Law students cross the bridge to negotiate with HBS

O n a raw and rainy winter day in Boston, in a small room at Harvard Business School, two teams of students sit facing each other across a conference table. Each team is made up of two HBS students playing the roles of corporate executives at major drug companies, and an HLS student acting as their corporate attorney.

Using an example from real life—the current conflict between Merck and Johnson & Johnson’s Centocor unit over distribution rights for two blockbuster arthritis drugs, Remicade and Simponi—the students are here to see if they can negotiate an agreement instead of heading into arbitration. A lot is at stake: The drugs are worth an estimated $4 billion to $9 billion, and the negotiations quickly become animated.

In an expensive-looking suit and tie, Henoch Sendetta HBS ’11 leans back in his chair and takes the friendly approach. “Let’s discuss both sides’ interests,” he says languidly, with a broad smile. “The value of the contracts, the options.”

But his teammate, Olga Vidiševa HBS ’11, jumps in aggressively. “The ideal is to end this here today!” she says, leaning forward.

FOR two hours, the teams debate and argue, discussing such things as expected value calculations and settlement options.

HEADED TO HLS An administrative law expert, a U.S. District judge and an international tax affairs secretary will join HLS this fall.

Is the Obama Health Care Reform Constitutional?

Fried, Tribe and Barnett debate the Affordable Care Act at HLS

D ebating what Harvard Law School Dean Martha Minow called “one of the most important public policy issues and one of the most important constitutional issues,” three law professors offered different perspectives on whether the individual mandate portion of the Affordable Care Act violates the commerce clause of the Constitution and infringes on personal liberties.

Co-sponsored by the HLS Federalist Society and the Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics, and moderated by HLS Professor I. Glenn Cohen ’03, the debate and discussion on March 24 featured HLS Professors Charles Fried and Laurence Tribe ’66, both of whom argued for the constitutionality of the mandate, and Randy Barnett ’77, a former student of both, who is now teaching at Georgetown University Law Center, and whom Minow called the “mastermind” of the legal challenge against the ACA. That challenge, which is expected to eventually reach the Supreme Court, thus far has had mixed results, with two courts deeming the mandate unconstitutional while two others have upheld the provision.

Just as those courts offered different interpretations of whether imposing the mandate was an allowable use of Congress’ powers, so did the professors, who each teach constitutional law. Barnett outlined what he called the “truly extraordinary and objectionable nature of the individual mandate,” noting that it is an unprecedented requirement in U.S. history. Though Congress can compel people to be drafted into the military or sit on a jury, it is ironic that an effort to keep health insurance in the private sector is seen as an enormous assault on our liberties.”

Charles Fried

“A life of thoughtfulness and grace

The 21st century’s Pentagon Papers

The convening power of Harvard

Everything old is new again

Cross-school collaboration
HLS ranks #1 with law firm recruiters

The Harvard Law Review elected Mitchell Reich ’12 as its 125th president. Before attending HLS, Reich graduated from Yale College with a B.A. in classics and political science. Reich, a native of New York, is the first openly gay editor elected to lead the Review.

HLS ranks #1 with law firm recruiters

REICH NAMED LAW REVIEW PRESIDENT

The Harvard Law Review elected Mitchell Reich ’12 as its 125th president. Before attending HLS, Reich graduated from Yale College with a B.A. in classics and political science. Reich, a native of New York, is the first openly gay editor elected to lead the Review.

AN OUTSTANDING SCHOLAR

In February, Harvard Law School Professor David B. Wilkins ’80 received the Outstanding Scholar Award from the Fellows of the American Bar Foundation, given annually to a member of the academy who has engaged in outstanding scholarship in the law or in government.

THE POWER OF AN APPOINTMENT

The Uniform Law Commission has formed a new drafting committee to prepare a Uniform Act on Powers of Appointment and has named Robert H. Sitkoff, the John L. Gray Professor of Law at HLS, as a committee member. An expert in trusts and estates, Sitkoff serves under gubernatorial appointment as a uniform law commissioner for Massachusetts.

