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FOREWORD

THE IMPORTANCE OF HISTORICAL SENSIBILITY

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For this issue of the *Rutgers Law Review*, the editorial board has selected a group of lively and compelling works that are touched in diverse ways by the spirit of history. It is especially fitting that they should have done so as students at this law school, particularly at this time.

Our institution has been powerfully guided by its understanding of the past. More than perhaps any other center for legal education in the country, our self-image has been rooted in a particular historical period—the late 1960s and 1970s. As Vice Dean Ronald K. Chen writes in his captivating essay, *A Brief History of Rutgers Law Review*, during that time of social and political upheaval, “the Law School sought both to reform itself to embrace the urban community that surrounded it and broadened its mission to champion the use of the law as an instrument for positive social change.” The era remains the touchstone of the school’s identity—its symbolic founding moment.

Yet of this powerful historical consciousness as it exists today, an observer might justly say that the owl of Minerva spreads its wings especially at dusk. The generation of the 1960s and 1970s—in the university, in law, in social and political activism—is rapidly fading into history. With it will fade not only its collective wisdom but also

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its vested interests and the historically regressive social and political arguments to which vested interests always give rise.

A new generation is coming into its own, and this is true at Rutgers School of Law—Newark as much as it is throughout the nation. Perhaps paradoxically, the success of this process of generational change will depend upon an awareness of history. The rising generation of scholars, lawyers, and activists will need a sense of the past as vital and rich as the one that helped make Rutgers School of Law—Newark such a distinctive and exciting institution over the last half century.

Why is historical awareness so vital for successful historical transformation? Most important, knowing the past is necessary to control the present—it is essential to all forms of self-mastery—because it highlights the contingency of our current practices. In the realm of law in particular, many of the institutions, doctrines, and commitments that now seem natural and worthy to us are in fact the result not of forethought or careful planning, rather of historical accident. Many others are the product of choices made long ago but whose justifications have long since vanished. In the absence of a historical perspective, it becomes difficult to see beyond our current horizons. Present legal forms become fetishes.

The most important current example of this phenomenon is the corporation (in historical terms one of the most liberating inventions of the human imagination). As Professor Burt Neuborne writes in *Of 'Singles' Without Baseball: Corporations as Frozen Relational Moments*—a meditation on the dangers of historical amnesia—“[w]hen judges forget that they are dealing with a snapshot of underlying human relationships, a legal fiction like corporate personality can assume a life of its own, overthrowing its useful role as a technique for advancing a corporation’s underlying human relationships and morphing into a device to distort them.” One could, of course, say something similar about most of our central legal institutions, from the electoral college to the jury trial.

By the same token, history is not only important as a critical tool. It also is essential to maintaining the vitality of progressive institutions. As Mr. John Hunter et. al. demonstrate in *New Jersey’s Drug Courts: A Fundamental Shift from the War on Drugs to a Public Health Approach for Drug Addictions and Drug-Related Crime*, legal programs that work effectively require continuous imaginative reengagement with the past if they are to thrive. Historical awareness keeps the justification for our current practices continually in view.

Because historical awareness is necessary for a people to be their own masters, shattering simple and ideologically tendentious illusions about the past is essential for a healthy democratic society. In *A Founding Father on Trial: Jefferson’s Rights Talk and the*

Problem of Slavery During the Revolutionary Period, Professor William G. Merkel engages in this clarifying task by reassessing Thomas Jefferson's early legal practice and considering its significance for the evolution of his public stance on slavery. Just as legal historians can demystify our present institutional practices, they can also demystify our present-day political symbols, thereby establishing new boundaries for the use of the past itself.

I take special pleasure in noting Professor Samantha Barbas's article, *How the Movies Became Speech*, which follows the shifting view of the United States Supreme Court on the status of cinema within First Amendment law—an especially illuminating story in light of today's rapidly changing technological environment. Professor Barbas's academic background in a doctoral program in history highlights how imperative it is that American legal education be rooted in the sensibility and the life of our national universities.

The past liberates us from the present by making it possible to imagine a different future. By studying particularity, we rise above our own—we transcend ourselves. This is why a legal education, especially one grounded in historical awareness, provides a capstone to a liberal education and can fulfill its core purposes. It is also why this issue of the *Rutgers Law Review*, in its turn toward history, is so welcome, and so representative of our transformative institutional moment.