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In Memoriam: Malcolm P. Sharp*

Gerhard Casper†

This service for which we have assembled in memory of Malcolm Sharp is, in one way, quite illegitimate. In a 1965 letter to Dean Neal, Malcolm said that he did not want a memorial service. His reason—and Malcolm always gave a reason—was somewhat shocking, at least for those who, when they think about occasions like this, are mostly bewildered by emotions of sadness, love, and bereavement. Malcolm wrote: "In a long life I've seen only one that was useful, and that depended on special circumstances." If one is not an anthropologist, it is difficult even to approach the question of how to make a memorial service "useful."

Should I urge you to disband? Of course not. One of my favorite stories about Malcolm is one that Wilber Katz told in the issue of *The University of Chicago Law Review* dedicated to Malcolm upon his retirement from the Law School. I quote Dean Katz:

Most rewarding of all my associations with Malcolm were the sometimes dizzying explorations of ideas which accompanied our exploration of mountain trails. I learned on one occasion the secret of his capacity to follow trails of both kinds. We

* Remarks delivered at the memorial service for Malcolm P. Sharp at Rosary College on October 5, 1980.

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had carefully mapped out an unfamiliar hike and had followed our plan perhaps less carefully as we discussed equitable liens—or was it Admiral Mahan or the mystery of responsible freedom? In the afternoon we were surprised to find ourselves in the same spot where we had been an hour or two earlier. I was somewhat dismayed, but Malcolm strode ahead explaining, “It’s always good to keep a flexible sense of objective.”¹

Malcolm’s family was right to keep a flexible sense of objective. It is really quite unthinkable not to gather in memory of this most beloved and admired man who taught at the University of Chicago Law School for some thirty years, through a post-retirement appointment, then took another post-retirement position at New Mexico, and finally a post-post-post-retirement assignment at Rosary College. In short, Malcolm never retired as a teacher. In the letter to Phil Neal that I mentioned earlier, he referred to himself as “primarily a teacher, or learner.” Indeed he was both, and I am grateful that our paths crossed, if belatedly.

When we first met, I happened to be teaching the commerce clause. Malcolm immediately engaged me in a dialogue that led to my revoking, the next day in class, a theory I had been expounding and in which I had firmly believed until Malcolm, gently and with a twinkle in his eye, showed me how and why I was wrong. In honor of Malcolm I should like to be as “useful” as possible. One way to be useful, I think, is to ask what Malcolm has taught us that we should not forget, especially those of us who try to be teachers ourselves.

I am not qualified to speak about his contributions to the analysis of contract law, though I have admired the penetrating casebook that he wrote with his one-time Chicago colleague, Fritz Kessler.² Nor am I qualified to speak to many of his other interests—legal, economic, political, literary, philosophical, anthropological, and biological. Malcolm’s sense of objective was not only flexible but universal. Permit me instead to single out four aspects that seem of special importance to me, and useful indeed.

The first of these is obviously the very point I have just adumbrated. Malcolm’s education and learning provide an outstanding example of the qualities that, in Edmund Wilson’s words, have

¹ Katz, A “*Vignette*” of Malcolm Sharp, 33 U. CHI. L. REV. 196, 196 (1966).

² F. KESSLER & M. SHARP, CONTRACTS (1953).

made the great American jurists and that, again according to Wilson, Malcolm Sharp combined: "subtle intellect, philosophic and literary interests, a long view of human history, . . . and a combination of moral anxieties with an ironic sense of humor."³ Malcolm told all of us, I am sure, that the two books that most affected him were Proust's *Remembrance of Things Past* and Toynbee's *A Study of History*. Especially Proust's skeptical and yet confident search for and recapture of "time lost" suggest what Malcolm's literary standards were. In the law library of the University of Chicago, the books of "Professor Malcolm Sharp's List of Recommended Readings" constitute the Sharp Collection of general readings. Let us make sure that future generations of students will find their way to it and through it.

When speaking with alumni about Malcolm, I often encounter a well-remembered bemusement about his classes. Sometimes it seems that only the most respected and admired of teachers evoke this sense of confusion. It is captured in a student verse of, as Harry Kalven characterized it, "affectionate malice":

Malcolm, Malcolm, you are welcome
With your ivy covered mind
Though no one can understand you,
You are good and wise and kind.⁴

The second aspect of Malcolm Sharp the teacher that is useful to keep in mind is his attitude toward political power. Malcolm's sympathy with the sufferings of human beings was not something compartmentalized and unconnected with his view of professional responsibilities and ethics. Indeed, the bemusement I just spoke of may have been the result of his utter unwillingness to compartmentalize. Law, literature, and politics were all easily brought together. In an article on constitutional law published at the height of McCarthyism in *The University of Chicago Law Review*, Malcolm cited another of his recommended readings—Kafka's *The Trial*—as "the definitive philosophical statement about loyalty proceedings."⁵

Just as Marcel Proust had worked on behalf of Captain Dreyfus, Malcolm came to the defense—in the lawyer's sense of the

³ Wilson, *Conversing with Malcolm Sharp*, 33 U. CHI. L. REV. 198, 200 (1966).

