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ESSAY

A WONDERFUL PROFESSIONAL RELATIONSHIP SURPASSED ONLY BY A PERSONAL ONE

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INTRODUCTION

The late Frederick Schauer and I were longtime academic and personal buddies. We wrote academic articles together, managed an academic journal together, and exchanged academic ideas frequently. But we also played golf together whenever we could, and we and our wives travelled together several times, on several continents. Most of this Essay is devoted to describing the articles we coauthored—not just because they were ours, but because the intellectual and moral issues they raised were both of supreme importance and remain unresolved (and in my mind, and I suspect Fred's, are incapable of being resolved). But I end this Essay by focusing on the non-intellectual side of my relationship with Fred.

I. OUR JOINTLY AUTHORED ARTICLES

Fred and I did not write articles together until several years after we had become friends and professional cohorts. But in 1997, two years after we had helped found and then lead the journal Legal Theory, we published in the *Harvard Law Review* our first coauthored article, *On Extrajudicial*

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Constitutional Interpretation.[1] Because it was in perhaps the most read and respected law review, it garnered a lot of response by well-regarded legal academics, much of it negative.[2]

In that piece, we endorsed *Cooper v. Aaron*'s[3] assertion that the Supreme Court's interpretation of the Constitution binds all officials.[4] Because a consensus had developed that *Cooper*'s assertion was erroneous, and that public officials need not take the Supreme Court's constitutional verdicts as authoritative,[5] we believed we should show why that consensus view was itself erroneous. Our disagreement with the scholars' disagreement with *Cooper* and our defense of judicial supremacy in constitutional interpretation were based on the need for settlement of contests over constitutional interpretation.[6] And, we believed, the Supreme Court was best equipped to provide that settlement.[7] Because we are obligated to adhere to constitutional requirements even when we believe those requirements are normative mistakes, the same value of settlement requires adherence to what we believe are mistaken interpretations of the Constitution. Just as the goals of settlement of disagreements and coordinating with others leads to the obligation to obey the law, so too does the obligation to obey what we believe is a mistaken law produce the obligation to obey what we believe is a mistaken interpretation of the law by the Supreme Court, including a mistaken interpretation of the Constitution.

The view we were arguing against was widely accepted, not only at the time we wrote, but also by, among countless others, notables such as Thomas Jefferson, Abraham Lincoln, and Franklin Roosevelt.[8] And among then (and now) contemporary legal scholars, it was endorsed by Michael Paulsen, Mark Tushnet, Laurence Tribe, and Sanford Levinson.[9] The view we supported was to defer to judicial authority in legal, including constitutional, interpretation. We believed that such deference

[1] Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev 1359 (1997).

[2] Larry Alexander & Frederick Schauer, Defending Judicial Supremacy: A Reply, 17 Const. Comment. 455, 458 & n.12 (2000) (compiling published responses).

[3] 358 U.S. 1, 18 (1958).

[4] Alexander & Schauer, supra note 1, at 1359.

[5] Id.

[6] Id. at 1377.

[7] Id. at 1359.

[8] Id. at 1360 & nn.2–5.

[9] Id. at 1361–62 nn.8–12.

could be overcome by a sufficiently strong reason not to defer, but we rejected the position of general non-deference.[10] Our position and the position we were rejecting were meta-rules that themselves rested on acceptance today. As we put it, "[t]he present, and not the past, decides whether the past is relevant."[11]

The settlement of some—perhaps most—normative questions is preferable to non-settlement, even if the settlement is not the ideal one. As we conceded, if the settlement were too inferior, then it might not be preferable to non-settlement.[12] But even mistaken laws provide settlement, and settlement has value. As we put it, the best reason to obey laws, including constitutional interpretations by courts, that we think are wrong is

> because of law's ability to coordinate a multiplicity of substantive views, mutually exclusive interests, and self-defeating individual strategies into the thing we call a state, and into beneficial collective activity. Coordination and the settlement of disagreements—and the individually and socially beneficial goods these goals produce—provide content-independent reasons for the existence of the state, of law, and of the obligation of obedience to the law.[13]

