

# HARVARD LAW REVIEW

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## IN MEMORIAM: JOHN H. MANSFIELD

The editors of the *Harvard Law Review* respectfully dedicate this issue to Professor John H. Mansfield.

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## THE BEST CLASSROOM TEACHER IN THE WORLD

*Anthony D'Amato\**

Professor John Mansfield walked into the classroom and then walked out of the classroom. That's all I knew about him. Law professors did not hold office hours for students back in the late 1950s, so as far as I could tell he may have been commuting from Neptune. But the hours he shared with us are deposited at compound interest in my memory bank. No — more than that — those hours are part of who I am. Because, you see, Professor Mansfield was the best classroom teacher in the whole wide world.

What did he do in the classroom that was so great? He asked questions. He only asked questions. He never actually *said* anything (except once, unfortunately, which my duty of full disclosure requires me to reveal no later than by the end of this humble tribute).

So many questions! So many more questions! He'd toss questions at us over his shoulder, so to speak. He had a quasi-British accent, tremolo in the upper vocal register, hinting at a playful sort of sarcasm.

After class my newly acquired friends — no, I should call them *my colleagues* — no, back in those days the correct terminology would have been *my competitors* — were jabbering things like:

“Did you get anything out of that session?”

“Apart from a headache?”

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"Any notes?"

"I didn't take any notes."

"Neither did I."

"There are no notes in torts."

"There are no notes because there are no rules."

"So what are we supposed to study for the final exam?"

"If I knew I wouldn't tell *you*."

"My government is paying a great deal of money for my law school education," said the Indian student.

"Where did they dig up this Mansfield? Doesn't he have to know about torts to get a job here?"

"No, he learns it from us as he goes along!"

"Right. And how are we supposed to know?"

"It's a chicken and egg problem."

"As in *Chicken v. Egg*."

"He questions us when we should be questioning him."

"Well let me tell you, for example, that when this course started I knew absolutely nothing about torts."

"What do you know now?"

"Absolutely nothing."

*(Laughter)*

"Do you guys know that my government is paying a great deal of money —"

"For my money this class is one big tort."

"How do you know it's a tort?"

"Hey watch it. You're beginning to sound like Mansfield."

I used to raise my hand a lot in that class. I knew nothing about law, so I figured I had nothing to lose. All my competitors knew about law. Either their fathers were lawyers or at least their uncles. They hung around law firms since they were fourteen. They knew how to take notes. There was no lawyer among all my relatives and extended family. I'd never even seen a lawyer before arriving in Cambridge. The only thing I found out about lawyers was that they were tall. Professor Mansfield was the tallest. Professor Civilpro Field was tall with a Boston accent. He used to needle us: "Pretty soon you'll be studying for the bah." Pronounced as in "bah, bah, black sheep." Professor Punster Baxter was tall, thin, and replete with horrendous puns about criminal law. I spent the whole semester inventing one of my own, and then was too intimidated to send it to him. For the record, here it is: "Then the defendant climbed the ladder of crime, wrong by wrong." Ouch!

When I raised my hand, Professor Mansfield would acknowledge me with a question. "Mr. Diamatta?" It was always "Mr. Diamatta?" He seemed to enjoy mispronouncing my name. At home I worked up some retorts. "Well, Professor Ritefield," I would practice saying. "No, excuse me, it isn't Professor Ritefield, is it? My mistake. Well,

er, Professor Leftfield . . .” But I never got up the nerve to do it. And I eventually realized he was teaching me something. If someday I’d be making an oral argument in court and a judge mispronounced my name, should I come back with a zinger? Not in the event that I might want to win the case.

Because I volunteered a lot in class, my friends started hanging around. “Do you understand torts?” they asked. How could I?, I replied. Everything I say is questioned. “You *don’t* understand torts?” How can I know whether I do or don’t? “You can find out from a treatise.” You mean those paperbacks at the bookstore, like torts in nutshells? “No, this is Harvard. We only do hardcover. Get *Prosser on Torts*.”

That afternoon I procured *Prosser on Torts* from the reserve room and lugged it over to a library table. I opened it cautiously. I was afraid it would have nothing in it but questions. To my relief it contained things with periods at the end. Declarative sentences. I located the chapter on intentional torts, took a deep breath, and started to read.

The first sentence struck me as problematic. The second sentence was misleading. The third sentence was full of holes, and the fourth sentence failed to fill them. The fifth and sixth sentences got in each other’s way. I forced myself to finish the paragraph. This stuff is not only wrong, I said to myself, it’s *superficially* wrong!

Where have all the nuances gone? Long time passing.

As I struggled to read on, it suddenly hit me. After eight years of elementary school, four years of high school, and four years of college — a total of sixteen years of unmitigated Ed — my Moment of Truth had arrived.

Yes, my Moment of Truth. I knew a helluva lot more about torts than Prosser.

There could be only one explanation. The tall one from Neptune.

I realized then how long it must have taken Professor Mansfield to prepare questions for each class. How hard he must have worked at it.

At times of student burnout, when the world becomes unglued and its pocket parts are falling out all over the place, I seek nepenthe among the pre-Socratics and say to myself that, after all, truth is relative. Professor Mansfield’s voice then intrudes into my daydream via an advanced interplanetary wave: “Did you just *say* something?” Yes, Professor, I did. “Are you making a statement?” Yes, I am making a statement. “Are you absolutely sure you’re making a statement?” Yes, I’m absolutely sure. “Are you making an absolute statement?” Yes, it’s an absolute statement. “Are you making a statement about truth?” Yes, it’s about truth. “Is it an absolute statement about truth?” Yes. “But how can it be absolute if all truth is relative?”

