

5-2012

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Dave Frohnmayer

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### Recommended Citation

Frohnmayer, Dave, "Remembrance and Renewal" (2012). *The Circuit*. 41.  
<http://scholarship.law.berkeley.edu/clrcircuit/41>

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# California Law Review Circuit

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VOL. 3

APRIL 2012

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Extension of Remarks by Dave Frohnmayer  
*California Law Review* “Alumnus of the Year”  
Annual Banquet of the *California Law Review*  
April 14, 2011 - Berkeley, CA

## Remembrance and Renewal

Dave Frohnmayer\*

Lynn and I are deeply grateful for the invitation to join you tonight in this celebration. It is a special privilege to see some of the faculty with whom I was associated those many years ago and an honor, obviously, to join my classmates at our table. I am touched to be recognized by a top ten journal of the eminence of this great institution. Thank you for the real warmth of this occasion of return, reunion, and remembrance.

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There is always a danger in inviting someone like me. A speaker’s trip down memory lane often turns quickly into an exercise of autobiographical self-justification. But fictionalizing my past is less likely to happen tonight because my fellow editors, David Leipziger, Myron Sugarman, and Alex Hehmeyer, are sitting right in front of me. Their body language, if nothing else, will reveal when I exaggerate.

It is also possible that a person in my position tonight will attempt to bask in past glories. But as the former president of a university, I was reminded that

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\* A.B., 1962, Harvard College; B.A., 1964, M.A., 1971 Oxford University; J.D., 1967, University of California, Berkeley, School of Law. Attorney General of Oregon, 1981–91; President Emeritus and Professor of Law, University of Oregon. Dave Frohnmayer served as Research and Chief Notes & Comments Editor, *California Law Review*, 1966–67.

one goes from “who’s who” to “who’s he?” very rapidly. Last summer, Lynn was a footstep behind me walking down the streets of Portland when we passed a couple, one of whom turned around and Lynn heard him say to his companion, “That used to be Dave Frohnmayer, I think.” I quickly abandon any further remarks of self-justification and bask instead in a few moments of reflection about long friendships and the importance of the life changing experiences of our times at the *California Law Review*.

## I.

### FOUR THEMES

That last reference was deliberate because those times in fact were life changing. I use that observation as a theme of four related subjects of my brief remarks tonight. When we published Volumes 54 and 55 we did not dream of the Centennial Issue, which you now are planning. Much of our time was colored by the upheavals of the 1960s. We harbored so many hopes and fears that it’s worth recounting at least some of them. Those were formative times and events, not merely for us at my generation’s table but also for this nation and world in a continuing way. Second, I will share what hopefully are enduring reflections that are still relevant to your own law review experience of this first decade of the new millennium. Third, I speculate on what this experience might bring to you in terms of the development of your own important leadership skills throughout the rest of your professional and personal lifetimes. And finally I speak to the hope that some part of your professional and personal experiences will include a gift of your abundant talents to public service.

## II.

### CHANGE IN CHANGING TIMES

In the sixties, law became an overtly creative instrument. It’s hard, of course, to recover and express the emotions and aspirations that colored our experience of those times. They may seem in many respects like ancient history. But try to imagine yourselves where we were. Only a few months before we entered this law school, President John F. Kennedy was assassinated. The Gulf of Tonkin Resolution and the overt escalation of the Vietnam War began approximately fifty days before we entered Boalt Hall. Some of us already had experienced the draft. Myron Sugarman was commissioned as a lieutenant and served in the Armed Forces immediately upon his graduation. The draft was incessant, ominous, and oppressive.

The civil rights movement was not only in full swing but visibly so—striking events were portrayed on the national news every night. Large numbers of our fellow students and a number of our classmates had been participants in civil rights activities in the South just the summer before. They had engaged in marches and demonstrations, observed protest techniques, and were witnesses to the evolving law that the federal courts were only just then beginning to

develop about the First Amendment, its limitations, and its opportunities in these circumstances. Three civil rights workers were murdered in Mississippi at that time. And the vividly televised violence of police officials using fire hoses and police dogs to attack our fellow American citizens of color had been put starkly in front of us.

