CARDOZO
Benjamin N. Cardozo School of Law

Cardozo Law Review

Vol. 15
Iss. 3

Article 5

Judge Charles Edward Clark Edited by Peninah Petruck

Peter Charles Hoffer
Assistant Circuit Executive, Second Circuit

BOOK REVIEW

JUDGE CHARLES EDWARD CLARK
edited by Peninah Petruck*
Oceana Publications, Inc.
Dobbs Ferry, New York, 1991.
207 pages; $42.50

*Peter Charles Hoffer***

For everyone who knew him while he lived and everyone whose career or education he touched, Charles Edward Clark (1889-1963) was a presence almost larger than life. A shade under six feet tall, with a bullfrog voice, barrel chest, and broad shoulders, he could not be missed in a crowd. A man whose habits and opinions had an "all-or-nothing quality"[1] during a critical era for legal education and government-lawyer relations, Clark's presence seemed to fill the law school he led and the bench on which he sat.

As a founding member of the legal realist movement at Yale Law School, he combined scholarly and pedagogical commitments to improving the law.[2] He published a stream of reports, monographs, and articles arguing for empirical study of the operation of legal systems that prefigured later developments as diverse as the University of Wisconsin *Civil Litigation Research Project* and the Williamsburg National Center for State Courts,[3] current federal trial procedure,[4] and

---

* Assistant Circuit Executive, Second Circuit.

** Adjunct Professor of Law, Research Professor of History, University of Georgia; Daniel Lyons Visiting Professor of Democratic Institutions, Brooklyn College, 1993-94; Ph.D., 1970, Harvard University; Liberal Arts Fellow, 1986-87, Harvard Law School.

[1] Elias Clark, *Memories of My Father, in* JUDGE CHARLES EDWARD CLARK 153, 156 (Peninah Petruck ed., 1991).

[2] Myres S. McDougal, *Reminiscence of Charles Edward Clark, in* JUDGE CHARLES EDWARD CLARK, *supra* note 1, at 171, 171-78.

[3] *Compare* CHARLES E. CLARK & HARRY SHULMAN, A STUDY OF LAW ADMINISTRATION IN CONNECTICUT (1937) (report on a 1926 study of divorce, auto accidents and other claims as they moved through the state courts of Connecticut) *and* CHARLES E. CLARK, THE BUSINESS OF THE FEDERAL COURTS (1934) (a study of federal civil and criminal dockets in thirteen districts) *with* DAVID M. TRUBEK ET AL., CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT (1983) *and* NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, ANNUAL REPORT (Williamsburg, Va., National Court Statistics Project, 1980).

[4] *See, e.g.*, CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 23-38 (1st ed. 1928) (code pleading in need of reform, particularly at the federal level); Charles E. Clark, *The Union of Law and Equity*, 25 COLUM. L. REV. 1 (1925) (failure to fully merge law and equity defeats justice on the merits of the case); Charles E. Clark & James W. Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387 (1935) (the revision of federal court procedure

modern compulsory automobile insurance.[5]

As Dean of Yale Law School throughout the New Deal—a time when law professors left their classrooms and worked the levers of power in Washington, D.C.[6]—he had a voice in every hiring, every course proposal, and every post-doctoral award,[7] and continued to express his opinions when he moved five blocks from the Sterling Law Buildings to the Federal Post Office to sit on the Second Circuit Court of Appeals.[8]

From 1939 until his death in 1963, Judge Clark remained highly visible—no retiring behind the bench for this court's resident educator. Indefatigable as ever, he gave addresses at law schools,[9] taught in the summers, made important contributions to judicial conferences,[10] and fought against the Red Scare tactics of the McCarthyites.[11] By the end of his career, Clark was regarded as a giant by his former

---

permitted by the Rules Enabling Act of 1934 must not stop at revision of the law docket, but should fully integrate law and equity). Clark made this prediction come true, for he became reporter of the draft prepared by the Advisory Committee for the new Federal Rules of Civil Procedure. *See* ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, FINAL REPORT (1937). Clark himself told the story of the Rules' drafting. *See, e.g.*, CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 31-71 (2d ed. 1947) (celebrating the achievement of the Advisory Committee); Dean Charles E. Clark, The Challenge for a New Federal Civil Procedure, Address at the American Judicature Society Annual Meeting (May 8, 1935), *in* 19 J. AM. JUDICATURE SOC'Y 8 (1935) ("stimulated thereto by the intelligent leaders of the bar and even more by the enlightened pressure exerted by the lay public," the Supreme Court and Congress agreed to long-awaited reforms); Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976 (1937) (progress reports to the American Bar Association on the activities of the Advisory Committee); Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447 (1936).

For variant critical readings of Clark's tale, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 132 U. PA. L. REV. 1015, 1132-37 (1982); Peter C. Hoffer, *Text, Translation, Context, Conversation: Preliminary Notes for Decoding the Deliberations of the Advisory Committee That Wrote the Federal Rules of Civil Procedure*, 38 AM. J. LEGAL HIST. (forthcoming 1994); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

[5] *See, e.g.*, Charles E. Clark, *A Compensation Plan for Injuries from Automobile Accidents*, BULLETIN OF THE NEW HAVEN COUNTY BAR ASS'N 4-6 (Oct. 1932).

[6] *See, e.g.*, PETER H. IRONS, THE NEW DEAL LAWYERS (1982).

[7] *See* LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960, at 115-40 (1986).

[8] Eugene V. Rostow, *Charles E. Clark and Yale Law School*, *in* JUDGE CHARLES EDWARD CLARK, *supra* note 1, at 187, 187-91.

[9] YALE LAW LIBRARY, PUB. NO. 16, *Charles E. Clark, 1889-1963: A Bibliography* (compiled by Solomon C. Smith 1968), listing fifteen lectures and addresses made at Law School and Bar functions between 1940 and 1963.

[10] *See* PETER G. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 170 (1973).

