Introduction

Melvin I. Urofsky

Every time I sit down to write an introduction to the next issue of the *Journal,* I shake my head in amazement. It is not that the articles we publish are good; they have to be, or we would not be running them. Rather, it is the great and growing diversity of material that fits into the rubric of Supreme Court history.

As those of you who went to law school before the "new" legal history took hold in the 1980s, and even for some of you who went afterward, study of the Supreme Court meant parsing cases. There might be an occasional course in constitutional history that would look beyond the cases to the broader political, economic or cultural events taking place at the time, and even a rare course in judicial biography. One read cases to get the bottom line—what does this case contribute to what the law is now. Digressions on law and economics, law and literature, and other "esoteric" views were offered, if at all, in elective courses.

Unfortunately, that situation still holds true in many law schools, but over the past two decades law professors, historians, and political scientists have come to appreciate that to truly understand the Supreme Court and its decisions, one has to look further than the "bottom line." This is the approach we have tried to take in the *Journal*, and from your comments it appears to be succeeding.

Who would have thought only a few years ago, for example, that we would carry an article on Muddy Ruel, a professional baseball player who wound up in the Supreme Court not to sue the professional leagues but to join the bar of the Court. What pleases me most is that the article comes from a law professor, Robert Jarvis of Nova Southeastern University Law School.

Douglas Abrams, associate professor of law at the University of Missouri, looks not only at a famous decision—the second flag salute case—but examines Justice Jackson's iconic opinion not only for the law it expounded, but for the inherent passion in it that shows us another side of a justice who truly deserves far more attention than he has received.

While we get many of our articles through the mail (usually e-mail) and from the Society's annual lecture series, Tim Huebner, who has joined us as associate editor, and I often find articles by talking to people we know.

And sometimes there is just plain luck in being at a certain place at the right time. Last year I chaired a session at the annual meeting of the Organization of American Historians, and Marc Lendler, a government professor at Smith College, gave a paper on *Gitlow v. New York* that looked at the majority decision in what I thought was a new and interesting light. So I asked Marc to turn the oral presentation into an article for the *Journal*, which he did, and we are pleased to present it.

Each year the Society sponsors a lecture at the time of the annual meeting, and this past year Judge Judith Kaye spoke on the law of juvenile justice as it has been shaped by the Court. Judge Kaye served for fifteen years as chief judge of the New York Court of Appeals, the state's highest tribunal, longer than any other chief judge in New York history. After her retirement in 2008 she joined Skadden Arps as counsel.

A few years ago the common wisdom was that one could not write very much about law clerks because of the oath of confidentiality they took, but that was before Todd Peppers came along. The Fowler Professor of Public Affairs at Roanoke College, Peppers realized that there is a great deal that can be mined about clerks and their relationships to their justices that does not involve breaking the oath, and we have been happy to open the *Journal* to his articles. In this issue he talks about Justice Hugo Black and how he mentored his clerks, both in the library and on the tennis court. Years ago, when I was in law school, I had two professors who had been Black clerks, and they told some of these stories. Peppers shows that their experience was not unique, but indicative of how Black looked on his responsibilities to his clerks.

So, as always, an interesting feast. Enjoy!

And Behind the Plate . . . Muddy Ruel of the U.S. Supreme Court Bar

ROBERT M. JARVIS*

On May 27, 1929, Herold D. Ruel "was admitted to practice before the United States Supreme Court."[1] The next day, the visiting New York Yankees beat the Washington Senators 12–7. Ruel walked, singled, and drove in two runs for the home team.

Ruel expected to practice law when his playing days were over, but he never did. Still, his training did not go to waste. Indeed, in November 1945 it helped him land a job as Happy Chandler's chief aide. One month earlier, Chandler had become baseball's second commissioner, succeeding the late Judge Kenesaw M. Landis.

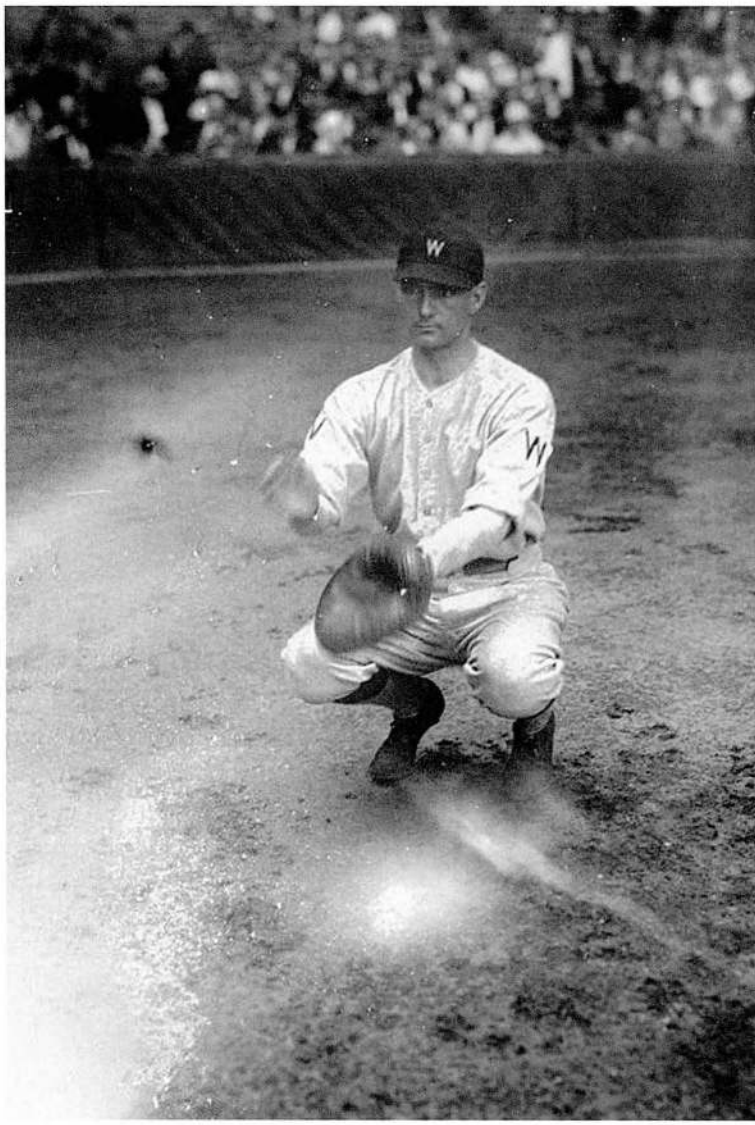
Although accounts of Ruel's baseball career are plentiful, his legal career has been all but overlooked. Accordingly, this essay seeks to shed a bit of light on this neglected aspect of Ruel's life.

Playing Career

Because Ruel's career as one of the game's best defensive catchers—as well as the person who dubbed the gear worn by catchers the "tools of ignorance"[2] —has been so well-documented, only a brief recap is needed here.

Herold Dominic Ruel was born in St. Louis on February 20, 1896, and grew up playing baseball on the city's sandlots, where he acquired the nickname "Muddy."[3] At 17, Ruel joined the semi-pro Wabadas and soon caught the eye of Charley Barrett, the chief scout of the American League's St. Louis Browns. On November 7, 1914, the Browns signed the diminutive (5′ 9″) Ruel to a $125-a-month contract.

Ruel broke into the majors on May 29, 1915, but his first year was not an auspicious one (in nineteen plate appearances he compiled a .000 batting average). Thus, after that season, his contract was sold to the minor-league Memphis Chicks. During the next two years, Ruel showed steady improvement, and in August 1917, the Yankees purchased his rights. In June 1918, however, Ruel was forced to leave the team when he was drafted into the army. Ruel was back the following season, and on August 14, 1919, he entered the record



Muddy Ruel during his playing days with the Washington Senators.

book, albeit for the wrong reason: while facing the Detroit Tigers, he hit into a triple play in a game the Yankees ended up winning, 5–4. One year later, Ruel was involved in a much more infamous play. On August 16, 1920, during the fifth inning of a home game against the Cleveland Indians, a pitch thrown by Carl Mays killed shortstop Ray Chapman. The incident marks the only time a major-league player has died on the field.

Following the 1920 season, the Yankees traded Ruel to the Boston Red Sox. Two years later, Ruel was on the move again, this time to the Washington (D.C.) Senators. As matters turned out, Ruel had his best years in Washington, with the high point coming in 1924: Ruel hit .283 that season and the Senators outlasted the Yankees to capture their first pennant.

In the World Series that year, the club faced the powerful New York Giants, who were appearing in their fourth straight fall classic. Although Ruel batted a mere .095, he came up big in Game 7. With one out and the score tied 3–3 in the bottom of the 12th inning, Ruel

doubled after fouling off the previous pitch. The easy pop-up should have been a routine play for Giants catcher Hank Gowdy, but as he went for the ball he tripped over his mask, giving Ruel renewed life at the plate. Two batters later, rookie Earl McNeely drove Ruel in with a ball that got past Giants third baseman Fred Lindstrom, causing the entire capital to go wild. Remarkably, in the bottom of the eighth inning, a similar play had allowed the Senators to erase a 3–1 deficit, with Ruel scoring the tying run.

In 1925, Ruel helped guide the Senators back to the World Series. Two years later, he was behind the plate at Yankee Stadium when Babe Ruth belted his record-breaking 60th home run. After 1928, however, Ruel was used strictly as a back-up, and, in December 1930, the Senators sold him back to the Red Sox. Following stints with the Tigers and Browns, Ruel finished his playing career with the Chicago White Sox, appearing in his last game on August 25, 1934.

Legal Career

In many ways, Ruel's legal career began when he signed his first professional contract with the St. Louis Browns in 1914. To entice Ruel, the team promised him an early tryout. When it later tried to go back on its word, Ruel protested:

> It has cost Robert Lee Hedges of the St. Louis Browns $250 to make good a promise made by one of his employees. Last fall Scout Charley Barrett signed Harold [sic] Ruel, a young amateur catcher, to a Brown contract. Among the inducements offered Ruel to sign was a trip to wherever the Browns might train, special attention from Manager Rickey, Joe Sugden and Bob Wallace, a chance to make good with the Browns and if he did not make good a place with some minor league club.

Ruel jumped at the great opportunity. Being but 18 years old, his father, Office George Ruel, of the St. Louis police department, signed his contract for him. Then the youngster settled down to a winter of hard study and hard training at Soldan High School.

When time came for the Browns to go South Mr. Hedges told the youngster that Mr. Rickey had not placed him on the list of those who were to go to the training camp. That meant that Ruel was not to go to Houston. . . .

"But, Mr. Hedges," said young Ruel, "Mr. Barrett promised me that I should be taken South. That was as good as a gift of $500 to me. I would sooner have that chance than $500. I would not have signed a contract had Mr. Barrett not promised me I would be taken South."

"Barrett promised you that?" said Mr. Hedges.

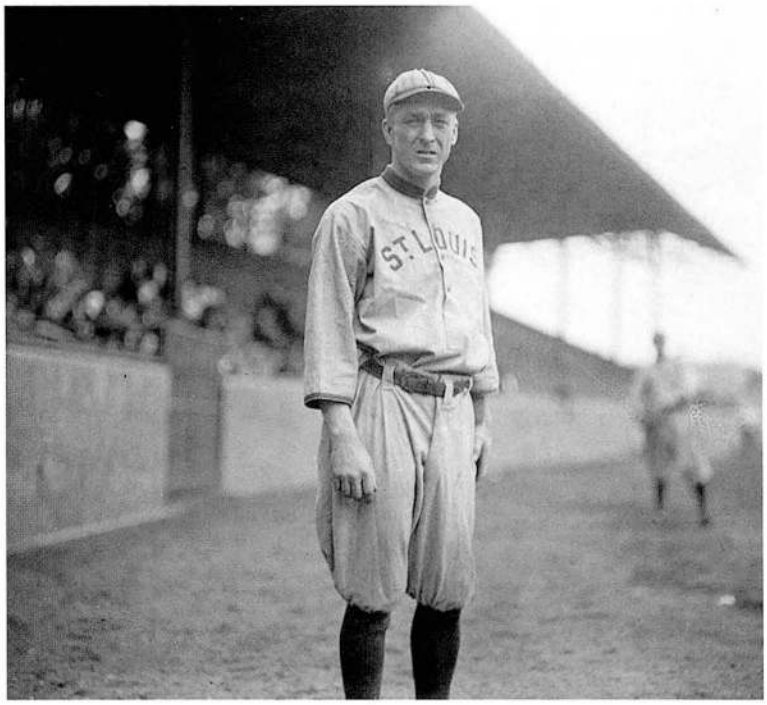
"Yes, sir."

