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Goodbye to Fred Rodell

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Fred Rodell died on June 4th, leaving instructions that no funeral or memorial service be held. There is irony in the fact that the only public farewell to him should be in the pages of this *Journal*. Surely his best-known piece was *Goodbye to Law Reviews*,¹ "perhaps the most widely read—and most controversial—article in all of legal literature."² In it he brashly denounced the law reviews, and legal scholarship generally, for all of the things he found wrong about them and announced that he would no longer write for their pages. It was a gutsy thing for a 29-year-old to do, after only three years of law teaching, but the easy and safe way was never his choice. Yet a quarter century later, Fred himself confessed, somewhat apologetically, that he had not quite lived up to his vow to stay out of law reviews. He explained that "most of those promise-breaking pieces were small anniversary or memorial tributes to friends, some living, some newly dead. . . ."³ Now that he is himself newly dead, perhaps he will forgive a friend for choosing the *Yale Law Journal* as the place to say goodbye.

There will be those who will not mourn his death. He managed to annoy and to make enemies of many people over the years, though the dreadful series of illnesses that beset him from 1965 on virtually ended his writing and thus his participation in public controversy. In any event, those who did not like him were people who would act on the maxim, *de mortuis nil nisi bonum*. Not so Rodell. In 1962 I asked him if he had been invited to contribute to any of the symposia that various law reviews were publishing on the occasion

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1. 23 VA. L. REV. 38 (1936).

2. Margolick, *Always The Rebel*, Nat'l L.J., May 5, 1980, at 1, 24.

3. Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279, 287 (1962).

of the retirement of his most famous target, Felix Frankfurter. He had not been asked, but went on to say: "However, if asked, I would not duck. I would keep remembering old Governor Pinchot's comment when he was asked for a statement at Senator Vare's death. What he said was, 'I thought he was an evil influence when he was alive, and I see no reason to change my view simply because he is dead.'"⁴

Those who thought Fred Rodell an evil influence while he was alive should not modify their views merely because he is dead. Certainly, to the very end Rodell himself was joyously unrepentant of the idols he had smashed and the great reputations he had sought to puncture. His famous—or to many, infamous—1939 book, *Woe Unto You, Lawyers!*, has just appeared in paperback,⁵ and doubtless will reach, for good or ill, a generation that was unaware of it.

I am not among the critics. I wear my heart unabashedly on my sleeve. Fred Rodell was the best teacher I ever had. He was also a powerful and influential force for improvement in the law. Finally, he was as loyal and devoted a friend as anyone could ever hope to have.

My earliest distinct recollection of Rodell is very typical of the man. I entered the Yale Law School in the fall of 1946. Sometime during my first year, a debate was scheduled between members of the Harvard and Yale faculties on the differences in the approaches their schools took toward legal education. Originally it was announced that Rodell would be one of the speakers for the New Haven side, but this was too much for the visitors from Cambridge. The rumor in the law school was that Barton Leach had refused to appear on the same platform with Rodell, and that for this reason another Yale professor was substituted. Parenthetically, I may say that it is hard not to feel some sympathy for the Harvard position. Save only for Justice Frankfurter, the Harvard Law School was Rodell's favorite target. Only a year earlier he had written that Harvard "is behind the legal times; it is out-of-date."⁶

The appointed time came and a packed auditorium awaited the festivities. Leach and Lon Fuller spoke for Harvard, while Myres McDougal and Gene Rostow presented the Yale position. The truth

4. Letter from Fred Rodell to Charles Alan Wright (September 24, 1962).

5. F. RODELL, *WOE UNTO YOU, LAWYERS!* (Berkeley Publishing Co. ed. 1980).

6. Rodell, Book Review, 54 HARV. L. REV. 897, 900 (1945). The strong words had not come from one side only. Surely Professor Leach was the "W.B.L." who had written of *Woe Unto You, Lawyers!*: "The chief interest of the work lies in its demonstration of what a man will do in the hope of selling a book. The author in his preface anticipates that the reader will question why he is a law professor, and he states that a 'hint' as to the answer will be found in Chapter IX. No sufficient explanation appears." Book Note, 53 HARV. L. REV. 363 (1939).

is that the debate was rather dull. The speakers vied in courteous compliments to the others and their school. The fun did not begin until the question period, when Rodell arose in the first row of the balcony. (From my seat downstairs I had not known he was there, but a classmate who was sitting in the row behind him in the balcony told me that while the speeches were going on, Fred was seen to take an occasional swallow from a flask and to mutter from time to time, "I should be up there.") "I feel like Juliet," he said, "but I expect there are those who think I am more like Banquo's ghost." He plunged into his usual denunciation of Harvard and all its works, and this brought forth a vigorous response from Leach and Fuller.

