

ALSO INSIDE: *EU law, viewed from home and abroad*

Winter 2011

Harvard Law

bulletin

*A bounty
of new
books
about its
decisions
and
dynamics*

On the Court

OCT. 1, 2010: Chief Justice John G. Roberts Jr. '79 with Associate Justice Elena Kagan '86 after her investiture ceremony



IN THIS ISSUE

VOLUME 62 | NUMBER 1 | WINTER 2011



→ PAGE 21

- 1 FROM THE DEAN
- 2 LETTERS
- 3 HEARSAY
- 4 FACULTY LAURELS
MacArthur-winning historian and HLS Professor Annette Gordon-Reed '84 on inviting Thomas Jefferson to the Tea Party, and other questions
- 6 ABSTRACT
Roe on derivatives and the bankruptcy crisis; Desan on money as a "creature of law"
- 9 CONNECTING THEORY TO PRACTICE
HLS clinic helps teens who have been victimized by acts of violence.
- 10 NOW ONLINE
- 12 ON THE BOOKSHELVES
Minow on the legacy of America's landmark education decision; Charles and Gregory Fried ask what can be justified in an age of terror; Heymann and Blum on laws, outlaws and terrorists; Feldman on FDR's great justices
- 21 OUTSIDE THE CLASSROOM
Winning asylum for refugees from persecution
- 46 HLSA NEWS
- 48 CLASS NOTES
A Brennan biographer; Intelligence advice; Victory against warrantless wiretapping; Aerial views of the Arctic; A life devoted to proving "you can"; A unanimous first; Law and faith; From HLS to the NFL
- 64 AUTHORS AND AUTEURS
- 68 FACULTY TRIBUTE
Benjamin Kaplan, 1911-2010
- 69 IN MEMORIAM
- 70 LEADERSHIP PROFILE
Kenneth I. Chenault '76
- 72 GALLERY
An HLS pop history quiz

24 On the Court

The '10th justice' becomes the 9th

28 Bandwidth

Regulating digital communications is like trying to control an explosion. FCC Chairman Julius Genachowski '91 brings a full spectrum of skills to the job.

34 Stories from the West Wing

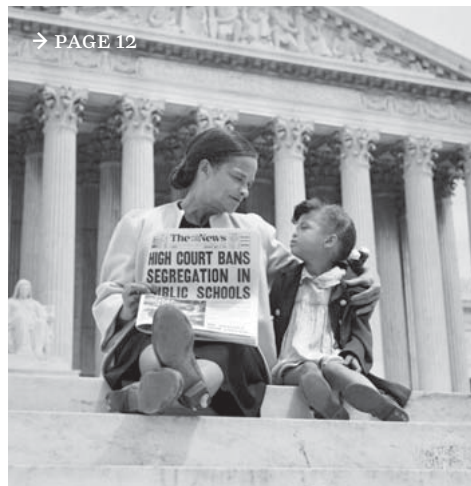
Three faculty who served in the Obama administration talk about gridlock, being part of history, living life at warp speed and the day the Easter Bunny blacked out the White House.

40 The Shape of the World to Come

Thirty years ago, Laurent Cohen-Tanugi left France to attend HLS. Today, he is an international lawyer, public intellectual and architect of a European strategy for globalization.



→ PAGE 34



→ PAGE 12

ASSISTANT DEAN FOR COMMUNICATIONS
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COVER
Chief Justice John G. Roberts Jr. '79 with Associate Justice Elena Kagan '86
Photograph by Brooks Kraft



Committed to Law's Promise

President Andrew Jackson once said, "All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary." Harvard Law School has long educated advocates and counselors about the judiciary but has also prepared individuals to serve as judges committed to law's promise. When our graduates accept the invitation and responsibility of becoming judges, it is a cause for celebration and hope—celebration of individual achievement and hope for the vitality of the rule of law.

This issue of the Bulletin includes a look at recent scholarship on the United States Supreme Court. Coming at a time of renewed relevance of the New Deal era, Professor Noah Feldman's "Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices" illuminates the battles of four justices appointed by President Franklin Delano Roosevelt. An authorized biography of Justice William Brennan '31 by longtime



Bulletin correspondent Seth Stern '01 and co-author Stephen Wermiel and my own new book on legacies of

Brown v. Board of Education provide fresh materials for Court-watchers, young and old.

Harvard Law School graduates serve on courts around the world, including international courts, and on state courts across the United States. According to our last count, more than 150 sitting U.S. federal judges are Harvard Law School alumni. Two of them, Chief Justice John G. Roberts Jr. '79 and former-Dean, now-

Justice Elena Kagan '86, are pictured on our cover. We are proud to be associated with each of the 21 individuals whose careers took them from Harvard Law School to the United States Supreme Court. (All right, two of them—William Cushing and Joseph Story—attended Harvard College before the law school was founded!) Today, six of the nine justices on the Court (Chief Justice Roberts and Associate Justices Anthony Kennedy, Stephen Breyer, Ruth Bader Ginsburg, Antonin Scalia and Elena Kagan) attended the Harvard Law School. We are grateful for their service to the country!

We honor public service by other alumni, faculty and students in this issue as we look at the work of Julius Genachowski '91, chairman of the Federal Communications Commission, and his predecessor in that post, Kevin Martin '93. These pages also share candid reflections of Professors Daniel Meltzer '75, David Barron '94 and Jody Freeman LL.M. '91 S.J.D. '95 as they return to HLS from government posts with significant responsibilities and challenges.

Also detailed in this



"When our graduates accept the invitation and responsibility of becoming judges, it is a cause for celebration and hope." —MARTHA MINOW

Bulletin: scholarship by Professors Mark Roe '75 (on the financial crisis and bankruptcy law) and Christine Desan (on law's role in the evolution of money), the innovative HLS Institute for Global Law and Policy (headed by Professor David Kennedy '80), and some of the many crucial projects under way at our 30 clinics and student practice organizations. One of our new faculty stars, Gráinne de Búrca, offers insight into the EU as a model of trans-

national governance and as a significant international player. This issue also shares interviews with leading international corporate lawyer and public intellectual Laurent Cohen-Tanugi LL.M. '82 and extraordinary business leader Kenneth I. Chenault '76.

It is a privilege to bring you this news from HLS, and with it my warm regards.



Dean Martha Minow

THANKS FOR MAKING MY DAY

IT IS HARD to restrain my enthusiasm for the Bulletin. The insights it gives me into what is happening at the school and, at least equally important, what is happening in areas of the law with which I haven't the faintest contact make reading it a real pleasure. The fact that it is so readable is an obvious plus.

I am particularly impressed by the new areas which are being opened to Harvard Law School graduates, particularly those in public service. When I graduated, getting a public service job often meant that one couldn't find something at Broad and Wall or comparable locations elsewhere. Parenthetically, I have the feeling that the Happiness Quotient may be as high for one type as for the other.

Thanks again for helping to make my day.

ARTHUR L. BERGER '48
Harrisburg, Pa.

SANDER TAX CLASS WAS "FIRST-OF-ITS-KIND PROBLEM-SOLVING WORKSHOP"

AS I READ your article about Professor Rakoff's "first-of-its-kind problem-solving workshop," I said to myself, "Gee, I bet I know where he got that idea—he probably took Frank Sander's tax class," the truly "first-of-its-kind problem-solving workshop" at HLS.

I took Professor Sander's wonderful course almost 40 years ago. Memory is tricky, but here are two of the assignments I recall: negotiating the tax aspects of the sale of a business (two teams in opposition—four students each) and preparing testimony for Senate hearings on a proposed revision to the Code (again, two four-student teams, making opposing presentations on the need for this particular reform). I wasn't much of a student, but I learned some tax in that class. It was great.

I checked with Professor Sander,



STANDING ON THE SHOULDERS OF A TRUE EDUCATOR

and guess what? I was right. Professor Rakoff did take Professor Sander's Tax Workshop. And even better, Professor Sander wrote an article about the course, for the HLS Bulletin, no less.

Professor Rakoff stands on the shoulders of a true educator. I'm glad to see the tradition being carried on.

ALICE BALLARD '73
Philadelphia

AND WHAT ABOUT FANNIE MAE?

I FIND IT surprising that none of the faculty participants in the Bulletin feature ["Hard Hats Required," Summer 2010] said word one about the role of Fannie Mae in the subprime mortgage debacle. If I lend money and bear the risk of getting it back, I will be very careful indeed. If, on the other hand, I know that I can sell that risk to someone who—due to populist political pressure—is less interested in getting repaid, I do not have to be so careful. Where is the assessment of Fannie Mae's role in distorting such simple market fundamentals?

RAUER L. MEYER '73
Los Angeles

TAXING QUESTIONS

PROFESSOR ALSTOTT'S "ABSTRACT" defense of the inheritance tax ["A Tax—

Not an Attack—On Families," Summer 2010] gets right to the intellectual mush without asking some fundamental questions about double taxation/death taxes.

A single parent who, by hard work and modest consumption, over a lifetime saved \$8 million after paying the full statutory income tax rate, should be able to give those four social-workers-to-be in the buggy their ticket to a decent life/lifestyle without including a road map to the arcanum of financial engineering. (Or pay an estate tax lawyer \$500/hour!)

DENNIS ROCHELEAU '67
Fairfield, Conn. / Waupaca, Wis.

SERVICE ON TRIBUNAL SHOULD HAVE BEEN MENTIONED

STRANGELY, THE ARTICLE [Summer 2010] on Krzysztof Skubiszewski LL.M. '58, the former Polish foreign minister, omitted any reference to his long service until his death as the full-time president of the Iran-United States Claims Tribunal in The Hague. The tribunal, created by the 1981 Algiers Declaration to resolve then existing disputes between Iran and the United States, is still functioning. I had the privilege of serving with him, as did George Aldrich '57 LL.M. '58 and Charles Brower '61. He was a man of great courage and intellect.

JUSTICE RICHARD M. MOSK '63
Los Angeles

CORRECTION: *The Summer 2010 story on Ory Okolloh '05 included several editorial errors. See the online version for corrections: http://www.law.harvard.edu/news/bulletin/2010/summer/cn_05.php.*

“Politics and Corporate Money”

Professor Lucian Bebchuk LL.M. '80 S.J.D. '84
PROJECT SYNDICATE
Sept. 20, 2010



“A recent decision issued by the United States Supreme Court expanded the freedom of corporations to spend money on political campaigns and candidates. ... This raises well-known questions about democracy and private power, but another important question is often overlooked: who should decide for a publicly traded corporation whether to spend funds on politics, how much, and to what ends? ... The interests of directors, executives, and dominant shareholders with respect to such decisions may often diverge significantly from those of public investors.

“Legal rules allowing corporations to spend on politics are premised on the view that expression of corporations’ positions has a legitimate role in the political marketplace. But a corporation’s wishes should not be automatically and necessarily equated with those of its management. That is why we need new legislation to ensure that the use of corporate funds in politics does not stray from the interests of shareholders.”

“Imagining a Liberal Court”

Professor Noah Feldman
THE NEW YORK TIMES MAGAZINE
June 24, 2010



“[P]rogressive constitutional thought must discover (or rediscover) a core set of beliefs about the right relationship between government, the individual and the powerful corporate entities that operate under the umbrella of the market. Reregulation, embraced

by the Obama administration to address a range of serious economic and environmental dangers, demands its own set of constitutional explorations and explanations. A truly progressive constitutional project needs to go beyond simply upholding regulations challenged in court. It demands that the Supreme Court and other bodies acknowledge the government’s responsibility to protect our democracy from the harmful side effects of all-powerful markets.”

“Our Nation’s Secrets, Stuck in a Broken System”

Professor Jack Goldsmith
THE WASHINGTON POST
Oct. 22, 2010

“Bob Woodward’s ‘Obama’s Wars’ contains remarkable revelations about the inner workings of the administration’s national security team and the development of its policy on Afghanistan and Pakistan. Equally remarkable is how much classified information is in these revelations—so much classified information, in fact, that it calls into question the legitimacy of the presidential secrecy system. ...



“The Woodward disclosures are especially incongruous because the Obama Justice Department is engaged in an unprecedented number of prosecutions of lower-level officials for their disclosures of classified information. An attorney for Stephen Jin-Woo Kim, one official under indictment, has said this month that Kim will challenge his indictment in light of top officials leaking classified material to Woodward. This legal strategy is not likely to succeed. But the optics for the government, to put it mildly, are not good.”

“Schumer’s Project Runway”

Professor Jeannie Suk '02 and C. Scott Hemphill
THE WALL STREET JOURNAL
Aug. 24, 2010

“Congress has for several years considered adding fashion design to the copyright laws. But previous bills were thought to protect too much—failing to acknowledge that almost all fashion designs, whether classic or cutting edge, are inspired to some degree by the works of other designers. A law prohibiting similarity in fashion would be like banning fashion itself.



“Sen. Charles Schumer (D., N.Y.) introduced a bill earlier this month that attempts to get around this problem. It prohibits only design copies that are substantially identical. In layman’s terms, a good way to tell if a copy should be allowed is to ask whether it fails the ‘squint test’: If you need to squint to see the difference between two designs, then one is an infringing copy of the other.”

Recognizing Jefferson's 'Genius'

Gordon-Reed on investigative history, redefining idols and INVITING JEFFERSON TO THE TEA PARTY

When Annette Gordon-Reed '84 won a "genius grant" this fall, the MacArthur Foundation recognized the Harvard Law professor and historian as having dramatically changed the course of Jeffersonian scholarship. It started with her 1997 book, "Thomas Jefferson and Sally Hemings: An American Controversy," a re-examination of the evidence about the long-rumored relationship between Jefferson and his slave Sally Hemings. Gordon-Reed's conclusions were confirmed in 1998 by DNA testing that supported evidence of Jefferson's genetic paternity of Hemings' descendants. Eleven years later, her exploration of the lives of those descendants, "The Hemingses of Monticello: An American Family," won her the National Book Award and then the Pulitzer. In July 2010, she joined HLS, the Harvard History Department and the Radcliffe Institute for Advanced Study. Currently a fellow at the Cullman Center for Scholars and Writers at the New York Public Library, she spoke with Bulletin reporter Alexander Heffner shortly after her MacArthur was announced.

Your research has brought to the fore the possibility of redefining Thomas Jefferson and the generally idolized founders. Was that your intention?

Yes, definitely. He was and remains a pivotal figure in the American story on more levels than anyone I can think of—the development of democracy, race, slavery, the Native American question, relations with foreign nations, botany, architecture—the list goes on and on.

Are enough "investigative historians" re-examining the founders or later presidents, as you did?

Well, I suspect that biographers and historians will continue to refine and expand the range of questions that are asked about presidents. That's the nature of history. Where we are now shapes our perspective about how to look at the past. We can't really jump into a time machine and go back to the place and report what we see. There are built-in limitations and we have to live with them.

With the MacArthur Fellowship, do you have specific travel in mind as part of your Jefferson investigation—perhaps exploring the former president's own ancestry?

I will use some of the money for travel to the places where later generations of the Hemingses lived—Ohio, Wisconsin, Illinois, California, Tennessee. I can now go and stay as long as my schedule permits, without having to think about money. I don't have any plans, right now, to do any investigations of Jefferson's ancestry.

Which aspect of Jefferson is most underappreciated, and which aspect is most ripe for your own further examination?

I think his life as a slaveholder and in Charlottesville has not been fully explored. Talk about Jefferson and slavery is largely talk about his intellectual attitudes about the institution, not how he lived it on a day-to-day basis.

In today's political discourse, the Tea Party protesters have been getting a lot of play. What's your reaction to their self-professed comparisons to Jefferson and fellow founders?

Well, I suppose it is a tribute to the legacy of the founders that modern movements would want to pattern themselves after them. The thing that occurs to me, however, is that the founders were reacting against a monarchy across an ocean. They could not have voted George III or any part of the government out of office. American citizens can do that if they are able to persuade enough of their fellow citizens of the rightness of their cause. Losing an election does not make the party that wins illegitimate or alien.

You have a joint appointment at Harvard. What collaborations do you envision?

Too many to think of all of them now. But law and history is a natural. ... [L]ife happens with a cascade of things taking place from all directions. It was like that in history, too. *



PROFESSOR ANNETTE GORDON-REED
'84, whose many awards now include a
MacArthur Fellowship

Exceptional Derivatives

BANKRUPTCY RULE EXCEPTIONS

exacerbated financial crisis, says Roe



ALTHOUGH THE SWEEPING financial reform package that President Obama '91 signed into law in July contained hundreds of provisions in its 848-page final version, Professor Mark Roe '75 says it's still not long enough.

The legislation should have addressed exceptions to normal bankruptcy rules enjoyed by holders of derivatives and similar instruments, says Roe. In an article forthcoming in the *Stanford Law Review*, "The Derivatives Players' Payment Priorities as Financial Crisis Accelerator," he argues that these exceptions undermine market discipline and

exacerbated the financial crisis.

Roe observes that while firms in bankruptcy are protected from immediately having to pay their creditors—so that the court has time to assess the bankrupt's finances

before the firm is pulled to pieces—parties that hold derivatives and repurchase agreements can seize and sell off the bankrupt's collateral immediately. Roe notes that there are bases for a more creditor-friendly

bankruptcy in many places in the Bankruptcy Code. But the favorable treatment of parties holding these financial instruments—which became a popular means to raise a large amount

of money quickly on Wall Street in recent decades—reduces risk for the failed firms' trading partners to such a degree that their incentives to monitor the firms' financial health decline commensurately.

"Normally, markets will adjust to whatever kind of rule Congress puts in place, and having a financing means that's very safe is usually for the good," he says. But here we're not dealing with normal financing. "The [Bankruptcy] Code's impact [on these instruments] is to transfer risk to the United States as the ultimate guarantor of the [large financial] firms' solvency, draining financial resiliency," he writes. "This encourages more knife's-edge financing, because it's the

WHEN NORMAL
BANKRUPTCY RULES
APPLY, THERE IS MORE
TIME TO STEADY THE
FINANCIAL SHIP

EXCERPT: Why Should Derivatives Players Get the Upper Hand?

U.S. Treasury that picks up the risk of catastrophic failure.” If these firms weren’t financially central, financial markets could, and normally would, adjust. But it’s the presence of the United States as ultimate guarantor that weakens the potential efficacy of financial market adjustments, Roe argues.

The original rationale for the exception was that healthy parties to derivatives contracts might themselves collapse if they are not paid because of the bankruptcy of a derivatives-trading firm, he writes. The fear was that this would lead to a contagion of financial catastrophe throughout Wall Street and all of American finance. But after the financial crisis of 2007-2008, we now know, he says, that it’s equally possible that the bankruptcy favoritism toward derivatives can spur heavy users to collapse, as financial players use the exception to pull cash out of the failing firm quickly and irrevocably.

When AIG, for example, lost its high-quality investment grade rating, derivatives counterparties demanded that the company put up more collateral right away. If normal bankruptcy rules applied, Roe says, “they wouldn’t have been able to pull fresh collateral from AIG so easily on the eve of its failure, so the crisis

atmosphere might not have been so severe, and there would have been more time to steady the financial ship.” The contest, he adds, was not between AIG and the creditor demanding new

“The point is that we have two sets of bankruptcy rules—one for derivatives counterparties and one for everyone else—and having two sets of rules here is unwise. One set limits creditors’ seizures from the bankrupt firm. The second set exempts seizures and accords extra priorities to creditors holding financial contracts called ‘derivatives’ or ‘repurchase agreements.’ It is no surprise that sophisticated finance players seek this favored framework because it protects them. By doing so, the super-prioritized counterparties’ incentive to ration their dealings with financially weak debtors declines [because it’s the United States that bears the risk of a major financial failure].

“These negative incentives can perniciously affect the debtor itself, its other creditors, and, ultimately, the economy. Better for Congress to re-do most of the special treatment, repealing some and cutting back others. Doing so would reduce the possibility of another AIG-Bear-Lehman melt-down.”

From “*The Derivatives Players’ Payment Priorities as Financial Crisis Accelerator*,” forthcoming in the *Stanford Law Review*

➊ To read the entire manuscript, go to <http://www.ssrn.com/abstract=1567075>

collateral. When the paying up was all done, the collateral was coming from AIG’s other creditors. The special exceptions to normal bankruptcy practice hurt those other creditors, and eventually the U.S. Treasury, as cash and value moved out of the company.

Repealing the wide exceptions, or cutting them back, would motivate the derivatives market players to more carefully consider the risk of their transactions and the financial stability of their trading partners, and would lessen the possibility of another financial meltdown, Roe says.

Roe hopes that the exception will be changed and that his article will help spark debate that eventually leads to a phased-in rollback of several of the derivatives’ special treatment exceptions. “The goal,” he says, “is to figure out how we can use and understand corporate law and bankruptcy law to make business work better and more effectively.” *

Derivatives in the Classroom AND BEYOND

Although the derivatives setup in bankruptcy is new enough not to have generated the judicial decisions that populate law school casebooks, last year Mark Roe devoted several classes to the subject in his bankruptcy course.

One student in the class, Ephraim Mernick ’12 (J.D./M.B.A.), was sufficiently motivated by the discussions to take Roe up on his offer to help place him in the office of Sen. Sheldon Whitehouse, chairman of the Senate Judiciary subcommittee focused on bankruptcy legislation.

The internship was facilitated through the HLS Semester in Washington Clinic, and Mernick says the four months were a highlight of his Harvard Law experience, with practical and academic components. As it turned out, he addressed many issues for the senator’s office—derivatives among them—and he also wrote a paper on the topic, separate from his Senate work.

Making Money

Uncovering the legal debates at the heart of MODERN MONEY

In her study of money in law, Professor Christine Desan has found herself looking back as far as medieval times. But in the wake of the financial crisis of 2008, in large part caused by liquidity problems—money oversupplied and then frozen in credit markets—her historical scholarship has led her to insights into today’s economic predicaments.

For the past decade, the legal historian has focused on money as a “creature of law.” In a recent work on the subject, “Beyond Commodification: Contract and the Credit-Based World of Modern Capitalism” (published in the collection “Transformation of American Law II: Essays for Morton Horwitz”), Desan examines how governments manage money, and the legalities that define it.

Desan’s argument is that societies have made money in many different ways and that those differences matter enormously. In “Beyond Commodification,” she examines the way contract doctrine has changed along with money. She contrasts the kind of contract that



undergirded medieval money with the doctrine that supports modern, bank-based money. “The essay is aimed at the notion we almost all share that money is just a function, just a thing that makes exchanges happen,” she says. “I argue instead that money has never been a neutral technology, not even when it seemed to be a commodity

and certainly not when it became bank money.”