"Well, he had no authority to do so, but if an employee of this club promises a player anything the promise shall be kept," replied the club owner.

"You won't mind my wiring Mr. Rickey to ascertain from Barrett if he remembers having made this promise[?] I do not doubt your word, but you may have placed a wrong construction on what Barrett said."

Mr. Hedges wired Rickey to ask Barrett about it. Barrett said that he had promised Ruel that he would be taken on the training trip, that Rickey would "look over him," in a word, everything Ruel had said [to] Mr. Hedges was affirmed.

"All right," said Mr. Hedges to young Ruel. "You go South."[4]



St. Louis Browns' manager Branch Rickey, who had a law degree, urged Ruel to complete his education.

Branch Rickey, the Browns' manager, was a one-time catcher who had earned a law degree at the University of Michigan. When Rickey optioned Ruel to the Memphis Chicks in 1916, he encouraged Ruel to finish his education. Rickey's words apparently made an impression, for in 1917 Ruel entered the law school at Washington University in St. Louis as a "special student."[5] For the next five years, Ruel played baseball in the spring and went to school in the fall. As he told the press: "I may not come as fast as some of [the] experts predict and I want to have a profession to fall back on when I am through with baseball."[6]

On May 29, 1922, Justice Oliver Wendell Holmes, Jr. issued his landmark decision in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.[7] Seven months later, on December 20, 1922, Ruel took and passed the Missouri bar exam. On January 3, 1923, he was admitted and assigned attorney number 4774.

Although Ruel did not set up a practice, he "kept in touch with the legal profession by study[ing] during the winters and attending trials during the summer months when baseball practice did not interfere."[8] On September 27, 1924, for example, Ruel's "friend, Associate Justice Edward A. Counihan, Jr., invited him to sit on the judge's bench in the juvenile session of the 3d District Court of Eastern Middlesex."[9] Later that day, Ruel helped the Senators beat the Red Sox, 7–5, at Fenway Park.

After the Senators won their second straight pennant in 1925, Ruel demanded a pay increase and threatened to sit out the 1926 season if he did not get one. When he made the same demand in 1927, *The Sporting News* wrote: "Maybe he regards his annual salary debate as practice for his Winter profession. He will be a successful advocate some day, especially if there are ladies on the jury, as he makes a big hit with the fair sex at the local stadium."[10]

In 1929, Ruel was in the news again when he became the first—and only, thus far—major leaguer admitted to the bar of the Supreme Court of the United States. Ruel's petition was

Washington D.C. tax lawyer Robert Ash moved Ruel's admission to the Supreme Court.

Clerk Charles Elmore Cropley swore Ruel into the Supreme Court bar.

seconded by Robert Ash, a Washington, D.C. tax lawyer.After the motion was granted, Ruel was sworn in by Clerk of Court Charles Elmore Cropley.

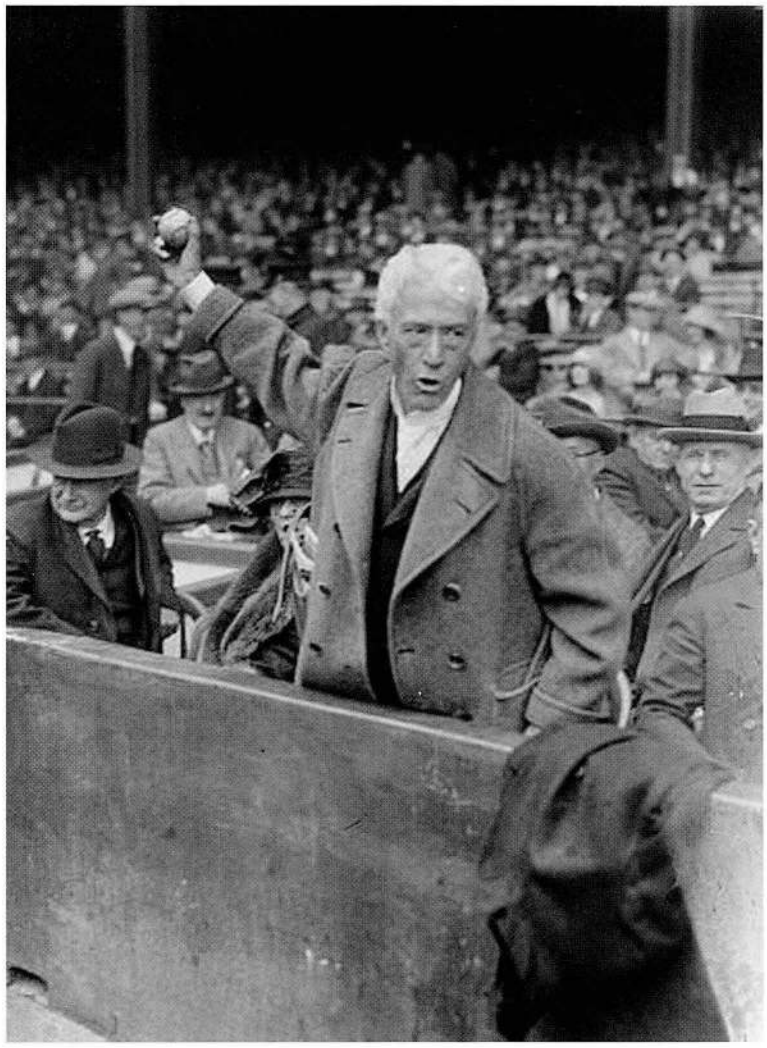
On May 7, 1932, the Yankees beat the Tigers, 4–1, at Yankee Stadium. In the sixth inning, Babe Ruth struck out on a checked swing. Disagreeing with the call, he threw his bat high in the air, barely missing home plate umpire Brick Owens, who ejected Ruth from the game. In the Detroit dugout, the players exchanged opinions about Ruth's legal liability:

> "To me it looks like, maybe, assault and battery," said Victor Sorrell. "And it probably will be mayhem, if Owens takes off that mask," added Earl Whitehill.
>
> Harold [sic] (Muddy) Ruel, the Bengals first[-]string catcher, grinned with the other members of the Tiger pack.
>
> "The Babe's antics may be interesting and may bring a suspension," said Muddy, "but he could hardly be charged with assault and battery for casting his bat into the air. It couldn't be battery because Ruth, despite all the noise he has made, has not struck the umpire. It could hardly be assault either, for judging by Owens' nonchalance as that bat whizzed past his left ear, he was not convinced Ruth intended to do bodily harm upon his person. The Bam probably will be suspended, but not for assault and battery nor mayhem. He probably will be accused in formal language of making one terrific squawk."
>
> His fellow Tigers were willing to accept Ruel's views on the legal aspects of the case, Owens vs. Ruth, for they well knew that Harold [sic] M. Ruel, during the off season, is a practicing attorney in St. Louis; that he has been granted the right to practice before the Supreme Court of his native State; and that he is the only professional baseball player who has been accorded the right to practice law before the United States Supreme Court.[11]

In November 1932, Ruel was released by the Tigers, and one month later he signed with the Browns. During the 1933 season, the immensely popular Ruel was offered the position of St. Louis County assistant district attorney. Although grateful, he declined.

On December 13, 1933, Ruel was again released. The next day, Joseph L. Breen, a friend of Ruel's in Boston, wrote a letter to Judge Landis urging him to hire Ruel:

> MUDDY RUEL was made a free agent yesterday.
>
> If no major league team displays sufficient wisdom to grab this smart little guy who would be an asset to any major league club, why do you not "adopt" him as a protégé to build him up as a future commissioner of baseball[?]
>
> MUDDY RUEL has been a big leaguer for 19 years. He has been a lawyer for 10 years. He is a gentleman and he is highly intelligent. He has a fine personality and is a favorite with fans and players alike.
>
> A graduate of Washington University, who has not forgotten his "yesterday," Muddy Ruel would make an excellent deputy for you to take care of many baseball duties which require tact, diplomacy, and UNDERSTANDING.
>
> MUDDY RUEL belongs to baseball and it is so seldom that a baseball man trains himself for Law that one who does should be encouraged by holding out the ultimate promise of a chance to combine baseball and legal talents for the general good of BASEBALL.



U.S. District Judge Kenesaw M. Landis served as baseball's first commissioner.

> I think that the suggestion is worthy of consideration.[12]

Breen soon wrote Landis again, but nothing came of his idea.

In the meantime, Ruel contemplated accepting a job with a St. Louis bank, but in March 1934 he finally landed a deal with the Chicago White Sox to catch and coach. Ruel did such a good job helping the club's pitchers that he was hired as the team's full-time bull pen coach, a position he ended up holding for eleven seasons.

In November 1945, Happy Chandler hired Ruel to be his executive assistant. For nearly his entire tenure, Landis's chief aide had been a Chicago lawyer named Leslie M. O'Connor. When Landis died, O'Connor left the commissioner's office to become the general manager of the White Sox. In his search for a replacement, Chandler quickly zeroed in on Ruel.

While Ruel had many backers (including legendary outfielder Ty Cobb), support for him was not unanimous. In October 1945, for example, Warren C. Giles, the general manager of the Cincinnati Reds, wrote Chandler a long

letter that opened with questions about Ruel's qualifications:

> As I was leaving Chicago last Thursday, I had a few minutes with [National League president] Ford Frick just before getting into a taxicab. He told me at that time that you had mentioned to him the name of Muddy Rhuel [sic] as a possibility to fill the place vacated by Leslie O'Connor.
>
> I don't want you to think I am butting into matters that may appear to be none of my business, but I do believe it would be a big mistake to select anyone to take Leslie's place unless that man had a background of actual baseball paper work. Muddy Rhuel [sic], no doubt, is a great coach and of fine character. As I understand it, he graduated in law (but apparently has not practiced it or done anything about it for several years). I am confident, however, that his work has not been such as would give him the necessary experience to handle intelligently the matters that will have to be handled and passed upon in the job in question.
>
> During the discussion of the matter in the National League meeting, all of us seemed to be of the opinion that the first qualification of a man for the job was experience in baseball transactions and baseball paper work. That seemed to be the No. 1 requirement, judging by the discussions, as I recall it. It is the No. 1 requirement in my opinion.[13]

Despite Giles's misgivings, Ruel proved to be a superb administrator, handling with aplomb such diverse matters as changes in the "bonus baby" signing system, relations with foreign baseball leagues, and the need to make the game more fan-friendly.

Although it appeared that Ruel had found the perfect job for his talents, he was eager to return to the playing field, and in September 1946 he agreed to become the Browns' new manager. Two months later, Ruel said goodbye to Chandler and headed back to St. Louis.

On the first day of spring training, Ruel "talked to his players ... and told them that he was a law school graduate and would be happy to help them with their problems."[14] One problem, however, proved insoluble: the team's lack of talent. After finishing last with a 59–95 record, Ruel was handed his walking papers.

Ruel's time on the unemployment line proved short: three weeks after being let go by the Browns, the Indians made him a coach. In November 1950, Ruel was placed in charge of the club's farm system, but in October 1951 he left for a similar position with the Tigers.

In October 1953, Detroit made Ruel its general manager, a position where his legal training proved a plus when negotiating player contracts. But in October 1956, a front office shake-up left him with the ceremonial post of special assistant to the president. Upset by his diminished role, in April 1957, Ruel requested a one-year leave of absence and then took a long vacation in Italy, where he served as a goodwill ambassador for baseball. In March 1958, he formally resigned from the Tigers.