It was vintage Rodell—but so is the epilogue to it. In 1968 I was a visiting professor at Harvard. We invited Fred and Janet to come up for the Yale-Harvard game. He said that they would come, but that they could not stay with us because they had already accepted an invitation to stay with Bart Leach and his wife. I was astonished, but a pleasant Sunday morning at the Leaches confirmed that, for all their public display of hostility, Rodell and Leach were old and dear friends.

I have said that Fred was the best teacher I ever had. I am not alone in that view. Justice Douglas, writing when Fred retired from teaching in 1974, referred to him as "by all odds one of the ablest teachers of all time and one of the best loved by students."⁷ I had Fred for a large course in taxation. I learned precious little about taxation in it, but that hardly mattered. To Fred the chief aim of legal education "was to help men learn how to use their own minds."⁸ The course opened my mind to what the law is and how judges work, matters of more lasting importance than the quiddities of the Internal Revenue Code.

My senior year at Yale, Fred offered for the first time his now famous seminar in Legal Writing—though that year it was called Law and Public Opinion. The stated purpose was to teach us to write about legal matters for readers who were not lawyers. Fred's superb writing ability, and his unusual talent for teaching others, made it successful in terms of its stated goals. Many of the best legal journalists in America today are products of that seminar. But it was an invaluable experience even for those of us whose writing is aimed at judges and lawyers. The purpose of our writing is to explain and persuade. We are more likely to be successful in those goals if we are able to express

7. Douglas, *Foreword*, 84 *YALE L.J.* 1, 2 (1974).

8. Rodell, *supra* note 6, at 901 (1945).

ourselves simply and clearly. I am sure that thirty years of very orthodox academic writing have corrupted my style, but I like to think that even today my books and articles and briefs are better because of what Fred taught me in that seminar.

I well recall Dean Sturges sitting in at the second meeting of the seminar. He was curious, Fred told us, to see what this seminar with the strange name was all about. Fred, forewarned, had brought several of the volumes of the *Yale Law Journal* in which Sturges had articles. He invited the Dean to pick one of his articles, to open it at random, and to read us a paragraph. (All this was the more delicious because the student rumor was that Rodell had represented the first wife of Sturges in her divorce from the Dean, and that the two men were now mortal enemies. The rumor should have foundered on the fact that Fred was never admitted to the bar, and could not have represented anyone in litigation. In fact, Sturges and Rodell were good friends and close allies on law school matters, but we would have enjoyed the episode less had we known the truth.) Dean Sturges obliged, and read a paragraph filled with the jargon and convolutions that mark most legal writing. When he had finished, Fred asked him what the paragraph meant. The Dean sputtered for a moment and then gave a brief and clear explanation of the proposition he had stated at much greater length in the article. "Why didn't you write it that way?", Fred asked. The point was made, and the Legal Writing seminar, as well as the Supreme Court seminar that he began offering after my time, remained among the most highly sought offerings in the law school's curriculum.

I have said also that Fred was a powerful and influential force for improvement of the law. On this there is more room for disagreement. There are those who think that Fred wasted his immense potential.⁹ In stating early in his career what he thought the law should be, Fred was describing the direction in which he wanted to push. "With law as the only alternative to force as a means of solving the myriad problems of the world . . .," he wrote, "the use of law to help toward their solution is the only excuse for the law's existence, instead of blithely continuing to make mountain after mountain out of tiresome technical molehills."¹⁰ The law has moved remarkably away from the

9. "[W]hen they discuss the man, they focus more on the might-have-beens than the weres and ares. They seem to consider his career something of a tragedy and him, in the lingo fashionable a few generations back, a 'busted phenom'—a man who, trapped by his own brilliance or laziness or obsessions, never fulfilled his potential." Margolick, *supra* note 2, at 1, 25.

10. Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 43 (1936).

dreary conceptualism of 1936 to a candid recognition that it can help solve serious social problems. Fred's former students and his good friends on the Supreme Court have played a prominent part in this change. I cannot help thinking that those who learned from him, either as his students or as readers of his works, have helped move the law in the direction Fred wanted it to go.

