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TRIBUTE

TRIBUTE TO JAMES W. TORKE CARL M. GRAY PROFESSOR OF LAW

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When Jim Torke arrived at the law school in August 1971, he set up shop in the school's new law building, dedicated the previous year. Nearly thirty years later he delivered one of the last public lectures presented in that building.[1] Soon afterwards the law school moved to its present home in Inlow Hall. Jim's lecture in March 2001, commemorating his investiture as the Carl M. Gray Professor of Law, was titled "What is This Thing Called the Rule of Law?"[2]

Jim's treatment of this question reflected ideas and beliefs that have guided and defined his work over the course of his career. "The rule of law," he said, "sets bounds to its discourse. Insofar as the rule of law is itself a rule, it is a rule of inclusion and exclusion of reasons, a rule of pedigree."[3] This vision of law as "process, a practice of reason-giving, a set of argumentative conventions,"[4] is what Jim has taught his students: effective lawyers "operate sure-footedly within the understood conventions," and we expect our judges to resolve disputes "by drawing on *legal* reasons, and not other reasons . . . or free-standing social, political, or moral purposes."[5] What distinguishes law from other disciplines or systems, such as "politics, science, and philosophy," is the "boundedness" of law.[6]

This concept of law as a disciplined process, operating within received traditions and constraints, has informed Jim's scholarship.[7] Analyzing and

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I thank Bradley J. Bingham, J.D. Class of 2005, for gathering the statistical information, drawn from American Bar Association (ABA), Association of American Laws Schools (AALS), and other sources, which appears *infra* at notes 14-26.

1. The "old" law building underwent a complete structural renovation and now houses the John Herron School of Art and Design.

2. Professor Torke's Carl M. Gray Lecture subsequently was published. James W. Torke, *What Is This Thing Called the Rule of Law?*, 34 IND. L. REV. 1445 (2001) [hereinafter Torke, *Rule of Law*].

3. *Id.* at 1450.

4. *Id*.

5. *Id*. (emphasis in original).

6. *Id*.

7. *See infra* notes 26-44 and accompanying text.

critiquing legal doctrine; exposing and evaluating its underlying policies; identifying doctrinal dissonance while seeking coherence; managing ambiguity within the determinacy of law; and bringing creative insights and fresh ideas to the enterprise—all of this distinguishes many of his contributions to legal literature. Much of his work affirms the value—indeed, the centrality—of traditional legal scholarship, even as inter-disciplinary and empirical methodologies have taken their place on academic research agendas. He has tried to bridge "a widening divide . . . between law scholarship and law practice."[8]

In his Carl M. Gray Lecture, Jim also spoke about the pathology that can afflict the rule of law. He acknowledged the hazard of having "too much of a good thing," quoting Grant Gilmore's wonderful caveat: "'In Hell there will be nothing *but* law, and due process will be meticulously observed.'"[9] "Do we have too much law?" he asked. "At times . . . I feel claustrophobic amidst its ever-growing baggage and clutter . . . ."[10] He cautioned against the rule of law sliding "into the vice of legalism, a kind of *reductio ad absurdum* of the constitutional maxim that for every wrong there must be a remedy."[11]

He also identified a paradox: "[W]e must, in a sense, turn [Chief Justice] Marshall's dictum on its head: A government of laws cannot exist without good people."[12] Of course, "good people" include worthy lawyers whose work guards and propels the rule of law.

> The rule of law is real, but . . . [i]ts preservation depends upon recognition of its limits, and even more importantly, upon an appreciation of how it works, and the existence of practical skills to keep it working. To maintain the rule of law and to provide good-faith lawyers upon which the rule of law stands, we must both enlighten and train.[13]

In his own words, we see intimations of Jim at work in his world—a good man in conscientious service to the profession he chose and the society in which he lives.

Jim's Carl M. Gray Lecture eloquently portrayed some of the key ideas and convictions that have animated his career in the legal academy. A fuller understanding of his character and cast of mind can best be apprehended, however, within the wider context of his extensive record of scholarship, teaching, and collegial relationships, which I will consider in more detail anon.