Following his return to the United States in June 1958, Ruel announced his retirement and began making plans to move to San Francisco. Finally settling in Palo Alto, Ruel lived out the remainder of his life quietly. On January 4, 1963, he had a heart attack, and on November 13, 1963, a second one killed him while he was driving near his home.

Conclusion

On December 10, 1938, Ruel got married in Chicago. His bride was Dorothea A. Wester, a beautiful press agent fourteen years his junior, and his best man was Michael T. Kelleher, a prominent Boston insurance executive.

In 1942, Ruel (center) joined the staff of Happy Chandler (seated), baseball's second commissioner.

By the time Ruel joined Happy Chandler's staff in 1945, he and Dorothea were raising four children. On June 10, 1968, their son Dennis, a graduate of the University of San Francisco's law school, became a member of the California bar.

ENDNOTES

*In preparing this essay I benefitted from the assistance of many people, including: Victoria L. Barron, Attorney Admissions Office, Supreme Court of the United States; Philip C. Berwick, Associate Dean for Information Sciences, Washington University in St. Louis; Ross E. Davies, Professor of Law, George Mason University; Thomas Doherty, Professor of American Studies, Brandeis University; Thomas G. Glick, President, Bar Association of Metropolitan St. Louis; Joel K. Goldstein, Professor of Law, Saint Louis University; Meg Kribble, Research Librarian, Harvard Law School; David A. Lossos, Principal, Genealogy in St. Louis; Caroline Mahan, Paralegal, Bauersfeld, Burton, Hendricks & Vanderhoof, LLC; Diane J. Oslund, Principal, Diane's Genealogy; Audrey Plump, Office of Student Records, Washington University in St. Louis; Miranda Rectenwald, Archives Assistant, Washington University in St. Louis; Gabriel Schechter, Research Associate, National Baseball Hall of Fame and Museum; and Kristy Strope, Office of Attorney Enrollment, Supreme Court of Missouri. I am also grateful to the staff of the Nova Southeastern University Law Library and Technology Center, particularly Director Eric W. Young.

[1]"Ruel Admitted to Practice Before U.S. Supreme Court," *The New York Times*, May 28, 1929, 37.

[2]Hy Turkin, **The 1955 Baseball Almanac** 208 (1955). Some sources, however, claim that the term was coined by Bill Dickey, the Hall of Fame catcher of the New York Yankees.

[3]George Earlie Shankle, **American Nicknames: Their Origin and Significance** 389

(2d ed. 1955). Exactly how Ruel gained his nickname is the subject of numerous conflicting accounts. Most, however, involve a mud-caked baseball.

[4]"Baseball By-Plays," *The Sporting News*, March 11, 1915, 4.

[5]E-mail from Miranda Rectenwald, Archives Assistant, Washington University in St. Louis, to the author, dated July 22, 2010, at 3:49 p.m. EDT (on file with the author) (explaining that "'Special Student' was a designation used . . . to indicate a student taking part-time, evening, or other 'off' schedule classes.").

[6]"Catcher Muddy Ruel is a Full-Fledged Lawyer," *St. Petersburg (FL) Evening Independent,* Jan. 16, 1923, 12.

[7]*Federal Baseball Club of Baltimore, Inc. v. Nat'l League of Professional Baseball Clubs*, 259 U.S. 200 (1922).

[8]"Muddy Ruel Has Enviable Record for 11 Seasons," *Hartford (CT) Courant*, Mar. 3, 1929, C9.

[9]Ford Sawyer, "'Muddy' Ruel at Session of Cambridge Court: Senators' Backstop, a Full-Fledged Lawyer, Given Seat on Judge's Bench," *Boston Globe*, Sept. 27, 1924, 1A.

[10]"Holdout or Holdup, Ruel Holds Answer," *The Sporting News*, Mar. 3, 1927, 1.

[11]Charles P. Ward, "Ruel's Legal Opinions Accepted by Bengals: Barrister Backstop Is Well Traveled and Cultured," *Detroit Free Press*, May 12, 1932, 17.

[12]Letter from Joseph L. Breen to Kenesaw M. Landis, dated Dec. 14, 1933 (copy on file with the author).

[13]Letter from Warren C. Giles to Albert B. Chandler, dated Oct. 15, 1945 (copy on file with the author).

[14]Ed Rumill, "In the Dugout," *Christian Sci. Monitor*, Mar. 28, 1947, 14.

The Time to Kill a Snake: *Gitlow v. New York* and the Bad-Tendency Doctrine

MARC LENDLER

> This statute is a preventive measure. It is intended to head off these mad and cruel men at the beginning of their careers. It is intended to put out a fire with a bucket of water which might not later on yield to the contents of the reservoir.
>
> —William MacAdoo, presiding judge at Benjamin Gitlow's arraignment

> The brief for the plaintiff-in-error contains a very interesting discussion—much of it historical, much of it philosophical—of the right of free speech. We shall not address that question at all.
>
> —State's Brief to Supreme Court, *Gitlow v. New York*

On January 30, 1920, Benjamin Gitlow went on trial in New York City, one of five early American Communists charged under the state's criminal anarchy law. Gitlow's case eventually wound up in the Supreme Court, which in June 1925 upheld his conviction. *Gitlow v. New York* is best known as the case in which the Supreme Court began the process of "incorporation"—applying the Bill of Rights to the states. But the *Gitlow* case also contains some of the most compelling debate about the "bad tendency principle"—that a speaker is responsible for the reasonable, probable outcome of his words, regardless of how likely it is that the words will lead to a criminal act. This article will focus on that part of the *Gitlow* case, rather than its better known role in incorporation.

Gitlow was among a group of Socialist party activists who, inspired by the October Revolution in Russia, envisioned a similar path to power in the United States. In the summer of 1919, a conference of the left wing of the Socialist party met to plan the creation

of a Leninist-style party. Unable to agree on when and how a party should be created, the conferees did put out a statement of purpose and intentions called the "Left Wing Manifesto." The Manifesto criticized the "moderate, petite-bourgeois socialism" of the older Socialist party leaders who made the "revolutionary class struggle a parliamentary process" as opposed to the "uncompromising proletarian struggle for socialism."[1] The goal of the left wing was to encourage "mass political strikes against capitalism and the state," as exemplified by recent general strikes in Seattle and Winnipeg. "Mass action becomes political in purpose while extra-parliamentary in form; it is equally a process of revolution and the revolution itself in operation," said the Manifesto.

Written in transliterated Bolshevese, the "Left Wing Manifesto" was virtually unreadable for anyone not saturated in the terms of debates on the left.[2] But it did have one avid non-Socialist reader—Archibald Stevenson, special counsel for the Lusk Committee, set up by the New York legislature to investigate leftist activity in the state. Stevenson believed that there was a basis for prosecuting socialists, Communists, and anarchists under the state's criminal-anarchy law, passed in 1902 after the assassination of President William McKinley by deranged sometime-anarchist Leon Czogolz. The law made advocacy of "the doctrine that organized government must be overthrown by force or violence . . . or by any unlawful means" a felony.[3] The purpose of the law was to make pernicious doctrines criminal before any consequences occurred or were even seen likely to occur. An appeal brief for the state in *Gitlow* pointed out that the motivation of the law was the frustration New York authorities felt with their inability to prosecute anarchist orator Emma Goldman, whose lectures Czogolz had attended, for the McKinley assassination.[4] The criminal-anarchy law was written to provide a basis for those prosecutions in the future, and Stevenson recommended it be used against these aspiring American Bolsheviks.[5]

The motivation of the criminal-anarchy law was the frustration New York authorities felt at their inability to prosecute anarchist orator Emma Goldman (pictured), whose lectures Leon Czogolz had attended, before his assassination of President McKinley.

At a celebration of the second anniversary of the Russian Revolution in New York, Gitlow was arrested along with hundreds of others. The District Attorney charged forty-five of them and eventually brought five to trial.[6] Gitlow, whose name was on the masthead of the "Left Wing Manifesto" as business manager, was an obvious choice.[7] James Larkin, an Irish national who was well known for his leadership of a general strike in Dublin in 1913, was another.[8] Also charged were national Communist leaders Charles Ruthenberg and Isaac E. Ferguson and a local New York party leader, Harry Winitsky. Gitlow and Larkin were members of the Communist Labor Party; Ruthenberg, Ferguson, and Winitsky were members of the Communist Party of America. While the differences between the two parties were microscopic, they were meaningful enough to their adherents that the two groups did not coordinate defense strategies.

The case the prosecution planned to present relied almost exclusively on the words of the Manifesto. In none of the trials was any defendant charged with an overt criminal act or with urging anyone else to commit one; at no time did the prosecution claim that the Manifesto advocated criminal acts or that its publication was likely to produce them. This is how Stevenson explained the theory of the case:

> Prosecutions have been for the use of words or printed arguments urging actions which if carried out by the reader or hearer would have resulted in the commission of a crime.[9]

Trial Run

Prosecution for a single publication was a novel theory, but the state had a chance to try it out before it turned to the Communist trials. Two Finnish anarchists, Gust Alonen and Carl Paivio, had been arrested in the summer after the Lusk Committee raids of the New York Industrial Workers of the World (IWW) headquarters. Stevenson focused on a pamphlet called "Luokkataistelu," or "The Class Struggle," which contained passages such as these:

> To get away from capitalist slavery, we have to do the work in the only way possible, by mass action. . . .
>
> Don't show them any more friendship. . . . but organize into mobs.
>
> Destroy everything which gets in the way of your aspirations and is property of your enemy . . .[10]

Stevenson believed that those words constituted the advocacy of illegal means, and he persuaded the District Attorney to charge Alonen and Paivio under the criminal-anarchy law, notwithstanding the fact that they had not written the pamphlet and could barely explain what it was saying. They were active in the New York IWW office from which it was distributed and were therefore liable for its contents. The prosecution argued here, as it would in the Communist trials, that an active role in circulating material that might lead some unspecified reader to commit an illegal act at some future time was itself a crime.[11] There were no speech-rights issues raised in the Alonen-Paivo trial. The defendants claimed mistaken identity. A young IWW worker, for instance, testified that she was given a stack of pamphlets not by Alonen, but by a "sweetheart" whose address and occupation she did not know.[12] The testimony revolved around not whether the words constituted a crime, but alibis and aliases. It was not much for the defense to work with; the two were in fact local leaders, and their stories were not credible. They were convicted and sentenced to four to eight years, a verdict setting the stage for the Communist trials that followed by less than a month.

The cast of characters in the Alonen-Paivio trial remained largely in place for all the subsequent cases. The bulk of the argument for the prosecution was handled by Alexander Rorke, assistant district attorney. The lawyers for the anarchists were Swinburne Hale and Walter Nelles, who, along with Charles Recht, were heavily involved in almost every level of the defense in the criminal-anarchy cases.

The central connecting figure was Judge Bartow Weeks. He presided over all the trials and relished engaging the defendants in broad, often tangential, arguments about their political views. In part, this was simple self-indulgence. Weeks clearly enjoyed matching wits with those who claimed an all-encompassing set of ideas. But his wide-ranging discussions with these Marxist witnesses also demonstrated an underlying difference he had with Rorke about the nature of the criminal-anarchy law. Rorke seemed to have possible First Amendment challenges to the prosecutions constantly in mind, and he tried to focus as narrowly as he could on the direct advocacy of illegal means of political change by the defendants.

> We are not concerned during the trial, with the question as to whether it would be better for the citizens in the United States to have the Soviet system of government here . . . or to have the ancient feudal system. All that we are interested in is the means they intend to bring about the change.[13]

Weeks, on the other hand, implied that it was sufficient to show that the defendants' ideas would inevitably lead to the employment of illegal means, whether they discussed those means directly or not. If illegalities could be deduced from the theories the defendants advocated, it did not matter whether they explicitly advocated crimes. When Ruthenberg testified about the Communist program, Weeks questioned him at length about seemingly abstract matters.

