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A Personal Note

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A PERSONAL NOTE*

*Debra Ann Livingston***

It's a pleasure to introduce this issue honoring Columbia's most lovable curmudgeon. What can I say about the Harlan Fiske Stone Professor of Law? I should acknowledge, at the start, Henry's profound intellectual contribution to Columbia and to the law. There are not many of us who can say, with justification, that we've written the Greatest Hits of Public Law Scholarship over the course of our careers. And few of us have made individual contributions that equal "Constitutional Common Law,"¹ "*Marbury* and the Administrative State,"² "We the People[s],"³ "Stare Decisis,"⁴ or "The Constitution Goes to Harvard."⁵ Henry is unusual among scholars in that you can pick a title from his CV at random and manage to name a chart-topper. Henry doesn't repeat himself, and he doesn't write filler. He just writes Greatest Hits.

This Symposium Issue celebrates the importance of Henry's work to the academy. This Essay, however, is personal, and I won't attempt to add to the chorus of academic praise. But let me say this from the perspective of a newly appointed judge: Since my appointment to the bench a few years ago, I have really come to understand in a deeper way why Henry's work is so valued by so many in the courts.

Henry's work has made us judges richer by helping us understand what it is we are doing, as we decide cases down in the trenches. Henry anticipated *Chevron*.⁶ He gave us constitutional common law as a way of understanding what courts were up to at a particular moment in history.⁷ For the academics, these are substantial intellectual achievements. But for the judges, I think they are even more than that. Henry helps us understand the world we inhabit. He excavates meaning from the Constitution, to borrow his phrase, and makes it available to judges who in difficult cases are trying so hard to discern that meaning; to wrest it from the legal materials rather than to decide cases feeling that we have imposed something from without. For this assistance in making sense of the law, we owe Professor Monaghan a great deal.

But as I said, this Essay is personal.

* Delivered at a dinner for the Symposium honoring Professor Henry Monaghan at Columbia Law School on May 15, 2009.

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1. 89 Harv. L. Rev. 1 (1975) [hereinafter *Constitutional Common Law*].

2. 83 Colum. L. Rev. 1 (1983) [hereinafter *Marbury* and the Administrative State].

3. 96 Colum. L. Rev. 121 (1996).

4. 88 Colum. L. Rev. 723 (1988).

5. 13 Harv. C.R.-C.L. L. Rev. 117 (1978).

6. *Marbury* and the Administrative State, *supra* note 2.

7. *Constitutional Common Law*, *supra* note 1.

I met Henry in 1994, at the Faculty Club, where many young professors have first encountered him over the years. I was newly appointed and untenured. My chosen field—the subject I had banked my future on, so to speak—was Criminal Procedure.

I will never forget Henry's first, encouraging remarks. "Your field," he said, "is dead. Finished. Nothing interesting has been said since 1975. What are you going to write? The 432nd article on car trunk searches?"

Well. I have an observation and a confession. First the observation: 1975, parenthetically and I'm sure coincidentally, is the year that "Constitutional Common Law" was published. (Henry, is that what you were referring to?)

Now for the confession: I actually had been thinking of doing a little piece on car trunk searches.

With such an auspicious beginning, it was of course inevitable that for me, like so many other junior faculty at Columbia, Henry would prove to be the essential ingredient in charting a path in the academy. Many colleagues offer helpful remarks on a junior colleague's work. It is Henry, though, who will read and edit a piece multiple times—who will tell you when it's interesting, and when it's not, when it's perfect, and when it needs to sit in the desk drawer. To put it simply, Henry has played a very special role for many people who have grown up at Columbia. And I was certainly one of them.

It's a role that continues, by the way, post-tenure. I have the office next door to Henry's—an office I don't get to use as much as I once did, but a place that now serves as something of a refuge from the courthouse on those days when I can be at Columbia. I still ask Henry to read my speeches, and to take a look at the occasional draft—meaning article, not opinion.

I remember being in my office at Columbia before I became a judge, just a short time after I'd been nominated to the Court of Appeals. Henry came in. I confided to him my concern about getting up to speed in so many different areas of federal law, to prepare for the Senate hearing that was to come. I came into the office the next day to find that Henry had slipped three or four articles under my door, each carefully marked to specify precisely the small number of pages I needed to read. Henry became something of my walking Nutshell for a period of weeks, sliding cases under my door and dropping by to ask whether I'd seen a slip opinion.

As it turned out, we didn't actually get to maritime law at the hearing. But if we had, I was prepared.

I began by noting the special regard that so many judges have for Henry's work, and for the many contributions he has made to our understanding of what we are doing when we think about administrative law or *stare decisis*, about constitutional interpretation or a statutory text. It's appropriate, however, that I close by underscoring the profound impact

that Henry has had on the scores of young and not-so-young academics who have found a home at Columbia. I am happy to count myself as one of them, and to count Henry as a mentor and friend.