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Michael J. Graetz

Columbia Law School, mgraet@law.columbia.edu

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CHARLES H. WHITEBREAD

MICHAEL J. GRAETZ*

Late in April when Charlie Whitebread learned that he had Stage 4 lung cancer, it occurred to me that I might someday be asked to say a few words about him. But these are comments I hoped never to make. I do not have words to describe to you the emptiness in my life that Charlie had filled for so many years. But our purpose here is not to mourn our loss; rather it is to celebrate Charlie's life.

Charles Whitebread walked into my life on a beautiful October evening, into an old farmhouse on 350 acres of land overlooking the Blue Ridge Mountains in Charlottesville, Virginia, where I was living with four other law students in 1968. It was Charlie's first year of teaching, my last year of law school. From then until September 16, 2008, the day he died—nearly forty years—Charlie and I were the closest of friends. We always referred to one another in speeches as my “great good friend,” and often described ourselves as oil and oil. Charlie was twenty-five years old then, and soon to become the University of Virginia Law School's teaching superstar, as well as a scholar of the first rank. In the conservative climate of the Law School in those days, Charlie was unique: full of energy, charismatic, larger than life. He always insisted that laughing is one of life's greatest callings; he had that unmistakable Breadman twinkle in his eye.

Thirty-five years later, giving the commencement address at the University of Illinois Law School, Charlie told the graduating class:

It is not enough in my view to stop and smell the roses. It will be essential to go and look for some roses. Take in museums, art galleries, theater, rock clubs, and live a life of joy in the law.¹

* Justus S. Hotchkiss Professor of Law, Yale Law School. This remembrance is adapted from remarks delivered at memorial services for Charles H. Whitebread at the University of Southern California on November 13, 2008, and the University of Virginia Law School on December 6, 2008.

1. Charles H. Whitebread, George T. and Harriet E. Pfleger Professor of Law, Univ. of S. Cal. Law Sch., Commencement Address at the University of Illinois College of Law (2003).

Charlie Whitebread and I often looked for roses—and not just roses, if one were to be completely candid. He, in particular, had something of a taste for thorns. And we lived a life filled with joy. We listened to a lot of music in a wide array of places. At University Hall in Charlottesville we saw what had to be the worst concert Janis Joplin ever performed. Elsewhere we also saw one of Warren Zevon's best, Pink Floyd, David Bowie and Iggy Pop, Bobby Short doing Cole Porter, the great Paul Simon, and we saw Little Feat—America's best 1970s rock and roll band—more times than I can count, to name just a few. We had season tickets to the Los Angeles Chamber Music series at the Ambassador Auditorium in Pasadena, where the signs in the bathroom warned us not to “step on the ONYX,” and we spent untold evenings in unnamable dives where we would have hesitated to use the bathroom, if only we could have found it.

We traveled together in Europe, more than once, and Charlie—who confessed to a pampered and preppy upbringing, and often aptly referred to himself as “Mr. Know-It-All”—used much of our time there to fill in some of the gaping gaps in my liberal arts education.

Charlie and I also spent a lot of time together on beaches: Virginia Beach, Biarritz, Jamaica, and Agious Nicolaous—a small town on the Southern coast of Crete—to name a few. After a time, our favorite beach became the Santa Monica beach, in particular, Lifestation Number 9, where much of the USC faculty spent the late 1970s and early 1980s together riding the waves, enjoying the sunshine, ogling the local fauna (without any discrimination on the basis of sex, color, creed, or national origin), and, I am sure, thinking and discussing profound thoughts.

Charles Whitebread played a crucial role in helping secure my appointment to the UVA law faculty in 1972, and that he was so enthusiastic about his life there no doubt erased any small doubts I might have harbored about entering the teaching profession myself. During our time together there, we were inseparable. Our offices in Clark Hall were only three doors apart. We ate lunch together nearly every day, and before the law school moved, we usually crossed Mr. Jefferson's magnificent lawn to eat at the corner. At faculty events, we always formed the core of the infamous table Number 3, which over time became so boisterous that when he became dean, Emerson Spies stopped having sit-down dinners. We started throwing Halloween parties for the Virginia law school community, a tradition we picked up again when we reunited at USC. In Charlottesville, we partied at the VFW lodge and the Bren Wanna Club, in Los Angeles, in students' family homes in Beverly Hills. Charlie often viewed these costume parties as occasions to don a toga.

