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John F. Sonnett Memorial Lecture Series: The New Advocacy

Tom Clark
Supreme Court of the United States

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2. Clark's Lecture:

   a. Clark Biography

Clark Biography 1st draft

Tom C. Clark was a Texas native born on September 23, 1899 in Dallas. He earned a Bachelor of Arts degree from the University of Texas in 1921 and a law degree from the same university in 1922. Like John Sonnett, Clark spent much of his life in public service. In his early years as an attorney, Clark moved from private practice to a six year tenure as Civil District Attorney of Dallas County, Texas. During this time, Clark worked in local Democratic politics, forging important relationships with Senator Tom Connally and Congressman Sam Rayburn, cornerstones of Texas and national politics.

In 1937, Clark joined the United States Department of Justice and spent the next six years tackling many legal issues, including antitrust and war frauds. As head of the Justice Department's Criminal Division, his work with war frauds brought him in contact with then Senator Harry S. Truman. Friendship with Truman grew as Truman's investigating committee and Clark's Criminal Division uncovered and prosecuted many frauds against the government. His respect for Truman led to Clark's support for Truman's Vice Presidential bid at the 1944 Democratic Convention. In May 1945, then President Truman appointed Clark as his Attorney General. Clark's tenure as Attorney General featured strong antitrust enforcement. During this time, John Sonnett served as Clark's Assistant Attorney General and Chief of the Antitrust Division. Both men worked together to institute numerous actions in the antitrust area. The two men also combined to argue one of the most important cases of the day, <u>United States v. United Mine Workers</u>,

330 U.S. 258 (1947). In that case, Clark and Sonnett successfully argued for contempt convictions against John L. Lewis and the United Mine Workers after they disregarded anti-strike injunctions in coal mines seized by the United States during the crucial transition period during the crucial transition period after World War II. In that case and others during his service as Attorney General, Clark stood solidly behind the importance of national security and national loyalty. He continued to stress these same issues as a Justice of the United States Supreme Court.

Clark was appointed to the Supreme Court by President Harry Truman in 1949, and served 18 years on the Court. Clark's tenure on the Court was marked by his participation and contribution to the most important issues of his day. In his early years on the Court, Clark joined a conservative bloc of justices on loyalty-security cases and criminal cases involving individual rights. Clark presence brought the anti-communist viewpoint to the Supreme Court. Although certainly no red-baiter, Clark clearly promoted his vision of the importance of national security. Later in his tenure as a Supreme Court justice, Clark wrote the opinion in <u>Mapp v. Ohio</u>, 367 U.S. 643 (1961), which extended full protection of the fourth amendment prohibition against illegal searches and seizures to the states, through the fourteenth amendment. In the area of civil rights, Clark often voted to support pro-civil rights decisions, among them the Court's <u>Brown v. Board of Education</u> decision that struck down the separate but equal doctrine. 347 U.S. 483 (1954).

Like John Sonnett, Clark held a deep devotion to his family.

This family devotion caused his retirement from the Court in 1967. Clark's son Ramsey had been appointed Attorney General by President Lyndon Johnson in early 1967, some twenty-one years after Clark's own appointment to that same position. To avoid any hint of conflict of interest, Clark retired from the Court. He continued his public service through frequent speaking engagements and service on several legal reform committees. Tom Clark died in New York City in 1977. His legacy of public service and his efforts at judicial reform honored his own career, as the delivery of the first Sonnett lecture at Fordham honored his co-worker in such a poignant manner.

b. Clark Introduction

2nd draft

Clark Introduction

Justice Tom Clark delivered the first John Sonnett Memorial Lecture only 1? year after Sonnett's untimely death. The lecture provided fitting tribute to the memory of one of Fordham's finest and influenced the subject matter of the lectures that followed. Justice Clark's choice of topic focused on skills crucial to the success of many attorneys both then and now. Justice Clark called for a "renaissance" of advocacy to elevate the quality of client representation. In a fashion similar to what Chief Justice Burger would discuss several years later, Justice Clark provided certain insightful criticisms of both the legal profession and the legal education system. In response to his own criticisms, Justice Clark provided several solutions to invigorate the profession.

