
HARVARD LAW REVIEW

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IN MEMORIAM: BERNARD WOLFMAN

The editors of the *Harvard Law Review* respectfully dedicate this issue to Professor Bernard Wolfman.

*Howard Abrams**

I remember well the first day of Professor Wolfman's corporate tax class in the fall of 1979. The first assigned case — the first case in Professor Wolfman's Little, Brown & Co. casebook — was *General Utilities & Operating Co. v. Helvering*.¹ In that case, the General Utilities corporation distributed to its shareholders stock of a second corporation. The government contended that General Utilities recognized income on this distribution equal to the value of the distributed stock over its adjusted basis. The government's theory of the case was that a cash dividend had been declared and then satisfied with appreciated property, and as to that argument the Supreme Court held for the taxpayer, saying that the Board of Tax Appeals had found as a fact that a cash dividend had neither been contemplated nor executed and that the trial court's factual determination should be respected.

The government also argued that a post-distribution sale of the shares by the distributee shareholders should have been attributed to the distributing corporation, but the Supreme Court rejected that argument as having been raised by the government too late to be considered. We also read *Commissioner v. Court Holding Co.*,² where this second argument was timely pressed by the government and accepted by the Tax Court (the renamed Board of Tax Appeals). This time the Supreme Court held for the government, again deferring to the factual finding of the trial court.

* Professor, Emory Law School.

¹ 296 U.S. 200 (1935).

² 324 U.S. 331 (1945).

Professor Wolfman, a master of the Socratic method, asked whether a liquidating corporation should recognize gain on the distribution of appreciated property. The student said no, that not even the government argued the mere distribution of appreciated property should be a taxable event to the distributing corporation. But Professor Wolfman pressed on: *should* it be taxable? And again the student said no: as a general rule, section 311 of the Internal Revenue Code precluded a distribution from being taxable to the distributing corporation.

Bernie had us read exceptions to this general rule of nonrecognition, some enacted by Congress and some created by the courts. We read the supporting statutory rule that allowed corporations to avoid the *Court Holding* problem if they moved quickly enough (old section 337), and we read a special rule that applied when shareholders were also creditors. Subchapter C was full of rules: the *General Utilities* doctrine, codified in section 336, seemed just one of many. What we did not read and what we did not understand was why the *General Utilities* case stood for a doctrine the Supreme Court did not discuss and why the *General Utilities* doctrine was such a big deal for the taxation of corporations (described in Subchapter C of the income tax statute).

Eventually we understood. As the Wolfman casebook walked us through more of Subchapter C, we understood that the taxation of corporations and their shareholders could make sense and could be sensibly explained except for the *General Utilities* doctrine. And, more importantly, we understood not only that the *General Utilities* doctrine was fundamentally unsound, but also that its failures infected almost everything else in Subchapter C. The *General Utilities* doctrine may have been a small hole in the taxing system, but taxpayers inevitably found ways of driving their transactions through it. Congress and the courts tried to patch that hole, but until Congress adopted a structural fix by repealing the *General Utilities* doctrine, those patches were doomed to fail. Professor Wolfman centered the course around the *General Utilities* doctrine because the law itself was centered on it, not intentionally but unavoidably.

I now teach the taxation of partners and their partnerships (described in Subchapter K). Most books start with the formation of a partnership, move to partnership operations, and end with partnership liquidations. My book goes in a different order: I start with the allocation of partnership-level income among the partners — what are called distributive shares — because understanding distributive shares is central to understanding almost every other part of Subchapter K. I teach Subchapter K from the inside out — from deeper structure to superficial rules — because that is the only way to understand how all the pieces fit and why they fit the way they do. I teach distributive shares first for the same reason that Bernie Wolfman taught *General Utilities* first, and I do it because he taught me how to teach.

With the repeal of the *General Utilities* doctrine in 1986, Bernie moved on to other things (and reordered his corporate tax casebook when it next was revised). Over the last thirty years, Bernie and I spoke only occasionally and wrote to one another now and again. Most recently, I wanted to talk about the proliferation of anti-abuse rules; he wanted to talk about changes to the legal profession. The Code was littered with anti-abuse rules that obscured structure, increased compliance costs, and arbitrarily treated similar transactions differently. Anti-abuse rules multiplied, he said, because tax lawyers had lost their way, moving from being stewards in a noble profession to being shills for their tax-minimizing clients. Courts and Congress were trying to patch a broken profession; fixing the Code required fixing the profession. Once again Bernie found the heart of the matter. He was a great teacher.