[11] MARVIN SCHICK, LEARNED HAND'S COURT 282-84 (1970); Kerry A. Brennan & Jeffrey B. Morris, *To Be 'Right on Time': Judge Charles E. Clark, The House Un-American Activities Committee and* U.S. v. Josephson, *in* JUDGE CHARLES EDWARD CLARK, *supra* note 1, at 23, 23-44.

students and his colleagues on the bench and in the legal academy.[12]

Strangely enough, Clark has virtually disappeared from modern scholarly accounts of this exciting period of our legal history. How could he have vanished? Once so visible, he no longer seems important in the stories we tell about legal realism and New Deal jurisprudence. He was not included in the *Dictionary of American Biography*[13] volume that covered his years, and there was no place allotted to him[14] in the planned *American National Biography*,[15] though popular musicians like Janis Joplin are to be included.[16] Legal realism is a hot subject—witness that Morton Horwitz's long-awaited *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy*[17] has devoted three of its nine chapters to the subject—but Clark is mentioned only twice: in a 1930 list of legal realists by Karl Llewellyn, and in an endnote.[18] In a collection of realist writings recently edited by William W. Fisher III, Horwitz, and Thomas A. Reed, there is nothing authored by Clark.[19]

The plot thickens; Clark's realist contemporaries fill the pages of articles and books. His Harvard Law School rivals, Felix Frankfurter[20] and Roscoe Pound[21] (who denied being realists, but were in fact the precursors of realism) are major figures for scholars. His real-

---

12 *See, e.g.*, PROCEDURE—THE HANDMAID OF JUSTICE: ESSAYS OF JUDGE CHARLES E. CLARK (Charles A. Wright & Harry M. Reasoner eds., 1965); William O. Douglas, *Charles E. Clark*, 73 YALE L.J. 3 (1963); Fred Rodell, *For Charles E. Clark: A Brief and Belated but Fond Farewell*, 65 COLUM. L. REV. 1323 (1965).

13 DICTIONARY OF AMERICAN BIOGRAPHY (John A. Garraty ed., Supp. III-VIII 1973).

14 Telephone Interview with Michael R. Kornegay, Senior Projects Editor, AMERICAN NATIONAL BIOGRAPHY (May 7, 1993).

15 AMERICAN NATIONAL BIOGRAPHY (Oxford University Press forthcoming).

16 *See* Revised Instructions for Contributors, AMERICAN NATIONAL BIOGRAPHY, *supra* note 15.

17 MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992).

18 *Id.* at 181, 312-13 n.85 (giving capsule biographies of the realists named by Llewellyn in 1930).

19 AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993). Four articles by Clark are included in the "primary sources bibliography."

20 For a recent work, see MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES (1991). There are over a dozen other books on Frankfurter, and still more editions of his writings, opinions, and reminiscences.

21 Recent articles on Pound include N.E.H. Hull, *Networks and Bricolage: A Prolegomenon to a History of Twentieth-Century American Academic Jurisprudence*, 35 AM. J. LEGAL HIST. 307 (1991) [hereinafter *Networks & Bricolage*]; N.E.H. Hull, *Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange over Legal Realism*, 1989 DUKE L.J. 1302 [hereinafter *Reconstructing the Origins of Realistic Jurisprudence*]; N.E.H. Hull, *Some Realism About the Llewellyn-Pound Exchange over Realism: The Newly Uncovered Private Correspondence, 1927-1931*, 1987 WIS. L. REV. 921 [hereinafter *Some Realism About the Llewellyn-Pound Exchange*]; N.E.H. Hull, Vital Schools of Jurisprudence: Roscoe Pound and Wesley N. Hohfeld (unpublished manuscript, on file with author).

ist colleague on the Second Circuit bench, Jerome Frank, is the subject of three books,[22] and around Karl Llewellyn, a legal realist who often sought Clark's aid,[23] a cottage industry has grown.[24] The legal realists with whom Clark worked at Yale (notably Abe Fortas[25] and William O. Douglas[26]) are regarded as either heroes or villains by later generations, while Clark—a dedicated controversialist recognized by his contemporaries as a key player in realist academic drama—has receded into the shadows of the story's edge.[27]

One can propose hypothetical solutions to the mystery. Clark would have liked to sit on the United States Supreme Court and

---

22 *See* ROBERT J. GLENNON, THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW (1985); JULIUS PAUL, THE LEGAL REALISM OF JEROME N. FRANK: A STUDY OF FACT-SKEPTICISM AND THE JUDICIAL PROCESS (1959); WALTER E. VOLKOMER, THE PASSIONATE LIBERAL: THE POLITICAL AND LEGAL IDEAS OF JEROME FRANK (1970).

23 Llewellyn consulted with Clark about the realist movement and saw Clark as a critical ally in a campaign to establish legal realism and discredit Llewellyn's former mentor, Roscoe Pound. Pound had written an article attacking Llewellyn and the realists. Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931). Llewellyn ran for aid to heavy hitters like Clark. See Clark's reply to Llewellyn: "I have your call for help as against Pound. I am not fully convinced whether the game is worth the hunt and whether you are not overdignifying the article by replying. In any event, I think there probably should be no joint reply from all 'realists' but perhaps if you and Mr. Frank do it alone, that may be sufficient." Letter from Charles E. Clark to Karl N. Llewellyn (Mar. 31, 1931), *in* KARL LLEWELLYN PAPERS, Indexed at A.II.65.b (University of Chicago).

24 In addition to William Twining's biography of Llewellyn, WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973), in the last decade alone, Llewellyn has received considerable acclaim. *See, e.g.*, Michael Ansaldi, *The German Llewellyn*, 58 BROOK. L. REV. 705 (1992); John B. Clutterbuck, *Karl Llewellyn and the Intellectual Foundations of Enterprise Liability*, 97 YALE L.J. 1131 (1988); Ingrid M. Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve The Good, The True, The Beautiful in Commercial Law*, 73 GEO. L.J. 1141 (1985); Hull, *Reconstructing the Origins of Realistic Jurisprudence*, *supra* note 21; Hull, *Some Realism About the Llewellyn-Pound Exchange*, *supra* note 21; Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 169 (1989); Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561 (1992); James Whitman, *Commercial Law and the American* Volk: *A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987); Zipporah B. Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987); Chris Williams, *The Search for Bases of Decision in Commercial Law: Llewellyn Redux*, 97 HARV. L. REV. 1495 (1984) (reviewing LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW (1983)).

