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Alan and I: Of Community, Critical Legal Studies and All That

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Prosper, raise strong families, remembering that all you will leave behind is your good works and your children.

Colin Powell

It is painful to speak of friends in the past tense. Indeed, I would have been perfectly happy to put off writing this piece for twenty or thirty years. Not forever mind you; I prefer to be the one who gets to put out the lights. But twenty or thirty years would have been quite satisfactory. Sadly such was not to be. And writing is not made easier by Alan who, now over two years ago, right after receiving the diagnosis of pancreatic cancer, said, “Schlegel, you will write the truth for my boys.”

Alan, you were so impossible. To make such a request when you of all people knew how problematic is my relationship to the notion of “truth” once it is stretched beyond the absence of lies. You who knew how little I could abide being the “authorized” anything, hesitant even to open the jar of clearasil for zits of the personality or institution that goes with that role and indiscrete to the core. And what do I have to offer your boys that they might find valuable out of our friendship, a shared curiosity of the mind? Surely they wish more to know what made you weep, what made you laugh, what made you mourn and what made you dance.

Alan, this perverseness somehow captures you better than any story I can tell. You knew all of the reasons why what you asked was difficult and went ahead anyway because what I might say you wanted said, however painful to the speaker or...
audience. Well, for once I will do as I am told. This is for you James and Jeremy. Hope some day you find important the questions that it tries to answer.

I met Alan at the first CLS meeting. Walking to Tom Hel- ler’s house at a ferocious pace that I later came to enjoy, but on that day was only exhausting in the heat of a mid-western sum- mer, I was struck with Alan's vibrant enthusiasm and his talk- ing and thinking at great speed and with great clarity. In the big room in Madison where we all met he seemed part of the in crowd, an appearance reinforced by his hanging out with Duncan Kennedy and Peter Gabel smoking cigars, yes, big, fra- grant cigars, under a bush in the Heller back yard. Years later I learned that Alan was as lonely and out of it at that meeting as most of the rest of us, knowing only those two people, and only Peter well.

The impression made by Alan’s presentation at that meet- ing and my discussion with him on that walk was strong enough that I inquired whether he might be interested in moving to Buffalo. He said he was happy at Minnesota and I left it at that. I later learned that his assertion of happiness wasn’t true either, that things with Iris were turning awful—in Alan’s words, “I was engaging in much badness, Schlegel”—and that it was only law school teaching that was going well.

I saw little of Alan at the Minneapolis CLS meeting the next year. Some pleasant words, at most. And so when Alan was ready to leave Minnesota, he called Fred with whom he had spent some time at the fabled, pointless CLS meeting at Santa Cruz with Hayden White’s history of consciousness group. I passed that one up; family life was then too thick. At that time Alan, unknowingly, was deep in what became a family life with Betty too.

When Alan first came to Buffalo, I spent less time with Alan than with Betty who needed support as she was finding that the stress of raising two adolescent boys in a small house, really a cottage, was not diminished when your lover soon turns deathly ill with ulcerative colitis. These years were part of what Betty, none too fondly, calls Alan’s “hippie phase.” His focus was Al’s evening seminar and that wonderfully productive, deeply in- tellectual floating crap game did not fit with my family life either.

Why tell you, his sons, this story that puts me in the center and not Alan? Simply this. Think twice before believing any- thing that I have to say. There was nothing foreordained in our friendship; indeed in many ways it was implausible. He was a doctrinalist; I was not. He hung out with the machers; I did not.
And there were divisions about politics and moralism too. Our friendship only really began when I felt my marriage was going under and chose to call him for comfort. He told me that I was mistaken; he knew what marriage break up was and I wasn’t even close. But the good soul that he was, he began to call regularly to look after my mental well-being and from those daily phone calls grew a friendship that, though it was anything but painless, I treasured.