Those events were two of the circumstances—the third epoch change is that we were no longer in the silent fifties. The culture of self expression, whether it was through the understanding that drugs emerged from something other than pharmacies, to invention of the birth control pill, which remarkably changed relationships between the genders—all these things were part of the cultural milieu of the times. The celebration of liberation was new, not fully examined, and in continuous evolution.

### III.

#### THE FREE SPEECH MOVEMENT

Yet just days from the moment we entered the University of California, School of Law, the university administration—for reasons that are still difficult to trace historically—banned the use of political tables at the intersection of Bancroft and Telegraph. And before our eyes emerged the galvanizing and difficult events of the Free Speech Movement. It was important in the lives of all of us because it not only caused us to question, to wonder, to explore the extent to which the First Amendment applies to student life and public speaking, but also to reflect on the emergence of the applicability of the due process clause to public universities and for that matter to a whole reach of other public institutions. And finally we were forced by events to reflect on the use, utility, and propriety of civil disobedience as a technique for achieving social change.

The Law School community of that time, I suspect, was the only community within the University of California that maintained a veneer and reality of civility. Even though there were starkly differing opinions among our faculty who were very visibly involved in one side or the other of the Academic Senate disputes, this school was in some ways an oasis for us to learn to understand immediate applications of law and legal skills.

Clearly all of this left a mark on me. These events illuminated the law relating to right to speech, assembly, and protest—but they also carried a powerful subtext: the expectation of personal, social, and political involvement in the face of things that needed to be changed. In those larger respects, or maybe because of them, the law review was an open sanctuary and an emotional outlet for those of us who experienced those times.

The Warren Court was still engaged in its rapid (and sometimes analytically difficult) expansion of personal rights that could be seen to be emanating from or incorporated by or through the due process clause. First Amendment jurisprudence was mined for the criteria of the time, place, and manner that rights of speech and assembly required. Prisoners' remedies,

habeas corpus, and major changes to the legal landscape of criminal procedure and federal jurisdiction occurred during the time we were students. Casebooks were out of date practically before they were printed because of the pace of constitutional change.<sup>1</sup> It was exciting and fascinating to be a piece of this unfolding cascade of legal events. Poverty law was the subject of one of our major symposium issues. The prior board of editors developed a symposium issue on student rights and campus rules, and on the role of larger questions of the First Amendment rights of expression more generally. These topics now may seem to be ancient history. But their formative influence remains with us personally and as a part of the larger context and heritage that you experience at this university and that we enjoy as Americans.

#### IV.

##### THE CULTIVATION OF PROFESSIONAL SKILLS

At the more enduring level of professional skill development, I found that being part of a law review developed competencies that I trust are not only enduring, but perpetuating. If what I say here is a surprise to you, then the law review is not doing the cultural job that it should. As a law review student and then as an editor, one learns how to research—and research deeply. You learn that cite checking technique is, or can be, a creative act, not simply a matter of validating forms of footnote expression. I actually bought an English-Dutch dictionary once to help cite check an article written by a professor from the Netherlands. There was no “Google Translate” then (in case I have to bring you up to date). Of course we had no World Wide Web. “Shepardizing” was something that one still did running fingers down numerical columns in a sequential series of red books. But the rigor that one learns to bring to this process of verifying accuracy I’m sure has endured to this day.

I remember reading closely the work of an eminent author’s manuscript—how potentially arrogant of us this might have seemed! But that eminent author misguided us or misunderstood the *Civil Rights Cases*, the *Slaughterhouse Cases*, and other major civil rights landmark decisions, which I read intensively in order to understand them (or at least I thought I did). I submitted a thirty-three page handwritten report to the Editor-in-Chief recommending, somewhat hesitantly, that this eminent author’s work not be published because it failed to meet the quality standards of the *California Law Review*. Calmer heads then prevailed, but the work was rewritten in a major salvage effort so that it might conform to quality expectations while retaining the author’s voice. This episode did give a sense, if not of power, at least of responsibility that an earnest second-year student was enabled to nurture.

