

MY FRIEND, CHARLES REICH

*Keynote Speaker – Remarks of the Hon. Guido Calabresi**

I. INTRODUCTION: A PERSONAL PERSPECTIVE

Many of you have come to love Charles through reading his works, and that is both admirable and understandable.

I have a different perspective. I came to know and love Charlie before he wrote what you all will talk about, and I loved his works not only in themselves and for their scholarly value, but also and as much as manifestations of the person Charlie was, the person I knew. So let me this evening tell you some stories about him and perhaps, in that indirect way, shed some lights on his writing.

Now, how did I get to know Charlie? I was clerking for Justice Black, and it was a hard year for Black because he won all the cases he didn't care about – economic cases, five to four – and he lost all the cases he cared about – the civil rights and civil liberties cases, five to four – because there were four and Tom Clark, who always voted for the government.

Clark would be on Black's side of the economic cases and on the other side on the others. And that was frustrating to the judge, because he liked to win. Unlike most judges, he liked to win.

And on Friday, Black wanted to get these things off his mind

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Judge Calabresi received his B.S. degree, summa cum laude, from Yale College in 1953, a B.A. degree with First Class Honors from Magdalen College, Oxford University, in 1955, an LL.B. degree, magna cum laude, in 1958 from Yale Law School, and an M.A. in Politics, Philosophy and Economics from Oxford University in 1959. A Rhodes Scholar and member of Phi Beta Kappa and Order of the Coif, Judge Calabresi served as the Note Editor of the Yale Law Journal, 1957-58, while graduating first in his law school class. Following graduation, Judge Calabresi clerked for Justice Hugo Black of the United States Supreme Court.

and play bridge. He loved bridge and loved tennis. He would never play tennis with me – I wasn't good enough. But he liked to play bridge, and the bridge foursome was a lawyer in Washington who was a very good bridge player, Charlie Reich, and me. And we wanted the judge to win, because he wanted to win, and we wanted him to win. But had we tried to make him win, he would've seen through it, and it would've been a disaster.

So what happened was that Charlie said, quite truly, "I can't be the judge's partner, because emotionally that just is something I can't do." And that was clearly true. So one of us, either the lawyer or I, would be the judge's partner, and the other would be Charlie's partner. Well, Charlie's brilliant, but you cannot be his partner in a thing like bridge. So with everybody doing their very best, the judge would win all the time, or almost all the time. That's how I got to know him.

II. APPOINTMENT TO THE YALE LAW SCHOOL FACULTY

Then, in 1958, Charlie, Robert Stevens, and I were appointed to the Yale faculty at the same time.

Very different backgrounds. Bob Stevens was an Englishman, a historian. He's gone on to great things, becoming president of Haverford, chancellor of Santa Cruz, and then master of Pembroke where, using his American-learned skills, he took the broke out of Pembroke because he knew how to raise money. Charlie, already a partner. And I, straight out of law school. Very different backgrounds.

Well, we arrive at Yale, and in those days, you didn't just say this is what I want to teach. The Dean saw what the school needed and said, that is what you will teach. Gene Rostow asked the three of us what we wanted to teach so that he could decide.

I said I want to teach a first-term course, a first-year course or two. And I'll teach anything, including Property – which at the time was very unpopular. I don't know why. There are these funny cycles of things. Property was very unpopular.

Bob Stevens and Charlie both said we want to teach anything except Property. The result was that I was assigned two seminars in land financing because I'd shown an interest in property, and Charlie and Bob Stevens taught the basic course. They were assigned Property I.

I never took an interest in my seminar, but there's a fun story

about when I gave it up and Bob Bork took it over, but that's for another dinner.

So, what happened?

Bob Stevens taught Property as if it were legal history. Quintin Johnstone, who was on the faculty, taught the traditional Property course: estates in land, and all that sort of stuff.

And Charlie developed *The New Property*.¹ It came out of the fact that he was assigned to teach Property. The result was that students at Yale, at that time, wanted to take all three courses because they could not have been more different. And, in order to allow them to do that, Property was dropped as a required course so that people could take one thing, or another, or something else under a different name. That was one of Charles's early, very good achievements.

III. A MAGNIFICENT TEACHER WHO WAS "OUT OF PHASE"

He was always a magnificent teacher. Why?

He was a magnificent teacher for many of the reasons that were said before but for another reason that characterized everything about Charlie.

