


Spring 2006

# Harvard Law

*bulletin*



*Harvard  
lawyers  
in the  
THIRD  
BRANCH*



*An  
international  
justice:  
NAVI  
PILLAY*



## **TAKING THE BENCH**

*at home and abroad*



*The  
road  
to  
AMES*



*An  
interview  
with  
JUSTICE  
BREYER*

**ALSO** *Is intelligent design  
intelligently designed?*



"To be master of  
any branch of  
knowledge, you must  
master those which  
lie next to it."  
*Oliver Wendell  
Holmes Jr. LL.B. 1866*

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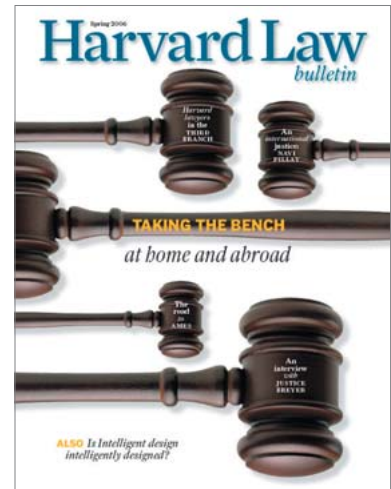
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# Views from Chambers

RECENT EVENTS have reminded us all of the importance of the judiciary in shaping legal rights and responsibilities. With the confirmation of two new Supreme Court justices during the past year—Chief Justice John G. Roberts Jr. '79 and Associate Justice Samuel A. Alito Jr.—we have debated large questions about the role of the judiciary in our society.

Such questions merit special attention here at Harvard Law School because our alumni have enjoyed unsurpassed success in the judicial arena—everywhere from the U.S. Supreme Court to state and local benches to courts in other countries.

As you probably know, five of the nine Supreme Court justices graduated from HLS (with a sixth attending the school), and in this issue of the Bulletin you will get a rare glimpse into the mind of one of these eminent alumni: Associate Justice Stephen G. Breyer '64. Justice Breyer's recent book, "Active Liberty: Interpreting Our Democratic Constitution," is an important contribution to legal scholarship and to the practice of judging, and I'm deeply grateful for his willingness to share his thoughts with us here.



Of course, before any justice can be confirmed, we have the spectacle of hearings. As cameras closed in on the nominees, HLS faculty members and alumni played central roles in the confirmation process. Two alums sat on the Senate Judiciary Committee, while faculty members testified and advised from the sidelines. Not surprisingly, Harvard Law School being what it is, we saw a vibrant range of viewpoints.

One thing's for sure: The life of a judge is not dull. Variety of work, intellectual stimulation, sense of purpose, and flexibility are some of the job's key benefits, according to interviews with alumni judges. (On the downside, they sometimes struggle with crushing caseloads and miss the camaraderie they enjoyed as practicing lawyers.) I hope you enjoy their stories.

Meanwhile, here in Cambridge, we're exploring new and exciting ways to prepare the next generation of judges—and the lawyers who will appear before them. Along with the traditional Ames Moot Court competitions, the law school now of-

fers a unique seminar on Supreme Court advocacy taught by name partners of a top Supreme Court litigation boutique. Another innovation—this one organized by students—is a series of moot courts for litigators preparing to argue cases before the real Supreme Court. Students also work closely with faculty preparing briefs in major cases.

Looking farther afield, HLS alumni can be found on courts around the world. One prominent example is Navi Pillay LL.M. '82 S.J.D. '88, one of 18 judges elected to the International Criminal Court at The Hague, the first permanent independent court established to address crimes against humanity. Such work has special resonance this year with the 60th anniversary of the Nuremberg Trials, commemorated at HLS with several special events, including a remarkable conference organized by Professor Martha Minow.

Also in this issue, you will read about the many HLS students who have contributed in connection with Hurricane Katrina—traveling to the Gulf Coast for pro bono projects, fundraising and welcoming the 25 displaced New Orleans law students who studied at HLS this fall. They make us all proud.

On a sad note, we also pay tribute here to two extraordinary faculty members who passed away recently: Professors David Westfall '50 and Arthur von Mehren '45. They contributed mightily to Harvard Law School and will be greatly missed.

It's impossible to overstate the role judges can play in upholding the rule of law and assuring that our legal systems are fair and unbiased. I'm gratified that so many HLS alums are thriving in this arena—and have no doubt that many of today's students will soon follow in their footsteps.

A handwritten signature in dark ink, appearing to read "Shira Auerbach". The signature is fluid and cursive, written in a professional style.

**“We would be naive to think, as the article suggests, that what stands in the way of peace is simply a better negotiation process.”**

—William Choslovsky '94

**PALESTINIANS AREN'T READY FOR NEGOTIATION**

I HAVE LIVED in Israel for the past 42 years—through three wars, two intifadas and repeated cycles of terror. The notion that the Israeli-Palestinian conflict can soon be resolved by negotiation (“Mission Impossible?” Fall 2005) is a naive and hopeless dream.

First, negotiation presupposes two responsible opposing entities. The Palestinians lack both entity and responsibility. There [has been] no dominant central authority—only a weak facsimile whose power base [was] shared by a conglomeration of independent armed gangs accountable to nobody.

Second, negotiation contemplates give-and-take on both sides. Realistically, Israeli-Palestinian negotiation would simply be a matter of how much Israel will continue to give and concede. Cessation of terror and murder is not a legitimate bargaining chip.

Third, if past experience is an indication, any resulting agreement will in any event not be worth the paper it is written on.

A prerequisite for successful negotiation is the reformation of the Palestinian psyche. This is the product of decades of indoctrination with a view

toward one goal—the elimination of the Jewish state and the concomitant justification of the deliberate and indiscriminate slaughter of innocent men, women and children.

If such indoctrination can somehow be reversed and the present and intense level of hatred replaced by a measure of understanding and compassion, perhaps in a generation or two the Palestinians will be ready for negotiation.

S. EZRA AUSTERN '42  
*Kiryat Sefer, Israel*

**GAZA WITHDRAWAL A SLEIGHT OF HAND**

PROFESSOR MNOOKIN MISREADS the motives and consequences of Ariel Sharon's withdrawal from the Gaza (“Mission Impossible?”). By abandoning territory he cannot hope to keep without major casualties to the Israeli Army, he diverted the world's attention from the massive construction of settlements and access roads in the West Bank. No one who has seen, as I did in November, the continued, accelerated construction of massive, new, illegal Israeli settlements on the Palestinian land in the West Bank can believe that Sharon or the Israeli government has any intention of forcing these new settlers to quit the new settlements with an easy commute to Jerusalem. Until you travel [these roads] and see the settlements they link together, you cannot understand the master plan which Sharon is implementing.

While American leaders in the administration and elsewhere applaud Sharon's self-sacrifice in leaving Gaza, they fail to recognize that his real objectives were to control and never surren-

der Jerusalem, the fertile parts of the West Bank and the water of the Sea of Galilee. All of this is non-negotiable.

JOHN H. MCGUCKIN JR. '71  
*San Francisco*

**TERRORISM NEVER MENTIONED**

DICK DAHL'S ARTICLE in the fall issue, “Mission Impossible?” describes how members of the HLS Program on Negotiation seek to apply their negotiating skills to the Israeli-Arab conflict. According to the article, the program participants emphasize “empathy” and the desire to “get a deep sense of what drives the people who are involved.” The article then devotes more than a page to discussing Israeli settlements and their political context. But the lengthy article does not mention terrorism even once. Nor does it mention the terrorist organizations Hamas, Islamic Jihad or Al-Aqsa Brigades, all of which openly call for Israel's destruction. Nor does the article mention democracy or suggest the desirability of creating a Palestinian government that might respect the human rights of its own people, never mind its neighbors. “Empathy” and a “deep sense of what drives people” are exactly what are missing from the article and, apparently, from Harvard's would-be Middle East negotiators.

MARK SHERE '88  
*Indianapolis*

**DO PALESTINIANS REALLY WANT PEACE?**

THE ARTICLE ON Professor Mnookin's ambitious effort at tackling the Israeli-



**WE WANT TO HEAR FROM YOU**  
The Harvard Law Bulletin welcomes letters on its contents. Please write to the Harvard Law Bulletin, 125 Mount Auburn St., Cambridge, MA 02138. Fax comments to 617-495-3501 or e-mail the Bulletin at bulletin@law.harvard.edu. Letters may be edited for length and clarity.

Palestinian conflict through negotiation left me with mixed emotions. Of course, negotiation often works and is a preferred dispute resolution tool. Its efficacy as a discipline has been validated through the years.

Just the same, we would be naive to think, as the article suggests, that what stands in the way of peace is simply a better negotiation *process* for the parties. We have 57 years of history since Israel's founding—and more before that—to tell us otherwise.

It does not take a Harvard-trained negotiator to understand that perhaps the most important element of any negotiation is sincerity. Both sides have to sincerely want to reach agreement.

Unfortunately, the politically incorrect truth is that as judged by actions—not sound bites—the Palestinians have lacked sincerity for 57 years. When Israel was founded it said “yes” to a two-state solution, while the Arab world responded “no Jews,” and launched the first of several wars to destroy Israel. Unfortunately, except for some posturing, little has changed since. Demanding a “right of return” is just a more polite euphemism for the old “no Jews,” which was arguably more direct and sincere.

#### CORRECTION

The fall issue of the *Bulletin* misquoted Professor David Shapiro '57 in a story that touched on an amicus brief he co-wrote and submitted to the U.S. Supreme Court in *Gonzales v. Raich*, challenging the federal government's prosecution of the use of home-grown marijuana for medical purposes. Shapiro was quoted as saying: “We persuaded two judges, but that was two less than what we needed.” It should have read “... three less than what we needed.” We regret the error.



All said, negotiation can be a wonderful aid to help solve many disputes, but to work, it must be premised on sincerity, which even the most seasoned facilitator like Mnookin cannot mandate.

WILLIAM CHOSLOVSKY '94  
*Chicago*

#### EARLIER PIONEERS

IN YOUR INFORMATIVE article on the Negotiation Program, “Online and on the Road” (Fall 2005), you refer to the “pioneering work of Harvard faculty giants.” I agree that they are giants, but their work on negotiation was preceded by important scholarship and teaching by others unmentioned and now not so famous.

In 1953, Robert Matthew of Ohio State Law School published his article, “Negotiation: A Pedagogical Challenge,” 6 *Journal of Legal Education* 93. In 1967, James J. White published an article reporting on a seminar on negotiation which he taught at the University of Michigan, “The Lawyer as a Negotiator: An Adventure in Understanding and Teaching the Art of Negotiation,” 19 *Journal of Legal Education* 337. In 1967 at the University of Washington, Robert Fletcher and I taught a course on negotiation on an experimental basis, which we reported in an article, “A Course on the Subject of Negotiation,” 21 *Journal of Legal Education* 196 (1968). I continued to teach the course at the University of Washington, at Stanford University Law School as a

visitor in 1979-80 and as a visitor at the University of Iowa Law School in the fall of 1982.

I have written this letter because I believe that those who undertook to bring negotiation

into law school education earlier than those highlighted by the *Harvard Law Bulletin* also deserve some credit and recognition for their work, which preceded that of the “pioneers.”

CORNELIUS J. PECK '49  
*Seattle*

#### MISSING STORY

I WAS DISTRESSED that the *Bulletin's* note listing the Harvard-educated jurists who have been justices of the Supreme Court (Gallery, Fall 2005) failed to refer to Joseph Story of the Harvard College class of 1798. He was not a law school graduate because the law school was not established until 1817, by which time Justice Story had been a member of the Supreme Court bench for six years.

While an associate justice, he became the first Dane Professor at the school and wrote the most important and influential legal textbooks of the era. He died in 1845.

If a degree recipient from Columbia was to be included in the list, certainly Justice Story, a Harvard-educated law school professor and Supreme Court judge for over 30 years, should have been added. After all, the entrance to Langdell Hall has been guarded by his statue for generations.

GEORGE MINKIN '44 ('47) LL.M. '48  
*New York City*

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# All in the game

IMAGINE A GAME in which two people—strangers—are told they will be given \$100 to share, and that one of them will have the power to decide how much to offer the other.

But the game isn't quite the take-it-or-leave-it situation it first appears to be. The rules give the recipient the power to reject the offer, in which case neither player will get anything.

Now come the decisions that make it a game of calculated guesses. How generous an offer will it take to secure the recipient's acceptance? What consequences should the two players weigh, especially if they are told that their decisions will not be known by others, and that their paths will not cross again—in other words, that reputation and fear of retribution are not to be considered? How will they perceive their self-interest, and act accordingly?

Economists will recognize this as the Ultimatum Game, a widely taught experiment that is now also studied by nearly 100 Harvard Law School students in a course titled Rationality, offered jointly in the fall by HLS Professor Christine Jolls '93 and Faculty of Arts and Sciences Professor Amartya

Professor Christine Jolls and Professor Amartya Sen use the Ultimatum Game to teach law students about the design of legal rules. Below left: Sen, the 1998 Nobel laureate in economics

Sen, the 1998 Nobel laureate in economics.

The Ultimatum Game and several others derived from it are thought to shed light on the rationality—and irrationality—of human decision-making. Some economists might say that the most “rational” expectation is that the offeror will tender the smallest possible amount and the recipient will accept it (on the premise that something is better than nothing). Wrong.

The experimental evidence is that the offer is often quite generous—even as much as a 50-50 split. Even more surprisingly, perhaps, the recipient frequently rejects anything less, a response widely interpreted as a willingness to pay a price to punish unfair splits. One lesson: People do not act solely to maximize their economic gain. Selfishness is not always what motivates people in a free-market economy. Students in the class are asked to ponder: What is “rational”? How is self-interest to be defined?

These questions are important for law, say Jolls and Sen, because the design and implementation of legal rules are ultimately about predicting and regulating how people will behave.

“It is common to understand legal rules against a background assumption that people will always act rationally in response to them,” Jolls says. “How



and when we regulate can be informed and improved by an understanding of the likely behavior of those who are regulated.”

Furthermore, she says, “we tend to think that the law should protect people from selfish or advantage-taking behavior by others. But one of the things we learn from games such as the Ultimatum Game is that people's choices are not always well-predicted by traditional economic theory, and the consequences of people's ‘wrong’ choices are not always bad, and in fact things can turn out quite well.”

“Sometimes, this gets at the fundamental question of whether and when a particular law may really be needed.”\*

— Robb London '86



## Former solicitor general puts Alito memos in context

JUDGE SAMUEL A. ALITO JR.'S opponents have seized upon two memorandums he wrote when he was a junior lawyer in the office of the solicitor general. ...

"Determined to fit the man to the Scalito caricature with which they hope to defeat his nomination to the Supreme Court, Judge Alito's detractors ignore the context and the content of both documents. ...

"What is remarkable ... is that Judge Alito recommended against taking the position that more senior, politically appointed officials were urging the solicitor general to take before the court. In the abortion case, not only the head of the civil division but also other high-ranking officials were urging that I, as the solicitor general at the time, ask the court to overturn *Roe v. Wade*. The bottom line of Judge Alito's memo was that I should not do that.



"Judge Alito did note that the lower courts' decisions in *Thornburgh* were highly irregular on technical, procedural grounds (a position with which Justice Sandra Day O'Connor agreed, in her dissent when *Thornburgh* reached the Supreme Court), and that *Roe* might well be modified—as it has been—in less radical ways over the years. ...

"I did not follow Judge Alito's advice and instead asked that *Roe* be reconsidered and overturned because I thought the administration had the right to have its position put before the Supreme Court in a forthright but professionally correct way. Judge Alito in his memo correctly predicted that the court would react with hostility to the administration's argument."

**PROFESSOR CHARLES FRIED**, *The New York Times*, Jan. 3, 2006.

## Balancing act

SOME DEMOCRATIC MEMBERS of the Senate Judiciary Committee have argued that Judge Samuel A. Alito's nomination to succeed Justice Sandra Day O'Connor merits more thorough scrutiny, if not outright rejection, because it would disturb the 'balance of the court.' ...

"As a matter of principle, to suggest that presidents should select nominees who will leave the court's ideological composition intact implies that the court's jurisprudence is always precisely where it should be—that nothing can ever be gained from a change in the perspective, experience or philosophy of any justice. Even more troubling still, the baseline for assessing 'balance' at any given moment is almost entirely arbitrary. If today's balance differs from that of an earlier court, presumably past presidents and Senates already violated the balance principle when they selected and confirmed the members of the court that we now seek to preserve."

**PROFESSOR JOHN MANNING '85**, *The New York Times*, Nov. 10, 2005.

To suggest that presidents should select nominees who will leave the court's ideological composition intact implies that the court's jurisprudence is always ... where it should be.



## CONSERVATIVE HYPOCRISY

[C]ONSERVATIVES ARE more or less devoted to a legal system and a policy-making approach that assume situational influence is, in the vast majority of circumstances, trivial and irrelevant. Get the government out of our lives so that we can be 'free to choose,' the argument goes. Unchain markets so that people can pursue their own ends as they see fit. ...

"But ... the right does sometimes underscore the importance of situation. According to the conservative narrative, the situational force that is most harmful and significant is that of the 'intellectual class' and the institutions where its ideas are developed, employed and advanced. ...

"Hence, the same individuals who are eager to point out how Supreme



Court justices are vulnerable to situational manipulation—who suggest that our country is being destroyed because of the powerful influence of liberal elites over our culture and, in turn, our culture over us—are otherwise adamant in denying the role of situation in the lives of consumers, workers, voters, parents, criminals and any justices who happen to be strict constructionists."

**PROFESSOR JON HANSON AND ADAM BENFORADO '05**, *The Baltimore Sun*, Dec. 12, 2005.



## What's wrong with the Court citing foreign law?

THE PROBLEM IS not reference to foreign law: It is how foreign law is used by judges who usurp powers reserved under the Constitution to the people and their elected representatives. ...

“Take *Lawrence v. Texas*, the decision striking down criminal penalties for homosexual sodomy, where Justice Kennedy, joined by Justice Breyer, wrote, ‘The right petitioners seek ... has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.’ The



remarkable implication is that it is up to our legislatures to justify a different view of human rights from that accepted elsewhere. This gives short shrift to the fundamental right of Americans to have a say in setting the conditions under which they live—the right that is at the very heart of our unique democratic experiment. Contrast the responsible use made of foreign law by Chief Justice William Rehnquist in *Washington v. Glucksberg*, to support Washington state’s legislative prohibition of assisted suicide in an opinion noting that in ‘almost every state—indeed, in almost every western democracy—it is a crime to assist a suicide.’

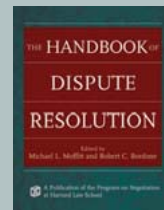
“The importance of the distinction between these two modes of use cannot be exaggerated. It is not only a question of respecting the separation of powers. Those who believe the Washington legislature got it wrong can work to change the law through the ordinary democratic processes of persuasion and voting. But in the U.S., unlike in countries whose constitutions are easier to amend, the court’s constitutional mistakes are exceedingly hard to correct. The unhealthy ripple effects of judicial adventurism are many: Legislatures are encouraged to punt controversial issues into the courts; political energy, lacking more constructive outlets, flows into litigation and the judicial selection process.”

**PROFESSOR MARY ANN GLEN DON**, *The Wall Street Journal*, Sept. 16, 2005.

The remarkable implication is that it is up to our legislatures to justify a different view of human rights from that accepted elsewhere.

## Recent Faculty Books

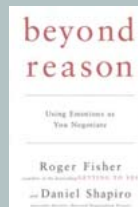
“The Handbook of Dispute Resolution” (Jossey-Bass, 2005), co-edited by **Lecturer Robert C. Bordone ’97** and Michael L. Moffit ’94, synthesizes more than 30 years of research in 31 chapters written specifically for this collection, each examining an aspect of conflict resolution. The contributors explore how factors such as personality, emotions, relationship dynamics and concerns about identity contribute to the escalation of disputes. The National Institute for Advanced Conflict Resolution recognized the volume with its 2005 Book Award, for showing the best promise of contributing to the field of conflict resolution.



In “Preemption: A Knife That Cuts Both Ways” (W. W. Norton, 2006), **Professor Alan M. Dershowitz** examines America’s increasing reliance on pre-emptive action to control destructive conduct, and discusses the implications for civil liberties, human rights, criminal justice, national security and foreign policy.



“Beyond Reason: Using Emotions as You Negotiate” (Viking, 2005), by **Professor Emeritus Roger Fisher ’48** and **Lecturer Daniel L. Shapiro**, helps readers understand how emotions can serve as a tool in the negotiating process. The book was awarded a prize by the International Institute for Conflict Prevention and Resolution.



In “Protecting Liberty in an Age of Terror” (MIT Press, 2005), **Professor Philip B. Heymann ’60** and Juliette N. Kayyem ’95 scrutinize the compelling concerns of national security and democratic freedoms and offer recommendations for dealing with questions such as whether assassination is ever acceptable, when coercion can be used in interrogation and when detention is allowable. They argue that drawing clear rules to curb government discretion can protect the public from unreasonable government intrusion and insulate government agents from becoming scapegoats.



## Student Snapshot

After Katrina struck, HLS students like Jeff Jamison '06 sought ways to help.

*HLS contributes to flood relief*

# The Katrina Connection

AFTER HURRICANE KATRINA hit the Gulf Coast, many HLS students felt helpless watching news accounts of the unfolding devastation while beginning fall classes. The law school had posted links for the university's matching donations program and announced plans to host 25 law students from Tulane and Loyola tuition-free. But HLS stu-

dents sought their own ways to donate their time and talents.

Through the combined efforts of student organizers, the law school community and the school's Office of Clinical and Pro Bono Programs, HLS raised almost \$70,000 and sent more than 30 students to the Gulf Coast in January to do pro bono legal work and

participate in relief efforts.

Devika Kornbacher '06, from Baton Rouge, La., who had been evacuated before the storm, said she was surprised by how quickly student groups at HLS and other parts of Harvard jumped into action.

"Some of the organizations didn't have direct ties to the people who were affected, yet still they were throwing jazz fundraisers and collecting clothes," said Kornbacher.

Within days of the disaster, the Black Law Students Association organized a clothing and toiletry drive. A month later, HL Central, a student group that promotes community-building, tallied up more than \$12,000 from the proceeds of its annual charity bash. The Federalist Society hosted a poker night. Competing 1L sections raised over \$20,000. The Catholic Law Students Association and HLS's Child and Youth Advocates collected over \$1,300 from the proceeds of a bake sale and the sale of cookie-grams, for a shelter



Sanetta Ponton '06 sweeping up debris in New Orleans during fly-out week



## HELPING OTHERS HELP

In the wake of Hurricane Katrina, Jeff Jamison '06 was one of many HLS students who contacted the Dean of Students Office looking for a way to contribute. It turns out helping students help was his greatest contribution. Jamison volunteered to organize student efforts.

Jamison, who says he learned his organizational and juggling skills as a litigation assistant for Professor Laurence Tribe '66 for seven years, cut back on sleep to manage the myriad tasks associated with coordinating multiple—sometimes simultaneous—fundraising events.

A class marshal who campaigned on a platform of building a cohesive community, Jamison connected groups with common goals

to maximize fundraising efforts. He was instrumental in getting students involved and is now part of a leader-

ship consortium of the Student Hurricane Network, a national movement which matches law students to pro

bono opportunities in affected areas.