As a law student at Yale and during his early years of teaching at UVA, Charlie served as a resident advisor in various dorms. He liked living rent free. But there came a time for him to give up dormitory life. Reluctantly—and only after I insisted—Charlie purchased his beloved Charlottesville home, where he and John Golden continued to spend Christmases and summers even after he had moved to Los Angeles. It was the first time in Charlie's life that he had borrowed any money, and for months after taking out his home mortgage, Charlie said that he felt like a criminal every time he entered the bank. I tried, time and time again, to explain to him that lending money was how banks make money, but Charlie would hear none of that. He paid off that mortgage as fast as he could.

You see, Charlie Whitebread, for all of his outrageous style, had a very conservative streak. For a long time, he was a committed Republican; in fact, he had headed the Goldwater for President club at Princeton. Charlie came by his conservatism naturally, having come of age in the late 1950s in Bethesda, Maryland, the grandson of a curator of the Smithsonian Institution.

And Charlie always had a keen regard for the civic virtues. We all know of his impressive hands-on philanthropic endeavors, raising more than \$1 million for the Jeff Griffith Youth Center in Los Angeles. Charlie was also unfailingly polite; he never dined at my home without dropping me a note of thanks. Nor did he ever fail to acknowledge a birthday or holiday gift, and never by email or typed by his secretary—always by a handwritten note.

Charlie also liked to return frequently to familiar surroundings—the same hotels, the same restaurants. Often he ordered the same dishes. In New York for example, he stayed at the UN Plaza Hotel and dined at The Palm. Even in Paris, he favored a small bistro on the Left Bank, a place he returned to regularly, paying no attention to any other culinary delights he might be foregoing elsewhere in the City of Lights.

Charlie loved the holidays, especially Halloween and Christmas. His Christmas cards were legendary. They were selected with great care, always stuffed with a photograph (also carefully selected), and finished off with a handwritten note—a bit about him, something about you. Charlie Whitebread cared deeply about his relationships, and his Christmas cards were only one example of his efforts to maintain them. More than five hundred cards, painstakingly handwritten year after year.

I was also on Charlie's birthday list. And—until this year—he never

missed. With me, he liked to be early.

Charlie and I often exchanged gifts, often at Christmas, usually on birthdays. We spent many years simply exchanging polo shirts; the same brand, the same size, in different colors. Every once in a while, I would receive a shirt from Charlie that I knew he must have been given by someone else. So if you, for example, are the person who gave Charlie that blue-checked shirt from Joseph A. Bank and have felt bad because you never saw him wear it, do not despair: I have been wearing it for years. Charlie, you see, believed in "regifting." Once we abandoned our tradition of exchanging polo shirts, I often had trouble knowing what to buy for Charlie. One year when I was living in Florence, Italy, I came upon the perfect present—a number of handmade Italian silk bow ties. I bought several for Charlie and some for myself. Three years after I had given these to Charlie for Christmas, I was surprised to open my Christmas gift from him and see that I had gotten them back. To this day, I do not know whether he had forgotten from whence they came or was sending me a not-so-subtle message about my taste in ties.

The first fifteen years of my friendship with Charlie Whitebread was a time of American life often referred to as an era of sex, drugs, and rock and roll. This means that much of my time together with Charlie necessarily fits into what John Golden calls the "do-not-recall box"—a box designed to fortify that core presumption of innocence, which meant so much to Charlie. But one of the things I miss most about Charlie is that he took so many of my memories with him. I have a terrible memory; I forget far more than I remember. Not Charlie, he remembered everything. He loved quoting back to me what he called "sayings of the Chairman," little aphorisms I had uttered long ago and long since forgotten.