Desan begins her story in the medieval period

because money made of precious metal seems to be such a simple, straightforward means of exchange. But silver and gold

coins were surprisingly fragile media: They circulated stably only when their net value, a compound

including both their commodity and liquidity values, remained constant across denominations and borders. And that rarely occurred. Coins wore out, prices of silver and gold changed, and sovereigns competed to attract precious metal to their mints. As a result, governments periodically had to change the face value of their coin. That intervention caused enormous controversies—devaluations or revaluations hurt creditors or debtors, left people with more or less silver or gold relative to the face value of their money, and

generally shook up prices. Given the turmoil, the government’s action had to be legitimized—and it was. Common law courts held that the sovereign could modify the contract that made money in order to support its ability to circulate. The legal order was knit together by a jurisprudence that defined liquidity as a public resource and required people to sacrifice property to make it work.

A LEGAL HISTORIAN EXPLORES MONEY AS A “CREATURE OF LAW”

Modern money operates according to a radically different kind of contract—or at least so it seems at first glance, says Desan. Most of the circulating medium that people use to pay public or private obligations is now produced by banks that back the checks their customers write on deposits. Those checks multiply the much smaller reserve, once made of gold and today made of cash, held by the banks. “Contract doctrine becomes essential to making money all over again,” she says. “Only if people believe the bank promise is sacrosanct will they hold paper representations of value rather than demanding gold or cash out of the bank reserves.” Desan points here to a landmark case from the 1930s, *U.S. v. Perry*, in which the Supreme Court repudiated Congress’ power to depreciate the amount of gold in the gold dollars owed to those holding WWI liberty bonds. “The doctrine of contract that the Court developed in *Perry* is far from the older and more flexible approach,” she says. “New doctrine condemns change from the original terms of a bargain, holds the government to the same standards as an individual and treats the bond as if it were a private agreement.”

The story has a twist, however. After it sanctified the contract and repudiated legislative devaluation of gold coin, the Supreme Court in *Perry* reached the question of damages—and decided there were

none. When Congress had devalued gold coin, it had also destroyed the legitimate market for the original coin and the gold in it. There was no way to measure the loss to the claimant, said the Court, which meant that there was no loss at all. Perry still had all the legal tender to which he was entitled, when the Court considered the legitimate market.

The amazing twist in *Perry* has had a remarkable result, says Desan: It confirms that the contract underlying money should be considered rigid and binding, according to its *ex ante* terms. But it preserves the government’s power in times of exigency to make changes.

Desan argues that the modern approach “critically configures the new political economy.” Modern markets depend on highly leveraged forms of liquidity that people will accept only if they are strengthened by rigid guarantees. Most of the time, those guarantees operate smoothly. They even reduce the strain on reserves by creating credit that itself provides liquidity. But in the end, the money supply remains a public entity and depends on the judgment of political authorities. She concludes that the law needs improvement beyond the sleight of hand we inherited from *Perry*: “As the financial crisis demonstrated, we need to map money’s legal dynamics, consider its distributive impact and reform it to operate more effectively and fairly.” *

CONNECTING THEORY TO PRACTICE

Uncommon Loss, Common Bond

HLS clinic helps teens who have been victimized by ACTS OF VIOLENCE

By Elaine McArdle

Mark Hutchinson’s father lost the use of his legs in a bombing in Northern Ireland. Caitlin Leavey was 10 years old when her father, a New York City fire lieutenant, died leading firefighters from Ladder 15 into the south tower of the World Trade Center on Sept. 11, 2001. For these teens and 73 others from around the globe with family members killed or seriously injured in acts of violence, this past summer offered a valuable experience: a weeklong program in Belfast, Northern Ireland, called Project Common Bond, where they learned new skills for communication and conflict resolution under the guidance of the Harvard Negotiation and Mediation Clinical Program.

The curriculum for the program was developed last spring by two students in the clinic, Elaine Lin ’10 and Annie Levin ’10. Immediately after taking the bar exam in July, Lin and Levin flew to Belfast to teach the program along with Robert C. Bordone ’97, clinic director and clinical professor of law; Toby Berkman ’10, an associate at the clinic; and HLS



PROGRAM PARTICIPANTS

came from countries on four continents, and nations in conflict. Pictured right: Kristina Anaya and Mark Hutchinson, with Professor Robert Bordone (center)



Negotiation Workshop Lecturer Florrie Darwin '84.

Project Common Bond is sponsored by Tuesday's Children, a New York-based organization that provides a wide range of services to people directly affected by the events of 9/11. It's hosted camps twice before, but this was the first to be held outside the U.S. and to bring together children from nations in conflict. The Belfast campers, ages 15 to 20, came from the U.S., Spain (including the Basque country), Israel, the West Bank and Gaza, Northern Ireland, Ireland and Argentina. Through group activities led by the Harvard team, designed to foster trust, cooperation and communication, the teens worked on listening to and empathizing with people from very different cultures—including those with whom they may be in direct conflict.

"The curriculum helped the students with perspective-taking, how to talk about things not as 'the truth' but as how

they see them, and also helped them identify and deal with emotions. These skills are central to helping individuals understand and deal with conflict more effectively," said Bordone. "I think the campers left with a better set of tools and a sense that the other side, too, has a story to tell."

Hutchinson, 16, who lives in Belfast and cares for his father, said, "I learned a number of things from the program, such as that I am not the only person out in the world [whose] family has been affected in times of trouble, such as the Troubles in Northern Ireland."

"I learned how effective nonverbal communication is, and how little it meant that we all didn't speak English," said Leavey, 19, who is studying Peace and Conflict Studies at NYU and plans to work with children who have been affected by violence. The program also taught her "how to be an active listener and how we can respond—and teach others how to respond—to conflict."

Bordone said the Belfast project was equally valuable for his clinical students: "It was real-world, connecting theory to practice in a way [that] can make a real difference."

Lin agreed, calling the project "the capstone" of her Harvard experience and "the initiation into life after law school." She is working in Australia for the next year at a conflict management firm and teaching negotiation at Monash University Law School in Melbourne.

Bordone added that the week gave students a chance to see real change, particularly in those campers who live in conflict zones.

"While it's gratifying to see Irish Catholics and Protestants become friends during the course of the week," he said, "it's even more meaningful to hear them talk about how they might share what they learned with others when they return to their segregated home communities. This kind of connection can make a difference, particularly in a moment of disruption and violence." *

success in player acquisition negotiations and created specialized training programs for environmental lawyers in China in collaboration with the Natural Resources Defense Council. It is the first law school clinic in the nation to focus on conflict assessment and designing systems to resolve disputes.

For more information about the clinic, visit www.law.harvard.edu/negotiation.

Conflict Resolution **BY DESIGN**

Students in the Harvard Negotiation and Mediation Clinical Program represent clients throughout the U.S. and the world and help them design better ways to resolve their differences. For example, in recent semesters, students in the clinic have evaluated the dispute resolution processes at the National Institutes of Health, helped the Cleveland Indians organization improve its

NOW ONLINE

Ramping Up New Ramps to Justice

Cyberlaw Clinic helps Massachusetts with ACCESS TO THE COURTS

By Elaine McArdle

HOW CAN TECHNOLOGY help people gain better and easier access to the judicial system? Are there new technologies—or more efficient ways of using existing ones—that can assist low-income, pro se and other litigants to navigate the legal system while easing the burden on underresourced courts?

Students in the HLS Cyberlaw Clinic affiliated with Harvard's Berkman Center for Internet & Society are working on a new project for the Massachusetts Trial Court that develops uses of technology to improve access to the justice system. The project is especially timely: In the current economy, more people are seeking legal redress to problems while fewer than ever are represented by lawyers; at the same time, court budgets have been slashed and there are fewer personnel to help the public.

For nearly a year, students in the Cyberlaw Clinic, under the supervision of Phillip Malone, HLS clinical professor and the clinic's director, have assessed a wide array of technologies that can help courts improve access to their services by all litigants, including the self-represented. "This project bridges the best of traditional law school clinical practice—assisting low-income, underrepresented people—with our clinic's expertise

in technology and the use of the Internet to leverage those efforts,” says Malone. “Because of that, students love it.”

The project began last January, when Malone and Professor John Palfrey '01, vice dean for library and information resources and faculty co-director of Berkman, were approached by Judge Dina Fein of the Massachusetts housing court, who was appointed as special adviser to the Access to Justice Initiative by Supreme Judicial Court Chief Justice Margaret H. Marshall and Chief Justice for Administration and Management Robert A. Mulligan. Fein's charge is to determine ways to broaden access to civil justice in Massachusetts, including for pro se litigants, low-income people, litigants who aren't proficient in English, and people with mental or physical disabilities.

“It was clear from the inception of the Access to Justice Initiative that the use of technology would be key to the courts' success in meeting the needs of historically underserved populations,” says Fein. “I approached Berkman initially hoping the center might help guide and support our work in this area. Over the past year, Phil Malone and the clinic students have done so much more than I could possibly have imagined, not only providing the Trial Court with a clear road map for moving forward with our use of technology but also allowing Massachusetts to attract energized partners from around the country and to assume a leadership role nationally.”

The clinic has taken a comprehensive approach to its challenge. Students have examined technology initiatives in courts around the country; interviewed court and legal aid personnel, technology specialists and vendors; and analyzed relevant literature. In August, Malone and the students presented a preliminary report to Fein on strategic planning and “best



TECHNOLOGY
CAN HELP
COURTS IMPROVE
ACCESS TO
THEIR SERVICES

practices” for using technology to better serve the needs of litigants. It includes recommendations on making courts' websites more helpful and easier to use; providing simpler, automated ways for people to fill out legal forms online; implementing electronic case management and “e-filing” systems that are fully accessible to pro se litigants; and developing online but “live” assistance for litigants with questions. While the Massachusetts Trial Court is the immediate client for this phase of the project, Malone and his students expect to broaden the results into a rich set of guidelines, resources and implementation materials that can help courts around the country.

Alan M. Cheuk '11 worked on the project over the summer. Among the options and issues he looked at were automated interviews for form completion, interoperability standards for form-filling software and e-filing systems, accessibility requirements for government websites and applications, and encryption and digital signing technology—all in the context of the unique needs of pro se parties. “I hope that the final report, when it is done, will be a go-to source for best practices,” he says, “to ensure a just solution that accommodates the needs of self-represented litigants.”

Dean Martha Minow is a strong supporter of the project, which continues now in a second phase. “From my perspective as vice chair of the Legal Services Corporation as well as my role as dean, the partnership between the Cyberlaw Clinic and the Massachusetts Trial Court exemplifies the opportunity represented when experts in new technologies join with justice professionals to extend access and transparency,” says Minow. “It's also a splendid chance for students to make a major difference in the struggle to make the promise of justice real in people's lives.” *



MAY 17, 1954
THE
SUPREME COURT
OUTLAWED
SEGREGATED

NAACP SAYS:
SEGREGATED SCHOOLS
UNEQUAL
AND
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IN 1954

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MAY 17, 1954
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WHY DO THEY
STILL EXIST??
NAACP

MARCH FOR FULL
EQUALITY
NOW!

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"AS LONG AS this country stands for the ideals of equal opportunity and tolerance, schooling is one of the most important settings for promoting not just these ideals, but the practices that support and reflect them."

A Life's Project and a Project's Life

What *Brown v. Board of Education* awakened—in a future dean, in this country and abroad

Dean Martha Minow answers seven questions about her new book, “In Brown’s Wake: Legacies of America’s Educational Landmark” (Oxford University Press, 2010).

What prompted you to write this book?

In some ways it’s been a life’s project. After graduate work and research in education during the Boston desegregation struggles, I pursued law school in hopes of advancing the efforts for equal education opportunity. I had the privilege of clerking for Justice Thurgood Marshall and discussing with him the unfinished business of *Brown v. Board of Education*. I lived through fights over the treatments of gender, class, religion, disability, and sexual orientation in schools and elsewhere. When the 50th anniversary of *Brown* came around, I was dismayed by how much of the public discussion and scholarly debate stressed the failures of the decision. I decided to write a book acknowledging disappointments while tracking the unexpected legacies of the decision.

What are some unexpected legacies?

Litigation and legislation pursuing equal education for girls, and then for boys; for kids with disabilities; for children learning English—maybe these efforts are not so surprising. More surprising may be the litigation movement for school choice and for equal treatment of religious schools and the challenge to the treatment of Roma children, who have largely been assigned to schools for children

with disabilities in the Czech Republic.

What about racial equality—what are the prospects for achieving that in schools?

The relative success of schools run by the U.S. military in closing the racial gap in achievement is instructive. The high expectations coupled with flexible teaching methods adapted to different students contribute; so do the context of a racially integrated world in which African-Americans routinely hold positions of authority—and the requirement of parental involvement, enforced by commanding officers. Here we have both high achievement and racial mixing in schools. Much of the country has given up on racial integration, and closing the achievement gap is the remnant of the *Brown v. Board* spirit.

Is there a cautionary tale here or a road not taken?

The current increase in school choice—notably with charter schools—could be a new occasion for racial integration, or instead, a time for further separation by race or ethnicity. Schools can identify a special mission, such as teaching African-American history or conveying Hispanic cultures. These can be great topics, but if they foreseeably attract homogeneous student bodies, there’s a choice to be made by parents and by school systems. School systems could instead promote the creation of schools that attract students from diverse backgrounds and offer a shared



MARTHA MINOW explores *Brown*'s wide-ranging impact—on everything from school choice in the U.S. to legal challenges to the treatment of Roma children in the Czech Republic.

HARVARD NEWS OFFICE

mission that helps bridge racial, ethnic and other differences. Ironically, after the Supreme Court’s decision in the Seattle and Louisville schools cases [*Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007); *Meredith v. Jefferson County Board of Education* (2007)], the one constraint on school choice plans is assignment of students by race—even when it’s intended to produce integrated schools. But choice plans can use socioeconomic class and residence as factors in student assignment—and these factors can

often be used to produce racially mixed schools. As long as this country stands for the ideals of equal opportunity and tolerance, schooling is one of the most important settings for promoting not just these ideals, but the practices that support and reflect them.

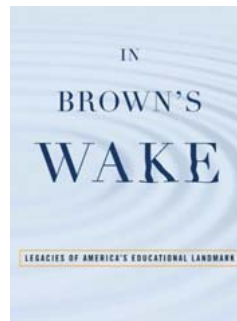
Are there legal arguments against integration other than avoiding classification of individuals by race?

In some circumstances, preservation of culture may justify separate schools. One fascinating but perhaps sui generis situation involves the Kamehameha Schools in Hawai'i. Funded by a private trust created by the last royalty in Hawai'i, these schools have been restricted to Native Hawai'ians. Yet they are really good schools, so other kids want to attend. Several court challenges have attacked the admission criterion, raising questions over whether

Native Hawai'ian is a racial, ethnic or political category. The trust in turn has contributed support to public charter schools conveying Native Hawai'ian culture—and although enrollment is by choice, the vast majority of the students in these schools are Native Hawai'ians. They are doing somewhat better academically than other Native Hawai'ians who stayed in the regular schools. There are other subcommunities that do or could benefit from schools devoted to their culture and traditions. The fascinating and challenging fact about schooling is that it is at once a focal point for individuals and their life chances while it is also an understandable preoccupation of groups—ethnic, racial, religious—in passing on their commitments. Defining and ensuring equality might focus on individuals or groups—and equal protection and religious freedom can both be evoked in this context.

How does this work relate to your other research on mass conflict and genocide?

The risk of intergroup distrust or hatred, I fear, increases when schooling communicates sharp differences between people; the promise of schooling, in contrast, could break cycles of hatred and forge ties among people with different backgrounds. The success of schools is crucial not just for the careers and life chances of individual students but also for expanding social networks, and hence opportunities for mutual help and respect for everyone.



How did Harvard Law School, and Harvard generally, affect your work on the book?

I had tremendous help from students in class discussions and as research assistants, editors and interlocutors as I worked on the book over the past 10 years. Colleagues on the faculty and in the clinics gave advice and criticism. The Harvard Law School library was extraordinarily helpful—and that's one reason I have donated my research materials, including the many books I consulted for the project, to its collections. I was delighted that the library and the Charles Hamilton Houston Institute sponsored a discussion of "In Brown's Wake." The Harvard Graduate School of Education has offered me encouragement and assistance since my student days—and will also host a discussion of the book. And the Humanities Center at the university has organized a daylong conference around it. I am honored by each of these occasions and grateful to everyone at Harvard who helps me pursue this work while doing professor and dean work as well. *

"In the field of public education, ... 'separate but equal' has no place."
Brown v. Board of Education, 1954



→ To watch a discussion of Minow's book, go to <http://tinyurl.com/in-browns-wake-discussion>

Human Dignity, Democracy and the Loaded Gun

A father-and-son collaboration asks what can be justified IN AN AGE OF TERROR



By Jeri Zeder

Father and son Charles Fried and Gregory Fried both value simplicity of expression. So it is fitting that they begin their book, “Because It Is Wrong: Torture, Privacy and Presidential Power in the Age of Terror” (Norton, 2010), with a rhetorical shortcut: a painting by 20th-century artist Leon Golub called “Interrogation I.” It depicts a man, nakedly exposed, hands bound, roped and swaying upside down from the ceiling. He is flanked by two soldiers in knee-high jackboots, one poised to strike him (again) with a bludgeon, the other (perhaps)

shouting orders. It's a sickening image of political might wielding pitiless power over a helpless human form. It does not matter what this prisoner has done. In our gut, we know this is wrong.

Professor Charles Fried, who writes extensively on moral and political philosophy and the law, began his career at Harvard Law School in 1961. He also served as President Reagan's solicitor general, and as associate justice of the Supreme Judicial Court of Massachusetts. His son, Gregory, a philosophy professor at Suffolk University since 2004, focuses his scholarship on classical liberal thought. Both men are steeped in the history of political philosophy and are keenly attuned to current events. "Because It Is Wrong" grew out of conversations they began after the attacks of 9/11, which picked up steam after the revelations of torture at Abu Ghraib in 2004.

The book explores three issues

presented by Bush administration policies, primarily from ethical but also from historical and legal perspectives: torture; eavesdropping, surveillance and the right to privacy; and executive prerogative. The authors conclude that torture is wrong, period. For Charles, it's a question of human dignity.

"If anything at all can ever justify destroying the dignity of a human being, then our capacity for valuing ourselves ... and others is undermined," he says.

Extending his father's thought, Gregory adds, "We are a republic founded on the idea that there are inalienable rights and that dignity is an essential part of what the government is there to protect—that dignity precedes government." He continues, "If you do grant government the power to engage in the most intimate invasion of freedom of the person, turning their body against them to break their will,

you have granted to the government a power that we think is completely inconsistent with a free republic."

In contrast to torture, the Frieds maintain that invasions of privacy through eavesdropping and surveillance are justified under certain conditions and circumstances. Coming to that realization surprised Gregory.

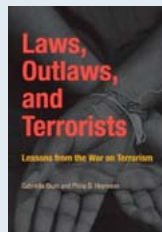
"That's not a position that I would have taken before thinking through the topics in this book," he says. "I think we as Americans tend to have an instinctual absolutism about privacy. I now believe privacy cannot be an absolute."

Charles, too, found himself changing his mind as he wrestled with the issues. "To my surprise, I came to conclude that arguments against torture, why torture is absolutely wrong, had a carry-over to the death penalty, which I had not expected," Charles says about his conclusion that just as it is morally wrong to torture a

THE AUTHORS
CONCLUDE THAT
TORTURE IS
WRONG,
PERIOD

LOOKING FOR THE THIRD PARADIGM WHEN CRIMINAL LAW AND THE LAWS OF WAR ARE NOT ENOUGH

ASSISTANT PROFESSOR GABRIELLA Blum LL.M. '01 S.J.D. '03 is a specialist in the laws of war. Professor Philip Heymann '60 is an expert in domestic law enforcement. With these different backgrounds, they decided to teach a course together on counterterrorism. Along the way, they challenged each other, discovered points of agreement, and realized that they had something new to say about law and national security. "Laws, Outlaws, and Terrorists: Lessons from the War on Terrorism" (MIT



Press, 2010) is the outcome of that collaboration and in October received an award from the Chicago-Kent College of Law.

In prose that satisfies the expert's craving for depth, the lay reader's need for clarity, and the demands of both for nuance, Blum and Heymann concede that the two dominant security paradigms—domestic criminal law and the laws of war—were not designed to address terrorism. But they reject the Bush administration's

national security claim of unchecked executive power, which they call the "No Law Zone." They argue that as we develop a third legal paradigm, we can and should be guided by the principles underlying the rules of domestic criminal law and the laws of war, and adopt rules for terrorism based on those principles. The authors illustrate their approach in chapters examining targeted killing, detention and interrogation.

But Blum and Heymann also acknowledge the limits of law. They examine when counterterrorism actions might be legal but unwise,

or illegal but necessary. And they devote the last section of the book to nonlegal concerns: negotiating with terrorists and reducing support for terrorism within the Muslim world. Their conclusion is sobering: We must accept that we can't reduce the risk of terrorism to zero. We must prepare, mentally and logistically, for the next attack. If we do these things—if we control our fear—we'll be less likely to overreact, which itself carries its own damaging consequences. —J.Z.

→ For a talk on the book, go to <http://bit.ly/lawsoutlawstalk>

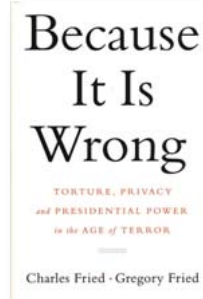


THE BUSH ADMINISTRATION violated the law, Gregory and Charles Fried agree. Where they disagree, is on what to do about it.

person who is totally within the state's power, it is also morally wrong to kill him. Beyond capital punishment, the Frieds explore related issues, including the relative evil of killing compared with torture. "Killing just ends the life," says Charles. It is worse, he believes, to destroy human dignity. They also consider targeted killing—justified, they say, as long as the target is acting as an enemy soldier.

It's clear, both from reading the book and from interviewing its authors, that father and son, despite their political differences, hold each other in the highest intellectual esteem. In today's atmosphere of debased public discourse, this book—and their relationship—shines with intellectual integrity and generosity. Through argument, reflection, and the act of writing and rewriting each other's words, Charles and Gregory worked their way to agreement on every point and issue—save one.

In the final third of the book, the authors address the question of executive prerogative: Is it ever permissible for an American president to violate the law, and if so, when? Their discussion incorporates the classics—Aristotle, Locke and Montaigne—as well as today's headlines, particularly the example of a husband slapped with a ticket as he speeds his pregnant wife, who has gone into labor, down a highway breakdown lane.