Considering that Fred deliberately avoided writing for the typical legal audience, it is remarkable how much attention has been paid to his writing by both courts¹¹ and commentators.¹² He is still being read. *Woe Unto You, Lawyers!* would not have been reissued this year if a publisher had not been convinced—correctly to judge from the early sales—that there is a market for it. I cannot think of any “scholarly” legal work of the thirties that is now available in paperback.

I do not mean to say that Fred did not suffer career disappointments. To him the prewar years at the Yale Law School were a Golden Age. He was bitterly critical of what he thought to be the changes in the school from the early fifties on, and once remarked that he did not like being “kindly condescended to as a sort of living relic of the good old silly days.”¹³ In the Yale baccalaureate address in 1969, then-President Kingman Brewster referred disparagingly to “a formerly powerful clique at the Yale Law School, those cynics called ‘legal

11. A Lexis search would probably produce many examples, but two that come immediately to mind will suffice. *Woe Unto You, Lawyers!* is commended as “interesting reading” in *Thomsen v. Reibel*, 212 Minn. 83, 86, 2 N.W.2d 567, 569 (1942). It is quoted and built upon in *Weeren v. Evening News Ass'n*, 379 Mich. 475, 485, 152 N.W.2d 676, 677 (1967), in which the judge speculates on what Rodell would have written had he “been seated here.”

12. Dean Griswold referred to a 1960 article by Rodell in the *New York Times Magazine* as taking “a thoughtful, restrained approach which should contribute to better popular understanding of these subtly difficult problems.” Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 83 (1960).

In *For Every Justice, Judicial Deference is a Sometime Thing*, 50 GEO. L.J. 700 (1962), Rodell predicted the votes of each of the justices in the then-forthcoming case of *Baker v. Carr*, 369 U.S. 186 (1962). With the exception of Justice Clark, about whose vote Rodell had confessed he had some doubts, every prediction was correct. This caused consternation to the political scientists who think that mathematical formulae are needed to understand the Court. Glendon Schubert referred to Rodell's prediction as “an impressive, indeed, a spectacular, example of the skill of the legal expert to anticipate the probable outcome of a specific judicial decision.” Schubert, *Judicial Attitudes and Voting Behavior: The 1961 Term of the United States Supreme Court*, 28 LAW & CONTEMP. PROB. 100, 104 (1963). A few pages later, however, he had persuaded himself that Rodell's feat was only of “mild interest.” *Id.* at 106. Another jurimetricist said: “Rodell correctly predicted seven of the eight votes cast—an impressive result indeed. But in a larger perspective, it may be meaningless. For who knows how Rodell reached his result? Can any lawyer replicate Rodell's experiment and results?” Ulmer, *Quantitative Analysis of Judicial Processes: Some Practical and Theoretical Applications*, 28 LAW & CONTEMP. PROB. 164, 165 n.4 (1963).

13. Letter from Fred Rodell to Charles Alan Wright (September 27, 1968).

realists.'"¹⁴ Fred was furious. The people Brewster was referring to were Charles E. Clark, Thurman Arnold, William O. Douglas, Walton Hamilton, Wesley A. Sturges, Leon Green, and Jerome Frank. They were Fred's heroes,¹⁵ as they are mine, and he was deeply and outspokenly hurt at what he regarded as proof that the Yale Law School had abandoned the faith once delivered to the saints.

His other great disappointment has always struck me as quite irrational. Justice Douglas understated the matter when he wrote of Fred that "in his middle years at Yale he must have regretted not having been honored with a named chair at the Law School."¹⁶ It was hardly necessary to speculate on how Fred "must have" felt, because, as early as 1962, he said it in print. "Yet a U.S. law professor I know was passed over, like a left-handed third baseman, ten times in a row, while those ultimate academic accolades, charmingly called 'chairs,' were awarded his junior colleagues—and this because he did his writing primarily for such *infra dig.* sheets as the New York Times Magazine, the Saturday Review, and the Atlantic. Ah, scholarship. Ah, American scholarship. Ah, American legal scholarship."¹⁷

Of course it is never pleasant to be conspicuously snubbed for anything, but I would have thought that Fred, who cared so little for the conventional niceties and status symbols of academic life, would have announced that "chairs are spinach" and forgotten about it. When you are extravagantly praised by Earl Warren, Hugo Black, and William Douglas, to name only the dead, when you have the most intensely loyal coterie of former students of any teacher I have ever heard of, seeking you out and expressing their gratitude to you, who needs a meaningless title from the Yale Corporation? For reasons I do not understand, Fred did, and was outspoken for years about the wrong that had been done him.

