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**TRIBUTE:
PROFESSOR HOMER H. CLARK, JR.**

PROFESSOR HOMER CLARK: “JUST DO IT!”

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The essays that lead into this issue of the *University of Colorado Law Review* testify to the impact that one professor can have on the lives of students, colleagues, and an institution. Homer Clark has influenced generations of lawyers, exemplifying tough-mindedness, high standards, hard work, and caring. Those of us who find a sense of security seeing him intently working at his desk as he has through our entire careers consider him a constant for the University of Colorado Law School. No matter how long we have been here, no matter how many bright new colleagues have joined us, we can count on Homer as our anchor.

After graduating from Harvard Law School, a judicial clerkship, private practice, and military service, Homer started his teaching career in Montana. In 1953 he joined the Colorado faculty, settling in Boulder where he could have the best of it all—a small law school blossoming in its widening aspirations, engaged students, the fellowship of colleagues, and a comfortable place to raise a family. We cannot think of Homer without thinking of his passion for life in the West. After the first good snow he is off to vigorous cross-country skiing. With the snowmelt he is tramping up a trail with his fly rod.

With equal passion, he seized on his chosen disciplines in the law

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and achieved excellence in teaching and writing in those fields—domestic relations, corporations, and antitrust. He rose to the top of the field of domestic relations nationally. For decades he not only was an apt critic where change was needed, but also chronicled every important development in that field. Many of us remember seeing him painstakingly updating his treatise and casebook, painstakingly proofreading, side-by-side with Jean, his late wife and beloved life-partner. Though he is retired, Homer is still at it after fifty-four years at Colorado Law, reviewing advance sheets, keeping up with the literature.

A privilege of deans is to meet alumni of all eras. They often fondly ask me about their favorite professors. Usually, at the top of the list of their inquiries is Homer Clark. How delighted they are to learn that, while retired, he is still an active part of our community. And often I hear stories of how he personally made a difference in the life of someone. How he persuaded a now successful lawyer not to give up law school but to return after a lackluster first year. Or how, when he challenged a student in class to think harder and better about an issue, it became a turning point in being able to overcome momentary embarrassment but also a revolution in the student's approach to law school. And there were many who flocked to take every course he offered. As one alumnus put it, "I majored in Homer Clark."

Homer's wisdom preceded Nike's "Just do it!" tag line. Colleagues have told their anecdotes on the pages that follow about Homer's fishing "lessons" where he sent them off alone; the essential rule was to go figure it out and practice. Once you know the objective of any enterprise, plus a few basic principles, you have to commit your own, often-solitary, hard work in order to succeed. A now prominent law professor at the brink of his career was not sure he wanted to produce scholarship, and was counseled by Homer. Dismissing the would-be professor's reluctance to write, Homer tersely responded, implying that the aspiring professor knew what the job well done entailed; he should just do it. Others cite his incisive, sound bite quality criticism of irrational rules of law. Why elaborate, pontificate, or sugarcoat a message that is clear? Some things become obvious to an intelligent observer and only become murky or doubtful if they are over-analyzed. Save hand-wringing analysis for the truly difficult issues.

The same belief that determination and hard work make the essential difference in achieving success in scholarship as it does in fly fishing applies to the pursuit of excellence by an institution. Homer brought high standards to the Colorado Law faculty and never assumed that a small law school in the Mountain West had any excuse for not being great. He helped to recruit and inspire first-rate faculty. He led by ex-

ample and his strength of character and unrelenting commitment to excellence set the mark for the school. During the Homer Clark years, without pretension or self-promotion, the University of Colorado Law School emerged as one of the best in the West. Our national recognition today traces to the standards set a half-century ago by Homer.

It is fitting that we pause and reflect on what we have learned day after day from our association with Homer Clark. Happily, we have embedded a reminder of his lessons in the recently dedicated Wolf Law Building. Thanks to the leadership of Jim Scarboro and Bob Hill in recruiting Homer's former students, colleagues, and friends to the cause, we have constructed a spectacular Faculty Colloquium Room named for Homer. This is our venue for faculty meetings and scholarly presentations by our own faculty members and by distinguished visitors. Its tall, timber-framed ceiling, warm appointments, and balcony overlooking the Flatirons set the tone for what we do. Homer Clark's name on the room should inspire us to stretch ourselves—to be tough enough to recognize what must be done without equivocation or excuse, to recognize obvious truths, to focus our energies on truly difficult and exciting matters, and to challenge ourselves, our students, and our colleagues to do all that we do better.

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HOMER CLARK: COLLEAGUE AND FRIEND

JAMES BOYD WHITE*

Born in Chicago in 1918, Homer Clark was raised in the Long Island suburbs of New York City. After high school he attended Amherst College, where he was an athlete—playing football, squash, and I think baseball too—as well as of course a good student. There he met the major influence in his intellectual life, Theodore Baird, who was the dominant academic figure at Amherst in those days. Baird was an English teacher, whose extraordinary freshman composition course opened the minds of generations of students. Baird and Homer hit it off, especially after they got into an argument in class. Homer asserted that he could smell fish in a stream; Baird thought this was incredible, and said so; Homer insisted, and together they visited a fish hatchery, where Baird realized his error. Homer and Baird became lifelong friends, correspond-

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ing for over fifty years.

During his Amherst summers, or at least one of them, Homer accompanied one of his geology professors on researches in the West. They camped out much of the time, sometimes by trout streams, which gave Homer a taste of the life that was later to be his.

After Amherst came Harvard Law School, of which it is fair to say that Homer took a dim view, especially as a teaching institution. Then two immensely important events: he married Jean Kramer, with whom he enjoyed a long and happy married life until her death just a few years ago; and he joined the Navy and went to war. He was posted to a destroyer in the Aleutians, where the Japanese were active, actually occupying one or more of the islands I believe. His ship hit a mine which blew much of it away, killing many men Homer knew and knew well, and inflicting on him a wound that is with him still.

When he returned from the Navy, Homer clerked for Judge Peter Woodbury on the First Circuit, then practiced for a couple of years in New Haven. Then came a teaching job in Montana, a place Homer has always spoken of as a fisherman's heaven. When the winters became too much to endure in Montana, Homer and his family moved to Boulder, Colorado, where his children grew up and where Homer lives to this day. It is in Boulder that I first met him, for it was there that my own life of law teaching began.

I had first heard of Homer a bit earlier, from Theodore Baird, who was my teacher at Amherst too. During my second year in law practice, in 1966, I had written Baird, telling him that I was interested in becoming a law teacher. I explained why I wanted to teach, what I was nervous about, and so on, and he had the idea of putting me in touch with Homer, who responded to my queries with a lengthy letter.

