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## FOR CHARLES E. CLARK: A BRIEF AND BELATED, BUT FOND FAREWELL

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It is hard for me to believe that it has been so long as two years now since he died. When the phone rings suddenly late in the evening—after some big Supreme Court decision, after some new or rumored appointment to the Yale law faculty, after some intriguing piece of political news from Washington or maybe from Western Europe—I still half-expect my “Hello” to be answered by that unmistakable blend of question and growl and chuckle that was his. I doubt that I shall ever wholly accept the fact that he is dead, since for me he never can be; let the psychiatrists make of that what they will.

He was one of the few truly great human beings I have ever known. He was easily the greatest man I ever worked under—and the list includes Gifford Pinchot, Henry Luce, and gentle Wesley Sturges. Except for the uncle in whose home I grew up, he came the closest, non-biologically speaking of course, to being (ah there, Dr. Freud) my father. More than that, he was for well over thirty years a hero of mine who never once—and I mean never *once*—let me down. I cannot write dispassionately of Charlie Clark.

But why should readers of the *Columbia Law Review* give half a hoot about Charles E. Clark of Connecticut or care that this one of his dozens of disciples holds him in such high affection and esteem? Let me try to list the three chief reasons before this “Farewell,” this tribute, goes readerless from here on. First, as prime instigator and architect of the rules of federal civil procedure, he ranks as the greatest American legal reformer of this century. (As such, he was a successor of sorts to New York’s and the 19th Century’s David Dudley Field.) Second, as dean for a decade of the Yale Law School, he was largely responsible for revolutionizing legal education in the United States. (Both Harvard and Columbia, among others, came to follow the lead he set—a lead which has produced three current Supreme Court Justices from Yale to one each for Harvard and Columbia.) Third, as judge for a quarter-century on the Court of Appeals for the Second Circuit—

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The footnotes that follow have been added by the editors. For the author’s crusading views against the use of footnotes in law reviews, see Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1937).

a quarter-century which included a stretch when, with Vinson heading the Supreme Court, the Second Circuit was the ablest bench in the nation—Clark was its strongest member, even among such renowned figures as Learned Hand, Jerome Frank, and Harold Medina. (Of this, a bit more later.) Yet not even this extraordinary trio of achievements comes close to telling all about Charlie Clark. Indeed, I can do not much more here—after adding a touch of flesh to the Who's Who skeleton of Clark as legal reformer, dean, and judge (and in all those roles, forever teacher)—than hint at what manner of man my mentor was.

Thus, suddenly, somewhat out of context or at least out of order, an incident comes to mind from way back in 1930. Clark had been dean of the Yale Law School for less than a year. As successor to his considerable junior, Robert M. Hutchins—that parabolic comet who had headed West toward higher things and Higher Learning—he occupied the boxlike dean's office on the ground-floor-front of boxlike Hendrie Hall, an ancient edifice which the Law School inhabited until its present grandiose and comparatively gargantuan quarters were readied. Simultaneously, six of us second-year students had been officers of the *Yale Law Journal* for about a month; we had just put to bed, around 4 A.M., our first issue of *our Journal*; as officers, we had special permission to work in Hendrie Hall—in the *Journal* office and the library—after it was locked to all other students. And it was Spring. What we did was to stack the unlocked Dean's office from floor to ceiling, crowning our exuberant celebration with festoons of toilet-paper, draped from the Victorian chandelier all around the desk of the Dean. Next morning, sober and sleepless, we began to wonder. Charlie Clark could not help knowing who the culprits, with their special keys, were. What *he* did was to ask the two janitors to clean up his office and set it in order, while he worked in the library. And from that day to his death, not one of the six of us ever heard a single word from him about our puerile prank. Do you begin to see what manner of man Charlie Clark was?

The very next year we were treated to a slightly less subtle but more spectacular display of unflappable deanmanship. The *Law Journal* banquet, by tradition a rather formal affair with black tie, big-name speaker and all such stuffiness, marked in 1931—as it always does—the transfer of *Journal* editorship from one board to the next. Ours was now the outgoing board—and again it was Spring. It was also during the undrought of Prohibition, a law flouted by all liberty-loving law students—plus their professors. So it happened that a small group of Journalites, relieved of their arduous editorial duties, arrived at a select circular table, just below the dais, a little late, a little liquored up, and with their dress collars painted bright red. Looking down on us from near enough to ignite our breaths were Dean Charles E. Clark, chief speaker

Harold J. Laski from London, toastmaster Thurman Arnold, and President James Rowland Angell of Yale, a fine and fastidious man.

