

RAISING THE HOE: THE NEW CLIENTAGE:
ANDY AND ME AT VANDERBILT HALL

THOMAS M. FRANCK*

Editor's Note: The following are remarks Professor Franck delivered in tribute to Professor Lowenfeld on April 16, 2009.

Thank you very much. I of course want to heartily embrace the congratulations that have been expressed to Linda Silberman for having pulled this august meeting together and inspired us to think a bit about long-term and short-term tendencies in our profession. These occasions are happy occasions if they, in fact, provoke those kinds of reminiscences joined to prognoses, and since this is my fifty-second year at the Law School and I'm responsible for having brought both Ted [Meron] and Andy [Lowenfeld] to the Law School, I thought I would exercise that prerogative by making mine a much more personal comment. And I am calling it "Raising the Hoe: The New Clientage," and as a subtitle, I would call it "Andy and Me at Vanderbilt Hall." But, and this is a very big "but," now, with a potential for a joyful closure, which is "Harold [Koh] at Foggy Bottom."

Andy Lowenfeld and I shared a lot during the more than thirty years we sat in more-or-less adjacent spaces at the end of the hallway at Vanderbilt Hall—the one leading to the faculty library and its gracious feeding trough.

Oddly, we rarely shared space. I did not casually wander into his Lowen-lair, neither did he into mine—whether out of some mutual sense of the scholarly and sacred, or because there might have been too many diverting distractions to be unearthed in that considerable special area of overlap.

We were, after all, two odd pebbles to have been tossed from the briny bloody sea that was Europe between the wars. My family were Buddenbrookish Germans, predominantly of non-observant Jewish stock, judges, doctors, Berlin, Hanover. We ended up in semi-retired gentility in Vancouver, Canada, which country offered us the extraordinary gift of its wel-

* Murry and Ida Becker Professor of Law Emeritus, New York University.

come—and that, at the very cusp of going to war with the place from which we were emigrating. We might have been treated as enemy non-combatants. Instead, we were placed among the righteous refugees, my father courted for his special insights into the Nazi menace into which our Canadian hosts and we were just then, pell-mell, being drawn.

Happily, my mother's parents were able to accompany us to the new and very beautiful home. In short, we had been very lucky and so, of course, felt very guilty, approximately in the same order of magnitude.

So, there we were: Andy and I, two pebbles tossed from a common, stormy sea, with so much, and yet so very little in common. We never really took time to examine the commonalities or attempted to derive meaning from the differences.

I did know Andy at Harvard Law School, but only through common student-friends. And then I went directly into teaching and writing and Andy went into doing international law in the U.S. Government.

I remember that this is where the road really began to diverge. Andy fashioned himself for the tough world of real international law: the crises, the midnight lairs, the make-or-break confrontations. I smoked a pipe.

Andy had gone with his mentor, Professor Abe Chayes, to join the Kennedy administration as Acting Deputy Legal Adviser in the State Department. He helped to devise the memoranda that served as justification for the embargo placed on Cuba, with the implication that an invasion might follow if the missiles were not quickly removed by the Soviet Union.

I, writing my twice-weekly Walter Lippmann-wannabe column in the Vancouver Daily Province, the Canadian Southam chain of newspapers, described the rationale for the Cuban missile crisis as being wholly without legal foundation. Professor Chayes asked a mutual friend, the historian Arthur Schlesinger, "Do you know some guy in New York who writes for a Canadian daily newspaper and is out of his mind?" My brilliant career outside government had begun. Our paths had begun to diverge.

But, then Andy, too, left government, or vice versa.

I must say that, for someone whose career as a brilliant young lawyer in government had just begun with an auspicious bang, Andy adjusted surprisingly well to exile. He made his

mark as a scholar and commentator in the great tradition of the European world of Diderot and the lexicographers, bringing sense and order to the world of conceptual confusion that have always marked great convulsions in the ordering of civilizations: the sort of thing that follows the dying of the light, the dusk of rationality. And he was able to bring that clarity of his thinking to a real trifecta: to the law schools, to the U.S. courts, and even to the world of private commercial transactions, a whole new field aborning.

Here we are, then, entering into the real crux of our divergence. Andy began to counsel law students thinking of going into international commercial transactions; I began to direct students into “public interest” international law. Andy began to direct commercial firms into business activities that facilitated mutual accommodation between the grinding gears of rival commercial definitions of the national interest.