*William D. Andrews**

I met Bernie Wolfman in 1964 when he came to Harvard Law School as a visiting professor. We had each had one year's experience as full-time law teachers, and our principal subject was federal income taxation. We both had a great deal of fun at it, and we shared that in frequent conversations. Clark Byse commented years later on his entertainment at observing the two of us going off for coffee together, every morning he claimed, even before classes.

But there were important differences. Bernie had practiced tax law for fifteen years at Wolf, Block, Schorr and Solis-Cohen, in Philadelphia, the last two of them as managing partner. I had spent much less time in law practice, and hardly any of it in tax. So Bernie taught me much more than I had to offer in return.

Another contrast was military service. I served in the Navy during the brief period of peace following the Korean War. Bernie was in the Army during the climax of the Second World War. He liked to talk about the army language school where he had been taught Norwegian. Indeed he liked to demonstrate some of what he remembered years later. When it became clear the war would not reach Norway, Bernie was sent instead to the trenches of France, where he would have been in the middle of the Battle of the Bulge but for the fact that his feet froze and he was evacuated shortly before that battle began.

* Eli Goldston Professor of Law, Emeritus, Harvard Law School.

Despite our different backgrounds, we had become fast friends at HLS in 1964–1965. Bernie was invited to stay on at HLS in 1965, but he turned it down. I was deeply disappointed, but his decision now seems completely in character. He had close old friends on the Penn Law faculty, and I think he was unwilling to leave them after only one year there. Also, I would guess that his family’s roots in Pennsylvania had not been fully replaced in one short year in Massachusetts.

Bernie stayed at Penn for fifteen years, the last five as Dean. Finally in 1976 he finished his deanship at Penn and accepted an invitation to come back to HLS as the Fessenden Professor of Law, a position in which he served until both of us retired, thirty-one years later, in June 2007.

Together again in Cambridge, Bernie and I took pleasure in shared interests that extended beyond tax law. For instance, we both had a lifelong fascination with language and words. We read and discussed new books about language, particularly *The Language Instinct* (1994) and *Words and Rules* (1999), both by Professor Steven Pinker, then at MIT.

Sometime not long after the appearance of the latter book, Bernie told me that Professor Pinker had accepted his invitation to come over from MIT for lunch, and he invited me to join them. It was a long and enjoyable lunch hour, but what I particularly remember is Bernie delicately raising a question about the following sentence in the book jacket: “In *Words and Rules*, Pinker explains the profound mysteries of language by picking a deceptively single phenomenon and examining it from every angle.” Bernie did not think “deceptively single” made sense, and after some discussion Pinker agreed. I think Bernie would be pleased to know that the cover of a later edition uses the expression “deceptively *simple* single phenomenon” and that the back cover of the paperback edition refers (more simply?) to a “deceptively *simple* phenomenon.” Bernie was always intellectually engaged, regardless of the subject matter, and loved the craft of writing.

Bernie was an author and editor himself, having compiled his own casebook for teaching the advanced course in federal income taxation of corporate transactions. At around the same time, I compiled a casebook for use in the basic income tax course. Both of us then had children incurring substantial college or secondary school fees.

Bernie then decided it would be useful to transfer the copyright for his casebook into a trust, for a period of at least ten years, with a direction to distribute the income as needed among his children. He then appointed me to serve as the trustee.

I thought so well of this idea that I followed suit, designating him as trustee to hold the copyright for my casebook in trust for my children. The publisher thereafter duly noted that the copyright owner for the Wolfman book was William D. Andrews, trustee, and vice versa. As a result of this arrangement I got to know the Wolfman children a

little better, and my children came to refer to Wolfman as Uncle Bernie. Moreover, the royalty income was taxed to the children to whom it was distributed, instead of to their fathers.

Uncle or not, Bernie was always a great and dependable friend, and I miss him sorely.

*N. Jerold Cohen**

Writing a short piece about Professor Bernie Wolfman is not easy because he was such a multifaceted man. I had the pleasure of crossing his path in several contexts and thus saw his many sides.

