <http://www.appointmentquest.com/provider/2010065429>. If you are a 1L, we hope you’ll mark our fall LCS and PILCS events on your calendar and make time to attend if the topics are interesting to you. Be sure to plan to attend both our Career Essentials for 1Ls and Career Resources for 1Ls sessions during the first week of November after which we’ll be glad to schedule an advising appointment for you to meet with us. We look forward to working with you!

SBA from the Inside:

A Glimpse into the Life of SBA Vice-President for Part-Time Students

It was two thirty in the morning when I finished cutting the final ballot. After checking my daughter, who lay asleep, a sense of anxiety rushed through me. Did I finish the sign-in sheet? How many copies do I need? Am I forgetting something? All of these questions came to mind as a mental checklist of what needed to be completed for the following day: the first day of elections.

For many who serve as executive board members on the Student Bar Association, this scenario is all too familiar and recurrent. As an SBA representative, we have been charged by the student body to carry out important tasks. However, along with these responsibilities comes an unavoidable sacrifice in personal time and energy.

When I placed myself as a candidate for the position of Vice-President [Part-time], I did so with the understanding that whatever “leisure” time I had, after school, raising a toddler, and working, would cease. My schedule would be filled with attending meetings, organizing events, being present at events, and speaking with faculty and staff. Forget about being prepared for every class; all I could focus on during the election was whether any of my professors would cold call and if my name came up, how I could talk my way through it without appearing like a fool.

Although elections are the chief events that fall within the ambit of

my responsibilities, so too does orientation. Consequently, a large part of the first week prior to school I spent running across campus assisting anyone with the orientation process, especially those parts that pertained to part-time students. Having to focus on the MPRE that same week made me realize completely that mastering the art of balancing my time



Patricia López

was going to be extremely vital if I wished to survive the coming year. But for others on the board, their jobs began immediately after they became elected. Some of them even worked through spring finals and summer to ensure that SBA events, such as the Grapevine, Orientation Digest, location for the

Barrister’s Ball, and the orientation mixer progressed smoothly. These individuals, no doubt, gave up precious studying and vacation time to ensure that the collective expectations of the student body were being taken care of. The driving force to do so, at least for me during the four-hour sleep days and for other board members, comes from our sincere appreciation that in contributing a part of ourselves to the improvement of student life on campus we improve the law school experience for everyone involved.

In writing this article, it is my hope that it illustrates the extent to which the SBA strives to provide students with a meaningful and pleasurable experience. We are committed to making certain that the student body’s best interests are advanced with the utmost integrity.



Professor on Call: Bradley Joondeph

By Adam Heller

Professor Bradley Joondeph recently wrote in the San Jose Mercury News regarding the John Roberts nomination. See <http://www.scu.edu/news/judgeroberts.cfm>.

Professor Joondeph, You described John Roberts as a man with great integrity, intelligence, humility and human decency. However, you stated that “[i]t is unclear that a great person with impeccable credentials should, for those reasons alone, be seated on the Supreme Court.”

Further, you allege that his confirmation to the Supreme Court could turn out “quite badly for the country” due to Judge Roberts’ constrained judicial philosophy.

Question:

If a nominee has great integrity, intelligence, humility, and human decency, what else is needed to be qualified to sit on the highest bench?

Answer:

I don’t view it as a question of whether he is qualified; no doubt he is, as are probably hundreds of other people. To me, the question is, among those who are qualified, is his becoming a justice going to

produce the best understanding of the Constitution, all things considered, over his likely thirty years on the Court. And although I admire Judge Roberts greatly, were I president, I would pick someone else.

Question:

How could Judge Roberts’ confirmation turn out quite badly for the country?

Answer:

Well, this is really a matter of one’s own personal values. To me, if the Court continues to constrain Congress’s enumerated powers, and in particular its

powers under § 5 of the Fourteenth Amendment, continues to limit Congress’s authority to permit citizens to sue the government for its failure to follow the law (through things like standing and the Eleventh Amendment), and continues to permit greater government involvement in religious activity, I think the nation will be worse off as a result.

Question:

Are your concerns alleviated because Judge Roberts is set to replace the late Chief Justice, who

Laptops, page 2

benefits of technology and laptops are numerous, and largely apparent,” said Bali. “While acknowledging the benefits, my concern is that laptop use may in actuality inhibit active learning in law school.”

Bali also stressed the importance of proper laptop use. “[S]tudents spend an inordinate amount of time finding tools to manage the data. Ideally, students’ reliance on laptops and technology should be more balanced, using it where it enhances efficiency, and discarding it when it inhibits creativity and judgment.”