When Alan and Betty began to write in dissent from Roe v. Wade many people were heard to say that Alan had finally flipped out. Marxism was OK, if a bit old fashioned; animals, weird, though not dangerous; but dissent from one of the pillars of liberal academic orthodoxy, that was proof of insanity, of Alan’s having crossed over to the dark side. That school of thought always amused me. While definitely an academic, Alan was anything but a liberal. He spent much of his academic life making fun of liberal legalism, of rights talk—and he spent the rest of his life placing himself in opposition, indeed in defining himself oppositionally, to whatever orthodoxy he could find or conjure up. So, while Alan’s dissent from Roe was anything but necessary, if you understood Alan you would have understood that good money could have been made by betting that had Alan paid attention to Roe he would have figured out a reason to dissent from it.

Why was it not necessary? Not for the usual theoretical reasons about the falseness of necessity, but because Alan’s was an omnivorous mind. That mind is what made his daily phone calls a pleasure. There was no telling what the topic would be. There were constants, of course; that national politics and academic politics were staples, would surprise no one. And food, especially Chinese food, and later, bread. Art and, nearer the end, a return to one of his earlier passions, music were always topics for discussion. And countless hours were spent as Alan worked out the details of his analysis with respect to whatever topic he was writing about at the time. But there were other topics that were in some ways more revealing.

One was science, especially animal behavior, physics, chaos theory and any odd bit that might puncture the pretense of the scientific establishment to neutral rationality. Here I supplied stories from Scientific American and Alan, newspaper articles and books—he loved Carl Degler’s book and anything written by Steven J. Gould. Learning, especially the mysteries of how humans— even law students—learn and why was somehow a separate discussion, fueled by my work with the LSAT folks and his skepticism about tests—“Tests test the ability to take tests,
Schlegel"—as well as his ultimate faith that a kind of cautious, not necessarily methodologically rigorous, empiricism could yield, if not truth, at least insight.

Another regular topic was family and raising children. Alan loved children, at least once they were out of diapers. And he understood them well. I can remember him saving Joanne's and my sanity at my son's fifth or sixth birthday party by inventing the game "Dead Bugs"—as in, "Now pretend that you are bugs and that I just sprayed and you are now dead. The best dead bug gets a prize." And it was he who recognized that for kids that age the uglier the monster the better. It was this love and understanding that was at the root of the wonderful article he and Betty did for Tikkun about Dr. Seuss. It was this love and understanding that enveloped Jenney and his boys and, in time, Betty's boys, John and Josh, too. It was this love and understanding that came over the phone daily. Here the regular grist was sickness and health, child care and school, talents and their lack and in the last few years computer games and science fiction and horror movies and TV. The games and movies, and also a spurt where the topic was all of Shakespeare's plays available on video, were a way that Alan, knowing that he was an intellectual and so that what he thought about for a living made poor family conversation, found to share life with his boys.

As I remember our conversations there was still another recurrent topic—sex. Alan was a lusty soul; he delighted in the sexual ways of the world. Talk was never prurient or even particularly ribald, but Alan had the joy of a medieval farmer—Chaucer was one of his favorite writers—at the absurd fecundity of nature. Mammalian sexual behavior, especially that of felines and chimps, was a recurrent topic, but I can also remember his continuing laughter over the comment of a radical feminist student who suggested that the world would be better if all male chicks were castrated and his observation that living with Betty carried with it the risk of humans multiplying like rabbits. And then there was his wonderfully funny, extended put down of Bruce Ackerman's book as an exercise in male potency imagery. Curiously though, Alan's interest in sex was not accompanied by a need for male bodily display. He was no peacock. Even before his colostomy I never saw Alan less than fully, generally baggily clothed or at least with a bathrobe tied ever so tight, unless one counts as unclothed his hairy, muscular calves sticking out of his shorts. 1 And after the colostomy his sensitivity to his body

1. Peter Gabel reports that this was not always the case. He remembers a time in
meant that he developed a nervous habit of checking whether his bag was in place, sometimes every five minutes.

