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Book Review, Commentary, and Appreciation

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BOOK REVIEW, COMMENTARY, AND APPRECIATION

ARCHIBALD COX: CONSCIENCE OF A NATION. By Ken Gormley.† Reading, Massachusetts: Addison-Wesley. 1997. Pp. xxii, 585. $30.00 ($18.00 paperback (Cambridge, Massachusetts: Perseus. 1999)).

*Reviewed by Joel L. Selig**

I.

There are not many accounts of lives in the law that can be recommended without reservation to students, lawyers, and general readers. One that can be so recommended is Ken Gormley's well-researched, well-crafted and readable biography of Archibald Cox. This recommendation can be made without regard to the prospective reader's specialized interests or legal or political philosophy.

Cox's most memorable moment in the limelight, and the one with the largest audience, was his October 20, 1973, press conference in which he explained why, in his capacity as Watergate special prosecutor, he was insisting that President Richard M. Nixon produce a limited number of specified White House tape recordings (pp. 285-86, 347, 351). Many of those who witnessed this televised event, which was broadcast live, nationwide by NBC and CBS, retain vivid mental images of the sixty-one-year-old Harvard law professor with the crew cut, bow tie, "tall, patrician looks" (p. 151), and "odd mixture of New England and New Jersey accents" (p. 438)—"the personification of the blue-blooded New Englander" (p. 151)—calmly averring that he sought no confrontation with the president but that his duty required him to pursue enforcement of the grand jury's subpoena (pp. 348-54).

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Cox's demeanor and performance at that Saturday afternoon press conference were both professorial and humble (in Cox's case, that is not an oxymoron). The press conference laid the groundwork for the firestorm of public anger that arose when later that day, in what became known as the "Saturday Night Massacre," Nixon ordered that Cox be fired (pp. 354-56, 361). Attorney General Elliot L. Richardson (the former student of Cox's who had appointed him special prosecutor) and Deputy Attorney General William D. Ruckelshaus both refused to implement Nixon's order and resigned, leaving it to the third in line at the Justice Department, Solicitor General Robert H. Bork, to do the deed (p. 357). Cox's prompt response to his firing was to release a one-sentence statement that itself would resound in history: "Whether ours shall continue to be a government of laws and not of men is now for Congress and ultimately the American people" (p. 358).

The American people responded to that dignified and eloquently provocative statement with an uproar that forced Nixon to retreat and agree to the appointment of Leon Jaworski to replace Cox as special prosecutor, thereby abandoning the president's decision to return the investigation to the (in his view) safer domain of the Justice Department (pp. 380-81). Ironically, Jaworski turned out to be less deferential to Nixon than Cox, whose predisposition, if any, was to give the benefit of the doubt to the president (pp. 267-68). The seeds that Cox had planted, husbanded by Jaworski, grew into the Supreme Court's decision rejecting Nixon's claim of executive privilege.[1] The contents of the tapes, including the so-called "smoking gun," ultimately led to Nixon's resignation in the face of certain impeachment (pp. 380, 387-88).

II.

Although Cox's most widely visible public moment was produced by his service as special prosecutor, to which Gormley properly devotes 165 absorbing pages (pp. 229-393), Cox's professional career included many other important instances of public service, the most significant of which was his 1961-1965 tour of duty as Solicitor General of the United States in the Kennedy and Johnson administrations (pp. 140-96). Gormley explores this and Cox's many other professional assignments, as well as Cox's hitherto unchronicled personal background and family life, starting with his birth in 1912 and continuing into his present state of semiretirement (pp. 3, 393-439).

Gormley was a student of Cox's at Harvard Law School (p. 431),

1. United States v. Nixon, 418 U.S. 683 (1974).

as I was twelve years earlier. Gormley's book is the work of an author who, like many biographers, does not conceal his admiration of his subject. I share this perspective, as I stated in my previous review in this journal's predecessor of one of Cox's books on constitutional law.[2] But the facts related by Gormley are reliable: the book is extensively and meticulously researched and documented. Gormley lists nineteen pages of sources (pp. 441-59) and provides 102 pages of endnotes identifying the sources of the information in the text in comprehensive detail (pp. 461-562). These sources include the author's interviews, most of them taped, with 141 individuals (pp. 441-44, 563), and mountains of documents from various files, some not previously available (pp. 444-59).

A principal source of Gormley's material is thirty-seven tapes (more than 1500 transcribed pages) of his interviews with Cox over a three-year period. He also conducted less formal follow-up interviews with Cox over a seven-year period (p. 461). Family members, including Cox's wife, Phyllis Ames Cox, were also interviewed. In addition, the three Cox children "carefully read over the chapters dealing with family history for factual missteps," and a Cox granddaughter who is herself a lawyer "read an early draft and critiqued it thoroughly, to the author's benefit" (p. 563). However, it appears that neither Cox nor his wife reviewed any of Gormley's drafts. It has been reported that Gormley initiated the project because he "wondered why nobody had yet written a biography of the Watergate hero," and that he "got Cox's permission to take on the job, with the understanding that Cox would cooperate and provide facts, but would not comment upon Gormley's conclusions or get involved in his independent research and interviews."[3]

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2. Joel L. Selig, Book Reviews, 25 LAND & WATER L. REV. 625 (1990) (reviewing ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) and ARCHIBALD COX, THE COURT AND THE CONSTITUTION (1987)).

For another review of the Gormley book from a more critical perspective, by a senior specialist in separation of powers at the Congressional Research Service, see Louis Fisher, *Public Service as a Calling*, 76 TEX. L. REV. 1185 (1998) (book review) (reaching a favorable conclusion despite seeing shortcomings). For another review from a perspective similar to mine, but by one of Cox's faculty colleagues at Boston University School of Law, see David J. Seipp, *Archibald Cox, Teacher*, 78 B.U. L. REV. 565 (1998) (book review).

3. 48 HARV. L. BULL. No. 3, at 8 (Summer 1997).

Gormley writes that in the 1970s Cox resisted pressures from friends, family and publishers to write an autobiography or a book about his Watergate experiences. Cox preferred to think about the present rather than the past, and he did not wish to cash in on his public service or risk trading his reputation for money or publicity. In 1977 "the 'Talk of the Town' column in the *New Yorker* magazine gave [Cox] a tongue-in-cheek award for the most important 'Book Not Written,' for *not* having written a book about Watergate" (pp. 397-98) (emphasis in original).

