

# First Annual Fairchild Lecture Held

On 29 September 1988, the Law School held the first annual Thomas E. Fairchild Lecture. Justice John Paul Stevens of the U.S. Supreme Court presented the lecture to more than a thousand guests in the Memorial Union's Theater.

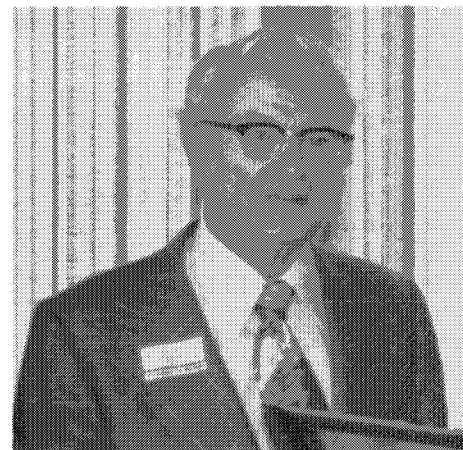
Judge Fairchild was elected to the Wisconsin Supreme Court in 1956 and served until 1966. In August 1966, he was appointed by President Lyndon Johnson to a seat on the U.S. Court of Appeals for the Seventh Circuit. From 1975 to 1981, he served as Chief Judge for the Circuit. Judge Fairchild took senior status in 1981 and has served as Senior Circuit Judge for the Seventh Circuit and, by designation, for eight other federal circuit courts.

Judge Fairchild attended Deep Springs College and Princeton University, and received an A.B. degree from Cornell University in 1934. He graduated from the University of Wisconsin Law School in 1937. His public service included service as Attorney General of Wisconsin from 1948-1951, and U.S. Attorney for the Western District of Wisconsin, 1951-52. He also acted as Chairman of the Governor's Commission on Constitu-

tional Revision, 1960-65, served on the Judicial Conference Committee on Administration of the Probation System, 1969-72, and was a member of the Judicial Conference of the United States, 1975-81. Judge Fairchild has received honorary degrees from the University of Wisconsin, St. Norbert's College, Carthage College, and the John Marshall Law School. In 1981 he received the Distinguished Service Award from the Wisconsin Law Alumni Association.

The Thomas E. Fairchild Lectureship was established as a tribute to the Judge. For over thirty years, Judge Fairchild has demonstrated both a scholarly regard for those principles of law that generations have molded into the American definition of justice and equality and a remarkable sensitivity to the ever-changing human conditions that make the search for justice and equality an ongoing one.

Initiated by Judge Fairchild's past and present law clerks, the lectureship brings to the Law School a distinguished member of the legal profession—from the bench, bar or academia—to speak on a topic of importance to the profession.



Hon. Thomas E. Fairchild

## Law Clerks to Judge Thomas E. Fairchild

### Wisconsin Supreme Court Clerks

1961-62	David L. Walther	Marquette University	1963-65	David D. Wexler	University of Wisconsin
1963	Bruce Gilman	University of Wisconsin	1965-66	Jack F. Olson	University of Wisconsin

