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In Memoriam – Marvin A. Chirelstein

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IN MEMORIAM

THE INCOMPARABLE MARVIN: AN APPRECIATION

*Barbara Aronstein Black**

Marvin Chirelstein was my good friend long before he was my colleague, and Ellen is one of my closest friends—it's a friendship that's lasted through oh! so many ups and downs for all of us for oh! so many years. As a sign of how good a friend I considered Marvin, I will report that he is the only person I have ever permitted to call me Babs!

Now Marvin and I did of course become colleagues—at Yale for a while, and at Columbia for almost 30 years. And since we both taught contracts, we had a lot to talk about. Or thanks to the magic of technology, to email about, and since I never throw anything out, or delete anything, I have something upward of 700 emails that we exchanged over the years, most of them about contracts but with more than a sprinkling of other, less solemn, topics. Not that Marvin was going to be solemn about any topic: Solemn he never was. Funny of course is what he was, possessed of a razor-sharp but antic—you might say wacky—wit. It is not easy, or I haven't found it easy, to identify the elements of the Chirelstein humor, just what it was that made him so very funny: The astonishing wit, of course, but some element beyond that, some combination perhaps of the unexpected and the outrageous. In any event he was a funny man. A very funny man. And—much more importantly—he was a serious man. A very serious man.

He was of course serious about his work. He worked almost too hard, often did not take advantage of generous law school leave policies, taught more classes and more students than just about anyone else, and one semester taught at three different schools. He worked hard at writing exams and at that soul-destroying task, reading exams. Having written his contracts primer,¹ he tinkered with it, wrestled with it, worried it like a dog with a bone, through all of its editions, worried about both its detail and its underlying philosophy. He thought long and hard about teaching, in particular about teaching contracts, taking on the challenge, just a couple of years ago, of planning a completely restructured contracts

* George Welwood Murray Professor Emerita of Legal History, Dean Emerita, Faculty of Law, Columbia Law School.

1. Marvin A. Chirelstein, *Concepts and Case Analysis in the Law of Contracts* (7th ed. 2013).

course, one that would provide students with both a practical and a theoretical introduction to the field of contracts, a course in which “theory and practice are joined at the hip, which,” said Marvin, “I think is as it should be.”

Behind this seriousness about his work lay a very serious devotion to the broader academic enterprise; he respected—one almost might say revered—that enterprise. He had what is now perhaps an old-fashioned, perhaps idealized, view of the academy, believed in its mission, in its pursuit of knowledge, believed that an academic institution must hold itself to and preserve the highest standards. And Marvin held himself to the highest standards, with the consequence, as we are all so very aware, that he is known far and wide as a superb scholar and inspiring teacher. Marvin’s mastery of tax law is something I can only admire from afar, since I know nothing about tax or therefore, about Marvin’s tax scholarship. I do, however, know a fair amount about his contracts scholarship and about his contracts philosophy, and I’d like to address that for a bit.

When dealing with individual contracts cases, Marvin usually adopted a tone of absolute certitude: He spoke breezily and confidently about what was ‘really’ going on in the cases. He could and did tell you what the parties were ‘really’ up to; he referred to this as “treating the cases as little stories rather than rule abstractions.” There was no end to his inventiveness in this regard, and one might say that on occasion he went a bit further than was entirely warranted: Indeed my not infrequent response to one of these scenarios was sez who? (or words to that effect). And it was not unknown for Marvin to admit that there was no evidence for his scenario; that of course didn’t faze or stop him.

In any event, you can see that Marvin took what we should call a transactional approach to the study of contract law, and in incorporating that extremely valuable approach in his wildly and deservedly popular primer—thus introducing it to thousands—of law students, he made a huge contribution to the world of contract law. The contribution was as significant as it was because he was himself amazingly adept at the necessary business of penetrating to, and analyzing, the underlying transactions, had the requisite economics and business background, and was of course a gifted teacher, in his writings as well as in the classroom. And it was not just law students that he taught; the many law teachers who assigned the primer, as I did, learned from him, as I did. For my own contracts students this was of particular value, since it provided them with insight into a dimension of the subject quite different from the one that overall I emphasized—that is, the historical.

Beyond a transactional analysis, which tells us what the parties were up to, there is always the question of what the judges were up to. Marvin thought long and hard about the nature of the judicial process, and there is a certain amount of evidence of his thinking on the subject in the context of contracts.

Marvin did not accept the reality of a formalistic, or highly conceptual, judicial process—at least within contract law. That is, he did not believe that the formalistic reasoning that a judge set forth to explain and/or justify her decision was what had actually produced the result reached. Many of the cases, he said, “demand an ‘off-record’ explanation of some sort.” Thus, he said, for example:

The . . . outcome in *Hamer v. Sidway*² . . . has nothing to do with the doctrine of “consideration.” Similarly *Ricketts*³ has nothing to do with “equitable estoppel.” *Seaver v. Ransom*⁴ has nothing to do with “who’s a 3d party beneficiary.” *Webb v. McGowin*⁵ has nothing to do with “moral obligation and past consideration.” [They all] quite simply, are will-contests and are decided by off-the-cuff surmise, viz . . . [what did the] testator intend to do with his estate? Having psychoanalyzed the dead body . . . [judgment for] one claimant or the other is reached on grounds of likelihood and plausibility.

Marvin sounds like a classic legal realist, and so, to a point, he was. So he said: “. . . [C]ontract rules . . . are often . . . used by courts in the cases that we study to achieve an unstated purpose, one that reduces to ‘fairness’ or ‘rough justice’ as it occurs to the heart and mind of a judge. Sounds like old-fashioned legal realism, I guess . . .”

But a good many classic realists felt that judges do this kind of thing—the right thing, as most realists thought—unconsciously, felt that judges are themselves convinced that abstractions like “consideration” decide cases; I think Marvin felt otherwise. In the examples I gave, Marvin not only approved of what these judges were doing, but attributed to the judges themselves a nice grasp of the transactional realities. So, he says: These “were” will cases, *and the judges understood that and acted appropriately*. Of course he also thought not a few cases just wrongly decided and some judges clueless, but in a significant number of instances, he credited the judges as seeing what he, Marvin, saw and deciding as he, Marvin, would have decided; he did not partake of extreme skepticism, far less cynicism, about the judicial process. But certainly he was a realist, and for that matter a realist about realism: In his thinking about the contracts course, he pointed out the critical role of legal realism: “[L]egal realism is an ad hoc philosophy that makes teaching in traditional terms impossible. You don’t have a body of technical knowledge to pass along, only a technique. The technique is worth learning, I suppose, and that, in part, is what the study of ‘cases’ is about.”

Of course there were lots of Marvins: the one who loved music and played the violin, the one who loved gambling (when he was a kid he used to place bets with the doorman of his building in Chicago), the one

2. 27 N.E. 256 (N.Y. 1891).

3. *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898).

4. 120 N.E. 639 (N.Y. 1918).

5. 168 So. 199 (Ala. 1936).

who made friendships in kindergarten that lasted forever (one of his Parker school buddies was present at his memorial service). There were lots of Marvins, but most especially the one who loved old movies. Marvin's favorite movie was *The Mask of Dimitrius*, and when he discovered that the star, Zachary Scott, had been a schoolmate of my husband's—well, such excitement!

And staying with the movie theme, a number of the emails I've referred to concerned a project that Marvin was deeply invested in—emotionally invested, that is, not financially. The project was a shared one: Marvin's very good friend Alan Axelrod was Marvin's partner in this. At one point Marvin and Alan allowed me to participate as well, though they did the heavy lifting, and so I can bring you a taste of what Marvin was doing in his spare time in the summer of 2002.

The goal was as full a list as possible of the names of pre-1950 actors who were never leading men but appeared on screen again and again—the workhorses of the movies.⁶ Here are some examples, some of Marvin's emails, on the search for names:

“I have in mind a bad guy whose evil nature was shown by the fact that he spoke without ever moving his lips.”

“Still missing (i think): (i) the gurgly-toothed protestant clergyman in wayne/o'hara irish movie, (ii) the british officer who wound up with kitty in p&pref, and of course (iii) that wattle-jowled bureaucrat we've been struggling to identify.”

“Who's the old guy with heavy pouches under his eyes who cut off one of the Tarleton brothers' legs in *Gone with the Wind*?”

“Still struggling to identify the bank president/commanding officer type who read the Kipling poem at the end of *Gunga Din*.”

You really must appreciate the seriousness with which this project was carried out: So “Laird Cregar has been considered carefully by the Board . . . and regretfully rejected. The reason: he's really known for a single part . . . but not for repeated roles. We have to be careful.”

And then there was this from Marvin: “I had dinner last night with [a person in the movie business]. Having told him about our great project, I added that I was tortured by my inability to remember the snaggle-toothed protestant clergyman in *Wayne/O'Hara*. ‘Arthur

6. See Carol Sanger, Marvin Chirelstein: Friend and Colleague, 116 Colum. L. Rev. 311, 317 n.13 (2016) (listing full name of actors).

Shields' he exclaimed. Shields, it turns out, was Barry Fitzgerald's brother! Wonderful things happen when you have a goal in life."

