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Ronald Rotunda: Scholar, Teacher, Professor, Public Intellectual. An Appreciation.

*Hugh Hewitt**

Members of the Rotunda family, friends of Ron Rotunda, Dean Parlow, colleagues, students, judges, and members of the bar, welcome.

I was very honored to receive the invitation from the *Chapman Law Review* to deliver some remarks about Ronald Rotunda at this symposium today.

I did not know Professor Rotunda for the first forty years of his remarkable life. He was a decade ahead of me at Harvard College and had graduated from Harvard Law School before I set foot in Cambridge. If we ever discussed how Ron made it through those turbulent years, I don't recall it, but I am fairly certain that as the Students for a Democratic Society (SDS) members occupied Harvard Hall at the college in 1969, Ron was strolling into Langdell Hall at the law school, unperturbed, almost certainly wearing a bow tie, and most certainly prepared for whatever class it was in those "Paper Chase years."

I first met Ron in 1986, when I became a member of the Administrative Conference of the United States by virtue of my being named, at far too young an age, as General Counsel of the United States Office of Personnel Management (OPM). The conference, or "acus," is a nonpartisan independent agency of the United States government, established in 1964 by the Administrative Conference Act for the purpose of promoting "improvements in the efficiency, adequacy, and fairness of the procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform regulated governmental functions."[1]

If agencies were ranked as colleges are, the Administrative Conference would most definitely not be a "party school." But its work was and remains important, and in 1986, the same year I

* Chapman University Dale E. Fowler School of Law, Law School Symposium, Keynote Address, January 25, 2019.

1 *Administrative Conference Act*, ADMIN. CONF. OF THE U.S. (Nov. 12, 2010), https://www.acus.gov/publication/administrative-conference-act [http://perma.cc/DGU3-TVT9].

became a member, Ron was named our Chief Consultant on Legal Ethics, a hot seat on a hot topic at the time during and following Iran Contra, and just a decade after Watergate's thunderous conclusion, when every agency was looking to their codes of conduct.

So, when not toiling away at OPM on the hiring, firing and retiring of our two million federal civilian employees, I loved the conference meetings, and I loved to sit next to Ron Rotunda. It was then I learned, early on, the great advantage of sitting next to brilliant and prepared people. Other meeting participants, who do not quite know everyone in the room or at the table, simply assume that the smart, prepared people sit next to each other. It does not occur to them that the less gifted, but perhaps more Machiavellian among them, might purposefully sit next to the very, very smart and bright people to take advantage of this penumbra effect combined with confirmation bias so I tried as often as possible to sit next to Ron.

Our colleagues on the faculty here today may now just be recalling to themselves, "Oh, Hugh always used to sit next to Ron in faculty meetings." To which I must confess, yes. When I was on time or early and had the chance, I drew a bead on the seat next to Ron, who was almost invariably early, and whom almost inevitably had a neat lunch prepared.

That was not the only thing he had prepared. Faculty members come to faculty meetings, generally speaking, in three categories: (1) those who are well prepared to comment on everything on the agenda; (2) those who are *prepared* to speak on *nothing* on the agenda—this by the way says nothing about their willingness to speak, indeed joy in speaking, on agenda items but rather only their preparation to do so; and (3) those who are prepared to speak only on matters on which they are expected by committee assignment or decree of the Dean to have an opinion.

Ron was in the first category. Always prepared. On every subject. He'd studied the agenda. He had opinions. Opinions anchored in experience.

I hope it might be said that I am most often found in the third group, though being also a radio and television talk show host in my other life, I may sometimes slip in to the second category. In my other world of talking heads, the rule is "frequently wrong, never in doubt."

About Ron I must say not only was he part of the first category—"always prepared"—he too was rarely in doubt, and no matter the subject, I dare say looking over a decade of these incredibly *unique*—I will not allow any other adjectives

here—gatherings of the law faculty, Ronald Rotunda was not only always prepared but also had significant and important things to say and for us to ponder.

Faculty also fall somewhere within a four-square box: They are either opinionated or accommodatingly ambiguous, and they are either quite deferential and courteous or, as sometimes happens when lawyers gather, vigorous, indeed obstreperous, even sharp tongued. Ron was *always, always, always* in that quadrant marked *opinionated and courteous*. Rarely have I observed anyone maintain such extended equanimity towards everyone—no matter the issue or the agreement or disagreement—as Ronald Rotunda.

Thus, at the beginning of this appreciation of a giant of a scholar, a wonder of a teacher, and a prodigiously prolific and influential public intellectual, let me first stress that Ronald Rotunda was a gentleman of the old school, polite, happy, peripatetic to be sure, full of an astonishing energy, but always and everywhere a gentleman. It is said that Queen Elizabeth has said the essence of good taste is never to be offended by bad taste. Ronald Rotunda was never, in my experience, offended by bad taste.

Always, for his students, for his colleagues, for his academic leadership, for his processional acquaintances, Ron was a model of integrity, seriousness, charm, and yes, manners.

A. Rotunda the Scholar[2]

Ronald Rotunda was also a giant of a scholar. When Ron became part of what I call "the great John Eastman brain bank robbery of 2008" when then-Chapman law school Dean John Eastman heisted away from George Mason University, not just Ron Rotunda to add a star to our constitutional law and legal ethics faculty, but also Kyndra Rotunda to launch our Military Personnel Clinic, and 2002 Nobel Laureate Professor Vernon Smith to our numbers here at Chapman University, the bar was raised very high indeed for everyone.

