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The new age of surveillance is here—and it’s about so many more things than just your smartphone.

Fighting for access to drugs for people with Hepatitis C.

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FROM THE DEAN | Where Theory Meets Practice

Harvard Law School is becoming a “laboratory”—or, more accurately, a collection of laboratories—where theory meets practice. For example, we now have the Food Law Lab, the Systemic Justice Lab, the Global Anticorruption Lab, the Labor & Employment Lab, and the Library Innovation Lab. In these initiatives, students, staff, and faculty work concretely on new solutions to ongoing challenges. Similarly, Clinical Law Professor Robert Greenwald leads the School’s Center for Health Law and Policy Innovation in practical research, policy construction, litigation, and public education, as illustrated in a story on Page 28. This spring, HLS’s Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics reviewed its initial 10 years of pathbreaking practical work and sketched new ideas for what comes next. The Berkman Center for Internet & Society is leading intensive hands-on efforts to advance knowledge, creativity, and a healthy exchange of digital information—and to navigate tensions between privacy and security. (See the related story on Page 38 exploring findings of a Berkman Center report on encryption and cybersecurity.)

The School offers our students chances to undertake legal work and to develop proposals for change in the world—and also chances to bring about change right here at HLS. Earlier this year, some students pressed for reconsideration of the HLS shield. Adopted by the Harvard Corporation in 1937, it was based on the family crest of Isaac Royall Jr., the son of an Antiguan slaveholder. Royall’s bequest helped to endow the first professorship of law at Harvard. I created a committee to examine the issue and recruited faculty and alumni to serve alongside student representatives and staff, selected by their own communities. The Harvard Corporation accepted the committee’s recommendation; you can read more about the process, and the report and separate opinions, in a story on Page 16. Notably, The Harvard Crimson, while disagreeing with the result, heralded the process: “The experience afforded over 1,000 people a chance to participate in deliberations over our symbol and framed discussions that will continue as we review our past and rededicate our future.”

Our past and our future require continuing focus on contemporary issues of racial justice, including in the area of criminal justice reform. An initiative of the Harvard Negotiation & Mediation Clinic designs better practices bridging police and communities (see the story on Page 22). Through our programs of research, service, and instruction in criminal justice—including the Criminal Justice Program of Study, Research and Advocacy; the Criminal Justice Institute clinical program; the U.S. Attorney Clinic; the Charles Hamilton Houston Institute for Race and Justice; and the Trial Advocacy Workshop—more and more of our talented faculty, staff, and students are engaged in vital efforts. Alumnus John Cranley ’99, mayor of Cincinnati, has demonstrated the benefits of a police-community accord for over a decade, as described in a story on Page 45. For more than half a century, Professor Phil Heymann ’60 has infused HLS with the commitment to push for smarter policing and better approaches to cybersecurity and terrorism while modeling a life of public service and inspiring generations of students. We celebrate Phil’s decades of work (see Page 12) as he retires from teaching to spend more time writing, advising and reforming.

We also mark the legacy and contributions of Justice Antonin Scalia ’60, one of the most significant jurists in United States history, with reflections of those who knew and worked with him, on Page 24. And the nomination of Judge Merrick Garland ’77 to serve as Justice Scalia’s successor stands as a superb recognition of his distinguished accomplishments and powerful talents (see Page 48).

As this edition went to press, we learned of the passing at age 98 of HLS Professor Emeritus Victor Brudney, whose career spanned between the New Deal (when he was a young lawyer) and the beginning of the 21st century, when he retired after teaching many generations of students. His influential teaching and scholarship inquired into fundamental fairness, equality, and freedom in the worlds of corporate law and finance. Our next issue will include a full tribute.
When it comes to courtroom argumentation, humans still have the upper hand

I AM A FORMER LAWYER with trial court experience, and I have some comments about the “Laws of Adaptation” article in the fall issue. It warns that the legal profession “as we’ve known it” is doomed unless it adapts. Adapts to what?

One of the things that the author of this article believes poses a threat to lawyering is artificial intelligence as embodied in computers able to select choices after sorting through large amounts of complex information. The article mentions IBM’s Watson project in this regard.

There are many tasks that lawyers perform, and many of them lend themselves to computerization. However, there is at least one function that lawyers perform that I doubt will ever be wholly replaced by computers exercising artificial intelligence, and that is arguing disputed facts and their disputed consequences in ambiguous circumstances and the ability to shape them in a way that persuades human beings. Unlike winning at a game of chess, whose rules are fixed and lead to predictable outcomes if followed, skillful argumentation by a lawyer, shaped to appeal to a particular audience, is not an art that can be replicated by programming.

Barton L. Ingraham ’57 Santa Fe, New Mexico

A punch in the stomach

THE HAGIOGRAPHIC PHOTO of Justice Roberts on the cover of the Fall 2015 Bulletin felt like a punch in the stomach. Roberts has been as much, or more, a radically conservative judicial activist as any justice in the Court’s history. Under his tenure, and with his fifth vote, the Court has about ruined our Constitution and what Lincoln called God’s “almost chosen country.” He was appointed because he was a conservative political hack—the effusiveness of the praise for his intellect is as florid as it is unsupported by any objective evidence—and has led the Court as if he is the personal assistant for the Koch brothers. He has been as wrong on the important issues of the last decade as often as another HLS graduate, President Obama, has been right. The problem is, his vote gets to say who wins. And the country has lost. Time and again.

Dominic Surprenant ’85
Los Angeles

Roberts tribute is uplifting

Your article on Chief Justice Roberts is both insightful and uplifting. At Harvard Law, we are very proud of our Dean.

Cory Dunham ’51
Greenwich, Connecticut

Don’t tarnish his reputation

I read with interest your premature “eulogy” of the Chief Justice. I didn’t expect your piece to be balanced but hardly anticipated a total whitewash of a very controversial jurist, at least in regions not bounded by the East Coast of the USA.

Not wishing to take up too much space, I will restrict my focus to the first (2012) Obamacare case. Mr. Roberts clearly believed that single-payer health insurance was the way to go and worked backward to reach the desired result. Crucial to his reasons was the imaginative finding that the statutory word “penalty” didn’t mean what it says but can connote a “tax” which government can impose without constitutional constraint. Never mind that the proposed levy (on folks who don’t obtain health insurance) was, by any reasonable reading, a penalty; never mind that Obama, himself, had publicly hotly denied that it was a tax; never mind that seizing on this argument was obviously a “way out” for someone who had already made up his mind.

John Roberts is a good judge who makes mistakes, like all judges; don’t tarnish his reputation by making him out to be a Judicial Saint!

Michael Flavell, Q.C. LL.M. ’65
Ottawa, Ontario, Canada

Tribute ignores Roberts’ impact on the laws of this nation

BY FOCUSING ON JUSTICE Roberts’ “mastery and deft management,” the article manages to ignore his major impact on the substantive law of this nation. Years from now, I doubt that he will be remembered for his “poetic” annual reports or the “impartiality” of his opinions. Rather I suspect he will be remembered for a number of very controversial decisions. These include allowing unlimited “independent” spending on federal elections (Citizens United) and ending federal pre-clearance of election rules in states with a history of discriminatory election rules (Shelby County).

Professor Minow’s one-sided “tribute” is, unfortunately, just that.

Robert H. Sand ’61
Brooklyn, New York

The acid test for a manager

I WAS STRUCK BY DEAN Martha Minow’s perceptive analysis of John Roberts as a manager. There is a big difference between thinking of yourself as primus inter pares and recognizing that you are a manager. The piece demonstrates how John Roberts understands that difference. “Manager” is a very unglamorous title compared with “leader,” but it better expresses the prodding, the maneuvering, and the stepping up to make a difficult decision that is the daily work of a leader. The acid test for a manager is whether he or she leaves the institution stronger. Based on the evidence in your tribute, my guess is that the verdict on Roberts will be, “Yes.” In today’s polarized world, that’s remarkable. When looking at those whose terms overlapped with Roberts’, could we say the same of today’s congressional leadership? Clearly not. Or of the president’s? The jury is out and history will decide.

I appreciate this very thoughtful piece and Dean Minow’s own remarkable stewardship of a great institution.

Gary T. Johnson ’77
Chicago
According to HLS Professor Hal Scott, nearly eight years after the 2008 crisis, the U.S. financial system is inadequately protected and more at risk than ever. He sounds the alarm in a new book, “Connectedness and Contagion: Protecting the Financial System from Panics,” forthcoming early this summer from MIT Press.

Scott sets out to debunk the prevailing belief that the 2008 crisis was caused by “connectedness,” the overexposure of giant financial institutions to one another’s insolvency. He recalls the tangible fear after Lehman Brothers filed for bankruptcy in September 2008. Toxic credit default swaps had brought AIG to the brink, he says, “and the idea was if AIG failed, too, it would default on contracts, then Goldman Sachs would collapse in turn, leading to a chain of failures. But the data doesn’t pan out that analysis.”

In fact, connectedness was not the issue at all, he says. “The real problem was contagion,” which exploded after Lehman collapsed and the run on money market funds began. Scott defines contagion as “the indiscriminate run by short-term creditors of financial institutions that can ruin otherwise solvent institutions” due to the fire sale of assets to fund the flood of withdrawals.

Contagion remains a serious threat, according to Scott, because our financial system depends on what he estimates to be $7.4 trillion to $8.2 trillion of “runnable” and uninsured short-term liabilities, 60 percent of which are held by nonbanks—hedge funds, insurance companies, broker dealers, and money market funds.

In September 2008, presidential candidates Barack Obama ’91 and John McCain met with President George Bush and congressional leaders about the Federal Reserve and Treasury’s proposed $700 billion intervention known as TARP (Troubled Asset Relief Program). Enacted on Oct. 3, TARP was immediately dubbed the “Wall Street
bailout.” Democrats paid heavily in the November 2010 elections for having passed it.

With the 2016 election approaching, almost every presidential candidate still talks about the bailout “as a bad thing,” Scott says. “But when crisis hits, people want to get their money out, so there is a run on banks and other financial firms, contagion erupts, and unless those firms get immediate help, they will go bankrupt and ultimately the entire economy will collapse.”

Contagion is the reason the Federal Reserve was created in the first place, in 1913, Scott says. “We had a series of panics in the 19th century that caused recessions, and then the Panic of 1907, when J.P. Morgan saved the day” by making massive personal investments and urging his counterparts to do the same, to fend off runs. Following that, “the general feeling was, ’We can’t put the financial system’s fate in the hands of one person,’ so the Federal Reserve was formed.”

In the 2008 crisis, the Fed lent massively to banks and nonbanks alike to slow the run on assets. The Treasury used the Exchange Stabilization Fund, originally created in the 1980s to address exchange rate problems for emerging countries, to guarantee the money market funds in crisis. To further calm the waters, the FDIC raised deposit insurance from $100,000 to $250,000, and to an unlimited amount on transaction accounts.

The Dodd-Frank Act was a major response to the bailout, Scott says, but it was based on the incorrect connectedness diagnosis. “The general sentiment was, ‘What the Fed did was bad; we need to strip powers.’” He describes the act as “two wings and a prayer—the wings are capital and liquidity, and the prayer is resolution [measures].” He continues: “There are good reasons to require [banks to have] more capital, but it’s all gone in a heartbeat if there is a panic. And if you claim ‘we can resolve troubled institutions effectively,’ many people will still pull out funds. None of this solves contagion.”

Since 2006, Scott has been the director of the Committee on Capital Markets Regulation. The group’s members represent all elements of U.S. financial institutions, from big banks and leading hedge funds to accountants, lawyers, and academicians. “We’re not just a think tank: We formulate policy positions and try to get Congress and regulators to consider our positions,” Scott says. In 2008, CCMR members recognized contagion was the real danger, he adds. Today they observe the waning of the Fed’s powers with alarm.

“The political environment [in Washington] remains intensely hostile to the Fed’s role as lender of last resort. If we have another financial crisis, we are toast,” Scott says. “Very few people, especially elected officials, will speak to this.”

And so he is doing exactly that. Forensic in approach, “Connectedness and Contagion” lays the groundwork for what Scott hopes will happen when the public and politicians stop fixating on “bailout”: reinstatement of contagion-fighting weapons.

This isn’t about just the U.S., he adds. “This is about the dollar, the world’s reserve currency. We now have the weakest of the five most powerful central banks. The dollar and U.S. are at the pinnacle of the economic system of the world, but could collapse because we don’t have a strong enough lender of last resort. This is a global issue.” —JULIA COLLINS
Inside the World of Jefferson

Annette Gordon-Reed looks further at the founder with ‘many different sides to him’

Winner of the Pulitzer Prize in History for her book “The Hemingses of Monticello: An American Family,” Annette Gordon-Reed ’84 first read a biography of Thomas Jefferson as a child—and hasn’t stopped learning and writing about him. The Harvard Law professor, who is also on the faculty at the university and the Radcliffe Institute, spoke to the Bulletin about her latest book, “Most Blessed of the Patriarchs: Thomas Jefferson and the Empire of the Imagination” (W. W. Norton, 2016), co-written with University of Virginia historian Peter S. Onuf. Gordon-Reed discussed her own fascination with and (measured) admiration for the third U.S. president—and the significance of teaching history at the law school.

Why have you devoted so much of your work to Jefferson?
He had his hands in so many aspects of American life. If you’re interested in politics, if you’re interested in the question of race in America, if you’re interested in gender, you can talk about that.

Gordon-Reed says she sees Jefferson’s life and his stance toward slavery as an opportunity to “interrogate ourselves—to think about things that we know are problems but we don’t do anything about.”
through him. So there are just so many things that he opens up. And I was interested in that era, thinking about people who decided to found a country and how that came about. There’s not any other member of the founding generation who has so many different sides to him.

Your latest book is about how Jefferson saw himself. What did you do to try to get inside his mind?

One of the things we had to do was step outside the construction of Jefferson that has been [created] by historians over the years. There’s sort of a template for how you talk about Jefferson—and it’s the paradox. He says this and he does another thing. As we say in the preface, where it is at all reasonable, we take him at his word. We don’t start from the proposition that this is a lying hypocrite who is trying to snow us. What if he actually did believe that the enlightenment meant that things were going to get better and better? Now, we laugh at that because most of us don’t think that’s true, but what if he really did believe that, and, if someone had that sense, how would they solve problems? We tried to take him seriously. I anticipate there’s going to be criticism about that because there’s such a paint-by-numbers way of seeing Jefferson.

EXCERPT

“Although it is impossible to know what he would have done had he lived a few more years, Jefferson—even at his most dispirited moments—never made the pivot to the nascent proslavery ideology that would have rationalized his life in an instant; he would be deemed understandable and consistent had he been a slaveholder who proclaimed that slavery was a moral institution. Instead, he lived a paradox, pushing the resolution of the problem off into a future in which the members of his community (whites, that is) became ready for a ‘revolution in public opinion’...

FROM “MOST BLESSED OF THE PATRIARCHS”

People do always focus on the slavery issue. How did Jefferson reconcile his anti-slavery views with the fact that he owned slaves?

I think he rationalized it the way human beings rationalize things when they have an intellectual understanding about something and have an emotional attachment to the thing they were supposed to get rid of. What’s interesting about this is that his life is a way to interrogate ourselves—to think about things that we know are problems but we don’t do anything about. Now slavery looms large for us because it’s so outside our understanding of how people could live. But he was born into this. It’s not an excuse, but it is a way to say that he’s different than we are. So the question becomes: How did someone who came up in that system make the decision that it’s wrong? Most people didn’t. Jefferson is along a continuum of someone who grows up in that society, understands that slavery is wrong, thinks of it as one of those things that the progressive enlightenment is going to get rid of, is naive about that—but that’s what he thinks.

What was Jefferson’s vision of an ideal republic?

The ideal republic would be a place where the people would be in charge. “The people” meaning white people, clearly. He would think of men representing their wives and children participating in democracy. He really liked New England and the town meeting, so he thought there would be men involved in local government and from there state government and then out to national government. The idea is that everyone should like politics as much as he did. He thought that once we got rid of the monarchy and set up a republican society, citizens would naturally want to participate.

You wrote that Jefferson wanted to be loved or at least liked. Do you like him?

Sometimes yes and sometimes no. Overall I think I do. One saving grace for him is that for all of his foibles, I don’t sense malice. Some people you read about and you think, This is a really nasty person. He could have been a clueless person or somebody who was so myopic or had such tunnel vision that he didn’t recognize what’s going on. But I don’t think he was a mean and nasty person. I sense a deeply sensitive person who was very passionate about things but was closed off in a way. In general, I certainly love him as a topic. There’s always something there. And this could be hubris, but I think I get him. I do think I understand him.

As a historian who is African-American, do you feel as if you bring a different perspective to Jefferson?

I think I do pay more attention to how he was dealing with enslaved people. It would never occur to me not to notice that. The bigger thing is I have the sense that many people who write about Jefferson identify with him. That would be a bigger field for me to cross. I don’t have the stake in him that I think some people who write about him do. Another question is, How am I seen? And I think there’s some difficulty in people accepting that I can actually be a Jefferson scholar.

You teach American legal history at HLS and are an advising faculty member for the HLS Program of Study in Law and History. How does it benefit law students to learn about history?

I think it provides the context for how laws are made. Law and society go together. You can’t just start talking about doctrine without thinking about the world in which these doctrines were created. I think it gives you a richer and fuller understanding of the way law operates.

—LEWIS I. RICE
“A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy,” by David Kennedy ’80 (Princeton). Kennedy routinely asks his students a question he poses in his book: Is the world today like it was in 1648, when a long war ended and an era of reinvention began? Or is it more like 1945, when the international order seemed to need reforming? For today’s generation, to remake the world will be just as difficult as it was in 1648, he contends. He points to widespread uncertainty and ambivalence about the world and explores “the role of expertise and professional practice in the routine conflicts through which global political and economic life takes shape.” That analysis includes the role of law in struggle, such as legal expertise in war.

“FDA in the 21st Century: The Challenges of Regulating Drugs and New Technologies,” edited by Holly Fernandez Lynch and I. Glenn Cohen ’03 (Columbia). Stemming from a conference at Harvard Law in 2013, the book features contributors with expertise in law, bioethics, and public health who address how the Food and Drug Administration should best approach drug regulation now and into the future. The essays, edited by the executive director (Lynch) and faculty director (Cohen) of HLS’s Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics, cover major developments that have changed how the FDA regulates; how the agency encourages transparency; First Amendment issues; access to drugs; and evolving issues in drug-safety communication. These issues, the editors write, lie “at the heart of our health and health care.”