WHAT WOULD HAMILTON DO?

Former Federal Appeals Court Judge Michael McConnell delivered the biennial Vaughan Lecture at HLS on Feb. 28. A distinguished scholar who held numerous academic posts before serving as a judge on the U.S. Court of Appeals for the 10th Circuit until 2010, McConnell is a former visiting professor at HLS. He is now on the faculty at Stanford Law School, where he is director of the Stanford Constitutional Law Center. View lecture video at http://bit.ly/McConnellVaughan.

A friend of the court

HLS Professor Charles Fried joined former elected officials in an amicus curiae brief filed in McComish v. Bennett, on Feb. 22. In the brief, Fried claims the Supreme Court should support Arizona’s issuance of funds to candidates for office whose opponents spend more than a threshold “trigger” amount against them. Fried also testified before the Senate Judiciary Committee earlier in February, arguing for the constitutionality of the health care mandate.

MINOW DELIVERS GINSBURG LECTURE

Dean Martha Minow delivered the annual Justice Ruth Bader Ginsburg Distinguished Lecture on Women and the Law, sponsored by the New York City Bar Association, on Feb. 7. The title of the talk was “Gender and the Law Stories: Learning from Longstanding Debates.” U.S. Supreme Court Justice Ruth Bader Ginsburg ’56–’58 introduced Minow. The annual lecture was created by the New York City Bar Association in 2000 to recognize Ginsburg’s groundbreaking contributions to the advancement of women’s rights and her achievements as a lawyer, professor and judge.

GREENWALD RECEIVES LEadership award

For the third year in a row, Robert Greenwald, director of Harvard Law School’s Health Law & Policy Clinic, was awarded a Positive Leadership Award from the National Association of People with AIDS. At the awards reception in Washington, D.C., in February, Frank Oldham, president and CEO of NAPWA, quipped that this year the award should be considered a lifetime achievement award for Greenwald, a national leader in AIDS policy, in order to make room for others to receive it in the future.

GORDON-REEED APPOINTED TO COMMISSION

HLS Professor Annette Gordon-Reed ’84 was appointed to the American Academy of Arts and Sciences’ newly established Commission on the Humanities and Social Sciences, a national commission charged with bolstering teaching and research in the humanities and social sciences. Harvard University President Drew Gilpin Faust will also take part in the initiative. The aim of the 42-member commission is to present actions that the represented institutions can take to maintain national excellence in each member’s respective field. Their findings will serve as a companion to a forthcoming report on the future of the research university and ways to strengthen American scientific enterprise.

WILLIAM STUNTZ [1958-2011]

An examined life of thoughtfulness and grace

WILLIAM STUNTZ, a renowned scholar of criminal justice at Harvard Law School, an evangelical Christian and a teacher beloved by students and colleagues, died March 15 after a long battle with cancer.

Stuntz, 52, joined the HLS faculty in 2000 and was named the Henry J. Friendly Professor of Law in 2006. His influential scholarship over the past three decades addressed the full spectrum of issues related to criminal justice and procedure, from the overcrowding of prisons and racial disparities in incarceration to the appropriate role of faith, emotion and mercy in the penal system. He wrote three dozen law review articles and essays on criminal law. This fall, Harvard University Press will publish a book he wrote on the collapse of the criminal justice system.

Extremely popular among his students for his compassion and accessibility, Stuntz was the 2004 recipient of the HLS Sacks-Friend Teaching Award, given by the graduating class to honor a professor for his or her contributions to teaching.

“Among his many gifts to us was the grace with which he lived his life,” said Dean Martha Minow. “In knowing Bill, we couldn’t help but be reminded to live life as our better selves. He described and lived his life in recognition of the need for humility and also for judgment and work to repair what we find around us. His devotion to family and friends remains legendary. Those of us lucky enough to have been able to consult with him for personal or professional advice will never forget his insights and generosity.”

