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## Richard A. Nagareda, "In Memoriam" 1963-2010

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# VANDERBILT LAW REVIEW

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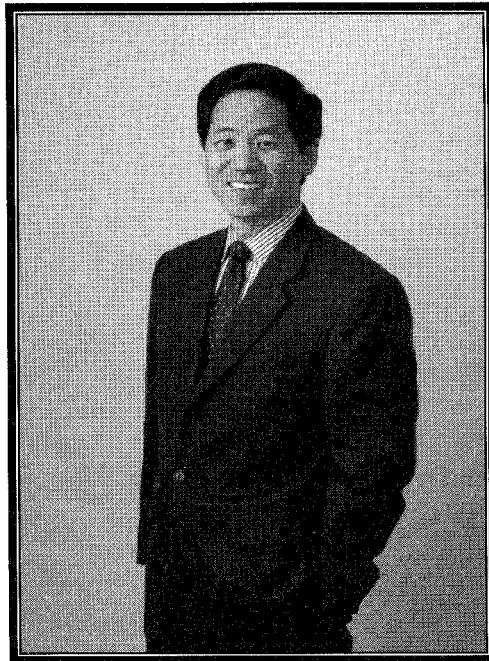
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## Richard A. Nagareda, *In Memoriam* 1963–2010



On November 12, 2010, the Vanderbilt University Law School held a service to commemorate the life and career of Professor Richard A. Nagareda, a leading civil litigation scholar whose work focused on aggregate litigation. Speaking at the ceremony were J. Maria Glover, Climenko Fellow and Lecturer on Law at Harvard Law School;

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\* Photograph taken by Sandy Campbell.

Professor John C.P. Goldberg of Harvard Law School; Dean Chris Guthrie of Vanderbilt University Law School; Professor Samuel Issacharoff of New York University School of Law; and Professor Suzanna Sherry of Vanderbilt University Law School. In the pages that follow, these individuals share tribute essays based largely on the sentiments they expressed to the Vanderbilt community during the memorial service. Andrew Gould, clerk for Judge Lee H. Rosenthal of the U.S. District Court for the Southern District of Texas and alumnus of Vanderbilt University Law School, introduces the memorial compilation.

# Foreword

A year ago, many of us gathered in Vanderbilt University Law School's Flynn Auditorium to attend a "Celebration of the Life of Professor Richard Nagareda." Frankly, I didn't feel like celebrating, a sentiment I suspect others shared. Richard—scholar, teacher, mentor, colleague, friend, father, husband—had left this earth before any of us were ready to part with him.

And yet, as the speakers shared their memories of Richard, the intense grief I had felt since learning of Richard's untimely death began to dissipate. There was then, and there remains now, so much to celebrate about his life. For in his forty-seven years, Richard so greatly touched the lives of those of us who were fortunate to spend time with him that he forever will be with us.

This issue of the *Vanderbilt Law Review* honors Richard—our scholar, our teacher, our friend. In it appear tributes from a group of distinctive scholars who, in many ways, knew him best: Maria Glover, who was a prize student of Richard's and will soon be a prize scholar in the field of civil litigation; John Goldberg, Richard's long-time colleague and friend; Chris Guthrie, Dean of the Law School and another colleague and friend; Sam Issacharoff, Richard's mentor in the legal academy or "Sith Lord,"<sup>1</sup> as Richard affectionately called him; and Suzanna Sherry, who not only was a colleague and friend but who also ensured that Richard's dedication to his students carried forward in his absence. Each of these scholars delivered deeply touching tributes to Richard when we met last year to celebrate his life. Here, they build upon them. In particular, each will begin with a selection from the ever-quotable Nagareda. Those selections will serve as a starting point for discussing how Richard enriched our lives as well as the law.

Given that Richard had only recently reached his academic prime, the breadth of his scholarly impact is staggering. He began his academic career writing on the Federal Rules of Evidence and mass

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1. The term comes from George Lucas's world of *Star Wars*, and it refers to an evil Jedi master who has embraced the dark side of the Force. I don't think Richard actually thought Sam was evil; if anything, Sam was less Richard's Darth Vader and more his Obi-Wan Kenobi.

tort litigation. He soon dumped the former to focus on the latter, and he then pivoted from analyzing mass tort litigation specifically to theorizing about aggregate litigation more generally. Richard quickly established himself as a leading authority in that increasingly important field—and particularly with respect to the Rule 23 class action. His works have been cited in over six-hundred law-review articles,<sup>2</sup> not to mention books and treatises. In 2003, only nine years after Richard had entered the academy, he was appointed Associate Reporter for the American Law Institute's recently published *Principles of the Law of Aggregate Litigation*. But these feats are rivaled by one he did not see: the role he played in the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*.<sup>3</sup> This decision was among the most significant of the 2010 term, not only because of the story behind the case—1.5 million female employees of Wal-Mart suing the world's largest private employer for gender discrimination—but also because of the effect it will have, and already has had, on the Rule 23 class action. The Court didn't merely cite Richard. Instead, the majority and partial-dissenting opinions heavily relied on his thoughts on the law that underpins Rule 23. In some sense, the competing opinions debated the meaning of Richard's work.

Still, a question remains: how did Richard become this leading authority? The scholars here can better answer that question than I can. Nevertheless, here's my theory. Richard's mind floated in the clouds: he possessed brilliant insights about aggregate litigation that few others shared. But that alone doesn't create greatness in an academic; one need only scan the annals of this law review, and others, to observe the wisdom of many legal scholars. What made Richard so special, instead, was *how* he conveyed his wisdom. He had a remarkable ability to explain his insights in a manner understandable to all, from the first-year law student to the general public. That very accessibility enabled his ideas to take flight. And yet Richard never sacrificed substance or style, especially the occasional pop-culture reference, for the sake of simplicity. To me, this unique gift—the ability to share his brilliance with the masses—allowed him to become one of the most influential voices in aggregate litigation.

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2. As of October 8, 2011, a Westlaw search for "Nagareda" in the journals-and-law-reviews database resulted in 687 hits. (I'm quite certain he's the only "Nagareda" who will appear in a JLR search.) Richard published 25 law-review articles, 3 of them posthumously.

3. 131 S. Ct. 2541 (2011).

Yet it's not Richard the scholar that I'll most remember. For as great as he was in that capacity, he was an even greater teacher of the law.