But what if there is no moral obligation to obey the law qua law? There may be good reasons for lawmakers and law interpreters to teach law obedience and to punish and discourage disobedience to law. As we explained,

> As paradoxical as it may seem, there are good arguments for requiring people, and particularly legal officials, on pain of penalty, to follow the law even when they believe they have good reason to disobey and even if they in fact do have good reason to disobey. Perhaps there are even good arguments for teaching that law has practical authority—that it provides content-independent reasons for obedience—even when or if it does not. . . . [T]he point is that, even though the addressees of the law may have good moral reasons for not treating law qua law as providing content-independent reasons for action, those who make the

[10] Id. at 1361–62.
[11] Id. at 1370.
[12] Id. at 1377 & n.79.
[13] Id. at 1374.

> law may have equally good moral reasons for trying to minimize the consequences of the moral errors of law's addressees.[14]

For even if the law is morally imperfect, and some cases of legal disobedience will be morally superior to legal obedience, most instances of actual legal disobedience will be morally inferior to legal obedience.

> If law's designers have reason to believe that law's addressees will, in exercising their moral independence, make such independent (or autonomous) but morally erroneous decisions, then law's designers have good moral reasons to try to make it painful for those addressees to exercise their expected-to-be-mistaken moral independence.[15]

(Note that this will create a "gap" between legal culpability and moral culpability, a gap that creates a dilemma for legal enforcers who are also devoted to morality, as, of course, they should be.[16])

Note that what is said applies to law enforcing officials as well as to ordinary citizens. Officials may believe that applying some laws will be at odds with morality, but even so, there may be good moral reasons to compel the officials to apply those laws. For although the officials' beliefs may be right in some cases, those beliefs may be wrong in too many. If that is true, punishing officials who in good faith believed their refusal to apply the law was the morally correct thing to do—and in some cases was the morally correct thing to do—will nonetheless produce a morally superior state of affairs than would be achieved if we refused to punish them.

Perhaps the most important function of law is to settle authoritatively what is to be done. And because the Constitution governs all other law, it is especially important that it settle all the matters *it* covers. That is why we believed and so stated that *Cooper v. Aaron* was correct. As we put it near the end of our article,

> [O]ne of the primary reasons for entrenching a constitution as law is to achieve a degree of settlement and stability, and another is to remove a series of transcendent questions from short-term majoritarian control. Both of these justifications, however, also support judicial supremacy.[17]

[14] Id. at 1375.
[15] Id.
[16] See Larry Alexander, The Gap, 14 Harv. J.L. & Pub. Pol'y 695, 695 (1991).
[17] Alexander & Schauer, supra note 1, at 1380.

Our bottom line in this article was that a constitutional law that is more specific than "act morally" will diverge in some of its application from what morality would prescribe and yet, if followed, would produce consequences morally superior to "act morally." But those who *do* act morally rather than legally will have to be punished, as will those who incorrectly but in good faith believe they are acting morally. And given that, the punishment of such lawbreakers will be legally proper though morally undeserved, as judges will also understand. That is the moral dilemma that all law, including constitutional law, creates.

Once we accept that we should obey laws that are morally imperfect, it is, we asserted, a short step to accept the obligation to obey imperfect interpretations of those imperfect laws. As we put it, "[w]e argue, therefore, for an obligation to follow judicial interpretations, not because they are, by definition, correct, but despite the fact that they may be incorrect."[18]

Finally, were we arguing that Lincoln was wrong in his rejection of the obligation to adhere to the Supreme Court's reasoning in *Dred Scott v. Sandford*?[19] As I indicated above, we were not arguing in favor of an absolute duty to follow all Supreme Court constitutional interpretations. What we did say was that although rejecting Supreme Court constitutional interpretations is a wrong, acting in accord with those interpretations might in some cases be a greater wrong.[20] Lincoln, therefore, may have had a stronger reason to refuse to follow *Dred Scott* than the reason he had to follow it.

We opined that there was always a reason to follow precedents, even if in some cases that reason was outweighed.[21] We never maintained that every precedential decision of the Supreme Court should be followed by the Court itself, nor, in some cases, by lower courts. But we did maintain that the Court's decisions, even if regarded as erroneous, carried substantial weight.[22]

Because of the high profile of *On Extrajudicial Constitutional Interpretation*, given where it was published and the blistering attacks on

[18] Id. at 1381.