From his perspective as a legal scholar and also an evangelical Protestant, Stuntz co-wrote a blog, “Less than the Least,” with fellow evangelical David Skeel, a professor at the University of Pennsylvania Law School.

In March 2010, a large group of his many admirers, including legal scholars, colleagues, friends and students, gathered at HLS for a two-day conference, “A Celebration of the Career of Bill Stuntz.”

Born on July 3, 1958, Stuntz grew up in Annapolis, Md., then attended the College of William & Mary and the University of Virginia School of Law. After two judicial clerkships, he was a law professor at the University of Virginia for 14 years until he joined HLS.
Benkler argues against prosecution of WikiLeaks
Details government and news media "overreaction"

Harvard Law Professor Yochai Benkler ’94 has released an article detailing U.S. government and news media censorship of WikiLeaks after the organization released the Afghan War Diary, the Iraq War Logs and U.S. State Department diplomatic cables in 2010. Among his key conclusions: The government overstated and overreacted to the WikiLeaks documents, and the mainstream news media followed suit by engaging in self-censorship. Benkler argues further that there is no sound constitutional basis for a criminal prosecution of WikiLeaks or its leader, Julian Assange. Benkler, the Berkman Professor for Entrepreneurial Legal Studies at Harvard Law School and faculty co-director of the Berkman Center for Internet & Society, argues that WikiLeaks' freedom of expression is protected by the First Amendment and should not be treated differently from that of traditional news media. His article will be published in the forthcoming issue of the Harvard Civil Rights-Civil Liberties Law Review.

What did you set out to investigate?
The article does two things. The first is to explain why WikiLeaks is essentially the Pentagon Papers case of the 21st century: a core journalistic release of material coming under attack. As a matter of First Amendment limitations, you can’t distinguish WikiLeaks from The New York Times along any dimension that is constitutionally relevant. The second is to offer a case study of the difficult but important relationship between the new, networked media and traditional media that is coming to characterize the new media environment.

How would you describe government and media response to WikiLeaks?
I think once you actually look at the facts carefully, the government and media vastly overreacted and overstated dramatically the extent of the actual threat of WikiLeaks. One of the things I did was an analysis of all the news stories at the time of the embassy cables release. About two-thirds of news reports in the U.S. in the first two weeks explicitly misstated what WikiLeaks had released and claimed that hundreds of thousands of cables had been dumped online at a time that only a few hundred cables had been released, in redacted form, and only after they were already published by one of the traditional newspaper partners in the endeavor. The pattern of misreporting in the news media fit the pattern of overstatement by government actors, both administration officials and senators.

What is your primary criticism of the government and media overreaction?
It fed into a description of WikiLeaks as though it were some terrorist organization as opposed to what it is, which is, in fact, a journalistic enterprise. Joe Biden responded to the release of the embassy cables by stating that WikiLeaks founder Julian Assange is “more like a high-tech terrorist than the Pentagon Papers.” That captured the overstated, overheated, irresponsible nature of the public and political response to what was fundamentally a moment of journalistic disclosure. They responded as if it were a security threat, in a way that was simply inconsistent with a democratic American administration. This, in turn, set the background for the denial of service attacks by the commercial providers of services to WikiLeaks: Amazon, EveryDNS, MasterCard, Visa, etc.

What are the main implications of your findings?
The direct implication is the U.S. should take a look at this investigation and declare that the Constitution’s First Amendment simply does not permit prosecution of WikiLeaks. It is not, as a matter of law, sustainable to treat WikiLeaks or Assange any differently from The New York Times and its reporters. The second implication is that we need a reformed legal regime, which is what I start to look at in the paper. A system that depends on privately owned critical communications systems and privately run payment systems owned by companies eager to avoid public controversy is an easy target for government trying to shut it down. We need to develop much more robust legal responsibility for private operators of critical infrastructures so they will have a backbone when the government or negative public opinion says you have to shut it down. We need to create a framework in which they instead have to say, We have a legal responsibility to not discriminate against users based on the fact that they are unpopular speakers. We have a lot of work to do in this area.