First, however, reflecting on the span of Jim's career, I offer some observations about the state of American legal education when the "Torke Era" began, and now, with Jim's retirement, as it comes to a close. When Jim Torke

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8. Torke, *Rule of Law*, *supra* note 2, at 1455.
9. *Id*. at 1451 (citation omitted).
10. *Id.*
11. *Id*. at 1452.
12. *Id*. at 1454.
13. *Id*. at 1456.

launched his career as assistant professor of law at Indiana University-Indianapolis thirty-four years ago, he was one of approximately 3100 full-time academic lawyers at American Bar Association (ABA) accredited law schools in the United States.[14] Since then the size of the U.S. legal professoriate has nearly quadrupled: in 2003-04, approximately 12,000 legal academics held full-time appointments at ABA accredited law schools.[15] Part of this growth is the result of changes in educational missions and instructional methodologies. For example, the number of full-time faculty who work in clinical legal education, or skills training, has grown from approximately 200[16] to over 1250.[17] Full-time instructors of legal writing now number more than 1700.[18] In 1972-73 only about 450 full-time faculty taught legal research and writing courses (and not all on a full-time basis).[19]

During the course of Jim's estimable career, the face of American legal education has changed in other important ways. The number of ABA accredited law schools has increased from 147 to 191.[20] In 2004-05, 148,000 law students

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14. *See* SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, AM. BAR ASS'N, LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS IN THE UNITED STATES 5-27 (1971) (full-time faculty includes deans, librarians with academic rank, and associate dean and assistant deans who also teach).

15. *See* LAW SCH. ADMISSIONS COUNCIL & AM. BAR ASS'N, ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS: 2005 EDITION 828 (Wendy Margolis et al. eds., 2004) (listing a total of 12,216 for the 2003-04 academic year, including full-time faculty as well as deans, administrators, and librarians who also teach, but excluding part-time faculty) [hereinafter 2005 OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS].

16. *See* COUNCIL ON LEGAL EDUC. FOR PROF'L RESPONSIBILITY, SURVEY OF CLINICAL AND OTHER EXTRA-CLASSROOM EXPERIENCES IN LAW SCHOOLS: 1970-71, at viii (1971) (data from 1970-71 academic year; only 100 of approximately 146 ABA-accredited schools responded). In a similar survey of American law schools conducted for the 1972-73 academic year, there were 344 clinical faculty members identified. COUNCIL ON LEGAL EDUC. FOR PROF'L RESPONSIBILITY, SURVEY OF CLINICAL LEGAL EDUCATION: 1972-73, at ix (1973) (117 of 151 ABA-accredited law schools responding to survey).

17. *See* ASS'N OF AM. LAW SCH., THE AALS DIRECTORY OF LAW TEACHERS: 2004-05, at 1144-53 (2004) (listing a total of 1254 who have taught any law subject by the "Clinical Method" or directed a Legal Clinic for a period of at least one full term; based on information submitted to AALS from law school deans and faculty).

18. *Id.* at 1285-97 (listing 1728 law teachers who identified themselves as teaching "legal research and writing," including legal bibliography).

19. ASS'N OF AM. LAW SCH., DIRECTORY OF LAW TEACHERS: 1972, at 756-59 (1972) (listing 457 faculty members who intended to teach "legal writing and research" courses during upcoming 1972-73 academic year).

20. Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass'n, *Legal Education and Bar Admissions Statistics, 1963-2005*, at http://www.abanet.org/legaled/statistics/le_bastats. html (last visited Apr. 20, 2005) [hereinafter ABA, *Legal Education and Bar Admission Statistics, 1963-2005*]; Section of Legal Educ. & Admission to the Bar, Am. Bar Ass'n, *ABA-Approved Law Schools*, *at* http://www.abanet.org/legaled/approvedlawschools/approved.html (last visited Apr. 20, 2005) (190 confer the J.D. degree; the other ABA approved school is the U.S. Army Judge

were enrolled, compared with 94,000 in 1971.[21] Graduate law programs and joint degree programs have proliferated, and summer abroad law programs, largely unknown in the early 1970s, now total nearly 200.[22] As law schools have sought greater integration with the universities of which most are a part, faculty scholarship has burgeoned, with increased emphasis on interdisciplinary research and empirical methodologies. To accommodate this outpouring of scholarship (as well as to enhance institutional prestige) the number of student edited and peer reviewed legal journals has increased from about 250 to 680.[23]

And, of course, the face of legal education in the United States literally *looks* different now than it did when Jim Torke's academic career began with the decade of the 1970s. Then, women comprised 9.4%, and racial minorities 6.1%, of students enrolled in the nation's law schools.[24] Today women and racial minorities account for 48%, and 21%, respectively, of the law student population in American law schools.[25] In the early 1970s, few women and racial minorities

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Advocate General's School, which offers an officer's resident graduate course, a specialized program beyond the first degree in law).

21. Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass'n, *2004 Enrollment Statistics* (Jan. 12, 2005), *at* http://www.abanet.org/legaled/statistics/fall2004enrollment.pdf (listing total law school enrollment of 148,169 as of the fall of 2004 at 188 ABA-accredited schools) [hereinafter ABA, *2004 Enrollment Statistics*]; ABA*, Legal Educ. and Bar Admissions Statistics, 1963-2005*, *supra* note 20. The total number of enrollment for both time periods includes students enrolled in post-J.D. and other programs.

22. There are currently 196 different ABA-approved foreign summer law programs offered through 103 different ABA-accredited law schools. Section of Legal Educ. & Admission to the Bar, Am. Bar Ass'n, *Annual Foreign Summer Programs*, *at* http://www.abanet.org/legaled/studyabroad/foreign.html (last visited Apr. 20, 2005).

23. INDEX TO LEGAL PERIODICALS: SEPTEMBER 1970 TO AUGUST 1973, at xiii-xxi (Grace W. Meyer ed., 1974) (listing a total of 362 legal periodicals for this time period that "regularly publish legal content of high quality and permanent reference value"; excluding bar journals, bar section newsletters, annual surveys, "institutes" and reporters, there were approximately 249 legal periodicals in publication from 1970 to 1973); 2005 DIRECTORY OF LAW REVIEWS 71-78 (Michael H. Hoffheimer ed., 2004) *available at* http://www.lexisnexis.com/lawschool/prodev/lawreview/default.asp (last visited Apr. 20, 2005) (excludes journals that do not accept unsolicited manuscripts, journals published outside of the United States, and journals that are not principally devoted to legal scholarship).

24. DIV. FOR MEDIA RELATIONS & PUB. AFFAIRS, AM. BAR ASS'N, FACTS ABOUT WOMEN AND THE LAW 2 (1998), *available at* http://www.abanet.org/media/factbooks/womenlaw.pdf (reprinted by permission from *Facts About Women and the Law*); *see* Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass'n, *Minority Enrollment 1971-2002*, *at* http://www.abanet.org/legaled/statistics/minstats.html (last visited Apr. 20, 2005); ABA, *Legal Educ. and Bar Admission Statistics, 1963-2005*, *supra* note 20 (In the 1971-72 academic year, there were a total of 5568 minority students enrolled in J.D. programs. The total J.D. enrollment for the same academic period was 91,225. This translates to a 6.1% minority enrollment for the 1971-72 academic year.).

25. *See* ABA, *2004 Enrollment Statistics*, *supra* note 20. These figures are computed using total women J.D. enrollment and total minority J.D. enrollment, divided by overall total J.D.

held faculty appointments. In 2004-05 approximately 47% of law faculties were composed of women, and racial minorities now comprise 16% of law faculties nationwide.[26]

It comes as no surprise that American legal education has changed over thirty-four years. That change is expected, indeed inevitable, is among the most durable clichés. What is remarkable, however, is how constant Jim has remained in his fundamental character, beliefs, and behavior, even as the world in which he worked, and the wider world around him, dramatically changed. Fashions come and go, fads emerge and recede, trends rise and fall, the scenery changes, but Jim remains stalwart. Neither inflexible nor unreceptive to change—in fact, sometimes a proponent of experimentation—he proceeds always with due regard for stability.

Having known Jim as colleague and friend since we arrived together at the law school, I can, however, bear witness that he has noticeably "evolved": accomplishment has overcome inexperience—an unerring trajectory inclining to excellence describes the evolution of his work; youthful vigor has given way to mature self-confidence; Lawyers' League softball seasons, interschool basketball games, and faculty-student gridiron matches have been replaced by the Game of Kings (and, as self-reported, Jim's golf game has been marked by vast improvement over time); his neckties have got wider, then narrower, and now a little wider again; and so forth.