25 *See, e.g.*, LAURA KALMAN, ABE FORTAS: A BIOGRAPHY (1990); BRUCE A. MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE (1988).

26 *See, e.g.*, THE DOUGLAS LETTERS (Melvin I. Urofsky ed., 1987).

27 *See, e.g.*, GRANT GILMORE, THE AGES OF AMERICAN LAW (1977) (Clark is missing from the chapter on legal realism—and Gilmore taught at Yale!); ALAN HUNT, THE SOCIOLOGICAL MOVEMENT IN LAW 160 (1978) (mentioning Clark only in an endnote); WILFRID E. RUMBLE, JR., AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS 21 (1968) (the only reference to Clark in the entire book is in a list of realists who did empirical research).

although his friends certainly thought that he merited that honor,[28] others were chosen. Supreme Court justices are the subjects of books, but this road to fame eluded Clark. The other realists wrote popular books—Frank's *Law and the Modern Mind*[29] and Llewellyn's *The Bramble Bush*[30] were instant blockbusters. Some of their more mature works, notably Frank's *Courts on Trial*[31] and Llewellyn's *The Common Law Tradition: Deciding Appeals*,[32] are still classics. Clark's *Cases on Pleading*[33] and other casebooks on partnership and real covenants were marvelous examples of their kind, but hardly spread his fame abroad. He had a deuce of a time getting his more original books, *A Study of Law Administration in Connecticut*[34] and the American Law Institute (A.L.I.) study, entitled *The Business of the Federal Courts*,[35] published at all.[36]

Such are the contingencies of anyone's life; surely Clark's turn for reassessment is on its way—if one discounts clues suggesting that Clark's day in the historians' accounts has already come and gone. In the 1970s and early 1980s, scholars examined the voluminous Clark Papers at Yale and concluded that Clark's energy was dissipated without much result.[37] Laura Kalman's fine *Legal Realism at Yale, 1927-1960*[38] devoted almost thirty pages to Clark's deanship at Yale, and found that Clark failed to transform education there.[39] Her reviewers, notably John Henry Schlegel, another student of legal realism at Yale, agree.[40]

In an earlier piece, Schlegel's condemnation of Clark's contribu-

---

28 Interview with Myres McDougal, Sterling Professor of Law Emeritus, Yale Law School, New Haven, Conn. (July 1, 1991); Interview with Elias Clark, Lafayette S. Foster Professor of Law, Yale Law School, New Haven, Conn. (July 1, 1991).

29 JEROME FRANK, LAW AND THE MODERN MIND (1930).

30 K.N. LLEWELLYN, THE BRAMBLE BUSH (1930).

31 JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949).

32 KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

33 *See, e.g.*, CHARLES E. CLARK, CASES ON PLEADING & PROCEDURE (2d ed. 1940).

34 CLARK & SHULMAN, *supra* note 3.

35 CLARK, *supra* note 3 (prefatory note).

36 *See* John H. Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459, 495-516 (1979).

37 The Charles E. Clark Papers at Yale University's Sterling Library comprise nearly 200 boxes of material. These boxes include letters, reports, case notes, drafts of articles, talks, memorabilia from Clark's days as a lawyer (1913-1919), professor (1919-1929), dean (1929-1939), and judge (1939-1963), as well as family papers. I am grateful to Judith Schiff and William Massa, Jr., archivists, for giving me permission to use the papers and for guiding me through them.

38 KALMAN, *supra* note 7.

39 *Id.* at 115-44.

40 John H. Schlegel, *The Ten Thousand Dollar Question*, 41 STAN. L. REV. 435 (1989) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986)).

tion was sharper and more damaging. Schlegel declared that Clark was "virtually shell-shocked"[41] by the variety of criticisms of his empirical work. His reliance on factual studies left him open to the barbs of the progressive reformers and his advocacy of progressive reforms in legal procedure annoyed more conservative members of the bar and bench. Clark became "confused" by the discordance of voices and could not combine the activism that went with legal advocacy—even when such activism supported the very reforms he wanted—with the objectivist canon of emerging social scientific research. Befuddled, Clark lost interest in key projects.[42]

It is entirely possible that Clark does not receive a due measure of recognition for his leadership at Yale because he left prematurely, at a critical moment in its history. Certainly his plans for the reform of legal education were cut short by his decision to accept a position on the bench. He had hesitated to accept an earlier call for fear his job at Yale remained unfinished,[43] but when the chance came to sit on a bench with Learned and Augustus Hand, Clark agreed. Had he fled from Yale because he saw his plans in disarray? Granted, human and financial resources were drained from the Law School by the Depression and the departure of Douglas, Sturges, Fortas, and other faculty to New Deal posts, and Clark alone could not staunch the wound. Although he kept his hand in law school affairs, without a formal position he could influence the course of events only through the good offices of others.

The problem with the critical assessments of Dean Clark's importance—the reason why they deepen the mystery rather than resolve it—is that they concede that Clark was the center of a beehive of activity and then minimize his long-term contribution to that activity. In fact, Yale Law School and legal realism were never the same without him.

At the same time that his work at Yale has been marginalized, Clark's contributions as a judge to substantive law and judicial administration have all but been ignored. Clark was a craftsman on the bench—his opinions were always prompt and never unprofessional[44]—but Clark's work on the bench has been cited for partisanship,[45] and his relations with the other judges have been criti-

---

41 Schlegel, *supra* note 36, at 515.

42 *Id.* at 518.

43 Clark, *supra* note 1, at 159.

44 Richard D. Cudahy, *Recollections of a Clerkship*, *in* JUDGE CHARLES EDWARD CLARK, *supra* note 1, at 165-66; Ellen A. Peters, *Chief Judge Charles E. Clark and His Court, 1954-1955*, *in* JUDGE CHARLES EDWARD CLARK, *supra* note 1, at 179-80.

