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A Conversation with Jan Deutsch

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Yale Law School
Oral History Series

A CONVERSATION WITH

JAN GINTER DEUTSCH

Interviewed by Bonnie Collier

New Haven: Lillian Goldman Law Library
Yale Law School, 2018

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(1935–2016)

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Yale Law School Oral History Series

Teresa Miguel-Stearns • Law Librarian • Yale Law School

You are invited to eavesdrop on conversations with former deans and faculty of Yale Law School as they recall the people, ideas, and events that helped shape this institution during their tenure. These conversations were held under the auspices of the Lillian Goldman Law Library as part of its oral history project.

The Law School's oral history project draws on the special skills of one of its long-time librarians, Bonnie Collier, who conducts the interviews. Bonnie has an academic background in history and a special interest in oral history. She also has a great talent for allowing people to talk freely, and she approaches each of her subjects with a relaxed, open-ended style. The overall project goal is to capture the unfiltered memory of key figures in the Law School's history and make these conversations accessible to a wider audience.

Most of the conversations in this series were conducted in two to three separate interview sessions, sometimes spread out over several weeks. They typically took place in the comfort of the subject's office. Each was recorded and later transcribed. The transcriptions were copy-edited for errors and the occasional indecipherable mumbblings deleted.

Otherwise, the oral history appearing on these pages reads very much as a direct recording of the actual conversations. Thus, some odd phrasing and occasional dropped clauses are inevitable and have been maintained in the interest of authenticity. Our hope is that readers will welcome the lack of intrusion between editor and end product and be forgiving of the twists, turns, and repetitions these conversations sometimes take.

Oral history is a complement to traditional written history and can be read for an enriched understanding of past events. Those readers who are familiar with Yale Law School will recognize the participants in these conversations and many of the personalities and events they mention.

Those who are less familiar with Yale Law School or who simply want a fuller understanding of its past are encouraged to read some of the published accounts, particularly the *History of the Yale Law School: The Tercentennial Lectures*, edited by Anthony T. Kronman (2004), which offers a broad account of this law school from the time of its founding through the late 20th century. Written history provides an analytical and interpretive narrative, while oral history provides a personal perspective. Both have important roles in helping shape our understanding of the past. The former offers the historian's sense of reality based on the sources drawn upon and the author's own perspective, as shaped by culture, place, and time. Oral history can serve as a primary source for written history. It provides emotional depth that written history does not and offers the reader a firsthand account of the events and personalities.

The oral history project fits into a tradition of Yale Law Library publishing projects dating from the early 20th century. Yale Law Library Publications is a now-defunct series inaugurated in 1935, in cooperation with the Yale University Press. Notably, four of the publications in this series provide a history of Yale Law School from its founding to 1915.

More recently, the Law Library again teamed with Yale University Press to launch the Yale Law Library Series in Legal History and Reference, with titles beginning in 2007. Additionally, the Law Library's online publishing ventures include the Yale Law School Legal Scholarship Repository, which provides online access to student prize papers and scholarly articles authored by Yale Law School faculty; the Avalon Project, which presents historical documents relevant to the fields of law, history, economics, politics, diplomacy, and government; and digitized Litchfield Law School notebooks, the originals of which are held in our collection and that of the Litchfield Historical Society. In our online Documents Collection Center, we host several collaborative faculty-librarian projects such as a comprehensive collection of War Manifestos, the Pronouncing Dictionary of the Supreme Court of the United States, and e-books including *Follow the Money* and *Before Roe v. Wade*. The Law Library's role as

publisher continues to grow as the creation of and access to publishing tools and platforms also expands.

Our goal with the oral history project is to preserve and provide direct access to the words of our deans and faculty – the policy makers, educators, and practitioners who shaped and defined the modern Yale Law School specifically, and legal education and national and international policy more broadly. Perhaps some future written history will draw on these conversations as a source for gaining a clearer understanding of Yale Law School’s evolution and ascension as one of the great institutions for legal education and influence in the world.

JAN DEUTSCH (1935–2016) earned a B.A., Ph.D. (political science), and LL.B. from Yale as well as an M.A. from Cambridge. He then served as a clerk to Justice Potter Stewart. After a brief period in practice, he joined the Yale Law School faculty, teaching and writing in the areas of corporations, securities regulations, jurisprudence, and constitutional law. He was the Walton Hale Hamilton Professor of Law Emeritus.

Three of his notable publications are: *Selling the People's Cadillac: The Edsel and Corporate Responsibility* (1976); "Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science," *Stanford Law Review* (1969); and *The Law of Corporations: What Corporate Lawyers Do* (with J. Bianco) (1976).

First Interview with Jan Deutsch, July 1, 2014

BONNIE COLLIER: I'm Bonnie Collier and today is July 1, 2014, and I'm here talking with Jan Deutsch in the Yale Law School. We've agreed to a short biographical sketch just to kick this off. So, you're on.

JAN DEUTSCH: I was born in Poland. When I was born my father looked like middle class. I think it's fair to say that calling my family working class is being positively euphemistic, because they were Viennese. During the Depression they literally would sit around the kitchen table trying to decide which of them would get the next job because there was no money and there was no job.

BC: And this was in?

JD: In the 1930s.

BC: In Poland?

JD: Well, the family managed to get into a multinational business, and my uncle was the one who rescued my nuclear family from Poland and became sort of a coffee salesman in Berlin. He emigrated to the United States, and my family was oblivious because my father got sent to Poland instead of Berlin. And it was my uncle who dragged us out of Poland six months before the invasion. So, I came to the United States penniless except for my uncle because we were Jewish. Technically my father was still liable to the draft because he was Austrian. But for my uncle we wouldn't have gotten here. If we'd gotten here, we wouldn't have had any money. In any event, because I spoke German and because in New York when I was a student in high school, you had to have four years of a foreign language to get into college, and because I spoke German I had this vicious fight, in which I was totally wrong, with my German teacher as a junior, and she swore I'd never go to college.

BC: (Laughter)

JD: And at that very moment the Ford Foundation was advertising that if you were not yet 16, they would fund a college education 100 percent. The theory was related to universal military training. This was 1948, I'm sorry this was 1951, so universal military training was on the horizon, and some brilliant man – I don't think it was brilliant – but somebody in the Ford Foundation decided to see whether you could have two years of college before you were 18, before being drafted. Footnote, they discovered you couldn't, but that was a different matter. In any event, I got one of those scholarships because they weren't hard to get, and Yale, for reasons which totally escape me, was one of the colleges you could go to. The reason it totally escapes me was all I knew about Yale was there was a Frank Merriwell series on the radio, and I honestly thought he was Yale when I got here to college. They put us all into directed studies and I simply believed that you could learn it all. I mean, that's what they taught us. Needless to say, I didn't think I'd understood it all when I graduated, but I believed that you could understand it all. I got a two-year fellowship to Cambridge, England, and then I did my reserve military status for a year, and then, I'm still unclear, a boyhood friend of mine had been at NYU and, for reasons I'm determined to get out of him, he transferred to Yale after one year. He and I spent the summer walking around the block trying to decide whether I should come to law school. I am still totally unclear why I did it, but as soon as I arrived – no, I would say after about a month – I just couldn't get over the fact that I was learning something that would literally have an impact. Meaning, people would do what I told them the law was. I simply couldn't get over that.

BC: That was when you first started law school that you had that feeling?

JD: I still am baffled by that, because it's so peculiarly American. So, I was determined to really be a good student. Unfortunately, I had Grant Gilmore in contracts in my first year, and twice I raised my hand and I said, "I see how you got from A to C, but now you're at E. Whatever happened to D?" And he simply started talking and lost me. And when it happened the second time, I went to see Jack Tate, who was sort of

the student dean, and I said, “Look, there are two possibilities: I don’t understand what’s going on, or it’s all a fraud. Frankly I don’t care which it is, I’m leaving. I’m only here because I’m on full scholarship and I don’t feel it’s fair to just walk. Well, his words were, “Look, you’re only three weeks from exams, don’t be silly.”

BC: So, this was well on into the first semester.

JD: Oh, yes. And I’m sure he felt that I was simply frightened of the exams. I’m sure that’s what he felt and so he simply talked me into staying. Well, when I got four A’s, my feeling was, “Well, maybe I don’t understand it, but so what? I mean, I seem to be good at it.” Therefore, there is no reason not to keep at it. Then I became a clerk for Stewart.

BC: How was the rest of the law school experience? More interesting? Less?

JD: Well, what happened—I know that from today’s perspective my law school career was not in a competitive environment. I mean I know that from today’s perspective, we were loafers. But from my perspective, I couldn’t deal with the competition. So, second term, when I was here, I went into the four-year program, not to get a Ph.D., although that’s what happened, but really simply to spread it out for four years.

BC: When you say in the four-year program, you mean the dual degree program?

JD: Yes.

BC: And you got a Ph.D. simultaneously.

JD: That’s another story. Well, because I had an M.A. from Cambridge, and I had two years—technically it was a degree in history even though I didn’t read history, and I knew I couldn’t get a Ph.D. in history because that’s serious business. So, I went into the political science department, and I didn’t tell them I was trying to get a Ph.D. I don’t mean I hid it, but I mean I didn’t make a thing about, “Oh, by the way, I’m a Ph.D. student.” I just enrolled. My feeling was I had never taken a political

science course because I don't take it very seriously, political science, but because one-third of it is law to begin with at Yale. I mean why should I not get a Ph.D.?

BC: So, you were mostly attached to the political science department here, not the history department.

JD: Totally. I had nothing to do with history.

BC: Did it happen simultaneously? Did you get two degrees after four years?

JD: Now we're into me and academe. There was Norbert Wiener. Norbert Wiener was the man who created cybernetics.

BC: Oh, yes! I've heard of him...