My first meeting with Professor Wolfman was really unexpected. I was on the National Board of the American Civil Liberties Union and someone tapped me on the shoulder. It was Bernie, who introduced himself (of course I knew who he was) and said that he was glad to see me because tax lawyers were a minority on that board. It was great to meet Bernie in person and to know that we had interests in common outside the tax code. It was also fun to see him in that context, weighing in on questions of civil liberties rather than on tax issues.

Bernie later asked me to serve with him as vice-chair of the Civil Rights Committee of the Individual Rights and Responsibilities Section of the American Bar Association. I was willing to do so because I knew three things. First of all, I enjoyed participating in anything with Bernie. Second, I knew that I would approve of the positions he would take. Finally, having become well acquainted with his work efforts, I knew that with Bernie at the helm I would not have to do any work.

In serving with Bernie on the ACLU Board and in the Civil Rights Committee, I got to know his passion for civil rights and liberties. Many would say that made him a dyed-in-the-wool liberal. You could not forget the “tax side” of Bernie, however. His liberal leanings did not prevent him from scolding the very liberal Justice William O. Douglas on that subject in *Dissent Without Opinion: The Behavior of Justice William O. Douglas in Federal Tax Cases*.¹ Many had thought that Justice Douglas’s opinions resulted from a personal encounter with the Internal Revenue Service, but, to my knowledge, only Bernie

* Partner, Sutherland Asbill & Brennan LLP.

¹ BERNARD WOLFMAN ET AL., *DISSENT WITHOUT OPINION* (1975).

and his coauthors publicly took him to task. This was, of course, only one of Bernie's many excellent books and papers.

Many tax professors write well, but do they teach well? Bernie did. I have heard that his students found him to be a professor of the first rank whose lectures and lessons were always very clear. I got to experience just how skilled Bernie was in that regard one snowy day in New Hampshire. Bernie had invited me to participate in a tax program he was putting on for the New Hampshire bar. I agreed to attend, but the day before the program a snowstorm moved in. I managed to catch the last flight into Boston and drive up to New Hampshire behind a snowplow. I worried that only the speakers would attend the conference, but Bernie just laughed and said that no New Hampshire lawyer would admit missing anything because of a snowstorm. He was right: the room was packed the next morning.

Before we began, however, Bernie said we had a problem. Missing from the conference was Marty Ginsburg, who had been grounded in New York by the weather. So Bernie called all the speakers together and asked who was willing to give Marty's part of the program. We all looked down at our feet and no one responded. "All right," said Bernie, "I will do it." And he did — without missing a beat. All of us were tremendously impressed and knew that we could not have done that. It took a first-rate professor to step in and deliver someone else's portion of the program as though he had intended to give it all along.

But Bernie was not only a top-flight tax professor. He also was an exceptionally well-rounded tax lawyer. He worked with the Tax Section of the American Bar Association and with the U.S. Treasury Department and served as Dean of the University of Pennsylvania Law School. Before embarking on his academic career, Bernie practiced with a major Philadelphia law firm for a number of years. Even while teaching he continued practicing law as a consultant and expert witness. He felt that this real-world experience enhanced his teaching. I do not believe that it needed enhancing, but I am certain that his students benefited from the broad background of their professor.

In addition to watching him at work on the ACLU Board, the Tax Section of the ABA, and in lectures, I also enjoyed seeing him on a board with a number of well-known tax practitioners. I was able to see Bernie interact with a select group of prominent tax lawyers when we both served on the Commerce Clearing House Board for its Tax Transactions Series. His comments in our meetings were always right on point. And they were closely listened to, even by a nationally known group of his peers.

However, at one dinner given for the CCH Board at the Supreme Court, I found that not everyone always agreed with Bernie. I was

approached by Justice Ginsburg, who said, “You must talk to Bernie. He is teaching everyone in his class that our *Gitlitz*² decision was wrong.” The decision held that even if the IRS did not like the way the statute at issue was written, contending that it conferred an unintended benefit on taxpayers, the remedy lay with Congress and not the courts. Practitioners loved the decision, but I could not convince Bernie, who felt it gave taxpayers a double benefit that the Code did not require.

It was wonderful to see Bernie — and to see him shine — in so many different contexts. I believe everyone who knew him felt the same way. We are all going to miss him very much.

*Michael A. Fitts**

In a sense, I have known Bernard Wolfman most of my life. Even though I met him for the first time only a decade ago when I became Dean of Penn Law, while I was growing up in Philadelphia in the 1960s and 1970s, Bernie was always larger than life.