### U.S. Court of Appeals—7th Circuit Clerks

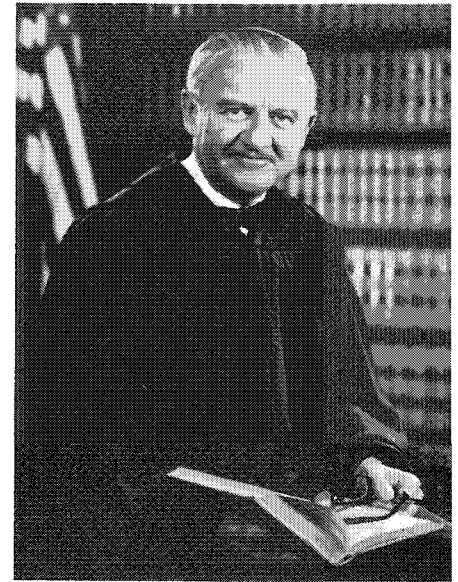
1966-67	Michael W. Wilcox	Marquette University	1975-76	Matthew J. Flynn	University of Wisconsin
1967-68	Michael J. Zimmer	Marquette University	1975-77	Michael H. Schaalman	Northwestern University
1968-69	John L. McCormack	University of Wisconsin	1976-77	Reena A. Raggi	Harvard University
1968-69	Charles A. Kranz	New York University	1977-78	Daniel R. Fischel	University of Chicago
1969-70	John S. Skilton	University of Wisconsin	1977-79	Jaroslawa Z. Johnson	University of Wisconsin
1969-70	James T. Ranney	Harvard University	1978-80	Ann Hilton Fisher	Wayne State University
1970-71	David A. Middaugh	Georgetown University	1979-81	Alan H. Raphael	Indiana University
1970-71	James M. Kramon	George Washington University	1980-82	Vincent R. Johnson	Notre Dame University,
1971-72	Janet S. Lindgren	University of Wisconsin			Yale University
1971-72	Joan Lefkowitz	Northwestern University	1980-81	Marthan J. Olson	New York State University
1972-73	W. Thomas Rosemond, Jr.	Georgetown University	1981-83	Gerald E. Flanagan	Brooklyn University
1972-73	Richard A. Primuth	University of Wisconsin	1982-84	William M. Conley	University of Wisconsin
1973-74	Daniel L. Goelzer	University of Wisconsin	1983-85	Hildegard Neubauer	State University of New York, Buffalo
1973-74	Luize E. Zubrow	University of Colorado	1984-86	Camille E. Willis	Ohio State University
1974-75	Rolf Nils Olsen	Columbia University	1985-86	Colette Holt	University of Chicago
1974-75	James A. Klenk	University of Wisconsin	1986-88	Colleen J. Reinke	University of North Dakota
			1988-90	Peter D. Kennedy	University of Chicago

### Remarks by Justice John Paul Stevens, United States Supreme Court

Tom Fairchild was the Chief Judge of the United States Court of Appeals for the Seventh Circuit on November 28, 1975, when President Ford telephoned to ask me if I would accept an appointment to the Supreme Court. Tom and [his wife] Eleanor had attended the dinner at the White House where I had first met the President a few days earlier. Tom was the Judge from whom I sought and received advice during the few bewildering minutes between the public announcement of the President's decision and the assembly of television cameras and representatives of the national news media in our courthouse in Chicago; he co-authored the text of the brief statement I made on that occasion. One does not soon forget the quality of the assistance provided by a friend at such a time.

My memory of my relationship with Judge Fairchild while we were colleagues on the Court of Appeals is remarkably similar to my memory of a very similar

relationship with Justice Potter Stewart. Both were my seniors; based both on their own experience and on that absorbed through association with their distinguished fathers, each knew far more about the work of the appellate judge than I did; yet each treated me as an equal, even when sharing helpful insights about our work. Both had run for elective office and had a sophisticated knowledge of the workings of our democracy. Both approached each new case with absolute impartiality and followed an unvarying practice of fully understanding, and being able to articulate clearly, the arguments of both adversaries, before forming or expressing an opinion on the merits. There are other parallels as well, but I believe I have said enough to explain why I consider it such an honor to have been invited to deliver the first Fairchild Lecture at the University of Wisconsin School of Law.



Justice John Paul Stevens

### Remarks of Chief Justice Nathan S. Heffernan, Wisconsin Supreme Court

Tom became a Justice of the Wisconsin Supreme Court on January 7, 1957. Within a month he had written his first opinion. It was two and one-half pages long. Tom wrote his last opinion for the Court in July of 1966. It was 36 pages long. It was clear that he had served his apprenticeship well and was ready for the Federal judiciary. And, of course, he became a distinguished Judge, and later Chief Judge, of the United States Court of Appeals. I will leave a recounting of his career as a Federal Judge to others.

I first got acquainted with Tom in 1949, when he was the Democratic Attorney General in a state house dominated by Republicans. I had shortly before finished law school and was employed across the hall in the office of Republican Governor Oscar Rennebohm, who never inquired about my politics, and really didn't care, for Democrats were of no political significance anyway.