Most of us would agree, the Frieds say, that the state trooper who ticketed the husband was wrong, because in an emergency, it should be a government official's prerogative to suspend what the written law requires. They apply the principle to compare Presidents Bush, Jefferson and Lincoln. All three violated the Constitution under emergency circumstances: Jefferson, when he appropriated funds for the military in the face of an imminent British attack; Lincoln, when he suspended habeas corpus at the start of the Civil War; and Bush, when he authorized torture and warrantless wiretapping in the wake of 9/11. The difference, Charles

and Gregory argue, is that Jefferson and Lincoln subsequently submitted themselves to the legal regime: They openly declared what they had done, admitted that they violated the law and sought the approval of Congress, which legalized their actions after the fact. Bush, in contrast, as commander in chief acting for the sake of national security, claimed the power to ignore and violate the law. (The Frieds note that Congress did eventually ratify Bush's wiretapping program, which in their eyes legitimated his actions there. Congress never ratified torture.) "That is an absolutely radical departure from our national traditions and from constitutional control of the executive around this question of the gray area of the law," Gregory says.

Charles agrees. Where he splits from his son is in what to do about it. Gregory sees prosecution of those Bush administration officials who ordered torture as the only way to redress, once and for all, the damage done to the Constitution. Charles believes that prosecuting, far from putting the issue to rest, would unproductively drag the issue forward for years. "The idea that a democratic government that peacefully took over power would start criminally prosecuting their predecessors leads to a terrible chain of pursuit," says Charles, citing the independent counsel investigations that weakened one modern presidency after another. He further believes that prosecuting would be disproportionate to the crime—Dick Cheney, he says, was not Stalin, Hitler or Pol Pot.

And there "Because It Is Wrong" ends—but the conversation does not. The Frieds note that justifications for torture are still on the books—"like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need," in the words of Justice Jackson in his *Korematsu* dissent—and the people who ordered torture are publicly unrepentant. "So, there's a dilemma," Charles acknowledges. "How do you signal the repudiation of such behavior short of criminal prosecution? I understand the strength of Greg's argument—only a prosecution can make that statement—and that leaves me casting about for alternatives." Before our eyes, father and son consider alternatives, such as presidential pardons and congressional commissions, but remain unsatisfied.

"So the loaded gun is still on the table," Charles says.

"Still on the table," echoes Gregory. *

Jeri Zeder is a freelance writer based in Lexington, Mass.

Great Minds That Did Not Think Alike

FDR APPOINTED ALL FOUR to the Supreme Court, but that didn't mean they had to agree with each other

By Seth Stern '01

PROFESSOR NOAH FELDMAN has a knack for picking the right book topics at the right time.

He began work on his first book, “After Jihad: America and the Struggle for Islamic Democracy,” long before the topic became of intense interest after the 9/11 attacks. And he started working on his latest, about four of President Franklin D. Roosevelt’s Supreme Court justices, in 2005, years before the New Deal era suddenly became newly relevant.

“I obviously had no idea we were headed for this big recession we are in or that Wall Street would be the subject of so much criticism or that the parallels with the progressive era and FDR’s presidency would become so central,” Feldman says. “It was just serendipity.”

In “Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices,” Feldman focuses on four men with remarkably diverse resumes, who, despite shared links to Roosevelt, often found themselves at odds once they joined the Court.

While much scholarship has focused on the justices of the Warren Court of the 1960s, Feldman says, “it seems to me many of the most important ideas we think of as our constitutional ideas were actually created in the years of the Roosevelt Court.”

Feldman says he focused on Hugo Black, William O. Douglas, Felix Frankfurter LL.B. 1906 and Robert Jackson because “these four justices were all chosen in an era when life experience was central to getting to be a justice, and they had fascinating life stories and backgrounds which they then brought to bear when they were on the Court.”

Black, an Alabamian and former Ku Klux Klan member, came to the Court directly from the U.S. Senate, where he had a reputation as something of a radical.

Douglas had headed the Securities and Exchange Commission and made a name for himself as a critic of Wall Street.

Jackson had served as Roosevelt’s solicitor general and attorney general during World War II and the president’s most important wartime legal adviser. He later took a leave from the Court to serve as chief prosecutor at the Nuremberg war crimes trials.

Frankfurter, a professor at Harvard Law School at the time of his nomination, had been an important—and often controversial—figure in American liberalism, coming to the defense of Italian-American anarchists Sacco and Vanzetti, who, despite his efforts, were executed in 1927.

“These are people with huge life experiences, and they

also had huge personalities,” Feldman says. “They had no judicial experience, but by any measure they are four of the greatest justices we’ve ever had.”

These four interwoven biographies are a change in direction for Feldman, whose last book, “The Fall and Rise of the Islamic State,” traced the history of Shari’ah law. But he says he tends to track back and forth between a focus on the Islamic world and U.S. constitutional history. He says he got the idea for this book while teaching constitutional law.

“I became fascinated with the way different personalities of the justices reflect and create their beliefs and ideas,” Feldman says. “These are real human beings and not just names on a page.”

He details the common ground these four justices shared when they joined the Court between 1937 and 1941 and how their relations frayed in subsequent years as each refined a different judicial philosophy.

But Feldman doesn’t think it’s necessarily a bad thing that they came to dislike each other and argue so much.

“We live at a time when we believe everyone should be collegial—including Supreme Court justices—but these justices made greatness out of their differences,” Feldman says.

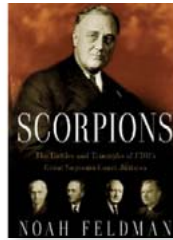
Looking back half a century after the quartet served together, Feldman says each of the justices continues to be influential.

He credits Black as an early voice for originalism, Douglas as the “intellectual father of the rights-expanding school of constitutional thought,” and Jackson as the progenitor of the sort of pragmatism adopted more recently by Justices Sandra Day O’Connor and Stephen Breyer ’64, while Frankfurter was the strongest advocate of judicial restraint.

Of the four, Feldman views Frankfurter as deserving more credit than he gets. “Republicans don’t like him because he was a New Dealer, and Democrats don’t like him because he was a judicial conservative,” he says. “But even though nobody practices it, everybody preaches judicial restraint, and that’s Frankfurter.”

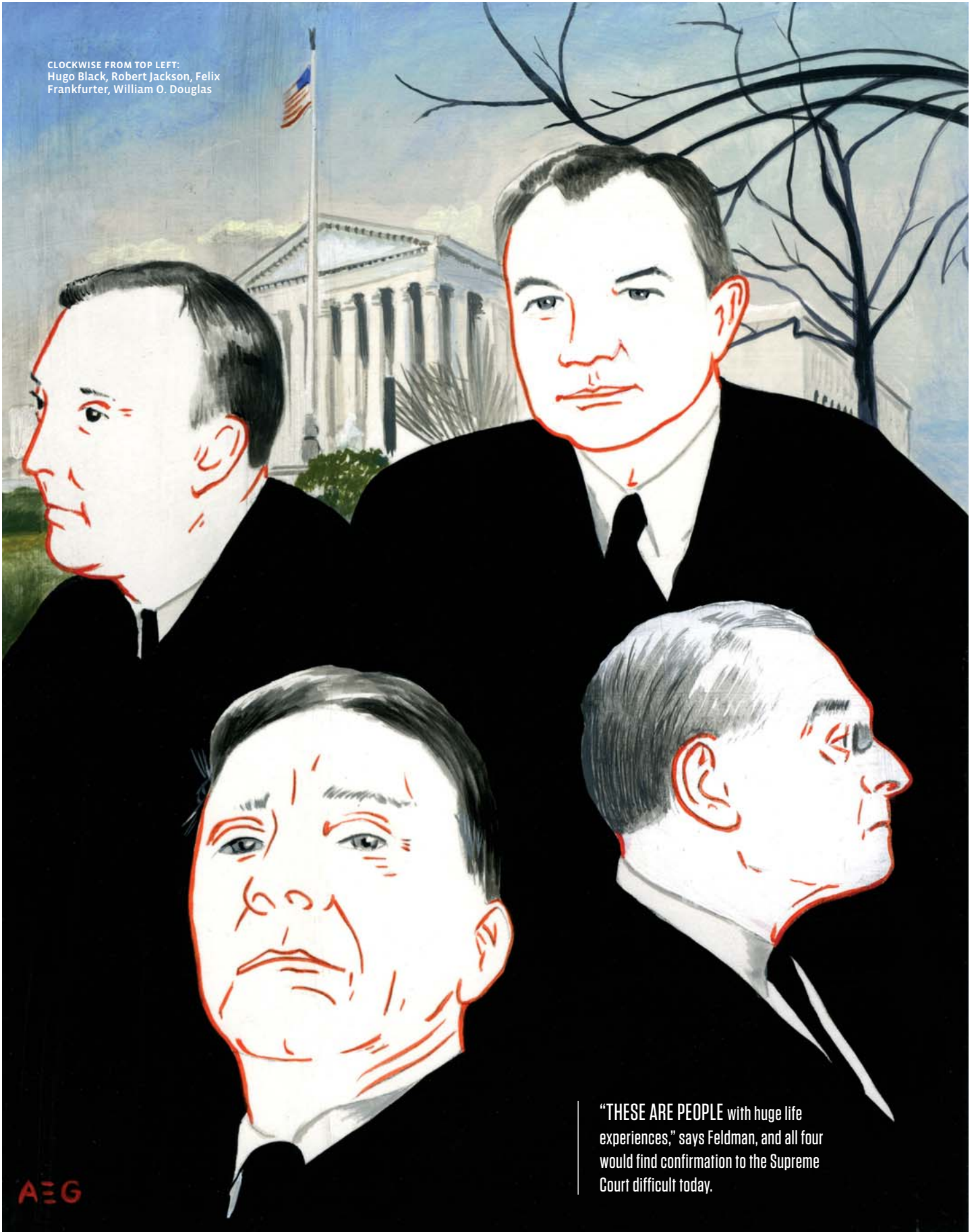
Feldman says all four would find confirmation to the Supreme Court hard going today, a reality which he thinks is regrettable.

“There’s something to be said for people with broad life experiences, big ideas and strong personalities.” *



Seth Stern '01 is co-author of "Justice Brennan: Liberal Champion" (see p. 50).

CLOCKWISE FROM TOP LEFT:
Hugo Black, Robert Jackson, Felix
Frankfurter, William O. Douglas



“THESE ARE PEOPLE with huge life experiences,” says Feldman, and all four would find confirmation to the Supreme Court difficult today.

RECENT FACULTY BOOKS

“PROSPECTS FOR THE PROFESSIONS IN CHINA” (Routledge, 2010) edited by **Professor William P. Alford '77**, William Kirby and Kenneth Winston. Through its meditations on Chinese professional development in areas such as journalism, law, accounting, engineering and the clergy, this collection of essays focuses on an Eastern power undergoing an “epochal effort at national transformation.” Readers are asked to consider the areas of tension and overlap between Western professional models and those on the rise in the Chinese system, while confronting issues such as the historical roots of modern Chinese professionalism, the trade-offs between autocracy and state control, and the translation of professional values across international and ideological lines.

“THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS” (Oxford University Press, 2010) by **Professor John Goldberg** and Benjamin Zipursky. Beginning with critical judicial decisions and legislation regarding tort law, the authors contextualize

each new development and cover related issues from medical malpractice to punitive damages, offering a comprehensive analysis of tort today.

Professor Henry E. Smith and Thomas Merrill, “PROPERTY” (Oxford University Press, 2010). This volume is designed for law students who want a short and theoretically integrated treatment of property law, as well as for lawyers who are interested in the law’s

conceptual foundations. One reviewer calls it “nothing short of a marvel.”

“STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY” (Stanford University Press, November 2010) edited by **Professor Lucie White '81** and Jeremy Perelman S.J.D. '11. With a foreword by Jeffrey Sachs and his daughter, Lisa Sachs. This volume presents a combination of theoretical essays and case studies highlighting the innovations of African lawyers in economic and social

rights activism to fight “the violence of radical poverty.”

“THE TRIALS OF ZION” (Grand Central Publishing, 2010) by **Professor Alan Dershowitz**. This thriller begins with an act of terror that brings the Middle East to the point of explosion. A young Jewish-American lawyer joins the defense team for a Palestinian arrested in the case, but as the plot unfolds, it’s the lawyer’s father—a famed criminal attorney—who must win the Palestinian’s case or risk losing his daughter.



Safe Harbor

WINNING ASYLUM for refugees from persecution

By Elaine McArdle

After countless hours of interviewing their client, digging through documents and working with experts to prepare for two court hearings, students in the Harvard Immigration and Refugee Clinic got what they were after: a grant of asylum.

Their client was a 25-year-old from the Democratic Republic of Congo—a man not much older than they are—who had been violently beaten by youths in his neighborhood in Congo, because he is gay and dared to think that gay people should be treated equally. When the decision from the judge came in the mail— asylum granted—the young man was ecstatic. That would have been reward enough for Lauren Kuley '10 and Connor Kuratek '10.

Then came a note from the young man's mother, who now lives in Kenya. "[T]hank you so much for the great work successfully done in your efforts towards granting my child permanent stay documents in the USA," she wrote. "May God Almighty bless you forever."

Under the direction of Clinical Professor Deborah Anker LL.M. '84, students at the Harvard Immigration and Refugee Clinic work on about 50 asylum cases a year, as well as other cases such as family reunification, visas for people who've cooperated with American law enforcement, special immigrant juvenile cases, and appellate work, including in the U.S. Supreme Court. For the past 25 years, the clinic has been a leader in developing the law of refugee status in the U.S., through client representation, federal court litigation, international and domestic advocacy, and training of students and adjudicators. Students represent clients from around the world fleeing life-threatening situations.

Immigration law has developed enormously over the past decade, with HLS students deeply involved in that evolution. "Many issues related to persecuted groups, like women, children and members of the LGT community, are surrounded by ambiguity still, and we are deeply involved in developing a rule of law culture in the administrative and judicial arenas," says Anker, author of the forthcoming major treatise "Law of Asylum in the United States."

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**HLS STUDENTS
REPRESENT CLIENTS
FROM AROUND THE
WORLD FLEEING
LIFE-THREATENING
SITUATIONS**

"That clinical was the most valuable learning experience I had at Harvard," says Kuratek, who is now an associate at Davis Polk in New York City, where he also does pro bono asylum work. "We had responsibility to decide the course of this individual's life. It made me see the human side of the law, and how powerful we can be as students." Kuratek says of receiving the letter from the client's mother: "That's when it really hit me what it meant to him and his family—and to future asylees who are in his situation."

Kuley and Kuratek worked on the case last year under the supervision of clinical instructor and lead attorney Sabrineh Ardalan. They interviewed the man extensively to prepare his

affidavit, as well as his mother, by telephone in Kenya. They also found and interviewed experts who submitted affidavits supporting their assertion that homosexuality is severely punished in the DRC and Kenya. “The affidavit was a significant part of our work since that is the foundation of the client’s case and the centerpiece for his testimony. It has to develop into a legal theory while remaining true to the client’s voice and to the details he’ll be able to recall on the stand,” Kuley explains.

HIRC had filed for asylum for the man based on his membership in a particular social group—based on his sexual identity—and because of his political beliefs that gays should be treated equally by the DRC government. For almost two decades, U.S. law has granted asylum because of persecution related to sexual identity, but there have been challenges related to proof and country conditions, Anker notes. “Refugees rarely flee with corroborative evidence, and such evidence is hard to produce,” she says. The DRC case was particularly difficult because there is little documentation from the U.S. State Department supporting the contention that gays are persecuted there; indeed, the judge in the Boston immigration court seemed skeptical of the man’s claim.

The students stayed in Cambridge last December, long after the fall semester ended and their friends had flown home for the holidays, to represent their client at a Dec. 23 hearing. The witnesses had to be lined up and prepared for testimony (some by telephone). Kuley and Kuratek also conducted the direct examination of the client.

In April, the man’s mother flew to Boston to testify that her son was persecuted because he was gay; she described taking him to the hospital after one assault, because he was in such severe pain. Kuley delivered the closing argument. But for months, they had no answer from the court. Finally, in September, they learned that their client was granted asylum.

Says Kuley, who is now clerking for Judge Karen Nelson Moore ’73 on the 6th Circuit Court of Appeals, “I witnessed



Professor Deborah Anker LL.M. '84, HIRC director, with Defne Ozgediz '11, Gianna Borroto '11 and Sabrineh Ardalan, clinical instructor

“THE CLINICAL ... MADE ME SEE THE HUMAN SIDE OF THE LAW, AND HOW POWERFUL WE CAN BE AS STUDENTS”

how important to the case it is to develop a good rapport with the client. I think our client was better able to tell us his story, both in preparing for court and in front of the judge, because he knew us and trusted us. Sabi and Debbie did a really great job showing us how to develop that kind of respectful and congenial relationship with him.”

And, she adds: “It was also a lesson in the value of persistence.” After the December hearing, the students were worried about the outcome. But after a pep talk from Anker, Kuley recalls, “we came back even more prepared the next time. In immigration cases especially, preparation makes a big difference—I think it communicates credibility and sincerity to the judge—as does trying lots of different angles and legal theories since the immigration judge has so much discretion.”

Students working in the Harvard Immigration and Refugee Clinic landed another victory in June 2010 when a young woman from Guatemala, who escaped with her two

STUDENTS IN HARVARD'S Immigration and Refugee Clinic take on about 50 asylum cases a year, as well as appellate work, including in the Supreme Court.



young children from a man who had repeatedly tortured all three of them, was granted asylum. Under the supervision of Ardalan, clinical students Defne Ozgediz '11 and Gianna Borroto '11 spent last spring developing her case. The woman sought asylum in the United States on the basis of gender and beliefs—her partner brutally attacked her because she believed in equal rights for women and because she insisted on her right to independence: to run her own business and not to submit to his sexual and physical abuse and control. She feared she and her children would be killed if forced to return to Guatemala.

The case touched on an issue of significance to HIRC and, in particular, to Anker, who has been a prime mover in urging legislative and regulatory reform. Since 1986, due in significant part to the work of the clinic under Anker's direction, the federal government has recognized that violence against women is persecution—a serious human rights violation—that can be the basis for an asylum petition. In 1995, the clinic drafted historic federal asylum law guidelines, which served as international precedent.

But these guidelines still are not consistently applied at the local level, and the clinic, in conjunction with its partners at Greater Boston Legal Services, has continued to push for their uniform application, filing amicus briefs, training asylum officers and working with congressional staffers.

The students met with the woman weekly to learn the details of her life in Guatemala, which they presented in an affidavit along with her petition for asylum. Borroto served as interpreter for the client, who speaks mainly Spanish, including at meetings with a therapist to discuss the abuse she and her children had endured. The students also researched cultural and political conditions in Guatemala, gathering news stories on domestic violence, machismo and “femicide.” They worked with Ardalan to develop the theory of the case, prepared the client to testify at an interview before an asylum officer and represented her at the interview, under the supervision of Anker and Ardalan. Two months later, in June, their client received the

news she'd dreamed of: asylum status in the U.S. for herself and her children.

“The moment I realized our client would never have to go back to Guatemala, and that she and her kids were going to have a good life here, was one of the most moving moments I've had while in law school,” says Ozgediz.

“I had the chance to develop my legal writing skills by working on the client's affidavit, while at the same time getting client contact with our weekly interviews,” says Borroto, who is considering going into immigration work after graduation, perhaps with a focus on policy. “It was difficult to ask her about these experiences, but through the interview process we formed a relationship ... and she began to feel more comfortable sharing these details with us.”

Adds Ozgediz, “The clinic gave us an opportunity to take on a great deal of responsibility in a case where our client and her kids had their whole lives at stake. Classroom courses teach us about different areas of the law, but this let us see what it is like to be an immigration lawyer and serve a client in a way that a classroom education can't.” *

ON THE COURT

A photograph of the Supreme Court building facade, featuring a row of six tall, fluted columns supporting a pediment with a relief sculpture. The inscription "EQUAL JUSTICE UNDER LAW" is visible above the columns. Two people, a woman in a blue jacket and a man in a dark suit, are standing on the wide stone steps in the foreground. The sky is blue with scattered white clouds.

Oct. 1, 2010:
Justice Elena
Kagan '86 with
Chief Justice
John G. Roberts
Jr. '79 after
Kagan's investiture
ceremony
at the Supreme
Court



WHEN THE '10TH JUSTICE' BECAME THE 9TH BY SETH STERN '01

AS HARVARD LAW SCHOOL'S first female dean and the first woman ever to serve as U.S. solicitor general, Elena Kagan '86 has made a habit of making history.

On Oct. 1, Kagan sat on the far right-hand side of the Supreme Court's courtroom in a chair first used by Chief Justice John Marshall, poised to make history once again at her formal investiture ceremony.

Kagan had already been a justice for almost two months by then, having taken the constitutional oath on Aug. 7 from Chief Justice John G. Roberts Jr. '79. Five days before the investiture ceremony, she had attended her first conference—in which the justices met privately to discuss all the cert petitions that had piled up over the summer.

In a sense, the investiture was her public debut in her new role, one witnessed by all three retired justices as well as a trio of Democratic senators who had helped shepherd her nomination, and President Barack Obama '91, who had tapped her for the Court five months earlier.

After the clerk of the Court read her commission, Kagan left the audience behind for the last time and ascended to the center of the bench. Roberts administered the

“THERE WAS NOTHING LIKE ... SEEING THE COMPLETE COURT WITH ELENA AS ITS NEWEST MEMBER.”

judicial oath as her seven colleagues stood facing her. Then Kagan finally took her seat—bringing the number of sitting justices who attended HLS to six.

The robe Kagan wore that day was a gift from some of her former colleagues on the Harvard Law faculty. More than a dozen of them—including Carol Steiker '86, Laurence Tribe '66, Elizabeth Warren and Robert Clark '72—sat in the

audience, as was the case nearly every step along the way in her rapid elevation from solicitor general. (At that confirmation hearing last year, Kagan noted she had “brought a little bit of family from Cambridge” as she introduced the half dozen faculty members seated behind her.)

Her Harvard colleagues were there again on May 10 when Obama announced Kagan's nomination to succeed John Paul Stevens, the Court's longest serving member, at a White House ceremony. And they were there throughout Kagan's three-day appearance before the Senate Judiciary Committee.

Confirmation hearings, like most aspects of the nomination process, have become carefully scripted affairs, where nominees have little to gain from revealing too much about themselves. But Steiker, who has known Kagan since they were second-year law students, said she was struck by how the person she knew shined through.