“Unstable Constitutionalism: Law and Politics in South Asia,” edited by Mark Tushnet and Madhav Khosla (Cambridge). The volume draws attention to a region that has been underrepresented in studies of comparative constitutional law, according to the editors (Tushnet, an HLS professor who has written widely in that field, and Khosla, a Harvard Ph.D. candidate). The book’s title refers to a phenomenon that links many countries in the region, they say: Participants in national politics are committed to the idea of constitutionalism but may not agree on a stable institutional structure for it that would be appropriate for their respective nations.

“The World According to Star Wars” (Dey Street/Harper Collins) and “Constitutional Personae” (Oxford), by Cass Sunstein ’78. In one of his new books, the author explores a world of heroes and soldiers … the world of the Constitution. In “Constitutional Personae,” he theorizes that judges approach constitutional law through one of four distinct personae. Heroes are “big and bold,” going against existing law with transformative decisions that may conform to their vision of a utopian society. Soldiers follow orders, deferring to the judgment of the political process. Minimalists prefer small, cautious steps, while mutes prefer not to address large constitutional issues. Sunstein prefers what he calls “Burkean minimalism,” favoring small steps but requiring reasons and not merely accepting long-standing practices.

As powerful as the Constitution is, it’s hard to compete with Star Wars. After all, Sunstein writes in another new book, “In all of human history, there’s never been a phenomenon” like it. It’s a force to be reckoned with: The franchise unifies people and connects generations, considers issues of good and evil, heroes and villains, republics, empires, and rebellions. It can even tell us about constitutional law—not in content, but “in terms of how it gets created, and the kinds of freedoms and constraints judges have.” Constitutional law has a lot of dramatic and unexpected moments that build on an existing narrative, he notes, not unlike when Darth Vader says to Luke, “I am your father.”
The spark that led to the launch of a new enterprise dedicated to social change and justice ignited in a moment of “bitter complaint,” recalls Alan Jenkins ’89. The year was 2000. Jenkins was deeply unhappy about the nation’s political affairs in the aftermath of the controversial U.S. Supreme Court decision that settled the presidential election.

Jenkins, who in January was a lecturer at HLS, recalls “be-moaning the state of inequity in the country and [recognizing] that more was needed.” It was a surprisingly pessimistic attitude for the then director of human rights at the Ford Foundation, who managed over $50 million in grant-making annually.

Since graduating from Harvard College in 1985 and then getting his law degree, Jenkins had been on a career fast track. He clerked for U.S. Supreme Court Justice Harry A. Blackmun ’32 and U.S. District Court Judge Robert L. Carter. He was the associate counsel to the NAACP Legal Defense and Educational Fund and served as assistant to the U.S. solicitor general—appearing several times before the Supreme Court.

At the same time, Jenkins felt frustrated about the forces of injustice and inequality he saw around him. Campaigns for reform or economic change were met with distrust by a fearful public. The world was awash in media, but the robust journal-

Seizing the Opportunity

Alan Jenkins’ agenda for social change starts with communication

Backstory on a change agent who knows the importance of stories
ism of the past seemed to have disappeared. He thought of the moment when Dr. Martin Luther King Jr. crossed the bridge in Selma, Alabama, and all three networks cut to broadcast the images of police beating back protesters. “We no longer have that mass audience; the closest is the Super Bowl,” he says.

“What I saw, over and over again, was that something was missing, something related to communications, culture, and connection,” he says. “Part of the role of the modern lawyer and advocate is to be an effective communicator.”

Change agents, he decided, needed tools to get out their messages to win hearts and minds. So Jenkins went back to school and received his master’s degree in media studies from New School University in 2005. Ten years ago he co-founded and became the executive director of The Opportunity Agenda, a communications, research, and policy organization dedicated to building the national will to expand opportunity for all.

It’s not as if the world needed yet another nonprofit, he admits, but he envisioned a resource for social justice advocates and grass-roots organizers to obtain the same tools and training of well-funded lobbyists and corporations. “I think I was born and raised to do this,” he says.

Jenkins grew up on Long Island, the son of two teachers who were active in the civil rights movement. His mother’s parents emigrated from the Bahamas; his father’s parents moved from the South to the North. “Both families left home in search of freedom and opportunity,” Jenkins says. “There was no question that I would be working as best I could to make the country better. I just didn’t know how I would do it.”

As a Harvard undergraduate, he considered becoming a civil rights lawyer, a filmmaker or a social psychologist. Law won.

At HLS, he impressed Professor Charles Ogletree Jr. ’78, now director of the HLS Charles Hamilton Houston Institute for Race and Justice. “Alan is the type of mentee that makes me proud to teach,” Ogletree recalls.

Although Jenkins went on to a distinguished legal career, he discovered there was still some necessary expertise he lacked. At Harvard, “I learned one method of communications—the language of the law,” he says. “But as a civil rights lawyer, I needed to be able to go on television to promote my clients’ interests. I needed to be able to speak to parishioners at a 100-year-old church. I needed to be able to move policymakers. Those were not skills I had learned here.”

Those are skills now promoted by The Opportunity Agenda. To give today’s Harvard students a taste of these techniques, Jenkins returned to campus in January 2016 to teach Communications, Law and Social Change. (See opposite page.)

The bitterness he felt in 2000 has been swept away. “This is a very exciting time to be in the world of social change,” says Jenkins, a New Jersey resident and father of two teenagers. “It poses great opportunities and also great challenges to those of us with law degrees to be of service to that change.

“Had you asked me in law school if I would be running an organization that combines communications, culture, law and policy, I would have said, ‘A what?’”

—STEPHANIE SCHOROW
Taking Hold of the Narrative

Students look at communications skills for lawyers outside the courtroom

STUDENTS IN THE HARVARD LAW School class Communications, Law and Social Change have just watched a Ken Burns documentary on the 1990 trial of five black and Latino juveniles convicted in New York of the beating and rape of a female jogger in Central Park. Lecturer on Law Alan Jenkins ’89 wants to know how they would retry the case—not at trial but in the court of public perception.

“Is there a different way this story could have been told?” he asks the class. The New York media depicted the defendants as a kind of wolf pack bent on “wilding.” “Once a social narrative is set,” says Jenkins, “it’s very hard to discard—to get at the facts.” Could the defense have created a different narrative for their clients? The five were eventually exonerated after spending between six and 13 years in prison.

“Lawyers could have shown the defendants as children. They played video games and basketball. They were babies,” says Elisabeth Ryan, a student from the Harvard T.H. Chan School of Public Health enrolled in the law school class. Other students say attorneys might have emphasized how police coerced confessions.

But, Jenkins explains, lawyers often have to walk a fine line between generating helpful PR for their clients and staying in the confines of what they are permitted to do under rules of professional conduct. Defense attorneys, for example, are required to keep client information confidential, but sometimes such information could show their client in a more positive light.

“Just because you’re a lawyer doesn’t mean the First Amendment doesn’t apply to you. In fact, outside the court you have greater First Amendment rights than inside,” Jenkins says.

Carolina Santana Sabbagh LL.M. ’16 notes the prosecution seemed bent on getting a conviction, no matter what the facts were. “It was as if there were no uncertainty of the culpability of the accused,” she says.

Yet, as Jenkins says, prosecutors are “officers of the court.” They should be seeking the truth, not necessarily convictions.

He challenges the class: Can they as defense lawyers respond to prosecution statements made outside the courtroom that put clients in a bad light? Several students jump in to explain the “right of reply” exception.

Breaking into groups, the students delve deep into communications strategy for the so-called Central Park Five. “We have to show that this was a rush to judgment,” says Kyle Strickland ’16. But it’s not just a matter of condemning police: “If you criticize law enforcement too much, [people] will not listen to what you say,” says Rebecca Copcutt LL.M. ’16.

As the students confer, Jenkins muses, “This is a course I wish someone had taught me while I was in law school rather than my having to learn it gradually over 20 years of practice.” —S.S.
Wise Promoter of Accountable Government

For more than half a century, Phil Heymann has served the nation—and Harvard Law School—with distinction | BY ROBERT CLARK ’72

PHILIP B. HEYMANN ’60 will retire in June 2016 after an extraordinary career in government and as an HLS professor. This transition invokes fond memories. As a 1L student who took Phil’s criminal law course in 1969, I remember well his long black sideburns and his 1960s vibe. I cannot forget an exchange in which we argued about consequentialist versus retributive approaches to punishment, or how much I admired his obvious practical experience and deep concern for getting policy decisions right. Over our many years as colleagues, I came to appreciate a deeply unifying theme that radiates from his teaching and scholarship—the search for accountable yet effective government power to control criminal behavior and terrorism.

After graduating from law school, Phil clerked for Supreme Court Justice John Harlan and then began a long series of positions in the U.S. government. He served at high levels in both the State and Justice departments during the Kennedy, Johnson, Carter, and Clinton administrations. He was assistant U.S. attorney general in charge of the Justice Department’s Criminal Division (1978-1981) and assistant to the solicitor general, acting administrator of the State Department’s Bureau of Security and Consular Affairs, deputy assistant secretary of state for the Bureau of International Organizations, executive assistant to the undersecretary of state, and deputy U.S. attorney general (1993-1994). As my 1L memory...
suggests, he took time off to be a visiting lecturer at HLS, and was soon afterward awarded tenure. Over the years he often taught criminal law and procedure, but eventually he shifted more time to the problem of terrorism.

Phil’s impressive scholarship illustrates his ongoing passion for making government responsible yet effective. He wrote or edited 10 books and numerous articles. Some articles, such as a 1987 piece in Public Interest and a 1996 article in the Fordham International Law Journal, are about the general problem of controlling corruption, including within the U.S. Others show great knowledge about similar problems in a wide range of settings, such as Guatemala, Peru, Northern Ireland, the Palestinian Authority, South Africa and Russia.

His scholarship also searches intently for optimal drug control policies and the best ways for police officers to interact with community policing efforts. And the book of which he is rightly quite proud, “The Politics of Public Management” (1987), offers great insight to political appointees who wish to do their jobs well while also coping with pressures from surrounding political forces.

But his most highly acclaimed contributions have been about good policy responses to terrorism. For example, the 2005 book he co-wrote with Juliette Kayyem ‘95, “Protecting Liberty in an Age of Terror,” provides a legal framework for policymakers faced with decisions on coercive interrogation, detention, electronic surveillance, targeted killing, racial profiling and related issues. Jeffrey Smith, former general counsel of the CIA, said it “should be read by the President and Congress, who should then move quickly to adopt as many of its suggestions as possible.” Phil’s prior book, “Terrorism, Freedom, and Security” (2003), led Rand Beers, former special assistant to the president and senior director for combating terrorism, to describe Phil as “one of the leading thinkers in the world on the subject of terrorism.”

Even earlier was “Terrorism and America: A Commonsense Strategy for a Democratic Society” (2000); Ariel Merari, founder of Israel’s Hostage Negotiations and Crisis Management Unit, called it “by far the best treatise on coping with terrorism.” His contributions kept coming, as in the 2010 book he co-wrote with Professor Gabriella Blum LL.M. ‘01 S.J.D. ‘03: “Laws, Outlaws, and Terrorists.” As these books and his newspaper op-eds about “authorized” torture of suspects indicate, Phil has been unrelentingly concerned about preserving humanitarian values, even as we struggle to deal effectively with terrorism.

Phil has taught, and strongly influenced with his wise policy analyses, thousands of HLS students. As a colleague, he taught and influenced me, mainly during innumerable lunchtable conversations. During my 14 years as dean, I was also inspired by his consistent behavior as a good “faculty citizen”: He was always willing to teach important basic courses, serve on key committees, attend faculty meetings and participate in debates in a thoughtful rather than polemical way. I was a tough grader but gave him an A+ on the citizenship dimension!

Throughout his long career, Phil has shown an unfailing commitment to the task of understanding how best to keep government and its officials accountable to fundamental social values, while nevertheless giving them power and showing them ways to achieve legitimate goals. We colleagues all hope he has a long and happy retirement, stays connected to the school, and inspires a new generation to follow his path.
Moving Pictures

Students explore the power of making arguments through film

“The emotional experience ... was the most difficult [part],” said Sam Koplewicz ’16 about shooting a documentary on children arriving alone by boat in Greece. When he first arrived on the island of Lesbos, he climbed up to a vantage point where he could make out Turkey across the water and see the boats coming in. “At some point,” he recalled, “I just put my camera down and was doing the work of the volunteers. You can’t really help it.”

In November, Koplewicz traveled to Europe to document the conditions faced by the multitudes of refugees trying to pass through Greek registration points and refugee camps. He focused on unaccompanied minors, “these children sent to find refuge alone.”

Since his 2L year, Koplewicz has been serving as president of the Harvard Law Documentary Studio, a student organization dedicated, he said, to bringing documentaries and the issues that they raise to Harvard Law School’s campus and providing an opportunity for students to tell stories that matter to them through a medium they may not have tried.

His interest in film began as a teenager, about the same time as his interest in law, and he has been exploring connections between the two ever since. “The practice of law and legal institutions tend to reduce civil rights and human rights violations into words—often arcane legal words,” he said. “I think film moves us and interacts with us in a way that writing can’t.” He hopes to incorporate video storytelling into a career in advocacy, taking inspiration from media-savvy organizations such as Human Rights Watch and short-form informational videos such as those being produced by AJ+, an offshoot of Al Jazeera.

Koplewicz first became attuned to the issues surrounding unaccompanied minors after spending a year in Croatia on a Fulbright scholarship before entering law school. As the plight of Middle Eastern refugees grew more prominent in the media, he was compelled to explore the topic through video.

Traveling by himself with a camera and a sound recorder, Koplewicz visited Moria, the primary camp on the island of Lesbos, where all incoming refugees must register. There he witnessed the detention facilities where unaccompanied minors were being held for an...
average of two weeks. He spoke through a barbed-wire fence with one young boy who claimed he had slept and eaten little in 13 days. “They’re being kept in what looks like a prison,” said Koplewicz. “There’s nobody there with the appropriate training.” He returned with footage and interviews from refugee camps and registration points in Athens and Lesbos and quickly pieced together a film in the hopes of raising awareness about the situation.

Doc Studio participants are producing six films this year. “The filmmakers come at it from a lot of different places,” said Koplewicz. “They’re good storytellers. They understand policy issues. They understand how to present an argument to an audience.”

Andrea Clay ’16 is working on a documentary about the development and use of the Socratic method in legal education. She has interviewed peers about their experience being called during their 1L year.

“It’s really hard for people to get in front of a camera and express that they felt inadequate, or confused, or stupid,” said Clay. She found herself “straddling that line” between wanting to make her peers feel comfortable speaking and reminding them that what they said would be publicly viewed.

Clay is also exploring the pedagogical value of alternative teaching methods—a hot topic on campus,” she said. “I think it’s really helpful to legal professionals, especially law professors, to see how some of their colleagues are doing things differently.”

With experience as a K-12 classroom teacher, Clay intends to use her law degree to do child advocacy work within the education system. She cited the New Media Advocacy Project—found ed by Adam Stofsky ’04—as an inspirational example of how film is used meaningfully for advocacy and social justice work.

Other topics addressed by this year’s student filmmakers include gentrification in Boston, the role of religion in shaping individuals and the experience of an Ethiopian political refugee. The films were screened this spring at the Harvard Film Archive in the Carpenter Center for the Visual Arts.

“Making their own films gives students the resources to learn about media advocacy in a practical, hands-on way,” said Rebecca Richman Cohen ’07, a filmmaker and HLS lecturer who, along with Jeannie Suk ’02, acts as an adviser and mentor to the Doc Studio participants. Cohen teaches courses in digital storytelling and documentary film at HLS, and believes that young advocates must be comfortable communicating across multiple media platforms in their legal work. “The tools are so inexpensive and powerful,” she said, referring to cameras, smartphones and other ubiquitous video technologies. “Video lets lawyers bring clients’ voices directly to policymakers, judges, and mainstream media … [I]t can expose corruption and law violations … and enhance public understanding of the law.”

In addition to helping law students make documentaries, the Doc Studio organizes events on campus, bringing guest speakers and hosting screenings and discussions with filmmakers. This spring, it launched a new program in partnership with a high school in Lawrence, Massachusetts. Ninth-grade biology students are learning the fundamentals of documentary storytelling and creating a brief video illustrating a public-health issue in their community.

—LORIN GRANGER

### RETROSPECTIVE

**A Starring Role**

HLS event explores the story behind the story of the alum portrayed in the Steven Spielberg film

In last year’s Academy Award-nominated film “Bridge of Spies,” Tom Hanks plays a lawyer who defends an accused Soviet spy in the U.S. The Hanks character appears to be dumbfounded that he has been asked to take on such an assignment. “I’m an insurance lawyer,” he says.

The real lawyer whom Hanks portrays, James B. Donovan ’40, was that—and more. His career included stints as general counsel of the Office of Strategic Services and assistant prosecutor at the principal Nuremberg trial—and negotiating a prisoner release with Fidel Castro, then the new leader of Cuba. The character depicted as an everyman in the film was celebrated as an extraordinary man earlier this year when the HLS Program on Negotiation hosted a film screening and a discussion, moderated by Dean Martha Minow, featuring Donovan’s granddaughter Beth Amorosi and negotiation expert and HLS Professor Michael Wheeler L.L.M. ’74.

The discussion explored how Donovan negotiated a swap of his convicted client, Rudolf Abel, and two Americans captured by the Soviet Union.

In his introduction, President John F. Kennedy thanked James B. Donovan ’40 for his help negotiating the prisoner swap.

“He was a superb lawyer,” said Minow. “He was highly skilled, and he had a sense of public mission that is manifested by how he spent his life.”
ON MARCH 14, THE HARVARD Corporation voted to retire the Harvard Law School shield, following the recommendation of an HLS committee. The shield is modeled on the family crest of Isaac Royall, whose bequest endowed the first professorship of law at Harvard. Royall was the son of an Antiguan slaveholder.

“The Corporation agrees with your judgment and the recommendation of the committee that the Law School should have the opportunity to retire its existing shield and propose a new one,” wrote Harvard President Drew Faust and Harvard Corporation senior fellow William F. Lee in a March 14 letter to HLS Dean Martha Minow.

They also wrote that with the HLS bicentennial approaching in 2017, “we believe the School should have the opportunity to retire its existing shield and propose a new one,” wrote Harvard President Drew Faust and Harvard Corporation senior fellow William F. Lee in a March 14 letter to HLS Dean Martha Minow.