Jamison and his wife, Alisa—who were married in New Orleans in 2004—would have wanted to go there during winter break to help. But the couple had to stay close to home for the birth of their first child.

Jamison said he now sees the school in a different way: “You don’t often make connections with each other here unless you’re in the same section or the same class or the same student organization.”

He added, “To see a group effort on this level, that crossed over student groups and different organizations, has made me feel amazing about this school, and I already felt great about it.”  
—C.P.

### ... and counting

**\$67,891** was raised by the law school community.

**25** law students from Tulane and Loyola were hosted tuition-free.

**10** HLS students went to New Orleans and Alabama during fly-out week in October to participate in relief work.

**8** HLS students worked on housing, FEMA and race discrimination issues in New Orleans and Biloxi, Miss., over January term.

**25** HLS students provided humanitarian aid and pro bono legal work in areas affected by Katrina, during the last week of January.

for abused children in Mississippi.

“A lot of the relief efforts were focused on things like the Red Cross, which are very important. But sometimes people like to give money when they can directly see where the money is going,” said Caroline Rothert '08, who knew of the shelter from her previous work in child youth advocacy.

During fly-out week in late October, while some students interviewed at law firms, a group from the Black Law Students Association organized a trip to New Orleans and Alabama to help with cleanup and rebuilding efforts.

“We were talking about feeling helpless and not knowing what to do,” said Sanetta Ponton '06, who helped plan the trip. “Because we’re students, financially we can’t give so much, and we were almost feeling as if being in law school wasn’t enough, that there was urgent work that needed to be done.”

The group of 10 3Ls spent the week distributing food, tearing down walls in people’s homes in New Orleans

and rebuilding a church in Alabama, thanks to a \$5,000 donation from the Dean’s Office and the BLSA. Ponton said it was wonderful to see the university support the things students feel are important.

Over winter break, HLS students participated in on-campus research projects and went to the Gulf Coast, with travel expenses paid for by the school’s pro bono office. Seven students spent three weeks working for the Lawyers’ Committee for Civil Rights Under Law. They included Ponton, who was in Washington, D.C., investigating racial discrimination allegations following Katrina, and Karl Baker, a 2L who is pursuing a master’s in city planning from Massachusetts Institute

of Technology, and who was involved in a community land trust project in Gulfport, Miss.

“Katrina has dissipated in the minds of a lot of people, but not really for me. It’s something I think about every day,” said Baker, who attended Tulane University and lived in New Orleans for six years. “If you’ve been down there and seen it, it’s not something you can brush aside.” \* —Christine Perkins



Students provided legal assistance in New Orleans in January.





William Stuntz is an evangelical Christian who has written widely about law and religion.

Is the case for intelligent design  
**designed  
intelligently?**

*No, says a leading scholar,  
and here's why*

SEVERAL SCHOOL BOARDS have recently mandated that science curricula include the teaching of intelligent design—the theory that all advanced life forms are so complex that they must have been designed by an intelligent force. In December 2005, a federal judge in Pennsylvania ruled that intelligent design is not science and that teaching it in public school science classrooms would violate the constitutional separation of church and state. But other cases are expected. The *Bulletin* asked Professor William Stuntz, an evangelical Christian who has written widely about law and religion: Is this a debate that proponents of intelligent design can win?

NO, BECAUSE THE proponents are too invested in the bottom line. You don't win scientific debates by arguing like lawyers; you win them by arguing like scientists. But my friends in the evangelical Christian community tend to argue like lawyers: They start with the bottom line and look for reasons to support it, just as a lawyer starts with the conclusion that most benefits her client and looks for arguments to support that conclusion. The only way to win a scientific debate is to play by the scientists' rules—start with premises and reason forward to conclusions. And the only way to do that credibly is to make clear at the outset that you're not committed to *any* conclusion, that you haven't already embraced a bottom line. Religious believers have already failed that test, which is why this debate will end up looking to most people like the debate over evolution in the 1920s. Nonbelievers think that believers are strategic, that we will embrace any argument that works to our benefit. To a large degree, they're right. Unless and until that changes, religious believers won't have any credibility with the secular academic world. We don't deserve to have credibility if we're not honestly engaged in truth-seeking.

And it isn't a defense to say that the other side isn't playing by those rules. Darwinism is a scientific theory, but it has also come to embody a set of ideological commitments, and those commitments deserve to be challenged. All true. But the price of admission to this debate, the hurdle any challenger must overcome in order to be taken seriously, is an absolute, unqualified commitment to truth-seeking. Once you say you're certain how the question comes out, you've given away the argument. Almost everyone on the intelligent design side of this debate has done just that. \*

# Thinking about teaching law?

Harvard Law School can help you get on the teaching track

This spring, HLS is offering a free, daylong workshop for alumni interested in embarking on law teaching careers. Directed by Professor Jack Goldsmith (with additional faculty participation), it will provide guidance on a range of topics, including the selection of scholarly and teaching fields, lining up recommenders, academic writing and an introduction to the academic market.

The session will be held Monday, May 22, 2006, from 9 a.m. to 3 p.m. on the law school campus. Alumni interested in attending should contact Sarah Gordon at [sgordon@law.harvard.edu](mailto:sgordon@law.harvard.edu) or 617-495-4601 by May 1.





# TAKING THE BENCH

AN ASSOCIATED PRESS article last summer said it this way: “Some schools just have a knack for particular kinds of fame: Notre Dame has produced 400 football players who went on to the pros. Point Loma High School in California graduated two pitchers who threw perfect games for the New York Yankees.”

And Harvard Law School, said the AP, has produced more judges than any other law school.

Six of the nine justices who currently sit on the U.S. Supreme Court went to HLS. (Justice Ruth Bader Ginsburg attended the school for two years but took her degree at Columbia.) In all, 19 justices—including Holmes, Brandeis, Frankfurter and Brennan—studied law at Harvard. HLS alumni account for 127 of the 866 federal district and appellate judgeships nationwide, and show up in similar numbers on state, local and foreign benches.

In the stories that follow, this magazine focuses on the working lives of judges.

There is no course called “Judging 101” in the HLS course catalog. Rather, the law school is a place where seeds are planted, where future judges discover a passion for something—or a small but unforgettable idea—that looms larger over the years and sets them on the path to judge’s work.

It is also a place they turn to later, for help.

Justice Stephen Breyer ’64 can trace a direct line from the Agency class he took at HLS to a public service career that led him to the highest court in the land. Judge Navi Pillay LL.M. ’82 S.J.D. ’88, who today sits on the International Criminal Court, found the freedom at HLS to delve into ideas of justice that she wasn’t free to explore under apartheid in her native South Africa.

Before Chief Justice John G. Roberts Jr. ’79 and Justice Samuel Alito Jr. were confirmed by the Senate, HLS faculty and alumni helped prepare them for the hearings on their nominations. U.S. senators getting ready for those hearings also turned to the law school for advice.

All wrestled—and continue to wrestle—with the same questions that face judges every day, as the following pages make clear: How should law be interpreted and applied in changing times? What are the qualities and values we should expect to remain constant in a judge?

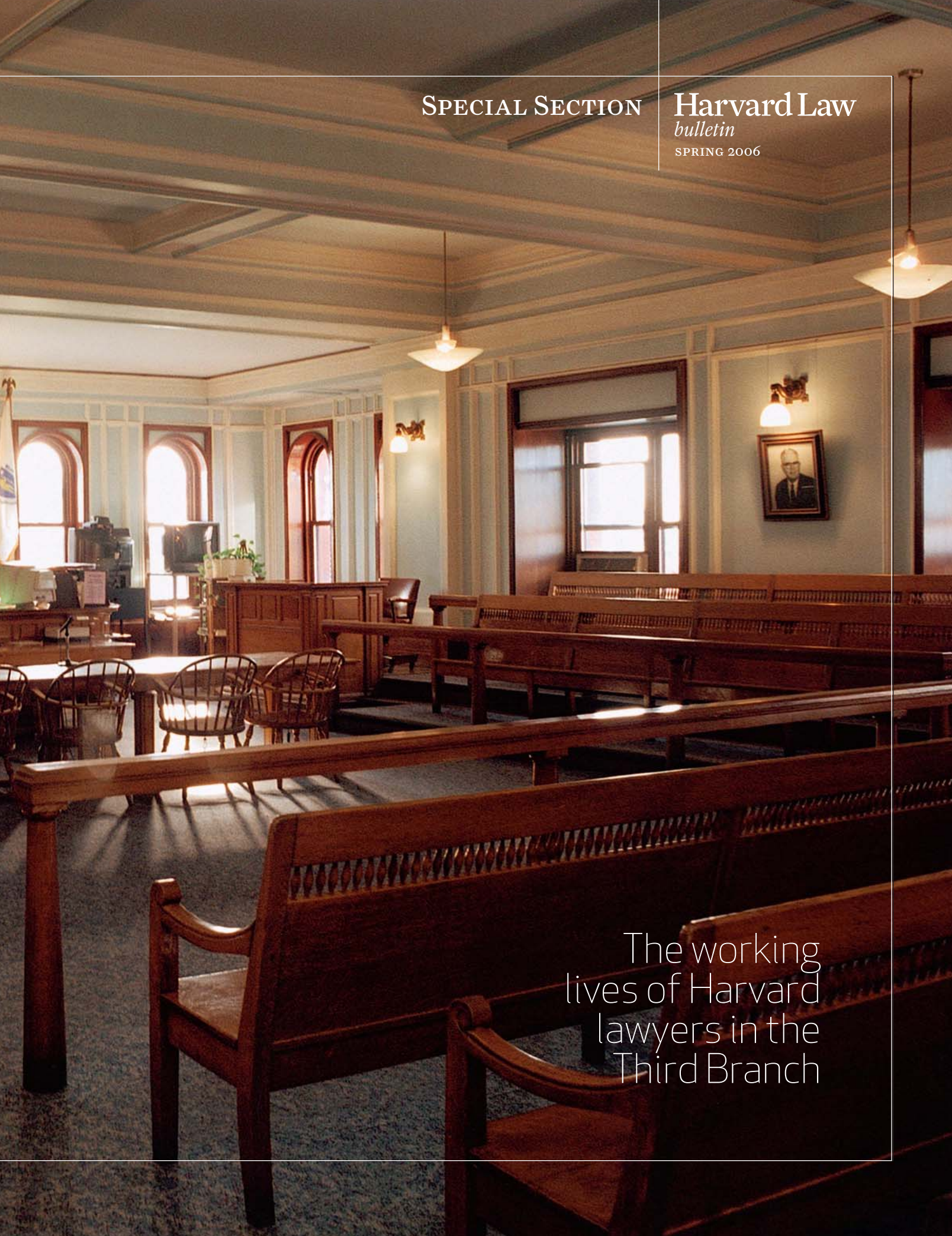




SPECIAL SECTION

Harvard Law  
*bulletin*  
SPRING 2006

The working  
lives of Harvard  
lawyers in the  
Third Branch



Photographs by Andrea Artz

toward

“active  
liberty”

**Stephen G. Breyer '64** has served as an associate justice of the United States Supreme Court since 1994.

Recently, he welcomed Robb London '86, editor of the *Bulletin*, and Michael Armini, HLS director of communications, into his chambers. After serving tea and throwing logs into a fireplace near Felix Frankfurter's chair, Breyer discussed a range of issues, and also his new book, "Active Liberty: Interpreting Our Democratic Constitution," in which he argues that judges should pay more attention to the framers' purpose of maximizing citizen participation in the democratic process, and criticizes the "originalist" view of constitutional interpretation.

**Q: Is there a typical day in the life of an associate justice of the Supreme Court?**

**A:** The working life of the Supreme Court justice is reading briefs and writing opinions. So a lot of it is spent here at the desk, with my word processor. I usually say to students what I told my son when he was growing up: If you do homework very well, you will get a job where you can do homework the rest of your life.

We hear about 80 cases [each year] culled from close to 8,000 applications. Our standard for hearing a case is whether there is a need for a uniform rule of federal law. And there's most likely to be that need if the lower courts come to different conclusions on the same question of federal law. If they all come to the same conclusion, there is less likely to be a need for us. Justice Jackson said once that we're not final because we are infallible, we are infallible because we are final.





*A Supreme Court  
justice offers a view  
from the top*

**IN CHAMBERS:** Stephen G. Breyer '64, Jan. 12, 2006



So we're there when other parts of the system come to different conclusions. Now, that isn't 100 percent of our criteria, but it is the main one. So out of those 8,000 cases—that's about 150 a week—the law clerks in the building will write memos. There are about

30 law clerks, and they each write about five memos. And I'll get a long stack, and I go through them to figure out what the issue is, primarily. Then almost every week we have a conference, and we will discuss those cases that any one of us wants discussed. And if

there are four votes to grant the petition for a hearing, it's granted. We can consider the same petition two or three times, if anyone wants to reconsider it. I talk to my law clerks quite a lot.

And the other part is hearing the cases, which is, as I say, reading large sets of briefs and listening to an hour's worth of oral argument. And oral arguments are held in seven sessions across the year, and we're all prepared—we've read the briefs, we've had our law clerks write memos, we've had a couple of discussions with our clerks. And then the nine of us are there, and the lawyers basically answer our questions for an hour. And that's not an easy thing for a lawyer.

Then we have conference. When we conference the cases each week, we all are in the conference room by ourselves. And we go around the table in order.

The secret to the conference is, people say what they really think. They're giving their true reasons for deciding a case this way or that way. And as long as it's a very honest discussion, which it is, and people are talking about the reasons that are important to them, it's possible for it to be productive. As soon as it becomes a debate, it's not productive, because anyone can think of some argument that he thinks is better than somebody else's argument. What is going to help is listening to the other person and trying to see what is of interest and concern to that other person, and then responding, appropriately.

So there is discussion. We have a tentative vote. And as a result of that vote, the opinion will be assigned to one of us. And then we start drafting. That's why I say it's reading, it's writing. And that's where my law clerks will do a long memo or a draft. I will then take the briefs, read them and write my own draft. Then the law clerk will redo it. Usually I have to write my own draft from scratch, basically two or three times. And then we go back and forth and the drafts circulate, and I hope they join. If I get five votes, that's the majority. People can write dissents or concurrences. When everybody's finished writing or joining, the case comes down.



**STEPHEN G. BREYER** was born and raised in California and attended Lowell High School in the San Francisco Bay area, where he competed in debating tournaments. He received his A.B. from Stanford in 1959 and studied economics and philosophy at Oxford University on a Marshall Scholarship.

After graduating from Harvard Law School, where he was articles editor of the Law Review, he clerked for Justice Arthur Goldberg during the Supreme Court's 1964-65 term, helping Goldberg write his opinion in *Griswold v. Connecticut*, the landmark right-to-privacy case. Following a stint in the Justice Department's antitrust division, he joined the faculty of HLS, where he taught full time from 1967 to 1980, with interruptions for public service. He was an assistant to Watergate special prosecutor Archibald Cox '37 and later chief counsel to the Senate Judiciary Committee.

In 1980, President Carter appointed Breyer to a seat on the United States Court of Appeals for the 1st Circuit, where he served—including four years as chief judge—until President Clinton elevated him to the Supreme Court in 1994.

**Q: How often do you go into oral argument genuinely uncertain about which way you're going to go?**

**A:** You're rarely uncertain. As soon as I read a question, I have a view. But the fact is, at the earlier stages of the case, although I have a view, I'm very open to changing my mind. Over time you become less and less willing to change your mind. For example, the old joke is that you read the petitioner's brief, you say they're right. You read the respondent's brief, you say they're right. Then somebody says they can't both be right, and you say, "You're right."

So I go into oral argument almost always with a view. But quite often I'll change it. How often? Maybe 15 or 20 percent of the time. But more often than actually changing the outcome, it might change what I think is important, how to characterize it, what the arguments are. And sometimes, really, it will be radically different.

**Q: Is your new book, "Active Liberty," a deliberate rejoinder to Justice Scalia's ["A Matter of Interpretation: Federal Courts and the Law" (1997)]?**

**A:** No, it's not a deliberate rejoinder. It is what I wanted to do as a judge. I've been a judge for 25 years. And I've been a judge on this Court for 11 years. And people sometimes want to know—I myself wanted to know—how is being a judge on this Court different from being an appeals court judge? Being an appeals court judge is totally different from being a trial court judge. They're simply different jobs. And is the Supreme Court different again? I think it is, in a way. But the difference arises out of the fact that, unlike an appeals court, we have a steady diet of constitutional cases.

And then I think it inevitably forces a judge on this Court to try to see the Constitution as a whole. What does that mean? That you begin to take a view of it. And of course, I was curious if I could put down on paper what had been emerging as a view of the Constitution that I think informs my opinions. I'm interested in that, because I'd like to be reasonably consistent. I don't know if I'm being consistent. I'm deciding each case as it comes along.

I was interested to go back, to see what I thought about the Constitution as a whole. And it does turn out to be a different view than Justice Scalia had. And I tried to put some of that down in this book. Many people have held similar views—but it's an effort to put down on paper something of what I'd call a more traditional view of the Constitution. And if you are an originalist, that's inconsistent with the way I see the job of interpreting the Constitution, and in this book I discuss that.

The [book] is not directly aimed at *(continues)*

## On the Potomac, a crimson tide

In confirmation hearings,  
Harvard lawyers are everywhere

BY SETH STERN '01

Senators on both sides of the Judiciary Committee turned to HLS professors when Chief Justice John G. Roberts Jr. '79 and Associate Justice Samuel A. Alito Jr. were up for confirmation.

Charles Fried and Laurence H. Tribe '66 sat side by side at the witness table, though they reached opposite conclusions while testifying at Alito's confirmation hearings Jan. 13.

Tribe warned that Alito would reduce to "a hollow shell" the *Roe v. Wade* decision establishing a right to abortion, while Fried predicted Alito would uphold it.

Fried also testified on behalf of Roberts during his confirmation hearing last September. Tribe had last appeared at Supreme Court confirmation hearings in 1987, helping to lead the fight against Robert H. Bork's nomination and later testifying at the hearing for Anthony M. Kennedy '61.

Fried says his newspaper opinion pieces on behalf of Alito, which appeared before the hearings started, probably made more of an impact than anything he said to senators. "I hope they added to his sense of comfort," Fried said of Alito, who was his subordinate for a year in the Solicitor General's Office.

Fried and Tribe were hardly the only participants in the hearing room with a Harvard Law connection. Assistant Attorney General Rachel Brand '98 helped both nominees prepare for the hearings and sat behind them throughout their testimonies.

And two alumni, Sens. Charles E. Schumer '74 of New York and Russell Feingold '79 of Wisconsin, sat on the other side of the dais as members of the Judiciary Committee.

Three other Harvard Law professors, John Manning '85, Heather Gerken and David Barron '94 served as advisers.

Manning participated in mock hearings for both Roberts and Alito, mooted the two nominees.

Barron discussed constitutional questions with two Democratic senators prior to Roberts' confirmation hearings. He briefed Schumer in his Washington office and Edward M. Kennedy at his Hyannisport, Mass., home. Gerken was consulted by Kennedy prior to the Roberts hearings.

"What they're trying to do is just get a sense from people who follow constitutional law what are areas of importance to follow and how to elicit a meaningful response," Barron said.

Barron added he wasn't sure how much of his advice either senator took. But Schumer apparently liked it well enough to ask for a conference call with Barron prior to Alito's hearings.

After testifying at two hearings in less than five months, Fried had some advice for future witnesses. "As little attention as senators do or do not pay, they pay no attention when you're reading a statement," Fried said. "You should try to provoke questions, since they're more likely to listen if you're answering their own questions." \*

*Seth Stern '01 is a legal affairs reporter at Congressional Quarterly in Washington, D.C.*

anyone. If there's a direct aim, it's to try to explain to people who aren't judges and some who aren't even lawyers, but certainly to law students, that from my perspective as a judge of this Court, the document that we interpret, the Constitution, is primarily concerned with setting up a democratic form of government. Not exclusively, but primarily. And there are other important parts as well, but that's a very important part that people sometimes don't notice, because it's as obvious as the nose on your face.

I've become more and more convinced that if people don't take advantage of those democratic institutions and participate in the democratic process, the Constitution won't work very well. Because that's what it foresees: participation in the democratic process.

**Q: How are law schools doing today in terms of training tomorrow's judges?**

**A:** Well, the law schools are doing what they always did. They do it very well. [But] the law is so fractionated now. It's terribly easy now for a graduate of a law

Scott. Agency taught the notion that a lawyer is a fiduciary. A fiduciary does not get his reward in life from the amount of money that he earns. He gets it by practicing the profession for the advantage of someone else. If you see law as a path toward making a fortune, I would say that's unfortunate. That isn't the job of a lawyer. And the more that people think it is, not only is it harder to keep that general interest in the community, but the more they're in a world they find unsatisfactory.

**Q: Why is it controversial when a justice of the Supreme Court looks to foreign law for guidance?**

**A:** Well, I think it's controversial because the two cases in which that became an issue happen to be cases involving controversial subjects—the death penalty and the rights of homosexuals, gay rights.

By and large, I think it is not controversial. References to cases elsewhere are never binding. We're interpreting the American Constitution, American law. And foreign case law is there by way of reference. It

***“You don't ever become immune to or unaware of the consequence of what you're doing.”***

school [to go] directly into a firm and spend his entire life learning nothing but the latest regulations of the bank regulators. That's a pity, because it's too narrow.

The great advantage of law always was that you could be a generalist. You have to specialize, but also you could be a generalist. And in particular, it's supposed to give you enough time to participate in the life of a community. And it becomes harder to have a life that is satisfactory in terms of family, community and work. Law schools can't easily control what law firms do, but they can encourage. The forms of encouragement are many—public service scholarships, forums where they can bring up issues with people in firms, participation by law professors in professional associations, like the ABA.

So I'd say the challenge for the law schools is the same as the challenge for every one of us, and that is how to prevent specialization from turning into balkanization. Can the law schools help? Probably, but only a little.

One of the courses I took in law school that made a tremendous impression on me was Agency with Professor Louis Loss and Professor Austin Wakeman

may show support or the opposite of what you should do. It's like referring to a treatise or like referring to a professor's work. But the more it refers to the values of people abroad, the more it seems as if the object of the reference is to promote values, the more controversial it is. The more the purpose of the reference is to look at how other people solve similar problems, the less controversial it is. And that's as it should be.

Consider, for example, the question of how Israel deals with the problems of terrorism and security. Isn't that something you'd like to know? Not that it binds us, but you'd just like to know what's possible in trying to balance those different objectives.

More and more of the cases in front of us involve questions of foreign law. And we have to be able to look to others. The real obstacle is not posed by politicians. It's ignorance, when we don't know what the source is, and the lawyers who must tell us may themselves not be sufficiently familiar with the foreign sources, because when they went to law school, the professors were themselves not that interested.

We're getting more and more briefs filed by the European Union, by Japan, France, Germany. Those briefs help. *(continues)*



# "May it please the Court"

For aspiring Supreme Court advocates, some hands-on experience

BY SETH STERN '01



A student-organized moot court held at the school in February

Harvard Law students hoping to learn how to argue before the Supreme Court need go no farther than the Ames Courtroom or a winter-term classroom.