Ten years later—fourteen years after the Saturday Night Massacre—Cox did

Thus, although one could characterize Gormley's book as a kind of authorized biography because of the cooperation of Cox and his family in the project, it appears that the Coxes had no control over the manuscript or any editorial or publication decisions. I see no cause for the reader to be skeptical of the book's fairness and objectivity, and I believe its factual accuracy is enhanced by the Coxes' involvement. To the extent that it views many events from Cox's perspective, this is part of what it adds to the historical record; and it may be considered together with, for example, the scores of books by other Watergate players, as well as other sources that contain information on and evaluations of Cox's service as solicitor general.[4] Gormley does not omit criticisms of Cox by other sources or accounts of embarrassing episodes, nor does he eschew critical judgments of his own; and the statements sourced to Cox himself contain a generous portion of reflective self-criticism and an obvious effort to be fair to erstwhile adversaries.

III.

A book like this, and the life it chronicles, are heartening reminders that despite public cynicism about lawyers—which in recent years seems to have reached Shakespearean proportions—it is possible for a lawyer to bring honor to the legal profession.[5] What stands out above all else throughout the book is not Cox's prodigious intellectual and lawyerly skills, his powerful work ethic, his inbred readiness to heed the call to public service, or his numerous professional accomplishments. What stands out above all else and emerges as a recurring and overarching theme is Cox's rock-ribbed integrity—a character trait and behavioral canon that any lawyer who is willing can emulate.[6]

After the Saturday Night Massacre, Gormley writes:

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provide his own relatively brief and contextually relevant discussion of Watergate in the prologue to one of his books. ARCHIBALD COX, THE COURT AND THE CONSTITUTION 2-25 (1987).

4. *E.g.*, VICTOR S. NAVASKY, KENNEDY JUSTICE (1971); LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (1988).

5. Cox, a labor law expert and experienced mediator, expressed to Gormley his concern that by the 1970s "labor arbitration had become 'lawyerized to such a great extent' " (p. 231). "The old-fashioned system of labor justice seemed to have given way to shouting attorneys and harsh tactics designed to produce victories at any cost. It bothered Cox that by 1973 lawyers in general began to earn a plummeting image in the public eye" (*id.*).

6. As the president of the Wyoming State Bar recently stated, "We all have a sense of right and wrong. We all have an ability to act upon that sense. We all have the potential for integrity. We all can be ethical lawyers." Paul J. Drew, *The President's Soap Box*, 23 WYOMING LAWYER No. 3, at 5 (June 2000). For an ancient statement to the same general effect, see *Deuteronomy* 30:11-14.

> Archibald Cox . . . stood as a symbol, a collective expression of something deep within the nation, binding it together. Harvard's President Derek [C.] Bok led a spontaneous morning prayer session at the Appleton Chapel in Harvard Yard, announcing from the pulpit that Cox's actions exemplified "the truth embedded in Aristotle's Ethics: if you would understand virtue, observe the conduct of virtuous men" (p. 371).

Gormley writes that as Watergate special prosecutor:

> [Cox] resolved to rely on the same internal compass that had guided him since he sat . . . in the chair facing Judge Learned Hand [for whom he served as law clerk], and learned to become a lawyer. He would stick with his own legal instincts. And leave the political calculations to others (p. 273).

Elliot Richardson, Nixon's (Republican) Attorney General who appointed Cox and later resigned rather than execute the president's order to fire him, recounts in his foreword to Gormley's book:

> Had Richard Nixon known Archie Cox as well as the readers this biography will know him, Nixon would have realized that his only hope of salvation lay in full disclosure. Instead, he repeatedly let himself be victimized by his own cynicism. Cox was a Kennedy man, and to Nixon that meant that Cox "was out to get him." Try as I might, I could not convince Nixon or his staff that Archie would rather cut off his right arm than take any action not fully supported by the law and the facts. Had Nixon known how stubbornly Cox dealt with the Kennedys when [as solicitor general] he disagreed with their judgment in the sit-in and reapportionment cases, Nixon would have understood what I meant (p. xi).[7]

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7. Gormley's account of his 1992 interview with Richardson says: " 'Archie would rather cut off his right arm,' Richardson told the president more than once, 'than take any action *inconsistent with his duties*' " (p. 321) (emphasis added). The difference in phraseology between that and Richardson's phraseology several years later in his foreword quoted in the text—*not fully supported by the law and the facts* (emphasis added)—is substantively insignificant, and there is not necessarily even a technical discrepancy since Richardson was recalling more than one conversation and could well have used both phraseologies. I prefer the phraseology in Richardson's foreword because it is more specific and because it is congruent with that of the first two of ten principles of responsible law enforcement that I have previously articulated. Joel L. Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 U. ILL. L. REV. 785, 790-91 ("[r]espect for the [l]aw" and "[r]egard for the [f]acts").

Watergate is only one of the episodes in Cox's life that shone a spotlight on his towering integrity. It is interesting to note, however, that Watergate resurfaced years later when Cox, then chairman of Common Cause, refused to participate in that organization's internal deliberations or in outside commentary or confirmation hearing testimony on the merits of President Reagan's nomination of then Judge Bork to the Supreme Court. Cox rejected pleas for his participation from, among others, Senator Edward M. Kennedy, whose family had played an important role in his career. Cox would not budge from his view that ethical considerations required him to recuse himself because of Bork's role in the Saturday Night Massacre (pp. 418-22). This was but another instance among many of the rectitude that was obvious long before and long after the Saturday Night Massacre. Gormley's book successfully attempts to identify the sources of that integrity in Cox's formative years and to recount its manifestations in the many and varied undertakings of his professional life.

Cox's "internal compass" (p. 273) asserted itself in many episodes other than Watergate, including, for example, his handling as solicitor general of the sit-in cases, the reapportionment cases, and the cases challenging the constitutionality of the Civil Rights Act of 1964.

In the first of these three sets of cases, Cox was reluctant to ask the Supreme Court to extend the "state action" concept to convert discrimination by private parties into a violation of the Fourteenth Amendment. Despite Attorney General Robert F. Kennedy's impatience with his approach, Cox believed that he owed a duty to the Court as an institution and that respect for stare decisis counseled that narrow arguments for reversal of the sit-in convictions be found (pp. 155-60).[8]

8. The reference to the Court as an institution parallels another of the principles of responsible law enforcement that I have articulated. Selig, *supra* note 7, at 791 ("[i]nstitutional [c]ontinuity"). In addition to the Court as an institution, the solicitor general's office is an institution with its own need for a reasonable degree of continuity, whether or not one agrees with those who view the solicitor general's role as that of a "tenth justice." *See* CAPLAN, *supra* note 4, at 3 (including discussion of Solicitor General Cox, *passim*). For a critical review of Caplan's book by a reviewer who, like myself, is an alumnus of the Civil Rights Division of the Department of Justice, see Brian K. Landsberg, Book Review, 6 CONST. COMMENT. 165 (1989) (reviewing CAPLAN). As solicitor general, Cox was acutely sensitive to the demands of institutional continuity, as his response to the sit-in cases demonstrates.

