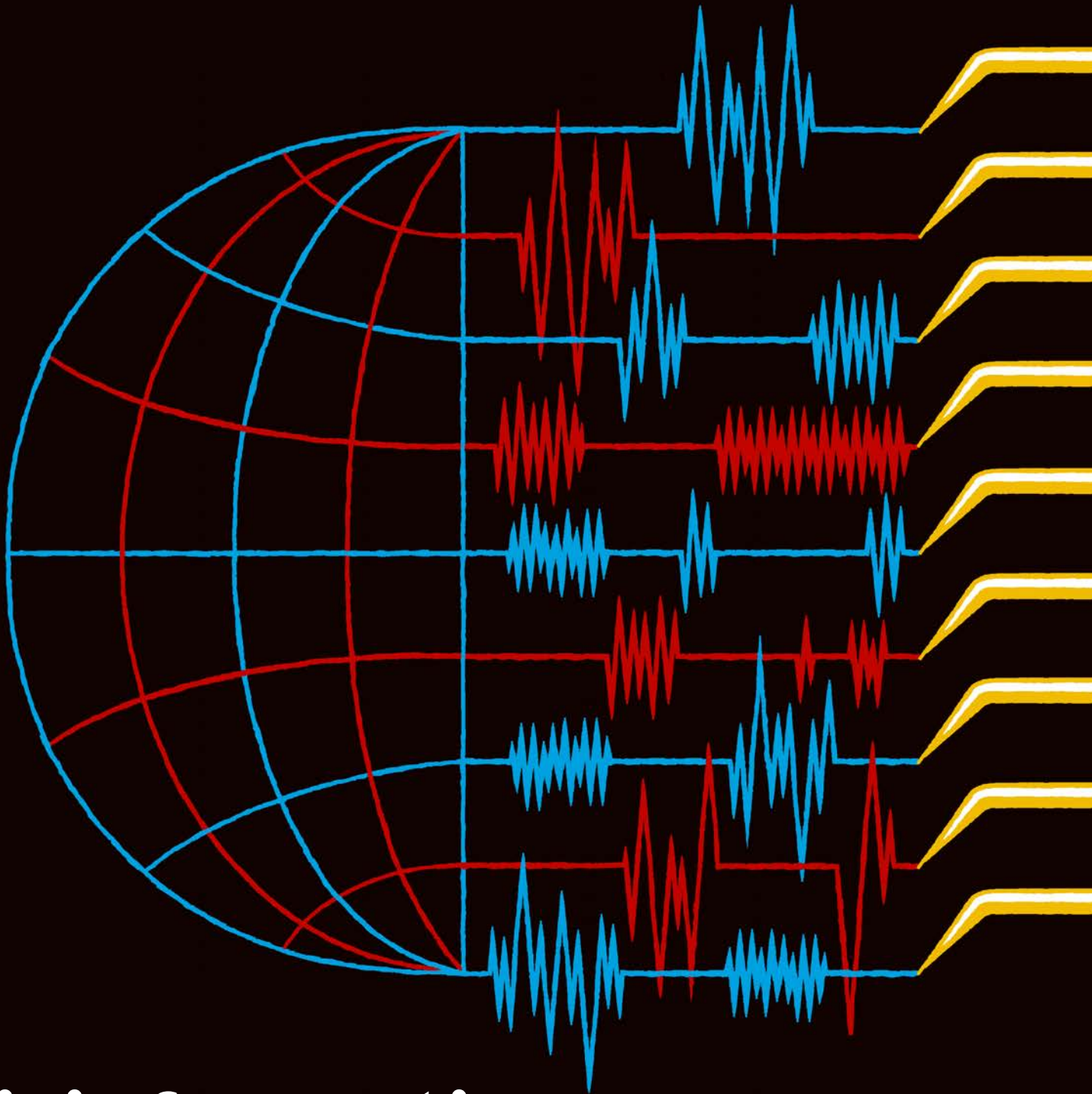


Harvard Law

Summer 2021

bulletin



Disinformation.

Deception spreads faster than truth on social media.
Who — if anyone — should stop it?

Oh, What a Tangled Web We Weave

18

Deception spreads faster than truth on social media. Who — if anyone — should stop it?

'What Can We Do to Help Create 150 Years of Change in 10 Years?'

26

The new Institute to End Mass Incarceration takes aim at 'one of the defining civil rights issues of our time'

Katherine Tai Represents

32

In her new role as USTR, Tai '01 brings legal expertise, political savvy, and a deep commitment to American workers

Off the Bench and into the Breach

36

Merrick Garland '77 returns to the Department of Justice as the 86th U.S. attorney general



TONY LUONG

ANDREW MANUEL CRESPO '08 LAUNCHES THE INSTITUTE TO END MASS INCARCERATION.

PAGE 26



DREW ANGERER/GETTY IMAGES

"THIS IS THE HIGHEST, BEST USE OF MY OWN SET OF SKILLS."

— MERRICK GARLAND

PAGE 36

2

FROM THE DEAN
Making meaning

3

LETTERS
In search of corporate law lyrics

4

**WRIT LARGE: FACULTY BOOKS
AND FILMS**
*“On Juneteenth,” “Vice Patrol,”
“The Crits!”*

10

INSIDE HLS
*An activist at home in the world;
Breyer cautions against
the ‘peril of politics’; What Betsy
built; Cities & the teacher*

42

HLS AUTHORS
*From an American daredevil to an
American president*

44

CLASS NOTES
*Finding her voice; Salute to justice;
The battle for the ballot box; ‘I’m still
trying to understand my role in this
complex place’*

54

IN MEMORIAM

58

GALLERY
*The Pentagon Papers
case today*

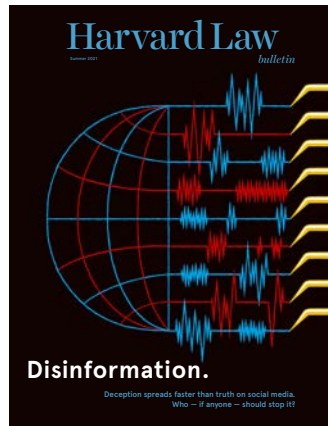


JESSICA SCRANTON (2)

Two legendary teachers retire

ELIZABETH BARTHOLET '65, the inspiration
for countless young lawyers
GERALD FRUG '63, master teacher, legal
theorist, city lover

PAGE 14



*Cover illustration
by Adam McCauley*

Harvard Law Bulletin

VOLUME 72 | NUMBER 2

ASSOCIATE DEAN FOR
COMMUNICATIONS AND PUBLIC AFFAIRS
Melodie Jackson

EDITOR
Emily Newburger

MANAGING EDITOR
Linda Grant

EDITORIAL ASSISTANCE
**Jeff Neal, Christine Perkins,
Lori Ann Saslav**

DESIGN DIRECTOR
Ronn Campisi

EDITORIAL OFFICE
Harvard Law Bulletin
1563 Mass. Ave., Cambridge, MA 02138
Email: bulletin@law.harvard.edu

Website: today.law.harvard.edu/bulletin

Send changes of address to: alumrec@law.harvard.edu

© 2021 by the President and Fellows of
Harvard College. The Harvard Law Bulletin
is published two times a year.

Making Meaning

The past year was among the hardest our Harvard Law School community has faced in recent memory. It was also one in which our students, staff, and faculty showed exceptional resilience, commitment, creativity, and generosity.

Like so many others, members of our community faced great challenges arising from the COVID pandemic, including illness and loss, significant new child or elder care responsibilities, and, for some of our students, learning remotely from halfway around the globe. This year also brought sharp focus to so many grave and persistent injustices: racism, abuse of power, inequality, poverty, intolerance, threats to democracy. All of this has touched our community deeply and has also highlighted the important role law and lawyers play in furthering the rule of law, equal justice, and democracy.

Even with all of the challenges they faced, our students committed themselves fully to the important work of learning and of meeting the growing needs of vulnerable clients. Our faculty, too, worked hard to adapt the distinc-

tive elements of law school classroom and clinical pedagogy to the best practices of online teaching. At the same time, they continued to dedicate themselves to teaching, research, and new initiatives that confront the urgent issues of our time. The Institute to End Mass

Incarceration, featured in this edition, is one such effort. And our staff have worked tirelessly and thoughtfully to sustain and further the law school's mission. I am filled with gratitude and pride for what our community has achieved and for its members' hard work and commitment.

Looking ahead as we begin to emerge

from the pandemic, we ask: How do we make meaning of this most difficult year? Ours is a profession of service and contribution. A common passion I see in our students year after year is a deep commitment, in many different ways and with many goals in view, to doing something larger than themselves, to making the world always better. That aspiration has never been more evident than in this past year.

In the time of COVID, when navigating school and life was just plain harder, one might have thought the extraordinary number of service hours typically performed by Harvard Law School students would fall off, at least a bit. In fact, it's been just the opposite. Members of the J.D. Class of 2021 each did an average of 662 pro bono hours during their time

here. That's a new record, and it represents a cumulative total of 393,384 hours of service for this class alone. A record 91% of graduating J.D.s took at least one clinic, and our LL.M.s — pursuing their studies from every corner of the world — enrolled in clinics at a 50% higher rate than usual.

This commitment to service is not only inspiring; it is vital. This is, in part, because our newest alumni, like all of you, have chosen to join a profession that is dedicated to guarding the rule of law, checking abuse of power, giving life to equal justice under law, and preserving the hard-fought right to govern ourselves. It is also because, in a time of division — when people aren't listening, when they cannot agree on facts much less policy — we lawyers have a special role to play. Our work consists of facts and reason and argument, and we cannot make our best case unless we listen generously to the other side's. In a world that feels broken, with so many problems to fix, your voice, and your service, and those of our newest graduates, will be crucial.

Thank you for all you have done and all you will do to make meaning of this challenging year, for bringing your best selves to the worst problems, and for showing once again the importance of the service lawyers and the law can render, especially when times are hardest. We will watch with pride as our newest graduates take their places by your side, among the generations of great Harvard lawyers and leaders who have dedicated themselves to making progress and to doing the always unfinished work of advancing the ideals of law and justice.

In a world that feels broken, with so many problems to fix, your voice, and your service, and those of our newest graduates, will be crucial.



JESSICA SCRANTON

READER'S QUERY

The retirement tribute to Professor Robert Clark '72 (Summer 2020 issue), who wrote and performed music in his classes to help students remember the principles of corporate law, spurred memories of another musical corporate law class. It also spurred a question.

I was wondering if any reader remembers or has a record of more verses to “Non-negotiable You,” which emanated from a Secured Transactions class in my era. The only bits I remember are “You’re the only note that I endorse,” and “I want to be your holder in due course.”

DANIEL FELDMAN '73
New York, New York

OTHER VIEWS ON THE TRUMP ADMINISTRATION

All four professors quoted in “An Election for the History Books?” (Fall 2020 issue) offer the same apocalyptic, negative views of the Trump administration found in most of the media. There are some opposing views out there, also expressed by distinguished scholars. It would have been nice to see some balance in the article. If opposing views cannot be found at Harvard Law School, that is a shame.

JAY KELLY WRIGHT '72
Fort Myers, Florida

Editor's Note: The following letters first appeared in the Fall 2020 online-only issue of the Bulletin.

PIGEONS, CORN PELLETS, AND THE TRANSFORMATIVE EFFECT OF LARRY TRIBE'S TEACHING

The first lesson Larry Tribe taught me in his Constitutional Law fall 1975 class at the start of my second year at HLS concerned pigeons and corn pellets. I had read the article Professor Tribe had assigned us to read, about the pigeons and the pellets and the magic lever the



smart pigeons learned to push, which, while denying the bird a pellet immediately, allowed the wise pigeon to collect many more pellets later. (This is the lever to which Kathleen Sullivan alluded in her tribute to Professor Tribe in the Summer 2020 tribute: “His imagery was vivid:

A constitution was a pre-commitment against future temptation, like Odysseus tying himself to the mast.”)

Why did that simple allegorical scientific article impress me? Well, like many, I came to Harvard Law School smart but not very wise. By the time Tribe’s class began, I was under the impression that I knew con law and that this would be merely a refresher course, for I had had three con law classes in college, and two in graduate school. Unlike Professor Sullivan, who came to Professor Tribe’s class with some feel for how magical his class would be, I had little sense of his reputation, only the advice of Professor Arthur Miller, at the end of our first year in law school, who, when asked for advice on classes to take the following year, admonished us to take Tribe’s class — “It may become the highlight of your time at HLS,” or words to that effect.

By the time the class was completed in December, I was no longer ignorant of the transformative effect Professor Tribe could have on a young, impressionable mind seeking enlightenment and knowledge. The pages of the simple diary that I kept for my days at law school were filled with praise for this class, “another amazing Tribe class” being a common entry.

Indeed, while I had some other wonderful teachers at HLS (the aforementioned Arthur Mill-

er among them), and some not so memorable, only John Hart Ely’s Advanced Con Law class approached Tribe’s every-single-day-at-the-top-of-his-game approach to teaching.

IVAN ORTON '77
Seattle, Washington

Editor's Note: We are sorry to report that Ivan Orton passed away in January.