I heard many stories about Bernie from my father, who was also a professor at Penn, though at that *other* professional institution — the medical school — where he was chief of surgery. My father, who’d met Bernie while both were in the Faculty Senate, viewed him as the model practitioner-academic, someone who moved effortlessly between practice and academia, as well as across schools within the University. I may not have understood all of these details as a child, but I did know from very early on that Bernie was special.

I was delighted, then, some thirty years later to have the opportunity to finally connect with Bernie personally when he called me one day about the management of a marvelous public service fund, the Zelda Wolfman Fellowship, which he’d established years earlier in memory of his late first wife. As our conversations about the fund became more frequent, it became clear that we both had ulterior motives. I wanted to finally get to know the man I knew only as a legend, while Bernie wanted to reconnect with the institution to which he had devoted so much of his early life.

In the end, Bernie and I developed a wonderful friendship, two deans separated by a generation, but united by their deep affection for an institution and a philosophy. Just as a grandparent takes pleasure

² *Gitlitz v. Comm’r*, 531 U.S. 206 (2001).

* Dean and Bernard G. Segal Professor of Law, University of Pennsylvania Law School.

in seeing his grandchildren grow, Bernie took great delight in seeing how the initiatives he had introduced years earlier had blossomed. Like all deans, Bernie took particular interest in the scholars he had recruited, such as Lou Pollak and Clyde Summers from Yale, who, he was delighted to know, continued to play such important roles at the Law School into the twenty-first century. For my part, I relished the opportunity to get to know someone who had moved so effortlessly across fields, making such a difference in each, all while serving as an academic leader in the 1970s — one of the most challenging times in our nation's history.

While Bernie was already close to retirement when we first met, his passion for people and institutions was still readily apparent. As my colleagues have often told me over the years, there were no lengths Bernie would not go in support of a person, institution, or cause about which he cared. Whether he was recounting in glowing terms the professional achievements of his wife Toni — herself another of our distinguished alumnae — or inquiring into the status of the yearly fellowship award, he always did so with uncommon enthusiasm. Bernie's zeal was part of what made him such an excellent attorney, fantastic educator, dedicated mentor, and engaging friend.

Of course, his professional identity was initially formed at Penn, where he earned his law degree, but he was deeply impacted by his legal practice at the Philadelphia firm of Wolf, Block. As fellow Penn Professor Howard Lesnick recently observed, “[H]e was first and most deeply a *lawyer*, with a breadth of vision about what that means which even in his generation was rare enough.”¹ It was while still working as an attorney that Bernie first returned to Penn Law in 1960, serving as an adjunct professor for three years before joining the faculty full time — at the time a unique transition in and of itself — in 1963 as the Kenneth W. Gemmill Professor of Tax Law and Tax Policy.

Bernie always brought to his teaching a well-developed understanding of what tax lawyers actually do and was committed to increasing the number of clinical programs at the law school as early as 1970, well ahead of his time. He knew that the law and law school needed to make a difference in the world.

At the same time, he was committed to the life of the mind and interdisciplinary scholarship at a period when that vision was more ideal than reality. Bernie was one of a number of Philadelphia tax lawyers who met regularly to debate tax policy, and, as Dean, he moved to establish the nation's first joint graduate degree program in law and public policy. Sponsored by the Law School and the Fels

¹ Email from Howard Lesnick, Jefferson B. Fordham Professor of Law, Univ. of Pa. Law Sch., to author (Jan. 20, 2012) (on file with the Harvard Law School Library).

Center of Government, this joint program not only set the stage for the development of similar programs nationwide, but also served as the foundation for Penn Law's cross-disciplinary focus, which has blossomed into a distinctive and distinguishing feature of the modern Penn Law.

The fact that these advances were made at a time of such great institutional stress makes them all the more remarkable. When Bernie took over the deanship, students were voicing increasingly intense demands for greater participation in governance and a more relevant curriculum. While Bernie may have been seen by some as being part of the old guard, he fully understood his critical role in seeing the Law School through this pressing social and political divide.