I have noted elsewhere that Rex E. Lee, the first Reagan administration solicitor general and a person of impeccable "conservative" credentials who fully supported the Reagan agenda, nevertheless had significant conflicts with other Reagan administration officials who did not share what I characterized as Lee's "concern for such institutional considerations as respect for precedent, the avoidance of overtly political arguments, and the credibility of his office with the Court." Selig, *supra* note 7, at 832-33. Lee, who

The intellectual integrity illustrated by Cox's position on the sit-in cases was viewed by some as stubbornness or arrogance (pp. 153, 158-59), but Cox's strategy was successful and, in hindsight, probably well-advised (pp. 159-60). In addition, Cox's integrity enhanced the general effectiveness of the solicitor general's office:

> Cox's cautious, dogged approach was earning him an increased standing inside the Supreme Court. In discussions among the justices and their clerks, Cox was being compared with the finest solicitors general in history. As Justice Byron [R.] White would explain [in an interview with Gormley] . . . , "We could always rely on what he said. He didn't try to horse around" (p. 159).[9]

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was replaced as solicitor general in 1985, described his view of some of the institutional strengths of the solicitor general's office as follows:

> [T]here is a widely held, and I believe substantially accurate, impression that the Solicitor General's office provides the Court from one administration to another—and largely without regard to either the political party or the personality of the particular Solicitor General—with advocacy which is more objective, more dispassionate, more competent, and more respectful of the Court as an institution than it gets from any other lawyer or group of lawyers.

Rex E. Lee, *Lawyering for the Government: Politics, Polemics, & Principle*, 47 OHIO ST. L. J. 595, 597 (1986) (text of March 19, 1986, lecture). In discussing the question whether the solicitor general should, for essentially political reasons, make arguments that he knows the Court will reject, and referring to one of his conflicts with other Reagan administration officials, Lee stated that if he had argued, as he was pressed to do in a school prayer case, that the Establishment Clause of the First Amendment was not binding on the states, "I would have destroyed—with one single filing—the special status that I enjoyed by virtue of my office." *Id.* at 600. Lee insisted, epigrammatically, that the solicitor general "is not the pamphleteer general nor [sic] the neighborhood essayist." *Id.*

9. This comment by Justice White calls to mind a private interview I had in the early 1970s with one of the heroic judges of the United States Court of Appeals for the (old) Fifth Circuit who played a leading role in calibrating that court's response to civil rights cases in general and to school desegregation cases in particular. It was a time in which the Nixon administration was playing political games with school desegregation cases and the issue of "busing," taking questionable or clearly unacceptable legal positions in an effort to go easy, or at least to appear to be going easy, on southern school districts. Nonpolitical, career attorneys in the Civil Rights Division of the Department of Justice, which had to take positions in appellate briefs that these attorneys thought inconsistent with the law or otherwise unacceptable, managed to get away with writing extensive, fully sourced accounts of the facts and the records of the cases, even though their drafts of the argument sections of the briefs were carefully controlled and edited to conform to the administration's restrictive policies. In the course of our conversation, the Fifth Circuit judge asked me to say hello to some of my Civil Rights Division colleagues who had appeared frequently in cases before him, to wish them well, and to tell them to keep up the good work of giving the court the detailed statements of the facts and the records. He and other judges apparently had surmised, probably from govern-

In the reapportionment cases, Cox supported the position that the issues were justiciable and that some remedy for constitutional violations was appropriate. But his inner compass led to an elaborate struggle in his own mind and between him and those who were less reluctant to support the concept that the Constitution requires absolute, mathematical one person, one vote equality (pp. 171-77). Cox's own published discussion of the reapportionment cases contains a cogent and sophisticated legal analysis as well as a critical discussion of his own ambivalences.[10] Gormley quotes Cox's candid retrospective judgment as explained to him in one of his interviews: " 'I felt that the Court wouldn't buy "one person, one vote"—and if the Court bought it, the country wouldn't buy it. . . . It's been plain to me now for some years that I was all wrong' " (p. 177).[11]

In the cases concerning the constitutionality of the 1964 Civil Rights Act, the issue of private conduct versus state action, which was involved in the sit-in cases, again reared its head, although now in the context of modern federal civil rights legislation making private discrimination a violation of federal statutory law, as opposed to a violation of the Fourteenth Amendment. Again it brought to the forefront what Cox called his " 'philosophy about the role of judges and the prestige of the Court, the legitimacy of the Court's decisions' " (p. 189), although considerations of litigation strategy seem to have played at least an equal role in these cases. Cox was at odds with Attorney General Kennedy, prominent civil rights lawyers, and even the views on the general subject expressed by President Kennedy before his death. Cox wanted to ask the

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ment briefs and oral arguments as well as from press accounts, what was going on in the Division. *See, e.g.*, RICHARD HARRIS, JUSTICE: THE CRISIS OF LAW, ORDER AND FREEDOM IN AMERICA 203-11 (1970) (reporting on controversy over school desegregation in Mississippi and revolt by Division attorneys). So long as the government's brief assisted the court by providing a full and accurate account of the facts and the record, he indicated, the court would know where to go from there and what to do with the case, and it could ignore the argument sections of the government's brief when appropriate. To adapt Justice White's terminology, this Fifth Circuit judge was in effect saying that his court could tell when it could rely on what the government said, and when the government was "hors[ing] around."

I should note that my private interview with the judge was neither case-related nor related to my work in the Civil Rights Division. I was not in the section of the Division that handled school desegregation cases at that time, and I was not acting as a representative of the Justice Department. The purpose of the interview was to explore the possibility of a judicial clerkship.

10. THE COURT AND THE CONSTITUTION, *supra* note 3, at 288-304.

11. The interactions between Cox, Attorney General Kennedy and others on the reapportionment cases and the sit-in cases, *inter alia*, have also been discussed in detail elsewhere. NAVASKY, *supra* note 4, at 277-323 (chapter entitled "Lawyering: The Solicitor and the General").

