

## Ave atque Vale

Peter E. Quint

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## Essay

### AVE ATQUE VALE\*

PETER E. QUINT<sup>+</sup>

I thought, since I have been here a long time, that it might be interesting, particularly for newer members of the faculty, if I said a few words about the way things were in the law school in an earlier period and also mentioned a few of our colleagues of the past who contributed a particular tone to the school. And I'll say a bit about my own experiences as well.

When I arrived here in the autumn of 1972, this wonderful building which we now inhabit did not exist and the law school had its quarters in a considerably smaller structure roughly on the same spot. The Thurgood Marshall Law Library did not exist either (the library was in the main body of the building) and where our library is now, there was a large green lawn particularly favored for touch football.

In the 1970s, the faculty seemed divided between the old guard—a conservative group of what seemed to me like elderly gents—some people in the middle, and a smaller group of young turks with lots of hair, of which I was one, I suppose. In fact, students have told me that I was sometimes known as “Rasputin” in those days.

But soon there was an influx of younger faculty members with a distinctly 60's left-liberal orientation, a number of whom are happily here today. These refugees from the 60's gave a sympathetic and rather laid-back tone to the law school. It was this, I think, together with the fact that, in those days, the emphasis seemed to be primarily on teaching, that contributed to establishing a remarkably relaxed and friendly atmosphere within the faculty that has lasted for many years—even after things changed (no doubt properly) to the more earnest emphasis on scholarship that we have today.

Certainly, one of the great pleasures of the law school over the years has been what I would call its—at least—moderate lefty-ness, which provides an atmosphere in which one can actually breathe. I remember once visiting

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+ Jacob A. France Professor Emeritus of Constitutional Law, University of Maryland Francis King Carey School of Law.

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Wayne State Law School where I had taught in the distant past. We were chatting at mid-morning coffee when another faculty member came in (I think he is now a very eminent teacher of antitrust) and he proposed a subject for discussion that obviously meant a lot to him: he asked us each to suggest our favorite candidate for the governmental agency that should be abolished *first*. (Incidentally, he suggested abolition of the Securities and Exchange Commission on the grounds that not much actual securities fraud was going on. Even in the days before Bernie Madoff, this was breathtaking.)

In any event, my point is that we've never had to put up much with that sort of thing here. Indeed, one of the most admirable traits of this great faculty is its predominant focus on the public interest—work against discrimination of all sorts, advocacy of environmental protection, work for tax reform and against urban poverty. There are thousands of examples of these projects, but I mention only Doug Colbert's decades-long campaign for legal representation of defendants at bail hearings, Karen Czapanskiy's great work on gender bias in the courts some years ago, and Rena Steinzor's hair raising—and completely convincing—jeremiads against the weakness of environmental regulation today.

Another great aspect of life and work at the law school, which has been most deeply gratifying for me, is our complete freedom to choose our own path in research and scholarship. For example, in the forty-three years that I have been here I don't think we have ever hired anyone specifically to teach comparative law—Hungdah Chiu may be a partial exception to this—but a number of us have turned decisively in this direction by our own choice. I would mention our retired colleague, Ted Tomlinson, a scholar in contracts and administrative law, whose wonderful comparative work in French law has always been a great inspiration to me<sup>1</sup>; and Marley Weiss, originally and still a labor lawyer, who accomplished the almost unbelievable feat of learning Hungarian as an adult to the point of being able to teach and write in that language, and to do research in Hungarian law. And about midway through my own work here, I shifted from writing about American constitutional law to at least a pretty substantial admixture of work on comparative constitutional law, particularly on the constitutional law of Germany.

Moreover, for many years we have had a quite favorable faculty-student ratio. This has not only permitted the extensive growth of clinics which are very labor intensive, but also has meant that we have had, on the whole,

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1. See, e.g., Edward A. Tomlinson, *Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking*, 48 LA. L. REV. 1299 (1988); Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131 (1983).

considerable freedom in the choice and composition of courses. So we are free to teach courses such as, for example (I select not entirely at random) the Constitutional Law of the Federal Republic of Germany—a course that I taught for a number of years (although I was never successful in making it a required course—that’s a joke). This ability to choose and create seminars has made it possible to reap the extraordinary benefits—for us and for our students, as well—of having courses which arise out of the teacher’s deep scholarly endeavors or other abiding interests. This excellence of the school is reflected in the schedules of all of us, and so I just mention a couple, more or less at random: Bill Reynolds’s much sought-after seminar in art law, and, among our remarkable younger faculty members, Amanda Pustilnik’s seminar in Neuroscience and the Law, and Michael Pappas’s seminar on Food, Farming and Sustainability, and his seminar on Natural Resources, which focuses on the legal implications of global warming and water shortages.