Thinking of myself as eager to teach, but not eager to devote myself to grinding out law review articles—which seemed to me to be, for the most part, a dreadful form of expression—I asked Homer, among other things, about the pressure to publish. His response in the letter was this:

In our own case there is somewhat less external pressure on younger faculty than in the larger schools, but if the pressure is not external it will be internal on the part of those who are worth anything. I believe the position is that in spite of the difficulties and frustrations of law teaching, what one makes of it is entirely up to him. If he has the firmness of character to concentrate on what is important, he can do it. If he is disposed to blame his environment for his failures, the environment will provide plenty of excuses. All that can categorically be said is that there is more personal freedom than in law practice or in any other line of work I ever was acquainted with. The unpleasant side of this fact is that if a law teacher turns into a promoter (as many

do) or a paper-pusher (as many do) or a dean (as many do), he has only himself to blame. Hence the large incidence of alcoholism.¹

You can perhaps begin to imagine the effect of such a letter on the mind of a young man eager to make a life of his own. The evident intelligence and strength of mind, the willingness to make judgments, the insistence upon the possibility of meaning—and the opposite—in one's work and life, all cast in a style of direct speech and laconic understatement (inherited perhaps from Icelandic forebears), these were to me irresistible. The almost Emersonian promise of the letter was of a life in which one would be free to make what one could out of one's experience and the opportunities it offered. But this promise was coupled with a threat, the threat of failure arising from one's own defects: insufficient firmness of character, or the simple lack of the internal pressure necessary to doing anything important. With this letter there began a friendship that has continued to this day, forty years later, an essential part of which has been Homer's relentless insistence upon the highest standards for himself and others.

It is worth stressing that there is something truly daunting in this letter. Even after all these years when I read those words I ask myself whether I have met the standards they imply, or not. Have I collapsed into being a promoter, a paper-pusher, or a dean, or otherwise failed at the task of living in the law fully and deeply and honestly? I am certain that I have on occasion blamed my environment for the imperfections of myself. But I am most grateful indeed for the part of my environment that took the form of Homer Clark, not the least because of his extraordinarily high standards, his determined realism, and his insistence that our aspirations should know no limit.

As for teaching, in his letter to me Homer said simply:

I never have the feeling that I teach in a trade school because I do not teach that way. I try to emphasize the impact of the law on the lives of those who have legal problems, although I do find it salutary, at times, to talk about practical questions of procedure. I find that this deflates those pretentious students who want to talk of metaphysics. In general I like law students and find that they respond to being treated as adults who are concerned with real issues.²

This captures much of what was most remarkable both about Homer as a teacher and about the school he did so much to shape, the University of

1. Letter from Homer Clark to the author (Oct. 22, 1966) (on file with the author).

2. *Id.*

Colorado Law School. As Don Sears told me on my appointments visit there, "This is a teaching school. The student comes first." In this world, law teaching was its own craft of art and life. It involved thinking constantly about what could be said and done in the language of the law, in particular cases, by lawyers and judges, always with an awareness that the stories it told were real stories, and that the losses and sufferings of which it spoke were real too. We also tried to be aware that our students were real people, about to become lawyers with all that might mean.

The effort to connect the world of law with human experience—the experience of clients, lawyers, judges, students—was for us what made the teaching so interesting, demanding, and amusing. We did not regard the law as a system of rules, let alone a theoretical structure, but as a living language with which to work in the world. Our job was to help equip our students for the life of learning and challenge, both intellectual and ethical, that they had perhaps unwittingly chosen. Teaching law was not a way of getting ahead in the world, or earning prestige, or elaborating one's theories, but a form of legal practice, with its own meaning and its own justification. Perhaps half the conversations I had with my colleagues here were about teaching—about a particular moment in class or about a student, or a more general problem of approach and attitude. Homer was not solely responsible for this fact of the School's life, to which many people contributed, but he surely influenced it deeply, as he influenced every aspect of the School.

Of course I never took a class from Homer, but I visited some classes, and can still remember the wonderful sense I had of a teacher asking real questions—questions without right answers, questions calling for thought and judgment—and waiting patiently for the answers, responding with more questions, often with a somewhat mordant wit. This was all done on the assumption that the student might have something valuable to say (or not), which must be one of the greatest gifts a teacher can give a student. Just as in his letter to me, he conveyed to the students in his class a complex sense of both the responsibilities and opportunities of the lawyer's life. Law teaching for him was real teaching.

For a number of years we taught the same course, his course, Domestic Relations. His casebook was the best I had ever seen, on any legal subject,³ in large part because of the penetrating and demanding questions it contained. I learned immensely from that book, and from Homer, not only about the law of domestic relations but also about the

3. HOMER H. CLARK, JR., *CASES AND PROBLEMS ON DOMESTIC RELATIONS* (1st ed. 1965) (herein after "CASEBOOK").

law more generally, and how to teach it.

His great work was his treatise, published by West and titled simply *The Law of Domestic Relations*.⁴ This was not only a learned and thorough treatment of a complex and important, yet often neglected body of law, it was a model of legal thought and writing. The core of its achievement was the extraordinary consistency of voice and force of mind it exemplified.

At the time there were in wide use legal encyclopedias such as *American Jurisprudence* and *Corpus Juris Secundum*, as well as annotations of the kind found in *American Law Reports*. For these works of legal thought, Homer had thinly disguised contempt, regarding them as useful only for the cases they collected. The heart of their failure—which may recall the failure threatened in his letter to me—was a virtually complete absence of mind and responsibility, a fact Homer liked to expose when he was acting as a judge in a moot court case. If a student quoted a sentence from one of these works, Homer would typically ask him please to read the next sentence; this almost invariably began with “however” and went on to articulate a principle opposite to the one quoted. Once one identifies their equivocality, these works become unreadable sequences of “on the one hand . . . on the other hand” without any conclusion or judgment at all, just a reiteration of commonplaces. This is not law as Homer thought of it then or thinks of it now.

Needless to say, Homer’s own writing was not evasive or empty in such a way. About the defense of recrimination in divorce, for example, he begins:

Recrimination is the outrageous legal principle which ordains that when both spouses have grounds for a divorce, neither may have a decree. Like other rules which have no perceptible basis in social policy, the explanations for it are historical, but the history of recrimination is unusual.⁵

In this passage you are brought to inhabit a world in which legal doctrine can be sensible or outrageous, in which it can be understood or misunderstood, in which it can be shaped by history or social policy, in which it is possible to make good and bad judgments. Then, at the end of the

4. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* (1968) (hereinafter “TREATISE”).

5. *Id.* at 373. This sentence is followed by a footnote, simultaneously revealing a piece of Homer’s wide and deep reading and locating the law in a wider cultural context, which reads as follows: “That English marriage was often a battle in which the chief weapons on both sides were misrepresentation and concealment is evident from Daniel Defoe’s *Moll Flanders*, first published in 1722.”

second sentence, you are told that you are going to learn something about history that will explain the evident absurdity of the doctrine in question. If you are like me, at least, you want to read on, and for many of the same reasons that I wanted to come to Colorado after reading his letter. You, like me, want to continue to be in the presence of this mind and to experience what it has to teach.

For another example of Homer's mind and style, consider his treatment of the English rule respecting fraud as a ground for setting aside a marriage, namely that the only fraud recognized as having such an effect is fraud as to the identity of one of the parties. The policy underlying this severe rule was, he says, "undoubtedly to prevent the dissolution of marriage."⁶ He goes on:

It is something of a paradox that although marriage was often looked upon by the English upper and middle classes as primarily a financial and property transaction, fraud was condoned in the negotiations leading to marriage which would not have been tolerated in commercial contracts. The English man of business was held to a higher standard when selling a bale of cloth than when arranging the marriage of his daughter. If, as seems plain enough, the rule concerning marriage was of ecclesiastical origin, we have a striking example of the immorality produced by certain kinds of officially sanctioned moral rules.⁷

Homer's mind—constantly at work asking questions, pursuing them, and coming to conclusions he stands behind—and his voice—at once forcible and clear, and at the same time sensible and fair, give remarkable unity to this book. Without these traits, *The Law of Domestic Relations* would be like so many other treatises, a simple collection of rules and cases and principles. One can sit down with this book and read it for pleasure and enlightenment, indeed for amusement, as I myself have done. In this respect, the achievement is a bit like that of Gibbon's *Decline and Fall of the Roman Empire*,⁸ one of the favorite books both of Ted Baird and Homer Clark, which is also held together by its voice and mind. Perhaps Gibbon was a model Homer actually had in mind. In any event, there cannot be many works of the common law that so perpetually reward attention and interest.