JD: And he was sort of a typical disturbed genius. His father simply drove him to be a child prodigy. He was a brilliant mathematician. If you can't be autistic, you can be a mathematician. I mean they are strange people, and he was a genius at it. And he saw what was wrong with the computer. I mean he saw that what was happening in the world was that what used to be statistics, which is what social scientists use and have the gall to tell you what the future would be, will now really be the future because if you put it into the software, it runs your life. And what he did was he developed a cadre of disciples who, with him, believed the computer was the future, but you had to control it. The one in political science was named Karl Deutsch. He came to the Yale political science department and what happened in reality was he was challenging Bob Dahl for power inside the department. Bob Dahl is most easily described as the empirical man, and his rival in the department was Bob Lane, who was sort of the Freudian, "statistics isn't everything, even history isn't everything." His wife wrote under the name Helen Hudson, novels, and she wrote a novel called *Tell the Time to None*.

BC: *Tell the time to?*

JD: *None*, which had as its main character this egomaniacal brute called Karl Deutsch. His name in the novel was Vernier Wolf. I took Karl Deutsch, as well as other people, and one day I was walking down the street with Karl Deutsch, and he said, “Have you thought about your Ph.D.?” And I said, “Oh, yes. I’m intrigued by the fact that at the Nuremberg Trials, you have four different countries, each of which had its own law of evidence. Well, how do you make the rules?” Of course, the answer is you don’t. You just make them up as you go along, but I thought what a great Ph.D. topic and Karl said, “Too bad.” And I said, “Why?” He said, “Oh, well, I need someone to get me statistics about ABCD, and I thought you would do that for me.” And I looked at him and I said, “Are you telling me that if I go to England for you and get those statistics, you’re in effect saying to me that I have a Ph.D. thesis?” And he said, “Oh, absolutely.” I am just explaining to you how I was introduced to academic life!

BC: What year would that have been? In the mid-fifties?

JD: 1951, 1951, 1953.

BC: 1953. I think of those years as being far less competitive than 40 or 50 years later, but maybe not.

JD: Oh, no. It was less competitive, it was just...

BC: But he was being competitive. He was using the system for his own competitive advantage, right?

JD: Things are not always what they seem. When Truman went into the convention that he ended up being made vice-president, do you know what was in his pocket?

BC: No.

JD: The nomination speech for Jimmy Byrnes. Very few people know that, but that’s because – What do you mean, politics!? They weren’t dirty like nowadays! Truman, it never crossed his mind that he would be vice-president. Everybody knew that that was Byrnes’ job.

BC: Yes. Okay. (chuckles)

JD: See, I told you I was trained as an historian.

BC: Okay, so, where were we? So, you did do a Ph.D. What ended up being your dissertation?

JD: Nothing. I mean there was the chapter on the statistics and I had written a comment for the law journal on anti-trust, extra-territorial... I mean it was nothing. It was a collection of essays. (laughter)

BC: Your dissertation?

JD: Yes. The only respect I ever had was from Harold Lasswell, he was on the committee.

BC: Oh, he was on your committee...

JD: And he was the one who said to me, "I'm not sure how the thesis ever connected." It was the only time I really had respect for him.

BC: (laughter) Is there a comparison to be made between the law school academic experience and the political science department? Can you compare or contrast?

JD: My great mistake...not that it would make a difference, I don't know whether you want to call it lucky or blessed or whatever – I've just been blessed, I've done exactly the right thing even though I never had a clue what I was doing, because my one great mistake was believing that the law school was so totally different from everything else.

BC: But it wasn't?

JD: No. I mean I came here to teach because – okay, true story: somewhere in my first year of teaching I went to a political science conference on Cardozo and we spent two hours debating the question, "Is it more important that he lived with his sister or that his father was, in effect, accused of taking bribes as a judge." Two hours! That was the issue, and that just confirmed for me that teaching the law is real, unlike anything else in academia.

BC: So, what you're saying is that the Law School was a place where the real issues could be tangled with, not these academic fluffs. Did the faculty impose that approach?

JD: The only thing that united the faculty was "Harvard isn't wrong, but we're better." That was the school I attended. I mean look, it ranged from Myres McDougal to Wesley Sturges to Grant Gilmore to Quintin Johnstone to Willie Moore, but it was a coherent, cohesive message. They were united, and they were united on the proposition that Harvard isn't wrong, but we're better. I mean it was exhilarating to be in that.

BC: Let me ask you about the Harvard thing. You know one of the themes that comes through in everybody else's commentary is the Harvardization fear. The fear that Yale Law School would be infiltrated somehow by Harvard.

JD: That was Fred Rodell.

BC: Yes, Fred Rodell. What was the source of that?

JD: Black and Frankfurter. It was just like today. Liberals are frightened of the mob so they are the people who say, "Thank God we're a republic as opposed to a democracy." That's who they are. The conservatives may—I mean there were lots of problems with conservatives, but they're not frightened. That's why they're so scary, they're not frightened. And Moore was the only real conservative on the faculty. He wasn't frightened. So, he happily wrote treatises, which only those idiots at Harvard do. I mean, change is happening all the time. It's true that Moore was the old style, and Gene Rostow was on the forefront of the new style. Until Guido came along, that was the end of the story. I mean, this place is Gene Rostow and Guido Calabresi, and Guido consciously, by which I mean I don't have the transcript but I can quote you Guido saying, "This place is going to be a university," and he accomplished it. He created things like, for instance, we don't hire for slots—crazy—you can't run an institution that way.

BC: That's a Yale College approach. You don't hire for slots.

JD: But Yale College has all these departments. They just hire for departments. This place doesn't have departments. It tried in the divisional program, but it just doesn't work. No, this place is in real trouble. It's just that the rest of the legal academic – no, strike that – the legal system is so at odds with itself that nobody's been able to do anything about it.

BC: So, what do you mean that this place is in real trouble? In what way?

JD: It can't last, but that's all right because the whole legal system can't last. Look, the Constitution is outmoded; common law is outmoded. That's what I tried to teach. That's why it's called Law in the United States. I don't know how to say it. We're competing with China for who's first in the world, who really sees – is what matters the individual or the family? That's the fight between us and China. We're competing. Who's going to run the show?

BC: That hasn't been played out yet, so we're not there yet. When you first began teaching here, I'm assuming that Rostow hired you, or no?

JD: No. You see, this is a good example of what's happened. You've got to understand I clerked for two years – Potter Stewart – I practiced for two years. When I came back, I got a raise. I got a raise!

BC: To come here?

JD: Right.

BC: Okay.

JD: So, this was a completely different world. I mean the world was not what it is now. So that now I can say, "You know for a school that believes in diversity, the number of white Jewish males that keeps getting hired is breathtaking." But that wasn't the world when I was hired. So, while now it's easy to say it's typical of a pompous institution that only hires its own, that could be said instead of Rostow hiring me. So few top students wanted to teach. I chose Yale because I was interviewed at Harvard and

I decided there was just no way I could teach anywhere but Yale. If you were a top graduate and you wanted to teach, it was not an issue. I mean, it was an issue if that's what you wanted, but if you were in practice and then you said, "You know for various reasons I can't really cope in this practice world and I would like to teach," I don't mean they hired you with tenure, but they certainly were ready to give you a chance to get tenure.

BC: So, in the 1950s it was the Law School that felt it could hire Jewish faculty. Yale College at that time was bereft of Jews on the faculty.

JD: Of course—it was either that or the political equation of Jewish and Communists, which was probably what was going on at Woodbridge Hall. I don't mean necessarily the president, but there the feeling was not, "We're anti-Semites," the feeling was, "We're anti-Communists." (laughter) And the Law School is just full of them. That's what was going on.

BC: Oh, I see. Okay, that connection. So, when you came here and began teaching, what was the atmosphere? What was it like? What was your impression?

JD: It was "Harvard's right, but we're different, therefore we're better." I mean that was the feeling. And I didn't know that, you see. All I knew was this was real, because if you learn this people will do what you've told them to do and I didn't understand it. Frankly, it's only—next September is first time the course is called *Law in the United States*, and it's only because I finally feel I understand it. It's taken literally this long for me to feel that I see what was wrong. I mean I saw what was wrong with what Grant [Gilmore] was doing after when he came back from Chicago and I realize...

BC: After he left and came back.

JD: Right, he left and came back, and I sat in on the *Contracts* course again and I saw what he was doing. I don't know how to say it other than the

Socratic platonic form. He actually taught and asked his questions as though all the cases fit in a great scheme. It's because he used to teach French, I mean it's not surprising for someone who thinks the way the French do – I mean that's a language which assumes that everything fits. That's what he did to me. I mean I didn't realize it, but that's what was happening. That's why I couldn't understand what was happening.

BC: Tell me about Fred Rodell.

JD: He's a Charlie Reich without guilt about being gay. He was a genius in tax – I mean tax is nothing but bureaucracy; we all know everybody cheats, and when it gets bad enough, we change the rule, I mean that's tax – and Rodell was a brilliant tax person who just said, "I don't want to do this the rest of my life." So he became – it's like the Tea Party he became an ideologue and the ideology was Bill Douglas, which was crazy. I mean Charlie Reich at least had the intelligence to make it Black. Rodell really made it Bill Douglas, who you know didn't much care about being a Supreme Court justice, he wanted to be president. And so Rodell went on a rampage against Frankfurter.

BC: Can you explain that?

JD: Well, if you were a brilliant – I'm not trying to say I can prove this, this is what I mean by gossip, but you just have to understand what makes people go, and Rodell was simply, how can I say this, he was a non-scared liberal just like Douglas. He was ruthless, he was a total ideologue, "I know the answer, nobody else does." So, you know, he would teach people at Mory's, "because it was all nonsense anyway and let's just learn how to write so you can write for the public," meaning write newspaper columns and he produced those people.

BC: Yes.