FOND FORUM MEMORIES AND CONGRATS TO JERRY RAPPAPORT

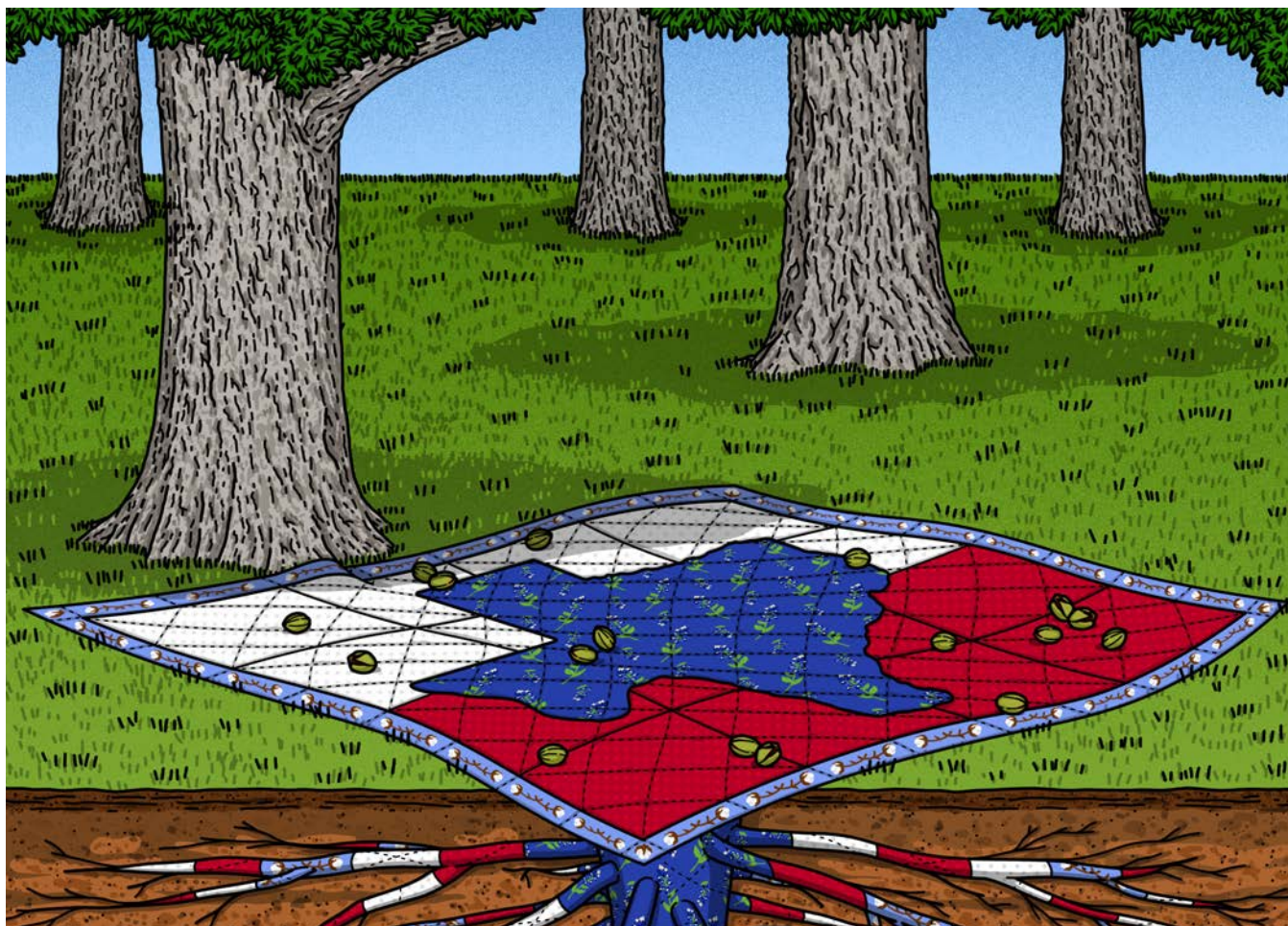
Julia Hanna’s article about the new Law School Rappaport Forum (“Coming Full Circle,” Summer 2020 issue) awakened some nice memories. In my last semester, 1954, I was president of the then “Harvard Law School Forum.” We presented, I think, about four forums each semester, in the same format described in her article: two speakers taking opposite sides of a specific question, with a moderator, usually from the university faculty. As mentioned, we were able to attract prominent speakers. Among those during my tenure, I recall former Vice President Henry Wallace, the columnist Dorothy Thompson, and, yes, James Michael Curley. In fact, I remember that 1953 nondebate wherein Curley, to my recollection, simply recounted amusing anecdotes about municipal government. The Forum also gave me an opportunity to personally meet Dean Griswold, when he called me to his office to down-dress me over what he thought was an inappropriate Forum topic. So congratulations to Jerry Rappaport for reviving this important structure. Would it not be a better way for presidential candidates to debate, instead of the current practice of stock, time-limited answers to anticipated questions?

EDMUND R. ROSENKRANTZ '54
Montclair, New Jersey

WRITE to the Harvard Law Bulletin: bulletin@law.harvard.edu; 1563 Massachusetts Ave., Cambridge, MA 02138. Letters may be edited for length and clarity.

A Sense of Place

Annette Gordon-Reed considers her home state's complex history / By Julia Hanna



As a child growing up in Conroe, Texas, in the 1960s and '70s, Annette Gordon-Reed experienced Juneteenth on different levels. She knew June 19 was the day in 1865 when enslaved African Americans in Texas were told slavery had ended — two years after the signing of the Emancipation Proclamation. But it was also a time to run and play with cousins, throw firecrackers, eat barbecued goat, and enjoy unlimited access to iced-down bottles of red soda. “I remember a

In “On Juneteenth,” Annette Gordon-Reed presents a 360-degree view of the history leading up to the holiday and beyond.

combination of childish celebrations and hedonism — and at the same time, a sense among older people that this was something important,” says Gordon-Reed ’84, the Carl M. Loeb University Professor at Harvard and author of six books, including “The Hemingses of Monticello: An American Family,” which earned her a Pulitzer Prize in history and a National Book Award.

In the newly published “On Juneteenth,” Gordon-Reed pres-

ents a 360-degree view of the history leading up to the holiday and beyond, weaving in her perspective as a Black woman with Texas roots dating back to as early as the 1820s. White cowboys and oilmen are an indelible aspect of the Lone Star State’s mystique, fed by popular culture references ranging from the Hollywood epic “Giant” to primetime television shows like “Dallas” — yet the reality, as Gordon-Reed shows, is far more nuanced. Texas, she says, holds

a unique place in U.S. history, with large Hispanic and Native American populations, a shared history with Mexico, the distinction of having existed as an independent republic, and a history of plantation slavery and legalized Jim Crow. “It’s a place,” she says simply, “where a lot of American things meet.”

On a more personal level, it’s also where Gordon-Reed grew up. The decision of *Brown v. Board of Education* was nearly a decade old when she entered kindergarten at Booker T. Washington High School, the de facto “Black school” that included students in grades K–12. Schools in Conroe remained segregated, for all intents and purposes, but Gordon-Reed’s father believed younger students benefited from attending schools separate from junior high and high school students — which was the case for the town’s white children. So it was that Gordon-Reed became the first Black student to attend Hulon N. Anderson Elementary.

“I learned later that my parents and the school district negotiated about how it would all proceed,” Gordon-Reed writes. “No fuss would be made. ... I would just arrive at school and begin first grade as if there were nothing to it. There was, of course, something to it. This was a new thing in our little corner of East Texas.” Her family received death threats; lynchings and extrajudicial killings of Black men were a deep-rooted part of the area’s history, with little more than a generation separating one of the more recent cases and Gordon-Reed’s impromptu integration. Even so, she writes, her



teachers treated her no differently.

The racism she did experience was more puzzling than anything else, as Gordon-Reed recalls. Some girls who were friends at school, for example, would ignore her in town. “You had to wonder, Why is it this way?” she says. “It created a detachment, a sort of anthropological approach to dealing with people.”

Gordon-Reed says it’s hard to know how much of that observational, outsider stance was already part of her personality and how much was cultivated by circumstance. Either way, she has used that power of observation as a historian committed to examining the accepted historical record to gain a more complex understanding of how people lived together.

Slavery in early American history, for example, is typically pegged to Jamestown and 1619, she notes, when in fact there is a record of its presence during the period of the Spanish exploration, when an enslaved man named Estebanico, originally from Morocco, traveled in the 1520s from Florida to Texas to what is now California. Spanish explorer Álvaro Núñez Cabeza de Vaca described his invaluable ability to speak and translate Indigenous languages as the ex-

pedition made its way across the Southwest. “We didn’t spend much time on Estebanico in school, because that story is not tied to our Anglo-American heritage,” says Gordon-Reed. “But there’s no real reason to accept those boundaries. It’s useful to consider slavery as a global system and not limit our understanding to the 20 Black people who were brought to Jamestown in 1619.” Estebanico also offers the opportunity to consider an enslaved man as an individual, she writes, going well beyond the history taught to her as a young person. “Seeing Africans in America who were out of the strict confines of the plantation — and seeing them as other than the metaphorical creation of English people — would have pushed back against the narrative of inherent limitation. Africans were all over the world, doing different things, having all kinds of experiences.”

In the same vein, Gordon-Reed’s account goes beyond a dualistic understanding of slavery and race relations. “This is not just a story of Black and white,” she says. “It’s the story of those groups but also Tejanos, Hispanics, and Native Americans.” She hopes “On Juneteenth” will cause readers to reflect on the complex nature of life — and of love. As awful as some periods of its history may be, she says, Texas is the place she and generations of her family have called home; recently, she found her great-great-grandfather’s voting registration card, dated 1867. “We tend to set a binary response to loving or hating a person or a place. But in every chapter of the book, there are good and bad things happening at the same time,” says Gordon-Reed, who hopes to devote more time to exploring her own family’s roots. “There’s a complexity of emotion there, a response that is both rational and irrational.”



Annette Gordon-Reed

Vice Age

Anna Lvovsky chronicles the policing of gay life in the mid-20th century / By Lewis I. Rice

Sometimes the police could identify a gay man by his red tie. In other cases, it could be his tennis shoes. Or maybe they just knew one when they saw one.

As preposterous as it may seem, the police once relied on such seemingly innocuous clothing choices or even a man's perceived feminine look to target "suspected homosexuals," as detailed in the new book "Vice Patrol: Cops, Courts, and the Struggle over Urban Gay Life Before Stonewall" by

"There's no question that policing was a major shadow in the lives of essentially anyone living a socially active life in gay or lesbian circles, particularly in gay circles," says Anna Lvovsky of the period her book covers.

Anna Lvovsky '13, assistant professor at Harvard Law School. The book, which focuses on the roles of the police and judges in policing gay life in the mid-20th century, originated as her thesis topic (she received her Ph.D. in the History of American Civilization from Harvard in 2015). During her research, she was struck by policing manuals she discovered from an era that focused on visualizing the "deviant body" as a way to stop sex-related offenses, particularly

those of gay men.

"There has long been a certain instinct to contain and redress ... the possibility of deviance by essentially mapping deviance onto something that's conspicuous and visible and therefore easily distanced from the self," she said in an interview. "There's something deeply reassuring about being able to both distance oneself from the deviant body and to assert that one can understand and grasp and therefore contain — concep-



tually at least — the figure of the ‘deviant.’”

The book begins after Prohibition ends, when laws were enacted to regulate how drinking establishments could operate their businesses and how their customers behaved. Enforcement often turned on whether or not bar owners knew that the patrons they served were gay, as shown in administrative proceedings detailed by Lvovsky featuring police testimony on “rouged faces,” or the “effeminate” way a customer spoke. She includes details about the cat-and-mouse game bar owners played with the police: One owner implemented secret signals to alert customers upon police entry to act “in a normal well-behaved manner,” while another signaled an accepting atmosphere with a sign advertising “Pickled eggs laid by gay roosters.”

When cited for violations, bar owners contended that they couldn’t reliably “recognize a homosexual” or questioned the police’s qualifications to do so. In time, the owners enlisted expert testimony that framed homosexuality as a disease best addressed by medical authorities — ironically using rhetoric often remembered for its harm to LGBT communities.

By the early 1950s, police started using plainclothes officers and decoys in specialized vice squads to initiate arrests. These efforts ranged from officers flirting with men in bars to decoys exposing themselves in public bathrooms in order to entice solicitations. When these cases went to court, judges frequently objected to these tactics, calling them a waste of police resources or questioning the morality of such manipulation. According to Lvovsky, judges’ more permissive attitudes partly reflected a growing liberalization among the educated and elite of

the period, but primarily stemmed from institutional pressures within the courts, from judges’ concern about their workloads to their professional relationships with psychiatrists. Yet she also emphasizes that the frequent leniency judges showed toward the accused should not minimize the harms suffered by those targeted by the police.

“There’s no question that policing was a major shadow in the lives of essentially anyone living a socially active life in gay or lesbian circles, particularly in gay circles, in these years,” Lvovsky said. “Even though many judges would reduce charges or would sometimes dismiss or acquit, the majority of defendants were still convicted of some kind of misdemeanor offense. And being brought into the criminal justice system is itself a great cost. Even when defendants don’t suffer direct penal consequences, there’s a certain psychological insecurity and fear of exposure to friends, family, and employers that come from any close encounter with the justice system. So that’s absolutely a very important part of the story.”

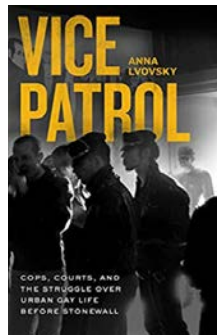
Her book concludes in the 1960s, when the popular media began to cover gay culture and attempts by the vice squads to regulate it. While press coverage was not necessarily sympathetic to the gay community, Lvovsky writes that it brought unfavorable visibility to the manipulative practices of vice officers, whose “expertise in an ostensibly deviant sexual culture did not bolster their standing in public debates about sexual difference. It undermined the legitimacy of their operations, casting the specter of deviance on the experts themselves.”



COLUMBIA LAW SCHOOL

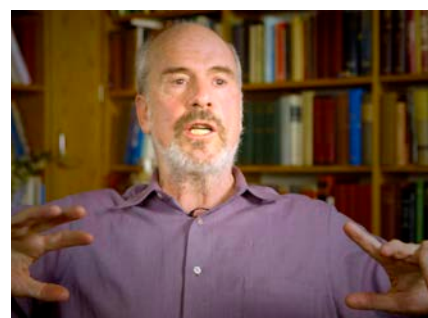
Although the book focuses on policing practices from the mid-20th century, according to Lvovsky, the history is relevant in helping us understand how police enforce laws against marginalized populations today.

Changes came later in the decade, as activists and critics pressured police departments to limit their undercover tactics, judges imposed legal limits on police surveillance, and courts prohibited liquor boards from suspending licenses because of the mere “presence of apparent homosexuals.” Those changes mirrored growing attention to police abuses and support for sexual privacy, writes Lvovsky, but they also “reflected a shifting view of homosexuality itself.” Policing that targets LGBT people, which spurred the Stonewall riots of 1969, persisted into later decades and still occurs today on a smaller scale, she writes. Yet the practice of vice officers immersing themselves in gay life and culture was primarily a feature of the mid-20th century, according to Lvovsky. That history remains relevant, she writes, in helping us understand how police enforce laws against marginalized populations, in areas such as narcotics, prostitution, terrorism, and gang activity: “The painful, contested tale of the state’s attempts to regulate gay life in the United States may be a classic case of history not simply showing us a shameful past, but also casting light into the hidden corners of the present.”



The Influence of Critical Legal Studies

A film by Jeannie Suk Gersen highlights the drama and import of the movement / By Elaine McArdle



By the time Harvard Law School Professor Jeannie Suk Gersen '02 was a first-year law student at HLS, Critical Legal Studies had been pronounced dead. CLS, which emerged in the 1970s from the civil rights and anti-war movements, argued that the law is not neutral but rather inherently biased toward maintaining the status quo to the detriment of marginalized groups. Vilified by the political right, CLS was derided as a “misplaced monster of prehistoric radicalism” by President Ronald Reagan at a 1988 meeting of the Federalist Society, but legal liberals were no fans either. There was a yawning generational gap between the old guard and the young upstarts of CLS,

With charismatic founding figures, battles over the meaning and uses of the law, and serious career repercussions against CLS adherents by traditionalists, the story was “filmic,” says Jeannie Suk Gersen.

who blamed liberals not only for the Vietnam War but also for fomenting an unnecessarily competitive model for the law school classroom. By the late '80s, the legal establishment had “crushed us like bugs,” says Duncan Kennedy, HLS professor *emeritus* and one of the movement’s founders.

And yet “every corner you turned and every closet you opened at the law school, there it would be, in some sort of zombie or ghost-like form,” Gersen recalls. Most of her 1L professors, as well as later mentors such as Kennedy and HLS Professor Janet Halley, were adherents of Critical Legal Studies, and its influence was still significant. “They didn’t wear their Crit

perspective on their sleeves in the classroom,” says Gersen, yet she was drawn to the theory they taught.