Before becoming the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence here at Chapman University Dale E. Fowler School of Law, Ron had been the George Mason Foundation Professor of Law, and before that, at the University of Illinois College of Law, the Albert E. Jenner, Jr. Professor of Law where he spent more than two decades writing

2 Note, throughout this Address I recite from the accomplishments listed on Ronald Rotunda's curriculum vitae. *See* Curriculum Vitae of Ronald D. Rotunda (last updated Dec. 18, 2017) (on file with Chapman University Dale E. Fowler School of Law), https://www.chapman.edu/our-faculty/files/curriculum-vita/Rotunda-Ronald-CV.pdf [http://perma.cc/K33X-T88D].

and teaching, interrupted by visitorships at universities—literally around the world—and special assignments here and there.

He had come to teaching from the U.S. Senate Select Committee on the Presidential Campaign, where he had been the Assistant Majority Counsel. That is better known as the Senate Watergate Committee. And yes, Ron worked for the Democrats. Everyone can make a mistake—even Ron.

Prior to that Ron had been an associate at Wilmer, Cutler & Pickering in D.C., and a law clerk to a giant of the Second Circuit, Judge Henry Mansfield. Ron of course had been on the *Harvard Law Review* and had graduated magna cum laude in 1970, as he did from Harvard College in 1967, magna cum laude.

By now you may have noted that Ron had a knack for being at interesting places at interesting times.

Harvard, just as the Vietnam War and SDS were convulsing the college, and then Harvard Law in the era of Charles Kingsfields as played by John Houseman in the *Paper Chase*, then to Richard Nixon's Washington into the belly of that tumultuous era, back again to D.C. in time for Iran Contra and the ethics revolution sweeping the nation's capital, back to D.C. in time for Whitewater to serve on Ken Starr's independent counsel team.

Ron had a nose for the news, it seems, and a touch of Potomac fever, a love for what Teddy Roosevelt famously called "The Arena."

But he also had this incredible mind and this vast great lakes-sized reservoir of energy, and soon after his Watergate years took up teaching and research and never, ever stopped, first at Illinois, then George Mason, then here at Chapman. Along the way he compiled what can only be described as a prodigious legacy, and pyramid of treatises, casebooks, books, papers, essays, and columns all the while serving the profession in a dizzying array of special assignments.

I have mentioned his role for the Administrative Conference, but Ron served in a dozen or even two dozen such roles. He was, for three years in the 1990s, on the ABA's Standing Committee on Ethics and Professional Responsibility.

The year before he had been an advisor to the Supreme National Council of Cambodia.

For thirteen years he served as a member of the consultant group of the American Law Institute's *Restatement of the Law Governing Lawyers*.

He was a constitutional law advisor to the Supreme Constitutional Court of Moldova. This is, shall we say, a diverse indeed Disneyland of law experiences.

As mentioned, Ron was also special counsel to the Office of Independent Counsel, Judge Ken Starr, during the Whitewater Proceedings, after having had roles in the Watergate hearings and the Iran Contra investigations. That's the triple play of big time Washington D.C. scandals.

He was also a member of the advisory board to the International Brotherhood of the Teamsters. He advised the Czech Republic. He served numerous think tanks, the Federalist Society, and the Cosmos Club. He served and he served and he served. Here too, at Chapman, on committee after committee.

Tireless does not begin to describe Ron Rotunda. Indefatigueable begins to approach. "Energizer bunny of the law" is perhaps the best summary for Professor Ronald Rotunda.

But always as a sidebar, always as an extension of his scholarship, to which I want to devote just a few words before getting to my main appreciation of Ron, that of his role as public intellectual which was in turn an extension of his calling as teacher.

When preparing for this talk, I requested Carlos Bacio of the law review if he might find for me a copy of Ron's CV, for I suspected, without having ever seen it, that it might be, how shall we say, "complete."

Carlos, God bless him, dug it up, and it indeed is complete. More than complete, it is staggering. It is a monument to industry. To work. To concentrated, focus application of mind to problem. It was, as of its last revision, which appears to me to have been in December of 2017, just three months before his untimely, wholly unexpected, and deeply saddening death. But this CV, my goodness, it is a humbling thing to peruse. It is fifty-five pages long, and there isn't much to the margins!

Fifty-five pages! His list of books alone is fifteen pages in full, with treatises and casebooks and supplements. Then it is on to articles!

Mind you, what I am about to cite is simply a skipping stone across the vast lake of Ronald Rotunda writings:

A 1970 *Virginia Law Review* article on the reform of presidential nominating conventions;[3]

A 1975 article for the *UCLA Law Review* on sponsors of real estate partnerships as brokers and investors;[4]

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3 Reid Peyton Chambers & Ronald D. Rotunda, *Reform of Presidential Nominating Conventions*, 56 VA. L. REV. 179 (1970).

4 Ronald D. Rotunda & Robert C. Hacker, *Sponsors of Real Estate Partnerships as Brokers & Investment Advisors*, 23 UCLA L. REV. 322 (1975).