45 Michael E. Smith, *Judge Charles E. Clark and The Federal Rules of Civil Procedure*, 85

cized.[46] The Second Circuit was burdened with appeals of income tax cases, tugboat and barge collisions, bankruptcies, labor disputes (principally appeals from decisions of the NLRB), federal crimes, and Clark's favorites—questions of federal civil procedure.[47] Clark made his way through these cases with skill and dispatch, but he did not choose to write in striking prose or with grandiose turns of phrase. He eschewed the posturing of Frank,[48] and lacked the literary gifts of Learned Hand.[49]

Instead of strewing his opinions with quotes from Aristotle or grand formulations of natural rights, Clark tried to get behind the pleadings on appeal to the actual relationships of the parties and the real damages they had suffered. He spent considerable time and effort on management of the circuit judicial councils, but the influence of these councils on their districts, and by implication, his influence in this area of judicial administration, has been questioned in the standard work on federal judicial administration.[50]

Students of legal procedure, the technical field in which Clark made his most lasting impression, have recognized the significance of his role,[51] but the most recent scholarship has found fault with Clark's program. Stephen Subrin has taken issue with Clark's vision of equitable adjudication,[52] Judith Resnik has criticized Clark's commitment to judicial discretion,[53] and Stephen Burbank has found that Clark played fast and loose with Congress and the High Court in his interpretation of the Rules Enabling Act of 1934.[54] In truth, Clark failed to anticipate that the Rules' introduction of wide-ranging discovery procedures,[55] broad judicial discretion in pre-trial conferences and summary judgment, and other innovations might simultaneously

---

YALE L.J. 914 (1976) (Clark never cut loose from his authorship of the Rules to act as a dispassionate judge in cases that involved procedural questions.).

46 SCHICK, *supra* note 11, at 247-304.

47 Clark wrote slightly over 1000 opinions while he sat on the Second Circuit Federal Court of Appeals. The bibliography of these opinions compiled by Solomon C. Smith, *supra* note 9, shows that the most numerous classes of cases on which he wrote were admiralty, bankruptcy, criminal law, federal civil procedure, labor law, and taxation.

48 GLENNON, *supra* note 22, at 129-63.

49 SCHICK, *supra* note 11, at 16.

50 FISH, *supra* note 10, at 404-09.

51 *See* Hoffer, *supra* note 4.

52 Subrin, *supra* note 4, at 961-73.

53 Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 502-07 (1986).

54 Burbank, *supra* note 4, 1136-37.

55 Although these were not actually his doing, they were prepared and sponsored by his colleague on the Advisory Committee, Edson Sunderland. *See* Stephen N. Subrin, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, *in* JUDGE CHARLES EDWARD CLARK, *supra* note 1, at 115, 149.

inflate litigation rates and delay adjudication on the merits.[56]

The volume under review here attempts to unravel the mystery of Clark's diminishing importance. Its publication was a celebration of Clark's 100th birthday. The occasion was fitting; as Elias Clark recalled, his father loved a good party.[57] Peninah Petruck, Associate Circuit Executive, has assembled in *Judge Charles Edward Clark* a variety of assessments of the labors of Clark by those who knew him well and those who studied his public life. The book, however, only deepens the mystery, for half of its contributors write as though Clark continues to loom large in history while the other half explain why Clark should remain a minor figure.

In 1989, the Second Circuit Executive, Steven Flanders, with the guidance of the Circuit Historical and Commemorative Events Committee and the full support of Chief Judges Wilfred Feinburg and James L. Oakes, arranged for the Circuit to display a Clark exhibit. The exhibit subcommittee under Judges Lawrence W. Pierce and Roger J. Miner, successive chairs, asked Lisa Greenberg to design the display and Petruck to edit the commemorative essays. The exhibit went on display in 1991. The essays prepared for the commemorative volume arrived later, the book was published a year after that, and copies were sent to law reviews sometime later still. While this time span suggests due reverence to the importance of the man and his celebration, Clark himself would have been displeased at the pace.[58]

The exhibit in the foyer of the federal courthouse in Foley Square, located in lower Manhattan, was a striking one. Clark had indeed become visible—a life-size photograph of him and his predecessor as dean at Yale, Robert Maynard Hutchins, dominated the entryway. Clark's career as dean and judge unfolded in a series of panels, with separate treatment of some of his most important cases.

It was a magnanimous tribute, but the choice of location again reflects a divided view of Clark's proper place in history. Clark travelled to the metropolis often and sat on panels there, but his office and his own court for most of his tenure were in the post office facing the

---

[56] These are many of the complaints denoted in RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985), but they are not original to him. *See, e.g.*, Robert H. Bork, Dealing with the Overload in Article III Courts, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), *in* 70 F.R.D. 231 (1976); Warren E. Burger, Isn't There a Better Way?, Annual Report on the State of the Judiciary Given at the American Bar Association Midyear Meeting (Jan. 24, 1982), *in* 68 A.B.A. J. 274 (1982).

[57] Clark, *supra* note 1, at 153.

[58] This is true even though many contemporary scholars would regard the pace as very prompt indeed, considering that projects such as this depend on the input of dozens of individual participants.

village green in New Haven. From his office window he could see the old law building, Hendrie Hall, where he had begun his teaching career, and beyond it the tops of the spires of the new Sterling law buildings, inaugurated during his deanship. He worked in the shadow of Yale, literally and figuratively. Though he loved to travel and crisscrossed the country in his sedan, he always returned to Yale. He ate in its clubs, attended talks by its faculty and distinguished visitors, and taught as an adjunct professor as long as he could manage the time. As a New Englander through and through, Clark did not truly belong in the foyer of the massive, high-rise courthouse where the exhibit was displayed, although that place arguably enabled a greater audience to see it and join in the commemorative event.

The volume of essays, edited by Petruck, is slender (207 pages). Petruck divided the volume into two parts, the first featuring essays on Clark's contributions to law and legal education by Carl Baar and Steven Flanders (Clark and quantitative studies of courts), Kerry A. Brennan and Jeffrey B. Morris (Clark's dissent in *United States v. Josephson*[59]), Arthur J. Jacobson (Clark's opinion in *Parev Products Co. v. I. Rokeach & Sons*[60]), Quintin Johnstone (Clark's opinion in *165 Broadway Building, Inc. v. City Investing Co.*[61]), John Henry Schlegel and David M. Trubek (Clark and legal education at Yale), and Stephen N. Subrin (Clark and procedural reform).