An expert in family, criminal, and arts law who has been teaching at HLS since 2006, Gersen was convinced the CLS story was an important one to share now. “Understanding what these fights were about affects and shapes the debates we are having today about the legitimacy of law,” she says, and she set out to make a film, something she’d never done before.

She was interested not so much in examining CLS philosophy, about which numerous law review articles have been written, but in spotlighting the experiences of those who lived through the movement’s spectacular rise and fall.

With charismatic founding figures, dramatic battles over the meaning and uses of the law, and serious career repercussions against CLS adherents by traditionalists, the story was “filmic,” says Gersen. It was rich with Freudian overtones of jealousy, aggression, patricide — in the sense of killing off the older generation — and passionate rivalries among the Crits, even as they cared deeply about each other. “It was about love, it was about violence, it was about sex, it was about death, it was all of those very primal concepts — and all of those dynamics fueled the story,” she says.

Gersen’s 25-minute film, “The Crits!” which premiered at the 2017 HLS Bicentennial, was featured at the HLS Film Society’s launch in November 2020. She is hoping the film can find a sponsor or site as a way for it to be widely seen, as she wants her target audience — people unfamiliar with the CLS story, including lawyers and law students — to see “how influential the movement has been and yet how much disavowal of CLS has existed, both within law schools and the general culture,” she says.

When she began the project, Gersen’s outreach to Crits met significant resistance. “A lot of them didn’t even return my calls,” she says. She doesn’t want to speak for them but adds, “I will just speculate that those were painful times and painful experiences for those individuals, at least some of them, and that to remember it or to have somebody nosing around afterward to try to unearth or resuscitate some of those painful experiences might not have been so welcome.”

She did her first on-camera interview, in 2014, with one of the movement’s founding figures, Peter Gabel ’72, former president of New College of California. Over the next several years, with funding from Harvard University and HLS, she worked with her

“Understanding what these fights were about affects and shapes the debates we are having today.”

filmmaking partner and friend, Jackie Mow. They spoke with key figures including Duncan Kennedy, a wide-ranging thinker who has educated generations of students on the politics of law, among many other topics; Kimberle Crenshaw ’84, a leading scholar in critical race theory who developed the concept of “intersectionality” in which gender, race, class, and other characteristics intersect and affect the experience of an individual; and Clare Dalton LL.M. ’73, who in 1987 sued and received a settlement for sex discrimination after HLS denied her tenure. Among other dramatic turns, the film describes how the movement splintered as new iterations developed. FemCrits, who were extremely critical of the patriarchal foundation of CLS, were themselves critiqued by critical race theorists over issues of racial oppression.

Yet through these iterations, the “influence of CLS has been incredibly pervasive,” says Gersen. Indeed, as she was completing the film, she noticed that for the first time in her teaching career a plurality of her students were “routinely performing acts of radical-left critiques of liberal legalism,” and “asking, ‘Is law the answer, or is law something that’s only as good as the people who are wielding it, interpreting it, and doing things with it?’”

“There’s something unique about this moment that is making this happen,” says Gersen, who speculates that the #MeToo movement, the Black Lives Matter movement, and the unprecedented size and breadth of global protests after the killing of George Floyd are prompting a resurgence of the CLS influence.

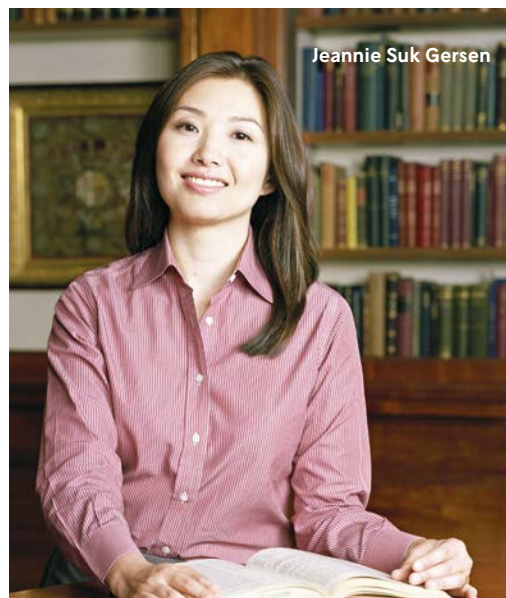
“Critical race theory right now, even just in the past year, has had enormous salience in our culture both in legal culture and in mainstream society,” says Gersen, who notes the scholarship of Crenshaw, in particular, for critiquing “politically neutral-seeming policies and laws as having impacts that are racially significant. I think that is everywhere today.”

At left, stills from a movie about a movement:

TOP ROW: Mark Tushnet, HLS professor emeritus; Kimberle Crenshaw, professor of law, Columbia and UCLA

MIDDLE ROW: David Trubek, professor emeritus, University of Wisconsin Law School; Robert Gordon, professor, Stanford Law School

BOTTOM ROW: Peter Gabel, whose career in academe has included heading New College of California; Clare Dalton, professor emerita, Northeastern University School of Law; Duncan Kennedy, HLS professor emeritus



Jeannie Suk Gersen

An Activist at Home in the World

With roots in Algeria, Ikram Ais works
for change – in her home country
and beyond / By Julia Hanna



Ikram Ais LL.M. '21 was 8 years old when she realized her mother could not read or write. "I asked for help with my homework and she just sat there," recalls Ais, who grew up in a small town outside Oran, Algeria. Ais learned that her mother's parents hadn't believed in education for young girls, which made her sad, she says — and angry. "I'm one of 11 siblings — our house was always crowded," she recalls. "My mother says I would get up on a table with a hairbrush and shout about how everyone should be treated equally. I had no clue what I was talking about, but I knew there was some discrimination against women and I did not like it." She taught her mother Arabic, letter by letter. Without realizing it, she had found her life's mission as an advocate for human rights.

That moment took on more meaning as Ais grew older. "My [female] cousins were dropping out of school and getting married at the age of 16, which is the norm in Algeria," she says. She also witnessed — and experienced — domestic violence and abuse. "It made me scared of what the future looked like for all of these women."

The summer after she graduated from high school, Ais became involved in Amnesty International; after participating in a human rights training program in the capital city of Algiers, she returned to Oran to launch a group of student activists at her university, leading them in some of the same training exercises and boosting female involvement. In time, she was elected to the executive board of Amnesty International Algeria — its youngest board member to date

— and found herself taking the train 250 miles from Oran to Algiers for meetings. "I was harassed countless times for traveling by myself," she says. Yet it did not diminish her resolve, as she went on to post-university stints at several Berlin-based nonprofits focused on conflict resolution and human rights.

Berlin, as it happens, is where she's spent her LL.M. year; while she wishes it could have been otherwise, Ais, who was an HLS class marshal, fostered a sense of virtual community through a number of efforts, including a movie club. Members voted for the 1966 classic "The Battle of Algiers" for the first screening. After watching together on Kanopy, Ais says participants debated which group could be considered the oppressors — the Algerians, the French, or both? "The movie and the discussion lasted four hours," she says, "but no one was bored, not for a minute."

Ais cites Feminist Legal Theory with Professor



Focusing on the connections between constitutional structures, government, business, and a healthy human rights climate has been a through line of Ikram Ais' work at HLS.

Ais has been immersed in a blend of advocacy, legal scholarship, and community building.

Janet Halley as just one of many favorite HLS courses: "She wouldn't give her opinion but would challenge you to understand how different scholars could view an issue, as a way to improve your thinking and point of view." Comparative Constitutional Law with Professor Vicki Jackson was another highlight. And Ais wrote her LL.M. paper, supervised by Professor Martha Minow, on how women's rights and domestic violence rates changed after constitution-building efforts in Algeria and Japan.

Focusing on the connections between constitutional structures, government, business, and a healthy human rights climate has been a through line of Ais' work at HLS; in the International Human Rights Clinic, she and others drafted a critique of the United Nations' guiding principles on business and human rights, which currently center on state, judicial, and corporate responsibility. "Our critique adds a fourth pillar to the document to include community and the people themselves," she says. "It's been an amazing learning experience."

Ais would like to return to Algeria at some point to contribute to her home country's progress in human rights, and more broadly, to the Middle East and North Africa region. This spring, as co-director of activism for HLS Advocates for Human Rights (a newly created role), she worked to bring attention to the fate of four Yemeni journalists detained since 2015 and sentenced to death in April 2020 in a campaign that included reaching out to President Joe Biden.

Intrigued by the intersection of activism and academia, Ais plans to continue to find ways to expand her knowledge of the role constitutions and legislation play in preserving regional stability and, by extension, human rights. In the meantime, she continues the work begun when she was just 8 years old, teaching her mother Arabic letter by letter. "I keep educating every single woman I communicate with from Algeria, whether on the phone or online, of how important it is to raise her voice and not accept oppression," she says. "I really would like to continue the sort of advocacy and legal scholarship work that will bring stability and improved human rights to my home region."

Breyer Cautions Against the ‘Peril of Politics’

Justice Stephen G. Breyer says changes to the Supreme Court could erode public confidence / By Rachel Reed

At Harvard Law School’s annual Scalia Lecture in April, Stephen G. Breyer ’64, associate justice of the Supreme Court of the United States, warned against alterations to the nation’s highest court that could erode the public’s long-standing confidence in the judiciary, instead inviting the American people, and the Court itself, to work together to maintain and build trust in the rule of law.

Justice Breyer’s wide-ranging two-hour lecture, which was brimming with quotations from the likes of Cicero, Shakespeare, and Camus, and which cited more than 20 Supreme Court decisions spanning two centuries of American jurisprudence, was titled “The Authority of the Court and the Peril of Politics.” In it, he traced the history of the judicial branch’s hard-won credibility since the nation’s founding, and implored would-be Supreme Court reformers, like those who spoke at the HLS Rappaport Forum in March (see story at bit.ly/1RapSC), to confront how changes could impact one of the nation’s most trusted institutions.

“This lecture ... reflects my own effort to be certain that those who debate [reform] proposals also consider an important institutional point, namely, how would ‘court packing’ reflect and affect the rule of law itself?” he said.

The justice began his lecture by recounting the Supreme Court cases that led to our modern deference to the rule of law. Although *Marbury v. Madison* (1803) is often understood as establishing judicial review, he said, “the acceptance of this view was not inev-

itable, nor did it become accepted without a long struggle.” In fact, at times the Court has encountered active resistance, as when President Andrew Jackson refused to obey its ruling in favor of the Cherokee Nation in *Worcester v. Georgia* (1832).

Following *Brown v. Board of Education* (1954), and with the help of civil rights leaders and President Dwight D. Eisenhower, the Court “won a major victory for constitutional law, for equality, and above all for justice itself,” he said. “Justice itself, the justice of the Court’s integration decisions, helped to draw respect for, and increased the authority of, the Court.”

That respect and authority, argued Justice Breyer, are the result of an ongoing partnership between branches of government, a delicate give-and-take that has enabled the Court to issue rulings

In his address in April, Justice Breyer cautioned would-be Court reformers to consider how changes could impact one of the nation’s most trusted institutions.

— sometimes unpopular ones — that are accepted by the general public and politicians alike, even if sometimes begrudgingly.

In return, he said, the Court eschews personal political beliefs for time-tested interpretive methods in making decisions, attempting to “minimize the number of cases likely to produce strongly felt political disagreements,” and deciding cases on narrow grounds where it can.

As a result, Americans have come to accept the Court’s judgments, even when they dislike them. “Put abstractly, the Court’s power, like that of any tribunal, must depend upon the public’s willingness to respect its decisions, even those with which they disagree and even when they believe a decision seriously mistaken,” said the justice. But we should not take this acceptance for granted, he added.



Today, Gallup polls show that Americans' confidence in the nation's courts remains much higher than in the executive or legislative branches. Yet, said Justice Breyer, "we see a growing public suspicion and distrust of all government institutions ... [and] a gradual change in the way the press ... understand the judicial institution," with journalists routinely affixing labels such as "conservative" or "liberal" to judicial nominees.

These changes have led to an increased perception of the Court as a political body — a view that he strongly rejects. Justices are not "junior-level politicians," he said. Instead, "I believe jurisprudential differences ... account for most, perhaps almost all, judicial disagreements."

Justice Breyer noted that the Court occasionally overturns itself, as it did during the 1930s when it finally gave President

"The Court's power ... must depend upon the public's willingness to respect its decisions, even those with which they disagree."

Franklin D. Roosevelt a victory for his New Deal legislation, causing him to abandon his own court-packing scheme. When such change occurs, he observed, it is not necessarily due to a change in the political makeup of justices, but rather "reflect[s] to a degree the changing political views of a majority of this nation's citizens."

He also challenged the idea of a politically charged modern Court.

"*Bush v. Gore* is often referred to as an example of its favoritism of conservative causes. But the Court did not hear or decide cases that affected the political disagreements arising out of the 2020 election," he said. "It did

HLS Affiliates Serve on Court Reform Commission

In April, President Joe Biden appointed 16 members of the Harvard Law School community to a newly created presidential commission studying Supreme Court reform. The 36-member panel includes seven HLS faculty members and nine alumni. (Read more at bit.ly/SCcomHLS.) The commission will consider "the length of service and turnover of justices on the Court; its membership and size; and the Court's case selection, rules, and practices." The panel is expected to release its findings and recommendations within 180 days of the first meeting.

uphold the constitutionality of Obamacare, the health care program favored by liberals. It did reaffirm precedents that favored a woman's right to an abortion. It did find unlawful certain immigration, census, and other orders, rules, or regulations favored by a conservative president. But at the same time it made other decisions that can reasonably be understood as favoring 'conservative' policies and disfavoring 'liberal' policies."

These perceptions matter, said the justice, because "If the public sees judges as 'politicians in robes,' its confidence in the courts, and in the rule of law itself, can only diminish, diminishing the Court's power, including its power to act as a 'check' on the other branches."

To retain the public's trust, he argued, changes should come not from political reform, but in recommitment to ideals within the Court itself and in the American people.

With that in mind, he implored justices to "do [their] job," using the interpretive tools and established legal conventions available to them. More importantly, he

counseled, "do not look for or expect popularity," and try to reach decisions through reasoned deliberation and compromise.

Justice Breyer suggested that the Court think deeply about its audience when drafting decisions. "An opinion that will have a broad public audience requires writing that is simpler and more direct than does an opinion about bankruptcy," he said.