Homer and I became friends not only in school but in the mountains

6. *Id.* at 102.

7. *Id.*

8. EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* (E.P. Dutton & Co. 1910).

as well. We learned to ski together and covered much of the terrain from the Moffat Tunnel to Lawn Lake in Rocky Mountain National Park, going out almost every Saturday during the snow season to climb for hours up through the woods and across snowfields, then to come down the trails we had made. And in the summer we fished the streams of Colorado and southern Wyoming as often as we could. In the mountains he was my teacher, in a certain, distinctive, Homer-like way. When I went with him on my first fly-fishing trip, as we arrived at the stream, after a long walk in, he said to me, "You go upstream, I'll go down, and we can meet here for lunch at noon." That was the sum of my instruction and it was teaching of the most important kind.

Those were wonderful days, in the memory running together in an endless sequence. Ted Baird once said something about Homer that was interesting, true, and surprising, especially if you have ever been exposed to his somewhat pessimistic and sardonic side. He said that Homer has a capacity for sheer enjoyment of life unmatched by anyone he knew. People in Amherst might enjoy tennis for an hour or two, Ted said, but for Homer the whole day out in the mountains was a source of continuous pleasure. This was true in my experience, from the moment, often in the dark, when we set forth for the mountains until that time, hours and hours later, when we returned, tired and happy.

I think it is likely, and not to my credit, that I as a highly parochial Easterner would not have had the sense to choose Colorado over a more familiar alternative, in what was then my own part of the country, had Homer not been here ahead of me, demonstrating that even a person from the East (and Amherst College too) could build a life of independent mind and character in the world of the West.

I have learned from him and have relied upon him in every way.

As Joe Sax, then a Michigan colleague who had also been at Colorado, once told me, "To know Homer is an education in itself."

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AN APPRECIATION OF HOMER CLARK: TOWERING PRESENCE; MODEST MAN

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Professor Clark was already the dean of American family law

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scholars when he and his wife Jean came to the University of California, Davis for the 1980-1981 academic year. Brigitte Bodenheimer, my senior colleague, had just retired⁹ and was hard at work on what was to become the 1980 Hague Convention on the Civil Aspects of International Child Abduction.¹⁰ Homer taught family law that year in her stead. His casebook was already in its third edition and a staple of the curriculum,¹¹ and his ground-breaking treatise¹² had been available for more than a decade.

I, in comparison, was a relative newcomer, still shy of my first decade in the academy. What a joy it was to know these giants in the field, and what lessons there were to learn. Professors Clark and Bodenheimer shared many wonderful traits: intellectual rigor; fair-mindedness; respect for the law in all its forms; close attention to interdisciplinary sources and the practical import of legal rules; even-handed policy analyses; and solicitude for each family member—particularly the children and others whose interests were minimized or overlooked. Perhaps equally impressively, each also maintained a calm demeanor throughout that was enriched by a gentle but irrepressible, spot-on sense of humor.

Although their examples set the benchmark for my own scholarly efforts, my personality has always been less subtle, and I think that Homer was particularly curious—and perhaps just a bit cautious—as he encountered a colleague whose legal training was marked by the insights of Gloria Steinem, Betty Friedan and Herma Hill Kay. To what I think was our mutual pleasure, he and I learned that we agreed on an enormous range of family law issues. Indeed, I cannot recall a single topic on which we disagreed.

From my vantage point, Homer Clark proved to be a fellow femi-

9. Professor Clark spoke at a U.C. Davis law school symposium that marked the occasion. See Homer H. Clark, Jr., *Constitutional Protection of the Illegitimate Child?*, 12 U.C. DAVIS L. REV. 383 (1979). Professor Bodenheimer died in January 1981, during the Clarks' visit, and Homer later presented a named lecture in her honor. See Homer H. Clark, Jr., *Bodenheimer Memorial Lecture: The Role of Court and Legislature in the Growth of Family Law*, 22 U.C. DAVIS L. REV. 699 (1989).

10. See Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

11. HOMER H. CLARK, JR., *CASES AND PROBLEMS ON DOMESTIC RELATIONS* (3d ed. 1980). The book's most recent edition was published just last year. HOMER H. CLARK, JR. & ANN LAQUER ESTIN, *CASES AND PROBLEMS ON DOMESTIC RELATIONS* (7th ed. 2005).

12. CLARK, *TREATISE*, *supra* note 4. This work, too, has stood the test of time. Originally published as a single volume, it was revised two decades later, creating two related "second" editions, a longer one for practitioners and an abridged version for law students. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* (2d ed. 1987) (herein after "PRACTITIONER'S EDITION"); HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* (2d ed. 1988) (herein after "STUDENT EDITION"). The 1988 Student Edition was then reprinted a decade later, in 1998.

nist, and one who got there years before me. So far as I could tell (both then and now), his family law analysis fits that description for the best of reasons. He pays attention to detail—most particularly, to the practical impact of family law rules—and he recognizes irrationality and unfairness when he encounters them. More than that, he is willing to call it as he sees it,¹³ without casting aspersions or “raising his voice.”

With the interactions that year at the law school and thanks to Jean Clark’s gracious hospitality, Professor Clark and I became friends as well as colleagues. For me it is a great sadness that fate has never again placed us on the same faculty and that Homer has abstained from the professional meetings where academics rub shoulders. I think this latter trait is not only a matter of Professor Clark’s clear priorities, but also a product of his truly unassuming and even shy personality.

Some years ago, I noticed an article in a national news magazine on a new technology that permitted professionals to stay in touch with the office while they were on vacation. I no longer remember whether the topic was facsimile machines, email or cellular telephones. What I do remember is that the reporter had encountered and photographed Homer Clark fishing in a beautiful place (was it Rocky Mountain National Park?), and had learned that this person (who he clearly did not realize was a renowned scholar) had no intention of letting technology intrude on his personal time in the wilderness. These facts have always seemed to me to capture the essence of Homer Clark—a brilliant and dedicated, yet modest scholar, who understands what is important and keeps his eye on the ball.

I am so pleased the university and law school have chosen to memorialize Professor Clark’s contributions to intellectual inquiry, to the law, and to the life of the school, by naming a faculty colloquium room in his honor. And I am glad he is here to enjoy (or perhaps, more accurately, suffer) this recognition. Homer, you go from strength to strength. Thank you for all that you have done for our field and the lives it touches, and thank you for being the kind, witty person you are. It has been—and remains—a privilege.

13. As Homer put it in his Preface to the 1988 Student Edition:

I have not tried to avoid expressing my views on the wisdom or desirability of the legal principles revealed by either statutes or cases A law book containing no reflections of the author’s opinions would certainly be a dull book to write and probably a dull one to read.

CLARK, STUDENT EDITION, at xvii. Happily, Homer’s writing is never dull.

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HOMER CLARK'S THIRD WAY

JAMES E. SCARBORO*

There is no right or wrong way to teach a law school class. Some professors lecture. Others use the Socratic method. Most use a combination. Homer was flawless in his use of both techniques. But, in addition to the Socratic method and lecturing, Homer had a third way. So far as I know, it is a way that has no name. The teacher as example, the teacher as catalyst—these capture part of what the method was. But I want to approach it a little bit differently by saying that Homer showed me how to fly fish—if only I could do it, and he showed me how a law teacher teaches—if only I could do it.