He always got the last word even if he wasn't there. Or, I should say, he always got the last question. Yet there was one time when he got the last word and it wasn't a question. It was, of all things, an answer. This is the moment you've all been waiting for — the end of my essay.

I didn't mean to put it that way.

Anyhow, it was a historic moment. Professor Mansfield came right out and actually showed us he could irrefutably say something.

It happened when we were struggling for fifteen long minutes over a *précis* in our casebook of a complex tort litigation that was so highly condensed that letters stood for the names of the litigants, witnesses, and third parties. There were six players in this one-act courtroom drama: A, B, D, M, P, and S. Flitting in front of the footlights in the theatre of my mind were faeries and queries like: Why is everyone dead in *Our Town*? Why did they name that streetcar *Desire*? and Why were six characters in search of an author? Aha! I said to myself at the next available Aha! Moment: if we want to prioritize this plot and figure out what's going on we need to search for the right character. Thus the question is: who has the burden of proof?

Excitedly, I raised my hand.

"Mr. Diamatta?"

"Professor, don't you think that we can get to the bottom of this litigation if we just try to figure out who the plaintiff is?"

He stopped and stared right through me for half a second. Then he said "The plaintiff is P."

It was a double whammy — not only *what* he said but *that* he said it. Suddenly my body was shrinking severely and slithering south on a slippery slope. I looked upward toward the ceiling but all I could see was the underside of my desk.

Yes, dear reader, Professor Mansfield did actually say something on that memorable day. Only I wish he hadn't.

#### POSTSCRIPT

I became a law teacher. I don't use a syllabus. My students aren't happy about this. "Does this course have a syllabus?" they ask. No syllabus, I say. "But if there's no syllabus, how do we know what this course will cover?"

I feel like replying (except they wouldn't get it): In this course you don't *cover* anything. I cover *you*.

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*Robert W. Gordon\**

I met John Mansfield in 1968 at the house of a mutual friend. A few months later I started Harvard Law School and was pleased to find I had been assigned to his section of Torts. I had some pretty good teachers that year — Lon Fuller for Contracts, Lloyd Weinreb for Criminal Law, and the great Jack Dawson for Development of Legal Institutions — but I think John was the best of them. (Right up there with Dawson, anyway.) His method was not like anything I had expected from law school. He would have us look at a case one or two pages long and examine every sentence of it, teaching us patiently, by trial and error — mostly error, as it happened — to speak precisely when we spoke, to make sure we got the meaning, or the range of possible meanings, exactly right. I was initially baffled by this method because my interest in law was, and remains, primarily sociological and historical: I want to know what causes legal change, and what happens in social life as a result of that change. John's internal point of view and exacting textual and logical approach to legal doctrine struck me as awfully dry and rather alien. One of the best decisions I ever made was not to fight the approach but to swim along with it and learn to practice it. I never got to be as good at it as John was, but I still hear his voice speaking through mine when I teach first-year Contracts and ask students for better and sharper approximations of what they are trying to say. What John's example taught was to look at every recital of facts, every statement of a legal premise or conclusion, every policy judgment, with fresh eyes — even if one has seen it a hundred times before and thinks he knows what it means. Nothing was too familiar, banal, seemingly obvious, or seemingly absurd to escape that gimlet gaze and probing scalpel. I worked as his research assistant in the summer after my first year, helping him put together historical materials for what became his course on Church and State: he gave me a lot of rope and was fascinated by everything we found. With John one learned what it means to recover "radical innocence" as a state of mind before an idea or a text.

As I got to know John better and we gradually became friends, I came to see that he approached all experience in that way — new people and familiar ones, encounters with strangers, personal and political events — as if something original and wonderful were always on the verge of happening; and the feeling was contagious: in his company one came to see as he did. His was almost a child's way of seeing, but John was a seasoned man of the world, with a flinty astringency mixed

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with his natural sweetness of temper. Although he came from an old and reputedly wealthy family, he lived simply, austere even, in a small apartment on Walden Street, barely furnished save for a few prize pieces like a wooden chair that had once belonged to Justice Holmes.<sup>1</sup> For many years he had no car and, though he loved music, no record player. His one extravagance was foreign travel: he went all over the world, into remote and often dangerous places. He came back with wonderful stories of his adventures — he was a born raconteur, with a novelist's eye for detail and gift for dialogue. In time I was to learn other things about him, told to me by others because he rarely spoke of his accomplishments. I learned that as a law clerk he drafted the memorably majestic language that ended up in Chief Justice Warren's opinion for the Court in *Trop v. Dulles*,<sup>2</sup> which held that depriving a deserting soldier of his citizenship was cruel and unusual punishment.<sup>3</sup> In 1965 he went to the South with his colleague Mark De Wolfe Howe to volunteer as a lawyer for the Lawyers' Constitutional Defense Committee (LCDC) to represent civil rights plaintiffs in Mississippi. While there he helped make some law in a case that resurrected then-obscure Reconstruction civil rights statutes to recover damages for clients who had been denied service at the Pink Hat Café in Hollandale, Mississippi, and had then been run over by the owner's

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<sup>1</sup> Justice Holmes had left the chair to Justice Frankfurter, who left it to Mark De Wolfe Howe (Mansfield's Harvard Law School colleague), who left it to Mansfield.

<sup>2</sup> 356 U.S. 86 (1958).

<sup>3</sup> *Id.* at 91. The paragraphs I understand to be Mansfield's contribution to the opinion:

We believe . . . that use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.

The punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.

