PILLARS OF JUSTICE

Lawyers and the Liberal Tradition

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To my grandchildren

Ezra Rubenfeld, Sophie Rubenfeld, Aidan Goldsmith,

Nicholas Palumbo, and Lucy Goldsmith

For the joy with which they infuse my life and for the promise they bring to the world

Pillars of Justice

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Introduction

This book seeks to inspire and instruct. It portrays the lives of thirteen lawyers who, through their tireless devotion to justice, changed the world. These individuals have lived grandly in the law and in good part account for the course the law has taken over the past half-century. Their careers provide a source for understanding the dynamics responsible for the progress of the law and, even more, reveal what a life devoted to justice might entail.

Some of the lawyers portrayed in this book were crucially involved in the struggle for civil rights. One is Thurgood Marshall, who represented the petitioners in *Brown v. Board of Education* and later became a Justice of the Supreme Court. Another is William Brennan. Although Brennan did not join the Court until 1956, two years after the *Brown* ruling, he soon made evident his commitment to that decision and the liberal tradition to which it gave life. Two others—John Doar and Burke Marshall—led the Civil Rights Division of the Department of Justice during the turbulent 1960s and then shaped and implemented the civil rights policies of the federal government.

The liberalism associated with *Brown* has not been confined to the work of practitioners and judges; it has also been nourished and elaborated by the law teachers of the nation. Five of the greatest—Harry Kalven, Eugene Rostow, Arthur Leff, Catharine MacKinnon, and Joseph Goldstein—are portrayed in this book. Rostow was also the Dean of the Yale Law School from 1955 to 1965, during which time he recruited an extraordinary group of scholars—Rostow's Dozen—who would define the character of the Law School for a generation. MacKinnon, a student of mine at Yale and now a professor at the University of Michigan and at Harvard, has been a pioneer of feminist thought, seeking to extend to women the promise of equality that *Brown* had affirmed for Blacks. Each of these teachers has educated new generations of lawyers, and each in his or her own way determined what the law might become.

Law is an instrument of power, and as the history of implementing *Brown v. Board of Education* painfully revealed, judges must sometimes resort to the force made available to them by the law to implement their edicts. Law is, however, also an instrument of reason and depends for its legitimacy on the principled elaboration of public values. Many have struggled to find the right balance of power and reason in the law. The final section of the book deals with the lives and work of four lawyers who, over the years, made an enormous contribution, though from varied perspectives, to this quest. Two are scholars, Robert Cover of Yale and Morton Horwitz of Harvard; and two, Carlos Nino of Argentina and Aharon Barak of Israel, had careers that spanned teaching and practice.

Carlos Nino was a world-class legal philosopher who taught at the Universidad de Buenos Aires, while at the same time advising President Raúl Alfonsín of Argentina as he sought to end a brutal military dictatorship and restore democracy in that country. Barak was, as a young man, a professor of law in Israel and then Dean of the Law Faculty at Hebrew University. Later he served on the Israeli Supreme Court, first as a Justice, then as its President. Over his twenty-eight years on the Court, Barak handed down countless rulings celebrated throughout the world that indicated what respect for human rights requires.

I have known and worked closely with these lawyers. They were mentors, colleagues, friends. One was a student. Each had an important influence on my work, and each enriched my life immeasurably and accounted for much of the vibrancy of the law as I have known it and lived it. They are united by a deep, abiding commitment to *Brown v. Board of Education*, not as a formal legal precedent, as it indeed remains, but as an extraordinary moment in the life of the law, transforming the law into an instrument for realizing the highest ideals of the nation. The two lawyers from abroad, Nino and Barak, were of course not bound by *Brown* in any technical sense. Yet they, like scores of lawyers around the world, looked to *Brown* and the theory of law on which it rested as a beacon to guide them in their endeavors.

For those who worked in the American context, the commitment to *Brown* transcended ordinary political allegiances. Some were Republicans, others Democrats. Some were appointed to high office by Republican presidents, others by Democratic presidents. Some had no political affiliation whatsoever, or at least none of which I knew. What united these lawyers was not politics understood in a narrow, partisan way, but a dedication to the theory of *Brown*—a willingness, if need be, to move mountains to make certain that we were living up to our very best selves.

