

Mr. Justice Brandeis: A Law Clerk's Recollections of the October Term, 1934

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Personal recollections of great men are undertaken only at grave risk. I have noticed, for example, that they usually reveal more about the recollector than they do about the subject of the recollections, and not infrequently — though quite unconsciously — they are most unflattering to the recollector himself. Nevertheless, I have undertaken to accept this risk, and I have no intention of welching on the bargain — no matter what it may reveal of my own twisted psyche. I ask you only to remember that I speak of quite a few years ago and of things seen through the eyes of a relatively callow and unsophisticated youth.

Consider, for instance, my very first personal recollection of the Justice. It was the occasion of his seventy-fifth birthday, and I was a senior at Yale Law School. Our law journal had dedicated one of its issues to the Justice in honor of the occasion, and a group of us drove to Washington during the Christmas vacation to present it to him personally. We had — as I recall it generally — a delightful visit; but only one specific thing stands out with real clarity. Midway in the conversation the Justice noticed that his trousers were not completely buttoned. Apparently I noticed this just about the same time as the Justice, and my immediate reaction was one of embarrassment — partly for him and partly for myself. Then, as the Justice calmly proceeded to button his trousers without for a moment breaking the tenor of the conversation, it gradually dawned on me that there was no cause for embarrassment on either part. Viewing the incident in retrospect, I wonder — does it suggest that the simple dignity of the Justice's manner might have been proof even against the aphorism that no man can be a hero to his own valet?

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I did not see the Justice again until almost three years had passed. After graduating from Yale, I had spent a year under the tutelage of Professor Felix Frankfurter and a year as law clerk to Judge Julian W. Mack. This was like climbing up the ladder rung by rung — with the assignment to the Justice as the ultimate reward. Actually it was a series of accidents that accounted for the apparently orderly progression — but perhaps some master designer had even those accidents in mind as well. Be that as it may, the commitment to candor which I have made requires me to record that the switch from Judge Mack to the Justice was not entirely painless. In the first place, it was painful to my pocketbook. Judge Mack had been seriously ill the year before I came to him and was just getting caught up with his work as my year came to a close. He was also deep in the New York subway receivership in which he had succeeded Judge Martin T. Manton as the trial judge. Consequently, he was anxious for his next law clerk to start work as soon as I left for the Justice. The Justice, on the other hand, learning that I had worked straight through the year for the judge without a break, was insistent that I have a good vacation before starting work with him. In effect, this exchange between the judge and the Justice seemed to boil down to a tug of war between them as to whose payroll was going to provide for my vacation. I am ashamed to report that I took the coward's way out; I cut the Gordian knot by taking the vacation at my own expense — at the time no small sacrifice, since our family fortunes had felt the bite of the Great Depression. I have no doubt that the judge and the Justice each thought that the other had yielded, and both would have been shocked to learn that the agreement had been achieved only at my own expense. In retrospect, of course, I wish that I had given them the shock.

THE JUSTICE WAS SKEPTICAL

Now at last I come to the great confrontation when I finally summoned up the courage to report to the Justice and to tell him that my "vacation" was now an accomplished fact. I recall, too, somewhat ruefully, that when I told him that I had been in Wash-

ington for about a week, living up my so-called vacation, he expressed surprise that I had not come in earlier. Other than that I recall two main themes of the conversation.

First, I was enjoined to absolute secrecy about my work — not even the other law clerks were to be told what we were working on — a precaution which put the Brandeis law clerk at considerable disadvantage in trading information. The other injunction was that I should learn to take a nap in the afternoon since I would frequently have to work late at night, but would nevertheless be expected to be on hand at nine o'clock every morning. The habit thus painstakingly cultivated to fit the Justice's schedule has dogged me all my life. I still like to work late at night and sleep in the afternoon — a schedule which makes no sense at all in my present environment. The Justice's schedule, by the way, was just the opposite. He went to bed early, apparently about nine P. M., and woke at five A. M. He did his concentrated work between five and eight and took a nap between ten and eleven before going to Court, which then started its session at noon. Our personal conferences were held between nine and ten — but these seldom extended beyond a few minutes.

The Justice's principal office was his bedroom — a rather small room furnished with a bed, a desk, and only two or three chairs. His other office was a two-room apartment — just above the apartment in which he lived. One of the rooms was for the law clerk's use — one for the Justice. But the Justice's room had much better daylight — and since the Justice hardly ever came upstairs to use it, I early formed the habit of working during the day at the Justice's desk. Once he did come up and surprised me there. When I asked him whether he minded my using his desk, he answered, certainly not — provided that I left it neat — because, as he said, "I always think that a messy desk betokens a confused mind." I was tempted to ask whether he had ever seen Judge Mack's desk, which was just one monumental mass of unassorted papers — but this was another pleasure I denied myself — perhaps from some strange sense of loyalty to the judge.