I, on the contrary, or so it seemed, began to seek to protect weak national governments in emerging states from their more rapacious adversaries, sometimes including the United States. Finally, Andy became the advocate par excellence for clarity, whereas I became, self-styled, the St. Francis of the poor, feeder of the underdogs of the world. Almost all of the clients in whose service I was training our students wore tarbooshes. They seldom could pay. They emerged from swirling populations raised in teeming slums. They tended to drink too much, though the worst drank not at all.

It is at this stage in the splendid adventures of Andy and Tom—and their inevitable synthesis: surely you can see it coming—that the Clinton years came along, followed by the Bush years. As we follow the philosophical evolution of Andy and Tom into those four Presidential terms of U.S. exceptionalism, Andy and Tom find a sort of semi-closure. No, it isn’t that we couldn’t tell the differences between Madeleine Albright and Condoleeza Rice. They were huge. But Albright managed to obscure them much more than necessary. It’s that the opportunities Dr. Albright *missed* at a moment when history might have swung on its hinge were missed in the name of American policy-science hubris: a nicer, gentler hubris than that which led, later, but inexorably, into the invasion of Iraq and the demolition of the whole construct of post-World War II multilateralism. But still, naked hubris all the same. This is the

American century. You're either with us or against us, quoth La Madeleine.

And, so, Andy had to do some choosing. And he chose to go over into open opposition, over where I was. He criticized the Clinton team not for what they did, but for the opportunities they missed.

This should have been the crowning moment for American creative leadership. There was a moment when we could have dealt. A moment to constrain the veto in the Security Council. A moment to create a global security force. A moment to establish a real world bank. What a golden moment that might have been—Clinton and Gorbachev—and what a loss it seemed when it was not seized.

Well, this is where Andy and Tom's mighty lifelong adventure reaches a kind of tentative closure. Eight years of GWB made such closure inevitable. But surely it could have been put on a conceptual framework stronger than Madeleine, better than Condoleeza and, yes, of course, the Clintons far better than the Bushes. Can something be built on that? Yes. Maybe. Now? Is it too late?

As I pass Andy's office on my way to the gracious faculty feeding station, I tend to want to stop and spend a few moments exchanging views with Andy. Why? Because, suddenly, I feel emanating from behind his cluttered scholar's desk an ambrosia of—what? Synthesis? The ambrosia of synthesis? Not too much to go on? Never mind. Suddenly, a picture emerges in which Andy and Tom are teaching their students, advising their governments and private clients and shaping their public philosophy with a new role for lawyers in mind.

In this view, *the new clientage*, I'll call it, the role of the lawyer is not simply to maximize his client's advantages vis-à-vis its adversary. Rather, it is to ensure that each party to the specific dispute is fully aware of the precise *cost to that party* of succeeding at *that* cost. The lawyer's obligation is to persuade the institutional setting within which the dispute is being addressed that the cost of succeeding is not fashioned so as to actually exceed the cost of some *other* form of settlement or some other form of resolution that might be reached or imposed. Does the advocate *for* torture know what the concomitant of that argument is going to cost your client "down the road"? Does the carpet-bombing of civilian sites have long-

term costs to your client that will outweigh any short-term advantage to be gained by pounding those sites into temporary submission?

Oddly, that means preparing your own client to alter his sense of what is in his own self-interest. It may mean having to prepare your client to do battle with the very people who have been providing the essential political means by which he has been pursuing, heedlessly, ends that were never in his interest, or that were only in his narrowest short-term interest. The lawyer may need to change his client's whole sense of identity of interest: between himself, as the leader, with those he purports to lead. He may need to grow a whole new clientage. This new clientage at first can be a hard row to hoe.

But Andy and I seem to have come to precisely the same row at just the right moment: which is to say, at the time when it's just a little too late for either of us to be seen to lead the charge. We are not candidates for power, although, after all this waiting, all this campaigning, a little power would have seemed fair. But what's fairness got to do with it? No, there may just be enough time—perhaps, *deo volente*, just about enough time, to raise that hoe we have been burnishing and, WHAT?—point! Point at this way, the way not taken. Perhaps even enough energy left to let out a full-throated shout.

If Andy and I were to join forces in such a shout—and I do believe that it's right there, lodged in our collective throat's *gestalt*—what a mighty roll of thunder might generate from right here in this room of students, teachers, colleagues, and friends. Oh, I don't mean anything like a revolution. I mean a redefinition of the national interest in which nothing America does will ever be justified again except as the reciprocal of how we would be willing to be treated by other states. How about that? The new clientage.

Well, the *other* thing didn't work, did it?