Court to uphold Congress's authority to outlaw discrimination in places of "public accommodation," which it had done in Title II of the 1964 Act, as an exercise of its power to legislate under the Commerce Clause, rather than its power to legislate under Section 5 of the Fourteenth Amendment. Cox once again prevailed in the internal deliberations, and the government relied, successfully, on the Commerce Clause (pp. 188-90).[12]

Cox's strategic reasoning on this issue, vindicated by the results, was that under the Court's established Commerce Clause jurisprudence, it "could easily uphold broad civil rights legislation. It would be duty-bound to accept Congress's determination that a particular industry 'affected' interstate commerce, unless Congress had made an 'irrational' decision on this score. For Cox, it was 'as easy as rolling off a log' for the Supreme Court" (p. 189). Of course, there was no reason for anyone to think in 1964 that the Court might arrive at an outrageous conclusion such as that reached by the present Court, which recently held, 5-4, in *United States v. Morrison*,[13] that Congress had exceeded its authority under the Commerce Clause when it enacted a federal civil remedy for victims of gender-motivated violence.[14]

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12. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

13. 120 S. Ct. 1740 (2000); *id.* at 1759 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

14. The wisdom or lack of wisdom in federalizing the issue of violence against women in this way is a separate question from the Commerce Clause holding in *Morrison*, and it is only the latter that I am characterizing as outrageous. *See id.* at 1764 n.10 (Souter, J., dissenting).

The *Morrison* Court's additional holding that Congress could not reach purely private action through its power to legislate pursuant to Section 5 of the Fourteenth Amendment is, of course, consistent with what Cox thought in 1964 was the existing law under prior Supreme Court precedent.

Back at Harvard, Cox published a law review article in the wake of *Katzenbach v. Morgan*, 384 U.S. 641 (1966), which he had argued as solicitor general. The article raised the possibility of interesting applications of that case's broad interpretation of Congress's authority under Section 5 of the Fourteenth Amendment to prohibit practices that would not themselves violate the Fourteenth Amendment. Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966). Cox suggested, for example, that after *Morgan* "[t]here is now scant basis for doubting the power of Congress to regulate public education in such a way as to eliminate *de facto* racial segregation," and that "[l]ogical pursuit of the reasoning in *Morgan* . . . leads to the conclusion that Congress can constitutionally adopt a comprehensive code of criminal procedure applicable to prosecutions in state courts." *Id.* at 107-08.

Cox's suggestion is not inconsistent with the *Morrison* Court's interpretation and application of Section 5, because the suggestion assumes that the legislation in question would regulate state actors as in *Morgan*, not purely private actors as in *Morri-*

Two other examples of Cox's integrity deserve mention here. The first, although relatively trivial, is nevertheless characteristic and instructive. Cox did a substantial amount of work for Senator John F. Kennedy in the 1960 presidential election campaign. Gormley reports:

> When JFK learned that Archie and Phyllis did not own a television set, he ordered a color TV from a department store in Boston, to be shipped to [their home in] Wayland so that Archie and Phyllis could watch the last debate in living color. Archie sent a brief note of thanks to Kennedy; then he made a call and canceled the shipment. It was an old New England precept that "you must never accept any money or any other material thing from anyone that will put you in debt." As tired as the campaign had made him, and despite his flagging interest in politics, there was no need to abandon such basic precepts now (p. 139) (footnote omitted).

The second example, an early one, involved Cox's "first major call to public service" (p. 65). In 1952, during the Korean War, the forty-year-old professor and expert in labor law (whose sympathies ran more to unions than to managements (p. 60)) agreed to serve as chairman of the troubled and recently reconstituted Wage Stabilization Board (WSB) (p. 66). Less than five months later, Cox resigned, releasing to the press a letter to President Harry S. Truman protesting his reversal, under pressure from United Mine Workers President John L. Lewis, of the board's decision to approve only a $1.50 per day raise rather than the $1.90 negotiated by Lewis and the bituminous coal industry (pp. 66-77).

Others attempted to dissuade Cox from resigning, or at least to persuade him to go quietly, but Cox's resignation was motivated by a desire "to illuminate the matter for the public, bring it into sharp focus for debate, so that such errors of government did not repeat themselves" (p. 75). Gormley concludes:

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son. Chief Justice Rehnquist's opinion for the Court in *Morrison* appears to endorse the continuing vitality of *Morgan*. *See Morrison*, 120 S. Ct. at 1755, 1758. But one may entertain justified skepticism that if Congress were to be so bold as to enact the kind of legislation to which Cox referred, the *Morrison* majority would uphold such action.

For another recent outrageous 5-4 decision by today's Court, see *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000) (although Congress clearly expressed its intent to abrogate the States' sovereign immunity and subject them to the Age Discrimination in Employment Act of 1967, that abrogation exceeded Congress's authority under Section 5 of the Fourteenth Amendment); *id.* at 650 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).

> Cox had faced down a president and stuck to his guns. In many ways, however, it seemed foolhardy, pointless . . . . He had left no perceptible mark on the small piece of government machinery that he had set out to protect. He had jeopardized, in the meantime, any future chance of working in Washington, in the tight labor circles that would view him as an academic stickler lacking sufficiently thick political skin.
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> Nevertheless, Archie felt oddly comfortable with his decision. . . . The important thing was that he . . . had established his own intellectual and moral compass. He had tried to stick to its needle (pp. 76-77).

In fact, Cox was able to return to Washington for other government service. And the character trait that made him a role model for so many law students was recognized in 1952 by Harold L. Enarson, a neutral WSB member who disagreed with Cox's resignation but "understood that there was an element of 'New England fortitude and integrity' at work in Cox's decision-making" (pp. 68, 74-75).

The inner compass that was an important ingredient in Cox's many successes could also hold him back. After all, one reason integrity is admirable is that it comes with costs. Cox felt obliged to submit his resignation as solicitor general to President Lyndon B. Johnson "once LBJ's own term began in 1965," in order to "allow the president to decide if he wanted to appoint his own solicitor general or make it clear that he wanted Cox to stay," although Johnson had not requested that routine or pro forma resignations be submitted by the many Kennedy Administration holdovers (p. 193).