*Id.* at 101-02 (footnotes omitted). Mansfield's own Justice, Justice Frankfurter, dissented in the case.

car.<sup>4</sup> A lawyer who was with John at the time remembered John and his African American client walking to the courthouse through a crowd of angry onlookers.<sup>5</sup> A U.S. Marshal, supposedly there to protect them, directed a stream of racist insults their way, while John, unfazed, said, "Do your duty, Mr. Marshal." In 1970, appalled by the predicament of American soldiers in Vietnam facing court-martial for alleged offenses like insubordination, who were isolated, friendless, and without any real representation, John went to Vietnam as a defense lawyer and helped persuade a very resistant military to transport him and his colleagues to their clients; he remained on the board of the Lawyers Military Defense Committee.<sup>6</sup> A devout Catholic who never missed a Sunday Mass if he could help it, John had some role in the liberal reform wing of the Church and was friendly with members of Dorothy Day's radical Catholic Worker Movement like the anarchist-pacifist Ammon Hennacy.

In light of such commitments it was ironic that, in the battles over faculty appointments and tenure at Harvard in the 1980s and 90s, he was associated with the "conservative" wing of the faculty. As an observer of (and occasional visitor to) the school in those years, I mostly took the opposite side of those battles from his; and we had some pretty fierce arguments over them, though never to the point of straining our friendship. Once John took a stand, he could be very stubborn; and his stand cost him some friends among his colleagues in those years.

He compensated in part by immersing himself in the study of law and religion in India, which became one of his passions in his last decades of teaching. He also made some notable contributions to scholarship on the Religion Clauses of the First Amendment,<sup>7</sup> and especially on the law of evidence. In *Jury Notice* he pointed out that juries learn some facts formally, through proof in open court, and some facts informally, because such facts are part of the common background

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<sup>4</sup> The case is *Sherrod v. Pink Hat Café*, 250 F. Supp. 516 (N.D. Miss. 1965). Thirty years later, Mansfield gave a lecture in Leverett House telling the story of that summer. John H. Mansfield, John H. Watson, Jr. Professor of Law, Harvard Law Sch., Murdock Lecture at the Leverett House, Harvard and the Pink Hat Café: Some Recollections of the Civil Rights Movement and a Few Observations on Its Surprising Consequences (Apr. 12, 1995) (transcript on file with the Harvard Law School Library).

<sup>5</sup> I remember the story but have forgotten who told it to me: it may have been Alvin J. Bronstein, the lead lawyer for the LCDC.

<sup>6</sup> Some details, characteristically playing down his own involvement, are in John H. Mansfield, *Liberties in Vietnam: Defending the Troops*, CIV. LIBERTIES, Feb. 1972, at 1, 1. The Committee was never called upon to defend American soldiers accused of committing atrocities against Vietnamese civilians: interestingly, there was no shortage of American civilian counsel willing to represent those clients.

<sup>7</sup> Most notably, see John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847 (1984).

knowledge of (at least some of) the jurors.<sup>8</sup> The article is the only one I know of to ask what sort of background facts jurors may legitimately supply from their own knowledge. The perspective gained from this article informed his later, savage but astute, critique of the Supreme Court's *Daubert v. Merrell Dow Pharmaceuticals*<sup>9</sup> decision purporting to require a higher standard of admissibility for expert testimony on "scientific" issues.<sup>10</sup> John considered this decision "An Embarrassing Episode in the History of the Law of Evidence" for its failure to define basic terms (like "scientific"), its arbitrary demands for extra probative value from an entire class of evidence, and its unreasoned distrust of juror competence.<sup>11</sup> Subsequent experience has, I think, largely validated his critique.

My favorite memories are of the walks we took together in the White Mountains of New Hampshire and in California. John was the ideal travel companion: setbacks and inconveniences only magnified his good humor. A ten-mile hike once turned into a twenty-five mile hike because we got lost; when cold and wet and hungry we stumbled home hours later, John was still gaily telling stories. He quickly came to easy terms with strangers of whatever class or age or sex. Once on a hike in Point Reyes, we suddenly came upon a pond in which two young women were splashing, apparently without any clothes; they waved to us; in a second John had his clothes off, dove into the pond, and was soon in animated conversation (I followed with somewhat more hesitation). On those walks it seemed as if all of the vexing trivia of life were burned away; the two of us were alone with nature and with thoughts close to the marrow of what really mattered. I can still hear John, serious but also raffish and debonair, asking in his amused clear challenging voice, "Well, what exactly do you mean by that?"

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<sup>8</sup> See John H. Mansfield, *Jury Notice*, 74 GEO. L.J. 395 (1985).

<sup>9</sup> 509 U.S. 579 (1993).

<sup>10</sup> See John H. Mansfield, *Scientific Evidence Under Daubert*, 28 ST. MARY'S L.J. 1 (1996).

<sup>11</sup> John H. Mansfield, *An Embarrassing Episode in the History of the Law of Evidence*, 34 SETON HALL L. REV. 77 (2003).

*Martha Minow\**

He asked astute questions and he invited others to ponder them with him. This practice is what made John Mansfield such a fine teacher, instructing students during his fifty years of active service and more after he took emeritus status. A truth-seeker, his pursuits ranged widely and his questions pressed deeply. What should be the scope of protection for the free exercise of religion when in conflict with military service or with effective government oversight of nonprofit organizations?<sup>1</sup> How can a free democracy accommodate multiple religious groups — and can it promote tolerant versions of a religion?<sup>2</sup> How should judges, in admitting testimony, administer claims of scientific expertise?<sup>3</sup> When, if ever, should protections of one constitution extend beyond the borders of its own nation?<sup>4</sup> How should the United States develop its courts, including its jury system and rules of evidence?<sup>5</sup> How should India, the world's most populous democracy, handle potentially divisive religious speech?<sup>6</sup>

In his expertise in the laws of India and in his devotion to protection for conscience, he stretched the imaginations and concerns of the Harvard Law School community even as he mentored students and alumni around the world. Exploring broadly, John's work nonetheless constructed an incorruptible "plumb line."<sup>7</sup> He turned his subtle and

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<sup>1</sup> See John H. Mansfield, *Conscientious Objection — 1964 Term*, in RELIGION AND THE PUBLIC ORDER: AN ANNUAL REVIEW OF CHURCH AND STATE AND OF RELIGION, LAW, AND SOCIETY 3 (Donald A. Giannella ed., 1966) [hereinafter Mansfield, *Conscientious Objection*]; John H. Mansfield, *Constitutional Limits on the Liability of Churches for Negligent Supervision and Breach of Fiduciary Duty*, 44 B.C. L. REV. 1167 (2003).