Following the rules was critical, and deviation not tolerated: I wasn't well versed in the rules and unwittingly violated a fundamental one. An Axelrod to Black email followed: "You're looking things up?????!!@@" I was abashed and wrote apologetically and cringingly—to which Marvin responded as only Marvin could: "You're a fine Jewish woman. Have no concern." As I said, the unexpected and the outrageous.

Marvin was an elegant fellow, of wide-ranging interests and finely cultivated taste; he had, I think, a deep feeling for, a profound appreciation of, authenticity. This is something one sees in both his personal and professional life, and it is something—one thing among many—that he shared with Ellen, who of course contributes the sensibilities of an art historian. If you were to visit their home—whether the big, old house in New Haven or the compact apartment in the Village—you would see this in operation—everything was chosen with an eye to authenticity as well as beauty, each piece was tasteful and interesting—and authentic. Marvin's office also reflected this quality.

Marvin was a modest man; he was of course a virtuoso of the fine art of self-deprecation, but much of that was fun and games, beneath which there was genuine modesty. He was, as I said, elegant, a courteous man with old-fashioned good manners; when he and Ellen and I went out to dinner he'd never let me pay. He was unfailingly helpful and kind to me, an ever-amusing, but also empathetic, companion.

In a classic eighteenth-century manner that Marvin would have enjoyed (while of course poking fun at it) we say: We shall not see his like again. How often that reflects reality (more than truistically), who knows. But we can say that with confidence about Marvin, can't we: After all, we never saw his like before.

I miss him a lot.

MARVIN THE MAGICIAN

*Stephen B. Cohen**

I graduated from Yale Law School in 1971. Marvin Chirelstein was my teacher for three courses at Yale: Basic Income Tax, Corporate-Shareholder Tax, and Corporate Finance. Marvin was also my mentor. He inspired me to become a tax teacher and made the phone calls that landed me my first job at Rutgers-Newark Law School, where he began his teaching career before Yale.

Marvin was a magician. At the start of class, he would shuffle back and forth and sheepishly announce, “This material is boring. I can barely get through it.” Or he would say, “I know this is obvious. I can hardly spit it out.” But he was never boring, and it was never obvious. With each class, like magic, he provided insights and perspectives that none of us, his students, could have ever anticipated or figured out without him. The intellectual content was stunning.

For my classmates and me, Marvin’s classes were among the most rewarding in our three years of Yale. And there was stiff competition from other inspiring and accomplished law professors at Yale, including Alex Bickel, Charles Black, Guido Calabresi, and Arthur Leff.

Perhaps most amazing was that, whether the subject was Individual Income Tax, Corporate-Shareholder Tax, or Corporate Finance, Marvin’s classes made you feel happy. Why were we so happy to be in his class? It was partly Marvin’s humor—no borscht-belt comedian was funnier. It was partly his informality. During class breaks, for example, as students loitered in the hallway, Marvin would bum cigarettes from them—you could still smoke inside the law school building then.

Besides the humor and informality, there were two other endearing qualities. Tax professors, if you will forgive me, can often seem pompous and self-important. Marvin was not. He was unabashedly irreverent and ever ready for self-deprecation.

The irreverence and the self-deprecation are evident in an article that Marvin co-authored with Larry Zelenak on income inequality and tax rates.¹ In 2010, three years before Thomas Piketty’s *Capital in the Twenty-First Century*,² Chirelstein and Zelenak proposed raising tax rates on high-income taxpayers in order to lessen burgeoning inequality. The article reviewed empirical studies by economists of whether raising tax rates deters work effort by talented individuals. For the most part, the

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1. Marvin A. Chirelstein & Lawrence Zelenak, Tax Increases, Revenue Effects, Efficiency, and Income Inequality, 128 Tax Notes 197 (2010).

2. Thomas Piketty, *Capital in the Twenty-First Century* (Arthur Goldhammer trans., 2014).

studies by economists conclude that the impact would be minimal and that higher taxes would not significantly deter work effort.

But aside from the scholarly discussion of empirical studies, there are two paragraphs that Marvin himself must have written. The first lam-poons, as argument by anecdote, President Ronald Reagan's claim that higher tax rates will deter work by the most talented individuals:

President Reagan, a stout opponent of progressive income taxation, some years ago reported that during World War II, he, being the only leading man in Hollywood left undrafted, was offered many a juicy movie role but beyond a point refused them all because of high wartime tax rates. "You could only make four pictures and then you were in the top bracket" . . . Reagan recalled. "So we all quit working after four pictures and went off to the country."³

In his second paragraph, Marvin's self-deprecation emerges:

[W]e must admit that we have no anecdote to compare with Reagan's. The older of us can say, however, that in a long life he has never met anyone, certainly no lawyer or businessperson, who chose to quit work and head for the beach because of an increase in his marginal tax rate. Just the contrary in that author's experience (which, he admits, may prove nothing, because his circle of acquaintances has mostly been limited to the hungry and unsatisfied).⁴

Marvin's humor, his informality, his irreverence, and his self-deprecation made him irresistible.

Now, a few words about Marvin's influence and impact outside the classroom even before the publication of his widely read and profoundly influential student guide to federal income taxation.⁵ In the late 1960s, the *Yale Law Journal* published his triumvirate of pathbreaking, creative articles on the structure of corporate-shareholder taxation under subchapter C of the Internal Revenue Code. All three, a tax trifecta, deserve to be in the tax canon.

In an article entitled *Learned Hand's Contribution to the Law of Tax Avoidance*,⁶ he addresses the complex and troublesome question of form and substance in corporate-shareholder taxation. No scholar has improved on his description of the problem:

The courts . . . follow no single and consistent set of rules in deciding when to accept and when to disregard the taxpayer's choice of form, although there is a conclusory commonplace for either type of determination. Thus when declining to accept

3. Chirelstein & Zelenak, *supra* note 1, at 197.

4. *Id.* at 200.

5. Marvin A. Chirelstein, *Federal Income Taxation: A Law Student's Guide to the Leading Cases and Concepts* (1st ed. 1977).

6. Marvin A. Chirelstein, *Learned Hand's Contribution to the Law of Tax Avoidance*, 77 *Yale L.J.* 440 (1968).

the taxpayer's choice of form the courts commonly assert as a matter of principle that the incidence of taxation depends upon the substance of a transaction and that mere form is not controlling. When, on the other hand, the choice of form is accepted, the appropriate maxim is that "there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible."⁷

Marvin analyzes Learned Hand's attempts to reconcile landmark Supreme Court decisions in *Gregory v. Helvering*,⁸ *Moline Properties v. Commissioner of Internal Revenue*,⁹ and *Higgins v. Smith*,¹⁰ and thereby formulates a coherent doctrine indicating when the corporate form will be disregarded and when it will not. Marvin's article remains the starting point for tax scholars wrestling with questions of rules versus standards and literal versus nonliteral statutory construction of the tax code.

In a second article, *Optional Redemptions and Optional Dividends: Taxing the Repurchase of Common Shares*,¹¹ Marvin uses financial theory to argue that share repurchases by publicly traded corporations should be taxed as ordinary dividends rather than sales of stock. He was the first legal academic to recognize the economic equivalence of such repurchases and dividend distributions and to appreciate the significance of that equivalence for the taxation of corporate-shareholder income.

In a third article, *Tax Pooling and Tax Postponement—The Capital Exchange Funds*,¹² Marvin explains that provisions of the Internal Revenue Code treating the incorporation of unincorporated businesses as nonevents—in order not to impose a penalty on a change in the form of conducting a business—were being misused by wealthy taxpayers to avoid being taxed on the exchange of stock for a diversified portfolio, which should ordinarily be a taxable event.

The second and third articles had a real-world impact. After their appearance, Congress modified the Code to prevent some of the abuses to which Marvin pointed,¹³ although admittedly Congress did not go as far as he proposed and would have liked.

Even more significant is his casebook, *Corporate Finance*,¹⁴ published in 1972 with co-author Victor Brudney. During the period following World War II, financial theory—the economic analysis of corporate

7. Id. at 440–41 (footnote omitted).

8. 293 U.S. 465 (1935).

9. 319 U.S. 436 (1943).

10. 308 U.S. 473 (1940).

11. Marvin A. Chirelstein, *Optional Redemptions and Optional Dividends: Taxing the Repurchase of Common Shares*, 78 Yale L.J. 739 (1969).

12. Marvin A. Chirelstein, *Tax Pooling and Tax Postponement—The Capital Exchange Funds*, 75 Yale L.J. 183 (1965).

13. 26 U.S.C. §§ 305(c), 351(e) (Supp. I 2014).

14. Victor Brudney & Marvin A. Chirelstein, *Cases and Materials on Corporate Finance* (1972).

financial structures—blossomed as an academic subject in departments of economics at leading universities. The casebook integrates financial theory with legal cases on corporate finance. It is the first law casebook to do so and inspired generations of corporate law teachers to apply the latest developments in financial theory to the subject of corporate law. It is no overstatement to say that the casebook did for corporate law what Guido Calabresi's *The Cost of Accidents*¹⁵ did for Torts and what Richard Posner's *Economic Analysis of Law*¹⁶ did for law generally.