I vividly remember my first class with Richard. I strolled into the classroom ten, maybe fifteen, minutes early, hoping to reserve a good seat for the semester. For most classes, the professor enters perhaps five minutes before class is scheduled to begin. Not Richard. He had already taken up position near the front of the classroom, and he had filled nearly the entire whiteboard with bullet points. For those ten to fifteen minutes, he stood silently, sizing up this new batch of students. (I sized him up too: he was sharply dressed, sporting a thin-pinstripe suit and monogrammed French cuffs.) The clock struck 9:30 a.m. "This course is intended to disabuse two melodramatic views of complex litigation," Richard began without welcome, his signature bass voice filling the room. "One, this is all about noble plaintiffs righting the wrongs of corporate defendants. Two, this is all about law-abiding defendants being shaken down by greedy plaintiffs' lawyers." And then, for what seemed like thirty minutes, Richard introduced complex litigation to us in perfectly crafted sentences, never once stammering. I was astounded. But it wasn't just his stylistic prose that astounded me: substantively, every word served an instructive purpose. When class ended, I turned to a friend and said, "He's the Bard reincarnated as a law professor." I wasn't entirely joking.

Richard truly had mastered the art of teaching the law. His lectures, as just described, were exquisite. But even more impressive, I think, was his use of the Socratic Method. Tough, unrelenting, and blunt best describe that use. Of course, those words also suggest that he was a real-life version of the infamous Professor Kingsfield from *The Paper Chase*. Not so; unlike the callous Kingsfield, Richard always treated us students with respect. And he was tough on us because he believed in our infinite potential. Richard often focused his attention on one student, and only one student, for significant stretches of class time. He would pepper that student with question after question, each one more nuanced than the last; few, if any, having a correct answer. My turn came one day in class, and I remember the dizzying feeling of falling down the rabbit hole of legal complexity as Richard asked successive questions of increasing difficulty. At the time, it didn't feel like I was learning much; I merely was trying to keep up with him. But later, when I reflected on that class, I realized the great extent to which I had learned through his questions. He used them to push me, and all his students, toward a higher understanding of the law. For many of us, Richard was the best

teacher we ever had because he led us to intellectual heights we never before had reached.

Richard, then, expected the best from us; and in turn we wanted to do our very best for him. Most of us prepared more for his class than any other. Sure, for some that can be explained by a simple fear of embarrassment during Socratic questioning. But many others, including me, saw the significant effort he put into teaching each class, and felt that he deserved no less effort from us. So we pushed ourselves, and pushed ourselves, and pushed ourselves in pursuit of a unique goal: attaining Richard's satisfaction. And to satisfy him meant never to settle for mediocrity in the work that we do, but always to strive for greatness. For in the end, that was Richard, and now it is us.

A year has passed without Richard, and many more will, but his legacy will endure in each of us—in every article, brief, memorandum, or opinion we write; in every case we argue; in every class we teach; in every student we mentor; in so much of what we do as practitioners, students, and teachers of the law.

And that is worth celebrating.

*Andrew R. Gould\**

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\* Law Clerk to the Honorable Lee H. Rosenthal, United States District Judge for the Southern District of Texas; Executive Editor, VANDERBILT LAW REVIEW, 2009–10.





*There are some things about narrowing your life down to six-minute increments that you will never regret. You'll never regret hopping on a plane to go settle one more multimillion-dollar lawsuit. You'll never regret sticking around the office for one more six-minute conference call to tell your clients you won. You'll never regret flying across the pond on a transcontinental flight to settle a piece of litigation and then taking the afternoon to walk through Paris munching on a Royale with Cheese.*

*When you retire, you'll never regret having spent an additional six-minute increment of your life doing any one of those things.*

*But, I dare say that what you may regret is the fact that in all of that there will come a time when you wish you would have had one more six-minute increment with a lifelong friend, a spouse, a child, or an elderly parent. It's easy to not think about those things now, but those are the six-minute increments that later in life you would give anything to get back. Those are the most important six minutes of your life.*

—Richard Nagareda

These were the last words Richard spoke to the students in his spring 2006 Complex Litigation class. These were also the last words I spoke to my first-year class in the spring of 2011—six months after Richard Nagareda passed away. In that moment, at the conclusion of teaching my very first law-school course, and as I stood looking out at my students, I was overcome with gratitude for the precious moments I spent with the man who inspired me to stand in that very spot. Richard was right: such moments are irreplaceable. For me, the moments I spent with Richard—as my professor, as my mentor, and as my friend—were some of the most important of my life.

*Richard Nagareda, the Professor.*

As a professor, Richard was challenging, and his standards for student performance were unyieldingly high. Indeed, I will never forget the first time he called on me in Evidence class during the fall of my second year. I arrived to class having accidentally read the wrong assignment. The class was discussing hearsay; I, however, had read the assignment on the many hearsay exceptions. Predictably, he

called on me to answer a straightforward question: "Is this statement hearsay, Ms. Glover?" I replied, "No, it's likely an excited utterance." "Wrong!" was the excited utterance I got in response, which was followed by a short, exasperated explanation that one must determine whether something is, in fact, hearsay before one can determine whether an exception applies. "Next," he said, and moved on.

Those of us who had the privilege of studying with him know, however, that the person Richard held to the highest of all standards was himself. Richard was, without fail, thoroughly prepared—and impeccably dressed—for every lecture. Indeed, Richard articulated the point as only he could when he quipped, "Students are paying \$36,000 a year to listen to me; the least I can do is wear a nice suit." But Richard's sartorial sophistication was only one of many indications of his serious approach to teaching. After I graduated law school, and once I started to transition into legal academia, Richard began to show me all the work he did to prepare for lectures. I learned that he spent hours designing lectures, and in so doing, he tried to both anticipate all possible questions and to imagine any potential dead-end roads down which students might wander. He worked tirelessly to prepare his responses to each inquiry, to remedy each point of confusion. This was in addition to the time he spent developing, from scratch, a year-long, upper-level litigation seminar.

Richard also poured his personality into his lectures, often in the form of favorite pop-culture references or of stories about the mishaps of even the smartest litigators. To this day, I cannot think about a Rule 23(b)(3) class action without hearing Richard's colorful description of the opt-out process, "Opt-outs are the Eric Cartman view of litigation; that is to say, a class member who opts out of a class says to the others: 'Screw you guys; I'm going home.'" Nor will I ever think about questionable litigation strategies without recalling his animated descriptions of the misadventures of Milberg Weiss.<sup>1</sup> And each time a large recovery fund is created with little attention to the details of its dispersal, I hear Richard's voice in my head, warning: "If you build it, they will come."

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1. The law firm of Milberg Weiss came under federal investigation for providing illegal kickbacks to serial plaintiffs in securities class actions. It had done so in order to position itself to receive the lion's share of work in the highly profitable field of securities litigation for approximately twenty-five years. Several partners at the firm pleaded guilty to federal charges and have paid millions of dollars in fines as well as served jail time. See Peter Elkind, *The Fall of America's Meanest Law Firm*, FORTUNE Nov. 11, 2006, [http://money.cnn.com/magazines/fortune/fortune\\_archive/2006/11/13/8393127/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/2006/11/13/8393127/index.htm); Edvard Pettersson, *Weiss Sentenced to 2 1/2 Years for Kickback Scheme*, BLOOMBERG (June 2, 2008), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aGqfpC4ZjoAw&refer=home>.