By this time you may have guessed that I was not entirely at ease in my early relations with the Justice. This would be, to say the least, something of an understatement. This was probably due

to a combination of circumstances. Unlike Judge Mack, the Justice did not immediately clasp his law clerk to his bosom as a member of the family as well as a working associate. On the contrary, he seemed to keep personal relations at a minimum — especially at first — and to be deliberately testing the mettle of his assistant. I recall mentioning this to Tom Austern, who, like myself, had been a law clerk to Judge Mack before going to the Justice. Tom assured me that he had had the same experience, but that gradually the ice had thawed and that eventually he had come to love the Justice as much as the judge. For a while this seemed to me quite impossible. Indeed, the first opinion that we worked on together increased the strain almost to the breaking point. It involved a very fine, almost esoteric, question of Federal procedure. The Justice wanted all the precedents on the point in all the Federal courts. I ransacked the books with the sense of thoroughness which I was confident I had learned from Judge Mack.

I believe I turned up five relevant lower court cases — none quite exactly in point. The Justice, obviously skeptical of the thoroughness of my research, kept asking whether I was certain there was nothing more. I could only assure him that I had exhausted my research ingenuity. Then one morning I was dismayed, when I walked into the upstairs office, to find that the Federal Digest had been disturbed. Indeed, it was open to the very question involved in our case. Obviously, the Justice had devoted part of his early morning work to checking up on my research. I was both offended and worried. I could hardly wait to see the next draft of the opinion which would tell me whether he had found any additional cases. That afternoon the next draft opinion came, as it always did, directly from the printer — one copy for the Justice and one for me — because the Justice used the Government printing office in place of a stenographic secretary. What a relief to find that the citations were still exactly the same — no more and no less! Neither the Justice nor I made any comment on the incident, but I noticed that from then on he never again questioned the thoroughness of my research — until, alas, our very last opinion. There hangs another tale which I am afraid reveals more about the writer than it does about the Justice.

THE FOOTNOTES ARE PRETTY GOOD

This last opinion was probably the most important of the year, for it was written for a unanimous Court holding unconstitutional the first special Farmers' Bankruptcy Act, the Frazier-Lemke Act. This Act was particularly designed to relieve farmers from overburdensome mortgages without loss of their farms. It was held invalid by the Court on the ground that this entirely laudable objective was to be accomplished too much at the expense of the holder of the mortgage. It was, of course, a delicate subject, and it came at an especially delicate time, because the opinion was scheduled to be delivered on the same day as three other opinions holding invalid New Deal actions — a day to be known in constitutional history as Black Monday.

True to the Brandeis tradition, the opinion had to be a complete exposition not only of the law, but also of the economics of the situation — including, for example, the growth of farm tenancy in the United States. The development of the economic background was largely the function of the footnotes and, therefore, almost entirely the responsibility of the law clerk. At any rate, we worked long and hard on the opinion, and when we were finally finished, the Justice made one of his rare visits to the upper office, chatted a few minutes, and then said, just as he was leaving, "Well, I think it's a good opinion; the footnotes are pretty good, too." To most persons this may seem like damning with faint praise, but from the Justice it was like being knighted with Excalibur. For a few days I was pretty near dizzy with success; only to have borne home the poignancy of that old adage: "Pride goeth before a fall."

The day after the opinion was delivered, the Justice called me into his office, handed me a small printed pamphlet, and said in exactly the same tone he always used, but with just a tinge of disgust in his expression: "You missed the best thing on farm tenancy." The pamphlet, he explained then, had been sent to him by a friend who had seen the opinion overlooked by me and had prepared it as one of a series of research reports which he supplied to newspapers as a basis for editorial comment. Needless to say, I lost no time in dashing down to the Library of Congress and enlisting all

available hands for the purpose of locating the Library copy of that pamphlet. Much to my relief, it was nowhere to be found, either in the catalogues or on the shelves of the Library. Apparently, the Justice's friend had neglected to file it with the Library of Congress. Not even the most diligent research could have unearthed it.

Now comes the curious part of the story, which reveals nothing at all about the Justice — except perhaps indirectly as it reflects something of our relationship. What, if anything, should I tell the Justice about the pamphlet? I remember that I debated giving him a curt note, saying something like this: "Tell your friend that if he wants to be cited in Supreme Court opinions, he must file with the Library of Congress." After cooling down a bit, I rejected this *démarche*, and I am glad that I did. But then, quite unaccountably, I swung to the opposite extreme. I decided to say nothing — unless he asked about it. The result was that neither of us ever mentioned it again. Not until sometime later did it occur to me that the pamphlet probably could not be filed in the Library of Congress because it was not copyrighted; indeed, it could hardly be copyrighted since it was meant to be copied freely by the subscribers. And for some unaccountable reason, as the years go by, every time I think of it, I am more regretful of my failure to explain this to the Justice. Indeed, if there is some place in the hereafter where, as Socrates suggested, the souls of kindred spirits may gather and resume their conversations, I will immediately make a beeline for the Justice to tell him that the footnotes were really "pretty good" after all.