JD: And see the one thing that was remarkable about this place is its size. It's because it's so small, and if you were one of us with tenure, I suppose, you could get away with anything. I mean what makes this

place so remarkable is the dean really is the puppet of the faculty, and the faculty is just small enough so you can't create parties. So, what you have is a true feudal system. Everybody is a baron and all the dean is is *primus inter pares*. It's not a workable institution, that is not workable. And that's what I mean by trouble. This place was number one when the whole system began to crumble. I mean there are no more law firms, there are just coalitions of barons.

BC: Not workable?

JD: Yale is distinctly different from Harvard because Harvard truly is like the law school meaning the departments are the barons. The departments at Harvard, at least when they become schools like the Law School, fund themselves. The center is like the dean. I mean they've got more power than the Yale Law dean, but it's different from Yale because Yale is highly centralized. I mean Woodbridge Hall can do things to your budget that nobody at Harvard would allow.

BC: Hmmmm...

JD: This place was like that...(interruption – knocking at door). I'm sorry.

BC: That's okay. I don't remember where we were, but I had a conversation with you briefly years ago in passing. I don't even remember where we were, at the library or the hallway or someplace, and you were talking about the sort of parade of scholarship that has overtaken Yale Law School. That the shift away from teaching substantive law to doing scholarship was bothering you, and I'd like to hear about that.

JD: When I was a student, the problem was it took as a class probably three terms to understand the process – how we read the case, how we integrate it in the field. But then what? Now Rostow's response was trying to create departments called the divisional program, and because back then the *Journal* was the only student scholarship piece. The theory was since the note is what you write to get on it, and the comment is what

you write to try to be a scholar, then you didn't have to write a divisional program if you wrote a comment.

BC: I hadn't heard that it worked that way.

JD: That was sort of it for scholarship. Now obviously that didn't work, the department idea didn't work, we lost the divisional program, and in typical institutional fashion, the only operational leftover was we added a second paper.

BC: Oh, okay.

JD: Now, that didn't make sense because the whole reason the department idea failed was you couldn't get the teachers to supervise the original paper.

BC: Well, my impression about the failure of the divisional program was that it unbalanced the workload too much. That some people had twenty students and some people had one, and there was a lot of tension about who was working harder, and that the program just couldn't sustain that.

JD: Yeah, but that's because this was still a law school. Now that it's a university department, it's clear that what scholarship means is that you are trying to be a teacher, in which case you can be my acolyte and do the hard work for me, and I'll see to it that you have a push to get to where you want to get. Now, I mean, that's graduate school stuff, and that's what we've become. We've become a graduate school.

BC: Right, right. And is that something that the faculty wanted? My sense is that the law faculty is becoming more like the Yale College faculty – steeped in scholarship, doing teaching casually, but mostly looking toward other people in their field for reputational success rather than the institution. Does that ring true?

JD: You're a hundred percent accurate about that's what we've come to, but since I participated in the transition, I think this is why I can't do history. You're assigning a cause, and it was much more complicated than that. A lot of it is because insiders always take over the system. I mean wherever

there's a system, I mean usually that's encapsulated in the word "expert." But what's really happening is the people who mastered whatever the system is, compete, and the way they compete is to try to be the "real insider." And so, what you always have in the system is the whole system is trying to simultaneously adapt to the future and remain true to itself. Because Yale is small – for example, I taught at Michigan, and it was clear that there were two completely different faculties – the Michigan faculty and the national faculty. Harvard, of course, is the legal world and everything gets its place at Harvard. But this place is too small and so it really defines itself. Maybe it's just that I glorified Guido, although I don't think so. See, I think it was Guido's vision and it was less that he was so sophisticated about where the future was, which I think is what Bob Post thinks he is when he does this Ph.D. program, but Guido was so powerful as a leader, and I don't mean a leader anywhere but Yale Law School. But somehow Guido...before he became dean he would never speak in the Governing Board meeting without first saying, "Now I'm not saying this because I want to be dean." That was always how he began.

BC: Interesting.

JD: He somehow, I don't mean that he saw the future, but he somehow had realized that if you want it bad enough in a group this small, you'll get it. He decided economics is the answer. If the law is faltering, I'll reform economics, which at that point was about no-fault insurance. And see, he made the Yale of today. As dean, he knew where he wanted to go.

BC: Someone in one of these interviews, and I now can't say who it was, said that Guido made the ultimate sacrifice, and that sacrifice was in splitting the Yale Law School away from Yale, away from the university fiscally, that he made himself so unpopular at Woodbridge Hall, that it made it impossible for him to become president. He wanted to be president at the university and he gave it up for the sake of Yale Law School. That was the story, that was the ultimate sacrifice.

JD: You know, Guido has an official biographer now.

BC: Yes, I know.

JD: Not that Guido would ever say this, but the official biographer would buy this.

BC: The biographer would buy that story?

JD: Yes. Whereas the truth of the matter is, this is gossip.

BC: Yes.

JD: The person at Woodbridge Hall from whom Guido became fiscally independent was Bart Giamatti. Now, they happen both to be Italian.

BC: Yes...

JD: See, you may not think that's very important.

BC: No, I guess I don't.

JD: They both think it's vitally important.

BC: I see.

JD: So, Bart condescended to Guido...

BC: Because of the affinity.

JD: Who knows? Because he knew that Guido thought he should be in Bart's chair. I mean, who knows what really – I'll tell you the true story – because Bart was, well, you don't know I was in Scroll and Key, which is a Yale senior society, and so was Bart, and he was only a couple of years behind me, and we really became close. We used to have these long lunches where I explained to him the difference between Yale and Harvard. It never occurred to me the guy was running to be president of Yale. It didn't cross my mind.

BC: And this was when you were undergraduates, though. When you were in Scroll and Key?

JD: You got into a senior society when you were a senior.

BC: Right, but...

JD: No, no this was after...my friendship...I was permitted to be a friend after I came back and he was already a big shot on the faculty and I was a young man on the faculty. But we really were close, so I could literally just walk into Woodbridge Hall and I forget why I went to see him this one day, but I had something and we talked for a while. At one point I said to him, "But Bart, when you really, really have to make a decision, what guides you?" He said, "Machiavelli."

BC: (Laughter)

JD: It just floored me, but because I knew...

BC: Yes.

JD: Whereas you see Guido and I were in the same college.

BC: Which college?

JD: TD. And he was two years ahead of me. This is literally true. The man who said everything's wonderful...Norman Vincent Peale. That was it. So, this was 1953 and Yale had its Norman Vincent Peale, I forget his name, he was master of (inaudible) – Greene, that was his name. And I went to a lecture and this is straight Norman Vincent Peale and I couldn't cope. I mean this is Yale, you know, I was this little kid from Queens and Yale was truth and this guy was Norman Vincent Peale. All I knew was that Guido, like me, was an immigrant and he was already known. Guido was Guido, he was already known at TD. "Oh, well, that's Guido." So, I knocked on his door and I said, "You don't know me, but you're Guido Calabresi and I need some help. I have one question." And he said, "Oh sure, what?" And I said, "Does Greene really mean what he says?"

BC: (laughter)

JD: And of course, Guido gave me his typical... "Well, on the one hand, on the other hand."

BC: Tell me the relationship between Guido and Giamatti.

JD: I can't.

BC: You don't know?

JD: No, no. I'm saying you see that was the key. In other words, well let's put it this way—Yates, no, no the assistant dean who left and now at the ABA?

BC: Oh, Yandle.

JD: Yandle. Yandle made the sacrifice, not Guido.

BC: Really?

JD: Oh, come on. Okay, here we go! Gene Rostow built Yale Law School on Yale University's money.

BC: Right.

JD: He wrote checks he couldn't back. That's why Lou Pollak succeeded, because Kingman Brewster came in here and...now you'll hear it all... Kingman Brewster showed up, he was a lawyer and he knew what he was doing. "I'm only the president. You people tell me who the next dean is." Now really, if the children hadn't turned on him, Rostow clearly should have had another term. I mean, his children turned on him. He brought all these people here, and they basically wouldn't give him another term. They thought they were going to make it a better school.

BC: Could he have had another term after ten years?

JD: This is Yale Law School.

BC: They can do anything they want?

JD: They can do anything they want.

BC: Okay, so...

JD: It is not written. The relationship between the faculty and the president in connection with the appointment of the dean is totally unclear. Totally.

BC: Well, that became a problem when the faculty wanted Shulman. Right? After Rostow?

JD: You're right.

BC: Yes, yes.

JD: You see, and I wasn't here. George Braden wrote the best law review article of anybody in that group, see, and he just went.

BC: Right.

JD: This is why I say Borie is no good because he won't talk. Braden — when I did my tenure article I must have read just about everything constitutional written back to the 1930s and Braden clearly was the most sophisticated, most coherent, I mean he wasn't writing for promotion, he really was trying to understand...I don't know what happened to him. I don't know why he couldn't stay.

BC: I don't know that story.

JD: But anyway, what I'm talking about is my first election, Kingman shows up. Obviously, everybody knows you can't have somebody like Rostow again and, I don't mean everybody on the faculty, I mean everybody at Woodbridge Hall knows. I mean the one thing you don't want is that kind of power. You just aren't going to put up with that.

BC: Yes.

JD: And so, Kingman shows up and says, "I want to be part of the process." And the faculty keeps meeting and voting, and Lou is always at the bottom. Maybe not *the* bottom, but the bottom and the top is always shifting. And Kingman just won't rest until Pollak is named.

BC: He wanted Pollak, is what you're saying.

JD: He didn't want somebody that could be Rostow.

BC: Pollak was somewhat quiet, or at least he was not a threat in anyway. He was quiet and easygoing.

JD: He didn't care about power.

BC: Yes.

JD: He was one of the – if I had to describe Lou, and I think the word is *fond*, I mean really loved, I mean he was wonderful as a person. . .

BC: Yes, a wonderful person.

JD: I would say he's one of the only litigators I've ever met who was a winner but not an ideologue. He didn't have to win, but he wasn't an ideologue. That someone like that should be a litigator is beyond belief, but he was and he was a damn good one. That's why I took his course twice. I mean I didn't know it then, but see, because I didn't understand how litigators were totally different from other lawyers. They're crazy. They must win. They're not interested in anything but winning. They're not interested in the law, they're not interested in ethics...