I believe that Richard devoted such incalculable time and energy to teaching not just because he held himself to exacting standards of excellence—which he did—but also because he sincerely believed—and expected—that we, his students, could achieve far more than we thought possible. So Richard pushed us, and at times he pushed us beyond where we thought our own limits were. And we, his students, are better for it.

Richard's voice remains in our heads, calling us to task when we take a shortcut, develop an approach that is insufficiently nuanced, or fail to see the bigger theoretical implications of our thoughts. And his voice on these matters is often memorable. I will never forget the day he emailed me, at the start of my third year of law school, telling me to stay focused on the upcoming clerkship process. He had learned from some of my more "loose-lipped cohorts," as he called them, that I had recently begun dating my now-husband. He wrote: "Love and infatuation literally cause chemical changes within the brain," and he cautioned that I must not let those changes divert my attention from the important clerkship challenge ahead.

Even more, Richard believed in the abilities of those who welcomed his challenges, those who let him make them better. Richard was our champion. It is no exaggeration to say that many of us, certainly including myself, would not be where we are today without him.

In the end, though, Richard cared about more than what his students learned or what they accomplished. At bottom, Richard cared about us—and he cared long after we left law school. We could always count on him to update us on each other's postgraduation activities, whereabouts, and adventures. Richard was, for us, the hub and the heart of Vanderbilt Law School. I remember asking him, prior to my wedding, whether he wished to be seated with "law-firm adults"—whom he knew well—or "Vanderbilt kids." His response: "Definitely Vanderbilt kids."

After Richard passed away, a friend of mine from a different graduating class contacted me, and she told me a story that I believe captures how Richard saw himself in relation to his students. In 2007, a tragic shooting occurred at Virginia Tech. Speaking with his current Complex Litigation class, Richard mentioned the tragedy. Instead of focusing on the students' deaths, however, he spoke of the acts of the professors at Virginia Tech. He recounted how they had run—not away from the gunfire, but toward it—in an effort to protect the students. He finished: "That is precisely what I would have done."

*Richard Nagareda, the Mentor.*

In addition to his devotion to teaching, Richard made substantial and often groundbreaking contributions to the scholarly community. As just one of countless examples, and as the other contributors to this memorial issue will set forth in greater detail, Richard's insights on the class-action mechanism provided the cornerstone of the Supreme Court's analysis in *Wal-Mart Stores, Inc. v. Dukes*<sup>2</sup>—arguably the most significant class-action decision in nearly a decade. Indeed, Richard fit so much life into each six-minute increment that even though he had fewer increments than many, he achieved what only a few could aspire to.

He also devoted scores of six-minute increments to students and young legal scholars; he was always willing to provide thorough comments on drafts and to discuss ideas. In the weeks following his death, I was astonished to learn just how many scholars had benefited, to no insignificant degree, from his immense generosity. I found it surprising—and yet completely unsurprising—that he had such an impact. Surprising in the sense that, when Richard helped you with a project, he did so in such a focused and individualized way that it seemed incomprehensible that he could have had the time or energy to spare on anything else. But neither his generosity nor his intellectual gifts knew normal bounds.

Some of the best, and certainly irreplaceable, increments of my life are those I was lucky enough to spend with Richard as my mentor. In my former, and to some degree current, life, I studied and performed opera. Indeed, opera was one of Richard's and my shared passions. As any opera singer will tell you, the most valuable asset she possesses is her voice. But she will also tell you that having a gifted voice teacher is critical; it is the talented voice teacher who helps you strengthen your voice, who teases out the depths of your tone and the clarity of your sound, who nurtures your voice as it reaches higher notes and seeks to master more difficult and exposed passages. More than that, though, the voice teacher is the *caretaker* of your voice: pushing you hard, sometimes to the brink, but stopping short of pushing you to take on more than your voice can physically handle. And if you are truly lucky, your teacher does all of this in a tireless effort to help you find *your* best voice. Not someone else's, and certainly not his, but *your* best voice.

And so I believe it goes with legal scholarship. I am grateful and proud that I had Richard as my "voice teacher." He pushed me

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2. 131 S. Ct. 2541 (2011).

very hard—in fact, he once said that his purpose in my life was to “beat me over the head” until the larger theoretical implications of my ideas emerged more focused and fully developed. He never hesitated to tell me when I was headed down a wrong path. More than this, he did not shy from telling me precisely *why* I was heading down a dead-end road, a talent I sometimes believed betrayed his ability to enter my brain. Perhaps he would not have found this shocking—he might have considered this talent evidence that “the force” was strong in him, proof that he could perform Jedi mind tricks. But he had this ability, I think, not just because he was brilliant (and certainly equipped with the force), but because he had generously invested so much time speaking with me about my work.

As hard as he pushed, and as hard as he could be to please, he nonetheless provided me with immense strength. Every time I hear his voice in my head telling me to “focus” an idea or to avoid an approach that would be “asinine and undifferentiated,” I also hear his voice saying that he believed in me. As I have come to understand more fully in the past year, through working with students of my own, Richard pushed me *because* he believed in me. His was the voice that said I *could* come up with ideas worth writing—or, more scarily—worth presenting to others. On my hardest days, when ideas will not flow and papers will not write, when everything in my head seems “asinine and undifferentiated,” I remember that Richard—one of the toughest critics—would have told me to keep going; he would have believed in me.

What is more, Richard never pushed me to develop a voice other than my own. He did not equate “good ideas” with “Richard’s ideas.” In fact, he and I disagreed frequently—and he seemed to delight in this. For him, this principle of acceptance was personal: he cherished Vanderbilt as a place where he could “proudly wear [his] Reagan cufflinks”; a place where all political and philosophical viewpoints were challenged, but also respected. And he extended that acceptance of both ideas and ideology—which he so valued in his own life—to others. One of the last things he said to me in September of 2010, a month before he passed away, was this: “Ultimately, Maria, you have to write about what makes you want to get up in the morning. You should think on things about which you are passionate.” “My role,” he said, “is to help you develop *your* voice.”

In short, Richard was an ever-elusive form of mentor: the one who provides a challenging, but *always* safe, space in which to grow. I have found that in scholarship, as in opera, the most valuable thing a teacher can provide is a safe space to try newer and more challenging tasks. That space is precious: if you are afraid to show anyone a new

part of your voice, even if it has yet to be perfected, or even refined beyond little more than a promising squawk, you will never sing. If you are afraid to share with someone further along in his or her career your ideas, even those that are undertheorized and far short of their ultimate potential, you will never write. To truly grow as a young scholar, you need someone who pushes you and who challenges you, but you also need someone to listen to your ideas—even when some of them are nonstarters—without writing you off. You need someone generous enough to help you refine those ideas into something new and interesting, but something that is still uniquely yours. Such space is rare, and I was lucky enough to have it in Richard. The six-minute increments I spent in that space—those are ones I would give anything to have back.