And Bernie took these difficult matters in stride, even seeming to relish the challenge the students' opposition provided. He even had sufficient perspective at the time to observe that "students help shake up our agenda; they make us rethink our priorities for action. . . . [T]hey get many of us mad at them some of the time. But they are going to be fine lawyers whose impact on the law and on justice holds unparalleled promise."²

In the end, Bernie adjusted the school's curriculum to reflect the students' best and most reasonable demands and allowed them to serve on all Law School committees and even to attend faculty meetings, both of which represented institutional changes of historic proportions. Only someone exceptionally well versed in the challenges of professional and personal transitions could have so successfully navigated such changes.

Bernie's commitment to students extended to the individual level as well. Professor Regina Austin was a law student when Bernie was Dean, at a time when there were few black students and not a single black professor at Penn. Despite first-year jitters, Professor Austin did exceptionally well.

Still, as a second-year student, Professor Austin recently told me, she knew nothing about law firm recruiting.³ Not only were there no lawyers in her family; there were no college graduates. But Bernie stepped in quickly to fill the void, sending Professor Austin down to the "Schnader firm," as he called it, for an interview during her second

² Bernard Wolfman, *Wolfman, Fordham Discuss Concerns*, U. PA. LAW ALUMNI J., Summer 1970, at 18, 19.

³ Email from Regina Austin, William A. Schnader Professor of Law and Dir., Penn Program on Documentaries & the Law, to author (Jan. 21, 2012) (on file with the Harvard Law School Library).

year.⁴ Bernie and the firm's chairman, Bernard Segal — an ardent civil rights supporter — had arranged for her to be interviewed.⁵

"I remember that I wore my favorite dress, a striped cotton mini," Professor Austin recalls. "Of course, I also had a big Afro. I am sure that I looked like a kid. I barely weighed 90 pounds. I do not know if every second-year prospect had a meeting with Mr. Segal in his office at the end of his interview[,] but I did. I got the summer job . . . [and] joined the firm as an associate after completing a clerkship."⁶

And Bernie's support did not end there. When Professor Austin went on the teaching market years later, he made sure she was considered by several top-tier law schools. Appropriately enough, Professor Austin is now the William A. Schnader Professor of Law at Penn.

"I hope that over the years I have repaid his faith in me," Professor Austin recounted to me in learning about his passing. "Dean Wolfman was one of the best guardian angels a young budding black working-class female academic could possibly have had."⁷

So too was Bernie a mentor to me through both his model of thoughtful stewardship and his wonderful knack for successfully rolling with the institutional punches. I will miss our talks and his cheerful insights, but most especially I will miss the great example of Bernie's boundless passion. My father was right. Bernie was, and is, special.

*Justice Ruth Bader Ginsburg**

Bernard Wolfman was my daughter's tax professor, my husband's working colleague — first in practice, later in the academy — and our treasured friend. As a practicing lawyer, Bernie was known for his skill in structuring transactions, his ability to see around corners, his good humor, and his wit. As a law professor, by all accounts, he was a grand master of the Socratic art, which he used to enlighten, not to embarrass or wound. I am not among the tax cognoscenti, and therefore am not qualified to speak of Bernie's lead role on matters of tax practice, scholarship, and policy. But I have had the good fortune of association with him in human rights endeavors, and, together with his wife Toni, on travel adventures in the United States and abroad.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

* Associate Justice, Supreme Court of the United States.

On Bernie's *sympathique* qualities, I recall an anxious day in the spring of 1978, during my semester at Stanford's Center for Advanced Study in the Behavioral Sciences. I was in San Francisco for a meeting of a Bar committee on which Bernie and I served. Midway through the meeting, a caller informed me that my then twelve-year-old son had been taken to the Stanford Clinic to repair a broken nose and other wounds occasioned by a bicycle accident. I left the meeting at once and Bernie rushed to my side. "Let me drive you to the Clinic," he volunteered. "You need company, and it will be safer that way." That act of kindness made the next hours more bearable for me.

Family mattered to Bernie. He was proud of Toni's accomplishments and supportive of her efforts to help women gain a fairer deal at work and at home. I recall a day in Court: Bernie and Toni were seated in the front row, Bernie's son, Brian Wolfman, then Director of Public Citizen's Litigation Group, was at the lectern. Brian's argument was, as usual for him, finely honed. Bernie and Toni listened attentively. In another setting, they would have cheered when Brian was done. The constraints of courtroom decorum precluded their applause, but one could sense their exaltation.