BC: Substance...

JD: ...they're not interested in the substance. They're interested in winning.

BC: Gamblers?

JD: No, because, see, gamblers know they can lose. Litigators don't know they can lose.

BC: It must be an unpleasant life when they lose.

JD: Well, not if you're willing to work 27 hours a day. No, no, they just go and work harder the next time. They don't believe they should have lost.

BC: So Pollak's deanship, was he – I've heard people say he was unsuited for the job. He was a wonderful guy, he was pleasant, but, and especially given the times, that it was an unsuitable match.

JD: Look, this is oral history. Pollak made a Goldstein possible. He was tough, he was...

BC: Goldstein, you're talking about?

JD: Yes. Well, that's what Lou did. Lou made Abe possible.

BC: A reaction.

JD: Again, one of the things that makes your oral histories not totally accurate is that everybody, everybody at the top, I mean deans, Woodbridge Hall, everybody hid how poor this place was.

BC: Poor?

JD: Yes, poor.

BC: Poor in terms of money.

JD: No money! No money!

BC: At what point? After Rostow?

JD: Pre-Guido. Not after Rostow. Pre-Guido! Woodbridge Hall controlled the money, and we didn't have our vast alumni money and so we were poor. We did not have...fiscal independence. We couldn't be Harvard, and Guido managed to talk Giamatti into letting us look as though we were in control of our money. The reason Yandle took the fall is that Guido was doing exactly parallel to what Rostow did. Guido was spending the funds for the building on operational stuff, and Yandle took the fall because Guido said, "Not me!"

BC: Interesting.

JD: All I'm saying about Abe was that...I had a very serious accident. When the revolution happened, we had one terrible year, the year I was on leave, which was the Bobby Seale trial and all that stuff. The prior year was when the Law School collapsed, in authoritative terms, and just gave the students all the power. This one day we were supposed to have class, not teach but talk about whatever...I forget, I think it was students being on committees. But I'll never forget, I came in that day and I said, "I don't want to discuss student demands because, frankly, my view is you're paying for the education and, therefore, if you really want it, you probably should get it. On the other hand, I don't think you want what

we're supposed to talk about. I think you want to get hold of the grading system. And if the grading system is yours, what it means is you don't want to compete and, frankly, if you don't compete you're going to be boring, and if I'm going to be bored, I'd rather be paid."

I had a very bad accident that summer. The University of Pennsylvania was starting its—I forget the name—I think Franklin professorships. It's not Sterlings in the sense that you're the top, but it's Sterlings in the sense that they give you money for research and they offered me a Franklin. I went to Abe and I said, "Look, I don't want to take this. The only reason I'm here is that..." (we didn't have stipends, so there were stipends, Wellington brought those in, but it was the equivalent) and I said "the only reason I'm here is that's what they're offering me." And he said, "Don't worry about that." Which I took to mean I'll cover your research in the summer. So, the next April I showed up and I said, "Well, you know, Canada has this medical system and we're clearly going to get it sooner or later. I'd like to go up there and study it, so I guess I'm applying for research." And he said, "We don't do that kind of thing." I remember thinking for about 20 seconds, and I thought, "Deutsch, you didn't get it in writing!" (laughter) See, that was Abe. I understand why he did it, I understand, "Oh, well, look this kid had this accident and besides, who does he think he is," blah blah.

BC: I see.

JD: But that's what Lou was about, he made Abe possible. And Abe brought back Ackerman and brought this guy Nelson. I mean Abe started this process of bringing people in. Why are we bringing them in? Well, we look at the whole world and say they are the best.

BC: But Abe also let a lot of people go.

JD: No, Abe didn't do that.

BC: No? Was there not a big sweep of...is that another story?

JD: Oh, here we go.

BC: Okay, tell me the story.

JD: Two of them were classmates of mine.

BC: Yes.

JD: One was named Bob Hudec and the other was named Dave Trubeck. Now Hudec, who was, um, how can I say it, probably a lot of it was because he was Slovak, meaning he was a union member and he was not unhappy about being who he was, union and all that kind of thing. And so, he played by the rules, and for reasons I do not understand, he really had a fight with Ellen Peters.

BC: With who?

JD: Ellen Peters. I have no sense, but she was out to get him. So, when he came up, because I got tenure first of the three of us, when he came up, the discussion was, “He’s too narrow. He’s not broad enough.” And I said, “Well, but look, he’s in international trade, not just contracts.” But that did no good. They voted him down. And when Trubeck came up, the discussion was, “Well, he’s not legal enough. He’s too much into social sciences, and after all we want more legal-type stuff.” And I said, “Now look, I can understand voting either of these people down, but you can’t vote them both down because if you vote them both down, it has nothing to do with what you’re saying.” And, of course, that was true. What was going on was the students were basically communicating, “Hey, you people are telling us that law is going to save the world. It hasn’t, so what are you talking about? Why are you bugging us? Why are you giving us a hard time as students? We’re supposed to do and learn what you say we’re supposed to learn. We think you don’t know what you’re talking about.” Well, the faculty couldn’t buy that! So, what they decided was that it was the junior faculty that were making the trouble.

BC: Oh. So the junior faculty had to go?

JD: That’s what happened. They simply turned on the juniors because they, the faculty, couldn’t...these were the Crits, who by the way, the first

Crits all said the same, “We learned it from Deutsch.” I mean, it’s not true. I didn’t want it this way, I didn’t mean to do it to them, but that’s who, I mean they were the students, Duncan Kennedy, Mark Tushnet, I mean they were the students who knew what they were talking about. They weren’t the real leaders, the real leaders didn’t have a clue except, what’s the name of the guy, oh, I forget, there was a great revolutionary who became a Wall Street mogul, the guy’s name was Richard Balzer, who is now a corporate consultant. Now he was the real leader.

BC: Balzer?

JD: Richard Balzer. He was in my first-year small group.

BC: Tell me about him.

JD: Yeah, he ended up a big shot, which he was. You know the picture of the black students at Cornell with rifles?

BC: Yes.

JD: When I was on the admissions committee when Balzer applied, there was a letter from Perkins, the president of Cornell, who said, “You know, if it wasn’t for Richard Balzer, we would have had gunfire.” Balzer made the difference. And Balzer was illiterate. He couldn’t write a paragraph. He could write sentences, but he couldn’t put a paragraph together.

BC: Really?

JD: And I said, “I know Dick, let’s work on it.” And then he saw that I wasn’t kidding about working. That was Dick Balzer.

BC: Interesting.

JD: He was the real leader. He orchestrated the revolution. God knows why. I mean he wanted to run a revolution and why? That was beyond me, but he did it.

BC: So, Goldstein’s deanship, was that a time when the Crits were banished? Is that fair to say? Or is that too simple?

JD: No, you see, that's right. You see, they were never banished. It was just easier at Harvard. Duncan, I walked around the block with Duncan for hours trying to talk him out of being Duncan.

BC: And how did that go?

JD: Because he's too serious for Yale. He really wants to save the world. He's like Charlie Reich. I mean, yes. He's a Reich without the guilt of being gay. Unlike, Rodell – well, put it this way, Rodell wouldn't get anywhere. People would laugh at him and throw him out. Well, Duncan was really the equivalent of Rodell at a much later time. But he really wanted to save the world. See I don't know how to say it. People aren't different, the times are different, and the Crits were the people who bought it, who believed.

BC: It's interesting. Maybe I put too much emphasis on what scholarship has done to at least this institution. It seems that the emphasis on scholarship has pulled people away from that urge to change the world, either through going to Washington or supporting a cause. Scholarship is sort of a way to make it all smooth and easy and get away from it all.

JD: You've put your finger on it. They're chicken. That's all. I mean look, you can't be chicken if you try to teach because your students don't want to learn. They don't want to learn, they want to do well, whatever that means. But if you're a teacher, you're dedicated to making them learn whether they want to or not.

BC: Chicken is a bit more radical than I meant. But I take your point.

JD: It's much more difficult than being a scholar. If all you want is to be a scholar, you just have to know who your audience is. All this nonsense – boot camps and blah, blah. No, you just know your audience. This is my thing about Karl Deutsch and my thesis. I mean come on, this is academia.

BC: You know a lot of the people earlier on, the older people I've interviewed, when I asked – many of them had done the beginning of graduate

work in one field or another, an M.A. or not even that far, but had considered it. Ralph Brown I think had considered doing a Ph.D. in history, and many had interests in academic fields, but came to law school because they thought the law was more hands on. That what they could do with it was more – as we said in the 1960s – relevant, that it had more immediate application. But that seems less of the message from this faculty.

JD: Oh, absolutely, but that's in large part because of what's happened to law. See, this country was founded on law. Okay, here we go. You can't have five to four decisions.

BC: I'm with you on that...

JD: But, see, that's it. I am who I am because during my two years on the court I saw what was happening, and nobody else seemed to notice. I saw it. I was there and it was happening. They were destroying the law.

BC: During the Potter Stewart years?

JD: Well, those two years. You see Warren – here we go, Earl Warren was governor of California when two things were clear: all the bad guys were in the military and because much of California was defense related, there was literally more money than you knew what do with. That was Earl Warren. So, he showed up to a court that was already beginning to be ideologically split between Black and Frankfurter, but the split was only about how do you do law, not about what should we do? But it was about how do you do law. And he showed up and literally conned them into "There's no problem here." Because that was his experience as a pol. Everybody forgets he was Dewey's running mate. I mean people forget that. But what they don't see is that he was a spoiled brat. He never had a problem. He had more money than he knew what to do with and all the bad guys were away, and that was his vision of the world. So, he showed up and he basically persuaded everybody, "Hey, there's no problem here." If he had been a good pol, he would have realized, "Okay, I've got *Brown*. That's it." It's like Black, turning conservative. Once you get what you think is crucial even though this was not a court's job. If it has

to be done, we have to do it, okay, but once you do that, stop. Stop! No way. They were on a roll, they were on a roll. And you had to be stupid not to realize, “Hey, if you can do it because you’ve got five members, what makes you think that it couldn’t go the other way.” I mean only Earl Warren could have missed that one.