The SCU Law Bulletin states, “Students are encouraged to use

also took a very constrained view of the Constitution, or are they heightened because he is now up for the Chief Justice slot?

Answer:

Probably lessened, but it all depends on who the President nominates for Justice O’Connor’s slot.

Question:

“Senator”

Joondeph, what 3 questions would you have John Roberts answer during a confirmation hearing?

Answer:

1. What are the most important lessons about the Supreme Court and its role in our

national government that one should derive from the New Deal period and its aftermath?

2. How would you describe the performance of the Supreme Court as a guardian of liberty during and shortly after World War II, with specific reference to the Korematsu decision?

3. What is the importance of stability and continuity in constitutional interpretation to the integrity of the Supreme Court and its place in our constitutional scheme?



Professor Joondeph
from www.scu.edu/law

Tech File Cloning Controversy’s Effect on California

By Roopali Malhotra

Since Dolly the sheep was cloned in 1996, a host of other animals have been successfully cloned. The list includes cats, goats, horses, and for the first time last month in Korea, dogs. The cloning procedure, which involves the replacement of an egg’s genetic material with that of the animal to be cloned, is actually being performed as nearby as Sausalito, California, at the company Genetic Savings and Clone, where for the mere price of \$50,000 you can clone your favorite feline friend.

While this procedure may seem to be a novelty, the technique could be useful in creating a more profitable meat and dairy supply by cloning livestock with desired traits, such as more meat or milk production. Cloning animals such as pigs may also prove useful to transplant surgery; pig heart valves have successfully been transplanted into humans who suffer from heart defects and have no available human donors.

There are several private bay-area biotechnology firms investing in cloning research and

development, Genetic S&C, Geron in Menlo Park, and Advanced Cell Technology’s branch in San Francisco are among the more prominent. In addition, academic institutions such as UCSF and Stanford have also developed independent programs and centers dedicated to the study of cloning and/or stem cells. Combined with the passage of Proposition 71 last year and the resulting creation of the California Institute for Regenerative Medicine in Emeryville, a legislative move since copied by nine other states, it is clear that Northern California is ready to make advances in the realm of cloning research.

Though cloning animals is gaining acceptance, with even the FDA expected to soon lift a ban on selling the products of cloned animals, the cloning of human embryos remains controversial. Currently the state of California is fighting a federal ban on such research. A bill has twice passed the House of Representatives that would punish scientists who engage in any form of cloning,

Cloning, page 7



Google, page 1

At first, Google set out to create this electronic library by negotiating permission to scan and index publisher's copyrighted material, but a quicker way to access this text presented itself. Google is now scanning all or portions of the libraries of Harvard, Oxford, The New York Public Library, University of Michigan and Stanford. In return for this privilege Google will supply each library with an electronic copy of the scans.

According to Susan Wojcicki, Google's director of product management, publisher's rights are being protected. The results of a search cannot be duplicated. "It's not like a Word document. It's an image, not text. The goal is to let users see if they would like to read the book and buy it."

So What's the Problem?

Google is potentially violating three of the copyright holders' exclusive rights under section 106 of the Copyright Act. Google is reproducing (in the form of the electronic copy), distributing (by giving the copies to the libraries), and displaying (albeit only small portions) the copyrighted material. However, these exclusive rights are subject to a loophole, created in order to advance access to information for scholarly or critical purposes. The name of this loophole is Section 107 of the Copyright Act, or the fair use provision. Of the four factors included in the fair use statute, the one at bar is the effect of use upon the potential market for or value of the copyrighted work.

There is a fine line between fair use and infringement, and according to Peter Givler, executive director of the Association of American

University Presses (AAUP), Google crossed it. Givler asserts that GooglePrint "cannot legitimately claim to advance the public interest by increasing access to published information if, in the process of doing so, it jeopardizes the just rewards of authors and the economic health of...nonprofit publishers."

"What Google is doing is tantamount to saying that it can make copies of every copyrighted work ever published, period."

Association of American University Presses

The concern for scholarly publishers is that most of their operating budgets come from the sale and licensing of what they publish. The

principles of copyright law, and the strict enforcement thereof, are what keeps them in business. As we have all seen recently, in both the music and movie industries, digital copies of files can be made extremely easily, and Google has provided no statements about how it intends to protect these copies from misuse.

Moreover, the legal precedent on which Google bases its fair use claim is *Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003), which has a substantially different fact pattern distinguishing it from what Google is trying to do. Since the Supreme Court has made it clear that the fair use analysis is extremely fact and circumstance specific, Google may not be on very solid ground.