“I thought she was remarkably forthcoming and natural and funny,” said Steiker. “You could see the teacher in her in her explanations about constitutional interpretation and the ways the Constitution changes and doesn't change over time. And you could see the person she was through her humor and her willingness to defuse tense moments with humor.”

In her opening statement, Kagan assured senators that “the Court must also recognize the limits on itself and respect the choices made by the American people.” She elicited laughs from both sides of the aisle in response to a question from Lindsey Graham (R-S.C.) about where she was at the time of a thwarted airline bombing last Christmas.

“Like all Jews, I was probably at a Chinese restaurant,” Kagan said.

Kagan's tenure as Harvard Law School's dean—and the scope of access she provided to military recruiters to campus—became a focus of the hearings.

HLS Lecturer Tom Goldstein, the Supreme

Court litigator and editor of SCOTUSblog.com, who has attended six confirmations, said it was a predictable focus of attention in “this era where conservatives care so much about respect for the military, and gay rights is kind of a cleaving issue between the parties.”

After Kagan had concluded her testimony, Clark joined Professors Jack Goldsmith and Ronald Sullivan '94 in testifying on Kagan's behalf, along with Kurt White '11, president of the Harvard Law School Armed Forces Association. White praised Kagan for going “to such great lengths to show her respect for and appreciation of the military and military veterans.”

Clark said he chose to focus his testimony on other aspects of her record at Harvard that hadn't received as much attention.

“I tried to make a more general point that her experience as a scholar of administrative law and constitutional law and her experience as an administrator of a major school should not be ignored,” Clark said. “There were lots of people critiquing her because she hadn't been a judge. I thought that was a little narrow-minded.”

Three alumni—Stephen Presser '71, Ed Whelan '85 and Ronald Rotunda '70—testified in opposition.



5TH ANNIVERSARY FOR THE COURT'S 17TH CHIEF JUSTICE

On Sept. 29, 2005, John G. Roberts Jr. '79 was sworn in as chief justice of the United States, as his wife, Jane Roberts, and President George W. Bush looked on. This year marks the fifth anniversary of Roberts' tenure leading the Court. In November, Harvard Law School students got the chance to argue before the Court's 17th chief justice, when he honored the school by presiding at the 100th Ames Moot Court Competition. Look for a related story in a forthcoming issue of Harvard Law Today.

Presser seized upon comments then-Dean Kagan had made about Justice Anthony Kennedy '61 during one of his appearances at Harvard Law School.

Presser said: "Her praise of Justice Kennedy's jurisprudence and his independence could certainly be interpreted as Ms. Kagan suggesting both that it was appropriate for justices to formulate their own notions of what the Constitution should mean, and that it was appropriate for justices to change the meaning of the Constitution by reference to emerging international norms and policies."

Another five weeks would pass until the Senate confirmed Kagan by a 63-37 vote. The next day, Kagan returned to the White House for an East Room celebration attended by Dean Martha Minow, along with a dozen faculty members and administrators, including Professors David Barron '94, John Manning '85, Daniel Meltzer '75 and Lawrence Lessig.

"It was a great celebratory mood there," said Sullivan.

That night, she gathered at a Washington bar for a more private celebration with family and friends. "I've never seen Elena—or maybe anybody—with such a genuine smile," said Lessig.

What Kagan didn't display was any hint of anxiety about the task ahead, said Dean of Students Ellen Cosgrove, who has known her since they worked together at the University of Chicago.

"I've never seen her nervous," Cosgrove said. "I've seen her in really tough situations, and she is calm, she is confident. It's an amazing quality to have."

And on Saturday, Aug. 7, Kagan took the judicial oath from Roberts at the Court. After the typically grueling 89-day process leading up to her confirmation, Kagan might have been forgiven had she opted for a little time off before taking her life-tenured seat on the nation's highest court.

But by Sunday, her first full day as a justice, Kagan was already scheduled to start computer training at the Court.

"That's Elena," said Steiker. "She is going to work very hard."

For Cosgrove, who had witnessed each public step in the confirmation process, the import of the moment didn't sink in until the October investiture ceremony.

"There was nothing like watching her take her seat with the other eight justices and seeing the complete Court with Elena as its newest member," Cosgrove said. "That was the moment of real goose bumps."



BROOKS KHMET



STEVE PETERWAY



STEVE PETERWAY

After the ceremony, Kagan—minus her judicial robe—joined Chief Justice Roberts for the traditional walk down the Court's 44 front steps, a scene captured by a dozen television cameras arrayed across the plaza. They posed together for pictures at the bottom before Roberts withdrew and left Kagan standing alone.

"Ready for Monday?" one journalist yelled out.

"All set," Kagan replied before walking away.

Sure enough, when the first oral argument of the new term and her tenure began three days later, barely 10 minutes passed before Kagan jumped in with her first question.

That question and the half dozen or so that followed in the course of the one-hour oral argument in a low-profile bankruptcy law case were polite but firm, a tone familiar to any former student who once sat in her administrative law class in Langdell Hall. *

Seth Stern '01 was a student in Kagan's administrative law class in the fall of 1999.

From the moment President Barack Obama announced Elena Kagan's nomination, through her appearance before the Senate Judiciary Committee, to the afternoon when she took the judicial oath, Harvard Law School colleagues were there to show their support.



BY KATIE BACON

Regulating digital communications is like trying to control an explosion. FCC Chairman Julius Genachowski '91 brings a full spectrum of skills to the job.

BANDWIDTH

At the entrance to the office of Federal Communications Commission Chairman Julius Genachowski, on identical stands, sit two objects that seem symbolic of the FCC's past and future and how radically the purview of the agency has changed since its founding in the 1930s. One is a thick dictionary, left over from a former FCC chairman. It contains words like *telephone* and *radio*, technologies that the FCC was created to oversee, but not the word *broadband*—the high-speed communications network that is now the agency's primary preoccupation. The other object is an iPad, a device that depends in large part on broadband, and one that signals the centrality of new technologies to modern daily life—and

Genachowski's strong belief in their importance.

Genachowski '91, who was classmates with Barack Obama and served as his chief technology adviser during the 2008 campaign, came to this job passionate about expanding broadband to all corners of the country. "I'm convinced that broadband will be as important to 21st-century America as electricity was to 20th-century America," he told me in an August interview in his office. Eventually, Genachowski says, broadband will be the platform for all communications technology and will be an essential part of most aspects of our society—from the economy to health care to our educational system. But according to the FCC, 35 percent of people in the U.S. still don't have it, and the speed of some of the broadband that does exist is inadequate. "Broadband should be the core mission of the FCC," he says. "And now it is." Accordingly, in March, the agency released a massive National Broadband Plan, a blueprint for radically expanding and improving the country's communications network while protecting consumer interests. Genachowski's FCC then set about building momentum for the plan. "Thanks to Julius' advocacy, pretty much everyone agrees we need to have a national policy of providing Internet access to everyone in the country some way or another," says Reed Hundt, who was a

chairman of the FCC under Clinton and was Genachowski's boss during that time.

Following up on an Obama campaign promise, Genachowski has also sought to enshrine rules protecting "net neutrality"—the idea that all content should be treated equally by the companies providing Internet service. Proponents of net neutrality rules worry that these companies can unfairly provide ultraquick access to certain sites for financial gain, while gumming up the connections to competing sites. But opponents argue that the cable and phone companies responsible for building out the broadband networks should have the right to charge varying rates depending on how much bandwidth a site uses. In a September 2009 speech at the Brookings Institution, Genachowski laid out his argument:

"This is not about protecting the Internet against imaginary dangers. We're seeing the breaks and cracks emerge, and they threaten to change the Internet's fundamental architecture of openness. This would shrink opportunities for innovators, content creators, and small businesses around the country, and limit the full and free expression the Internet promises. This is about preserving and maintaining something profoundly successful and ensuring that it's not distorted or undermined. If we wait too long to preserve a free and open Internet, it will be too late."

But in April, Genachowski's agenda encountered a serious roadblock, in the form of a federal appeals court decision in *Comcast Corporation v. Federal Communications Commission*. In the court case, originally filed by his predecessor, Kevin Martin '93, the FCC argued that Comcast was violating net neutrality principles by slowing customer access to a site that was clogging Comcast's network. The problem for the FCC is that the court ruled it has no authority under current law to regulate online service providers or their broadband networks. In response, Genachowski came up with a "third way" proposal to reclassify broadband as a type of hybrid utility—which would allow the FCC to regulate broadband under its authority to oversee telecommunications, while at the same time exempting Internet service providers from onerous regulations or price controls. He called the approach "consistent with the long-standing consensus regarding the limited but essential role that government should play with respect to broadband communications." According to Thomas Perrelli '91, a friend of Genachowski's from law school who is now the associate

Genachowski is passionate about expanding broadband to all corners of the country and about establishing rules to protect net neutrality—despite the stumbling blocks the agency has encountered, including a federal ruling that said the FCC has no authority to regulate online service providers.



ASSOCIATED PRESS

Berkman Broadband Study Stresses Open Access

In 2009, HLS Professor Yochai Benkler '94 and the Berkman Center for Internet & Society were commissioned by the FCC to do a study on broadband deployment throughout the world (see <http://bit.ly/broadbandstudy>). Among its key findings was that a series of regulatory policies called open access regulation have

contributed to superior broadband penetration, capacity and affordability in other countries.

They wrote in their report: "Open access policies seek to make it easier for new competitors to enter and compete in broadband markets by requiring existing carriers to lease access to their networks to

their competitors, mostly at regulated rates."

The FCC did not incorporate the report's findings into the National Broadband Plan released in March. Nevertheless, in a New York Times op-ed, Benkler praised aspects of the FCC plan: "[I]t takes many admirable steps—including very important efforts toward

opening space in the broadcast spectrum," he wrote, but the plan, he continued, "does not address the source of the access problem: without a major policy shift to increase competition, broadband service in the United States will continue to lag far behind the rest of the developed world."



PHIL PARNSWORTH

attorney general, the "third way" approach is also consistent with Genachowski's working style. "This is really the way Julius approaches a lot of problems—trying to bring people together and find an approach that people can get behind is very characteristic of him," Perrelli says.

Since the ruling, the FCC has continued pushing forward aspects of the National Broadband Plan, but considerable attention has shifted to the jurisdictional questions now facing the agency. At issue, too, are larger tensions—between consumer interests and business interests, between those who believe in more regulation and those who believe in less, and between those who believe passionately in an open Internet and those who worry that an open Internet will unfairly benefit some types of companies over others. These tensions inevitably coalesce around the person who runs the FCC. Blair Levin, who worked with Genachowski at the FCC under both Clinton and Obama and is now a communications strategist at the Aspen Institute, offers some perspective: "If there's any decision that's easy, it's made long before an FCC chairman has to deal with it. I'm quite certain that Genachowski will be in line with other chairmen who will be controversial. You can't do the job without controversy. It just doesn't happen." Yochai Benkler '94, the faculty co-director of the Berkman Center for Internet & Society and

professor for entrepreneurial legal studies at Harvard Law School, makes a similar point. In 2009, he was commissioned by the FCC to do a study of broadband deployment throughout the world (see sidebar). "This is a case of a very talented and well-intentioned man bumping up against an impossible political economy," says Benkler. "There are hundreds of billions of dollars at stake in the core questions he's interested in working on."

The chairman of the FCC, perhaps more than the head of any other federal agency, has to walk a delicate line—between the powerful businesses that make up the communications industry and the consumers who rely on it. HLS Dean Martha Minow, whose father, Newton Minow, was chairman of the FCC under President Kennedy, and who has known Genachowski since his days at Harvard Law, sees it this way: "There's a risk that the chair simply serves the industry, and there's a risk that the chair does not understand the needs and demands of the industry. Julius is uniquely suited to understanding the industry perspective while keeping American needs at heart."

Genachowski describes himself as stubborn. Others have described him as pragmatic, creative and deeply knowledgeable about cutting-edge technologies. And according to Hundt, there's widespread respect in Washington for

HLS Professor Yochai Benkler says of Genachowski: "This is a case of a very talented and well-intentioned man bumping up against an impossible political economy. There are hundreds of billions of dollars at stake in the core questions he's interested in working on."

Genachowski's acumen and integrity. He'll need all those qualities, as well as some help from the political process, to push his agenda through.

THE SON OF two survivors of the Holocaust, Genachowski grew up on Long Island. He was always interested in technology, and recalls once when his father took him to his alma mater, MIT, to show him the research he'd done creating a device to help blind people read. "It was an important experience, and what it really showed me was the power of technology to transform lives for the better. And that was something that ended up pointing me on a path that was relevant to this job," he says.

In the years before and after law school, Genachowski gained experience in all three branches of government, as well as in the private sector. A history major at Columbia, he decided to go to law school because he was "interested in the world and the way it works." But he deferred twice to work for Chuck Schumer '74, now a New York senator, who at the time was a member of the House of Representatives. Then he got an opportunity to work as an aide for the House committee investigating the Iran-Contra affair. But when he approached Harvard for a

third deferment, they turned him down. "Being stubborn, I decided to take the job and take my chances," he says.

When he did go to law school, Genachowski says, "I learned a lot about the importance of a healthy debate, and about the importance of multiple disciplines coming together in areas like public policy to produce the best outcomes for the country." Among other classes, he took constitutional law from Laurence Tribe '66 and civil procedure from Minow. As Minow recalls, "He was a star creative student with the ability to get to the heart of the matter, maintaining common sense while using sharp analytic skills. He's still like that today." Genachowski served as notes editor for the Harvard Law Review under Barack Obama. They would sometimes escape from their work onto the basketball court (Genachowski has a picture in his office of the two of them playing basketball). And they would talk about the paths that led them to Harvard Law and the Law Review. "Growing up, Harvard Law School was the last place I expected to go," Genachowski told me. "Only in America could someone who was the child of immigrants, of Holocaust survivors, end up on the Law Review at Harvard Law School. I was very appreciative

The Predecessor: Kevin Martin '93 Led FCC Under President George W. Bush

Genachowski's path to the chairmanship of the FCC in some ways mirrored that of his predecessor, Kevin Martin '93, though they arrived via different sides of the political aisle. After graduating from Harvard Law, each worked as a legal adviser to the FCC early in his career, and then as a technology adviser for the president-elect, prior to being tapped as head of the agency. Martin served as a commissioner of the FCC during President George W. Bush's first term, and

was elevated to chairman at the beginning of his second, during a time of exponential Internet growth. His philosophy during his four years as chairman, he has said, was to "pursue deregulation while paying close attention to its impact on consumers and the particulars of a given market." In terms of broadband, his goal was to create the conditions necessary for the expansion of broadband infrastructure—the number of broadband lines doubled to more than 100 million during



his tenure—and also to push the development of broadband networks that could link state and regional health care facilities.

Like Genachowski, Martin faced controversy during his tenure, particularly over the FCC's efforts to strengthen polic-

ing of indecency over the airwaves and to relax media ownership rules.

In October, Martin offered some advice to Genachowski, as part of a C-SPAN panel with former FCC Chairmen Reed Hundt and Michael Powell: "Some of the most important advice

I got as chairman was that you have to be deliberate in thinking and decision-making, but you have to make sure you move forward with what you thought was the right thing."

Martin is now a partner at the law and lobbying firm Patton Boggs, in Washington, D.C., where he co-chairs the technology and communications practice, and is representing a half dozen clients opposed to the proposed \$30 billion merger of Comcast and NBC—a plan that is now under review at ... the FCC. —K.B.

when I was there of the uniqueness and the import of that opportunity. Barack Obama had a very different background, but we shared that appreciation.”

After graduation, Genachowski clerked for Abner J. Mikva in the U.S. Court of Appeals for the District of Columbia (the position was offered first to Obama, who turned it down in favor of returning to work in Chicago and writing his book “Dreams from My Father”). Genachowski went on to clerk for two Supreme Court justices—William Brennan ’31 and David Souter ’66. At that point, in 1994, a typical path might have been to teach at a law school or work for a prestigious firm. But Genachowski instead chose the FCC.

“People thought it was a little strange. But I was interested in technology and I thought that communications technology was a world that was about to explode—and that was an explosion that you wanted to be near,” he says. He spent the next three years as a high-level legal adviser, eventually serving as chief counsel to Reed Hundt. As Hundt recalls, “Harvard and also the Supreme Court clerkships gave him a tremendous base of knowledge—he was really quite brilliant.” Back then, when the Internet was still in its infancy, digital communications—satellite radio, and digital mobile service and TV—were just becoming topics of conversation for the FCC. Genachowski was there for the first spectrum auctions, where the government sells off the rights to transmit signals over specific sections of the airwaves. (A decade and a half later, with the huge expansion of mobile devices and mobile Internet use, a looming spectrum crunch is one of the issues Genachowski is working to address.)

But according to Hundt, what really prepared Genachowski for his current job was not his time at the agency, but the decade he spent in the private sector, working in the nascent digital world—as an executive at IAC/InterActive, Barry Diller’s media and e-commerce company, and as a founder of an incubator for Web startups, among other positions.

Obama drew on that expertise during the 2008 campaign. Genachowski recognized the social networking power of the Internet and made a successful pitch to the candidate that he could and should use that power to his advantage. Many of the technology issues of the campaign—including a strong defense of net neutrality and the push to develop a national wireless system for emergency responders—have remained priorities under Genachowski at the FCC.

THIS PAST SUMMER, the agency gathered

comments on its reclassification plan while meeting with stakeholders such as Google, Verizon, AT&T and the Open Internet Coalition to try to come up with an acceptable agreement on net neutrality. (The talks were called off in August, after Google and Verizon announced their own agreement. The two companies had long been in behind-the-scenes negotiations to come up with a mutually beneficial policy on net neutrality.) Genachowski moved forward on aspects of his agenda, including the most significant release of spectrum since the 1980s, to be used for extra-powerful Wi-Fi networks. But net neutrality and reclassification became such hot-button issues that the decisions on them have been delayed, and most likely will not be made until well after the midterm elections in November. While some of the FCC’s business can proceed without reclassification, much of it is dependent on re-establishing clear jurisdiction over broadband. According to Levin of the Aspen Institute, it’s not yet clear how the FCC will achieve that, but there’s a general recognition that broadband needs some level of government oversight. “I think at some point it’s either determined by the Court that there is some residual power, or Congress steps in and restores that power. There’s a great public interest in this being done by a government agency,” Levin says.

With the delay on reclassification and net neutrality, Genachowski has come under strong criticism from consumer groups advocating for an open Internet. One such critic is Aparna Sridhar, policy counsel at Free Press, a media-reform organization. “He’s doing a good job at gathering information and he recognizes the problems before him, but I think the issue is that solving them is hard. It requires potentially upsetting major interests, and it requires the stomach to do those things,” Sridhar says.

But Genachowski argues that coming to the right solutions takes time—and that the ongoing process of debate over how broadband should be deployed throughout the country and over how to keep the Internet open is essential for reaching those solutions. “One of the things that I’m proud of is that there are many issues now about our broadband future that are being discussed and debated. Some of these are hard, complex issues, but a year ago they weren’t being discussed,” he says. “We need to debate them to make the right decisions for the country.” *

“There’s a risk that the [FCC] chair simply serves the industry, and there’s a risk that the chair does not understand the needs and demands of the industry,” said Dean Martha Minow. “Julius is uniquely suited to understanding the industry perspective while keeping American needs at heart.”

Katie Bacon, a journalist and editor based in the Boston area, has written for The New York Times, The Atlantic.com and other publications.



STORIES

from the West Wing

INTERVIEWS BY
ELAINE McARDLE

Three faculty who served in the Obama administration, and recently returned to HLS, talk about gridlock, being part of history, living life at warp speed and the day the Easter Bunny blacked out the White House




Meltzer



Barron



Freeman



Professor Daniel J. Meltzer '75, a veteran of the Carter administration, joined Obama's transition team to oversee the preparation of executive orders that might be issued soon after the president took office. At the request of his friend Chief White House Counsel Gregory Craig, Meltzer then accepted the position of principal deputy counsel to the president, committing for one year and remaining another four months to assist Craig's successor, Robert Bauer.

Professor David Barron '94, an expert in constitutional and administrative law and a member of the Clinton administration, joined Obama's team as acting head of the Office of Legal Counsel in the Department of Justice, where he worked for 18 months before returning to HLS this August.

Professor Jody Freeman LL.M. '91 S.J.D. '95, founding director of the school's Environmental Law and Policy Program, served as counselor for energy and climate change in the White House for more than a year, returning to Cambridge in the spring.

THE WORK THEY DID:

PROFESSOR DANIEL J. MELTZER '75, *principal deputy counsel to the president*

"A SIGNIFICANT PART of the work consists of giving advice to the president and the White House staff about compliance with a large set of rules that govern some of their activities. Examples include compliance with conflict of interest and other ethical rules, restrictions on contacts with federal agencies, compliance with the Hatch Act and other rules regulating the appropriate bounds of political activity, and issues related to the Freedom of Information Act and the Federal Advisory Committee Act. The Counsel's Office is also responsible for making recommendations to the president on individuals nominated as federal judges and U.S. attorneys. In addition, there is a huge volume of material that comes through the office—for example, draft communications to Congress about pending legislation, proposed testimony of government officials and draft remarks of the president—all of which are reviewed by someone in the office to be sure they don't raise any legal questions. And then there are a broad set of hard and interesting issues—a range of national security matters relating to terrorism and detention policy, or questions about positions to take in controversial





litigation—in which we work with the Department of Justice to ensure that the government’s legal approach is consistent with the president’s program.”

PROFESSOR DAVID BARRON '94,
head of the Office of Legal Counsel

“OUR OFFICE HAS to approve all executive orders for form and legality, as well as reviewing all the issues about setting up the government, such as appointment issues—both statutory and constitutional questions about who can be appointed and how they can be appointed. On top of that, there was all this pending litigation that the department had to deal with, the Harriet Miers litigation [concerning whether the former White House counsel

in the Bush administration could be required to appear before Congress or whether she instead had immunity] and all the pending Guantánamo litigation. And there were so many basic separation of powers issues already in court. And all the new legislation from the economic crisis—all that had to be reviewed. There was also a very ambitious legislative agenda, and we review it all.”