Only then came Marvin's wildly popular *Federal Income Taxation: A Law Student's Guide to the Leading Cases and Concepts and Insights*.¹⁷ This book, Michael Graetz observed, "taught more students than any of us could ever hope to reach."¹⁸ A University of Nevada law professor, Nancy Rapoport, says she was able to pass her law school tax course only because of Marvin's student guide. In gratitude, Nancy Rapoport made a public vow: to name her first child, whether boy or girl, Marvin Chirelstein Rapoport.¹⁹

No appreciation of Marvin Chirelstein would be complete without mentioning his possible impact on the New York Knicks basketball team. For the past three decades or so, the Knicks have fallen on hard times. The 1970s, however, were different. The Knicks won two world championships, in 1970 and 1973, and were a dominant team during that entire period. Their five starters were, as the older of us may recall, Walt Frazier, Earl Monroe, Bill Bradley, David Debusschere, and their towering, overpowering center, Willis Reed. Marvin was not only an avid Knicks fan during that time. It is a little known and underappreciated fact that Marvin was Willis Reed's attorney. This fact deserves repetition: Willis Reed was Marvin's client. It cannot be mere happenstance that the period of the Knicks' greatest success coincided with the time when Marvin represented the team's star center. After all, Marvin was a magician.

Finally, it's hard to improve on Larry Zelenak's description of Marvin:

He knew everything about the history of boxing and baseball [and] seemed to have the complete works of Gerard Manley Hopkins committed to memory He wrote in an unmistakable voice, with clarity, grace, and wit (and not just about

15. Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (1970).

16. Richard A. Posner, *Economic Analysis of Law* (1972).

17. Marvin A. Chirelstein, *Federal Income Taxation: A Law Student's Guide to the Leading Cases and Concepts* (13th ed. 2015).

18. Columbia Law Sch., Marvin A. Chirelstein: Revered Professor and Leading Scholar of Federal Taxation, Corporate Law, and Contracts (Feb. 17, 2015), <http://www.law.columbia.edu/marvin-chirelstein/623309> [http://perma.cc/8DEW-NLLL] (quoting Michael Graetz).

19. Nancy Rapoport, R.I.P., Marvin Chirelstein (Feb. 16, 2015), <http://nancyrapoport.blogspot.com/2015/02/rip-marvin-chirelstein.html> [http://perma.cc/4GQL-CML2].

tax . . .). He belongs on the short list of funniest law professors of all time (despite, or perhaps because of, his almost never cracking a smile). And underneath a somewhat gruff exterior, he was one of the kindest persons I have ever known.²⁰

20. Paul Caron, Death of Marvin Chirelstein, TaxProf Blog (Feb. 17, 2015), http://taxprof.typepad.com/taxprof_blog/2015/02/death-of-marvin-chirelstein.html [<http://perma.cc/26NN-8SSG>] (quoting Lawrence Zelenak).

MARVIN A. CHIRELSTEIN

*Michael J. Graetz**

The Surgeon General of the United States was not Marvin Chirelstein's general. Marvin did not doubt the Surgeon General's warnings that smoking cigarettes was harmful to one's health; he just didn't care, and he refused to quit. Marvin enjoyed gambling, and this was no doubt the most important bet he ever won. Nor was Marvin willing to accept fully Michael Bloomberg's insistence that all smoking take place outdoors. Most of the time, I would catch up with Marvin on 116th Street, leaning against the law school, puffing away. But now and then I would drop into his office where the lingering odor made clear that Marvin wasn't following all the rules. For a man so dedicated to the law, Marvin Chirelstein was a maverick.

Unfortunately, although I saw quite a bit of Marvin in the past few years, I cannot say that we were close friends. Marvin had disembarked for New York nearly two years before I arrived at the Yale Law School. His reputation, however, like the smoke in his office, lingered. Before arriving at Yale, I had, of course, heard often of Yale's two tax law giants "Bittker and Chirelstein." They were, in fact, very close friends. Boris Bittker and Marvin Chirelstein walked together to the law school nearly every morning while they were both at Yale, and they occupied offices adjacent to each other there for nearly twenty years. But despite their shared immense intellects, their mutual admiration, and their abiding friendship, Marvin and Boris were very different. Mostly, this was due to tastes. To take just one example: Boris knew nothing and cared less about sports. Marvin was avid about sports, especially boxing and baseball, and he loved placing a wager on a horse. He sometimes said he wanted to be buried at the seventh furlong pole at Belmont. Boris thought Belmont was a city, but he wasn't sure whether it was in Massachusetts or California or why it might have such a pole. Marvin loved music and was an accomplished violinist; Boris couldn't distinguish one note from another. Marvin himself, in a tribute to Boris in the *Yale Law Journal*, describes what it was like working next door:

It was a harrowing experience. My own scholarly life, to call it that, consisted chiefly of an agonizing, daily effort to think up a writing project that I could regard as respectable, and there were weeks and months, never mind years, when absolutely nothing worthwhile entered my head. On the other side of my office wall, too thin to be entirely soundproof, I heard the steady and relentless tap-tap-tap of Boris's typewriter as he began, finished, and then went on to another brilliant research

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project in what appeared to me to be an endless succession of scholarly triumphs. He never ran out of ideas, he never ran out of energy, and he behaved at all times with a calm, unfailing self-assurance that exactly mirrored the reverse of my own fevered mental state. The fine portrait of Boris that hangs in the student lounge at Yale Law School misses only one thing, and that is a tiny cartoon of me in the lower right-hand corner in the attitude of *The Scream*.¹

Looking beyond his self-deprecating wit, Marvin was again expressing a difference of taste. Marvin had amply demonstrated his capacity for pathbreaking scholarship in articles on corporate taxation and corporate finance published in the *Harvard Law Review* and *Yale Law Journal* in the 1960s and 1970s,² but truth be told, Marvin Chirelstein didn't have high regard for the scholarly enterprise. He said that legal scholarship "at best offers other writers an opportunity to bring their own ideas into focus and advance the issues in some useful direction."³ Legal writing, he said, "has a painfully short after-life"; over time it "sink[s] back into the shadows."⁴ Marvin Chirelstein did not love the shadows. His view of legal scholarship more gently echoed my former University of Virginia colleague Tom Bergin, who long ago described the *Index to Legal Periodicals* as the "Forest Lawn of catalogues."⁵

So it is hardly surprising that Marvin spent little of his time on traditional legal scholarship. Perhaps more surprising is that Marvin—who by his own admission, often failed to make it to class as a student⁶—was a dedicated and enormously successful teacher, loved and admired by generations of law students. Teaching, Marvin frequently said, is "easy"—not something we all agree with, but Marvin was a "natural."⁷

Not everyone, of course, was captivated by Marvin's teaching. His most famous student, Bill Clinton, confessed to reading *One Hundred Years of Solitude* during Marvin's federal income tax class, but he, of course, was not about to become a tax lawyer. Even well into his eighties, students would describe Marvin as "the best professor I ever had," "a tremendous educator." Nearly everyone he taught remarked on his sense of humor. He was indeed a very funny man. But tax isn't for everyone: As

1. Marvin A. Chirelstein, Boris I. Bittker, 115 Yale L.J. 737, 737 (2006).

2. E.g., Marvin A. Chirelstein, Optional Redemptions and Optional Dividends: Taxing the Repurchase of Common Shares, 78 Yale L.J. 739 (1969); Marvin A. Chirelstein, Tax Pooling and Tax Postponement—the Capital Exchange Funds, 75 Yale L.J. 183 (1965).

3. Marvin A. Chirelstein, Walter J. Blum and My Brilliant Career, 55. U. Chi. L. Rev. 725, 725 (1988) [hereinafter Chirelstein, Brilliant Career].

4. Id.

5. Thomas F. Bergin, The Law Teacher: A Man Divided Against Himself, 54 Va. L. Rev. 637, 646 (1968). For those who do not know, Forest Lawn is a well-known Los Angeles mortuary and cemetery.

6. Chirelstein, Brilliant Career, *supra* note 3, at 729.

7. For the sense of the word, see generally Bernard Malamud, The Natural (1st ed. 1952); The Natural (Tristar Pictures 1984) (starring Robert Redford).

one student summarized it, “Chirelstein is everything positive, and tax is everything negative, which the Chirelstein positives greatly outweigh.”⁸

But the classroom could not contain Marvin’s appetite for teaching. Early in the 1990s, Marvin published his *Federal Income Taxation (Concepts and Insights)*, an indispensable guide for law students struggling to understand taxation. Thirteen editions later and now co-authored by Larry Zelenak, it remains one of Foundation Press’s very best sellers. Like virtually all other tax professors, I urge my students to read it, but I ask them to wait until I have first covered the relevant material in class. I tell myself that this is sound pedagogically, but sometimes I wonder whether it is just so they will think I have something original to add in the classroom to Marvin’s insights. Through that marvelous volume, Marvin has taught taxation to an enormous number of law students—far more than any of us could hope to reach. And he inspired many law students to choose tax law as a career. Fortunately, that teaching will continue long after his death.