By early April, the shield, which was modeled on the Royall crest, was removed from sites all over campus.

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but we can choose that for which we stand. Above all, we rededicate ourselves to the hard work of eradicating not just symbols of injustice but injustice itself.”

In 1937, the Harvard Corporation and Radcliffe trustees adopted seals for 27 Harvard academic units, naming the Royall crest, with its three sheaths of wheat, as the HLS shield.

Research by Visiting Professor Daniel Coquillette ’71 for his new history of HLS surfaced the ties between the Royall family and slave labor. In 2007, Janet Halley also explored the topic in the lecture she gave when she became the Royall Professor. Each year, Minow has talked to incoming 1Ls about the Royall legacy, citing slavery as an example of how injustice is sometimes perpetuated through law.

Last October, amidst activism on issues of race and inclusion on campus, a group of Harvard Law School students formed an organization called Royall Must Fall to demand that HLS discontinue using the Royall family crest as its symbol.

In November, Minow appointed a committee of HLS faculty, legal historians, students, alum-
GIVEN THAT 63 PERCENT OF THIS YEAR’S CLASS OF 1Ls had two or more years of work experience before coming to Harvard Law School, it isn’t surprising to learn there’s a former New York City police officer in the mix.

Gene Park ’18 grew up in the Bronx and was always interested in criminal justice. After attending the University of Rochester, he applied to the New York Police Department, graduating from the police academy in 2010. For five years he was assigned to East Harlem and then the South Bronx as an officer in the New York City Housing Authority.

The NYPD is responsible for the public safety of a city of nearly 8.5 million, roughly half of them minorities. Its methods, Park says, have included “broken windows” policing, which is a zero tolerance policy of cracking down on minor crimes to prevent major ones, as well as the “stop-and-frisk” practice of stopping and searching people who are suspected of having committed or planning a crime. Both tactics have been criticized for targeting minorities, and new rules now apply to stop-and-frisk.

“I loved the job inherently. I think most police officers want to do something meaningful. They want to serve the community,” Park says. He found satisfaction whenever he made an arrest to protect someone or successfully “de-escalated” a dangerous situation. What was much harder to accomplish, he says, was connecting on a personal level with the people living on his beat.

He explains that an officer pausing to shoot some hoops with kids on a basketball court could be construed as “wasting job time” by supervisors focused on NYPD’s CompStat system, which tracks complaints, arrests and summons activity citywide, correlating this enforcement data with crime rate changes. Weekly meetings to review results created a pressure throughout the hierarchy, he says. “Everyone is evaluated by the numbers.”

The challenge for individual officers, Park says, was “to determine where the line is between establishing positive relationships with the community” and “bringing in the activity and the numbers that you’re being paid for.”

Complicating matters is the need to be vigilant, even in down time. He interacted every day with gang members and drug dealers. Chaos and violence can break out at any time, he explains, citing the example of two officers who were shot while sitting in their patrol car. A friend from the police academy, Officer Randolph Holder, died in the line of duty last October, pursuing a suspect who turned around and shot him.

“It’s difficult to balance those two mentalities, where you want to be friend, and grow close to the community, yet you’re trying to protect yourself,” Park says. And some cops feel they are doing a thankless job, he adds. “In my five years, I was thanked for my service maybe once or twice.”

He believes “one of the natural parts of being a police officer is having the freedom to decide, to use your
After dropping his backpack into a locker, a 19-year-old headed to the kitchen. Others were working on the computer or just chilling for the evening. A young woman asked for some advice about an issue that had come up during the day.

Meanwhile, a team of Harvard students preparing the evening meal at Y2Y—the new shelter for homeless youth in Harvard Square—needed some advice of their own, on how to make the grilled cheese sandwich that the young man had requested.

“Each night I work at the shelter, my culinary skills are put to the test,” said Jina John ’17, a member of a Harvard Law coalition whose focus is to engage the HLS community around the issue of homelessness. John was quick to add that, culinary skills aside, her shifts at the shelter have helped her become more cognizant of the issues that these 18- to 24-year-olds face.

Y2Y was founded by two recent Harvard College graduates to meet the distinct needs of homeless youth. Central to its mission is the idea that students serve as case managers as well as legal volunteers, helping other people their own age get back on their feet.

Lauren Gabriel ’17 and Brian Klosterboer ’16 (above) prepare the pod-like sleeping areas and review tasks before guests arrive. Harvard Legal Aid Bureau student attorneys Jordan Raymond ’16 (top left) and Awbrey Yost ’16 (bottom left) discuss the legal services HLAB offers to guests.
Since the shelter opened in December, about 150 students per week from Harvard and other local colleges and Harvard graduate schools have volunteered in the renovated space in a church basement.

Among them were student attorneys from the Harvard Legal Aid Bureau, who staffed a help desk three nights per week starting in February. In addition to providing guests with legal referrals to outside agencies, they partnered with Greater Boston Legal Services to help guests request copies of their criminal records and initiate motions to seal those records, said Awbrey Yost ’16, who heads HLAB’s legal services at Y2Y.

Homeless youth move around a lot, she said, which makes it difficult for legal services organizations to reach them. At Y2Y, guests can stay up to 30 days at a time.

In addition to providing legal services, said Yost, “we hang out in the community space where we are available to answer questions or just chat about the day.”

Members of Lambda, HLS’s LGBTQ student group, also came to the shelter weekly, to help guests get state IDs and other identification. “IDs touch every aspect of a person’s life, from getting a job to even staying at a shelter,” said Kristen Bokhan ’17, the project’s head. The ID process is particularly difficult for many LGBTQ youth, she said (who make up about 40 percent of homeless young people). “Often the birth name might not be the name they go by.”

For many HLS volunteers, it’s the small moments that stay with them. Brian Klosterboer ’16 mentioned waking up a guest at 4 a.m. to help him get ready for an early morning job interview. Yost recalled riffing with a guest on a recent Leonardo DiCaprio movie. For Rachel Granetz ’17, volunteering at Y2Y was her favorite part of the week.

Lauren Gabriel ’17, the liaison between the HLS coalition and the shelter, hopes that the tally of these moments will lead law students to think more critically about issues of homelessness in their future roles. “That’s one of the great things about being a student-run organization,” she said. “You feel like you’re taking ownership of a community effort. You feel like you’re part of a movement.” —LINDA GRANT
Q: What happened?
A: This is an anniversary! Seven years ago I walked into the hospital for surgery. A cervical decompression and fusion, it was supposed to help me keep on mountain hiking. In the recovery room, I woke up paralyzed. I won’t walk again. I’m a tetraplegic. It takes me, with my aides, four hours total to get in and then out of bed.

Other effects?
Called “complications.” Better not list them. A short list: infections, hospitals … so more infections, more hospitals …

How has that affected your teaching?
I haven’t missed a scheduled class. I love teaching. I’m lucky.

What about the rest of your work?
Due to the sit-down strike by my hands, it’s pretty hard to write.

What have you learned? Let’s start with life as a disabled person.
I don’t identify as “disabled.” It’s a matter of attitude. The keys for me, I suppose, are patience (something new), a rebellious mindset (something old) and denial (a direct antidote to despair).

You sued. What about that?
A long story. Before, I was skeptical about medical malpractice lawsuits and tended to favor “tort reform”—without knowing anything about it. Then, shortly after my paralysis, three colleagues came to my hospital room and urged me to get a lawyer. I did.

And?
We launched two suits—one against the surgeon, the other against the company that was supposed to “monitor” spinal signals electronically throughout the operation.

FACULTY VIEWPOINTS
Working with Constraints
HLS Professor Richard Parker ’70, a constitutional law scholar and a populist, reflects on a life-changing event seven years out—what it has altered and what it has not
Take the second lawsuit first. It turned out that almost no monitoring was done. There was no doctor observing incoming data in real time; there was no recording of data during most of the procedure; what records existed were, in large part, destroyed; and the employee in immediate charge lied under oath.

You must have won that one. We settled. But the company twice recently had to pay big fines for overcharging Medicare and claimed to be on the verge of bankruptcy. That limited the settlement. The hospital, I understand, went right on doing business with that company.

What about the other suit? After a grinding delay of four and a half years—there’s a special barrier to malpractice suits—we went to trial and we lost. We lost to an insurance company affiliated with Harvard.

Why? I guess the jury bought the argument that the surgery was “a success” and that the outcome—of bankruptcy. That limited the settlement. The hospital, I understand, went right on doing business with that company.

What lessons do you draw? And how do they relate to your thinking about your own field, constitutional law? The threshold question in both contexts is: Whom, if anyone, should we most distrust? There are, I think, three possibilities. Take them in order of ascending significance.

There’s a modern legal tradition of distrusting juries on account of their supposed prejudice, ignorance, susceptibility to emotion, or whatever. The law of evidence—limiting a jury’s access to raw material with which to make a common-sense judgment—is partly based on that distrust.

But distrust supposed to cabin prejudice may itself be rooted in prejudice. And prejudice is not all the same. Some kinds are very bad.

The distrust of juries is a prejudice against ordinary people—against ordinary people as self-governors. In a democracy, that is an especially odious, dangerous prejudice—one that has long infected constitutional law as well.

Who’s next in line then? Lawyers. The plaintiffs’ bar is the butt of the case against malpractice suits. However, that argument is misdirected.

Compare the number of malpractice suits—and the number of successful ones—with estimates of culpable medical “mistakes” (small fractions). The “mistakes” are the problem. It’s not lawyers who make the “mistakes.” And it’s not plaintiffs’ lawyers who cover them up.

In constitutional law, there’s distrust of lawyers, too. Most prominent has been Justice Scalia’s claim that orthodox values in elite law schools, among “tall-building lawyers,” and in the ABA influence his “patri- cian” colleagues. I thrill to his populist argument, but, taken alone, it’s too narrow.

His colleagues often imagine themselves as transcending mere advocates. Often they—sometimes even the justice himself—have acted as though they were our governors, as though they are entitled to rule because they are more enlightened than mere voters. In that attitude, they’re part of a much broader professional class. That is the constitutional danger to democracy now.

So, who most merits our distrust? The wielders of predominant power to do harm. “Predomi- nant” in that they are insulated from criticism and control, especially by the voters.

In constitutional law, ask whether there is such a power. Not because “all power cor- rupts,” but because the exercise of all power produces bad results sometimes, sometimes culpably, and because the instinct of most of us is to hide our “mistakes” and so perpetuate them. Those with predominant power can get away with it.

In a malpractice case, it’s the insurance-hospital-medical complex. Why do we take it for granted that juries shouldn’t be told that an insurance company is on one side? Why in Massa- chusetts are hospitals protected, by statute, from pretty much all liability? Why do we assume that the outcomes—even the existence—of medical “peer reviews” subsequent to a “mistake” should be kept from juries? And even from patients themselves? Another powerful group that does a great deal of good, that is likewise committed, as a group, to doing good, but that makes culpable “mistakes” and often seeks to conceal them, is not so cosseted. I mean the police.

Has this experience jaded you as a law teacher? No. I’m more or less the same person.

I’ve learned about another niche where law is constrained by political and cultural power. Still, everything we do is con- strained by something or other. That shouldn’t stop us from asserting ourselves within those constraints, or from fighting against them. I love legal argument as much as I ever have.

It is a wonderfully stylized sort of politics—even democratic politics.
IN JUST ONE DECADE, Everett, Massachusetts, once a predominantly white city, has become the most racially and ethnically diverse in the commonwealth. Building communication between police officers and local youth is a priority for Chief of the Everett Police Department Steven A. Mazzie, who is white, as are 86 percent of his officers. Last fall he invited a team of HLS students from the Harvard Negotiation & Mediation Clinical Program to Everett for an impartial assessment.

“Our clinic trains students to think about how systems issues contribute to conflict situations,” said Clinical Professor Robert Bordone ’97, director of HNMCP. “By taking a systems approach, we ask: What’s working and what isn’t? What can we do to improve day-to-day interactions, to build trust and connections, to help people gain perspective, and to create systems that promote both peace and justice?”

FIELDWORK

Meeting at Cops’ Corner

Clinical project underscores how ‘every interaction matters’ for Everett police officers and youth

At the invitation of the Everett police chief, Sara Bellin ’17, Jenae Moxie ’16 and Carson Wheel ’16 conducted interviews in the city last fall to find out how the police and youth relate to each other and to make recommendations for improvements.

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Clinical project underscores how ‘every interaction matters’ for Everett police officers and youth
For six weeks, starting last October, HLS students Sara Bellin '17, Jenae Moxie '16, and Carson Wheet '16 led focus groups and one-on-one interviews with youth and police to assess how well police officers and Everett teens relate to each other and to recommend improvements. They also interviewed community group leaders.

“We entrenched ourselves in Everett. We met with people at the playground, at the school, at the YMCA, at the police station, at City Hall,” said Moxie, who handled much of the community outreach.

“Trying to lead a focus group of 10 high school students was pretty challenging,” said Wheet, who was lead facilitator, but many students opened up and shared their experiences. One minority student talked about being detained for shoplifting and how much he appreciated the officer’s kind manner and willingness to give him a break. In contrast, another student said an officer racially profiled her, and she asserted, “All these cops are so racist.” Students talked about being fearful of police, given their power, and one youth said he feels like a statistic. “Students talked about being fearful of police, given their power, and one youth said he feels like a statistic,” said Bellin. She oversaw the research for and writing of the final report, which the team presented to the EPD last December and to a meeting of major city police chiefs in the Boston area in April.

The report emphasizes that “every interaction matters,” because Everett youth tend to generalize one bad interaction into a negative view of the whole EPD, while the police in turn often apply broad generational and cultural preconceptions.

Recent national events, from Ferguson to Baltimore, involving police use of force and fatal shootings involving minority youths have deeply affected Everett youth, the team concluded. They reported that youth and community members feel police officers don’t allow room for young people to make mistakes. At the same time, police officers believe Everett youth generally don’t appreciate the job they do. And both Everett High School students and EPD officers expressed the perception that they are not treated with respect.

Moxie underscored the HLS team’s findings: “We may have good intentions, and the kids have good intentions, but they don’t always turn out that way and can have a negative impact.”

In their report, Bellin, Moxie, and Wheet credited the EPD with “doing a lot of things very well” and concluded that Everett youth want three things above all: transparency, to be heard, and to interact more with officers in social settings.

The report’s top recommendation: “Implement programs that increase continuous, positive, voluntary interactions between police and youth.” Other recommendations included increasing diversity on the force, emphasizing communication skills in hiring, and implementing simple policy changes to EPD practices in approaching Everett youth.

Said Moxie: “Our school resource officers do a good job and have a positive impact,” and the report noted that Everett High School students agree. “But the problem is, they’re a small sampling of the department. They [the HNMCP team] said opportunities to get more police officers interacting with young people would be beneficial. They found the police officers want those positive interactions and young people do as well.”

To that end, Moxie has launched the new Cops’ Corner initiative. Once a week, a pair of EPD officers head to the high school cafeteria and meet with students over lunch, at the Cops’ Corner table, to discuss whatever is on their minds, from movies to sports to criminal justice careers. Mazzie and Officer Jeff Gilmore, who completed a tour as a youth services officer, signed up to be the first pair.

Moxie praised the EPD leadership’s openness: “Their willingness to hear the truth and the whole truth was incredible and refreshing after a year of negative narrative about police receptiveness to change.”

“Putting negotiation theory and tools into practice, to help with what is obviously a prevalent problem in our society, was incredibly rewarding,” said Wheet.

HNMCP was “thrilled to have the Everett project and would love to do more,” said Bordone, and in fact another team is already partnering with the Boston Police Department to create a pilot mediation program.

—JULIA COLLINS
WITH THE PASSING of Justice Antonin Scalia ’60 of the U.S. Supreme Court on Feb. 13 has come an outpouring of remembrances and testaments to his transformative presence during his 30 years on the Court. On Feb. 24, Dean Martha Minow and a panel of Harvard Law School professors, each of whom had a personal or professional connection to the justice, gathered to remember his life and work.

PROFESSOR JOHN F. MANNING ’85
Law Clerk, Justice Antonin Scalia, 1988-1989

“I clerked for Justice Scalia almost 30 years ago, when he was a young man and a fairly new justice. ... What struck me immediately about my new boss was that for him, it was all about the ideas, about mixing it up, about arguing so that you’d come out closer to the truth. Sometimes, he’d have to remind us, ‘Hey, it’s my name that’s going on the opinion.’ And sometimes, that would be followed by, ‘And I’m not a nut.’ But that just underscores how free he made us feel to express ourselves and to disagree with him. ... Justice Scalia was also a natural teacher. He would always tell us that part of what we were entitled to as law clerks was to understand the Court. And so after every conference, he would call all five of us into his office and ask us each to predict case by case and justice by justice how the case had been decided by the Court. It was unspeakably fun, and he was always playful about it. And he’d rewrite our drafts from top to bottom—well, at least he would rewrite mine from top to bottom. And he would always tell us why, and it would help us learn.”

PROFESSOR LAWRENCE LESSIG

“It’s puzzling to many of my friends why I am an admirer of Justice Scalia. Justice Scalia’s politics, his personal preference, his judgment in
many cases, are all things I would say I disagree with. But I can’t escape the fact that he profoundly affected how I thought, how I think about the law. ... [T]he experience that was most meaningful to me was to sit as a law clerk and watch him struggle with what he knew his principles said he should do, and what he wanted as a conservative to do. ... In every single case where we saw that conflict, Scalia did what his principles said he should do. ... When people of great power demonstrate their willingness to restrict their power in the name of something—whether you agree with it or not—it is moving.”

PROFESSOR RICHARD LAZARUS ’79  
Supreme Court Advocate

“[Justice Scalia] changed the way lawyers argue cases. He changed our framework. And so, too, he changed the way the justices, and all judges, analyze cases. Arguments became better, more rigorous, more precise, and less sloppy, and it was true for both written briefs and oral arguments. It will be strange to stand up before that bench and not have Scalia there. I cannot say I’ll miss his vote. ... Justice Scalia was environmental law’s greatest skeptic. In cases I have done, he has been my most persistent nemesis. While I won’t miss his vote, I will miss his voice. And I’m grateful for his enormous public service and contributions to a nation he clearly adored.”