Several students have organized a series of moot courts in which litigators preparing to go in front of the Court can come to Cambridge for a dry run before a panel of professors and an audience of students. And two lawyers from the nation's most prominent boutique Supreme Court litigation firm, Goldstein & Howe, now teach a class at HLS in which students can write briefs and submit them to the Court.

Dean Elena Kagan '86 helped woo the pair, Tom Goldstein and Amy Howe, to campus to teach over the winter term. She also found the money for the student moot court project. But the impetus for the moot courts came from students themselves, including self-described "Supreme Court nerd" Warren Postman '07, who admits he enjoys listening to the high court's oral arguments online.

"We spend a lot of time reading appellate opinions, but this is kind of the more dynamic side of it before the opinion has been made," said Postman, a member of the campus chapter of the American Constitution Society.

In September, Postman and fellow ACS members organized the first in a series of moot courts this academic year, co-sponsored by the campus chapter of the Federalist Society. Their goal is to attract government and public interest litigants who can't necessarily afford the expensive moot courts that private parties often pay for during the run-up to oral argument.

The offer intrigued Oregon Senior Assistant Attorney General Robert Atkinson, who was preparing to defend his state's physician-assisted suicide law in *Gonzales v. Oregon* in early October.

Atkinson, who has done appellate work for 30 years, is hardly a novice in the courtroom. But as a rookie before the Supreme Court, he said his September appearance at

Harvard Law "was particularly useful as a confidence builder."

"Justices"—including Professor Richard Fallon—quizzed Atkinson, and a standing-room-only crowd of students got a chance afterward to ask questions of their own.

Atkinson said he wound up reworking his opening and took back questions to share with his team in the attorney general's office in Oregon.

The experience proved equally instructive for students, says Postman. "You get to see them spar back and forth. It's just fascinating to watch."

Added the Federalist Society's Jeff Harris '06, "It's a good way to emerge from the academic cocoon and see what practice actually looks like."

In February, sessions were held on *Randall v. Sorrell*, a challenge to the constitutionality of Vermont's campaign finance reform law, and on the pending challenge to redistricting in Texas. Eventually, Postman and Harris hope to give students additional ways to participate in the moot courts and help them better understand the nature of Supreme Court advocacy. They envision students playing the roles of clerks, writing bench memos for the professors who serve as justices. And, says Harris, this spring the Federalist Society will organize a panel discussion among several lawyers who specialize in Supreme Court litigation.

Students who want even more Supreme Court advocacy can enroll in the seminar offered by the husband-and-wife team of Goldstein and Howe, who teach a similar course at Stanford Law School. They offered it this winter at Harvard for the second year in a row. Goldstein has argued 16 cases before the Court.

Their method is to divide the class into teams and to assign each team an actual cert petition or brief. Last year, the Court agreed with the team that asked it to deny cert, rejecting two other student-filed cert petitions. Recently, students worked on a case on the rights of detainees at Guantanamo Bay, Cuba. Some also worked on *Sorrell*. \*

**Q: The death penalty is one place where we tend to differ with many other countries. What's it like to approach a death-penalty case?**

**A:** I didn't have any death cases at all when I was in the 1st Circuit. [Here] there are quite a few. And when one comes up just prior to an execution, we'll all consider the case, almost always. And there's a system for doing so, but although it's routine, it's never routine, because from the beginning and continuously, one is fully aware of what turns on the decision. So it's approached with caution and care.

**Q: Does it affect you on a personal level?**

**A:** These cases affect a lot of people.

My wife is a clinical psychologist. She works at Dana Farber. And she's working with children, and many of them and their parents have terrible problems. So there are people in other professions who deal with the most difficult human problems on a daily basis. And I think here, as in all those jobs, you don't ever become immune to or unaware of the consequence of what you're doing. You take the job seriously and do your best.

**Q: Quite a few states have judges who are elected. It sounds like that's not something you would support.**

**A:** No, the grave concern with the elected judge today is campaign contributions. A student of mine became chief justice of Texas. He told me he had to collect several million dollars in campaign contributions. Now, that is a debilitating influence, and at the very minimum it produces an appearance of justice for sale. It's a very, very bad thing. But ultimately it has to be up to the people of the state to decide what to do.

**Q: Of your predecessors on the bench and on this Court, whom do you admire the most and why?**

**A:** I admire different ones at different times. I admire Brandeis a lot because he'd go into things in detail. He tried to be very fair-minded. He considered laws as a series of problems aimed at trying to produce a better system that worked better for people. He was practical. And he was basically a defender of civil liberties, but with care and caution in the analysis. \*

## Keeping an eye on consequences: an excerpt from "Active Liberty"

Some lawyers, judges, and scholars ... ask judges to focus primarily upon text, upon the Framers' original expectations, narrowly conceived, and upon historical tradition. ... They fear that, once judges become accustomed to justifying legal conclusions through appeal to real-world consequences, they will too often act subjectively and undemocratically, substituting an elite's views of good policy for sound law. ...

[But] to consider consequences is not to consider simply whether the consequences of a proposed decision are good or bad, in a particular judge's opinion. Rather, [it] is to emphasize consequences related to the particular textual provision at issue. The judge must examine the consequences through the lens of the relevant constitutional value or purpose. The relevant values limit interpretive possibilities. ... [W]hen a judge candidly acknowledges that, in addition to text, history, and precedent, consequences also guide his decision-making, he is more likely to be disciplined in emphasizing ... constitutionally relevant consequences rather than allowing his own subjectively held values to be outcome determinative.

Stephen Breyer, "Active Liberty: Interpreting Our Democratic Constitution," ©2005 Alfred A. Knopf.

STEPHEN  
BREYER

ACTIVE  
LIBERTY

INTERPRETING  
OUR DEMOCRATIC  
CONSTITUTION

# Friendly fire

Amicus briefs can help a party. They can also hurt.

BY AMY GUTMAN '93

The amicus curiae—or “friend of the court”—brief has deep roots, dating back to ancient Rome. Its original purpose was fairly narrow: to guard against legal or factual error. Today, that role has broadened considerably, with amicus briefs serving a wide range of functions, from explicating technical materials to exploring issues of public interest or offering supplementary information from other countries or disciplines.

“An amicus brief can reorient the frame through which a case is understood,” said Professor David Barron '94. “Even better, it can suggest an alternate legal route, one that the court prefers to options suggested by either party.”

Flagging this alternate route is a key goal of the amicus brief filed in the U.S. Supreme Court recently by Barron and 39 other HLS professors arguing that the school is not legally required to exempt military recruiters from an evenhanded application of its antidiscrimination policy—which is at odds with the military’s “don’t ask, don’t tell” policy on homosexuality. The brief argues that HLS can exclude military recruiters from its Office of Career Services and nonetheless be in compliance with the Solomon Amendment, a 1994 law allowing the government to block federal funds to universities that restrict military recruiters’ access to students. Barron and his colleagues say that the Solomon law, properly construed, requires only that the military be given the same access to students, on the same terms, given to other employers.

The brief offers grounds quite different from those pressed by the Forum for Academic and Institutional Rights, the consortium of law schools and professors who filed the underlying constitutional challenge to the Solomon law on grounds of academic freedom and free association. The amicus brief even points out some dangers in deciding the case on constitutional grounds.

In December, when the Solomon Amendment case was heard, several justices referred to the argument of the amicus brief and suggested that it could permit the Court to avoid a constitutional ruling. In January, the scholarly journal *Green Bag* cited the HLS brief as one of the best examples of legal writing in 2005.

Professor Laurence Tribe '66, one of the contributors to the HLS brief, has participated in only a handful of amicus briefs in his long career, and only when he believed an issue was “really

important” and that the point of view or information to be offered wasn’t “otherwise fully before the court.” Amicus briefs often present challenges in terms of coordinating the various groups interested in weighing in, he notes. “There’s a diplomatic art to pulling together the people involved,” said Tribe. “And sometimes less is more. Sometimes the art is persuading people *not* to file an amicus brief.”

Professor Martha Minow, who has worked on numerous amicus briefs in federal and state courts, noted that “an amicus brief can offer the court a picture of the larger context of the issues presented—and that context can include impact on legal doctrines and judicial administration, historical trends, or social and economic effects of the decision.”

The Solomon brief is just the latest of many recent amicus filings by HLS faculty members in high-profile cases. Others have weighed in on the Supreme Court’s consideration of whether the federal government can prohibit the personal medical home use and production of marijuana (Professors Charles Fried and David Shapiro '57 said it cannot) and the Massachusetts Supreme Judicial Court’s consideration of gay marriage (Tribe filed an amicus brief arguing against a bill that would have barred gay marriage while providing for an alternate “civil union” law).

Students, too, have gotten into the game. During her first semester at HLS, Alexandra Chirinos '07 joined a student group working with the Harvard Immigration and Refugee Clinic on an amicus brief seeking protection of the family unit in asylum cases—a conclusion adopted in June by the 9th Circuit Court of Appeals.

“I felt like I was truly doing groundbreaking work and practicing activism in the truest sense of the word,” said Chirinos.

Still, for some, writing an amicus brief isn’t as satisfying as filing a brief on behalf of a party. “Amicus practice has gotten way out of hand,” said Fried, noting a recent proliferation of amicus filings, some signed by hundreds of “authors.” “A party brief is a more serious participation. I prefer being in the game to cheering from the sidelines.” \*

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*Amy Gutman '93 is HLS's assistant director for academic affairs and the author of two suspense novels: “Equivocal Death” and “The Anniversary,” both published by Little, Brown.*



**WITH A LITTLE HELP FROM YOUR FRIENDS:** Amicus briefs are meant to offer judges some extra information. But is amicus practice getting out of hand?



By Elaine McArdle  
Illustrations by Dan Page

*A judge's*

# getting it right

**IN A STARBUCKS NEAR** Harvard Law School, on a November evening, Geoffrey C. Packard '73 blends in easily among the latte crowd. With a red-checked flannel shirt and jeans, longish hair flopping over one eye and the relaxed demeanor of a guy who's listened to his share of Cream albums, he looks like any number of other former-hippie-

*life is varied and rewarding. And a bit lonely.*





types-turned-professionals. He could pass for an aging techie, perhaps, or a gentleman carpenter.

Except that if he wanted to, Packard could insist you call him “Your Honor.” Behind his retro-rebel appearance, Judge Packard carries the authority of the Commonwealth of Massachusetts.

But Packard’s not the sort to flaunt his position. He relishes moments when nobody recognizes him as a trial judge in the Massachusetts district courts, a job he took three years ago after 30 years as a public defender in the Boston area. If there’s one thing he misses these days, it’s the camaraderie of being just another member of the bar.

“Except with my closest friends, I’m aware there’s a little bit of distance with people now,” he says, sipping a decaf coffee. “People aren’t going to call me up to go out, or drop by to shoot the breeze. Lawyers can’t be seen hanging out in judges’ chambers.” His laugh carries a slight ache of nostalgia.



## *“It’s a constant deluge of material on often complicated matters.”* ROBERT J. CORDY ’74

Does he enjoy his new view from the bench? He pauses.

“Mostly, yeah, I do,” he says. “And I say ‘mostly’ only because I so loved my other job.” There are many pluses: the interesting variety of cases, from criminal to landlord-tenant to unemployment and pension appeals; the intellectual challenge, even in misdemeanor trials; and, most of all, the import of making decisions that affect people in their daily lives. And he finds he’s more relaxed than he was when he was a trial lawyer.

But there are downsides. For more than three decades, counting two years at HLS in what was then called the Harvard Voluntary Defenders, Packard would return to the office after a brutal day in court to swap war stories with a close-knit team of fired-up public defenders. “It was 12 to 15 people every day, very supportive, always kicking stuff around. It was very collegial,” he muses. Packard puts his hand on his cheek, leaning on his elbow. “One thing about this job is that it’s very isolating.”

Isolation. Staggering caseloads. Stacks of paperwork to read each day. Underfunded and understaffed courts. The weighty responsibility of passing judgment on other human beings. Work that is widely misunderstood, especially in an age when “judicial activism” is a catchphrase. The world of judging carries particular burdens.

Yet Packard and others say the good far outstrips the bad. Hard data on judicial job satisfaction is difficult to come by: Neither the American Bar Association nor the American Judges Association can point to any such studies, in contrast to countless studies on lawyers’ professional satisfaction. But among the hundreds of HLS grads who serve as federal and state court judges, at least, the step up to the bench has been gratifying. They cite the enormous breadth and depth of their work; the sense of purpose, even nobility, in upholding the rule of law; the joy of working with dedicated colleagues and committed law clerks. The workload is daunting, but there’s more flexibility in their schedules now than there was in private practice.

“I love every minute of it,” says Robert J. Cordy ’74, a justice on the Massachusetts Supreme Judicial Court, whose tasks include administrative oversight of the commonwealth’s courts, outreach to schools and bar associations, and, of course, appellate review of the Bay State’s most pressing issues, including 2003’s landmark decision legalizing gay marriage, *Goodridge v. Department of Public Health*.

“It’s wonderful,” says Margaret M. Morrow ’74, a U.S. District Court judge for the Central District of California, despite the fact that she works much more than she did when she was a lawyer in Los Angeles immersed in bar activities, including serving as the first



woman president of the State Bar of California, in 1993-94. "I've learned more in the last eight years than probably the 15 to 20 years before that."

Four years ago, when he was named to the U.S. Court of Appeals for the 10th Circuit, Harris L. Hartz '72 was so shell-shocked by how completely the job absorbed his time and energy that he wondered if he had made a mistake. Then he noticed a couple of retired judges in their 80s who came into the court on a regular basis, looking to help out, working essentially for free.

"They wanted to get assigned cases; they wanted to write opinions," recalls Hartz, who lives in Albuquerque, N.M. "That meant a lot to me in my first couple of years. Because frankly, it was so hard, so consuming, I was not enjoying myself. I thought, If people can do it for no pay in their 80s, there must be something good about it." Now that he's settled in, he understands the mysterious draw of the position.

So what is it that makes judging such a great gig?

#### VARIETY IS THE SPICE OF JUDGING

"There are a lot of things to like about it," explains Catherine C. Blake '75, a U.S. District Court judge for the District of Maryland. "Number one is the chance to help people solve the problems that brought them into court in the first place, and to try and get a fair result."

Still, the workload can be crushing. At any point in time, Blake has about 200 open civil cases and 50 to 80 criminal cases, plus other duties. What makes it bearable—indeed, Blake calls her work "fun"—is the incredible variety.

"I can start the day at 9 a.m. with a conference call in a product liability case and move on to a conference call in a civil rights case and move on to a sentencing in a tax fraud case, then a guilty plea in a narcotics case, and then a trial on a pregnancy discrimination case," she says. "When we break for lunch we may have a bench meeting, or I'll be doing administrative work, and then I'll go back into trial. And then I may have a 4:30 committee meeting or another conference call or a pretrial conference for next week's civil trial. And in between, I'd better be reading my mail."

The pace and breadth are exhilarating, confirms Karen Nelson Moore '73, who sits on the U.S. Court of Appeals for the 6th Circuit and is based in Cleveland. "The federal courts have such an array of cases," she says. "So every day there are literally 10 or more fascinating questions in diverse areas that I'm dealing with. There's never any time to be bored."

This diversity is what surprised him the most about the business of judging, says Cordy, who went from managing partner at a major Boston firm to the state high court: "The thing that's been amazing to me is the range of issues the courts deal with every year, from

property disputes to major criminal cases to regulatory matters to tax cases. It's just extraordinary."

It comes with a high cost. "Although I knew there'd be a lot of reading—wow! Wow!" Cordy exclaims. "It's thousands and thousands and thousands of pages every month. We hear 22 full court cases a month, which means 44 briefs, and usually reply briefs, and often amicus briefs, and the briefs are usually 40 to 50 pages, and then all the appendices." There are also at least 80 petitions for further or direct appellate review, while the judges circulate among themselves 400 to 500 pages of draft decisions. "It's a constant deluge of material on often complicated matters," he says.

This is one aspect of a judge's work that seems to be so little understood. The process of deciding the law is far more extensive and demanding than perhaps even lawyers realize.

"I think the thing that surprises law clerks the most is our fidelity to the law," says the 10th Circuit's Hartz. "They think, Oh, you're appointed by a Democratic or Republican president, this is how you think and that's how you decide things. One of my clerks last year says, 'I don't think anyone realizes how careful [judges] are,' and that judges really try to get it right, for the most part. There's an incredible amount of self-discipline that I don't think people are aware of, with regard to the law."

Lisa White Hardwick '85, who serves on the Missouri Court of Appeals, agrees. "The thing that would surprise the public the most is the amount of time we spend trying to decide cases. I think people think we already know the law or we have a bias we use to decide a case a certain way." In reality, she says, "even though the cases are fully briefed, we still read the law and check it. We are accountable to ourselves, and we spend a lot of time doing that."

As for allegations of judicial activism, "I don't think it occurs nearly as much as people think," Hardwick says. In her eyes, an activist judge—and such a person is rare, she asserts—ignores the law in favor of his or her own agenda. Cordy concurs, noting, "People use [the term] to describe judges with whom they disagree."

At a November meeting of the Federalist Society's National Lawyers Convention in Washington, D.C., Massachusetts Gov. Mitt Romney '75 told the gathering that the Goodridge majority had approved gay marriage to promote their values and those of "their like-minded friends in the communities they socialize in." Cordy, who was in the dissent in that case, declines to respond directly to Romney's criticism but then says: "All of us ended up writing on this case. We really got into it—we read all of the literature, all of the briefs, all of the amicus briefs. We thought very long and hard on

the constitutional and statutory issues. Innumerable drafts were circulated expressing views as it evolved. Looking back on it, it was really quite an extraordinary journey with my colleagues. Everybody worked very hard on it, regardless of how we ultimately came out, thinking about it and trying to put it in the right legal framework.”

The case drew attention worldwide, as Cordy has found on trips to Russia as part of a court exchange program. “Every time I go, that’s pretty much the only thing people want to talk about, whether it’s Siberia or St. Petersburg or Moscow,” he says. While the case consumed the public imagination, the court had to move on. “Some folks would say, ‘Is that all you’ve been thinking about?’” He laughs. “Once it was done, it was done. We have another 180 cases to be decided.”

Sentencing defendants in criminal cases can be one of the most emotionally challenging parts of the job, particularly when the death penalty is involved. The District of Maryland carries a high number of death-



**“People think we already know the law or we have a bias. ... [But] we still read the law and check it.”**

**LISA WHITE HARDWICK '85**

penalty cases, and in 2004, Blake presided over her first one. Two young men were convicted of a Baltimore murder; in the second phase of trial, the jury decided not to impose the death penalty, and the co-defendants instead will serve life without parole.

“If the jury made the decision and said it should be the death penalty, I don’t know that I’d have had a great deal of choice. I would have had to impose it,” Blake says. She was relieved to learn in mid-December that the U.S. Department of Justice decided not to seek the death penalty in a drug, firearms and murder case over which she will preside.

When a trial includes the possibility of the ultimate sanction, she—as well as the lawyers and everyone involved—carries a heavy burden. “It magnifies the feeling of responsibility,” she says. “You have to be that much more careful and consider the issues much more seriously,” including issuing written opinions on various matters instead of ruling orally from the bench.

“One aspect of criminal cases generally, and the death-penalty cases in particular, is it can make you depressed to see the waste of human life and talent,” she adds. “Obviously, there are the victims, but also the young men in front of you that seem to have sufficient intelligence to have done something else with their lives.”

While she lauds law enforcement for doing its job, at the same time, “you wonder whether something could

have made a difference somewhere along their lives,” she says. “So it can be challenging and depressing.”

#### **ORAL ARGUMENT MATTERS**

Most judges are quick to point out that a widely misunderstood aspect of their decision-making process is the critical role of oral argument. A good oral argument often changes the way judges analyze a case, if not the actual result, they say.

“I’ve kept statistics on how I feel going in and how I feel coming out, and about 30 percent of the time, my view will shift, from reversal to affirming the case, or something significantly different than I felt going in,” says Hardwick. Hartz finds a similar effect, noting, “I’d say that 20 to 30 percent of the time, oral argument has had a significant impact on my thinking.” On the other hand, he adds, “sometimes oral argument seems absolutely worthless.”

What makes for effective oral advocacy?

Andrew S. Effron '75 sits on the U.S. Court of Appeals for the Armed Forces, a civilian court which reviews cases tried by military courts. He has specific advice, based on nine years’ experience on the bench, which may seem obvious yet isn’t always followed.

“Your job is not to regurgitate the brief,” he says. “You have to have a game plan in advance for figuring out the three to four points you want the judges to walk



# Trading places

Sometimes the grass is greener on the other side of the bench

Compared with that of a lawyer in private practice, a judge's schedule may be more flexible. But not when compared with the life of an academic, says Professor Charles Fried.

Fried, who joined the law school faculty in 1961, served on the Massachusetts Supreme Judicial Court from 1995 to 1999. By his second year on the high court, he realized he missed teaching; the following year, he began to seriously consider returning to Harvard, and he did so a year later. He hasn't looked back.

"I'd be a damn fool if I did," he says. "Because as much as I liked [serving on the court], and I did like it, I found that my life here I liked better."

The life of a judge is "quite constraining," he explains, "in the sense that you've got a job and you've got to show up and spend the day doing it, and

that's all you do. And you're working for the government and you've got to do that conscientiously and can't do anything else." He adds, "It constrains your time, constrains how you organize your life, constrains what you do and what you can say."

Since returning to HLS five years ago, in addition to teaching, he's published two books, while a third is scheduled for publication at the end of the year. He's also written numerous opinion pieces for newspapers, traveled extensively and participated in the litigation of a number of cases, including the landmark 2000 U.S. Supreme Court case *Bush v. Gore*.

While private practice lawyers who step onto the bench find their new lifestyle more flexible, Fried says, "Mine is freer still, and the variety of things I'm doing is freer still." —E.M.



RICHARD SCHULTZ

away with, and make sure you find time to make those points."

At the same time, he emphasizes that lawyers must answer judges' questions. "If you're trying to make your own point, answer the question first, then get your point in." And if you don't know the answer, he says, "tell the judge that. It may be necessary to say, 'I haven't read that case. Would Your Honor like something further on that in a supplemental brief?'"

The fastest way to lose credibility, judges agree, is for lawyers to try to gloss over law or facts that negatively affect their arguments. Lawyers should reread the record and the cases cited in the briefs before stepping into court, and shouldn't rely on the case summary. Does that ever happen? Effron laughs, then hesitates. "People get very busy and have a lot of priorities," he says. "I think from time to time that may happen."

Moore says she loves oral argument because it's a chance to learn from not only the lawyers but also the other judges on a panel. The questions her brethren ask signal issues that are troubling or significant to them, which often prompts her to take a closer look at a particular matter. It's also the part of the job that mitigates some of the isolation of sitting alone in chambers reviewing cases, judges say.

Obviously, brief-writing is equally important. Hartz, who served on the New Mexico Court of Appeals some years ago, chuckles when recalling one particularly effective argument. "It was a state tax case, and the oral argument flipped all three of us. I told the attorney, who is a Harvard Law grad, 'You flipped all of us.' He says, 'I guess that means I screwed up in the briefs.'" \*

*Elaine McArdle is a writer living in Watertown, Mass.*

A child at the time of the  
Nuremberg Trials, Navanethem Pillay  
now carries their legacy forward

# the bus driver's daughter

Navi Pillay LL.M. '82 S.J.D. '88 first came across the Nuremberg Trials on a shelf in the library at the University of Natal in apartheid South Africa. A student enrolled in classes for nonwhites, Pillay spent hours reading the trial transcripts, transfixed by the ideal of justice represented in the account of countries coming together to hold individuals responsible for the most heinous acts.