How is WikiLeaks a journalistic organization?
There are multiple functions that go into journalism: identify sources, review material, preserve anonymity of sources at some points and choreograph the release of information. WikiLeaks is not a traditional media organization, but essentially over the course of the year, WikiLeaks was learning how to participate in a joint venture with a number of other traditional news organizations in order to achieve exactly that—finding sources, getting information, structuring it in a way that is usable and integrating with other organizations to achieve release. That’s journalism.

“WIKILEAKS IS ESSENTIALLY THE PENTAGON PAPERS CASE OF THE 21ST CENTURY.”
Yochai Benkler ’94

In a forthcoming law review article, HLS Professor Yochai Benkler ’94 details U.S. government and news media censorship of WikiLeaks.
A host of conferences, hosted at HLS

The convening power of Harvard

A number of important conferences were hosted by HLS faculty and students this semester. Professor Elizabeth Bartholet ’65, director of the Child Advocacy Program, explored the disproportionate representation of African-American children in foster care, in a two-day symposium in January, while Professor Jon Hanson focused on “The Psychology of Inequality” in the Fifth Conference on Law and Mind Sciences. Asian Pacific American law students challenged conference attendees to contemplate the meaning of progress, the Women’s Law Association envisioned a better world for women and girls, and the Black Law Students Association focused on effective leadership.

“This is What Equality Looks Like: The World We Want for Women and Girls” was the theme of the Women’s Law Association conference on Feb. 11. Panelists stressed that education is key to equality.

HLS Professor Lani Guinier and Theodore V. Wells Jr. ’76 (left), partner at Paul, Weiss, Rifkind, Wharton & Garrison, were this year’s BLSA keynote speakers.

> WOMEN’S LAW ASSOCIATION
L-R: Mary Catherine Blanton ’12, Beth Greaney ’12, Kimberly Lucas ’11, Poppy Alexander ’11, and WLA President Cari Simon ’11.

> BLACK LAW STUDENTS ASSOCIATION
“Empowerment: Effective Leadership Within and Outside Our Communities” was held March 4–5.

> LAW AND MIND SCIENCES
Professor Jon Hanson presented “Inequality Dissonance and Policy Attitudes” at the Project on Law and Mind Sciences conference Feb. 26.

> ASIAN PACIFIC AMERICAN LAW STUDENTS ASSOCIATION
Peggy Kuo ’08, center, chief hearing officer for the New York Stock Exchange, discussed the leadership challenges women face at the APALSA conference Feb. 25–26.

> CHILD ADVOCACY SYMPOSIUM
Henry Smith is the director of Harvard Law School’s Project on the Foundations of Private Law. In conjunction with the project, which he launched in the fall of 2010 with Professors John Goldberg and George Triantis, a Private Law Workshop is being held this term for the first time (see sidebar). An expert in the laws of property, intellectual property, natural resources, and taxation, Smith joined the HLS faculty in 2009 and was named the Fessenden Professor of Law last year.

What is private law?
Private law is the part of the law that guides the interaction of people in society, very broadly. More specifically, it corresponds to what would be called private law in the civil law countries. In those countries, there’s a self-contained theory of private law, and the goal in our project is to do an interdisciplinary study of that part of the law. Another way to think about it comprises the traditional common law subjects—property, torts, contracts, some that have been neglected like restitution and unjust enrichment, and allied areas.

What do you hope to accomplish with the Project on the Foundations of Private Law?
One thing is the idea of studying private law as a whole—how these different parts work together, don’t work together, are similar and different. Also within these areas, there are some characteristically private law issues.

We want to bring back serious study of these individual areas. Certain areas of private law have fallen off the radar, and this is a good way of bringing attention back to them.