At this point my source becomes, perforce and impeccably, Dean Clark. We were making far too much ribald noise to hear conversation from above—as President Angell soon noted with distaste. He leaned across to Clark and inquired: “Who are these objectionable people down here? If they are in any way connected with the Law School, I want them dismissed from the University immediately.” Charlie, I feel certain, gave that combined grunt and chuckle. “Well,” he said, “starting at your left, there is Howard Marshall who will be Assistant Dean of the Law School beginning in the fall; then Gerry Wallace who will be law clerk to Judge Tom Swan of the Second Circuit, a former dean of the Law School as you know; then comes Fred Rodell who will be legal advisor to that great old Yale man, Governor Gifford Pinchot of Pennsylvania; next is Bill Gaud, whose appointment as assistant professor at the School, starting in September, you and the Corporation have authorized; and then comes—surely you know him—William O. Douglas [Bill looked younger and gayer than his 32 years], one of our Sterling Professors of Law.” “Hrrumph,” hrrumphed President Angell, “very well then. Very well. But I insist that you secure apologies from all of them for this discourteous display.”

On Monday morning, Charlie called us into his office and told us the whole tale, straight-faced. We began to snicker and then to laugh. “Thank you, gentlemen,” said Charlie, with just the touch of a grin. “I shall report to the President that you have apologized.” And the meeting was over. How can one write in solemn tones of memorial tribute about such a man?

And what has happened to those three facets of Charlie Clark's public or Who's Who career—legal reform, legal education, judging—of which I had started to tell when the lingering warmth of the man drove the cold account of his vast achievements from my mind? Let me dispense, first and fast, with the procedural reforms on which Clark, as teacher and writer, as judge and advisor, as common-sense crusader, worked so tirelessly throughout the whole of his life in the law. I do this in part because, although I once studied and later taught procedure under him, I now feel incompetent to comment on his contributions here—in part because one of his most brilliant disciples, Professor Charles Alan Wright of Texas, has recently joined with Harry M. Reasoner to publish a book of Clark's essays entitled *Procedure—the Handmaid of Justice*, which, when illumined by the editors' own incisive introduction leaves nothing more to say of Clark as procedural reformer. From that introduction I steal one quote of a highly knowledgeable commentator (not Wright or Reasoner; they quote it too) who called the federal rules which Clark led in framing and guiding to adoption “one of the greatest con-

tributions to the free and unhampered administration of law and justice ever struck off by any group of men since the dawn of civilized law."<sup>1</sup> Indeed, it may well be for this, rather than as educator or judge, that Charlie Clark's name and fame will last the longest.

But it was as his student for three years, and as his subordinate colleague (and still his student) for six years more, that I got to know Charlie on a basis of day-to-day intimacy and that my respect, verging on reverence, first came to flower. Not that he was, as were most of the Law School's then leading lights, a stunning class-room performer. Justice Potter Stewart may now remember of Procedure I that "because of the man who taught it, there was no more exciting course in the whole Law School," but some of us remember better those eye-rubbing, yawn-stifling early morning hours he chose to teach in—and that there was more of the hum than the ham in him. Today's law students, a somewhat solemn lot, may be surprised to learn that yesteryear there was a faculty song with a verse for every professor and that it was sung—to the faculty—on every possible occasion. Charlie's verse, scarcely a hymn to an "exciting course," ran:

Here's to Clark, our burping dean,  
Whose sense of humor is so keen  
He thinks, each dawn, it's quite a treat  
To call on every empty seat.

No, Charlie produced no pinwheels from the lecture platform. It was in small seminars and in the directing of individual honors work that he did his top-notch teaching. And as dean he was simply superb—for my money, the finest in the whole history of American legal education.

If I sound lyrical, I so intend. Consider the galaxy of stars (most of them recruited for the School by him) whom he had to handle and hold together in something resembling a common course; they included Thurman Arnold, Bill Douglas, Abe Fortas (briefly), Walton Hamilton, Underhill Moore, Wesley Sturges and others equally explosive but less well-known or remembered. Consider, too, that when Clark became dean there was, by common concession, only one really first-rate American law school, Harvard, and there was only one proper way to teach law, namely the "case method" that Langdell had instituted at Harvard about half a century before. But when Clark stepped down from the deanship and up to a judgeship a decade later, Yale's new critical yet constructive "functional approach" to legal education—with its borrowing of materials and men from economics, political science, psychiatry, and other social sciences, and its sights set ahead toward progress and reform, not backward toward principles and precedents from the past—this approach had already begun to stir the whole law school world. Today it has

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1. PROCEDURE—THE HANDMAID OF JUSTICE 3 (Wright & Reasoner eds. 1965), quoting Carey, *In Favor of Uniformity*, 18 TEMP. L.Q. 146 (1943).

all but captured that world as even Harvard comes part way around to it; (Columbia, with Llewellyn and others, was on the bandwagon early and indeed helped start it rolling). And it was Charlie Clark who, just as he led the team which reformed the federal rules of civil procedure, here led and kept harnessed together the far more high-spirited team that literally reformed and reshaped the way we teach and students learn the law.