It's a chapter from history that stayed with her over the next three decades. But as she represented her clients, including anti-apartheid activists and battered women, against a system that enforced injustice, it often seemed as remote as the end of apartheid itself.

Today, at age 64, Pillay is helping to write subsequent chapters. She is one of 18 judges from around the world elected to the International Criminal Court in The Hague, the first-ever permanent independent court set up to punish individuals for

**By Emily Newburger**  
Photograph by Judith Dekker







**Navanethem (Navi)  
Pillay in her office at the  
International Criminal  
Court in The Hague**

# International criminal courts: a timeline

Sixty years in the making

## 1945

The Nuremberg Tribunal is established to try alleged Nazi war criminals.

## 1946

The Allied powers of World War II approve the charter that establishes the Tokyo Tribunal to prosecute alleged Japanese war criminals.

## 1948

The U.N. General Assembly adopts the Convention on the Prevention and Punishment of the Crime of Genocide. In the same resolution, the General Assembly invites the International Law Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide."

## 1993

The U.N. Security Council establishes the ad hoc International Criminal Tribunal for the former Yugoslavia, to hold



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**Brig. Gen. Telford Taylor '32, the U.S. chief counsel for war crimes, presenting opening statements at Nuremberg in 1947**

individuals accountable for the atrocities committed as a part of "ethnic cleansing."

## 1994

The U.N. Security Council establishes the ad hoc International Criminal Tribunal for Rwanda to prosecute individuals responsible for genocide and other serious violations of international humanitarian law committed in 1994 in Rwanda and by Rwandan citizens in neighboring states.

**To date, ICTR cases have resulted in over 20 convictions. Almost all cases have gone to the appeals chamber (pictured below).**



LANGEVIN JACQUES/CORBIS SYGMA

## July 17, 1998

With 120 countries voting in favor during a conference in Rome, the statute of the International Criminal Court is adopted and the court is established. It's the first-ever independent permanent court, set up to punish individuals for genocide, war crimes and crimes against humanity. It complements existing national courts in only if national courts are unwilling or unable to investigate or prosecute such crimes.

## Jan. 16, 2002

The U.N. and the government of Sierra Leone sign an agreement to establish the Special Court for Sierra Leone to try individuals who bear greatest responsibility for crimes committed during the country's violent conflict after Nov. 30, 1996.

## July 1, 2002

The ICC's statute enters into force. Any person who commits crimes under the statute after

this date is subject to prosecution by the court, which is located in The Hague.

## March 11, 2003

The ICC's 18 judges, elected from all over the world and including seven women, are sworn in.

## March 31, 2005

The U.N. Security Council refers Sudan war crimes to the ICC. The U.S. agrees not to veto the measure, after obtaining assurances that its peacekeepers in the area will be immune from prosecution in the court.

## Oct. 13, 2005

The ICC unseals its first five arrest warrants, charging leaders of a Ugandan rebel group for war crimes and crimes against humanity.

## Oct. 28, 2005

Mexico becomes the 100th country to ratify the International Criminal Court's Rome Statute.



ASSOCIATED PRESS

**Slobodan Milosevic, former Yugoslav president, on trial at the ICTY for genocide, war crimes and crimes against humanity**



genocide, war crimes and crimes against humanity (including apartheid).

The idea for the court was raised at the U.N. in 1948, when Pillay was 7 years old. It became a reality more than 50 years and a Cold War later, after “ethnic cleansing” in the former Yugoslavia and a genocide in Rwanda. The international community’s response to the massacres—the establishment of ad hoc tribunals involving judges from all over the world—lay the groundwork.

A member of the appeals chamber, Pillay sits on the court as a seasoned advocate and a trailblazer. A bus driver’s daughter from a poor Indian section of Durban, she was the first woman of color in Natal province to start her own firm, winning victories for apartheid’s prisoners (including her husband) and becoming an advocate for women. She applied international precedents in her cases and was the first South African to receive an S.J.D. from Harvard Law School, studying human rights and international law to fight unjust laws at home. But she is also one of the most experienced international criminal law judges on the court, having served eight and a half years on the International Criminal Tribunal for Rwanda.

Pillay was elected to that tribunal in 1995. It was the same year she’d been appointed a High Court judge in South Africa, the first woman of color in the country to hold that post. During 28 years as a “colored” lawyer, she had not been allowed to set foot in a judge’s chambers.

She says it was a hard time to leave South Africa and admits it was difficult to imagine staying four years in Arusha, Tanzania, where the U.N. had established the tribunal. But that changed once she began the work and saw how important it was for the victims of Rwanda—and for Africa itself, where there was so much injustice in domestic legal systems.

“Your own personal ambitions and interests and discomforts fell away,” she said. “The accused must have fair trials, and we have to be impeccable in our procedures so that these kinds of institutions will have credibility.”

Pillay ended up staying for two terms, contributing to rulings that have shaped international criminal law.

Within her first term, Jean-Paul Akayesu, the mayor of the Rwandan town of Taba, was tried for inciting fellow Hutus to murder, rape and torture thousands of Tutsis. He was found guilty and became the first

## At tribunals all over the world

Other HLS alumni who sit on courts of international jurisdiction



Theodor Meron LL.M. '55 S.J.D. '57 (right), addressing the U.N. Security Council during his ICTY presidency, flanked by ICTR President Erik Mose

For nearly three years, until mid-November last year, **Theodor Meron LL.M. '55 S.J.D. '57** was president of the International Criminal Tribunal for the former Yugoslavia, hearing cases, steering the court and acting as a diplomat. The international law scholar continues to serve in the appeals chamber, to which he was elected in 2001.

Other grads who sit on the ICTY are **O-Gon Kwon LL.M. '85**, senior judge on the Taegu High Court in South Korea, and **Krister Thelin LL.M. '76**, a high court judge in Sweden.

Alumni serving on some of the world’s other international courts include **Thomas Buergenthal LL.M. '61 S.J.D. '68** and **Sir Kenneth Keith '64-'66**, both on the International Court of Justice in The Hague, which handles mostly civil disputes between member nations. **Koen Lenaerts LL.M. '78** and **Juliane Kokott S.J.D. '90** sit on the Court of Justice of the European Communities in Luxembourg, the EU’s highest court.

## International criminal justice—at home and abroad

HLS students learn the lessons of Nuremberg in Cambridge, Arusha and The Hague

It's been a good couple of years at Harvard Law School for students interested in global justice. The first chief prosecutor of the International Criminal Court, **Luis Moreno-Ocampo**, left The Hague to teach a course at the school in January 2005 with Professor **Philip Heymann '60**. Spring semester that year, **Richard Goldstone**, who served as the first prosecutor at the international criminal tribunals for the former Yugoslavia and Rwanda, offered two classes. South Korean judge **Sang-Hyun Song**, who was recently elected to a second term on the ICC, has also taught at the school.

Soon students can turn to a new casebook co-written by Assistant Professor **Ryan Goodman** forthcoming from Oxford University Press, "International Humanitarian Law." Students of the Nuremberg Trials everywhere

can click on [www.nuremberg.law.harvard.edu](http://www.nuremberg.law.harvard.edu) to access documents and images from the trials, digitized and presented with analysis by the Harvard Law School library.

This fall, an HLS conference explored the legacies of Nuremberg, 60 years after the trials challenged the world to apply law to mass violence. Organized by Professor **Martha Minow** with the educational organization Facing History and Ourselves, it focused on connecting lawyers and educators in efforts to prevent mass atrocities that continue despite international law. ICC chief prosecutor Moreno-Ocampo spoke, as did the court's senior trial lawyer, **Christine Chung '90**, along with Nuremberg trial participants such as prosecutor **Benjamin Ferencz '43**—a vocal advocate for the ICC—and scholars such as **Stephen**

**Schlesinger '68**, an expert on the history of the U.N. There were also teachers and students, including **Rebecca Cohen '07**, whose film on Nuremberg participants was screened; **Rebecca Hamilton '07**, who has mobilized students to pressure the U.S. government and Harvard to condemn the Sudanese genocide; and **Noah Weisbord LL.M. '04**, an S.J.D. candidate who has studied the Rwandan gacaca courts and worked at the ICC.

The conference was the culmination of a year of events at HLS, including a film series and a library exhibit (see p. 72) spearheaded by 2Ls **Hallie Fader** and **Alina Zagaytova**.

When it comes to helping the international tribunals achieve their potential, the human rights community plays an important role, says **Binaifer Nowrojee LL.M. '93**, clinical instructor at the HLS Human Rights Program, which involves students in that process. Nowrojee has served as an expert witness at the ICTR and supervised many of the students who have interned at the tribunal over the past three years. Projects they've worked on include helping Nowrojee prepare her testimony, and contributing to memos analyzing and sometimes critiquing the court's judgments on sexual violence in the context of the latest jurisprudence in the area. This January, **Meredith Osborn '06**, who interned at the tribunal in 2004, was asked back to work on a closing brief for one of the prosecution teams.

In addition to students who have interned at the tribunals and the ICC, others have helped from Cambridge. This year, **Amy Penn '06** has been providing the ICTY's senior prosecutor, **Kenneth Scott '79**, with legal support, working with HRP Clinical Director **James Cavallaro** in efforts to streamline prosecution while respecting due process norms.



ICC Chief Prosecutor Luis Moreno-Ocampo and Samantha Power '99, author of "A Problem from Hell," were among those who spoke at an HLS conference co-chaired by Professor Martha Minow (opposite).



person to be convicted of genocide in an international court. The tribunal also held that rape was a crime against humanity and constituted genocide when it was meant to destroy a targeted group.

“Rape had always been regarded as one of the spoils of war,” Pillay said in a statement after the verdict. “Now it is a war crime, no longer a trophy.”

The case also introduced a broader definition of rape into international law. The precedent has since been followed by the International Criminal Tribunal for the former Yugoslavia—established by the U.N. in 1993—and is reflected in the law of the International Criminal Court, which recognizes a range of acts of sexual violence as among the most serious crimes under international law, and which was set up to defend the rights of women and children, so often targeted during warfare.

The Akayesu judgment was “a real turning point for criminal law, especially when it comes to crimes committed against women in armed conflicts,” said Elizabeth Odio Benito, who served as a judge on the tribunal



**In 1998, for the first time, rape was held to be a crime against humanity and a form of genocide.**

## *During 28 years as a “colored” lawyer in South Africa, Pillay wasn’t allowed in a judge’s chambers.*

for the former Yugoslavia and is now Pillay’s colleague on the International Criminal Court. “Before, they were totally hidden, never mentioned in any international jurisdiction.”

Although Pillay was one of three judges who signed their names to the Akayesu judgment, she is credited with shaping and articulating its arguments. The only woman on the Rwanda tribunal during her first term, she’d been an early advocate for women’s rights in South Africa and later co-founded the international women’s rights group Equality Now with Jessica Neuwirth ’85.

“My impression is that if [Pillay] hadn’t been there at the time, nothing would have changed,” said Odio

Benito. “And for us, the judges on the ICTY, it was very, very important to have this precedent.”

Other precedent-setting cases Pillay participated in include the conviction of Jean Kambanda, the former prime minister of Rwanda, who pleaded guilty to genocide. It was the first time an international criminal tribunal held a head of government accountable for atrocities committed during his regime. And during her last year at the tribunal, in the first case of its kind since the Nuremberg Trials, Pillay and two other judges convicted three Rwandans for using media reports to incite genocide.

Pillay earned a reputation as a tough but fair-minded judge. Rosemary Byrne ’92, director of the Interna-

tional Process and Justice Project at Trinity College in Dublin, Ireland, who observed the proceedings in Arusha for several years, says this is a boon for an international trial, where one of the challenges is control from the bench. “[Pillay] exercised her authority, but she did it with graciousness and humor,” Byrne recalled.

The other thing that was distinctive about Pillay’s style, says Byrne, was the way she treated the many victims and witnesses who traveled from Rwanda to testify about atrocities. “At the end of an examination, judges routinely thank witnesses and victims,” she said. “But [Pillay] would also recognize that it is often very difficult for people to testify about these kinds of experiences, and that recognition was actually something quite unique.”

Neuwirth, who served as a consultant to the tribunal, said that in addition to being an adept lawyer, Pillay proved to be a skilled diplomat: “She knows how to get people to come together toward a common vision. She really has a unique talent.” It was all the more valuable considering the international nature of the

was done giving evidence. “Every step of the way it was like that,” said Pillay. “Courts don’t run that way.”

Pillay did everything she could to expedite the trials, including imposing heavier caseloads on judges and streamlining the pretrial process. But as she reported in 2002 in her last appearance before the U.N. General Assembly, “Trials continue to be drawn out and often defy our plans to expedite proceedings.”

A big part of Pillay’s challenge was the highly political nature of the presidency. In addition to wading through an administrative quagmire, reporting to the Security Council and being constantly monitored by NGOs, the head of the tribunal must balance extremely sensitive diplomatic relations with Rwanda, which controls access to most of the witnesses; for much of 2002, it made it nearly impossible for witnesses to travel to Arusha.

“Even presidents of the Supreme Courts in national jurisdictions don’t have the same kind of profile and widely spread expectations directed against them as Judge Pillay had to deal with,” said Byrne.

## **Hearing the accounts of barbarity affected her sleep, but hasn’t made her cynical about human nature.**

tribunal, with judges and attorneys from all over the world. Although the proceedings are adversarial, the trials meld common and civil law practices.

“At first I thought it’s just not going to work because each one of us is loyal to the system under which we were trained,” said Pillay. “In internal deliberations, one judge would say, ‘That is the right way of doing it,’ and another would say, ‘You mean that’s the way you do it in *your* country.’”

Sometimes there were misunderstandings. She cites the day one of her colleagues suddenly banged his gavel to clear the court. When asked why, he pointed to the empty public gallery. Another judge explained that the requirement that trials be public means only that the doors be open to spectators. “It was a learning experience every step of the way,” Pillay recalled. But looking back, she says, it was the least of their difficulties.

Pillay became president of the court in 1999, and one of her greatest challenges was untangling the U.N. bureaucracy that had hamstrung the tribunal since its creation in 1994. Trials would be postponed for weeks because there were no ink cartridges to print briefs, or because translators who’d worked the maximum number of hours set by the U.N. had to quit before a witness

Pillay knows the Rwanda tribunal has its flaws and its critics. Many complain that its remove from most Rwandans diminishes the impact of its sentences on their lives. She appreciates the need for healing and is interested in the Rwandan gacaca courts, in which lesser crimes are tried by the community, and apology and reparations lead to a lightened sentence.

But Pillay believes that what the tribunal has achieved—jailing and trying the “big fish,” high-level Hutus deemed responsible for the genocide—has been crucial for Rwanda and could not have been accomplished in-country. After the genocide, Rwanda didn’t have the resources and, she says, couldn’t have obtained the suspects arrested in 24 countries around the world. “Other governments would not have transferred them because of [Rwanda’s] death penalty and political tensions,” she explained.

Other countries’ cooperation is in itself a breakthrough, Pillay adds. “Before, leading criminals in Africa always had refuge.”

The tribunal’s biggest achievement, she said, is “showing that international criminal justice is possible. ... It was just a concept and an idea, and we turned it into a reality”—the sort of thing Pillay might have



dreamed of more than 40 years ago as she read through the Nuremberg Trial transcripts.

The biggest challenge for the International Criminal Court is to make international criminal justice a reality in countries like Uganda and Sudan, where genocide is happening now. To succeed, it will take even more juggling and cooperation.

Unlike the ad hocs, the court is independent from the U.N. and deeply reliant on the 100 states that have agreed to its jurisdiction—with China and the U.S. conspicuously absent. (The U.S. has called that independence “a recipe for politicized prosecutions.”)

The court’s jurisdiction began on July 1, 2002. For crimes committed from then on, member states refer cases and assist with investigations. The court may prosecute only when states cannot or will not. And it then relies on members or the international community to apprehend those indicted.

In October 2005, the first five arrest warrants were unsealed, against leaders of a Ugandan rebel group who are accused of raping, enslaving and killing thousands in Northern Uganda, many of them children. The office of the prosecution has two other cases under way, including a referral from the U.N. Security Council to stop the killing in Darfur. But before the trials can begin, defendants must be in hand.

In the meantime, in a white metallic high-rise on the outskirts of The Hague, the judges prepare. They’ve drafted regulations for the court, trying to learn from the mistakes and the accomplishments of the ad hocs. Pillay and her colleagues from the International Criminal Tribunal for the former Yugoslavia had a lot to contribute as the judges looked ahead to streamlining proceedings, while protecting the rights of the defendants. As Slobodan Milosevic’s trial labored on a few miles away, a proposed allowance for the appointment of counsel against the will of the accused was vigorously debated, for example. (In the end, judges agreed that it would be allowed under certain circumstances.)

Other projects include helping to implement a reparations program, the first one set up by an international court. It’s one of the things Pillay pressed the Security Council to obtain for victims of the Rwanda genocide, albeit unsuccessfully, and she’s been part of a team helping to work out the details at the International Criminal Court, which can order those found guilty to make reparations to their victims.

There is a collegial bustle in the high-rise, a mix of languages in the elevators and by the metal detectors in the lobby and at the cafeteria coffee bar. Pillay brings her experience to this legal community, but it’s coupled with a lack of self-aggrandizement, which Neuwirth

calls humility: “She’d be just as comfortable with activists in a mud hut as with heads of state at a dinner table.”

Pillay says Harvard Law School made an enormous difference in her career. For the first time, she studied human rights and, after focusing so long on the political struggle in South Africa, made space to develop arguments to defend women. HLS Professor Martha Minow says it’s Pillay who has made an enormous difference, citing the landmark Akayesu rape decision. And, looking ahead to Pillay’s role at the International Criminal Court, Minow added:

“As new and challenging as the ICTR has been, the ICC is even more uncharted, both in terms of powers of the courts and capacity to proceed across the globe while respecting the efforts by member nations to redress injustice. I think the world is lucky that someone with her talents, wisdom and experience is there as the uncharted becomes known.”

In Pillay’s office with its big windows looking out on changeable Dutch skies and an orderly landscape below, she has few mementos of her time in Arusha. But the voices of the survivors have stayed with her. You couldn’t listen to their testimony without being affected, she says, recalling a mother whose seven children were murdered, and another witness who lay oozing blood for days under a pile of corpses.

Hearing the accounts of barbarity affected her sleep, but hasn’t made her cynical about human nature: “The courage of all those witnesses inspires you.”

Hans-Peter Kaul, an international law scholar from Germany and Pillay’s colleague on the court, says he looks to her as his guide on many matters as trials approach, including the prospect of facing the facts of genocide from the bench. Despite all she heard in Arusha, “she has remained a gentle, balanced person,” Kaul said. When his turn comes at the International Criminal Court, he hopes to do as well.

Kaul believes the participation of judges such as Pillay should help allay concerns that the court will be dragged into politically motivated prosecutions.

After struggling for nearly 30 years against a judiciary that wasn’t fair and independent, and looking to Americans for guidance (her S.J.D. thesis at Harvard questioned the possibility of justice in South Africa when courts were used as political instruments), it saddens Pillay that the United States isn’t a party to the International Criminal Court. But she imagines that once the trials are under way, there will be greater faith. In the meantime, all judges can do is administer justice honestly, but that—she’s learned from personal experience—is not to be taken for granted. \*





# count

*Dispatches from a reporter  
behind the scenes with the  
2005 Ames Moot Court finalists*

By Mary Bridges  
Photographs by Kathleen Doohar



Jordan Heller '06,  
immersed in briefs

# down

QUIET MOMENTS  
BEFORE GLORY: Adam  
Harber '06, left,  
searches for words in  
an Austin Hall prac-  
tice session.





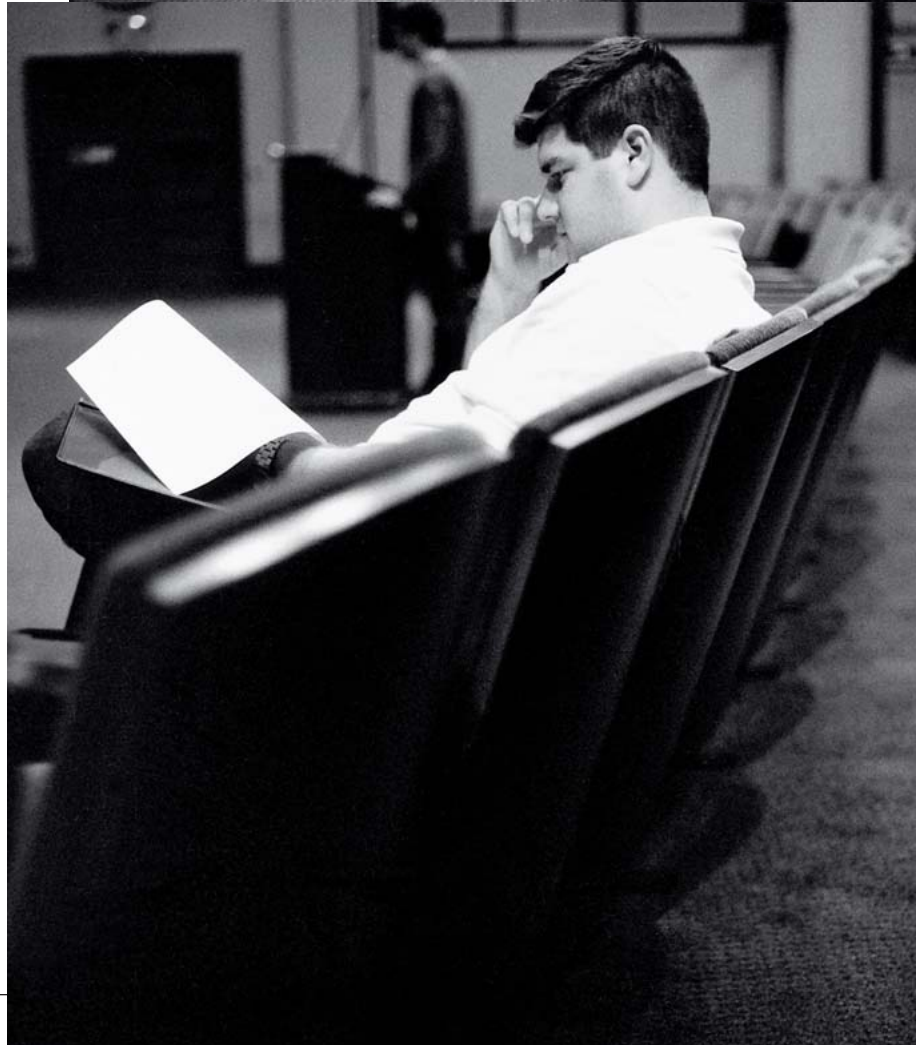
## EIGHT DAYS AWAY

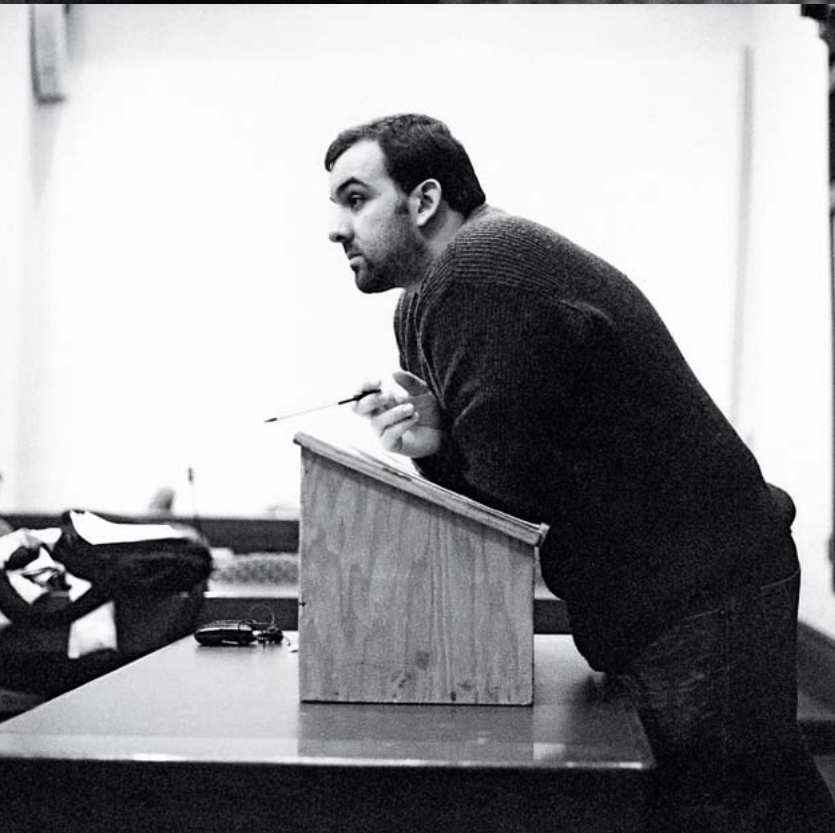
**J**OSHUA HURWIT '06 stands at a lectern, facing four classmates. They stare down at him from rolling chairs on the elevated bench of stately Ames Courtroom. In eight days, on Nov. 17, 2005, Hurwit will stand here again, but instead of his friends, he'll face U.S. Supreme Court Justice David Souter '66 and Judges Emilio Garza and Ilana Rovner of the U.S. Circuit Court of Appeals—the judges who will decide the winners of the 2005 Ames Moot Court Finals.