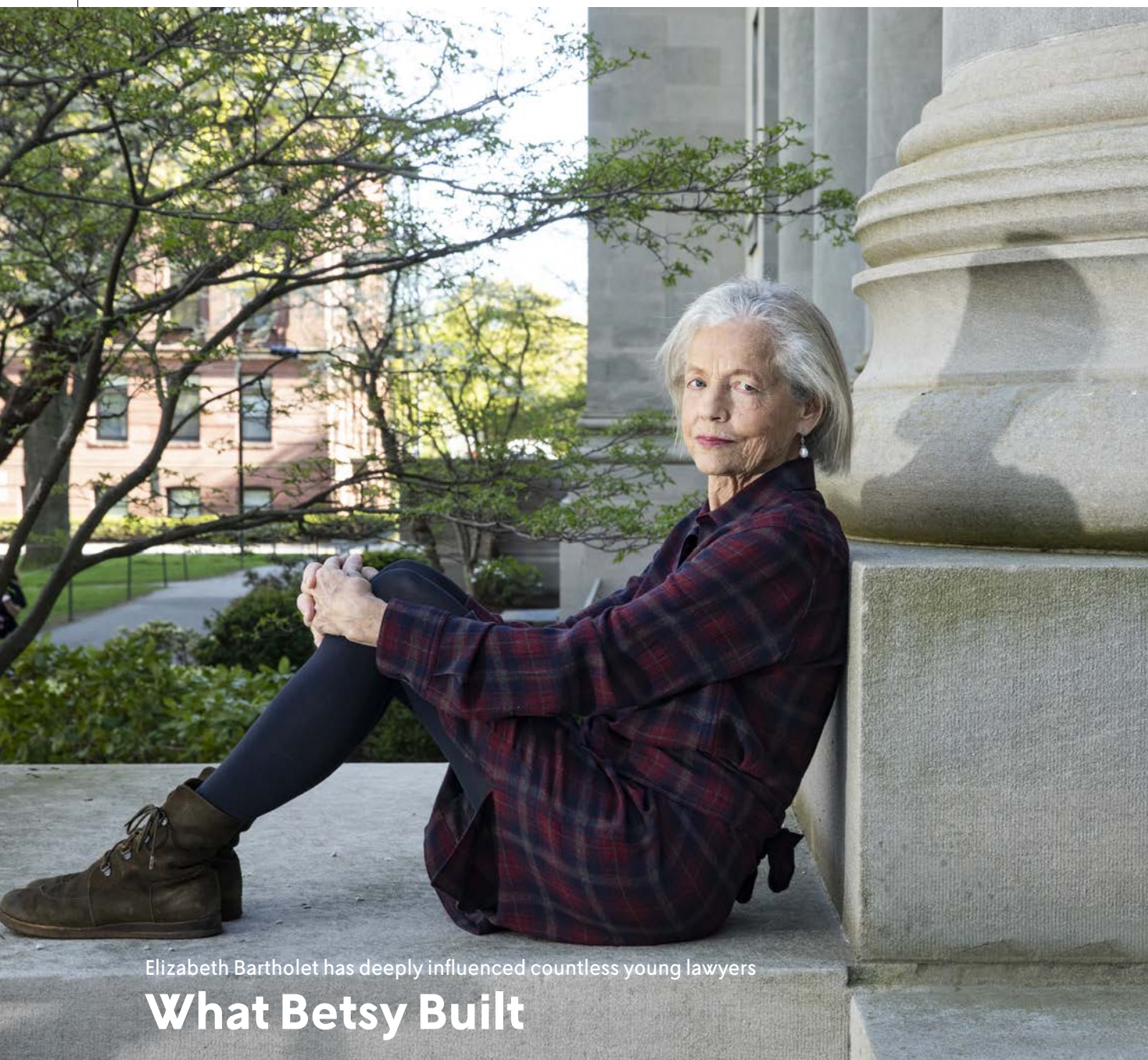
He also had ideas for the public. Because the rule of law relies on people's understanding of its protections, "[w]e need to explain it to our children and to our grandchildren, hoping that they too will understand its importance," he said.

"I keep in mind the fact that we are a nation of nearly 330 million people of every race, every religion, many different national origins, and holding virtually every possible point of view," he said. "I regularly see ... these highly diverse groups of people trying to work out their differences through law, rather than in more brutal ways."

He added that Americans might rededicate themselves to civic participation — including voting, running for office, and serving in local organizations — and to the values of cooperation and compromise.

Instead of risking "further eroding [the] trust" of the public through changes to the Court that could be perceived as politically motivated, Justice Breyer recommended a more democratic solution: an ongoing affirmation of the American experiment by its citizens. He said, "Trust in the Court, without which our system cannot function, requires knowledge, it requires understanding, it requires engagement — in a word, it requires work."

Justice Breyer's full lecture is expected to be published in September 2021 by Harvard University Press.



Elizabeth Bartholet has deeply influenced countless young lawyers

What Betsy Built

In her 44 years on the HLS faculty, Elizabeth Bartholet '65, the Morris Wasserstein Public Interest Professor and faculty director of the Child Advocacy Program, which she founded in 2004, has deeply influenced the law of child welfare while teaching and mentoring budding lawyers in the areas of family law and civil rights. Bartholet, who before joining the faculty in 1977 co-founded the Legal Action Center in New York City and worked at the NAACP Legal Defense Fund, will retire this year. The Harvard Law Bulletin asked several former students, and alumni who have worked closely with Bartholet, to reflect on her influence.

PAULO BARROZO S.J.D. '09, *associate professor, Boston College Law School*

Betsy Bartholet broke ground in legal education — as a student and as a professor. What most strikes me about Betsy is how she welds forceful intellectual honesty, principled consistency, and inclusiveness. For her, one virtue does not survive, and does not deserve to survive, without the other two. Thus, relentlessly, she deprives of oxygen around her prejudices as well as underexamined attitudes and opinions. At the same time, she grows around her an inclusive forum of principle, bringing together persons and organizations whose paths would hardly cross, much less engage as they do in years of constructive dialogue and collaboration in and outside of the classroom. As Betsy steps out of regular teaching, I'm filled with anticipation for the ground she will next break.

CLAIRE HOUSTON LL.M. '10 S.J.D. '17, *professor, Western Law in London, Ontario*

Professor Bartholet is the reason I chose Harvard Law School for my graduate studies and the reason I am a law professor today. Betsy showed me that advocacy can be married with academia, modeled how to unapologetically take a stand, and taught me how to write a (good) law review article. I can only hope in my career to have the same impact on students and those on whose behalf I advocate as Betsy had in hers.

HA RYONG (MICHAEL) JUNG '18, *legal officer, Legal Aid of Cambodia; technical adviser, Child Rights Coalition Cambodia*

Simply put, I would not have been able to become the child rights lawyer that I am now if not for the existence and passionate support of Professor Bartholet. She was an instrumental mentor to me for all three years in law school and beyond, providing me with invaluable guidance and countless words of encouragement in my academic, clinical, professional, and personal endeavors. Her trust in me as a 1L enabled me to

engage early on with topics that led me to law school in the first place, which laid a strong foundation for years to come. Her warm welcome for my family at graduation was a testament to our relationship and her devotion to students, for which I was immensely grateful. Professor Bartholet's character and knowledge have impacted me in ways that cannot be expressed in words.

BRAD S. KARP '84, *chair, Paul, Weiss, Rifkind, Wharton & Garrison*

I first met Betsy in 1982, as a 2L, in her Employment Law class. Betsy, then as now, was a brilliant, dynamic, and caring professor. [Later] I had the privilege of joining the board of the Legal Action Center, an extraordinary public interest organization that she co-founded in 1973. Betsy has been devoted to the work of the center for nearly 50 years, serving as its first president and executive director. I've had the privilege of serving as a board member with her for almost 30 years, and it was Betsy who ultimately persuaded me to become chair. I have never met a finer, wiser, or more thoughtful director in my professional career. Finally, over the past decade I have been privileged to lecture in Betsy's Employment Law and, more recently, her Art of Social Change classes at HLS. I have watched firsthand her devotion to teaching and her rare ability to motivate her students to strive to make a positive difference in the world. Betsy has inspired me, along with thousands of HLS students and LAC clients and countless others, to make our world more just, more fair, and more equitable. There can be no greater legacy.

EMILY KERNAN '07, *associate director, Public Interest Law Center, NYU School of Law*

I came to law school to pursue a career in child advocacy, and I was incredibly fortunate to meet Professor Bartholet during my 1L year, as she was initiating the Child Advocacy Program, and at a point when I was questioning my decision to go to law school. With her instruction, mentorship, and guidance,

I not only discovered exactly why I was there, but learned everything I needed to know to become an attorney advocating for children when I graduated. Professor Bartholet's passion and dedication continue to inspire me to this day, and it is with her in my mind and heart that I now work to mentor current law students interested in public interest work and child advocacy.

BRYAN STEVENSON '85, *founder and executive director, Equal Justice Initiative and author of "Just Mercy"*

Studying with Betsy Bartholet was life-changing. She was way ahead of her time by integrating clinical experiences with classroom instruction. She used Harvard's January term to send us across the country to work with the poor and underserved. She facilitated my work with an organization providing legal services to condemned people on death row, and that shaped my life and career. Studying how the law is supposed to work in Cambridge was incomplete; Betsy made it possible for us to witness how the law was applied to vulnerable people in the Deep South, and it changed everything I understood about the study and practice of law. She inspired students to not just think about the law but to also think about justice.

JASON SZANYI '09, *deputy director, the Center for Children's Law and Policy*

There is no way of quantifying Betsy's remarkable impact on those working in the public interest, particularly those advocating for vulnerable children. As founding faculty member of the Child Advocacy Program, she created an incredibly special space for students to learn, build skills, and ultimately join the community of lawyers who are advancing the well-being of children around the country and around the world. I wouldn't be doing the work I am without the benefit of Betsy's commitment to child advocacy. I will be forever grateful to her for her career and dedication to advancing work in the public interest.

Cities & the Teacher

Master teacher, legal theorist, city lover Gerald Frug / By David Barron

I can still see the scene vividly. He is pantomiming what it would mean to act with “deliberate indifference” — purposely rushing forward only to slow down abruptly like he did not have a care in the world. It was just one more attempt to convey to his students the contradictions, the tensions, the at-times-hopeless effort to give content to competing interests in one legal test by Jerry Frug [’63], master teacher, legal theo-

rist, city lover, mentor (a word he does not like one bit) and, to me, great friend (a word he likes a lot more), basically ever since I took that class — his signature, Local Government Law — in 1993. And now, nearly three decades later, and more than four decades after he began teaching at Harvard Law School, he is stepping down. It is a great loss for the school and for the field of local government law, which he revived and trans-

Gerald Frug, who has been writing and teaching in the field of local government law for more than 40 years, will be retiring this year.

formed. It is also an occasion to reflect on his contributions.

If there were a law school version of “Name that Tune,” called “Name That Law Professor,” it would not take more than saying “decentralization” in Jerry’s distinctive way — the word rising to a crescendo in the middle, then falling sharply at the end — for his former students to know it was “Frug.”

But it is not just how he says that word. It is the word itself — one he



has made the focus of his teaching and writing and, in turn, the focus of the teaching and writing of so many after they encountered what he has had to say about it.

For Jerry, all the assumptions about where power should reside, what power is, who should wield it, whether it should be wielded and for whom, are wrapped up in that word and attitudes about it. He was convinced when he started teaching that much more attention needed to be given to it — and to all the questions that it provoked — than were being given in law schools, especially national law schools like HLS.

It was not that there was no tradition of thinking about decentralization at such places. There certainly was at Harvard, thanks to Frank Michelman in particular. But, Jerry, who served as a top administrator in New York City before teaching, was convinced there was so much more to say. When he came to Cambridge as a professor, cities were still in the midst of decades of decline, suburbs were booming, and the civil rights

Few have looked at cities with as much care or creativity as Jerry Frug has.

movement had understandably given localism a bad name. But he was convinced that had to change. Only in close proximity could people of different backgrounds learn from each other and grow together in ways that would make life meaningful.

The result was a dizzying array of writings on the topic, from his seminal article — “The City as a Legal Concept” — to his award-winning book, “City Making: Building Communities without Building Walls.” That last writing ensured



Frug, the Louis D. Brandeis Professor of Law, in 1981, the year he joined the HLS faculty

that Jerry achieved something only the most creative performers ever do — true crossover appeal, making his work as influential in design, planning, and urban theory circles as within legal academia. And not only in the United States but all over the world.

Why?

It is in part because he comes at the topic so distinctively, mixing history, close doctrinal analysis, and theory (his is the first — and probably the last — casebook to start each section with a quotation from Italo Calvino) in a thrilling mix that keeps you questioning what is real — the observed facts on the ground or the ideas that we generated to describe them?

It is also because he writes about cities and the way that judges and legal thinkers talk about them with verve and a sense of irony that is anything but dogmatic, while keeping his eye at all times on what cities mean to us, who they are serving, who they are failing, and how they could be made to be more just and more fun — City-making!

I think it is also because he so evidently loves the topic and is so obviously enthused to find anyone who might come to love it as much as he does.

In other words, I think it is because Jerry is an original, with dis-

tinctive ideas that are hard to categorize — one of his best articles was called “Decentering Decentralization” — and, in consequence, hard to forget.

I ended up joining Jerry at HLS and teaching Local Government Law in the semesters he didn’t. We talked every day — usually more than once. I never made an important decision without his advice. He is a friend for life.

He also was — and still is — a close collaborator. I never wrote a word he didn’t see first. We co-taught seminars; I joined his casebook (Calvino is still there). We co-wrote two books. We also worked on two long projects to make home rule work better for Boston and Massachusetts.

That class 30 years ago set the trajectory for my own career. I am one of many former students of his who could say that.

But, Jerry’s work does not focus only on cities. He wrote a defining piece on bureaucracy and another powerful one about argument and character. He also taught Contracts to generations of students, who got the full benefit of his humor and his insight. And along the way, he has assembled a world-class collection of contemporary photography that fills every inch of wall space in his house.

It won’t surprise you to know that almost all of the photographs are of cities. And it won’t surprise you to know either that no two of them depict the city the same way — a visual testament to Jerry’s belief in how much there is to see in them if you are willing to look. Few have looked at them with as much care or creativity as he has. Few who’ve seen how he has seen them have looked at them the same way again.

David Barron '94 is a judge on the U.S. Court of Appeals for the 1st Circuit and the Louis D. Brandeis Visiting Professor of Law at HLS.



OH, What

a

Deception spreads faster than truth on
social media. Who – if anyone – should stop it?
By Elaine McArdle / Illustrations by Adam McCauley

TANGLED

Web We

Weave

The

day after a deadly riot in the U.S. Capitol following a rally in which then-President Donald Trump and others repeated false claims that

the 2020 election, which Congress was about to certify, had been stolen from him, Facebook took the stunning action of indefinitely suspending the president from its platform. Twitter, Trump's favored means of communicating, went a step further and banned him for life, and other social media sites followed suit.

Suddenly, the leader of the free world was, if not silenced, certainly muffled — and by a handful of private companies whose immense power was undeniable.

Trump's outraged supporters insisted his deplatforming proved that big tech is biased against conservatives. But even those who have been critical of President Trump, such as German Chancellor Angela Merkel, were troubled that these corporations had clearly demonstrated that, in some ways, they had more power than the president of the United States.

Still, the unprecedented actions seemed to achieve the desired effect. A week after Trump was barred from social media, *The Washington Post*, citing the online analytics firm Signal Labs, reported a 73% decrease in online disinformation about the election. Many people believed that the social media giants were taking long-overdue action and assuming some responsibility for the serious injuries that disinformation begets.

In the months since Trump's deplatforming, concerns about blatant and unchecked falsehoods on social media have only grown.

"It's inexpensive — and in fact cheaper — to produce lies rather than truth, which creates conditions for a lot of false information in the marketplace," says Harvard Law Professor Noah Feldman, an expert in constitutional law and free speech who serves as an adviser to Facebook. "We still collectively have a tendency to believe things we hear that we probably shouldn't, especially when they seem to confirm prior beliefs we hold."