Bernie Wolfman was the very best of lawyers and law teachers, and an all-around good citizen. If genuine tax reform is achieved one fine day, it will come about because Bernie and a few others of his stature paved the way.

*Martha Minow**

Bernie Wolfman was a great man. A devoted teacher and loving family man, he also lived according to high ethical commitments and indeed integrated ethical values in all he did. His landmark book, *Ethical Problems in Federal Tax Practice*,¹ and the related course he created pioneered the vital approach to professional responsibility teaching that embeds ethics in the daily work and problem-solving of lawyers.

Bernie stood up for what he believed and inspired others to do so. As a volunteer attorney, his research led to the landmark Supreme Court decision directing public schools to stop conducting prayers.² As

* Dean and Jeremiah Smith, Jr., Professor, Harvard Law School.

¹ BERNARD WOLFMAN & JAMES P. HOLDEN, *ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE* (1981).

² *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

a leading expert in tax law, he devised an argument crucial to the Supreme Court when it addressed whether a private university should retain its tax-exempt status.³ Bob Jones University had racially discriminatory policies — initially excluding Blacks altogether and later forbidding interracial dating.⁴ Lower courts upheld the IRS decision to withhold tax-exempt status from Bob Jones University, but then, with a change in administration, the IRS changed its view and the government moved to vacate the lower court decisions. Bernie's argument, forged with his colleague Larry Tribe, defended the denial of the tax exemption and preserved the issue for consideration by the Supreme Court.⁵ Despite the government's effort to change the policy and to avoid judicial review, the Court affirmed the policy against racial discrimination and established the still critical policy that even religious claims cannot shield racial discrimination from prohibition of government support.

It is fitting to celebrate Bernie's accomplishments, his memorable teaching and scholarship, and more. Here, I want to celebrate his kindness. That is what he showed me when I arrived here 30 years ago, when the school had one tenured woman professor. I will never forget how Bernie welcomed me, treated me as someone who belonged here. His support and encouragement really made a difference. He even willingly sat through an interview with me when I wanted to learn about single-sex schools, and he regaled me with vivid memories of Central High. His bountiful love for and pride in his wonderful family I first saw when he told me about Brian, whom I was lucky enough to teach, and the kindness he showed me, other colleagues, and students reflected his great capacity to love.

"Light dawns in darkness for the upright, gracious and merciful and just," says Psalm 112.⁶ Even with his passing, all who knew Bernie will cherish how he lighted the way, with integrity, excellence, and love.

³ Brief of Laurence H. Tribe and Bernard Wolfman as Amici Curiae with Respect to Respondent's Motion to Vacate, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (Nos. 81-1, 81-3), 1982 U.S. S. Ct. Briefs LEXIS 1232 [hereinafter Tribe/Wolfman Brief]; see also Bernard Wolfman, *Tax Expenditures: From Idea to Ideology*, 99 HARV. L. REV. 491 (1985) (book review).

⁴ *Bob Jones*, 461 U.S. at 580-81.

⁵ Tribe/Wolfman Brief, *supra* note 3, at *8 n.3.

⁶ ROBERT ALTER, *THE BOOK OF PSALMS: A TRANSLATION WITH COMMENTARY* 401 (2007).

*Daniel N. Shaviro**

I first met Bernie Wolfman in 1989, at a Harvard Law School tax conference in Cape Cod. In those days, strange though it may seem now, intergenerational relations within the legal tax academic community could at times be tense, reflecting (I suppose) both ongoing transformations in the style and methodology of legal scholarship, and, perhaps, some of the personalities on both sides. While Bernie was firmly ensconced, both socially and intellectually, on the more senior scholars' side of this divide, and was one who, when he had strong views, did not hesitate to express them, I always found him exceptionally kind, gracious, welcoming, and open-minded.

In subsequent years, when I saw him at conferences and otherwise, we would frequently talk, and not just about the issues (and of course personalities) in our field. My favorite story of his related to World War II. He had been with one of the units that got encircled and nearly obliterated by German forces at the Battle of the Bulge. Luckily for him, as it turned out, he needed to be evacuated to a U.S. military hospital only a couple of days before the surprise attack hit. He, with his unit, had been trudging through the Ardennes in the brutal winter of 1944–1945, wearing inadequate shoes that the U.S. Army had commissioned for use in the North African desert campaigns against Rommel. He got severe frostbite, from which his feet apparently never fully recovered. But he realized in retrospect that what happened to his unit next might have proven even worse.¹

Bernie's extraordinary passions, not just for good tax policy but for personal and professional ethics, are strongly reflected in both of his most famous academic writings: *Dissent Without Opinion: The Behavior of Justice William O. Douglas in Federal Tax Cases*,² and *The Supreme Court in the Lyon's Den: A Failure of Judicial Process*.³ These remain recommended reading for new generations of tax academics, lawyers, and students, both for their analysis and their style. Each, however, has an important legal ethics backstory that evidently helped motivate a thorough demolishing of this otherwise gentle man's chosen targets.