Charlie was always out of phase. He was never at the same position, the same time in his work or life that other people were. In that respect, he was like Rousseau, whose greatness was always to be out of phase, not connected with things. And that made students always look at the ordinary from a different point of view, from a starting point that was surprising – not just to be different, but inevitably seeing things that were surprising because Charlie was looking at everything from a different point of view.

That effect on the young is extraordinary because it shows them that the canon – that what people are telling them – does not need to tyrannize. So along with all the qualities of personality, love, and so on, it was this intellectual thing that made him different.

I saw an example of Charlie being out of phase once when I was walking down the hall, and I saw Charlie run into Charles Black. He said to Charles Black, "Charles, none of us can be lawyers until we've read *Billy Budd*."

Charles Black, who had been an English Ph.D. scholar, said, "But Charlie, I've read *Billy Budd*."

¹ Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964)

And Charlie said again, "Charles, none of us can be law teachers until we've read *Billy Budd*."

And Black kept saying, "But Charles, I've read *Billy Budd*."

I listened to them and was wondering what was going on. And then I realized Charles Black had read *Billy Budd* at the time that most people like him would have read it: in college, as an English Ph.D., with that in mind.

Charlie had just read *Billy Budd* for the first time then as somebody who was older, had been a clerk, a lawyer, was a tenured professor and all that. So he saw *Billy Budd* in a way that was totally different. When he was saying none of us can be law teachers without reading *Billy Budd*, he was saying, without reading *Billy Budd* from this totally different point of view, which is absolutely correct for all sorts of reasons: because Captain Vere was Lemuel Shaw, the great Chief Justice of Massachusetts, who was Melville's father-in-law — any number of things that explain why *Billy Budd* deals with slavery, all things that you don't read in it as an English scholar but you see when you read it like Charlie Reich.

It's that out-of-phasedness that leads to genuine originality, to the new paradigm. Most of us make ourselves move the furniture. We try to do things, in a different order, changing things around so that we will see things differently.

Let me give you one funny example that happened to me. I was teaching Estate and Gift Tax once and two students, one a first-year student — it was a huge class — another a third-year student, had their hands up. I called on one, and she started describing the cases that I was teaching in a way that I had never heard before. The other one — a third-year student, a guy — was jumping up and down because he had seen the same thing. And I said to myself, what have they seen? I didn't know, so I checked, I talked to Boris Bittker. No one had ever seen the cases that way, and it was a very interesting, powerful way of looking at them.

So I said to myself, what is it that caused two people to see this at the same time? If somebody had seen it, I would've said a brilliant person. But why, when no one had seen it before, all of a sudden, two people saw it?

The only thing that was different was that the mimeograph machine had broken. You know, that thing that we used to copy that smelled purple. That had broken, and so I had to teach the cases in a

different order. There was nothing about the different order that logically led to these kids seeing this point about these cases. The different order didn't do it.

But the fact that the order was different meant that two very bright people saw something that people hadn't seen before. And that's what most of us, who don't have that blessing and problem that Charlie had, have to make ourselves do.

Since then, and since knowing Charles, I all the time move the furniture around to make myself be somewhat out of phase so that I can see that. That's why he could write *The New Property*.

But can you be so out of phase and be accepted, and gain tenure? Perhaps. But it's hard. Will others understand?

My best books, which are only slightly out of phase, have never gotten glowing reviews. They've always gotten reviews at the time that are respectful and say "interesting, but gee, what the hell is he doing?" And it's only years later that people come around.

So I worried about *The New Property*, which was then what he was writing. The result was that I urged him to publish first his good, but ultimately boring, piece on Hugo Black: *Justice Black and the Living Constitution*.² It's a perfectly fine piece of scholarship, but the only not really interesting thing that Charlie wrote. The reaction was just as I hoped. Alex Bickel and Harry Wellington thought it was terrific. With his teaching, he easily got tenure and the liberty to write *The New Property*, which came out almost immediately after, then from a tenured professor at Yale, of course.

IV. THE PROPHET

Then he became the prophet.

The class of '66 at Yale was an unusual class when it came in, in 1963. We thought that we had won. Race was no longer there. Kennedy had been martyred and LBJ had come in, and the Voting Rights Act was being passed, and so on.

And I remember my African American students from that year who, when they came into Torts, didn't seem to be African Americans at all. They were prototypes of the school they came from. There was a guy named John Rose from Dartmouth who looked as though he had skied in. There was a guy named Hugh Price who was the perfect

² Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963).