*Richard Nagareda, the Friend.*

Finally, for many of his students, Richard became a dear friend. He was one of the first people we thought of, and contacted, when we read an opinion or article that would stun him (for better or worse), when we attended an opera or a play that he might like (or not), when we saw a movie clip he would find humorous. If you sent Richard a particularly funny email, you would receive one of his all-caps responses, and you could hear his voice speaking the words: “HILARIOUS!” “STUNNING.” “OUTSTANDING.” As just one of many examples, one of my classmates, an Assistant U.S. Attorney, told me that she immediately contacted Richard when she found herself prosecuting a defendant named Ricky Marcellus Wallace (“Marsellus Wallace” is a character from the movie *Pulp Fiction*), knowing that he would get such a kick out of the Quentin Tarantino reference. And of course he did. In his response to her, he mentioned one of his recent articles, in which he had managed to work in a reference to a “Royale with Cheese.”

As a friend, he was still very much “Richard”—always sharing his precise opinions on anything from the conducting style of James Levine to the proper way to start a meal. As to the latter, the answer is, of course, a glass of crisp, brut champagne. My husband, Derek, and I had the privilege of dining with Richard a fair number of times in the years after I graduated law school; Richard made frequent trips to Washington, DC, where my husband and I currently live, and during Richard’s time at New York University Law School, we would often join him for dinner and an opera. Invariably, the dinner would start something like this: “Derek, I don’t know what you’re having, but Glover and I are having champagne.”

Richard also had particular views on love. For instance, women, he believed, faced a choice between two types of men: Luke Skywalker (or slightly wimpy, whiny) men and Han Solo (or stronger, but more difficult) men. He was even particular about weddings. Shortly after my own, in fact, I received a two-paragraph “review” of the entire affair. In it, Richard noted everything from the content of the ceremony remarks (of which he approved, given the focus on the hard work that is marriage), to the selection of the bridesmaids’ dresses (flattering, not like you sometimes see when a bride “stuffs her friends into ill-fitting pastel polyester numbers”), to the cake cutting (“perfectly timed to let us old folks know when it was fine to head home”).

It is hard to measure the impact of a friend on one’s life in minutes, in hours, in days, or even in years. Perhaps numbers seem an even cruder measure, but it turns out that numbers, for me, illuminate just how much of a friend Richard was in my life. As I prepared my remarks for Richard’s memorial, I looked back through some of the emails we had exchanged. I started with my Gmail account, which I signed up for *after* graduating law school. I typed Richard’s email address into the search field and pressed “Enter.” Once the computer finished its search, my cursor rested on the most recent email he had sent, just days before he died. Below the email field, I read Gmail’s numerical description of the search results: “one of hundreds.” The unquantifiable emails, in a strange way, said everything. Those of us who were lucky enough to have those precious minutes with him know that we cannot measure the impact that he had on our lives. Perhaps that is why his passing, which came too suddenly, and far, far too soon, is so very difficult—we feel indebted to him, and we regret deeply that we will never have the chance to repay his generosity. That said, it is assuredly true that, no matter how long he was here, few of us could have ever given as much to him as he gave to us.

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Sometimes I feel as if I only got to spend six minutes with Richard. You can have thousands of moments that mean very little, and precious few defining moments that mean everything. In that way, Richard was right, yet again. And those moments I had with Richard, as it turns out, helped define *me*. In those moments, he stoked the fires of my intellectual passions, he inspired and challenged me to be a better scholar, and he instilled in me a deep respect for teaching. On days when, in the wake of his death, I found it most

difficult to teach, I remembered that he always put everything he had into his lectures, and from that I drew strength. The respect he had for his students has now taken hold in me. And on days when I feel most alone with my ideas, I read one of his articles. With each new reading, I learn something more; I see something I did not see before. And on days when I find myself most frustrated with my writing, I ask, "What would Richard think of this idea? What connections would he expect you to draw? What bigger insight, lurking underneath, would Richard push you to unearth?" Richard, it turns out, still teaches me.

There will, of course, come a time when the articles run out, when the reference points grow faint, and when even the most vivid of many memories fade. There will come a time when legal developments and scholarly projects currently unforeseen demand attention, and when his guidance for my voice will manifest as little more than a whisper. But the best voice teachers do more than teach a student how to sing a particular song, or a particular passage, or a particular note. Instead, the best voice teachers guide their students to develop the very core of their sound—the core that will remain no matter what the song to be sung, no matter the complexity of new roles and new arias, no matter even how the tone and timbre of the voice naturally evolve, and change, as the seasons pass. I will carry with me always the core sound that Richard helped and encouraged me to develop, and in that way, I will carry *him* with me always. And when I stand, whether before a classroom of students or before a group of scholars, I stand on his shoulders—I stand on the shoulders of a giant.

And I will carry one thing more: the ears to listen. When I first came to know Richard, I was a young, wide-eyed student who spoke to him with what sounded to me like a squawk; Richard, however, heard somewhere in me a *voice*. Guided by his example, when I devote many of *my* six-minute increments toward mentoring students—students who can hear in themselves a mere squawk—I will listen for a voice. I expect that one of these students may ask me where *my* mentor has been. And to them I will say this: in my core, he never left.

*J. Maria Glover\**

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\* Climenko Fellow and Lecturer on Law, Harvard Law School. Maria was both Richard Nagareda's student and research assistant from 2005–2007. Maria and Richard remained close friends until he passed away in 2010.





*I admire the ability of The Simpsons to communicate on a wide range of levels. The show does a wonderful job at ridiculing pretentiousness of all varieties without devolving into cynicism.*

—Richard Nagareda<sup>1</sup>

Here's what I like about this quotation. For me, and I hope for others who knew him, it preserves vividly the memory of sitting in Richard's office, surrounded by his beloved pop-culture trinkets. I swear I can still smell the plastic.

It also reminds us of Richard's remarkable and endearing breadth. I'm not sure I've ever met anyone who was as fluent in pursuits both highbrow (e.g., opera) and lowbrow (e.g., bad television).<sup>2</sup> And for those who might have drawn a mistaken impression from having observed Richard only in buttoned-down professional mode, the quotation will serve to point out that he also had a sense of humor. More on this below.

Finally, the quotation obviously expresses Richard's detestation of pretension and his rejection of cynicism.

Richard's dislike of poseurs was visceral. It stemmed in part, I believe, from a lingering resentment that the academy was slow to accept him, not only because of his conservative politics, but also because he was quite incapable of engaging in the sort of performance-art that sometimes passes for displays of intelligence.