A year later, a *Georgetown University Law Review* article on Congress's ability to restrict federal court jurisdiction.[5]

In 1984, an *Oregon Law Review* assessment on "The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag."[6]

Four years later for the *Vanderbilt Law Review*, "Original Intent, the View of the Framers, and the Role of the Ratifiers."[7]

Three years after that, for his beloved *University of Illinois Law Review*, an article on "Exporting the American Bill of Rights: The Lesson from Romania."[8]

I skip ahead another half decade, to a favorite of Dean Parlow's, the *Marquette Law Review*, where Ron contributed "An Essay on Term Limits and a Call for a Constitutional Convention."[9]

Another half decade forward and into the new millennium, we find Ron writing for the *Richmond Law Review* an article of lawyer advertising and the philosophical origins of the commercial speech doctrine.[10]

And though I could go on and on, I have to conclude this sprint through the Rotunda hall of articles. My favorite, and not because it was in the *Ohio State University Law Journal*, but because of its 2003 title, is "Yet Another Article on *Bush v. Gore*."[11] Ron's sense of self esteem was healthy, but his sense of irony was as sharp as his often very dry asides.

These scholarly pieces do not of course begin to match for his influence on students, practitioners, and judges, his comprehensive treatises and casebooks on constitutional law and legal ethics. This is where Ron Rotunda was Chapman's Ted Williams, baseball's last .400 hitter, the gold standard, the one whose output was equaled in earlier eras, but not so recently. Even as Williams racked up base hit after base hit, our own "splendid splinter" of a scholar racked up citation after citation.

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5 Ronald D. Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts & the Problem of School Busing*, 64 GEO. U. L.J. 839 (1976).

6 Ronald D. Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 OR. L. REV. 455 (1984).

7 Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507 (1988).

8 Ronald D. Rotunda, *Exporting the American Bill of Rights: The Lesson from Romania*, 1991 U. ILL. L. REV. 1065 (1991).

9 Ronald D. Rotunda, *An Essay on Term Limits and a Call for a Constitutional Convention*, 80 MARQ. L. REV. 227 (1996).

10 Ronald D. Rotunda, *Lawyer Advertising & the Philosophical Origins of the Commercial Speech Doctrine*, 36 U. RICH. L. REV. 91 (2002).

11 Ronald D. Rotunda, *Yet Another Article on* Bush v. Gore, 64 OHIO ST. L.J. 283 (2003).

Did I mention along the way he wrote for the *New York Post* and the *Washington Post*, the *Washington Times* and the *Chicago Sun Times*, for the *Atlanta Journal-Constitution*, *National Review*, *Fox News*, *The Hill*, and of course his beloved *Orange County Register*, as well as for every legal professional outlet on scores of occasions and whenever the spirit moved him, which was usually monthly or perhaps even weekly. My favorite entry in this category of pieces is his tribute to Justice Scalia in the *Champaign Urbana News Gazette*. When Justice Scalia died, everyone, and I mean close to everyone, had something to say, and by God, Ron wasn't going to be left out, so he sought out his home state and paid his compliments to the departed "lion of the law."

I mentioned that Ron did not lack for confidence. His penultimate entry among his writings? A *Washington Post* column, from December 6, 2017, title "Justice Ginsburg has some explaining to do."[12] You can be sure that one had at least nine readers.

If you wish to see the first and last entries in his writing CV, you shall have to look for yourself. Ron was a great believer in making his students work for it.

I am going to move to the consent calendar that this CV be included in the proceedings, and hearing no objection, conclude it so moved, for it is itself a work of scholarship: precise, deep, illuminating, but the CV illumines a life in the law as a scholar, professor, teacher, and public intellectual.

B. Rotunda the Public Intellectual

Which brings me to my last section of remarks and the matter on which Ron genuinely deserves your appreciation. He was a pioneer in the rise of the legal scholar and law teacher as public intellectual.

For decades, indeed for centuries, the law was quite literally robed in mystery. Grab your copy of *Bleak House* and refresh your memory of the opinion of lawyers in the era of Dickens where it had improved a bit from centuries earlier. Or revisit the character of Jaggers in *Great Expectations*. Lawyers were men of mystery in the old days, gradually becoming men *and*_women of mystery, and law professors the seraphim above the cherubim of the practitioner and just below the archangels in robes. For every back-woods honest Abe Lincoln, there were a hundred cloistered clubby and vested white shoes lawyers, and professors at the

12 Ronald Rotunda, *Justice Ginsburg has some explaining to do*, WASH. POST (Dec. 6, 2017), https://www.washingtonpost.com/opinions/justice-ginsburg-has-some-explaining-to-do/2017/12/06/224d8f0e-da0c-11e7-b859-fb0995360725_story.html?utm_term=.7aa43e1bf31b [http://perma.cc/XSA5-9H9U].

great citadels of legal education, well they didn't mix much with the lower angels of the profession much less with—deep breath and furrowed brow—clients.

This paradigm held well past the upheavals of the 1960s. Rewatch *The Paper Chase*. Kingsfield alone, grading his exams. Kingsfield high above the proletariat of the students. Law professors did not deign to write down, except rarely to practitioners. They wrote for each other and they wrote for judges. This was a tradition, but being a tradition, it would fall to modernity.