Marvin not only taught tax classes; he also taught contracts, and again he found the classroom too small a stage. So early this century, he followed his wonderful tax book with a second best seller: *Concepts and Case Analysis in the Law of Contracts*. Through this effort, Marvin provided the kind of insights for generations of first-year contracts students that he had long accorded their upper-class colleagues struggling to learn taxation.

In addition to teaching, Marvin loved lawyering. His office was stacked high with transcripts of testimony from arbitration hearings in contests between tax shelter investors and the promoters of shelter deals that had collapsed or even backfired. When I asked Marvin which side he was testifying for, after acknowledging that he had testified over a dozen times, he replied, “It doesn’t matter, they are all scoundrels.” He reserved his greatest scorn for “the supporting legal opinions from some of the best known firms in the country.” But he insisted, his expert testimony was highly valued and produced fear and lucre, both of which Marvin appreciated. Perhaps as an outgrowth of this endeavor, Marvin created and taught a very successful seminar on the implications of the codification of the economic substance doctrine⁹ for the “proper scope of Tax Planning, that foul disease.”¹⁰ Having mastered something new, Marvin was anxious to share his expertise and experience with his students.

8. These quotes stem from anonymous student surveys from classes Marvin taught in 2008 and 2013.

9. See generally I.R.C. § 7701(o) (2012).

10. Email from Marvin Chirelstein, Professor Emeritus, Columbia Law Sch., to Michael Graetz, Columbia Alumni Professor of Tax Law, Columbia Law Sch. (June 12, 2010, 2:50 PM) (on file with the *Columbia Law Review*).

Marvin's taste and energy for teaching did not end when his students graduated law school. Steve Cohen and Roberta Romano, in articles adjacent to this one, offer compelling testimony to Marvin's talents and efforts as a mentor. Yale Law Professor Anne Alstott, who embarked on her teaching career at Columbia, echoes their sentiments:

I met Marvin when I began teaching in Columbia in 1992, and I could not have asked for a better mentor and friend. Marvin's office was next to mine, and so we would wander into each other's office several times a day. He read every word of my articles and commented sharply but always gently. Once I (unwittingly) titled a section of an article "What is To Be Done?" and he wrote, "Lenin?" Marvin was hilarious and always original. He never repeated a quip but had an endless font of dry humor. One of my regrets in leaving Columbia was leaving Marvin's company. I miss him.¹¹

Marvin lamented that he couldn't teach taxation to all of America. He expressed "abiding" frustration at the "extent to which ordinary people can be misled and misinformed about our tax system—even lied to—by political candidates, news commentators and others having access to a public audience."¹² He remained "moderately proud" of the income tax, despite its many shortcomings, which he knew well, and was firmly committed to progressivity in distributing its burdens among the populace.¹³

As Bob Scott relates in detail, Marvin was famous around Columbia Law School for his email correspondence. He brought many a smile to the faces of everyone on his mailing list. Once in correspondence about "a director of transnational studies" at the law school, Marvin suggested that, if I were to refuse the position (which was a question I never faced), we should turn to Rodion Romanovich.¹⁴

Bill Clinton described Marvin Chirelstein as a "gifted teach[er]" with "endless curiosity," and a "generous spirit."¹⁵ The former president got that exactly right. More compelling than all of Marvin's many accomplishments were his great humanity, his unparalleled sense of humor, and always, the twinkle in his eye.

11. Email from Anne Alstott, Jacquin D. Bierman Professor in Taxation, Yale Law Sch., to Michael Graetz, Columbia Alumni Professor of Tax Law, Columbia Law Sch. (Sept. 15, 2015, 10:29 AM) (on file with the *Columbia Law Review*).

12. Marvin A. Chirelstein, *Taxes and Public Understanding*, 29 Conn. L. Rev. 9 (1997).

13. *Id.* at 26.

14. Email from Marvin Chirelstein, Professor Emeritus, Columbia Law Sch., to Michael Graetz, Columbia Alumni Professor of Tax Law, Columbia Law Sch. (Jan. 20, 2013, 10:28 AM) (on file with the *Columbia Law Review*).

15. Columbia Law Sch., Sincerely, Marvin Chirelstein (Oct. 12, 2015), http://www.law.columbia.edu/media_inquiries/news_events/2015/october2015/chirelstein-memorial [perma.cc/3YWW-6C4L].

Not long after my mother died, my daughter Sydney, then age six, caught me in a moment of profound sadness. “Dad, why are you sad?” she asked.

“I was just thinking about your grandmother,” I said.

“Oh,” she said, “I’ve been thinking about her too.”

“What are you thinking?” I asked.

“I am thinking of her in heaven having tea with Louie Armstrong,” she said.

This, I realized instantly, is the best way to think about people who have passed. So now when I think of Marvin Chirelstein, I see him in heaven, taking advantage of his new heights to cash a winning ticket on a longshot at Belmont, watching a boxing match or baseball game now and then, convincing Isaac Stern to play a duet or at least give him some violin lessons, amusing the “B-list” actors from old movies he loved, and teaching anyone who will listen about taxation and the law of contracts.

REMEMBERING MARVIN CHIRELSTEIN

*Roberta Romano**

It is a privilege for me to contribute to this volume remembering Marvin Chirelstein, for he changed the course of my life. I knew Marvin best as my teacher, and that perspective informs my remarks. To put it most directly, I would not be doing what I have been doing for the past thirty-plus years, if I had not taken Marvin's courses. I would also venture to say that this is true of innumerable lawyers and law teachers who were his students.

I did, of course, see Marvin after I graduated from law school. And there was one notable sustained change that occurred in our conversations over the years: Our later conversations always started with a laugh, more precisely my laughing, as Marvin had taken to greeting me with a Brooklynese rendering of my name as "ReBirda." It always had the intended effect, as every time he said that I would burst out laughing. One of the disappointments in my career is that we were not full-time colleagues, for I missed out on laughing on nearly a daily basis.

The first class I took with Marvin, the second semester of my first year in law school, was Federal Income Tax. And as it turned out, I enjoyed Marvin's class immensely from the outset. What was there not to like? Marvin pulled you in with a wry sense of humor and nonchalance. There was nearly always something hilarious in what he said or in a little gesture he made that kept the class a bit off balance and everyone's interest and attention at a peak, and then he would amaze us with elegant clarity and tremendous insight—often using the apparent simplicity of a numerical example while mumbling something self-deprecating about the calculation—and, with or without numbers, always making a nonobvious connection or extracting a nonobvious interpretation. After the "aha" moment, you would find yourself invariably saying, "Yes, of course, it's exactly so." It was teaching as performance art, but with intellectual content of the highest order. And humane pedagogically, as he called on us alphabetically.

My experience in the income tax class was the start of an intellectual journey, and a relationship that I developed with Marvin, over the rest of my law school years and my professional life. I enrolled in every one of Marvin's courses: Federal Income Tax, Business Units II, and Corporate Tax. When I exhausted the courses that Marvin taught by the end of my second year in law school, I then fulfilled a writing requirement under Marvin's supervision, which became a co-authored paper with my classmate, Mark Campisano. Writing that paper suggested to me that it might be fun to use economics to analyze legal rules and pursue an

* Sterling Professor of Law, Yale Law School.

academic career; Mark followed more substantively in Marvin's footsteps and is a distinguished tax lawyer. And he had this to say in remembrance:

For me, Marvin was more than a wonderful teacher—he introduced me to the intellectual love of my life. He presented tax law as a marvelous and massive conceptual jungle gym, where you could climb from one idea to another, and then to another, and so on—until you found yourself in a place you'd never foreseen. So, for example, the question of “what is income?” led Marvin to talk about the timing of taxation, and then to benefits in kind, and then to inside buildup, and then to the convenience of the employer, and finally to whether a family should be taxed on “the housewife's uncompensated labor as a homemaker.” How did we get there?

I think Mark captures a feeling shared by all of Marvin's tax students.

Mark and I not only wrote the paper together for Marvin, but he asked the two of us to review a note on tax preferences that he was thinking of adding to the first edition of his marvelous little book, *Federal Income Taxation*,¹ which had been published shortly before we took his course in Spring 1978. The book is a veritable *objet d'art* from a student perspective. Meeting the test of time, it has gone through a dozen editions, but from the outset it was evident that it was the rare book that would impact, indeed transform, the content of classroom teaching. It so lucidly conveys and synthesizes the key tax concepts that students armed with the text no longer are like deer in the headlights in the income tax class; indeed, with Marvin's text as a teaching tool, students could emerge unharmed by a less compelling teacher, while the more ambitious teacher could spend more class time on broader policy issues. And, most importantly, law students all over the country were able to obtain a glimpse of the wondrous experience of discovery, one “aha” moment after another, that those of us privileged to attend Marvin's classes experienced.

Although writing a paper on net operating losses under Marvin's supervision was the impetus for my following in his footsteps as a teacher, the course that, in retrospect, had the greatest impact on me was Business Units II. It was a pioneering, innovative course for the law school curriculum at the time and, despite what might seem to be an arcane subject, was heavily subscribed because Marvin was such a celebrated teacher. Years later, Marvin wrote to me describing how he was dragooned to teach the course. It is quintessential Marvin—dry, self-effacing wit yet with a serious edge:

When I arrived at Yale as a visitor in 1965, the outgoing Dean . . . , author of some of the longest unread books ever published—told me that I was scheduled to teach a course called Business Units II [BU II]. “What is that?” I asked timidly.