Richard's relationship to cynicism was more complicated. He was cynical about certain things and probably could not have been otherwise. His academic career was devoted to studying the high-stakes machinations of boundary-pushing lawyers and businessmen. Vices such as greed and corruption naturally accompany this sort of activity,<sup>3</sup> and Richard was far too clear-eyed not to understand the power of the dark side in this context.

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1. As quoted on the Vanderbilt University Law School website, <http://www.vanderbilt.edu/day/nagareda.html> (last visited Aug. 27, 2011). The comments that follow my ruminations on the above quotation are a revised version of remarks delivered at the memorial service held for Richard Nagareda at Vanderbilt Law School in November 2010.

2. I do not mean to suggest that *The Simpsons* counts as bad television. Richard was equally knowledgeable about good television.

3. So too do virtues such as integrity and professionalism.

And yet, Richard was quite idealistic about the role that law and principles of democratic governance could and should play in mass tort litigation. He understood the degree to which law leaves room for maneuver in the resolution of complex disputes. Still, he was keen to stress law's guiding and cabining role. Richard believed in law. And so he believed that, in complex litigation, no less than in a simple slip-and-fall suit, liability should turn on whether one has a valid claim—hence his concern to smoke out instances in which procedural rules and lawyerly and judicial practice allowed for end-runs around substantive law.<sup>4</sup>

Much the same can be said of his views on democratic governance. Worries about the use and abuse of power lie at the center of his magnificent book. It aims to demonstrate that mass tort suits are not so much instances of private dispute resolution as exercises of regulatory authority by attorneys over their clients.<sup>5</sup> The fundamental challenge, as he saw it, was to harness law and market forces to ensure that this authority is wielded legitimately. Legal representation, he insisted, is in this context a form of governance and must therefore be subject to the constraints of democratic principle.

So Richard was a realist about life and an idealist about law and democracy. That he—the son of a man unlawfully detained in an internment camp—should be idealistic in these ways is at once entirely remarkable and entirely understandable.

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Richard and I were something of an odd couple. Readers of a certain vintage might think of us as Felix Unger and Oscar Madison. The difference in our physical statures was merely the most visible of many.

Richard studied the high-stakes, big-money, fast-moving world of class actions, multidistrict litigation, plaintiffs' steering committees, and settlement grids. That stuff makes me dizzy. I'm still trying to understand what it means to commit a trespass.

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4. See, e.g., Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 104 (2009) (arguing that procedural and evidentiary issues associated with class-certification decisions mask "an implicit demand for a new and often controversial conception of the substantive law that governs the litigation"); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 181–98 (2003) (maintaining that the bargaining power of class counsel derives, and should derive entirely, from class members' preexisting legal rights).

5. RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT*, at ix–x (2007).

Richard was also a true blue (red?) conservative. I don't know how things work at Federalist Society headquarters, but Richard surely had achieved the status of Grand High Lord Protector, or whatever title is bestowed upon their most eminent eminences. I'm not part of that world, instead belonging to the mushy center-left—folks who like to congratulate themselves for being reasonable, often while getting nothing done.

Richard was most definitely a steak-and-potatoes guy. I remember a law school event that brought us together at a local steakhouse. As he sipped his martini (gin, of course!) and tucked into his barely departed cow, he couldn't resist mocking the gigantic head of broccoli that played the role of entrée for his vegetarian friend.

Richard was fastidious. Until I met him, I thought that rubber overshoes—"galoshes," my parents called them—had gone the way of the rotary phone. This same sensibility was evident across Richard's wardrobe: Brooks Brothers, even on the hottest Nashville summer day. I had it in my head that he spent his evenings in a smoking jacket and slippers. No surprise, then, that Richard was unimpressed with my commitment to "grad student chic," especially when I took on a position of nominal authority at the law school. "Jesus, Goldberg, you're supposed to be a grown-up!! Dress like one!!"

Enough said; the point is made. We were two very different people. By all rights, we shouldn't have been friends. But we were. What is it that brought us together? I won't venture to say what Richard saw in me. But I can say what I saw in him.

Richard was smart—super, scary smart.

Richard had standards. And he wasn't shy about letting it be known when someone failed to meet them. In others, this might have been irritating, but Richard played fair. He held everyone to the same standards. And he was harder on himself than anyone else.

Richard was driven. From the day he set foot in the academy, he had something to prove. All those self-satisfied, loosey-goosey, multifactor-balancing, judicial supremacists would be hearing from him. And they did. Richard had the attention of the academy, the bar, and the bench.

Richard was funny—wickedly, bitingly, laugh-'til-you-cry funny. One of his specialties was nicknames. He had a real genius for them. Decorum prevents me from offering examples here. I assume that he had one for me, so if anyone wants to let me in on that secret, I'd love to hear it.

Richard was cultured. When we were in New York for an academic conference, he arranged for us to see Vanessa Redgrave and Philip Seymour Hoffman in *Long Day's Journey into Night*. It was

mesmerizing. We spent hours afterwards talking about it. It was no less a treat to hear him wax eloquent about the cinematic significance of *Kill Bill*.

Richard was loyal—when you needed him, he was there.

Richard was considerate. Just days before I was to embark on that vaguely debasing, three-month-long job interview referred to in this business as a “visit,” Richard stopped by my office with a bottle of scotch and an encouraging note. And it was good scotch. Really good scotch. Did I mention that Richard had standards?

Richard was caring. He was a devoted husband to Ruth and a proud father to Evan. And he loved his students—at least those who were serious about being students. I’ll never forget seeing him break down in tears as he introduced the first graduates of his beloved Branstetter Litigation Program to an assembly of proud family and friends.

Richard was responsible. In academic writing there’s the familiar character of the free rider. So far as I know, there’s little discussion of the free rider’s opposite. Let’s call him the “full-fare rider.” The full-fare rider is the one who subsidizes those who travel on a discount. It’s only because he pays more than he should—too much, way too much—that others get by on the cheap. Richard was the full-fare rider. He did everything and did it exceedingly well: husband, father, teacher, scholar, colleague, citizen, mentor, and friend. He gave all he had to give.

At Richard’s invitation, I once participated in a Federalist Society conference. Its members tend not to have kind things to say about the tort system. The audience was packed with tort skeptics, and most of the panelists added fuel to the fire. I meekly suggested that political conservatives, of all people, should be tort law’s defenders. It is, after all, the part of the law that is most about personal responsibility—the responsibility to adjust one’s own conduct so as to avoid injuring others. I didn’t get the sense that this message was well received. Later, at a reception, Richard introduced me to Gene Meyer, President of the Federalist Society. With his wry smile and booming voice, he said to Gene: “I’d like you to meet my colleague John Goldberg, a true conservative.” I couldn’t have been prouder.