<sup>2</sup> See John H. Mansfield, *The Personal Laws or a Uniform Civil Code?*, in RELIGION AND LAW IN INDEPENDENT INDIA 139 (Robert D. Baird ed., 1993); John H. Mansfield, *Promotion of Liberal Islam by the United States*, in ENEMY COMBATANTS, TERRORISM, AND ARMED CONFLICT LAW 85 (David K. Linnan ed., 2008) [hereinafter Mansfield, *Promotion of Liberal Islam*]; John H. Mansfield, Book Review, 63 J. ASIAN STUD. 212 (2004) (reviewing GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE* (1999)).

<sup>3</sup> See John H. Mansfield, *Scientific Evidence Under Daubert*, 28 ST. MARY'S L.J. 1 (1996).

<sup>4</sup> See John H. Mansfield, *The Religion Clauses of the First Amendment and Foreign Relations*, 36 DEPAUL L. REV. 1 (1986) [hereinafter Mansfield, *Religion Clauses*].

<sup>5</sup> See JACK B. WEINSTEIN, JOHN H. MANSFIELD, NORMAN ABRAMS & MARGARET A. BERGER, *EVIDENCE: CASES AND MATERIALS* (9th ed. 1997 & Supp. 2005); John H. Mansfield, *Jury Notice*, 74 GEO. L.J. 395 (1985); John H. Mansfield, *Peremptory Challenges to Jurors Based upon or Affecting Religion*, 34 SETON HALL L. REV. 435 (2004) [hereinafter Mansfield, *Peremptory Challenges*].

<sup>6</sup> See John H. Mansfield, *Religious Speech Under Indian Law*, in COMPARATIVE CONSTITUTIONAL LAW 205 (Mahendra P. Singh ed., 1989).

<sup>7</sup> See *Plumb Line Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/plumb%20line> (last visited Oct. 26, 2014) [<http://perma.cc/XPA2-YWR4>] (defining "plumb line" as "a line (as of cord) that has at one end a weight (as a plumb bob) and is used espe-

nimble mind to the very rules governing truth-seeking; he adhered to standards of integrity and principle; and he provided a sterling example of an upright life.

*Evidence.* — Perhaps the most obvious pull in his commitment to truth-seeking was his constant exploration of proof and corroboration through facts relevant to the truth of a belief or assertion. Throughout his professional life, John taught and evaluated the federal rules governing the treatment of evidence. Coauthor of a leading casebook and consummate teacher of the subject, John guided generations of students who became litigators, judges, and professors of evidence. Judge Richard Posner jocularly prefaced remarks at a conference on teaching evidence and trial advocacy by noting how pleased he was to encounter there “Professor John Mansfield of the Harvard Law School, who taught me evidence forty years ago. If I have made any errors in my evidentiary rulings as a judge, or in these remarks, I am sure they can be referred to his instruction.”<sup>8</sup> Professor David Kennedy, another former student, taught evidence for many years because Professor Mansfield made it the most intellectual and probing inquiry. The study of evidence, inevitably confronting questions of fairness, the nature of knowledge, and the limitations of human understanding, matched John’s philosophic bent and sense of perspective.

*Individuals, Religions, and Government.* — No single principle can capture simultaneous commitments to individual liberty, equal treatment of individuals and of groups, and democratic government, but earnest and rigorous analysis could make progress in advancing all of these principles in practice, as John tried to demonstrate. He located a threat to liberty and to popular participation in government in the treatment of allegedly expert testimony at trial.<sup>9</sup> In his hands, a critique of the Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>10</sup> became an examination of the potential influence of powerful economic interests, the appeal of being associated with the aura of science, the scorn “elite scientists feel toward what they consider bad science,”<sup>11</sup> and all-too-common distrust of juries.<sup>12</sup>

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cially to determine verticality,” and as “a line directed to the center of gravity of the earth: a vertical line”).

<sup>8</sup> Richard A. Posner, *Clinical and Theoretical Approaches to the Teaching of Evidence and Trial Advocacy*, 21 QUINNIPIAC L. REV. 731, 731 (2003).

<sup>9</sup> John H. Mansfield, *An Embarrassing Episode in the History of the Law of Evidence*, 34 SETON HALL L. REV. 77 (2003).

<sup>10</sup> 509 U.S. 579 (1993).

<sup>11</sup> Mansfield, *supra* note 9, at 83.

<sup>12</sup> *Id.* at 80–87 (discussing *Daubert*, 509 U.S. 579).