Yet, Jim's life has always portrayed, first and foremost, the Stablizing Virtues that accommodate and manage change: sound judgment, balanced by what Judge Learned Hand described as a quality of mind "which is not too sure that it is right;"[27] an uncomplaining willingness to shoulder responsibility and to do what needs to be done; steady resolve in all things; and impeccable loyalty that infuses personal and professional relationships with trust. Several years ago, in a traditional exchange of modest Christmas gifts, Jim gave me a paperweight inscribed with a quotation from Francis Bacon: "Constancy is the Soul of Virtue." That, in a nutshell, is the way Jim Torke thinks and lives.

Born in Milwaukee, Wisconsin, about two weeks after the Empire of Japan attacked Pearl Harbor, Jim attended public schools in his hometown. He was a high school athlete and, perhaps unrelatedly, acquired the sobriquet, "Turtle." In 1963 he received his B.S. degree from the University of Wisconsin-Madison. Two years earlier, Bob Dylan had proclaimed, "The Times They Are A-Changin'." Six months after Jim was graduated, President John F. Kennedy was assassinated. The following year, as the civil rights movement gained momentum, the 1964 Civil Rights Act became law. In March 1965 the small

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enrollment. The figures do not include enrollment in post-J.D. and other law school programs.

26. *See* 2005 OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, *supra* note 15, at 828. These figures include full-time faculty, deans, administrators, and librarians who also teach, but exclude part-time instructors.

27. Judge Learned Hand, Remarks at the "I Am an American Day" Ceremony in Central Park, New York City (May 21, 1944), *in* LEARNED HAND, THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND, at 144 (Irving Dilliard ed., Vintage Books 1959) (1952).

town of Selma, Alabama made national headlines. American "advisors" were in Vietnam, but deployment of American troops was still in the early stages. American college campuses had not yet been radicalized by the war. During the period 1963-65—a time of relative calm in Madison—Jim enrolled at UW Law School but soon withdrew to pursue graduate work in history and then in English literature. Later, accepted into a Ph.D. program at Ohio State University, Jim reversed course and decided to return to law school. In 1968 he earned his J.D., Order of the Coif, from UW Law School.

Jim entered the legal profession with a prestigious judicial clerkship in the chambers of Chief Judge Edward J. Devitt, U.S. District Court for Minnesota, for whom the "Devitt Award" for outstanding public service by federal judges is named. (Some years later, at Jim's invitation, Judge Devitt appeared as the law school's Commencement Speaker.) While working for two years at a top notch law firm in Minneapolis, he took the decision to seek an academic appointment in law.

Jim and his wife, Christine, arrived in Indianapolis in August 1971 with their infant daughter. In due course, daughter Alexia was graduated from Carlton College, earned her M.D. from Indiana University, became a pediatrician and a mother, and is now conducting post-doctoral work at the University of Chicago. Two sons followed: Will, a graduate of Purdue University's School of Engineering, is an electrical engineer working in Austin, Texas; Carl, a Wells Scholar at Indiana University and J.D. graduate of UC Berkeley (Boalt Hall), is based in San Francisco. Chris Torke, wife and mother, and an award winning drama teacher at Brebeuf Preparatory School in Indianapolis, retired in 2000, thereby, once again, beating Jim to the punch.

From his earliest days at the law school, Jim emerged as a respected and influential faculty member among his colleagues. At first, he was welcomed by the senior faculty as the best evidence of their own good judgment in hiring decisions. Soon, Jim was regarded as an equal, and then as a faculty leader. Two years after he arrived, Dean Cleon (Bill) Foust announced his retirement, and the faculty elected Jim to the Dean Search Committee. Three deans later,[28] while I did a year and a half stint as acting dean, Jim was the consensus choice to serve as academic dean, a job I had held for five years during Jerry Bepko's exemplary deanship, and which Jim agreed to inherit on an interim basis. At the urging of many colleagues, Jim then stood for the deanship as the only "inside" candidate in a crowded field. Perhaps no other chapter in his storied career at the law school better reveals his character.