> You used an unusual word there, the word "expropriate." . . . [W]hat is the meaning of [that word] as you use it?. . . Does that include any proposal for the workers as groups, or individuals, taking property, taking industries from capitalist owners?[14]

The purpose of Weeks' questions was to demonstrate that massive illegalities such as confiscation of property and the disruption of legally constituted authority were a necessary corollary of the defendants' commitment to the Bolshevik path to power. The distinction between Rorke and Weeks illustrated the width of the bad-tendency net. It permitted the judge to argue—and to charge the jury—that a defendant does not have to be charged with directly inciting someone to do something illegal; even the discussion of illegal means in pursuit of those goals can be inferred.

Clarence Darrow (pictured), who was occupied with a similar trial going on with Communists in Chicago, represented Gitlow in his New York trial. He met him only the night before the trial began, when Gitlow informed him that if put on the witness stand he "would not deny, but affirm and defend every communist principle in the 'Left Wing Manifesto.'"

"I Am a Revolutionist"

While the Alonen-Paivio defense resembled that of a burglary trial ("wasn't us—must have been someone who looked like us"), Gitlow in essence presented no defense at all. He was represented by Clarence Darrow, who was occupied with a similar trial going on with Communists in Chicago and met Gitlow only the night before his trial began.[15] At that meeting, Gitlow informed Darrow that if put on the witness stand, he "would not deny, but affirm and defend every communist principle in the *Left Wing Manifesto*."[16] That was not welcome news to Darrow, but he realized Gitlow was beyond argument: "Well, I suppose a revolutionist must have his say in court even if it kills him."[17] So he compromised: Gitlow would not go on the stand, but Darrow would ask Weeks if his client could make a speech to the jury. Darrow also surprised the prosecution by stipulating that Gitlow was, in fact, responsible for the publication and circulation of the Manifesto. Rorke, suspicious of the

stipulation ("I'm afraid of Greeks bearing gifts") proceeded to produce witnesses who testified to what Darrow had already stipulated.[18] He even brought Gitlow's sister to the stand to testify that Gitlow had asked her to help type the pamphlet.

Rorke read the entire Manifesto to the jury. He argued it would "make the hair on your head stand on edge"; Darrow warned it might put jurors to sleep.[19] The part of the Manifesto that Rorke highlighted, and that, in fact, resulted in more pages of testimony in the Criminal Anarchy trials than any other topic, was this favorable reference to a general strike in Winnipeg that had taken place in spring, 1919:

> Strikes are developing which verge on revolutionary action, and in which the suggestion of proletarian dictatorship is apparent, the striker-workers trying to usurp functions of municipal government as in Seattle and Winnipeg.[20]

The strike had not been especially violent, but what the prosecution pointed to as its criminal nature was that the Winnipeg Strike Committee had decided that a minimal level of police, hospital, and health-inspecting work should continue, and issued a license in the name of the strike for those activities. A decision made for humanitarian reasons may not seem malicious, but the prosecution described it as the action of a proto-Soviet. Praise for the Winnipeg strike in the Manifesto was given as evidence that the authors favored this kind of usurpation of legal authority in New York. A witness from Winnipeg was brought in to describe the havoc the strike had caused. Darrow and lawyers in the subsequent trials objected vociferously to this testimony about a Canadian strike with no New York parallel or likelihood that there would be. But Weeks overruled them. "This sort of strike did usurp the functions of the municipal government, to illustrate what these people mean."[21]

The Gitlow defense presented no witnesses and, as promised, Darrow requested permission for Gitlow to address the jury. Weeks agreed.[22] The speech was a forthright defense of Gitlow's Marxist views.

> People who adhered to the socialist program and philosophy were always considered revolutionists and I as one maintain that in the eyes of the present day society, I am a revolutionist. [I]n order to bring about socialism, capitalist governments must be overthrown. My whole life has been dedicated to the movement which I am in. No jail will change my opinion in that respect. I ask no clemency.[23]

Decades later, even after Gitlow had become a vehement anti-Communist, he continued to refer to that speech with pride. Although he no longer would have agreed with a syllable of its substance, he saw his stance as an act of integrity.

Darrow tried to soften the message of Gitlow's speech and simultaneously address the question of speech rights in his summary. He presented Gitlow as one in a long line of eccentric "dreamers." "I am for the dreamers. I would rather that every practical man shall die if the dreamers shall be saved."[24] Understanding that Gitlow's hard-edged rhetoric limited the possibility of selling him as a misunderstood reformer, Darrow barely mentioned his client's name. He turned to the argument that would eventually send the case to the Supreme Court—that the Manifesto was too abstract and its audience too diffuse to make it a plausible cause of criminal acts. In the Manifesto, he argued, there was "not a word inciting anyone to violence, not a word inciting anyone to unlawful activity."[25]

In response, Rorke tried to make tangible the links in the bad-tendency chain of causality. Although the authors of the Manifesto were too clever to write a call to violence, he argued, it was hiding in plain sight. Revolution started with strikes of protest—"mass action," in the

language of the Manifesto. Political strikes of the Winnipeg kind could illegally deprive people of life-giving services such as police and fire protection. Then the revolutionaries would turn to their real goal—-seizing private property. But that could not be accomplished without violence. "How are you going to take their property away without murder?"[26] There was connection: from the abstractions of the Manifesto to murder, by logical inference. The Manifesto did not call for violence, but it was there in the reasonable, probable outcome of its ideas. Nor was the improbability of followers engaging in overt illegal acts as a result of the Manifesto a problem. Weeks dismissed the argument that a pamphlet as dull as this could never incite anyone to activity.

> If a man tries to do it and his powers of expression are not such as will incite the person to whom he addresses his remarks, that is not his fault. He commits a crime when he advises it.[27]

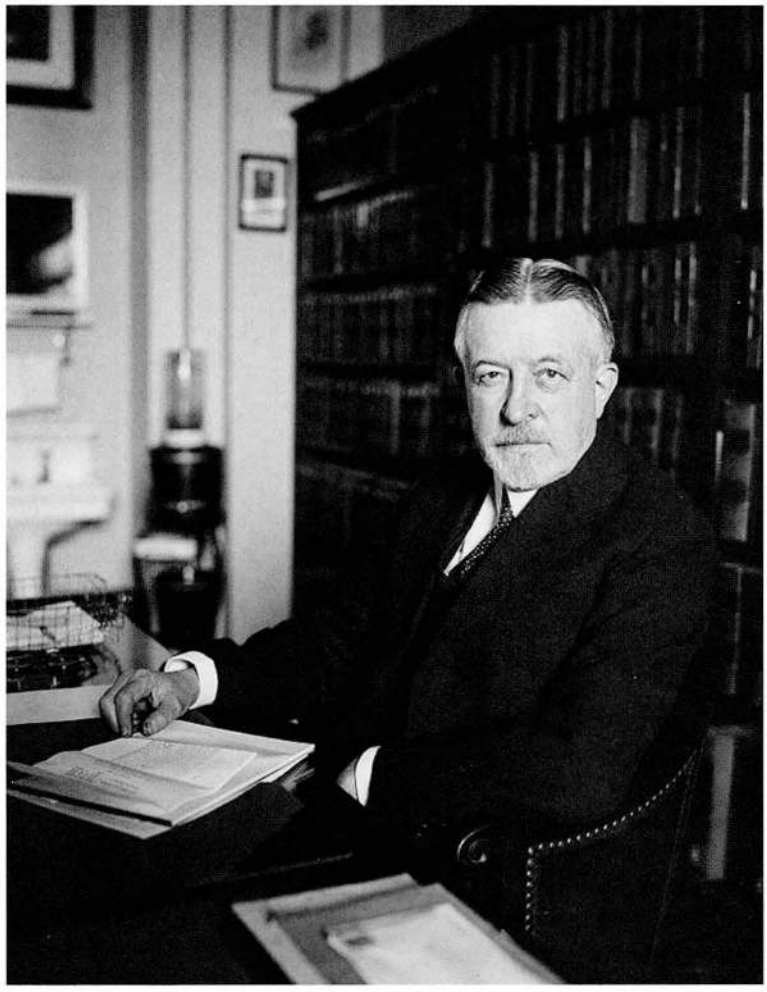
The jury convicted Gitlow in three hours. The defense made no argument for mitigation, and Weeks sentenced Gitlow to the maximum, five to ten years at hard labor. The *New York Times* praised the verdict, especially its rejection of the free speech argument "so often and so wearisomely appealed to by the men and women who seek to overthrow freedom."[28]

Reruns

The prosecution had accomplished its central goal (apart from putting Gitlow in jail): it had obtained a conviction for a pamphlet Gitlow did not write, that was not addressed to anyone in particular, and that urged no one to commit an illegal act. Although Gitlow's name was on the masthead of the Manifesto, his main culpability lay in the fact that he was an advocate of its views. That made the outcome of the other criminal-anarchy trials almost certain. Nonetheless, they were interesting variations on a theme. Harry Winitsky, next up, may have had the best case. Unlike the other four, he was not a national Communist leader and had not been at the convention that drafted the Manifesto. He also hired a well-known, non-leftist lawyer who, unlike Darrow, put on a vigorous defense. No matter. The prosecution overcame Winitsky's lesser role by putting into evidence the Constitution of the Communist Party of America and documents from the Comintern to argue guilt by membership.[29] Calling Winitsky's activities "very close to treason," Weeks handed down the same sentence Gitlow had received.

Jim Larkin looked at the verdicts in the first two cases and decided he would save the legal expense and defend himself. Larkin was well known in Ireland as a flamboyant orator within the labor and Irish national movements. He struggled mightily to restrain his tendency toward bombast to conform to courtroom norms, but he failed frequently. After one confrontation, Weeks told him, in effect, that if he were not going to jail at the end of the trial anyway, he would be cited right then for contempt. The high point of the trial—more comedy than drama—was Larkin asking himself questions from the witness stand and then answering them. (Larkin: "Did the defendant ever advocate the use of violence?" Larkin: "No, on the contrary, always decried violence.")[30] In a rambling three-hour summary, he compared himself to Lincoln, Whitman, Twain, Einstein, and Galileo.[31] The jury took an hour to convict him, and he received the same sentence as the first two.

Charles Ruthenberg and Isaac E. Ferguson were tried together and Ferguson represented both of them. This was a different situation from Larkin's. Ferguson was a highly skilled lawyer, a University of Chicago Law School graduate who had a successful law career both before he became involved in Communist politics and after he left.[32] His approach was to demonstrate that he and Ruthenberg, located in Chicago, had little to do with the Manifesto, which was finalized and printed in New York. He also attacked the bad-tendency doctrine more clearly than the previous lawyers



In his majority opinion, Justice Edward Sanford pointed out that "[t]here was no evidence of any effect resulting from the publication and circulation of the Manifesto."

had, arguing for a more libertarian interpretation of Oliver Wendell Holmes' recent "clear and present danger" test.

> [Ferguson]: There is nothing chargeable as advocacy which is not directed toward some set of hearers . . . who can do something about it.
>
> [Weeks]: You have in mind the language of Mr. Justice Holmes. But this indictment is not under the Espionage Act.
>
> [Ferguson]: But the principle is the same, if it is an indictment founded upon advocacy. I assume we are not charged with emitting certain sounds. We are charged with getting over certain ideas to certain people.[33]

The centerpiece of this trial—especially since the outcome was a foregone conclusion—was a rollicking, virtually unrestrained exchange about Communist principles between Ruthenberg, Ferguson, and Weeks. Rorke stood by helplessly as Weeks commandeered his cross-examination of Ruthenberg and turned it into a discussion about the meaning of private property, the savings rates of hourly workers, the Soviet Constitution, and the transition period between capitalism and Communism. Ruthenberg was a more-than-willing participant and made an unapologetic

defense of socialist revolution and its consequences. Far from restraining him, Weeks egged him on. Rorke tried to object to the bull-session atmosphere, but Weeks was having too much fun with the discussion and cut him off in midsentence.[34] Rorke had no reason to worry: in spite of the surface respect with which the seminar on Communism was conducted, Ruthenberg and Ferguson were quickly convicted and given the same sentence as the others.

The work that Ferguson had done in separating himself and Ruthenberg from the Manifesto paid off on appeal: they won an order for a new trial because the appeals judges felt that the evidence linking them to the document was insufficient.[35] A trial was never scheduled and the charges were effectively dropped.