And perhaps this is the moment for me to say—certainly not an original thought by any means—that the younger members of the faculty who have joined us in the last few years represent a truly extraordinary group of teachers and scholars whose presence bodes very well for the future of this institution.

When I first signed the agreement to come here, I remember Dean Cunningham calling me on the telephone (I was still in New York, winding up my affairs there) and he read me a long list of courses, saying, “We need someone to teach these, why don’t you choose a couple?” If the Dean had insisted, I probably would have taught Corporations—the subject of much of my legal practice in New York—but on the list was Constitutional Law and, of course, I couldn’t turn that down. And so that early phone call on a sunny morning in New York was pretty fateful for me, although I probably didn’t realize it at the time.

Another very happy chance occurred in 1976 when a group of German academics from Heidelberg came to spend a day at the law school. I had always maintained an interest in the German language since I had studied it in college, and I had engaged in conversations about German law at Wayne with my friend Fritz Juenger, a German academic then establishing himself in the United States. As a result, I spent some time talking with those German visitors in 1976. When I had a sabbatical looming a year or two later I wrote to one of them to ask if he knew of a place where I could spend a sabbatical year in Germany. Unbeknownst to me, he was an important figure at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg—probably the very best place in Germany for an American to dive into the waters of German constitutional law—and so this was a very

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happy accident that sent me again in a direction I found very gratifying and fruitful. Sometime after my sabbatical in Heidelberg, I also spent a year in Tübingen, a medieval university town of great charm, where I collaborated with a German colleague in teaching a course on American constitutional law to remarkably interested and talented German students; and I also spent a fateful sabbatical year in Berlin about which I'll say a word in a few moments.

I have had a lot of fun, and very deep satisfaction, in writing, or in trying to write, articles (and books) on the law—an endeavor on which we spend a lot of our time, although sometimes outside observers of law faculties don't fully understand that.

Perhaps the most exciting of my projects started when, to everyone's surprise, the Berlin Wall was opened by some confused and bewildered East German border guards on a cold November evening in 1989. Obviously the social and political aspects of this event and what followed were of primary importance, but there were also a lot of significant legal and particularly constitutional problems involved as well. I was able to go to Berlin a month and a half later, at the beginning of January 1990, and I spent two weeks there doing interviews with political figures in East Germany across the political spectrum—from the new parties of the citizens' movement to the hard-line Communist Party, which was then declining precipitately in power.<sup>2</sup>

Most exciting was the evening of January 8, 1990, when I observed, or participated in, one of the huge Monday night protest marches which a few weeks earlier had toppled the hard-line East German regime: a scene of hundreds of thousands of people walking around the Ring in Leipzig, the street that a century earlier had replaced the old city walls. At that point, no one foresaw rapid German unification and everyone assumed that a democratic East Germany would arise and exist for some years at least; and so this was a great time of constitutional ferment, as people with democratic political yearnings, now suddenly set free, began to work on proposals for a new democratic East German constitution. In my interviews I tried to elicit views from all sides about what a new constitution of East Germany should look like. On the evening of January eighth, I was invited to attend one of these drafting sessions in Leipzig for a citizens' party called "New Forum." It was exhilarating to see a young man come in from the great demonstration, place a banner with some democratic slogan against the wall, and then sit

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2. For the results of these interviews, see Peter E. Quint, *Building New Institutions in East Germany*, BALT. SUN, Jan. 21, 1990, at E1. See also PETER E. QUINT, *THE IMPERFECT UNION: CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION* (1997).

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down to help draft and debate the details of fundamental constitutional provisions.

About two years later, shortly after German unification, I was fortunate to be able to live in Berlin for a sabbatical year and to pursue these interviews, now with people in East Germany who had participated in the events of unification—and also in the drafting of democratic constitutions for the newly created Eastern German states. It was great to be able to talk to these—mainly young—people who had participated in these stirring events. The most amazing of the interviews was a four-hour conversation with Lothar de Maizière, who had been the first and only democratically elected Prime Minister of East Germany. We talked a lot about the events of German unification, but what was most impressive to me was that de Maizière, a former professional viola player who had turned to law after a hand injury ended his musical career, was clearly one of the very most brilliant and cultivated people I had ever met—much to my surprise, in light of his rather bumbling depiction in the press. Well I still have the tapes of this conversation somewhere, but as time goes by, it may be more and more difficult to find the antiquated equipment necessary to play them.