Dissent Without Opinion addresses the bizarre behavior in tax cases of Justice William O. Douglas, who was still on the Supreme Court at the time that the study came out. Justice Douglas was in some circles a vaunted liberal lion; in others, a lightning rod for grow-

* Wayne Perry Professor of Taxation, NYU Law School.

¹ The fact that my father, during World War II, flew in a Pacific squadron that apparently lost all of its planes except for his, may have added to this story's resonance for me.

² BERNARD WOLFMAN ET AL., *DISSENT WITHOUT OPINION* (1975).

³ 66 CORNELL L. REV. 1075 (1981).

ing conservative anger about the 1960s Warren Court.⁴ While much of that controversy has passed, to this day law students who take Tax I may be bemused by the sheer number of Justice Douglas's stand-alone, antigovernment dissents without opinion, punctuated by a few cases in which he has jotted down a few paragraphs breezily asserting IRS bad faith⁵ or deliberately ignoring the factual record of the case along with prior case authority.⁶

Stranger still, Justice Douglas had started his Supreme Court career as a frequent supporter of IRS positions that required relatively expansive or flexible readings of unclear statutes. As Daniel B. Evans has noted, the "accepted explanation of this odd voting record is that [Justice Douglas] still was angry at having once been audited by the IRS."⁷ I have even informally heard a specific date — 1948 — as being when this ill-chosen audit occurred. The article, however, while not specifically mentioning this theory — which a mutual friend assured me Wolfman was familiar with — presents and carefully documents a more nuanced and gradual account of how a talented legal thinker gradually succumbed to self-infatuated intellectual hubris. We learn that Justice Douglas went through four sharply delineated periods: the "government years" (1939–1943), "a shift to the taxpayer" (1943–1959), the "extreme years" (1959–1964), and "tempered rebellion" (1964 through the book's 1973 publication date), leading to absurd and indefensible inconsistencies both within and across periods.

The overall picture that emerges is no more edifying than the standard view that Justice Douglas had been lashing out because he disliked being audited, but it is considerably subtler. We learn in close detail about how a life-tenured judge, convinced he had been striking great blows for personal freedom, gradually surrendered to self-indulgent emotionalism at the expense of bothering to engage in serious legal analysis, reflecting what became "an overwhelming orientation to result . . . [and an] 'indifference to the texture of legal analysis,

⁴ Gerald Ford, for example — at the time the House Republican Minority Leader — sought in 1970 to have Justice Douglas impeached for asserted improper behavior. See Gerald R. Ford, House Floor Speech: Impeach Justice Douglas, Box D29, Gerald R. Ford Congressional Papers, Gerald R. Ford Library, available at <http://www.ford.utexas.edu/library/speeches/700415a.htm>.

⁵ See, e.g., *Comm'r v. Idaho Power Co.*, 418 U.S. 1, 21 (1974) (Douglas, J., dissenting) (stopping just short of accusing the IRS of deliberate intellectual dishonesty: "That is not to impugn the integrity of the IRS. It is only an illustration of the capricious character of how law is construed to get from the taxpayer the greatest possible return that is permissible under the Code.")

⁶ See, for example, *Rudolph v. United States*, 370 U.S. 269, 278 (1962) (Douglas, J., dissenting), in which, as Wolfman, Silver, and Silver note, he simply ignores the factual record of the case, as well as prior precedent, in order to assert his own shorthand conclusions. See WOLFMAN ET AL., *supra* note 2, at 54–58.