I went my separate way to practice law in Sheboygan and became active in politics, so from 1950 on, our paths, Tom's and mine, frequently crossed. Tom ran for the Senate in 1950 and 1952. While he is rightly remembered for his

courageous fight against McCarthyism, his really great accomplishment was his mastery of the intricacies of the Brannan plan. As far as I know, only Tom Fairchild understood it. I'm not sure that Secretary Brannan did. The country and the state's misfortune in Tom's unsuccessful campaign for the Senate eventually redounded to the lasting benefit of the State of Wisconsin and to the judiciary of Wisconsin and of the United States.

It was in 1956 that Tom decided to run for the Supreme Court of Wisconsin to succeed his father, Edward T. Fairchild, who was retiring as Chief Justice. He asked me to campaign for him in the Sheboygan area.

I remember well a morning in February or March of 1956 when I stood with Tom at about 6 A.M. greeting the voters who worked at one of the factories located on the river where there was a clean sweep of the wind that blew off of Lake Michigan. The temperature was in the teens, and the wind chill I would estimate was about 30 below. I think it was then that it occurred to me that this is real fun! It might have been then that I conceived the mad ambition of becoming

a Justice of the Supreme Court, but only if I could first be appointed to the job.

Well, Tom was elected and served, as I said, for almost 10 years. He was re-elected in 1966, without opposition, but because of his appointment to the federal bench in the fall of 1966, he never completed his first ten-year term.

Roger Traynor stated, with considerable wisdom, but I believe not with complete correctness, that the influence of a judge on the law is inversely proportional to the number of dissents written. By this measure, it is clear that Tom represented the mainstream thinking and was a major factor in influencing and directing the work of the Court.

I achieved my mad ambition when John Reynolds appointed me to the Court in 1964. By this time, Tom Fairchild had become one of my heroes—politically, jurisprudentially, and personally. By then, he had served over seven years and had established himself as a great judge and a great legal scholar.

When I was sworn in as a Justice of the Court in August of 1964, I almost had to pinch myself to comprehend that I was an apprentice member of a Court that appropriately had been referred to by Chief Justice Winslow as a "great" court.

The membership of the Court at that time was George Currie, Tom Fairchild, Harold Hallows, Myron Gordon, Horace Wilkie, and Bruce Beilfuss—all outstanding judges. When I attended the Appellate Judges Seminar in New York City, Roger Traynor, the Chief Justice of California, almost universally acclaimed then as America's outstanding judge, was a member of the faculty. He told me, "Nat, you are a very lucky young man—you serve on the best appellate court in America." And he specifically ranked the California Court and the United States Supreme Court below that of Wisconsin.

There were indeed giants of the law on our Court, and Tom was the peer of any of them.

I could wax eloquent about Tom's opinions—the great ones and some that were not so great—those are the ones to which I dissented. In the approximate period when I served with Tom he wrote 98 majority opinions for the Court—a rate of about 4 a month—and yet in the period from January 1964 to his departure from the Court in 1966, he wrote only 3 concurrences and 4 dissents.

We had not only weighty issues in terms of philosophical jurisprudence, but also cases which gave Tom a chance to express his less serious side. In the case of *Happy Hollow Guernsey Farm v. Greenway*, the culprit was, and what else could it be with a title like that, an errant Angus bull. Tom commenced his opinion with the following quotation, "What dire offenses from amorous causes springs, What mighty contests arise from trivial things."

Tom was genial and friendly in conference and socially—incisive and perceptive in his comments on the world and the law in general. His aphorisms were sometimes expressed in somewhat ribald limericks, which I will not repeat here.

I do remember his response when someone, I believe Bruce Beilfuss, commented on his somber and traditional attire—black suit, white shirt, and dark tie. Tom said, "Well, Bruce, you can get away with a hell of a lot of liberalism if you just talk softly and look conservative enough."

One of Tom's great cases, at least a notorious one, was *McCauley v. The Tropic of Cancer* in 1963. Writing for the majority of the Court, Tom held that the book was not obscene. The dissent however stated, "The book is pitched at the nadir of scatology . . . The *Tropic of Cancer* is saturated with filth in its substance and its expression."