Hurwit and his five teammates have spent nearly a thousand hours researching and writing about the hypothetical case *McNeil v. Lu*, involving the constitutionality of a juvenile curfew law (see sidebar, p. 40). They held their first meeting before classes even started in September; they submitted over 50 pages of briefs; and they've left 30 other teams in their wake to make it to the finals. All this work will culminate in oral arguments on a Thursday night—eight days away—when Hurwit, Bryce Callahan '06 (the team's other oralist) and the two oralists for the respondent team will stand before the panel of judges, a packed Ames Courtroom and crowds in two overflow rooms.

Tonight, standing in jeans and sneakers, Hurwit struggles to finish his first timed run-through behind the lectern. He will argue their state action claim, which alleges that an amusement park was acting for the state when it detained two minors for curfew infractions, in violation of their civil rights.

When he finishes the run-through, the team critiques the substance of his arguments about summary judgment and the coercive effects of the statute. They also critique his style. He should stand





Clockwise from lower left: Christopher Szczerban '06 listens and reads; Adam Harber '06 under fire; a petitioners' jam session (from left): Nathan Kitchens '06, Andrew Cooper '06, Jason Vollbracht '06, Joshua Hurwit '06, Jordan Heller '06; Bryce Callahan '06

up, speak more loudly and make eye contact with all of the judges, rather than just the one who asks questions.

"Should we do another run-through?" asks Nathan Kitchens '06 from the bench. "We've got 20 more minutes."

## SIX DAYS

THE RESPONDENTS gather in Ames Courtroom on Friday night. It's their first time practicing oral arguments as a full team. Adam Harber '06, the first oralist, stands at the lectern. He'll defend the legitimacy of the curfew law while the other oralist, Christopher Szczerban '06, will answer the state action argument.

"May it please the court, my name is Adam Harber," he begins. He's tall and he gestures like John Kerry. "Along with my co-counsel—"

He stops suddenly.

"Wait—does anybody remember if I introduce all of you guys or just Chris?" he asks, sounding like a student again.

Just Szczerban, they tell him. Harber nods and again assumes the posture of an orator discussing legal precedents.

"Is this framework really workable?" interrupts Joshua Salzman '06 a few minutes later. "As Justice Souter here, I wasn't really comfortable with that framework."

Harber backtracks and tries to argue his way out of the challenge, but his teammates keep pushing him on nearly every point—his description of the right to free movement, the foundations of the right and hypothetical situations that undercut the petitioners' claims.

"I've been going for like 45 minutes," he says after a circuitous round of questions. On Thursday, he'll have less than 20.

Szczerban takes the lectern next,



and after a half hour, they're ready to break for the night. But they'll be back. The next day—Saturday—their shift in Ames Courtroom will begin at 10:00 a.m.

## BACK STORY

THE AMES MOOT COURT competition is a nearly century-old tradition at HLS, started in 1911 through a bequest from Dean James Barr Ames LL.B. 1873. Since 1912, the names of finalists have been memorialized on bronze plaques in Langdell Library—including Harry Blackmun LL.B. '32, University of Chicago Law Professor Cass Sunstein '78 and Harvard Law Professor Guhan Subramanian '98. Previous competitions have brought a stream of "Supremes" to campus, including former Chief Justice William Rehnquist and Justice Ruth Bader Ginsburg '56-'58.

The two finalist teams this year have histories of their own. Seven of the 12 were in the same 1L section; one petitioner and one of the respondents are roommates; and both teams have been working to get to the finals for nearly a year and a half.

The process began during their 2L year in qualifying and semifinal rounds, but it kicked up a notch at the beginning of their 3L year in preparing briefs for the finals.

Petitioners say they worked nearly around the clock the final 48 hours before a deadline.

"It's painful, but it also becomes

## McNeil v. Lu: Questions Presented

Shortly after midnight in the city of Amesville, petitioners McNeil and Perez—15-year-old boys—were playing video games at Playland, an all-night amusement park and arcade, when the owner approached and asked if they were under 18. When they refused to answer, he called two employees and had the boys physically escorted to his office. He phoned the police, detained the boys for 45 minutes until the police arrived, and denied their requests to call their parents, use the bathroom or leave.

A police officer questioned the boys in the Playland office and, after determining that they were minors, issued them citations for violating Amesville's curfew law, which made it unlawful for persons under the age of 18 "to remain, idle, wander, stroll or play in any public place or establishment between 11:00 p.m. and 5:00 a.m.," regardless of parental permission. (The boys had it.)

The law also prohibited the owner of a private establishment from knowingly allowing a minor to remain on the premises during curfew hours, and said also that, upon probable cause, the owner "may question any person suspected of being a minor and take reasonable steps to prevent minors from entering or remaining on the premises during curfew hours."

In a suit against Playland and the police and prosecutor, petitioners alleged that the curfew violated their fundamental right to freedom of movement—a right enjoyed by people 18 and older—and therefore denied them equal protection of the law under the 14th Amendment. They also claimed, under 42 U.S.C. Sec. 1983, that Playland was liable for damages because it engaged in state action (the detention), under color of state law, that was unreasonable and violated their Fourth Amendment rights.

Respondents answered that the curfew was constitutional because it was substantially related to the state's interest in preventing crime and mischief by minors. They argued further that there wasn't enough of a common purpose between Playland and the state of Ames to warrant the conclusion that Playland had engaged in "state action."

The three-judge panel in the Ames finals didn't rule on the merits. But, as Judge Ilana Rovner said in her remarks to the assembly afterward—without disagreement from Justice Souter or Judge Garza—"I just want to say to the petitioners, you had the harder case." —Robb London '86

surreal," recalls Jordan Heller '06, remembering the all-nighters and "war room" environment. "The levels of inside jokes and ridiculousness, the junk food that's consumed—"

"It's fun in its own special way," Andrew Cooper '06 agrees.

Respondents experienced a similar rite of passage writing their brief.

"The night before, we were up all night," says Harbor.

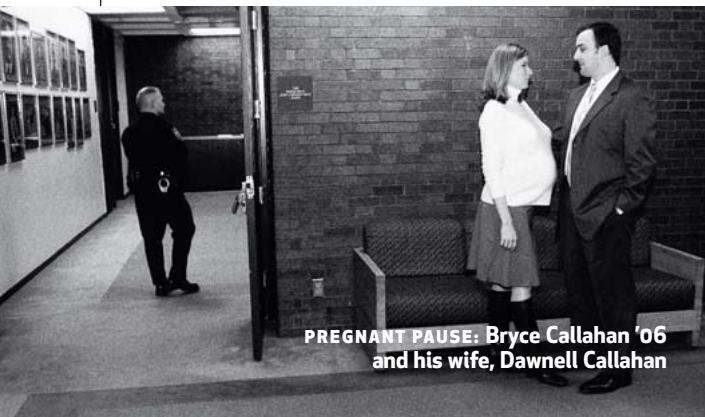
"And the night before that," adds Ramin Tohidi '06.

"It was basically different shifts of when people were awake and working on things," says Szczerban.

They remember it as a delirious week not without its upsides.

"I wouldn't trade it for anything. We've become good friends over this," Tohidi says. "It's worth it, given that two of us get to argue before a Supreme Court justice."

The final week focuses on preparing the speakers, who were picked by their teammates. The petitioners' oralists will have two additional hurdles. Hurwit, who will speak second, has never com-



PREGNANT PAUSE: Bryce Callahan '06 and his wife, Dawnell Callahan

peted as an oralist before. And Callahan has an unusual complication: His wife is 39 weeks pregnant. His teammates are well aware that the likelihood she'll go into labor on or before Thursday increases with every passing day.

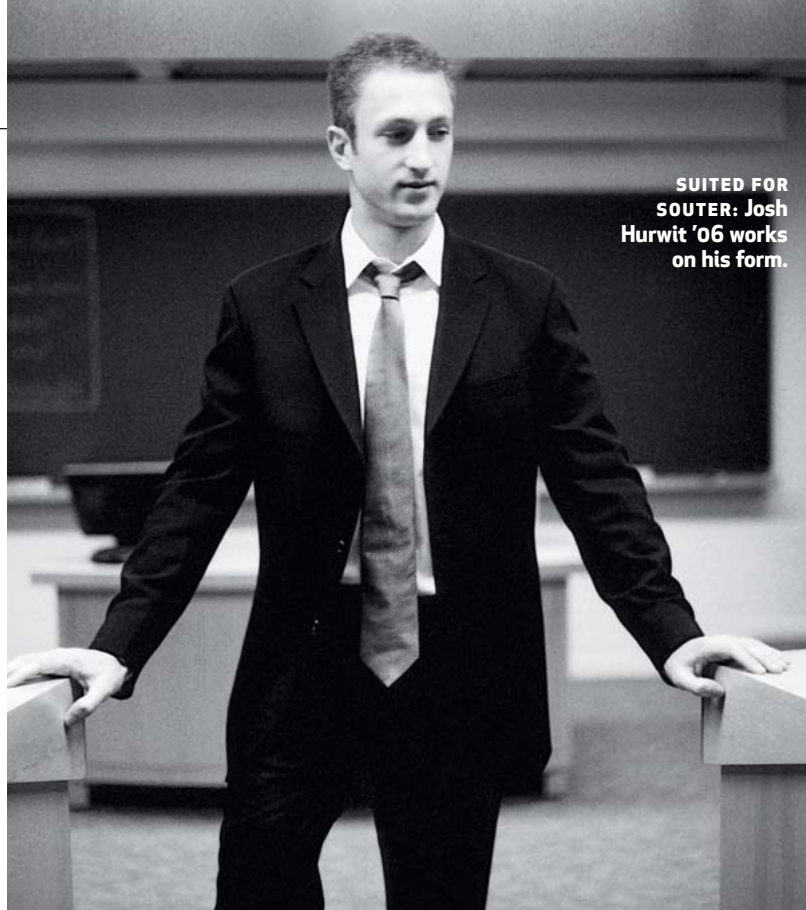
## FOUR DAYS

THE SUNDAY BEFORE the competition, each team has a four-hour practice in the courtroom. It's sunny outside—the warmest day in weeks.

Callahan has learned that his wife must have a procedure at the hospital next week, and the doctor's only available appointment is Thursday afternoon. The procedure risks inducing labor, but the team is not deterred. He keeps practicing as the team's first oralist.

Just before 2 p.m., when their shift in Ames will end, the teammates decide to move to an empty classroom for more run-throughs. They pack their notes and laptops quickly to avoid an awkward encounter with the other team.

They get as far as the courtyard behind Austin Hall before running



SUITED FOR SOUTER: Josh Hurwit '06 works on his form.

into Harber and Tohidi from the respondents.

"What are you guys working on?" Harber jokes.

They stand in the courtyard clutching many of the same case documents, but they seem unsure what to say. After polite but uneasy waves, the shift change is complete.

Respondents take the courtroom

and spend the next four hours debating curfew constitutionality and state action. On several occasions, the exchanges become heated.

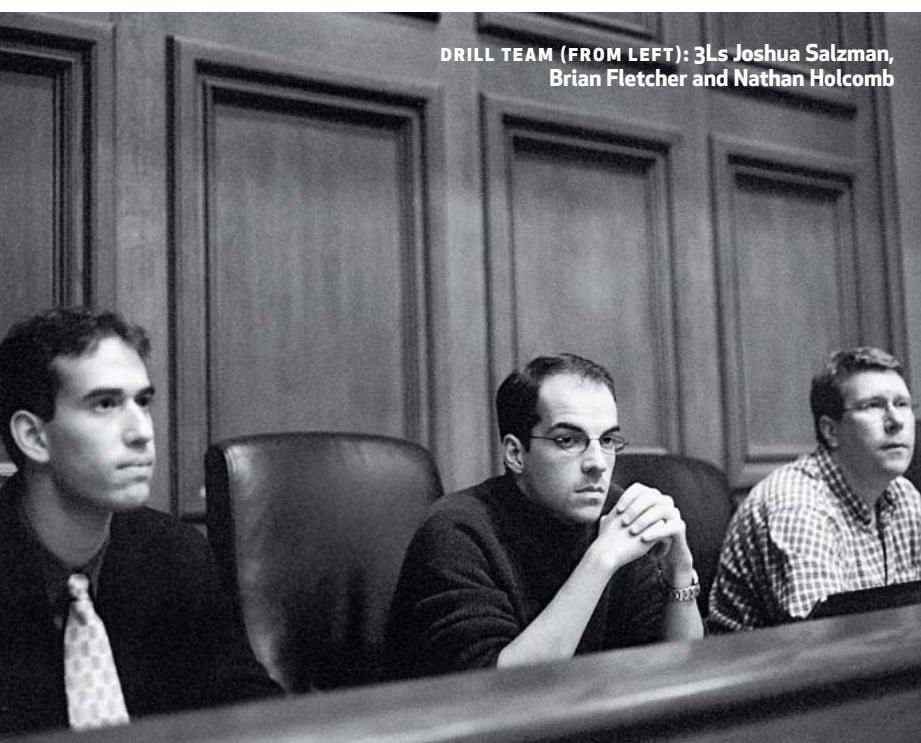
"You're very indignant at the thought that we'd look at those two doctrines [joint action and coercion] together," says Salzman, whom the team has taken to calling "Justice Souter."

Szczerban stands at the lectern silently.

"I think the petitioners very reasonably asked us to look at all the factors together," Salzman—aka Souter—continues. "Why are you so opposed to letting us see the whole picture? Is it because you know they add up to a loss for you?"

Szczerban tries again to explain his point, but Salzman keeps pressing.

"Your Honor," Szczerban begins, addressing a hypothetical that Salzman has introduced. "That's just preposterous," he says, breaking into a laugh. "I don't even know where to begin to answer that question—a dubious curfew statute applied in a preposterous way?"



DRILL TEAM (FROM LEFT): 3Ls Joshua Salzman, Brian Fletcher and Nathan Holcomb

## Foxes, take note

From Justice Souter's remarks to the Ames finalists and the audience:

"Where I sit, it's helpful both for people who are listening to arguments and for lawyers who are constructing them to bear in mind the distinction that Isaiah Berlin made when he called attention to the dichotomy between the hedgehog and the fox—the fox being an animal that knows a great many little things and can deal very cleverly with those things, and the hedgehog being an animal that knows one great big thing. And lawyers who argue appeals have got to have a fox side of the brain and a hedgehog side of the brain. The trick in doing this kind of work, the necessary condition for success, is to make sure that ultimately the hedgehog is in control. By the time a case gets to the court that I usually sit on, a great deal of the tough subsidiary, exploratory issues have dropped aside. ... Lawyers at the end of the line [should] know what the hedgehog would see, what is the hedgehog issue, and stick to it. And in this case, the hedgehog issue is, What are you going to do with Bellotti and Baird [a case involving the rights of minors]?"

"The trick in the arguments this evening was to keep Bellotti and Baird in mind and to keep coming back to it, and making the best possible point that can be made on Bellotti and Baird. There were loads of cleverly raised smaller issues that the fox had to field. But the case gets won, and the case gets lost, in real life, on what is done with the hedgehog issue. ... The overall burden that counsel had [here] ... was [arguing] without losing sight of Bellotti and Baird, in a lot of detail. The arguments ebbed and flowed, but counsel kept Bellotti and Baird in mind. We've got a couple of hedgehogs here in the room."

For a second, the charade vanishes, and they seem like friends in a dorm room again. But within seconds, Szczerban resumes his argument and they plod onward through the late afternoon.

### ONE DAY AWAY

THE TEAMS HAVE one last chance to practice in the courtroom. Callahan stands at the lectern. His wife's appointment is scheduled for 1 p.m. tomorrow. He seems as calm as ever. (His teammates note that he attended West Point and served in Bosnia and Iraq before attending HLS. They say he has perspective on the stakes of a moot court competition.)

"Can you point me to where respondents agree to that?" Heller interrupts Callahan, insisting that he back up an argument.

"Respondents concede on page 15 that Bellotti is the proper framework for determining in what cases states can justify treating minors' fundamental rights differently from those of adults," Callahan says without skipping a beat.

"Is it page 15?" asks an incredulous teammate.

Heller flips through the respondents' brief.

"It is page 15," she says, smiling.

Hurwit takes the lectern next. Though he's been soft-spoken all week, his responses to the team's questions pack plenty of data—facts, precedent and arguments that reinforce the team's case.

At 5:15, the respondents enter the courtroom. They exchange hellos and ask about Callahan's wife, then both teams return to business.

Harber and Szczerban practice timed run-throughs at the lectern. Harber is criticized by teammates for excessive use of the phrase "to

the extent that." And Szczerban admits that it's the first time he's been satisfied that he's covered all the material.

"I want to do it at least twice more tonight," he says.

Their time in Ames ends, and they move to an empty classroom to keep practicing.

"I think we're trying to concoct some really, really long explanation that we're not going to have a chance to get out," Brian Fletcher '06 tells Harber after they've pored over printouts of legal decisions. "You're not going to have time to analyze the text of Bellotti."

In fact, tomorrow Harber will have to condense months of preparation into 17 and a half minutes' worth of discussion, with judges interrupting with any challenge or clarification they find important. Though the team has tried to prep him by asking every question imaginable, only tomorrow will they know for sure if their practices covered the right bases. They finish several more run-throughs but ultimately decide that sleep will serve them better than a late-night crunch.

### SHOWTIME

NEARLY 275 PEOPLE fill Ames Courtroom, and the overflow takes up two rooms downstairs. Floodlights, which seem to raise the room's temperature at least 10 degrees, shine down on the lectern.

"All rise," says the court clerk, rapping a gavel. "The honorable chief justice and the associate justices for the United States Court of Appeals for the Ames Circuit."

In their long black robes, Justice Souter, Judge Garza and Judge Rovner take their seats on the bench.

Callahan stands at the lectern in a dark suit. He spent much of the



afternoon at the hospital, but his wife did not give birth. He begins his argument, and before the first minute passes, Souter interrupts. The questions are benign at first but become increasingly pointed.

Souter wants to know why legislatures shouldn't be allowed to distinguish between minors and adults by using a cutoff age of 18.

"Well, how about my question?" he asks, interrupting Callahan's answer. "You're telling me reasons you may have for answering my question in a certain way, but I want to know what the answer to my question is."

The questions for Hurwit are fierce as well. His teammates have coached him all week about speaking up and making eye contact. Their team even videotaped run-throughs so he and Callahan could review their presentations. Tonight, under the lights and behind the microphone, the advice seems to pay off.

He responds with lead-ins like, "It's true, Your Honor," to acknowledge the judges' challenges before rattling off a stream of evidence and precedents to support his argument.

Souter and the other judges are no gentler with the respondents.

"That was not an answer to my question," Souter says, interrupting

IT ALL COMES DOWN TO THIS: Bryce Callahan's moment.



Harber. "How about the answer to my hypo?" he presses Szczerban.

Some of the questions focus on points that the finalists barely covered in practice rounds. Several precious minutes are gobbled up when the judges ask about statistical evidence in Harber's presentation. Much of Callahan's time is taken up by the interrogation about a cutoff distinction between minors and adults.

By the time the judges file out of the room to deliberate, the participants already seem to have shifted gears—congratulating each other with hugs and handshakes, receiving flowers and applause from friends and family, and smiling for pictures in front of the empty bench.

The judges file back in after nearly 20 minutes, and the room goes quiet again.

## THE JUDGMENT

JUSTICE SOUTER ANNOUNCES the decision. The respondents win for best team and best brief. Joshua Hurwit of the petitioner team wins for best oralist. But as the two teams congregate for the post-argument reception, the results seem almost secondary to their relief at being done.

"I don't remember any of it," says Hurwit, who still seems dazed only an hour after his argument. "I feel like I didn't get to make any of the points I wanted to make. They were asking me questions I didn't really know."

But would he do it again?

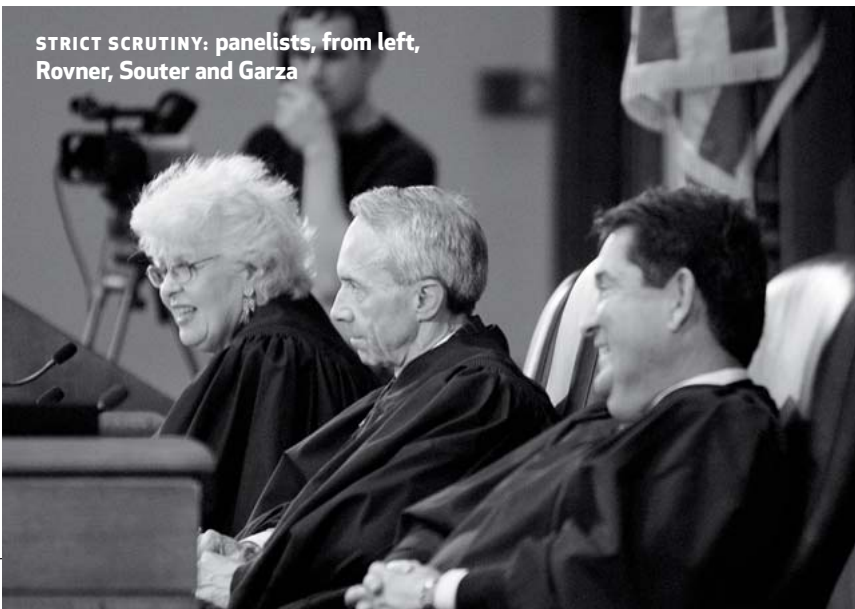
"Oh yeah," he says with a grin. "I didn't want to leave."