John addressed other challenging topics, such as the right against self-incrimination despite governmental needs for information<sup>13</sup> and conscientious objection to military service.<sup>14</sup> It may have been this interest in discerning the scope of individual rights alongside the powers of democratic government that led him to write what became “[t]he leading article on the Establishment Clause’s application abroad” five years before judicial case law on the subject.<sup>15</sup> After 9/11, top government officials in the United States held meetings on the issue and involved Professor Mansfield in an effort to clarify how much the United States could engage religious communities abroad as part of a strategy to prevent future conflicts.<sup>16</sup> Indeed, John remained the leading expert on the subject, advising and writing in his characteristic way, with “more questions raised than answered,”<sup>17</sup> and publishing further thoughts on the topic in 2008.<sup>18</sup>

John anticipated the evolution of the Supreme Court’s views about public aid to pervasively religious entities by viewing the rule as “not of such severity as to invalid the core freedom protected by the [F]irst [A]mendment.”<sup>19</sup> In his analysis of the potential collision between an impartial jury and equal protection posed when lawyers strike to exclude prospective jurors based on their religion<sup>20</sup> — one of the first discussions of the topic — John stressed that sharpening beliefs about the way the world works, about the good, and about values are crucial to ensuring that the jury offers a fair representation of “cognizable groups” — groups that share such beliefs.<sup>21</sup> The ability to hold and express such beliefs undergirds the Free Exercise Clause, he noted, which should extend to individuals at risk of exclusion from a jury through use of a peremptory challenge.<sup>22</sup> He also explored how such a group could be eligible for heightened judicial protection under the Equal Protection Clause.<sup>23</sup> At the same time, he emphasized that the right to an impartial jury is an interest of the defendant.<sup>24</sup> He offered an initial set of sensible conclusions: “Jurors may not bring to bear re-

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<sup>13</sup> See John H. Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government’s Need for Information*, 1966 SUP. CT. REV. 103.

<sup>14</sup> See Mansfield, *Conscientious Objection*, *supra* note 1.

<sup>15</sup> Jesse Merriam, *Establishment Clause-Trophobia: Building a Framework for Escaping the Confines of Domestic Church-State Jurisprudence*, 41 COLUM. HUM. RTS. L. REV. 699, 700 (2010) (citing Mansfield, *Religion Clauses*, *supra* note 4).

<sup>16</sup> *Id.* at 703–04.

<sup>17</sup> Mansfield, *Religion Clauses*, *supra* note 4, at 1.

<sup>18</sup> See Mansfield, *Promotion of Liberal Islam*, *supra* note 2.

<sup>19</sup> Mansfield, *Religion Clauses*, *supra* note 4, at 34.

<sup>20</sup> Mansfield, *Peremptory Challenges*, *supra* note 5.

<sup>21</sup> *Id.* at 437 (internal quotation marks omitted).

<sup>22</sup> See *id.* at 464–65, 468–69.

<sup>23</sup> *Id.* at 463–64.

<sup>24</sup> *Id.* at 464.

ligious beliefs even though they are confident that the beliefs are held by a group of substantial size in the population, perhaps even by a majority. Thus the fair cross-section standard of the Sixth Amendment is limited by the Establishment Clause.”<sup>25</sup> But he also ended with “another perspective”<sup>26</sup> undoing the prior analysis in light of “the norm embodied in the Religion Clauses, which says that if certain advantages are given to nonreligion they must also be given to religion” so “religion-based peremptories [would have to] be disallowed.”<sup>27</sup> John would probe and reconsider a problem, as he did here in print. Even more telling now is his exquisite articulation of the competing arguments of the litigant and the religious juror,<sup>28</sup> along the way assessing contrasting reasons governing the use of peremptory challenges in the contexts of race and sex.<sup>29</sup> His published analysis affords those who knew him a vivid reminder of his capacity to wrestle with a knotty problem and those who did not have the benefit of learning from him a welcome glimpse of his talents.

*Sterling Example.* — John came to Harvard Law School following his studies at Harvard College, and he excelled throughout his time as a student. He demonstrated not only intellectual prowess but also other fine qualities. Dean Erwin Griswold recommended him for a choice clerkship with these words: “During the fall I have been looking for the outstanding one of our students and recent graduates to recommend to you for one of your law clerkships next year. I believe I have found him. In terms of legal training, all around qualifications, personality, and maturity, I think he is well up to the qualifications of [your two prior clerks].”<sup>30</sup> John later explained that his boss, Justice Felix Frankfurter, “knew of what poor stuff we were made. But his expectations of us did indeed arouse a desire to respond, to be what he assumed we were, to live as nobly and as usefully as he suggested we

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<sup>25</sup> *Id.* at 477.

<sup>26</sup> *Id.* at 483.

<sup>27</sup> *Id.* at 484. While serving on the Court of Appeals for the Third Circuit, then-Judge (now Justice) Samuel Alito wrote a unanimous opinion suggesting that a juror could not be struck solely based on religion. See *Bronshtein v. Horn*, 404 F.3d 700, 725 (3d Cir. 2005). A later commentator argued that the Constitution disallows use of peremptory challenges based only on stereotypes about religions but permits their use in response to specific statements by the juror about his or her beliefs. Daniel M. Hinkle, *Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?*, 9 BUFF. CRIM. L. REV. 139, 141 (2005). Without word by the Supreme Court on the issue, some argue that the permissible use of peremptory challenges on the basis of religion has led to continued racial exclusions, using religion as a pretext. See, e.g., Christie Stancil Matthews, *Missing Faith in Batson: Continued Discrimination Against African Americans Through Religion-Based Peremptory Challenges*, 23 TEMP. POL. & CIV. RTS. L. REV. 45 (2013).

<sup>28</sup> See Mansfield, *Peremptory Challenges*, *supra* note 5, at 468–77.

<sup>29</sup> *Id.* at 482–83.

<sup>30</sup> ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 79 (2006) (comparing John Mansfield to “Mr. Gunther and Mr. Stern”) (internal quotation marks omitted).

might.”<sup>31</sup> How telling it is that John’s former student, Professor James Sonne, chose these very words to pay tribute upon Professor Mansfield’s retirement.