Attorney General Nicholas deB. Katzenbach made persistent efforts to dissuade Cox from submitting a resignation, fearing that Johnson would accept it. This fear proved well-founded: Johnson accepted Cox's resignation and appointed Thurgood Marshall (a good appointment in Cox's view) to replace him (pp. 193-94). At the same time, however, there was a vacancy on the United States Court of Appeals for the First Circuit in which Cox was interested.[15] In this connection, Katzenbach lamented Cox's decision to offer Johnson his unsolicited and unconditional resignation:

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15. Gormley's sources and his reconstruction of events suggest that if President Kennedy had lived and had the opportunity to make a third Supreme Court appointment (after Byron White and Arthur Goldberg), the chances of Cox's receiving that appointment were excellent (p. 171). In March 1965, Chief Justice Earl Warren told Cox that before his assassination JFK " 'had plans' " for Cox on the Court (p. 194).

> [Cox's failure to win the First Circuit nomination] could have been avoided, [Katzenbach] felt strongly, if Cox had held back his resignation letter to LBJ. "He was the most principled man I ever met," Katzenbach said of Cox. "He was also a bit stubborn." If Cox had remained in the solicitor general's office, Katzenbach had it figured out, President Johnson would have had a powerful incentive for appointing Cox to the First Circuit, if Johnson wanted to name his own solicitor general. A little political muscle and jockeying would have been enough to turn the tide of Cox's life. "He could have traded [his job] for the court," said Katzenbach frankly.
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> It was not in Cox's nature to open up doors that way, however. "I respected him," Katzenbach said . . . . "That's how he did things" (p. 197) (footnote omitted) (third bracketed phrase in original).

Looking back, Cox expressed no regrets about his failure to win the First Circuit judgeship, telling Gormley that he had had a much more satisfying and exciting life than he otherwise would have (p. 198).

Today, it is as urgent as it ever has been for lawyers and public servants to act, and to be perceived as acting, with honor and integrity, despite the costs, real or imagined, to careerism or the bottom line. The legal profession and the public at large have seen too many instances of dishonor and lack of integrity which feed and exaggerate the sense that lawyers are quite willing to promote their own self-interest at the expense of the public interest, sometimes even in ways that actually disserve their clients' interests. The corrosive belief is widespread that lawyers will say or do almost anything to win their cases or to achieve their other goals, and that the ideal of the attorney as an independent member of a learned profession, governed by the highest ethical standards, is an anachronism.

On the public stage, the nation has progressed, if such can be called progress, from the first president to resign his office, because of the crimes he, a lawyer, and his confederates, many of whom were lawyers, committed, to another lawyer-president, who gave false testimony under oath in the course of a judicial proceeding and was deservedly impeached but was not convicted and removed from office. The Nixon scandals involved serious wrongdoing which threatened to steal the country and our democracy, while the Clinton impeachment involved matters of considerably less cosmic significance; but the conduct by the lawyer-president in both situations was utterly indefensible. Today

(summer 2000), as in 1996, the presidency, the Congress, and the candidates of both major parties are awash in a corrupting flow of money gushing through carefully lawyered legal loopholes. In election years and nonelection years alike, media-hungry members of Congress, a large number of them lawyers, indulge in actions or comments involving legal issues that the public rightly perceives as self-serving, manipulative, almost entirely political, and practically devoid of underlying principle or integrity. There are even two sitting Supreme Court justices who, there is some reason to believe, may have made false or misleading statements to the Senate in the course of their confirmation battles.[16]

Some of the lawyer-commentators who appear on cable media provide glib sound bites or filibusters masquerading as legal analysis: for example, the commentary by some of the talking heads who fawn over, or who are fawned over by, Geraldo Rivera and offer supposedly expert opinions unencumbered by more than superficial knowledge concerning the facts or the applicable law.[17] Too many prosecutors and defense law-

16. Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the* Brown *Case*, 1988 SUP. CT. REV. 245, 247 (Chief Justice William H. Rehnquist's assertion that a memorandum he wrote as law clerk to Justice Robert H. Jackson in connection with the school segregation cases, advocating reaffirmance of the separate-but-equal doctrine, was intended as a statement of Jackson's views, not Rehnquist's) (newly available draft concurring opinion by Jackson reinforces prior scholarship and "appears inconsistent with Rehnquist's assertion that his memo was intended to state Jackson's rather than Rehnquist's view on the constitutionality of segregation"); RICHARD KLUGER, SIMPLE JUSTICE 609 n.* (1976) ("a preponderance of evidence [suggests] that the [Rehnquist] memorandum . . . was an accurate statement of his own views on segregation, not those of Robert Jackson"); *id.* at 604-07, 606-09 n.* (detailing the evidence); EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 452-55 (1998) (Justice Clarence Thomas's assertion that he could not remember personally discussing or debating *Roe v. Wade*, 410 U.S. 113 (1973), either while a law student or any time thereafter, and his blanket denial of charges by Professor Anita Hill) (cited only for the proposition stated in text); JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS 8, 218-19 (1994) (same); *see also* Sanford Levinson, *Coda*, in ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 281 (2d ed. 1994) ("Clarence Thomas . . . could gain confirmation only by denying to the Senate, truthfully or not, that he had ever thought seriously about *Roe* or had any opinions about the constitutional status of privacy and abortion") (quotation from coda written by Professor Levinson long after Professor McCloskey's 1969 death and added in Levinson's 1994 revised edition of McCloskey's 1960 book).

N.B. The proposition stated in the text is a limited one: there is *some reason to believe* that the justices *may have made* false or misleading statements to the Senate. I do not purport to resolve the question whether they did in fact do so, but the fact that legitimate questions of integrity have been raised and not definitively answered contributes to the cynicism discussed in the text, and in these instances it seems to me that the problem may not be laid solely at the doorsteps of those making the charges in question.

17. The criticism applies, as stated, to some, not all such commentators. Many do

yers, as well as lawyers handling civil litigation, try to win at all costs without regard to notions of professionalism or integrity: for example, prosecutors who resist exploration of DNA testing or of the prejudicial effects of sleeping, incompetent counsel in capital cases on the ground that defendants' cases have already been the subject of (often cursory and reflexively unsympathetic) judicial review on other occasions; or lawyers who (blatantly or subtly) urge jurors to decide cases on the basis of racial or other passion or prejudice; or lawyers who offer deliberately but, they hope, unprovably false explanations for their unlawfully discriminatory peremptory challenges.[18]

In the shadow of so much behavior that breeds public contempt for lawyers and disrespect for the legal process itself, Gormley's story of a lawyer who reveres the law as law, not an arena for politics or sandlot brawls, and who exudes professionalism and integrity from every pore, "is welcome as flowers that bloom in the spring."[19]

IV.