I was a brand new law professor in Boulder when I asked Homer if he would take me fly fishing. I had grown up fishing, but only on lakes, and I was drawn to the romance of the fly rod and the western stream. Homer could have taken me to a high mountain creek where even a child can catch a lively brook trout on the third cast. But, I realized later, Homer was taking me where he wanted to fish, and I was welcome to come along if I wanted to. So it happened that I went with him to the Antelope River in Wyoming, a substantial stream not easy for a novice to fish, full of wild browns and rainbows, some of them large.

When we got to the river, Homer showed me his favorite spot and suggested I fish it. He offered no advice, though he knew I was a beginner. He did not look at my flies or my rig. He did not show me how to read the water. He merely told me that he was going upstream to fish and would meet me here for lunch, which he did, and after which he went back upstream.

It seemed as if I was getting nowhere. Where we were fishing, the Antelope was perhaps thirty yards wide and chest deep or more in the middle. I did not know where the fish were, and I never saw one. I may not have even gotten a strike. At the end of the day Homer returned and suggested it was time to go. I was frustrated but did not want to tell him so. In response to my question, he told me he had caught some fish but not how many. Homer always said the fishing was slow, no matter how good it really was, and he liked to lie about how many fish he caught by understating the number. Only a fool, in Homer's view, reveals his fa-

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vorite fishing holes by bragging about his catch. For years he told me that his favorite stream was Secret Creek in Yellowstone Park. Only recently did I learn that there is no Secret Creek.

I cannot now remember how many times Homer took me to the Antelope before I caught a fish. At least four times. After one particularly discouraging morning, I snuck up river, hid behind some bushes, and watched Homer fish. Another time I asked him to watch me cast and give me some pointers. He watched me for a minute or two and then said, "It looks fine to me." At the end of each day he would tell me that the fishing had been slow. It sure had been for me. I finally asked him if I could look in his creel. There, in his bamboo container, lying in a bed of grass, were six (the limit) large trout, all of them more than sixteen inches. This destroyed any illusion I had that the fishing really was slow. On the way out one day I remarked that the scenery was grand, and it was lucky that there was more to fly fishing than catching fish. "Yes," Homer answered, "but not much." On the rides home I asked questions. Homer always answered, occasionally elaborating, but he never offered unsolicited advice.

Finally—the fourth time, the fifth time—I began to catch fish. I learned to cast, to read the water in a pretty big river, to play the fish and bring it to hand, to keep it or let it go without doing too much damage. I knew Homer was upstream doing this all day long. He had a soft overhand cast. The line slid through the guides and laid out straight, just as it should. The fly turned over, just as it should. He fished quickly. He did not stay in one place long but covered a lot of water. It was clear from his concentration that he was just fishing—not thinking about his work, the things about life that bothered him, or anything else. "What chance!" Homer once exclaimed when he had a strike and missed the fish.

Did Homer teach me how to fly fish? He would say he did not. He would say he did nothing. My answer is yes, unquestionably. I trust you agree with me. So, what, after all, is meant by the word "teaching"? What is the relationship, so mysterious, between teaching and learning? As a beginning teacher, I was troubled by these questions. "Real teaching," I believed, meant teaching students how to think for themselves, but such a bromide merely redefined the difficulty. How does one tell when a student is thinking for herself and, if so, whether the teacher has helped her, interfered, or had nothing much to do with it? Sometimes I thought the best classes were those in which the students got excited. At other times I thought that excitement made for the worst classes and that the students learned more if they were frustrated. On many days—perhaps most—nothing much at all seemed to happen.

I asked Homer if I could sit in on his antitrust class. I think he knew

why I was asking, but he said nothing about it. He had no objection. To generations of students, Homer Clark was the face of the University of Colorado School of Law. He was admired for his teaching as well as his scholarship, which had attracted national attention to the school. As a teacher he could be feared as well as admired, especially by students who were not serious. For Homer teaching was not a performance or an intellectual exercise. Teaching, like learning, was a high endeavor demanding not just intellect, but, more importantly, character and judgment. This was true whether Homer was lecturing or asking questions. When he disagreed with a judicial opinion—and that could happen frequently—as dismissive as he might be of the judge's handiwork, he was never dismissive about the subject itself or the material. Indeed, he taught every day as if the value of who we are and what we do, our virtue and our excellence, turned upon how honest and thoughtful we were able to be about the law.

Homer's antitrust class drew the very best students. I was surprised when he began the course with a series of lectures on the architecture of antitrust law. Occasionally, but only occasionally, he asked questions. He was setting the stage. Then he asked the students to divide themselves into small groups. Each group was given a problem. The class as a whole was given reading assignments for each problem. Each group was charged with conducting a class or classes, as needed, in which it would defend its treatment of its problem. Homer sat in the back of the classroom. Often he took notes. He said very little. Inevitably, though, usually two or three times in an hour, the discussion would get hopelessly tangled or go off the rails and Homer would have to fix it. He did this reluctantly. Often he seemed about to say something and would change his mind. When he did intervene, it took him no more than a sentence or two to get the discussion going again.

For me the first few of these classes were nerve racking. I did not think the idea would work. It would be too slow. The students would make too many mistakes. They would waste time. The classes would lack that veneer of effortless effort that a skillful teacher, particularly one as skillful as Professor Clark, could bring to the task.

I was right, but I could not have been more wrong. The students did make mistakes. They were slow. They got things bollixed up. At the same time, though, they were acutely aware of their responsibility—to themselves, to their classmates, and especially to their teacher—to make the class work. They were well prepared. They had thought their positions through and were ready to defend them. In their presentations they imitated (only faintly and certainly unconsciously) their teacher. There was something of his tone, his phrasing, his attitude toward the material.

The class too, when its turn came to ask questions, seemed to be trying to live up to the standard that Homer had set for them. They were animated not just by their excitement over the material but by their desire to please the teacher they so admired.

Real learning does not often take place visibly, perhaps seldom so. It takes place internally, or after class, or even years later when, with a shock of recognition, the former student suddenly realizes what his teacher was driving at. Here, though, in class after class—some with more success than others—I could see the learning taking place, and not just because the students were engaged and wanted to live up to their professor's expectations. There was an extraordinary dynamic at work. The presenting group first articulated and defended its thesis, after which the class raised hard questions. In other words, the presenters stated their thesis and explained the reasons for it while the remainder of the class attacked the presenters' conclusions using the Socratic method.

This in itself was satisfying. The class was acting out the two sides of the Socratic dialog. But the better presenters, perhaps with the intuitive sense for the give-and-take of argument, turned the tables on their questioners by asking how they, the questioners, would solve the problem. The class could not very well resist this gambit by claiming that their only job was to ask questions, not answer them. Everyone in the room recognized that they had an obligation both to ask the hard questions and try their best to answer them. Moreover, the questioners' knowledge that, in their turn, they would be required to take a position had the instantaneous effect of elevating the conversation. It was not enough to be clever or to expose errors in logic. Each student was forced to take some responsibility for the problem. What the situation required—much more than intellect—was character and judgment, the two qualities that were so inseparably a part of Homer Clark as a teacher and as a person. These classes were as productive as any I have ever seen.