14. Baccalaureate Address by Kingman Brewster, Jr., Yale University (June 8, 1969), reprinted in YALE ALUMNI MAGAZINE, July 1969, at 23.

15. "It was the greatest collection of legal teacher-thinker-writers ever to grace any law school faculty in the land. . . . Brewster's clique of cynics were my mentors and have remained, though all but a couple are now dead, my heroes." Rough draft of a proposed letter on the subject, enclosed with Letter from Fred Rodell to Charles Alan Wright (November 25, 1969).

16. Douglas, *supra* note 7, at 2.

17. Rodell, *supra* note 3, at 288.

In a 1970 article, Rodell is quoted as saying: "[i]t got to be like a slap in the face twice a year. I got annoyed. Not bitter," he smiled, "but annoyed. If they gave me the choice of \$500 more or the chair, I'd take the \$500." Kaukas, *A Friend of the U.S. Supreme Court*, Hartford Courant, Nov. 8, 1970, Sunday Magazine, at 2, 23. I think Fred was being less honest with himself and about himself in that interview than he usually was. From conversations over the years, and from recently rereading my correspondence with him, I think he was bitter.

I have said, finally, that Fred was as loyal and devoted a friend as anyone could ever hope to have. An obituary describes him as “crusty, sardonic and irreverent.”¹⁸ He was those things. But to Justice Black, he was “the good, gentle, friendly soul I have always known,”¹⁹ and that is how his friends knew him. He had no ideological test for his friends. He and I differed over many things during the thirty-four years I knew him, and neither of us were ever hesitant about voicing our differences. On July 26, 1973, at a White House press conference, I explained President Nixon’s decision to challenge subpoenas for White House tapes. Later that day I received a telegram from Fred: “CHARLIE CLARK AND I ARE TURNING IN OUR GRAVES. LOVE ANYWAY.” (A telegram in a similar vein later that summer was addressed to “Professor Charles Alan Wrong,” a fact Fred happily shared with a columnist for the *New York Daily News*.) To Fred the friendship of two people was a precious gift and far transcended even the great issues of national life.

To be Fred’s friend was fun. Having tartly observed in his youth that “[o]nly The Law insists on making a ‘party’ out of a single person,”²⁰ he was glad to have a party whenever two or three were gathered together. In his last years, when his health was so awful, it was not easy for him to see people, but the appearance of a friend was enough to inspire heroic efforts on his part to be the Fred Rodell of old. Despite devastating pain, despite the effects of the drugs needed for pain, despite being barely able to talk audibly, he would offer a limerick, a bit of gossip, or a devastating criticism of a Supreme Court Justice, with laughs and drinks flowing freely all the while.

The final stanza of his famous Haverford College commencement address said:

In Jeffersonian pursuit
Of happiness, no disrepute
Inheres. Pursue it.
Squander, don’t hoard for some
hereafter
Your gifts of grace and love and
laughter.
Good luck. Go to it.²¹

18. *N.Y. Times*, June 6, 1980, § D, at 15, col. 4.

19. Letter from Justice Hugo L. Black to Fred Rodell (March 2, 1966) (in the Black Collection, Manuscript Division, Library of Congress).

20. F. RODELL, *supra* note 5, at 28.

21. Rodell, *Commencement Address Delivered at Haverford College, June 8, 1962*, 84 *YALE L.J.* 6, 8 (1974). The address had been published earlier at 71 *YALE L.J.* (No. 8) vii, xi (1962).

Fred followed that rule in his own life. He was more interested in pursuing happiness than tangible rewards. He gave freely his great gifts of grace and love and laughter, and those of us on whom he squandered them were much the richer for it.

So this is goodbye, Fred. There have been no tears. Laughter has always marked our relationship and it is too late to change. Besides, I remember what you wrote about our mutual dear friend and mentor, Judge Clark. "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."²² That's the way I feel about you, Fred. Goodbye, old friend.

22. Rodell, *For Charles E. Clark: A Brief and Belated but Fond Farewell*, 65 COLUM. L. REV. 1323 (1965).

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