Gormley's accounts of Cox's service as solicitor general and Watergate special prosecutor, including the behind-the-scenes information and Cox's views concerning those assignments, are probably the parts of this biography that hold the most general interest. However, the story of Cox's professional and personal life presented by Gormley addresses many other matters that are intrinsically interesting and knowledge of which provides its own rewards.

For example, after his service as solicitor general and special prosecutor, Cox presented oral argument in two important Supreme Court cases that remain relevant to current events and controversies. He filed a brief on behalf of Senator Hugh Scott, et al., as amicus curiae and participated in the oral argument on behalf of the appellees in *Buckley v.*

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know what they are talking about and do make a genuine contribution to public understanding of legal issues. Wyoming attorney Gerry L. Spence, for example, seems to fall into this latter category most of the time, as does Rivera himself much of the time. The performances I have seen by Joseph E. diGenova, former United States Attorney for the District of Columbia, have been consistently outstanding.

18. For examples of "blatant lying" by prosecutors attempting to explain racially discriminatory peremptory challenges, see RANDALL KENNEDY, RACE, CRIME, AND THE LAW 208-14 (1997).

19. W.S. GILBERT & ARTHUR SULLIVAN, *The Mikado*, *in* THE COMPLETE PLAYS OF GILBERT AND SULLIVAN 392 (Modern Library ed. n.d.).

As I have explained elsewhere, the historical tradition and ethos of the Civil Rights Division of the Department of Justice required such professionalism and integrity. *See* Selig, *supra* note 7, at 786-90.

Valeo,[20] the seminal case on the constitutionality of congressionally imposed limitations on campaign contributions and expenditures in elections for federal office. Cox's brief and argument supported the federal legislation at issue (p. 401). In *Regents of the University of California v. Bakke*,[21] Cox presented the oral argument on behalf of the University of California in support of the U.C. Davis medical school's affirmative action program (pp. 401-06).[22]

For another example, while he was back at Harvard after his service as solicitor general but before his service as special prosecutor, Cox allowed himself to be drafted into frontline roles dealing with Vietnam era student protests, some of which involved riots and building seizures. His reputation for fairness and objectivity led to a request that he serve as chair of a fact-finding commission appointed by Columbia University to evaluate its response to the student disturbances there (p. 201). The report of the commission was critical of the university administration, but although "Cox was sympathetic toward many of the 'abstract ideals' of the student protesters," he "disapproved, more strongly than he could express, of their destructive methods" (p. 203).

Cox's role with respect to the unrest at Columbia was that of a detached and impartial investigator and evaluator. He later took on an operational role at Harvard when he was "asked to become the de facto president of the university in all matters concerning student disruptions" (p. 211). This request came after what many members of the Harvard community believed was President Nathan M. Pusey's drastically misguided overreaction to a campus building occupation. Pusey had called in 400 state troopers and local police who stormed University Hall in a before-dawn raid characterized by police violence and brutality that left "a trail of blood as dawn rose over the troubled university. One observer watched police beat a handicapped student out of his wheelchair onto the ground" (pp. 207-08).

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20. 424 U.S. 1 (1976) (contribution limitations of the Federal Election Campaign Act of 1971 are constitutional, but expenditure limitations violate the First Amendment).

21. 438 U.S. 265 (1978) (medical school's special admissions program for minorities is unlawful, but school can take race into account as a factor in future admissions decisions).

22. Some, including myself, would consider Cox's handling of these cases more noble undertakings by a former solicitor general and special prosecutor than representation of tobacco companies by a former solicitor general and future independent counsel (Kenneth W. Starr). On the other hand, I believe the unfair criticisms of Cox's actions as special prosecutor (*e.g.*, a "Kennedy man," "out to get" Nixon (p. xi)) were a relatively minor matter in comparison to the scope and vehemence of the largely unjustified abuse directed at Starr's actions as independent counsel.

Cox's assignment to replace Pusey in the handling of student disruptions at Harvard was an emotionally draining experience for him. At one point he was almost overwhelmed by a sense that he had failed in his job (p. 221), although he would later conclude that " 'on the whole we kept the university from blowing up' " (p. 226). In one incident he found himself pleading unsuccessfully with protesters determined to disrupt an event featuring "pro-war" speakers: " 'Freedom of speech is indivisible. You cannot deny it to one man and save it for others. Over and over again the test of our dedication to liberty is our willingness to allow the expression of ideas we hate' " (p. 224). Cox's four-minute speech, unheard by most because of the din of the protesters and of no effect on the disturbance, ended with an (uncharacteristically) "impassioned finale, his face choked with emotion, almost begging. 'Answer what is said here with more teach-ins and more truth,' he shouted over the roaring chants [including someone who yelled 'F___ you, Archie!'], 'but let the speakers be heard' " (pp. 223-24).

Why had Cox accepted such a thankless assignment at Harvard? Gormley's answer: "Cox had been part of [the 'Establishment'] his whole life, enjoying the ample benefits of an Ivy League education, secure finances, government contacts, and an influential position on the Harvard faculty. Now it was time to pay his dues" (p. 215).

V.

The preceding reference to what might be described as a kind of *noblesse oblige* brings us to the information Gormley provides on Cox's personal background and family life, as it illuminates his formative influences and his professional career. Without going into excessive or mundane detail in a book that focuses primarily on Cox's professional life, Gormley provides enough of this kind of biographical information to enable the reader to begin to know and understand Cox the person as well as Cox the lawyer.

Both Archibald Cox and his wife, Phyllis Ames Cox, have distinguished family lineages. As one who spent the first twenty-five years of his life in the environs of Boston, where such matters can assume exaggerated importance, I read the genealogical part of Gormley's story with interest (albeit from an intellectual and genealogical distance), and I think other readers will also find it of interest.[23]

23. Elliot Richardson may overreach a bit in the penultimate paragraph of his foreword. He describes the stereotypical features of Cox's (and presumably his) background as "old-line, cultivated, well-to-do, and WASPy;" characterizes that "culture" as "one of the smaller minority groups making up our multicultural society;" and says that persons

In a nice literary touch and with serendipitous irony, Gormley's biography begins with a prologue concerning attorney William M. Evarts's successful defense of President Andrew Johnson in his impeachment trial, and other aspects of Evarts's character and career that have their parallels in Cox's character and career (pp. xv-xxii). Evarts was Cox's great-grandfather on his mother's side. His grandfather on his father's side was also a lawyer, as was his own father (pp. 3-4). Cox told Gormley that there was " 'never a day when I wasn't going to be a lawyer' " (p. 18). Once in law school, Cox "enjoyed the challenge, the tension, the regular, hard hours of work. Steady routines and tedious attention to detail were the hallmarks of a solid, old-fashioned New England lifestyle" (p. 27).