PROFESSOR ADRIAN VERMEULE ’93  
Law Clerk, Justice Antonin Scalia, 1994-1995

“I want to make a suggestion about the justice’s ruling virtue. I think it was courage. So many people remarked on his brilliance, his joie de vivre, his loyalty. I think all those are true, but I think that courage underlies them all in some essential way. ... His brilliance [wasn’t] just a function of IQ, but it stemmed from a kind of courage to follow a chain of reasoning wherever it might lead and ignore the socially induced constraints and self-censorship that so many times caused us to stop short in our reasoning. His joie de vivre is famous. He was a man bubbling with good humor. I think that’s, in part, a product of courage, too. Fear’s great enemy is joy, and this is a man who was joyful because he was often unafraid. And his loyalty [was] courage not to fall away, not to deny a person or deny one of his commitments even when the whole world was clamoring for him to deny them.”

PROFESSOR CASS SUNSTEIN ’78  
Colleague of Antonin Scalia, Law Faculty, University of Chicago

“I want to say two things that are kind of questions in the spirit of Justice Scalia’s own love of argument. I think that he was not at his very best when his convictions were most intensely felt. Some of his technical opinions are kind of transcendentally good, where his convictions were kind of red in color—not communist but deeply felt. The large abstractions, I think, being less enduring than they would otherwise have been. That’s one question. The other question has to do with the existence of originalist blind spots. There are areas — standing, affirmative action and takings are three — where the historical record is not clearly supportive of his ultimate judgments. And I think it’s fair in the spirit of welcoming contestation to wonder whether the positions he defended in those three areas were compelled by or

In 2014, during his last visit to the school, Scalia judged the final round of the Ames competition. During that same visit, he attended the inaugural lecture in the series established in his honor.
were consistent with the original understanding. Still, Justice Scalia was not just a very significant justice; he was also a superb one. You’re blessed to be working in law in the time when Justice Scalia was on the scene.”

PROFESSOR EMERITUS FRANK MICHELMAN ’60
Classmate of Antonin Scalia,
HLS Class of 1960

“I think my friend Nino was an exceptionally gifted man in many ways, of which I stand sometimes almost in awe. ... I admire [Justice Scalia] for sticking his neck out, putting out on the table a method for judging constitutional cases, a judicial philosophy, as we sometimes grandiosely call it. ... So, what do we think, and what will history say about that judicial philosophy’s suitability to the time and the country and the conditions in which it was brought to bear? What do we think about its founding premise? Do we really do best to treat our Constitution as a lock-in for more or less specific political ideas and conceptions accepted by majorities and on their minds at the time of the formation? Would we do better to treat it as an open-ended pointer toward a better future and continued progress toward liberty and justice for all? Is the answer sometimes one and sometimes the other?”

DEAN MARTHA MINOW

“... ‘Just call me Nino.’ That’s the first exchange that I had with Justice Scalia. I was a dean; I met a lot of famous people. That’s not usually how the conversation begins. His warmth and his willingness to just be genuine were what overwhelmed me. And in each of the interactions that I had with him, that was the overriding experience. His interest in having a genuine conversation, connecting about family, about religion, about law, about ideas, thorough, complete, generous and engaging. At the same time, he knew I didn’t agree with almost anything that he actually concluded, whether it was his methods of interpretation or where he came out in many cases. It didn’t matter to him. In fact, I think it made it a plus.”

PROFESSOR CHARLES FRIED
Former U.S. Solicitor General of the United States

“I have known, I knew, Antonin Scalia since 1985. ... And whether it was meeting him at a Federalist Society jamboree for really young lawyers over pizza and beer, or at the poker table, or arguing to him on the Supreme Court, or watching him as others argued to him, one came away with a sense of energy. And now he’s gone. Well, he’s not, because of his writing, which we will encounter in generations to come. And so I thought I would just give you a little bit of that voice. ... He is in that great trilogy, of Oliver Wendell Holmes Jr., Robert Jackson and Scalia. But there’s a difference. Let me give you one fairly characteristic to me, Holmes in Buck v. Bell: ‘Three generations of imbeciles are enough.’ It is not an argument. It is not the conclusion of an argument. It is just what he said. ... But it’s memorable. In McAuliffe v. Mayor of New Bedford, [regarding] a policeman who’d been fired for engaging in political activity: ‘The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.’ That isn’t the conclusion of the argument; that’s the whole argument. Well, compare that to Jackson ... in the steel seizure case: ‘I am quite unimpressed with the argument that we should affirm possession of [emergency powers] without statute.’ And his line ‘Such power either has no beginning or it has no end.’ That is not the whole argument. It is the summation of an intricate, careful argument, which any law student knows, which goes on for pages. But the maxim sums it up. And that is the case with Scalia. There are memorable maxims, but they either introduce or sum up a careful, intricate and memorable original argument. In the independent counsel case Morrison v. Olson, the maxim comes by way of introduction. ‘That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish. ... Frequently an issue of this sort will come before the Court clad, so to speak, in sheep’s clothing. ... But this wolf comes as a wolf.’ And there follows an original and remarkable piece of analysis. It’s not just the maxim.”
OBAMA HAS OFFICIALLY ADOPTED BUSH’S IRAQ DOCTRINE

TIME
APRIL 6, 2016

Professor Jack Goldsmith

“LAST WEEK THE STATE DEPARTMENT’S top lawyer, Brian Egan, ... announced the Obama administration’s official embrace of the same preemption doctrine that justified the invasion of Iraq. ... [George W. Bush’s] team, of course, fatefuly applied its preemption theory in the controversial context of Iraq where it turned out that the premises of analysis were false and the consequences of error were enormous. The Obama team, by contrast, is applying its similar theory in a less controversial ‘light-footprint’ context where the terrorists are indeed menacing and the consequences of error much lower. ... Though the contexts for the Obama and Bush preemption principles differ, the principle is the same. But it is the Obama team’s articulation of the principle that will be influential. Future presidents who want to use force in other nations won’t invoke the doctrine used in the disastrous Iraq war. They will instead adopt the functionally identical principle that the Obama administration normalized and legitimated.”

THE TESLA DIVIDEND: BETTER INTERNET ACCESS

Elon Musk’s newest car doesn’t just run on electricity—it needs a world class fiber network

BACK CHANNEL
MARCH 25, 2016

Clinical Professor Susan Crawford

“PICTURE ELON MUSK’S mass-market electric car, packed with people using phones and tablets. The car is navigating and watching out for obstacles; the people are hard at work, in video meetings with remote colleagues; the car is letting the rest of the fleet know what it’s learning; all the machines are talking to all the other machines. That’s billions and billions of machine-to-machine connections, all carried over the air—and needing fiber to get where they’re going. ... There’s more: How will people charge these electric cars? Musk is banking on the charge-at-home model, powered by a home battery array called the Powerwall that stores electricity generated from solar panels. ... The Musk battery could be a tipping point for America. We’ll get freedom from gas stations, and eventually from fossil fuels. And that freedom will require fiber everywhere.”

WHO’S AFRAID OF GENDER-NEUTRAL BATHROOMS?

THE NEW YORKER
JAN. 25, 2016

Professor Jeannie Suk ’02

“A recently proposed Indiana law would make it a crime for a person to enter a single-sex public restroom that does not match the person’s ‘biological gender,’ defined in terms of chromosomes and sex at birth. ... But the implications of the controversy go far beyond bathrooms. ... Perhaps the point is precisely that the public restroom is the only everyday social institution remaining in which separation by gender is the norm, and undoing that separation would feel like the last shot in the ‘war on gender’ itself.”

THE TRUMP-OBAMA CORPORATE TAX REFORM FAIL

THE WALL STREET JOURNAL
MARCH 6, 2016

Professor Mihir Desai

“Removing the incentive for American companies to move their headquarters abroad is a widely recognized goal. To do so, the U.S. will need to join the rest of the G-7 countries and tax business income only once, in the country where it was earned. Notably, this principle—called territoriality—is included in the bipartisan framework for international tax reform developed by Sens. Rob Portman (R., Ohio) and Charles Schumer (D., N.Y.) in 2015. Unfortunately, recent reform proposals have a serious flaw: a ‘minimum tax’ on foreign business income. This flaw is in President Obama’s fiscal 2017 budget, and Republican presidential front-runner, Donald Trump, has broached a similar idea on the campaign trail.”
For decades it has been a death sentence. First comes the fatigue, the joint pain, and the jaundice, and then the cirrhosis, the liver cancer, and finally death.

Naomi Judd has it, as does David Crosby. It killed Allen Ginsberg, Mickey Mantle and, just last year, Natalie Cole. And those are just the famous ones. The Centers for Disease Control and Prevention estimates that 3.5 million people in the United States are
infected with the Hepatitis C virus, 60 to 70 percent of whom will go on to develop chronic liver disease.

There is now a cure. You can have this cure, if you're the right person, in the right place, with the right medical history and the right insurance. If, however, you're, say, a low-income Vietnam veteran, a caregiver making $16,000 a year, or a chemist so disabled by Hepatitis C that you can't work, you’ll likely have to wait for serious liver scarring before your insurance will cover your cure.

Unless the students and faculty of Harvard Law’s Center for Health Law and Policy Innovation clinic have something to say about it, that is.

In February, the center filed a class-action lawsuit against the Washington State Health Care Authority on behalf of its Medicaid enrollees, challenging the agency’s limitations on coverage of Hepatitis C treatment. At issue are HCA’s stringent guidelines regarding who receives treatment, and when. CHLPI’s goal is to resolve the kind of disparity in Washington’s medical system that is restricting vulnerable and at-risk populations’ access to a lifesaving drug that treats a chronic and debilitating disease.

In some states, Medicaid won’t pay for a drug to cure Hepatitis C until it’s too late.

In some states, Medicaid won’t pay for a drug to cure Hepatitis C until it’s too late.

Robert Greenwald, director of the Center for Health Law and Policy Innovation, has long been working for access to health care for members of vulnerable populations.

Along the way, they hope to put other Medicaid providers on notice: It’s time to comply with treatment guidelines and the law.

Damage Demanded

When the Food and Drug Administration approved ledipasvir-sofosbuvir, which goes by the brand name Harvoni, in October 2014, the drug was hailed as a lifesaver. Just a two- to three-month dose is enough to eliminate HCV antibodies in 96 to 99 percent of people infected. Purging the disease before it becomes chronic also greatly diminishes the likelihood that the person will go on to develop diabetes, cirrhosis and liver cancer.

And yet in Washington state, and in many other states, the Medicaid provider has been refusing to cover the drug for people before they develop significant liver scarring—and have a Metavir fibrosis score of F3. By F4, that liver scarring would be rampant and the patient would likely have cirrhosis. In effect, rather than heading off the disease before it could do damage, HCA has been requiring those who want the cure to first become seriously and irrevocably ill.

Seattle-area chemist David Morton, who believes he was infected on the job in the late 1980s, is one such patient. With a Metavir fibrosis...
HARVARD LAW AND GLOBAL ACCESS TO DRUGS

Across the law school, faculty are also focusing on international access to lifesaving drugs for underserved populations. One forthcoming book, “The Health Crisis in the Developing World and What We Should Do About It,” by HLS Professor William W. Fisher ’82 and Talha Syed, addresses just such issues.

“We need to immunize residents (preferably while they are children) against the diseases that we can’t block,” says Fisher, “and we need to provide infected people with medicines that will save their lives, or at least make their lives bearable.”

In the book, Fisher compares the handling of pharmaceutical products in developing countries to Steinbeck’s depiction of the Great Depression in “The Grapes of Wrath.” There, in order to protect the market and demand, fruit is burned rather than given to starving migrants from the drought-stricken center of the country.

Fisher goes on to argue not only that we have failed to “stimulate the development of an arsenal of drugs that would enable us to cure or treat the diseases that are ravaging the developing world” but that lack of incentive has also resulted in a failure to produce the kinds of vaccines and drugs that would eradicate those diseases entirely, or at least shield people against them.

In the end, Fisher’s goal is to determine how the laws and institutions that historically cultivated new pharmaceutical products and then channeled their distribution might be adjusted to generate vaccines and drugs for neglected diseases. And, he hopes to determine how to then make those vaccines and drugs available to the people who need them.

HOW HEPATITIS C IS TRANSMITTED

HCV is a blood-borne disease. Prior to 1992, when blood supply screening became widespread in the U.S., HCV was primarily spread through blood transfusions or organ transplants. Today, the primary means of transmission is needle sharing.

ON THE CASE

Robert Greenwald
Clinical Professor and Director of the Center for Health Law and Policy Innovation

WHAT HE’S DOING: Greenwald was at the forefront of HLS efforts to provide legal services to people with HIV/AIDS, at a time when no other law school in the country did so. He has since built the center that leads law reform efforts addressing the health care needs of some of the country’s most vulnerable residents.

Kevin Costello
Director of Litigation

WHAT HE’S DOING: Costello joined the center from private practice in the fall of 2015. He directs its litigation efforts and filed the lawsuit in Washington.

Carmel Shachar ’10
Clinical Instructor

WHAT SHE’S DOING: Shachar came to the center from private practice in 2014. She directs its administrative and regulatory advocacy efforts.

Kellen Wittkop ’16

WHAT SHE’S DOING: After spending four terms in the clinic and taking Greenwald’s public health and policy seminar, Wittkop has developed an expertise in state Medicaid policies for the treatment of HCV.

Kelly Jo Popkin ’17

WHAT’S SHE’S DOING: Popkin’s primary duties in the clinic have been working on a motion for a preliminary injunction and on the class certification. She participated in Greenwald’s seminar this semester.

WEIGHING THE ETHICS

HLS Professor I. Glenn Cohen ’03, faculty director of the Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics, and one of the world’s leading experts on the intersection of bioethics and the law, weighs in.

“CHLPI’s lawsuit brings to light troubling allegations regarding how some of the poorest in America are being denied a treatment that they desperately need for Hepatitis C. They make important points about the potential illegality of denying access to these drugs based on the fact that they are expensive.
score of just F0 to F1, he was denied coverage for Harvoni by his insurer, Group Health Cooperative. While his liver may be intact, his life is not. Hepatitis C causes him such extreme fatigue that he is unable to work. Instead, he has become the face of the disease, and a vocal advocate for the right to the cure.

“People die from complications of Hepatitis C. I’d like to know that, while I can’t stop my death, I can prevent my death from Hep C,” says Morton. “It’s a virus, and it seems like our society is interested in stopping viruses in people. It appears there’s a way to eradicate this virus, and I’m advocating for its eradication.”

**Budget in Balance**

CHLPI would also like to eradicate the virus—for everyone. When the center’s director of litigation, Kevin Costello, and Washington lawyers Amy L. Crewdson and Eleanor Hamburger filed the complaint in mid-February, they argued that HCA was in violation of the Medicaid Act in three ways: in its requirement to provide medical assistance—including drug coverage—to all qualified enrollees; in its mandate to provide timely medically necessary treatment to enrollees; and in its obligation to provide comparable coverage to individuals with comparable needs.

While the state will argue that its restrictions are a result of fiscal policies, HCA’s chief pharmacy officer acknowledged during a public hearing that its restrictions have been at least partially political in nature. That revelation only fueled the fire for CHLPI.

“What we’ve seen, much as we saw with HIV, is resistance. In part, that’s related to costs, but I think we need to be really clear that this work is about particularly vulnerable populations, low-income groups, and people of color,” says Robert Greenwald, CHLPI’s director and clinical professor of law at Harvard.

“If this was a cure for MS or Alzheimer’s disease, we wouldn’t be having this conversation.”

It’s easy to see why the HCA would make an issue of cost. Harvoni was initially billed at $31,500 for a one-month supply, with the full regimen lasting eight to 12 weeks. The maximum price of a cure then was estimated at a hefty $94,500 per patient.

The price tag even resulted in an investigation by the U.S. Senate Committee on Finance, which is responsible for overseeing federal programs paying for prescription drug coverage. In December, the committee released a report stating that it believed the drug’s maker, Gilead Sciences, had “set a price as high as it thought the market would bear before significant access restrictions would be imposed.” The Senate committee also asserted that Gilead’s pricing strategy was focused on getting the maximum revenue, even if that meant that fewer patients would be able to be treated.

Going after big pharma will have to be left to the legislature or government regulators.

“While CHLPI would certainly like to see lower drug prices, it is extraordinarily difficult for private parties to sue private companies on the basis of the price they charge for a product,” says Costello.

That controversial $63,000 to $94,500 estimated price is also something CHLPI takes issue with. Greenwald notes that, by law, all Medicaid programs in the U.S. receive an automatic 23.1 percent rebate on drugs and many receive an additional supplemental rebate. While initially Gilead extended an additional meager 10 percent...
discount, today, according to the drug maker, both Medicaid and the Veterans Administration receive discounts on Harvoni in excess of 50 percent.

Gilead also contends that up to half of people with Hepatitis C genotype 1—the most common form of the disease in the U.S. and the most difficult to treat—will be cured with just an eight-week program. The price then would be $63,000 retail, and less than half that for Medicaid and its enrollees.

“This is the state budget office cutting off their nose to spite their face,” says Costello. “They’re taking the maximum cost, times the maximum number of people, and saying ‘That’s our exposure’ without looking at the larger picture.” Such prolongation means extended costs for treating not only the virus itself but also all of the diseases—such as lymphoma, diabetes and liver cancer—that living with HCV for an extended time causes.

Then there’s the price of a liver transplant. According to the National Kidney Foundation, in 2002 a liver transplant cost around $314,000. A 2014 report by actuary firm Milliman estimated the retail price of billed charges for a transplant and for surrounding medical care to be $739,100.

“We have a cure for HCV,” says Kelly Jo Popkin ’17, a student in the Harvard Law clinic. “Refusing to provide that cure until patients’ livers are completely ravaged runs the risk of increasing transmissions in the state. In addition, the HCA is forcing those living with Hepatitis C to live with increasing symptoms and comorbidities they wouldn’t normally have. That ranges from joint pain and depression to really horrific side effects such as diabetes, lymphoma, cancer, and death. All of that could be completely avoided.”

Pen, Pill, Gavel

Litigation is only the most recent phase in CHLPI’s battle. The clinic, which was founded in 1987 as the AIDS Law Clinic and was the nation’s first law school-based legal services program to serve low-income people living with HIV and AIDS, began its work on issues of access and HCV with regulatory advocacy.