In 1897, Oliver Wendell Holmes, Jr. wrote "The Path of the Law" for the *Harvard Law Review*.[13] Damn, but it is dry and hard going, and it most definitely wasn't going to get a read out of Josiah Quincy, the then incumbent mayor of Boston, a Democrat, or Edwin Upton Curtis, the former mayor of Boston, a Republican, who were battling it out for mayor when Justice Holmes's famous, and famously dense, law review article first appeared. I can't imagine a local political campaign ever giving much notice to the opinions of professors, or a statehouse race, though perhaps a few presidential elections might have cared a tiny bit for a law professor's views.

But Justice Holmes wouldn't have cared that the politicians didn't care for his majestic if dense prose. He was writing for . . . well, for whom was he writing? What was he trying to achieve? *Goodreads*, a review site, says of "The Path of the Law" that it "is the single most important essay about law ever written" and that it "defines the responsibilities of the legal profession . . . ."[14]

Perhaps it once was, and perhaps it once did, but why then did the scholarship machine simply not stop?

You don't discover $E=mc^2$ twice after all. If "The Path of the Law" was dispositive of anything at all, why Ronald Rotunda's prodigious outpouring of scholarship on constitutional issues legal ethics? Why the 120 years since of 5-4 decisions? Why the sudden turn of members of the Supreme Court to popular books and memoirs for popular consumption? On September 15, 2011, Associate Justice of the Supreme Court Stephen Breyer came to my humble radio studio for two hours. Why? He wasn't consulting me. He was flogging his book, *Making Our Democracy Work*, which is terrific. I mean bravo. Justice Thomas has appeared on the radio show as well, and they all are welcome any time. Justices should talk to people, not just other judges and

13 Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

14 *The Path of the Law (Little Books of Wisdom)*, GOODREADS, https://www.goodreads.com/book/show/1596899.The_Path_of_the_Law.

professors, and lawyers. They were not intended to be a priesthood, despite the robes.

And that is because the law is, as Justice Holmes tipped his hand in his essay's title, "a path," an ultimately democratic path in its making and paving.

For a long, long time that path was laid out almost exclusively by lawyers and especially judges and law professors, with an occasional bothersome interruption from Congress and the President, but in recent decades, professors and lawyers found themselves not so much leading as left behind in charting the life of the law because of the galloping race called public opinion. Judges, of course, still get to lay out the broad plans for the path, but many more hands are involved in the work, and relatively few of them are now JDs, much less law professors.

Now lawyers are not shy, neither are most law professors, and they are not conformed to this new reality, not at all. In this refusal to stay "professional" and in their towers, they have an example. The same Oliver Wendell Holmes, I have just mentioned. Justice Holmes who wrote this magisterial essay and five years later would be named to the United States Supreme Court where he would serve thirty years from 1902 to 1932. Justice Holmes was no soft spoken, shy and retiring jurist. For twenty years before his appointment to the U.S. Supreme Court, he'd been teaching at Harvard Law and on the Massachusetts Supreme Court.

But all those years on the Supreme Court and the state court and at Harvard Law, and for all the copies sold and unread of "The Path of the Law," Justice Holmes's greatest contribution to the life of the republic came in a very short speech he delivered in public in 1864.

Justice Holmes had been in the Union Army since the beginning of the Civil War. He fought in some of the bloodiest battles of that long war for freedom, in the peninsula campaign, at Fredericksburg and the wilderness, and was wounded three times, at the battles of Bull Run, Chancellorsville, and Antietam. Weakened by dysentery and wounded so often, Justice Holmes was on garrison duty in D.C. as Grant marched on Richmond in the spring and summer of 1864.

In the hope of lessening the pressure on Richmond, Robert E. Lee ordered General Jubal Early to leave the Shenandoah Valley with the Confederate Army there and threaten Lincoln's base in D.C., thinly defended because of Grant's intention to, quote,

"fight it out on this line if it takes all summer."[15] Grant followed through and had drained the parapets and forts surrounding the capital of all but the older troops and the convalescing. But, Grant rushed some troops back to D.C. that got there before they arrived, though it was a close-run thing.

It was when rebel General Early got within sight of the capital's defenses, specifically at the battle of Fort Stevens in July of 1864, that Justice Holmes made his greatest contribution to the life of the republic.

Princeton historian and Pulitzer Prize winner James M. McPherson relates the story in his magisterial *Battle Cry of Freedom: The Civil War Era:*

> During the skirmishing on July 12, a distinguished visitor complete with a stovepipe hat appeared at Fort Stevens to witness for the first time the sort of combat into which he had sent a million men over the past three years. Despite warnings, President Lincoln repeatedly stood to peer over the parapet as sharpshooters' bullets whizzed nearby. Out of the corner of his eye a 6th Corps captain—Oliver Wendell Holmes, Jr.—noticed this ungainly civilian popping up. Without recognizing him, Holmes shouted "get down you damn fool before you get shot!" Amused by this irreverent command, Lincoln got down and stayed down.[16]

Thus, it was not as a professor, writer, state supreme court or United States Supreme Court jurist that Justice Holmes did his best work, but rather in a short, profane command to the Commander in Chief that would preserve him to win re-election after the fall of Atlanta, then deliver the Thirteenth Amendment through the Congress and off to the states for ratification of the command to abolish slavery, then his magisterial second inaugural address, and then the tragedy and yet mystically unifying assassination and funeral procession in April of the next year, after Lee had surrendered to Grant.