[19] See generally 60 U.S. (19 How.) 393 (1857) (arguing that the Constitution, as originally understood, excluded Black people from citizenship and protected slavery as a property right under the Fifth Amendment, thereby rendering congressional limits on slavery unconstitutional).

[20] Alexander & Schauer, supra note 1, at 1382.

[21] Id. at 1363.

[22] Id. at 1382.

it by several high-profile academics, we decided to come to its defense three years later. In *Defending Judicial Supremacy: A Reply*,[23] we defended our position that the Supreme Court's interpretation of the Constitution should bind all other officials. As we put it,

> The undeniable fact that a judicial interpretation of an attempted legal settlement may be incorrect does not and should not call into question its authority, for it is inherent in all legal settlements of what ought to be done that such settlements claim authority even if those subject to them believe the settlements to be morally and legally mistaken.[24]

In a footnote to the above quote, we pointed out that taking the legal settlements as conclusive of what ought to be done may lead to fewer substantive mistakes than having each agent acting on his or her own view of what ought to be done.[25]

This view of ours, as we expressed it in the *Harvard Law Review* piece, was, as I said, attacked in numerous articles, many written by very distinguished scholars.[26] In response to those attacks, we framed the arguments we were making in response to these critiques as one based on a preconstitutional norm.[27] In our view, such a norm

> determines not what was adopted *then*, but how what was adopted then should be regarded *now*. The Constitution's authority—its status as fundamental law—ultimately rests not on facts about the past, but on the Constitution's acceptance as authoritative in the present. This is a logical and not a historical point, and it is a logical point that undergirds our entire approach.[28]

What makes the 1787 Constitution our Constitution today is its acceptance by us today. And if we accept the *Cooper v. Aaron* rule as authoritative today, then it is authoritative in exactly the same way that

[23] Alexander & Schauer, supra note 2, at 457−58.

[24] Id. at 457.

[25] Id. at 457 n.11.

[26] See Alexander & Schauer, supra note 2, at 458 & n.12 (2000).

[27] See generally Richard S. Kay, Preconstitutional Rules, 42 Ohio St. L.J. 187 (1981) (proposing that constitutional interpretation ultimately rests on preconstitutional norms, which are defined as rules of recognition that determine how courts identify and apply constitutional limits).

[28] Alexander & Schauer, supra note 2, at 460. We did admit that we were mistaken in claiming that our position was nonempirical and admitted that the empirical could not be avoided. Id. at 464.

the 1787 Constitution is authoritative today.[29] And being authoritative, it produces the very high value of the coordinated settlement of what ought to be done.[30] As we said,

> When the disagreement is merely with the Supreme Court's interpretation of a constitutional rule and not with the substantive result, where people believe that the Supreme Court's constitutional rule is superior to the actual rule adopted by the framers, then the case for Cooper is . . . strongest. This is not to say that the Court should not attempt to interpret the Constitution faithfully, even when it believes the Constitution to be sub-optimal or even mischievous as a matter of morality or policy. It is merely to point out that when the stakes consist only of the correctness of an interpretation of an earlier settlement, the value of settlement appears to outweigh the value of interpretive correctness.[31]

* * *

Where Fred and I arrived after these first two coauthored pieces was the following:

(1) What the law requires, including constitutional law, and what morality requires will not be identical in all cases. This means

[29] Id. at 466. In other words, we argued that we can accept as authoritative *now* both what the Constitution required *then* and what the Supreme Court now interprets it to have required, even if the latter departs from the former.

[30] Id. at 467. We also pointed out the "gap" that even the morally best law will produce between what the law requires and what morality requires:

> An authority's rules claim absolute obedience, and not mere consideration. They demand that the subject obey even if the subject is convinced that the balance of reasons, including the reasons to have the rule and its settlement benefits, favors disobedience. The subject, however, faced with an authoritative rule, cannot alienate her rationality and moral agency, even if the overall results would be better if agents were to do so. There is thus always a gap between the concept of what the authority is right to command and what the subject is right to do. As a result, there appears to be no inconsistency in saying that the Court, from *its* perspective, was right to demand obedience from Lincoln, and that Lincoln, from his, was morally right to disobey.

