

## EDITOR'S PREFACE

IN MEMORY OF ALAN FREEMAN

We find no escape, it seems, from the Coverian dilemma, no matter how many approaches we make. Robert Cover wrote, [t]he paideic is an etude on the theme of unity . . . . The unity of every paideia is being shattered—shattered, in fact, with its very creation. The imperial is an etude on the theme of diversity . . . . The diversity of every such world is being consumed from its onset by domination. . . . Confronting the luxuriant growth of a hundred legal traditions, [judges—and Cover might also have included all lawmakers and all in a position of power in a community] assert that this one is law and destroy or try to destroy the rest.<sup>1</sup>

Whether we describe this dilemma more prosaically, e.g., as the tension between individualism and community, between unity and diversity, between the status quo and its challengers, the dilemma of the murder of law is always with us.

Alan Freeman, to whom we dedicate this issue of the Journal, was keenly aware of this very dilemma. He came from inside the American legal community, educated at Brown and NYU, working as a law review editor-in-chief, a federal court clerk, a summer associate for Cravath, and a lawyer at the Department of Defense before he became a law professor serving first at the University of Minnesota and later at SUNY Buffalo. Yet, as it turned out, he was not a defender of any community status quo; his passion against injustice moved him swiftly outside the comfort zones of intellectual respectability, even while he kept very human ties with those whose life's work depended on the ultimate goodness of the status quo. He did not seem ideological or instrumentalist about community, even though he was both a founder/nurturer and a curious observer of communities; he did not seem to travel from community to community simply because he found intellectual agreement or because these communities served his purposes. One could tell he simply liked *being in* community, hanging out with a group of people who did not take themselves or their own arguments too seriously but did take their vision or project seriously enough to profess about it—to say what they found to be true, even at cost to themselves and their own pretensions. (It is hard for me to

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1. Robert Cover, *Nomos and Narrative*, 97 Harv L Rev 4, 15, 53 (1983).

think of Alan without remembering, at the same time, his grin and his raised eyebrow, the one hospitable to the humanity of the person he was speaking with and the other poised to challenge the very words out of his or her mouth.)

In fact, just as he seemed to enjoy people—students, new scholars, and others—who were still fresh enough to learn and to care, Alan seemed to relish intellectual movements in their organizing moments, before they became lifeless orthodoxies or began to draw sharp lines on who was permitted respect and care in the community and who was not. Those of us who only came to know him in his last few years of life, when he came curiously to the community around law and religion, cannot imagine what critique of our rigidity, our exclusion, our self-righteousness, our redundancy he might have eventually brought to bear. But, just as both friends and strangers continue to have conversations with Robert Cover, gone bodily from this earth, we will continue to have these conversations with Alan, wondering what demands he might have made on us, both as a community of scholars who talk through what is just and right, and as people who live it out. Even though the conversations we might have had with him would probably have been more surprising and vibrant than any we can imagine, we can still imagine and we must still imagine.

In his article in honor of Alan, Daniel Conkle presents his take on a question Alan was asked to discuss at the 1994 Symposium on Law, Religion and Ethics but which his illness prevented him from speaking about: Whether there are secular fundamentalist movements, such as political liberalism, that insulate themselves from competing claims for truth and share the methodological presuppositions of their religious counterparts. Conkle's aim is to identify theological and political problems with any fundamentalism, including the sins of intellectual pride and the diminishment of others who raise alternate explanations.

The struggles of church and state extend the Coverian dilemma to concrete political settings. William Everett proposes to confront an important American dilemma—how to ground republican authority in the cultural/religious values of the American people and involve religious life in the establishment of constitutional norms, while permitting religious institutional forms sufficient independence to perform their distinct prophetic roles in our society. Through the problem of the Pacific Homes Case, litigating whether the United Methodist Church could be sued for its involvement with some non-profit nursing/retirement homes, he proposes to consider this question

through the concepts of covenant and publicity. James Torke sheds insight on how the Anglican Church has worked to find a home within the state in a post-Christendom era, attempting to exercise its influence on the political and cultural values of the English people, while avoiding irrelevancy or complacency. Ze'ev Falk's reflections on how Judaism has worked out its political responsibilities as a minority religion in other religious and secular nation-states, including modern-day Israel, continue this theme.

Helping us to re-vision the problem, Frank Pommersheim breathes painful life into our abstractions in his poem, "Separation of Church and State." And Alfred Brophy fleshes out the way in which *Uncle Tom's Cabin* became an impassioned dialogue between Harriet Beecher Stowe and her critics on competing images of slavery, and the theological indictment of the legal regime supporting it.

We also publish a symposium held at Eden Theological Seminary on April 27, 1996, on Franklin Gamwell's *The Meaning of Religious Freedom: Modern Politics and the Democratic Resolution*. According to Philip Devenish, symposium chair, Gamwell's attempt to unsettle the current consensus, dominated by both separationist and religionist beliefs that religion is "nonrational," argues for a politics of the common good that enfolds diverse religious voices. George Goodwin analyzes the philosophical structure of Gamwell's argument, focusing on the relation of particular and general, the recognition of ultimacy and unity of truth, and the problem of accessibility. Glenn Tinder asks about the openness of democratic institutions and the possibility for settlement of deeply contested issues. Steven Smith focuses on the Gamwellian thesis from the perspective of the "sincerely troubled," those "caught somewhere between resolute religious faith and dogmatic atheism." And Robert Sherman asks how we would educate our children if Gamwell is correct.

We also return to the distinct question Cover was asking throughout his life—how does the *judge* face the dilemma of killing law? Louis E. Newman publishes his interpretation of interviews he conducted with sitting judges from a variety of backgrounds, judges trying to articulate how their personal values and obligations as judges can be reconciled. We also publish a panel on how Judge John T. Noonan, Jr. on the Ninth Circuit Court of Appeals has wrestled with these questions, presented by two of his former clerks on the occasion of his receipt of the *Journal of Law and Religion Achievement Award* in 1996. Sophie Pirie asks how Judge Noonan's call in *Persons and Masks of the Law* for judging that recognizes the full humanity of liti-

gants squares with feminist theory. Patrick Brennan demonstrates how Noonan's understanding of judging extends to such apparently mundane issues as the standard of review. Professor Robert Rodes shows how Noonan's fascination with historical figures illuminates the humanity of his scholarship.

Finally, the Journal is going through a process of self-evaluation and planning for its future over the next year. We have been heartened, looking over our subscription list, at the number of individual subscribers who stick with us year after year. We would gladly invite you to give us the benefit of your ideas and hopes for the Journal, constructive criticisms, and anything else that might help us engage you more thoughtfully and delight you more deeply. And we'll take them any way we can—letters, telephone calls to the editors or our new wonderful production manager, Kathryn Marron (612-523-2082), e-mail at [mfailinger@gw.hamline.edu](mailto:mfailinger@gw.hamline.edu), or through any other technology at your disposal. We express our gratitude to Jo Anne Matson, who has left the Journal after six years as production manager, for her unfailing competence and dogged dedication to the Journal.

Marie A. Failinger, Editor