Justice Clark criticized excessive attorney specialization, which remains a difficult problem in the legal profession. Today, large law firms find it convenient to focus associates and partners on specific areas of practice. While this allows a firm to offer clients expertise in that specific area, one must ask whether the larger picture may be lost. Will attorneys fail to provide the most comprehensive and useful services to their clients? The answers to these questions can and should be argued within the profession.

Justice Clark's discussion of legal education is just as important and timely. His proposed solution of increased clinical legal education has been widely accepted in the years since 1970. At Fordham University School of Law alone, clinical programs

provide welcome opportunity for aspiring attorneys to develop skills in a realistic forum.

Despite the availability of clinical programs at many law schools, the full scope of Justice Clark's suggestions have not been adopted. Every law student has heard the following description of law school: "First year they scare you to death. Second year they work you to death. And third year they bore you to death." Justice Clark's recommendation of full clinical work in the third year of law school may be the perfect solution to the problems of legal education. Hands-on experience with advocacy and other necessary legal skills would improve the quality of legal representation. Justice Clark's explorations and suggestions provided a fine model to future lecturers and a well suited tribute to the accomplishments and qualities of John Sonnett.

Justice Tom Clark delivered the first John Sonnett Memorial Lecture only two years after Sonnett's untimely death. As the inaugural lecture, it provided fitting tribute to the memory of one of Fordham's finest and it influenced the subject matter of the lectures that followed. Justice Clark's choice of topic focused on skills crucial to the success of many attorneys, both then and now. Justice Clark called for a "renaissance" of advocacy to elevate the quality of client representation. In a fashion similar to what Chief Justice Burger would discuss several years later, Justice Clark provided certain insightful criticisms of both the legal profession and the legal education system. In response to his own criticisms, Justice Clark provided several solutions to invigorate the profession.

Justice Clark criticized excessive attorney specialization, which remains a difficult problem in the legal profession. Today, many attorneys specialize in one area of law, or even one sub-area of law. Past surveys of attorneys in several states indicate that a majority of attorneys report that they specialize in one particular legal area.[1] While this specialization offers a client expertise in that specific area, one must ask whether the larger picture may be lost? Will attorneys fail to provide the most comprehensive and useful services to their clients? Although the answers to these questions may vary, the subject remains a fruitful

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[1] See Esau, Specialization and the Legal Profession, 9 Manitoba L.J. 260, 260-61 (1979).

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one for discussion within the profession. Justice Clark's warnings should not go unheeded.

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The New Advocacy 3251 original words

minus 99 words= 3152 words

Justice Tom Clark

Mr. Kostelanetz, Dean Mulligan, Ladies and Gentlemen:

Alexis de Tocqueville wrote in his Democracy in America, "The profession of the law is the only aristocracy that can exist in a democracy without doing violence to its nature." We might add that even though the lawyers were - in a manner of speaking - of the aristocracy, they nevertheless belonged to the people and thus made the strongest link between the two. In those days the majority of them were country lawyers and as Oliver Wendell Holmes said in The Guardian Angel in 1867, they were honorable, knowledgeable and honest. Daniel Webster told us twenty years earlier, in a speech at Charleston, South Carolina that: "An eminent lawyer cannot be a dishonest man. Tell me a man is dishonest, and I will answer he is no lawyer. He cannot be because he is careless and reckless of justice, the law is not in his heart, -- is not the standard and rule of his conduct."

Webster added that high standards were characteristic of the legal profession despite the fact that the practice of law was not calculated to yield "the greatest fortunes." In fact, he noted "most, if not all good lawyers ... lived well but died poor."

Today a glance at the conduct of some lawyers leaves a different impression. As of late I have chaired the American Bar Association's Committee on Disciplinary Procedures, and from what I have observed, the behavior of some lawyers is, indeed, shocking and disastrous to the public's confidence in the profession. In addition it is evident to me that many lawyers must not be working too hard from the looks of their briefs and the substance of their advocacy. In addition, I am sorry to say, a growing number are dishonest, not only in their practice but in their private lives.