Charlie also remembered everyone: students, acquaintances, friends, business associates, and judges. And Charlie made every effort to stay in touch with his friends. When he was on the road giving his lectures to first-year law students, to bar review courses, or to judges, he would often call and tell me whom he had just seen in one of the cities or towns he was visiting, usually someone from USC, UVA, Yale, Princeton, or even the Landon School. Charlie treasured his friends and he refused to allow his friendships to atrophy from inattention. Over the past two decades, when we lived thousands of miles apart, Charlie and I frequently got together, often on one coast or the other, and we talked at least once a week on the phone. I hate the thought of not seeing him and will miss what—until this May—he usually called our "cheery phone calls." Charles Whitebread and I shared many great times together—and a few difficult ones.

Others have applauded Charlie's legendary stature and prowess as a teacher. Each of us who teaches harbors the hope that at some alumni event or another, one of our former students, or maybe two, will offer up our name during debates about who was their most important teacher. But none of us can fail to marvel at the outpouring of student affection that followed Charlie's death. Nearly two thousand posts on the web, remembering him, indeed revering him. Who among us expects even a small fraction of that? Charlie was a unique figure in American legal education.

I do want to add a few words about Charlie's professional life, for there too he and I were closely connected. First, Charlie's book with our friend and colleague, Richard Bonnie, *The Marijuana Conviction: A History of Marijuana Prohibition in the United States*,² went through six printings at the University of Virginia Press before being sold out, and then was republished thirty years later, since it remained important, wise, and unfortunately still relevant. Few among us can claim such scholarly success.

Shortly before his death, Charlie was in the process of revisiting what he regarded as the common theme of all such prohibitions: the confluence of a difficult social, economic, or medical problem that divides "us" from "them"—divides, as Charlie often said, "the movers and kickers" from "the moved and kicked." Charlie was certain that the next prohibition, and the next failure of prohibition policy, would be against tobacco. He felt it was ten or fifteen years away, but that it was inevitable. Unfortunately, he did not live long enough to make his case or to see if his prediction proved right.

Charlie's interest in drug prohibitions was just one reflection of his commitment to what, in a graduation speech at the University of Virginia Law School in May 2000, he described as "the ultimate issue of any great law school: the promotion of social justice."³ It was the discriminatory history—and present—of the drug prohibitions that he was battling against. In that graduation speech—and throughout his life—Charlie often quoted Calvin Woodard's words that "law schools must assume, as their basic premise, that the man who first understands his obligations to Justice will be better able to fulfill his legal 'function' whatever it might be. Justice, in a word must take precedence over law."⁴ Charlie told the graduating

2. RICHARD J. BONNIE & CHARLES H. WHITEBREAD, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* (1974).

3. Charles H. Whitebread, George T. and Harriet E. Pfleger Professor of Law, Univ. of S. Cal. Law Sch., Commencement Address at the University of Virginia School of Law (May 21, 2000).

4. Calvin Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV.

students, "You will decide if justice rather than parochial or economic benefit is to prevail."⁵ He also told the students that keeping the promotion of justice in the forefront of their thoughts would ennoble their daily work and enrich our nation and our lives.

When Charlie entered teaching, there was turmoil in the legal academy, conflict between what our Virginia colleague Tom Bergin called law school schizophrenia between the "true academics"—those "who have the potential for serious scholarship"—and those he labeled the "Hessian-trainers"—people who were excellent at training practicing lawyers.⁶ Bergin fretted that the Hessian trainers were being forced to produce "vast tonnages of trivia . . . in the name of scholarship."⁷ For evidence of this, he referred his readers to what he called "that vast Forest Lawn of catalogues, the Index to Legal Periodicals."⁸ Bergin titled his article: "The Law Teacher: A Man Divided Against Himself."

In this battle, the academics, the scholars, have long since won out. But Charlie Whitebread's overwhelming commitment to teaching—indeed to teaching over scholarship—did not produce any schizophrenia. Charlie Whitebread was a man with an adamant sense of self. He knew that his calling was to teach. He had proved early in his career with his and Richard Bonnie's book on the marijuana prohibition that he could do scholarship at the highest level. But that is not what he wanted to do. He wanted to teach.

And so the vast bulk of Charlie's scholarship as his career matured was in the service of his teaching: our piece together on Monrad Paulsen and the role of a university law school;⁹ his annual review of Supreme Court cases,¹⁰ written mostly for state court judges; his coursebooks on juvenile justice and criminal procedure;¹¹ his book on how to take law

689, 737 (1968).