Id. at 472 n.50.

[31] Id. at 474–75 (footnote omitted). As we pointed out, even when the other political branches believe the Supreme Court's interpretation of the Constitution is not only incorrect but also bad from a moral or policy standpoint, the value of settlement suggests that it will in general outweigh that of substantive correctness. Alexander & Schauer, supra note 2, at 475. In a footnote we acknowledged that the position we were defending allowed some mistaken constitutional decisions to stand and at the same time also allowed some mistaken constitutional decisions to be overruled. Id. at 477 n.62.

that those who choose to follow what they believe, correctly or incorrectly, will face the sanctions the law imposes on its violators. This is the ineliminable "gap" between what the law requires and what morality requires. If we attempt to eliminate that gap and have the law require only what morality requires—i.e., the law of "do the right thing"—too many people will in good faith but erroneously believe their acts are morally justified. Therefore, we have a system of more precise laws that will inevitably depart from "the right thing" in some cases. But when we do so, many people will rightly or wrongly believe their acts are on the morally correct side of the gap and disobey the law. They, the morally innocent, will be legally guilty and, if the law is followed, punished.

(2) What the legal system's final decision-maker, i.e., the Supreme Court, concludes is the Constitution's meaning may be erroneous, but that meaning may be preferable to the correct interpretation as a moral or policy matter, or it may be so widely followed that repudiating it would be morally or politically disastrous; or, alternatively, the effect of that misinterpretation can be limited, or it can be rather painlessly overruled.

In the same year the previous article was published, Fred and I produced a short entry in the *Encyclopedia of the American Constitution* titled *Nonjudicial Interpretation of the Constitution*.[32] In it, we addressed the question of what lower court judges and other officials should do when they face a Supreme Court decision that they believe to rest on an incorrect interpretation of the Constitution.[33] Should they treat it as (1) only binding on the specific parties in the Supreme Court, as (2) having force but not absolute force on other parties, or (3) having the force of the Constitution itself, the supreme law of the land. We endorsed (3), based on the value of settlement.[34] We did not take a position on how the Supreme Court should treat its constitutional precedents that it now thinks were erroneous, except to say that it should not overturn constitutional precedents merely because they are now in their eyes believed to be erroneous.

[32] Larry Alexander & Frederick Schauer, Nonjudicial Interpretation of the Constitution, *in* 4 Encyclopedia of the American Constitution 1823, 1823–24 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

[33] Id. at 1823.

[34] Id. at 1824.

After these year 2000 articles, Fred and I did not publish a jointly authored piece until 2007. In that piece, *Law's Limited Domain Confronts Morality's Universal Empire*, we argued that law cannot perform its essential functions if it is open to the full universe of moral considerations.[35] In other words, we argued that, as a moral matter, law must ignore at least some moral arguments in legal decision making. "[L]egal incorporation of morality presents the odd case of the subset incorporating the larger set, and thus suggests the peculiar image of a mouse attempting to swallow a python."[36]

We went on to show why law has a limited domain:

> Law exists against a background of moral disagreement and moral uncertainty; for if people generally agreed about what morality required, there would then not be much reason to substitute law for the direct moral decision-making of citizens and officials alike. But because that is not a world we recognize, and because moral and practical disagreement seems endemic to the human condition, law must step in to settle practical controversies over what ought to be done. But law can fulfill this role only if its domain . . . is less than that of all practical reasons or even of all moral reasons.[37]

Because we are not all-knowing gods, "[a] legal system in which the law . . . were coextensive with the universe of moral norms would serve primarily to embroil the citizens in never-ending and enormously morally costly controversy over what 'the law' required."[38]

We pointed out that law has a complex relationship with morality; its determinacy serves its moral function of reducing the moral costs of error, conflict, lack of coordination, and the time and resource costs of decision-making through claiming practical authority.[39] It succeeds, though, by simplifying what morality requires, guiding citizens better than morality itself can do. For morality, unmediated by law, will produce more morally erroneous decisions and moral conflicts.[40] Law must claim authority to serve its moral function, but morality will deny law's claim. We explained:

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[35] Larry Alexander & Frederick Schauer, Law's Limited Domain Confronts Morality's Universal Empire, 48 Wm. & Mary L. Rev. 1579, 1579–80 (2007).