Hamlet cautioned Horatio, "There's a special providence in the fall of a sparrow. If it be now, "tis not to come; if it be not to come, it will be now; if it be not now, yet it will come;

the readiness is all. Since no man has aught of what he leaves, what is't to leave betimes?" In short, "the readiness is all" -- that is what counts. John Sonnett, I have an abiding faith, would heartily agree. He was a consummate advocate who knew through experience that truth is attained only by complete "readiness" in litigation, the first essential for an advocate, and that the rules of law are fashioned from facts, not from sorcery. Another eminent New Yorker, Mr. Justice Cardozo, taught John Sonnett, and all of us that we first must master "the precepts of justice, for these are the truths that, through the lawyer shall come to the hour of their triumph:" second: "Study the life of mankind, for this is the life you must order, and to order with wisdom, must know; and, lastly, "study the wisdom of the past for in a wilderness of conflicting counsels, a trail has there been blazed." [See Law and Literature at pp.175.]

Today law graduates are grounded in the first and last of these truths. John Sonnett learned, however, as have all good advocates at the bar, that law schools do not teach us the life

of the law which, as Mr. Justice Holmes said, is experience. ["The Path of the Law" 44 Harv. Law Rev. 719]

Law schools are too isolated from the court system. While we all know that there is no court of law without a practicing bar, unfortunately we have also known for almost a hundred years that the law schools have not encouraged apprenticeships -- which is the stuff of which advocates are made. Instead, they have taught specialization which has made a public scarecrow of the law, and perhaps inadvertently encouraged lawyers to put a premium on moneymaking rather than instilling the highest standards of professionalism. Was it not Wordsworth who said: "By getting and spending we lay waste our powers"? Young people entering the profession who wish to become advocates are obliged to learn by trial and error. John Sonnett himself realized this and sought training in the United States Attorney's Office for the Southern District of New York, which remains one of the finest training grounds in the law. While serving there John Sonnett mastered the art of advocacy by participating in the

dramatic trials of the forties. As an advocate he fought relentlessly to uphold the law. As an officer of the court he was sincerely dedicated to the accomplishment of equal justice for all. No lawyer brought to the art of advocacy a higher of skill and practicality than John Sonnett. When I say this, I speak from a professional association with him in the United States Department of Justice during a troublesome and litigious period of our history. Together we represented the United States and its highest officials -- from the President down -- in a rash of World War II cases. I shall mention only one, United States v. United Mine Workers of America 330 U.S. 258 (1947). This was in injunction suit to halt a nationwide strike in the coal mines. The union and John L. Lewis, its president, defied a court order directing the rescission of a strike call. Both were held in contempt of court. John Sonnett tried the case in the United States District Court. The Court of Appeals was by-passed, and we both argued the case in the Supreme Court. The Union ultimately suffered a $700,000 fine, and John Lewis was fined

$10,000. In large measure, the success of the Government in avoiding a severe national crisis may be attributed to the matchless legal advocacy and inexhaustible dedication of John Sonnett.

It is most fitting that the distinguished Fordham University Law School recognize John Sonnett through this series of lectures. He will in this way live on in the profession he honored so highly. I am sure that this prestigious forum will each year draw the finest lawyers in America as guest lecturers -- men and women with the attributes that he possessed so abundantly. It is with this in mind that I have devoted this opening lecture to the subject: "The New Advocacy." I shall undertake to point out, first, the dire need for a renaissance in the art of advocacy; second, how this may be accomplished; and, third, the influence this would have on the law, the courts and the public.

First, I need not tell you that legal wisdom is obtained through practical experience. We learn by doing and the

direction in which we begin our legal education often determines the quality of the career which follows. For many years the emphasis in legal education has been on legal theory and specialization, rather than advocacy. Speaking to the American College of Trial Lawyers at Bar Harbour in 1962, I regretted that trial lawyers had been for many years a vanishing species; and that the nuts and bolts in the solution of legal problems comes only in the courtroom. I believe that the success of a lawyer in finding solutions for legal problems depends upon his basic understanding of the principles of law plus -- and it is a big one -- his aptitude in applying them to the particular fact situations of his cases. The only way to escape the tyranny of the theoretical and to become a complete lawyer is through trial advocacy. I submit that this is the secret of the British: They have a highly trained trial bar - the barristers from which the judges are invariably selected. This makes for a more experienced practicing bar as well as a more accomplished judiciary. In the United States, however, we have very few, if