On Clark's incandescent conduct of the Yale Law School deanship, one final fillip: it was carried on with something less than enthusiastic support—for new programs, appointments, promotions, and such—from the top Yale Establishment (Charlie used to call them "real inner Yale circles"), a group never known for receptiveness to innovations such as "those new-fangled notions over there at the Law School." Thus, in the Spring of 1945, when the School was beginning to restaff its faculty after the war and a strong push was being made, backed by some of the Yale Corporation, for more orthodox, Harvard-Law-type appointments, Charlie, now as a judge no longer able to fight actively for the kind of law school he had built, wrote me with what I sensed as a touch of wistfulness:

Your letter of June 4 suggests developments at the L.S. of which I had not heard—you can see that [A and B and C] whom you quote are apparently closer to the L.S. than I. I wish I did have more influence; usually I don't mind, recognizing as one price I pay for what I feel is my intellectual freedom, the absence of interest in my ideas at Yale, even I guess the relief felt that my worrisome presence is gone. But when it comes to Harvardizing the L.S., that is the chief thing I tho't held us back in the days when [X and Y] and others really tho't our function was to reflect Harvard and what I did my best to combat. And it seems to me so axiomatic that our success was in direct proportion to our showing that we had gone beyond Harvard's leading strings. Following Harvard again would, it is true, make the School unobtrusive, which I fear is a desired objective; it would also condition it to being second rate . . . .

Charlie Clark still cared deeply about the Yale Law School—as he continued to do until his death—even though he had by then served six of his twenty-five years on the federal bench.

It was during the 1940's and early 1950's—as the Supreme Court staggered under the burden of a quartet of new and inexperienced justices—that the Second Circuit's sextet probably set an all-time high for federal Courts of Appeal. Indeed, all of the Second's members probably were as able or abler than several of their formal superiors in Washington. Of these, four were judicial titans: legendary Learned Hand, cousin Augustus Hand, Jerome Frank, and Charles E. Clark. And the greatest of these was Clark. I say it flatly; I believe it deeply; I shall try to explain it briefly.

Most people, indeed most lawyers, would probably pick Learned Hand, the man who "should have made the Supreme Court" but never did. Yet

there was something of the cultured dilettante about Hand; though often a wizard with words, he fought no fights, he made no enemies. It was Charlie Clark himself who used to say of the two cousins: "Write like Learned but think and vote like Gus"—and many a lawyer agreed. Learned Hand, shortly before his death, gave a series of lectures at Harvard in which, to no one's surprise, he suavely supported judicial self-restraint and opposed overlordship of legislatures by judges.<sup>2</sup> To this Charlie Clark replied, shortly before his own death:

We should recognize the facts of judicial life and not be upset by them . . . Both the great Learned Hand and the eminent Dean of the Harvard Law School have expressed distaste for being ruled by a bevy of Plato's wise men and the dean even concedes that the idea "makes me shiver a little bit." I think this is unfortunate . . . For the hoary apothegm of a "government of laws and not of men" needs to be supplemented by a fuller expression; what we must seek is a government of laws as maintained, fortified, and enriched by the good decisions of intelligent men.<sup>3</sup>

As for Jerome Frank—Clark's only other conceivable rival for strongest man on that great Second Circuit bench of yore, not one of whose members still sits although Swan and Chase still live—he would heartily have agreed with my quote from Clark's essay on *Limits of Judicial Objectivity*; indeed the final sentence carries a footnoted citation to one of Frank's books. And yet—and yet—this is hard for me to say because Jerry Frank too was one of my closest friends, even though I knew him intimately less long than I knew Charlie Clark—and Jerry was brilliant, imaginative, inspiring, exciting, incredibly widely read, generous, brave, and gay. Let me simply put it that in a tough fight against long odds and rough opposition, it would be Charlie Clark I would rather have on my side.