⁴ Kalven, *For M.P.S.*, 33 U. CHI. L. REV. 193, 193 (1966).

⁵ Sharp, *The Old Constitution*, 20 U. CHI. L. REV. 529, 545 n.27 (1953).

word—of unpopular causes, such as in the *Rosenberg* case.⁶ Among unpopular causes there are some that one may characterize as more popular than others, at least in the long run. Malcolm's choices were not necessarily the popular unpopular causes, nor were they predictable.

Of the manner in which he approached political power, Malcolm gave a summary in an observation about his friend and University of Chicago colleague William Crosskey. In 1973 Malcolm wrote: "He was, like me, neither a Pelagian nor a Jansenist; but, like me, he had a healthy Eighteenth Century regard for the limitations of . . . the human being in power."⁷ The paragraph from which I quote continues, by the way, with a capsule rendering of Malcolm's views on economic liberty that tends to surprise those who have embraced the contemporary notion that political liberalism and the welfare state go hand in hand. Malcolm added: "While history as usual is ambiguous, economic liberty seems to me, in experience and in principle, a necessary and probably in the long run a sufficient condition of freedom in communication."⁸

The third lesson to learn from Malcolm Sharp is a belief he shared with Crosskey. Malcolm steadfastly and tirelessly defended not only much of the substance of Crosskey's work but, more particularly, his method. Crosskey was of the view that "the historical meaning of the Constitution, read in the context of its presentation and adoption, must determine its later meaning."⁹ The issue is not whether Crosskey or Malcolm interpreted the Constitution correctly but how they went about this task—for instance, Sharp in his magisterial essay on the separation of powers that was published in the second volume of *The University of Chicago Law Review*.¹⁰

In the current debate over methods of constitutional interpretation, the so-called noninterpretivist school views the Constitution essentially as a system of values (albeit rather vaguely per-

⁶ *Rosenberg v. United States*, 346 U.S. 273 (1953). See generally Krash, *Malcolm Sharp and the Rosenberg Case: Remembrance of Things Past*, 33 U. CHI. L. REV. 202 (1966).

⁷ Sharp, *Crosskey, Anastaplo, and Meiklejohn on the United States Constitution*, 20 U. CHI. L. SCH. REC. 3, 14 (1973).

⁸ *Id.*

⁹ Sharp, Book Review, 54 COLUM. L. REV. 439, 442 (1954) (review of W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953)).

¹⁰ Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385 (1935).

ceived ones) and denies the rationality and feasibility of historical approaches. There is nothing new about the controversy between these two types of interpretation, as Malcolm's writings amply demonstrate. Though he and Crosskey may have been overly confident as to the reach and results of historical interpretation, Malcolm's cogent summary of that position, as offered in his discussion of his friend's contribution to it, is worth quoting:

[V]erbal honesty, the Anglo-American theory of the function of the Judiciary, and the nature of a written constitution, require that we give effect to the historical meaning of the Constitution where it can be determined. That meaning should prevail over doctrines—however statesmanlike—invented by the courts to justify their own views. Though Mr. Crosskey's position may have become unfamiliar, it seems to the reviewer impregnable.¹¹

To read Malcolm on Crosskey is one of the more refreshing experiences a constitutional law teacher can have. The issues are complex and not easily reduced to a few words in praise of Malcolm, but to remember his words on this subject is very useful indeed.

I shall conclude by suggesting a general lesson that can be illustrated by a reference to Malcolm's beloved Proust. It is a lesson that takes us beyond the confines of the legal profession, and it is thus, I hope, a fitting conclusion to these words of tribute to a man with interests and talents as nearly universal as one is likely to encounter in this age of intellectual specialization. Swann, the main character in the first volume of *Remembrance of Things Past*, when looking at old portraits always recognized in their features some trait shared by his own friends and acquaintances. Malcolm possessed a similar gift of attributing immediacy and vitality to all of the multifarious objects of his contemplation. Let us try to imitate Malcolm in this. To the extent that we succeed, we shall profit both as teachers and as lifelong learners.

¹¹ Sharp, *supra* note 9, at 443.