Having the world brought to my door in this way, for months at a time on a daily basis, was a wonderful experience. It often raised my spirits; even more often it expanded the fund of useless information that I have squirreled away. Always, in its recurrence, it was comforting like a night light in ones life. There was, however, a down side to Alan's regular attentions; nothing associated with Alan had the unadulterated singular pleasure of Al's standard—the Breyers chocolate ripple ice cream cone. Alan had a tenacious preference for controlling the agenda of our little discussions and his intense competitiveness was never far from the surface. Often conversations would start with, "Well, what did you do today, Schlegel?" But, unless I offered one of my rambling, seemingly (and often actually) pointless narratives, the conversation shifted to what Alan wanted to talk about on which there was generally only one opinion to be had—Alan's. It was not that Alan would brook no dissent from his opinion. Precisely the contrary; he loved an argument and was both ferocious in it and ferociously good at it. But, unless I wanted to go to the mat for a while there was no point in dissent. It was just easier to listen and respond, if at all, at a later time when thoughts were more coherent and so field advantage more neutral.

Neutralizing field advantage with Alan was essential, though often impossible, in all sorts of pursuits. Several times we either rode bikes or walked together for many days in a row, an activity that Frank Munger, who at times shared or separately engaged in this activity with Alan, dubbed the Amherst Land Use Field Seminar because land use was always before our eyes and so a recurrent topic. These could be truly exhausting forays for Alan's pace was grueling. And yet, when I could observe Alan coming to our agreed meeting place before he noticed me, I would see that he walked or rode rather leisurely; it was only after I had been noticed that Alan began to pump it out.

That was the dynamic in our fabled book review collaboration, "Sex, Power and Silliness," the one that Richard Posner later labeled "sheer infantilism." I wrote first (as Betty always

Minnesota when to attempt to banish alienation from and encourage openness in a gathering in his home Alan took off all of his clothes and sat in the middle of the floor leading the discussion.

did) and produced an essentially complete, intemperate review. Alan wrestled for a long time (writing for him was always much harder than the final product seemed), gave up attempting to rewrite my work and so added the long section on Ackerman and sex. I can vividly remember his wild excitement on the phone when he laid out all of the relevant passages in the book. I then provided a dialogue to frame the whole, since the two pieces of our review were essentially unrelated. That assertion of finality didn't sit very well either, so Alan added to the beginning an epigrammatic passage from Beckett. I do not wish to dump on the resulting product. Indeed, as a matter of mature thought I, who on the whole enjoyed his "hippie phase," probably approve more of the resulting product than did Alan who in the last few years was more concerned with temperate statement than I ever will be. Making fun is at times the only sane response to a world that does not listen. But the dynamic of its production was pure Alan, competitive to the core.

Competitiveness was, I suppose, an important reason why we never tried to teach together. We talked about doing so from time to time, but neither ever pushed it. I think that fighting for the podium would have bothered us both. There was another reason, of course. Alan, who at his full bearded, long haired, pepper and salt, balding best looked like a cross between an old testament prophet, Karl Marx and one of the Smith Brothers, was essentially a moralist concerned with the rightness of the rules he taught. I am not. Doctrinal exegesis of law always leaves me cold; "That isn't the way law is done," says my mind. Moralism has little attraction either; understanding is enough. But for Alan doctrine was the center of legal education. The point of theory and other resources apart from the rules was the insight that these sources brought to understanding and critiquing, justifying, as I, stealing from Al, like to put it, the rules. And so, Alan, who was a good, though like most of us, undisciplined, social scientist and a careful historian, mindful of his sources, seldom wanted just to know about the past of law in its strange pastness or of the present of law in its wonderful oddness; almost always the point of his inquiry was to uncover something that he thought was important material for his doctrinal enterprise, for the job of piecing out arguments for the correct rules of law.

Alan was thus, like most of our CLS friends, a very traditional law teacher. The center of his consciousness was the common law of property. He often argued to me the desirability of recreating the two semester property course and never could heap enough praise on the work of one of my heroes, Charles E.
Clark, though not for his empirical work, but for a book on covenants that run with the land, or on the work of a great English property conveyancer, Sir Orlando Bridgeman. Alan could always be heard to say at a crucial point in each year's property course, "By the time I am done they really know their future interests!" And common-law, case method decision-making was so deep in his core that over the last few years he had been lamenting the disappearance of that method in the work of the Supreme Court and arguing for its reintroduction by trumpeting the work of Sandra Day O'Connor, hardly a liberal heroine, whom he believed, with more than a little warrant, practiced it.