Some say that story is apocryphal, but not Professor McPherson. It seems Justice Holmes did not want too much credit, and eschewed the footnote there. But no matter. It illustrates a point: We do not know what the most significant thing we do is, or when we do it. Thus the best course is to do as much as we can, for as many as we can, in all the ways we can, for as long as we can. And that is what Ron Rotunda did.

So I honestly cannot tell you what the most significant thing Ronald Rotunda did is. That he taught thousands of law

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15 *Ulysses S. Grant Chronology*, ULYSSES S. GRANT HOMEPAGE, https://www.granthomepage.com/grantchronology.htm [http://perma.cc/N8TX-5QS6].

16 JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 757 (2003).

students . . . and lawyers . . . and judges the finer points of constitutional law and of course his influence on the actual practice of ethics within the bar cannot be doubted. But are his treatises and his widely recognized stature in various fields the most significant thing he did?

No one can answer that, but I can point to one thing he did quite well: He entered the public lists.

For the Steelers fans among us, let me explain the term, "the lists."

In the Late Middle Ages, jousting was the rage among the nobility in England and on the continent. Indeed it had been so for hundreds of years. The lists, or list field, was the arena, often just a roped off field with grandstands, where the fighting took place. To enter the fray was "to enter the lists."

And sometimes it was a fray, with vast teams of knights bouncing and banging each other around on horseback and foot. In T.S. White's magnificent *The Once and Future King*, the basis for the movie *Camelot*, Sir Lancelot would have to fight anonymously, for it was considered a done deal to spot the side in a melee on which Lancelot, the Lebrun of his day, played. But almost everyone, even the worst of the horsemen and most uncoordinated of the swordsmen, got into the lists.

These days in our country, we have a militarized media industrial complex, which serves as the list field for politics. At present, it consists of a handful of cable news channels, the traditional networks, *60 Minutes*, a half dozen nationally syndicated radio shows, a score of influential podcasts, and of course a handful of agenda-setting newspapers, which are not so much newspapers as websites with old papers attached to them, and yes, a thousand websites.

It has become, to borrow and modify a bit from Ike, a militarized industrial media complex.

There remain among this complex some great law blogs, such as *Instapundit*, *Law Professors Blog*, *Lawfare*, *TaxProf Blog*, and many other name brand blogs/websites. The law professors are back in the game. Sort of. They continue to write for each other, indeed in a vast, vast array of law journals. And AALS has its sections, and the ABA its conferences, and the circuits gather annually and professors speak.

Former Dean Eastman and Berkeley Dean Erwin Chemerinsky often appear together as the so-called "smart guys," which I humbly take credit for naming and launching fifteen or sixteen years ago, and which they now take on the road like an

old Bing Crosby and Bob Hope road movie, except they don't dance. At least I hope they don't dance.

That's where we are in 2019, a 120 years after "The Path of the Law." How did the scholars cross over the field from their cloistered towers into the lists?

It's a complicated answer. But one part of that answer is most definitely Ron Rotunda.

For the past many years—really since the close of World War II—public intellectuals have argued about the most prestigious "placement" for their opinions on matter of public importance. There are only three contenders for most prestigious placement among them. Everywhere else is "tier two" or lower to use *U.S. News and World Report* terminology.

Those three are: the "paper of record," the *New York Times*; the "paper of power," the *Washington Post*; and the "paper that makes and moves markets," the *Wall Street Journal.* For the Manhattan left-leaning elite, and those who think like them or desire to be thought to think like them, there is the *New Yorker*, but that's a weekly, and always a beat late to the party unless it blows up the party as Ronan Farrow has done with #MeToo or Lawrence Wright with Islamic Fundamentalism or Scientology. Long form journalism still, as it has for years since Joseph Pulitzer cleaned up the craft of scribbling, it still makes and leaves marks.

It is the view of many that, under first Vermont Royster, then Robert Bartley, and now Paul Gigot, that the most influential of the dailies is the *Wall Street Journal*'s editorial page. That is because of its quality. Its seriousness. The fact that it is read left, right, and center, and because it does in fact make arguments that change minds.

Twenty-two years ago, Ron Rotunda appeared on the editorial pages of the *Journal* for the first time on September 9, 1987. The headline of his op-ed: "Bork's Firing of Cox: What Really Happened."[17] This provocatively titled essay appears fourteen plus years after the October 20, 1973 firing of Archibald Cox, the first Watergate special prosecutor, by then-Solicitor General Bork. Why then, in 1987 this Rotunda article?

Because September of 1987 marked the opening battle in the thirty years war for the Supreme Court, a war just concluded—or at least temporarily won—with the confirmation of Justice Kavanaugh and the seating of a fifth so-called "conservative"

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17 Ronald D. Rotunda, *Bork's Firing of Cox: What Really Happened*, WALL ST. J., Sept. 9, 1987, at 32.

Justice on the Supreme Court, or so most observers believe. The war that began in 1987 was over the nomination of Judge Bork to join the Court. Justice Antonin Scalia had made the relatively short walk from the D.C. Circuit a year earlier and was confirmed 98-0 on September 17, 1986.

These were unusual times, and I had a front row seat. I had had the great good fortune to clerk on the D.C. Circuit for Judge Roger Robb in 1983 and 1984, but when the judge had fallen ill, as was the tradition of the court, his clerks were adopted by the entire circuit for a period of weeks while it was determined if the illness was a disabling one. During that time I received cases on which to work from then-Judges Scalia, Bork, Ruth Bader Ginsburg and Spotswood Robinson—they were an extremely collegial bunch back then, and obscure in the way circuit court judges are but never Supreme Court Justices.