I do not think Homer could have accomplished all this from the front of the classroom. He would have had to play both teacher and student and have class members do the same. The process would probably have been confusing, if not bizarre. Yet we are all both students and teachers, are we not? We all have an equal obligation to answer our questions and question our answers. What Homer had so skillfully stage-managed was neither a lecture nor a Socratic dialog but a melding of techniques and roles. The result was a real conversation and a real learning experience.

Homer once told Jim White that the best of his "problem" classes were those in which he himself was invisible. He could have left the room and it would have made no difference, he said. Homer liked to

downplay his own importance. The problems he drafted and the readings he assigned were essential to the success of his classes. More than that, it was Homer's attitude toward learning—his seriousness, his meticulous preparation—that formed the fabric of these classes. He communicated, without seeming to, how learning could take place. At bottom, though, it was up to the students themselves. The message in all of his teaching was that he could not do it for us. We had to do it ourselves. We had to make the material our own. We had to master it and to decide what we thought about it, what kind of world we wanted to live in. It was Homer's great strength as a teacher that he would never let us forget that teaching is about learning, and the opportunity and burden of learning are ours and no one else's.

* * *

HOMER H. CLARK, JR., AS SCHOLAR

SANFORD N. KATZ*

Each area of the law has its greats who have written not only the major treatise in his field but has also had an enormous impact on shaping the law. Few think of torts without reference to Prosser, to evidence without Wigmore, or to contracts without Corbin or Williston. In family law, our great scholar is Homer H. Clark, Jr., and his masterwork, *The Law of Domestic Relations in the United States*¹⁴ must be the most cited family law text in appellate cases and scholarly books and articles in the United States. For almost half of a century, Professor Clark has dominated family law in America.

When West published the first edition of Clark's treatise in 1968, it was replacing Joseph Warren Madden's *Handbook of the Law of Persons and Domestic Relations*,¹⁵ which had been the leading national text on domestic relations for the previous thirty-seven years. In the preface to the 1931 book, Professor Madden, later Judge Madden,¹⁶ wrote that since the previous publication of a book on domestic relations,¹⁷ "there

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14. CLARK, TREATISE, *supra* note 4.

15. JOSEPH WARREN MADDEN, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS (1931).

16. When he wrote the domestic relations treatise, Professor J. Warren Madden (1890–1971) was on the faculty of the University of Pittsburgh Law School. Later he was appointed to the United States Court of Claims where he served from 1941–1961.

17. He was referring to WALTER C. TIFFANY, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS (3d ed. 1921).

have been far-reaching developments centering around family life.”¹⁸ He cited these developments as “trends toward greater liberality in the law of annulment of marriage for fraud, and of divorce for mental cruelty, the effect on infant’s contracts of this age of motor vehicles and installment buying, [and] the new problems of tort liability of parents and children and husbands and wives”¹⁹

Judge Madden’s handbook moves beyond those issues, which were thought to be important at the time, and reads very much like a restatement of the law of persons and domestic relations with each section beginning with a doctrinal statement in bold print, followed by a full discussion extensively footnoted with references to state cases and statutes. Madden’s handbook may be studied today not only as an illustration of a particular style of writing a treatise prevalent at the time, but also for learning what the law was in a given area of family law in many states seventy-five years ago. Throughout his book, Judge Madden, a highly regarded scholar, stayed close to a holding of a case or to the wording of a state statute so that he could extract a rule of law. It is difficult to determine precisely what Madden’s position was on a given issue, except where he wrote that a particular judge’s statement of the law was accurate.

I have described Madden’s book so that I can contrast it with Professor Clark’s monumental work, which is encyclopedic in both depth and scope and is also illustrative of the enlightened family law scholarship of the second half of the twentieth century. One aspect of that scholarship, which Professor Clark carries out so successfully, is the viewing of family law as neither isolated from other legal areas nor limited by state boundaries. Professor Clark believed that “the provincial nature of domestic relations so commonly assumed . . . is both an illusion and a mistake.”²⁰ Another aspect of modern scholarship is the introduction of the active voice. Professor Clark states in his preface to the first edition that he expresses his own criticisms of legal principles and suggests the direction that the law ought to take.

Throughout his book there are many examples of Professor Clark’s expression of his own views. One illustration is in his discussion of *Perez v. Lippold*,²¹ the 1948 California miscegenation case. Professor Clark praises Justice Traynor’s “great opinion,” which established the unconstitutionality of the California miscegenation statute. He then analyzes the case brilliantly. The reader knows where Professor Clark’s

18. MADDEN, *supra* note 15, at vii.

19. *Id.*

20. CLARK, TREATISE, *supra* note 4, at vii.

21. 198 P.2d. 17 (1948).

preferences lie when he writes that the dissenting opinion in *Perez* “relied upon precedent and upon outdated and unscientific studies of interracial marriage to find the statute constitutional. The judicial precedents are interesting only as extreme expressions of racial prejudice.”²² Later, in the same section of the book he discusses *Loving v. Commonwealth of Virginia*,²³ the United States Supreme Court case, decided almost twenty years after *Perez*, which struck down Virginia’s miscegenation statute as a violation of both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and concludes with the statement, “By this decision a pernicious set of statutes has been erased from American law.”²⁴

In 1988, West published Professor Clark’s second and sadly the final edition of *The Law of Domestic Relations in the United States*.²⁵ In that edition, Professor Clark recognizes the major changes that had taken place in two decades, especially those relating to the status of women and illegitimate children,²⁶ the growing legislative acceptance of no-fault divorce, and the attempts at redefining marriage. His discussion of same-sex marriage, footnoted with state appellate cases and an extensive social science bibliography, all absent from the first edition, is excellent in terms of laying out all the legal, historical, religious, and cultural arguments that were and are used almost twenty years later in the same-sex marriage cases of our time.²⁷ However, what Professor Clark did not anticipate was the extent to which advocates for legitimatizing same-sex marriage would sue in a state court and invoke that state’s constitutional law to argue the illegality of the provision of the state’s marriage law that limited marriage to one man and one woman.

Professor Clark noted that in the twenty years since the publication of his first edition, he had seen the tension between the power of individual autonomy and legislative regulation. The former was and is particularly evident in prenuptial agreements, and the latter more pronounced in divorce where legislation governs the assignment of property, and the

22. CLARK, TREATISE, *supra* note 4, at 93.

23. 388 U.S. 1 (1967).

24. CLARK, TREATISE, *supra* note 4, at 94.

25. CLARK, STUDENT EDITION, *supra* note 12.

26. Professor Clark’s fifty-four page discussion of the rights of illegitimate children in a variety of contexts and his discussion of termination of parental rights and adoption of children in eighty-eight pages are the most comprehensive treatment of the subjects I have read. *See id.* at 149–203, 850–938. West published a two-volume edition for practitioners in 1987. *See* CLARK, PRACTITIONER’S EDITION, *supra* note 12. The Student Edition is an abridged version of the longer work. The Student Edition was then reprinted in 1998.