Kellen Wittkop ’16 has spent the last four semesters identifying how—and where—policies restricting patients’ access to Harvoni might be considered discriminatory and in violation of federal regulations and law. She investigated how states were responding to the availability of Harvoni, evaluated the varying degrees of regulations states placed on access to the drug, and researched how accessibility to the cure varied by state. Some states, she noticed, had been quick to cover the medication. Others, such as Washington, were restricting access to only those with severe liver damage.

That research led to an article in the Annals of Internal Medicine in August 2015 and to a report that included an assessment of Medicaid programs in 10 states, including managed care plans in five of those states. Pennsylvania responded to the research and the legal implications by eliminating its sobriety requirement (which required a documented history of abstinence from alcohol and drugs for at least six months prior to treatment) and lowering its Metavir fibrosis criterion from F3-F4 to F2. Other states have come up with every reason possible not to comply with the law and what the research shows, says Greenwald.

The research also led the center to file the lawsuit aimed at forcing HCA to cover this cure for all patients, not merely those at Metavir fibrosis score F3 or higher.

The CHLPI team believes that it has the law on its side. After months of advocacy by the program, in November 2015 the Centers for Medicare & Medicaid Services, or CMS, sent guidance to all states, reminding them of federal regulations and their obligation to cover medically necessary drugs. CMS also expressed concerns that some states, by imposing conditions limiting coverage of HCV drug treatment to those whose liver damage had progressed to Metavir fibrosis score F3 or F4, were unreasonably restricting access to treatment in violation of the Medicaid Act.

In March, in hopes of getting relief for such patients, CHLPI moved the court in Washington for a preliminary injunction and for class certification. Greenwald, Costello and the students will be on hand when patients, joined by medical experts, testify about the expected trajectory of their disease. The court will consider whether those men and women are likely to suffer irreparable harm before an ultimate court decision, in which case the HCA would likely be ordered to approve interim coverage of the drug.

That would be an initial double victory. As Greenwald says, the center would be winning for people living with HCV while simultaneously mentoring the next generation of lawyers.

Bigger winners still would be people such as Morton. “I may be able to rejoin the workforce and become a contributing member of society,” he says.
How Richard Lazarus explored the Supreme Court's inner workings and prompted a change in how it operates
IT IS THE RARE LAW REVIEW ARTICLE THAT directly leads the Supreme Court to change how it does business.

But that’s exactly what happened after the Harvard Law Review published an article in 2014 by Harvard Law Professor Richard Lazarus '79, revealing how Supreme Court opinions get changed after issuance, with little public notice.

At the start of the new term last October, the Court announced that any future changes will now be noted on the Supreme Court’s website.

That policy change is just the latest example of the wide influence of Lazarus’ scholarship, which, in recent years, has also included a groundbreaking study of how an elite bar has come to dominate practice before the Supreme Court.

“Not many people had written about advocacy before the Court—and advocacy within the Court—from a scholarly perspective,” said Lazarus. “It came naturally to me, not just to understand the Court’s work by reading the opinion itself, but [to try] to understand what forces led to that opinion and what the Court did and didn’t do.”

Lazarus, who joined the Harvard Law School faculty in 2011 from Georgetown University Law Center, has long divided his attention between the Court’s inner workings and his other specialty, environmental and natural resources law. He served as executive director of the
“It’s a testament to ... the nuance of Richard’s work that a Supreme Court justice could read it and learn something new about how the Court functions.”

national commission that examined the BP Deepwater Horizon Oil Spill, and he was the principal author of the commission’s 2011 report.

Lazarus said his interest in how the Court operates dates back to his “formative time” in the solicitor general’s office, where he worked between 1986 and 1989 and argued nine times before the Court (he has since argued there four more times).

It was during his time as an assistant to the solicitor general that Lazarus had his first exposure to the Supreme Court’s informal procedures for updating already-published opinions. His client, the Environmental Protection Agency, wasn’t happy with seemingly extraneous language in an opinion in a Clean Water Act case.

Lazarus thought such adjustments weren’t possible, but a veteran deputy solicitor general told him all he had to do was write a letter to the reporter of decisions explaining why language could be changed. “I said, ‘You’ve got to be kidding,’ but I did it and they made the change. When that happened in 1987, I said, ‘I’m going to write about that someday.’”

That day finally came in 2011, when Lazarus began what he described as “scorched-earth” research, which included combing through the papers of half a dozen justices at the Library of Congress and utilizing computer programs to scan more than a century of Court opinions.

What he discovered was that the justices revised their opinions “in significant, including highly substantive, ways” and that not all methods employed for making such revisions were particularly transparent. At the end of his article, Lazarus recommended the Court follow the lead of what Congress and federal agencies do in revising legislation or correcting errors in regulations—by providing after-the-fact public notice.

Lazarus’ findings made headlines, starting in The New York Times, where Supreme Court reporter Adam Liptak noted the justices were “quietly revising” their decisions and “altering the law of the land without public notice.”

Soon after Lazarus’ article was published, Justices Ruth Bader Ginsburg ’56–’58 and Elena Kagan ’86 began giving out notices when they made changes. As of the start of the October 2015 term, it became policy Court-wide. Other courts, including the Massachusetts Supreme Judicial Court and the U.S. Court of Appeals for the 1st Circuit, have adopted similar procedures, Lazarus said.

“It’s very gratifying,” he said. “I would rather write an article that solves global climate change, but this one was certainly a lot of fun.”

An earlier law review article Lazarus wrote on the impact of the elite Supreme Court bar dominated by a handful of corporate law firms has also had broad resonance. In that 2008 Georgetown Law Journal article, he showed how the justices are more likely to grant cert. petitions filed by members of the expert bar, who also prevail more frequently on the merits.

The result, Lazarus wrote, is that the elite bar “may be skewing disproportionately the Court’s docket and rulings on the merits in favor of those moneyed interests more able to pay for such expertise.”

In the years since, several other scholars have been inspired by Lazarus’ “unique and seminal” work to do additional research, said Assistant Professor Andrew Manuel Crespo ’08, who clerked for both Justices Kagan and Stephen Breyer ’64.

Crespo’s forthcoming law review article examines sharp disparities in the quality and expertise of lawyers representing criminal defendants before the Supreme Court. Reuters also did a multipart investigative series explaining the rise and impact of the Supreme Court bar to a general audience, he noted.

“Richard identified the emergence of an elite Supreme Court bar and, more importantly, its growing impact on the institution. Before his study, a small group of insiders may have been aware of the phenomenon, but it had not been studied from a scholarly perspective, or brought to the public’s attention,” Crespo said.

After reading a more recent paper by Lazarus using statistics to analyze the chief justice’s administrative and assigning authority, Crespo said he suspected even the justices are learning something about the Court from his scholarship.

“It is a testament to the comprehensive detail and the nuance of Richard’s work that a Supreme Court justice could read it and learn something new about how the Court functions as an institution,” Crespo said.

Lazarus said he gets no special insider information about how the Court functions from his law school classmate Chief Justice John G. Roberts Jr. ’79, with whom he has taught a summer seminar throughout Europe and in Japan.

“We’re good long-standing and loyal friends, but we don’t mix the two,” he said. “I don’t know what he’s working on, and he doesn’t know what I’m working on.”
Richard Lazarus’ scholarship has revealed how Court opinions were changed after issuance with little public notice, and highlighted the impact of an expert SCOTUS bar dominated by a few corporate law firms.

Photograph by DANA SMITH
SURVEILLANCE

Cellphones may be the least of your privacy concerns

BY ELAINE MCARDLE

ILLUSTRATION BY HARRY CAMPBELL
Consider your home in five years:
Before you’re out of bed in the morning, the drapes open themselves, the shower turns the water to the perfect temperature, and the toaster toasts your bagel just the way you like. Motion detectors know when you’ve left for work and switch on your home security system as a robot vacuum begins cleaning your floors. At the office, you realize you forgot to start the clothes dryer; a simple voice command to your smartphone means the laundry’s ready when you get home. As you head up the driveway at night, sensors in your smart car alert the garage door to open and the lights in your home to turn on while the TV tunes itself to your favorite program.

Welcome to the Internet of Things. It may be about to change our lives as radically as the Internet itself did 20 years ago.

“Some analysts think this is the future—it’s huge, as big as the Internet and World Wide Web,” says David O’Brien, a senior researcher at the Berkman Center for Internet & Society at HLS. “It’s hard to separate the hype from reality, but signs suggest we’re at the early stages of a tectonic shift.”

The Internet of Things, or IoT, relies on sensors embedded in a wide variety of devices and systems to make your life incredibly convenient while exchanging a stunning amount of very personal information about you via cloud computing. This technology is already available in everything from home appliances to Fitbits and children’s toys, and over the next 10 years, it is expected to become a multi-trillion-dollar industry, according to a report released in February by the Berkman Center, “Don’t Panic: Making Progress on the ‘Going Dark’ Debate.”

All that personal data—just waiting to be mined. The implications for privacy, national security, human rights, cyberespionage and the economy are staggering.

For corporations, the IoT is the golden goose of the very near future, with everyone from Amazon to Nike creating products with cloud-connected sensors—including cameras, microphones, fingerprint readers, gyroscopes, motion detectors, and infrareds—collecting streams of data about your movements, preferences, and habits.

For law enforcement, it’s one reason we are entering a “Golden Age of Surveillance,” to use a term coined by Peter Swire and Kenaes Ahmad at the Center for Democracy & Technology in Washington, D.C. The IoT “has the potential to drastically change surveillance, providing more access than ever in history,” says the Berkman Center’s report, the result of a highly unusual gathering of government intelligence officials, think tank experts and HLS faculty who met for a series of off-the-record conversations about cybersecurity over the previous year. Several leaders in the U.S. Senate and House, and key staffers from the White House, have reached out to Berkman about the report, which has also garnered praise from members of the international intelligence community, O’Brien notes.

Recently, the FBI and Apple waged a very public battle over the government’s access to encrypted data in an iPhone connected to the terrorist attack in San Bernardino, California, last December, which ended in late March when the FBI, with help from an unnamed third party, cracked the encryption without Apple’s help. But that has not ended the debate raging over the legal status of encryption in telecommunications and other digital devices. The government worries that its ability to protect the country from terrorism and other crimes is “going dark” as a result of widespread “end-to-end encryption” in smartphone operating systems and Internet services—where even the device manufacturers and service providers can’t see customers’ data—while civil libertarians and others say unlocking iPhones won’t solve the problem and in fact will raise serious new dangers such as terrorists hacking into cellphones.

But at the very time the tussle between Apple and the FBI was grabbing international headlines during the winter, the Internet of Things was quietly stepping up to offer an overwhelming treasure trove of information about all of us. In other words, even as the technology gods close an encrypted window or two, they’ve been opening huge, Internet-connected doors.

“The good news and the bad news is that we aren’t ‘going dark,’” says HLS Professor Jonathan Zittrain ’95, faculty director of the Berkman Center and a co-convener of the group, along with Matt Olsen ’88, former general counsel for the NSA, and Bruce Schneier, a cybersecurity expert and fellow at Berkman. “It’s good news because law enforcement isn’t as hamstrung as they may feel. If you look at the digital trails people are laying down, the clear trajectory is toward much more available to someone with a subpoena than ever before,” Zittrain says.

The “going dark” metaphor is the wrong one for several reasons, the group agrees. For one, aside from Apple, most tech companies,
David O’Brien, Jonathan Zittrain, and Matt Olsen (from left) are among the authors of a much-cited Berkman Center report on the encryption debate. Samantha Bates (second from left) and Tiffany Lin (right) contributed research and editing.
including Microsoft and Google, rely on access to unencrypted user data as their primary revenue streams, selling your information to advertisers. In addition, so-called “metadata” about your communications, such as location data from cellphones and header information in emails, is unencrypted and is a useful investigatory tool. Perhaps most importantly, the burgeoning Internet of Things offers a vast array of new opportunities for surveillance through cameras, microphones, GPS trackers and other sensors in your home, in your car, even on your wrist: Police could seek a warrant to track your whereabouts through your Fitbit, say, or watch and listen to you in your home via your baby monitor or Internet-connected TV.

“There’s a lot of opportunity to learn about a suspect in a way that didn’t exist 20 or even just 10 years ago,” says Olsen, former director of the National Counterterrorism Center, who has been teaching a national security course at HLS this spring. At the same time, the fact that the cyberworld is not “going dark” is also bad news, Zittrain believes, because the overwhelming amount of personal information floating in cyberspace raises “troubling questions about how exposed to eavesdropping the general public is poised to become,” and how vulnerable to a host of bad actors, including malicious hackers, cyberthieves, and terrorists.

“The thrust of the report is that as technology develops, government will have many more tools available to find the bad guys,” says HLS Professor Jack Goldsmith, a national security and terrorism expert who was part of the group. “But it’s also true that the bad guys will have many more tools to evade the government.”

For now, he says, it’s unclear who’s going to come out ahead.

Apple v. the FBI
Of course, this rapidly expanding compendium of potential information via the IoT is “small solace to a prosecutor holding both a warrant and an iPhone with a password that can’t be readily cracked,” as Zittrain puts it, which was precisely the case in the Apple-FBI showdown. Apple itself couldn’t access the data in end-to-end encrypted iPhones (most modern iPhones are encrypted, by default) and insisted it should not be forced to write a software program to assist in bypassing the passcode on the iPhone used by Syed Rizwan Farook when he and his wife killed 14 people in San Bernardino. Apple argued—with many Silicon Valley companies in strong support—that a court order to do so would set a disturbing precedent of “backdoor access” that would leave it vulnerable to a rash of similar requests, including from foreign governments, placing the privacy—and in the case of political dissidents, the personal safety—of all iPhone users in jeopardy.

“This is big stuff; this is dramatic stuff. I have never seen a company—a Fortune 500 company, let alone one of the five biggest companies on earth—take on the government this way,” including with a lengthy letter defending Apple’s position by CEO Tim Cook posted on the company’s website, says Vivek Krishnamurthy, a clinical instructor at Berkman’s Cyberlaw Clinic. Stakeholders around the world have been watching with deep interest (see sidebar).

Even before the FBI cracked the code, counterterrorism expert Olsen and many others in law enforcement agreed it was essential for the FBI to access the data on that particular phone. “There’s every reason to think that the cellphone Farook used could contain critical information and evidence,” he said, in an interview before the code was cracked. “There’s still a lot we don’t know about the attack. Was it directed by ISIS or some other terrorist group? Were the shooters part of a cell? Are there others planning additional attacks? There are lots of important questions the FBI is responsible for answering.”

The government had a strong position because the circumstances of the case were so compelling, and because it “did everything right” by obtaining a warrant and also trying to access the data without Apple’s assistance before turning to the court to
While the encryption debate is most often painted as a two-sided battle between law enforcement and technology companies, in truth there are many other stakeholders around the world that are deeply concerned about the widespread implications of regulating encryption in iPhones and other telecommunications devices.

The global human rights organization Amnesty International, for one, has significant concerns about the impact on privacy and free speech should it become easier for governments—foreign and otherwise—to access private communications. Last fall, Amnesty, which is in the process of developing a global policy on the regulation of encryption, reached out to the Cyberlaw Clinic at the Berkman Center for Internet & Society at Harvard Law School for help in understanding the legal landscape and policy debate in the U.S.

For Allison Kempf ’17, who chose HLS in part because of the Cyberlaw Clinic and came to law school with a background in cybersecurity and national security, the timing of the project was ideal. “For the last year, encryption and the ‘going dark’ debate have become really prominent in the public discourse,” says Kempf, who worked on the project during fall semester along with Richard Pell ’16. Although the Obama administration announced it would not seek changes in the law around encryption, “Amnesty’s question is relevant because it’s very possible future administrations will face great pressure to take some sort of action, be it regulatory or legislative,” she says.

“From a human rights perspective, encryption is an empowering tool because people can communicate more freely, especially in places where there are more authoritarian regimes,” says Kempf, who is contemplating a career focusing on national security. While the U.S. government must adhere to a lawful search process, “not all governments abide by the same standards we do, so [Amnesty is] concerned about the privacy of individual users of encrypted technology.”

Under the supervision of Vivek Krishnamurthy, a clinical instructor whose work focuses on understanding the human rights impacts of new technologies, the students produced a substantial memorandum that identified legal and constitutional issues. “The project required our students to consider the issues around encryption from multiple points of view, as there are no easy or right answers around these issues,” he says, adding, “Our work for Amnesty anticipated many of the issues that have surfaced in the Apple case.”

Amnesty was very happy with their work, says Kempf, who continued at the clinic this spring working on a project related to cloud computing. “I was really excited to get such positive feedback, and I’m looking forward to seeing how they use it in the future.” —E.M.
compel Apple’s help, Olsen argued. Moreover, the request was narrowly tailored to one phone, he added, the property of Farook’s employer, which had consented to disabling the security feature.

But Schneier argues that our national security is better protected by strong encryption despite the difficulties it presents to law enforcement. “If a back door exists, then anyone can exploit it,” Schneier wrote in a New York Times blog. “That means that if the FBI can eavesdrop on your conversations or get into your computers without your consent, so can cybercriminals. So can the Chinese. So can terrorists.”

“Encryption makes it harder for the government to do its job—that’s indisputable,” says Jennifer Daskal ‘01, former senior counterterrorism counsel at Human Rights Watch who now teaches at American University Washington College of Law. “But is the increased ease of government access worth the security costs that would result from a government-mandated back door? I don’t think it is.” The new Berkman report, she adds, “points to a whole host of other potential ways for the government to access sought-after information. Some may be more costly or time-consuming for the government, but they are much preferable to the kind of insecurities—as well as costs to American businesses—that would result from mandatory back doors.”

Matt Perault ’08 is head of global policy development at Facebook. While Facebook recognizes that law enforcement has an important role in fighting “legitimate threats to public safety,” the company “will fight aggressively against requirements for companies to weaken the security of their systems,” he says. “We can’t make it easier for law enforcement to access encrypted communications without making it easier for cybercriminals and foreign governments to do the same.”

Zittrain points out that a larger battle looms between companies like Apple and law enforcement organizations such as the FBI. “Apple is in a position to make a new generation of phones that even Apple can’t crack,” he says. “At that point, the tension between law enforcement and industry will shift from a one-off demand for assistance through judicial action to the U.S. Congress, which might be asked to mandate how companies build their products and services.”

Ultimately, it is up to Congress to resolve the issue, Goldsmith says: “The balance must be struck by Congress because there will not be agreement on the costs and benefits, and in a democracy, that’s for Congress to sort out.” While he predicts that Congress ultimately will force tech companies to give government the tools it needs for criminal investigations, he doesn’t see it happening any time soon, given the political paralysis in Washington, D.C.