That utility infielder role continued until it became obvious that Judge Robb's return would be delayed and then halting, and I was adopted by Judge George MacKinnon, a great man, whose daughter Catharine is every bit to the left as Judge MacKinnon was to the right. His enormous pride in her groundbreaking scholarship and entering into the public fray was my first glimpse of the changing role of the scholar-professor in the public square, and she is in it today. Professor MacKinnon was never out of it. Our most recent Dean prior to Dean Parlow, Dean Tom Campbell, can regale you with stories of Judge MacKinnon's incredible intellect and wonderful great good humor, and of Catharine MacKinnon's not quiet entry into the public debates, and of the judge's enormous pride in that entry.

If Professor MacKinnon had a parallel partner in pushing scholars into the public arena, it was Ron Rotunda and in that, (in retrospect though not at the time) obviously significant era of turning, very few professors would sally forth on an issue as contentious as the nomination of Judge Bork.

This first of Professor Rotunda's fifteen significant contributions to the editorial pages of the *Wall Street Journal* concluded thus, after a spirited defense of Judge Bork's actions in 1973—recall this is 1987, in the middle of the Bork hearings:

> Some senators have suggested they will not vote for Judge Bork unless he tells them how he will vote on particular cases or promises not to overturn certain cases. The senators can't constitutionally do that. Article III of the Constitution prohibits a nominee from giving advisory opinions. He may tell us that some opinions are drafted poorly (constitutional commentators have done that for years), but he can't say how he would decide particular issues. Nor can the senators attach any conditions to his appointment. An opinion of the U.S.

> attorney general made clear 150 years ago that senators cannot place any "qualifications or alteration" on an appointment.
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> Justice Joseph Story, an early-19th century Supreme Court [J]ustice, tells us in his influential "Commentaries on the Constitution" that senators may withhold "their advice and consent from any candidate" only if the candidate "in their judgment does not possess due qualifications for office." Story acknowledges that the Senate may act "from party motives, from a spirit of opposition," but he hoped that "such occurrences will be rare."[18]

"Let us hope that in Judge Bork's confirmation hearing," Ron concluded in 1987, "we will not be witness to one of those rare occurrences."[19]

Now consider that brace of paragraphs from thirty-one years ago from Ron. It is the foreshadowing of what would become colloquially known as "the Ginsburg Rule" adopted by then-judge, now Justice Ginsburg in her 1993 confirmation hearings five years after the Bork fiasco, and adopted by every single nominee since.

Was Ron's 1987 *Journal* op-ed his equivalent of Justice Holmes shouting at Abe Lincoln to get "your god damned fool head down"—but less profane but also to a wider audience of all future Supreme Court nominees—Ron's most influential bit of writing? It might well have been. I can guarantee you that everyone watching the Bork proceedings was reading the *Journal* editorial page everyday, certainly Judge Bork's friend Judge Ginsburg was, and I suspect every federal judge who considered themselves a potential Supreme Court nominee, which is usually pretty much every federal judge not in senior status, read Ron Rotunda's advice.

And note as well the foreshadowing of the increasing bitterness of the confirmation mess. Ron quoted Joseph's Story, who worried or at least speculated a century and a half earlier that confirmations might become a matter of party, but not too often. Ron hoped it would not be so, in the case of the Bork nomination, that it would not be one of those "rare occasions." Of course it was, and now it seems every nomination by a Republican President is an occasion for the brass knuckles to come out in print and cable. Way back in 1987, Ron Rotunda provided every future nominee with the sorcerer's stone on how to survive the new gauntlet Ron saw taking form in 1987. Refuse to commit to conclusions on cases that might come before you and refuse conditions on your confirmation. He made the suggestion. Justice Ginsburg embraced it. It is now the rule. Any serious

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18 *Id.*
19 *Id.*

consideration of that policy will find a genesis story with Ron's op-ed of September 9, 1987.

Not surprisingly, this important piece marks a beginning and a midpoint for Ron. It was the beginning of an almost annual, important contribution to the *Journal*'s op-ed pages, and it is roughly at the beginning of the midpoint of his career, when a scholar-public intellectual might best begin to forward opinions on public controversies, equipped with not just learning but experience and hopefully humility.

I do not propose to review each of these fifteen significant essays—I omit Ron's January 1993 letter to the editor upbraiding a columnist for getting wrong a point about law firm partnerships in California and anticompetitive partnership agreements, except to note the good professor's vigilance—and a book review, yes he did those as well, but to again alert you that once he took to the public lists, Ron never retired from them.

In November 1994, he essayed on the constitutionality of term limits. A year later, he blasted the young lawyers of the ABA for attempting to legislate among their number against discriminatory words or conduct.

In March of 2000, he proclaimed "[p]erhaps the Clinton presidency will claim as its greatest victim the reputation of the federal courts for integrity and impartiality."[20] Agree or disagree, there is a blunt-force-object bit of opinionating.