27. *E.g.*, *Goodridge v. Dep’t of Health*, 798 N.E.2d 941 (Mass. 2003); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

custody and support of children. Interestingly enough, those two areas of family law are now the subject of uniform acts and provisions in the American Law Institute's *Principles of the Law of Family Dissolution*.²⁸

The brilliance of both the first and second editions of *The Law of Domestic Relations in the United States* lies in the fact that they are more than two works on family law. Both editions can be studied as a two century history of family law in the United States, from the eighteenth century English origins to the twentieth century. They can be read as an analysis of and commentary on family law in the United States during the same period, and they can be read as a leading scholar's view of the family law of the future. Using any standard, the contribution of Professor Homer H. Clark, Jr., to family law is immeasurable. His is the scholarship on which all of us working in the family law vineyard have relied.²⁹

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FIFTY YEARS LATER: HOMER CLARK AND THE LAW OF DOMESTIC RELATIONS

ANN LAQUER ESTIN*

When Homer Clark began teaching domestic relations law in 1953, the world was a very different place. Divorces were difficult to obtain and the law on the books in most states required proof of serious marital fault. Married women had gained the right to contract and own property, but in most states a husband could not be prosecuted for forcibly raping his wife. The Supreme Court had recently weighed in on the problems of full faith and credit and migratory divorce, but it had not yet addressed

28. E.g., UNIF. PREMARITAL AGREEMENT ACT (1983); UNIF. MARRIAGE AND DIVORCE ACT (1973); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (2002). Professor Clark discusses surrogacy contracts as a possible area for regulation. In 1988, there were no statutes regulating surrogacy contracts. See CLARK, STUDENT EDITION, *supra* note 12, at 921-25. Since 1988, assisted reproductive technology has become a major issue especially with regard to the rights and legal status of the parties involved. See KINDREGAN & MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY (2006) (discussing the latest cases and statutes on the issue and including a reference to Professor Clark's work).

29. I do not believe that the footnotes in any other text on family law in America have a more complete list of cases, statutes, and social science research in a given area. What is extremely helpful to one doing research in the field is Professor Clark's comments on the references, often stating that a particular law review article is the best on the subject. As a source for family law research the 1988 edition (either the Student Edition or the Practitioner's Edition) of *The Law of Domestic Relations in the United States* is indispensable.

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laws prohibiting interracial marriage, contraceptive use and abortion, or laws discriminating against nonmarital children and unwed fathers.³⁰

In 1953, although the "divorce revolution" of the late 1960s and 1970s was yet to come, the old fault-based divorce system was slowly collapsing under its own weight. The law on the books was convoluted—full of rules designed to prevent divorce or make it more difficult—but the law in action allowed couples to terminate their marriages by strategic use of annulment actions, perjured testimony regarding cruelty or adultery, or a temporary move to Nevada or Florida.³¹ For generations, academics had focused their attention principally on the conflict of law questions prompted by migratory divorce.

Homer Clark had just arrived in Colorado in 1953, after teaching corporations and antitrust law in Montana for four years. At Colorado, he was assigned to teach a course in domestic relations. On one level, this assignment sounds like a bit of hazing for a new junior faculty member. Characteristically however, he took it seriously.³² By 1954, he had begun work on the landmark domestic relations treatise he was to publish in 1968³³ and again in 1987.³⁴ More than fifty years later, his comprehensive, scholarly, and pragmatic treatment of the law is still the standard reference work in the field, regularly relied upon by lawyers, judges, students, teachers, and scholars.

In the early 1950s, academic writing in domestic relations still centered on conflicts questions,³⁵ with some new attention to historical, comparative, and empirical studies of divorce.³⁶ Beyond the law, this was a period of enormous interest in the family as an institution, reflected in the work of sociologists and psychologists. A number of lawyers and judges had begun to advocate new approaches to family law cases.³⁷ In some corners of the legal academy, however, domestic rela-

30. Also in 1953, Earl Warren was named Chief Justice of the United States Supreme Court, and Edmund Hillary and Tenzing Norgay became the first people to summit Mount Everest.

31. See generally MAX RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* 51-105 (1972).

32. "If I was going to teach the damn course," he says, "I figured I needed to learn something about it."

33. CLARK, *TREATISE*, *supra* note 4.

34. CLARK, *PRACTITIONER'S EDITION*, *supra* note 12; see also CLARK, *STUDENT EDITION*, *supra* note 12.

35. See, e.g., Erwin N. Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 HARV. L. REV. 193 (1951); J.H.C. Morris, *Divisible Divorce*, 64 HARV. L. REV. 1287 (1951).

36. See, e.g., Max Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633 (1956).

37. See, e.g., Paul W. Alexander, *Let's Get Embattled Spouses Out of the Trenches*, 18 L. & CONTEMP. PROBS. 98 (1953); William E. McCurdy, *Divorce—A Suggested Approach with*

tions law had not changed much for generations. In *Man and Wife in America*, Hendrik Hartog winds up his wonderful history of nineteenth century marriage law with a look at four domestic relations casebooks published in 1951 and 1952. Hartog writes that “three of the four looked much like their predecessors of the 1890s. And all of them presented the twentieth century law of husband and wife in complicated continuity with a nineteenth century past.”³⁸ He notes that a close reader “could have found glimmers of new constitutional rights and of egalitarian understandings,” but argues that the casebooks presumed “a continuing marital legal order, surviving in the face of a changing culture and society.”³⁹

During the long labor required to write his treatise, Homer Clark was persuaded by his publisher at West Publishing to put together a casebook. The first edition of *Cases and Problems in Domestic Relations* appeared in 1965, and has been followed by six more editions.⁴⁰ Clark’s 1965 casebook was clearly a different project from the creaky 1950s texts that Hartog describes. While questions of marital status were included, they were addressed in contemporary cases and centered on newly emerging issues.⁴¹ As Clark noted in his introduction to this section:

Today the more obvious legal disabilities of married women have been eliminated, notwithstanding a determined rear-guard action by the courts, who demonstrated a real hostility to the Married Women’s Acts. Some strongholds of disability remain unconquered, however, as will appear from some of the cases in this chapter. Although hardly of overwhelming importance to the position of married women, these cases do provide an illustration of judicial conserva-

Particular Reference to Dissolution for Living Separate and Apart, 9 VAND. L. REV. 685 (1956).

38. HENDRIK HARTOG, *MAN AND WIFE IN AMERICA* 295 (2000). This is particularly true of two of these casebooks: WILLIAM EDWARD MCCURDY, *CASES ON THE LAW OF PERSONS AND DOMESTIC RELATIONS* (4th ed. 1952), and WILLIAM RANDALL COMPTON, *CASES ON DOMESTIC RELATIONS* (1951). The other casebooks Hartog discusses are ALBERT C. JACOBS AND JULIUS GOEBEL JR., *CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS* (3d ed. 1952), and FOWLER V. HARPER, *PROBLEMS OF THE FAMILY* (1952). Jacobs and Goebel took a more contemporary approach, and the Harper text was introduced as an experiment in integrating various disciplines that deal with family affairs including law and social work.

39. HARTOG, *supra* note 38.

40. CLARK, *CASEBOOK*, *supra* note 3. Subsequent editions were published in 1974, 1980, 1990, 1995, 2000, and 2005. The fourth and fifth editions were coauthored by Carol Glowinsky, now Judge Glowinsky of the Colorado District Court. As noted below, the sixth and seventh editions have been prepared by this writer, with ongoing contributions from Homer Clark.