Ferguson soon left the Communist movement, but he presented the defense case in *Ruthenberg v. Michigan* to the Supreme Court in 1927.[36] Larkin and Winitsky were pardoned by New York Governor Al Smith, who appeared to take issue with the court's approach to protection of speech ("The public assertion of an erroneous doctrine is perhaps the surest way to disclose the error . . .").[37] But Gitlow had agreed to let the American Civil Liberties Union (ACLU) seek a Supreme Court decision on his case, and that required turning down a pardon.[38] It is not clear why the ACLU selected his case from among the four. It may have been as simple as the fact that his trial was first. The one that raised the clearest constitutional problems would have been Winitsky's conviction for membership alone. The record shows two things clearly: that the decision to use Gitlow as a test case was made after the verdict, not before; and that it was the ACLU that generated the idea, not Gitlow himself.[39]

Reading Between the Lines

Why should the ACLU have pressed for a Court decision on peacetime sedition laws after the adverse First Amendment decisions in the World War I cases? The push was that thirty-one states had passed laws similar to New York's during the Red Scare of 1919, and this was creating a broader basis for repression.[40] The pull was that they believed there was a better argument against open-ended sedition laws than against wartime measures, which were almost all allowed to expire at the end of the war. There were also small signs that an atmosphere might exist to convince courts to create wider protection for speech rights. The Red Scare had largely subsided. Governor Smith's pardons of Larkin and Winitsky had hardly created a murmur. And three convictions under sedition laws had recently been overturned in state courts, including one in New York.[41] While these were only a small judicial countercurrent, they might have led the ACLU to wonder whether the time was right for the Supreme Court to take a new look at the First Amendment.

Gitlow's first appeal had a more prosaic side than that. He hired an expensive establishment lawyer—Charles Whitman, past Governor of New York—to fight the case on the grounds most likely to win a reversal. Whitman ignored speech rights completely and focused on a narrower issue: that a law prohibiting anarchist doctrine should not be applied to Communists. When that failed, the appeals process took shape as a speech-rights battleground. Charles Recht argued to the Appellate Division that the criminal-anarchy law was a violation of the New York constitution ("Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right.") He focused on the fact that the law criminalized a doctrine:

> Speaking or writing can be dealt with as a crime only when in such close relation to substantive evil condemned as criminal as to constitute an active immediate factor toward the prohibited end.[42]

Since the criminal-anarchy law designated one doctrine as illegal and had no requirement of proximity to an overt illegal act, Recht argued, it was unconstitutional on its face, with no breakthrough in protection of speech rights required to reach that conclusion.

The state barely responded to the constitutional argument. It simply pointed to the heinous features of the "Left Wing Manifesto," leaving the impression that constitutional objections were unserious nitpicking. The judges needed no convincing. "[T]he common-law theory of proximate cause . . . has no application here" because the legislature had already made a determination that the doctrine was harmful.[43] Although the Manifesto did not directly counsel criminal acts, it did praise the confiscation of private property and the usurpation of elected authority. "[S]uch results could not be brought about peacefully. Some things are so clearly incident to others that they do not need to be mentioned."[44]

The appeals process produced very little that was useful to the ACLU, let alone to Gitlow. Every court rejected the speech-rights defense almost offhandedly. No judge had agreed with, or even taken seriously, the argument that the New York legislature was outside constitutional bounds in passing the 1902 criminal-anarchy law. None had agreed that the minimal possibility that the Manifesto would be acted on had any relevance. All the judges agreed that the legislature could define the "abuse of that right" clause of the state's constitutional speech protection in any way it saw fit. Although some of the opinions did discuss whether prosecution could take place over a political tract that did not call for criminal acts, they all decided that it could. "When people combine and advocate such doctrine, there must necessarily be great latitude for reading between the lines."[45] "Such doctrines" as Gitlow's, as opposed to some others that might not be as pernicious. At the trial level, Rorke had done his best to make the means advocated in the Manifesto rather than the ends it envisioned (a Soviet America) the issue. The appeals courts were not interested in making that distinction.

Although the briefs written by Gitlow's lawyers at each level emphasized that a peacetime sedition conviction was a novelty and a radical departure from established practice, in fact it was neither. It was a logical, unremarkable extension of the bad-tendency doctrine in which "bad" was to be defined by legislative majorities and "tendency" covered as much time as judge and jury could imagine.

Unsafe at Any Time

When the case moved to the Supreme Court, stewardship passed from the left-leaning lawyers Hale and Recht to the ACLU, represented by Walter Pollak. He must have known the odds against a favorable ruling were long. The first two decades of the twentieth century were not good ones for the First Amendment. The speech-rights environment prior to World War I was described by the principal historian of those cases as "[j]udicial hostility and neglect."[46] Before his consequential change of heart during the war cases, Oliver Wendell Holmes described freedom of speech as the equivalent of "freedom from vaccination"—a right to be weighed (lightly) against the common good. The Court's speech-rights legacy included sustaining a federal law prohibiting foreign anarchists from visiting the United States because "the general exploitation of such views is so dangerous to the public weal."[47] Because of its similarity to the criminal-anarchy law, that precedent appeared frequently in the state's appeals briefs. Although the Supreme Court engaged in more serious discussion of speech rights in the World War I cases, the bottom line was that it sustained convictions in each case. Holmes himself provided a vivid bad-tendency metaphor in a prior case: "a little breath would be enough to kindle a flame."[48] Even after he and Louis D. Brandeis began a series of dissents with the *Abrams* case in 1919,[49] only one other Justice

had ever voted to overturn a conviction in a speech-rights case, and that was a single time, on narrow and technical grounds.[50]

Gitlow was argued on April 12, 1923, and re-argued at the Court's request on November 23 of the same year. Pollak wrote the defense brief and made it clear that the ideas of the "Left Wing Manifesto" would play no role in his argument. "Our contention is that the Statute, prohibiting advocacy as such, without a showing of circumstances in which it is properly punishable, is unconstitutional. We do not, therefore, discuss the construction of the Manifesto."[51] Pollak did point out that the Court of Appeals had stipulated that the Manifesto contained no advocacy of illegal acts. Other than that, Pollak left aside any discussion of what ideas or acts it was advocating. His case would be tightly wrapped around one point: "the statute penalizes doctrine as doctrine, without regard to consequences or to the proximate likelihood of consequences."[52] He began with an extended exploration of English and early American concepts of seditious libel—the crime of attacking the government with words. The moral of his historical story was that a revolution that was rooted in opposition to British practices and that had given rise to the natural-rights language of the Declaration of Independence must have been motivated by great sympathy for the freedom to express doctrines of political disaffection. Pollak drew this conclusion: "It is unthinkable that men who not only asserted but acted upon such principles could carry over into a government based upon them a principle of English law under which mere advocacy was a crime."[53]

Pollak certainly could not have imagined that generalizations from history as broad as these would give the Court a reason to overturn the verdict. So he also packaged his client's case as being situated within, rather than a departure from, recent Court decisions. The war, he wrote, was an appropriate rationale for finding certain kinds of dissent to be punishable.[54] But with the end of the war came the end of the emergency. There was no showing in this instance of any likely harm resulting from the publication of the Manifesto. In his summary, he called explicitly for a "balancing test," a term that has not been looked on favorably in the last fifty years by First Amendment supporters. He even accepted a basic premise of the bad-tendency doctrine: that speech causes acts. "When they occasion a substantial evil that the legislature has a right to prevent, the speaker of the language which causes it may be punished."[55]

The reason Pollak argued from within, rather than in criticism of, the bad-tendency doctrine is not hard to understand. There was much more likelihood of convincing a Court majority that its prior rulings would not sustain the *Gitlow* conviction than of convincing three more judges that they had been wrong and Holmes and Brandeis right since *Abrams*. If Pollak had succeeded in convincing the majority to apply a balancing test, it would have been hard to uphold the conviction. The state had put nothing on the "likely to cause illegal act" side of the scale, and the criminal-anarchy law had not mentioned any need to do that.

In his brief for the state, John Caldwell Myers took on the "circumstances" argument. He differentiated between expression—which is punishable only when it is not "made under such circumstances as to incite the hearers to do that which the law forbids"— and "per se abuses of the right of free speech," which were judged inherently harmful."[56] The Gitlow case was in the second category. Criminal anarchy, Myers wrote, "is a dangerous doctrine at *any* time."[57] Any government has a fundamental right to self-preservation, and the New York legislature had designated the advocacy of criminal anarchy as a threat to public order.

Here, the briefs for Gitlow and the state confronted the bad-tendency test directly from their contrasting perspectives. Walter Nelles, for Gitlow, admitted that laws "punishing acts of evil tendency" had sometimes been upheld.[58] But he argued that they had always been

evaluated by "objective and external tests," to determine if a "dangerous probability" existed that overt illegal acts would follow.[59] The New York law, which did not permit evidence to be given about the likelihood that an expression of "criminal anarchy" would cause an overt act, was therefore unconstitutional. Myers pointed out that when President McKinley had been assassinated, there was "no public unrest, there was no state of war, there was no great strike or riot in progress." In other words, there were no special circumstances. But there was Emma Goldman. Her speeches, at least one of which Czolgosz had attended, "caused a silly man to murder the President." But New York prosecutors had found, "much to their chagrin[,] that the real perpetrators of the crime, Emma Goldman and her like, could not be punished for want of a statute."[60] Thus, the criminal-anarchy statute was needed to prosecute the "real perpetrators" of crime set in motion by speech.

Myers added a final argument. Even if expression had to be viewed in its surrounding circumstances to be found illegal, the "Left Wing Manifesto" met the test. "'Imminent' does not necessarily mean the next moment."[61] Gitlow and his associates were "taking definite steps" to bring about these illegal ends, even if they involved no current illegal action. The steps included winning converts to the view that the government had to be overthrown. Win enough and the plan would be unstoppable. Gitlow's teachings now were part and parcel of overthrowing democratic institutions. Myers summarized the argument in a sentence that should be bad-tendency scripture:

> The time to kill a snake is when it is young.[62]

Shouting "Fire" in a Court Decision

The decision handed down on June 8, 1925, was exactly what one could have been predicted in the beginning: conviction upheld, 7–2, Holmes and Brandeis dissenting. Relatively new Justice Edward Sanford wrote the majority decision, and while it broke new ground in a quick aside suggesting that the First Amendment applied to the states, on the substance of Pollak's free-speech claims it gave no ground at all. Sanford first pointed out that "[t]here was no evidence of any effect resulting from the publication and circulation of the Manifesto."[63] This was not just an admission of fact; it was a crucial element in Sanford's opinion. From the beginning of the criminal-anarchy cases, the central argument on the defense side had been that the "Left Wing Manifesto" was not directly counseling anything illegal. The argument on the side of the prosecution was that the whole point of the Manifesto was to gain enough adherents to do something massively illegal as soon as possible—to overthrow the government by political strikes. Sanford found a way to reconcile those seemingly competing arguments in a way that sustained the conviction.

He described the plan the Manifesto promoted as being to bring about mass strikes like Winnipeg. Mass strikes "necessarily imply the use of force and violence, and in their essential nature are inherently unlawful."[64] Therefore, to advocate such a plan now, even though the Manifesto did not encourage anyone to start striking, was "action to that end."[65] So the "fervent language" with which the Manifesto urged people to join them in preparing for this future action was criminal now: "it is the language of direct incitement."[66] The word "incitement" had been part of the World War I speech rights debates, but with a different meaning from that it was given here. New York District Court Judge Learned Hand had ruled against the Postmaster's attempt to ban the antiwar newspaper *The Masses* from the mails, arguing that only "direct incitement" could be prohibited.[67] Hand's "incitement" standard was much more protective of speech than the Supreme Court was in those years, and Sanford likely knew that. So he appropriated the term and gave it a different meaning—"incitement" in his terms being advocacy that contains a

logic that might bring about illegal acts at some point in the future, the first link on the bad-tendency chain.