PROFESSOR JODY FREEMAN
LL.M. '91 S.J.D. '95, counselor for energy and climate change

“OUR OFFICE WAS responsible for advancing the president’s agenda on energy and climate change, and related environmental issues. This included advising the president on

the use of executive power by the EPA, DOE, DOI, DOT and other agencies to make progress on his goals; leading the White House team working on passing comprehensive energy and climate legislation; and coordinating with the NSC and the State Department teams on the strategy for pursuing an international agreement in Copenhagen. The issues we worked on in the office were incredibly diverse—renewable energy, energy efficiency, transmission, biofuels, greenhouse gas regulation, green jobs—anything that related to the president’s agenda for the clean energy economy and for addressing climate change. We played a key coordinating role on a number of issues—for example, the historic fuel efficiency standards set jointly by the EPA and the Department of Transportation.”

ON JUMPING RIGHT IN:

MELTZER: “AFTER THE inauguration, one walks into an entirely empty set of offices—no permanent lawyers, no assistants, no books, no memoranda—just desks, computers and empty bookshelves. Thus, each White House Counsel’s Office starts from scratch. The lawyers in the Bush administration’s Counsel’s Office were extremely helpful to us when we had questions, but to a certain extent you don’t know the right questions to ask until after you are already there. It’s a crazy way to run an important government legal office, but that seems to be the way it’s always been done. You can’t help but spend a certain amount of time reinventing the wheel.”

BARRON: “THERE WAS a small group of us who were there from Day One—this was before the attorney general was in, before the deputy attorney general was in—so the first day is basically walking down Constitution Avenue through the crowds into the building. A group of us took our oath after [the president] took his oath, and then right away there was a huge number of executive orders that were being issued. I think the ethics executive order, the

limitations on lobbying, that was the very first day, and the next couple of days later, the executive order on Guantánamo and on creating a detention task force, and a whole range of executive orders in the first few weeks.”

FREEMAN: “LITERALLY MOMENTS after my appointment was finalized, I started working from my garage office on a set of executive orders, in my yoga pants. Things were going a mile a minute, and this was before the inauguration. It was warp speed. I bought a BlackBerry, got on a plane, dropped my stuff in a hotel room and showed up for work. It was truly like leaping off a cliff. I had no idea how to do my job. No one explained it. I just started doing it.”

“As polarizing as things seemed, I’ve seen people with different legal priorities working together as hard as you could possibly work.” David Barron

MAJOR ACCOMPLISHMENTS:

MELTZER: “AMONG THE things of which I am proud is the relationship that our office established with the Department of Justice, in which we sought to respect the department’s independence and our shared commitment to compliance with the law while also striving to ensure that the president’s views and concerns were given appropriate consideration when the administration was formulating its legal positions.”

BARRON [REFLECTING ON the negative publicity the Office of Legal Counsel garnered during the Bush administration, particularly for the “torture memos”]: “I think the main goal was I wanted the office to be thought of as operating in accordance with its best traditions, so it would be respected in the way it has been for most of the time of its operation.”

FREEMAN: “ONE OF the real accomplishments of our office was that we kept energy and environmental issues on the front burner even as the administration was tackling two wars, health care reform, financial regulatory reform, two Supreme Court nominations and a host of other issues. I

think our office played a critical role in helping the president to use his executive power effectively while at the same time moving the ball down the field on comprehensive energy and climate legislation. Even though it was unsuccessful in the Senate, getting the bill out of the House was at the time real progress, and all this was while coordinating the largest investment in clean energy in U.S. history, via the Recovery Act, which put about \$90 billion into the clean energy sector. The experience with the fuel efficiency standards really exemplifies what can be done when everyone rows in the same direction—the first-ever greenhouse gas standards and the strictest fuel efficiency standards in U.S. history, announced by two agencies working hand in hand, with the support of the entire auto industry, states, labor and environmental groups. Plus, it involved a raft of litigation. The president was really pleased with the result because it was such a win-win-win. He said, “This is what I’m talking about.”

HOW DIFFERENT WAS THE WEST WING FROM LIFE AT HLS?

MELTZER: “I SOMETIMES joke that the job is about 180 degrees different from being a law professor. Law professors work on a small number of things at one time, they pick their projects, they generally have a lot of relevant background knowledge about the matters they’re working on, they work on the substance apart from a complex political and institutional environment, they have enough time to work things through more or less to their satisfaction, they are free to talk about what they are working on, and no one is very interested. None of those things is true about the White House Counsel’s Office.”

FREEMAN: “IN A way, it was hugely different; in another way, it wasn’t. The pace was just totally different. There are only three speeds: urgent, emergency and immediately. And of course there is a political valence to everything that doesn’t exist here, so there are political imperatives that constrain the kind of policy options you can consider. At the same time, the substance, the laws and regulations, the interagency process, the governance system, is something I know well. So advising on that felt very familiar.”



PHOTO BY PETE SONZA

March 20, 2010: Nancy-Ann DeParle ’83, director of the White House Office of Health Reform, consulting with Meltzer, while President Obama calls a member of Congress. The House passed the health care bill the next day. Also present, from left: Robert Bauer, counsel to the president; Phil Schilliro, assistant to the president for legislative affairs; Danielle Gray ’03, associate counsel to the president.



THE PACE WAS *HOW* INSANE?

MELTZER: “THERE WAS an exhilarating quality to the pace and the number of interesting issues that passed through, and the adrenaline was clearly flowing, but it was frustrating and sometimes a little bit frightening to have to provide legal advice under ridiculously short time constraints on issues of some complexity about which one didn’t feel as informed as one would like to be. It felt like an avalanche when I arrived, and the avalanche did not feel much smaller when I left. It’s just a huge, huge volume of business.”

BARRON: “THE PACE of the government seems extremely fast now. I would ask people who were in sub-Cabinet positions in the Clinton administration and were now working in the Obama White House, and they were all of the view that the pace of the government has quickened enormously. I think some of it is national security, maybe a lot of it, but there had also just been a big economic breakdown as well, and the war in Iraq and the war in Afghanistan, and the issues of terrorism—and that’s before you even get to the affirmative agenda.”

FREEMAN: “THERE WERE times when I would literally run to the White House in the morning, partly out of exhilaration and partly out of fear. There was just this sense of relentless incoming to manage, and at the same time we needed to be pushing the positive agenda forward. The pace has an impact. Your body chemistry changes. You either lose weight or gain it. And your family just gives up on you. Routinely, I was on a computer with two BlackBerries going at the same time. I saw my mother only once, for a single day, during this experience, when I met her in New York City. We were walking through the Museum of Modern Art, and then we went shoe shopping, and I was on two BlackBerries the whole time. She has a photo of me in MoMA frantically typing on two BlackBerries. No art. No shoes.”

“There were times when I would literally run to the White House in the morning, partly out of exhilaration and partly out of fear.” Jody Freeman

HOW POLARIZED IS WASHINGTON TODAY?



MELTZER: “IT SEEMS much more partisan and nastier, and that was a source of enormous frustration. Whether you were talking about responding to the financial crisis, judicial nominations, or trying to respond sensibly to the threat of terrorism, it was just extremely difficult to find a basis for working things through in a cooperative and bipartisan way.”

BARRON: “I HAVE to say that given that the president was being impeached during a large portion of my time in the Clinton administration, polarization seems to be a feature of our government. You could get pessimistic, I guess, but I have somewhat of an optimistic read on it. As polarizing as things seemed, I’ve seen people with different legal priorities working together as hard as you could possibly work on the most challenging issues from a perspective of trying to get the law right. If that can happen, there’s a reason to be optimistic. There’s no doubt that it’s going on [extreme partisanship]—you can’t deny

it—I’m just saying it’s not the whole story. I think for young lawyers coming through, it’s a mistake to think the only options are to choose up sides.”

FREEMAN: “IT’S VERY hard to get anything done without a supermajority, which makes big structural reform really challenging and frustrating. That said, the president got the Recovery Act through, he got health care done, he got financial regulation done, because the Democrats pulled together. The question is, Can the same thing happen with climate change and energy? You’d think that the [BP] oil spill would have put a punctuation mark on the need to transition to cleaner forms of energy that are less dangerous for the environment and for the public—that it would have added some impetus to getting a bill passed. It was very disappointing to watch Congress instead only wanting to deal in an immediate sense with BP. That was a perfect instance where something positive could have come from a tragedy. You think, If nothing else helps the case, why doesn’t this? But the focus was already turning to the midterm elections.”

FUNNY WHITE HOUSE MOMENTS:

MELTZER: “THE PRESIDENT had a Christmas dinner for senior staff which featured the unlikely combination of Bon Jovi and the Rockettes as the entertainment.”

BARRON: “DURING THE transition, all I had was my wife’s old BlackBerry, which didn’t have Internet service [Barron is married to Juliette Kayyem ’95, assistant secretary for intergovernmental affairs in the Department of Homeland Security]. It was just a phone, so that was my phone, and when I went to my first meeting for the transition, everybody whips out their BlackBerries and starts typing on them because an e-mail had just come in about some meeting, so I faked it—I pretended to type on it. I went home that night and said, ‘Juliette, we have to get this turned on because you obviously can’t operate in this city without one.’”

FREEMAN: “THERE WERE all kinds of very funny moments. At the White House Easter Egg Roll, the Easter Bunny tripped over a wire and the power temporarily went out. I mean ... power outage ... in the White House ... due to Easter Bunny.”

IMPRESSIONS OF PRESIDENT OBAMA:

MELTZER: “I ARRIVED down there not really knowing the president, having only the smallest acquaintance with him from law school, so my sense of him was from having watched the campaign, but I was an enormous admirer. I left the White House being a still-greater admirer, which in some ways is surprising, because often when you have a chance to work at close range with someone, no matter how distinguished, his warts become more visible. But I thought he was a remarkably able, thoughtful, shrewd, wise and decent person, who was committed to trying to do the right thing in the extraordinarily difficult circumstances that he inherited. He also is a superb lawyer.”

BARRON: “I THINK he’s an exceptional leader and, from all that you can tell, has a much longer view of things than most people are capable of having. He’s also just an exceptional lawyer. We didn’t have that much interaction with him, but there have been a lot of great lawyers who worked in the Office of Legal Counsel, and I can’t imagine any that could have worked for a better lawyer than the current president.”

FREEMAN: “HE’S A very, very impressive person. It was really terrific to watch somebody who is so smart and strategic, so decisive and even-keeled. He also happens to really get our issues. I don’t know that any president before him has fully put it all together the way I think he does, in terms of the way the economic and energy challenges are related and represent an opportunity for the U.S. to gain a competitive advantage. And that always gives you hope, because if the guy at the top really understands this, then ... ”



ASSOCIATED PRESS

ON BEING PART OF HISTORY:

MELTZER: “I NEVER got to the point where it didn’t feel a little bit special to be walking into the West Wing every morning.”

BARRON: “THERE IS a shared spirit of good will, a very special environment, which makes it an unusually fulfilling experience for many people. It’s hard outside government to replicate that as a lawyer. In the adversarial system, you have your own team of lawyers. But it’s something distinct when the client is the United States of America.”

FREEMAN: “I HAD a feeling the entire time I was there that I was part of something special. There are all these indications that you aren’t somewhere normal—the Secret Service, Marine One landing on the lawn, seeing this or that world leader wander into the West Wing. But beyond the atmospherics, the work was special. I loved the substance. I loved working with really smart, dedicated people, and I’ll always feel lucky I got a chance to contribute.”

Elaine McArdle is a Boston-area freelance writer.

BY EMILY NEWBURGER

*Thirty years ago, **Laurent Coben-Tanugi** embraced internationalism by leaving France to attend HLS. Today, as a leading international lawyer and public intellectual, he is an architect of a European strategy for globalization.*

THE SHAPE



**OF THE WORLD
TO COME**

IN 1981, A young Frenchman attended Harvard Law School's graduate program. Like many alumni, after he received his LL.M. degree, he worked for a firm in the States. When he went back to France, Laurent Cohen-Tanugi LL.M. '82 became an associate at the Paris office of the firm, but he also published an elegant comparative analysis of the French and American legal and democratic traditions. The book, "Le droit sans l'État" ("Law without the State"), which was called "Tocquevillian," influenced the transformation of the French idea of democracy and the legal profession, and it launched the 27-year-old's career in France as a writer and intellectual.

Cohen-Tanugi has since written other books that articulate the tensions facing France and Europe at different stages in their political and economic development, as well as the relationship between Europe and the U.S. in the globalized world. He also served as an adviser to the French government on issues related to the future of the European Union.

At the same time, Cohen-Tanugi is an international M&A and arbitration lawyer who has been involved in some of the major trans-Atlantic mergers of the last 25 years—as a partner at Cleary Gottlieb Steen & Hamilton, then Skadden, Arps, and as general counsel of a French pharmaceutical company. (In 2009, he taught a class at HLS on those deals and he is offering it this spring at France's leading business school.) He now runs an independent practice in what he calls the traditional "trusted adviser" model.

HLS Professor Lucian Bebchuk LL.M. '80 S.J.D. '84 says of Cohen-Tanugi, whom he first met when they were both students at HLS: "He offers the rare and fascinating combination of a sophisticated corporate lawyer and a broad-ranging and prolific public intellectual. His intellectual body of work is a reflection of his passion for ideas, creativity and gift for writing."

A graduate of the prestigious École Normale Supérieure and the Institut d'Études Politiques, Cohen-Tanugi decided to take a detour on the path to French civil service and applied to study law in the United States. He saw it as a compromise between "intellectual activity and real life."

He was accepted to Harvard Law but hesitated. What sealed the deal, he says, were a few words from writer and international lawyer Samuel Pisar LL.M. '55 S.J.D. '59, a survivor of Auschwitz, who had written a highly acclaimed book about the experience and was practicing in Paris.

"When I finally got him on the phone," recalls Cohen-Tanugi, "I explained my choice: Should I become a high-ranking civil servant or go to Harvard Law School? Without any hesitation, Pisar replied, 'Go to Harvard Law School,' and hung up the phone."

"So I did, and it changed my life," says Cohen-Tanugi. "I discovered what law meant in the United States—I mean, how different the role of law and lawyers in society, in politics, in the economy were between the United States and France at the time." His first book stemmed from that realization and was directly inspired by his Harvard experience. Cohen-Tanugi says people in France still want to talk to him about this book. He laughs, "I've since written eight more,

but this is the one they come back to most often."

Many in France had very negative views of the American legal system, Cohen-Tanugi says. He concedes that in some respects, they were justified. But in the book he argued that law and lawyers and legal regulation were central to American democracy. "In the '80s, France was trying to reduce the role of the state, in the economy and in society," he says. "It was the Reagan era and there was a lot of talk about the market as the solution." Cohen-Tanugi argued that you can't have the market alone; you also need the rule of law because you need to regulate the market. He made

COHEN-TANUGI IS THE RARE INTERNATIONAL CORPORATE LAWYER WHO IS ALSO A BROAD- RANGING PUBLIC INTELLECTUAL

the case that the way to reduce the role of the state in France was to encourage the rise of law and lawyers. "It was a message that was really new at the time," he says, "and it's the direction French democracy, and the legal profession, have followed over the past 20 years."

Through his focus on France, Cohen-Tanugi began to write about Europe—first "as an interesting political science animal, something that was actually an embodiment of the 'law without the state,' the title of my first book," he says, "because it was really a legal system without being a state."

He wrote an essay (translated into English as "Europe in Danger") on the political issues that he anticipated would arise as Europe moved toward unification. Two months after it came out in 1992, French President François Mitterrand submitted the Maastricht Treaty—which created the European Union and would lead to the birth of the euro—to a referendum. This was a first, says Cohen-Tanugi. There had never been a referendum on a European treaty. "That prompted a huge national debate, a huge partisan campaign and the coming out of the anti-Europeans," he says.

Jacques Salès LL.M. '67, a Paris-based attorney, founder of Salès Vincent & Associés and former head of the Harvard Law School Association, has known Cohen-Tanugi for years. He remembers his visibility and eloquence on the issue of the referendum, at a time when French public opinion was highly divided. "There were many opponents," Salès says, from many factions. "We did not know how it would go."

"I found myself engaged in the campaign in favor of the treaty, taking a very pro-Europe stance," recalls Cohen-Tanugi. "I met Jacques Delors [then president of the European Commission] and became part of the movement."

"From being an analyst of Europe as a political science concept, I became a European militant, if you will," he says. "And I've remained that since then."

For Cohen-Tanugi, that has meant a hard, clear-eyed look at the institution that he champions. In books, articles, and regular columns for French and international newspapers,

LIVING HISTORY

De Búrca studies the European Union as a model of transnational governance

Professor Gráinne de Búrca calls EU law “history in the making, a process of integration that’s taking place and changing before our eyes.” When she first taught the subject in Europe—at Oxford and then the European University Institute in Florence, Italy—it was a question of interpreting the region’s emergent law.

When the Irish scholar came to the U.S. to teach—first at Fordham Law School and this fall joining the faculty at HLS—her angle changed. Instead of the law of the land, the EU represented a model of the possible. “It’s the world’s largest trading block,” says de Búrca. “And despite the financial crisis, it’s still seen by many as the most successful example of regional economic cooperation, emulated by other regional organizations, including ASEAN, the African Union and Mercosur.”

States that had been at war, on and off, for centuries, “are now knotted together in this ... incredibly complicated, fine-grained, but, nonetheless, working system of political and economic governance.” It’s a fascinating entity, she says, as a trading power and as a global political force in its own right.

In her writing on the EU, de Búrca is exploring its viability and significance as a model of transnational governance, as well as its emerging role as an international actor.

The signing of the Maastricht Treaty in 1992 marked

the creation of the euro, but also, de Búrca says, “the expansion of Europe’s ambitions from being a project of economic integration to something explicitly political.” This expansion did not come without tensions. And in 2008, the financial crisis raised these tensions to a whole new level, she says.

Some people have gone so far as to predict the end of the euro and of the European project itself. “I don’t believe there is a real threat to the future existence of the EU,” says de Búrca, “but these are very turbulent times.”

De Búrca believes that for political elites, there’s little risk of a loss of faith in the European project. But she does see a significant disconnect between these governments and their citizens. And that growing gap, she says, is what is most likely to be destabilizing.

She also points to the troubling wave of anti-immigrant sentiment, which “cuts against the ideals on which the EU was founded.” It started well before the French expulsion of Roma this summer, she says. Since the Eastern expansion of the EU in 2004, there has been a whole new anti-immigrant slant often couched in nationalist rhetoric, aimed in particular at migrant workers from the newer member states of Central and Eastern Europe, as well as at non-EU nationals more generally.

But at the same time as

these debates rage in individual states, de Búrca observes that the web of policymaking and governance and administration that links all of the EU countries on a daily basis is only getting stronger. And most Europeans don’t realize it. “Their sense of national identity and sovereignty is far stronger than the actuality of how and where their laws and policies are made.”

Many citizens don’t realize how much their everyday life is governed at a European level, de Búrca says, until they have a problem that calls for government involvement. And then it becomes clear just how complex it is. “It’s not just a case of writing to your local MP, or to your town council,” she says. “The position is much more complicated. It’s increasingly hard to point to an issue that is uniquely national, or

uniquely European.” The local, national and European levels are increasingly meshed, she says, in the making of policy from family law to criminal law.

In 2009, the Lisbon Treaty came into force, after a decade of failed struggle to enact a constitution for Europe. The treaty contains almost everything that was in the rejected constitutional treaty—all the functional reforms, says de Búrca, but with the symbolism of “superstatehood taken out.” For de Búrca, this omission speaks volumes about member states’ ambivalence toward the EU’s emerging role.

“On the one hand, they want the EU to be a strong global actor,” she says. “On the other hand, there’s always a fear of undermining the voice and the status of the individual states.” —E.N.

PHIL FRANKSWORTH



Professor
Gráinne de
Búrca

he has addressed the challenges facing Europe since the signing of the Maastricht Treaty, as the EU has grown from 19 to 27 states “without institutional reform, a sufficient financial commitment, or popular consultation or support.”

In 2007, he wrote a book putting his concerns about Europe in the bigger context of the global geopolitics of the 21st century. “Guerre ou paix,” titled in English “The Shape of the World to Come,” looks at how the rise of economic powerhouses such as China and India, the diminishing influence of Europe and the U.S., and the transformation represented by the attacks of 9/11, have created a new geopolitical reality with new power dynamics. He says it’s not a question of “the West against the rest.” But he believes that there is an important role for Europe and the U.S., and that their ability to rise to the challenge is not a given. “For all their democratic shortcomings, China’s and even Russia’s ruling classes have demonstrated strategic vision and the leadership skills to bring about change and use globalization to restore national power,” he writes. “The long-run superiority of democratic government over authoritarian regimes to produce stable

... societies does not eliminate the need for political vision and courage.”

In 2008, he approached some of the same issues from a different angle. In anticipation of the French presidency of the EU, Christine Lagarde, the French minister of finance, asked Cohen-Tanugi to lead a task force assessing the Lisbon Strategy—an economic growth and employment strategy for Europe launched in 2000, which called for structural reforms across countries to compete with the U.S. in terms

of productivity and innovation.

For almost a year, Cohen-Tanugi traveled through Europe holding interviews and staging debates. In the end, he says, the report his task force issued called for something more ambitious than was outlined in the original plan. “Beyond Lisbon: A European Strategy for Globalisation,” the report and a related book, came out just as the financial crisis broke. But Cohen-Tanugi says the central theme is more relevant than ever. “Europe has to upgrade its ambition and its means to cope with globalization in a meaningful way.”

In late August, when the Bulletin interviewed Cohen-Tanugi, talk of reforms to France’s retirement system had been in the news all summer, and he predicted demonstrations would break out after people got back from their holidays. Sure enough, in the fall, after the French government voted to increase the retirement age from 60 to 62, Parisians took to the streets, and strikes spread across the country. Cohen-Tanugi believes changes to the entitlement system throughout Europe are necessary and inevitable. “There is a moment of social protest in this country,” he says, “but it will happen, because everyone knows that it has to. There is only a debate as to the modalities.”

Another debate that had been raging in France this summer centered around immigration. French President Nicolas Sarkozy’s government issued orders to expel more than 100 Roma. There also had been talk of stripping French citizenship from naturalized citizens if they threatened or took the life of a police officer.

Cohen-Tanugi says when it comes to immigration, France is in a “gloomy” period. “We haven’t been successful at integrating immigrants and making them part of society,” he says. And in the suburbs, in particular, this had led to violence.

“There’s this whole debate right now in France about national identity, immigration and security. It’s been very politicized,” he says, “with extreme right tonalities.”

The situation is all the more challenging, he adds, because “Europe needs immigration. We have a demographic decline and an aging workforce. We will not be able to remain competitive and have the workforce we need without immigration.”

Much of Cohen-Tanugi’s writing focuses on, or at least engages with, the issue of trans-Atlantic relations (their recent low point was the topic of “An Alliance at Risk: The United States and Europe since September 11”).