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1. Our always elegantly-attired and British colonial-accented torts professor, John Fleming, delivered up to us quickly duplicated copies of *New York Times v Sullivan*, 376 U.S. 254 (1964), immediately after its issuance, noting that the decision displaced much of what he otherwise would have taught us about defamation from William Prosser’s brilliant treatise and casebook on torts.

A third skill we acquired was learning how to become better writers from the insights of a good editor or, in everyone's case, literally a series of editors. We also learned attentiveness to precision in the marshaling, use, and citation of authority. Yet another competency we touched, at least, was that of developing the subtleties of reasoning that add to the discovery of new knowledge—bringing truly new creative sophistication to what might be an old and even hackneyed argument. We learned anew the importance of deadlines—that they really matter, and can't be waived or forgiven. We were rewarded by being regarded, in some small respect, as peers by the law faculty. How many students ever really have that chance otherwise? Some may think it odd, even arrogant or nonsensical, that students should be editors of the most significant professional journals in the field of law. I'm not aware of any other professional or academic discipline in which that's possible, let alone even dared. But this unique opportunity develops sense of responsibility in those who take it seriously. The discipline and seriousness of purpose endures, I believe, through the course of a lifetime.

Those are real skills and real competencies. They accumulated glacially, it seemed, at the time. But they developed at light speed, considered in retrospect. To repeat, if I've said anything about this professional growth that is a surprise, I'm actually disappointed. Development in these skills was a personal reality. And that experience really has mattered for the rest of my life.

## V.

### THE DISCOVERY OF COMMUNITY

We also built community in this adventure. We actually did have fun. The programs for several of our celebratory banquet evenings looked something like this menu program. But we called it the *Cali Flaw Review*. This small parody issue was without doubt the subject of greater discipline and more creative intellectual energy than many other of our published works. It also contained the dinner menu and other nonsensical yet topically important parody snippets. (Incidentally, I would note the return to the Blue Book in the 19<sup>th</sup> edition of the full abbreviation of *Cali Law Review* would allow you now, too, to publish the *Cali Flaw Review* should you choose.) (applause).

To give you a sense of the entertainments of our times and how they were reflected in the arts, let me recall the brilliant trio of the Westen brothers. Tracy Westen was in our class, Peter the class behind us, and Derek came soon thereafter. In this time, the Beatles reigned supreme. Peter and Tracy listened, as I remember, to BBC over shortwave and recorded all of the first release of the revolutionary "Sgt. Pepper's Lonely Hearts Club Band" before anyone else in the United States heard it except for our community the next morning.

We had wonderful parties—in one of which I remember Mike Tigar, the Editor-in-Chief the year ahead of us, engaging in what in those days was some early form of rap singing. Only Mike sang spontaneous rhyming lyrics that included citations, oftentimes to the "jump" page of United States Reports,

some of which went back to the John Marshall era. His was an amazingly brilliant, spontaneous, and inspiring *tour de force*.

We played Diplomacy for several extended weeks. We experienced romances, both successful and failed. We also had some lessons from the larger world's *Realpolitik*. Justice Brennan's clerkship offer to Mike Tigar was rescinded summarily while Mike was driving his family back to Washington, D.C., to take this coveted position. Mike's politics allegedly were too left wing, and an exposé, discovered by some preblog-era blogger, was enough to derail the merited selection of Tigar for the clerkship. Our board wrote an editorial, the first ever carried by the *California Law Review*, to protest this injustice. This decision to editorialize in our journal was major and serious and caused trepidation among some faculty, but it was also a notable exercise in group responsibility and one that could only occur in circumstances of our mutual trust and our sense of engaged editorial independence.

## VI.

### OPPORTUNITIES OF THE PRESENT

So let me now turn from that trip down memory lane to what I hope is part of your present experience. I hope you sense a profound legacy to perpetuate and improve a top ten journal. You actually have the pick of the litter in terms of submissions to you from new faculty members in what is an ever more voracious competition among them to publish in a prestigious journal in order to achieve promotion and tenure at one of the nation's 180 or so law schools. You also possess the opportunity to select a fine work and, in the words of James Collins's famous book, *Good to Great*, to seize a rare but really important moment, to help turn someone's excellent work into a potential world legal classic.