Fake news is 70% more likely to be retweeted than the truth, according to a widely cited 2018 MIT study. If a healthy democracy relies on an informed populace — or at least one not deliberately disinforming by malicious actors — then the prevalence of disinformation is an existential threat. Social media is hurting people, society, even entire systems of government in ways unforeseen 20 years ago.

What, if anything, can or should be done? Whose responsibility is it to moderate social media content? Can social media be trusted to self-regulate? If not, should government be involved? How to strike a balance between free speech — a bedrock of American democracy — and other critical interests like safety, privacy, and human rights?

"This is a problem that is complex and pressing. There aren't silver-bullet solutions," says HLS Professor Jona-

than Zittrain '95, who is also on the faculty at the Harvard John A. Paulson School of Engineering and Applied Sciences and at the Harvard Kennedy School. Author of the influential 2008 book "The Future of the Internet — And How to Stop It," Zittrain is now working on a new book that he jokingly calls "Well, We Tried."

"I feel we're really at an inflection point where things are getting more heated," says Evelyn Douek, an S.J.D. student and lecturer on law at HLS who co-hosts *Lawfare's* "Arbiters of Truth," a weekly podcast on disinformation and online speech. "The next few years," she adds, "are going to be very interesting."

FREE SPEECH VS. PUBLIC HEALTH

Facebook has 2.8 billion users across the globe; Twitter, 192 million daily users. They and other social media outlets offer a reach and speed of communication that provide limitless possibilities for actors both good and bad. In March 2021, the Biden administration revealed that Russian state media and the Russian government were using Twitter to convince people that the Pfizer and Moderna COVID-19 vaccines could cause Bell's palsy — a lie — in order to promote sales of the Russian Sputnik V vaccine. That same month, Russia announced it was slowing down the uploading of photos and videos to Twitter because the company refused to remove content banned by the Russian government. In other countries, such as Myanmar, social media companies are accused of allowing their platforms to spread state propaganda that has led to serious human rights abuses.

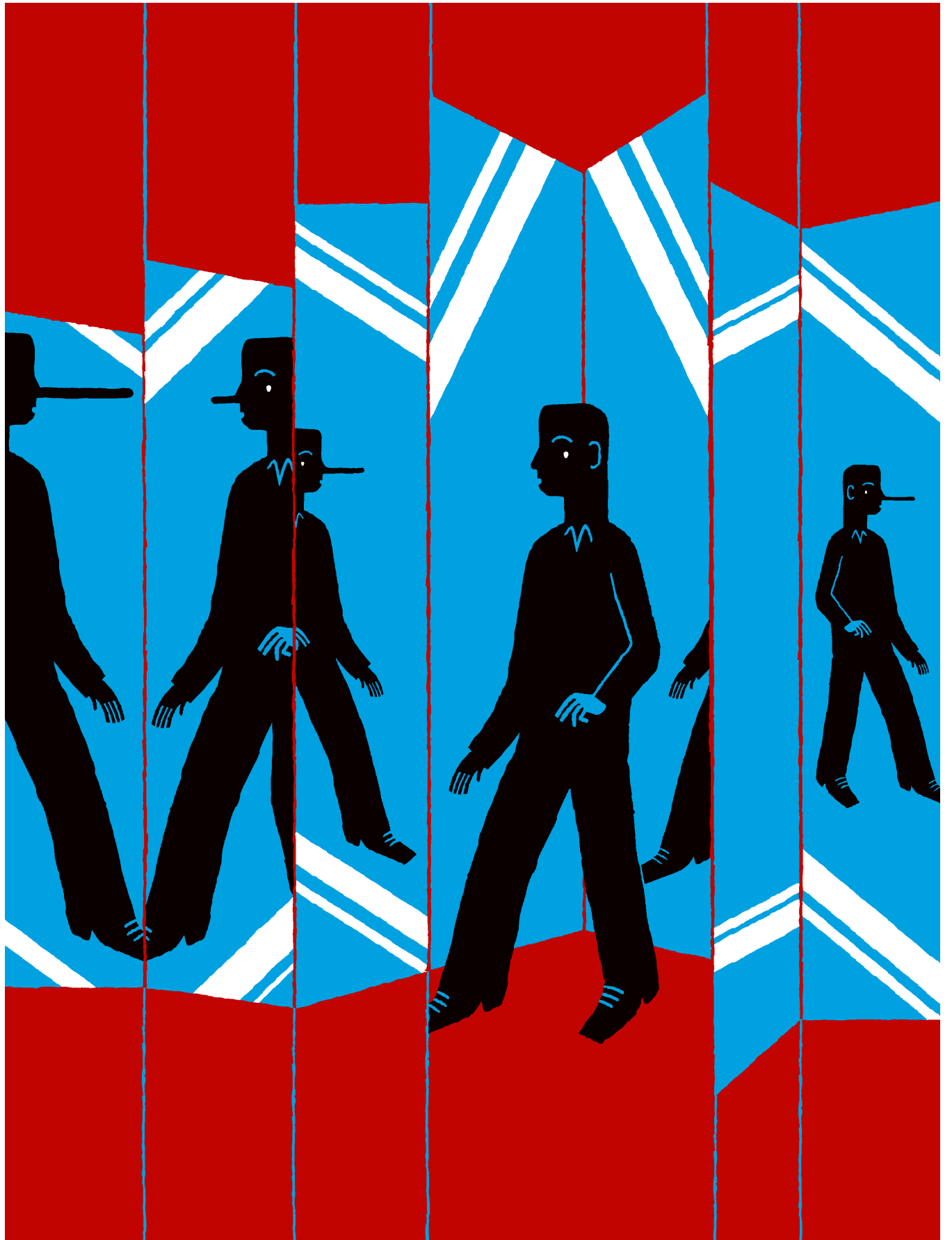
Social media companies, in part from a sense of self-preservation, are showing a new willingness to

Fake news is 70% more likely to be retweeted than the truth, according to a widely cited 2018 MIT study.

self-regulate. Twitter has kicked off 70,000 QAnon conspiracists since January, and in March, Facebook banned Myanmar's military leaders after years of public criticism for its failure to do so. At Feldman's suggestion, Facebook created an Oversight Board, designed to be an independent body that reviews its content moderation decisions, including the one to deplatform Trump. At the same time, there is a flurry of proposed laws to regulate social media, a type of governmental interference unimaginable in the early days of the internet.

This rapidly changing landscape shows how drastically public opinion has shifted from a strongly pro-free speech stance.

"I think there's been this turn away from 'just let the tweets flow' into thinking more about what harms are caused by this ecosystem and what guardrails we need on



free speech to make [the internet] a healthier and more positive space,” says Douek.

Zittrain divides digital governance into three eras, starting with the “rights era” from 1994 to about 2010, when free speech reigned and the protections of the First Amendment prevailed. “There was this idea of the internet as a really open space,” he says, “a free-expression paradise. It just couldn’t be regulated and that was inherently democratizing.”

Around 2010, growing concerns about the sometimes deadly consequences of unfettered online speech led to what Zittrain calls the “public health era.” It was a name he meant as a metaphor, but in 2020, it became very clearly literal when disinformation about the COVID-19 pandemic, including bizarre “cures,” led to actual deaths. A more absolutist view of the First Amendment began to give way as more voices asked whether private social media platforms had a social responsibility to interrupt the broadcast of (and profit from) unhinged conspiracy theories that could hurt or even kill people.

Today, the metaphor of the marketplace of ideas, where truth eventually emerges as the winner, no longer works, says Mark Haidar J.D./M.P.P. ’23, who is studying the impact of disinformation on voting rights and U.S. democracy in an HLS/Harvard Kennedy School program. “We have an ‘information disorder’ where we’re flooded with information and it’s hard for people to sort between high- and low-quality information or false information,” he says.

As a result, the “hands-off-my-free-speech” model no longer satisfies many people. Social media companies are “under enormous public pressure because they have power to amplify messages that can turn the course of an election or affect the path of a communicable disease, and everyone is aware of the power they have,” says Zittrain. “And the choice not to intervene is as much an exercise of power as the choice to intervene.”

Today there are signs that we are entering what he calls the “legitimacy era,” with more acknowledgment of the need to balance free speech and other interests like safety, and attempts to create processes to do so. Facebook’s Oversight Board is an example. “I think we’ll be seeing more and more of that,” Zittrain says.

But if we turn away from the “just-let-the-tweets-flow” model, as Douek calls it, where do we go?

SEARCHING FOR SOLUTIONS

This question is at the heart of the work of the Assembly: Disinformation program at the Berkman Klein Center for Internet & Society at Harvard. Established by Zittrain, the program is convening a broad range of thought leaders from academia, industry, government, and civil society to explore the problem of disinformation in the digital public sphere and try to forge solutions. In the past, the Assembly program examined cybersecurity and artificial intelligence, but for the past two years it has been focusing

on the factors that incentivize people to spread disinformation, and who — if anyone — should be responsible for regulating the online ecosystem.

One of its current projects is Disinfodex, a publicly available and searchable database of disinformation campaigns by social media platforms created by a group of cross-disciplinary experts who serve as Assembly fellows. Within a cohort of student fellows, a group is examining the for-profit model of social media platforms, where companies push content — and make more money — by leveraging a user’s personal data to develop sophisticated algorithms that keep them online and scrolling. How? Often, by presenting them with increasingly extreme content, some of which is not only false but potentially dangerous.

Assembly student fellow Isabella Berkley ’23 is working with her team on a project that’s looking at promoting a values-driven approach among social media companies. “What if the onus of preventing passive scrolling wasn’t on users but on the creators, where you might have a situation where the disincentive to limit disinformation is higher because it would go against the creative values of these companies?” suggests Berkley, who worked at Facebook as a child safety investigator. She is also interested in finding ways to encourage people, particularly minors, to view themselves as in control over their use of social media rather than feeling powerless to decline whatever is pushed on them.

Haidar, a student fellow on a different team, wants state governments to encourage digital literacy, and nonprofits such as AARP and similar groups to mount tailored campaigns to combat disinformation. Feldman says educators and media have a role in drawing public attention to the

By amplifying a message, social media companies can change the course of an election or affect the path of a communicable disease.

prevalence of false information but notes that alone isn’t enough.

It was in 2018 that Feldman first proposed to Facebook the idea of an independent body to review the company’s content decisions. So far, the board, which is purely advisory, includes 19 lawyers, human rights experts, and others from around the world, and has heard seven cases — most recently issuing its assessment of the deplatforming of former President Trump. On May 5, it upheld the ban, at least temporarily, but said that an indefinite suspension wasn’t appropriate and gave Facebook six months to decide Trump’s status. Although the decision has been met with criticism from those on both the left and the right, Feldman says, given the challenges of this case — which is likely to be the biggest it ever decides on — he believes the board did remarkably well. “They correctly told Facebook,



if it's going to infringe on free expressions values, it has to do it through clearly stated rules, not in an ad hoc way."

Outside of the U.S., many countries are considering strict restrictions on social media. These efforts are more likely to succeed in countries where free speech doesn't enjoy the protections of the First Amendment, Douek and others note. But even in the United States, many are pushing for legislative change. There are currently dozens of proposals to reform or repeal Section 230 of the Communications Decency Act, which protects social media companies from liability for user-generated content. John Palfrey '01, former HLS professor and executive director of the Berkman Klein Center, who now heads the MacArthur Foundation, is among those who believe it is time to amend Section 230, as he said in this year's HLS Klinsky Lecture. The protection it provides companies has led to growth, competition, and innovation, he said, but it's also "led to many bad acts and to many companies turning the other way when law enforcement or aggrieved parties come calling." (Watch the lecture at bit.ly/Klinsky21.)

How proposals for reform will fare against the First Amendment is as yet unknown, and, in general, conservatives and liberals have different views of the problem, let alone of the best solutions.

"Clearly there's a lot of appetite for statutory reform, but people don't really know what they want, and they have conflicting goals for potential reforms," says HLS Professor Rebecca Tushnet, an expert in copyright law who writes the false-advertising-focused legal blog 43(B)log. "There's a group that wants the internet companies to take down more content and a group that wants them to take down less content," particularly regarding divisive issues such as the 2020 election and COVID-19 vaccines. Still, there is bipartisan support in the Senate for the Honest Ads Act, which would require more transparency in digital political ads, similar to that required for those on TV and other traditional media.

To Tushnet, the real problem with social media companies is that they are monopolies. "If we had a revitalized anti-monopoly approach throughout the economy and not just in big tech, we might make some progress on the issues dividing us," suggests Tushnet, who would start by breaking up Facebook. "Just to be clear, that wouldn't get rid of a lot of awful speech, but it would change the ways awful speech got distributed." There are pending antitrust suits against both Facebook and Google, she notes, although "whether those suits will go anywhere is a good question."

SOCIAL MEDIA ISN'T THE BIGGEST PROBLEM

While there's a role for social media outlets to make changes, focusing on them is missing the real culprits, argues HLS Professor Yochai Benkler '94, faculty co-director of Berkman Klein, and "no amount of intervention and regulation of social media will make a meaningful dent on misinformation in America."

Social media plays a secondary role to the real purveyors of disinformation, he says, those whom he calls "elite actors," including both politicians like Trump and others in the GOP leadership and media elites, primarily Fox News and talk radio, which Benkler argues have spread untruths to their advantage. Beginning in the 1980s, he says, white identity and evangelical audiences had formed a distinct market segment, and Rush Limbaugh and later Fox found that "it's a really lucrative business model to supply identity-confirming, outrage-stoking narratives that reinforce their identities and systems irrespective of their truth."

It's a conclusion Benkler reached after analyzing massive amounts of data during both the 2016 and 2020 election cycles, resulting in an October 2020 paper he co-wrote with others at Berkman Klein, "Mail-In Voter Fraud: Anatomy of a Disinformation Campaign," which analyzed over 55,000 online media stories, 5 million tweets, and 75,000 posts on public Facebook pages.

"The pattern is very, very clear," says Benkler. "It's a combination of active disinformation on the right and a large component of the mainstream press not being sufficiently well trained to deal with an asymmetric propaganda system." Some 20% to 30% of the population, who are "mostly politically inattentive because they are busy with other things," get their news from local and network TV, and/or regional and local newspapers, not social media.

"I've been saying this since the book I wrote in 2018 — the people with the most power to do something useful are mainstream reporters and editors and mainstream

"The people with the most power to do something [about disinformation] are mainstream reporters and editors and mainstream media."

media," says Benkler, referencing his book "Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics."

Only since last August and September, he says, have traditional media such as the major newspapers and networks been willing to explicitly call out untruths and lies. "The traditional media outlets need to practice a much more aggressive policing of propaganda and disinformation," he urges, "which is not being anti-Republican or politically biased; it's about being explicitly focused on evidence and objective truth to the extent it is achievable, and being explicit when one or other party lies or gets it really wrong, and putting that right up front."

There is one thing on which all seem to agree: The situation is becoming more urgent by the day.

"Nothing will solve everything," says Douek. "We have so many problems, and we'll need lots and lots of different solutions."