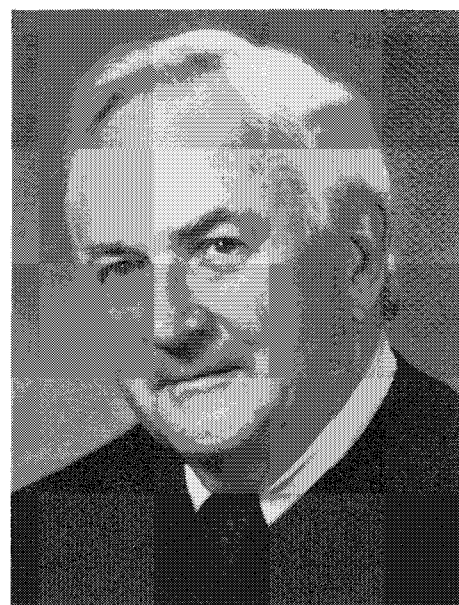
Tom's closing lines are perhaps more memorable—and they express the law of Wisconsin:

"Our reading of the book has engendered no enthusiasm. We do not endorse it. . . . We probably do no great thing in preserving it. Our function, however, is not to determine the quality of the book. Our duty is to respect and enforce the full measure of the freedom of expression guaranteed by the state and federal constitutions."

The mandate in the *Tropic of Cancer* case was issued in May of 1963. I was not a member of the Court, but the question of the obscenity of the book was the issue in Horace Wilkie's campaign in 1964 and mine in 1965. When I pointed out that I did not participate in the opinion, I was excoriated nevertheless as a "morally degenerate member of a morally degenerate court." Thanks, Tom. But Horace won, and I won, with much help and good advice from Tom. Had I been on the Court I would have supported Tom's opinion. I think my opposition sensed that.

The insanity defense was a hot issue when I was on the Court with Tom. In *Shoffner v. State*, writing for the Court, which was fractured on specific issues as much as the United States Supreme Court has been sometimes, Tom stated that a defendant could have the option of relying on the American Law Institute test of "mental disease or defect" if the defendant assumed the burden of proof on that issue or the M'Naghten test of "knowledge of right or wrong" could be used. Tom and I expressed a preference for a third option, which is now lost in the mists of time.

At a judicial seminar at N.Y.U., Chief Justice Burger, then a Judge of the D.C.



Chief Justice Nathan S. Heffernan

Circuit, in a rare display of humor, referred to the *Shoffner* case as a "schizophrenic case about schizophrenia."

The case was remanded to determine whether the amorous peregrinations of the Angus bull in fact caused the subsequent trauma to "seven of the plaintiff's virgin and unsophisticated registered Guernsey heifers: Lavender, Lenore, Lelor, Kalline, Margarete, Lindis, and Lena."

While I guess the Happy Hollow Guernsey Farm case indeed contained elements of what was truly barnyard humor, Tom was a judge and a person of good and gentle humor, friendliness, and compassion. While he took his work seriously indeed—and the *Happy Hollow* opinion is a serious and scholarly exposition and resolution of a difficult problem—he did not take himself seriously. He was always good company. The Court was indeed a family, and Tom and Eleanor were treasured members of it. I certainly hoped that this happy condition would go on indefinitely, but it was not to be.

In May of 1956 came the first ominous rumblings that upon the retirement of Judge Ryan F. Duffy, Tom might receive the appointment. There was no doubt that the appointment was Tom's if he wanted it—and there were good practical reasons why he would, a salary of \$33,000 as compared to \$14,000 he was receiving on the Supreme Court. Under the strange salary structure then imposed by the constitution, Tom was stuck at the statutory salary in effect at the time he commenced his term. Bruce Beilfuss and I as the junior members of the Court received \$10,000 a year more. There was

also the fact that there would be no more icy mornings campaigning along the waterfront in Sheboygan, and the Court of Appeals for the Seventh Circuit was a fine Court presenting new challenges. I also pointed out to him that, since he was getting up in years—he was then 54—that

perhaps in his geriatric days he would be more comfortable with the lighter burden of a limited jurisdiction court.

I wish there were time enough to tell you more about Tom's career on the Wisconsin Supreme Court—a career that I

was privileged to view at close quarters for almost 3 years. I wish I could adequately express my admiration for Tom as a great Judge and a great man. After more than 20 years, we still miss you, Tom.