You know, already, that you have an enviable admission ticket that your status as members of this great review's board confers. In my life I have interviewed thousands and hired hundreds of legal professionals. The absence of a law journal membership on an applicant's resume usually calls to me for an explanation. It's not disqualifying should that credential not be present—blue-nosed credentialism is suspect—but on many occasions, the credential is a “proxy.” It is a proxy for work ethic, for responsibility, and for the professional pursuit of excellence. Beyond these points, if not a “proxy,” it is an “indicator”—of intellectual curiosity, of passion to learn, and of personal initiative. All of these qualities are hallmarks of leadership much more generally in institutions and, for that matter, in life itself. Law journal experience is almost always necessary to be considered as a faculty member of any of the nation's law schools (and if statistics hold true probably 20 percent of you will be faculty members somewhere at some point in your careers!). If you do not have the law journal piece of “credentialism” in your background and all it signifies, either as proxy or indicator, you will be disadvantaged.

## VII.

## THE RESPONSIBILITY OF LEADERSHIP

I now reach my third topic, which is to ask what might this law journal experience mean in your lives in a larger sense? Why do we celebrate your service in this banquet or elsewhere? Why have you conferred on me this kind privilege to address you and why do you honor those in your midst whose names will be read shortly?

Lawyers are or historically have been civic leaders, or at least are expected to assert these skills. We are taught to understand process. We are taught and have the obligation to use the tools of communication creatively. Beyond that, we are supposed to understand what it is to represent someone who does not have a tongue, a voice, a pen (or a word processor). We speak for those who are powerless and for those, even if armed, who cannot effectively be heard. The law review experience, I think, is an exercise in *collective* responsibility. It is unlike many law school experiences (or at least stereotypes of them) where dog eats dog in competitive succession as part of the understood order of the day.

Publishing a top tier journal is an exercise in collective ownership and collective responsibility for consequences. What you publish, together, counts. It affects your collective reputation and that of your academic institution. In that respect, every name on the masthead matters. Group responsibility calls for a different set of skills—not merely those that enable individual achievement, but rather those which implicate knowing how to make groups work. Leadership is not the role of a soloist alone. Law journal membership means that one must make an unyielding commitment to someone and others beyond one's self.

The law review experience also is one where a person inescapably experiences what I call the “Dark Alley Test”: when things are tough, who is reliable? Whom do you want watching your back and how will you know that he or she will? I'd be amazed if you haven't discovered that infallible and necessary set of insights already through this experience. On a more hopeful note, the “Dark Alley Test” is also a way to discover how to foster the development of group esprit. Everyone leads and yet no one single person always leads. But that sense of esprit and that sense of community can only occur when three other conditions also are at work: the condition of shared goals, the condition of mutual trust, and the condition of constant communication amongst one's selves.

This journey to produce a top-quality publication should cause us all to appreciate anew the pursuit of excellence. This pursuit must be of something larger than one's self, and it secures a value because of that quest. From reports I've heard from your wonderful colleague, Leslie Wulff, and others, you have pursued a larger vision through your diversity initiatives and your building of a sense of community when you might have abstained. You celebrate tonight an important public service award. We all need to walk the talk of the values that

we profess. You have achieved this goal in the milestones you honor.

## VIII.

### THE OBLIGATION OF SERVICE

That last observation brings me to the concluding point that I share with you tonight. I hope you savor all of this law journal experience (whether it still nascent or fully developed). In just a few weeks you'll take your last finals and, in a few more, many of you will be credentialed with a stellar J.D. from U.C. Berkeley and will move on to great opportunities and, we trust, achievement. But I hope there's a place in your plans that you kindle a responsibility for public service as a life obligation.

I tried in the opening part of these remarks to describe the convergence of political forces of my own times with those who sit here tonight. On the very first day of admission to the California Bar, I was appointed *pro bono publico* (there was no compensation attached to it in those days) by Federal District Court Judge Alfonso Zirpoli to represent a prisoner at San Quentin who had filed a habeas corpus petition. I'm sure I received that appointment because our great and talented friend, Steven Kipperman (who couldn't be here tonight, but who was on our 1967 Board of Editors), was law clerk to Judge Zirpoli.