Meanwhile, the Internet of Things is raising “new and difficult questions about privacy over the long term,” according to Zittrain, yet is mushrooming with almost no legislative or regulatory oversight. We are, he says, “hurting toward a world in which a truly staggering amount of data will be only a warrant or a subpoena away, and in many jurisdictions, even that gap need not be traversed.” The law—notoriously slow in responding to technological changes—may be facing one of its biggest challenges yet.

“While a number of federal agencies have flagged the IoT as being problematic for both privacy and security reasons,” says O’Brien, “little has happened,” which demonstrates not only a lack of coordination among various arms of the government but also uncertainty about competing policy interests between innovation and consumer protectionism. A strict regulatory regime could hamper this growing part of the economy, but on the other hand, without regulation, “there’s a risk the IoT will become the Wild West of the Internet,” he says, adding, “Some might argue we’re already headed in that direction.”

“Is it a wake-up call that we really should be thinking about building in certain protections now for the Internet of Things,” says Zittrain, who wants academia, governments and industry to focus on developing an Internet of Things “Bill of Rights.”

“That’s why this report and the deliberations behind it are genuinely only a beginning, and there’s much more work to do before the future is upon us.”
Mayor John Cranley ’99 champions his city’s unique police-community accord
NOW IN ITS 14TH YEAR, a compact on policing in Cincinnati, Ohio, focused on building strong police-community relationships is a lauded model nationwide. John Cranley ’99, now the city’s mayor, was there from the start of the landmark agreement known as the Collaborative.

In April 2001, a white police officer in Cincinnati shot and killed 19-year-old Timothy Thomas, an unarmed black man, while attempting to arrest him for nonviolent misdemeanors. The killing set off four days of rioting and civil unrest. At the same time, local civil rights leaders were pursuing a federal lawsuit alleging racial profiling by the Cincinnati Police Department.

This plunge into crisis was a “baptism by fire” for a new member of the City Council. John Cranley had graduated less than a year earlier from Harvard Divinity School, and before that from HLS. He recalls how then Mayor Charlie Luken took the novel step of asking the Department of Justice to intervene and review the CPD’s policing practices, a “controversial move that was clearly the right decision,” Cranley says. “Clearly there had to be reforms—half the population of the city was black and was not receiving fair treatment.”

The lawsuit plaintiffs and the DOJ proposed mediation rather than litigating claims, to find a better way forward. The City Council voted 5-4 in favor of mediation—“the most historic vote in all of this,” says Cranley, who was one of the majority. “We would have immediately been in court otherwise. The five of us took a lot of criticism for that.” For one thing, in the intense public scrutiny following the shooting, many Cincinnati police officers felt unfairly attacked and branded as racists. “But civil rights are non-negotiable,” says Cranley. “We needed to be forceful. We needed to improve the culture. And we needed federal oversight to push this.”

In 2002, after a year of claims resolution and discussions, community, police, and city leaders all signed the Collaborative agreement. Its measures included new limits on use of force; emphasis on conflict de-escalation; better training in the academy; mental health training to prepare police to deal effectively and humanely with people high on drugs or intoxicated; and formation of a Citizen Complaint Authority that had the power to investigate allegations of non-felony police misconduct.

The early years were very rough, Cranley recalls. The Citizen Complaint Authority was flooded with complaints at first. The CPD dragged its heels, resisting change. Yet “everyone wants the police to be successful,” Cranley notes. “Community residents want good relations with police. They want strong law enforcement, but they want it targeted to violent crime, not kids who’ve made a stupid mistake.”

Saul Green, the DOJ-appointed independent monitor, kept pushing for improvements. New leadership in the city helped. So did the CPD’s adoption of the problem-oriented policing method, which Cranley says “did a lot to break the ice” by pulling police and local residents together to respond to and fix crime and disorder problems in the community. One example: Police and community residents together pressured a bad landlord to stop allowing drug dealing in a public housing location that had made an elderly woman too scared to walk out her door.

By 2006, “there was a sea change,” and the key Collaborative elements...
were all operative, says Cranley, including an advisory group representing all stakeholders. Its members to this day meet regularly and talk often—because no one takes Cincinnati’s hard-fought reforms for granted. “We can always do more,” Cranley says.

A major test of Collaborative relationships came just last year, on July 19, after University of Cincinnati Police Officer Ray Tensing while on patrol shot and killed 43-year-old Samuel DuBose, a motorist. Video from Tensing’s body camera showed he tried to get DuBose out of the car and reached in; DuBose began to drive away and the officer fired one shot, hitting him in the head. Thanks to 14 years of building communication channels, the 10 days leading up to the announcement of the prosecutor’s decision to indict remained calm, and the community felt the legal outcome was just, says Cranley.

Elected mayor in 2013, Cranley is outspoken about his commitment to keeping the Collaborative strong and continuing problem-oriented policing, which he says got a boost from the recent appointment of a longtime CPD officer and Cincinnati resident as the new chief.

Cranley likewise has local roots. He grew up in Cincinnati’s Price Hill neighborhood and then attended John Carroll University in University Heights, serving twice as class president, before going on to earn his J.D. and a Master of Theological Studies degree at Harvard.

At HLS he worked for clients who couldn’t afford legal counsel through the Harvard Legal Aid Bureau, and at Commencement he gave the class address. Then Cranley returned to Ohio, where he practiced law at the firm Keating Muething & Klekamp and co-founded the Ohio Innocence Project at the University of Cincinnati College of Law, serving as administrative director from 2002 to 2006. In one case, he successfully argued before Ohio’s 5th Appellate District Court to overturn Christopher Lee Bennett’s conviction of aggravated vehicular homicide; to date, the project has helped free 23 individuals.

While serving on the City Council, Cranley also spearheaded expanding Cincinnati’s hate crime ordinance to cover acts of violence, hatred, and bigotry against individuals on the basis of their gender identity and sexual orientation; he was galvanized in his efforts by the 2002 murder of a young gay black man walking toward a nightclub with friends, two in drag.

Cranley gets immense satisfaction from how far his city has progressed in building police-community trust and collaboration since the firestorm of outrage he helped resolve at the start of his nine years on the City Council.

“Community residents want ... strong law enforcement, but they want it targeted to violent crime, not kids who’ve made a stupid mistake.”
ON MARCH 16, President Barack Obama ’91 nominated Merrick Garland ’77 to the U.S. Supreme Court.

Currently chief judge of the U.S. Court of Appeals for the District of Columbia Circuit, Garland has served on the appellate bench for almost two decades, after a high-profile role as U.S. Justice Department prosecutor supervising investigations into the 1995 Oklahoma City bombing and Unabomber Theodore Kaczynski, among others. Dean Martha Minow described Garland as “an outstanding, meticulous, and thoughtful judge with a superb career of public service.”

Senate Majority Leader Mitch McConnell (R., Ky.) has delayed action on the nomination. As Obama presses for a hearing, Garland is poised for the confirmation process. (The Senate confirmed him to the D.C. Circuit by a vote of 76-23.)

A highly regarded jurist, Garland has stayed connected to Harvard Law School since receiving his degree nearly four decades ago. He has returned to campus on a number of occasions to share his perspectives with students and to judge moot court competitions. In 2006 and again in 2013, he was part of the three-judge panel presiding over the law school’s Ames Moot Court Competition.

In 2010, Garland came to HLS to speak with students in a trial advocacy class taught by Professor Charles Ogletree ’78, a friend from their student days. He engaged them in a Q&A about careers in the law, and he drew from his experience.

Another classmate, Professor William Alford ’77, called Garland an extraordinarily impressive person. “When we were students, he was well known throughout the law school not only for being enormously intelligent, but for his thoughtfulness and decency—for being a real mensch,” Alford said.

Professor Laurence Tribe ’66 has known Garland and “admired him greatly” ever since he was a student in Tribe’s advanced constitutional law class in 1975-1976. “No sitting judge in the country, state or federal, has a more stellar reputation as a thoughtful analyst with a firm commitment to the rule of law and to the proper reach of the judicial role,” Tribe told the Harvard Gazette. “And that stellar reputation is one that Judge Garland has amply earned. To put it simply, he would be a truly great Supreme Court justice.”
Bert Rein ’64 might have understandably felt a bit of déjà vu upon entering the Supreme Court in December 2015.

Three years after first arguing against the University of Texas’ affirmative action program, Rein found himself back at the Court delivering oral arguments in a challenge to the same program. He even faced off against the same opposing counsel, former Solicitor General Gregory Garre.

The outcome in the case—Fisher v. University of Texas—was no clearer at the end of the second round of oral arguments: The Court appeared just as divided.

This time, though, Rein was no longer the same rookie Supreme Court advocate who argued the Texas affirmative action case and also a separate challenge to a provision of the Voting Rights Act later that term.

“Bert comes to his first arguments at a rather late age,” said Edward Blum, who recruited Rein to the case. “So … just because you haven’t made a Supreme Court argument before you’re in your 70s, don’t rule out that possibility.”

Rein was hardly unfamiliar with the Supreme Court: He clerked for Justice John M. Harlan II in the October 1966 term. But overseeing international aviation and telecommunications negotiations as a deputy assistant secretary of state in the Nixon administration led him to specialize largely in those areas. In 1983, he left Kirkland & Ellis to co-found Wiley Rein, which started with 39 attorneys and now has more than 250.

Rein’s involvement in litigation around race-based protections began in the early 1990s when Blum, a former stockbroker with no legal training, sought help in a case challenging racial gerrymandering. Another Wiley Rein attorney argued that case, but Blum developed a lasting appreciation for Rein’s skills as a litigator.

“He has the ability to noodle through every contingency in litigation,” said Blum. “He can very quickly assess the costs and benefits of framing a case one way versus framing it a different way. I have found Bert to be someone I turn to when other lawyers just seem to be befuddled.”

Over 20 years, Blum has single-handedly orchestrated at least a dozen lawsuits aimed at race-based protections “with the financial support of a handful of conservative donors,” according to a 2012 Reuters story.

He turned to Rein’s firm again as he launched a series of other lawsuits, including the challenge to the University of Texas’ affirmative action program and a separate challenge to the Voting Rights Act’s pre-clearance requirement.

Rein said he believes “personally that the positions we litigated are constitutionally sound and in the best interest of all.”

“Accepting and patching inequality and surrendering the aspiration to achieve true equality is shortsighted and can embed the discrimination that we should strive to overcome,” Rein said.

Rein said having a case pending before the Supreme Court made it easier to organize moot courts, and it certainly attracted more media attention than some of the other appellate cases he’d argued, but he found the experience inside the courtroom similar to that of other oral arguments.

“I didn’t think there was any great magic to it,” Rein said. “It’s just a matter of really focusing, listening intently to the questioning.”

The justices handed down decisions in both cases in a span of two days in June 2013, which Washingtonian magazine dubbed “Bert Rein’s week.”

The Court ruled 5-4 in Rein’s favor in Shelby County v. Holder, holding unconstitutional the formula used to determine which jurisdictions must get pre-clearance before adopting any new voting changes.

The outcome was less decisive in the Texas affirmative action case. The justices voted 7-1 to send the case back to the lower appellate court for further consideration of the admissions policy. After the 5th Circuit ruled in the university’s favor, the justices agreed to hear a second challenge. HLS Dean Martha Minow filed a brief with Yale Law School Dean Robert Post, warning that a decision against race-based admissions would have “devastating” consequences. “Requiring schools to ignore a factor that is often inextricable from an applicant’s formative life experiences would perversely penalize some applicants in the name of equal protection,” said the brief.

Rein said he anticipates an end to the case, although not any finality regarding affirmative action. “I’m not expecting a radical decision that will lay to rest all the controversy about what is the permissible role of race in admissions.”

While awaiting the decision, he stepped down from management of the firm that bears his name as of the start of the year. But he has no intention of retiring any time soon: “I haven’t left the practice in any sense.” —SETH STERN ‘01
TIME CAPSULE

Life as a woman at HLS in the ’60s, through the letters of Caroline Simon

In the fall of 1962, Caroline “Cal” Simon ’65 started at Harvard Law, one of 23 women in a class of 540. Her reflections on the experience are perfectly preserved in dozens of sharply witty letters she wrote to her family—letters she rediscovered when her father died. Together, they give an indelible sense of life at the school in the mid-1960s, and specifically, life as a woman there, a decade after women were first admitted. (Simon and her female classmates were invited over to one of the now famous dinners at Dean Griswold’s, where they were asked, one by one, to justify taking a man’s place in the class.) The letters also hint at larger undercurrents—the brewing war in Vietnam, the changing place of women in society, the ongoing Cold War.

Soon after Simon arrives, she writes home describing the pall cast by the Cuban Missile Crisis, and that strange feeling of being immersed in the world of the law school while tectonic events are rolling the world outside: “How real the cold war has suddenly become; how strange it feels to discuss bombs and destruction in other than an academic manner.”

Simon writes of a different, but apparently no less visceral, kind of fear when she faces her first examinations: “He has the nasty habit of destroying students in wholesale lots, but it is nevertheless a pleasure to attend his classes.” On that day, Professor Casner quizzed several women about the property issues surrounding engagement rings, but by the time he got to Simon, he’d moved on to asking about negotiable instruments. “To the amazement of the young men around me, I managed to calmly answer and discuss with the master for about fifteen minutes. ... When he finished with the girls there was a bit of time remaining and he called on a male classmate and, with an hour’s worth of stored venom, destroyed the poor lad in two minutes. Sometimes inequality is not such a bad thing.”

Her letters home tell of the stress of preparing for her first moot court competition, of figuring out how to work with people even when she found them difficult, and of cramming for exams. (“I’m so tired I haven’t got the strength to worry. Bit by bit I am learning the law.”) But she found time for other things, too—taking trips to the beach (albeit with her Property book in hand); having beer and pretzels at a professor’s house with a group of classmates; writing a humor column for the HLS Record. As “Fenno,” Simon anonymously tweaked the life and culture of the law school. She was the first woman to write the column, though her editors decided not to let readers in on that secret. In her last installment, after she was left out of the paper’s staff picture and staff list in the yearbook, she aimed her humor at the newspaper itself:

“‘Listen, Fenno,’ the staff said in unison, ‘it’s the image. People think of you as the cool law school type—you know, a sort of young Jimmy Stewart. ... We can’t have people finding out what you really are.’

“I guess it would have a demoralizing effect on the readers,” I replied. ‘On the other hand, I don’t want to let my confreres down. They’ve been striving for equal rights around here for a long time.’

“‘Let’s not make an issue of this,’ said the Editor, glancing at the page proofs. ‘We’ll let you wear your ‘I AM FENNO’ button on your dress on alternate Thursdays.’”

Before Simon graduated, and embarked on a career in which she ended up specializing in professional education in legal ethics, she wrote one last letter to her family, explaining the thing she would miss most: “I guess we are all ready to go on to the big world, but there is something about this cold dreary place with its tweedy people bursting with ideas that creates an electricity that it is not easy to leave behind.”

—KATIE BACON
When he was a student at HLS, a friend made Geoff Shepard ’69 a campaign button that said “Nixon Shepard,” representing Shepard’s enthusiasm for the presidential candidacy of Richard Nixon and his hope that he would join Nixon in the White House. Shepard still has the button today—and almost 50 years later is still advocating for the president he served and defended.

Earlier this year, he came back to the law school to present his findings from his recent book, “The Real Watergate Scandal: Collusion, Conspiracy, and the Plot That Brought Nixon Down.” Based on documents he uncovered from the Watergate proceedings housed in the National Archives, the book contends that charges of a cover-up that ultimately forced Nixon to resign from office proved unfounded. Even the “smoking gun” tape that appeared to show the president seeking to limit the FBI’s Watergate investigation was misunderstood, Shepard contends. It was in fact an attempt to keep the names of Democratic donors to the Nixon campaign from becoming public. Yet the cover-up charges were buttressed by biased prosecutors and judges who colluded to ensure the downfall of the president, he believes.

“Judges and prosecutors aren’t supposed to get together in advance and make decisions, and that’s what it turns out they were doing,” he said. “It’s just startling, what was going on.”

Shepard’s presentation at HLS was one of many he has made at law schools around the country, where he has found students interested in his examples of a flawed system of due process. For them, it’s history (Shepard jokes that the students buy the book for their parents). For him, it’s his life.

Like Nixon, Shepard went to Whittier College in California, where he grew up. In fact, to his surprise, he sat next to Nixon during a luncheon at the college which the former vice president at the time attended to present a scholarship to Shepard. He later was thrilled to find out that Nixon had doubled his scholarship amount—to $500.

When he was a law student, Shepard applied to be a White House fellow hoping to help the Nixon administration. It wasn’t, he said, because of a deep political conviction. He didn’t really even think about Nixon’s—or anyone else’s—politics at the time. Nixon gave him scholarship money and they went to the same college. And they had something else in common: “He wasn’t a highfalutin Easterner,” as Shepard put it, nor was either one among the “sons of prominent men” like those who were introduced by one of his professors during a first-year class at Harvard Law.

The “backward kid from Irvine Ranch,” as Shepard described himself, won the fellowship and the next year was hired for the staff of the White House Domestic Council under John Ehrlichman. Shepard would work with many of the major Watergate figures and, after the scandal broke, on the president’s defense team.

It ended badly and he felt a share of responsibility, Shepard said. He stayed on with the Ford administration and then left government, never to return, working in the insurance industry for 35 years until his retirement. He has maintained connections from his White House experience through reunions he’s arranged with the policy planning staff and also helped produce “Nixon Legacy Forums,” documentaries on policy initiatives undertaken by the administration. Although for many people Nixon’s legacy can be summed up in one word, Shepard says the president he served should be celebrated for his foreign policy acumen and domestic achievements, such as efforts to combat drug abuse.

“The people who have loathed Richard Nixon—just this visceral hatred of this guy from nowhere, without culture, without family, without a Harvard education, who kept winning elections,” he said, “they want to give him no credit for anything.”

Shepard says his friends from that time have moved on from Watergate, but he won’t—even if many people think the case is settled history.

“To some extent, I think I’m a lone ranger, the sole survivor of a legal pogrom who cares about what happened, who is going to, by Jove, find some justice,” said Shepard. “The alternative view is Don Quixote tilting at historic windmills of no consequence whatsoever.”

He may yet discover which view is more accurate. He cites the possibility of a lawsuit, a coram nobis, to challenge the long-ago Watergate rulings and, perhaps, to use another literary metaphor, to finally catch his white whale.