## CODA: FOUR DAYS LATER

BRYCE CALLAHAN'S wife gave birth to a healthy, 7-pound, 14-ounce girl, Tessa Rose. The team visited several weeks later to congratulate Callahan and his wife, and then went to a Mexican restaurant to celebrate. Hurwit pick up the tab with earnings from his "Best Oralist" prize. \*

The webcast of the final arguments in the Ames competition can be found at [www.law.harvard.edu/news/webcasts](http://www.law.harvard.edu/news/webcasts).

STRICT SCRUTINY: panelists, from left, Rovner, Souter and Garza



# Armed with the Truth

At the top of his game, Melvin Kraft '53

**A** FEW YEARS AGO, HLS Professor Richard D. Parker '70 sat down to read a draft of a novel-in-progress by a retired commercial litigator, Melvin D. Kraft '53.

Parker was immediately captivated.

"Most modern fiction is about love, usually the failure of love. But there is very little about work," said Parker, who teaches a popular seminar on law and literature that focuses on the spiritual aspects of professional work. "It's particularly hard to write about [work] in a way that isn't flat, superficial and negative." That's where Kraft's novel, "His Sole Weapon," stood out.

"What struck me was its tone—a tone of gentle intensity," said Parker. Although the book focuses on two trials, it includes none of the usual accoutrements of the typical legal novel: sex, violence, detailed explanations of police procedure. Instead, it tells the story of a brilliant young lawyer who tries a major corporate case, then finds unexpected satisfaction in a court-appointed immigration fraud case. The "sole weapon" referenced in the title is the truth, and the story explores the lawyer's deep love for the law and its capacity for imposing order on chaos.

For Kraft, who began working on the novel eight years ago when he was 72 years old, the story line came naturally. In the mid-1960s, when boutique litigation firms were

rare, Kraft, hungry for independence from law firm life, opened his own practice in Manhattan. For two decades he tried cases on behalf of numerous major corporations, including Mobil Oil, and he was often called in by major Wall Street firms to join their litigation teams. Like the hero of his novel, Kraft loved the intellectual stimulation of those trials. But it was a court-appointed habeas corpus case on behalf of a young man convicted of rape and robbery that fed his soul.

The petitioner, serving time in a New York state penitentiary, claimed that his legal aid lawyer failed to subpoena four alibi witnesses. Kraft got the lawyer's file, found his client's claim was true, and presented the testimony of the alibi witnesses at the habeas corpus hearing. It was a mistaken identity case, says Kraft. The petitioner was a young black man, and the people who testified against him were white. Kraft got the conviction reversed, winning praise from Judge Marvin E. Frankel and a story in *The New York Times*. Kraft didn't make a penny on the case but found the satisfaction incomparable.

"It's that case that left me with very good feelings about myself, my role in the system, my feeling about honesty in the law and my confidence in the law," said Kraft. "I feel a great deal of professional pride, which aren't the words I mean to use. Because I felt something deeper than that, something more

rewarding." It was that feeling that he set out to capture in "His Sole Weapon."

Kraft retired from his trial practice in 1988, when he was 62. He went on to teach dispute resolution at MIT's Sloan School. At the same time, he started toying with the idea of writing a novel that reflected his experiences, but he was discouraged by a journalist friend who insisted his idea wouldn't work because it didn't include a murder.

Kraft eventually decided his friend was wrong. "I think you can tell an interesting story about the daunting problems intelligent people face in their lives and careers."

And although he had never before tried his hand at fiction writing, he started in earnest in 1998, and put the same intense focus into his avocation that he'd applied in his legal work.

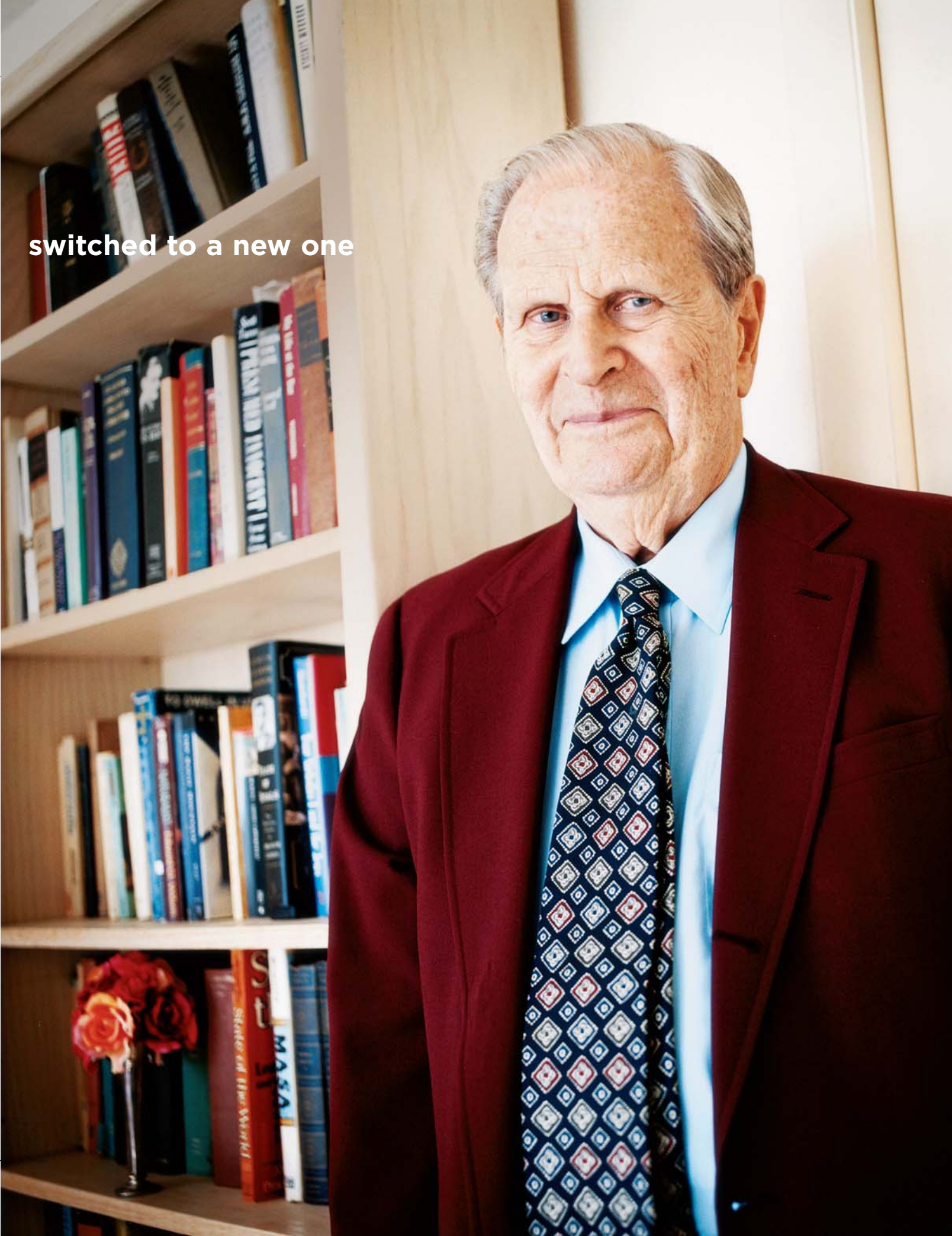
When Kraft met Parker on the recommendation of mutual friends, they immediately hit it off. Parker has served as Kraft's writing mentor, while in turn coming to admire his new friend's approach to life and the law. "He made the decision to stop when he was at the top and then to undertake a major new project at this point in his life," said Parker.

Kraft hopes to attract the attention of a publisher. In the meantime, he said, "I'm sort of taking it easy and enjoying life. Now that I'm 80, I think it's time to sit back." \*

By Elaine McArdle | PHOTOGRAPHED BY JOSHUA PAUL, PALM BEACH, FLA., JAN. 24, 2006



switched to a new one





# A Passage in India

Zia Mody LL.M. '79 blazes a trail for women

W

HEN ZIA MODY LL.M. '79 started her own law practice in India in the mid-1980s, clients had a hard time believing she would be as good as a male attorney, so she set out to prove she was better.

"India's a society which is traditionally male-dominated, and the aggressive woman is not necessarily a popular animal," said Mody.

Rather than be relegated to a junior position in a traditional Indian law firm, Mody, who had spent the previous four years in a New York City firm, opened her own litigation practice in Bombay in 1984. She said the schedule was back-breaking (16-hour days, six and a half days a week) and it wasn't easy getting cases, but when she did, she made sure she was heard.

Today, she is a top corporate attorney and one of India's 25 most powerful women. Her firm, now known as AZB & Partners, is an international powerhouse that is at the table for most of the multimillion-dollar deals in the country.

The opening of India's global marketplace in the 1990s transformed Mody's firm, and multinational corporations currently make up 80 percent of her clientele. Her firm has merged twice—something previously unheard of in India—and today it is the country's second-largest law firm with offices in New Delhi, Bangalore and Mumbai (known as Bombay until the official name change in 1995).

Unlike traditional Indian law

practices, where family members are often guaranteed partnerships, Mody designed her firm with clear partnership tracks for junior attorneys. Antiquated national statutes restrict the number of partners to 20 (AZB currently has 14).

She forbids gender bias in recruiting, although her partners tease that she favors women attorneys, who make up nearly 40 percent of her legal staff. She says she understands the issues women face and does try to accommodate them, but the reality is when the deal is on, attorneys have to be there night after night. And she finds many women who marry and have children have to drop out because they don't have support at home.

"Very often the husband, and the in-laws who live with the husband, don't appreciate the 16-hour days," said Mody.

Born in Bombay, as the oldest child and only daughter of Soli Sorabjee, India's former attorney general, Mody always knew she wanted to be a lawyer. She felt she "got a bit lucky" when her mother, whom she describes as the decision-maker, insisted her younger brother become a doctor.

"My father had probably wanted his eldest son to be a lawyer, but I think my mother squashed that," said Mody.

She studied law at Cambridge University in England and Harvard. She describes her LL.M. year at HLS as the best of her life.

After working for Baker & McKenzie in New York City, she returned to India to marry.

She knew she wanted to continue her career in India and felt luck was on her side again when her mother-in-law and husband, whose father had been a judge, supported her. "The entire infrastructure in the house was geared toward letting me still go out and work while the children were growing up," said Mody. This was highly unusual and might not have occurred had she married into another family, she says.

Over the next six years, she established her law practice and gave birth to three daughters (now 19, 18 and 15). Building an institution and raising a family was stressful, and she says she was never able to strike a balance between the two.

"I chose to prioritize my career simply because I had worked so hard to get to a certain level," said Mody. "Having been recognized in the legal landscape, I didn't want to drop the space that I was occupying."

One of her daughters is now following in her footsteps, setting her sights on law school. Mody believes it is getting easier for women to succeed in India's legal profession.

"I was one of the very few women who were trying to take up for the gender at that time," said Mody. "People are much more willing to give women a chance today and wait for them to perform." \*

By Christine Perkins | PHOTOGRAPHED BY TOM PIETRASIK, MUMBAI, INDIA, JANUARY 2006





# Taking the 'A' Train

James O'Neal '82 knows it goes though Harlem and

**W**HILE MOST OF HIS classmates were busy searching for jobs during their third year at HLS, James O'Neal '82 was searching his soul.

"I saw myself as a community activist who could use my skills to serve poor, urban communities, but I had no idea what form that would take," said O'Neal, who didn't see an easy fit in the legal services work he'd tried during law school. "I started thinking creatively about what I could do to really change outcomes in people's lives and how I could use the law as a mechanism for helping especially young people improve the quality of their life opportunities."

O'Neal, who grew up in Atlanta during the civil rights struggle, took his cue from a book he'd read as a teen, Claude Brown's "Man-child in the Promised Land," about an African-American boy growing up in Harlem. "I started to think about going to a community like Harlem to serve people who did want more for their lives but didn't know how to get where they wanted to go," he said.

Indeed O'Neal went straight from HLS to Harlem, with a public service fellowship funded by his classmates and a proposal to teach a law course for kids. Several high schools took him on, he said, "partly because they couldn't believe someone from Harvard Law School wanted to teach in Harlem or Bedford-Stuyvesant."

His constitutional law class was a hit, but O'Neal noticed that students sought his advice about more practical legal issues such as those that arise in families or between landlords and tenants or with the police. The community law course he developed in response to students' questions was the genesis of the program he heads today. Legal Outreach, co-founded with a fellow community activist in 1983, uses a law curriculum to prepare inner-city youth in New York City to address problems in their communities and to inspire them to strive for college and professional school.

O'Neal initially used mock trials and field trips to courts, law firms and law schools to engage the teenagers, but he soon realized the lessons wouldn't go far if he didn't also help the students build strong academic skills.

"They weren't getting college-prep level classes, and they didn't have the transcripts they'd need to go to college," said O'Neal, who decided to catch kids earlier—in middle school—in order to set them on an academic path that could lead to college.

By 1989, with a teaching staff and revised curriculum, Legal Outreach, in addition to working with individual schools, welcomed six students into a four-year after-school College Bound program that pushed them to excel in academics and gave them a goal to graduate and enroll in college.

Since then, Legal Outreach has seen 176 students graduate from the College Bound program and 74 percent of them have gone to many of the country's top colleges and universities—including Harvard, Yale, Columbia, Swarthmore, Cornell and NYU.

"Two of those first six kids are now lawyers who are very active in helping our program," said O'Neal. Other former students have gone on to graduate work in a range of professional fields, he said. "It's really so exciting to see what they're doing."

Legal Outreach now offers law-related courses to numerous middle-schoolers in the five boroughs each year. With 11 full-time and 38 part-time staff, O'Neal no longer teaches but focuses instead on fundraising and on developing new ways to overcome barriers that still block many children from getting a quality education.

"My wish for the future is to develop supports for the students after they get into college—to help them find the time and money to prepare for the LSATs," said O'Neal. "It's momentum. When you see what poverty can do—when students decide to stop the program or defer college because they have to work to survive, you see why it's really hard to develop a true pipeline to achieve diversity in the legal profession." \*

By Margie Kelley | PHOTOGRAPHED BY ANDREA ARTZ, NEW YORK CITY, DEC. 12, 2005

on to college





# Cable from Kabul

Scott Worden '00 tackled legal challenges

**O**N A MONDAY IN November, Scott Worden '00 was confined to his office in Kabul, Afghanistan, unable to leave the building until 9 p.m., not because he was working late but because security restrictions forced him to stay. A series of car bombs had exploded outside. Eight people were dead, eight others injured.

According to Worden, that kind of violence isn't the norm. "Generally speaking, Kabul is a very safe city," he said, "very friendly and welcoming."

He moved to Afghanistan last June to become the U.N.'s senior legal adviser to the Joint Electoral Management Body—an Afghan-U.N. commission that oversees the country's elections.

The JEMB played an essential role in September's parliamentary elections—a democratic landmark for the country. Some 5,800 candidates ran for 249 seats in parliament and for 34 on provincial councils, and Worden and his colleagues were charged with overseeing many of the logistical and legal challenges involved. He has helped develop processes for polling, nominating candidates and registering voters.

One major challenge is that an estimated 80 percent of the country is illiterate, so the commission had to devise ways to make the process intelligible to voters. "Each ballot has a candidate's name, but it also has a picture and a symbol that's unique to the candidate," Worden

explained. "So even if you can't read, you can recognize either the candidate or their symbol."

The election results stirred controversy because the new legislative body will include former militia leaders and accused drug lords. "There have also been some surprise winners," Worden noted. "In a country that's really conservative, several women wound up winning their seats outright rather than through the quota system," he said, referring to laws that reserve a minimum number of seats for women.

While the work gave him a close-up view of election law and logistics, he says it didn't offer him as much insight into the political landscapes of Afghanistan. "Ironically, my position as a legal officer and my placement in Kabul have kept me out of the fray of politics," he wrote in an e-mail to friends.

He lives in a housing area with a "cozy walled garden with grapevines ... 24-hour armed guards and a rent that would hold its own in Manhattan," he said. "A lot of times you're restricted to going between your guesthouse and your office and maybe one or two restaurants. ... [I]t can be very confining."

It's a far cry from the New York law firm where he worked for three years after graduation. His career swerved in 2003 when he won a fellowship that allowed him to move to Cambodia to help draft anticorruption legislation in Phnom Penh. That job helped prepare him for the

work in Afghanistan.

"Issuewise, there are a lot of similarities between Afghanistan and Cambodia," Worden said. "They have a similar history of conflict, and their legal systems are both in shambles. And in that sense it wasn't that surprising what I encountered professionally here [in Kabul]."

In his work at the New York firm, Worden focused on international legal issues, and while this interest has remained relatively constant in his work, the setting has changed dramatically. "It comes down to risk taking," he said. "It's difficult to make that first step from something that's more established when your career path is all set out for you."

With security lockdowns and streets broken by car bombs, the path hasn't been entirely smooth. Eventually, he plans to return to the United States to work in foreign policy. In the meantime, he says, the firsthand experience has been invaluable.

"Coming here, I'm surprised at how ... energetic people are, and how committed they are to making reforms in government," he said. "I think there is a lot of potential here, and I'm not sure that gets reflected accurately in the media."

Even the car bombs didn't shake this belief. "Most times, the exhilaration outweighs the exhaustion," he said, just hours after the November attack. \*

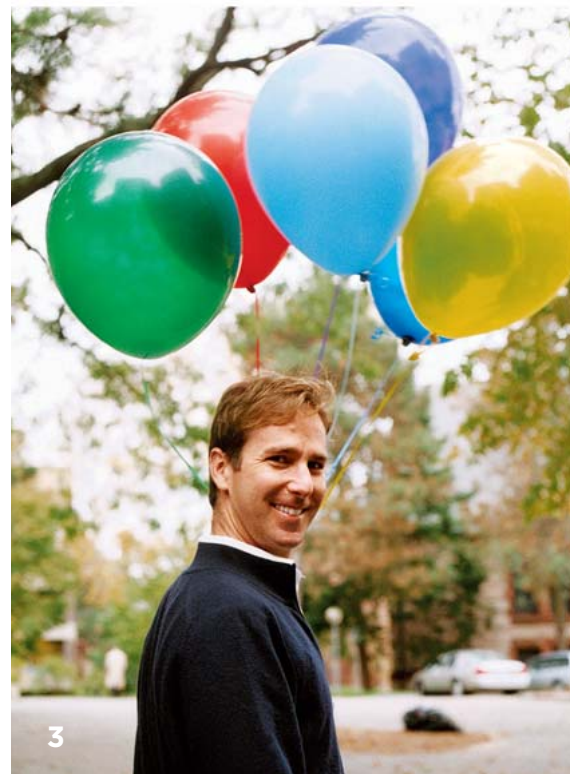
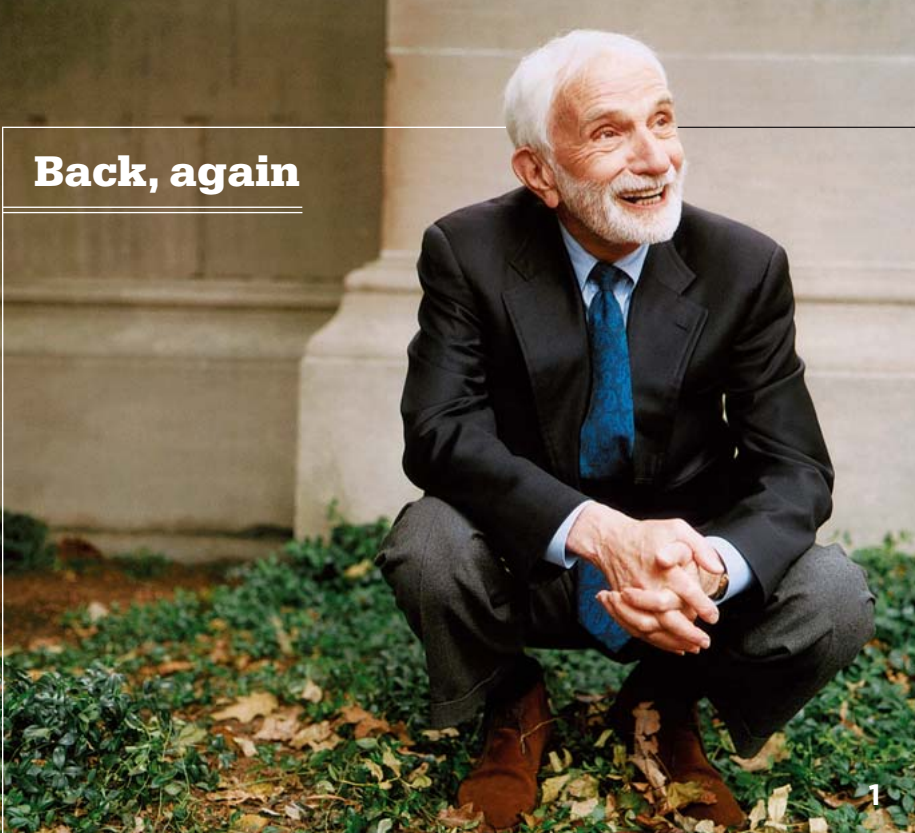
By Mary Bridges | PHOTOGRAPHED BY FIRANZA WAHIDY, KABUL, AFGHANISTAN, NOVEMBER 2005

in historic elections in Afghanistan





Back, again



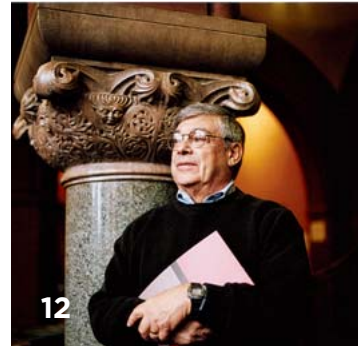
# Fall Reunions 2005







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**1.** Philip Isaacson '50 **2.** 1975 classmates Michael Fay, Ian Hall, William Tanis **3.** Edward Reitler '90 **4.** 2000 classmates Jacqueline Gigantes, Krassimira Zourkova, Humberto Reboredo, Jacob Tyler **5.** Pamela Everhart '90 **6.** 1975 classmates Charles Maurer, Francis Menton **7.** Leecia Eve '90 **8.** 1960 classmates Samuel Donnelly, Philip Chapman **9.** Nancy Browne '85 **10.** Theodore Stevens '50 **11.** 1985 classmates Richard Strasser, Michael Dickstein **12.** Harvey Wax '60 **13.** 1975 classmates Jonathan Walters, Hugo Morales, Barry Dichter **14.** Laura Lou Meadows Taggart '60



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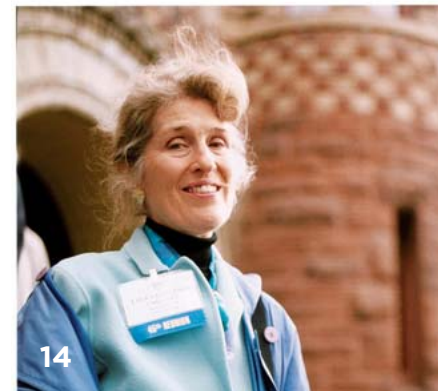
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# In Memoriam

## Obituary Information

Details may be sent to Harvard Law Bulletin, In Memoriam Editor, 125 Mount Auburn St., Cambridge, MA 02138

### 1920-1929

**David Teitelbaum '29** of New York City died Aug. 3, 2005. A corporate attorney, he helped found the Brooklyn Philharmonic in 1954 and served as its first president. He was a partner at Donovan, Leisure, Newton & Irvine in New York City and served on the Temporary Commission on City Finances in the 1970s, during New York's fiscal crisis. From 1961 to 1968, he was chairman of the board of the Brooklyn Philharmonic.