1. Marvin A. Chirelstein, *Federal Income Taxation: A Law Student's Guide to the Leading Cases and Concepts* (1st ed. 1977).

“That is our finance course,” he answered, obviously impatient to get back to his writing. “But I don’t know anything about . . .” I started to say when he closed and locked his office door. Anyway, the next morning (!!), I found myself teaching a course that consisted entirely of case-annotations for commonly used bond indentures and other boiler-plate documents . . .

At all events, I staggered through the semester, aware that BU II was surely the most boring and insignificant course ever offered anywhere at any time in any language. When it was over, fearing that I might have to teach it again, I approached the faculty person whose responsibility it was to assign teachers to courses . . . and begged to be relieved. “Nonsense, Timothy,” he said, “we hired you on the basis of your reputation as a leading Finance specialist. So don’t be modest. Go to it!”

Well, the choice then was to find somebody named Timothy to take my place or do something with the course itself. Result: I spent the summer reading such fascinating magazines as *The Journal of Finance*, half-understanding or misunderstanding what the articles therein were talking about, and next time around attempted to smuggle a truncated Bschool finance course into BU II. In the end, together with Brudney, we put together a dreadful casebook—the one you used, I believe—of which the only virtue was that it so irritated teachers at other law schools that within a few years a small army of casebooks, much better than ours but also including a lot of BSchool stuff, made their welcome appearance.

The whole thing was nothing more or less than an act of desperation. And you were its victims.

Well if we were victims, we were willing ones; indeed, we were delighted to be them. More seriously, no one could possibly use the adjectives “boring and insignificant” to describe what the course became. For Marvin’s Business Units II was a sophisticated interdisciplinary intellectual adventure in which corporate law rules and modern finance theory were intertwined, along with a dose of social choice theory. Having taken Marvin’s course, it did not require a fertile imagination to figure out the direction in which corporate law was going to move; the intellectual payoff was self-evident.

Marvin was, in fact, far too modest about his introduction of corporate finance into the law school curriculum. When I forwarded to him an intellectual history of the field that I was sketching, he asserted—wrongly in my judgment—that I “g[a]ve him a lot more credit than [he] deserved.” And he informed me that the field went back further “than I probably wanted [to know],” in that:

There was a casebook (unpublished and in looseleaf when I took the course in 1952!!!) on Insolvency Reorg’s by Walter Blum and Wilbur Katz, both at the U. of Chicago L. School, which included a tiny smattering of Finance that I then found interesting. Blum & Katz drew on a [book] “On Valuation”

by... Bonbright, who actually made the point, non-mathematically, that capital structure had no relevance, taxes aside, to the value of the firm. Bonbright went to Valhalla long, long ago, and his book, probably still in the law library is entirely forgotten, but I think it did suggest some theoretical developments that distinguished him from Graham and Dodd. Truly ancient history.

Blum and Katz and Bonbright did make an appearance in the Brudney and Chirelstein Corporate Finance casebook;² still, the contemporary field commenced with Brudney and Chirelstein, for they systematically introduced finance into the study of corporate law. And that project was no doubt informed by what had initially piqued Marvin's interest way back in his University of Chicago Law School days and Blum and Katz's course.

For me, each B.U. II class was mesmerizing, as Marvin would make my head spin as he characterized and recharacterized transactions, just as he had in tax, or unpacked the multiple layers of proceedings buried within the explicit proceeding in a case, while making you laugh with pithy characterizations of cases, often a phrase from the decision—the preferred stock cases were “sailors, idiots or infants” cases, the district court opinion in *Atlas Pipeline*³ was the “men of large means” case. These phrases, which reverberate in my memory, had the pedagogic benefit of providing indelible markers for what we had learned, as they turned into subtle stand-ins for his introduction to the uses of finance theory, such as the importance of finding a market value test as the benchmark for judicial determination of a valuation dispute.

Marvin's insights into cases, of course, originated in his singular gift of seeing the isomorphic structures of diverse transactions, a prime reason why he was a superb tax lawyer. But there was another factor for why he was a master teacher: He truly enjoyed engaging with students—a trait not as prevalent among law teachers as one would wish. Marvin once told me how he particularly disliked New Haven in the summer—which I found startling, for it is green, peaceful, and I think, quite pleasant in the summer—but he disliked it because the students were not there. Marvin thought that things were dull without students, and he looked with anticipation to their return; the buzz in the hallways at the start of the school year, he found exhilarating. I think that Marvin's genuine affection for students is a key to understanding his tremendous classroom success and formative impact on his students, as it would be difficult not to have burned out over the years from the emotional energy expended in class, if there had not been joy in the work.

2. Victor Brudney & Marvin A. Chirelstein, *Cases and Materials on Corporate Finance* (1972).

3. *In re Atlas Pipeline Corp.*, 39 F. Supp. 846, 848 (W.D. La. 1941).

I would like to close with a further word on Marvin's character. Marvin was inspirational not just as a teacher: He had a keen sense of fair play. He employed female research assistants at a time when that was a rarity. One should keep in mind that in the late 1970s when I was a law student, although the situation was rapidly changing, women constituted less than thirty percent of the class, and my Contracts teacher, of whom I thought and still think the world, did not call on female students. I was fortunate to be involved in several of Marvin's research projects and thereby had a front seat observing this aspect of who he was. And I would be remiss if I did not also share an instance of Marvin's sense of right and wrong that I observed from that perch. Marvin was concerned that the issuance of cable TV licenses in New Haven might involve corrupt influence peddling. We drove to Hartford together thinking that we would get state regulators to, at the least, investigate the granting of the licenses. The Connecticut regulators were simply not interested. With the benefit of hindsight, we expected too much, as over the succeeding years a large number of state elected officials, of both political parties, have been convicted of corruption. Although our trip to Hartford was disappointing, that experience will always stay with me, for it conveyed so clearly to me Marvin's integrity and decency.

If there is a Valhalla, then Marvin is there, and I am sure that he is having the Gods laughing every morning. And I am also certain that his tax classic will long be in the law libraries, and it will not be forgotten, just as he will not be forgotten.

MARVIN CHIRELSTEIN: FRIEND AND COLLEAGUE

Carol Sanger*

I have been lucky in my friends at Columbia Law School, and among those held most dear is Marvin Chirelstein. Marvin was one of the wittiest men about, one of the kindest, and certainly one of the most elegant. His manners I credit on faith to his parents; his *bella figura* I credit to Ellen. He was a handsome man of great bearing, and he had the most sophisticated ties in the building.

In recent weeks, I have been reviewing email exchanges between Marvin and me to be able to explain more vividly why Marvin is so missed and what it meant to have him as a friend. In doing so, I have found myself getting into a very Marvin state of mind. I know others on the faculty have similarly experienced the evocation of Marvin by rereading his messages. His distinctive manner of thought is all over everything he wrote, even the melancholy comes through. These emails and his published contracts work (I can't speak for tax, though others will) serve as tangible reminders of Marvin's intellect, his playfulness, and his depth with regard to subject upon subject. They provide a comforting way to *almost* get back in touch with him. They certainly show how both Marvin's wit and incisive critique were always on the ready.

Sanger to Chirelstein: Why do we keep teaching *Sullivan v. O'Conner*?

Chirelstein to Sanger: Well, little chipmunk, *S v. O* is not well understood. What it stands for is the proposition that consumer surplus is non-compensable. *S* went to the doctor store to buy a new nose; they sold her one that didn't fit. She took it back. They gave her money back plus damages for injury suffered while trying it on. She wanted to be compensated chiefly for her disappointment, i.e., the difference between what she would actually have paid for a nose like Hedy Lamarr's and the pinocchio thing she began with. Can't have that because consumer surplus is non-measurable. Not a bad exercise after all.

Sanger to Chirelstein: Can you explain why you keep *Wasserman v. Middletown* in your little book?

Chirelstein to Sanger: Yes, you beautiful thing. The question to be asked, I suppose, is why the court treated *Middletown's* exercise of its buy-out option as liquidated damages. The case is excitingly discussed at the end of my chapter on damages.

In reference to a well-known case about whether a contractor's failure to put clothing rods in the closets and doors on the kitchen

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cabinets of a suburban tract home was a material breach, came an email from Marvin under the subject heading of “Emily D.” It opened with a stanza:

*I dwell in possibility
A fairer house than prose
More numerous of windows
Superior of doors.*

This was followed by Marvin’s notation: “Last two lines somehow relevant to *Plante v. Jacobs*.”

Marvin had a way with juxtaposition. A few years ago, I wrote an article on infant abandonment, which Marvin read. “Carol Little Turnip, Odd thought: your paper led me to think about foundlings in literature: Tom Jones, Heathcliff, Skeezix—used to be something romantic about it (in fiction).” It’s not just the delight of Heathcliff coying up to Skeezix,¹ but the scope of what Marvin knew (everything) and the somber recognition (after the joke) of the realities of the foundling romance.