BC: (laughter)

JD: But it’s true, and I was there.

BC: Well, aren’t we having that now?

JD: Of course, of course. But the point was I could see it, I could see it there. I mean look, I didn’t understand that the only reason I was in this position was because Potter was brand new. He wasn’t a justice, he was just a judge. He had just gotten there. He didn’t act like a justice, he acted like a judge. So that, of course, my guy knows what he’s doing. So, I could see that the rest of them just didn’t understand what they were doing. Harlan understood, that was what was so amazing. Frankfurter, of course, was Felix, I mean he was like Guido, you know, he was just above it all. He knew the answer, he didn’t have to....

BC: That’s what I’ve heard about him. I’ve heard stories about Frankfurter that are pretty hair raising.

JD: Oh, Frankfurter was impossible.

BC: Personally impossible?

JD: Well, that was the big difference. Unlike Guido, he had no...he didn’t feel like an immigrant. He didn’t feel he was an immigrant. I mean he obviously did in spades, but he had turned it on its head.

BC: Arrogant?

JD: Well, I mean sure, but you see the more accurate way of putting it is Alex Bickel. Because Alex was sort of a more modern version of Felix. I don’t mean he wasn’t Jewish or anything like that, but he was more... Alex only wanted to be on the Supreme Court. He didn’t want to run

the world. Felix actually wanted to run the world. I mean, he thought he could do better than FDR.

BC: I see.

JD: I mean Alex was a more plausible version of Felix. He just wanted to be on the Supreme Court. I mean if you were going to say one man hired me, it was probably Alex.

BC: Oh. Interesting.

JD: Until Alex realized that I wasn't going to be a public figure, I was his protégé. Once he realized that I wasn't going to be a big shot Supreme Court justice, I was his protégé.

BC: He was ambitious you think?

JD: That defined Alex. Alex—how should I say it—Alex knew what he wanted. He wanted to be a Supreme Court justice.

BC: It didn't happen.

JD: Well, you don't know, if he'd lived. You don't know. I don't know. I mean, I don't think it would have happened, but look—Guido got to the circuit.

BC: You know, just to get back to Rostow for a minute, one of the impressions I've had from other people is that Rostow wanted more also. He wanted to be secretary of state...

JD: No, no, no. Look, this is history. You've got to understand you can't really understand Yale if you don't understand, this is New Haven, not New York. This is New Haven, not Boston. This is New Haven, which means nobody is going to look at you at a cocktail party and in effect communicate that I know you're the world's expert in your field. What the hell is that worth in the market. Nobody. That's not what you do here, whereas in every other great university, that's the world. I mean, you may be important, but hey, fella, there's a world out there. You have to understand that about Yale. Once you understand that, both Rostow

and Wellington are just townies. They're townies. They happen to have made it to the top of the ladder at Yale Law School, but they're townies. Rostow had two brothers. It was Eugene Victor Debs Rostow, it was really Eugene Victor Debs Rostovsky. You gotta understand that. One of the brothers is Walt Whitman, and the other one I forget, I used to know the third one...

BC: Eugene Debs. Yes, I remember that.

JD: Yeah, but the third one...

BC: I don't know the third one.

JD: He stayed in business, but he was another like that, and what I'm trying to say is that's who Gene Rostow is. Gene Rostow is a thirties Jew without money. That's who Rostow is. Rostow's "What do you mean anti-Semitism? I'm telling you...this is New Haven...I'm Gene Rostow and it's not easy to make it." Don't you remember all of the stories about faculty members helping Jewish students who wanted jobs?

BC: Yes. There was a group that got together to find jobs for Jews.

JD: That was the world that Gene was presiding over. I mean that's what he represented. He represented, "This is New Haven and this is America, and you can make it if you're meritorious enough."

BC: Yes.

JD: That was the school I entered. That was what I learned.

BC: Fred Rodell did not acknowledge his Jewishness, or was it just not an issue?

JD: I don't know, but my instinct says that it's what I said that he was Reich without the guilt. I think you're right. He was defined by not acknowledging it. I mean that's what drove him.

BC: Now Reich has a great, deep feeling of loyalty to Yale Law School, while at the same time not.

JD: Oh yeah, sure.

BC: His experience with *Greening of America* was a bitter one, and the fact that it was ignored at Yale, it was never mentioned to him, was deeply hurtful.

JD: Yes.

BC: ...not that he was such a big proponent of that book, necessarily, but the fact that the whole episode was ignored was astounding to him. What was that about?

JD: Here's what it's about. Read the *New York Times*?

BC: Yes.

JD: *Sunday Times, Book Review*?

BC: Yup.

JD: *Front Page This Week*?

BC: That I didn't see.

JD: It's Rowling's detective story.

BC: Oh, yes. Okay.

JD: This is what happens when critics aren't critical. The guy who's reviewing can't get over, *this is J.K. Rowling*, so he writes a review that keeps saying things like, "Well, you've got to understand when she talks about publishers, she's J.K. Rowling! She's being satirical." I mean it sounds childish, but she's not childish, she can't be! Okay?

BC: Yes.

JD: All I'm communicating is lawyers are critical. They have to be because you learn from cases and there's always another side so that you get trained to be critical. That's not a happy perspective on the world. It's tense. It's not happy. It's not relaxed. And that's a background to everything concrete like Charlie and *Greening*. There was a guy, I forget his name — Segal? — *Love Story*.

BC: Oh yes, Erich Segal.

JD: That's what was really going on. Everybody went in for Segal. I mean, Charlie honestly believed he was a good scholar and he was really talking about "the truth" and what would be, and meanwhile this guy is saying, "What is that fiction?" It's art and science. I mean this is how the world works. It isn't that people were down on *Greening*, it was if you're going to play popular culture, Segal's always going to beat you into the ground because people want to be relaxed and happy and...

BC: So, you don't think it's that dealing with popular culture was an enterprise that the Law School disapproved of?

JD: Of course. Oh, of course.

BC: Wasn't that enough of a story? We disapprove. We're not going to touch it. Just make it go away.

JD: Right, but that's because you're not inside, you're outside. If you're inside, I don't know how to say it—you're narcissistic. It's just you're narcissistic as a group, not as a person. Then you can feel, "Oh, Charlie isn't good popular culture." That's just inside and outside. I mean now we're back to the thing. I was at a school where there was Willie Moore and Grant Gilmore. These people all have...there's no collegiality. Faculty workshops, okay, when I started I couldn't miss them. They were brutal. They were brutal because we were together, I mean we were a group and you didn't, you simply didn't do it the way workshops work now, which is "Look, I got my turf, you've got your turf. If you listen to me, I'll tell you why I'm so great, I will be nice to you because we're all academics." I mean, who needs that? That's what's happened. I mean the inside...it's just like education. The insiders are theoreticians. They're not interested in what's going on in the classroom. They're interested in what *should* go on. That's what's happened.

BC: Well, it certainly is interesting to me. I don't know about the Law School, but everywhere else in the university the way you get rewarded is by getting released time so you don't have to teach.

JD: Oh, that's true. But what do you think is going on here? I won't specify, because my secretary is off getting...what do you call this thing?

BC: Oh, carpal tunnel?

JD: Yeah, taken care of. But there is a person I work with who is working on another faculty member's work and she keeps saying to me, "It's so boring!" I can remember when I was on *Journal* and I was a notes editor, the articles editors were completely different from us. That's because we were trying to be relevant, and what that meant was the practitioner; the articles editors were into their academics kind of stuff.

BC: Yes.

JD: And it was clear to everyone that it was two completely different editing jobs. That's totally changed. That's totally changed. I was trying to argue that Yale should become what you are defining as a liberal arts college. I don't mean that we should dump the stuff, but I was literally arguing things like – "The next president clearly has to stop expanding science spending." You can't compete with Cambridge. Come on, they've got MIT, they've got Harvard. Yale has to say, "Of course we want sciences, but we only want them for the purpose of teaching our students science. What we are is a great finishing school for the elite!" And that's a liberal arts college. It never crossed my mind that the man [Giamatti] would ultimately become President; but I should have known.

BC: Well, let's...we've been at it for a long time. Let's take a break for now. Thank you so much.

Second interview with Jan Deutsch, October 28, 2014

I'm **BONNIE COLLIER**, and I'm chatting with Jan Deutsch on October 28, 2014, for our second interview. We've agreed that we'll start by talking about some of the luminaries at the Yale Law School. So why don't we begin with Harold Lasswell? I'd love to hear your assessment of him as a scholar, teacher, colleague.

JAN DEUTSCH: Well, the easy way I can explain my view of Lasswell is a story I used to tell people when I was a graduate political science student, which is that once a week Lasswell walks down the street until he gets to a building and then he takes out a key, puts it in the lock of the door, opens the door, goes in, locks the door, walks down a long hall, opens another door with a key, closes it and locks it, goes down another long hall, until he gets to a trap door, which he pulls down, climbs up, closes the door behind him, locks it, and then he's in a room with a chair and a table and he goes to the chair and he sits down, and he laughs, and he laughs, and he laughs.

And that's my view of Harold Lasswell.

BC: So, what you're saying is that he was pulling the wool over everybody's eyes.

JD: Well, what's so interesting, and this is why I would say this, I took property using McDougal's book. I've never, ever come in contact with a more brilliant casebook. I mean, McDougal was the most sophisticated realist because he was not theoretical. He literally was a realist about property law, and he taught through the casebook. He knew how to communicate his insights and I assume that he just got bored.

BC: With property? Or with legal realism?

JD: Yes, with legal realism. And there's no question that he became Yale Law School's ambassador to the world.