**James A. Velde '29** of Lake Forest, Ill., died June 8, 2005. Formerly of Lake Bluff, he was a longtime partner at Gardner, Carton & Douglas in Chicago, and he continued to go into the office until the age of 90. In the early 1970s, he was president of the Chicago Bar Association. He was also director of United Charities of Chicago.

### 1930-1939

**James J. Weinstein '31** of Quechee, Vt., died Oct. 20, 2005. He was a founder of SnowSports Industries America, a national ski trade organization, and served as its corporate counsel for four decades. He was in private practice in 1954 when he helped a client organize the National Ski Equipment and Clothing Association, which later became Ski Industries America. He also organized the National Ski Credit Association, a credit reporting agency, and was legal counsel to the New England Sporting Goods Agents Association and the American Windsurfing Industries Association. At 98, he helped write a 50-year history of the SIA trade show.

**Myron K. Wilson '31** of Prescott, Ariz., died Nov. 8, 2005. A longtime resident of Larchmont, N.Y., he was a solo practitioner, specializing in estates and trusts and real estate law. He also served as counsel for the Westchester County Chamber Music Society.

**Frank W. Hubby III '32** of Old Black Point, Conn., and Princeton, N.J., died Nov. 4, 2005. For 50 years, he was an attorney with Breed, Abbott & Morgan in New York City, where he focused his practice on estates, trusts and corporate real estate law. From 1955 to 1965, he was a member of the Princeton Borough Zoning Board.

**John W. McPherson '32** of Bryn Mawr, Pa., died July 13, 2005. He was of counsel to the Penn Mutual Life Insurance Co. of Philadelphia, where he specialized in real estate. He was a longtime trustee of the Medical College of Pennsylvania and a director of the Harriton Association, which oversees the Bryn Mawr home of Charles Thomson, secretary of the Continental Congress. He was also president of the Scotch-Irish Foundation.

**John D. Cartano '34** of Bellevue, Wash., died July 19, 2005. A longtime Seattle lawyer, he helped found Cartano, Botzer & Chapman, where he specialized in personal injury cases. He was president of the Seattle Chamber of Commerce, a member of the steering committee that brought the World's Fair to Seattle in 1962 and manager of Dwight Eisenhower's 1956 presidential campaign in Washington state. He commanded a PT boat during WWII and received the U.S. Navy and Marine Corps Medal of Honor for helping rescue 35 survivors from the USS John Penn, after the transport ship was torpedoed by Japanese aircraft off Guadalcanal in the Solomon Islands in 1943.

**E. Spencer Miller '34** of Portland, Maine, died Aug. 12, 2005. For more than 25 years, he was president of Maine Central Railroad. He joined the railroad's legal staff in 1940 and was named president in 1952. During his tenure, he fought to keep the railroad independent and successfully resisted takeover attempts by other railroads to create a consolidated system. After his retirement, Maine Central became a part of Guilford Rail System. He later was a consultant to Maine Central Railroad and Ashland Oil Co. He also served as director of the First National Bank of Boston, Maine National Bank and Association of American Railroads.

**Norman Miller '34-'35** of Pompano Beach, Fla., and Livingston, N.J., died Jan. 7, 2005.

**Alvin F. Klein '35** of New York City died Oct. 11, 2005. For more than 25 years, he served in the New York court system, first as a civil court judge and later as a justice on the Supreme Court. After retiring from the bench, he served as an arbitrator and then a judicial hearing officer. He retired for the second time in 2004 at the age of 93. He was a trustee of the East 55th Street Conservative Synagogue in New York City.

**John M. Robinson '35** of Pebble Beach, Calif., died March 5, 2005. He was a partner at Musick, Peeler & Garrett in Los Angeles, where he specialized in corporate, commercial, real estate, and oil and gas law. He was a director of Trust Company of the West, St. John d'el Rey Mining Co. and MAPCO.

**Donald J. Ball '36** of Jamesville, N.Y., died Sept. 17, 2005. He was in private practice in New York and also served as comptroller of Rudolph Brothers' Jewelers until 1963. A 60-year member of the New York State Bar Association, he was also active in many civic and philanthropic organizations.

**Michael L. Supnik '36** of Delray Beach, Fla., died Oct. 4, 2005. He was a partner in a two-lawyer firm in Syracuse, N.Y., where he worked principally in commercial and bankruptcy law.

**Richard S. Baxter '36-'37** of Peterborough, N.H., died April 8, 2005. Formerly of New York, he was of counsel at DeForest & Duer in New York City.

**Samuel B. Andrews '37** of Lexington, Mass., died Oct. 21, 2005. Formerly of Rockport, Mass., he worked for the federal government, retiring in 1972.

**Duane C. Frisbie '37** of Seattle died May 11, 2005. He was president of Western Pre-Paid Legal Services and Western Motor Association.

**John B. Harriman '37** of North Andover, Mass., died Aug. 11, 2005. He was vice president of Boston Safe Deposit & Trust Co. He also worked as senior vice president at Bank of New England, where he was head of the trust department. A resident of North Andover for more than 60 years, he was chairman of the North Andover School Building Committee. He also was president of the Boston Life Insurance and Trust Council, now known as the Boston Estate Planning Council. During WWII, he served as a captain on an aircraft carrier.

**Alfred J. McDowell '37** of Alton, N.H., died Sept. 15, 2005. Formerly of Abington, Pa., he was senior partner at Morgan Lewis in Philadelphia. He joined the firm in 1946 and specialized in corporate tax law. He moved to New Hampshire in 1974 and was of counsel to Heard & Porch in Alton, where



he focused on taxes and estate planning. Earlier in his career, he clerked for the Tax Court of New Jersey and for the U.S. Tax Court in Washington, D.C.

**John S. Monagan '37** of Washington, D.C., died Oct. 23, 2005. A Democrat, he represented Connecticut for seven terms in the U.S. House of Representatives beginning in 1958. In the 1960s, he was chairman of a government operations subcommittee that helped uncover irregularities in the Federal Housing Administration's financing of the Housing Renewal Program. He also was a member of the Committee on Foreign Affairs and president of the U.S. Association of Former Members of Congress. In 1972, he helped open the Washington, D.C., office of Whitman & Ransom, where he was a partner. From 1943 to 1947, he was mayor of Waterbury, Conn. He wrote opinion pieces and articles for several newspapers and wrote biographies of the Rev. Horace McKenna and Justice Oliver Wendell Holmes Jr.

**Kenneth O. Rhodes '37** of Pasadena, Calif., died Aug. 23, 2005. For more than 30 years, he was a solo practitioner in Los Angeles, before joining Taylor, Kupfer, Summers & Rhodes as a partner in 1979. He also served as a referee in juvenile court. Beginning at the age of 35, he devoted a third of his time to volunteer work and was associated with many charities and educational institutions, including Family Services of Los Angeles, the Hathaway Home for Children and the Legal Aid Foundation. He traveled extensively with his wife, trekking in the Himalayas three times and visiting every continent, including Antarctica aboard a Russian icebreaker when he was in his 80s.

**Mervin N. Bachman '39** of Palo Alto, Calif., died Aug. 22, 2005. Formerly of Chicago, he began his career as a National Labor Relations Board attorney before joining Arvey, Hodes, Costello & Burman in Chicago in 1953. He worked for the firm for 30 years, representing management in collective bargaining negotiations and serving as head of its labor department. He also served as chairman of the Illinois Industrial Commission, now the Illinois Workers' Compensation Commission, and as a member of the Illinois Human Rights Commission.

**Alfred M. Nittle '39** of Bradenton, Fla., died Nov. 4, 2003. He was counsel to the U.S. House of Representatives' Judiciary Committee and Internal Security Committee in Washington, D.C. In the 1960s, he was counsel to the House Un-American Activities Committee. Earlier in his career, he was in private practice in Pennsylvania and served

as assistant district attorney in Northampton County, Pa. He also served in the U.S. Army in London.

**Frank Untermyer '39-'40** of Deerfield, Ill., died Oct. 10, 2004. He was professor emeritus of political science and African and African-American studies at Roosevelt University in Chicago. He also taught at the University of Ghana. He served as a lieutenant in the U.S. Army.

### 1940-1949

**Everett A. Eisenberg '40** of Delray Beach, Fla., died Sept. 4, 2005. He was a solo practitioner in New York City, specializing in international commercial transactions. During WWII, he was a pilot in the South Pacific.

**Jules A. Karp '40** of Manchester, Conn., died Feb. 23, 2005. He was a partner at Lessner Rottner Karp & Plepler in Manchester, where he specialized in real property and zoning laws, and then a solo practitioner. He also served as counsel to a savings and loan and taught real estate law at the University of Connecticut. After retiring, he taught commercial law at Manchester Community College and conducted pretrial proceedings and trials of civil nonjury cases as a state trial referee.

**John F. Lang '40** of New York City died Oct. 5, 2005. He was a partner and later of counsel at Hill, Betts & Nash in New York City. Active in the International Bar Association, he was co-editor of the IBA Maritime Law Manual. In 1989, he was knighted by the president of the Republic of Liberia for services in connection with Liberia's ship registration program. He served in the U.S. Navy as a captain of three different vessels in antisubmarine warfare.

**John W. Lowe '40** of Salt Lake City died Dec. 28, 2004. He was a partner at Brayton, Lowe & Hurley in Salt Lake City and general counsel of First Federal Savings Bank. He was also sole proprietor of Lowe & Associates and then senior partner at Lowe & Arnold, specializing in corporate law at both firms. He was president of the Salt Lake City Rotary Club and the Alta Club, a private social club in Salt Lake City. He also served as a colonel in the U.S. Army Reserve.

**Norman Moloshok '40** of Ardsley, N.Y., died Sept. 1, 2005. He specialized in litigation as a partner at the New York City law firm of Delson & Gordon.

**L. Harry Weill '40** of Chattanooga, Tenn.,

died June 22, 2005. He practiced law for more than 60 years and was senior partner at Weill, Durand and Long in Chattanooga. A lifelong skier, at 87, he continued to ski with his children and grandchildren in North and South America and in Europe. After graduating from HLS, he was counsel to one of the WWII Selective Service Boards. Rather than accepting an exemption from military service due to his position, he enlisted in the U.S. Army with Hamilton County's first group of inductees. During WWII, he served in military intelligence and later as a B-29 pilot, flying bombing missions in Guam.

**L. Kellsey Dodd II '40-'41** of West Hartford, Conn., died Sept. 8, 2005. For 35 years, he was employed by Stanadyne Automotive Corp. in Hartford. He was president of the West Middle School Committee, now ConnectiKids, where he was also a tutor. During WWII, he served as a gunnery officer aboard the USS Wichita and attained the rank of lieutenant commander.

**Thomas H. Ahrens '41** of New York City died Oct. 4, 2005. He was a professor of hotel and restaurant management at New York City College of Technology, where he spent decades teaching students about wines, hotel law and dining room management. For many years, he led the college's study abroad program. From 1946 to 1990, he wrote scripts on wine, gastronomy and music for Eddie Gallaher's morning radio show in Washington, D.C. He was an active member of many organizations in Paris, and in 1976, he was awarded the Medal of the City of Paris, France. During WWII, he served in the U.S. Army.

**John C. Firmin '41** of Findlay, Ohio, died May 30, 2005. For more than 50 years, he was an attorney in Findlay, where he lived for 74 of his 88 years. In 1946, he began his law practice, which became Firmin, Sprague & Huffman. Active in the community, he was a government appeal agent for the Selective Service System and Findlay's law director, and he served on the Findlay Board of Education. During WWII, he was a special agent in counterespionage for the FBI in Washington, D.C., Oklahoma City and New York City.

**Daniel M. Gribbon '41** of Washington, D.C., died Nov. 3, 2005. A partner and later senior counsel at Covington & Burling in Washington, D.C., he focused his practice in antitrust, tax and commercial law and litigation and was chairman of the firm's management committee. He argued many times before the U.S. Supreme Court, and one of

# Arthur T. von Mehren, 1922-2006

*A comparative scholar beyond compare*

PROFESSOR ARTHUR T. VON MEHREN '45, a world-renowned scholar in international and comparative law whose work influenced generations of lawyers throughout the globe, died Jan. 16 of pneumonia. He was 83.

Fluent in several languages, von Mehren had studied extensively abroad. He was the author of 10 books and hundreds of articles on various aspects of comparative and international law, including conflicts of law and jurisdiction. "Phases of German Civil Procedure," co-written with HLS Professor Emeritus Benjamin Kaplan and Rudolf Schaefer, and published in 1958, remained the gold standard in the field for 50 years, according to Visiting Professor Peter Murray '67. A founding member and past president of the American Society of Comparative Law, von Mehren taught in nine countries.

In 1966, von Mehren was appointed by the State Department to the U.S. delegation to the Hague conference on private international law. His work there over the decades culminated in the Convention on Choice of Court Agreements, finalized at The Hague last summer, which allows parties to stipulate the jurisdiction in which they litigate international disputes.

"He was a revered elder statesman," said Murray, in large part because he emphasized that in comparing

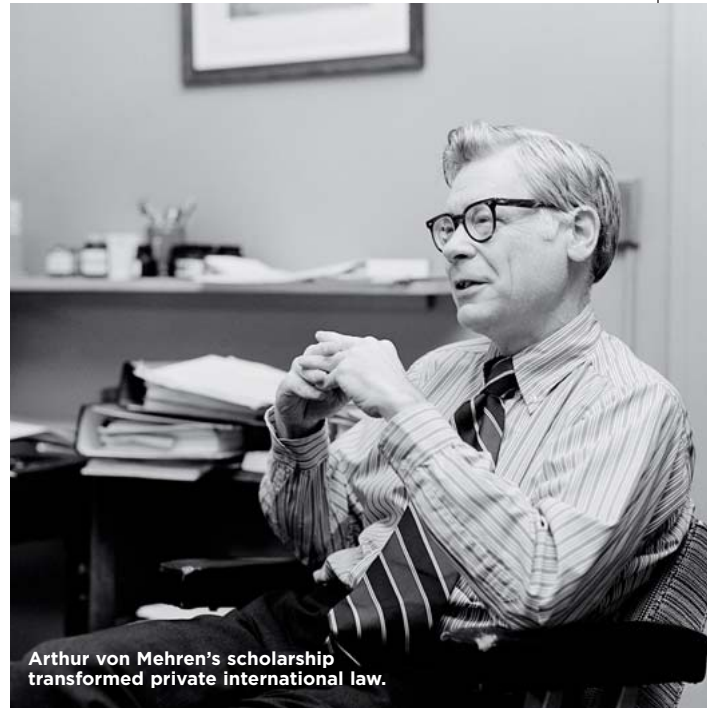
legal systems, one must never resort to nationalism or a judgmental approach. His love for teaching was as strong as his passion for scholarship. This past fall, despite his failing health, von Mehren co-taught with Murray a course for LL.M. students on the

American legal system. "I think the reason he did it was because of his image of himself as a teacher. I don't think he could give it up," Murray said. "Nobody at the law school defined himself as a scholar and law professor more than Arthur von Mehren."

Several years ago, for von Mehren's 80th birthday, more than 75 colleagues and former students from around the world gathered at Harvard for a special celebration that included a Festschrift, a collection of academic articles dedicated to von Mehren. At the time of his death, a second Festschrift was being compiled in his honor by a dozen German scholars who, as Joseph Story fellows, had served as his research assistants over the years.

"He was a great scholar of the old school," said Professor Emeritus Detlev F. Vagts '51. "He relied on his immense knowledge of comparative law rather than relying on search engines and modern machinery, and he knew an enormous number of people around the world in the field. He was an institution."

Born in Albert Lea, Minn., von Mehren and his twin brother, Robert, won scholarships to Harvard and Yale, respectively, and Arthur graduated Phi Beta Kappa in 1943. Both attended HLS, where they stand as the only twins to have succeeded each other as president



Arthur von Mehren's scholarship transformed private international law.

of the law review, with Arthur serving first.

After graduating from the law school in 1945, von Mehren received a doctorate in government from Harvard. In 1946, he was appointed as an assistant professor of law at HLS. Before he began teaching, he spent three years studying law in Germany, France and Switzerland, and then returned to Cambridge, where he taught for more than 50 years. In 1993, he became emeritus but continued to contribute in the classroom.

"Arthur's scholarship and teaching have been immeasurably influential both at home and abroad," said Dean Elena Kagan '86. "He has had an effect on generations of LL.M. students who studied at Harvard Law School and went back to their own countries, and his work in comparative civil procedure has endured for 50 years." \*

—Elaine McArdle

To inquire about receiving a memorial booklet, please contact the Dean's Office at 617-495-4601.



his cases, *Upjohn Co. v. United States*, set legal precedent by expanding the scope of a corporation's attorney-client privilege. He was chairman of the Advisory Committee on Procedures for the U.S. Court of Appeals for the D.C. Circuit. He was also president of the Metropolitan Club and the Historical Society of the D.C. Circuit. During WWII, he served in the U.S. Navy and was legal secretary for the Joint Chiefs of Staff.

**George J. Hayer '41** of Greenfield, Mass., died Nov. 15, 2005. A Massachusetts Superior Court judge, he served on the court from 1972 until 1985. Prior to his judicial appointment, he was a partner at Hayer, Callahan and Shea in Greenfield. He was Greenfield's town moderator for more than 20 years, and he also served on the town's school committee. During WWII, he was a combat intelligence officer in the U.S. Army Air Forces in campaigns in the Southern Philippines, Northern Solomon Islands and New Guinea and received the Asiatic Pacific Service Medal, the Philippine Liberation Medal, the WWII Victory Medal and the American Defense Service Medal.

**Bert T. Kobayashi '43** of Honolulu died Oct. 6, 2005. He was an associate justice of the Supreme Court of Hawaii from 1969 to 1979. Prior to his appointment, he was an attorney general for Gov. John A. Burns and helped mediate several dock strikes that threatened to cripple the state's economy. From 1948 to 1962, he was in private practice. After retiring from the bench, he continued to work as a mediator. He was also president of the Hawaii State Bar Association.

**Herbert F. Schmelzer '46** of New York City died Nov. 10, 2004. He was a solo practitioner, specializing in corporate litigation.

**Robert M. Ewing '46-'48** of Portland, Maine, died June 10, 2005. He was a planning consultant before his retirement in 1978.

**William D. Hart Jr. '47** of New Canaan, Conn., died Nov. 1, 2005. He was associated with several law firms during his career, including Bleakley Platt & Schmidt and later Whitman & Ransom. A longtime resident of New Canaan, he was a member for many years and then chairman of the town's planning and zoning commission. During WWII, he served as an officer in the U.S. Navy aboard the USS Heyward L. Edwards in the Pacific.

**Page M. Anderson '48** of Honolulu died Oct. 13, 2005. For more than four decades, he

practiced property law in Hawaii and was a partner of Anderson Wrenn and Jenks, now known as Goodsill Anderson Quinn and Stifel, in Hawaii. He served in the U.S. Army Signal Corps in the Northern Mariana Islands during WWII.

**Warren L. Ashmead '48** of Hamilton, N.Y., died Sept. 24, 2005. He was a solo practitioner in Hamilton, where his practice focused on estate planning and probate, and real estate law.

**Bernard Axelrad '48** of Marina del Rey, Calif., died Oct. 1, 2005. He was a trustee and later acting administrator of Casper Mills Scholarship Foundation.

**Robert S. Davis '48** of Providence, R.I., died May 14, 2005. A corporate attorney and an advocate for children and education, he was an attorney at Edwards & Angell in Providence for more than 40 years. He headed the firm's corporate department and was chairman of its executive committee. In 1992, he was appointed to the Rhode Island Board of Governors for Higher Education, and in 1995, he was named chairman of Rhode Island Children's Crusade for Higher Education. He was a director of many business and civic boards, and chairman of the board of the Providence Athenaeum and Roger Williams Hospital. During WWII, he served in the U.S. Navy in the Pacific.

**Harold I. Kaplan '48** of Palm Beach, Fla., died Oct. 28, 2005. Formerly of New Jersey, he was a patent attorney for 46 years and a managing partner at Blum Kaplan in New York City. During WWII, he served in the U.S. Army as an engineering officer with the Air Transport Command in Iceland, attaining the rank of captain.

**Sumner S. "Stan" Koch '48** of Grand Rapids, Minn., died Feb. 20, 2005. He was a longtime partner at White, Koch, Kelly & McCarthy in Santa Fe, N.M., where he lived for many years. He served on the Board of Bar Examiners from 1963 to 1980, and he was president of the Santa Fe County School Board. During WWII, he served in the U.S. Marines in the South Pacific.

**Herbert Lasky '48** of Santa Rosa, Calif., died March 14, 2005. He practiced workers' compensation law in Fairfield, Calif.

**Denis Maguire '48** of Whitefield, Maine, died Nov. 14, 2005. Formerly of Westford, Mass., he practiced law at the Boston firm of Harrison & Maguire, now known as Roberson & Cole, for 43 years, and specialized in real estate law. He devoted many hours

to Greater Boston Legal Services, where he served in several executive positions. The Boston Bar Association and the Volunteer Lawyers Project both named awards in his honor. A secretary of Boston Five Cents Savings Bank, he was also a 30-year member of Westford's Planning Board and helped create its current zoning bylaws. During WWII, he served as an air cadet in the U.S. Navy and later as a navigator for the U.S. Army Air Corps.

**Donald L. Philbrick '48** of Scarborough, Maine, died Sept. 12, 2005. A longtime Portland attorney, he specialized in real estate and probate law. He began his career at the firm now known as Verrill & Dana, before opening his own practice in Portland. He was president of the Maine State Bar Association Mutual Title Insurance Co. and the Maine Historical Society and vice president of New England Historic Genealogical Society. During WWII, he served as a German interpreter with the U.S. Army Reserve's 95th Infantry Division and received the Purple Heart and four battle stars. In 1951, he returned to military service as a Maine Air National Guardsman in Libya.

**Francis E. Silva Jr. '48** of Hingham, Mass., died May 11, 2005. He was a partner at Warner & Stackpole in Boston.

**Leonard W. Tuft '48** of New York City died Nov. 11, 2005. He was an executive vice president of RCA, where he negotiated commercial satellite agreements. After working for the company for 37 years, he retired to practice law. As a delegate of Nassau County to the 1960 Democratic National Convention, he was the sole dissenter to the presidential nomination of John F. Kennedy, preferring Adlai E. Stevenson. He earned two Purple Hearts and the Distinguished Flying Cross as a navigator during WWII.