any, organized courses for the training of trial lawyers; the public is our guinea pig. Our system leaves much to be desired. There is a danger of stagnating the development of law and at a stupendous cost not only in money but in terms of downgrading the profession. The latter occurs in two areas - first the public image of the bar suffers. It is now reaching the lowest point in our history. Second, the degradation of the bar itself stares us in the face, not only in the ministry of justice but in personal discipline and ethical standards of far too many lawyers. There can be no question as to the former. Indeed Chief Justice Stone alluded to the lack of independence in the bar back in the twenties, when he referred to its control by business -- a situation which, I am sorry to say, has worsened. As far as discipline is concerned, our ABA Committee found widespread violations of not only ethics but of common decency. Invariably the guilty ones were not among the real advocates but among the specialist. For example in the personal injury field, a larger percentage of unprofessional conduct is found, but even within

this specialty area of practice the abuses generally come from the "ambulance chasers" and not the first class trial lawyers. I strongly believe that the increase in unethical conduct can be traced to the failure of the law schools to instill ethical standards through the strict discipline of advocacy. Lawyers have become free wheelers and an ever-increasing number are convicted felons by the time they reach 15 years of practice.

I mentioned earlier that many lawyers today are not doing their homework and simply are not prepared in the courtroom. I noticed when I was sitting on the Supreme Court that a large percentage of the advocates appearing there were not prepared. This was amazing to me, but since my retirement I have learned that in both the Courts of Appeals and the United States District Courts, the situation is even worse. I find a large percentage of the lawyers appearing before me are unprepared. At the trial level this will run about 50 percent, and at the intermediate appellate level, at least one-third. Indeed I remember one week of sittings in Court of Appeals where the panel agreed that only

four or five cases out of some twenty to twenty five argued were properly prepared. This causes the judges considerable concern and consternation. It should be self-evident that if the lawyers for either or both sides cannot answer a judge's question pertaining to a case cited and relied upon by the parties, not only are the litigants bound to suffer but the fair and effective administration of justice is hindered. I was hopeful that the Criminal Justice Act of 1964 might improve the situation, but it has not done so. Indeed, it has had the tendency to concentrate the cases in such a way that only a handful of firms are handling the indigent cases which make up 70 percent of the criminal docket. To remedy the situation, it appears that we shall have to organize federal defender programs nationally as we have in the Seventh Circuit and the Northern District of Illinois. There a professional legal staff of defenders handles a large number of indigent cases with the assistance of a group of about 100 students from the law schools in the area, who act as clinical interns under supervision of the staff. This operation has

proven very successful. The District of Columbia has also organized the Prettyman Scholars, who are engaged in the same type of work, but at the Appellate level only.

In 1962 I further reported in my speech to the College of Trial Lawyers that conditions at the "criminal bar" were worse than in civil litigation. In most cities the number of capable criminal lawyers can be counted on the fingers of one hand, and in some of them you need not use all of your fingers. The law schools had then, as they have now, their moot courts and practice courses, but this is a far cry from advocacy as an art that can be attained only through exposure to courtroom action. I was bold enough to suggest that courtroom training begin in the law school, adding: "However, while we await that development, it is suggested that the law firms of the United States adopt a policy of requiring every lawyer who becomes affiliated with them to handle some trial work." This has not been done because the law firms just cannot afford it. I quoted Dean Rostow in his article "The Lawyer and His Client," ABA Journal (February,

1962), where he said that the "provision of legal services ... is ... scandalously inadequate" and referred to the rising increase in cases being filed in the Supreme Court. But nothing came of any of it, save the College of Trial Lawyers which has begun the preparation of a manual for trial lawyers, and there is now a rumor that perhaps prosecutor schools will be organized. I should mention that the Northwestern Law School has a very good prosecutor school, and Harvard is preparing some students in prosecutor work. There must be much more. Although my basic theme is that trial advocacy training is needed, I think, as I mentioned earlier, that due to the deluge of criminal cases, greater emphasis should be placed on defender -- not prosecutive -- work.