Alan never fought clinical work, but it was also clear that he considered it secondary to the examination of norms that he did in the class room. This relatively benign pose is to be contrasted with his constant, wonderfully tenacious opposition to my attempts to undermine the common law categories—contract, tort, property, crime—that anchor the first year and replace them with non-doctrinal categories either rooted in recurrent problems or in lawyer's activities. His argument was always a variation on the proposition that students needed to know the old ways of thinking before they could criticize them and so learn better ways of thinking, but the sub-text was always, "Schlegel, you simply don't understand how important doctrine is." And it was this sense of the centrality of the law school doctrinal categories that led Alan to venture into teaching Antitrust law when it atrophied because the faculty could never find an economist it could agree on hiring, as well as to offer a course in International Trade law. Coverage was important.

The center of all of Alan's moralism/criticism, both in class and in print, was his objection to exclusion and so his championing of the causes of the excluded. This is what holds together his early article on zoning, his anti-discrimination piece and his discussion of the abortion question. It informed much of his participation in faculty politics and ultimately brought about his estrangement from critical legal studies. Alan was, or at least thought of himself as, a one man counter-hegemonic enclave, however much he later ridiculed that concept. Not all would agree where the relevant hegemony might lie and Alan could flip amazingly quickly in his estimate on the matter, most recently when Bill Clinton turned from hero to goat in less than a month after his first policy pronouncement was on gays in the military and not on economic security for working Americans. Still, if one could accept his evaluation of where the social power lie, one could reasonably easily come to understand where his thought would go.
Once I understood this thread in Alan’s work I tried to probe gently as to its origin. While it would be neat if I could demonstrate that the perpetual outsider had canonized the outsider’s perspective, I do not think that such is the case. Alan seldom talked lovingly of the community he grew up in, but there is no reason to believe that he was any more of an outsider in that community than often is the case with the average bright, middle-class kid turned intellectual. And while he was surely never a social BMOC at either Brown or NYU, he clearly was potentially enough of an insider in the legal community to have ended up as Editor-in-Chief of his law review, an Edward Weinfield clerk and a summer associate at Cravath. And he was valued enough by that firm as a prospective employee that it was willing to pull strings to get Alan a commission as a Captain in the Air Force with a nice assignment in the Pentagon doing contracts work at a time when the alternative was a realistic possibility of being cannon fodder in South-East Asia. But Alan did not revel in this world. His conversation never mentioned his clerkship; seldom, his time at the Pentagon and I did not know until after his death what his rank there was. While he talked reasonably positively about pieces of his legal education, he never spoke of his time on the NYU Law Review and his only tie to Cravath was an heavy weight envelope of the kind fancy law firms use that he always wanted me to introduce my corporations class with—an example of the opulence that it was all about.

Alan’s categories of outsiders shifted over time in response to his reading of the contemporary political scene. This was most notable in race relations. When he came to Buffalo, Derrick Bell was moved to call him an “inverse oreo,” white on the outside, but black on the inside, this on the strength of the antidiscrimination piece. That piece effectively contrasted the “victim” and the “perpetrator” perspectives on civil rights, the one emphasizing the hurt that comes form a thousand, nameless cuts and the other emphasizing causation and individual responsibility for individual acts. I doubt that Derrick would say the same thing today. Over time as affirmative action became a leftist orthodoxy Alan’s views changed. Part of that change came from watching affirmative action policy in our own school, as individuals that he perceived to be weak admittees not only failed to excel, but also slid along the bottom of the class, all but wearing failure on their faces, then often failed the bar exam and, for Alan at least, had their lives destroyed, all in the name of liberal benevolence. Liberal benevolence was always a dubious proposition for Alan. So, while he worked to get the Law School
to support the minority students we admitted with a strong, hands on legal methods program and with follow up support for bar exam preparation, he also worked to reduce substantially the number of students admitted so as both to strengthen the group by eliminating the weakest and to provide the strongest possible support by relying on the few faculty Alan felt to be most committed to mounting a good program as he saw it, all of which was, of course, not necessarily how others saw it.