The substantive essays treat complex subjects in readable ways, with little annotation or citation of authorities. For those of us who labor through the 200-300 odd footnotes of the average law review article (I exaggerate only a little for effect) these essays are a refreshing relief. However, Clark gets shortchanged by the paucity of citations and close textual analysis. Clark revelled in the gathering of raw data and believed that properly sorted and arrayed data would spill out its secrets to the world. In his procedural writings, he demanded that courts get to the facts behind the pleadings and hear the voices of the parties that were too often drowned out by the voices of counsel. Clark wanted texture, and bare bones accounts cannot do him justice.

Nevertheless, the case notes in Part I are well-chosen, and that was not easy, for even in his most innovative opinions—opinions in which he made law—Clark refused to grandstand. A powerful advocate of free speech and democratic process, he dissented from his brethren in a series of Smith Act contempt cases. The man who emerges from the Brennan and Morris essay on the *Josephson* case is

---

[59] 165 F.2d 82 (2d Cir. 1947).
[60] 124 F.2d 147 (2d Cir. 1941).
[61] 120 F.2d 813 (2d Cir. 1941).

the man of principle and courage that his clerks and colleagues remember.[62] Jerome Frank, the great liberal, went along with the herd.[63]

Jacobson's essay on Clark's opinion in *Parev Products*, a complicated licensing case, is similarly revealing.[64] Clark wanted equitable solutions to business disputes; he wanted to enable ongoing relationships to survive when both parties benefitted from them. As Jacobson suggests, this foreshadowed a "law and economics" solution to the dispute, in effect a Pareto optimality (although Jacobson spares his readers that precise formulation). Clark silently borrowed the term "relational" from his colleague Jerome Frank for a theory of contracts that combined the reality of business practices with the ideal of good faith dealings embodied in equity.[65] Both the law-and-economics style of reasoning and the idea of relational contracts have fully arrived today, making Clark the founder of two movements.

Clark's penchant for dissent, demonstrated in *Josephson*, and his willingness to invent, apparent in *Parev Products*, were joined with an inclination to educate, as illustrated by his opinion in *165 Broadway Building*. According to Quintin Johnstone, the key issue was whether the benefits of a real estate covenant were to flow to the successor in interest of one of the parties or to the original parties to the agreement.[66] Clark held, over the objections of one of his brethren and the opposition of the reporter of the *Restatement of Property*, that covenants that ran with the land were equitable servitudes and followed each holder in course.[67] Thus, the reimbursement for removing an archway from a building to an elevated rail line went to the current owner of the building, not to the original owner's receiver in bankruptcy. In *165 Broadway Building*, Clark changed old law to fit the policy for which he argued in articles and his casebook on real covenants. Belatedly, the *Restatement (Third) of Property* appears to be coming around to his point of view.[68] Again, Clark seems to have been ahead of his time.

The three remaining substantive essays—the most ambitious

---

62 Brennan & Morris, *supra* note 11, at 23-44.

63 *See, e.g.*, United States v. Sacher, 182 F.2d 416, 453 (2d Cir. 1950) (Frank, J., concurring).

64 Arthur J. Jacobson, *The Equitable Administration of Long-Term Relations: An Appreciation of Judge Clark's Opinion in* Parev Products, *in* JUDGE CHARLES EDWARD CLARK, *supra* note 1, at 45-66.

65 *Id.*

66 Quintin Johnstone, *The Academic as Judge:* 165 Broadway Building, Inc. v. City Investing Co., *in* JUDGE CHARLES EDWARD CLARK, *supra* note 1, at 67-80.

67 *Id.* at 71-77.

68 *Id.* at 78-79.

pieces in the collection—come together to focus upon the 1930s in a kind of triangulation, to explain why Clark has not emerged as an important figure in modern scholarship. They reinforce and expand upon the clues in the case notes, but paradoxically reach the opposite conclusion from Brennan, Morris, Jacobson, and Johnstone. The first of these is the Baar and Flanders piece entitled *False Start? Charles Clark and the Quantitative Study of Judicial Administration*.[69] Their thesis is simple and plausible: Clark's attempts to quantify the flow of cases and analyze their outcomes were ahead of their time, and for that reason, failed to make a mark.

Baar and Flanders recognize the substantive conclusions of the *Business of the Federal Courts* and report that Clark and his staff had in fact discovered important patterns in the enforcement of law. The most important of these was the emergence of an innovative-looking pattern of plea bargaining, in which federal courts appeared more administrative than juridical. This was exactly what Clark found when he studied the Connecticut courts. Unfortunately, "[w]hen Clark's quantitative work flourished, neither law nor social science provided theoretical perspectives or a community of scholars sufficient to sustain or reap the benefits of a continuing program of original empirical research."[70]

Baar and Flanders concluded that it was Clark's misfortune to be in front. After the data for his study of the business of the federal courts was gathered, transferred to Hollerith cards, and collated (Baar and Flanders fail to note that these were techniques that Clark had pioneered five years earlier in his Connecticut study and explained in a series of short publications), there was little extant in the literature to help Clark and his associates interpret the data; such interpretations were ultimately not attempted. Staff was drawn away to other projects. The early enthusiasm of advisors like Douglas and Arnold was misplaced. The realist empirical program was itself too fragile to transform the study of law.[71]

One cannot fault Baar and Flanders for ignoring the voluminous correspondence that Clark kept on the project[72] or the papers that the

---

69 Carl Baar & Steven Flanders, *False Start? Charles Clark and the Quantitative Study of Judicial Administration*, *in* JUDGE CHARLES EDWARD CLARK, *supra* note 1, at 1.

70 *Id.* at 2.

71 *Id.* at 7, 18, 20-22.