Ron would go on to write essays titled (and it is important to recall that rarely do writers write their headlines, though we have been known to nudge the header one way or the other), "Rubbish about Recusal," "The Case for a Libby Pardon," "Egypt's Constitutional Do-Over: This time around, take a closer look at America's Bill of Rights," "Endangering Jurors in a Terror Trial," "Hillary's Emails and the Law," "Thin-Skinned and Upset? Call a Lawyer" and his last contribution to those pages, in August of 2016, headlined "The ABA Overrules the First Amendment."[21]

Ron was a civil libertarian of the old school sort—a freedom man. He also had quite a big heart. As an undergraduate at Harvard, it led him to volunteer at the college's social services organization, the Phillips Brooks House, where he was assigned to teach a class at the Massachusetts Correctional Institution at Bridgewater, a prison for the criminally insane. This experience is the basis for Ron's most arresting *Wall Street Journal* essay,

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20 Ronald D. Rotunda, *Another Clinton Victim: The Integrity of the Federal Courts*, WALL ST. J., Mar. 20, 2000, at A35.

21 *See* Rotunda, *supra* note 2, at 24–49.

titled "The Boston Strangler, the Classroom and Me." It ran on July 26, 2013, and I recommend it to you all. My favorite, very Ron-ish line is "[s]econd, what your mother told you is true: You can't judge a book by its cover."[22] DeSalvo—the Boston strangler was Albert DeSalvo—"DeSalvo did not look at all like Jack Nicholson's demented character in 'The Shining,' or even like most of the other inmates I taught. He looked normal. What was so abnormal was his mind."[23]

Suddenly a light opens onto Ron's perpetual equanimity and not just in faculty meetings or the classroom, but everywhere and always. He was imperturbable. It is perhaps an advantage that falls to everyone who teaches classes in such institutions, or perhaps it is unique to those who have taught sociopaths of the highest rank, but wherever gained, whether in 1966 when Ron taught the serial killer or through the years, it came to define Ron in my mind. He was rather fearless, even contemptuous of public opinion. Like an umpire in a baseball game—Chief Justice Roberts' now famous analogy from his confirmation hearings—he called them as he saw them, in print, in meetings, in the classroom. Most of the time the recipient would accept the verdict, even if disagreeing in his mind and muttering as they left a called third strike behind. But sometimes arguments break out. Sometimes managers and players are ejected. Sometimes in the public square the elbows get very sharp indeed, and few punches are pulled.

To my knowledge, none ever landed on Ron, at least he never let it show if one did. As just noted, he took on the most controversial subjects, and did so with typically specific, well-formed and complete arguments that led to the only conclusion Ron could see. Then he left it out for all to read, and walked away, apparently unconcerned with the reaction one way or the other.

And in so doing, Ron cut down a path through the thicket of the public square for other law scholars and law professors to follow, and boy have they. Just a week ago the formidable Jack Goldsmith, the Shattuck Professor of Law at Harvard University, joined me on air to discuss the conduct of the Federal Bureau of Investigation in 2016, days after Professor Goldsmith, a former assistant attorney general at the Office of Legal Counsel in the DOJ, had opined on the same topic for the *Lawfareblog*—not the *Harvard Law Review*, but a blog! On a most crucial matter from one of the country's leading if not pre-eminent experts on the subject.

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22 Ronald D. Rotunda, *The Boston Strangler, the Classroom and Me*, WALL ST. J., July 26, 2013, at A11.

23 *Id.*

A few months earlier Akhil Reed Amar, one of Yale Law's giants, had joined me to discuss whether a President ought to be indicted. I've already told you Former Dean Eastman and Dean Chemerinsky meet in the public arena to wrestle more often than Andre the Giant and Bobo Brazil ever did. For goodness sake, Laurence Tribe tweets and Glenn Reynolds is by far the most read law professor in the land because of his blog *Instapundit*.

What did Ron Rotunda, if not unleash, at very least rank as a pioneer in doing?

Amply put, he helped bring scholars into the public fray. He modeled and lived the life of a public intellectual concerned about the here and now, and the great debates, often debates that unfolded at the speeds of light and sound and into which law reviews could not hope to timely intervene. He built his reputation as a scholar via the traditional means, but he used it as a lance, sword, and shield in these public lists for more than two decades.

Is that a good thing, what Ron Rotunda and his like-minded colleagues have done? Was it a good thing that the future Justice Holmes presumed to shout at the then President Lincoln? Now I draw close to my conclusion, but before that, a word on Ron as a teacher.

Ron was as a teacher what football used to call a two-way player. He could and did play both ways, offense and defense, or in the case of the law, students and practitioners.

As I never know how my colleagues actually teach, or what their students think of them, I consulted Former Dean Eastman. Deans are supposed to know these things. That's what deans do, that and raise money and preside over faculty meetings intended to test their sanity and prove if someday they are deaf enough to run a college or a university.

Former Dean Eastman replied, "I never sat in on a class, but the buzz is that the students loved him, both his antics and his command of the material, and particularly is ability to convey to the students clear rules of law."

As a teacher himself attached to antics—mine almost always are connected digressions about the movies (have you seen *Cold War*, the story of star-crossed lovers in Stalin's Poland of the early 1950s? But I digress)—I know that showmanship is part of successful teaching. Do not expect other than Ferris Bueller if all you serve them is Ben Stein. That would not be Ron Rotunda. I had assumed what Former Dean Eastman confirmed to me because Ronald Rotunda could not turn off the energy, and energy is everything. Hamilton said it about the presidency in *Federalist* No. 70—that energy in The Executive would be

necessary for the republic to succeed[24]—and Ron's energy guaranteed without my seeing that he would charm, and far more importantly instruct students.