In time Alan came to see the white, hourly and salaried working class of large families, evangelical religious affiliation, traditional values and little economic opportunity as being ignored or worse denigrated by the liberal, especially the liberal academic, establishment. And so he began to champion their cause, not as articulated by the right wing politicians who sought to profit from their discontent, but in terms of the values, particularly the religious values, that were important to them. In reasonably short order he concluded that affirmative action had to go. Law needed the victim's perspective; it did not need to institutionalize, much less expand, victimization. Even worse, for Alan affirmative action distinguished between equally needy, equally, though differently, marginalized individuals in a way that seemed designed to disparage the values of home, work and family of the whites, particularly ethnic whites.

Whether Alan was correct in any sense in his analysis is, I think, largely an unimportant question, here at least. What is important to see is how his shift on affirmative action fits with other shifts in his perception of dominance, and thus in his opposition to it, in American life. There is no doubt that the hardest thing that Alan ever wrote was his Harvard Civil Rights-Civil Liberties Review piece answering his critics among the Critical Race Theorists. The piece came after nearly ten years of almost complete silence as he struggled in his head to write the promised follow up to the anti-discrimination article. It was a particularly bad time for Alan. He and I had had an enormous fight in which he screamed me out of his house over what he considered my unprincipled behavior. And the intellectual substance of the topic was anything but easy. Counseling and tranquilizers (and much love from Betty) were all that got him through. Alan’s point, said more pithily to me than ever in print—rights are OK but recognize that they are a second choice to the support that membership in the community provides—was anything but welcome to that group for whom rights were a mark of acceptance in civil society and community only a measure of both that from which they had been excluded and that
narrower set of attachments—the black community—that had made the larger exclusion modestly endurable. There was an unbridgeable gulf here that I think neither side understood at the time and it was not just about community, but also about the primacy of the personal. For Alan rights were hollow because the indeterminacy of their verbal formulation allowed community understandings of meaning to shape both application and enforcement. That was the point of his anti-discrimination piece; racial discrimination could be legitimated in the act of enforcing anti-discrimination law. His was essentially a sociological observation about law in any liberal society. The response from the critical rights theorists was, “But we feel more like citizens when we have rights that are enforceable and besides your community hasn’t been very hospitable while ours has been better.” For Alan that observation was personally painful—he had worked to make his community more hospitable—and irrelevant. Feeling good was always a positive thing, but it was essentially beside the point. Becoming a part of a community, sharing and transforming its norms in the process of gaining membership, was the only way to secure the protection of law. Caring about how one felt was only setting oneself up for fall after fall.

There is a certain wonderful irony in this position of Alan’s. It was only through being a part of a community, sharing and contesting its values, that one could secure the benefits of law. But, as a member of the community one didn’t really need the benefits of law, for the logical indeterminacy of the rules would work, not against one as it had before membership was secured, but in one’s favor. We never talked much about this particular perversity of the law. Indeed, as I think about it now, Alan never talked much about community with me at all. He clearly enjoyed community when he found it. The early years of CLS are a great example. He reveled in the lives and times and discussions and the simple energy of a reasonably diverse group of new friends. And I like to think that he had the same response in his early years at Buffalo... though those years were entirely too filled with the ulcerative colitis that led to his near death from a surgery postponed too long.

But, our community didn’t last long, I am afraid. Alan never understood, and to the extent he understood clearly rejected, the tyranny that comes with community, the cost in terms of conformity with community norms, swallowing individual objections because, well, “It just wasn’t worth it,” the limits to appropriate behavior that come with community membership. Nor could he ever accept the notion that communities are cre-
ated by drawing lines, by excluding others from membership because of their values, their desires, their activities. Alan’s model was, I suppose, CLS in the early years, not that CLS did anything other than move to exclude the left-wing empiricists from the group at the outset. So, he most often fought for inclusion, most notably of blacks and religious whites, but also, when it came to hiring decisions, of conservative economists.