BC: But jumping from property law to international law.

JD: Yes, but the mechanism was Harold Lasswell. I mean Harold Lasswell – I can give you the exact analogy – Grant Gilmore was probably the most sophisticated analyst of the common law as an abstraction. If you read his writings, I mean his articles, he saw exactly how the common law operated. He was an incredibly sophisticated analyst. And Llewellyn somehow conned him into civil law. I mean the UCC is nothing but civil law, it is not common law, and because Gilmore was so sophisticated about common law that he permitted Llewellyn to somehow just turn him around, I mean, become a substantial interpreter and proponent of a civil law system, of a code rather than the common law. Now I think the exact analogy happened to McDougal. Reisman is the last largely scholarly survivor of that theory. I mean, when I was a student, it was literally all students understood – there were two types of law taught at the Law School – there was regular law and then there was the McDougal version of the law. It was simply a parallel system.

BC: Yes.

JD: I think that was entirely due to Harold Lasswell.

BC: You know, McDougal is interesting. When I interviewed him, he seemed to me to talk about his youth and early academic career in such provincial terms. You know, his childhood and his early years – everything was very provincial, even the study of property law seemed provincial in the way he went about it. Then suddenly he blossomed out of it. He got attached to Lasswell, and I could never quite get to how that happened, why it happened.

JD: You put your finger on what it must have been. It's moving from the restrictive field to the world.

BC: Right.

JD: Lasswell suddenly persuaded him and he understood everything. I know exactly... I know how to try to communicate it... I teach two courses now. One is called *Reading Cases in Corporate Law* and the other is called

Laws of Social Science, and it's perfectly clear to me that I'm doing exactly the same thing from two opposite directions. I mean the first is deduction in the sense of you're deducing the law from a single documented case, and so inevitably you do induction to get up to the law. The course, *Laws of Social Science*, is just the same process in reverse. I mean you're starting from the philosophical proposition and you're working down to a concrete instance. Now, I think what happened to McDougal, he, in effect, was so good at analyzing the property cases...

BC: That he needed more scope...

JD: Well, it's like the mirror image, he just stepped through the mirror to the other side.

BC: The way I see it is the difference between text-based studying and non-text. In property law there's a text, there's the law. In social science, you ask free-form questions and your evidence may or may not have to do with the text.

JD: That was why it took me until this year to say *Laws of Social Science*. You're absolutely right about what social scientists say they're doing, but the only reason they can sell it is that the word "science" implies that they're doing something quite different, that they're operating from a coherent theory. That was really my problem as a graduate student in political science. I felt the law was so much more rigorous than what they were doing. What I finally understand is, all the legal realists were sophisticated lawyers who took the social scientists at their word instead of analyzing the social science. Law and economics now. I mean that's happened now inside the law schools because economics has become accepted instead of science. What it is is a rationality, which is precisely what makes legal analysis so much more sophisticated and rigorous.

BC: Lasswell gets very mixed reviews from the people I've talked to. Some folks think he was wonderful, and that the kind of duet that he and McDougal performed was brilliant. Others say "It's the course I dropped because I didn't know what he was talking about; he just made it all up."

I've heard reviews so widely dispersed, that I really don't know where to go with it.

JD: Well, the only way I can articulate what you're confronting was Harold Lasswell made philosophy a social science. I mean that's what's taken me half a century to work out. I've talked a lot to Reisman, and I see that what he's done is he's given you a normative framework as though it were a science. The framework that they use is normative, they're in effect making normative judgments, and it's because Lasswell convinced them that that was a scientific endeavor. That's how he got McDougal, I think, and here's what the problem is. I really can't say this differently, other than we'd really be talking about the philosophy of theory. From my perspective, this is the endless debate which was very substantial when I was a graduate student between history and social science. I mean in the end the social scientists have to claim, of course they don't, but they have to claim that history simply has no theoretical basis for validity. Otherwise, there's no reason for social science.

BC: Well, I think most historians would agree with that. I don't think historians want to have a theoretical basis at all.

JD: You put your finger on it. They don't want it.

BC: Yes, they don't want it.

JD: But, of course they do. It's not theoretical, it's personal, by the questions they ask.

BC: Well, yes, it's personal in that when you ask a question it's coming from you, so it's personal in that sense. Yes.

JD: But that's all I mean. And the only reason I'm insisting on it is, it's the only way Lasswell made sense. If you're faced with a really sophisticated legal realist, there are only two ways to go. The way I've gone is to say reading a case is a historical investigation, because you are taking a text and asking where it came from, and that's what a historian does.

BC: That's right.

JD: Now that's my solution, that's where I finally have gotten to.

BC: Right.

JD: And Lasswell is the alternative. If it somehow starts from theory and deduces what the correct result is, that's exactly...

BC: He comes to the text backwards.

JD: Well, from a historian's point of view.

BC: Yes.

JD: Yes. I mean, the way I put it, he's really coming at it like a civil lawyer, not a common lawyer. My firm belief is that all of this began when Henry VIII left the Pope, so that what you got was the Catholic Church, which was overarching, I mean it was Roman law, it was civil law. There are a couple of cases in the Supreme Court which say this is a Christian country, the United States is a Christian country.

BC: Yes.

JD: My feeling is the much more accurate way of putting it is that it's a Protestant country, and that's where the rule of law has to be common law rather than civil law. That's my theory and that's the basis from which I come when I make judgments about the legal realists and Lasswell, political science, and history. I think it's taken me half a century to find a theoretical basis for history, and I think what it is is that I came to the Law School as a trained historian, but I could never figure out what I was supposed to be doing as a trained historian, and that's what happened. I mean without understanding it, I finally found a way to apply my history.

BC: I see...very interesting.

JD: I didn't know that that's what Gilmore was doing, but that's, of course, what Gilmore was doing. He bewildered me because he is so French, because that's what he taught before he came here. He's coherent. His sense of history is coherent because he was so deeply into the French

language that he couldn't conceive that the common law system was not a coherent system, it was an evolving system.

BC: That didn't ring true to him.

JD: Well, it did ring true in the sense that he adored Cardozo, and if there ever was a man who basically structured the facts to justify the legal holding, which is really common law posing as civil law, or vice versa. All I'm trying to say is that's why it was Cardozo rather than Holmes that Gilmore adored because he had coherence. It was purely rhetorical, it was purely verbal, it was purely the opinion itself. There's a famous Cardozo case, *Lucy, Lady Duff-Gordon*, which basically says that any promise whatsoever is a contract. No one would say that. But that's the holding, of course that's not the language Cardozo uses, but it makes no sense any other way. Simply trying to describe the sort of mind that would adore that opinion, and that's Grant Gilmore.

BC: Yes. And how did it go with Gilmore?

JD: So, it's no wonder that I was absolutely bewildered my first term because Gilmore was sort of "the" teacher, and I literally tried to leave. I told Jack Tate, "Either I don't understand it or it's a great fraud, but I can't go on with it." Now I understand why, you know, it's like French history. There is social science posing as history because the French are so clear that their history was coherent. And, of course, you get the disserts, which are also French and just say, "Stop bothering me with history, theories, everything." It doesn't matter because, neither one of them is real anywhere but France.

BC: Getting back to Lasswell just for a minute. I think McDougal told me that he persuaded Lasswell to come here, he courted him. Went to Columbia...or Chicago?

JD: I think it was Chicago...

BC: Maybe it was Chicago, and Lasswell deflected all that for a while. He didn't want to have anything to do with it, but McDougal kept at it. What was the relationship there? Why was McDougal so hooked on Lasswell?

JD: If we're going to talk about a public persona or someone impressive in the public sense, Lasswell was it.

BC: Was he impressive?

JD: It's like Susan Sontag in the intellectual world. He may not have been Madonna, but he was so intellectually arrogant.

BC: Arrogant.

JD: Lasswell really, honestly...he was a sophisticated analyst and how can a sophisticated analyst claim that his theory is perfect?

BC: And he did?

JD: Well, because it wasn't a theory. He made norms scientific. You can't do that, but that's exactly what he did. That's what Reisman believes, not talks, but believes it, that he's got a technique that in effect makes norms, how shall we say, they can be applied empirically. That's what Lasswell persuaded people of, and he did it the way all people at that level do it by not saying what he's doing. I mean with any of these techniques you basically say I'm not here to convince you, I just want you to work with me in the way I work, and it proves so successful that you accept it. My thesis-antithesis is philosophy and ideology. If you disagree with a philosophy, it becomes an ideology rather than a philosophy. Lasswell was simply eliminating the distinction. He's claiming he knows about what I just said, and he's got the solution, and so you're reduced to saying, "But I think you're an ideologue," then of course you do the Freudian psychoanalysis "How interesting that you're resisting!" And that's how it works. It's exactly Freudian doctrine.

BC: And there was a language – part of it was a language that to some people was brilliant, and to other people was just...

JD: When you said personal history, I mean in the end that's all philosophy is, is one's personal language, meaning one's personal perspective. Since we're human beings, and we think we articulate what we think, we say philosophy but really we're only communicating our perspective, and that comes down to words. And now we're at why I'm so dedicated to the common law. All one does is force oneself to say that is what my opponent is citing as a precedent, and it is a relevant analogy. That's all that's going on in the common law.

BC: Yes.

JD: But that's history. Your perspective tries to demonstrate that you never, never analogize other than relevantly. That's what writing history is all about. Of course, some people like me think it's too complicated to do, but that's a different topic.

BC: Well, you know, you're right, that's another whole topic, what the writing of history really is. You get it all the way from it being just another form of literature to the scientific side and everything in between.

JD: By scientific do you mean Namier or do you really mean scientific?

BC: I don't think that anybody would even get close to claiming that history is scientific these days.

JD: As I said before, Elton, Geoffrey Elton, my teacher, I think he felt Namier was as close to science as history was going to get. Elton would periodically say to me, "Oh, there you go into philosophy again." And it was exactly what I tried to have a conversation with him about. He simply would not talk...