For it was Charlie who, among all our judges, stood up first, and at first stood up alone, against the indecencies of the post-war "loyalty" and "security" laws and procedures, against the McCarthy-style witch-hunt even before McCarthy became the hunter, against the travesties of the Constitution that court majorities, high and low, were writing into law; especially notable were his opinions—both of them, significantly, one-man dissents—in the *Josephson*<sup>4</sup> and *Sacher*<sup>5</sup> cases. As Black and Douglas, also of course in dissent, became throughout this sorry period the vocal conscience of the Supreme Court, so Clark remained the unheeded conscience of the Second Circuit. And as recently as the year he died, he was still making wicked fun of the timidity of the judicial self-restrainers—from Hand and Frankfurter on down—who

2. HAND, *THE BILL OF RIGHTS* (1958).

3. Clark, *Limits of Judicial Objectivity*, 12 AM. U.L. REV. 1, 12-13 (1963).

4. *United States v. Josephson*, 165 F.2d 82, 93 (2d Cir. 1947), *cert. denied*, 333 U.S. 838 (1948).

5. *United States v. Sacher*, 182 F.2d 416, 463 (2d Cir. 1950), *aff'd*, 343 U.S. 1 (1952).

were now touting something that Columbia's Professor Wechsler, speaking at Harvard, had dubbed "neutral principles." In a *Plea for Unprincipled Decision*, Clark asked: "In the light of their time, how could *Gibbons v. Ogden* or *McCulloch v. Maryland* be considered anything but 'unprincipled decisions'? But how the history of the country would have been changed, the Supreme Court lessened in authority, and our government hampered and restricted without them."<sup>6</sup> And then: "I do fear to be left to the tender mercies of judges who shiver to take the responsibility of forthright decision along lines never before attempted."<sup>7</sup> No such shiverer, ever, was Charles E. Clark.

So much—and perhaps too much—for the Clark record as reformer, teacher, dean and judge. Let me go back now a bit to the human being whom I came so to admire and so to love. Except for the genial warmth and almost sweet sincerity of his big bullfrog smile, he was not overly endowed with surface charm. He walked awkwardly, his feet, penguin-like, almost at right angles. In conversation he was not a wit although he generously enjoyed and appreciated wittiness in others. He had little small-talk save gossip, never malicious, about the myriad people he knew: many of them former students or former colleagues, almost all of them lawyers or law teachers, judges or otherwise active in government. His writing was prolific, profound, straightforward and down-to-earth, but rarely inspired; as a stylist he was no Walton Hamilton, no Learned Hand, no Holmes. As a speaker he tended to ramble on too long, not out of thoughtlessness—quite the contrary—but because he supposed with a sort of sublime simplicity that whatever interested him would interest any who took the trouble to come to hear him. What interested him inevitably involved or touched on law. Outside of his family and a few occasional diversions—golf, bridge, sports or politics on TV—the law was not merely a jealous mistress; it was his life.

But when not working into the night, he liked to relax of an evening with family or a few intimates—and relax he did. No one who knew him well will ever forget how, whether as host or guest, he used to stretch out on a couch after dinner, while his handsome, wonderfully uninhibited wife, Dorothy, held up with increasing decibels the Clark end of any conversation until, usually in midsentence, she would turn and say: "Charles. Now Charles. We don't mind your taking a little nap but do try not to snore." And no one who ever joined him on the New Haven Country Club golf course, when he played hooky from his chambers many a late afternoon between spring and fall, will forget what a frustrating experience it could be. Charlie's stance was atrocious as he addressed the ball, his penguin posture exaggerated, from a horizontal club's length away. He swung for dear life, like an unhinged gate; he rarely got the ball more than five feet off the ground; it rarely travelled more than

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6. Clark, *Plea for Unprincipled Decision*, 49 VA. L. REV. 660, 665 (1963).

7. *Ibid.*

150 or 160 yards. But it travelled *straight*. That way, if you putt straight too, you can make quite a few pars. Charlie used to beat a lot of beautiful-form golfers who could hit the ball half again as far as he. There is some sort of symbolic moral here which I shall not try to explain or explore.

What was there about this modest, mild-mannered, often graceless man that set him so apart, that made him so special and so great? There was some quality of absolute rock-steadiness; you knew by instinct that you could trust him and that his own instincts would always be right. There was a quality of utterly uncompromising honesty; I think it would have been physically impossible for him, on a matter of any moment (I except polite social trivia), to trim or to lie. And there was also a quality of humanity, of tolerance-of-the-other-fellow, which kept him from ever taking on the humorless hues of the self-righteous do-gooder.

There will be, as time goes on, other great American legal reformers. There will be deans who dare to realign toward a new ideal the whole structure and thrust of legal education. There will be judges who scorn present popularity and future fame to dissent against the doxologies of their day—as did Charlie Clark. Yet for downright integrity and decency and courage—as a man—I doubt that I shall look upon his like again.