Alan’s support for inclusion did not mean that he was always, even often, accepting toward the members of the community he found himself in. He seemed to have had a rule that outsiders could do no wrong and that insiders were to be held to his and not to the community’s standard of behavior. Thus, at one time or another virtually all of us felt the sting of Alan’s disapproval. My tongue-lashing, provided because I allowed myself to become the focus for our faculty to protest, correctly I thought then and still believe now, the action of the Provost in imposing a dean on the Law School over the opposition, largely united, of the faculty, was followed with nearly two lonely years during which Alan refused to talk with me. I recently was told that Peter, Alan’s longest and dearest friend, received the same painful treatment at some period of their friendship, though for what transgression I do not know. Alan’s disapproval of Al after his arrest was, I suspect, less keenly felt, but no less real; they had grown apart somewhat over issues that I really never did understand, but that Alan attributed to his marriage to Betty. And then there was David Filvaroff who could do no right after getting himself entangled in the question of the use of our placement facilities by the military and who over and over expressed bewilderment at Alan’s continuous, unabated anger.

Now none of us was anything approaching blameless in these disputes. At the same time, all demonstrate what was for Alan a difficult problem—the relationship between community and moral authority. Each one of us had, in Alan’s opinion, acted in a way that had breached what he saw as the proper bounds of behavior in some community. Yet the grounds for Alan’s judgments often left those on the short end wondering what, other than a rather stern idiosyncrasy, was the basis for his judgment. It was, I believe, this difficult problem that also played itself out in Alan’s disputes with two larger communities of scholars.

When the views of the critical race theorists and the feminists converged in an approach to modern life that emphasized the climate of social interaction, stressing positive images—“people of color,” not “minorities”—and the connection between what we say and how others feel about themselves as links in a
chain of self-esteem that makes possible social advancement and then joined with the academic liberals to enforce these norms under an understanding that saw deviations from such polite behavior as "harassment," Alan began to get really angry. The key event was long talks with his daughter, Jenny, about political correctness at Wesleyan in the course of helping her with a paper she was writing. Alan had been politically incorrect all of his life and the notion that there was some orthodoxy of the left, the party that he had supported for all of those years, was simply something that he could not stomach. His fury knew no bounds. At the same time his disenchanted with Critical Legal Studies was coming to a head. For several years he and Betty had been co-secretaries of the organization, a job they took over when Mark Tushnet was no longer willing to bear that burden. In that role Alan clearly obtained a certain amount of pleasure presiding over his flock of dues backsliders and with Betty’s help produced several newsletters of both intellectual and artistic note. But at the same time he became conscious that he and Betty were presiding over the death of the organization. And so they passed the job to Peter and Gary Peller.

Most often Alan explained his action and the associated disaffection with CLS by saying that, “CLS is dead.” He never embraced my sense that the movement died because no one in the group ever had a second, big idea and instead let itself get absorbed in the politically similar, but intellectually quite different, concerns of its black students and its female spouses and students, but he never disagreed either. Instead, he was more likely to observe conclusorily, “That time has passed, Schlegel.” Or, more disparagingly, “It’s all so much bull shit.” But underneath these more direct expressions was to be found a recurrent sense that the relevant issues had changed, but that the group’s concerns had not. Dozens of times in recent years I heard him say of an article by a CLS member, “It’s the same, tired old stuff.” The plight of the unionized factory worker, the college graduate feminist or the middle class minority was simply not the center of Alan’s concern any more and therefore, he felt it should not be the center of anyone’s concerns. Indeed, here Alan’s dislike of the pretentious talk of the academic intellectuals merged with his substantive concerns. That there were plenty of people, a whole liberal academic intelligentsia, concerned with workers, women and minorities, debating the same old questions—capital v. labor, sameness v. difference, integration v. separateness—criticizing the self-interest of others while offering the same, self-centered solutions and, when challenged, acting like a threatened species even though firmly in control of
academic power and prestige was the problem as he saw it. This hubris of the newly powerful brought forth not sadness, but rage.