72 Correspondence (Charles E. Clark Papers, Yale University Sterling Library, box nos. 76 & 77). To be fair, Clark may have raised some of these obstacles himself. He did not handle criticism well, and some of his responses to it have a passive aggressive quality. They seem to say: "Yes, I'll concede the point, but with bad grace and foot dragging." He sent copies of preliminary reports to batches of readers, subtly impelling them to put aside their own work to comment on his. For example, he mailed a draft of the report on the civil business of the

A.L.I. has on the project.[73] They are not professional historians, and their other duties would have precluded the tedious research in which historians revel. Nevertheless, as N.E.H. Hull has argued, such archival research is essential to the full understanding of our legal past.[74] What emerges from this correspondence is the vast complexity of the task Clark and his cohorts faced.[75]

Absent the manuscript correspondence, Baar and Flanders cannot truly appreciate the difficulty Clark had holding together a far-flung information gathering staff, coordinating its efforts with his post-docs and colleagues at Yale (imagine getting Thurman Arnold to focus on any one thing), and producing a finished product that would please George Wickersham[76] and the A.L.I. committee of Judges Learned Hand and William Grubb, and Monte Lemann, the lone dissenter on the Wickersham Commission on the one hand, and Clark's own assemblage of unofficial advisors, led by liberal critics of Wickersham like Arnold and Douglas, on the other.[77] And all this in the midst of the Depression, when funding for such projects had all but disappeared.

David Trubek and Jack Schlegel relate a story on legal education with an even more "unhappy ending," again because Clark was ahead of his time. At Yale,

> Clark developed a bold program for reorienting legal scholarship and transforming legal education. At its core was the idea that legal scholarship should move from the study of appellate cases to empirical inquiry into law and social problems. . . . As dean, he

federal courts to twenty-two law school students. Letter and Report from Charles E. Clark to "Dear ————", law student (Sept. 1, 1933), *id.* at box no. 77. Most of them replied, a few with criticisms or suggestions. Clark then had to deal with these replies.

73 William Draper Lewis and George Wickersham, Director and President, respectively, of the A.L.I. kept copies of all correspondence relating to the project during this period. These can be found at the A.L.I. library in Philadelphia at 40th and Chestnut Streets. My thanks to Paul Wolkin, Emeritus Executive Director, for allowing me to see these materials.

74 Hull, *Networks & Bricolage*, *supra* note 21, at 309-10.

75 I should report that my reading of these letters differs sharply from Schlegel's in *Legal Realism*. Which of our stories is true? is the wrong question; it is rooted in a delusion of scholarly omniscience and a longing for definitive accounts that can only mislead. Instead we should ask what the multiplicity of possible narratives reveals about human actions, about Clark and his staff, and the A.L.I.

76 Clark knew from the outset that "we must play in with the Wickersham com[mittee]." Letter from Charles E. Clark to William O. Douglas, Professor, Yale Law School (Aug. 8, 1931) (Douglas Papers, Library of Congress, box no. 3).

77 *See, e.g.*, Letter from Charles E. Clark to Monte Lemann (Mar. 10, 1933) (Learned Hand Papers, Harvard Law School, box no. 116, folder no. 13) (Clark unsure how to proceed given Lemann and other's criticisms of the report); Letter from Thurman Arnold to Charles E. Clark, Clark Papers, box 77 (Aug. 5, 1993) (criticizing fellow workers Clark and Douglas for incautiously including voluntary and involuntary dismissals in the same category).

inscribed empiricism on the banner of the Yale Law School.[78]

Yet his prodigious effort came to naught. By the time he took up his judicial duties ten years later, "the school had largely turned away from empiricism."[79] Clark was so far ahead of his time that few could follow. To make matters worse, there was always a traditionalist opposition which Clark lacked the leadership skills to overcome.[80]

Schlegel and Trubek do not ascribe Clark's failure to transform legal education at Yale wholly to forces beyond his control. They warn that Clark's own view of social science

> sound[ed] unbelievably naive to contemporary readers. We have come to understand that "problems" are not just out there waiting to be discovered and solved, but are created by the act of taking a state of affairs as problematic. We have come to see that "facts" are themselves social constructions; no one anymore believes that we just go out and collect facts like rocks upon a cobble beach.[81]

Clark may be forgiven this naiveté, Trubek and Schlegel continue, for these modern "understandings, commonplace today, were not available to Clark or—for that matter—to most American social scientists of his time."[82]

Schlegel has done a great deal of exciting manuscript research in the Clark papers and Trubek is an outstanding legal scholar, but here they are on the wrong track. Though Clark may be faulted for failing to revolutionize legal education—albeit such revolutions are rare in education, and those that occur in legal education are often condemned[83]—he was not naive in his view of factualism. In the first place, the idea that facts are social constructions is not so new. There was plenty of fact skepticism circulating in academic circles when Clark was engaging in his crusade. Historians called it "historical relativism," and it was very popular in the late 1920s and early 1930s. Indeed, relativist historians viewed legal realism as a major source of support for historical relativism.[84] Both Frank and Llewellyn were

---

78 John H. Schlegel & David M. Trubek, *Charles E. Clark and the Reform of Legal Education*, *in* JUDGE CHARLES EDWARD CLARK, *supra* note 1, at 81.

79 *Id.* at 81.

80 *Id.* at 104.

81 *Id.* at 90-91.

82 *Id.* at 91.

83 For example, the case method-socratic dialogue revolution wrought by Christopher Columbus Langdell and James Barr Ames at Harvard Law School has come under attack from many modern scholars. *See* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 51-72 (1983); *see also* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

84 PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION 145-50 (1988).

fact skeptics early in their careers, and could often be found on weekends in the early 1930s lounging on the front steps of Hendrie Hall at Yale.[85] Clark knew them and their thinking well.

Second, it is patronizing, misleading, and just plain wrong to call Clark naive in his determination to argue from "facts." He opted for a progressive-pragmatic rhetoric of "facts," arguing that facts speak for themselves while guilefully manipulating data into a configuration that he sought to present.[86] He knew how to make facts argue, explain, and narrate. There is no particular reason to regard Clark's rhetorical strategy as inferior to the post-modernism *some* scholars (not all, or even, I suspect, the majority) now espouse.[87] Most historians, for example, still believe that facts are real and can be found through diligent inquiry.[88]

Having accused Clark of naiveté, Schlegel and Trubek admit that he shifted emphasis in his teaching to areas where the application of doctrines and rules in the real world would have an effect, particularly in the areas of civil procedure and contracts. Unfortunately, they continue, Clark failed "to integrate the research he and his Yale colleagues had done on civil procedure in his own teaching materials for this basic first year course."[89] Clark was fully aware of modern conditions and incorporated these in his casebook, yet he did not add his own research findings to his casebooks. Schlegel and Trubek indict

---

85 Interview with Myres McDougal, *supra* note 28.

86 On the power of facts in the progressive viewpoint, see THOMAS BENDER, NEW YORK INTELLECT: A HISTORY OF INTELLECTUAL LIFE IN NEW YORK CITY, FROM 1750 TO THE BEGINNINGS OF OUR OWN TIME 302-08 (1987).