The law faculty constitution is a peculiar document in certain respects: outside of the faculty, and within the larger university community, it has no binding effect (if it is consulted at all); within the faculty, it is invoked selectively, or at least irregularly; great "constitutional" themes are subsumed

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28. William F. Harvey (1974-79); Frank ("Tom") Read (1979-81); Gerald L. Bepko (1981-86), who went on to become Chancellor of the combined campus of Indiana University and Purdue University at Indianapolis (IUPUI) and Vice-President of Indiana University (1986-2003), and later served as IU's Interim President (2002-03).

within the minutiae of faculty governance; more akin to a statute or set of by-laws than an organic charter, it is often amended. One amendment, with only a ten year pedigree in 1987 (but still on the books), provides that faculty endorsement of a decanal candidate requires a supermajority confidence vote constituting three-fourths (!) of the law faculty. When Jim's vote tally came in at a fraction of a point less than seventy-five percent, he immediately withdrew his candidacy. Unmoved by suggestions that the vote constituted substantial compliance with constitutional intent, and deflecting entreaties that he allow his name to be sent forward for consideration by the chancellor, Jim stood on principle: he would no longer regard himself as a viable candidate. Then, after one of the remaining decanal candidates ultimately was selected,[29] Jim had the good grace to remain in his post as academic dean during a semester of transition.

As those events of 1986-87 have faded into the mists of institutional memory, Jim has speculated that their outcome may have borne the earmarks of intervention by a Higher Power. Jim knew that he could effectively lead the law school; he was willing to take on the job; and he stepped forward. Yet, because he did not covet the deanship, disappointment was modulated and fleeting. Freed of administrative duties and ambitions, he happily returned full-time, and with renewed purpose, to teaching and scholarship. When the Faculty Leadership Award was established in 2000, Jim was chosen by his colleagues as the first recipient.

One measure of Jim's enthusiasm for teaching consists in the number and variety of courses he has taught. They include sixteen different courses, from Administrative Law to Wills, Trusts & Future Interests; from Civil Rights to Federal Jurisdiction; from a Seminar in Copyright Law to a Seminar in Mass Communications; and, in his principal areas of interest, courses in Civil Procedure, Constitutional Law, and Jurisprudence. Manifest in Jim's eclecticism is also the commitment he brought to his enterprise. Preparing and teaching new courses is hard work. Yet, for a dedicated teacher it is a way of sustaining vitality and achieving renewal, as Jim's example makes plain. Jim's *gift* for teaching is revealed in the popularity he has enjoyed, and respect he has commanded, among his thousands of students. For example, in six separate years (and as recently as 2005) students in the law school voted to confer on him the Black Cane Award as the faculty's outstanding teacher.

Jim also has taught in other venues. Early in his career he was a visiting associate professor at the University of Illinois College of Law. Exporting his knowledge and skills to the wider community in Indianapolis, he exposed the foundations of law and legal institutions to high school students and civic groups. More recently, he went to the People's Republic of China as resident professor in the law school's 2002 China Law Summer Program at Renmin University of China School of Law in Beijing. (Although not an ardent traveler, his spirit of

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29. Norman Lefstein, formerly of the University of North Carolina School of Law, began his fourteen year deanship in January 1988. He was succeeded by Anthony A. Tarr who in 2005, after three years as law dean, took up the presidency of the University of the South Pacific. Professor Susannah Mead, academic affairs dean in both administrations, was designated interim dean.

adventure persists and sometimes overcomes.)

As a legal scholar, Jim has a record of notable virtuosity. His writings include a multivolume treatise,[30] book reviews,[31] commentaries,[32] essays and articles in a variety of legal journals,[33] and five unpublished textbooks.[34] His writing is trenchant and pellucid. It is not too spare, yet is never prolix. It is eminently "readable." Not inclined to showy displays of rhetorical flourish, Jim has the deft ability to choose *just* the right word; the imagination to create the apt and memorable turn of phrase; and the skillful writer's instinct intelligently to deploy stylistic elements, such as metaphor and allusion, which both decorate his prose and render complicated ideas more accessible.

James W. Torke and Kenneth M. Stroud, *Indiana Pleading & Practice*,[35] a six volume treatise, is a standard reference on Indiana civil practice and procedure. Jim is the co-author of four volumes and the sole author of two,

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30. JAMES W. TORKE & KENNETH M. STROUD, INDIANA PLEADING AND PRACTICE WITH FORMS (Matthew Bender 1983-2004).