That was a long distance from "clear and present danger," however ambiguous Holmes' famous phrase was.[68] Sanford felt that he had to engage that phrase, and doing so enabled him to respond to Pollak's argument about "circumstances." The World War I cases had involved violations of the Espionage Act, in which Congress had designated certain acts, such as supplying sensitive information to the enemy or obstructing recruiting, as crimes. The judgments that courts had to make were about how directly defendants had counseled the commission of any of those acts—that was what the phrase "clear and present danger" referred to. Both lower courts and the Supreme Court granted wide latitude for prosecutions, but at their base, the cases involved an allegation that a defendant had urged people to violate the crimes described in the Espionage Act. This case was different. The New York legislature had declared a doctrine to be illegal, not an act. Sanford wrote that a legislative judgment in the interest of public safety was given a strong presumption of validity. So if the charge involved a publication that was an example of the banned doctrine, the courts had no role to play in applying a "clear and present danger" test, or any other test. The legislature had already determined that the doctrine was a crime. "[T]he question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration."[69] Sanford did not disagree with Pollak that this case was a departure from the prior speech-rights cases, but his conclusion was the opposite: in this case, the legislature had taken the issue of "circumstances" off the table.

Sanford's reliance on legislative determination has at times been described as a creative attempt to develop a more sensible speech-rights doctrine.[70] But it could just as easily be seen as making matters worse, permitting censorship as long as it was done by legislatures. The idea that a legislature should be allowed to choose which doctrines are inherently criminal seems more directly at odds with protecting speech rights than that they decide which acts are criminal and permit courts to sort out the relation of speech to those acts. A legislature could determine in advance which words "by their very nature, involve danger to the public peace."[71] The distance between the appearance of those words and any consequences is immaterial.

Sanford also approved the essence of Myers' "kill the snake when it is young" theory, although he preferred fire to snakes:

> And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger of every such utterance in the nice balance of a jeweler's scale. A single, revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration.[72]

Fire is the perfect metaphor for the bad-tendency doctrine and had been part of the case against Gitlow from Judge MacAdoo's opinion in the magistrate's court to the Supreme Court. Once started, fire spreads quickly, threatens everything, and does not respond to reason. The civil libertarians involved in Gitlow's defense argued at every turn that if speech is not likely lead to immediate illegal acts, there is time for other thought and counsel to prevent the acts from ever occurring. Speech, even when expressed in "fervent language," only translates into behavior with additional time. But the majority thought about speech through the lens of fire, which consumes immediately. Sanford concluded that it was proper—obligatory—for the State to "extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration."[73]

Every Idea an Incitement

The fact that Holmes saw his dissent in this case largely as a reprise helps explain some of the sweeping generalizations in it. He understood that he and Brandeis had been alone in their views since *Abrams,* but "the convictions I expressed in that case are too deep for it to be possible for me to as yet believe that it . . . settled the law." The central issue, Holmes wrote, was whether the "Left Wing Manifesto" counseled an immediate revolutionary uprising, and no one arguing the State's case had ever said that it did. "[I]t is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views."[74] He described the conditions under which he might have considered upholding the conviction, emphasizing the time frame.

> If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more.[75]

The most impassioned part of Holmes' dissent was his disagreement with Sanford's characterization of the "Left Wing Manifesto" as "incitement."

> Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between an expression of opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason.[76]

On its surface, this part of the dissent looks questionable. Direct incitement to here-and-now illegal activity is one of the categories of speech that, in contemporary First Amendment doctrine, may at times be subject to punishment, and it looks as though Holmes is denying that any punishable speech exists at all. But he was replying to Sanford, who had not used "incitement" in that sense. Sanford had contrasted incitement to "philosophical abstraction," leaving nothing between the two.[77] Sanford said accurately that the Manifesto was not "mere prediction."[78] Gitlow was not simply forecasting a socialist revolution; he was urging it. But it also was not a call to immediate action, or in any way likely to produce such a call. So Sanford was using the term "incitement" in exactly the manner Holmes described in his dissent—"the speaker's enthusiasm for the result."

The most famous and debatable line in Holmes' dissent was this:

> If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.[79]

Is Holmes predicting and endorsing the formulation of the Bill of Rights as a suicide pact? One way of interpreting his sentence is relatively benign—that if in free and open debate a majority endorsed a proletarian dictatorship, then that is what they should get. But he is not quite clear what the phrase "dominant forces" means. He certainly understood that the Bolshevik path to power did not follow democratic norms. Did he mean that if power were seized by an energetic minority, so be it?

That last possibility has led some critics to describe Holmes' speech-rights doctrine

as a form of heartless Social Darwinism.[80] Holmes' dissent does not rise or fall on that sentence. But even the more radical interpretation can be justified. Neither Holmes nor Brandeis, nor any subsequent Justice, grounded their speech-rights thinking on an assumption that words have no consequences. What they believed was that no specific long-term consequence is inevitable. Time and other words will temper the outcome of events. That basic point united Holmes and Brandeis in spite of different emphases in their dissents and set them in opposition to the rest of the Court for almost the whole of the 1920s. Brandeis did more than sign the *Gitlow* dissent; he wrote "very good opinion, this" in a note to Holmes at the bottom of a copy that Holmes sent to him.[81]

The dissent has also been criticized for not directly addressing Sanford's contention that once the legislature has designated a specific doctrine as harmful, courts and circumstances have no role. "Justices Holmes and Brandeis did not rise to the occasion.... Holmes ignored the distinction Justice Sanford had drawn between *Schenck* and the case at the bar."[82] That is true; addressing that Sanford point was not among the "ten words" Holmes wanted to add to his previous thoughts. It would have been instructive if he had, because the only plausible conclusion he could have reached was that the law itself was unconstitutional, rather than the application being faulty. Holmes still shied away from overturning laws, as opposed to verdicts, perhaps a product of his general advocacy of judicial restraint.[83]

Criticisms of Holmes' dissent in this case are in large measure a product of its mix of brevity and passion.[84] He and Brandeis were simply not on the same page as the Court majority any longer. The differences were not over fine points. They had moved toward a view, expressed differently in different dissents, that speech could only be held to be criminal if it were likely to result in immediate illegal acts. They thought there was something to be gained by allowing even the speech of someone like Gitlow, who opposed democratic government; the majority believed there was nothing lost by prohibiting it. The constitutional reasoning proceeded from those opposed mind-sets. Sanford's motivating thought was this one: "[r]easonably limited ... this freedom [of speech] is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic."[85] From that vantage point, tolerating the "Left Wing Manifesto" would make no sense. Immediately after the ruling, Holmes wrote to Sir Frederic Pollock, "the prevailing notion of free speech seems to be that you may say what you want if you don't shock *me*," and added in another letter, "Of course the value of the constitutional right is only when you do shock people."[86] The *Gitlow* dissent was not a comprehensive restatement of his differences with Sanford's principle of "reasonably limited" speech rights. It should be seen as part of a continuum, from *Abrams* to eventual acceptance by a Court majority ten years later. But it did add at least one new element to the developing Holmes-Brandeis speech-rights doctrine. Unlike the World War I dissidents, Gitlow actually *was* intent on sedition. He was—as described in his own trial speech—a "revolutionist." And the Manifesto, in its harsh condemnation of the Socialist party, made it clear that the revolution was not to be accomplished by votes or parliamentary reform. The fact that Holmes and Brandeis dissented in a case involving an avowed and unapologetic American Bolshevik demonstrated the depth of their repudiation of the bad-tendency doctrine.

Aftermath

Shortly after the Court upheld his conviction, Gitlow was pardoned by Governor Smith. He went on to play a major role in the Communist party in the 1920s, becoming the General Secretary of the party for a brief period in 1929. In the summer of that year, he, Jay Lovestone, and

Bert Wolfe, leaders of the majority tendency in the party, went to Moscow to argue in front of a special commission of the Comintern that the American party should be allowed to choose its own leaders and policies. Gitlow engaged in a heated confrontation with Joseph Stalin and found him to be less sympathetic to open discussion than the Supreme Court had been. Gitlow and everyone in the group who agreed with him were expelled.[87] Following the expulsion, Gitlow joined or started a variety of left-wing groups in the early and mid-1930s, at one point rejoining the Socialist party. By the late 1930s, a combination of the Moscow show trials, the role of the Communists in the Spanish Civil War, and the Stalin-Hitler pact led him to publicly repudiate his former views. In 1939, he presented lengthy, voluntary testimony to the Dies Committee (forerunner of the House Un-American Activities Committee). By the end of World War II, he had become as committed a crusader on the political right as he had been on the left in the 1920s, testifying against alleged Communists in some of the hearings and trials of the period. He never really understood the significance of the case he had been involved in, especially Holmes' dissent. In a 580-page autobiography written in 1938, he spent a single paragraph on the case and mentioned the dissent only in passing.[88] He enthusiastically supported the Smith Act prosecutions of Communist party members in the 1950 and condemned the ACLU for being too willing to defend Communists.

In a now-it-can-be-told moment late in life, he said to his son, "Of course I was guilty of what they charged me with—conspiring to overthrow the government."[89] The implication was that the only reason some people opposed his conviction was that they had been hoodwinked about the real purposes of the party. The bad-tendency doctrine is built on a judicial version of rough common sense, and to the Gitlow of the 1950s, it seemed incomprehensible that there was a right to advocate and work toward a Soviet America. That is why the bad-tendency doctrine had such appeal and in various guises continues to reappear. It is not an irrational argument, and the state had not misrepresented Gitlow's activities and goals.

But neither was the argument of the civil libertarians of the period based on naïveté about Gitlow's real purposes. The argument was squarely over how far those who advocate an end to tolerance should be tolerated. Hale, Recht, Pollak, Smith, Holmes, and Brandeis simply had a vision of the role of speech rights in democratic governance different from the conventional legal wisdom of the time. Speech intended to bring about prohibited ends—such as, say, the storming of an American version of the Winter Palace—was not the same as the prohibited acts themselves. Insurrection-mongering would not inevitably lead to insurrection. And there was far more to gain than to lose by permitting discussion of views such as those in the "Left Wing Manifesto."

By 1931, the Court majority had adopted the general perspective that Holmes and Brandeis had been advocating.[90] But somehow, New York's criminal-anarchy law survived. Although it clearly ran counter to most of the Court's speech-rights decisions for the next thirty-five years, it was never declared unconstitutional. In fact, it was used again in the conviction of an African-American member of the Progressive Labor party in the Harlem riots of 1964.[91] Finally, the New York legislature decided it had outlived its usefulness and repealed the old law—on July 20th, 1965, the day following Benjamin Gitlow's death. No one noted the irony.

ENDNOTES

[1]"The Left Wing Manifesto," published July 5, 1919. These quotes from the pamphlet were among those singled out in the trials as demonstrating the advocacy of illegal means.

[2]And for some of them as well. Gitlow and several other defendants were critical of the stilted, doctrinaire, and generally unappealing

language of the pamphlet. Bertram Wolfe, a compatriot of Gitlow's during the 1920s, describes how it came to be written that way in **A Life in Two Centuries** (New York: Stein and Day, 1981), 48.

[3]New York Criminal Anarchy Act of 1902, as amended in 1918, section 160.

[4]Brief for the State of New York, *The People of the State of New York v. Gitlow*, 13. 268 U.S. 652.

[5]"Soon after this Committee was organized, it became apparent that the Criminal Anarchy statute of this state was being constantly and flagrantly violated." Lusk Committee, **Report of the Joint Legislative Committee Investigating Seditious Activities** (New York: J.B. Lyon, 1920), vol. 1, 20.

[6]There is no agreed-on number of those charged. Harold Josephson used thirty-five, taken from a contemporaneous account. See Josephson's "Dynamic of Repression: New York During the Red Scare," 59 *Mid-America* (October 1977). I took the number forty-five from the Lusk Committee list of names of those convicted or "waiting trial," Lusk Committee, *supra*, note 3, 24–26. Most of those waiting had their charges dropped.

[7]His name was only third on the list, but the first two, Louis Fraina (the actual writer of the Manifesto) and Eadmonn MacAlpine, were out of the country on Comintern business.