The year 2010 belonged to the Giants—Richard's beloved San Francisco Giants. Richard was a giant. Richard was my friend. I will miss him terribly.

*John C.P. Goldberg\**

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\* Professor, Harvard Law School; faculty member, Vanderbilt University Law School, 1995–2008.

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*I can't help giggling at the irony of the ACS inviting someone who happens to be named Birkenstock. I guess the Federalists now need to invite someone named Countryclub!*

—Richard Nagareda<sup>1</sup>

On November 12, 2010, Vanderbilt Law School hosted a celebration of Professor Richard Nagareda's life. At the celebration, I was honored to welcome the many family members, friends, colleagues, staff, students, former students, and others in attendance.

In my opening remarks, I shared the quote that appears at the beginning of this Tribute to illustrate, in a small way, Richard's splendid sense of humor. I chose to repeat the quote in this Essay in part because I shared it at the celebration and in part because it hints at some of Richard's other most admirable and enduring qualities: his open-mindedness, his tolerance, and his humility.

To be sure, Richard held deep and well-reasoned views. He could argue persuasively in support of *all* of his opinions. But he never lost sight of the fact that he was advancing an *opinion* and that opinions are contestable. He might be right; his counterpart might be right; they might both be right; or they might both be wrong. Despite his deep political convictions, Richard never believed he had somehow cornered "the truth."

Richard was both my colleague and my friend. His life, all too short, was well-lived. He left behind many who loved him and learned from him; an influential body of scholarship; and a model for how to live life as a law professor and as a human being.

As time passes, and as Richard's death becomes more distant, I find myself reflecting less on my grief and more on the ways I can keep Richard with me. I have concluded that I can do so best by trying to emulate him and, in particular, by aspiring to temper my own deeply held views with the kind of open-mindedness, tolerance, and humility he so often displayed.

This Essay is a lightly edited version of the remarks I made at the celebration held in Richard's honor:

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1. Email from Richard Nagareda to Chris Guthrie (Jan. 22, 2007) (on file with author).

Earlier this fall, I had the privilege of appointing Richard to the David Daniels Allen Distinguished Chair in Law. At the time, I anticipated that we would formally install Richard as the Allen Chair at a ceremony that would occur at about this point in the semester.

I was really looking forward to *that* ceremony.

I confess that I have not been looking forward to *this* ceremony.

To be clear, I believe that Richard's life deserves celebration. He accomplished more in his forty-seven years—both personally and professionally—than most of us will accomplish in what we hope will be much longer life spans.

But the celebration of Richard's life forces us to confront Richard's death—and the feelings of loss and grief accompanying it.

Frank O'Connor, the well-known Irish writer and critic, is quoted as saying, "All I know from my own experience is that the more loss we feel[,] the more grateful we should be for whatever it was we had to lose."<sup>2</sup> In that spirit—and in what I hope will be the spirit of this celebration—I want to focus my brief remarks not on my grief but rather on my gratitude.

I am grateful that I had the chance to know, to work with, and to become friends with Richard.

As I reflect on the nearly ten years I spent as Richard's colleague and friend, I am reminded of his personal and professional integrity; his unwavering commitment to high standards; his penetrating intellect; his command of pop culture; his uncanny ability to impersonate others; his boundless generosity and other-regarding behavior; his stubborn refusal to wear jeans; and his awesome sense of humor.

With regard to his sense of humor, I can't resist sharing one anecdote—in *Richard's words*.

To appreciate this anecdote, you need to know that the American Constitution Society (or ACS) is a liberal or left-leaning organization and that the Federalist Society is a conservative or right-leaning organization. Richard was our long-time Faculty Advisor to the Federalist Society.

A few years ago, I sent an email to the faculty informing them that the ACS was hosting a presentation by a gentleman named Joe Birkenstock, the former General Counsel of the Democratic National Committee.

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2. Quote from Frank O'Connor, in ASHTON APPLEWHITE ET AL., AND I QUOTE: THE DEFINITIVE COLLECTION OF QUOTES, SAYINGS, AND JOKES FOR THE CONTEMPORARY SPEECHMAKER 131 (2003).



Shortly after sending this email to the faculty, I received the following reply from Richard. I can see the impish grin on his face as he typed it:

It's excellent that the ACS is adding to the outside speakers available to our law school community. The topic, too, sounds interesting. But I can't help giggling at the irony of the ACS inviting someone who happens to be named Birkenstock. I guess the Federalists now need to invite someone named Countryclub!<sup>3</sup>

But above all else, I am reminded, when I think of Richard, of his open and unabashed love and affection for both his family and the Vanderbilt Law School community.

Richard's abiding love for his family—for Ruth and Evan—was apparent. But shortly before his death, he made clear to me the depth of his feelings for his family, and for Evan, in particular.

As many of you know, Professor Tracey George and I are expecting a baby in the next couple of months. When Richard learned of this, he emailed us congratulations and graciously described our news as “absolutely joyous”<sup>4</sup> to him.

I thanked him and acknowledged that though I was excited I was also a bit terrified.

In response, he wrote as follows:

I was completely terrified, too, for what it's worth. But I will never, NEVER forget the moment when I first saw Evan resting in the baby ward after he was born and cleaned up. It was as if all the motion and tumult of the world had suddenly stopped. I've never experienced anything like that in my life.<sup>5</sup>

Richard also loved Vanderbilt Law School. His affection—particularly for his students—was palpable each May, when he presided over the Branstetter Litigation & Dispute Resolution Program ceremony in honor of the graduating students who had completed his capstone course.

At the ceremony, he congratulated each of his students individually; celebrated their accomplishments in front of their loved ones; and then delivered heartfelt farewell remarks that invariably brought him (and most of the rest of us) to tears.

This summer, Richard sent me an email that captured, at least in part, his affection for the Vanderbilt Law School community. Following the flooding in Nashville last spring, I sent an email to the

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3. See Email from Richard Nagareda, *supra* note 1.

4. Email from Richard Nagareda to Chris Guthrie (Aug. 30, 2010) (on file with author).

5. *Id.*

Law School describing how its members were supporting one another during that challenging time. Richard responded, in part, as follows: "I just read your well done and compassionate . . . e-mail message to friends of VULS . . . . [You've identified even] more reasons why I am glad, and proud, for all the reasons that you summarize in your message, to be here . . . ."6

I, too, am glad and proud that Richard was here.

*Chris Guthrie\**

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6. Email from Richard Nagareda to Chris Guthrie (May 7, 2010) (on file with author).

\* Dean of Vanderbilt University Law School and John Wade-Kent Syverud Professor of Law.