BC: Really! That surprises me that it was so late in the 20th century. I think of scientific history as going back to the Johns Hopkins school of history in the early 20th century.

JD: Well, yes. Do you know anything about Jack Hexter?

BC: Yes, of course! He was a buddy of mine, when he was here.

JD: Well, that was the big discrepancy between Elton and Hexter, because Elton never said, “Oh, you’re just like Hexter,” because I knew better than to talk like him (laughs), but of course I respected what he was trying to do.

BC: What Elton was trying to do?

JD: No, Hexter.

BC: Yes, yes.

JD: And that’s when Elton would say, “Oh, there you go being philosophical again.”

BC: Boy that seems extreme to me.

JD: Who was it that I really adored, that I really appreciated, the Spanish Armada guy.

BC: Oh, yes, I know who you’re talking about. Garrett Mattingly.

JD: Well, see I had exactly the same reaction Hexter did, except he had it professionally. I mean it was his field, whereas I just felt it was great literature. That didn’t mean I didn’t think it was good history, but I thought what made it great was there was no distinction. I don’t think Hexter would like that.

BC: Well, I don’t know. When you read Hexter’s baseball book, you get a sense of the fun of historical analysis, but it’s real history, too.

JD: Now this is really personal. Ernest Barker, when I was very young, wrote a book on national character, and I thought “What garbage and how could anybody blah blah blah,” but really I think that’s what you’re responding to. Hexter’s instinct is to see it all as an index of national character, and of course he’s dead right.

BC: Oh, yes.

JD: That is what historians have to feel to write good history.

BC: You know who else did that right here was Ed Morgan, who was able to weave national character, wonderful history, answers to or at least suggestions about big historical questions, all rolled into one, and well-written at the same time.

JD: Well, it's almost like Rome, where there are a very limited number of texts. I don't mean for a minute that I disagree with you about Morgan, but he has the advantage of a relatively limited number of texts.

BC: Well, yes, because he's doing 17th- and 18th-century history. Is that what you mean?

JD: Yes, and in a very small, in that sense, context.

BC: To me that's the beauty of history. You ask the question first, and then you go to find out how you can possibly answer it, instead of being presented with a text.

JD: I don't do that anymore. I'll give you a concrete example. Not that I'll ever do this, but I was thinking about writing an article saying, "ISIS, it's just the enlightenment for the alienated."

BC: What? Back up.

JD: It's the Enlightenment, it's just that instead of the Enlightenment being the alienated upper class, which it was...

BC: Yes.

JD: . . . we've now globalized. This is the Enlightenment for the alienated of the world.

BC: Oh, I see.

JD: And that's—I'm not going to use the word progress—but that's where we've come historically. That knowing what the Enlightenment really was, I can analogize to ISIS. Yes, it's a different thing, but there is an analogy.

BC: I've begun thinking that the right wing, both political and legal, are the children of the Enlightenment. That the text will give you all the answers you need. That it's rational, we don't need to go any further. But we don't need to have this conversation of my crazy ideas.

JD: I think you're right. You see, I can only go back to the common law and say, "Socrates was absolutely right. He was nothing but a counter-revolutionary, he saw the written word, and he was ready to do anything to stop it."

BC: Hmmmm...

JD: Oh, absolutely. You go through any Dialogue and he says explicitly don't write it down, because then you're claiming an authority you don't have.

BC: Yes, relevant.

JD: Oh, absolutely. Well, you know he can't win because, of course, what he's really objecting to is "the word." He's right, it will be worse if you write it down, but that's just a matter of efficiency. If you get enough people, you're going to have to use writing. And that's what I mean by counter-revolutionary. I mean Socrates in the end—it's the ultimate irony. The only reason we know this is because, of course, Plato was an artist who was determined to make Socrates live, which he did by doing the very things Socrates didn't want him to do. But that's the common law.

BC: So, a written constitution written by the elites becomes the reason to make permanent their ideology and their needs.

JD: Absolutely. I mean my whole pitch in *Laws and Social Science* is the utopian constitution, which is the American constitution without a Bill of Rights, so that we confront the fact that what we call rights are social privileges and immunities.

BC: Right. When you write down the Bill of Rights, you are implying that those rights are all you've got, right?

JD: Well, no. This is my thing about history. You know Pauline Maier?

BC: Yes.

JD: If you read her book on the ratification, you realize that the Tea Party was right there and it was exactly the people who were opposing the Constitution. And we bought them off with the Bill of Rights. They didn't buy it, but we somehow convinced everybody that we were heeding their objections. If you read the *Wall Street Journal*, what's wrong with the world is that it's crony capitalism instead of the world as it should be, and of course all Namier is proving is that crony capitalism is inevitable. It's just the way the world works. Well, that's history.

BC: Yes. Namier's localism and provincialism seemed to him to be inevitable.

JD: As opposed to social science. I mean, as opposed to the *Economist*, which is sort of the sophisticated version of the *Wall Street Journal*, the only thing they don't have any sense of is history.

BC: What do you think about people who teach let's say constitutional law out of context, refuse to see the historical context?

JD: I think that's why I stopped teaching. The only reason I could teach constitutional law was I taught nothing but the commerce clause because that was historical. That was gradually moving...I don't know exactly how I can say it...Germany is nothing domestically, I mean it's a country, but domestically Germany is simply the United States without the Constitution; it's still the Articles of Confederation.

BC: Today's Germany?

JD: Yes, oh absolutely. That's why Merkel can't do anything.

BC: Because of the states?

JD: Well, people still basically see themselves as Bavarian, Swabian. That doesn't mean that these are the outsiders. Why do you think the Germans were such great soldiers? Because their view of their relationship to others was Prussian, it wasn't German, it was Prussian. Germany only existed

from the top down. Inside Germany, you weren't a German, you were a Bavarian or Swabian.

BC: Interesting. You had told me a bit, just to skip a little bit, about Fred Rodell the last time we talked, but I want to hear more.

JD: You know Charlie Reich.

BC: Well, yes, and you know I've interviewed Charlie twice.

JD: Well, Fred Rodell was an unprincipled version of Charlie. Vis-a-vis the Law School, I would say Rodell was sort of half way between me and Charlie. He fought it.

BC: He fought it how?

JD: Oh, yes, he fought it. He was a personally defined ideologue. He was someone who thought that Bill Douglas stood for more than Bill Douglas stood for, and that was his ideology.

BC: He got hooked on Douglas, then.

JD: No, in a weird way he got hooked on what Douglas should have been. Spartacists, not Communists, but true revolutionaries, and it was all personal. What I'm about to say I don't know, I simply deduced it—the only way I can account for it was that he was an apparently brilliant tax lawyer and that he just turned, that that was so corrupting in his eyes, that he just turned.

BC: Was he, in your estimation, an authentic lefty?

JD: No.

BC: No. What was he?

JD: Fred Rodell.

BC: Yes, I know (laughs).

JD: Did you interview Emerson?

BC: No. I only got to Emerson through Ruth. I did interview her.

JD: Well, I mean, Emerson was an authentic lefty. He wasn't new left, he was old left, authentic old lefty. I think Rodell looked down on him. Not that Rodell didn't appreciate the ideas, but I think he felt that he was a rebel. I mean Rodell was trying to – if I say the name Paul Goodman?

BC: I know two Paul Goodmans.

JD: Politically anarchist, well, I think that's Rodell. Rodell bought all of that. He was not a dumb man, but he would have said to you and me, "Aah, history, that's just dressed-up journalism." And he trained people to be journalists about the law.

BC: Yes, yes.

JD: But I'm trying to put it into the context. He was like an active Lasswell. He would have felt, "Oh that's just theory. I'm trying to train people to act."

BC: I assumed that he believed the public had a right to know more about the law, and that the public was being blindfolded by theoretical and obscure language that they couldn't understand, and so it was his job to make things clear.

JD: If I say Hofstadter and paranoid style?

BC: Absolutely, yes.

JD: Well, this is a perfect illustration because what he felt, not said, but what he felt was that the Frankfurter people were doing all these bad things, and that his people, mainly Douglas, but also Black, his people were trying to do the right thing, and that that was the substance of the message. There's no question that was what he stood for. I mean he thought Rostow getting Bickel was the end of the world.

BC: I know, yes. And also Wellington.

JD: Oh, yes, but Bickel was the...

BC: Bickel was the symbol of the Harvard threat. Yes. He believed it or was he trying to attract attention?

JD: Well, this is what I meant by rebel. How can one know. You said McDougal. I knew when I asked the question that it was a stupid question, but I once asked Rostow whether he had made a deal that if he gave Mac the whole graduate program, Mac would back him everywhere else. As soon as I finished the question, I realized what a stupid question it was. I'm saying that that's the equivalent of, you know, did he mean it? I feel that real political (whatever we want to call it) plan, maneuver, change, we never know because the people doing it don't know. They're not self-aware about it, it just happens. There are two things about when FDR picked Ike instead of Marshall for the job, I've spent half a century thinking about these historically, and you know what it was, Marshall believed that whatever Roosevelt wanted was the right thing.

BC: Oh, hmmm.

JD: And when Truman wanted him to go to China, he went because unlike Ike, Marshall was the perfect servant. Bureaucratic servant and Ike wasn't, I mean it was that simple. And Roosevelt preferred Marshall. Did Roosevelt understand? No. Just as I can't imagine that Roosevelt was conscious of the fact that he had no succession plan. He told Truman nothing, absolutely nothing, and you can see it at the 1944 convention.

BC: Yes.

JD: He chose Truman for no reason at all other than he wasn't about to admit that he didn't want Wallace anymore, and so he let them do the job. And, so you read all kinds of reports on what happened there, and nobody who writes about that tells you a wonderful fact. Do you know what Truman had in his pocket when he went to the convention? The nominating speech for Byrnes.

BC: The nominating speech?