With exactly one day of post law school legal experience, I assumed the professional responsibility to journey to San Quentin and to ask the Warden to get my client out of the "hole," where he had been consigned, so that I could confer with him. I assure that when you hear that clank of the steel prison door behind you and the echo of your footsteps down your long march through the cellblock, there is no way that cinema, radio, television, or any sound effect can mimic the seriousness of imprisonment in maximum security.

Without my law review experience, I could not have represented Guadalupe Hernandez adequately. Not only did I represent Guadalupe in federal district court and in the Ninth Circuit<sup>2</sup> but in the next eighteen months, after a series of appointments made by Judge Zirpoli (and I'm sure with the encouragement of Steve Kipperman), I secured invaluable litigation and appellate experience.

But I secured much more than professional seasoning. I gained a greater sense of responsibility that I want to underscore. There was no money in this. There was little by way of honor in it. But my representation of otherwise powerless clients was fueled by values and by the professional sense that what skills I possessed and had developed now could make a difference in a person's

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2. See *Hernandez v. Nelson*, 298 F. Supp. 682 (N.D. Cal. 1968), *aff'd*, 411 F.2d 619 (9th Cir. 1969) (Writ of Habeas Corpus granted where defendant denied culpability in illegal sale of drug, informer was material witness on issue of defendant's guilt, and prosecution knowingly engaged in conduct which permitted informer to be unavailable at time of trial).

life. And for Mr. Hernandez and for others who followed whom I represented—because of the competence that I developed in significant part from the law journal experience that you are now sharing with each other—I was able to say to myself that I helped to use the law as a creative instrument to do something important. I was able to do justice in a cause that might otherwise not be vindicated or certainly ever be remembered. That realization of the responsibility of advocacy has been a high motivator through my now-long professional lifetime.

My private practice job included mentorship by Professor Tom Klitgaard, here tonight, who was a supervising partner at Pillsbury Madison and Sutro—now Pillsbury Winston or something. But my next opportunity took me to government on the Potomac. I left this large corporate law firm, and my volunteer habeas corpus work, and I worked instead as a speechwriter in Washington, D.C., for the Secretary of Health, Education, and Welfare. It was heady work, exciting and deeply engaged with national policy issues. I barely opened a law book for two years. Yet my legal training and the law review experience still made a difference. And my subsequent careers while I was Oregon’s Attorney General and Law Dean and even University of Oregon President all benefitted from the acquisition of good habits that came from early experiences with this great law journal.

## IX.

### A PACT WITH THE FUTURE

So your tasks, your horizons, are still undefined. Will law reviews survive the digital age? I don’t know. But the skills that are required to produce them should survive, and this tradition you inherit and pass on culturally asks you to do three things. First, to demand the highest standards for your own performance and for the group with which you associate. Make things better; do not just follow the lazier or the faddish or the convenient. Second, to create a desire to seek and build communities of spirit, not just communities of interest. And third, to be builders with these tools: to embrace your challenges, unafraid of innovation, and eager to create anew.

This ethic is an enduring theme in our own American history. It requires of us that we do service to things larger than self. My favorite moment in American history was experienced in the American Revolutionary War. It involves that wonderful and famous couple, John and Abigail Adams. At that time (contrary at least to some of the Whig history books), only a third of the nation was really engaged with building a new nation; a third were neutral and a third were Tories. Abigail wrote to John, who was away at the war effort, and said, “Why is it that we do this? What should I tell our neighbors?” And John Adams wrote back to Abigail his famous letter, which I paraphrase: “You tell them that we study war, so that our children can study business, law, commerce and invention, so that their children can study art and poetry and music.”

And among the most wonderful things that this exchange between this

loving, talented, brilliant couple says to us is that the task of service is always with us. Our objectives will never be achieved within our lifetimes, but our responsibility still is to leave a legacy for those yet unborn so that they may live a good life on this great green planet. That is a profound hope that our renewed dedication can advance each day.

Thank you for this privilege and honor. Best of luck to you all.