41. *Id.* at 320–437.

tism as it interacts with a fast-changing society.⁴²

Later in the same section, following a series of excerpts from the writings of sociologists and psychiatrists, Clark referred students to the work of Betty Friedan, Margaret Mead, and Simone de Beauvoir.⁴³ The casebook asked students to draw from the cases in the book "the law's version of how the family and its members should operate" and to compare that with the social scientists' account of family life presented in these excerpts.⁴⁴

The Clark casebook dealt at great length with the complex problems of jurisdiction and full faith and credit for divorce decrees, reflected in a series of recent decisions from the Supreme Court.⁴⁵ Divorce grounds and defenses were covered,⁴⁶ but so was divorce procedure,⁴⁷ and the materials included significant coverage of divorce reform proposals. The section on divorce reform began with excerpts from a 1956 *Report of the Royal Commission on Marriage and Divorce* which assessed the arguments for and against amending the English law to allow for divorce by mutual consent or following a period of marital separation.⁴⁸ The section also excerpted materials examining how the divorce process was viewed and experienced by the spouses, and materials proposing a new therapeutic approach to divorce.⁴⁹

While Clark's casebook referenced the extensive literature of the era on families in fields such as sociology and psychiatry, his focus was clearly on the work of lawyers and judges. In a 1966 review of three recent family law casebooks, Robert Drinan wrote that the books "constitute at least the beginning of a revolution in the attitude of the legal profession towards its role in the process by which some 400,000 American couples annually obtain a divorce."⁵⁰ Drinan posed the "central question confronting the authors of these volumes" as "how much sociology can

42. *Id.* at 322-29.

43. *Id.* at 433.

44. In the preface to the book, Clark noted that he has included "[s]uch nonlegal material as there was space for," and adds that: "Citation to books and articles from other disciplines has been made with the perhaps optimistic hope that law students might be induced to do some reading outside the library." *Id.* at ix.

45. *Id.* at 438-539.

46. *Id.* at 539-85.

47. *Id.* at 585-605.

48. *Id.* at 746-60.

49. *Id.* at 760-775.

50. *Book Review*, 79 HARV. L. REV. 1727 (1966). In addition to the Clark casebook, the review considers JOSEPH GOLDSTEIN & JAY KATZ, *THE FAMILY AND THE LAW: PROBLEMS FOR DECISION IN THE FAMILY LAW PROCESS* (1965); CALEB FOOTE, ROBERT J. LEVY & FRANK E.A. SANDER, *CASES AND MATERIALS ON FAMILY LAW* (1966).

be taught in a law school course on family law?"⁵¹ Drinan described Clark's book as "concentrat[ing] on teaching the legal formalities surrounding annulment, divorce, adoption, and so forth, but with a generous nod to those nonlegal materials and sciences which affect family law so profoundly."⁵² While Clark's book reflected the broad social concern with families and family life of the time, it was fundamentally a book about the law. Law was presented here not as a formal system of abstract principles and rules, or as an instrument for shaping society or human behavior, but as a system that should provide practical, sensible, and humane approaches to resolving family disputes in a quickly changing society.

Homer Clark's sharp and perceptive understanding of family law doctrine and its limitations is clear in one of his earliest publications, an article entitled *Estoppel Against Jurisdictional Attack on Decrees of Divorce*, published in the *Yale Law Journal* in 1960.⁵³ The article reviewed the various circumstances in which courts had invoked or refused to invoke estoppel principles against individuals who challenged the validity of a prior divorce decree, pointing out difficulties with the law, and deploying a sardonic humor that reflected many hours spent trying to make sense of the many unwieldy cases. As Clark wrote:

The New York courts, with an ingenuity which would be praiseworthy if employed in a socially useful cause, have succeeded in constructing upon this ostensibly simple distinction an edifice of inconsistency and confusion unsurpassed elsewhere in the law. Unfortunately for the rest of the nation, these decisions have had some influence in other states.⁵⁴

After several pages of close analysis, he observed that "the real source of the difficulty" was "a profound conflict in policies, a conflict whose ultimate outcome depends upon the changing attitudes toward divorce of both the public and the courts."⁵⁵ With the rest of the article he proposed a more coherent approach to the estoppel problem, rooted in

51. *Book Review*, 79 HARV. L. REV. at 1727.

52. The other books Drinan reviewed drew more heavily on the behavioral sciences, suggesting that "no lawyer who handles family law matters can avoid the client's underlying nonlegal problems." *Id.* at 1729.

53. Homer Clark, *Estoppel Against Jurisdictional Attack on Decrees of Divorce*, 70 YALE L.J. 45 (1960). Except for articles on conflicts questions, domestic relations did not appear with much frequency in elite law reviews during this period. Clark's article is one of only two on family law questions published by the *Yale Law Journal* between 1950 and 1970, although the journal also published several student notes on family law topics.

54. *Id.* at 50.

55. *Id.* at 53.

the cases but formulated to be consistent with "the contemporary view that when a marriage has ended, and its end has been recognized by divorce, little is to be gained by treating it as if it were still in force."⁵⁶

By the mid-1960s, the formal domestic relations law had begun to shift. Along with several new casebooks and Clark's treatise came an outpouring of law reform initiatives that began to reshape the law of divorce.⁵⁷ In 1966, New York added additional grounds to its extremely restrictive divorce statute, providing for divorce based on mutual consent of the parties to a separation agreement and living separately for two years.⁵⁸ In 1969, California enacted the nation's first pure no-fault divorce law, eliminating all grounds for divorce other than the irretrievable breakdown of the marriage. In the same year, Robert Levy finished his *Preliminary Analysis of Uniform Marriage and Divorce Legislation*, prepared for the National Conference of Commissioners on Uniform State Laws and supported by funding from the Ford Foundation.⁵⁹

Clark strongly supported the divorce reforms. In *Divorce Policy and Divorce Reform*, published in the *University of Colorado Law Review* in 1970,⁶⁰ he outlined the criticisms levied against the current divorce laws and the reform proposals recently made in England, California, and at the National Conference of Commissioners on Uniform State Laws (NCCUSL). Clark did not agree with all of the specific criticisms, noting for example that "it is a delusion to suppose that by changing the grounds for divorce in some way we can reduce the number of divorces granted."⁶¹ He opposed statutes that would require trials even in uncontested cases to determine whether marriages had broken down. Clark agreed with the view that it was time to end a system which "permits the parties to obtain divorces by consent, but subjects them to the humiliation, hypocrisy, sometimes perjury and needless hostility of having to testify to one of the prescribed grounds—usually cruelty."⁶² He saw statutory authorization of divorce by consent as the "straight-forward

56. *Id.* at 68.

57. For contemporary discussion of divorce reform in the law review literature see, for example, Homer H. Clark, Jr., *Divorce Policy and Divorce Reform*, 42 U. COLO. L. REV. 405 (1970); Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966).

58. See generally RHEINSTEIN, *supra* note 31, at 352–66.

59. ROBERT J. LEVY, *UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS* (1969). Clark's treatise is one of the sources drawn upon in Levy's monograph, which quotes the treatise at length in the sections on alimony. *Id.* at 140–63. On separation agreements, see *id.* at 189–203. On alimony and child support enforcement, see *id.* at 208–216. See generally RHEINSTEIN, *supra* note 31, at 382–391.

60. See Clark, *supra* note 57.

61. *Id.* at 405.