**J. Elmer Weisheit '48** of Lutherville, Md., died July 7, 2005. He practiced real estate law in Towson, Md., and was counsel to the Baltimore County planning and zoning boards. During WWII, he served in the U.S. Army in the South Pacific.

**William C. Jones '49** of St. Louis died Sept. 16, 2005. A Washington University law professor and acting dean and a Chinese law scholar, he taught contracts and comparative law for 40 years and translated the principal legal code of the last Chinese dynasty, "The Great Qing Code." He also edited "Basic Principles of Civil Law in China." Prior to his appointment at the university, he was an attorney for the U.S. Department of the Interior. He also taught at a number of

other universities, including China's Wuhan University and Nanjing University.

**William J. Moss '49** of Garrison, N.Y., died Sept. 25, 2005. A longtime partner at Cadwalader, Wickersham & Taft in New York City, he joined the firm in 1949, became a partner 10 years later and was of counsel beginning in 1996. His clients included the Salvation Army, and in 1989, he received the organization's Order of Distinguished Auxiliary Service. In 1999, he was honored with its Evangeline Booth Award for "outstanding service by an exceptional individual for 50 years." He was president of the Garrison Union Free School PTA and chairman of the board of the former Butterfield Memorial Hospital. During WWII, he served in the U.S. Army in North Africa and Italy and attained the rank of captain. Among other military distinctions, he received the Medal of Honor, the Bronze Star with cluster for valor and the Purple Heart. He continued in the U.S. Army Reserve through the 1950s.

### 1950-1959

**Mark H. Berger '50** of New York City died July 27, 2005. He was a partner at Berger & Ackman in New York City. He served on the board of trustees and executive committee of Polytechnic University, his alma mater, and was chairman of its education committee.

**Richard F. Hart '50** of Glencoe, Ill., died Oct. 26, 2005. He spent his law career with Mayer, Brown, Rowe & Maw in Chicago, where he practiced trusts and estates law. Before attending law school, he served in the research division of the Federal Reserve Board in Washington, D.C. In 1954, he survived a KLM airplane crash off the coast of western Ireland that killed 28 of the 56 people on board. A golfer, he played at Lake Shore Country Club at the same tee time with the same foursome every Saturday and Sunday for nearly 50 years. During WWII, he served as a tech sergeant in the Signal Corps in the South Pacific.

**Robert Zuckerman '50** of Ellicott City, Md., died Jan. 16, 2005. He practiced corporate and publishing law in New York City before moving to Maryland.

**Patrick B.M. McCormick '50-'51** of Woodland Hills, Calif., died July 29, 2005. He was a comedian and writer for "The Tonight Show" and performed in many skits, including one as a diaper-clad, 6'7", overweight New Year's baby, and he once streaked naked across the set in 1974 during one of Johnny Carson's opening mono-

logues. McCormick wrote for or performed on several television shows, including "Candid Camera" and "The Gong Show." He also wrote and voiced hundreds of commercials for radio and appeared in "Buffalo Bill and the Indians" and in several "Smokey and the Bandit" movies. After attending HLS, he sold magazine advertising space in Cleveland before landing a job as a writer for "The Jack Paar Show." From 1946 to 1948, he served in the U.S. Army.

**Robert W. Bjork '52** of Greenwich, Conn., died Oct. 23, 2005. For 50 years, he worked in New York City as a litigator, prosecutor, financial consultant and money manager. He began his career at Simpson Thacher & Bartlett before becoming an assistant U.S. attorney for the Southern District of New York in 1956. He returned to private practice and then helped found what is now known as MacKay Shields Financial Corp. A board member of five publicly held corporations, for the last eight years he was affiliated with Jefferson Financial Group in Stamford, Conn. He was a founding member of the Princeton Tigertones, a men's a cappella group that has performed at venues including Carnegie Hall. During WWII, he served in the U.S. Navy as a weatherman and aboard the USS Alcove in the Pacific.

**Bernard Bressler '52** of Morristown, N.J., died Sept. 17, 2005. A founding partner of Bressler, Amery & Ross, he focused his practice on corporate and securities law and commercial litigation. He was a co-editor of the "New York Lawyers Manual" and a tax annotator for "Nichols Cyclopaedia of Forms." He was also chairman of the New Jersey Public Interest Law Center, a trustee of the Community Theatre in Morristown and a mentor in Rutgers University's prelaw program. He served in the U.S. Navy during WWII.

**Charles Dibble '53** of Chehalis, Wash., died Sept. 9, 2005. He was a consultant to regional cities and was Snohomish County's labor relations consultant for 10 years. In 1970, he was a city administrator in Edmonds, and in 1983, he was the first city manager of Mill Creek, serving from the town's incorporation in 1983 to November 1984. During WWII, he was a master sergeant in the U.S. Army and participated in the Battle of the Bulge.

**Jerry Fink '53** of North Huntingdon, Pa., died May 3, 2005. He was assistant secretary and deputy legal counsel for Air America, a CIA-owned air carrier, from the mid-1950s to the 1970s. He later worked for the U.S. Agency for International Development and

was the legal adviser for the International Narcotics Control Program. He also advised the Office of Contract Management and the Office of Housing Loan Guarantees. From 1955 to 1957, he was a civilian attorney in the secretary of the Air Force general counsel's office in Washington, D.C. During WWII, he was a second lieutenant in the U.S. Army Air Forces. He continued in the U.S. Air Force Reserve, attaining the rank of major before retiring from military service in 1968.

**David E. McGiffert '53** of Washington, D.C., died Oct. 12, 2005. He was a Washington, D.C., lawyer and was undersecretary of the U.S. Army during the antiwar protests and racial confrontations of the 1960s. In 1967, he formed a civil disturbance steering committee, with assistance from then Deputy Attorney General Warren Christopher, to review and coordinate the domestic role of the federal military. He later served as assistant secretary of defense for international security affairs under President Carter and was a principal negotiator for the administration's efforts to maintain military security in the Middle East. He began his career in government in 1962 as Defense Secretary Robert McNamara's assistant for legislative affairs. He joined the Washington, D.C., firm of Covington & Burling in 1953, became a partner in 1969 and retired in 1995. He was a member of the Council on Foreign Relations and on the boards of the Atlantic Council and the Center for Naval Analysis. During WWII, he served in the U.S. Navy.

**G. Michael Bache '54** of Lavallette, N.J., died Aug. 8, 2005. A foreign service officer for more than 30 years, he began his diplomatic career in 1951 and was posted as an economic officer in Pusan, South Korea. He also worked in Germany, the Ivory Coast, Sweden and Washington, D.C., as well as at the U.S. Mission to the United Nations in New York. From 1958 to 1961, he worked in his family's investment brokerage firm, later known as Prudential-Bache. After retiring from the foreign service in 1982, he began a second career as a financial planner. A cellist, he played with the Garden State Philharmonic. He was a member of Diplomatic and Consular Officers, Retired. He served in the U.S. Army from 1946 to 1947.

**Sanford Saideman '54** of New York City died Jan. 31, 2005. He was of counsel at Kridel & Neuwirth in New York City, where he focused his practice on estate planning and probate law.

**Alexander J. Holland '55** of Fairfield, Conn., died July 30, 2005. He was a founding partner at Holland Kaufmann & Bartels in



# David Westfall, 1927-2005

## *A passion for teaching*

PROFESSOR DAVID WESTFALL '50, as beloved by generations of students for his warmth and humor as he was respected for his legal acumen and teaching skills, died of cancer Dec. 7, surrounded by family. He was 78.

Westfall's teaching career at the law school spanned 50 years and continued through October, when his decade-long illness became more serious.

"Professor Westfall was the instigation for the laughter and fun we had as a section," said Karen Suber '06. "He wanted us to realize that life is more than what's in a book, and that came out through humor, some of it at his own expense." Westfall, who

professor as exceedingly generous. "He was always having events for students, inviting them to his house, advising them, entertaining them."

When the new 1L section initiative was instituted in 2001 to foster more student-faculty contact, Westfall was among the first professors to volunteer. He hosted small dinners in his home for his students. Over Thanksgiving breaks, he invited students who were remaining on campus to dine with him at the Faculty Club.

"I think he just enjoyed life, and he enjoyed and respected people," said Dawn Warner, program assistant for the first-year sections. "I never saw him without a suit or tie on, but he always had this big smile."

Westfall, a native of Columbia, Mo., graduated in 1947 from the University of Missouri with a bachelor's degree in economics. In 1950, he received an LL.B. from Harvard, where he was a member of the Harvard Law Review and received the Fay Diploma, awarded to the graduating student with the highest combined grade point average.

The Korean War broke out just as he was graduating from law school. Westfall joined

the U.S. Army and was trained as an infantryman. He served his tour of duty in the Office of the Judge Advocate General in Washington, D.C., and then practiced with the Chicago firm of Bell, Boyd, Marshall & Lloyd from 1950 until he joined the Harvard Law faculty in 1955.

Westfall became a tenured professor of law in 1958. He began by teaching

estate planning and then turned his focus to labor and family law. He was a member of the American College of Trust and Estate Counsel and was an assistant reporter to the American Law Institute from 1961 to 1966. Since 1991, he had served as a member of the ALI's consultative group on the principles of the law of family dissolution. From 1964 to 1968, he was a consultant to the U.S. Department of the Treasury.

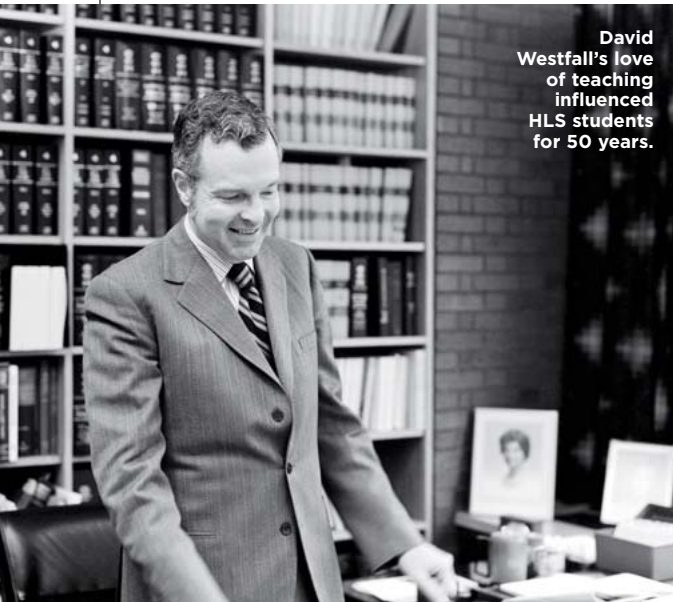
Westfall was the author, co-author or editor of a number of scholarly publications including a volume on family law. The fourth edition of his casebook and supplement on "Estate Planning Law and Taxation" was published in 2001.

But teaching was his real passion, and he embraced it with renewed vigor over the past decade, says Visiting Professor Peter Murray '67, a former student of Westfall's who later became his close friend and colleague. "You don't know how much of this was a sense of mortality and the fact he had the cancer or what it was, but he really invested in students in a much more intimate and meaningful way than most colleagues do and than he'd done before," Murray said.

He also began traveling extensively and taught on cruise ships as well as in Germany, Spain, Japan and Chile. "More than once he said to me that his 70s were

the best decade of his life," Murray said. "He shows a tremendous example of how one can in one's mature years still remain open to and embrace new opportunities and new challenges—and really go out and smell those flowers." \*

—*Elaine McArdle*



David Westfall's love of teaching influenced HLS students for 50 years.

attended many student-sponsored events, encouraged members of his sections to develop close ties with each other. "The friendships he planted the seeds for will last forever," Suber added. "That's the best gift any professor could give."

"The most notable thing was how devoted he was to students," said Dean Elena Kagan '86, recalling her former

To inquire about receiving a memorial booklet, please contact the Dean's Office at 617-495-4601.

Greenwich, Conn., which merged with Shipman & Goodwin last year, and he was most recently of counsel. He had helped establish the firm, originally Pierson, Duel and Holland, in 1969, after working in New York City and then at another Greenwich firm. He was a fellow of the American College of Trust and Estate Counsel and a life fellow of the Connecticut Bar Foundation James W. Cooper Fellows Program. A licensed pilot, he was a member of the American Bonanza Society, an organization of Bonanza, Baron and Travel Air-type aircraft enthusiasts.

**Melvin C. Levine '55** of New York City died Sept. 6, 2005. He was a solo practitioner in New York City and a longtime member of the New York County Lawyers' Association. He served as the civil court practice section's co-chairman and sponsored its annual judicial award. He also served on the NYCLA's judiciary committee and on the housing court advisory council of the New York State Unified Court System.

**Davis A. Crippen '55-'56** of Piermont, N.Y., died Sept. 2, 2005. He was an editor for Usertech, and he served for 10 years as president of the New York State Association of Library Boards and was a trustee of the Piermont Public Library.

**Ernest R. Dell '56** of Issaquah, Wash., died Oct. 4, 2005. Formerly of Pittsburgh, he was a partner at Reed Smith Shaw & McClay, where he practiced banking and finance law.

**Charles E. Spring '57** of Edina, Minn., died June 10, 2005. He practiced law with Neville, Johnson and Thompson before becoming a solo practitioner, specializing in small business and estate planning.

**Leonard V. Quigley '59** of Forest Hills, N.Y., died Nov. 15, 2005. He founded the Canadian practice group and was a partner for more than 35 years at Paul, Weiss, Rifkind, Wharton & Garrison. He also served for many years as general counsel of the Archaeological Institute of America and received the institute's Martha and Artemis Joukowsky Distinguished Service Award in 1996. He was a director of the Covenant House, a shelter for homeless children, and a member of the Council on Foreign Relations. He served in the U.S. Navy during the Korean War. He was the father of Cannon Quigley Campbell '93.

## 1960-1969

**Clifford J. Meyer '60** of Laguna Beach, Calif., died July 21, 2005. He was a partner and general counsel of Buchalter Nemer

Fields & Younger in Irvine and then Newport Beach, Calif.

**Burton A. Schwalb '60** of Potomac, Md., died Oct. 23, 2005. He was a commercial litigator and trial attorney in Washington, D.C. He was a trial attorney for the U.S. Department of Justice's tax division before helping to found the litigation department of Arent Fox Kintner Plotkin & Kahn. In 1978, he helped found what is now Schwalb, Donnenfeld & Schwalb, where he later practiced law with his son, Brian Schwalb '92.

**Dale A. Thorn '61** of Miami died Sept. 30, 2004. He was general counsel of Milgo Electronics in Miami, a manufacturer of modems, which later merged into Racal-Milgo. Earlier in his career, he worked in Washington, D.C., for the Department of the Navy, Office of the General Counsel, and for RCA in Boston and Cherry Hill, N.J. After retiring, he pursued an interest in Mayan and other pre-Columbian archaeology and was a benefactor and member of the board of St. Bonaventure School in Thoreau, N.M., on a Navajo reservation.

**David P. Kassoy '63** of Los Angeles died Sept. 7, 2005. He was a partner in the real estate department at Ervin, Cohen & Jessup in Beverly Hills, Calif. He served on the Resolution Trust Corp.'s first Settlement Workout Asset Team for the western region of the U.S.

**Stephen L. Hester '65** of Richmond, Mass., died Aug. 18, 2005. Formerly of Washington, D.C., he was vice president and general counsel of American Capital Strategies in Bethesda, Md. He previously was a partner at Arnold & Porter.

**Rudolph "Rudy" Pearl '65** of San Pedro, Calif., died April 10, 2005. A general practitioner in San Pedro, for the last 10 years, he handled cases through the Los Angeles Mental Health Court. Before opening a practice in 1969, he was a deputy public defender in Los Angeles County. He was the father of Anthony Pearl '96 and David Pearl '08.

**Larry D. Soderquist '69** of Watertown, Tenn., died Aug. 20, 2005. A securities law scholar, he was director of the Corporate and Securities Law Institute at Vanderbilt University Law School, where he taught for 25 years. He frequently spoke on securities law and was quoted in the national media, and he wrote or co-wrote a number of books and articles on both that and corporate law, including "Understanding the Securities Laws," which was published last year in the People's Republic of China, and "Securities

Regulation." He also wrote two novels set on a university campus. In 1999, he was named the Joseph Flom Visiting Professor of Law and Business at HLS. Before joining the Vanderbilt faculty in 1981, he was a professor at the University of Notre Dame. In 1998, he earned a Doctor of Ministry degree from Trinity Theological Seminary in Newburgh, Ind., and he went on to volunteer as a chaplain at a Veterans' Administration hospital and conduct graveside services for indigent men and women buried by Metro Social Services. During the Vietnam War, he was a captain and chief intelligence officer in the U.S. Army.

## 1970-1979

**Charles L. Johnson '74** of East Falmouth, Mass., died April 12, 2004. He was a staff attorney for the Committee for Public Counsel Services.

**Ta-Ko Chen LL.M. '79** of Quincy, Mass., died Oct. 16, 2005. She was a lawyer and Chinese history scholar. She practiced law at Baker & McKenzie in Taipei, Taiwan, for two years before joining New England Electrical Service in Westborough, Mass., where she concentrated on bond financing and securities law. In 1993, she returned to Harvard to study Chinese history, focusing on the Tang Dynasty, from the 7th to the 10th centuries, and earned her doctorate in 2003. In 2004, she gave a presentation at the annual meeting of the American Asia Society, of which she was a member. She was also a member of the American History Association.

## 1980-1989

**Jay L. Gottlieb '84** of Woodstock, N.Y., died Nov. 9, 2005. He was a partner at Brown Raysman Millstein Felder & Steiner, where his areas of practice included creditors' rights, bankruptcy and structured finance. Since 1984, he was a member of the U.S. Bankruptcy Court Register of Mediators for the Southern District of New York. He wrote articles on creditors' rights and bankruptcy for professional journals and was an adjunct professor at Pace University School of Law. He also coached his children's soccer teams.

**Eric N. Miller '84** of Alexandria, Va., died Aug. 29, 2005. He was a lawyer for the U.S. Securities and Exchange Commission. He worked for several Washington, D.C., law firms before joining the SEC in 1999.





**BEFORE NUREMBERG** Included in a recent HLS library exhibit, these illustrations from a 16th-century book show instruments of torture and a criminal on the way to execution during the late 1400s. This was the period when the first international criminal tribunal tried and convicted an individual for “violating the laws of God and man.”

**A**S THE MARSHAL shouted “Let justice be done,” Peter von Hagenbach was beheaded in 1474, after being tried and convicted by the first international criminal tribunal. Created by the Archduke of Austria, the tribunal consisted of 28 judges from different states in the Holy Roman Empire. Von Hagenbach, appointed governor by Charles the Bold, Duke of Burgundy, was told to keep order in Austria’s territories on the upper Rhine. In fulfilling the duke’s directive, von Hagenbach terrorized the population.

Charged with violation of “the laws of God and man,” specifically murder, rape and perjury, among other crimes, von Hagenbach used as his defense that he was simply following orders. “Is it not known that soldiers owe absolute obedience to their superiors?” he asked.

By setting up a court to handle von Hagenbach’s case, rather than holding a summary execution, the Archduke of Austria laid the groundwork for the Nuremberg Trials, the international criminal tribunals for the former Yugoslavia and Rwanda, and the In-

ternational Criminal Court, says Professor Martha Minow, who co-chaired an HLS conference on the legacies of Nuremberg (see p. 32) and worked with students on related events, including an accompanying exhibit.

“Von Hagenbach’s defense, ‘just following orders,’ was raised by several defendants at the the Nuremberg Trials, and more recently by the International Criminal Tribunal for the former Yugoslavia, but it’s a defense that has essentially been rejected in international law,” said Minow. \*

—Linda Grant

Michael R. Klein attended Harvard Law School on a Brandeis Fellowship and received his LL.M. degree in 1967. Last year, after more than 35 years as a corporate lawyer, he cut back on his practice at WilmerHale in Washington, D.C., to concentrate on his own business and nonprofit ventures. He is president of the PEN/Faulkner Foundation (which makes annual awards for fiction writing) and has founded a new organization, the Sunlight Project, to fight corruption in Congress. In 2004 he made a gift to Harvard Law School establishing the Michael R. Klein Professorship of Law.

## All this, and Kathmandu

### What's the Sunlight Project?

Louis Brandeis wrote, "Sunlight is the best of disinfectants." I founded a business, CoStar Group Inc., that assembles and disseminates online data about billions of square feet of commercial real estate throughout the U.S. and Great Britain. The Sunlight Project combines these two ideas. It will try to provide transparency through online access—for reporters, bloggers and citizens—to all the information required to be disclosed about lobbyists, political contributions, personal financial interests of senators and congressmen, travel and entertainment of politicians, government contracts, the revolving door and the like. We will also push for legislation to increase the availability of other information about the corrupting effect of money in government.

### What prompted you to start the project?

A growing revulsion at what's happened to the Congress. If they were to pass legislation tomorrow confirming the day of the week, it would likely have a half dozen special interest riders. My two sons led me to

realize that a significant part of their generation thinks democracy isn't worth engagement or even respect. For an old 1960s activist like myself, that was the tipping point.

### Why did you become involved with the PEN/Faulkner Foundation?

Contemporary American fiction is perhaps the glory of our national culture. Meeting great writers and bringing their work not only to adult readers but into urban public schools through PEN/Faulkner's Writers in Schools program are exciting activities that drew me into it. A recent Harvard study of the gaps in aptitude test scores between high school students of various races and economic segments found that leisure reading is a key indicator of successful performance. So the program is making an important contribution.

### You're a trustee of the American Himalayan Foundation. How did that happen?

My wife and I trekked in Nepal about 30 years ago. It's beauti-



ful and the people outside the government are lovely. One of my best friends started the American Himalayan Foundation and invited me to join its board. The AHF now serves about 75,000 people through an array of indigenously managed health, education and cultural programs. My favorite is the Hospital for the Rehabilitation of Disabled Children outside Kathmandu, where a saintly man, Dr. Banskota, repairs the broken and distorted limbs of thousands of impoverished children and trains orthopedic surgeons.

### You've been one of Harvard Law School's strongest supporters. Why?

I believe that those who are fortunate have an obligation to repay moral obligations and contribute to the public good. It was a generous fellowship that enabled me to attend Harvard, which proved invaluable. Performing well academically was important for my self-confidence. The credential of an HLS degree opened up career opportunities. Relationships with HLS classmates became important in my business activities. The culmination of all those factors has enabled me to pay Harvard back, in annual giving and reunion campaigns, in the form of the chair and in supporting the work of the Charles Hamilton Houston Institute, which seeks to continue the important civil rights efforts that captured the hearts of my generation. It's a continuing pleasure that I hope to extend. \*





**THE VIEW FROM  
THE BENCH**

“Being an appeals court judge is totally different from being a trial court judge. They’re simply different jobs. And is the Supreme Court different again? I think it is. ... It inevitably forces a judge to try to see the Constitution as a whole.”

—STEPHEN BREYER '64  
*Associate Justice, United States Supreme Court*

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