—LEWIS I. RICE
UNITING IN DIVERSITY
Koen Lenaerts on leading the EU’s highest court

In October, Koen Lenaerts LL.M. ’78 was elected president of the European Court of Justice.

Koen Lenaerts LL.M. ’78 keeps a photo engraving of Austin Hall in his home office in Leuven, Belgium. The image reminds him of the course he took from then HLS Professor Stephen Breyer ’64 (a 2L named John G. Roberts was also in the class), his LL.M. thesis with Duncan Kennedy, and hours spent perusing newspapers from around the world at Out of Town News in the Square. HLS is also now the alma mater of one of his six daughters.

Although elected president of the European Court of Justice in October, Lenaerts has served as an EU judge for decades. As president, he coordinates judicial case management, presiding over the Grand Chamber, a 15-judge bench that takes on cases of the highest constitutional importance. He also directs the operation of the court, which works in 24 languages, and is its representative to the outside world. HLS Professor William Alford ’77 has known Lenaerts since the Belgian professor first returned to HLS to teach a class in 1989. “He is extremely brilliant. He is very thoughtful. He is a very calm person. He is very wise,” said Alford, adding that the court is especially lucky to have someone of Lenaerts’ talents at a time when the EU is facing many challenges. During Lenaerts’ three-year term, the ECJ will likely hear arguments on issues ranging from terrorism to migration to environmental protection. Lenaerts spoke to the Bulletin about his time at HLS as well as the workings of the court.

BULLETIN: What do you see as some of the challenges that will face the court during your presidency?
KL: An ongoing challenge in the years ahead will be to deliver case law which upholds the law, including the common law of Europe, and which is cogent and persuasive and wins hearts and minds.

The EU is both a common level of governance and a legal order. Europe now—as it has been in the past—is facing significant issues. Even if member states are dealing with extremely sensitive, highly political situations, they can, nevertheless, always count on the legal discourse to release some of the pressure, and finally at the legal level have the problem settled with a level of legitimacy and accept ance on the merits of the arguments.

When a crisis occurs, there is first a political response and then a judicial response. I should note that the ECJ does not have the political question doctrine. We must decide all the cases which have been validly brought to us. We have compulsory jurisdiction on sensitive issues covered by substantive rules of European law.

In crafting your opinions, do you consider how judicial officials around the world will interpret them?
Yes, I would say the members of our court do it almost naturally. You go a few hundred kilometers in whatever direction, and you see another language spoken and another tradition. The comparative method is inherent in our way of functioning.

In the spirit of Justice Breyer [author of the book “The Court and the World,” see Page 67], our court strives to be aware of what’s going on in the world. For example, there is very often extensive analysis of U.S. case law for issues that have already arisen there. Sometimes we reason in parallel, and sometimes we explain why we can’t follow that precedent.

How has your time at HLS influenced your teaching and jurisprudence?
Europe is a project for consolidation of freedom, democracy, the rule of law, respect for fundamental rights, and mutual respect and equality between its people. Unit ing in diversity means striking the proper balance between (a) one’s own identity, on the one hand, and (b) unity for all those policy matters which can only meaningfully be dealt with at the level of the European Union as a whole, rather than separately by each state.

Oddly enough, I learned a great deal about this in Professor Tribe’s U.S. constitutional law class. He taught about a system of separate and divided powers to address ongoing issues across a diverse jurisdiction.

From Stephen Breyer, I learned the link between the work in the classroom and the work in the courtroom. What you do in the classroom is discuss cases, how the arguments were put to the judges, and evaluate the arguments based on hypothetical variations. We often do the same in the courtroom. We dialogue with the parties appearing in front of us in order to crystallize the point of the case to its inflection point, where the case becomes more clear.

Justice Breyer’s “The Court and the World” emphasized that the role of the judge is to decide cases, not to put forward big theories. Starting to develop big theories beyond what is needed to solve the case at hand—that’s beyond the mandate from a separation of powers perspective for the judges. As a court, we aim to come to the right outcome—the right solution in that particular case. I explain concepts like the American case or controversy requirement often to my colleagues at the court and to outside visitors.

—THOMAS TOBIN ’16
John Carlin ’99 entered hostile, if not quite enemy, territory when he appeared at a March conference in San Francisco filled with representatives of the tech industry to defend the FBI’s efforts to force Apple to unlock a terror suspect’s iPhone.

Carlin, the soft-spoken assistant attorney general who heads the Justice Department’s National Security Division, sought common ground as he found himself repeatedly cut off by a fellow panelist, a former counterterrorism official turned television talking head, who criticized the FBI’s subpoena.

“With the ingenuity in the room, if we share the same values of [wanting to] ensure public safety and civil liberties in their broadest sense from both government over-intrusion and theft from nation states or terrorist attacks, we can come up with a better system than we are in right now,” Carlin said.

For more than seven years, Carlin has quietly been at the center of the most sensitive counterterrorism cases, which have often involved tricky technological questions—first as an adviser to FBI Director Robert Mueller and then at the National Security Division.

It is not a career path Carlin could have envisioned when he arrived as a student at Harvard Law School, and not just because the National Security Division didn’t exist at the time. Carlin, a Manhattan native who studied English literature and political science at Williams College, admits he didn’t know much about computers. But a career as a federal prosecutor always appealed to him.

So he followed the advice of Professor Philip Heymann ’60, the former deputy attorney general, who told him the Justice Department’s Tax Division was a good place to gain trial experience before seeking work as an AUSA. Carlin was one of the first recipients of the HLS Heyman Fellowship (established by Samuel Heyman ’83), which he said was “incredibly helpful” in making a federal career possible.

It was in the Tax Division that Carlin first developed his expertise in cybercrime while working on an IRS investigation of an online fraud scheme. “I was the youngest guy there,” he said. “They assume you know how to use a computer and how computer stuff works, so suddenly you become the go-to guy.”

He took that interest with him to the U.S. attorney’s office in Washington, where he began a six-year tenure shortly after 9/11, and then on to the FBI, where he helped write one of Director Mueller’s first speeches on cybersecurity.

Heymann says Carlin is well suited to a role advising agencies such as the CIA or the National Security Agency. “It’s a good move to be reasonable and mild-mannered,” he added.

As it happened, Carlin has found familiar faces among his counterparts: The National Security Agency’s former chief lawyer, Rajesh De ’99, was his law school housemate. Another one of their classmates and friends, Adam Szubin ’99, is the acting under secretary of the Treasury for terrorism and financial intelligence. “It’s wonderful to see people you have known for a long time and trust and respect in these roles,” said De, who is now a partner at Mayer Brown.

Carlin has seen firsthand how the nature of online threats has evolved, whether it be from economic espionage, North Korea hacking a movie studio’s computer network in revenge for a movie plot, or lone wolf ISIS sympathizers inspired by social media. “It’s a humbling array of threats,” he said.

Last year saw more terrorism cases than any other time since 9/11, Carlin said. “The only common factor inside the U.S. is social media,” he said, with a third of suspects age 21 or younger and half under 25. “That’s obviously a troubling phenomenon.”

Outreach has become part of Carlin’s job. He has spoken at HLS twice over the past few years. A week before his San Francisco appearance, he addressed industry executives from Madison Avenue, Hollywood and Silicon Valley gathered at the Justice Department on the importance of reaching audiences attracted to violent extremist recruitment via social media, according to The New York Times.

Carlin’s tenure atop the National Security Division is likely to end along with the Obama administration, but he is reluctant to talk about what might come next. He quotes his “former boss” Bob Mueller, who liked to say, “You can’t do the job you’re doing if you’re thinking about the next one.” —SETH STERN ’01
Josh Singer ’01 gives a lot of credit to Harvard Law School for helping him in his career. But in one way, it has made things difficult for him.

In his latest project, he was supposed to write a scene in a movie having to do with a legal topic. You may think that would be a cinch for him. But there was one problem. “I’d write the first draft of the scene, and it would be something no one could understand unless they had gone to Harvard Law,” he said.

Since the filmmakers wanted a slightly wider audience, he went back and rewrote—and then rewrote again. It worked out pretty well, and so did the movie as a whole, since the result, the script for the movie “Spotlight,” turned into one of the most acclaimed movies of the past year, with six Academy Award nominations, and two wins, for best picture and for best original screenplay for Singer and his co-writer, Tom McCarthy (who also received a nomination as director).

Singer is thrilled with the acclaim, not so much for himself, he says, but for the exposure that has brought increased attention to the story about the Boston Globe investigation into the Archdiocese of Boston’s cover-up of priest sexual abuse and the societal issues it raises. The complexity of the story—and the filmmakers’ commitment to presenting an authentic portrayal of the events—necessitated copious research, many trips to Boston, and lengthy interviews with those involved.

“This is something I love to do, work on real-life stories, because I’m a law student at heart,” said Singer. “I love doing research on topics I have absolutely no knowledge of.”

He worked on another real-life story—with a very different result—for his first feature film, “The Fifth Estate,” which focused on Julian Assange and WikiLeaks. That movie was critically panned and a failure at the box office. “I don’t know if enough writers talk about this. It was very difficult. Frankly, it was devastating,” Singer said. “At the end of the day, I’ve reconciled. I’m pretty proud of the work, and that work was absolutely foundational for ‘Spotlight.’”

Indeed, his work on “The Fifth Estate” gave him the exposure to be hired not only for “Spotlight” but also for his next project, a biopic of Neil Armstrong directed by Damien Chazelle, who helmed another Academy Award-nominated film, “Whiplash.”

Being an in-demand Hollywood screenwriter was not something Singer expected when he was at Harvard Law. A math and economics major at Yale, he arrived at HLS hoping for a more well-rounded education and, as a joint J.D./M.B.A. student, had designs on pursuing business opportunities in media. He interned with the Disney Channel and Nickelodeon, where he read scripts and thought that maybe he could write them, too.

Moving to Los Angeles after grad school, he sought advice on how to break into the industry from Yale and HLS connections, including Peter Blake ’95, who had written for the TV shows “The Practice” and “House.” He advised Singer to write a mock script for a show he liked, and his favorite was “The West Wing.” In a serendipitous Hollywood twist, Singer happened to sublet a room from a woman who was dating Lou Wells, a producer on “The West Wing,” whose brother, John Wells, was about to take over the show. Lou Wells offered to take his script, and later, Singer got a call that changed his life: He was hired as a staff writer for his favorite TV show, where he worked for its last three years.

Singer calls himself lucky—to get the opportunity and also to work with some of the great talents in the industry. But whether it’s luck or talent, or a combination of the two, he has achieved a goal he set out to accomplish after he finished law school: Not to win awards, but to inspire people to talk about things that matter.

“To me, it was always about being able to be part of the conversation. Look at our public discourse nowadays; it needs to be elevated,” he said. “Hollywood gets a bad rap, but Hollywood certainly can do it, and that’s certainly what I’m trying to do.”
FACING DOWN DISCRIMINATION
Raheemah Abdulaleem fights—and experiences—prejudice in the nation’s capital

Raheemah Abdulaleem ’01 was standing on a Washington, D.C., street corner in 2009 on her way to work at the Justice Department’s Civil Rights Division when a man yelled at her from his car to “go back to your country.”

Abdulaleem, an African-American who grew up in Philadelphia in a family whose roots in the United States are nearly as old as the country, was wearing a hijab, the traditional headscarf worn by some Muslim women.

In that moment, Abdulaleem said, she “was flooded with disbelief, shock, anger, and fear” and too flustered to engage the heckler. Only later, she asked herself why she didn’t say something—and why no passersby interceded or even asked if she was OK.

Abdulaleem described the experience in a February blog post on the website of the White House, where she now works in the Executive Office of the President’s Office of Administration. She was one of several Muslim White House staffers who detailed their personal experiences with discrimination on the occasion of the first visit of President Barack Obama ’91 to a U.S. mosque.

She’d never encountered such a public or hostile reaction to being a Muslim while growing up in Philadelphia, where her parents taught in the city’s public schools for decades. They inspired her own interest in public service, and she knew she wanted to be a lawyer even before she started college at Yale.

Learning about the history of voting rights in Harvard Law School Professor Lani Guinier’s course in law and the political process was a “transformative experience.” She became equally fascinated with employment law while taking that class as a 2L.

“To me, it was a practice area with a human component,” Abdulaleem said. “Real people were affected by discrimination and harassment in the workplace.”

She had just started working in the Atlanta office of King & Spalding when news of the 9/11 attacks interrupted her new employee training session. The firm asked Abdulaleem and her sister, who was also working at the firm, along with a third Muslim woman, to meet with colleagues and “help dispel myths and misconceptions” they might have about Islam.

Abdulaleem spent a total of eight years at King & Spalding and then Ballard Spahr in Philadelphia, where she practiced labor and employment law. In 2009, she moved to the Justice Department’s Civil Rights Division, which she said was the “perfect way” to combine her employment law experience and commitment to civil rights.

Her office brought cases against state and local governments on behalf of victims treated unequally due to their race, color, sex, disability, religion or national origin. Her cases ranged from a prison employee sexually harassed by his female co-worker to police officers seeking accommodation to wear beards while on duty in accordance with their religious beliefs.

In May 2015, Abdulaleem moved over to a nonpolitical career position in the Executive Office of the President. She represents the Office of Administration in matters before administrative agencies on issues such as equal employment opportunity compliance and fiscal and appropriation law. She compares the work of her office to that of an engine in a car. “The work we do is not always seen by the public, but it is vital to the smooth operation of the ‘car’,” she said.

Abdulaleem was among a half dozen Muslim White House staff members who shared their experiences online when President Obama visited the Islamic Society of Baltimore in February.

The breadth of their backgrounds and range of their jobs at the White House underscore the many ways Muslims work to provide “service to our nation,” she said. “We are lawyers, doctors, accountants and scientists. We are not of one race or national origin. We bring a diversity of experiences and perspectives to our work.”

Outside of work, Abdulaleem serves as president of KARAMAH, a nonprofit group based in Washington which provides accessible legal scholarship to Muslims and non-Muslims about issues related to Islamic law, family law, and civil rights law. She has taught courses on leadership during the group’s summer law and leadership program for Muslim women from the U.S. and abroad.

“It is amazing to me year after year to see such motivated women of faith who want to effect positive change in their communities,” she said.

—SETH STERN ’01
“Wisdom From a Chair: Thirty Years of Quadriplegia,” by ANDREW I. BATAVIA ’84 and MITCHELL BATAVIA (BookLocker.com)
Drew Batavia intended to publish his memoir on the 30th anniversary of his spinal cord injury from a car accident when he was 16. But only a few months beforehand, on Jan. 6, 2003, he died from an infection. His brother, Mitchell, has completed the memoir of a man depicted as Don Quixote in a wheelchair, on a mission to improve the lives of people with disabilities (he served as executive director of the National Council on Disability and wrote regulations for the Americans with Disabilities Act) and to ensure that all people “have greater choices in and control over their lives.” Drew’s writing, often witty and self-deprecating, includes details about his rehabilitation, his experience at HLS, and his work at the Department of Justice, with Mitchell offering additional commentary and recollections.

“The Curve: A Novel,” by JEREMY BLACHMAN ’05 and CAMERON STRACHER ’87 (Ankerwycke)
In this satirical novel, the students at the fictional Manhattan Law School are graded on quite an unusual curve: a “pay for an A” scheme whereby students can purchase their grades from a corrupt staff. A new professor, an HLS grad who left legal practice to become “a dartboard on which the students flung their disdain,” must figure out how to save the school and his own career. With tongue firmly in cheek, the writers enjoy spoofing a legal academy replete with dimwits, reprobates and even a few people worth rooting for.

“Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck,” by ADAM COHEN ’87 (Penguin)
Through the backdrop of Buck’s story, Cohen reveals how the most powerful in society embraced a eugenics movement. It culminated in an 8–1 Supreme Court decision in 1927 upholding the commonwealth of Virginia’s ruling to sterilize Buck in order to, as Justice Oliver Wendell Holmes Jr. LL.B. 1866 wrote, “prevent our being swamped with incompetence.” The Court’s decision led to tens of thousands of forced sterilizations in America through the 1980s, and it was cited by the Nazis to defend their own eugenics program. Cohen humanizes the victims and exposes the inhumanity of the intellectuals and leaders responsible for this little-known injustice.

“Chasing the Tape: Information Law and Policy in Capital Markets,” by ONNIG H. DOMBALAGIAN ’95 (MIT)
Individuals participating in financial markets rely on information to make decisions. In his book, Dombalagian explores the policies that affect how that information flows to the capital markets in the United States. In addition, the professor at Tulane University Law School addresses the role of information in promoting market efficiency and the regulatory regime that governs different types of information. He also considers long-term challenges to regulatory policy in the face of “the deluge of information available in the marketplace” and globalization of markets.

“The White House Vice Presidency: The Path to Significance, Mondale to Biden,” by JOEL K. GOLDSTEIN (University Press of Kansas)
Denigrated and marginalized throughout U.S. history, the office of the vice president gained newfound influence under Walter Mondale during the Carter administration, and it continues to this day, Goldstein contends. The professor at Saint Louis University School of Law, who also wrote an earlier book on the vice presidency, examines how the change occurred, pointing to earlier and increased vetting of vice presidential candidates and a closer association of vice presidents with the executive branch. The evolution of the office also provides a lesson about “institutional advance and regeneration,” he writes.
“The Court and the World: American Law and the New Global Realities,” by Stephen Breyer ’64 (Knopf)

Breyer, justice on the U.S. Supreme Court, says that the Court must increasingly consider foreign persons and activities, from issues of national security to commerce on the Internet. Because of this, he writes, “there is an ever-growing need for American courts to develop an understanding of, and working relationships with, foreign courts and legal institutions.” Addressing foreign threats to national security, Breyer discusses what restraints may be necessary to protect citizens—and which institution should decide on the limits. The Supreme Court recently has refused to provide a “blank check” for presidential power, as shown by cases involving Guantánamo inmates. He writes on statutory law, noting that the Court has moved toward interpreting domestic law in a way that would work in harmony with foreign law. That harmony is even more important with regard to international treaties, he contends. He also considers the role of a judge as a diplomat and how the interplay among judges throughout the world affects the law.