Some years later, in writing about civil disobedience in Germany, I also did many interviews with members of the German peace movement of the 1980's—and with the prosecutors who prosecuted them and the judges who judged them.<sup>3</sup> In the case of the German peace demonstrators, as with the participants in German unification, these events seemed to be the high point of their lives, and it was easy to evoke a flood of enlightening memories.

Teaching the classes here—particularly constitutional law in its various forms—has also been a great joy and I have been joined in that exciting endeavor by wonderfully talented colleagues. I would like to mention, particularly, Dave Bogen, my predecessor as well as my colleague, whose great articles on constitutional law helped to point the way in teaching that deep and complex subject.<sup>4</sup>

And of course I have had many remarkable students—beginning with Paige Marvel and her extraordinary class whom I had as students in the very first year that I taught here. Another student in those early years was Elijah Cummings—now my representative in Congress in my Baltimore City district—who has been playing such a valiant role on the streets of the city in the last few days. Other memorable students from the past are happily here

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3. See PETER E. QUINT, *CIVIL DISOBEDIENCE AND THE GERMAN COURTS: THE PERSHING MISSILE PROTESTS IN COMPARATIVE PERSPECTIVE* (2008).

4. See, e.g., David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 *HOFSTRA L. REV.* 97 (1982); David S. Bogen, *Balancing Freedom of Speech*, 38 *MD. L. REV.* 387 (1979); David S. Bogen, *Evans v. Abney: Reverting to Segregation*, 30 *MD. L. REV.* 226 (1970).

today, including Bonnie and Mike Travieso, Sandy Cohen, Robin West, and Markus Rauschecker.

I would like to say a word or two about another memorable student in constitutional law—a student from many years ago who is now sadly deceased. This was Alfred Mollin, who, at the time that he was taking the evening program here, was also a full time professor (they call them “tutors”) at St. John’s College in Annapolis. He was responsible—as were the rest of the St. John’s tutors—for teaching everything, from DNA to calculus to ancient Greek. Mollin’s brilliance was extraordinary, and when he graduated, he gave me as a present a two volume textbook of ancient Greek grammar that he and a colleague had *written*.<sup>5</sup> That’s a present you don’t get every day from your students. Mollin eventually left St. John’s and went on to have a distinguished career as an appellate lawyer in the Justice Department.

As I look back over more than forty years, there is a lot to think about and a lot of people to recall. You come in as a young turk and you go out as an old geezer and you meet a lot of people in between. So I’ll say a word or two about a few colleagues who are no longer with us but who, in their various ways, contributed to the history and atmosphere of this law school, and contributed quite a lot to my own education as well. These are all people who have been gone for quite a few years now and are probably not known to most (or at least very many) of the faculty today.

I remember with particular warmth Everett Goldberg, a man of immense talent and sharpness of mind. He was Associate Dean of the law school for many years and during that period, according to Dean Kelly, his “integrity. . . inherent decency [and] thoughtfulness” were “the soul of the [institution].”<sup>6</sup> Rett, as he was called, had spent two years as a Peace Corps volunteer teaching law in Ethiopia before coming to the law school. In the first year that I was here I audited Rett’s great course in African law which was an extraordinary combination of traditional law, colonial law, and the law of the new—then, very new—-independent African states. This magisterial course was a high point in my education in comparative law. Rett never gave this wonderful course again—I don’t know why; the enrollment was certainly good. It was like a rare African flower that bloomed once but was to bloom no more.

A considerably more problematic, but quite fascinating character, was Max Isenbergh. Max had an extraordinary record at the Harvard Law School. He was a law clerk of Supreme Court Justice Hugo Black, and he seemed to

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5. ALFRED MOLLIN & ROBERT WILLIAMSON, AN INTRODUCTION TO ANCIENT GREEK (1st ed. 1980).

6. Michael J. Kelly, *In Memoriam: Everett F. Goldberg*, 53 MD. L. REV. 263, 263–64 (1994).

know all the great legal and political figures of his generation and the generation immediately preceding his, as well. (One day, for example, he showed me correspondence to him from the former Secretary of State Dean Acheson.) Although Max had clerked for Justice Black, he didn't have much to say about Black, but he had a lot to say about two other justices whom he knew well, Justices Douglas and Frankfurter. His reflections on Douglas were *not* complimentary, to say the least. With Frankfurter he had a close, almost familial relationship, which is described in a wonderful piece by Max in the *Virginia Law Review* some decades ago.<sup>7</sup> Max taught constitutional law, antitrust, and legal process. In constitutional law he had very strong, clear ideas about what the Constitution meant and, in many instances, those views were decidedly not the views of the Supreme Court of the United States.