This brings us to the second phase of my presentation: How can the law schools engage in clinical work? From my conversations with the Deans, I would say that the most difficult task is to convince the law schools to shorten the classroom experience. The students seem eager to get their third year over

with since in many respects it presently resembles a "squeezed orange". Students would rather get into court; but the law schools are not inclined to follow student opinion. It, therefore, appears that the "unlearning" pressure must come from the bar and the Courts. What we must "unlearn" is that the Langdell case method is sacrosanct. If we could get a top rate law school to try out an advocacy program, it would be helpful. My suggestion is that the third year be made a clinical one with the student devoting full time to trial work under the close supervision of practicing lawyers. The assignments could be to prosecutors or defenders; to a judge as a law clerk or to the court as an administrative assistant; or, if the student preferred, to an administrative agency, such as a public utility commission, the Internal Revenue Service, etc. If the educators believe that two years of theoretical work is not sufficient, I suggest that we increase slightly the number of credit hours required in the first two years so that the third year could be devoted to clinical assignments. Law schools located in smaller

communities, such as Washington and Lee, Duke, University of Florida, etc. could shift the clinical year to a nearby metropolitan community. There would be little difference in the cost, save perhaps for the supervision. If the professors did not wish to do this or were not equipped for the work, then I suggest that we recruit the assistant prosecutors and defenders as well as the retired lawyers who have been active in advocacy work to be supervisors. Supervisors would then be present at the prosecutor and defender offices, as well as the clinic and court administrative assistant assignments. Where there is no public defender, a defender program could be organized. The offices of the National Legal Aid Society could also be pressed into service. Assigning students to it in civil actions would be helpful.

This program would not only improve the law school curriculum but it would be of inestimable benefit to the courts. With the increasing coverage of Gideon that appears inevitable, we need, as Dean Rostow says, a much larger trial bar. In a few

years we could have a strong trial bar which we desperately need at present.

Finally, what effect would such a program have on the law schools, on the law, the courts, the profession and the public? It would, in my view, revolutionize the law schools. The students would come in contact with the real thing -- not just moot exercises. It would bring new life and stamina to the law schools; bring them into daily contact with the bar and the courts; and in the long run give them higher standing and much greater satisfaction with the ultimate product, i.e. the complete lawyer. It would also have a profound effect on the law. Students would be inquisitive as to prevailing procedures, practices etc. which would lead to innovation; the shortcomings of the law would come forcibly to their attention and they could help bring about improvements. With the advent of both innovations in the law and better trained lawyers, the public's image of the bar could only be enhanced. The courts would be served by more capable advocates and backlogs might be reduced

not only in this manner but also by improved procedures. Similarly, the courts would be more conscious of the need to improve the judicial system. This would, in turn, improve their public image. Our profession would be assisted because not only would the image of the profession be improved but the actual caliber of practicing attorneys would be enhanced. The public in turn would gain much from various types of student clinics. Indigent people who find themselves in legal difficulties would have a champion for their cause. Millions of people who never before had legal counsel would be benefitted and the quality of legal service provided would be greatly improved.

And so this is my case. I submit it to you with the hope that you will take it to your heart and do something about it. Great hopes make great men, they say. And one honor won leads to another. To take an interest in the effective administration of justice and to further and promote the principles which are vital to it, is every lawyer's duty. It is to be regretted that so many good lawyers abstain from taking part. We have enjoyed

freedom so long that we often forget how much human blood has been shed for it. The Constitution is the authoritative language of the people. In a sense we men and women of the law are its custodians. While the people made the Constitution, it is our job to serve and protect it; for your Constitution is the difference between a free society and a totalitarian dictatorship.

The Constitution and our nation will remain viable if we all take an interest in public affairs and devote our lives to preserving our freedoms. As Chief Justice Warren reminded us in Perez v. Brownell, 356 U.S. 44 (1958), "Citizenship is man's basic right for it is nothing less than the right to have rights." That nations is strongest where every citizen enjoys his rights and feels himself to be part of his country. Let us all do our part and labor for justice to the end that we, as professionals, may be an example to all of our fellow-citizens.

Daniel Webster once said that "justice is the great interest of man on earth," and he continued, "whoever labors on this

edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself, in name and fame and character, with that which is and must be as durable as the frame of human society." It is my prayer that all lawyers will take this eloquent wisdom to heart and observe it in both their professional and personal lives.