A prime example is restitution. This is the hot topic of private law in England. It’s quite neglected here. We believe that serious study of private law will be useful in law schools in general. There is a need for people to go out and teach in these areas. These issues are extremely timely and come up in practice all the time. The Madoff litigation is just the latest super-high-profile one, to take restitution as an example. Issues of equitable remedies are very important in practice, and we in law schools are in a very good position to give students a sense of the landscape, which we believe will serve them very well when they go out into practice and encounter these issues instead of having to navigate them for the first time without any kind of map.

What are you exploring in your scholarship?
I am particularly interested in the relationship of property and contract. Very much tied into private law, a prototypical property right is good against the world as opposed to a contract right, which avails between the contracting parties. From that difference, many of the contrasts between property and contracts flow. Property law and contract law often are solving a different problem. So I apply information cost economics to explaining some of the basic differences between property and contracts.

What is your latest book, “The Architecture of Property,” about?
Property has often been thought of as a collection of rights and privileges, and property law has been considered a collection of this rule and that rule. Many commentators take some specific rule and ask whether it is efficient and fair. But that overlooks what I’m calling architecture of property. Certain features of property aren’t fully detachable, and we shouldn’t study them only in isolation. There is a basic architecture, and part of it is that property is a law of things. Taking a thing as a starting point is actually quite important from an architectural point of view. The world is a lot simpler if we start our rights system with reference to things, and how we define a thing, and when we depart from our everyday notion of a thing. The idea is that explanations for property have to be holistic.

Professors Smith and Goldberg reinvigorate the study of Private Law at HLS

When John Goldberg was a law student, he had a problem in classes like contracts, torts and property. The problem wasn’t with the subject matter, but with the fact that some professors didn’t seem to take it seriously enough. “These are basic and important legal categories, even today,” he said. “I felt that way intuitively reading the cases, and I was being taught by a lot of professors who didn’t have that view.”

Now a professor himself, Goldberg is working with Professor Henry Smith to reinvigorate the study of such traditional law school subjects with the new Private Law Workshop, which they co-teach as part of the Project on the Foundations of Private Law at Harvard Law School. The workshop, said Goldberg, is “an opportunity to introduce students to some of the emerging literature that’s aiming to rethink the significance of private law in modern legal systems.”

Featuring several guest speakers conducting the latest research on private law topics like torts and contracts, the workshop often incorporates philosophical, historical and economic perspectives. For example, one speaker examined whether contracts are best understood as devices that allow efficient allocation of resources or that ensure parties will keep their promises. Another recent session on the law of restitution, conducted jointly with faculty and students at Oxford University in England, offered valuable insight from foreign lawyers and scholars, who tend to offer a different perspective on private law matters, according to Goldberg.

Patrick Withers ’12, a student in the class, praised the session for addressing a subject often ignored in the U.S. He said the professors and the guest speakers have provided a good survey of the different issues of private law.

“The idea of getting to meet academics who were workshop shopping their papers and to talk with people who are really on the cutting edge of this discipline was something that really appealed to me,” he said. In particular, the workshop has made Withers interested in issues of property rights, which he expects that he will apply in legal practice. That sentiment resonates with Goldberg, who hopes that students will learn lessons that will benefit them at HLS and beyond.

“We want students to learn about the subjects and the academic debate in these subjects in part because we think it will help them stand out in the academic job market,” he said. “There’s no comparable program at other comparable schools. And we hope it will revive lines of inquiry that have been pretty sleepy in the legal academy for some time now.” #
Cross-school collaboration
continued from page 1

across the table, her tone more intimidating than collegial. If their goal is a “good cop-bad cop” approach, she and Senetta are pulling it off well.

Their “lawyer,” Ian Wildgoose Brown ’11, speaks up. “There’s a lot of potential to get a deal done,” he says, in a quieter voice. “But the arbitration elephant is in the room. To be frank, we’re pretty confident in our position going into arbitration.”