[36] Id. at 1581.

[37] Id. at 1583.

[38] Id.

[39] Id. at 1586.

[40] Id.

> As a result, . . . moral agents would have good moral reasons for rejecting those claims of law that they believe to be morally erroneous, just as the law has good moral reasons for imposing its legal will on those same moral agents who, from the law's perspective, mistakenly refuse to accept the law's wise guidance.[41]

This is what I called "the gap" and Fred called the "asymmetry of authority."[42]

We then proceeded to deny that morality could be sufficient for legality or necessary for legality.[43] The former either renders morality the key to legality, or else morality and legality must be weighed against each other, which we deny is possible. The latter reduces to the ultimate decision-maker's belief that its rulings on legality are consistent with morality, or else it will produce anarchy. Further, treating morality as a necessary condition of legality collapses into treating it as a sufficient condition.

Finally, making accord with moral norms the necessary condition of legality runs against the fact that there is no guarantee that the joints at which the law attempts to carve morality are joints that exist within morality.[44] And likewise, there is no guarantee that the morality that law incorporates won't undermine the non-incorporationist legal provisions.[45] Finally, and perhaps paradoxically, providing the moral goods of guidance and settlement suggests that not making morality a test for legality is what morality itself would prescribe.[46]

In the same year that previous article was published, Fred and I responded positively to an invitation to publish our views on legal interpretation in Australia. So we published *Is Policy Within Law's Limited Domain?* in the *University of Queensland Law Journal*.[47] Just as we had argued that law best serves morality by simplifying its requirements, here we argue similarly that law produces wise policies "by reducing the costs of error, of conflict, of lack of coordination, and of time and resource-consuming decision-making by claiming practical authority

[41] Id. at 1587.
[42] Id. at 1587–88 (citation omitted).
[43] Id. at 1592–99.
[44] Id. at 1600.
[45] Id.
[46] Id. at 1599–1600.
[47] Larry Alexander & Frederick Schauer, Is Policy Within Law's Limited Domain?, 26 Univ. of Queensl. L.J. 221 (2007).

for its more determinate commands."[48] And just as law has a paradoxical relation to morality, so too "the policy that creates law always puts it into potential conflict with the policies it serves. . . . As a result, it may well be the case that agents would have good reasons, and especially good moral reasons, for rejecting those claims of law that those agents believe to be erroneous."[49] But the law will have good reasons, "including good moral reasons, for imposing its legal will on those same agents."[50] Once again, "the legal-moral relationship of dependence and conflict . . . 'the gap.'"[51]

Paralleling what we said in the prior piece, if consistency with the morally best policy is a necessary condition of legality, it will also have to be a sufficient one. Consider the Model Penal Code's lesser evil defense, which amounts to "Don't violate the criminal law unless it's the right thing to do."[52] That, if followed literally, would be quite morally inferior to more specific exceptions to criminal liability. The morally best legal regime is one that rejects recourse to the unlimited domain of morality.[53]

In 2009, Fred and I published our last coauthored piece in the book *The Rule of Recognition and the U.S. Constitution*.[54] Our chapter was titled *Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance*.[55] In it, our basic topic was the U.S. rule of recognition and a variety of questions about it: Does it change over time? If so, how? Has the Constitution changed other than by the processes prescribed by the Constitution itself, and if so, how? If interpreters employ different interpretive methods, is there one Constitution or are there several? If the Supreme Court or some other institution has final interpretive authority, and it misinterprets the

[48] Id. at 225.
[49] Id. at 226.
[50] Id.
[51] Id.
[52] See Model Penal Code, §3.02(1)(a) ("Conduct the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged . . . .").
[53] See Alexander & Schauer, supra note 47, at 235.
[54] Larry Alexander & Frederick Schauer, Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance, *in* The Rule of Recognition and the U.S. Constitution (Matthew D. Adler & Kenneth Einar Himma eds., 2009).
[55] Id. at 175–92.