87 For the post-modernist historian, there is no "history," only histories—stories that people relate about their idea of what happened in the past. Some of these stories are privileged over others. Professional historians privilege the stories of other professional historians, described in an unkindly manner by Keith Jenkins as "a group of labourers" whose job it is to use "technical vocabularies" to talk to each other in conventional rarified discourses. KEITH JENKINS, RETHINKING HISTORY 21 (1991). What many of these historians will not admit is that the "past" is only a congeries of stories—narratives if you will—all of which must and do coexist in the present. In a gentler voice, Tim Breen admits that the professional historian ought to have no more claim to objectivity, for the "pretense of neutrality" is a species of "intellectual dishonesty." History is "fundamentally an interpretive exercise, a sorting out of conflicting perceptions and an appreciation of the narratives that humans have always invented to make sense out of their lives." T.H. BREEN, IMAGINING THE PAST: EAST HAMPTON HISTORIES 14 (1989).

88 *See, e.g.*, C. BEHAN MCCULLAGH, JUSTIFYING HISTORICAL DESCRIPTIONS (1984), arguing that there is a "then" which we can know; historical truth is attainable given some basic assumptions. McCullagh does not call this history scientific, rather he describes it as positivist and empirical.

89 Schlegel & Trubek, *supra* note 78, at 97. But Clark's lectures *did* incorporate some comments on social policy, his own research on Connecticut juries, and modern theories of "fact." *See* Louis Loss, Lecture Notes from Clark's Civil Procedure Course, Yale Law School, at 48, 87, 95-96 (1935-36) (on file with author).

Clark for his failure to anticipate the fullness of the "Law and Society" approach that forty years later, "one of us" (Trubek)[90] pioneered. In the end, Clark falls short of the mark because he did not recognize what would happen forty years later in a small corner of the legal academic world.

In the third of these essays, Stephen Subrin returns to the theme and materials of his *How Equity Conquered Common Law* and revises some of his earlier positions on Clark and the Federal Rules of Civil Procedure.[91] Subrin, too, documents Clark's maneuvering for advantage on the Advisory Committee. While Clark's self-serving perseverance is unquestionably disquieting, as long as the full merger of law and equity hung in the balance, Clark was unwilling to risk his long campaign for merger to someone else, even to his respected friend Edson Sunderland. Admittedly, it is not easy for a person to pass the strings of his or her life into the hands of another. By 1935, however, Clark had been dean at Yale for six years, and deans must learn either to be manipulative or resign themselves to merely presiding over their faculties. Clark was a consummate administrator and, in my experience, effective administrators must always pull strings. Subrin does not fully appreciate these facts, but his unflattering portrait still has bite.

Subrin believes that the Rules have become an unwieldy invitation to delay and misconduct by counsel, but now concedes that Clark would have seen the problems himself and worked to correct them. Clark was not the advocate of such misuse of rules, but

> wanted a procedure that would help cases get to the merits. His current legacy may be a procedure that insists it has failed if cases get to the merits by trial in open court. Rededication to Clark's goal of creating a procedure that aids, rather than hinders, the vindication of substantive rights is an appropriate memorial gift a century after his birth.[92]

Clark just did not see how his Rules would be warped by judges who were too disciplinary or managerial.

Subrin's criticism is off the mark, for the modern judge-manager is a response not to the inherently tyrannical tendencies of the Federal Rules, but to the rise of complex party structure, mass torts, and liti-

---

90 Schlegel & Trubek *supra* note 78, at 111 (citing David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 4, 6 (1990) ("The notion that law can be conceptualized as a social process and studied in the context of society as a whole using methods of the social disciplines: I mean the reconceptualization of law in ways that make it amenable to study by the social sciences.").

91 Subrin, *supra* note 55.

92 *Id.* at 152 (footnote omitted).

gation in antitrust and patent infringement cases unseen in the 1930s. Even if Clark were to agree that such slow-track cases made transubstantive rules problematic, he would not have wanted less judicial discretion. Instead, one can see Clark supporting recent efforts to allow judges to differentiate cases and allot time and space in the docket to them accordingly.[93] He trusted judicial discretion, not because he thought that judges would have his own "knowledge, discipline, courage, and social conscience,"[94] but rather because he realized that most disputants have some claim of right. Clark's empirical research had taught him what he already experienced in his own practice of the law—that both sides in most cases have reason to be aggrieved. Justice on the merits was not a perfect abstract solution that the Solomonic judge could discern, but an administrative process of bringing people together to solve their problems. Letting cases go to trial, where the sporting instincts of counsel could display themselves, did not lead to justice, just expensive theater.

The second section of the book features personal reminiscences by Clark's son, Elias, his former colleague, Myres S. McDougal, his successor as dean at Yale, Eugene Rostow, and three former clerks, Richard D. Cudahy, Ellen A. Peters, and Charles Alan Wright. According to Wright, these reminiscences were to be short vignettes or personal anecdotes.[95] One can understand why these instructions were issued; but, they were as mistaken as the policy of limiting annotation in the first section of the book. The essence of Clark was a rich texture of words—words he spoke and words he wrote. He was not given to pithy one-liners or profound epigrams. The anecdotal approach thus unfairly diminishes the man.

Despite this limitation, the personal anecdotes call to mind an immensely energetic man—neat, orderly, liberal in political sentiment, conservative in social views—who took pride in his opinions and did not suffer disagreement or fools gladly. For his son, Elias, Charles Clark was a man of principle who loved the law and Yale in equal measure. Elias's father enjoyed the combat of scholarship, the tutoring of brilliant young minds, and the reform of archaic practices.