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*Frederick Schauer\**

In the fall of 1969, I was a student in John Mansfield’s Evidence course. The experience was not memorable for either of us. But now, forty-five years later, and as someone who spends some of my time teaching and writing about the law of evidence, I realize that my failure then to make an impression on John and his failure then to make an impression on me were both entirely my fault. Only in retrospect, and only with an increased knowledge of, and interest in, evidence, do I realize how much John had to teach me, and how much I could have learned from him.<sup>1</sup>

Let me be more specific. Although John’s teaching of, and case-book on,<sup>2</sup> evidence were appropriately comprehensive, his particular interest was in the topic that we can call the “knowledge base” of judges and jurors. When the jury system first emerged, it was understood (and desired) that jurors would be aware of (or would acquaint themselves with) the parties and sometimes even of the events at issue,

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<sup>31</sup> James A. Sonne, *Harvard’s Good Servant*, HARV. L. BULL., Fall 2008, at 6, 6, <http://today.law.harvard.edu/harvards-good-servant/> [<http://perma.cc/TTD9-S4MZ>] (quoting John H. Mansfield, Remarks at a Meeting at the Harvard Law School in Commemoration of Mr. Justice Frankfurter (Feb. 26, 1965), reprinted in John H. Mansfield, In Memoriam, *Felix Frankfurter*, 78 HARV. L. REV. 1529, 1533 (1965)) (internal quotation marks omitted).

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<sup>1</sup> I feel privileged to have gotten to know John much better when I returned to Harvard as a faculty member, and indeed as a teacher of Evidence at the Harvard Law School. Although John and I discussed evidentiary matters on occasion, and found ourselves at the same social events now and then, our principal contact was through a moral, political, and legal philosophy dinner and discussion group known as the Austinians. The group was founded in 1969 or 1970 and persisted in a desultory manner, and with a changing cast of characters, for about thirty years. Some of the founding members claim that the name came from John Austin, the nineteenth-century legal theorist; others that the group was named in honor of J.L. Austin, the mid-twentieth-century linguistic philosopher; and at least one member attributed the name to a seventeenth-century horse thief of some repute. John was an active and engaged member of the group from its early years, and although jurisprudence was never his primary scholarly or pedagogic interest, his knowledge of the field and his penetrating insights were a large part of what made the sessions so engaging.

<sup>2</sup> JACK B. WEINSTEIN, JOHN H. MANSFIELD, NORMAN ABRAMS & MARGARET A. BERGER, *EVIDENCE* (9th ed. 1997).

and would use this knowledge to inform their verdicts.<sup>3</sup> Over time, however, common law systems have engaged in a dramatic about-face, and we now select jurors not for their knowledge of the events and the parties but precisely for their ignorance. We expect the minds of jurors (and judges serving as triers of fact) to be clean slates, and thus that decisions will be based only on what is heard in open court and not on what the jurors or judges might otherwise know.<sup>4</sup>

But of course none of us is a truly clean slate in this sense. We know facts about the world, and the facts we know vary from person to person. More importantly, the facts that jurors know inform the decisions they are required to make, and thus it is simply not true that jury decisionmaking is based entirely on the evidence that is presented in court, and which is accordingly subject to cross-examination and constrained by the rules of evidence. In reality, jury decisionmaking is based, at least in part and more likely substantially, on what jurors themselves bring to the adjudicatory process.

The problem of juror knowledge fascinated and troubled John in two ways. Most significantly, and in a noteworthy article in *The Georgetown Law Journal*, he focused on the pervasively important but often scholarly unfashionable topic of evidentiary relevance.<sup>5</sup> In order for a piece of evidence to be relevant, some proposition must be made more likely (or more unlikely) with the evidence than without.<sup>6</sup> But making this fundamentally Bayesian judgment requires that we know things about the world. It is relevant that the defendant charged in a criminal case with embezzlement is an accountant but not that he is a Capricorn because we know that the former is probabilistically indicative of someone's ability to commit the crime of embezzlement and that the latter tells us nothing. But we can at least imagine a possible world in which the month of one's birth was actually indicative of certain behavioral tendencies while one's profession was not. Similarly, you have to know something about cars and driving in order to understand how a defective hood latch could increase the probability of an accident in a way that a defective trunk latch could not.

What John recognized about the dependence of factual inference on empirical knowledge was the very variability of judge and juror knowledge. This may seem obvious to some, but it has often been de-

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<sup>3</sup> See John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 203 (1988).

<sup>4</sup> See JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW 245-46 (2009).

<sup>5</sup> John H. Mansfield, *Jury Notice*, 74 GEO. L.J. 395 (1985).

<sup>6</sup> FED. R. EVID. 401(a) (explaining that evidence is relevant if "it has any tendency to make a fact [of consequence in determining the action] more or less probable than it would be without the evidence").

nied by those who create and write about the law of relevance. Indeed, it was traditionally assumed that there was some sort of common knowledge — Thayer called it “general experience”<sup>7</sup> — possessed by all or virtually all of the people likely to become judges or jurors. Consequently, if some fact was part of this common knowledge, it could provide the basis for a factual inference without the necessity of explicit proof. But any fact not part of this repository of human knowledge could be taken into account only if admitted into evidence in the normal fashion.

But of course this idea of common knowledge is a fiction — common knowledge is often not common. Consequently, John wrestled with the problem of reconciling the empirical presuppositions of factual inference both with the logistical impossibility of treating all of those presuppositions as matters requiring formal proof and also with the reality of there being more variance in knowledge about those presuppositions than the traditional view was willing to acknowledge.<sup>8</sup> His solution — an elaborate multifactor and admittedly discretionary approach<sup>9</sup> — sacrificed simplicity and elegance for realism and trust in judges. No doubt others might suggest different solutions. But what John most valuably contributed was the very identification of a previously ignored problem, a problem whose consequences increase as the experiences and backgrounds of the pool of jurors and judges became increasingly diverse.