*What is likely to emerge is not the exceptionalism of the U.S. experience but, instead, a striking lack of exceptionalism—McDonald's on the Champs-Elysees, but with its Quarter Pounder famously restyled as a Royale with Cheese.*

—Richard Nagareda<sup>1</sup>

One of the joys of the academy is the rare opportunity it affords for engagement across generational lines. The shared rank of professor and the sheer duration of academic careers allow contact across the cycles of life. We see our colleagues have children, and we see them age. We experience joy, and we experience sorrow. It adds fullness to our lives, and it gives meaning to a life of transmitting knowledge from one generation to the next.

This is the first time that I have been asked to write in memory of a colleague and friend who was younger than me. I find this almost as bewildering as confronting the news of Richard's death. The normal patterns of confronting death do not hold. This time, grief is mixed with disbelief. Mourning is unalloyed by the normal sense of reflection on a life fully realized. To think of Ruth, Richard's wife, so much in her prime, and to think of Evan, his son, bursting with the energy of youth, is to realize how cruel and ungenerous the fates were that brought about such a young death.

Yet, it would dishonor our friend to not allow ourselves the normal, bittersweet remembrances of a life—a life too short, but a life well led. Let me go back in time to how I first met Richard. I was introduced to him, as were so many of us, through his writing. I came across his first piece, *Turning from Tort to Administration*, when it appeared in the *Michigan Law Review* nearly fifteen years ago.<sup>2</sup> The article stood out from within the still-nascent field of mass torts, before the Supreme Court's defining opinions in *Amchem* and *Ortiz*. The challenge at the time was to bring the daunting procedural issues into alignment with the substantive claims in critical areas, such as asbestos, breast implants, and DES. Most daunting of all was how to

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1. Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 52 (2009).

2. Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899 (1996).

reconcile the individual nature of a tort claim with the underlying epidemiologic proof in mass torts.

What stood out immediately was Richard's writing. My wife insists on clear writing, and Richard was always a favorite of hers. From his first article, Richard's ability to express difficult concepts clearly was remarkable. The turns of phrase, the use of analogies from distant areas of law, the humane introjection of popular references, all yielded a compelling prose that was crisp, analytic, evocative, imaginative.

Richard had the ability to think across categories to try to find the operational lever that could resolve a puzzle. He relished the opportunity to use cultural references to bring difficult issues to life. The references could be to high culture, but he had a remarkable attentiveness to popular culture. So Richard could look askance at my being taken by a concert I had heard by Lang Lang—too flashy, he thought. But Richard brought to life an otherwise long and difficult article we wrote together by comparing an imprecise doctrine of procedural law to Shimmer, the commercial creation of *Saturday Night Live* that could serve as both a dessert topping and a floor wax. It is no doubt the most memorable part of the article.

Or let me give one of my favorites, the last line of Richard's insightful piece on the hesitating European experiments with aggregate procedures: "What is likely to emerge is not the exceptionalism of the U.S. experience but, instead, a striking lack of exceptionalism—McDonald's on the Champs-Elysees, but with its Quarter Pounder famously restyled as a Royale with Cheese."<sup>3</sup> How great it is to read a law review article and hear it in the voices of John Travolta and Samuel L. Jackson. And how sad to think that the last enterprise that Richard and I organized together was a conference in Italy on just this theme, one that Richard's health forced him to miss.

To return to our first meeting, I sent Richard a letter on his first article, the old kind with stamps and all. I praised the piece and welcomed its contribution to the field. But I also meted out criticism for what I thought of as shortcomings in the analysis and assumptions that needed further scrutiny in future articles. It was the criticism directed at a peer that I had so deeply appreciated when I was a junior professor at the University of Texas School of Law. And, in seeing a kindred scholar at another institution, and perhaps one who did not have colleagues as engaged in his fields of inquiry as I had been fortunate enough to rely upon, I ventured out of the blue to offer not

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3. Nagareda, *supra* note 1, at 52.

only praise but serious commentary on his piece. From there began a long and deep collaboration.

Sometime later, I was invited to give a lecture at the University of Georgia School of Law when Richard was on the faculty there. Richard gave me the most memorable introduction I have ever received. It was memorable not for the usual, overly laudatory, false flattery of the invited speaker—an odd academic affectation—but for the way he took the occasion to address the students in the audience. Richard began the introduction by referencing the unsolicited letter I had sent him. He told the students what it meant to be starting out and insecure and unsure of whether what you are doing is worthwhile. He described in an open way his own vulnerabilities and his own sense of being reassured by the attention of someone more established so that his students might also find a deeper sense of resolve and perseverance in their moments of doubt.

For me, it was an introduction to Richard the extraordinary teacher, someone who would not let pass an opportunity to engage his students not just on matters of substance, but also on the way one learns from all aspects of life. I had the privilege to see this side of Richard when he visited as a professor at schools where I taught. And it is this side I see in the outpouring of student grief over his loss. To quote one of my students, writing to me, “I just heard about Professor Nagareda via a friend at Vanderbilt. I know he was a friend of yours in addition to a colleague, and I am sorry for your loss. He was one of the best professors I had at NYU.” Simple, but he touched people.

Let me turn to a personal note, one about the sense of loss following the intense engagement that I had with Richard, Charlie Silver, and Bob Klonoff over a five-year period working for the American Law Institute on the *Principles of the Law of Aggregate Litigation*. For Richard, I know, this was a significant professional experience, even leaving aside the personal relations that ensued. The masterful work that Richard did on this project enriched his book, *Mass Torts in a World of Settlement*, and provided the raw material for his important casebook, *The Law of Class Actions and Other Aggregate Litigation*. Most recently, it was Richard’s work on how to litigate class actions that was relied upon by the Supreme Court in *Smith v. Bayer Corp.*<sup>4</sup> Even more striking was the repeated invocation of Richard’s work on proper and improper aggregation in the majority and dissenting opinions in the *Wal-Mart Stores, Inc. v. Dukes* case.<sup>5</sup>

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4. 131 S. Ct. 2368 (2011).

5. 131 S. Ct. 2541 (2011).

But I want to turn to the personal side of this engagement, for this is what I will most treasure and miss from my relation with Richard. Male friendships are a complicated business. We tend to be the second-most communicative members of the human species. Grunts, expletives, one-word answers are often our preferred forms of discourse. Yet, it is through common effort, for example in sports or in professional activities, that male friendships form.

Honoré de Balzac in his greatest novel, *Lost Illusions*, noted that male friendships tend to be made early in life, particularly in the military, where there are shared vulnerabilities and openness. I want to take up that theme for the efforts Richard, the others, and I went through during the ALI project, with all the differences properly discounted. We were no longer young men, we had made our lives, and we were not at war. All true.

Yet, for five years, we felt ourselves besieged by a project that would not obviously end well. And although we were neither young nor at war, our experience was a shared camaraderie, a sense of mutual reliance, and the joy of a joint endeavor. Often we would spend an entire day having one hundred or more people take turns assailing the limitations of our product. And yet, it was fun.