Max was actually a torn spirit. He had great legal abilities, but he was also a clarinetist who played at a professional level, and perhaps he never quite decided which path he should follow. When Max retired, he agreed to have a farewell ceremony like this one, but with the condition that there should be no speeches. Rather he, and a quartet of string players from Peabody Institute, would play the Mozart clarinet quintet. The ceremony went off in a manner truly characteristic of Max. Two or three minutes into the quintet, Max abruptly stopped the music. He didn't like the way the Peabody students were playing it. He gave them a few moments of no doubt stern instruction about how the piece ought to be performed. They started again and played the piece through beautifully.

Let me also briefly mention two more colleagues of the past. There was a substantial period, I think, when John Brumbaugh was one of the central figures of the law school faculty. (And his widow, Alice, is here today—this was an intra-mural law school romance). John was always beautifully dressed in a suit and tie, and he possessed a wonderful fluency of expression and a quasi-British style and precision. John taught evidence, criminal law, and jurisprudence, and his students found him a challenging and inspirational teacher with a very subtle sense of humor and extraordinary devotion to the University of Maryland School of Law.<sup>8</sup> John was a traditionalist and occasionally grumbled a bit about certain innovations in legal education, such as the clinics. But it was a tribute to the tone of friendship and solidarity that prevailed at the law school (and also a tribute to John's good nature) that this never descended into any kind of personal unfriendliness, as it had in so many

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7. Max Isenbergh, *Reminiscences of FF as a Friend*, 51 VA. L. REV. 564 (1965).

8. See Howard S. Chasanow, Frederic N. Smalkin, Susan Leviton, Tanya Washington, Edward S. Abrams, & Alan D. Hornstein, *In Memoriam: John M. Brumbaugh*, 61 MD. L. REV. 1 (2002).



other institutions. John was universally liked and admired throughout the faculty.

Well, I cannot speak of all of our departed colleagues, and so I have only mentioned those from the rather distant past whom I knew the best. But I do want to say a word about one of the youngest of them, Marc Feldman.

In the law, Marc was an adventurer or, as I said in a memorial piece then, an explorer.<sup>9</sup> His views contradicted much of what was generally accepted in legal education at the time. Indeed, on the view that law school itself, as things were then taught, ignored the social context of law and downplayed the problems of the poor, Marc decided not to obtain a J.D. degree at all, but rather to enter the bar by reading in a law office—a nineteenth-century method that had survived in a few states only. After joining the bar in this manner, Marc worked for the U.S. Civil Rights Commission and directed a federal legal services office, providing legal representation for the poor. Here at Maryland, Marc was one of the chief theorists of the noted Legal Theory and Practice program, which sought to expose students to the social meaning of legal problems. In his work, Marc had become interested in the problems faced by public education, as an instance of broader institutional failure, and he spent the last active year of his life on sabbatical leave, observing public education and teaching at three public schools in New York City—an unusual choice for a law school sabbatical and another example of Marc's audacious exploration. He planned to write about these experiences in a work that would have been, perhaps, part critique and part memoir. But sadly it was not to be. He suffered the onset of his fatal illness as he was returning to Baltimore in the summer after his sabbatical year in New York. Marc had a number of very close friends on the faculty, among them Max Chibundu and also Richard Boldt—who later wrote a major appreciation of Marc's work in the *Maryland Law Review*.<sup>10</sup> As with the others I have mentioned, those who knew Marc still mourn his loss.

I think the law school has been very fortunate in the deans who have arrived since I have been here. As Greg Young has said, Mike Kelly, who served an extraordinary tenure of sixteen years, should be considered—when the history of the law school is written—really as the founder of the modern University of Maryland School of Law. He was the originator or early decisive supporter of many things that we take for granted now—one might mention particularly the clinical program, the Health Law program and the Environmental program. But it hardly ends there, and I would like to say a

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9. Peter E. Quint, *In Memoriam: Marc Feldman*, 58 MD. L. REV. 325, 325–28 (1999).