Phyllis Ames, whom Cox was to marry, "had roots that were generations long, linked to Harvard Law School and legal education" (p. 31). Her grandfather, James Barr Ames I, was dean of Harvard Law School in the 1890s; her father served as administrative secretary at the law school; and her maternal grandfather, Nathan Abbott, founded Stanford Law School and served as its first dean (*id.*).

Cox inherited from his father "an old-fashioned work ethic" and from his mother "an optimist's view of humanity" and "a quiet Yankee

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with that background, "at their best," are "prime transmitters of the distinctively American attributes that transcend other cultural lines" (p. xii). Richardson's point in this paragraph is inclusionary and in no way intended to be ethnocentric. His argument also is that "it would be too bad if minority groups ceased to think of themselves as Americans" as a result of "the emergence of multiculturalism," and he describes the cultural tradition to which he refers as one that "bases its affirmation of diversity on a profound belief in the dignity and worth of every individual" and that "[i]n so doing . . . helps to create unity even as it celebrates diversity" (*id.*). Richardson's point is a fairly subtle one with which I have no great quarrel, and in taking apart the pieces of a carefully constructed paragraph it is not my intention to alter or distort his meaning. But I do find it somewhat quaint and premature to describe those who share Cox's (and presumably Richardson's) background as members of a "minority group," a phrase with connotations broader than what Richardson meant to evoke; and I am not sure that by the twentieth or even the nineteenth century any cultural group could be said to include more "prime transmitters" of "distinctively American attributes" than any other group.

Similarly, I have no quarrel with the substance of Richardson's final paragraph, although I find his use of the word "indigenous" in this context infelicitous albeit technically accurate because it refers to values, not to peoples:

> Someday, perhaps, our society will be mature enough to create a pantheon of heroes who fought for this nation's indigenous values while also representing the distinctive attributes of their personal heritage. The man whose qualities and contributions are remembered in these pages surely deserves an honored place in that assemblage (*id.*).

reserve" (p. 9). Cox and his wife-to-be shared "a simple hard-working New England ethic, a . . . love for the mountains and outdoors, a private vision of how life should be lived" (p. 33). Cox commuted to work at Harvard in a pickup truck from the farm in Wayland, Massachusetts, where he and Mrs. Cox lived and where, like the Evarts family, they " 'liked to work the soil with our own hands. To grow things, to muck out our own horses and cows even though we didn't have to' " (pp. 33, 65). Mrs. Cox "had spent childhood summers on her grandfather's farm . . . in Maine, riding horses and doing the work of a farmhand" (p. 33).

Gormley summarizes some shared family traditions after recounting the Coxes' courtship and marriage:

> Money and success were necessary up to a point. But simpler pleasures, dirt on the hands and twigs in the hair after a hard day's work, were far more significant achievements. The greatest common bond shared by Archibald Cox and Phyllis Ames for the next sixty years—although only their closest friends and family would ever observe it—would be their mutual desire to preserve this simple, uncluttered, unelaborate, intensely private New England life.
>
> Even after Archie had become, to his own surprise, a very public figure (p. 34).

VI.

Other personal biographical information, as well as information on Cox's motivations for and reactions to various events, are helpfully integrated throughout Gormley's account of developments in Cox's professional life. Gormley also gives us a sprinkling of Cox's present views, expressed to him in interviews, both on past controversies and on contemporary issues.

For example, Gormley describes some of Cox's personal reactions to Watergate and its aftermath. Cox disapproved of Bob Woodward and Carl Bernstein's book that described in embarrassing detail President Nixon's near-breakdown during the final days before his resignation.[24] Cox told a news conference: " 'I see no useful purpose to be served by relating gossip about the disintegration of any human being . . . . It's not surprising any man would disintegrate under those circumstances and I don't see any gain in peddling those stories in books and

24. BOB WOODWARD & CARL BERNSTEIN, THE FINAL DAYS (1976).

news magazines' " (p. 388). He also disagreed with President Gerald R. Ford's decision to pardon Nixon, believing Nixon should have faced criminal prosecution—not with " 'vindictiveness,' " but "like any other citizen"—and mercy or leniency should have been reserved for any sentencing determination (pp. 388-89). His concerns were analogous to those expressed today by other observers in other contexts (e.g., the O.J. Simpson criminal trial and the current capital punishment controversy): " 'the lack of equal justice. The high and mighty aren't required to answer at the bar of a court for crimes when taxi drivers and baggage handlers *are*. It's a very dangerous message to send out' " (p. 390) (emphasis in original).

Cox was, for reasons he described to Gormley, ambivalent about the independent counsel statute that Congress recently allowed to lapse, but he believed it should be continued, with modifications he specified (pp. 432-33). He doubted that the Supreme Court would make dramatic shifts in the legal landscape " 'of the magnitude of the shift that took place after 1937 [in the midst of the New Deal], or with the Warren Court' " (pp. 433-34) (bracketed phrase in original). He believed (at least as of 1996) that " '[t]he Court is in the hands of the middle-of-the-roaders,' " whose " 'votes are necessary' " (p. 434). He thought it would be difficult for the "conservative" justices to reconcile their professed opposition to judicial activism with "overrul[ing] well-entrenched precedent, even if they [find] it personally distasteful" (*id.*). This prognosis seems overly sanguine, although the most recent Supreme Court term included some pleasant surprises, such as *Dickerson v. United States*,[25] in which the Court declined to overrule, or to allow Congress to override, *Miranda v. Arizona*.[26] Finally, Cox expressed a view about the high tech age that some will find merely quaint but that I am inclined to believe has substantial merit: " 'I think one of the costs of the computer and related developments—the Internet—more and faster information, is that it discourages reflection. In the legal world, I think it discourages good writing, clear and thoughtful analysis' " (pp. 435-36).

VII.