Before each meeting we would indulge ourselves a good dinner, with wine or spirits (Richard's rule: you do not mix; though we never knew why). Here we would talk casually about our work, hear of Evan's exploits on the gridiron, and speak of our various engagements. We had such dinners in many places, including China and Italy, in the various permutations of our work. As Bob Klonoff told me, it is these dinners that seem most vivid now.

When Richard died, my daughter sent me the following email: "Hey dad, Mom just told me about Richard Nagareda. I am so sorry. Of all your colleagues I met he was one of my favorites. Really can't believe it. Hope you're doing okay." Her email allowed me to acknowledge the personal sense of loss. I know I speak for Bob and Charlie as well to say we all feel diminished. On behalf of the broader communities Richard engaged, I am certain that we are all the less for this.

*Samuel Issacharoff\**

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\* Reiss Professor of Constitutional Law, New York University School of Law.



*What matters . . . is not the raising of common 'questions' . . . but, rather, the capacity of a class-wide proceeding to generate common answers . . . .*

—Richard Nagareda<sup>1</sup>

Richard Nagareda was both my colleague and my friend. As a colleague, I saw his public side. He was a brilliant and prolific scholar, a careful and insightful thinker, a fabulous teacher, and an extraordinary citizen of the law school. His work earned him praise from the bench and bar as well as from academia and will continue to influence the course of the law. Both the majority and the dissent in *Wal-Mart Stores, Inc. v. Dukes*—probably the most important class-action case in decades—relied on Richard’s work, and his thoughtful analysis has therefore become enshrined in the law.

In the passage quoted by the *Wal-Mart* majority, Richard described the “commonality” requirement of Federal Rule of Civil Procedure 23(a). “What matters,” he wrote, “is not the raising of common ‘questions’ . . . but, rather, the capacity of a class-wide proceeding to generate common *answers*.” Generating answers was Richard’s passion, in both his teaching and his scholarship. Countless Vanderbilt law students are better lawyers because they learned from Richard.

Richard’s knowledge was broad and deep. He was equally at home discussing sophisticated class-action settlements, Wagner’s Ring Cycle, or Homer Simpson. He brought popular culture into the heart of the law school, entertaining faculty and students with impressions of Arnold Schwarzenegger, calling one of his mentors his Sith Lord, and referring to the law school’s program directors as the Dons of the Five Families.

The public Richard held himself and everyone else to the highest standards. He shared his opinions on everything from scholarship to hiring to movies. He even gave advice to senior colleagues like me: he told me not to “waste time” on particular projects. (I pursued them anyway.) Students have told me that they

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1. Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009) (emphasis omitted). It is quoted in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

prepared so thoroughly for his classes because they were afraid to disappoint him.

As a friend, though, I also saw Richard's private side. His high standards led him to be generous rather than judgmental: he took tremendous time and care to help others do their best work. No matter how busy he was, he would read and comment extensively on every draft article a colleague shared with him. While he was commuting back and forth to NYU, he took the time to help me prepare a new course. He spent hours mentoring junior colleagues. He never missed an opportunity to praise a colleague or send a note of congratulations on some accomplishment.

He was as generous with his students as he was with his colleagues. His comments on students' papers were longer than the papers themselves, and his letters of recommendation ran ten pages—I think judges hired his students because they figured that any student who could spark that kind of response from a professor must be brilliant.

And he did all this while still writing his own books and articles, teaching a full course load, running the Branstetter Litigation and Dispute Resolution Program, sitting on important University committees . . . and leaving every day at 3:30 p.m. to pick his son up from school and spend time with him. He even cooked dinner every night for his wife and son. I don't think he slept!

Richard's generosity with his time sprang from a central aspect of his personality: he always put the interests of others before his own. When he first fell ill and I took over teaching his seminar, I asked him to come speak to the students about his situation in order to reassure them. In the course of our pre-class discussion of what he would say, it became clear that he was intending to reassure them that his own illness would not have a detrimental effect on the seminar or on their education. He had no clue that they wanted to hear from him because they were worried about *him*, not about themselves.

As a teacher, Richard tried to convey to his students the importance of that generosity of spirit. On the last day of his Spring 2010 Complex Litigation class—which turned out to be the last class he taught—he gave his students a speech about lawyering and life, tearing up when he came to these concluding thoughts:

There are some things about narrowing your life down to six-minute increments that you will never regret. You'll never regret hopping on a plane to go settle one more multimillion-dollar lawsuit. You'll never regret sticking around the office for one more six-minute conference call to tell your clients you won. You'll never regret flying across the pond on a transcontinental flight to settle a piece of litigation and then



taking the afternoon to walk through Paris munching on a Royale with Cheese. When you retire, you'll never regret having spent an additional six-minute increment of your life doing any one of those things. But, I dare say that what you may regret is the fact that in all of that there will come a time when you wish you would have had one more six-minute increment with a lifelong friend, a spouse, a child, or an elderly parent. It's easy to not think about those things now, but those are the six-minute increments that later in life you would give anything to get back. Those are the most important six minutes of your life.

It felt like we had only six minutes with Richard, and we should have had more. He was my friend and my colleague, and I miss him terribly.

*Suzanna Sherry\**

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\* Herman O. Loewenstein Professor of Law, Vanderbilt University Law School.

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# Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures

R. Michael Cassidy

64 Vand. L. Rev. 1429 (2011)

*In a criminal justice system where guilty pleas are the norm and trials the rare exception, the issue of how much discovery a defendant is entitled to before allocution has immense significance. This Article examines the scope of a prosecutor's obligation to disclose impeachment information before a guilty plea. This question has polarized the criminal bar and bedeviled the academic community since the Supreme Court's controversial 2002 decision in United States v. Ruiz. A critical feature of the debate has been the enduring schism between a prosecutor's legal and ethical obligations—a gulf that the American Bar Association recently widened by issuing a controversial opinion interpreting Model Rule of Professional Conduct 3.8(d) to impose obligations on prosecutors well beyond the requirements of the Due Process Clause.*

*The author addresses the controversial subject of impeachment disclosures from both an institutional and a substantive perspective. A great deal of legal scholarship aims directly at the content of proposed law reform without considering the threshold and pivotal question of what institution is best situated to administer those imposed duties. The author argues that as a matter of institutional competence and legitimacy, the courts are far better equipped to enforce criminal discovery obligations through rules of procedure than bar disciplinary authorities are capable of doing through attorney conduct rules. With regard to the substantive issue—that is, how much impeachment evidence should be turned over by a prosecutor before a guilty plea—the author proposes a categorical approach to impeachment disclosures that will mediate the tension between the defendant's interest in accurately assessing the strengths and weaknesses of the government's case and the state's interest in protecting the privacy and security of potential witnesses.*

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