10. Richard C. Boldt, *Public Education as Public Space: Some Reflections on the Unfinished Work of Marc Feldman*, 61 MD. L. REV. 13 (2002).

word about one other particularly notable aspect of Michael's tenure. Mike was (and remains) deeply interested in legal ethics from a philosophical point of view, and for a substantial period under Mike's aegis and thereafter there was a strong and explicit philosophical emphasis at the law school. Not only were we fortunate to have eminent philosophical writers such as David Luban and, later, Robin West on the faculty itself—but a wonderful institution called the Center for Philosophy and Public Policy at College Park (now sadly dispersed, I am afraid) was very closely associated with the law school. David was originally one of the philosophers from that center, as well as Professor Judith Lichtenberg, David's wife, and a number of other very brilliant (and in some cases somewhat eccentric) individuals. They would often come to the law school for philosophy reading groups, and they also taught a number of elective courses here, such as the philosophy of environmental protection, and the philosophy of the law of torts, a seminar that I had the pleasure of auditing years ago. In the philosophy reading group we read Rawls, Kant, Aristotle and others with some success; it was only Hegel who defeated us. Incidentally, Greg Young mentioned the philosophy reading groups as well, and I'm very happy to acknowledge the presence here today of a great stalwart of those groups, Ken Abraham, now at Virginia.

Among deans after Mike Kelly, Don Gifford had the foresight and acumen to plan this wonderful building in which we now reside, and somehow—it still seems like a sort of miracle to me—to get it approved through the layers of bureaucracy (ahead, I am told, of some supposedly prior university projects). Karen Rothenberg shepherded the building to its completion and, among many other accomplishments, greatly strengthened our faculty through the recruitment of some of our extraordinary younger faculty members—including some who are involved in the area of health law, Karen's first love and first focus of responsibility at the law school. Phoebe Haddon was here for a shorter period, but she brought us the name of Francis King Carey (and very substantial benefits therewith). And it was also under Phoebe's guidance that we were joined by the more recent of our brilliant younger colleagues.

Donald Tobin, a native Marylander, has only recently arrived—but he has been marshaling deliberation, skill and sensitivity in confronting the current financial problems facing this institution as well as most other law schools in the country.

So, looking back on this parade of individuals and parade of courses, articles and other work over the years, we may ask for the major theme. As I suggested before, I was and remain at least to some extent a refugee from the 60's, and back in those days it was common to hear law teachers say something to the following effect: we are not teaching *justice* here, we are

teaching *law*. Even the revered Oliver Wendell Holmes said things like that sometimes.

But it seems to me that you can't really teach law if you don't think that you are teaching justice or at least teaching people how to strive for justice, and in your own work seeking justice. Justice may come in many forms; it may not always be the precise result that you would choose in a particular situation, for procedural regularity and the rule of law are certainly components of justice and may sometimes require a result different from the result that you might choose if you had your completely open and free choice. But it seems to me that the whole lesson of the Socratic method—a method in which I was taught at the Harvard Law School now more than fifty years ago, and the method that I still think shows the finest traits of a legal education—cannot be understood other than as a relentless quest for justice. In the Socratic method, the relentless questioning of one argument over another, one result over another, one explanation over another comes down basically to the question of what is best for society and the individual and whether society or the individual should be preferred in particular circumstances when there is tension or dispute between them. In this sense, justice is something outside of and beyond the law, against which the law must be measured. And I believe that the process of learning and teaching the law is the process of (articulately or inarticulately) seeking to develop an understanding of justice and then seeking to refine the law so that it accords more perfectly with that ideal.

Well, in any case, that's my homily for today. I rarely get to deliver homilies, and so I am happy to deliver this one. And because my time is drawing to a close, I will end with a joke.

This is not a new joke—in fact it's a very old joke.

I told this joke at a similar gathering when I left the law firm in New York in 1972, and indeed a colleague Alan Hornstein told this joke at a similar event here not so long ago. But it is a good joke and a pertinent joke and so I'll tell it again.

It seems that the playwright S. N. Behrman had spent some time writing scripts in Hollywood but was about to return to New York, and so there was a gala dinner in his honor before his departure, which lasted late into the night.

The following morning, however, Behrman had to go into the office to pick up some last papers, and there in the corridor he encountered the always dangerous George S. Kaufman, the famous playwright. Kaufman fastened upon him his gimlet eye and said to Behrman:

“Ah–hah! Forgotten but not gone!”

Well, this is a pertinent story because I will be keeping my office, staying in my office. (It may not always be too easy to find me in there, with its furnishings of stacks of papers that give, you might say, a sympathetic tone to the office—but I'll be there basically.) I'll be working on some old projects and some new projects in constitutional law and in comparative law, and—who knows?—perhaps I'll have a chance to revisit Alfred Mollin's monumental two volumes.

In any case, I won't be gone.

And I'll try to make enough of the right kind of noise—or as one famous writer put it, the right kind of legal music—so that I won't be entirely forgotten either.

Thank you.