[8]Larkin was a prominent enough figure to have three biographies written about him: R. M. Fox, **Jim Larkin: The Rise of the Underman** (London: Lawrence and Wishart, 1957); Emmet Larkin (no relation), **James Larkin: Irish Labor Leader** (Cambridge: MIT Press, 1965); and Emmet O'Conner, **James Larkin** (Cork: Cork University Press, 2003).

[9]"The World War and Freedom of Speech," *New York Times Literary Supplement,* February 18, 1925.

[10]Quoted in *People of New York v. Gust Alonen and Carl Paivio,* Oct. 6, 1919, 12.

[11]Another advantage for the prosecution in beginning with these somewhat hapless anarchists was that it avoided a problem that popped up on appeal: that of prosecuting Communists under a law that had been written about anarchists. Alonen and Paivio became friendly with Gitlow, Ruthenberg, and Winitsky in prison and joined the Communist party when they got out.

[12]*The People of New York v. Gust Alonen and Carl Paivio,* 369–70.

[13]*People of the State of New York v. James Larkin*, April 1920, 13.

[14]C.E. Ruthenberg, "Testimony at the October 1920 New York 'Criminal Anarchism' Trial [extracts]," in **A Communist Trial: Extracts from the Testimony of C.E. Ruthenberg and Closing Address to the Jury by Isaac E. Ferguson**" (New York: National Defense Committee, n.d. [Dec. 1921]), 6.

[15]Benjamin Gitlow, **I Confess** (New York: E. P. Dutton & Company, 1939), 67.

[16]Unpublished, unpaginated draft of **I Confess**, Benjamin Gitlow Archives, University of North Carolina at Charlotte.

[17]Gitlow, *supra* note 14, 70.

[18]*The People of the State of New York v. Benjamin Gitlow* (1920).

[19]*Id.* 351.

[20]"Left Wing Manifesto," 8. Interestingly, there was no mention of the Seattle strike, even though general strikes are illegal in America. The reason is probably that it was the "workers' council" element of the Winnipeg strike that fit the prosecution's argument better.

[21]*New York v. Gitlow,* 231. Testimony about Winnipeg was an important part of each of the trials—so important that Winitsky's appeal brief argued, "In practical effect, the Court allowed the defendant Winitsky . . . to be tried and convicted for the Winnipeg strike of May and June of 1919." Memorandum on Application for a Certificate of Reasonable Doubt, New York Supreme Court, *The People of the State of New York v. Harry M. Winitsky*, April 29, 1922.

[22]He gave no reason and Rorke did not object. Josephson speculates that Weeks thought

Gitlow would hang himself with his speech. Josephson, *supra* note 5, at 139. He probably did, but Weeks also allowed lengthy political presentations at the other trials.

[23]*New York v. Gitlow,* 280.

[24]Unpublished autobiographical notes, Gitlow Archives, UNCC.

[25]*New York v. Gitlow,* 320.

[26]*New York v. Gitlow,* 361.

[27]Charge to Jury, *id.* 38.

[28]*The New York Times*, Feb. 10, 1920, 10.

[29]Winitsky was a leader of the New York local (which included upstate New York and New Jersey). None of the five tried was a small fry, at least within the relatively limited sphere of American Communism.

[30]**The American Trial of Big Jim Larkin** (Belfast: Athol Books, 1976), 13.

[31]At one point in Larkin's summary, Judge Weeks commented: "You are losing your head." *The People of New York v. James Larkin,* 758.

[32]He had helped write the defense brief for *Debs v. United States* when it reached the Supreme Court, and in 1925 he wrote the brief for *Ruthenberg v. United States* on other charges his friend was appealing. After he left Communist politics in the mid-1920s, he argued four more Supreme Court cases, none involving leftists or civil liberties.

[33]*People of the State of New York v. Isaac E. Ferguson and Charles Ruthenberg*, October, 1920, 15–16.

[34]Rorke: "Your Honor, I want to interpose an objection to continuing this line of examination further. I apprehend, sir, that I have three things to attempt to establish in this case, one that there is an organized government here—" Weeks: "Do not discuss it. " Rorke: "It is a digression from the main line of the case." Weeks: "Perhaps it is, but even sometimes when you digress you get some light." *People v. Ruthenberg*, 714.

[35]*People of the State of New York v. Ferguson et al.,* 136 N.E. 327 (N.Y. 1922).

[36]*Ruthenberg v. Michigan*, 273 U.S. 782 (1927).

[37]*Statement of the Pardons, Commutations, and Reprieves Granted by the Governor for the Year 1923*, 3.

[38]A New York Senator had submitted a pardon request for both Winitsky and Gitlow. The ACLU convinced Hastings and Gitlow to drop the pardon request. ACLU Archives (Princeton, NJ), "Memorandum on the Gitlow Matter," 1920.

[39]Draft of **I Confess**, Benjamin Gitlow Archives, Hoover Institute, 179; ACLU Archives, January 15, 1923.

[40]Those laws are compiled in Eldridge Dowell, **A History of Criminal Syndicalism Legislation in the United States** (Baltimore: Johns Hopkins Press, 1939).

[41]*In re Application of Hartman*, 188 P. 548 (Ca. 1920); *State of New Jersey v. Gabriel*, 112 A. 611 (N.J. 1921). The third (no title given) involved a Communist associate of Gitlow's from New York, Israel Amter. Reported in the *New York Times,* December 21, 1921.

[42]*Brief for the Defendant-Appellant,* 46. 195 App. Div. 773, April 1921.

[43]Justice Frank Laughlin, for unanimous Court, *id.*

[44]Chief Justice Frank Hiscock's concurrence, 234 N.Y. 132, July 1922. There were two dissenters in the Court of Appeals, including future Supreme Court Justice Benjamin Cardozo. They did not take issue with the majority that a legislature could decide which views were harmful. But they did not think a law passed to make anarchism illegal should be used to try Communists. *People of the State of New York v. Gitlow*, 136 N.E. 317, 326 (N.Y. 1922).

[45]*New York v. Gitlow*, 187 N.Y.S. 783, 799 (1921).

[46]David Rabban, "The Emergence of Modern First Amendment Doctrine," *University of Chicago Law Review* 50, 1983, 1287.

[47]*Ex rel. Turner v. Williams*, 194 U.S. 279, 294 (1904). The law at issue was passed in the aftermath of the McKinley assassination, giving the case an added measure of relevance to the criminal anarchy cases.

[48]*Frohwerk v. United States*, 249 U.S. 204, 209 (1919).
[49]*Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting).
[50]Chief Justice Edward Douglass White in *Gilbert v. Minnesota*, 254 U.S. 325 (1920). White wrote a single sentence dissent on the grounds that the federal government had preempted state legislation in the area of seditious anti-war speech. Holmes wrote a short concurrence saying that he agreed with the majority, but not its reasoning.
[51]*Brief for Plaintiff-in-Error*, 4. *Gitlow, supra*, note 3.
[52]*Id.*, 5.
[53]*Id.*, 66–67. One purpose might have been to supply those Justices who might be sympathetic—Holmes and Brandeis on this Court, others in the future—with a useful package of history. His conclusion was echoed, intentionally or not, in a famous concurring opinion Brandeis wrote in *Whitney v. California* two years later. 274 U.S. 357, 373 (1927).
[54]Pollak was framing his argument in the terms Oliver Wendell Holmes, Jr., had used in upholding the conviction of Charles Schenck before his *Abrams* switcheroo. His brief also quoted several civil libertarians critical of the *Schenck* verdict, so in all likelihood Pollak actually disagreed with it.
[55]*Brief for Plaintiff*, 13.
[56]*Brief for the Defendant-in-Error*, 11.
[57]*Id.*, p. 20.
[58]*Id.*, p. 12.
[59]*Id.*, p. 16.
[60]*Id.*, p. 13.
[61]*Id.*, p. 26.
[62]*Id.*, p. 20.
[63]*Gitlow v. New York*, 268 U.S. 652, 656 (1925).
[64]*Gitlow*, 268 U.S. at 666.
[65]*Gitlow*, 268 U.S. at 666.
[66]*Gitlow*, 268 U.S. at 665.
[67]*Masses Pub. Co. v. Patten*, 244 F. 535, 540 (1917).
[68]*Schenk v. United States*, 249 U.S. 47, 52 (1919).
[69]*Gitlow*, 268 U.S. at 670.
[70]Harry Kalven, **A Worthy Tradition** (New York: Harper and Row, 1988), 152–54.
[71]*Gitlow*, 268 U.S. at 669.
[72]*Gitlow*, 268 U.S. at 669.
[73]*Gitlow*, 268 U.S. at 669.
[74]*Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).
[75]*Gitlow*, 268 U.S. at 673.
[76]*Gitlow*, 268 U.S. at 673.
[77]*Gitlow*, 268 U.S. at 665.
[78]*Gitlow*, 268 U.S. at 665.
[79]*Gitlow*, 268 U.S. at 673.
[80]Alexander Tsesis, **Destructive Messages** (New York: NYU Press, 1982).
[81]Frame 11, The Papers of Oliver Wendell Holmes, Jr., Harvard Law Library, Cambridge, MA.
[82]Kalven, *supra* note 69, at 155.
[83]Demonstrated best in his dissent in *Lochner v. New York*, 198 U.S. 45, 65 (1905).
[84]Holmes wrote after the *Gitlow* decision that he knew there was "criticism of my opinions that they might be literature but were not the proper form of judicial exposition. My notion was that long winded expositions of the obvious were as out of place in opinions as elsewhere. . . . I had my whack at free speech some years ago in the case of one Abrams, and therefore did no more than to lean to that and add that an idea was always an incitement." July 11, 1925, in **Holmes-Einstein Letters** (New York: St. Martin's Press, 1964).
[85]*Gitlow v. New York*, 268 U.S. 652, 667 (1925).
[86]Holmes to Pollock, June 3, 1925, in **The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874–1932,** edited by Mark DeWolfe Howe (Cambridge: Harvard University Press, 1946).
[87]Gitlow describes the meeting, including his own hostile interaction with Stalin, at some length in **I Confess**, *supra* note 14. Another eyewitness description can be found in Wolfe, *supra* note 2. Theodore Draper, **American**

Communism and Soviet Russia (New York: Viking Press, 1960), has the most complete account.

[88]Gitlow, *supra* note 14, 226.

[89]Author's interview with Benjamin Gitlow, Jr., summer 2005.

[90]That same year, in *Stromberg v. California,* 283 U.S. 359 (1931), the Court overturned a state law making the display of a red flag illegal. It was the first state law held to violate the First Amendment.

[91]*Epton v. New York,* 390 U. S. 29 (1968). The Supreme Court reviewed the case, but because Bill Epton had also been convicted on charges of felony riot, and because there was no additional penalty based on the criminal-anarchy law, the Court did not address its constitutionality.