In dedicating his now famous 1980 book on the Supreme Court to Earl Warren—the Chief Justice and author of *Brown*—John Ely, once Dean of the Stanford Law School, wrote, "You don't need many heroes if you choose carefully." The choice of the persons portrayed in this book reflects my assessment of their importance to the progress of the law and to the triumphs of liberalism over the past half-century. It also reflects my belief, based on my lived experience, that their careers provide a standard by which to measure our own and guidance for anyone who wonders how he or she might achieve something in this world that is worthwhile and good.

I feel blessed by the fortuities of history that brought me together with these lawyers—people I think of as pillars of justice. In each chapter I describe the nature of my relationship with the person portrayed,

sometimes colored by the deepest attachments. All biography is a form of autobiography, but in the accounts of others that I present here, the autobiographical element is explicit.

Although, as a youngster, I had toyed with the idea of a career in the law, when the Civil Rights Movement began to gather momentum I was headed in a different direction. From 1959 to 1961, I was a graduate student in philosophy at Oxford, one of the world's great centers of learning. My teachers—Gilbert Ryle, Isaiah Berlin, P. F. Strawson, H. L. A. Hart, and G. E. L. Owen—were among the very best Oxford had to offer, and they gave me a vivid sense of the challenges and excitement of philosophy. Yet the insular quality of the inquiries that then dominated the profession—for example, how can you be sure you are not dreaming?—made me restless, and I grew more restless as reports reached England about the civil rights protests back home. As history unfolded, John Kennedy won the 1960 presidential election, and the policies he soon announced opened new possibilities for public service. In light of these developments, I turned from philosophy and decided to study law.

I entered the Harvard Law School at a time when civil rights and the *Brown* ruling made only fleeting appearances in the curriculum, and even then not in an especially favorable light. In my final year, however, I enrolled in a seminar on constitutional litigation offered by Professor Paul Freund. Although the assigned material centered on the legal struggles of the New Deal, Freund encouraged me, in his kind, stately way, to pursue my vaguely formed inclinations and to write a paper on the implications of the *Brown* decision for the urban school systems of the North. In the course of that project, I spent considerable time in my final year at Harvard interviewing educators and civil rights leaders in the Boston area, which set me on the path that was to become my life's work.

After graduating in 1964, I clerked for Thurgood Marshall, who only a few years earlier had stepped down as Chief Counsel of the NAACP Legal Defense Fund to become a judge on the United States Court

of Appeals for the Second Circuit. When that clerkship ended, we both headed for Washington—Marshall was appointed Solicitor General (which was to become a stepping stone for his appointment in 1967 to the Supreme Court), and I began a clerkship with Justice Brennan. While the docket of the Second Circuit during my clerkship with Marshall was largely occupied by issues arising from criminal prosecutions and complex commercial transactions, my year with Brennan focused primarily on cases involving the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

It seemed only natural when I finished the Brennan clerkship that I should go to the Civil Rights Division of the Department of Justice. I worked there for two years as a special assistant to John Doar, then the Assistant Attorney General in charge of the Division. Before becoming Assistant Attorney General, Doar had served as First Assistant to Burke Marshall. In 1961, Marshall had been appointed by Attorney General Robert Kennedy to head the Division; to much acclaim, including from many who resisted *Brown*, he served in that position until the end of 1964. During the years that Doar and Marshall worked together, an extraordinary bond developed between the two, such that Marshall's presence was felt even during my years in the Division. I finally came to meet the legend in the spring of 1974, shortly before I joined the Yale faculty, and he remained a colleague and friend until his death in June 2003. The portraits of John Doar and Burke Marshall, together with those of Thurgood Marshall and William Brennan, form Part One of this volume, "The Struggle for Civil Rights."

In the summer of 1968, upon leaving the Civil Rights Division, I joined the law faculty of the University of Chicago. There I would begin another type of apprenticeship, this time with one of the preeminent legal scholars of his generation, Harry Kalven. By the time I arrived in Chicago, Kalven had distinguished himself as a torts teacher, as one of the authors of a famed, interdisciplinary study of the American jury, and above all, as a brave defender of political freedom. During the 1950s he was an outspoken critic of Senator Joseph McCarthy's witch hunt. Kalven

is also widely celebrated for finding in the Supreme Court's 1964 decision in *New York Times Co. v. Sullivan* a new and more generous approach to freedom of speech. His 1964 book, *The Negro and the First Amendment*, hailed the Supreme Court decisions that protected the forceful and often dramatic protests of the Civil Rights Movement.