For several years, Marvin, Barbara Black and I had what might be called a contracts perplexion² group. We met over lunch in Barbara’s office to discuss cases we had each taught forever but were having trouble remembering just why. *White v. Corlies & Tift* was one. Over time, we became more focused on lunch than on doctrine, so we decided to invite our partners, and later the Scotts, and went to lunch on Saturdays at fancy places and had heaps of fun.

The revised discussion club wasn’t our only communal activity. Marvin and I also shared and vetted one another’s Contracts exam questions. I brought along the draft of one of Marvin’s essay questions from 2011. Here goes:

Shmuel and Yudl are brothers-in-law and until recently good friends. Shmuel, who once worked as a chef in a midtown restaurant, has conceived a bright idea, namely, to open a

1.

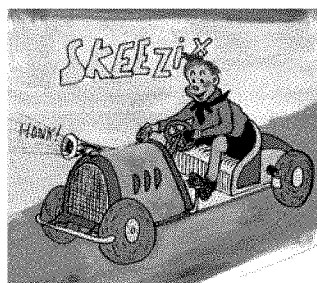
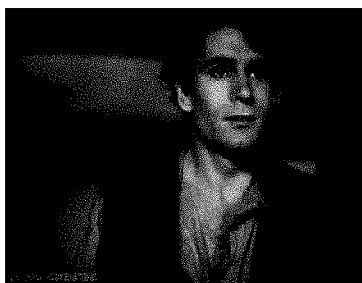


Image of Heathcliff (left), CMBA Films of 1939 Blogathon: Wuthering Heights, Bette’s Classic Movie Blog (May 17, 2011), <http://bettesmovieblog.blogspot.com/2011/05/cmbs-films-of-1939-blogathon-wuthering.html> [<http://perma.cc/HB4M-8V3d>]. Image of Comic Strip Character “Skeezix” (right), Full Service, <http://www.fullservice.bz/skeezix.JPG> [<http://perma.cc/8ALX-3KC6>] (last visited Feb. 1, 2016).

2. Perhaps “puzzler” is a better word.

traditional Jewish delicatessen in Greenwich Village, which has no such facility at present. The new restaurant would serve matzabrei, knishes, kishke, lungen (if permitted by the health authorities), ptcha (if permitted, etc.), lukschen kugel, and so on. "Should be very popular, especially with the younger Village crowd," says Shmuel. "But what I need to get started is at least \$150,000, maybe more, which unfortunately I don't have, *shlimazel* that I am. Running a delicatessen is the dream of my life."

Hearing this, Yudl, who has just made a bundle shorting bank stocks, responds warmly. "Great idea!" he says. "I'm for anything that's good for the Jews. I do love lungen (if permitted by etc.) and I'm simply crazy for matzabrei. I'll back your delicatessen with whatever you need. Also, this should please my Becky, who hocks me a tchainik every time your name comes up. Anyway, it's a promise!" "Thanks a million," Shmuel exclaims. "I'll give it my best effort."

Thus assured, Shmuel at once sets about to make the necessary arrangements. [Details of the arrangements follow; Shmuel commits himself to over \$300,000 of remodeling, equipment, cooks, and so forth.] "Send the bills to Yudl," he tells them all. "He's my *meshpucha*. He's backing me and he'll be glad to pay you on the spot."

Yudl receives all the bills and is about to pay them, when to his great surprise he gets a loud objection from Becky. "How can you make a promise like that to my *narische* brother?" she cries. "That no-good. He's been a failure at everything and always will be! Don't you dare give him a nickel without ironclad security and a right to any profits." "But I've promised," says Yudl. "Give him nothing, that *schnorrer*! *Phestaste?*" "Okay, okay," Yudl responds. "*Vill er helfen vie a toyten bahnkus.*" [Trans. "I'll help him the way cupping helps a dead man."]

Embarrassed and looking for a way out of his dilemma, Yudl meets with Shmuel and gives him the bad news. "I'm afraid we'll have to make it a business deal," he tells Shmuel. "Look, I've prepared a contract. I'm willing to lend you \$100,000 to finance the Jewish delicatessen. You agree to give me 50% of the profits for the next ten years plus all the matzabrei and kugel I can eat. And I have a right to inspect the books on a monthly basis." "That's not fair!" Shmuel cries. "I do the work and you get half the profits? That's a *shahnda* to the *goyim*. Also, I'm already on the hook for \$300,000. If I don't start paying my creditors, they'll shut me down. Where am I going to get the *mazumeh?*" "Well, it's the best I can do," says Yudl. "Take it or leave it." "You've got me over a barrel," Shmuel mutters desperately. "I'll have to take it." Shmuel and Yudl sign the contract.

The delicatessen opens in due course but after a few weeks of operation Shmuel realizes that restaurant-goers in Greenwich Village have no interest whatever in kugel and ptcha. Following a slight delay, Shmuel wisely converts the delicatessen into a

fancy pizza parlor, and, having settled with the kosher food supplier and persuaded all the other creditors to delay their claims for a few months, Shmuel begins to turn a very handsome profit by selling designer pizza for \$6 a slice (\$50 for a whole pie) plus \$20-a-glass for the best vintage chianti. Among his regular customers are Clark Gable, Claudette Colbert, Gary Cooper, Joan Crawford, Myrna Loy, Mary Astor, George Raft, Mel Ott, Joe Dimaggio, Lefty Grove, Bill Dickey, Jimmy Foxx, Honus Wagner, John dos Passos, William Dean Howells and many other well-known celebrities.

It takes Yudl (and Becky) about a month to learn what has happened to the original delicatessen plan. Shmuel and Yudl (still brothers-in-law but no longer friends) have a meeting. "This is not what I bargained for," says Yudl. "Either you go back to the delicatessen, start serving kugel and gefulte fish, or I demand you repay my \$100,000 loan immediately." "Fooey on you," Shmuel replies. "*Im drerd zolstu gayen.*" [Trans. Go to hell.] "Okay," says Yudl, "I always knew you were a *gonef*. You can expect to hear from my lawyer in the morning. Meanwhile, I want half the profits from this *trafische* pizza parlor, and don't forget that my half-interest in the restaurant profits continues for the next ten years." "Again, I say fooey," says Shmuel. "In case you've forgotten, you promised to back me with all the money I might need to open a restaurant. I've actually spent more than \$300,000 getting the thing started. What happened to that promise, on which I relied completely and because of which I've gone deeply into debt. I don't owe you a cent. *Au contraire!*" [Trans. To the contrary!] And as to half the profits, forget it! Our agreement was for the profits of a delicatessen and included your right to free kugel. There is no delicatessen and hence no kugel. The pizza business is mine alone. Your share is *gornischt*."

Yudl sues Shmuel seeking enforcement of their contract. Shmuel crossclaims for \$300,000, the amount he originally committed to the restaurant enterprise.

What result?³

It is a very good first year question, though in the end, on the possibility that the question might be "too Jewish" (or maybe too French), we changed the facts to make the brothers-in-law Greek, for which we had no idiom, and much of the charm went out of the question. I often think back to Yudl and Schmuel.

I want now to say a few things about what is sometimes called Marvin's "little book," the primer called *Concepts and Case Analysis in the Law of Contracts*.⁴ Written twenty-five years ago, it is one of the most

3. Marvin A. Chirelstein, Draft Exam Question (unpublished manuscript) (on file with the *Columbia Law Review*) [hereinafter Chirelstein, Exam Question].

4. Marvin A. Chirelstein, *Concepts and Case Analysis in the Law of Contracts* (7th ed. 2013).

elegant pieces of legal writing there is, a model of simplicity and of intellectual invitation: *Welcome to the intriguing realm of exchange*. The book's tone is light and its content disarmingly clarifying; *that's* what economic efficiency is all about? Not so bad. As Eben Moglen wrote to me, "For the student, Marvin's writing is what Benjamin Cardozo's is only cracked up to be: *lex loquens*, the living, speaking voice of a reasonable, learn-able Law."

Two words about the book's "front material." The first concerns the cover. This picture that has been on its cover from the start⁵ was long thought to be the *Peerless*, or at least one of the *Peerlesses*, from the famous case of *Raffles v. Wichelhaus*.⁶ A few years ago a scuffle broke out on the contracts listserv about whether this is one of the *Peerlesses*, or simply "a" *Peerless*, as according to Brian Simpson there were 11 ships named *Peerless* plying the seas around this time.⁷ It turns out that both of the *Peerlesses* involved in the case were ship-rigged (that is, three-masted square-rigged ships) and that the ship featured on Marvin's book isn't ship-rigged at all but is rather a barque, called *Peerless* to be sure but quite unrelated to the case.⁸ Around this point in the discussion, Marvin intervened: "Didn't mean to pass it off as one of the real *Peerlesses*. This was the only '*Peerless*' in the Greenwich Maritime Museum, where a friend of mine worked as a subcurator, so I used it."

The other point about the book concerns the dedication: *To Ellen*. The tens of thousands of students who bought and used *Concepts and Case Analysis in the Law of Contracts* over the last twenty-five years knew when they opened the book that Marvin did not stand alone; there was also an Ellen. The footnote below is a fragment from a painting by Ghirlandaio of the Visitation in Florence that Ellen, a published scholar of

5.