John framed the problem he had unearthed as one of jury *notice*, thus connecting it with the topic of judicial notice. By making this connection, he started with the most concrete manifestation of the issue of juror background knowledge. Just as judges may take judicial notice of widely known or easily verified facts,<sup>10</sup> so too do jurors, usually invisibly, do much the same thing in drawing inferences from the facts they are given. If a witness testifies that she observed the driver of a car slurring his speech, walking unsteadily, and speaking in an abnormally loud voice, the jury is entitled to conclude that the driver was drunk, even though one must be aware of contingent empirical facts about the world in order to infer inebriation from the aforesaid observed behaviors. But as John recognized, the problem extends well beyond the domain of factual inference alone. It extends to questions of jury selection,<sup>11</sup> because once the assumption of truly common knowledge is undercut, the necessity of exploring the “background infor-

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<sup>7</sup> JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 265 (Boston, Little, Brown & Co. 1898).

<sup>8</sup> Mansfield, *supra* note 5, at 411–19.

<sup>9</sup> See *id.* at 396–402.

<sup>10</sup> See FED. R. EVID. 201.

<sup>11</sup> Mansfield, *supra* note 5, at 402–06.

mation” that jurors bring to the proceedings becomes exponentially more important.<sup>12</sup> Moreover, the question of background juror knowledge is highly relevant to crafting jury instructions,<sup>13</sup> to determining when bringing specialized knowledge into the jury room does or does not constitute jury misconduct,<sup>14</sup> to circumscribing the boundaries of permissible argument by counsel,<sup>15</sup> and much else. John identified all of these topics, and in doing so set out and opened up a research agenda that others might still now be well-advised to follow.

The most obvious manifestation of John’s concern with the background factual knowledge of the trier of fact, however, was the particular problem of expert testimony, an issue he pursued in his later work.<sup>16</sup> In ways that some of us find anomalous,<sup>17</sup> the law of evidence has long subjected the testimony of experts to a higher standard than that of lay witnesses, partly because experts are given broader latitude in their testimony than nonexperts, and partly because of the longstanding but arguably erroneous belief<sup>18</sup> that jurors are especially likely to be “bamboozled” by experts with fancy credentials and technical language.<sup>19</sup> But as John recognized, the line between the expert and the nonexpert is dependent on what we can expect nonexperts to know. Consequently, the entire topic of expert testimony rests on a foundation of assumptions about common knowledge, assumptions that John, in all of his writings about relevancy and inference, was at pains to challenge. And thus his objections to the entire *Daubert-Kumho* regime,<sup>20</sup> a regime he described with an uncharacteristic lack of gentility as “an embarrassing episode,”<sup>21</sup> were based in part on the Supreme Court’s injection of a reliability criterion that did little more than add a new basis for inconsistency in evidentiary rulings, and in part on the incompatibility between the heightened reliability thresh-

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<sup>12</sup> *Id.* at 403.

<sup>13</sup> *Id.* at 410.

<sup>14</sup> *Id.* at 410–11.

<sup>15</sup> *Id.* at 422–24; see also John H. Mansfield, *Evidential Use of Litigation Activity of the Parties*, 43 SYRACUSE L. REV. 695, 695–96 (1992) (discussing the influence that the conduct of a party’s lawyer can have on a trier of fact’s determination of relevance).

<sup>16</sup> John H. Mansfield, *An Embarrassing Episode in the History of the Law of Evidence*, 34 SETON HALL L. REV. 77 (2003) [hereinafter Mansfield, *An Embarrassing Episode*]; John H. Mansfield, *Scientific Evidence Under Daubert*, 28 ST. MARY’S L.J. 1 (1996).

<sup>17</sup> See Frederick Schauer & Barbara A. Spellman, *Is Expert Evidence Really Different?*, 89 NOTRE DAME L. REV. 1 (2013).

<sup>18</sup> *Id.* at 13–18.

<sup>19</sup> See *SmithKline Beecham Corp. v. Apotex Corp.*, 247 F. Supp. 2d 1011, 1042 (N.D. Ill. 2003) (citing *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1301–02 (Fed. Cir. 2002)), *aff’d on other grounds*, 403 F.3d 1331 (Fed. Cir. 2005).

<sup>20</sup> *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). The regime also includes *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

<sup>21</sup> Mansfield, *An Embarrassing Episode*, *supra* note 16, at 77 (capitalization omitted).

old for scientific evidence and the standards of relevancy otherwise applied throughout the corpus of evidence law. Because John recognized that the expert/nonexpert distinction was ultimately dependent on shifting conceptions of juror knowledge, he was troubled by a sharp divide between expert and nonexpert testimony. Thus he insisted that the very contingency and variability of background factual knowledge, and consequently of the expert/nonexpert distinction itself, argued for viewing expert testimony as continuous rather than differentiated from lay testimony, which was exactly the opposite of the approach that the Supreme Court had adopted.

The focus on the informational and experiential knowledge base of jurors (and judges), and its implications for multiple facets of evidence law and trial procedure, is John's signature contribution to the law of evidence. In recognizing the problem, and in foreshadowing the numerous avenues of research that might follow from this recognition, John laid the path for future scholarship about the often-unchallenged assumptions of common knowledge, common experience, and common sense that pervade the doctrine and the academic literature of the law of evidence. Both courts and scholars could do much worse than to follow the paths that John so helpfully marked.

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*James A. Sonne\**

In these pages almost fifty years ago, a young Harvard Law professor named John Mansfield honored the passing of his dear friend and mentor Justice Felix Frankfurter: "He knew of what poor stuff we were made. But his expectations of us did indeed arouse a desire to respond, to be what he assumed we were, to live as nobly and as usefully as he suggested we might."<sup>1</sup> And so it also was with the Professor and me.