Kalven and I often taught together. Outside of class we chatted almost endlessly about the most recent Supreme Court decisions, about the unruly demonstrations that had occurred before the Democratic Convention in August 1968, shortly after I had arrived in Chicago, and about the protracted criminal trial of the leaders of the protest, a trial that was the subject of Kalven's long essay "Confrontation and Contempt." We also spoke about a book that he was writing on the history of freedom of speech in the United States. When he died in October 1974, Kalven left behind a thousand-page manuscript that his son Jamie edited, now and then with my advice. This work was eventually published in 1988 as *A Worthy Tradition*.

Kalven's liberalism was an exception for the Chicago faculty. For the most part, the Law School was dominated by conservative scholars. Two neoclassical economists, Aaron Director and Ronald Coase, were on its faculty when I first arrived in 1968. In 1969, Richard Posner joined the faculty, and he soon published his now famous treatise *Economic Analysis of Law*, in which he sought to demonstrate that the purpose of law is to promote efficiency. At the center of the constitutional law faculty was Philip Kurland, who in the foreword to the November 1964 *Harvard Law Review* used his vitriolic pen to excoriate the egalitarianism of the Court that was led by Earl Warren and responsible for *Brown*.

When I joined the Yale faculty in 1974, I found myself in a different milieu. A number of the Yale faculty, among them Robert Bork, were part of an insurgent conservative movement defined by its resistance to the egalitarianism of the 1960s. In fact, Bork was one of the most prominent leaders of this movement. He belittled much of the Warren Court's work, on occasion referring to the Equal Protection Clause, the

provision of the Constitution that was the source of its egalitarianism, as the "Equal Gratification Clause."

In 1987, Bork was nominated to the Supreme Court by Ronald Reagan. That nomination was eventually turned back by the Senate, but only after a protracted and highly publicized hearing that centered on two articles written by Bork—a 1963 article in *The New Republic* opposing a bill that was about to become the Civil Rights Act of 1964, and a 1971 article in the *Indiana Law Journal* that denounced rulings of the Warren Court that afforded protection to artistic freedom and that, under the rubric of the right to privacy, had set aside a Connecticut law prohibiting the dissemination of information about contraceptives. This latter decision was a stepping stone to the 1973 decision in *Roe v. Wade* invalidating a Texas law criminalizing abortion.

At Yale, Bork was an exception. The Yale faculty was larger and more varied than Chicago's, and for the most part the school was a bastion of liberalism. A number of the faculty had worked on the briefs in *Brown*. Some, indeed, sprang to the defense of that decision once it came under attack in the academy. Students and faculty participated in the Civil Rights Movement, and graduates of the school were appointed to key positions in the Kennedy Justice Department. This group included, in addition to Burke Marshall, Byron White (Deputy Attorney General), John Douglas (head of the Civil Division), Louis Oberdorfer (head of the Tax Division), and Nicholas Katzenbach (head of the Office of Legal Counsel).

One of the singular figures on the Yale faculty was Eugene Rostow. Early in his career, Rostow achieved fame as the author of an article denouncing the 1944 *Korematsu* decision of the Supreme Court, which had upheld a wartime order of the federal government requiring all persons of Japanese ancestry, including U.S. citizens, to abandon their homes and jobs on the West Coast and move to internment camps located in the interior of the country. Strikingly, though, his critical assessment did not lead Rostow to lose faith in the Court as an instrument of public reason.

On the contrary, he wholeheartedly approved of *Brown* and the conception of judicial power that it embraced. Rostow served as Dean of the Yale Law School from 1955 to 1965, and the chapter about him here, "The Law according to Yale," describes the special character of the school that he helped build.

The Yale that I encountered when I arrived in New Haven in 1974 was not the work of any one person; nor did it follow a blueprint handed down on high. It was largely a product of intense, spontaneous interaction among strong-minded individuals, guided by norms that emerged over the decades and sharpened by students' demands and faculty's views about what was right for the students and their education. In addition to the accounts of Kalven and Rostow, Part Two, "Legal Education and the Culture of Liberalism," includes portraits of three figures at Yale who each had an enormous impact on the school and, for that matter, on the law itself: Arthur Leff, a near contemporary and once a colleague; Catharine MacKinnon, a student of mine in the 1970s; and Joseph Goldstein, one of the guiding spirits of the Law School for almost half a century.