---

93 Title 1 of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. § 471 (Supp. II 1988)), commonly called the Civil Justice Reform Act of 1990, has provided for increased judicial discretion in the management of civil litigation. A number of "early implementation districts" have been authorized to plan and implement their own programs to place different kinds of litigation on specially tailored tracks "according to their needs, complexity, duration, and probable litigation careers." § 102(5)(A), 104 Stat. at 5089. Clark would have been delighted.

94 Subrin, *supra* note 55, at 152.

95 Charles A. Wright, *Charles E. Clark and the* Spector *Case*, *in* JUDGE CHARLES EDWARD CLARK, *supra* note 1, at 193.

He brooked little opposition. "In temperament and style, he was an advocate. There was a correct position to every issue. Opposing views and shadings in between were to be scorned."[96] For Richard Cudahy, "Judge Clark was a kindly and thoughtful boss—frankly a bit of a surprise to me who had known him only as a seemingly gruff and demanding teacher. . . . Clark, the Judge, was a father figure of heroic dimension. His courage was never once questioned in any circumstances by anyone."[97] Ellen Peters's recollections of a paternal figure are as vivid and as lionizing, though Judge Peters discovered another Clark: "Once, I innocently cited an opinion of Judge Frank on a procedural question—and the roof fell in. One learned."[98]

The historian reading the essays in the Petruck collection will find many clues to the mysterious disappearance of Charles E. Clark from the scholarly record, but no satisfying explanation. This is precisely because the mystery begins, not with modern law, but rather with old manuscripts. Boxes of papers that might have revealed the inside story of Clark's deanship were lost in the process of cleaning the basement of the law school library,[99] and this misfortune likely explains the "scanty record" Clark left of his "ideas for reform of legal education."[100]

The missing papers would have demonstrated that Clark was more loyal to Yale than to any abstract vision of legal education. Clark's modern critics want him to display a discernment amounting to prescience, though few administrators can afford this luxury. Instead, if they are any good at their job, they build institutional structures out of bits and pieces. Clark fought with Yale President James Angell for more money; with Harvard's Business School to create a joint legal studies program; with the trustees to liberalize Yale's policies about professional involvement in government; and with the more conservative members of his own faculty to hire more realists. In the end, however, he always stopped short of burning his bridges. He belonged at Yale, and when the fight was over, he wanted Yale better for it.

So, too, historians must piece together the lost message of the boxes of papers that Clark carefully maintained documenting his stewardship of the Court when he was its Chief Judge from 1954 to

---

96 Clark, *supra* note 1, at 160.

97 Cudahy, *supra* note 44, at 167, 170.

98 Peters, *supra* note 44, at 179, 182.

99 Interview with Morris Cohen, Librarian Emeritus, Yale Law School, New Haven, Conn. (July 10, 1991).

100 Schlegel & Trubek, *supra* note 78, at 88.

1959. These, too, cannot be located.[101] They would demonstrate Clark's attention to detail and concern for administrative efficiency, for he visualized courts not as old fashioned adjudicators of disputes over mine and thine, but as full partners in the modern administrative and regulatory state. He had no overarching vision of courts as moral reform agents—that he left to the legislatures—but he trusted well-trained and hardworking judges to monitor legislatures and administrative agencies.

The historical record of Clark's most lasting achievement, the Federal Rules, has survived.[102] But, Clark's vision of them has yet to be fully recovered. In a 1955 address to the New York City Bar Association, eight years before his death, he submitted that his advocacy of equitable forms of pleading, his belief in judicial discretion, and his support for Edson Sunderland's faith in extensive pre-trial discovery and summary judgment, were all an attempt to minimize the role of lawyers in pleading. Clark told his audience that he wanted the words of the real parties—the common language of harms and broken promises—to control the outcome of cases, not the formalities of pleading or the tricks of counsel.

> Instead of pressing for more pleading detail [Clark's long-standing quarrel with "fact pleading"] we should turn to the modern devices of pretrial, discovery, and summary judgment; for by their processes of reaching at once to the party himself, rather than to his lawyer, they may actually obtain further clarification of what did happen with respect to the concrete issues dividing the parties.[103]

A perceptive historian who might read the lost sources would notice that Clark's writing exhibits a distinct New England mentality. Though he worked with lawyers all his professional life, he never really trusted them. Just as New England legislatures once barred lawyers working for fees,[104] Clark, in the manner of a traditional New

---

101 Telephone Interview with Steven Flanders, Circuit Executive (June 8, 1993).

102 A full transcription of the deliberations of the Advisory Committee from 1935 to 1937 was deposited by Edgar B. Tolman, secretary of the Committee, with the Supreme Court. These were archived at the Suitland, Maryland facility of the National Archives. Stephen Burbank kindly directed me to this source. Through the good offices of James Macklin and Ann Gardner of the Administrative Office of United States Courts, Washington, D.C., I was able to purchase a duplicate of the transcript, all the drafts of the rules prepared by Clark and his staff, and the comments of members of the bench and bar in the various judicial circuits to those drafts, along with permission to quote from the various documents. These materials comprise over 5000 pages.

103 Charles E. Clark, *A Modern Procedure for New York*, 30 N.Y.U. L. REV. 1194, 1199 (1955). Clark told his students that code pleading was "greatly resisted by lawyers" as another strike against them. Loss, *supra* note 89, at 78.

104 PETER C. HOFFER, LAW AND PEOPLE IN COLONIAL AMERICA 41-42 (1992).

England magistrate, likewise disdained the trickery of counsel. He strove for a form of legal scholarship and education based upon his knowledge of how people actually sought redress in courts and, as a result, increased opportunities for graduate study within and without the law school. He wanted a legal procedure that both minimized the role of lawyers and maximized the roles of parties and judges.

Is there one final clue to the mystery in the New England tone of Clark's words? Could it be that we no longer really understand or admire men like him—liberal in sympathies, conservative in social tastes, strong in institutional ties, committed to the dispassionate collection of data, optimistic about the ability of government to solve problems—in these times when Critical Legal academics and American Enterprise Institute scholars-in-residence battle for the soul of the law school? Perhaps Clark must wait patiently for a new generation of scholars to unearth him from the debris of today's ideological wars.