Professor Mansfield — I never could bring myself to call him John, so well did the title fit — died last April. But long will endure his contributions to the law, to his former students, and to *the* Harvard Law School (as he insisted on calling it). He had a truly remarkable intellect, a keen interest in all those he encountered, a knack for asking just the right question, and a soft yet hearty laugh I can still hear today. Professor Mansfield was one of the most engaging and engaged men I

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<sup>1</sup> John H. Mansfield, In Memoriam, *Felix Frankfurter*, 78 HARV. L. REV. 1529, 1533 (1965).

have known. As he wrote of Justice Frankfurter, “[t]he world around him teemed with matter for his attention.”<sup>2</sup>

John Mansfield defied categorization. He was a traditionalist who taught in a probing and demanding Socratic style, and spent his entire professional life in Cambridge — save for one year clerking for the legendary Justice and another for California’s Justice Roger Traynor. He was also a poet and native San Franciscan who travelled the world seeking adventure and new ideas. He first married at age seventy-five, and cherished the past decade with his beloved Maria Luisa, an accomplished Islamic art scholar. I remember well a lunch the three of us shared at the Charles Hotel shortly after they wed; we talked and laughed for hours. What a fun and fascinating pair they made.

Among my fondest memories of law school were late afternoon chats in Professor Mansfield’s office. He was invariably dressed in a coat and tie, and we would sit in his “Harvard chairs” — the ones with the spindled backs — as the sun dappled the trees outside. We might discuss Dante or the Federalist Papers, but would also explore topics like the culture of contemporary music or the various motivations for getting a tattoo. Despite his seemingly conventional demeanor, he was perpetually curious and broad-minded.

We corresponded for years after I graduated. His letters often raised a technical point of law to explore, and yet they were always personal, warm, and witty. In describing a speech by a long-lost colleague, “He didn’t look much older, but creaked a little as he mounted the platform”;<sup>3</sup> or upon receiving a wedding invitation, “I can say from my own experience that the married state is a wonderful one to be in.”<sup>4</sup> Professor Mansfield wore his sophistication lightly.

John Mansfield was an academic whose depth and breadth of work — with articles on the jury system, rules of evidence, church and state, and even the law of India — reveal a brilliant yet practical thinker. Much of his writing concerned torts and evidence, where he argued for the reconceptualization of many assumption-of-risk cases as informed-choice cases (excusing breaches of duty, but for reasons apart from a defendant’s moral culpability)<sup>5</sup>; challenged the broad admissibility of pleadings (fearing parties may abandon reasonable positions on which they might prevail at trial)<sup>6</sup>; and criticized the expert-evidence standard articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>7</sup>

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<sup>2</sup> *Id.* at 1532.

<sup>3</sup> Letter from John H. Mansfield to author (Nov. 12, 2001) (on file with author).

<sup>4</sup> Letter from John H. Mansfield to author (Apr. 8, 2004) (on file with author).

<sup>5</sup> See John H. Mansfield, *Informed Choice in the Law of Torts*, 22 LA. L. REV. 17 (1961).

<sup>6</sup> See John H. Mansfield, *Evidential Use of Litigation Activity of the Parties*, 43 SYRACUSE L. REV. 695 (1992).

<sup>7</sup> 509 U.S. 579 (1993).

as threatening the jury trial right (lamenting what he considered the Court's incomplete analysis of what constitutes "scientific" evidence).<sup>8</sup> He wrote in precise, scholarly language, but with sensitivity to the real-world effects of legal rules on litigants and those who represent them.

Of particular interest to me was Professor Mansfield's work in law and religion. We shared a passion for the subject, and it was a recurring topic of our correspondence; indeed, Mansfield's popular church-state class sparked a path leading to my having founded Stanford Law School's Religious Liberty Clinic. His teaching brought to life the American story of religious freedom, from Anne Hutchinson and James Madison to Larry Witters and Alfred Smith. His writing included thoughtful articles on extending *Batson*<sup>9</sup> limits on jury challenges to religion (suggesting faith-based strikes may be unconstitutional);<sup>10</sup> Establishment Clause rules for foreign aid (proposing a flexible approach that considers local culture);<sup>11</sup> and the underlying philosophy of the Religion Clauses (arguing they reflect a particular view of the human person and its destiny).<sup>12</sup> Like his other work, these pieces are at once refined and humble; words befitting a spelling bee might appear (for example, tergiversation, Erastianism), but at the service of real problems and in concrete situations.

A devout Roman Catholic, John Mansfield drew strength from his faith and had an abiding reverence for the Church's traditions, both liturgical and intellectual — much in the manner of Cardinal John Henry Newman, whom he greatly admired. A fellow Harvard alumnus recently told me that during the trying times of his first year he drew great comfort from seeing Professor Mansfield kneeling in prayer at St. Paul Parish. In these and many other small ways, the Professor embodied Newman's adage, "Knowledge is one thing, virtue is another."<sup>13</sup> For me, that may be his most enduring legacy.

During his half century of work and life at Harvard, John Mansfield earned many friends and admirers, and changed many people's lives for the better. I am honored and blessed to have been among them.

<sup>8</sup> See John H. Mansfield, *Scientific Evidence Under Daubert*, 28 ST. MARY'S L.J. 1 (1996).

<sup>9</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>10</sup> See John H. Mansfield, *Peremptory Challenges to Jurors Based upon or Affecting Religion*, 34 SETON HALL L. REV. 435 (2004).

<sup>11</sup> See John H. Mansfield, *The Religion Clauses of the First Amendment and Foreign Relations*, 36 DEPAUL L. REV. 1 (1986).

<sup>12</sup> See John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847 (1984).

<sup>13</sup> JOHN HENRY NEWMAN, *THE IDEA OF A UNIVERSITY* 91 (Notre Dame Press 1986) (1852).