Lest it be thought that Gormley's book is unrelievedly serious and completely lacking in entertainment value, I would mention three tidbits I believe many readers of this journal are likely to enjoy: (1) Cox's confirmation hearing before the Senate Judiciary Committee for the post of solicitor general lasted only ten minutes. "When [he] was

25. 120 S. Ct. 2326 (2000).
26. 384 U.S. 436 (1966).

questioned whether he had any holdings of stocks or securities, he replied seriously, 'The only stock we have is my wife's horse' " (p. 146). (2) At an "elegant dinner party" shortly after Byron White's confirmation as a Supreme Court justice, Mrs. Cox was White's partner "as men escorted women into the dining room. They stood at the top of [a] sweeping marble staircase, where Justice White took Phyllis's arm [and whispered,] 'It's a long way from Buffalo, Wyoming, to this' " (pp. 170-71). (3) During his tenure as Watergate special prosecutor, Cox received "at least two" telephone calls from George H.W. Bush (George Bush, Sr.), who at that time was chairman of the Republican National Committee. Cox had the impression that Bush had been told to make the phone calls and wanted to be able to say he had done so. The calls were "to inquire, 'Why haven't you prosecuted any Democrats?' . . . Cox's reply to Bush in both instances was, 'Well, if you had any evidence, then of course we could.' Which always produced silence on the other end of the phone" (p. 268).

Those and other bits of entertainment notwithstanding, this biography is a predominantly serious work that will be most rewarding to readers who have at least a potential interest in its subject. But the book is rich in contemporary resonance in an age that has seen too many members of the bar bring dishonor rather than honor to the legal profession.

VIII.

As for Cox's teaching style, Gormley reports that in the 1940s and 1950s Cox "got strong marks [from students] for his powerful grasp of legal material, lukewarm reviews for his ability to endear himself to his students, but universal acclaim as a steady and unflappable teacher" (p. 85). "Although he thrived on discussion and open debate, he required students to meet him on his own turf. Like most of his colleagues of the era, Cox believed in treating the students without leniency or coddling" (p. 84), but he also engaged in "quiet acts of kindness and encouragement" (p. 86). Some students, however, thought him a "stuffed shirt," "arrogant," even "insufferable" (p. 84), and he "earned his marks for clarity and intellect, rather than for warm, personal charms" (*id.*).

Gormley quotes sources to the effect that Cox began a "transformation as a teacher" after his service as solicitor general, and that this transformation reached completion after his service as Watergate special prosecutor (p. 397). These sources credit the "transformed" Cox with no

longer being "austere," with a "rise of the humility quotient," and with being warm and "approachable" (*id.*).[27]

I was a student in Cox's section of the required full-year course in criminal law and procedure, and in his section of the required full-year course in constitutional law, in 1965-66 and 1966-67 respectively, his first two years back at the law school after his resignation as solicitor general. I do not know whether the sources quoted by Gormley consider that the "transformation" they say began in those two years had progressed very far. I can only say that my recollections are overwhelmingly positive. I did not find Cox arrogant or unapproachable, especially in comparison to many other members of the Harvard faculty. I found it a privilege to witness his analytical mind at work, and I appreciated his straightforward, practical views of the law, informed by history, leavened by real-world experience, and uncontaminated by the fog or acid rain of the ivory tower. Although I did not often volunteer in most of my law school classes, I did in Cox's and was comfortable in doing so. Having perceived where I was coming from philosophically at that time, he sometimes called on me to elicit the "liberal" response in opposition to which he then sometimes played devil's advocate. I did not find him in any way intimidating or insensitive.[28] To the extent that he was spartan or "austere," serious and demanding, and intellectually honest, I believe my exposure to the rigors of twelve semester hours in his classroom benefited me as a lawyer and as a teacher. Writing in 1991, Cox did not seem to have abandoned rigor as an important element of his approach, as he referred with approval to "lessons [he] learned as [a] law student and as a young professor," including: "(1) always face up squarely to the hard questions; (2) only performance counts; (3) nothing less than an impossible best is good enough."[29]

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27. The dust jacket endorsements of Gormley's book include the following from former Senator Alan K. Simpson of Wyoming, then teaching at Harvard: "Archibald Cox is a marvelous professor and a most impressive man . . . bright, honest, warm, witty and always accessible to his students. In this book the world will learn a little more about a lot of man" (ellipsis in original).

28. Professorial abuse and humiliation of students—practices in which there is no suggestion Cox ever engaged—had pretty much ceased at Harvard by the mid-to-late 1960s. But in one of the four sections into which my first-year class was divided, a professor called on a student and the student then collapsed and fell to the floor. According to one of my classmates, the professor looked over at the fallen student (whose diagnosis and prognosis were presumably not yet known), said "I didn't think the question was that difficult," and continued the class without missing a beat while some students attended to the victim. The professor in question was not Cox. (Even if this story is exaggerated or apocryphal, it still makes its point.)

29. 42 HARV. L. BULL. No. 3, at 6 (June 1991). The other item on his list was "a dedicated love of the law—law in books as inherited wisdom but also for an ideal." *Id.*

In the circles in which I moved as a law student, it was a common perception that only the boldest of students, or members of the *Harvard Law Review*, would consider approaching a professor outside of class without serious trepidation and a very good reason for trying to do so. Certainly one would not lightly do so to ask a question to which diligent research or other forms of self-help could supply the answer, or to seek an explanation of something before exhausting the alternative means available in the library or from fellow students. Perhaps my memory fails me on this question, or perhaps I was atypically timid. But I believe the atmosphere—far inferior in this and other respects to that of the University of Wyoming College of Law, for example—and the grapevine suggested that many faculty members viewed any student demand on their time outside of class as an unwelcome imposition.[30] My recollection is that Professor Cox was not like that, although I do not believe I sought him out in his office more than once or twice, when I was a third-year student and no longer in one of his classes. I also remember an occasion when he came through the serving line of the graduate student cafeteria, proceeded to a table at which a group of law students including myself was sitting, and asked whether he could join us. My recollection, which may be imperfect, is that it was a rare occurrence for a faculty member to visit with students on his own initiative, in such an informal and unprogrammed way.

My own interest in the law was kindled in my college years by undergraduate courses with Paul A. Freund[31] and Robert G. McCloskey.[32] My decision to become a lawyer in order to contribute to the civil rights movement in that capacity was triggered by a number of influences, both temporal and spiritual. In law school, I was privileged to receive from Archibald Cox the most valuable and the most lasting kind of instruction and inspiration: lessons that are taught " 'not by precept but by example.' "[33]

30. Of course, Wyoming's entering class numbers about eighty, while Harvard's in 1965 numbered about 535. Wyoming enjoys one of the most, if not the most, favorable faculty-student ratios in the country.

31. For a sample of Freund's work, see PAUL A. FREUND, ON LAW AND JUSTICE (1968).

32. For a sample of McCloskey's work, see ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (1960, or 2d ed. 1994 (1960 ed. as revised and supplemented by Sanford Levinson)).

33. HARV. L. BULL., *supra* note 29, at 6 (Cox quoting Learned Hand).

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