

In Memoriam: Fred C. Zacharias

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I am not a scholar of legal profession issues but rather someone who knew Fred well for over twenty years. At the same time I cannot separate Fred from his scholarship because the themes, the frequency, the intensity, the positions taken, and viewpoints in that scholarship all reflect Fred's personality and his commitments. So, in this brief encomium, for that is what I would like it to be, I will focus on Fred's *oeuvre*, including one of his recent pieces, as a way to talk about Fred and his life in the midst of the sadness of his early passing.

In the April 2009 issue of the *Minnesota Law Review*,¹ Fred argued well, I think, that the old saw that the law is a self-regulating profession is an overstated myth and that our complex web of legal profession regulations, coming from various jurisdictions and for various substantive reasons, is really a system of mixed regulation including some self-regulatory features and many state, federal, and local rules that Fred wished to relabel "co-regulation."² This is typical of Fred's scholarly work and in the next paragraphs, each starting with an italicized sentence, I will describe Fred's characteristic scholarly tendencies that reflected in turn his personality and convictions.

Fred liked to tilt against the conventional wisdom. This is such an important part of Fred that I have put it first. This trait was wonderful for the

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1. See Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009).

2. See *id.* There is, to some extent, a companion piece written with Fred's close colleague, Bruce A. Green. See generally Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73 (2009).

world of scholarship but occasionally led him to advocate positions that others thought blatantly wrong or ill-advised. None of this deterred Fred. It was such a part of Fred and in retrospect, such a wonderful and admirable thing. It was in the tradition of the common law system that we all benefited from this imperative within him.

Fred argued for things passionately. Fred could and did get up a head of steam frequently for an idea, and he rarely ever gave up. He wrote many articles. Now of course he trimmed and curtailed and reshaped his ideas, but he rarely discarded them completely. I can remember him telling me twenty years ago or more that the law was not a self-regulating profession. I told him that I believed that the common law was desirable—and had been successful—over the sweep of time due to the relative independence of the bar from the state. This did not slow him down at all.

Fred liked to argue for change but was not a revolutionary. Fred's *Minnesota Law Review* article illustrates well that although he was ready to toss away big labeling concepts often—"self-regulation" for "co-regulation"—he usually did not immediately propose major changes in the substance of that regulation. He was a firm believer that numerous facts and circumstances are the anvil of legal formulation and reformulation rather than naked and abstract principles and rules. Fred was a policy person and not a principle person, although some of his policies sure looked like principles to me.

Fred liked to argue for organizational changes that made sense of existing confusion or made things more coherent. The *Minnesota Law Review* article, and his first big article on the First Amendment in the *Cornell Law Review* many years ago,³ worked largely in a realm of organizational structures, even fearsomely complex ones, rather than proposing a fundamental reworking of an underlying aspect of doctrine. Now, I know Fred had doctrinal preferences and other views on outcomes, but his scholarship frequently aimed at a structural reconceptualization rather than rule shifting.⁴ Not everyone liked this approach, but it sure produced some interesting insights and could ultimately, if adopted, be more significant in some cases. Probably Fred's strongest article was in

3. See Fred C. Zacharias, *Flowcharting the First Amendment*, 72 CORNELL L. REV. 936 (1987); see also Fred C. Zacharias & Bruce A. Green, *The Duty To Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1 (2009).

4. See Fred C. Zacharias, *Are Evidence-Related Ethics Provisions "Law"?*, 76 FORDHAM L. REV. 1315 (2007); Fred C. Zacharias, *The Preemployment Ethical Role of Lawyers: Are Lawyers Really Fiduciaries?*, 49 WM. & MARY L. REV. 569 (2007).

this mode and argued about the dual impulses in legal professional rules: role-focused versus integrity-focused prescriptions.⁵

Fred believed that lawyers are advocates but not political figures. Fred was most explicit in articulating his rejection of a more ideological role for lawyers in an article he contributed to a symposium, which had a premise that lawyers can and should be advocates for explicitly “liberal” political positions to ensure the proper functioning of a democracy. Fred wrote:

My experience as a public interest lawyer makes me question broad generalizations about the functions lawyers can, must, or should fulfill in promoting democratic values. For every liberal lawyer-advocate of individual rights there is usually an equally reasonable conservative lawyer-advocate for restraint in judicial or executive enforcement of those rights. . . . When there is no threat to the rule of law—either in an individual case or more globally—how each lawyer acts is a personal moral choice rather than a matter of role.⁶

Fred was more concerned about what I would call corruption risks—the powerful looking out for themselves—rather than excessive state control risks. Fred believed that people would and did operate primarily in terms of their own self-interest, particularly the powerful. So, it was to some extent a policy preference against self-regulation that led him to wish to reconstruct the area as one of coregulation. As I told him, I thought he risked substituting one self-interested group, lawyers, with another, state officials, who also have self-interested views, although perhaps different ones. But Fred had congenital distrust for clubbiness and received wisdoms and thus thought control over or checking of this mainly by a profession independent of the “club” zealously advocating for clients and positions was the best guarantee of fairness.

Fred could seem impatient with others or even dismissive but was also generous and thoughtful. Particularly in the early stages of a project Fred would adopt his working thesis and could sometimes seem dismissive of the work and viewpoints of others. Some found this unattractive or misguided. I actually found this to be a pretty common trait among those trying a case or preparing to try a case. Occasionally they would change their minds—as did Fred—but rarely did they come

5. See Fred C. Zacharias, *Integrity Ethics*, 22 GEO. J. LEGAL ETHICS 541 (2009).

6. Fred C. Zacharias, *True Confessions About the Role of Lawyers in a Democracy*, 77 FORDHAM L. REV. 1591, 1609 (2009).

back to you and admit that they had altered course. Fred was better at this than many.

Fred brought to his scholarship on the legal profession a commitment, in terms of work over time, rarely matched in range and volume. Fred liked to work and to write. He liked to be stewing about an issue. He really liked to research a matter. Finally, and most importantly, in a field in which there are not a lot of people writing consistently over time, Fred was one of the most prolific and productive. I know he did not do this to prove a point; I just think this was what Fred wanted to do.

Fred was an individualist, not an adherent of a group or school of thought. As I mentioned above, Fred had lots of opinions. He was politically committed and fiercely proud of his heritage and family. All of this made him aware of the risks of cheap ideologies or “pure theories of law,” or anything like that for that matter. He was both humanistic and humane. When he started teaching law he was perhaps a little inflexible at times on particular issues, but at the end of his life he was a wonderful, considerate human being with preferences and attachments but an abhorrence of rigidity in the great issues of life. Probably his greatest value commitment was to freedom of speech and thought. He had an enduring underlying concern for individual humans, particularly those not in the dominant power or ideological elite.

I hope my italicized comments begin to paint a picture of Fred the human being based on what he wrote and did professionally. But to leave it at that would be incomplete and insensitive in view of Fred’s death in late 2009. So, to complete this discussion of Fred I want to say a bit about the two times that we talked about the possibility of death in view of his cancer. First, let me say that he was mad about his diagnosis. He was not ready to face something like this due to his sense that he had more to offer to the world and for his family. Second, he left behind the impatience and the touch of inflexibility of his early years and faced up to the possibility that this illness could be terminal in a generous, mature, and peaceful way. Third, he did not want to stop working. This was for me the greatest solace: that in the face of this diagnosis, Fred did not stop being the Fred whom I knew, respected, and even treasured. But the cancer did catch him suddenly, and I will miss the many offprints he sent along every so often, the occasional conversation or e-mail, the contrariness, the doggedness, and everything else about Fred.