5. Whitebread, *supra* note 3.

6. Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 645-46 (1968).

7. *Id.* at 646.

8. *Id.*

9. Michael J. Graetz & Charles H. Whitebread, *Monrad Paulsen and the Idea of a University Law School*, 67 VA. L. REV. 445 (1981).

10. E.g., Charles Whitebread, *The Conservative Kennedy Court – What a Difference a Single Justice Can Make: The 2006–2007 Term of the United States Supreme Court*, 29 WHITTIER L. REV. 1 (2007); Charles H. Whitebread, *Going Out with a Whimper: A Term of Tinkering and Fine Tuning, The Supreme Court's 2004–2005 Term*, 27 WHITTIER L. REV. 77 (2005); Charles H. Whitebread, *The Rule of Law, Judicial Self-Restraint, and Unanswered Questions: Decisions of the United States Supreme Court's 2003–2004 Term*, 26 WHITTIER L. REV. 101 (2004); Charles H. Whitebread, *The 2005–2006 Term of the United States Supreme Court: A Court in Transition*, 28 WHITTIER L. REV. 3 (2006).

11. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE*, AN

school exams;¹² even his Green Bag article on how to make the bar review fun.¹³ These were all writings in the service of teaching, materials mostly for a student audience, reflections on the process of teaching itself. In my view, it was Charlie's self-awareness, his thoughtfulness about teaching that set him apart. That, along with his unbending quest for greater justice, his marvelous sense of humor, his limitless energy, his humanity, his novelist's eye for detail, and his love for the classroom. Those things, coupled with his uncanny ability to make learning both fun and memorable, made him the great law teacher of our generation. Winning USC Law School's teaching award this year meant more to him than you can imagine.

Charlie almost always told his students the truth. His mother, for example, really did express sadness at Mr. Miranda's passing, because of "all that he had done for us," as she put it. And I was the witness who suffered the cross-examination that set up Charlie's oft-told story about seeing jurors rocking. That trial involved an armed robbery on the fourth floor of the USC Law School. But sometimes Charlie exaggerated a bit. When he did so, he always did it in an effort to put his students at ease, to make a point of law more memorable, or to make his students more confident about their own prospects. For example, Charlie claimed he was a nonsmoker when the bar examiners made him take his exam in a room for smokers. But when I met Charlie, he was smoking at least two packs of cigarettes a day. The *New York Times*, on November 3, 1973, published an article entitled, "Despite the Warnings, Millions Can't, or Won't, Give Up Smoking."¹⁴ The article has no byline, but it was written by a very young Maureen Dowd when she was a stringer for the *Times*. She was captivated by Charlie. The article begins: "Charles H. Whitebread, Professor of Law at the University of Virginia, sat in his cramped, book-lined office, lit a cigarette and talked about smoking."¹⁵ Later in the article, after recounting the well-known health hazards of cigarettes, Ms. Dowd asks, "Why do people keep on smoking?" She says:

With some, like Professor Whitebread, it has become part of the personality structure, part of the public role. Pacing up and down before

ANALYSIS OF CASES AND CONCEPTS (5th ed. 2007); SAMUEL M. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM: CASES AND MATERIALS (2d ed. 1997).

12. CHARLES H. WHITEBREAD, THE EIGHT SECRETS OF TOP EXAM PERFORMANCE IN LAW SCHOOL (2d ed. 2007).

13. Charles H. Whitebread, *Making the Bar Review Fun*, 9 GREEN BAG 2D 263 (2006).

14. *Despite the Warnings, Millions Can't, or Won't, Give up Smoking*, N.Y. TIMES, Nov. 5, 1973, at 45.

15. *Id.*

a class of 100 students, Mr. Whitebread waves an unlighted cigarette to emphasize a point or pauses dramatically, snaps his fingers and accepts a quickly offered light from his audience.¹⁶

"He also illustrates another common reason: Compulsion, deep-rooted and fanatical, perhaps a little mad. 'I would rather smoke than eat,'" she quotes Charlie to say.¹⁷ Charlie was always an outsized personality: Anything worth doing a little was worth doing to excess. Moderation was never a virtue to Charles Whitebread.