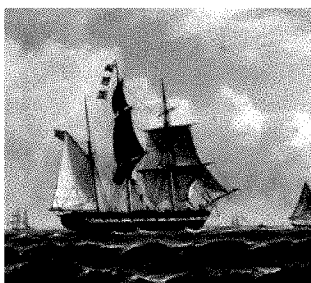


Image of Ship, Sinking of the *Peerless*, ContractsProf Blog (Dec. 9, 2015), http://lawprofessors.typepad.com/contractsprof_blog/2005/12/today_in_hist_5.html [<http://perma.cc/5HNY-CLK4>].

6. (1864) 2 H. & C. 906 (Eng.).

7. A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 Cardozo L. Rev. 287, 295 (1989).

8. Email from Frank Snyder, Professor of Law, Tex. A&M Univ. Sch. of Law, to Carol Sanger, Barbara Aronstein Black Professor of Law, Columbia Law Sch. (Sept. 29, 2015, 4:52 PM) (on file with the *Columbia Law Review*). Frank adds, "I never used Chirelstein for contracts, but the man saved my life in tax." Id.

Renaissance art, gave me years ago, and that I keep on the wall behind my computer so that when things seem frenzied, I can join the two Florentine lads and watch the passing scene below.⁹

In 2009 came an email I hated. It first insulted two new cases in the latest edition of the Farnsworth, Sanger, Cohen, Brooks and Garvin casebook. Then came the bad part: “The above will be our last intimate contact on this well-worn subject, which leaves me kind of heartbroken. I’m hanging up my spikes as far as Contracts is concerned. I just can’t face those idiotic cases one more time.”

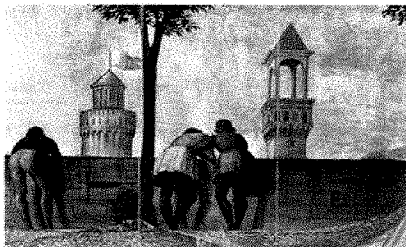
“Loss” does not capture the substance of Marvin’s absence from the building for his friends.

There is one last email to share. It complements something already introduced with Yudl and Schmuel: Marvin’s love of the movies. The regulars sitting around their designer pies at Schmuel’s successful pizza parlor included the biggest stars of the Hollywood studios (Joe DiMaggio and Honus Wagner were there too).¹⁰

But celebrities were just the froth on a much deeper picture. A few years ago, Marvin and I were discussing some of the smaller actors from mid-century; the actors who played the three comrades in *Ninotchka*, for example. A few days later I got an e-mail from Marvin, subject line “Precious Collection” and an attachment. The attachment was titled “REMEMBERED NAMES followed by the quote: *‘I had not thought death had undone so many.’* Dante.”

Under the title was a list of about 150 names. Some of them were familiar to me—Gabby Hayes, Walter Huston, Arnold Stang—but most were not. In looking over the list in preparation for today’s memorial, I took the first person, C. Aubrey Smith, and discovered from IMDB that “[i]f the role called for the tall stereotypical Englishmen with the stiff upper lip and stern determination, that man would be C. Aubrey Smith, graduate of Cambridge University, a leading freemason and a test

9.



Frescoes of Santa Maria Novella, Ghirlandaio, flickriver, <http://www.flickriver.com/photos/snarfel/4118883443/> [http://perma.cc/2W4Y-ULWY] (last visited Mar. 2, 2016) (referring to figures in background of fresco).

10. Chirelstein, Exam Question, *supra* note 3.

cricketer for England.”¹¹ To be sure, there were some big stars, but mostly, these were largely character actors and the word “remembered” in Marvin’s title was not so much “the great remembered” in an honorific sense but rather, as Barbara Black tells us, under house rules, Marvin had to come up with the name *from memory*.¹²

To honor Marvin (which he would absolutely *hate*) and because it keeps delightful things going, (this I think Marvin would say was all right), I have decided that over time I will look up all the people on Marvin’s list, watch their movies, and make sure someone else, someone younger, gets ahold of the names too.¹³ It won’t be as good as hearing Marvin recall them, but there is something satisfying in the idea.

Rephrasing the quote from Dante, many of us were undone by Marvin’s death. There is comfort in knowing that Marvin’s name will be remembered, as professors continue to assign his books to their students. And for those of us who knew him, Marvin is right there in our memory; we won’t have to look anything up.

11. C. Aubrey Smith Biography, IMDB, <http://www.imdb.com/name/nm0807580/bio> [<http://perma.cc/Z77Y-QMJ9>] (last visited Oct. 29, 2015).

12. See Barbara Black, An Incomparable Marvin: An Appreciation, 116 Colum. L. Rev. 287, 290 (2016) (discussing list and Professor Chirelstein’s search for names).

13. They are: C. Aubrey Smith, Donald Crisp, Roland Young, Lewis Stone, Ray Collins, Nigel Bruce, Jack Oakie, Adolph Menjou, Walter Brennan, Arthur Kennedy, Akim Tamiroff, Sydney Greenstreet, Jack Carson, Walter Huston, Sam Jaffe, Ward Bond, Gene Lockhart, Jerome Cowens, Edward Everett Horton, William Demarest, Reginald Gardiner, Alan Mowbray, Leon Errol, Howard Da Silva, Thurston Hall, Henry Kolker, Stefan Geray, Lionel Stander, J. Carroll Naish, S.Z. Sakall, Eduardo Ciannelli, Billy Gilbert, Hugh Herbert, Lon Chaney, Jr., Eugene Pallette, Arthur Treacher, Dane Clark, Morris Carnovsky, Gabby Hayes, Walter Slezak, John Carradine, Andy Devine, Edmund Gwenn, Don De Fore, Dan Durysa, Donald Meek, James Whitmore, John Loder, Clifton Webb, Jimmy Gleason, Reginald Owen, Otto Kruger, Louis Heydt, Mischa Auer, Frank McHugh, Conrad Veidt, H.B. Warner, Caesar Romero, Melville Cooper, Porter Hall, Rags Ragland, Alan Hale, Cecil Kellaway, Albert Dekker, Guy Standish, James Burke, Mike Mazurki, Paul Hurst, Leo G. Carroll, Cedric Hardwicke, Alan Baxter, George Barbier, Erik Rhodes, Samuel S. Hinds, Walter Connolly, Allan Jenkins, Eric Blore, Oskar Homulka, Franklin Pangborn, Arnold Stang, Walter Catlett, Helmut Dantine, Barton MacLane, Murray Alper, Patrick Knowles, Minor Watson, Charles Lane, Gregory Ratoff, Carl Benton Reid, Chester Clute, Charlie Grapewin, Edward Brophy, Bruce Cabot, Henry O’Neill, Slim Summerville, Leonid Kinski, Tom Power, Frank Faylen, Reginald Denny, Henry Travers, Victor Moore, Guy Kibbee, John Ridgely, Sheldon Leonard, John Litel, Robert Armstrong, Chill Wills, George Bancroft, George Macready, Sig Rumann, Warren Hymer, Elisha Cooke, Jr., Leon Ames, Henry Wilcoxon, Rhys Williams, John Qualen, Lionel Atwill, Henry Daniell, James Whitmore, Richard Haydn, Charles Bickford, Laird Cregar, Jack Haley, Joseph Schildkraut, Raymond Walburn, Don Beddoe, Percy Kilbride, Howard Freeman, Leo Genn, Felix Bressler, Forrest Tucker, Donald MacBride, Nat Pendleton, Vladimir Sokoloff, George Zucco, J. Edward Bromberg, Henry Stephenson, Edgar Kennedy, Charlie Winninger, Edgar Buchanan, William Frawley, Douglass Dumbrille, Allan Joslyn, Fortunio Bonanova, Robert Barrat, Arthur Shields, Roman Bohnen, Grant Mitchell, Paul Stewart, Phillip Dorn, Ernest Truax, Harry Davenport, Roscoe Karns, Harry Carey, Jr., Montague Love, Charlie Ruggles, Cecil Parker, Victor Francen, and George Coulouris.

MARVIN CHIRELSTEIN

*Robert E. Scott**

My relationship with Marvin Chirelstein began with a letter I received from him thirty-five years ago. I had never met Marvin and in fact, didn't meet him face-to-face for six more years, by which time our relationship had blossomed into an unlikely friendship, a friendship that was nourished by a thirty-five-year debate over the nature of contract law that began with that first correspondence. While we ultimately became colleagues at Columbia and even closer friends thereafter, and while the words in our exchanges continued to change, the music was always the same.

I still have that first letter. It reads:

Dear Professor Scott: I have just read your excellent article "Enforcing Promises" in the *Yale Law Journal*.¹ I congratulate you on a magnificent attempt to rationalize the Law of Contracts, although I fear that in the end the effort is ultimately futile.

Sincerely, Marvin Chirelstein,
William Nelson Cromwell Professor of Law.

My first reaction was one of pure joy: I was not sure that anyone had read my article and certainly not a distinguished professor at the Yale Law School. I especially savored the words "excellent" and "magnificent"; receiving an encomium of this sort was heady praise indeed. But then, as I continued to reread the letter, two other words began to stand out more starkly: What exactly did he mean by "ultimately futile"? One could argue that he was suggesting that the scholarly project to which I was planning to devote my academic life was a fool's errand. And so, I decided to throw caution to the wind and write him back with the hope that he might explain his pessimism at my efforts to theorize about contract law.