“French and Americans have a very ambivalent relationship of love and hate,” he says, “or at least admiration and irritation, that is very strong, certainly among the French,” he laughs. But there are lots of commonalities, he adds. “The two countries were at the heart of the revolution of modern democracy. It’s really two democratic traditions in competition.”

In foreign policy, he says, “the Gaullist tradition in France, which has influenced Europe, was really just to assert French independence against the U.S.” On the European level, it’s less confrontational. “But essentially one of the elements of trying to build a European identity is to distinguish from the U.S. in terms of values.” He adds that there are certainly important differences between U.S. and European society in terms of the role of the state and the existence of the social safety net, for example. “But there’s been a temptation to raise the profile of these differences here without really knowing the United States very well. It can be overblown and create unnecessary conflict. That happened during the Iraq war,” he says. “The difference in values was really exaggerated when you compare it to the common interests, the huge weight of the trans-Atlantic economy.”

“I am seen as an Atlanticist—that’s true,” he says, “but I happen to also be a proponent of European integration. I see no contradiction in wanting a strong Europe that is allied to the United States.”

In 1983, Cohen-Tanugi married American Jodie Einbinder ’82, whom he met in antitrust class. She now works in the French Ministry of Economy and Finance and for many years was a partner and corporate lawyer at Salès Vincent & Associés in Paris. They have two sons who are attending college and graduate school in the States.

But Laurent Cohen-Tanugi says his inclination to see himself as part of something bigger than France goes beyond his connections to the U.S. Born in Tunis, he is from a Jewish

**“I SEE NO
CONTRADICTION
IN WANTING A
STRONG EUROPE
THAT IS ALLIED
TO THE UNITED
STATES.”**

family that had lived in Tunisia, at least on his father's side, since the 17th century, after the Inquisition drove his ancestors out of Spain.

He thinks his background influenced him in wanting to have a more international career, outside of just one state, just one national framework. That goes back to "the environment I grew up in," he says, "the cosmopolitan atmosphere of Tunis," the Mediterranean mix of cultures and religions, and "the values that my parents instilled."

From early on, after hearing the stories told by his parents and grandparents, Cohen-Tanugi formed very positive

images of Americans as liberators. He also grew up with the idea of Europe as a product of World War II—an answer to the era's atrocities and a way to end the continent's entrenched rivalries.

Many of these influences may have been unconscious. "But to me, Europe is about transcending nationalism," says Cohen-Tanugi. "I think without the European project, it would feel really provincial to live in France or in most of the other member countries, if we didn't have the European dimension to really have a say in the global world. And that's what I'm advocating for, that we haven't gone far enough." *

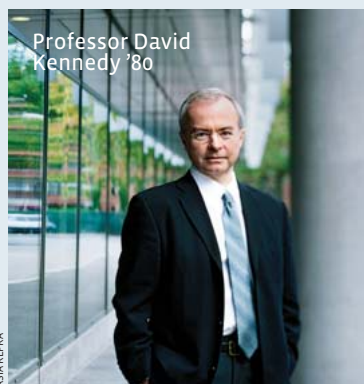
MAPPING THE NEW GLOBAL ORDER

HLS institute seeks to broaden the solutions to global challenges

The global economy is alarmingly vulnerable to private contractual obligations and property arrangements. That's one lesson from the credit market freeze that cascaded into Europe's financial crisis. Another lesson: The state is back. Even those most enthusiastic about economic globalization have turned to their national state for bailouts and regulatory protection.

"When private law can be a form of global governance and local rules can have global consequences," says HLS Professor David Kennedy '80, "politics and economics take place on different scales in different institutions, making it terribly difficult to understand the workings of global policy. Just how are we now governed?"

That's the basic question behind HLS's Institute for Global Law and Policy, of which Kennedy is director. Formerly the European Law Research Center, the institute was renamed last year to reflect its broader research scope and to engage the increasingly legalized and disaggregated nature of global



governance across a range of issues, from humanitarian action and war to poverty, risk management and economic development. Kennedy says each of these issues is also a legal regime: "We need to understand that even things we don't like—war, inequality, underdevelopment—have legal roots." Yet the laws governing these issues come not from a single source—such as the UN—but from various national and subnational governments and institutions. Therefore, Kennedy says, "We must look for disaggregated solutions."

To that end, IGLP's theoretical work centers on developing better maps of the global legal order to improve the range of possible solutions.

Environmental protection, for example, may be more fruitfully tackled by cities working together—or by collaboration among military forces—than by the search for global treaties and intergovernmental agreement. The institute is committed to bringing fresh thinking and new perspectives to discussions of global policy—particularly by encouraging "voices from the periphery," as Kennedy puts it, including the perspectives of scholars from such places as Russia, Egypt, Colombia, Thailand, Brazil, China, South Africa and India. The institute also promotes networking among scholars around the world.

So far this year, the institute has secured important relationships with sponsors and funders, and has developed a network of scholars, many of whom serve on IGLP's Honorary, Advisory and Academic Councils. It also launched its signature program: a 10-day workshop for young scholars and policymakers from around the world. The June 2010

workshop, which focused on global policy in the aftermath of the financial crisis, drew more than 80 participants from more than 35 countries. This fall's events included a seminar on mergers and acquisitions in the context of the financial crisis, and current developments in EU and U.S. antitrust law.

The 2011 conference next June, co-sponsored by the School of Oriental and African Studies (University of London), the Bernard and Audre Rapoport Center for Human Rights and Justice (University of Texas) and the Sciences Po Law School (Paris), will introduce a series of seminars. These will bring scholars together as they advance their work toward publication.

"The range of solutions that have been developed for global challenges from poverty alleviation to security has been far too narrow," Kennedy says. And that's why, he believes, it is important for Harvard to have inaugurated this collaborative institute for thinking about global policy problems in new and untraditional ways. —Jeri Zeder

SHARON E. JONES '82, the new president of the HLSA, on her goals for the association

The focus of the Harvard Law School Association over the next two years will be building awareness and engagement among alumni on a global basis. My mantra is “One World, One HLSA.” We work collaboratively with local associations that focus on events for students and alumni in their own cities. Over the next two years, we intend to build upon our global initiative so that alumni and students can more easily connect with each other around the United States and around the world. We are also launching these pages as a regular feature of the Harvard Law Bulletin.

During the next two years, we will work hard to support existing affinity initiatives, such as our upcoming Celebration of Black Alumni (September 2011). We are launching a new initiative, a global women’s network, that will connect HLS alumnae throughout the world. It will begin in Chicago and Washington, D.C., and expand based upon interest. In addition, we will begin focusing on our senior alumni (alumni who graduated before 1965) through

an initiative that will provide special programming during reunion weekends as well as through local associations. We will also continue with our new alumni programming (for recent grads) and outreach to current students.

The Harvard Law School Association was founded in 1886 and will celebrate its 125th anniversary during my term. There will be dinners and receptions around the world over the next 12 months, beginning in December 2010. Please plan to attend as many events as possible. I look forward to celebrating with old friends and new. *

Sharon E. Jones '82 became president of the HLSA in June 2010. She is president of O-H Community Partners in Chicago.



HLSA snapshot



HUNDREDS OF ALUMNI attended HLSA events across the country this spring, and Dean Martha Minow spoke at many of them. She's pictured {far right} with Bryan Cressey '76 and Christy Cressey at the Harvard Law Society of Illinois reception in Chicago.



KARA ROSEEN '09, Whitney Washington '09 and Talhia Tuck '10 were among the more than 300 people who attended the gathering of the HLSA of the District of Columbia, Virginia and Maryland.

CONNECTIVITY | How to stay in touch with HLS

HLS CONNECT Share your expertise with students and other grads through the online advising network. You can also take advantage of the online directory and get access to job databases in the public and private sectors: <https://hlsconnect.com/>.



CLASS NOTES Submit your news for the Harvard Law Bulletin to <http://www.bit.ly/sendyournews>.



FACEBOOK Get your news from campus at <http://www.facebook.com/harvardlaw> and follow HLSA events around the world at <http://on.fb.me/HLSAfacebook>.



TWITTER Receive HLSA event announcements by signing up at <http://twitter.com/hlsa>.



“YOU CAN USE YOUR EXPERIENCES TO EDUCATE THE NEXT GENERATION”

An HLS mentoring success story

A SELF-PROCLAIMED “POLITICAL junkie,” **Bryson Morgan '11** worked after college for the Utah Democratic Party and saw firsthand the influence special interest groups and lobbyists can have on the political process. In part, he came to HLS out of a desire to address the ethical issues that arise out of this influence.

At the end of his first semester, Morgan expressed his interest in ethics and working on Capitol Hill to Alexa Shabecoff at HLS's Bernard Koteen Office of Public Interest Advising. She put him in touch with Leo Wise '03, who

had just been selected to head the Office of Congressional Ethics in the U.S. House of Representatives. Wise and Morgan had an instant connection, and Morgan was offered a summer position at the office.

“In my initial meeting with him ... I realized Bryson was a remarkable person and lawyer,” Wise comments. “Over the summer, he immediately

Whatever your field of practice, share your expertise and insight with students through the Alumni Advising Network at <https://hlsconnect.com/>

stepped into investigations. He was doing the same work our staff attorneys were doing.”

In Wise, Morgan found a mentor and role model. “Leo is always the first person I call to get advice,” he says. “He’s been a pleasure to work with and is someone I clicked with personally. He has this aura of honesty and integrity, and is a great example of the type of lawyer I’d like to be.”

For Wise—who announced in October he was joining the U.S. Attorney’s Office for the District of Maryland—his love of mentoring is a manifestation of his passion for public service: “Public service is so incredibly exciting and satisfying. You just want to talk to people about how important it is, encourage them and inspire them to pursue it. As a mentor, you can use your experiences to educate the next generation and connect them to your network.” *

MENTOR AND MENTEE: From left, Leo Wise '03 and Bryson Morgan '11



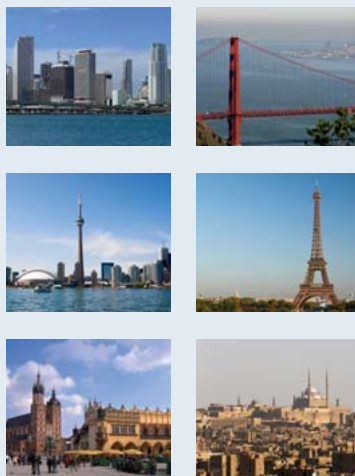
The Harvard Law School Association is turning 125!

Help us celebrate ...

Join the HLSA for celebrations in Miami, D.C., San Francisco, Toronto, Paris, Krakow, Cairo and other cities in the U.S. and around the world.

➔ For more information on an event near you, check our calendar at <http://bit.ly/hlsaeventscalendar>

Looking forward to seeing you!



DEC. 8, 2010
HLSA of Northern California
Reception with Dean Minow
Bingham
McCutchen
San Francisco

DEC. 9, 2010
HLSA of Northern California
Reception with Dean Minow
Latham & Watkins
Menlo Park

FEB. 11, 2011
HLSA of San Diego
Jerry Lovejoy '78, general counsel, El Pollo Loco
University Club
Atop Symphony Towers
San Diego

FEB. 15, 2011
HLSA of Florida

APRIL 8-10, 2011
Spring Reunions Weekend
Classes of 1961, 1971, 1976, 1986, 2001, 2006
Harvard Law School

SEPT. 16-18, 2011
A Celebration of Black Alumni III
Harvard Law School

➔ For the latest on Harvard Law School Association events, go to <http://bit.ly/hlsaeventscalendar> or call 617-384-9523.

Marshaling Brennan

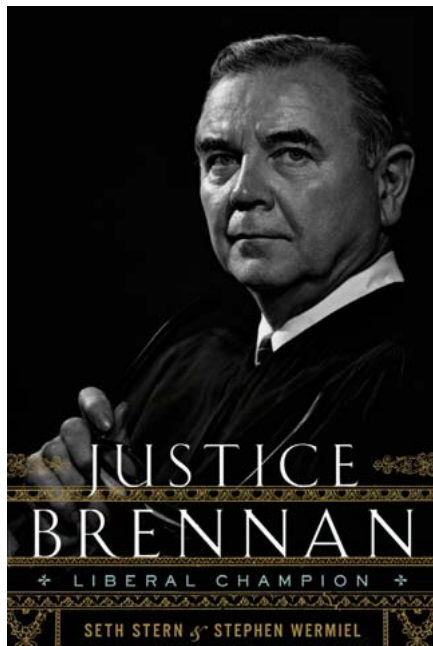
SETH STERN '01, a legal affairs reporter for Congressional Quarterly, recently completed "Justice Brennan: Liberal Champion" (Houghton Mifflin Harcourt, 2010) with Stephen Wermiel. The biography weighs in at more than 500 pages, and included among them is the story of Brennan's brief disaffection with HLS and the thaw that ended it, an episode described by Stern below.

THE REACTION FROM Harvard Law School was decidedly cool 54 years ago when President Eisenhower appointed its alumnus William J. Brennan Jr. '31 to serve on the Supreme Court.

Few were more surprised by the choice of this little-known New Jersey judge than his law school classmate Professor Paul Freund '31 S.J.D. '32 and the man who had taught them both: Justice Felix Frankfurter LL.B. 1906.

Embarrassed to have been quoted by the Harvard Law Record predicting Brennan would become a "great justice," Freund privately wrote Frankfurter, "I can only hope that my spurious prediction will turn out to be one of those self-fulfilling prophecies."

Frankfurter harbored his own misgivings about Brennan, who was not among the favorite students he had invited to join his seminars and



"I WAS A STUDENT OF PROFESSOR FRANKFURTER," SAID BRENNAN. "AND WHEN WE DISAGREE ON THE COURT ... HE OBSERVES THAT HE HAS NO MEMORY OF ANY SIGNS IN ME OF BEING HIS PRIZE PUPIL."

Sunday teas or later funneled to New Deal agencies after his friend, Franklin D. Roosevelt, became president.

The tepid reactions from Freund and Frankfurter ushered in what proved to be a rocky first decade in the relationship between Harvard Law School and its seventh alumnus to join the nation's highest court.

Things went well at first, particularly when Brennan opted to follow Frankfurter's advice and enlist Freund as his sole supplier of law clerks. Frankfurter could con-

ceive of no other source.

"If you want to get good groceries in Washington, you go to Magruders," Frankfurter once explained. "If you wanted to get a lot of first-class lawyers, you went to the Harvard Law School."

But Frankfurter grew increasingly disenchanted with his former pupil's direction as Brennan aligned with the bloc of liberals.

Brennan joked about

Frankfurter's disappointment during a speech at the Harvard Law Review's annual banquet in April 1959. "I was a student of Professor Frankfurter," said Brennan. "And when we disagree on the Court—perhaps you have noticed that this happens not infrequently—he observes that he has no memory of any signs in me of being his prize pupil."

A few months later, their conflict spilled out in the pages of the Harvard Law Review, where Henry Hart, a leading constitutional scholar and longtime Frankfurter disciple, criti-

reverence. He enjoyed recounting the story of his first appearance in a New Jersey courtroom as a young lawyer, when the judge presiding over the case mocked him for using words a witness could not understand. "You see, he's a Harvard graduate and he doesn't speak English," the judge said.

But Brennan could not forgive his alma mater when he was passed over for a seat on the school's Visiting Committee in 1963 in favor of his colleague John M. Harlan.

Dean Erwin Griswold '28 S.J.D. '29 later said no slight was intended; the school simply wanted to fill the Visiting Committee with men of "varied backgrounds."

Brennan did not see it that way. He never said anything about his hurt feelings to Griswold or anyone else on Harvard Law's faculty, but he shared his disappointment with his clerks.

"It was a case of Harvard picking its ideological heir rather than one of its own sons," said Stephen J. Friedman '62, who clerked for Brennan during the October 1963 term.

Brennan later told the book's co-author, Stephen Wermiel, that there was no connection to the perceived slight, but in April 1965 he informed Professor Freund that, after nine years, his role—and Harvard's

cized one of Brennan's recent opinions.

Brennan mostly took Hart's criticism in stride, just as he had when Harvard Law School's admissions committee rejected his son in 1955. Brennan still accepted an invitation in 1962 to judge HLS's moot court competition, and

he spoke at the Legal Aid Bureau's 50th anniversary banquet the following year.

Brennan had never viewed the school with Frankfurter's



Seth Stern

monopoly—in supplying law clerks was coming to an end.

By April 1966, word of Brennan's disaffection had reached Griswold, who extended an invitation to join the Visiting Committee. Griswold also approached Professor Frank Michelman '60, the first clerk of Brennan's to join the Harvard Law faculty, looking for a way to honor the justice, and then settled on the idea of commissioning a portrait, which was un-

veiled during a weekend-long celebration in 1967.

A few months later, Brennan returned to campus as a featured speaker at the school's 150th anniversary celebration. "The school has not been content to rest on memories of a Golden Age—an age of giants, now legendary," Brennan said. "After 150 years, I sense no lessening of vitality. Indeed, I am confident that the school's great days are still before it." *



WHAT COLOR is a Supreme Court justice's parachute?

"One measure of Brennan's job satisfaction was his answers to a Harvard Law School survey mailed to alumni in November 1966. For the question, 'Are you satisfied with your present work?' Brennan checked 'Very satisfied'—the highest rating. When asked what satisfied him in his work, Brennan marked off 'subject matter,' 'intellectual stimulation,' 'independence,' 'people with whom I work,' 'variety of work,' 'organization for which I work,' and 'importance of problems.' He did not check 'high prestige of profession,' 'helping people,' 'high income'—or, least surprisingly, 'opportunity for advancement.'"

From "Justice Brennan: Liberal Champion"

QUESTIONING the QUESTIONER

SETH STERN '01 has been a legal journalist since he graduated from law school. Below he takes his turn answering the questions.

How did you come to work on this book?

My co-author, Steve Wermiel, who was then covering the Supreme Court for The Wall Street Journal, started this biography in 1986. After years of research, including 60 hours of interviews with Justice Brennan, Steve was looking for a partner by 2006 and sought out a fellow lawyer-journalist. Given the exclusive access Justice Brennan had granted Steve and the interviews he had conducted, this really was a once-in-a-lifetime opportunity.

What have you learned about Justice Brennan that surprised you most?

I am particularly fascinated by the tensions between Brennan's personal views and some of the positions he took as a justice. There is this notion that he was a liberal activist who wrote his personal preferences into law. In fact, no one infuriated this champion of press freedoms more than reporters. He wrote seminal women's rights decisions

in the 1970s even as he refused to hire female clerks. He personally opposed abortion but signed on to *Roe v. Wade* after helping lay the groundwork for it in prior decisions.

How do Americans remember him?

I'm struck by Brennan's enduring relevance 20 years after his retirement. After President Obama took office, liberals invoked Brennan as just the sort of passionate and persuasive justice they want on the Court. Law students, who were toddlers when he retired, post messages on Twitter holding him up as their hero. But it's also true that progressive legal scholars have become increasingly uneasy with Brennan's vision of a "living Constitution." Liberals are still groping for an alternative that resonates with the public as well as the brand of judicial restraint so effectively marketed to the public by conservatives.

Are there issues where you found yourself disagreeing with Brennan?

We sought to write the book down the middle, and there are a number of places where I took issue with

Brennan's approach. I came to question how much he relied on human dignity as the value underlying his death penalty dissents and other decisions. But I also came to admire Brennan deeply for the way he applied the concept of human dignity in his own life. He treated everyone at the Court—including the maintenance staff and police officers—with the same respect and affection.

How has writing this book influenced the way you think about today's Court?

I've learned that the Supreme Court is an institution where change often comes slowly. It was six terms before Justice Brennan's bloc of liberals got their fifth vote after Arthur Goldberg replaced Felix Frankfurter in 1962. That's when Hugo Black finally could turn a quarter century's worth of dissents into majority opinions. Except in those instances where a new justice dramatically alters the Court's ideological balance, I don't think it's realistic to expect a new arrival such as Elena Kagan to come in and shift the Court's direction.

The Wire

STEVEN GOLDBERG '72 has never been afraid to challenge authority. From protesting the Vietnam War while a student at Harvard Law School to representing a National Guardsman in a suit against the involuntary extension of his enlistment, the Portland, Ore., attorney has sought to check misuse of power and to support those affected by it. That was his goal in a case involving one of the most controversial initiatives surrounding the War on Terror, which for him exemplifies overreach at the highest level of government.

Since 2006, Goldberg has served as one of the attorneys representing Al Haramain, a now defunct Islamic charity with an American branch in Oregon, and two of its American lawyers, in a case alleging that the Bush administration illegally wiretapped the plaintiffs after suspecting the organization of terrorist ties. The basis for the suit emerged only after the government inadvertently sent another attorney representing Al Haramain a document—reportedly a log of calls—that pointed to the apparent surveillance. That document—and arguments surrounding its use—led to a complex and long-running case involving state secrets and the president's ability to cir-



COUGHLIN/GLASER

GOLDBERG'S LEGAL TEAM WAS THE FIRST TO ESTABLISH STANDING TO SUE THE GOVERNMENT OVER WARRANTLESS WIRETAPPING

cumvent Congress, which culminated in a federal judge ruling on March 31 that the surveillance was unlawful under the Foreign Intelligence Surveillance Act.

"We never understood how unbelievable this case would be in terms of the novelty of the issues and the amount of time it would take to work on the case," Goldberg says. "But at the same time, it's the most challenging, exciting thing I've ever done in my legal career."

Attorneys who viewed

the document in 2004 in fact did not understand what it signified until December 2005, when The New York Times reported on a warrantless wiretapping program that President Bush had secretly authorized after the 9/11 terrorist attacks. Until then, Goldberg says, they assumed that the surveillance had been authorized through a warrant under FISA. Soon after the attorneys filed the suit, the Department of Justice sought to remove consideration of the

document and dismiss the case itself using the state-secrets privilege. "When the state-secrets privilege is asserted as a defense, it's extremely difficult to argue against it," says Goldberg.