Although this was our last opinion, it was not the last job I did for the Justice. When he departed for his summer vacation, I was left with the usual statistical job to do for Professor Frankfurter's annual article on the business of the Supreme Court. In addition, I was given a special research job to do as the aftermath of the Farmers' Bankruptcy case — perhaps even as a penance for the supposed omission in the footnotes on farm tenancy. However that may be, the Justice's explanation was that he believed that a good many of the farmers' economic troubles were caused by overinvestment in farm machinery. Consequently, I was to do a study on the economic effects of agricultural mechanization. Frankly, I

was horrified by the assignment. I had not the slightest interest in the subject or belief in the Justice's theory. I suspected that it was simply an offshoot of his general antipathy for automobiles. A farm tractor was only a specialized kind of automobile and, in consequence, to be equally condemned. I protested that I was obviously unqualified for the task, since I was neither an economist nor an agriculturalist — to say nothing of an agricultural economist. The only answer I got was this: "The small advances in an art are made by the experts, but the great discoveries are made by the neophytes." So I sweated through the summer, examining bulletins of the Department of Agriculture, collecting data on the key question of at what point — i. e., for what size farm — it becomes economically worthwhile to retire old Dobbin and substitute a shiny new tractor. In due course I prepared a memorandum and sent it to the Justice. Apparently it represented neither a small advance nor a great discovery in the art, for the Justice never mentioned the subject again.

EXCELLENCE, IRONY, AND THE TREATMENT

As I think back over what I have said so far, it occurs to me that I may have given the impression of a constant struggle between the Justice and myself — albeit one fought on a tiny stage with weapons carefully hidden from view. In a way it *was* a struggle, but essentially it was a struggle to satisfy what I knew was probably the highest standard of excellence against which I would ever be measured. There were also certain ameliorating aspects which considerably relieved the tension. For one thing, Mrs. Brandeis, as the year wore on, did not hesitate to let me know that the Justice really appreciated my efforts, and Professor Frankfurter eventually passed on similar assurances — both acting, I am sure, in accordance with the Justice's intentions. Finally, there was an indescribable sense of exhilaration, sparkle, and even fun in almost every contact with the Justice.

The personal contact was almost always brief. The Justice frequently indicated what he wanted in a note addressed to "N. L. N.," signed "L. D. B.," and transmitted by Edward G. Poindexter, the

Court messenger assigned to the Justice. My replies were addressed "Mr. Justice," signed "N. L. N.," and were either transmitted through Poindexter or slipped under the door of the apartment late at night or early in the morning, when I finished working. Nevertheless, the few minutes each day that were spent in the combined bedroom-office seemed to more than compensate for all the drudgery and tension frequently involved in the work itself. This was partly because the Justice had a way of packing so much meaning — sometimes offered with deadly seriousness, and sometimes with pure devilment — into the briefest exchange. I remember, for example, that in the latter part of the year I got up courage to suggest that I would like to take a weekend off to go up to New York — partly to see Judge Mack. I also wanted to see a girl in New York, but I did not mention that. The Justice allowed as to how he thought it might be arranged — and so it was. I saw both Judge Mack and the girl. The following Monday morning, when I came into his bedroom, as usual at about 9 o'clock, to see if there was anything special he wanted, he looked up at me and said with a perfectly straight face, "Well, sir, have you entirely recovered from your debauch?"

In addition to the relentless pursuit of excellence, salted with a touch of irony, there was also the gradual exposure to what was known among Brandeis law clerks as "the treatment." This was the Justice's own exposition of the Brandeis philosophy, which has been popularized under the brand name of "The Curse of Bigness." Of course, this emphasizes only one aspect of a whole attitude toward man and society, and gives much too negative a tone. The affirmative aspect was the emphasis on individual responsibility, the faith in reason and in the common man's ability to comprehend the problems of his society, *provided*, of course, that the uncommon men took seriously their responsibility to explain and to lead — as the Justice and his little group of followers had done in Massachusetts. That is why the burden of the message to the law clerk always was, "Go home and be a leader in your own community" — advice, it may be noted, that was seldom followed, at least in its literal sense.