In the *Arriba* case, defendant was using a visual search engine to display thumbnail copies of images that had already been digitized and made available on the internet by the individual copyright owners. However, not only is Google violating the fundamental right of reproduction (of works which have never been digitized) without the copyright holder's consent, it is doing so on an unprecedented scale. What Google is doing "is tantamount to saying that it can make copies of every copyrighted

work ever published, period." says the AAUP.

In response to publisher's objections, Google made it clear to publishers that they may opt out of the program on a title by title basis. Unfortunately for Google, this has no legal significance, because it is only allowing the publisher to assert its control over the exclusive right of display once the infringing copies have already been distributed.

What Happens Now?

So far this battle has been fought in the media rather than the courts, and that is most likely where it will remain. Although what Google is doing is unprecedented in scope, as long as it is not a substitute for purchase, chances are it will be deemed a fair use of the material.

Though courts do not limit their fair use analysis to immediate market impact, but rather the long

Cloning, page 6

whether intended for reproduction or research, with prison sentences of up to 10 years and fines of \$1 million or more; a similar proposal in the Senate, dubbed the Human Cloning Prohibition Act of 2005, has not yet come up for a vote.

Concerned about the potential loss to California's \$3 billion institute and the slowing of biotech investment in the state, Republican Governor Arnold Schwarzenegger and Democratic Senator Dianne Feinstein are actively denouncing the bill proposed by the U.S. Senate. Instead, they are pushing for the passage of an alternative bill drafted by Feinstein which would allow cloning for research, but not reproductive, purposes with respect to human embryos.

Their statements are similar to those of Senate majority leader Bill Frist, who argued for a loosening of President Bush's stem cell funding policy of 2001. The Bush Administration's funding policy, opponents say,

term effects of violations, it is hard to see how GooglePrint will be anything but a boon to the publishing industry. When it comes right down to it, this is just another way for people to find books that they want to buy. It makes access to information, not the information itself, more readily available to the general public and that is what fair use is all about.

There may be a slippery slope on the road ahead where publishers will have to deal with the same pirating issues that the music and entertainment industries have been fighting for years, but in today's increasingly digital world that is par for the course. And just in case anyone sees this article as an attack on big bad Google, the author would like to gratefully point out that all of the research that went into it was obtained using their search engine.

has severely restricted the progress of cloning/stem cell research in the United States and allowed other countries to take the lead in this field.

Despite the challenges to the constitutionality of the research, as of September 9, the state issued several grants nearing \$40 million. Recipients include Stanford University, the California Institute of Technology, the University of Southern California, eight campuses of the University of California, three nonprofit research labs, and the Children's Hospital of Los Angeles. Where this money will come from and when it will be received is unclear. Bond investors will not provide loans while lawsuits are pending.

What is clear is that the drive of political leaders and researchers persists in the effort to keep Northern California a leader in biotechnology and the cloning of human and animal embryos.



Ogletree, page 1

opinions.

Ogletree then answered questions from the audience:

The first question asked for Professor Ogletree's opinion as to whether Judge Roberts, if confirmed, would fill the void in the 'swing' seat of the Court, similar to the role performed by Justice O'Connor. Ogletree expressed skepticism that Roberts would exhibit any of O'Connor's more liberal tendencies.

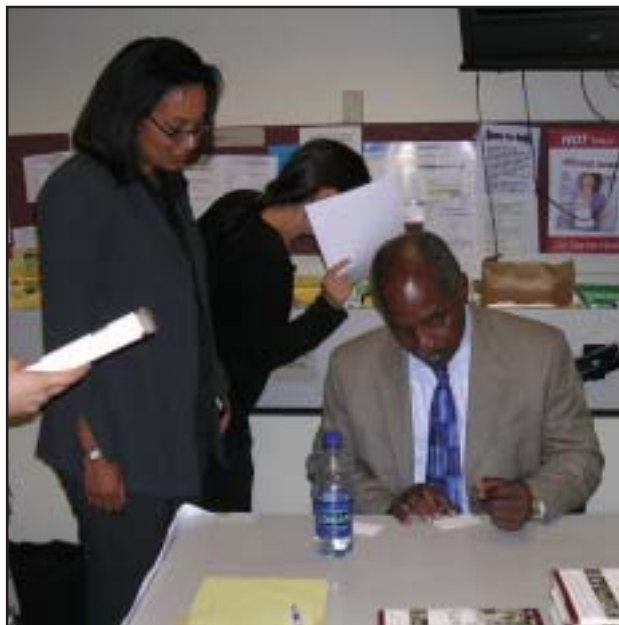
To the question of left-shifting in new members of the Supreme Court Ogletree said that it is not an absolute. Justice Thomas, though admittedly conservative before his appointment to the Court, ran to the right of his prior opinions. Ogletree did recognize that a moderate shift to the left is common, and he credited that shift to two, related phenomena. First, the evolving standards, both of the legal community and of society. Second, the effect of *stare decisis* on recent justices. The Court does not currently have any extremely liberal justices, but the more conservative justices feel bound by