## Remarks by Senior Judge

**John W. Reynolds,  
Eastern District of Wisconsin**

Forty years ago, 154,000 dedicated Wisconsin Republicans went to the polls and voted for the wrong man for Attorney General. They thought they were voting for John E. Martin; but, in fact, they wound up voting for Don Martin. This was an understandable mistake for the Republicans to make because they had been in the habit for ten years of voting for the Martins and the Smiths, and the fact that the Martin who had been Attorney General for ten years was then on the Wisconsin Supreme Court escaped their notice. When the people of the state became aware of the mistake that the Republicans had made, and when they further became aware of the fact that the Martin the Republicans had voted for was unqualified for the job of Attorney General, they took a look at the candidate who had won the Democratic nomination, and there they found a nice, conservative looking young lawyer by the name of Tom Fairchild.

Well, who was this Tom Fairchild? At first glance, it appeared to the establishment that he wasn't too bad because he was practicing law with Mille, Mack and Fairchild (which is now Foley & Lardner), and his father was a Stalwart Republican. (We used to have the Stalwart Republicans and the Progressive Republicans.) In fact, his father was on the state supreme court after having served as a Republican state senator and as circuit court judge in Milwaukee.

So, a boy like that couldn't be all bad. Of course, there were some things in Tom's background that they probably were not aware of. One was that he was a radical when he was twenty. He was so radical that, while a twenty-year-old student at Cornell University, he and G. Mennan Williams (who later became governor and a chief justice of Michigan) were active in the Young Republican Club and had worked hard for Herbert Hoover's election in 1932. That demonstrated that he was not one to go along with the herd. Tom also had been active in the LaFollette Progressive Party. After law school, he went up to Portage to practice law with Dan Grady, a well-known cantankerous and individualistic Democratic lawyer; and, while in Por-

He thereby became the only Democrat to win a statewide election in Wisconsin from 1932 to 1957. One of his father's old friends stopped in at the supreme court and said to Justice Fairchild, "What did Dan Grady do to our Tom?"

tag, Tom emerged as the chairman of the Progressive Party of Columbia County and, as a matter of fact, as the state chairman of the Young Progressives of Wisconsin.

When the war came, Tom went to work for the Office of Price Administration in Milwaukee. And, after the war (and unknown to the senior partners of his firm), he consorted with such people as Bob Tehan (who was the Democratic national committeeman and who later became the federal judge in Milwaukee), and Congressman Andrew Beimiller (who had been a socialist member of the state legislature), and Phil Marshall (a leading liberal lawyer at the time). In fact, in 1948, after the defeat of Robert M. LaFollette, Jr., in 1946, they, along with a group from Madison (including Jim Doyle, Carl Thompson and Horace Wilkie) were actively putting together a statewide ticket of liberal Democrats, and Tom was asked to run for attorney general. Whether or not he cleared his candidacy in advance with the elders at his firm, I do not know, but he agreed to run, with the understanding that he would limit his campaign outside Milwaukee to weekends. Given Tom's qualifications and the record of his opponent, the people broke with tradition and elected him Attorney General. He thereby became the only Democrat to win a statewide election in Wisconsin from 1932 to 1957. But, his election as a Democrat troubled many. One of his father's old friends stopped in at the supreme court and said



Judge John W. Reynolds

to Justice Fairchild, "What did Dan Grady do to our Tom?" And, Mr. Schuberger of Schuberger Ryan Peterson & Sutherland, was heard by one of his young associates (Nat Heffernan) to say, "Isn't it a terrible thing for Justice Fairchild in his declining years to have a son like that?"

Tom plunged into the work of Attorney General with professionalism and competence, but, in addition to that, he and his wife, Eleanor, committed themselves to the building of the Democratic Party in the state of Wisconsin as a political vehicle for liberals. While Attorney General, he, along with Jim Doyle, Pat Lucey, Horace Wilkie and Carl Thompson, went out and organized the then Democratic voluntary committee known as the DOC (that is, Democratic Organizing Committee) in counties all over the state. Tom brought to the Democratic Party a sense of respectability (because he looked respectable), and a sense of integrity (because he was not only a man of integrity, but he looked like one), and a sense of dedication. When the time came in 1950 to select candidates for the U.S. Senate, Tom was encouraged to run and he threw himself into that campaign. He was nominated and became the Democratic candidate against Alexander Wiley. The fortunes of the Democratic Party declined substantially with the advent of the Korean War in June of



1950, and the Republicans carried the day.