There was also the faith in, and the insistence upon, the values

of education, coupled with the disdain for emphasis upon gadgets, especially automobiles. This was beautifully illustrated by one of our major cases that term. It concerned the allocation of the cost of building a highway-railroad underpass in Tennessee. The railroad contended that the order of the Highway Commission requiring it to pay one-half the cost deprived it of property without due process of law, because the underpass would benefit primarily its competitors — trucks, buses, and automobiles on intercity journeys. I recall how warmly the Justice spoke of the excellence of the railroad attorney's presentation of both the facts and the law, and how happy he was to write the opinion of the court sustaining the railroad's contention. Indeed, he gave me a special dispensation from the general rule that I was never to disclose to anyone what I was working on, so that I could go to the Bureau of Public Roads and get all the latest data on Federally aided interstate highways. We also examined in detail the annual budgets of Tennessee to see just how much it was spending on highways. Among the documents I turned up with was a beautiful diagram showing the relative proportions of the state budget devoted to various purposes. As soon as the Justice saw it, he called my attention, in shocked tones, to the relatively large segment of the state budget devoted to highways as compared with the small segment devoted to education. And when the opinion was finished and the time came to clear away all the books, he would not let me return this particular volume containing the state budget. Instead, he kept it in his office-bedroom until the very end of the term, and I got the impression that every visitor who came to chat with him there would have his attention drawn to that diagram and be invited to join in the Justice's shocked surprise.

THE SINEWS OF A PHILOSOPHER

Another element of the Justice's philosophy which was of considerable interest to me was his Zionism. This was not unrelated to his general economic and social philosophy. I recall, for example, that when we were working on the Farmers' Bankruptcy case, with its economic implications regarding the growth of farmer tenancy,

he said, "Our people in Palestine have found a better way," apparently referring to the farm cooperatives. But the fullest exposition of his Zionism came to me quite by accident when Edgar E. Siskin,* then rabbi of Mishkan Israel in New Haven, Connecticut, and a family friend from my New Haven days, visited Washington. When I asked the Justice to see Rabbi Siskin, I offered as additional bait — perhaps quite unnecessarily — that his congregation was largely non-Zionist, but that the rabbi was open to persuasion. I do not know whether our visitor came away persuaded, but *this* I can testify: if he did not, it was certainly not for want of the Justice's trying. It was one of the longest single interviews with the Justice that I ever attended, and I recall that Mrs. Brandeis called on the phone three times to remind him that it was time for their daily walk.

In that interview, the Justice painted a picture of the future of the Middle East as he saw it in the centuries ahead — with the Jews of Palestine serving as the bridge to bring to the whole Arab world a synthesis of the finest cultural achievements of Western Civilization, which synthesis would in turn generate a rebirth of Arab Civilization. I sometimes wonder whether the Justice, if he were here today, would still cherish his vision of ultimate accommodation between Jews and Arabs. Essentially, however, I have no doubt that his confidence in the future would still be unshaken, for the Justice, like de Gaulle, took the long view of history.

This brings to a close all the specific recollections I have to offer, although I dropped in to see the Justice occasionally in later years and found that I enjoyed his presence even more when I was not harassed by a feeling of being weighed in the balance. Nevertheless, the hardest thing of all to describe about the Justice is the clearest recollection I have of him — the general impression of a shining serenity which no enemy or adverse fortune could hope to pierce. I thought of this again recently when reading Epictetus. Since my own words fail me, I may be permitted to borrow his — in the hope of presenting a closing glimpse of the Justice as I remember him.

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If God had committed some orphan to your care, would you have neglected him so? Yet He has entrusted your own self to you and He says, "I had none other more trustworthy than you: keep this man for me such as he is born to be, modest, faithful, high-minded, undismayed, free from passion and tumult." After that, do you refuse to keep him so?

But they will say, "Where has this man got his high looks and his lofty countenance?"

Nay, I have not got them yet as I ought: for as yet I have not confidence in what I have learnt and assented to, I still fear my own weakness. Only let me gain confidence and then you shall see a proper aspect and a proper bearing, then I will show you the statue as it is when it is finished and polished. What think you? That this means proud looks? Heaven forbid! Does Zeus of Olympia wear proud looks? No, but his gaze is steadfast, as his should be who is to say:

For my word cannot be taken back, nor can it deceive.

(Homer, Iliad)

Such will I show myself to you — faithful, self-respecting, noble, free from tumult.

"Do you mean, free from death and old age and disease?"

No, but as one who dies as a god, and who bears illness like a god. These are my possessions, these my faculties; all others are beyond me. I will show you the sinews of a philosopher.

"What do you mean by sinews?"

Will to achieve that fails not, will to avoid that falls not into evil, impulse to act appropriately, strenuous purpose, assent that is not precipitate. This is what you shall see.

When I think of the Justice, I think of the only person I have ever known who seemed to have fulfilled this prescription of Epictetus.