The Daily



**'WHAT
CAN WE
DO TO
HELP
CREATE
150
YEARS
OF
CHANGE
IN 10
YEARS?'**

Andrew Manuel
Crespo and Premal
Dharia, leaders
of the ambitious
new Institute
to End Mass
Incarceration,
take aim at
'one of the
defining civil
rights issues
of our time'
By Erin Peterson



When they were public defenders in Washington, D.C., early in their careers, Andrew Manuel Crespo '08 and Premal Dharia saw the full weight of the criminal legal system bear down time and again on the people they represented.

Navigating that system often left deep scars on their clients. The loss of self-determination and basic liberty routinely upended families' lives. Frequently, the process itself caused the people they represented to miss work and rent payments, lose jobs, and get evicted from their homes. The psychological impact could last a lifetime.

Crespo and Dharia knew that what they saw on a daily basis only scratched the surface of mass incarceration in America, where roughly 2 million people are behind bars every day. The rate of incarceration today is nearly four times higher than it was in the early 1970s, outstripping every other country on Earth. And while incarceration numbers have drifted down over the past decade, the declines would have to

Rikers Island, New York City's main jail complex, holds around 10,000 people a day. In the U.S., roughly 2 million people are behind bars every day, outstripping the incarceration rates of every other country on Earth.

continue at the same rate for 150 years before numbers reached even those of the 1970s.

To Crespo and Dharia, however, the crisis goes beyond numbers. They do not want to merely shrink the number of people harmed by the system. They want to help end that harm — by supporting and strengthening communities that are working to radically decarcerate the United States.

“Mass incarceration is a monumental injustice in its own right and also a symptom of much deeper structural injustices in our society,” says Crespo. “It’s a metastatic cancer.”

A SHARED VISION

Crespo and Dharia followed different paths in their efforts to create social change, both carrying the lessons learned from the people they represented. Dharia stayed in public defense for nearly 15 years, practicing in Washington, D.C.; in federal court in Baltimore; and before the military commission at Guantánamo Bay. Crespo joined the Harvard faculty

in 2015 and became an influential scholar in the field of criminal procedure.

In 2019, Crespo and Dharia were independently exploring the roles public defenders can play in the broader movement to end mass incarceration. Dharia, who has also engaged in civil rights litigation and broader advocacy work, had recently started an organization called Defender Impact Initiative to engage public defenders in support of community organizers and movement coalitions. In that work, she collaborated closely with longtime community organizers, including Pilar Weiss, director of the Community Justice Exchange, which hosts the National Bail Fund Network. “Premal brings a unique depth of experience in public defense to the project of reevaluating and shifting the role of lawyers and litigation in social movements,” Weiss says. “That is a sorely needed project.”

At the same time, Crespo was launching a project with a similar name: a new in-house clinic at the law school called the Impact Defense Initiative, which focused on helping public defenders play a larger systemic role in the fight against mass incarceration. He saw the clinic as a force multiplier and as a central component of a broader research and advocacy institute he hoped to build at the school to tackle mass incarceration head on. In its first two years, the clinic litigated a complex challenge to a federal charging policy that doubled prison terms for hundreds of people in Washington, D.C., almost all of them Black men.

“Professor Crespo and the students worked tirelessly to craft a strategy that went beyond individual cases,” says Carlos Vanegas, a federal public defender who is co-counsel in the clinic’s cases. “Their aim has been to take down a sweeping policy that burdens many hundreds of people with unjust and draconian prison sentences and that results in long-term separation from their families and communities.”

JOINING FORCES

As their separate projects developed, Crespo and Dharia were regularly in touch. They soon realized that an emerging insight in their parallel work rang true for them on a personal level as well: There is power in the collective. They decided to deepen their impact by joining forces, creating a team with complementary expertise.

“I created Defender Impact Initiative to fill what I saw as a gap in the landscape of the movement to end mass incarceration,” Dharia says. “The insights and roles of public defenders could be activated toward broader change, to support organizers and advocates working in social movements in addition to the representation of individual people within the criminal legal system.” When national discussions about the

criminal system’s structural harms gained momentum in the summer and fall of 2020, Crespo and Dharia’s ongoing conversations about their work took on a different shape. “Lots of people have been tackling issues of systemic injustice for a long time, but the recent broader reckoning opens up more paths to potential change,” Dharia says. “Alongside the deep pain, this is, in some ways, a hopeful moment.”

They mapped out a plan. With the support of HLS Dean John F. Manning ’85, Crespo moved forward with plans to transform the Impact Defense Initiative into a new research and advocacy center — the Institute to End Mass Incarceration. And in February, Dharia brought the strategies and work of Defender Impact Initiative to Harvard Law, teaming up with Crespo to help lead the new institute, where Crespo serves as faculty director and Dharia serves as executive director.

Preparing for a formal launch this summer, Crespo and Dharia have brought together a diverse set of collaborators and advisers to help guide and build the work to come. Reflecting the institute’s driving values, many of the core advisers embedded in its construction and strategy have themselves been directly impacted by the penal system. “The institute has fresh and exciting ideas and strategies to help build collective power from the ground up, and to support that power with new models of lawyering and organizing,” says David Ayala, a formerly incarcerated community organizer who was central to the push to restore voting rights for convicted people in Florida, and who serves on the institute’s advisory board. “I’m excited to be able to help guide and shape this important work,” Ayala says.

PROPELLING DRAMATIC CHANGE

The institute’s bold mission is in its name. Working closely with existing community organizations, Crespo and Dharia are determined that it will play a role in radically decarcerating the United States and in dismantling the harmful practices that fuel mass incarceration. “The institute is guided by a firm belief that the way our country deals with harm and approaches punishment is one of the defining civil rights issues of our time,” Crespo says. “We’re not merely studying mass incarceration. We’re on a mission to end it.”

Crespo says the ambition to bring swift and comprehensive change to the American penal system is nothing short of a moonshot: “What can we do to help create 150 years of change in 10 years?” he asks.

The answer to that question is simultaneously groundbreaking and time-tested. Crespo and Dharia believe that organized and strategic social movements, leveraging broad collective action, can achieve profound social change. Thus the institute will work to build community power, to support orga-

“We’re not merely studying mass incarceration,” says HLS Professor Andrew Crespo, faculty director of the new institute. “We’re on a mission to end it.”





nized collective action, and to train and guide lawyers — including public defenders — to support collective community-driven efforts.

To start, Crespo and Dharia have combined their experience and insight as lawyers to identify structural components of the penal system where collective action holds the greatest potential for rapid decarceral change. Their targets include the power imbalances defining the plea-bargaining system, the inherent coercion surrounding police custody in the period after arrest, and the structural impediments stifling the power of juries.

The focus on plea bargaining builds on Crespo's prior scholarly work and teaching, which emphasize the extent to which plea bargains are the engine of mass incarceration. Ninety-five percent of all criminal convictions arise from guilty pleas, which prosecutors frequently obtain by exploiting sky-high statutory punishments, he says. To avoid these catastrophic sentences, people facing prosecution typically plead guilty in exchange for sentencing discounts. As a result, cases that might otherwise take days to resolve via a trial get pushed frictionlessly through the system in a matter of minutes, with dozens of people incarcerated in a single courtroom in just one hour.

To disrupt this process, the institute will work to implement and support a collective action strategy highlighted nearly a decade ago by civil rights lawyer and New York Times contributor Michelle Alexander, based on an idea shared with her by Susan Burton, a formerly incarcerated organizer: People facing prosecution might demand, collectively, to invoke their right to a trial.

In theory, the deluge of trial requests would overwhelm the system and lead prosecutors to abandon charges against a significant number of people. "Can this work?" asks Crespo. "No one has ever put that idea to the test or fully explored its ramifications. But if it can work, it could be a game-changer."

A related initiative aims to use collective action and community intervention to eliminate the "black hole" between a person's initial arrest and first court appearance — a time of intense isolation when coercive police tactics feed into the plea-bargaining process described above. A third major initiative will work to activate the power of the community through juries, reducing systemic barriers to fully empowered jury service in the communities that are most directly impacted by the penal system — communities that have long seen and lived the injustices brought to the surface in 2020.

In all of these initiatives, according to Crespo and Dharia, the institute aims to model a form of advocacy in which organizers and lawyers operate in tandem, each leveraging a distinct set of skills and practices in support of a common overarching mission. Toward that end, they are partnering with community

In all of its initiatives, says Premal Dharia, executive director of the institute, it aims to model a form of advocacy in which organizers and lawyers operate in tandem.

organizers both at Harvard and on the ground. "This project embraces collaboration between community leaders, organizers, lawyers, and the people most directly affected to help build power," says Marshall Ganz, a senior lecturer at the Harvard Kennedy School and a leading expert on community organizing who serves on the institute's advisory board. "That power will be necessary to end the harms of our deeply unequal and unjust system of justice." Fellow board member Dawn Harrington is the executive director of Free Hearts and a leader in the National Council of Incarcerated and Formerly Incarcerated Women and Girls. "I've been a grassroots organizer for five years," Harrington says. "It's so important for people coming into this space to center the need for meaningful power-building in communities. I am heartened and excited that that's a core part of the institute's agenda."

As for lawyers, Crespo and Dharia see their role as buttressing social movements, not leading or being at the center of them. "It's not lawyers who are going to save the day," says Dharia. But they "can bring deep expertise that can be critical in this particular movement as communities themselves take action based on what they need and want."

STRUCTURED TO SUCCEED

The institute will be built around three interlocking components. Its innovation hub will bring together people with different types of expertise — academics, advocates, activists, people who have been incarcerated or impacted by the system — to share ideas about achieving bold decarceral goals. The organizing and advocacy center will include an in-house legal clinic where students will learn and help develop the organizing-oriented legal practice described above and deploy it toward systemic change. Finally, a research component will study a broad variety of efforts in real time to pinpoint and promote what's working and reconsider what's not.

The mix of academic and advocacy elements draws on Crespo and Dharia's distinctive strengths and their unique career trajectories and relationships — and, they hope, represents a powerful model for creating change. "We think it is possible to commit to taking concrete action in the world while also being self-reflective and analytical about the action we take. We need to be both bold and humble about how we approach all of these problems," Crespo says.

And the moonshot that Crespo described — dramatically reducing the number of incarcerated people in the country in a decade's time — is really just the tip of the iceberg. Indeed, their goal is not simply to pursue decarceration, but also to address the structural problems that led to this crisis to begin with. "We want to end mass incarceration in all senses of the phrase, root and branch," Crespo says.





KATHERINE TAI

In her new role as USTR, Tai brings legal expertise, political savvy, and a deep commitment to American workers

By Julia Hanna

REPRESENTS

ON April 15, one month after the Senate confirmed her appointment 98-0 as U.S. trade representative, Katherine Tai '01 spoke at a virtual conference, "Greening U.S. Trade Policy," hosted by the Center for American Progress, a prominent D.C. public policy organization. Her address reinforced what was already widely understood: The Biden administration's strategy for doing business with other nations would be fully integrated with its approach to a range of other issues, from the environment to national security to workers' rights.

"For too long, the traditional trade community has resisted the view that trade policy is a legitimate tool in helping to solve the climate crisis," said Tai, in her first public address

as USTR. “As we have so often seen with labor issues, there is a certain refuge in arguing that this is all a question of domestic policy, and that we need not tackle the daunting task of building international consensus around new rules. But that dated line of thinking only perpetuates the chasm that exists between the lived experiences and expectations of real people on the one hand, and trade experts on the other.”

“Daunting” is also a good word to describe the overall complexity confronting Tai in her new role as USTR. In a mind-boggling laundry list of concerns, trade between the United States and China looms large, as does U.S. engagement with the World Trade Organization. Both relationships might best be described as “frosty” under the Trump administration, with significant tariffs imposed on Chinese goods from 2018 onward (those tariffs remain in place, at least for now). As for the WTO, the United States blocked the appointment of new members to

Katherine Tai is sworn in as United States trade representative as her husband, Robert Skidmore, holds the Bible.

its seven-person appellate body, essentially neutralizing the organization’s ability to hear disputes brought by member countries. “No one’s really missed it,” said USTR Robert Lighthizer, Tai’s predecessor, in December 2020; at the time, the U.S. had also declined to support two-time Nigerian finance minister Ngozi Okonjo-Iweala as the WTO’s new director general, a stance reversed in early February.

There are a host of other headline-grabbing issues as well. One of the most immediately pressing — a 17-year dispute between the United States and the European Union regarding illegal subsidies to aircraft manufacturers Boeing and Airbus — has resulted in retaliatory tariffs from both sides on billions of dollars’ worth of goods, including everything from French wine to U.S. tractors. The conflict took one step toward resolution in March, with a four-month moratorium on those same tariffs opening the door for negotiation. There’s also the long-standing issue of protecting intellectual property —

another wrinkle to confront when considering how to proceed with China — as well as violations to the renegotiated version of NAFTA (known as the United States-Mexico-Canada Agreement) that Tai led through a contentious approval and reapproval process from 2018 to 2019 in her prior role as chief trade counsel of the House Ways and Means Committee.

The list of potential concerns is endless, really, with it all boiling down to a simple yet overwhelming question: What will the future architecture of the world trading system look like?

BY all accounts, Katherine Tai appears to be in a rare position to address that question. Ask anyone enmeshed in trade’s legal and political minutiae about her qualifications, and prepare to be buried in superlatives. “It would be hard, if not impossible, to find anybody better equipped to do this job at this time in history,” says Harvard Law Professor William Alford ’77, director of the East Asian Legal Studies Program. Noting the unanimous support her nomination received (“Why Everyone Likes Katherine Tai,” read a Foreign Policy headline), Alford highlights Tai’s combination of political savvy, negotiating skills, and deep knowledge of the issues, a viewpoint echoed by Lori Wallach ’90, director of Public Citizen’s Global Trade Watch, who calls Tai “the unicorn USTR for this moment.”

“There are typically two kinds of USTRs,” she continues. “Political figures or trade wonks. Katherine is the unusual person who knows about the WTO *and* free trade agreements *and* anti-dumping law, *and, and, and* ... she led the renegotiation of NAFTA under Trump, which had the biggest majority support in the history of



trade agreements.”

Tai accomplished this, Wallach adds, with a listening, calm, respectful demeanor; yet “the fact that she was not screaming and pounding the table did not mean she was not incredibly strong and formidable.”

“Katherine is tenacious and creative; she will find the way to solve a problem. If the door is shut, she’ll crawl in the window if she has to,” says Claire Reade ’79, who worked with Tai at the Office of the USTR when Tai was associate general counsel (2007–2011) and chief counsel for China trade enforcement (2011–2014). “Her ability to get along with people and keep them at the table is very important — with trade issues, it’s policy, politics, and ego. You have to be deft in your handling of so many diverse needs. You’re part wise legal counsel, part Obi-Wan Kenobi.”

Tai will also have HLS Professor Mark Wu at her side as a senior adviser to the USTR. Wu’s extensive research and publications in the area of international trade encompass areas including digital technologies, the impact of emerging economies on global governance, and the environment. Currently on leave from HLS, Wu is in his second stint at the Office of the USTR, too: Earlier in his career, he served as director for intellectual property, leading negotiations for the IP chapter of several free trade negotiations. “For someone like Mark, who has spent his career immersed in these issues — issues that are now really front burner — it could not be a better time to be at USTR,” Alford says.