Tom then was appointed by President Harry S. Truman as the United States Attorney for the Western District of Wisconsin. By 1952, a new force had emerged on the Wisconsin political scene, and that was McCarthyism, led by Senator Joe McCarthy. Joe McCarthy and what he stood for galvanized the liberal forces in Wisconsin and the nation. They were looking for a candidate who would stand up and campaign against Joe McCarthy. Tom was nominated, and the battle lines were drawn. It was a campaign, the likes of which one seldom sees in this country. It was perceived by many, not as a battle between two fine individuals of different ideologies, but as

a battle between good and evil. In many ways, it was a glorious campaign, because how often can one campaign against someone who is perceived by his supporters to really be the personification of evil? The national spotlight was on Wisconsin, and help for Tom Fairchild came from around the nation. The contrast between Tom and Joe was dramatic, but Joe won and Tom was sent back to private life.

Tom returned to Milwaukee and embarked on practicing law with Irvin Charne, but his campaigns were not over. In 1955, he entered the non-partisan race for the Wisconsin Supreme Court and was overwhelmingly elected to that position to succeed his father. (By this time, we assume the voters knew they were

voting for Tom and not Edward.) Tom still had one more campaign to go. In 1966, he was re-elected to the Wisconsin Supreme Court without opposition. Fortunately for the federal judiciary, Judge Duffey went on senior status that same year, and President Johnson appointed Tom to the Court of Appeals for the Seventh Circuit. The rest of Tom's career as a judge is well known to you.

Tom opened the way for the Democrats who came after him, and his contribution to the political development of this state and to its two-party system is impressive and shall always be remembered by those of us who benefited from his work.

### Remarks of Judge Reena Raggi, United States District Court, Eastern District of New York

I am very pleased and honored to be asked to say a few words on behalf of Judge Fairchild's law clerks. In a sense, it is an almost impossible assignment. There is not a one of us who could not tell stories long into the night about how challenging, and how much fun, it was to be a clerk in Judge Fairchild's chambers. On the other hand, no one among us thinks that he or she can begin to express in mere words all we feel about that experience, except perhaps to say that for each of us, for as long as we live, "the Judge" can only refer to one person.

For some time now, we have wanted to honor the Judge in a way that went beyond the dinners and get-togethers that we have from time to time. We wanted to honor him in a way that said something special about the kind of person he is.

The Judge, it seems to us, is always giving. Everyone here knows what I mean. Whether we are talking about the love and commitment he feels for his family, the time he spends on the matters that come before him, or the patience he shows to young lawyers who work in his chambers and for years after look to him for advice and guidance, the Judge is always giving of himself. We thought it would be fitting—and maybe even pleas-

You see, we have great expectations for this Lecture and for the contribution it may make to legal thought in the name of a truly outstanding jurist.

ing to him—if, in honoring him, we gave something to this community here in Madison that means so much to him. And so we conceived the idea of the Fairchild Lecture series.

On behalf of all the clerks, I want to thank Justice Stevens for agreeing to give the first Lecture. Your thoughtful remarks were certainly everything we could have hoped for in an inaugural lecture.

You see, we have great expectations for this Lecture and for the contribution it may make to legal thought in the name of a truly outstanding jurist.

Many of us who served as Judge Fairchild's clerks remember his prescription for dealing with difficult cases. He would tell us that he would always try to follow



Judge Reena Raggi

the law. But, in those cases when the law was not clear, he would try to do what was right. That may sound very simplistic when I say it. But, somehow, it never did when the Judge would. I think that is because he has an almost unerring sense for what is "right." And perhaps that is because we can say of him as Learned Hand did of Cardozo: "He is wise because his spirit is uncontaminated; because he knows no violence, or hatred or envy, or jealousy or ill-will."

Well, we may not all be Cardozos or Fairchilds. But we can strive for what is "right." Our search may be helped by thoughtful discussion and provocative ideas. We hope that in the coming years the Fairchild Lecture will provide a forum for such discussion.

### Remarks of Chief Judge William J. Bauer, Seventh Circuit Court of Appeals

I only know that Thomas Fairchild is one of the best men I have ever known and one of the best judges in America. If I convey that message then I accomplish what I want to do!