Whether Alan's shift in concern was from a deep and abiding need to be in the opposition or whether he was a real visionary in shifting concern to the white lower and lower middle class when that class was most ignored by the liberal intelligencia is an interesting question the answer to which probably tells more about the answerer than about Alan. He was deeply troubled, no that word is too weak, offended by the actions of his party, the party of the left, when it reached power, its failure to see new problems, its attachment to old interest groups, its disparagement of the values of effectively powerless American citizens and its intolerance of views that contradicted its own. And so, while he never gave up on the indeterminacy of doctrine or on its essentially political valence, never doubted the subordinate position of some women and some minorities in American society, Alan parted company with CLS, feminist and critical race theorists and went his own way. All had become part of the problem and not part of the solution, as we used to say.

Part of that problem, maybe the biggest part, lay in moral authority. As far as Alan could see, few of the claims asserted by minorities, women, workers and homosexuals amounted to anything more than a self-centered assertion of, "I want mine too." For Alan, who was deeply engaged in the justification of doctrine, that simply wasn't a sufficient moral claim against the community. It was whining. Whining wouldn't do. But the difficulty for Alan was that, while he was vitally interested in grounding the moral authority of the community and thus in the foundation of claims against the community, he had real problems with community as an empirical entity. He clearly did not approve of the exclusions that are part of forming a community. I suppose that he understood about the multiplicity of communities that at least the critical race theorists and empiricists, such as David Engel, emphasize; we never talked about the subject. But as a constitutional law scholar confronting not claims to be let alone, but claims for state interference with (and thus state reversal of policies that aided) extant legal norms, he needed to, or at least was prone to, see community as a unitary entity. If one is uncomfortable dealing with real, empirical communities, the question of what is the moral ground for altering extant norms is even harder, for it is in some sense an abstract, formal question. As there would be a single rule for an entire political entity, the relevant community is the people of that en-
tity, taken as a whole and not as some pluralist sum of the parts. At least that is how Alan seemed to approach it.

But if Alan had problems with community as an empirical entity, he had real problems with moral authority as an empirical fact. If ever there were a boy who was born with the old bumper sticker "RESIST AUTHORITY" clutched in his little pink hands it was Alan. Though he always talked as if deans should exercise their authority when he thought that they were being wishy-washy, Alan could wholeheartedly support only the weakest, most non-threatening kinds of actual authority, and then only when he perceived that authority as undermining an earlier stronger authority. "Don't tell me what to do," was a common taunt when I tried to organize faculty to do anything while playing at Associate Dean. And deriding the possessors of political authority from Nixon to Clinton was a non-contact, indoor sport for the man. Thus, again, as befits an inhabitant of the common-law world, when it came to moral authority Alan similarly needed to, or at least was prone to, see authority as a unitary, abstract or formal principle of the kind that could justify legal rules.