Brian Kozlowski ’11 has a very different opinion. “Both sides want to resolve this in a friendly way, and it’s counter-productive to say what the arbitration outcome would be,” he says, firmly. “From a business standpoint, it’s scary because there’s no certainty. But it’s also scary from a legal standpoint.”

For two hours, the teams debate and argue, discussing such things as expected value calculations and settlement options. In the end, they agree to shorten the distribution contract between their companies by several years. Among the 15 teams participating in the joint HLS-HBS negotiation exercise, nine reach a deal—in a wide variety of ways—while six do not.

“The students were very creative, and there were lots of different solutions,” says Guhan Subramanian J.D./M.B.A. ’98, who holds joint faculty appointments at HLS and HBS. It is the first negotiation exercise to bring HLS and HBS students together in a mock business negotiation.

Subramanian divided the students in his HBS course on negotiation into 30 teams of two. He then reached out to HLS Clinical Professor Robert Bordone ’97, director of the Harvard Negotiation and Mediation Clinical Program, to find HLS students to play the lawyers. Bordone sought volunteers from his popular Negotiation Workshop, and, despite the additional time commitment the exercise required, 40 HLS students participated.

“For many of my Negotiation Workshop students at the law school, working with their counterparts at HBS was their first taste of managing a two-level negotiation game,” says Bordone. “My hope, then, is that this will be the first of many opportunities for HLS negotiation students to collaborate with their peers at our other professional schools.”

Bridging the law-business gap among students was valuable, says Subramanian, who hopes to expand the schools’ collaboration in the future with the strong support of HLS Dean Martha Minow and HBS Dean Nitin Nohria.

One valuable aspect, he notes, is that it gives students a realistic preview of the kinds of expectations that CEOs and lawyers will bring to the table in real-life situations. “On many teams, the M.B.A.s kept pushing their lawyers for the likelihood of winning in arbitration,” says Subramanian. “The lawyers initially resisted the idea of providing a percentage and wanted to do the typical law school thing: ‘On one hand, this; on the other hand, that.’

But during the exercise, they realized that in order for the businesspeople to make business decisions, the lawyers needed to provide a number.”

It was clear from the post-exercise debriefing that the chances of success in the negotiations often hinged on intangibles, for instance, instead of sitting across from each other, one group chose to alternate the members of both teams to create a less confrontational atmosphere. One student took the opposite approach, bringing along the biggest law book he owned—an old Black’s Law Dictionary—to see if he could intimidate the other side. In some groups, the lawyers led the discussions; in others, it was the M.B.A. students who dominated as they debated cash flows and valuation methods.

Alan Cheuk ’11 says the exercise was worth the hours his team put into preparing for the negotiation and doing the actual negotiation. “I saw an entirely different side of things,” he says. “In the Negotiation Workshop, what we usually do is value-building, developing trust, more information-sharing and problem-solving. But this was very tense. Nobody wanted to share information.” #
Three renowned scholars and practitioners will be joining the HLS faculty in the fall: Jacob Gersen as a professor of law, and Nancy Gertner and Stephen Shay as professors of practice.

Gersen, Gertner and Shay to join HLS faculty

Jacob Gersen, an administrative law, legislation and constitutional theory expert, will join the HLS faculty as a professor of law. U.S. District Judge Nancy Gertner and Stephen Shay, deputy assistant secretary for international tax affairs in the U.S. Department of the Treasury, were appointed as professors of practice at Harvard Law School. The professorships of practice are given to outstanding individuals whose teaching is informed by extensive expertise from the worlds of law practice, the judiciary, policy and governance.

“With the appointments of these superbly accomplished and talented individuals, we continue to strengthen the Harvard Law School faculty and the bridge between Harvard Law School and law-in-practice,” said Dean Martha Minow.

Jacob Gersen

University of Chicago Law School Professor Jacob E. Gersen has accepted an offer to join the Harvard Law School faculty with tenure. An expert in administrative law, legislation and constitutional theory, he is currently teaching environmental law, executive branch design, judicial review and torts.