C. Rotunda the Teacher and Professor

His second undertaking was to teach practitioners ethics, and this he did in countless articles, conversations, and consultations. When the subject of legal ethics comes up, I am reminded of the 1981 movie, *Chariots of Fire*.

That movie debuted while I was a law student at the University of Michigan in April of 1982, and I saw it with a dozen or so other law students, including our recent first lady of California Anne Gust, we collectively had invented "bad movie night." Tuesday nights were given over to attending the worst movie we could find. In retrospect, this may have been a commentary on the quality of our teaching or just on the second year of law school, those dreary middle miles of a marathon being run in the rain. Anyway we went and were shocked. Here was a fine movie, no, a great movie. As we staggered out, dazed by the sudden exposure to quality art in Ann Arbor in the middle of my second year of law school, one scene stuck with me.

The would-be fastest man on the planet, the fellow who intended to win the gold in the 100-meter dash at the Paris Olympics, Harold Abrahams, played by Ben Cross, approaches legendary professional track coach Sam Mussabini, played by Ian Holm, with the request that Mussabini train him, that he make Abrahams fast. Mussabini replied, "I can't put in what God left out," but agreed to try. He succeeded.

Now about lawyers, and people generally, by the time they reach their 20s, their ethical make-up is set. The mold is made so to speak. So why bother teaching and writing about ethics? You cannot put in what God left out after all.

Because if they are built ethically, they can be coached to superiority. If they aren't, then, true, no scholar can put in what God left out. But if they are built for ethics, they can be coached. They can be made "fast" in the terminology of the film.

That is what Ron did. He assumed you were ethical, but that you needed coaching. How do you handle a married couple's client trust fund when husband and wife divorce? (Does anyone here remember?) What is the obligation of a lawyer who suspects their client is, if not lying outright, then dancing on a cliff over which they might both fall? Upon taking the decision to leave a

24 *See* THE FEDERALIST NO. 70 (Alexander Hamilton).

law firm partnership, what are the duties owed to your partners? These are questions of ethics, yes, but they presume the lawyers involved want to do the right thing. Ron was very good in teaching from the wholesome and happy perspective, that those consulting an ethics expert wanted to learn to do the right thing.

Here is where Ron Rotunda truly advised tens of thousands. How many lawyers there are who have looked up from a Rotunda commentary or article on some ethical quandary and said, "so that's what to do?" There must be legion. And if they followed the advice of Ron Rotunda, they would have served the bar, the client, and themselves well. That's a giant testimony to Ronald Rotunda.

But now what about this entering into public debates matter. Was that a good thing?

Ron could have stayed in the ivory tower and have been deemed very influential. Any given work of law scholarship can be evaluated roughly with the formula: Perceived status of the publication times obscurity of the subject matter equals influence of the opinion rendered by the scholar divided by the number of readers times the influence of those readers. It makes a difference, after all, if the Chief Justice is reading your piece on a Sunday afternoon or if a second year doing research for a note for a somewhat obscure law journal is doing so.

A lifetime's work requires a bigger scale on which to weigh, a much bigger scale in fact, but the formula is the same: What topics did you cover and where did you cover them work together to equal the influence they might have had cabined by the readers they actual did have and the political and legal authority and power of those readers.

Ron's influence as a scholar was immense. And standing alone would have always been immense. Every legal scholar's importance fades with time because the famous path changes course I mean, for goodness sakes, somewhere down the line Prosser won't matter, or he will matter in the way Lord Coke matters. Everyone gets ground down. Vanity, vanity, "[a]ll is vanity and a chasing after wind," says Ecclesiastes, and that's one of a handful of works that's genuinely stood the test of time.[25] The writer might have added to the chasing after wind part "and tenure."

But as for the age in which we live on this earth, and the few years or decades thereafter, influence depends on what you write, with what authority, for which audience, and in a timely fashion.

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25 *Ecclesiastes*, 1:14.

Are you moving the debate? People with bullhorns and posters rarely if ever do. People who persuade often do.

It was Lincoln, after all, who in his seven debates with Stephen Douglas in 1858, systematically demolished the Supreme Court's worst decision ever, the *Dred Scott* decision. It was Lincoln, this time alone, who in the Cooper Union speech of 1860 demolished Calhoun and his progeny's hateful ideology of racial superiority and the alleged untouchable status of slavery under the Declaration of Independence and Constitution. Words spoken into public debates matter. Not slogans, or placards, or shouts, but arguments.

And while it was Justices of the Supreme Court who began the inevitable slide towards civil war with a ruling in the *Dred Scott* decision, the worst in the Court's history, it was a lawyer wielding words in an extended public debate covered by the papers of the day, that not only won the presidency, but the war, and freedom for the enslaved. So, yes, lawyers wielding words matter. Arguments matter.

I don't know for sure if Ron Rotunda is truly the father of the Ginsburg Rule, but having mused on this for quite some time, I think he was. And I don't know who read his writings then, but I am certain when he wrote for the *Washington Post* or the *Wall Street Journal*, he had an audience of at least nine and in fact far, far more. Ron's role as a public intellectual was important and groundbreaking and a testament to him. That he conducted himself in that role as a gentleman and a scholar, as a *good* man, is more important still, and a credit to Chapman that he was among our number. He will be missed. Thank you.