Williams guy. Drew Days was a perfect small-college guy. There was a guy from New York and Columbia named David Pittinsky who spoke with almost a Jewish accent from New York. And there was Haywood Burns from Harvard, who came in with two books already written. So, they were that. We had won. Integration had succeeded.

It all fell apart. It all fell apart because it was false. We hadn't won at all. And Charlie saw it and walked down the walls in effect saying, repent, the end is near.

And the next class already saw it. The teachers who meant most to Ackerman were Dworkin, because of his elegance; me for any number of reasons; and especially Charlie Reich, because he saw things nobody else could see.

Michael Varet, who was Charlie's great friend – did his portrait, had his portrait done, that magnificent portrait – saw the same thing. And it came to be true for the class of 1966 as well. Each one of those people I mentioned in time became fiercely active in different ways in the Civil Rights Movement. Haywood Burns ultimately dying in a car crash after becoming Dean of CUNY Law School. All of them did.

And Charlie saw it. Why did he see it incompletely, to some degree wrong? Prophets always are that way. They don't always get it exactly right. But he saw it, and it was again because in many ways he was out of phase.

He was, in some ways, an adolescent. Sexually, he had had no sexual experience. Sexual orientation? Out of phase, and yet a grown up and articulate. He felt what many of these kids felt and he could speak of it when they were not articulate enough to speak of it.

That scared some people. I remember Bart Giamatti, who was head of one of the colleges where Charles was a fellow, coming up to me and saying, "Is he dangerous to the students?"

And I said, "Yes, but not in the way you think."

And Bart was smart enough to understand what I was saying and to buy that. It scared some, but he was loved at the Yale Law School for it because of what that meant.

So why did he leave? Well, perhaps because of Abe. Who knows? Abe Goldstein, who became dean, was a complicated fellow. But I think also, much more deeply, it was because with his prophecy stated and having come to be to a significant extent – all the troubles and non-troubles, all the joys and things of the late '60s and '70s – he thought it was wrong to stay and live off tenure. He had said his thing.

At that point, he didn't have something else to say. And in some wonderful way, he thought it would be wrong.

V. A LOVE OF BEAUTY AND PEOPLE

Well, all this leaves out two things that made his work so crucial apart from this great originality. And these are his love of beauty. He had an aesthetic sense which was again all his own and which I saw when we happened to meet – Anne and I, and he – at Delphi.

We'd come from different parts, and we happened to come to the same hotel, which went down the mountainside and looked over a river of olives, which went into a sea of olives, which went into the sea. And I saw Charles understanding that beauty and making it his own, even though, unlike me, he was not a European. I mean, I thought I understood that because I'm Italian. He understood it because he had a love of beauty which was all his own.

And his love of people – emotional, but more than empathy – and it could complicate things.

When the Judge died, and his funeral was at the Cathedral. Interestingly, the Judge had his family, then his law clerks, and then the President of the United States, which is as it should be.

Charles was not going to go. He didn't think he could do it. So I tricked him. I called him up early that morning. He was sleeping. And I said, "Charles, you need to come. You need to do something with me. I need you desperately. I can't tell you what." And I went in a cab, put him in the car, went to the airport, got to the airport. I still didn't tell him what it was. And we flew to Washington. (In those days there were planes that went from New Haven to Washington – little planes.)

And we arrived in Washington, and he said, "What are we doing?"

I said, "We're going to the Judge's funeral."

And he started to cry. It's more than empathy. It's a depth of feeling.

And then there was his wonderful writing style. These pervade all of his work. He wrote beautifully. In *The Greening*,³ the metaphors of everything that is good is animal or vegetable and all the things that are bad are mechanical. And it ends with a turtle, the most mechanical of animals, going into the water. Now I've always wondered, was it

³ CHARLES A. REICH, *THE GREENING OF AMERICA* (1970).

chosen? Was he conscious of that? Or was it just a reflection of what he was? I don't know.

To his dying day, he was my friend, and we corresponded from afar. And all the love, aesthetics, and originality – and even out of phase – were still there. He discovered law and economics 40 years after I started writing about it, and he saw some things that I had never seen. Again, they pervade all his work, all he wrote, and all his relationships and made each of these more unique than rare, you know? He was unique, not just rare, because of that.

I loved Charlie. We were two very different people, and yet he loved Anne and me. What a blessing to be able to join you in honoring him.

Thank you.