the liberal majority of the Warren and Burger Courts. Their adherence to precedent then appears as a left-shift in their own views.

The next question focused on the Warren Court's policy of social reform demonstrated by its *Brown v. Board of Education* decision, and whether the Court now occupies a different place in society. Professor Ogletree quoted the namesake of

Harvard's institute, Charles Hamilton Houston, "a lawyer's either a social engineer or he's a parasite on society." While the Court may no longer be the most effective tool of social engineers, it is still the duty of lawyers to seek to change society for the benefit of the underrepresented.

The next question asked about the media's affect on justices.



Professor Ogletree signs copies of his book.

photo courtesy of the Center for Social Justice and Public Service

Ogletree acknowledged that modern Justices are much more influenced by the media than Courts of the past, e.g., Justice Antonin Scalia's lengthy defense of his refusal to recuse himself in a case involving his sometimes duck hunting partner, Dick Cheney, in response to wide media criticism that their relationship impaired his objectivity.

The final question asked Ogletree to discuss his position on reparations. Ogletree shared the story of his clients who unsuccessfully sought reparations arising from the massacre of "Black Wall Street" in 1921. A tight-knit community of African-Americans flourished in Tulsa Oklahoma in the early 20th Century until a massive, coordinated bombing, orchestrated by the Ku Klux Klan killed an estimated 1500-3000 people.

Ogletree concluded his remarks by sharing his view that economic reparations, where they are not direct reparations to survivors of such a crisis, should be designed as a system to lift up the traditionally neglected and underprivileged members of society. He suggested that reparations should serve a goal similar to the G.I. Bill, to create an opportunity for those born into unfortunate circumstances to lift themselves up by creating opportunities not otherwise available in their socio-economic sphere.

Merck, page 2

prejudicial evidence, and surprise witnesses.

It should be noted that this case is not the only action against Merck regarding Vioxx. A similar trial is scheduled in New Jersey, and thousands of other suits are pending.

A rough estimate by Forbes.com puts Merck's overall liability between \$20 and \$38 billion. The advanced age of the typical osteoarthritis sufferer should aid Merck's legal defense. The cardiovascular problems purported to arise from Vioxx usage are common among the elderly. Nevertheless, given the high number of current legal actions against Merck, the company will sustain significant financial and organizational damage because of the *Ernst* decision.

The *Ernst* decision may impact the pharmaceutical industry and the

Breakdown of damages

\$450,000 - Past + future pecuniary (economic) losses
\$12,000,000 - Past + future loss of companionship
\$12,000,000 - Past + future mental anguish
\$229,000,000 - Punitive damages*
\$253,450,000 - Total damages

*Texas limitation on punitive damages should make this figure \$1.6 million based on a formula doubling the economic loss and adding up to \$750,000.

testing and regulation of drugs. After a drug like Vioxx is revealed to have previously unknown side effects, questions arise about the policies of the Food and Drug Administration. The FDA verifies a potential drug's efficacy and safety before approving its sale. Whether or not these questions and governmental inquiries yield shifts in regulation is secondary to the caution such attention raises

throughout the industry. Wary of Merck's predicament, those in the industry will be even more alert about potential side effects and their prompt disclosure.

At first blush, this may seem like a purely beneficial result of the *Ernst* case, but closer examination of the nature of the industry casts some doubt on this notion. The pharmaceutical industry is heavily dependent on the rapid

development of treatments and cures for human ailments and conditions. While additional regulation and planning will better facilitate safe and effective drugs coming to market, it is evident that such constraints will slow the innovation and delivery of life bettering drugs to consumers.

Obviously, removing all restrictions and barriers to pharmaceutical companies would not be a viable option,

but an effective balance must be made between protecting consumers from undisclosed side effects while providing the prompt benefit of useful drugs. Cases like *Ernst v. Merck* help to define this dynamic balance, and, hopefully, foster further discourse about policies and statutes regarding the intrinsically beneficial and risky pharmaceutical industry.