Posner points to an increasing gulf between the legal academy and the judiciary. The U.S. Court of Appeals judge writes that law professors have become more specialized and provide less information to judges. He argues that the judicial system needs help, pointing to the uneven quality of judicial appointments and delays in filling them; deficiencies in how judges decide cases and justify their decisions; and problems with management. While acknowledging that the academy can’t solve all judicial problems, Posner proposes improvements such as more collaborative research between law professors and judges, and calls for law schools to modify their curriculum to impart better understanding of judges to law students, including offering courses on the judiciary and on opinion writing (which Posner has taught), and to provide continuing education for judges.

activists on both sides of the abortion debate as well as archival research, the award-winning book focuses on the decade that followed the 1973 Roe v. Wade Supreme Court decision and how the ruling “became a flash point for deeper struggles about the meaning of human life, sex roles, sexuality, and the role of the judiciary.” Ziegler examines how both sides reacted to the decision and to one another, including efforts to find common ground on an issue many consider insurmountably divisive.
IN MEMORIAM

1930-1939
MARVIN A. H. BURNETT ’30 Nov. 13, 2015

1940-1949
FELIX F. STUMPF ’41 Aug. 15, 2015
GRAY THORON ’41 Sept. 18, 2015
LESTER B. BUSOFF ’43 Feb. 8, 2016
ALAN J. FRIEDLANDER ’44 June 14, 2015
HAROLD R. DONDIS ’45 Dec. 10, 2015
ROBERT K. ARGENTIERI ’47 June 24, 2013
ARTHUR L. BERGER ’48 Feb. 23, 2016
JOHN E. CLAY ’48 Oct. 17, 2015
RICHARD H. CROOK JR. ’48 Feb. 16, 2016
FRANK F. DAVIDSON ’48 2014
FRANK J. DAVIS JR. ’48 Feb. 27, 2016
JOHN F. DAVIS ’48 February 2016
ROY C. LABUDEK ’48 Sept. 20, 2015
JOHN C. MÜLLER ’48 Sept. 18, 2015
FREDERIC M. MYERS JR. ’48 Feb. 27, 2016
M. ROLAND “ROD” NACHMAN ’51 Aug. 27, 2015
GUY E. DAUGHERTY ’53 Nov. 26, 2015
NOV. 26, 2015
MARTIN T. GROSS ’53 Jan. 20, 2016
DANA M. TAYLOR JR. ’57 March 4, 2016
LEONARD H. MOCH ’57 March 4, 2016
WILLIAM H. PICKETT ’57 Dec. 3, 2015
JOHN B. ROSENBERG ’57 Feb. 17, 2016
STEVEN R. SPECTOR ’57 Feb. 8, 2016
J. THOMAS ROSCH ’65 Oct. 16, 2015
ROBERT A. RICHARDSON ’64 March 2, 2016
JEROME S. SCHLEIER ’64 Dec. 3, 2015
ROBERT K. SPRINGER ’64 Jan. 18, 2016
EDWARD H. MARTIN ’65 Jan. 18, 2016
T. ROGNALD DANKMEYER ’65 Sept. 29, 2015
ERICK F. ARNOLD ’63 Oct. 5, 2015
ROBERT M. SPEVACK ’66 Sept. 21, 2015
PETER PARKER ’66 Oct. 20, 2015
JOHN W. PIHLBERG ’68 Feb. 12, 2016
STEVEN J. STEPHENS ’68 Aug. 28, 2015
GERALD S. GOFFMAN ’69 Nov. 4, 2015
JAMES W. GLADDEN JR. ’69 Nov. 5, 2015
ROBERT GOLDFIELD ’69 Sept. 17, 2015
BRADFORD GORHAM ’69 Oct. 19, 2015
STEPHEN R. RIVKIN ’69 Nov. 9, 2015
HOKEN S. SIKI ’64 2015
IBA R. SHEPPARD ’64 March 27, 2016
JOSEPH E. IRENAS ’65 Oct. 16, 2015
ROGER PASCAL ’65 Dec. 27, 2015
JAMES T. BOSCH ’65 March 30, 2016
ROY A. HEIMLICH ’66 Sept. 20, 2015
ROBERT A. RICHARDSON ’66 April 20, 2016
JACQUELINE A. BERRENI ’66 Nov. 3, 2015

1950-1999
CARLOS A. VILLREAL LL.M. ’50 Nov. 22, 2015
SANTIAGO R. BUSTAMANTE LL.M. ’51 Nov. 2, 2015
REGINALD L. DAVIS LL.M. ’54 Feb. 29, 2016
JACQUELINE A. BERRENI ’56 Nov. 9, 2015

1970-1979
JONATHAN L. ALPERT LL.M. ’70 Nov. 15, 2014
MARIO DIAZ-CUEZ III ’70 Sept. 21, 2015
JOHN P. HENNING JR. ’74 Dec. 3, 2015
THOMAS A. SCHNEIDER ’74 Jan. 8, 2016
MARK D. KUTHNER ’77 Feb. 3, 2016
BARBARA A. BURKETT LL.M. ’78 Dec. 29, 2015
EDWARD J. PIERCE ’79 Oct. 22, 2015

1980-1989
THOMAS STEPHENS JAMES JR. ’80 Jan. 8, 2016
SANTIAGO R. BUSTAMANTE LL.M. ’82 Nov. 2, 2015
REGINALD L. DAVIS LL.M. ’84 Feb. 29, 2016
JACQUELINE A. BERRENI ’86 Nov. 9, 2015

1990-1999
CARLOS A. VILLREAL LL.M. ’90 Aug. 26, 2015
NATASHA C. “SCHATZ” MAY-NARD THOMAS ’94 March 12, 2016
MARC Y. PEEK BAKER ’95 March 12, 2016
CAROLYN J. HOPKINS ’95 March 12, 2016
CHRISTOPHER B. EDELMAN ’96 Oct. 17, 2015
EBRAHIM H. RASHEED ’96 Nov. 13, 2015
SHERIF R. EBRAHIM ’96 Oct. 12, 2015

2000-2009
JILL L. FELDMAN ’01 (’02) Dec. 31, 2015
RHEE H. LARSON ’01 Feb. 4, 2016

Visit the In Memoriam section online at bit.ly/Inmem2016 for links to available obituaries.
HLSA of Massachusetts

IN JANUARY, AS THE ELECTION SEASON WAS ABOUT to heat up, the HLSA of Massachusetts hosted an event spotlighting two veterans of Massachusetts politics: Republican William F. Weld ’70, former governor, and Democrat Scott Harshbarger ’68, former attorney general. In a candid exchange, moderated by the HLSA of Massachusetts president, Barry White ’67, Weld and Harshbarger discussed the 2016 presidential election and potential effects on the Supreme Court with an audience of over 130 alumni and guests at the Harvard Club of Boston.

The speaking program began with recognition of Neil Chayet ’63, former president of the HLSA of Massachusetts, marking the 10,000th installment of “Looking at the Law,” the one-minute daily CBS broadcast that Chayet began on April 1, 1976.

HLSA of Houston

MAYOR OF HOUSTON SYLVESTER TURNER ’80 AND Houston City Council member Amanda Edwards ’07 were the guests of honor at an HLSA of Houston event at the end of March. Both were elected in December. Turner had served in the Texas House of Representatives for 25 years and has long focused on income inequality and finance reform. Edwards, who has experience as a municipal finance lawyer, is serving as vice chair of Houston’s Budget and Fiscal Affairs Committee. Both Turner and Edwards are Houston natives.

Changing of the Guard

SALVO ARENA LL.M. ’00, THE MANAGING PARTNER of the New York City office of the Italian law firm Chiomenti Studio Legale, will complete his two-year term as president of the Harvard Law School Association on June 30. Arena will pass the mantle to President-elect Peter Krause ’74, former managing director, Morgan Stanley and Greenhill & Co.
LEADERSHIP PROFILE

A conversation with John and Lynn Savarese

John Savarese ’81 and Lynn Ashby Savarese ’81 met as first-year Harvard Law students after John had graduated from Harvard and Lynn from Mount Holyoke. But it wasn’t until a few years after graduating from HLS, when both were working in New York City—John as an assistant U.S. attorney for the Southern District of New York, Lynn as an associate with a Wall Street firm—that they became a couple, marrying in 1987. Over the years, the Savareses, whose three children are graduates of Harvard College, have remained very active in the life of HLS: They served as co-chairs of the HLS Annual Fund several years ago, and John is a member of the Dean’s Advisory Board, while Lynn has played a leadership role in Celebration 60 and earlier events celebrating women graduates.

Today, Lynn, who left law practice after five years to raise their family, is a professional photographer. One of her social justice photography projects, the “New York’s New Abolitionists” campaign to fight human trafficking and modern-day slavery, was exhibited at HLS last fall. She has taken formal portraits of several HLS faculty and alumni for the project, including Laurence Tribe ’66, Samantha Power ’99, and Charles Ogletree ’78. For the past 25 years, John has been a partner at Wachtell, Lipton, Rosen & Katz, where his experience in complex litigation and white-collar criminal cases includes major investigations arising out of the financial crisis of 2008 as well as accounting fraud, insider trading, and criminal antitrust allegations. Chair of the board of trustees of the Vera Institute of Justice and former president of the board of trustees of the Brearley School, both in New York City, he was a lecturer on law at HLS in the fall, teaching the course White Collar Criminal Law and Procedure.

How did you meet?

JOHN: I will never forget the moment when Lynn walked into the first day of our first-year Civil Procedure—she was beautiful, smart and a little exotic, but she was also going out with someone else, as was I at the time. As a result, we were simply friends and acquaintances during law school.

LYNN: Our HLS classmate Kathleen Sullivan ’81 rightfully takes credit for reconnecting us in New York City. As a classmate, however, it did not escape my attention that John was brilliant, appealingly left-leaning, and insanely handsome, and I am very grateful to HLS for the initial introduction.

What were some high points of your time at HLS?

JOHN: A few that stand out especially for me include serving as a research assistant to Professor Duncan Kennedy during the summer between my 1L and 2L years; Professor [Alvin] Warren’s federal income tax course—intensely demanding but also completely wonderful; and Professor [Laurence] Tribe’s Advanced Constitutional Law course—he was inspiring, brilliant, and always pushing the envelope of how to think about constitutional interpretation.

LYNN: Classes with Duncan Kennedy, Larry Tribe, and Roberto Unger [LL.M. ’70 S.J.D. ’76] were absolute high points. Never before or since have I enjoyed that kind of intellectual engagement and excitement. Discussions with classmates, especially when Kathleen Sullivan was present, were also extraordinary. Receiving a better-than-passing grade on my third-year paper from my adviser John Ely was also a high point, especially given the times he questioned the soundness of my thesis—that the 13th Amendment provides the best constitutional basis for recognizing a woman’s right to abortion—and the number of times he reminded me that I would need a passing grade from him in order to graduate.

How did HLS prepare you for your current work?

LYNN: Advancing human rights and social justice has been a primary concern of mine for decades. The three years spent at HLS focusing on fairness in myriad complex contexts helped fuel and shape this endeavor. Although I enjoy pursuing fine arts projects as well as some commercial work, much of my time as a photographer is spent helping not-for-profits further their missions through strategic photography projects. Recently, my “New Abolitionists” portraits were exhibited at a national judiciary conference held in NYC to address human trafficking, with the chief justices of almost half of the country’s state supreme courts in attendance.

JOHN: HLS instilled habits of discipline and rigor, making sure that you really did all the necessary digging to understand an area of law, and that you not only dug deep but also roamed broadly in search of strategic angles and potential analogous areas that could provide support for an argument.

Why have you chosen to be actively involved in the life of HLS?

JOHN: Lynn and I feel profoundly indebted to HLS. Not only did it bring us together, but it also has given us habits of mind and shared interests that have enriched our lives. We also care passionately that the school remains available to students in need of financial aid, that it maintains a diverse student body, that it continues to be on the cutting edge of legal research and scholarship, and that it continues to be able to offer the extraordinarily broad array of courses, clinics, and research opportunities that it is rightly famous for.

LYNN: I sincerely believe that there is no other institution better positioned to cultivate leaders possessing the skills and means necessary to effectively address the full spectrum of major challenges facing us at home and worldwide. A cursory look at the number of alums who go on to become key decision-makers in all branches of government both here and abroad—as well as profoundly influential scholars, social justice leaders, community leaders, business leaders, and leaders of the bar—makes it clear that HLS plays a unique and extraordinarily impactful role in the world.
“Advancing human rights and social justice has been a primary concern of mine for decades. The three years spent at HLS focusing on fairness in myriad complex contexts helped fuel and shape this endeavor.” —Lynn Savarese

Given HLS’s mission to provide its students with the training, skills, inspiration, and confidence needed to take on these many critically important roles, I can’t imagine another institution more worthy of my loyalty and support.

**Could you describe how HLS has changed since you were students here?**

**JOHN:** The changes, in my view, have been absolutely all for the good. Indeed, the current law school is almost unrecognizable compared with the school we attended over 30 years ago. Everything from the physical space—imagine, comfortable sofas and fireplaces!—such comforts were utterly unimaginable in the late 1970s when we arrived. The food is approximately 1,000 percent better. And, far more importantly, the space available for student-led organizations; the proliferation of clinical education; the increase in the size, intellectual breadth, and diversity of the faculty; and the dazzling variety of courses are all wonderful to see, and important for all of us to support.

**LYNN:** There is now a much broader, deeper, richer curriculum; smaller class sizes permitting more meaningful interaction; an amazing proliferation of wide-ranging legal clinics; vastly improved physical facilities that encourage and facilitate student interaction and group endeavors; and far more generous financial assistance for students while on campus and post-graduation. Our recent HLS deans not only have transformed the law school; they have transformed the role of dean itself, by seeking far more active engagement and genuine dialogue with students.

**What is your greatest hope for HLS going forward?**

**JOHN:** That it continues to be a stimulating laboratory for new ideas; that it continues to be a training ground for future leaders across a broad array of disciplines; and that it continues to stretch to do new things, teach in new ways, introduce new generations to bold ways of thinking about the law and society.

**LYNN:** My greatest hope is that HLS remains committed to its ambitious mission and that alums continue to provide the support needed for its fulfillment, so that HLS continues to be a force for good in the world.
MATT SECCOMBE spends much of his day sorting through roughly a million pages of horror. It’s his job to analyze documents in the HLS Library’s Nuremberg Trials Collection, one of the most extensive collections of documents from the trials of military and political leaders of Nazi Germany and other accused war criminals. He acknowledges that it is sometimes “nightmare-inducing reading,” but every dramatic and unexpected individual document he uncovers makes the job compelling, he says. Seccombe catalogs some of his findings, including those shared here, in his blog Scanning Nuremberg.

AN EXECUTIONER REFLECTS: In October 1941, Lt. Walther supervised the execution of a group of Jews and Gypsies in Serbia and filed a detailed report. He noted that everything went quickly the first day, but on the second day, some of his soldiers “did not have the nerve” to kill quickly. As for Walther himself, “one does not develop any psychological inhibitions during the shooting to death. However, these appear if one contemplates it quietly after a few days in the evening.”

ORDERS TO KILL CIVILIANS: In September 1941, upon instructions from Hitler, the senior military commander, Wilhelm Keitel, issued the “Keitel order” for the eastern front (Russia and Yugoslavia). All opponents in the occupied territories were deemed to be Communists, and since “a human life frequently counts for naught” in the region, deterrence required “unusual severity.” For any attack, “the death penalty for 50 to 100 communist[s] must in general be deemed appropriate as retaliation for the life of a German soldier.”

FATAL WORDS: The most incriminating statement of the trials appears in Dr. Adolf Pokorny’s proposal to Heinrich Himmler, the head of the SS, that prisoners be chemically sterilized so that they could be used as laborers but...
would eventually die out. Pokorny was “[l]ed by the idea that the enemy must not only be conquered but destroyed.” Himmler made a note about where to start: “Dachau.” Because his plan was never carried out, Pokorny was acquitted.

DESTROYING THE WARSAW GHETTO:
On Himmler’s orders, the Warsaw Ghetto was eliminated in 1943. SS Cmdr. Juergen Stroop was privately impressed by the Jews’ armed resistance, but officially he denigrated them as traitors and bandits in his report, “There Is No Jewish Ghetto in Warsaw Anymore.” The survivors were marched away as the district burned.

PROSECUTORS’ NOTES ON DEFENSE DOCUMENTS: In two cases we have defense document books that had been used and annotated by the prosecution, indicating its response. One note was personal: “Oeschey a hypocrite?” One was strategic: “Object to entire book” as being irrelevant to the charges; the outcome is noted: “Overruled.”

SELECTIONS FOR EUTHANASIA: Dr. Fritz Mennecke of the Eichberg Mental Institution was tasked with selecting individuals for “euthanasia,” and his file contains photos and notes. Individuals selected were described as either having “a life not worth living” or being “a useless eater.” Among them was Anna Weil, diagnosed by Mennecke as being an “Unsympathetic Czech Talmudic Jewess.”

CURIOS WORDS: One document refers to legal files that have been dealt with by “the electrical wolf” (with no further explanation). A German colleague suggests that this is a German term for a paper shredder.

A VICTIM SPEAKS: The prosecution made a public request in January 1947 for accounts of forced sterilization, and Inge Lorber was one of those who told her story: “They treated me like an animal that was led to the slaughterhouse.” She had a minor hip deformity, and lacked Nazi connections to protect her, so she was sterilized. Even if her evidence was not suitable for the trial, “I had to unburden my heart to somebody.”

UNEXPECTED VOICES: Most of the 3,000-plus (so far) authors of the affidavits, letters, reports, orders, books, and other documents are ones you would expect: the leaders who issued orders, and the people who carried the orders out, or suffered the consequences, or bore witness. But there are also unexpected authors turning up—among them, Oliver Wendell Holmes Jr., Vladimir Lenin, Col. George Ruggles from the American Civil War, Dr. Jonas Salk, Tom Paine, Plato, and the Brothers Grimm.

THE WEREWOLVES: One defense affidavit by Hans Hammling claimed that in April–May 1945 in the German village of Grenzen, the newly arrived U.S. occupation force put up a poster warning that “for each soldier of the United States Armed Forces, who was killed by members of the Wehrwolf organization or the German population, 200 . . . Germans would be executed by shooting.” (The commander who had occupied Grenzen later testified that no such order for reprisal killings had been given.) Werewolves? A bit of research revealed that this was an SS idea to set up clandestine forces to harass and sabotage the Allied armies when they entered Germany and to punish Germans who coopered. Little came of it, except perhaps making the Allied occupation regime more suspicious than it might have been.
Reflections on the legacy of
Antonin Scalia ’60

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