Ultimately, he and the legal team were able to establish standing to sue the government over warrantless wiretapping—they are the first litigants to do so—by citing evidence other than the document's contents (which he is not allowed to disclose), including a speech by an FBI official acknowledging that the charity had been surveilled. The attorneys representing the charity operated under the assumption

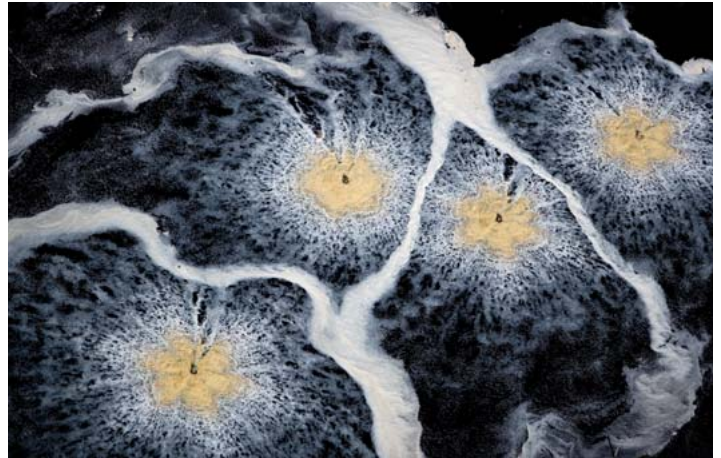
can disregard Congress is still very critical and needs to be resolved," he says.

He became connected to the case through his work with the National Lawyers Guild, a progressive legal organization that he has been involved with since law school. As a student, Goldberg got a project funded for law students to counsel soldiers on issues such as filing for conscientious objector status, and he worked for a welfare rights organization. Later he became partner in the Portland firm Goldberg, Mechanic, Stuart & Gibson, concentrating on labor law and civil rights, and a few years ago he launched a solo practice.

Having his own practice gives him the flexibility, he says, to devote the substantial time necessary to cases like Al Haramain's. Nearly 40 years after graduating from law school, he remains influenced by the protests of his youth, still driven by a commitment to fight for the principles he believes in.

"When I was in law school, the times were infected in a positive way by challenges to government both domestically and internationally," Goldberg says.

"I don't think I've ever forgotten those lessons. It's kind of determined how I'd lead my life and pursue my legal career." LEWIS RICE



ROBERT HAAS '72 spent three years photographing the Arctic from a bird's-eye view. "Through the Eyes of the Vikings: An Aerial Vision of Arctic Lands" (National Geographic Press, 2010) is the glimmering result and Haas' third book of aerial photography. The landscapes featured include the occasional figure, whether it be a polar bear in Manitoba or a clam digger in Alaska. But they also showcase neuron-like explosions of color (clusters of recycling at a lumber facility in Sweden) and fiery swirls, like boldly marbled paper (industrial byproducts at a waste treatment facility in Norway): aerial transformations both rich and strange.

A Daughter of the Korean Peninsula Ascends to the Federal Bench

ON JUNE 7, the U.S. Senate approved the nomination of the first Korean-American in U.S. history to serve as a federal district court judge.

By a 90-0 vote, Lucy Koh '93 was confirmed to sit on the U.S. District Court for the Northern District of California. She had been serving as a California Superior Court judge for Santa Clara County, and before that, she had established herself as an IP litigator and criminal prosecutor.

Koh was the first in her family born in the United States. Her mother had escaped from North Korea at the age of 10 by walking for two weeks to South Korea, hiding from North Korean soldiers along the way. Her father fought against the Communists in the Korean War. He immigrated to the United States and worked as a busboy and waiter while taking university courses.

Koh was raised



JOHN STUBLER

civil rights issues for a U.S. Senate Judiciary Committee subcommittee and worked at the Justice Department for then U.S. Deputy Attorney General Jamie S. Gorelick '75.

Early in her career, she moved to Los

LONG BEFORE HER JUDICIAL APPOINTMENT, KOH HAD BEEN SETTING NEW STANDARDS

primarily in Mississippi, where her mother taught at Alcorn State University. As a young child, she was bused to predominantly African-American public schools. U.S. Sen. Barbara Boxer told the Senate that it was in part this experience that inspired Koh to pursue a career in law and to work for the NAACP Legal Defense and Educational Fund in law school. After graduating from law school, Koh worked on

Angeles and became a federal prosecutor. Then FBI Director Louis J. Freeh gave Koh an award for her prosecution of a \$54 million securities fraud case. A jury instruction from one of Koh's trials was also adopted as a 9th Circuit Model Criminal Jury Instruction.

She later worked in private practice as a partner at McDermott Will & Emery in Silicon Valley, where she concentrated on complex intellectual

property litigation. She was part of the litigation team in the landmark patent case *In re Seagate Technology*, in which a new standard was set for willful patent infringement for the first time in 24 years.

Bijal V. Vakil, who now is executive partner-in-charge of White & Case's Silicon Valley office, was her colleague at McDermott, and they both also were actively involved

with the Asian Pacific Bar Association of Silicon Valley. "Judge Koh is uniquely positioned to be a district judge in Silicon Valley because of her criminal law and intellectual property background," he said.

Praise for Koh's appointment has also come from leadership of the Asian-American legal bar. Joseph J. Centeno, president of the National Asian Pacific American Bar Association, called it

"a historic achievement."

In 2008, Koh spoke about her experience practicing law as an Asian-American woman during an event at Harvard Law School focused on women graduates. She touched on negative stereotypes about Asians that she confronted as a prosecutor and a judge. But she also made the audience laugh as she spoke of some stereotypes that were potentially helpful. She recalled, for example, that as a patent litigator, if a client "wanted to presume I was from a long line of Silicon Valley engineers," she said, "I would never tell them nobody in my family could program a VCR."

Koh is the second federal judge of Korean descent. The first was 9th Circuit Judge Herbert Choy '41, who was appointed to the Circuit Court by President Richard Nixon in 1971. MICHELLE BATES DEAKIN

Connecting Law and Faith

WHILE SHE WAS in law school, Rachel Anderson '03 dreamed of finding a way to combine her passions for the law and for her evangelical Christian faith into one career. She had no idea what that would look like, but she held out that hope as she pursued joint degrees from Harvard Law School and Harvard Divinity School.

Since graduation, Anderson has been pursuing faith-based policy work, first as public policy director of the Episcopal Diocese of Massachusetts. Next, she created a network of progressive evangelicals called the Boston Faith and Justice Network, an advocacy group of Christians committed to alleviating poverty. And since March 2009, Anderson has been the first director of faith-based outreach at the Center for Responsible Lending, a nonprofit research and advocacy group that focuses on issues surrounding predatory lending, examining practices that are discriminatory or exploitative, documenting them and formulating policy alternatives.

Based in the D.C. office of CRL, Anderson channels her expertise specifically to faith communities, where she has found tremendous motivations to address financial exploitation. "There are churches whose members'



CHRIS HARTLOVE

ANDERSON HAS FOUND TREMENDOUS MOTIVATION IN FAITH-BASED COMMUNITIES TO ADDRESS FINANCIAL EXPLOITATION

neighborhoods are being blighted by payday lending and where people are losing their homes to foreclosures and costly and discriminatory loans," she says.

Anderson reaches out to religious leaders to help them educate their parishioners about what is happening in the lending field, and she advocates for fairer laws and regulations.

After a summer maternity leave following the birth of her first child, she embarked this fall on an initiative with the Mississippi Center for Justice to reform payday lending in the state, where rates on short-term loans can exceed 500 percent. Along with policy advocates, educational institutions and faith communities, she is

lobbying the Mississippi Legislature to reinstate a usury cap of 36 percent.

She is also enlisting faith-based groups in her advocacy efforts. After a series of meetings with leaders ranging from Catholic bishops to megachurch pastors in which they resoundingly reported that usury has hurt their members, she is offering workshops to discuss the issue within their congregations. And she is also offering media and legislative training in preparation for a state lobby day in the spring of 2011.

"Churches and religious leaders have a unique moral voice in the community," says Anderson. "And I want them to have a voice in public decision-making to articulate their moral

concerns and their moral vision."

Fighting predatory lending unites a coalition of faith groups. Prior to the Christmas and Hanukkah holidays of 2009, Anderson, along with PICO, a national network of faith-based community organizations, helped organize a press conference in front of the U.S. Treasury Department. A rabbi, a pastor of a black Baptist church, and a Protestant minister implored the leaders of financial institutions and the Treasury that, in the spirit of the coming holidays, lenders should help families stay in their homes. Following the news conference, faith leaders met with members of the White House National Economic Council, where

they delivered a letter signed by hundreds of clergy nationwide calling for specific reforms to hold banks accountable, help homeowners avoid foreclosure and protect consumers from predatory lending. PICO has continued to press financial institutions, particularly Bank of America, to end predatory lending and help families facing foreclosure.

"It's a human issue, because homes are at risk," she says. "And it's a moral issue affecting what our corporations and laws and public policy look like."

Anderson says that she's grateful for the opportunity she had as a Harvard student "to explore both the practice of law and policymaking, and faith and ethical traditions and bring them together." She appreciates the faculty encouragement she received at HLS to explore how her evangelical Christian values influence her perspective on the law. Of particular value to her were Lani Guinier's class on community lawyering and Martha Minow's on nonprofits.

Anderson first put the nonprofits class to use when she created the Boston Faith and Justice Network. "I had a desire to see my faith community engage in the public sphere in new ways," she says.

MICHELLE BATES DEAKIN

Game Plan

IN THE SPRING of 2007, HLS Professor David Wilkins '80 asked the members of his seminar to envision their futures. One student foresaw a federal judicial appointment. Another wanted to make partner at a prominent law firm. Also in the class was Daron Roberts '07, who had a different sort of answer. He wanted to be head coach at a national football powerhouse.

The pronouncement was a bit of a surprise even to Roberts. The 3L hadn't had any football experience since his days as an All-District strong safety for Mount Pleasant (Texas) High School. A University of Texas graduate with a year on Capitol Hill and two years at the Kennedy School under his belt, he had thought of being a politician—perhaps spending a few years at a Texas law firm before moving into public service. Now all that was to be postponed. Graciously but firmly, Roberts turned down job offers from international law heavyweights like Vinson & Elkins. There was no longer a fallback option.

The turning point had come the previous summer, at a South Carolina youth football camp where Roberts volunteered during a break in his internship schedule. There, he says, he realized he was reliving his “best days” as a high



GAVIN SMITH

“DRAFTING LEGAL ARGUMENTS AND DRAFTING A GAME PLAN IN THE NFL ARE REALLY TWO IDENTICAL EXERCISES.”

school player, marveling anew at the power of the game to bring young men together, and at his own desire to mentor the campers. “I remember flying back, leaving there and thinking, I’ve got to coach football,” he recalls. “And I’ve got to do it now.”

Roberts set his sights high, offering his services to all 32 National Football League teams and to the top 50 college programs as well. “After five years at a setting like Harvard, my only inclination was to be a part of the best program that would take me,” he

recalls. “I always envisioned the NFL as where I want to be—the NFL is the Harvard of football.” Roberts was willing to work for no pay beginning after his graduation in June 2007—that is, if anyone would have him.

As it happens, there was only one person who would. Just two months before receiving his law school diploma, Roberts got a call from Herman Edwards, then coach of the NFL’s Kansas City Chiefs. Edwards offered a coaching internship. His rationale? “He said, ‘If you can get through the first year of Harvard Law

School, then you ought to be able to make it through training camp,’” Roberts recalls.

That proved to be the case. While friends at notoriously demanding firms proved their mettle with late nights and early mornings, Roberts kept pace and then some. After Edwards agreed, at the end of training camp, to let him stay on with the Chiefs through the 2007 season, he began spending nights on a mattress in a stadium closet to make sure he was ready for work each day at 4:30 a.m. The commitment made an

impression. In 2008, the Chiefs hired Roberts to a full-time position as a defensive quality control assistant. In 2009, he made the move to the Detroit Lions, where he now helps coach the team’s secondary.

The transition—from law student to professional coach—has been breathtakingly rapid. According to Shaun Mathew '07, when someone asks him which of his law school friends has the most interesting job, he inevitably tells them about Roberts. “I have even more fun answering their next question,” says Mathew: “How is that even possible?”

But Roberts remains grounded, and focused on mentorship. He recently launched a free camp—“4th and 1”—for younger players in east Texas, emphasizing football skills in the morning, SAT skills in the afternoon and life skills at night. Cambridge, he says, often seems closer than ever. “Drafting legal arguments and drafting a game plan in the NFL are really two identical exercises,” he says. “What’s my opponent’s best argument? How do I combat that argument? What are the counterarguments to my position? That’s very similar to us asking, Who is their best player? How do we stop their best player? What will be their next move?”

CHRISTIAN FLOW

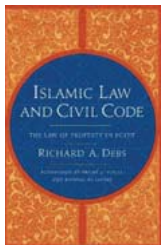
“War Don Don” by **REBECCA RICHMAN COHEN '07**. Winner of the Special Jury Award at the South by Southwest Film Festival, this film explores the trial of Issa Sesay, a former rebel leader accused of war crimes in Sierra Leone.



The trial highlights the challenge of creating justice in a country torn by civil war. The film, which translates from Krio to “War Is Over,” gives

voice to the people in the trial and to Sierra Leonians outside the courtroom. Cohen focuses on the inherently subjective boundaries of right and wrong during conflict. Whether or not you end up feeling sympathetic to Sesay after you see the court issue its verdict, in the end, “War Don Don” opens up a broader discussion about the nature of crimes against humanity and the international justice system. It was broadcast on HBO in September and—as of December—is available on DVD.

“Islamic Law and Civil Code: The Law of Property in Egypt” by **RICHARD A. DEBS '58** (Columbia University Press). Originally the author’s doctoral dissertation written

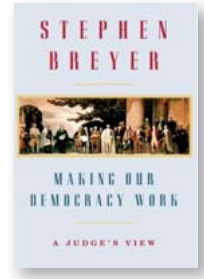


some 50 years ago, the book examines the development of national law in Egypt. Frank Vogel, founder and former director of the Harvard Law School Islamic Legal Studies Program,

writes in a foreword: “Despite the passage of years, no study I am aware of renders Dr. Debs’s work obsolete or even significantly overlaps with it.” An advisory director of Morgan Stanley, Debs focuses on the Civil Code of 1949, which established modern Egyptian property law, and examines how

SUPREME PRAGMATISM

“Making Our Democracy Work: A Judge’s View” by **STEPHEN BREYER '64** (Knopf). To ensure public confidence, the Supreme Court should employ a “pragmatic” approach to interpreting the law, with consideration for the real-world consequences of its actions, Justice Stephen Breyer argues. “The key lies in the Court’s ability to apply the Constitution’s enduring values to changing circumstances,” he writes. Breyer notes that the public has not always abided by the Court’s rulings in cases such as *Cherokee Nation v. Georgia*, the Court’s decision to protect Cherokee Indians, and *Brown v. Board of Education*, which federal troops had to enforce. In contrast, a recent case like *Bush v. Gore*, though controversial, faced no such resistance. Although the public now accepts the legitimacy of Court decisions even when they are unpopular, according to Breyer, that will continue only through civic education and Court “rulings and interpretations that help the Constitution work in practice.” He outlines principles to consider when deciding whether to overturn an earlier case, including whether it has created a set of unworkable legal rules or it has been embedded in national culture. He concludes by examining the Court’s role in protecting individual liberties. In those cases, as in others, Breyer says that Court decisions that respect the role of other government branches and make the law work more effectively will help foster “a workable democratic government.”



traditional Islamic legal institutions that existed in the 19th century were incorporated into it. The result, he writes, is a nation that is governed by its constitution and legislation but still respects the religious tradition of Shari’ah.

“Wild West 2.0: How to Protect and Restore Your Online Reputation on the Untamed Social Frontier” by **MICHAEL**

FERTIK '05 and David Thompson (American Management Association). Fertik, the founder and CEO of the online reputation management firm ReputationDefender, and his chief privacy officer have written an account of how disasters can happen



online, and how to make sure they don't happen to you. The book offers a step-by-step guide to readers looking to assess their online footprint and endorses a "proactive" approach to warding off online character assaults. Readers are encouraged to shore up their online presence with positive or neutral material, building up what the authors term "Google insurance" to drown out attacks and slanders that might come later.

"Dust" by Joan Frances Turner (Ace Books). This debut novel by a 1995 graduate—her real name is **HILARY HALL**—is narrated by Jesse, a member of the undead ("zombie," she says, is



a racist term) since a car accident at the age of 15. As we follow Jesse and her decaying band of fellow hunters, the Fly-by-Nights, through Indiana (they fight and banter with each other, rot, and devour bloody meat), we learn a thing or two about what it means to leave life behind.

"The Partnership" by **STEVEN J. HARPER '79**. Written by a man who himself spent 30 years as a litigator in a large firm, this novel—Harper's first—follows two star attorneys at the fictional Michelman & Samson as they stage relentless, soul-draining drives to the top of the career ladder, sacrificing their morals, their personal lives and their friendship along the way.

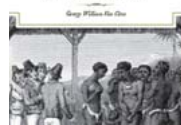
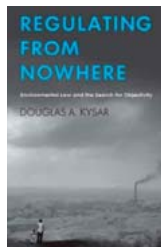


"Regulating from Nowhere: Environmental Law and the Search for Objectivity" by **DOUGLAS A. KY SAR '98** (Yale University

Press). Yale Professor Kysar draws on philosophy, psychology, economics and science to critique the dominant cost-benefit model for assessing environmental risk and making policy decisions. Kysar's work rigorously defends the "precautionary principle" in

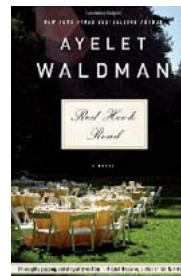
environmental lawmaking, which at once recognizes the limits of our ability to numerically assess the many risks that face us and brings us back in touch with our moral responsibility not just to other human generations but to other forms of life. The book's final segment takes shape around Kysar's own model statute, which he calls "The Environmental Possibilities Act," and which looks at how we might engage with a moral and constitutional vision of economic policymaking.

"A Slaveholders' Union: Slavery, Politics, and the Constitution in the Early American Republic" by **GEORGE WILLIAM VAN CLEVE '77** (University of Chicago Press). This analysis of the legal and political history of slavery—from the American Revolution through the Missouri Compromise—asks why it persisted and prospered after a revolution some thought would end it. Now a scholar-in-residence in the Department of History at the University of Virginia, Van Cleve argues that slavery endured because it was essential to the foundation of the republic. He examines the Constitution's formation in detail, finding that it was "pro-slavery in its politics, its economics and its law." To create a strong



federal republic that could become a continental empire, he contends, the Southern states had to be willing partners in the endeavor, and a major part of the "price of their allegiance" was the "continued protection of slavery as it expanded."

"Red Hook Road" by **AYELET WALDMAN '91** (Doubleday). This novel set in Down East Maine opens with a

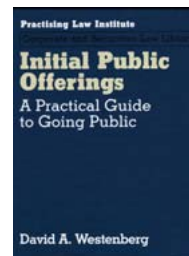


wedding followed by the death of the bride and groom on their way to their own reception. In the chapters and years that follow, the couple's family members—Maine natives on one side

and summer people from New York City on the other—find their lives interwoven in ways they might not have predicted.

"Initial Public Offerings: A Practical Guide to Going Public" by **DAVID A. WESTENBERG '83** (Practising Law Institute). Hailed as the upcoming "bible of the market" on The New York

Times' DealBook blog, Westenberg's work aims to be a comprehensive, ground-up guidebook for companies and their advisers as they first consider and then enact the complicated process of going public. Readers are shepherded from the most minute preliminary considerations all the way through topics like investor relations and post-IPO liquidity by the WilmerHale partner, who himself has decades of experience leading companies from formation through venture financing and onward to IPOs. *





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3



4

MANY HAPPY RETURNS

FALL REUNIONS ▶ A PEAK WEEKEND

PHOTOGRAPHS BY ASIA KEPKA

1. Paul Edelman '50 and granddaughter Alita
2. Class of 2005
3. Geraldine Horn and Michael M. Horn '65
4. Pamela Everhart '90
5. 1995 LL.M. classmates Maria-Sara Jijon and Nathalie Moreno
6. David Simon '50 and his wife, Suzanne Simon, and Bob Shamansky '50
7. 1980 classmates John Snyder and Bob Hinton
8. Christian Hausmaninger LL.M. '90 and his wife, Franziska Hausmaninger-Tschofen LL.M. '90
9. 1980 classmates Mary Lu Bilek, Jeff Kindler, Aaron Marcu and John Sachs
10. Class of 1955
11. Jim Robertson '65
12. Emeritus Club member Donald Marcus '58 and his wife, Judith Marcus



5



6



A Legendary Teacher, in the Classroom and on the Bench

BENJAMIN KAPLAN, THE Royall Professor of Law Emeritus at Harvard Law School and a former justice of the Massachusetts Supreme Judicial Court, died Aug. 18, 2010.

A specialist in civil procedure and a preeminent copyright scholar, Kaplan co-wrote the first casebook on copyright, with Yale Law Professor Ralph Brown '57 in 1960. His 1967 seminal text, "An Unhurried View of Copyright," grew out of a series of lectures he delivered at Columbia Law School.

"Ben Kaplan was a towering giant in the law with legendary wisdom and analytic precision," said Dean Martha Minow. "The generations of students and litigants guided by his work as professor and justice ensure that his legacy will long endure."

Kaplan first joined Harvard Law as a visiting professor, in 1947. The visit turned out to last a quarter of a century, during which he developed his long-standing interest in civil procedure and intellectual property, joined the permanent faculty, and had a lasting influence on generations of students, legal scholars and jurists.

"Sometimes one is lucky enough to have a teacher who changes one's life," said Professor Andrew Kaufman '54. "Ben Kaplan was such a teacher, and I was his lucky student. He taught me how to think critically about law and life."

Professor David Shapiro '57 said of his former teacher: "Ben Kaplan's wisdom and wit, and his mastery of the art of teaching, have been an inspiration to me as a student and throughout my academic career. Like the many others who have had the good fortune to work with and

learn from him, I treasure the experience—he was a wonderful combination of rigor and encouragement, of skepticism and faith."

Kaplan's students also included two Supreme Court justices, Stephen Breyer '64 and Ruth Bader Ginsburg '56-'58.

At a memorial service that filled Ames Courtroom in October, Breyer called Kaplan "the master of us all."

"To listen to Ben teach," he

added, "was to listen to the Socratic method at its best, used by a first-rate craftsman and articulated by a true gentleman."

Breyer also recalled how beautifully Kaplan wrote, but he praised above all, "the quality of his thought and analysis, his integrity, his humanity that animates his opinions and assures us that they will last."

Kaplan graduated from Columbia Law School in 1933, and he began his law practice with

the New York firm Greenbaum, Wolff & Ernst, participating in the civil rights case *Hague v. Committee for Industrial Organization*, which reached the U.S. Supreme Court in 1939.