I didn't really expect a reply and certainly not a prompt one, but Marvin surprised me, as he would time and again for all the years thereafter that our debate continued. The next letter arrived within a week.

This time he began "Dear Brother Scott," and I remained "Brother Scott" ever after (an appellation I came to cherish). "I went back and reread your article," he wrote, "Found it quite convincing. At the same time, you remind me somehow of Saint Stylite who spent his entire adult

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1. Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 *Yale L.J.* 1261 (1980).

life standing on a pillar to show his passion for renunciation.” (I was assigned the role of Saint Stylite many times over the succeeding years.) He continued:

What bothers me about teaching Contracts—and I’m about to give it up—[a threat he also repeated for many years thereafter] is that treating the cases chiefly as dramatic episodes—novelizing about them, if you like—strikes me as the best way to give the students a sense of real life and experience, which is what (I’ve come to think) the Contracts course provides. Stressing contract theory and the analysis of contract as a coherent set of *ex ante* rules is to treat the decisions as abstractions rather than interactions, in the end leaving the students with a sense that there is a debate about theory that could probably be summarized in a lecture or two.

Well, that was a bit of a downer, but he wasn’t finished.

But you must continue; you are extraordinarily good at this and way ahead of me: If you can teach and write about Contracts without placing primary stress on outcomes, you’re a marvel. In class, at least, I find it is too tough to trade off accuracy in the particular case against cost-sparing rules for all the cases that are not before the class.

And so the colloquy continued year after year. Marvin would faithfully read my articles and respond with frequent (and often excessive) praise and generosity. I would try to reciprocate by reading drafts and offering suggestions for new material to add to the next edition of his wonderful primer: *Concepts and Case Analysis in the Law of Contracts*.² Marvin would respond to these efforts of mine to reciprocate with gratitude and characteristically gruff affection. One time after I had sent him comments on a revised chapter for the next edition of his book, he replied “You’re so easy to take advantage of. Yer just a big dumb guy. How about reading this chapter as well?”

Let me add just an aside about Marvin’s book: If you talk to generations of Columbia Law graduates and ask them, as I do, what they remember about contracts, they don’t mention Allan Farnsworth’s magisterial treatise on the Law of Contracts, or Allan, Carol, and Rick’s contracts casebook, or my contracts casebook. They all say, “The way I learned Contracts as a first-year student was from Marvin Chirelstein’s invaluable book that taught me how to think about the cases and what they mean.”

Through the years we continued to debate the question with which we began: Which perspective is correct, the *ex ante* or the *ex post*? Was the goal of contract law justice between the parties to the case at hand or was it to create rules that justly regulate the interactions of future parties? Marvin’s style was to soften any comment that exposed a weakness in my

2. Marvin A. Chirelstein, *Concepts and Case Analysis in the Law of Contracts* (7th ed. 2013).

argument with gentle humor. Once, he responded to my claim that he analyzed contracts cases as though he were a judge in a traditional court of equity with the following: “The conflict between the *ex ante* and the *ex post* simply makes me dizzy. You’re making me think my primer is subversive of good analysis and should be suppressed. But I’ve assigned the copyright to my son and so it’s too late. Anyway, my thanks as usual. (Signed) Chancellor Chirelstein.” All too frequently, these exchanges ended as did this one, with Marvin pinning me to a position that made me uncomfortable and then, with typical generosity of spirit, letting me off the mat by offering unstinting praise and support for my efforts.

In 1987–1988, Buffie and I spent a year at Columbia at the invitation of Dean Black and the faculty. Marvin became a mentor to both of us during that period. He spent many hours urging us to stay in New York and was sad but supportive when we elected to go back to Charlottesville. For the next dozen years or so, we went our separate ways, but the correspondence continued. Our friendship deepened even more, however, when we began visiting Columbia on a regular basis in 2001. Being colleagues again gave many opportunities for me to revel in the larger-than-life experiences that always seemed to be part of being Marvin’s friend. Buffie and I still relive a memorable lunch that year at Le Bernardin with Marvin and Ellen, Jeremy Waldron and Carol Sanger, and Barbara Black, when the wine flowed freely (between extended cigarette breaks) and the waitstaff patiently waited for us to conclude our merriment as the afternoon wound down to dinner.

While our intellectual debate was the engine for our friendship, it was for me in many respects just an excuse to be able to participate year after year as a recipient of Marvin’s warmth, his phenomenal wit, and his incredibly sharp intellect. As my colleagues all know, this opportunity was a rare treat beyond any other.

The wit was always mixed with the warmth: Marvin was filled with praise for the efforts of his friends, admiring of their talents, and concerned about their future. Since he was persuaded that my scholarly project was, as he had said many years earlier, “ultimately futile,” Marvin began to worry that I had chosen the wrong field. And so he started to urge me to change my focus. It began in earnest once we had moved permanently to Columbia in 2006. In response to yet another admission of defeat on my part, he replied one day, “Brother Scott: I think you should teach the tax course.” This campaign, urging me to move to tax, continued every time we met for coffee in the faculty lounge. “You would like it,” he said. “But,” I would protest, “I don’t know anything about tax.” His answer, as usual, came in an email the next day. “Of course you can do it. Look at me and Contracts. I should have progressed beyond this point after so many years. Just shows what a really tough course Contracts is, compared, for example, with corporate tax. You gotta be very quick in your head to teach Contracts.”

Often, there was also wit mixed with wisdom: Sometime in 1986, a letter came from Marvin explaining that, finally in his view, Columbia was hiring another person to help teach tax courses. The only problem was this individual wanted to have a Chair and there were none available. So, Marvin declared, “I told them he could have my chair.” The letter relating this episode was not signed “Marvin” as was his usual practice; rather, he appended a formal signature to the end of the letter: It was signed “Marvin Chirelstein, Professor of Law, No Chair.”

There are many other examples where the zinger carried important truths: One time, Marvin sent an email after reading an article I had recently published with my frequent co-author Alan Schwartz (in which the argument is supported by a formal economic analysis).³ Marvin’s reaction: “Wonderful article, though it’s a pity you guys ever took freshman calculus. Using ordinary English probably would find you more readers.”

But then as it was destined to do, our debate reached its conclusion. In late January 2014, Marvin wrote, “I see a lot of ill-informed crap about these cases on the Contracts blog. Why aren’t people citing your piece? You’d better take a hand.” I replied: “The problem is they don’t read. The law teaching profession is in pretty bad shape.” His answer: “That’ll change when my Journal of Legal Education piece comes out. It cites you, though not by name. Prepare yourself.”

Marvin’s article appeared that February and in several pages he summarized his conclusions from a lifetime of teaching Contracts:⁴

The [contracts] decisions best remembered by our students are largely freaks—unlikely ever at any time to be repeated in the same form. But then why do we teach them? Could it be, as one leading scholar has suggested to me, that the cases are actually selected for their amusing narrative value rather than as illustrations of something more serious? If that is true, . . . then how many appellate decisions . . . do we really need to teach Contracts? My guess: no more than ten or 15 . . . and despite their comic appeal, none of those cited just above. The cases of my selection would have one consistent theme, to-wit, *the inadequacy of legal draftsmanship*.⁵

After explaining how this would work, Marvin concluded, “The result: our students receive both a practical and a theoretical in-

3. Alan Schwartz & Robert E. Scott, Market Damages, Efficient Contracting, and the Economic Waste Fallacy, 108 Colum. L. Rev. 1610 (2008).

4. Marvin Chirelstein, Teaching Contracts, 63 J. Legal Educ. 429 (2014).

5. Id. at 430. In referencing cases’ comic appeal, Chirelstein is referring to the many chestnuts of the standard contracts course: “The cases I have in mind—*Hamer v. Sidway*, *Hawkins v. McGee*, *Jacob & Youngs*, *Wood v. Lucy*, *Peerless*, *Peevyhouse*, *Alaska Packers*, *Sherwood v. Walker*, *Lucy v. Zehmer*, *Lefkowitz v. Great Minneapolis Surplus Store*, and a few others—will be recognized at once with a groan by anyone who has ever taught the course.” Id. at 429.

roduction to the field of Contracts. Theory and practice are joined at the hip, which I think is as it should be.”⁶

The day the article appeared, I wrote to congratulate him: “Your article has hit the streets. Contract theory smolders on the ash heap (along with casebooks and their authors). Vive la difference!”

And that was the last salvo. I never received a reply. Marvin, as was appropriate, had had the final word.

* * *

I loved Marvin Chirelstein, and my exchanges with him were one of the great highlights of my professional life. When I was a young boy growing up in India, my parents would send for the *Readers Digest* so that we could keep up with cultural trends in America. I would read the *Digest* avidly, and my favorite feature was a monthly story entitled, “The Most Unforgettable Character I Ever Met,” in which the author would describe his or her encounters with a person of unusual qualities. I have thought about that series many times since Marvin died because, for me, Marvin Chirelstein was the most unforgettable character I ever met.

6. Id. at 430.