Nearly three years later, on the same July 1976 day that John Golden and I set out in an underpowered, half-filled U-Haul for a bicentennial trip across America, Charlie quit smoking. His mother, like his father before her, had just been diagnosed with lung cancer. It never occurred to any of us that it might already be too late for Charlie himself.

I was moving to California. None of us knew it at the time, but Charlie and John would soon follow. As John and I got into the U-Haul, which was filled with some of my prized possessions, Charlie said, "When you get old, you need to have some of your things around you." I was thirty-one; Charlie was thirty-three.

Whenever Charlie and I faced any adversity, the time between our phone calls and our visits shortened. We checked in with each other regularly, often daily. Last spring, when Charlie's doctors thought that his lingering bronchitis had turned to pneumonia and that he might not be able to travel to Charlottesville, we talked regularly. When he called at the end of April to say that his illness was actually lung cancer, I came to see him. He had asked me to wait until the day after USC Law School's graduation; he wanted nothing to interfere with that very special day.

I arrived just after Charlie had received his first chemotherapy. He was realistic; he knew his chances for survival were not good, but he was determined to fight. Charlie and I had always described "good advice" as advice that you know you should take, but just cannot. The last good advice I ever gave Charlie was to live at least until January, when his estate tax would be \$600,000 to \$700,000 less. He promised to try.

During the years when Charlie and I lived next door to each other on Ocean Avenue in Santa Monica, we would often take walks along the bluffs overlooking the Pacific Ocean. Frequently, we talked of growing old there together, moving into the EL Tovar retirement home near the San

16. *Id.*

17. *Id.*

Vicente intersection, and we argued about who would be in the wheelchair and who would be pushing it. The EL Tovar is no longer in our future.

Despite his illness, Charlie was determined to try to remain upbeat. That—of course—was an essential element of his personality. One day in June, he called my house wanting to chat. When he learned that I was in London and that my nineteen-year-old son Jake was at home alone taking care of the house, Charlie asked Jake if he had been throwing any wild parties. When Jake insisted that he had not, Charlie replied, “Well then, you are not half the man your father was.”

I saw Charlie for the last time in August. He had returned to Los Angeles from Charlottesville both exhausted and exhilarated from all the friends who had visited him there. By then, the combination of his deadly illness and the poisons they had put into his body had beaten him down. By twilight each evening, he was exhausted, his head drooped down on his chest. His enthusiasms had largely left him. Manny Ramirez had just come to the Dodgers, and after dinners we watched parts of a few games together. The last day we spent together, Charlie summoned the strength to go shopping with John and me at the Santa Monica Farmers Market. A spark or two of the old Charlie remained. A young man selling cheese there was as magnificent a specimen of California youth anyone could imagine. Even I noticed. So, of course, did Charlie. He showed a little of the old energy, the old humor, the old Charlie. That night, we spent our last moments together watching the Dodgers.

Appropriately, the last real conversation I had with Charlie was from an airport. We had often talked when he was waiting for a plane to take him to some law school, some conference of judges, or a bar review lecture. This time I was in the airport waiting for a plane to take me to watch my son play soccer—a pastime Charlie could hardly comprehend. He told me that if his days now were what it meant to be living after a cure, he had no use for it. He saw no point in carrying on. I couldn’t convince him otherwise; I hardly tried. The next week Charlie went to the hospital for the last time. Two weeks later, he was gone. Charlie died peacefully in his apartment on Ocean Avenue in Santa Monica with two of his best friends at his bedside.

Shortly after my mother died, one of my daughters, then age six, caught me in a moment of profound sadness. “Dad, why are you so sad?” she asked.

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

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

"What are you thinking?" I inquired.

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

This, I realized, is the best way to think about people who have passed. So I now try to think of Charlie Whitebread in heaven telling stories to anyone who will listen, maybe talking to Jackie Robinson about baseball or Lowell George about rock and roll, perhaps exchanging quips with Oscar Wilde, chatting with Agatha Christie about her novels, and no doubt pacing in front of some large classroom entertaining and educating the large crowd that has gathered around to listen and learn from him.