Constitution, what is the legal status of that misinterpretation? And if one function of the Constitution is to entrench the fundamental legal rules, then because such rules will be both over- and under-inclusive with respect to their background purposes, how can citizens accept the authority of such rules? We dealt with all those issues and the problems faced by the possible resolutions of them.

Along the way we pointed out that if only the officials need to accept the rule of recognition, Hart's view of law collapses into Austin's, given that the citizens who do not accept the rule of recognition will view the officials as just a gang of muggers and may accept a government in exile.[56] We also pointed out that if those accepting the Constitution have different interpretive methodologies, they won't be accepting *the* Constitution but *different* constitutions.[57] This is easy to see if we translate the Constitution into a language in which those different meanings of an English word are represented by different words in that language.[58] In other words, different interpretive methodologies produce different constitutions.[59] Finally, we came back to a point that we had discussed in former pieces:

> [T]here are rational reasons to create and enforce rules that the subject of those rules will perceive, from their lights, to be irrational. This may appear paradoxical, but the paradox, which one of us has called "the asymmetry of authority" and the other has called "the gap," applies to all legal rules, including constitutional rules and even the rule of recognition itself. There will frequently be [moral] reasons . . . for those in authority to create rules that limit the decisional moral freedom of the subjects of those rules, but there will always be a [moral] reason . . . for the rule subject (from the rule subject's perspective) to ignore a legal rule where the rule's requirements depart from the subject's own vision about what the right thing to do is.[60]

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[56] Id. at 178–79.
[57] Id. at 181–82.
[58] Id. at 182–83.
[59] Id. at 184.
[60] Id. at 189 (citing Frederick Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life 128–34 (Oxford Univ. Press ed., 1991)); Alexander, supra note 16.

This 2009 piece was the last Fred and I wrote together. In the following years, Fred and I perhaps drifted apart to some extent. Fred, I believe, was more comfortable than I became with enforcing incorrect constitutional interpretations that we believed were superior in terms of policy or morality to correct interpretations. At a later time, I even suggested that the Court, when it recognizes that its constitutional interpretation is both mistaken as an interpretation but superior as a moral or policy matter, should announce that it will stick to its misinterpretation for a limited number of years. That will give Congress and the state legislatures a chance to amend the Constitution to square it with the heretofore misinterpretation. But although Fred and I may have parted ways for dealing with beneficial misinterpretations, we continued to see eye to eye regarding the basic problem that dogs constitutional law and indeed all law, namely, that the law—even the morally best law—will have applications that are at odds with morality. And this means that one can be legally guilty but morally innocent. Neither Fred nor I saw, nor do I see now, a solution to this dilemma.

CONCLUSION: FRED AS FRIEND

As significant as was my intellectual relationship with Fred, equally was my personal relationship with him. Long before our coauthored papers, and soon after we began our professional relationship (over thirty-five years ago), we began and continued through Fred's lifetime a close personal relationship.

One aspect of this relationship was golf. Whenever Fred and I were in the same town, and the weather was even minimally decent, we would head to a local golf course. That meant that if we were going to be at the same conference, and the site was south of the North Pole, we would bring our golf clubs. And when we were the coeditors of Legal Theory, along with Yale's Jules Coleman, we would hold our annual editors' meeting in a place where the three of us could play golf and then discuss journal issues over a fine dinner. (Jules and I shot in the mid-70s to low 80s, though Jules' swing was better than mine; Fred shot about ten strokes worse than us, but that never lessened his enthusiasm one bit for joining us.)

But an even more significant aspect of my nonprofessional relationship with Fred—much more significant in fact—was the fact that Fred and his then-wife Virginia and my wife Elaine and I traveled together several times. One was a day trip while the four of us were in Israel. But our more

significant travels together were in Australia (Tasmania), South America, and Africa. The latter two were quite memorable because they were quite lengthy and because on the Africa trip, Virginia and Fred and Elaine and I were the only ones traveling with our guide and his crew.

As you can see, my relationship with Fred, as *very* significant as it was intellectually, was equally if not more significant personally. The world has lost an important intellectual. I have lost that but much more.