JD: Jimmy Byrnes! Everybody assumed Byrnes was the logical successor, including Truman!

BC: Oh, really.

JD: Oh yes, and one of the most intriguing questions, because it's pure social class, is why FDR didn't allow that to happen. I mean, you know, what they said was oh, well, he was divorced. Oh no, Roosevelt just couldn't abide the idea of succession.

BC: So, he saw Truman as a weak outsider?

JD: Sure, Truman was Pendergast's buddy. Pendergast's man in Washington. And Truman never hid that. Truman didn't claim to be anything else. I'm not talking corruption or anything, it was just Truman knew exactly what was going on and why.

BC: Hmm. Interesting. I'm getting lost in other things here. I'm not sure that last time we talked we got into the 1990s at the Law School. As the 1990s progressed, I think we did talk about Guido's deanship and I think you agreed with everybody else who has said that Guido made this place what it is today in terms of fiscal strength and also the building of the scholarly Yale Law School. But I know you've been somewhat critical of the emphasis on scholarship versus teaching.

JD: But not anti-Guido. It's the other way around. I don't know how conscious it was because Guido never permits you to locate him at point A without pointing that he's aware of all the problems with A and, therefore, there's also B, C, D, and E. I'm not trying to ascribe any of this to Guido, but I think what, in fact, happened was that Guido intuited that the Law School was no longer a place where retired lawyers would pass on their experience to people who wanted to be lawyers. Instead it became an academic institution. All I've ever felt is I, unfortunately, was right at the turning point and so really by the 1990s I'd lost all contact. It simply wasn't the Law School I felt was the Law School.

BC: So, the transition that you're just now describing, do you approve of that?

JD: So, now you're in the ultimate philosophical...my feeling is that it doesn't matter whether I approve of it.

BC: Okay.

JD: My only contribution is to make people aware that I'm right about the analysis of what happened. That's what I mean by history. Nelson Polsby was a big-time political scientist. *Who Governs*, the book by Dahl about New Haven, well, Polsby wrote the theory companion volume and he and I had a quite heated exchange about *Who Governs* as analysis. My point was that, though it claimed to be a scientific analysis, it was, in fact, a positive judgment on Lee and I didn't think that that was accurate science. Of course, Polsby simply refused to accept that and we had, as I say, a really heated exchange about it, and it's everything you and I have been talking about, about history and political science. Really, what he couldn't imagine is writing without making a normative judgment. He simply couldn't imagine. To him nothing he did was normative, and I kept trying to say that's impossible.

BC: Right. I'm with you on that.

JD: I told you about this political scientist who wrote a book about the Yale political science department in the 1950s, and he cites this exchange because it was the clearest attack on consensus. I mean, the book was about consensus theory and he says that that was the most clear delineation of the limitations of consensus.

BC: When we were talking about schools of thought, I wanted to ask you this and then it slipped by. There was a brief period in American historiography when people became enamored of psychohistory. The application of psychological theory onto historical subjects, which was problematic to say the least but did produce some interesting reading. Did the law ever get into that?

JD: Oh yes. First of all, theoretically what was happening was the Freudians split between the neo-Freudians and the Freudians like Fromm who saw the social side of what was going on and tried to ask whether there was anything going on other than conformity to whatever the culture was at that moment. That was the fight inside the Freudian doctrine, and exactly

this point. This was exactly when I was in law school and the great hero in criminal law was David Bazelon because of *Durham*, treating the insanity defense as science, and Bazelon somehow was convinced that insanity somehow was scientific... I mean really insanity means, how shall I put it... we have a private meaning inside our heads, and a public side. All insanity means is that your inside is so out of tune, so out of touch, that people can't deal with you. That's all insanity means. They just wouldn't accept that because you had to deal with the criminal system. Instead of saying, "Well, insanity means outside the system," Bazelon insisted on making it scientific. That was sort of the center of advancement, which really just means Joe Goldstein...

BC: I was just going to say Joe Goldstein, yes.

JD: Joe Goldstein. No question. Joe did the equivalent of Lasswell to the Yale Law School.

BC: Tell me more about him.

JD: Joe?

BC: Yes.

JD: There was something personal going on, I think tuberculosis, I mean he made Fred Rodell look tame.

BC: Really!

JD: Joe masked his personal ideology as scientific truth. But the book, the textbook, was Joe's in criminal law. After two weeks, I bought a bar review course. My reaction was this is C-minus sociology. This is silly. That was pre-psychoanalysis with Joe, and he was saying, I know the truth which nobody is telling you about criminal law. Operationally he believed the inside of your head was scientifically analyzable. I mean the pose was total openness and perfection of teaching. Instead, it made McDougal look open. I never had a course with him, thank goodness, because you did what Joe wanted, which included, of course, dissent. You could dissent as long as you had the right assumptions. It was perspective.

I don't think he was capable of a different perspective, of giving credence, a perspective which contradicted his vision.

BC: Interesting for someone so steeped in psychology.

JD: He and Katz worked together. I taught with Jay for a couple of years, and it was clear that Joe would have nothing to do with Jay intellectually. That was because Jay was what Joe pretended to be – totally open, this is just technical. He believed it, absolutely, technically, but he didn't act on it. It was just doctrine. Tushnet is one of the Crits who says "They learned it from me." (Laughs)

BC: (Laughs) Oh really? Is that right?

JD: Yes, but Mark claims that where he really got the message was in the course I taught with Jay. That never crossed my mind because it was *Psychology, Psychoanalysis, and the Law*. I mean it was a wholly technical approach...what do we know about psychoanalysis, how does it affect things. It was what Joe presented himself as being, totally open, ready to ask the fundamental questions. But Jay was really doing it, and that's why I say I can't analyze some of these personal perspectives, but all I know is Jay was everything Joe claimed to be, and it somehow had to do with psychoanalysis, but I have no idea why or what.

BC: That's interesting.

JD: All I know is the registrar claimed that if Joe didn't get his way, he'd throw a tantrum about classes and times. He was a spoiled child, but I don't know where that came from or how it...

BC: He didn't misbehave with his colleagues, though, apparently.

JD: He certainly was extreme. His position was we shouldn't have anything to do with recruiting. He wanted aesthetic scholarship...I don't mean so much scholarship as teaching, but for him it meant the students were supposed to be anything but exposed to what the scholars were ready to teach them.

BC: There's a fellow out in California named Bill Felstiner whom I was going to interview. He had a long history here and knew everybody. Is that an interview worth undertaking? Do you think he would know a lot about...?

JD: Oh yes. Have you ever interviewed Stevens?

BC: Yes, Bob Stevens. Yes. I have, and that's a very interesting one. We're up to the point where Tony became dean and sets a different tone from Guido's in that it becomes, in my view, quieter, less sort of organizational and more scholarly. Am I going in the right direction with that?

JD: Yes, that is right.

BC: Were his ten years productive years in your mind?

JD: I think Guido knew that I just was no longer in the school. Once you go past Guido, I'm not a participant. And worse, I really lost the ability to observe because too many of the people I knew were gone and were going, and there were too many new people that I didn't know. I think a lot of it was my doing, but I don't think anybody was terribly anxious to keep me. You see that's one way it changed. The school I never left was truly competitive in the sense that everybody was held to the standard of being able to persuade you of their position. That's what totally changed. Now it's completely, if I don't go on your turf, you won't go on my mine.

BC: Oh, that's interesting.

JD: I said this before, it's like what the college was when I said, "Well, at least I can go be a legal academic if I can't be any other kind of academic." It totally changed. It went right back to where it was. As I told you, Charlie Reich was head and shoulders the most brilliant of the history people and he couldn't stay.

BC: What you're describing, turfs, is the way Yale College is and the Graduate School is. That's the way academia is.

JD: Right, and that's what this place became. That's what Yale became.

BC: Right. But you preferred the more integrated way.

JD: It isn't preferred. It's the curse of tenure. If I didn't have tenure, I might have had to adjust, but because I had tenure I didn't have to adjust, and I couldn't. It isn't "wouldn't" – that's what I mean by the curse. I can say that, if I hadn't had tenure, I might have had to do what others did.

BC: But you're using the word "curse." I don't think you mean it as a real curse. I mean isn't that the beauty of tenure, that you could do what you did?

JD: I'm ambivalent about that because it's so personal as opposed to social. Again, it's like Rodell and Reich, I had this very serious accident...I felt compelled to prove that I could still do scholarship, but I never approved of anything I wrote.

BC: You never approved of anything you wrote? Like what, for instance?

JD: Well, I wrote all these articles.

BC: Yes.

JD: And I felt they were tight in the sense that they delivered what they said they would deliver, but I felt, with very few exceptions, that what they were delivering was not worth bothering the reader with. That's an easy way to say it. There were two books, one was my thing. I had this wild student who said he could get a casebook authorized and he did, and then I was forced to write it with him. But the other one, I told you about it, it was the Edsel. The editor-in-chief said it's fine except for this article, which was the tenure article, which was the one thing I was proud of, and she said, "But that's the problem." And I said, "I couldn't agree with you more. You're the editor." And that was the end of that. That's what was wrong with my writing. It's only now that I see that the tenure piece other than showing that Alex wasn't right, that Bickel wasn't accurate, really wasn't so much law as social science. It was ambivalent... not that that's wrong.

BC: Yes, yes. Are you writing anything now?

JD: No. I mean there are written things in the courses, but I really do believe that law insofar as it's useful, is useful as a social science. But what the course is about is asking the students to develop their own philosophy. It's not about persuading them that I'm right. What does that mean? That means that one's reading of the case and what one tells the client is the law. One is actually creating the law as a common lawyer and, the real question is, is there any place for that in the digital world?

BC: Is there?

JD: I think there is. My argument, I don't mean I'm sure, but my argument is look, Socrates wasn't wrong about writing, but we didn't stop talking.

BC: We've had a long and productive conversation. I won't keep you any longer. Thank you so much.

End of interview