TAI’S parents were born in mainland China and moved to Taiwan before immigrating to the United States. Katherine Tai was born in

Connecticut and grew up in the D.C. metro area, where her father worked as a researcher at Walter Reed; her mother still works at the National Institutes of Health, researching opioid addiction. After graduating from Yale University in 1996 with a history degree, Tai, who is fluent in Mandarin, lived in Guangzhou, China, for two years, teaching English at Zhongshan University as a Yale-China Fellow.

When she was introduced as President Biden’s nominee on Dec. 11, 2020, Tai recalled a moment from her previous stint at USTR. She and colleague Shubha Sastry were appearing before the WTO’s appellate body in Geneva to present a case against China, which had put illegal export limitations on the rare earth minerals used in lithium batteries. “We sat down at the table — she, whose parents had emigrated from South India, and I, whose parents had come from Taiwan — and my heart swelled with pride as we raised our placards and stated that we were there to present the case on behalf of the United States of America,” she said, her voice clear and strong. “Two daughters of immigrants, there to serve, to fight for, and to reflect the nation that had opened doors of hope and opportunity to our families.”

That lawsuit against China was largely successful. Yet it, and others that will no doubt be brought to the WTO, can’t get at the larger structural issues that put a free-market economy at odds with one in which state-owned enterprises are the norm, notes Alford. That fact has driven much of the skepticism facing the WTO’s ability to enforce established trade agreements, particularly where China is concerned — a sentiment predating the Trump administration and signaled by Tai as well, who cited the need to work together on reforms to the organization’s appellate body when questioned during her confirmation hearing.

**“DAUNTING”
IS A GOOD
WORD TO
DESCRIBE
THE
OVERALL
COMPLEXITY
CONFRONT-
ING TAI IN
HER NEW
ROLE.**

Meanwhile, the clock is ticking as other nations form trade alliances and move forward without the United States. Beijing’s 15-nation Regional Comprehensive Economic Partnership in Asia, negotiated just last year, includes significant partners such as Japan and South Korea, for example. Whatever shape U.S. trade policy takes, it will follow in the footsteps of previous administrations that also walked the delicate line between reaping the economic advantages of open trade and ensuring American workers don’t suffer its consequences. “There’s no silver bullet,” Alford says of that balancing act. “These are difficult trade-offs, and when you get to the politics — you can just imagine.”

Yet the rewards of that work are lasting. Reade, now senior counsel at Arnold & Porter, recalls the Office of the USTR as “an amazing, overwhelming place to work when you consider the decisions being made, the level of responsibility, and the fact that your work is never done. But you do feel as if you’re participating in a process of moving forward on meaningful issues,” she adds, “and that life will be made better when you do. Who can not want that?”

Whatever shape U.S. trade policy takes in the months and years to come, it’s clear that Katherine Tai is driven by a similar sentiment, holding the “lived experiences and expectations of real people” referenced in that first public address on climate at the forefront of her thinking as she navigates the domestic and international complexities of her work. “Trade is like any other tool in our domestic or foreign policy,” she stated, when President Biden introduced her as his nominee last December. “It is not an end in itself. It is a means to create more hope and opportunity for people, and it only succeeds when the humanity and dignity of every American and of all people lie at the heart of our approach.”

Off the

Bench and

into the

Breach





Merrick Garland returns to the Department of Justice as the 86th U.S. attorney general

By Lana Barnett '15 In the early morn-
ing hours of Jan. 6, 2021,
rumors began to leak that
President-elect Joe Biden
had selected Merrick Gar-
land '77, a judge on the U.S.
Court of Appeals for the Dis-
trict of Columbia Circuit, to
serve as his attorney general.
The highly anticipated pick
should have dominated the
day's news, but it was almost
immediately overshadowed
by a violent riot at the U.S.
Capitol.

Later, at his confirmation
hearing, Garland drew on his
family's history to explain
why he felt motivated to
serve as attorney general and
why the Jan. 6 attack had so
profoundly affected him. "I
come from a family where my
grandparents fled anti-Sem-
itism and persecution," he
said. "The country took us in
and protected us, and I feel
an obligation to the country

to pay back, and this is the highest, best use of
my own set of skills."

Garland, who was confirmed as attorney gener-
al on March 10 by a 70-30 Senate vote, made the
unusual choice to leave a lifetime appointment
on the nation's second most influential court
to instead lead a federal agency with roughly
115,000 employees. Unusual, but not surprising,
say those who know him well. The role is a cap-
stone, a coming full circle for a man whose values
and deep commitment to public service have re-
mained rooted in the Department of Justice even
after decades on the federal bench. "For those
of us who spent our first jobs at DOJ, you leave
a piece of yourself there, professionally but also
personally," said Harvard Law Professor Richard
Lazarus '79, who has known Garland since his
early career days in Washington, D.C. "Return-
ing to DOJ as attorney general — it must fill his
heart with pride to walk through those doors, to
feel all the responsibility but also all the history
of that building and that place."

Garland's path took him from the suburbs of
Chicago, where he was his high school's valedic-
torian and head of student council, through
Harvard's college and law school, where he was a
star student and editor on the Law Review. From
there, he clerked for the 2nd Circuit's Judge Hen-
ry J. Friendly '27 and Supreme Court Justice Wil-
liam J. Brennan Jr. '31, and alternated between
service in the federal government and member-
ship in the D.C. law firm of Arnold & Porter.

Yale Law School Professor Kate Stith '77, who
served with Garland on the Law Review and lat-
er clerked alongside him on the Supreme Court,
said he had appeared to her to blend seamlessly
into a world of legal insiders. Garland had been
"so attuned and so smart and so aware of the com-
plications of law and judging when we were in
law school, that I just assumed he came from a
family with a bunch of lawyers," Stith said. "Oh,
how wrong I was!" In fact, his father had run
a small advertising business out of the family
home, and his mother was a community volun-
teer and school board president. Garland worked
a summer job as a shoe store stock clerk to help
pay for college, and in law school he lived with
and advised undergraduates in Matthews Hall
to cover room and board.

Greg Rosenbaum '77 met Garland in 1969
when both attended the summer National High
School Institute in Speech at Northwestern Uni-
versity, an elite program that attracted the top
high school debaters in the country. In rooms of
competitive noisemakers, Garland stood out to
Rosenbaum even then for his ability to sit back,



think carefully about an issue, and then “ask the question, the one that just takes the air out of the room,” Rosenbaum said. “To this day, watching him testify at his confirmation hearing, as soon as I hear his voice, I just think back to ... the way that he pierced the heart of the matter.”

In both college and law school, Garland’s reputation for quiet brilliance preceded him. “When Merrick talked, people listened,” said Rob Olian ’77, his college roommate. Even so, it took Olian until law school, when he shared a class with Garland for the first time, to realize what exceptional talent his friend had. One day in class, Garland and the professor began discussing a topic that utterly eluded Olian. Trying to determine if he was simply being dense, Olian asked several classmates afterward if any

had understood the conversation. None had. He wasn’t the type of person who was “just so smart you couldn’t talk to them about normal things,” said Olian. To Olian, he came across as “a very normal, down-to-earth” guy, but beneath the unassuming exterior, Garland “was brilliant.”

After completing his clerkships, Garland joined the DOJ as a special assistant to U.S. Attorney General Benjamin Civiletti before leaving for Arnold & Porter. He made partner in four years. As he considered becoming an assistant U.S. attorney, Garland called Stith for advice. She pointed out to him that as an AUSA in D.C., he would begin his career by prosecuting low-level local crimes rather than major federal ones. “I’ll never forget that phone call,” she recalled. “I said, ‘You’ll leave a partnership at a fancy law firm to become an AUSA at the lowest rank?’ And he said, ‘Yeah, I think it’ll be really interesting.’ That was impressive.”

Merrick Garland testifying during his confirmation hearing before the Senate Judiciary Committee



Merrick Garland, then principal associate deputy attorney general at the Justice Department, addressing the press during the Oklahoma City bombing investigation, which he headed

Garland returned to private practice for just one year in 1992, before being tapped by Jamie Gorelick '75 to be part of a team that prepared former Attorney General Janet Reno '63 for her confirmation process, and later to serve as Gorelick's principal associate deputy attorney general, his last position before his nomination to the D.C. Circuit. Gorelick, who has known Garland since college, supervised him at the Justice Department during his career-defining prosecution of Oklahoma City bomber Timothy McVeigh.

Gorelick recalls being with Garland in 1995, shortly after learning that a bomb had exploded at the Alfred P. Murrah Federal Building in Oklahoma City, killing 168 people, including 19 children who had been in the building's day care center. Garland and Gorelick both had young children at the time, and each was horror-struck by the images they saw on television. Garland immediately volunteered to head what was sure to be an intensive, months-long investigation. He turned to her and said, simply, "I have to go."

Garland's responsibilities in the deputy attorney general's office did not include directly supervising individual cases on the ground. But within days of the attack, he moved to Oklahoma to oversee the operation. "He was very motivated by what he saw and heard and asked to be sent," Gorelick recalled. "For me, that was

very difficult because he was my right arm, but it was the right decision."

Garland was adamant that the DOJ consistently and transparently prosecute the case by the book at every step. Decades later, he remains visibly affected by memories of the prosecution. While speaking publicly about his role at the White House Rose Garden in 2016, his voice cracked as he recalled, "We promised that we would find the perpetrators, that we would bring them to justice, and that we would do it in a way that honored the Constitution."

Before leaving for the federal bench in 1997, Garland supervised one more headline-dominating case — that of Theodore Kaczynski, better known as the Unabomber,

who planted more than a dozen bombs that killed three people and injured 29 over the course of 17 years.

On the D.C. Circuit, Garland was known for his wise and principled decision-making and his commitment to rule of law. Jenner & Block partner Ishan Bhabha '09, who clerked for him, recalls that even when other judges on the court disagreed with Garland on hard-fought, controversial issues, they would nevertheless seek his counsel to try to understand how he approached a particular issue. "The D.C. Circuit's loss is the Justice Department's gain, but it's a real loss," Bhabha said.

Bhabha was particularly impressed by Garland's unwavering work ethic, noting that his law clerks always knew they had a long night ahead of them when Garland reached for a 5 p.m. bowl of Cheerios. "He really dealt with every single case with the [same] level of intensity and care and focus," Bhabha said. "He would spend hours and hours and days agonizing over word choices and case analysis and outcome, even for cases where there was no dispute about how it would eventually resolve."

Since 1998, Garland has volunteered twice a month as a tutor for elementary school students. During the pandemic, he has doubled his commitment, meeting weekly with sixth

graders via video. Though his tutoring became well-known when he was nominated for the Supreme Court, Garland never otherwise discussed it. Lazarus said he was blown away when he learned about it through news articles, noting that the tutoring “told me a lot about his fundamental decency and character.”

Given Garland’s reputation, his name had been repeatedly mentioned in past years as a possible Supreme Court nominee. When in March 2016 Barack Obama ’91 selected this jurist who was highly respected on both sides of the aisle to fill the Supreme Court seat vacated by the death of Justice Antonin Scalia ’60, the biggest surprise appeared to be only his age, which at 63 bucked the recent trend of appointing young justices whose influence on the Court can be expected to last for decades. Garland himself may have thought that “his chances for getting nominated were behind him,” said his friend Olian. Garland became a household name, however, when the Republican-led Senate refused even to hold a hearing on his nomination in an election year, scuttling his Supreme Court aspirations.

Rosenbaum, who had been overjoyed to see his old friend nominated for the position, was “just devastated” by the long, drawn-out political process that ultimately ended in January 2017 when Garland’s nomination expired after 293 days without congressional action. Speaking at a May 2016 high school graduation at Skokie’s Niles West High School, his alma mater, Garland appeared humbly resigned to how his nomination might end. “When you are facing the unanticipated twists and turns that life shall surely take, when the bad things happen, it should be of tremendous solace to get outside yourself and focus on someone else,” he told the young graduates.

Garland returned to the front pages in January, when President Biden nominated him for attorney general and after the events of Jan. 6 transformed overnight what the country expected from a role often referred to as the nation’s “top cop.”

Garland’s supporters can think of no one better to inherit a Justice Department left shaken both by recent national events and by what many viewed as a dismantling of norms in recent years. Given the urgency of reviving the department’s morale, Lazarus said, Garland is “central casting for what an attorney general should be after what we’ve been subject to. He just exudes professionalism and integrity.” Bhabha agreed: “He’s just somebody who can restore so much through his extraordinary

and overriding adherence to basic principles of fairness.”

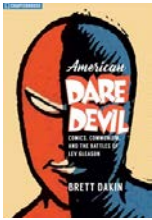
The task Garland now faces invites comparisons to former Attorney General Edward Levi, who was appointed by President Gerald Ford to restore public confidence in the DOJ after the Watergate scandal. Garland implicitly accepted the mantle in his first speech to his staff on March 11, when he referenced the former attorney general and assured career prosecutors that they would no longer face pressure to enforce “one rule for friends and another for foes, one rule for the powerful and another for the powerless, [or] one rule for the rich and another for the poor.”

Garland now has his work cut out for him, as he tackles politically tricky and legally challenging investigations, including how to address the underlying criminal allegations that led to both impeachments of President Trump; a tax probe of the current president’s son, Hunter Biden; and the Jan. 6 attack on the Capitol, which is sure to be one of the most complex and scrutinized federal prosecutions in DOJ history. Garland has stated publicly that he expects total independence in each of these investigations. As he said at his confirmation hearing: “The president made abundantly clear in every public statement before and after my nomination that decisions about investigations and prosecutions will be left to the Justice Department. That was the reason that I was willing to take on this job.”

Garland will face at least one more major challenge: building public trust in the criminal justice system after the death of George Floyd, which sparked nationwide protests and a national reckoning over the roles of police and prosecutors. Indeed, the day after the conviction of Officer Derek Chauvin for the murder of George Floyd, Garland announced that the Justice Department will investigate whether the Minneapolis Police Department engages in a pattern or practice of unconstitutional or unlawful policing.

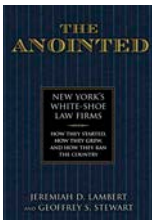
If anyone can rise to these crucial challenges, Gorelick believes, it is Garland. He has viewed the department from every angle, she said, and has always recognized that “the awesome power to prosecute must be undertaken with great care and indeed empathy, that the dedication of the department to civil rights is absolutely critical, and that the role the department can play in society is unlike that of any other element of the government.”

Recent Alumni Books



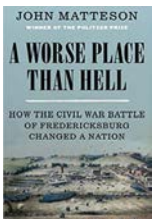
“American Daredevil: Comics, Communism, and the Battles of Lev Gleason,” by Brett Dakin '03 (Chapterhouse)

When Brett Dakin set out to learn more about Lev Gleason, his great-uncle who died five years before he was born, he was stunned to find many references to him in The New York Times index under the heading “U.S. — Espionage — Treason.” Thus began the author’s journey to explore the life of Gleason, a comic book publisher who made and lost a fortune, but also, Dakin learned, a war veteran investigated by the FBI and called to testify before the House Un-American Activities Committee, and a progressive activist who put on showy displays of wealth. Even the “Daredevil Battles Hitler” comic book Gleason published, which encouraged U.S. intervention in World War II at a time when many Americans favored isolationism, reflected his convictions.