Gersen, who joined the Chicago faculty in 2005 as an assistant professor, also served as HLS’s Samuel Williston Visiting Assistant Professor of Law in 2009. He has received numerous academic honors, including a research grant through Chicago’s Stigler Center for the Study of the Economy and the State in 2007, and Chicago’s John M. Olin Prize for Outstanding Graduate in Law and Economics in 2004.

His most recent scholarship includes a chapter on “Designing Agencie: Public Choice and Public Law,” in the Research Handbook in Public Law and Public Choice (Farber and O’Connell, eds., 2010). He has written and co-written articles in leading law reviews. Gersen also has served as a referee for the journals of Law & Economics, Political Philosophy and Legal Studies.

He is currently researching articles on agency spending and political control of the bureaucracy; voters, nonvoters and the implications of election timing for public policy; and administrative law of money.

Prior to teaching, he clerked for Stephen F. Williams ’61 of the U.S. Court of Appeals for the District of Columbia.

Gersen holds an A.B. in public policy, magna cum laude, from Brown University, and a Ph.D. in political science and a J.D. with high honors from the University of Chicago.

Nancy Gertner

Nancy Gertner has been on the federal bench since 1994, when President Clinton appointed her to a seat on the U.S. District Court for the District of Massachusetts. Prior to that, she had a 20-year career as a lawyer, first at Silverglade & Gertner and later at Dwyer, Collora & Gertner, and was celebrated for her work as a criminal defense attorney and civil rights activist. She was described by Massachusetts Lawyers Weekly as one of “The Most Influential Lawyers of the Past 25 Years.” She will retire from the bench in September.

While serving on the federal bench, Gertner taught for more than 10 years as a visiting lecturer at Yale Law School, focusing on American sentencing and comparative sentencing law.

She has served on the faculty of American Bar Association’s Central European and Eurasian Law Initiative and is currently a member of its advisory board.

In 2008, Gertner became the second woman—after Justice Ruth Bader Ginsburg ‘56–’59—to receive the Thurgood Marshall Award from the American Bar Association, Section of Individual Rights and Responsibilities, for her career as both a lawyer and a judge.

She will share her experiences as a trial lawyer in her upcoming memoir, “In Defense of Women: Memoirs of an Unrepentant Advocate.” She also co-wrote “The Law of Juries.”

Gertner is a 1967 graduate of Barnard College, and she completed her J.D. and M.A. in political science at Yale. After law school she clerked for Chief Judge Luther M. Swygert of the 7th Circuit.

Stephen Shay

Stephen Shay, a longtime practitioner of tax law, is currently deputy assistant secretary for international tax affairs in the U.S. Department of the Treasury.

Since joining the Treasury Department in 2009, Shay has worked to develop and oversee implementation of U.S. international tax policy. He played a significant role in the development of proposals for the FY 2011 budget, was instrumental in structuring foreign account information reporting provisions passed as part of the 2010HIARE Act, and helped develop international tax abuse proposals that were passed as part of the Education Jobs and Medicaid Assistance Act of 2010.

Shay also serves as the U.S. delegate to the Global Forum on Transparency and Exchange of Information for Tax Purposes.

Previously a partner for 22 years at Ropes & Gray, he has extensive tax counseling and controversy experience advising multinational companies, private equity funds, financial institutions, global institutional investors, and foreign governments on cross-border taxation matters and transfer pricing.

While in private practice, Shay regularly published scholarly and practice articles relating to international taxation, and testified for law reform before congressional tax-writing committees.

He is a 1972 graduate of Wesleyan University, and he earned his J.D. and his M.B.A. from Columbia University in 1976.

Blum gains tenure as professor of law at Harvard

Gabriella Blum LL.M. ’01 S.J.D. ’03 has been promoted from assistant professor to professor of law—a tenured faculty position.