Arthur Leff served on the Yale faculty for a tragically short period. He was appointed to the faculty in 1968 when he was in his early thirties, but died of lung cancer, at the age of forty-six, in 1981. He served during a trying period in the life of the school, a period that demanded his unique gifts of character and intellect. It was a time in which the Law School faculty suffered great losses and was confronted with an urgent need to rebuild.

During the late 1960s and early 1970s, several of Yale's most famous senior professors died, retired, or left for other schools. In addition, Robert Bork took an extended leave to serve in the Nixon and Ford administrations. Charles Reich, author of "The New Property" and *The Greening of America*, quit teaching law altogether. And most of the junior faculty were denied tenure and took positions elsewhere. In the face of these developments, the Yale faculty sprang into action and sought to recruit a new generation of law teachers, with the hope that they would

seize the reins of the school. Leff was a member of this group of young scholars and soon became one of its leaders. He was a catalytic presence for the new generation, cheerfully prodding us on with his wit and countless acts of graciousness, helping to make us the best professors we could possibly be. He also provided an example to be emulated.

Leff was a supremely popular professor, greatly admired by his students. He taught contracts and achieved prominence in that field, but his intellectual curiosity was virtually unbounded. He offered sharply varied courses and in a number of famous articles attacked Posner's view of law as nothing more than an instrument of economic efficiency. Leff saw the aim of law as justice rather than efficiency, and he identified an array of disciplines, beyond economics, that bore on the questions of what justice required and how it might be achieved.

Catharine MacKinnon was a student at the Law School during the 1970s. Even then, she was at the forefront of the women's movement. Her law school paper on the sexual harassment of working women was turned into a book that was published by Yale University Press in 1979, only two years after she graduated. Guided by the same insistent demand for equality announced in *Brown*, MacKinnon gained even greater prominence analyzing social practices such as prostitution and pornography, and calling on lawmakers to curtail these practices.

MacKinnon's view of pornography appeared to some to be in conflict with a central precept of the liberal tradition, given forceful expression by the Warren Court, that sought to curb the censorship of great works of art and literature because they were sexually explicit. In truth, however, MacKinnon sought to deepen our understanding of liberalism, not to repudiate it; her point was that the bombardment of our culture by the pornography industry threatened to turn women into sexual objects, thereby perpetuating their subordination and impairing their capacity to participate fairly and fully in public debate.

MacKinnon's work dramatically broadened the perspective of many liberals, myself included, who were committed not only to freedom of

speech but also to equality. Guido Calabresi, Dean of the Yale Law School from 1985 to 1994, now a federal judge, often spoke of the special pleasure a teacher experiences in learning from a student. The pleasures to which Calabresi referred are compounded many times over when a student educates a teacher, as MacKinnon did, by founding a wholly new field of study.

Joseph Goldstein was a true iconoclast and as strong-minded a colleague as one might ever encounter. He joined the Yale faculty in the late 1950s as one of the dozen appointed during Rostow's deanship. Goldstein taught at Yale until his death in March 2000, at the age of seventy-six. He taught primarily criminal law and family law and was a pioneer in exploring how the insights of psychoanalysis could be applied to the formulation of rules for governing society. Together with two of the world's most famous analysts, Anna Freud and Albert Solnit, Goldstein wrote *Beyond the Best Interests of the Child*, a 1973 book on custody disputes that was heralded by both the academy and the bar.

Aside from his scholarly achievements, Goldstein was relentless in his efforts to preserve the unwritten rules that governed Yale and endowed the school with its unique outlook on law and legal education. At the heart of these efforts was a belief, manifested by his own behavior, that the institution and its administration should have no control over what a professor wrote or taught. He insisted on protecting the autonomy of each individual faculty member, so much so that it would not be a stretch to say that he felt that each professor was endowed with a measure of sovereignty.

Part Three of this book, "The Fate of the Law," features four lawyers whose careers, especially when considered collectively, reveal the fault lines within the liberal tradition. This tradition, at least in its classic form, posits the existence of a line separating law from politics and then places decisions such as *Brown* on the side of the law on the theory that they constitute reasoned elaborations of constitutional principles. Liberals also recognize, however, that the judiciary is part of the apparatus of the state and that, as a result, it is subject to dynamics—some arising from