31. Book Review, 6 IND. L. REV. 624 (1973) (reviewing ROBERT MCCLOSKEY, THE MODERN SUPREME COURT (1972)); *Special Book Review*, 62 KY. L.J. 452 (1974) (reviewing B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1972)); Book Review, 11 IND. L. REV. 501 (1978) (reviewing BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977)); *Red, White and Blue: A Critical Analysis of Constitutional Law*, 13 LEGAL STUD. F. 101 (1989) (book review); *"Grand Theory" and Constitutional Change*, 26 IND. L. REV. 677 (1993) (reviewing BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991)); *Robert M. O'Neil, Free Speech in the College Community*, 24 J.C. & U.L. 699 (1998) (book review); *The Aesthetics of Law*: *On Beauty and Being Just*, 48 AM. J. JURIS. 325 (2003) (book review).

32. *A Look at the Constitutional Law Texts*, 31 J. LEGAL EDUC. 688 (1981) (reviewing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978) and JOHN E. NOWAK ET AL., HANDBOOK ON CONSTITUTIONAL LAW (1978)); *On Teaching Law to High School Students*, 15 LEGAL STUD. F. 167 (1991).

33. *The Future of First Amendment Overbreadth*, 27 VAND. L. REV. 289 (1974); *Survey of Recent Developments in Indiana Law: Constitutional Law*, 8 IND. L. REV. 94 (1974); *Res Judicata in Federal Civil Rights Actions Following State Litigation*, 9 IND. L. REV. 543 (1976); *Some Notes on the Proper Uses of the Clear and Present Danger Test*, 1978 BYU L. REV. 1; *The Judicial Process in Equal Protection Cases*, 9 HASTINGS CONST. L.Q. 279 (1982); *What Price Belonging: An Essay on Groups, Community, and the Constitution*, 24 IND. L. REV. 1 (1991); *Assessing the Ackerman and Amar Theses: Notes on Extratextual Constitutional Change*, 4 WIDENER J. PUB. L. 229 (1994); *The English Religious Establishment*, 12 J.L. & RELIGION 399 (1996); *Introductory Remarks: Enumerated and Reserved Powers: "The Perpetually Arising Question,"* 32 IND. L. REV. 3 (1998); *Nepotism and the Constitution: The Kotch Case—A Specimen in Amber*, 47 LOY. L. REV. 561 (2001); *What Is This Thing Called The Rule of Law?* 34 IND. L. REV. 1445 (2001).

34. The Right to Be Let Alone: Constitutional Law, Personal Choice, and Privacy (1986) (635 pages); Man the Rulemaker: An Introduction to Law and the American Legal System (1991) (190 pages, with Teacher's Guide); Materials on the Amendment of Constitutions (1993) (361 pages); Readings on the Rule of Law (1993) (519 pages); Selected Provisions from Constitutions of the World (2004) (140 pages).

35. TORKE & STROUD, *supra* note 30.

which he revised and updated semiannually for more than 20 years. This treatise, comprehensive in scope and meticulous in detail, stands as a masterful exposition of Indiana's adjective law.

One of Jim's earliest articles, *The Future of First Amendment Overbreadth*—which was followed by thirty years of scholarly verisimilitude—appeared in the Vanderbilt Law Review[36] in 1974. In a confident and leading-edge analysis, Jim challenged the Warren Court's justification for invalidating statutes on the basis of "overbreadth," arguing that a different, more legitimate, concern explained the Burger Court's more cabined application of the doctrine.

> Whatever its virtues or currency, overbreadth remains an impressionistic doctrine, often so vague and flexible as to be guilty of the very vice it condemns.[37]
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> . . .
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> The key to discovering the paths by which the Court is "retreating" from its overbreadth holiday of the sixties lies in the recognition that the central dynamic of overbreadth is the peril posed by standardless administration rather than the threat of a chilling effect on first amendment rights.[38]

Jim's forecast of the Court's future application of the overbreadth doctrine presciently predicted a course of action that would become but one aspect of a wider doctrinal shift within the Court overtime, now sometimes labeled the "New Federalism."[39]

> [S]ince uncontrolled discretion rather than chilling effect has been the real, if not the rhetorical, dynamic of overbreadth, a growing willingness to trust to the informed good faith of state officials will lead to a greater demand that complainants make a showing of incorrigibility not unlike the "bad faith" sought in cases like *Younger v. Harris*.[40]
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> . . .
>
> [T]he new Court majority has utilized the numerous potential routes of escape from the overbreadth technique, routes through which a Court bent on deferring to the states can readily come and go . . . .[41]

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36. Torke, *The Future of First Amendment Overbreadth*, *supra* note 33.