A specialist in the laws of war, Blum joined the HLS faculty as a visiting assistant professor in 2005. She focuses her research on conflict management, counterterrorism operations, law of armed conflict, negotiation and public international law. She is currently visiting at a Berkowitz Fellow at New York University’s Tikvah Center for Law & Jewish Civilization.

She co-wrote, with HLS Professor Philip B. Heymann ’60, “Laws, Outlaws, and Terrorists: Lessons from the War on Terrorism” (MIT Press, 2010). Their book, which rejects the argument that traditional American values embodied in domestic and international law can be ignored in any sustainable effort to keep the United States safe from terrorism, received the 2010 Chicago-Kent College of Law/Roy C. Palmer Civil Liberties Prize in October.

She is also the author of “Islands of Agreement: Managing Enduring Armed Rivalries,” which was published by Harvard University Press in 2007.


Blum earned an LL.B. in 1995 and a B.A. in economics in 1996 from Tel Aviv University. She then joined the Israel Defense Forces, serving in the International Law Department of the Military Advocate General’s Corps.

After completion of her LL.M. and S.J.D. degrees at Harvard in 2003, Blum returned to the International Law Department of the Israel Defense Forces to lead the counterterrorism desk, and then went on to serve as strategic adviser to the National Security Council.
those activities relate to, as the Supreme Court put it, the “supreme and noble duty” of citizenship, he added. “There is no supreme and noble duty of citizens to enter into contracts with private companies,” said Barnett, who added that the mandate would result in a “fundamental alteration in the status of American citizens.”

He also contended that the individual mandate goes beyond the powers of Congress granted under the Commerce Clause in that it regulates economic inactivity, comparing it to regulating people’s decisions not to sell their belongings. Though proponents of the mandate cite the economic consequences of not buying health insurance, failing to act still is not economic activity, he said.

“The Affordable Care Act did not regulate the activity of obtaining health care,” said Barnett. “Instead, the bill requires everyone to buy health insurance whether they seek health care or not.”

Fried questioned the importance of the distinction between economic activity and inactivity, citing Chief Justice John Marshall’s view that Congress has the power to regulate commerce, a power granted under Article I, Section 8 of the Constitution.

“Insurance is commerce. Health insurance is commerce,” said Fried, who served as solicitor general in the Reagan administration and later as a Massachusetts Supreme Court justice. “Why then is not the mandate within that power?”

Tribe expanded upon that point, noting that failing to buy health insurance shifts the cost to others. “There’s no right to force a society to pay for your medical care by taking a free ride on the system,” he said.

Thus, conduct is being regulated, he contended. Such conduct is subject to the Commerce Clause as much as a decision to act, said Tribe, citing precedent from as far back as 1790, when Congress penalized ship owners for failing to provide medicine on their ships.

But Barnett said that Congress can regulate only those who choose to engage in economic activity—for example, it can require a motel owner to accommodate members of racial minorities. He said if Congress wanted to increase access to health care, then it could have used its tax powers. But since it did not want to pay the political cost of doing so, it instead imposed an unprecedented burden on individuals, he said.

Fried said that the mandate was a product of Congress’ reluctance to institute socialized medicine or a government option.

“It is ironic that an effort to keep health insurance in the private sector is seen as an enormous assault on our liberties,” Fried said. Tribe also noted that if a state such as Massachusetts has the power to impose a health insurance mandate, then it is hard to argue that the federal government doing the same thing would violate personal liberty.

Not surprisingly, the panelists also had different predictions on a possible Supreme Court decision on the mandate. According to Tribe, the Court has consistently upheld Congress’ right to regulate interstate commerce, including people’s decisions that have broad economic consequences, such as not buying health insurance. But Barnett said the Court would not have to striking down any other law in order to overturn the mandate and would “draw the line at regulating inactivity.”

A year and a day after President Obama ’91 made the Patient Protection and Affordable Care Act official, three legal scholars took up the question of whether or not it violates the Constitution.

“This is a moment when public policy and constitutional law come together.”

MARTHA MINOW