In 1942, he joined the U.S. Army, ending his tour of duty as a member of Justice Robert Jackson's prosecuting staff in the first Nuremberg case. Working first with Col. Telford Taylor '32 and then with Jackson, Kaplan played an important role in drafting the indictment in the case.

In 1972, Kaplan left the Harvard Law faculty to become an associate justice of the Massachusetts Supreme Judicial Court. He served until 1981, when he reached the constitutional age for retirement. He was recalled to the Massachusetts Appeals Court in 1983.

In a 1988 profile in the *Bulletin*, Kaplan said: "Each appellate case presents itself as a puzzle. The challenge is to find the one right solution, and to explain it in a way that satisfies not only the Bar and the specialists but also the general intelligent public. There is not much difference in the end between judging and teaching. The job of the judge, like that of the teacher, is to instruct, to educate." *



HIS HISTORICAL AND SPECIAL COLLECTIONS

"TO LISTEN TO BEN TEACH WAS TO LISTEN TO THE SOCRATIC METHOD AT ITS BEST, USED BY A FIRST-RATE CRAFTSMAN AND ARTICULATED BY A TRUE GENTLEMAN." —JUSTICE STEPHEN BREYER '64

1930–1939

LEO YANOFF '33
July 16, 2010
DAVID GINSBURG '35
May 23, 2010
WARD B. LEWIS '35
April 10, 2010
ALEXANDER A. MARKS '35
June 9, 2009
JOHN J. ZOLLER '35
Sept. 6, 2010
ROBERT L. WERNER '36
May 14, 2010
BERNARD S. NEEDLE '37
Feb. 26, 2009
W. WILLARD WIRTZ '37
April 24, 2010

1940–1949

MORTON D. ELKIND '40
Aug. 22, 2010
JOHN P. "JACK" FISHWICK '40
Aug. 9, 2010
LOUIS HENKIN '40
Oct. 14, 2010
JAMES F. MCCOY '40
April 30, 2010
ADDISON M. PARKER '40
June 15, 2006
HERBERT ROBINSON '40
June 14, 2010
WILLIAM A. CENTNER '42
Feb. 28, 2007
ALBERT W. SCHIFFRIN '42
Aug. 29, 2009
RUSH E. STOFFER '42
Sept. 10, 2010
HECTOR G. DOWD '43
June 23, 2010
LOUIS F. EATON JR. '43
May 26, 2010
LOUIS KUNIN '44
July 11, 2010
ROBERT MARKS '44
Sept. 27, 2010
CLYDE O. MARTZ '44
May 18, 2010
ALBERT W. BARNEY '45
May 10, 2010
DONALD M. CORMIE, Q.C.
LL.M. '46
Feb. 20, 2010
JEROME H. BERKOWITZ '47
Dec. 2, 2009
STANLEY E. EDWARDS, Q.C.
LL.M. '47
May 12, 2010
JOHN R. ALEXANDER '48
Dec. 29, 2008
GEORGE P. FLANNERY '48
June 20, 2010
HERBERT W. IRWIN '48
April 22, 2010
WILLIAM H. LATIMER JR. '48
May 5, 2010

CHARLES B. MELBY JR. '48
May 23, 2010
RICHARD H. MILLEN '48
March 10, 2010
HERBERT L. SHERMAN JR. '48
May 14, 2010
DAVID B. STEARNS '48
Feb. 19, 2010
CHARLES A. SULLIVAN JR. '48
Sept. 5, 2009
PHILIP H. WARD III '48
March 18, 2008
JAMES M. WILSON JR. '48
Nov. 15, 2009
HERBERT S. ASCHERMAN '49
April 14, 2010
WEAVER W. DUNNAN '49
June 29, 2010
ALLEN F. GOODFELLOW '49
May 4, 2010
WILLIAM W. HANCOCK '49
June 14, 2010
JOHN B. HENDERSON '49
Sept. 5, 2010
CHADWICK JOHNSON '49
Aug. 27, 2010
PAUL J. KIRBY '49
April 27, 2010
EDWIN J. SOMMER JR. '49
April 9, 2010

1950–1959

ROBERT A. CURLEY '50
June 11, 2010
BRIAN D. FROW '50
Aug. 4, 2010
HANS F. LOESER '50
May 15, 2010
JOE L. RANDLE LL.M. '50
May 11, 2010
THEODORE F. "TED" STEVENS
'50
Aug. 9, 2010
BURTON C. WOOD '50
May 9, 2010
JOSEPH W. DI CARLO '51
Sept. 8, 2010
JOSEPH H. INDICK '51
July 16, 2010
IRWIN J. LANDES '51
May 27, 2010
RICHARD BERTRAND "DICK"
MCMURRAY '51
May 4, 2010
JACOB I. ALSPECTOR '52
Sept. 3, 2010
EUGENE R. ANDERSON '52
July 30, 2010
THOMAS P. BIRMINGHAM '52
April 29, 2010
EDWARD P. BRANDEAU '52
June 15, 2010
DANIEL P. DAVISON '52
Aug. 25, 2010
ANTHONY F. DE LA PEÑA '52
Nov. 6, 2008
JOSEPH M. FARLEY '52
May 24, 2010

H. JONATHAN FOX '52
Aug. 27, 2010
JAMES J. GUINAN '52
May 21, 2010
LLOYD W. HERROLD '52
Aug. 28, 2010
RICHARD J. GRAVING '53
April 19, 2010
STEPHEN W. HOWE '53
Aug. 4, 2010
GABRIEL A. IVAN '53
May 29, 2010
JOHN R. LENNAN '53
Aug. 19, 2009
WILLIAM A. PIEDIMONTE '53
July 22, 2010
R. REGNER "REG" ARVIDSON
'54
July 26, 2010
F. MARTIN BOWNE '54
March 13, 2010
WILLIAM E. FOLEY '51-'52
Sept. 17, 2010
GERARD F. GIORDANO JR. '54
April 22, 2010
JOHN MASON HARDING '54
Sept. 28, 2010
ELVIN "ZADIE" KANTER '54
Aug. 9, 2010
RONALD S. KONECKY '54
June 10, 2010
ROBERT A. MACKENNAN '54
July 30, 2010
HERBERT B. ROSE '54
May 22, 2010
NORMAN M. YOFFE '54
April 9, 2010
LAWRENCE B. FLORIO '55
April 10, 2010
JEREMY E. GOLDSTEIN '55
June 19, 2010
SAUL H. MAGRAM '55
June 21, 2010
JAMES A. REED JR. '55
Oct. 28, 2008
FRED M. RINGEL '55
June 26, 2010
PHIL J. SHAFER '55
March 31, 2010
DANIEL A. SOBERMAN LL.M.
'55
July 17, 2010
JOHN R. ALLEN '56
Sept. 3, 2010
ANDREW C. CARLIN '56
May 12, 2010
JOHN O. EHRENCLOU '56
Aug. 6, 2010
JOHN H. GOEWY '56
April 17, 2010

STEPHEN R. PETSCHKE '56
July 24, 2010
P. JAMES RIORDAN '56
Nov. 22, 2009
RICHARD M. WALL LL.M. '56
Sept. 14, 2010
WALLACE R. BENNETT LL.M.
'57
July 25, 2010
WILLIAM A. DOBROVIR '57
May 23, 2008
MARTIN D. GINSBURG '58
June 27, 2010
GERALD D. KLEINMAN '58
April 6, 2009
DAVID A. NELSON '58
Oct. 1, 2010
EDWIN V. PETZ '58
Aug. 13, 2010
KRZYSZTOF SKUBISZEWSKI
LL.M. '58
Feb. 8, 2010
HERBERT S. DENENBERG
LL.M. '59
March 18, 2010
ARTHUR F. FLAHERTY '59
Aug. 19, 2010
EUGENE M. GRIMMIG '59
Aug. 21, 2010
CARL D. HOBELMAN '59
Aug. 31, 2010
LEE POLLAK '59
Dec. 4, 2009

1960–1969

DONALD E. ENDACOTT '60
April 26, 2010
ROBERT H. MACKINNON '60
July 6, 2010
RICHARD L. MAYER '60
July 2, 2010
WALTER H. MCLAUGHLIN
JR. '60
June 11, 2010
WALTER A. BAKER '61
May 24, 2010
ROBERT E. JORDAN III '61
May 14, 2010
PAUL R. MCDANIEL '61
July 16, 2010
DAVID B. SALZMAN '61
April 14, 2010
JUAN MANUEL GARCIA-
PASSALACQUA '62
July 2, 2010
DUANE R. BATISTA '63
Aug. 23, 2010
PAUL A. LYNCH '64
June 26, 2010
EDWARD F. C. MCGONAGLE
LL.M. '64
July 19, 2010
ROGER P. CRAIG '65
May 25, 2010
LLOYD CYMROT '66
April 7, 2010
RICHARD J. FLASTER '66
Aug. 9, 2010

K. DUN GIFFORD '66
May 9, 2010
NEAL W. JOHNSTON '66
May 24, 2010
ROBERT J. KLEIN '66
Feb. 20, 2010
DAVID K. PARK '66
Aug. 27, 2010
JOHN W. "JACK" DELANEY '67
July 30, 2010
ROBERT B. "ROBEN" EUBANK
'67
April 23, 2010
PETER J. "JIM" HUNTER JR.
LL.M. '67
Sept. 15, 2010
RONALD S. SHELDON '67
March 2, 2009
JOHN H. SMITH '67
Nov. 11, 2009
PATRICIA A. FLYNN '68
June 22, 2010
WILLIAM L. MURPHY '69
June 4, 2010

1970–1979

KENNETH F. SEMINATORE '71
Aug. 31, 2010
DENNIS B. WOLKOFF '71
March 9, 2010
ARTHUR G. PEINADO '72
Aug. 12, 2010
SHALOM L. KOHN '74
May 30, 2010
DANIEL M. FERRERE LL.M.
'76
July 29, 2010

1980–1989

SANDRA L. COHEN '80
Aug. 25, 2010
RICHARD H. "RICK"
SCHNEIDER '81
April 2, 2010
ROBERT A. "ROBBIE"
WOMACK '82
May 31, 2010
PETER A. VON MEHREN '85
Feb. 1, 2010
PAUL S. MILLER '86
Oct. 19, 2010

1990–1999

WOODROW F. DOWNS '90
June 17, 2010
GREG C. GIRALDO '90
Sept. 29, 2010

2000–2009

NOAH D. LEVIN '07
Aug. 25, 2010

A Conversation with Kenneth I. Chenault '76

Kenneth I. Chenault '76, chairman and CEO of American Express, is widely considered one of the most successful and talented business strategists of our time. Joining AmEx in 1981 as director of strategic planning, he was named president and COO in 1997, and CEO and chairman in 2001. Chenault is a member of the Council on Foreign Relations and the Business Roundtable.

What drew you to law school, in general, and to HLS in particular?

I was attracted to law school because I believed it would help me prepare for a career in the real world. At that time, I didn't know whether I wanted to practice law, go into government, teach or join a not-for-profit organization. Harvard Law provided an opportunity to learn from a faculty that had shaped the laws of our country and helped to change the world around us. It also offered an opportunity to study with the brightest students and to test myself against the best.

Did you have a particular career path in mind after graduating HLS?

Back then, business and the corporate world were not on my radar screen. By graduation, I had decided to be an attorney and joined Rogers & Wells in New York. My plans were to practice law and then possibly go into public service. The business world of the later 1970s was going through some sweeping changes. We were moving from an industrial-based to a service economy, and new patterns of global trade were emerging. Old companies were fading away, and new, dynamic ones were taking their place. With all that was changing, I began to think that business offered more opportunities to get ahead and to make a difference. Corpora-

tions are "for profit," but I recognized that businesses could play a leading role in driving social change, that they do have responsibility for being good citizens.

I moved back to Boston and joined some of my Harvard classmates at Bain & Co. I quickly realized I enjoyed business. I liked being responsible for developing strategies. I liked creating a persuasive argument, pursuing it with clients and rallying support among my colleagues. I also liked the discipline that came with measurement, the chance to be judged in terms of outcomes. The ability to drive change appealed to me, and I was very comfortable with the concept of being held accountable for my work.

You joined American Express in 1981 and are widely credited for transforming it into the premier financial services and travel company in the world. What was your vision for what AmEx should be?

When I joined American Express, it was a well-established global company with a long heritage built on customer service dating back to 1850. I didn't have goals for the company back then, but I wanted to learn as many aspects of the business as I could.

One of the first things I learned was the importance of brands. That lesson would shape my thinking for years to come. I learned the importance

of earning the trust of your customers and how important relationships were to any successful business. Building a brand requires you to make a commitment. The founders of American Express made a commitment to serve their customers, and they brought that commitment to life in good times and bad. In many ways, the vision that I have for our company today is still grounded in that tradition. We value the trust that our customers put in us, and we know that we have to earn it every day.

You believe strongly in corporate social responsibility; you have said that businesses exist to serve not only their customers but also the communities in which they operate. Why do you believe this is the appropriate approach for a corporation (and its CEO)?

Corporations exist because society allows them to exist. I believe every business has an obligation to give back and to help improve our society. Sometimes we show this by writing checks. Sometimes it's by providing our employees with opportunities and time to volunteer. Sometimes it's by sharing our skills and resources. Sometimes it's by being there for customers in times of emergency when there is no one else to turn to. Regardless of how we do it, contributing to the betterment of society is part of the corporate charter.

What more should corporations, and their leaders, be doing to serve the world?

You don't need an opinion poll to know that very few people believe corporations always deliver on their social responsibilities. But I know there are many individuals and companies—small, medium and large—that are committed to social good and that believe that companies can pursue profits while also contributing to the public good. Leaders can't just look at the bottom line. They have an obligation that goes beyond the products or the jobs they help to create.

I want American Express to serve customers and help our business partners succeed. I encourage employees to ask the tough questions, speak up and demand action, whether it helps to make a service more helpful, a product more transparent or the community healthier.

How did your HLS education affect your life and your career? Did HLS have an impact on your dedication to public service?

Harvard Law taught me a disciplined approach to analyzing problems and situations. It taught me the value of appreciating

different perspectives and respecting the opinions of people you don't always agree with. Harvard also taught me the importance of adaptability, integrity and accountability. I learned that you have to know what you stand for, but that you cannot be so rigid in your thinking that you never adapt to new realities. I learned never to put goals ahead of values. I learned that when you are given opportunity, you need to hold yourself personally accountable to delivering results. Harvard taught me the importance of law but also the importance of leadership.

You have chosen to generously support HLS—why have you done so?

I want future students—particularly those who are economically disadvantaged—to have plenty of opportunity to benefit from studying at Harvard Law.

What do you hope to see HLS achieve in the coming years?

I want Harvard to develop great lawyers and great leaders. Whether they end up on the bench or in the boardroom, I want them to leave Cambridge with a sense of purpose and a commitment to bring about positive change in the world around them. *

ELIEN BLASS/USA TODAY

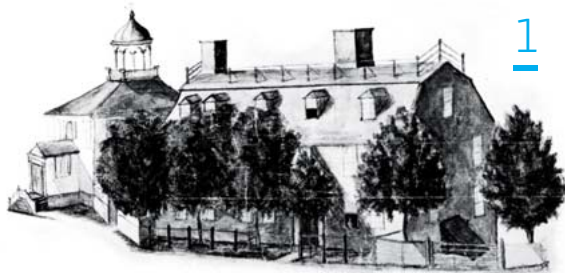


GALLERY

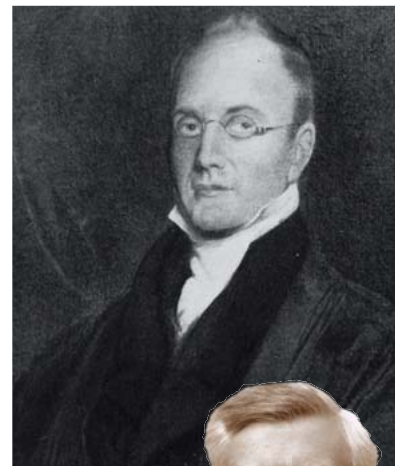
Talking About a Revolution

DANIEL COQUILLETTE '71, the Charles Warren Visiting Professor of American Legal History at Harvard Law School and the J. Donald Monan, S. J. University Professor at Boston College Law School, is writing a new history of HLS, to be published in time for the school's bicentennial—2017. This fall, he gave students an introduction, highlighting ways the school has transformed legal education, but also covering “the rough times and great challenges.” Here are some highlights from his talk, in quiz format. See how you do.

1. What connection does this building—once situated in Harvard Square where the Coop now stands—have to Harvard Law School?



1



3

2. And what about this building?



2

3. Who was the youngest U.S. Supreme Court justice in history, and what else did he do while he served on the Court?

4



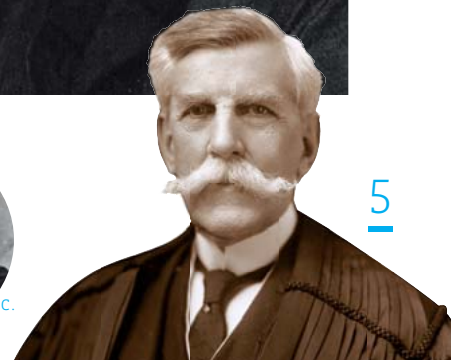
a.



b.



c.



5

4. Who are these three men, and how did their lives intersect?

6



7

5. When is it a bad thing to be a national school (Joseph Story's goal for Harvard Law)?

8



9



10



A pop quiz with some surprising answers



6. *This man is credited with shaping American legal education. What other school besides HLS was most immediately affected by his innovation?*

7. *How would Langdell have reacted to this group?*

8. *What degree might you expect Dean Roscoe Pound to hold, which he lacked, and what degree might you expect him to eschew, which he accepted?*

9. *Why is Hawaii especially significant to HLS?*

10. *What's going on in this picture, and what does it have to do with Harvard Law School?*

1 In 1817, it was Harvard Law School. Called **College House Number 2**, it was located next to the courthouse for convenience, but it was part of Harvard College. When the school opened, it had 15 students, one teacher, and was the first professional law school within the context of a university to teach people to be lawyers—the school's first big idea, said Coquillette, at a time when most lawyers were taught through apprenticeship.

2 This building, which still stands in Medford, Mass., housed **slaves of the school's founder, Isaac Royall**. He had owned a sugar plantation in Antigua, and it was the sale of slaves in the Caribbean that allowed him to buy his property in Medford and also to endow the first chair at Harvard Law School.

3 **Joseph Story**. At 32, he was nominated to the Court, and he continued to serve while he was Dane Professor of Law at HLS, where one of his goals was to transform the school into a national institution. "Here's the tragedy," said Coquillette. "To be a national law school, you have to have a nation." Early on, Story saw that the country's cohesiveness was threatened by the divide over slavery. In 1842, he enforced the Fugitive Slave Act in the *Prigg* case, sending a mother and her two children back into slavery, not because he supported the institution, said Coquillette, "but because he thought it was the price of a nation."

4 **Edward Greely Loring (a)** was appointed to teach at HLS in 1852, one of three faculty. He was also a federal magistrate in Boston, and in 1854 he ordered the return of fugitive slave **Anthony Burns (b)** to Virginia, under the Fugitive Slave Act. Rioters stormed the streets and the courthouse in an attempt to rescue Burns.

But in the end, a Coast Guard cutter was brought in to take Burns away. Abolitionist **Richard Henry Dana LL.B. 1837 (c)** had unsuccessfully represented Burns, but his freedom was later ransomed, and he went on to become a Baptist preacher. After the riots, the Harvard Board of Overseers refused to renew Loring's appointment.

5 Joseph Story had recruited from all over the country, and as the Civil War approached, nearly half of the students were from Southern states, said Coquillette, and "the school was ripped apart." **Oli-ver Wendell Holmes Jr. LL.B. 1866** famously served in the Union Army before attending HLS, but more leaders of the Confederacy were alumni of Harvard Law School than of any other school in the U.S. besides West Point. "There are true stories of people serving in the war, taking a prisoner and discovering it was one of their classmates." As many as 74 grads may have died fighting for the Union, and 54 for the Confederacy.

6 **Christopher Columbus Langdell LL.B. 1854**, dean of Harvard Law School from 1870 to 1895, revolutionized the teaching of law and had an immediate impact on HLS, but also on Boston University. Famous for introducing the case method and the Socratic approach, Langdell was also responsible for standardizing the curriculum and for introducing rank in class. According to Coquillette, Langdell saw many of his innovations "as a way of creating a legal elite based on merit, rather than power and influence." And in fact, Langdell's methods were so shocking at the time, said Coquillette, that there was an exodus of students from Harvard, many of whom fled to the newly founded Boston University Law School.

7 Langdell was vigorously opposed to **the admission of women**. His meritocracy was very limited, said Coquillette.

Women started applying in the 1870s, then again in the 1890s and then again in the 1910s. But "gender apartheid" ruled at HLS, said Coquillette, until 1950, when the determined women in this picture were admitted.

8 **Roscoe Pound**, dean of Harvard Law School from 1916 to 1936, an innovative legal scholar and one of the first to focus on internationalizing the law school, held an advanced degree in botany but no LL.B. HLS faculty member and leading progressive Felix Frankfurter LL.B. 1906 lobbied for his appointment. But according to Coquillette, Pound made one great mistake, "and it's hard to know in retrospect why he did it." He was a great admirer of the German university system, and in 1934, he took an honorary degree from the University of Berlin—at a time when Hitler had been chancellor of Germany for one year.

9 HLS's first Asian-American graduates came from Hawaii. The Chinese Exclusion Act (1882) prevented those who were Chinese from becoming American citizens, and by 1924 the exclusion had been broadened to apply to all Asians. But when Hawaii was annexed, its residents automatically became U.S. citizens, including **Hiram Fong '35**, the first Asian-American to be elected to the U.S. Senate and the first U.S. senator from Hawaii.

10 Coquillette was a 2L in 1970, and he remembers the **Harvard Square riots**: Some 3,000 demonstrators, protesting the war in Southeast Asia, marched on the Square, leaving "cars wrecked, trash bins on fire, windows smashed." Harvard itself, he said, like campuses across the country, was periodically shut down by strikes. "At times you had to break a picket line to get into the library, and classes were canceled because the students wanted to talk about Cambodia." *



→ **Page 28**

“There’s a risk that the chair [of the Federal Communications Commission] simply serves the industry, and there’s a risk that the chair does not understand the needs and demands of the industry. Julius is uniquely suited to understanding the industry perspective while keeping American needs at heart.”

—DEAN MARTHA MINOW ON JULIUS GENACHOWSKI '91, chairman of the FCC