37. *Id.* at 295.

38. *Id.* at 309.

39. *See, e.g.*, Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law,* 89 CORNELL L. REV. 1, 11 (2003) (providing an overview of the new federalism); Daniel A. Farber*, Pledging A New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133 (2000); Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding,* 94 MICH. L. REV. 615, 618 (1995) (reflecting on *United States v. Lopez* and discussing the origins of the new federalism).

40. Torke, *The Future of First Amendment Overbreadth*, *supra* note 33, at 293.

41. *Id.* at 309-10.

Here was a young scholar already engaged in serious doctrinal scholarship, both normative and prescriptive. Many articles employing similar techniques were to follow, treating topics as diverse as res judicata; the "clear and present danger" test; equal protection methodologies; enumerated and reserved powers; and extra-textual constitutional change.

Occasionally, such doctrinal excursions were vehicles for indulging Jim's penchant for historical investigation, as when he traced the arcane history of river pilotage in the Mississippi Delta. Not content to consult the historical accounts of this uniquely nepotistic culture, he traveled to New Orleans to conduct interviews with working river pilots. All of this provided background and context for his analysis of the equal protection clause as applied to nepotistic practices—a largely unexplored backwater of constitutional law. Jim is not a contrarian, exactly, but he knows his own mind. He described the Supreme Court's principal case on the subject as "a specimen in amber,"[42] concluding, in effect, that the Court had traveled a gravel road in arriving at the right place, albeit a mostly solitary outpost in a widening equal protection landscape.

Yet, Jim's scholarship often departed from more traditional doctrinal methodologies. For example, he has written elegantly and at length about the role of groups and communities within society and within the constitutional schema.[43] Returning from Sabbatical Leave as an Academic Visitor at Oxford, he published an insightful and extensive meditation on the religious establishment in England, drawing thoughtful comparisons with the separation of church and state in America.[44] More recently, he produced a small gem of jurisprudential reflection on what he termed "the aesthetics of law."[45]

> Law's potential for beauty seems rather like the beauty that justice may reflect. But law is not a generalized idea of justice; it fits within a particular tradition which gives it a singular and contextual character. Law's beauty . . . may be said to represent the beauty which a common law system is apt to achieve: each decision may be an embellishment; many together may form a graceful curve, the shape of which seems, from the present, inevitable.
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> There may also be a kind of beauty peculiar to law in what we might call its architecture.[46]
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> . . .
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> Recognizing that law can be beautiful may likewise bring greater pleasure and purpose to those of us who work in the law.[47]

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42. Torke, *Nepotism and the Constitution: The Kotch Case—A Specimen in Amber*, *supra* note 33.

43. Torke, *What Price Belonging: An Essay on Groups, Community, and the Constitution*, *supra* note 33.

44. Torke, *The English Religious Establishment*, *supra* note 33.

45. Torke, *The Aesthetics of Law*: *On Beauty and Being Just*, *supra* note 31.

46. *Id* at 331-32.

47. *Id*. at 333.

In these words we can detect at least part of the reason for Jim's success in his realm of the legal profession: he has gladly embraced his work and pursued it with constant purpose.

During a certain period of time now past, Jim locked on to the notion that he could disguise his voice on the telephone and have me believe that something I said or did had become a matter of interest to his imaginary interlocutor—perhaps the Attorney General of the United States, or a disgruntled student, or the head of an investigatory commission. I will comment on these efforts at misdirection by employing a conceit that has become fashionable, yet remains disconcerting: the conveyance of information through questions posed and answers given, each and all by the same person. Does Jim regard himself as an adept impersonator? Apparently, yes. Is he correct in his assessment? Sadly, no. Did I occasionally feign ignorance of his cunning? Gleefully, yes. Did Jim's imposture ever fool me? Candidly, no. Did exposure deter him from further attempts at harmless pretense and deceit? Happily, no. Was I always amused and delighted by his audacious, if unsuccessful, ploys? Absolutely, yes. And, when we met as friends at thousands of lunches and dinners and on countless other occasions, did his intelligent repartee, witty insights, and wry observations invoke smiles and laughter, time and time again? Yes, and yes again.

During his thirty-four years at the law school, Jim Torke has been a signal force for the good and the right. With his retirement, will Jim's companionable, collegial, and guiding presence in Inlow Hall be profoundly missed? This is a rhetorical question.