⁷ Daniel B. Evans, *The Tax Protester FAQ*, EVANS-LEGAL, <http://evans-legal.com/dan/tpfaq.html#incomedef> (last updated Feb. 27, 2011).

which arises from an exclusively political conception of the judicial role.”⁸ Conservative critics of Justice Douglas could not have put it any more starkly, although Wolfman expressly admired Justice Douglas’s judicial “vision of a free America in a system of law,”⁹ and evidently wanted the Justice just to live up to “his own standard.”¹⁰ The cautionary tale is one that today’s conservative ideologues on the Court might do well to think about.

The Supreme Court in the Lyon’s Den: A Failure of Judicial Process likewise addresses Supreme Court jurisprudence — here, a decision, *Frank Lyon Co. v. United States*,¹¹ that, as Wolfman notes, made the Supreme Court a “laughingstock” among tax lawyers.¹² The case was a “fairly mundane financing transaction”¹³ for a building, in which the taxpayers employed a sale-leaseback structure so that the mortgage lender would nominally become the property’s owner, permitting it, in lieu of the true economic owner, to be the party that could claim depreciation deductions. Among the decision’s idiocies were its reliance on no fewer than “twenty-six factors peculiar to this transaction,”¹⁴ thus undercutting its precedential value and making one wonder why the Supreme Court had bothered to intervene, and — the point that made the Court a laughingstock — its insistence that a tax deal’s legitimacy could be strongly supported by the insertion of an otherwise irrelevant third party into a tax planning transaction.¹⁵

What makes the article more than just a critique of a single poorly reasoned Supreme Court decision is its legal ethics backstory. At the time when Wolfman wrote this article, one of his most eminent colleagues in the tax and academic world was Erwin Griswold, whose résumé included stints not just as Dean of Harvard Law School, but also as Solicitor General of the United States. We learn in *Lyon’s Den* that the taxpayer in the case had retained Griswold to file its Supreme Court certiorari brief, and that Griswold subsequently signed (and presumably wrote) the taxpayer’s briefs while also presenting its oral argument¹⁶ — all this to an audience of Supreme Court Justices who had come to know him well in his only recently concluded role as the government’s advocate. Griswold evidently took advantage of his position to lend credibility to repeated assertions — which remained

⁸ WOLFMAN ET AL., *supra* note 2, at 135 (quoting Yosel Rogat, *Mr. Justice Pangloss*, N.Y. REV. BOOKS, Oct. 22, 1964, at 5, 6).

⁹ *Id.* at 138.

¹⁰ *Id.* at 5.

¹¹ 435 U.S. 561 (1978).

¹² Wolfman, *supra* note 3, at 1099.

¹³ *Id.* at 1076.

¹⁴ *Id.* at 1099.

¹⁵ *Id.* at 1099–1100.

¹⁶ *Id.* at 1084 n.51.

uncontradicted by (perhaps overawed) government counsel — that were at best extremely misleading. In particular:

Taxpayer's counsel repeatedly asserted to the Court, without challenge by the government, that . . . [the parties to the sale-leaseback] were "subject to identical tax rates," that there was "no differential in tax rate," "no effort to take advantage of a tax differential," and "no special tax circumstance." On the basis of such assertions, the Court concluded that there was no net revenue at stake.¹⁷

This was untrue. The deduction "seller" in the transaction had the ability to reduce its taxable income to zero, if so it chose, wholly without regard to the depreciation deductions from this building, whereas the deduction "buyer" faced a true forty-eight percent marginal tax rate.¹⁸ Thus, the transaction clearly served tax planning objectives that Griswold told the Supreme Court were absent. He surely knew better, and it is plausible that his evident willingness to "make assertions that lack[ed] a basis in the record"¹⁹ reflected a shrewd judgment that his lofty reputation — most particularly, in the Solicitor General's office and in the minds of Supreme Court Justices — would aid him in getting away with it.

To one with Bernie Wolfman's moral compass, this was offense enough to require a public calling-out despite his personal connection to Griswold (who had written a laudatory foreword to *Dissent Without Opinion*). Lyon's *Den* is not written in such a way that the general reading public would see just how pointedly Griswold was being called out for ethically dubious behavior. However, when I first became a tax academic, a senior colleague assured me that, within the close-knit legal tax academic community of the 1970s, it was very well understood indeed, not least by Griswold himself. In today's entrepreneurial world, it would be a good thing if experts-for-hire still had Bernie Wolfman to worry about.

¹⁷ *Id.* at 1094–95 (footnotes omitted).

¹⁸ *See id.* at 1095–98.

¹⁹ *Id.* at 1101.