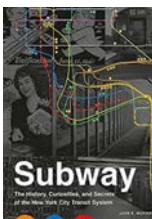
“The Anointed: New York’s White-Shoe Law Firms — How They Started, How They Grew, and How They Ran the Country,” by Geoffrey S. Stewart '76 and Jeremiah D. Lambert (Lyons Press)

Focusing on three firms, Cravath, Swaine & Moore, Davis Polk & Wardwell, and Sullivan & Cromwell (Geoffrey Stewart worked at Davis, and Jeremiah Lambert at Cravath), the book traces their evolving roles not only in the legal world but also in the nation’s social and economic life. For most of their existence, the firms recruited mostly white Protestant men from Ivy League institutions and elite Eastern prep schools, and operated in exclusive New York social and business circles. By the 1960s, their “starchy social reputation” became a liability, leading to more diverse recruitment and eventual expansion to global practice. The firms remain highly profitable and preeminent, the authors write, because of their ability to accommodate both continuity and change.



“A Worse Place Than Hell: How the Civil War Battle of Fredericksburg Changed a Nation,” by John Matteson '86 (Norton)

Fredericksburg is not one of the more important battles of the Civil War from a military perspective, according to John Matteson. Yet its cultural impact was immense, he argues, and was exemplified by the experiences of five people who were shaped by the battle: Oliver Wendell Holmes Jr., a Harvard Law School graduate and Supreme Court justice, whose belief in the sanctity of duty was upended by his wartime experience (including being wounded and nearly dying in battle), leading him to view “skeptically the very nature of authority”; John Pelham, a West Point cadet and Southern soldier, whose death, called an irreparable loss by Confederate Gen. Jeb Stuart, toppled assumptions about the invincibility of the Confederacy; Walt Whitman, who traveled in search of his brother wounded at Fredericksburg, later writing poetry and a memoir on the war; Arthur B. Fuller, a chaplain and abolition supporter who despite



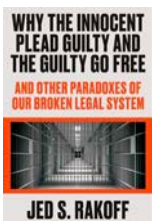
his frailty took up arms and died in battle; and Louisa May Alcott, whose work as a volunteer nurse influenced her writing, in particular “Little Women.”

“Subway: The Curiosities, Secrets, and Unofficial History of the New York City Transit System,” by John E. Morris '83 (Black Dog & Leventhal)

Understanding New York City requires an understanding of its subway system, writes John Morris, who provides a colorful history of the people who created it and have shaped it since its inception in 1904. Filled with images, the book explores the “horse-drawn gridlock” that compelled people to seek a less congested means of navigating the city; the massive construction effort; and the subway’s role in popular culture, ranging from the 1912 vaudeville hit “The Subway Glide” to a “Seinfeld” episode revolving around strange encounters on a subway train. For all its faults, the subway serves to bring together a diverse array of riders and “still ranks as one of the greatest shows on earth,” Morris writes.

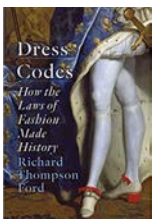
“Why the Innocent Plead Guilty and the Guilty Go Free: And Other Paradoxes of Our Broken Legal System,” by Jed S. Rakoff '69 (Farrar, Straus and Giroux)

A general faith in the justice system has caused many people to overlook its shortcomings, contends Jed Rakoff, who calls for reforms to address mass incarceration, the death penalty, and access to courts, among other issues. The senior U.S. district court judge, who previously served as a federal prosecutor and criminal defense lawyer, criticizes the plea-bargaining system, which he contends pressures most defendants — including innocent ones — to accept prison time in order to avoid more punitive sentences. He also cites the lack of prosecutions against white-collar crimes, the frequent inaccuracies of eyewitness testimony, and a Supreme Court that is too deferential to the executive branch. Legislatures have the power to improve the system, he writes, provided that they are spurred by voters who recognize that changes should be made.



“Dress Codes: How the Laws of Fashion Made History,” by Richard Thompson Ford '91 (Simon & Schuster)

Far from merely a surface matter, fashion is tied to political struggles for equality and individual dignity, and offers important lessons about status, sex, power, and personality, argues Richard Ford, a Stanford Law School professor. Surveying the history of fashion from the Renaissance era to today, he cites examples such as the provision in the Negro Act of 1740 that sought to prevent Black people from wearing clothes “above the condition of slaves,” and the androgynous style of the flappers that challenged norms of “virtuous femininity.” Though acceptance of individual choice in fashion is far more prevalent today, clothing still reflects the social class, race, religion, and sex of the person wearing it, Ford writes.





A Presidential Journey

In the first volume of his presidential memoirs, Barack Obama writes about his campaign and events during his first term

The first of two planned volumes, “A Promised Land” (Crown) provides candid details of the relationships and decisions that shaped the life and presidency of Barack Obama ’91. He writes of his political journey, including the mistakes he made in his first, unsuccessful campaign for Congress and the initial resistance of his wife, Michelle ’88, to his running for president. He covers well-known moments from that presidential campaign, such as the controversy that arose over his relationship with the Rev. Jeremiah Wright, and lesser-known ones, such as a tense exchange with his then-rival Hillary Clinton on a tarmac.



His presidency began in the midst of a financial crisis, requiring Obama to assess divergent opinions on what stimulus package to propose that would both pass Congress and restore a cratering economy. He also provides full accounts of other significant events of his time in office, particularly related to health care reform and the mission to

find Osama bin Laden, which ends the volume. And he shares the content of many one-on-one conversations with close advisers like David Axelrod, Rahm Emanuel, and Valerie Jarrett.

In addition to the historic decisions that define a presidency, Obama points to myriad small moments that make up the job of a president: He holds a practice session on the proper way to salute at the behest of a staffer; he discovers all his clothes perfectly pressed and displayed by White House valets; he attends White House shows by famous performers like Paul McCartney, who sang the Beatles song “Michelle” to his wife.

Through the successes and disappointments of his tenure, he retains his belief, as the title suggests, in the promise of America. “If I remain hopeful,” he writes, “it’s because I’ve learned to place my faith in my fellow citizens, especially those of the next generation, whose conviction in the equal worth of all people seems to come as second nature, and who insist on making real those principles that their parents and teachers told them were true but perhaps never fully believed themselves.”

The Pentagon Papers Case Today

Does the First Amendment still protect the press when it lawfully receives classified information unlawfully obtained?

By Lincoln Caplan '76

The First Amendment shields the press, Justice Hugo L. Black wrote 50 years ago in a concurring opinion in the Pentagon Papers case, so the press can “bare the secrets of government and inform the people.” In that historic ruling, the Supreme Court put an end to a temporary injunction against publication of the Defense Department’s secret history of the American involvement in the Vietnam War.

The Court allowed The New York Times, The Washington Post, and other newspapers to carry on publishing excerpts from the Papers’ 7,000 pages, revealing how the government used secrecy to deceive the American people about the nation’s disastrous role in the war. The advocates for the Times and for the government were eminent members of the Harvard Law School community: alumnus Alexander M. Bickel LL.B. ’49, a Yale Law School professor; and Solicitor General Erwin N. Griswold LL.B. ’28 S.J.D. ’29, who was HLS dean from 1946 to ’67 until he joined the Justice Department. The ruling legitimized the media’s status as what historian Stanley I. Kutler called “the people’s paladin against official wrongdoing.”

The ruling rests on the principle that free speech, embodied in a free press, is an essential element of American democracy. Except when publication would do grave and irreparable harm to the nation, the risk of damaging democracy by publishing information is preferable to the risk of undoing it by allowing the government to decide what citizens can know. When a government for itself supplants government for the people, the misrule of power displaces the rule of law: Autocracy takes over democracy.

The government based its case against the newspapers on the Espionage Act of 1917. That old law aimed mainly to curtail spying by punishing disclosure to foreign enemies of secrets about national security. In 1973, two years after the Pentagon Papers decision, the Columbia Law Review published an exhaustive

analysis of the Espionage Act, explaining the law’s “fundamental problem”: It is “in many respects incomprehensible.” In a concurring opinion in the case, Justice Byron R. White had read meaning into the law, suggesting that it might be a crime for a newspaper to publish information classified as secret — and suggesting that the paper could be punished for doing so. The law review called White’s opinion “dicta amounting to admonition” — “a loaded gun pointed at newspapers and reporters who publish foreign policy and defense secrets.”

That gun was also pointed at leakers. The Justice Department charged Daniel Ellsberg with espionage and theft for leaking the Pentagon Papers to the Times. At his trial in Los Angeles, Ellsberg was represented by Leonard Boudin, a renowned civil liberties lawyer who was a visiting lecturer at HLS, and Charles R. Nesson ’63, then a junior professor at HLS, now in his 55th year teaching at the school. Their client might have been convicted and sentenced to prison if another secret had not become public — the burglary

of the office of Ellsberg’s psychiatrist in search of embarrassing material at the behest of President Richard M. Nixon. Those “bizarre events,” as the judge called the incident, led to the end of Ellsberg’s case and helped propel the end of Nixon’s presidency. But it did not restrict the government’s authority to prosecute future whistleblowers.

In 1985, a federal trial court applied White’s logic from the Pentagon Papers case and convicted Samuel Loring Morison, a government analyst, for espionage and theft, for providing Jane’s Defence Weekly with photographs taken by a U.S. spy satellite of the Soviets’ first nuclear-powered aircraft carrier. Morison’s lawyer portrayed him as a whistleblower, who let the Western world know about the Soviet carrier. The lawyer contended that the benefit of publication outweighed the harm, since the Soviets already knew

The impact of a historic ruling, 50 years out



about the satellite. The U.S. Court of Appeals for the 4th Circuit upheld the convictions, rejecting the argument that leaks to the press were exempt from the Espionage Act.

In January of 2001, before leaving office, President Bill Clinton pardoned Morison, after Sen. Daniel Patrick Moynihan told Clinton that the prosecution had been unfair, for “an activity which has become a routine aspect of government life: leaking information to the press in order to bring pressure to bear on a policy question.” (In the Pentagon Papers case, Max Frankel, the Times’ Washington bureau chief, made a similar point: “Without the use of ‘secrets’ that I shall attempt to explain in this affidavit, there could be no adequate diplomatic, military and political reporting of the kind our people take for granted, either abroad or in Washington and there could be no mature system of communication between the Government and the people.”)

Still, the precedent of Morison’s conviction for disclosing classified information to the press remains valid law. In the Obama and Trump administrations, the government indicted a dozen people for leaking secrets to the press, with the former normalizing the practice and the latter building on the norm. The 2013 case against U.S. Army Private Chelsea Manning for leaking a huge number of secret documents to WikiLeaks was among the most prominent examples. She was convicted and sentenced to 35 years in prison and dishonorably discharged (though President Obama commuted most of her sentence).

The Constitution, including the First Amendment, does not protect leakers against prosecution and punishment for unauthorized disclosures. But does it protect members of the media when they receive in a lawful manner classified information unlawfully obtained?

In 2013, The Washington Post reported, the Obama Justice Department decided not to indict Julian Assange, the founder of WikiLeaks, for conspiring with Manning because Assange did not leak the doc-

Daniel Ellsberg, who leaked the Pentagon Papers, was acquitted after a judge declared his case a mistrial. The decision did nothing to protect future whistleblowers.

uments. As former Justice Department spokesman Matthew Miller told the Post, there would have been “no way to prosecute him for publishing information without the same theory being applied to journalists.” That created a “New York Times problem”: If the government indicted Assange, it would have to indict the Times and other news organizations and journalists that published the classified information. That impediment, however, didn’t stop the Trump administration, which indicted Assange in 2019 (the first time the government has prosecuted a publisher based on the Espionage Act), saying that Assange “is no journalist” and that the administration took “seriously the role of journalists in our democracy.”

The Assange case underscores how different the world is today from 50 years ago. The terrorist attack on the United States on Sept. 11, 2001, led to the expansion of the power of the executive branch and to the magnification of national security as an American





they were in 1971 and the ensuing decades.” They conclude that while national-security experts worry about too much disclosure and civil liberties experts warn about too much secrecy, their “profoundly important collective judgment” is that the current system of law and practices “has worked reasonably well.”

In the Bollinger-Stone volume of essays, Harvard Law Professor Jack Goldsmith contends that the small number of prosecutions of leakers compared with the large quantity and breadth of leaks since 9/11 reflects “an unprecedented growth in press freedoms in the national security context” — and that the Trump indictment of Assange confirms the norm of “greater protection of journalists” because the administration stressed that the indictment was no threat to the press.

Jameel Jaffer '99, executive director of the Knight First Amendment Institute at Columbia University, argues that the U.S. has “paid a staggering price for excessive secrecy” since 9/11; that leaks have exposed some of that price in the form of abuses at Abu Ghraib, the National Security

concern, leading to a large increase in the number of people with security clearances and access to classified information. It also led to exponential growth in the amount of classified information — a realm “so large, so unwieldy and so secretive,” as The Washington Post explained, “no one knows how much money it costs, how many people it employs, how many programs exist within it or exactly how many agencies do the same work.” New technology has led much of the information to be digitized, making it much easier for secret information to be copied, leaked, and communicated over the internet — and for the government to track down leakers.

This April, First Amendment scholars Lee C. Bollinger and Geoffrey R. Stone published “National Security, Leaks and Freedom of the Press,” subtitled “The Pentagon Papers Fifty Years On.” They write: “[T]he risks of both too much secrecy and too much disclosure are arguably very different from what

The prospect of prosecuting WikiLeaks founder Julian Assange for publishing classified government documents has been described as a threat to press freedom.

Agency’s massive collection of Americans’ telephone records, and other violations of law, and have led to “significant adjustments to policies relating to interrogation, detention, surveillance, and extrajudicial killing”; and that, in addition to clarifying that American law distinguishes between leaking to the press and to foreign spies, the law should provide much stronger protection for leakers who are whistleblowers, because developments in the past two decades have made Americans “more reliant on whistleblowers even as they have made whistleblowing more difficult and more hazardous.”

Goldsmith and Jaffer disagree fundamentally about how much secrecy American democracy needs and whether the balance now unduly favors secrecy or free speech. They agree as deeply about the need for the press’s bright light to bare secrets of government. To Jaffer, that’s “crucial to our democracy.” To Goldsmith, it’s “vital.”

Harvard Law Bulletin

Harvard Law School
1563 Massachusetts Ave.
Cambridge, MA 02138

Nonprofit Org.
U.S. Postage Paid
Burlington, VT
05401
Permit 347

COMMENCEMENT 2021 In cap and gown, at home, or out in the world, graduates and their families and friends celebrate.

TOP ROW: Aashiq Jivani with his parents and sister; Mark Gillespie with his son; Vanessa Rodriguez's proud parents
MIDDLE ROW: Alexis Alvarez; Sean Quirk and his wife; Mo Light's cousins and aunt watch Commencement ceremonies
BOTTOM ROW: April Xu; Rory Torres and her daughter; Sheila Kose Bamugemereire
For more coverage of Class Day and Commencement, go to: bit.ly/hlscommencement2021.