62. *Id.* at 407.

way to remedy this situation.”⁶³ The balance of the article reviewed and critiqued the provisions of the draft Uniform Regulation and Dissolution of Marriage Act that was under consideration by NCCUSL.⁶⁴

Although Clark was concerned about the problem of inadequate standards and wide discretion on the part of trial court judges, he argued that “only experienced, sensitive and objective judges can do justice to the complexities of the problems of alimony, property divisions, child support, and especially custody. It therefore is a mistake to think that any extensive limitations on judicial discretion in any of these fields would be either successful or wise.”⁶⁵ At the same time, however, he wrote that: “[l]egal principles devised by Solomon and administered by Oliver Wendell Holmes could not mitigate the hardship caused by divorce to families in the middle and lower income ranges.”⁶⁶ Clark pointed out the problem of inadequate resources in the courts:

The typical divorce court in America’s larger cities is an assembly line operation, frustrating to the judges and degrading to the parties and their counsel. What is required to correct this is obvious: more judges and court staff so that these cases can receive the same thorough and thoughtful consideration which is given, say, to an important piece of corporate litigation. It also requires the appointment of judges having experience and interest in the field, and continuing opportunities for judges to exchange views with their colleagues in other districts and other states.⁶⁷

Clark argued against the prejudice that “divorce law is wholly local in nature,” suggesting that this attitude led to “prejudice, provincialism, and the sort of scorn for the judgments of other courts which is such a repulsive feature of custody litigation.”⁶⁸ His conviction that judges and lawyers could learn much that was useful from meeting with their counterparts in other states suggests one of the reasons that his treatise was to prove so useful to the practicing bench and bar. Clark’s broad and thorough research and careful analysis offered a comparative and national perspective on the law, which proved to be invaluable during a period of widespread debate and transition.

63. *Id.*

64. Clark wrote that: “The Committee responsible for the draft, and particularly the project director, Professor Robert J. Levy, have attacked what are most difficult issues with great thoroughness and imagination.” *Id.*

65. *Id.* at 410.

66. *Id.*

67. *Id.* at 417.

68. *Id.*

Between publication of the first versions of Clark's casebook and treatise in the mid-1960s and the publication of his subsequent editions, families and family law in America were transformed. In the introduction to the second edition of his treatise in 1987, Clark observed that over the previous twenty years:

Many forms of discrimination against women have been mitigated or removed. The power of the individual to control many of his personal relationships by contract has been increased. The discrimination against the illegitimate child has been removed, while the relationships between parents and illegitimate children have been altered in many respects. The old fault based grounds for divorce have largely been replaced by such non-fault grounds as marriage breakdown in many states. The financial aspects of divorce have changed in the direction of placing more emphasis on divisions of property and less on alimony. The enforcement of child support and to some extent the computation of awards have received attention from legislatures both state and federal. An entirely new jurisprudence of child custody jurisdiction has developed out to the Uniform Child Custody Jurisdiction Act. A region of the law which was formerly left exclusively to the states is now subject to federal regulation in many ways. Many other changes could be listed, but the foregoing are enough to indicate why this edition has had to be almost entirely rewritten. The present text contains little that remains unchanged from the first edition other than the general arrangement of the work.⁶⁹

Clark engaged with many of these developments in articles published between the various editions of his casebook and treatises.

Both Clark's treatise and the various editions of his casebook follow closely the growing involvement of the United States Supreme Court in family law matters.⁷⁰ He was often skeptical of the Court's treatment of family law issues, particularly the series of cases on illegitimacy and the rights of unwed fathers beginning with *Levy v. Louisiana*.⁷¹ Clark was troubled not by the principle he saw behind the *Levy* decision—"that the disability of illegitimate children is attributable only to the circumstances of their births for which they are not responsible, and for which they should therefore not have to suffer"—but with the "confusion and vacillation" of the opinions that followed.⁷² He indicated more concern with

69. CLARK, PRACTITIONER'S EDITION, *supra* note 12, at vii.

70. See also Homer H. Clark, Jr., *The Supreme Court Faces the Family*, 5 FAMILY ADVOCATE 20 (1982).

71. 391 U.S. 668 (1968).

72. Homer H. Clark, Jr., *Constitutional Protection of the Illegitimate Child?* 12 U.C. DAVIS L. REV. 383, 384 (1979).

the cases that erased the distinctions between the treatment of married and unmarried parents, and was critical of the rigidity and lack of guidance that the Court had introduced into the law with a series of sweeping and inconsistent decisions constitutionalizing the relationships between mother, father, and child.⁷³

Later in his career, after publishing the second edition of his treatise and retiring from full-time teaching, Homer Clark reflected on the broad changes in family law over the past generation.⁷⁴ His comments addressed the great jurisdictional headaches in child support and custody litigation, traceable in part to the Supreme Court's decisions in *May v. Anderson*⁷⁵ and *Kulko v. Superior Court*.⁷⁶ Clark noted the challenge involved in drafting the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA) around the entirely unworkable rule of *May v. Anderson*,⁷⁷ Clark had previously observed, after working through the difficult and often murky interaction of the UCCJA and the PKPA, that these statutes were "technical enough to delight a medieval property lawyer."⁷⁸

It was during this time that I first met Homer Clark. I was fortunate to begin my teaching career at the University of Colorado Law School while Homer was still actively teaching and writing. Assigned to the course in domestic relations—which had comprised about half of my litigation practice—I began to get acquainted with Homer through his casebook and treatise. For a lawyer who only knew no-fault divorce law, who went through law school without taking a conflicts course, and who had learned to use and appreciate child support guidelines when they were instituted in the mid-1980s, his books provided a tremendously useful grounding in the larger currents of policy, history, and doctrine.

Despite his retirement, Homer continued teaching one section of the

73. See *id.* at 409–410. Clark was particularly concerned that these decisions would turn out to be unworkable in light of later experience, observing that this was a particular risk in family law, "where the implications are subtle and far-reaching and where the Supreme Court and other federal courts have had little experience."

74. Homer H. Clark, Jr., *The Role of Court and Legislature in the Growth of Family Law*, 22 U.C. DAVIS L. REV. 699 (1989).

75. 345 U.S. 528 (1953) (holding that a custody determination entered without full personal jurisdiction over both parents is not entitled to full faith and credit).

76. 436 U.S. 84 (1978) (finding that nonresident father did not have sufficient minimum contacts with the state where his children resided to allow court to exercise personal jurisdiction for purposes of child support determination).

77. Clark, *supra* note 74, at 707–08 ("My own sympathies in this conflict lie with the statutes' drafters. They were attempting to construct a workable national law of custody in the face of a Supreme Court decision that was not based on precedent and that lacked comprehension of the complex interests in custody cases.").

78. CLARK, PRACTITIONER'S EDITION, *supra* note 12, at 825.

Domestic Relations course each year, and during the ten years I taught at Colorado I could count on finding him in his office every day, preparing for class or working through a big stack of advance sheets. We discussed issues or developments in the law, but more often talked about ski trips, or our families, or the state of the law school. When I first began traveling to conferences, family law people who noticed "University of Colorado" on my nametag stopped me to ask about Homer Clark. Many of these were people who had never met him, but were deeply curious about the man who made such a profound contribution to the field. More recently, I have had the privilege of working closely with Homer on the sixth and seventh editions of his casebook. He has been unfailingly generous in entrusting his work to me, allowing me complete freedom to edit and update his book, and I in turn have come away with a deeper appreciation for his intellect, his humor, and his strong sense of right and wrong.

More than fifty years after Homer Clark began his work on domestic relations, he still comes regularly to his office to read the advance sheets for all state and federal reporters, sending me monthly stacks of cases worth noting. He reads each chapter I revise for the casebook, offering a suggestion or two. He is still available for those long conversations, whether on the phone, over lunch, or on an early morning hike in the foothills. And while he is unfailingly modest, I know that it gives him deep pleasure to see his books still in active daily use: the tangible evidence of his years of hard work, and his gift to generations of students and colleagues.

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