For Alan the community could not possibly be the source of its own moral authority; after all, it was the community that had excluded blacks from participation in it and on the flimsiest of moral grounds. And law was not the source of moral authority either. While a doctrinalist, Alan was no positivist; it was law's rules that needed justification, not that provided it. For a while, I think, Marxism provided the moral justification for a community's norms that Alan felt was needed and lacking. But by the time I got to know him well Marxism was being discarded, its disappearance covered by a choice to publish almost nothing. Marxism's positivist prescriptions, its faith in the transformative potential of the working class, were for Alan, somewhat ironically, too "undialectical." More common alternatives were even less acceptable. The faith of the liberal legal intelligencia in the moral authority of "civic republicanism" always brought forth derisive laughter—and the shade of John C. Calhoun—from Alan. And the related left-liberal version of this—the self-evident virtue of the aspirations of what Alan once called "the left's army of the dispossessed"—was anything but self-evident to him, especially since Alan felt that the aspirations of these individuals were hardly unitary and that the aspirations asserted on their behalf by their self-appointed representatives elided the conservative religious foundation of much of minority culture.
For a while, I think, Alan flirted with grounding the moral authority of the community in "species being," Marx's debt to Aristotle. This was during the time when his transition from Marxism to the religious values of the community crossed with the terrible reality of Bruno. That dog, about as stupid as any mammal could be, too large and gracelessly rambunctious for a home or a suburban yard and so cowardly that he peed wherever he was standing when looked at cross-eyed, was a monument to the degenerative effects of inbreeding and should have been disposed of in some humane way, most plausibly by placing him at some large country estate, as he was placed in the end. But for years Alan could not bear to do so; Bruno had provided comfort as had the goats and chickens when Alan was recovering from his first serious bout with colitis. And so he and Betty endured.

Was there something natural to a species that could ground moral behavior? What could we learn about this question from examining our behavior toward other species in their being? These questions were implicitly explored in a series of seminars called Animals (and the Law). What was learned about them was never made clear to me or, I suppose to the deans who had to defend the course to skeptical alumni. But a grand time was had by all and that may be the real point of seminars anyway.

Under the cover of concern with the political correctness debate that brought forth some wonderful constitutional law exams, the best of which was about Goya's famous painting, The Naked Maja, animals was replaced by abortion as the topic of choice and with it the search for the moral authority of community norms in the religious understanding of that community. Here it should be made clear that Alan's concern was not with exploring the mysteries of faith, much less of grace. He believed in saving souls—he once shouted at me tearfully, "I'm fighting for your soul, Schlegel!"—but the process held no fascination for him. Rather, Alan's concern was with the moral imperatives seen to be entailed by faith and in the reverse, the community of understanding that follows from a shared faith. And he applauded examples of that entailment, for example when the Catholic bishops linked opposition to abortion with opposition to the death penalty and support for social welfare programs, and he derided examples of what he saw as the failure to see entailment, as in the mainstream Protestant churches' response to changing sexual mores in general and to abortion in particular.

In the "Politics of Virtue" he and Betty seem to have come to the conclusion that religious thought—at a rather high level of abstraction—could provide the needed moral basis for, and so
a limit on, the community's exercise of authority. Alan acted
that conclusion out in the little community that was Chautau-
qua and the chautauqua, a combination of serious religious con-
cern and good fellowship. It replaced for him the community
that he found lacking at the Law School and was a summer re-
placement for the community he sought with his law students,
or at least some of them. And he enjoyed the community of
scholars that was the law and religion conference at Hamline. It
replaced the community that he had lost with the demise of
CLS.

This is not the place nor am I the person to evaluate the
plausibility of Alan's conclusions, only to understand them. If, as
I once suggested, CLS was valuable simply as a "lonely hearts
club for left wing law professors," then there is nothing wrong
with other lonely hearts clubs; they may be the only healthy ag-
glomeration of humans the modern world affords us. Maybe the
exercise of the authority of the community that is law needs
constant justification, though it is at least possible that the free-
dom of the citizen is more secure the more insecure and chal-
lengeable is that authority. Maybe the normative justification of
the rules of law is the most important part of a legal education
and understanding of the practices of lawyers the least. Maybe.
Maybe. Maybe. Who gives a shit! Alan's musings, the stuff he
would bring to our recurrent phone conversations, made the day
more interesting and kept the brain in working order during the
tedium of the semester. While in the medium run the topics had
a certain repetitive sameness, in the short run and the long run
it was a great, wild ride. Alan's friendship was not an unmixed
blessing—as if mine or that of any one of us is. Indeed, we had
an explosive confrontation over the homosexual rights agenda
less than six months before he died. But Alan was a great, good
friend and as in the case of other great, good friends his loss di-
minishes ourselves. He was a great, good friend whose being
and company I loved. He was a great, good friend and I do and
will continue to miss that great, wild ride intensely.