Justice Jackson and the Second Flag-Salute Case: Reason and Passion in Opinion-Writing

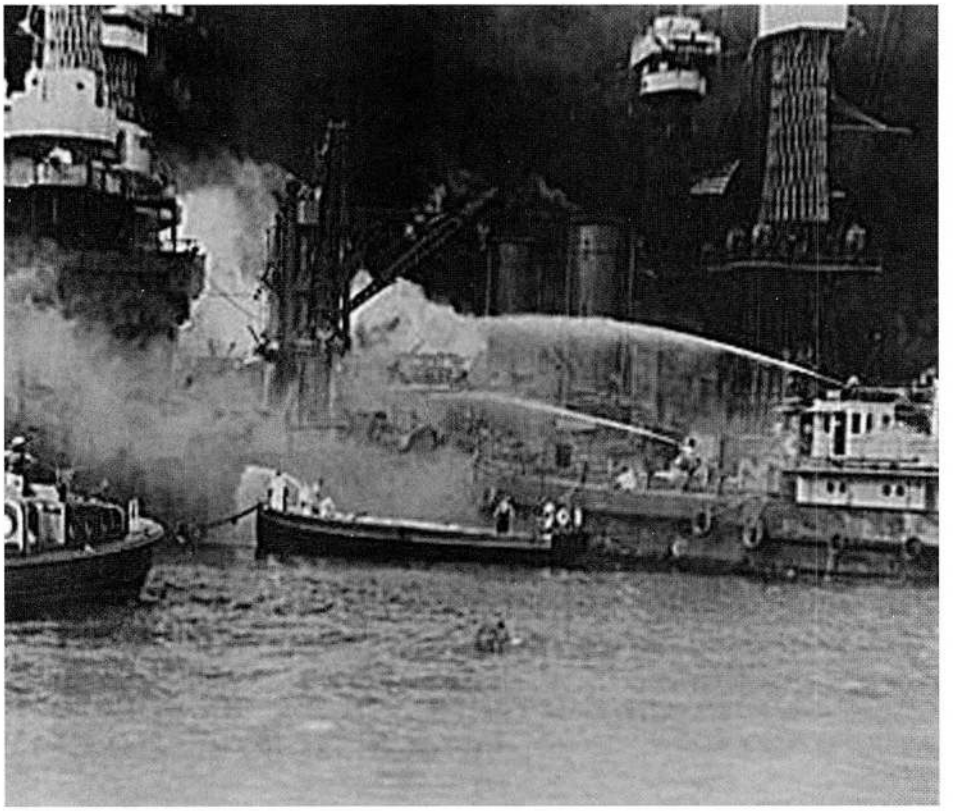
DOUGLAS E. ABRAMS

I. Introduction

In 1943, the Supreme Court handed down *West Virginia State Board of Education v. Barnette*.[1] With Justice Robert H. Jackson writing for the six-Justice majority, the Court upheld the First Amendment right of Jehovah's Witnesses schoolchildren to refuse to salute the flag or recite the Pledge of Allegiance, state-imposed obligations that the children and their parents contended were acts of idolatry that violated biblical commands. Judge Richard A. Posner has said that Justice Jackson's effort "may be the most eloquent majority opinion in the history of the Supreme Court."[2]

Barnette reached the Court as the nation waged global war, a dire moment in history that Part II of this article describes. For its high drama and the endurance of its doctrine, the case continues to engage historians and students of the Court.[3] This article concerns the singular eloquence pinpointed by Judge Posner and others.[4] Justice Jackson adroitly balanced two ingredients—reason and passion—that (as Part III describes) have marked assessments of rhetoric and human experience since ancient times, that guided the nation's Founders and early Presidents, that have now moved President Obama in both of his memoirs, and that otherwise continue as dual touchstones frequently applied in law and popular culture.

Few cases summon the high drama that energized the Court in *Barnette* during wartime, but (as Part IV describes) focusing on reason and passion throughout the opinion-writing process remains a useful judicial compass today. Justice Jackson's blend of these two ingredients, and his mastery of the written language, bequeathed a decision whose bedrock



West Virginia State Board of Education's resolution requiring all public-school students and teachers to salute the flag and recite the Pledge of Allegiance each day followed quickly after Pearl Harbor was attacked.

First Amendment holding, according to Professor Charles Alan Wright, "teems with vivid expressions and memorable statements" that still enrich the fabric of the law as statements of core American values.[5]

II. "Among the Darkest Times in Recent Memory"

Barnette's record began in early January of 1942, barely a month after Japan attacked the Pacific naval fleet at Pearl Harbor. Historian David McCullough recalls these days as "[a]mong the darkest times in recent memory."[6] "Hitler's armies were nearly to Moscow; . . . German submarines were sinking our oil tankers off the coasts of Florida and New Jersey, within sight of the beaches, and there was not a thing we could do about it; . . . half our navy had been destroyed at Pearl Harbor. We had scarcely any air force. Army recruits were drilling with wooden rifles. And there was no guarantee whatever that the Nazi war machine could be stopped."[7]

General James H. Doolittle's daring bombing raid over Tokyo and other Japanese cities would buoy American morale, but the raid was still a few months away (April 18). So too were the first great American victories, in the Battle of the Coral Sea (May 4–8) and at Midway Island (June 4–7). Without the reassurance of hindsight available to later generations who know the war's outcome, Americans in mid-winter 1942 remained resolute and committed, yet aware that the nation faced an epic challenge to vanquish the Axis Powers in total war.

In the weeks following Pearl Harbor, appeals to patriotism summoning young and old spread quickly from coast to coast. On

January 9, 1942, the West Virginia State Board of Education followed a number of other state and local school boards by passing a resolution that required all public school students and teachers to salute the flag and recite the Pledge of Allegiance each day.[8] The West Virginia resolution allowed no exemptions because, the state board found, "national unity is the basis of national security."[9]

Noncompliance carried draconian punishment. Where West Virginia schoolchildren refused to salute or recite in their classrooms, their parents faced imprisonment for violating compulsory education acts and citation for child neglect, which might cause temporary or permanent loss of custody.[10] The children themselves faced not only expulsion from school, but also delinquency proceedings and confinement for "insubordination" in state reformatories, austere institutions notorious for locking up vulnerable, dependent children in close quarters with murderers, rapists and other predatory and sometimes mentally ill adolescent criminals under the supervision of physically and emotionally abusive guards. In 1950, one study condemned the nation's juvenile reformatories as "incompatible with human dignity, . . . a black record of human tragedy, of social and economic waste, of gross brutality, crass stupidity, totalitarian regimentation . . . and a corroding monotony even deadlier than physical violence."[11]

The brunt of statutes and resolutions like West Virginia's fell heavily on the Jehovah's Witnesses, a small religious group despised by many Americans for their sometimes aggressive public proselytizing and for their refusal to serve in the military or to salute the flag or recite the Pledge. And for their success in court. When Justice Harlan Fiske Stone wrote in 1941 that the Jehovah's Witnesses "ought to have an endowment in view of the aid which they give in solving the legal problems of civil liberties,"[12] he was not dispensing gratuitous praise; he was observing that the Witnesses had appeared regularly in court to seek the law's refuge from dominant majorities, and had frequently won.[13]

In 1942, legislators and school authorities in West Virginia and elsewhere stood on solid

West Virginia parents faced imprisonment if their children did not comply with the flag-salute requirement.

constitutional ground because only two years earlier, in *Minersville School District v. Gobitis*, the Supreme Court had firmly rejected religious freedom claims by Witnesses families and held that the First Amendment permitted states and localities to mandate flag salutes and recitation of the Pledge in the public schools.[14] Less than three weeks before the fall of France to the Nazis, Justice Felix Frankfurter wrote for the eight-Justice *Gobitis* majority, and Justice Stone stood alone in dissent despite Frankfurter's private entreaties for unanimity.[15] "History teaches us," Justice Stone read from his dissent in open Court, "that there have been but few infringements of personal liberty by the state which have not been justified . . . in the name of righteousness and the public good, and few which have not been directed . . . at politically helpless minorities" such as the Witnesses.[16] Justice Stone rejected "the position that government may, as a supposed education measure and as a means of disciplining the young, compel public affirmations which violate their religious conscience."[17]

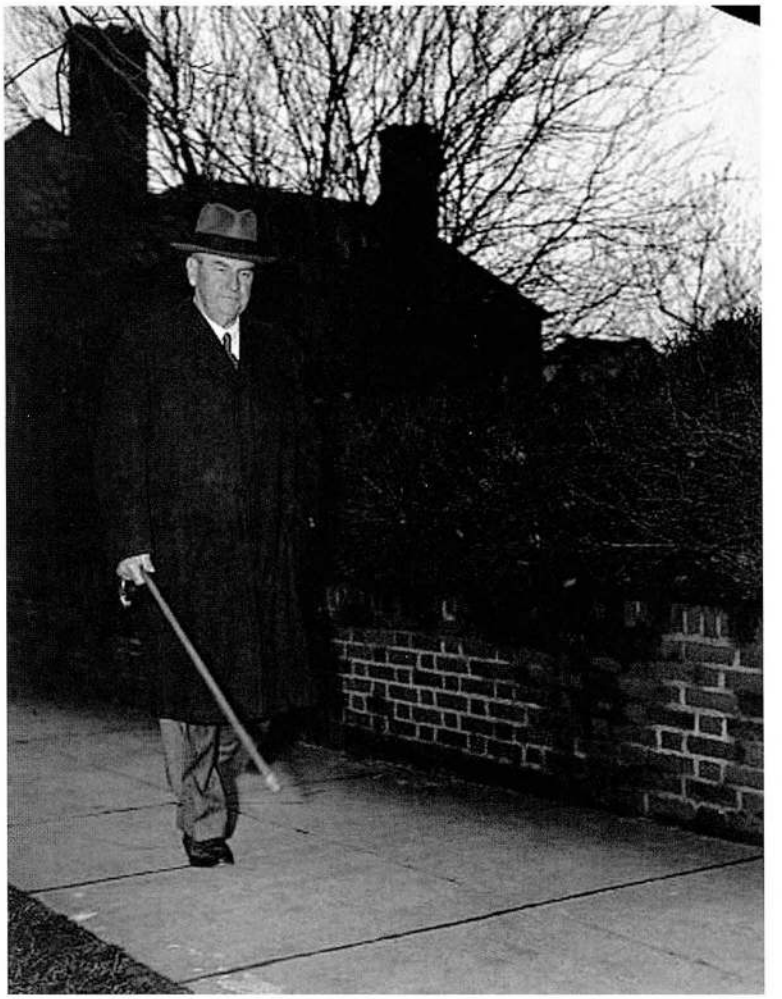
"Few Supreme Court decisions," wrote one historian, "have ever provoked as violent a public reaction as the *Gobitis* opinion."[18] The decision drew immediate condemnation from more than 170 leading newspapers and support from only a few, but the swift reaction extended beyond written words.[19] The decision also unleashed a national wave of vigilantism against the Witnesses, whose refusal to salute or pledge allegiance to the flag appeared disloyal or even treasonous to Americans who perceived the salute and Pledge as domestic obligations with war clouds looming and who feared domestic subversion (the so-called Fifth Column). Witnesses families suffered beatings, physical intimidation, and property destruction from mobs, often while local sheriffs and other law enforcement officers stood watching in evident approval, without intervening to secure the victims' safety.[20]

"Because lawless mobs may have misunderstood [*Gobitis*'s] meaning is not in itself a reason to change it," wrote Justice Jackson's law clerk in an undated confidential memorandum.[21] Most historians acknowledge, however, that the intensity of the post-*Gobitis* brutality surprised and likely shocked Justices who had not anticipated such a bloody backlash against the small, peaceable religious group that had summoned their protection.[22]

In the wake of *Gobitis*, as many as 2,000 Witnesses children were expelled from the nation's public schools, and many of their parents landed in criminal court.[23] On October 6, 1942, the special three-judge West Virginia federal district court hearing *Barnette v. West Virginia State Board of Education* enjoined enforcement of the board's resolution against more than a half dozen expelled Witnesses children, including Walter Barnett's two young daughters, who attended Slip Hill Grade School outside Charleston.[24] The unanimous panel decision was written by Fourth Circuit Judge John J. Parker, who would have been sitting on the Supreme Court except that the Senate, by the scant margin of two votes, had refused to confirm him after President Herbert Hoover nominated him in 1930.[25]

The three-judge panel recognized that lower courts ordinarily apply Supreme Court precedents until the Court itself overrules them,[26] but the panel declined to apply *Gobitis*, which the Court already appeared on the verge of rejecting. Judge Parker noted that in *Jones v. City of Opelika* (1942), another First Amendment appeal brought by Jehovah's Witnesses, the Court had distinguished the earlier decision and three members of the *Gobitis* majority (Justices Hugo L. Black, William O. Douglas and Frank Murphy) had called *Gobitis* "wrongly decided,"[27] Justice Stone's earlier approach in dissent.

"Under such circumstances and believing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs," wrote Judge Parker, "we feel that we would be recreant to our duty as judges, if through a blind following of a decision which



Justice Harlan Fiske Stone (pictured) stood alone in his dissent in *Gobitis*, despite Justice Felix Frankfurter's private entreaties for unanimity in the wake of France's invasion by Germany.

the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties."[28]

Gobitis dissenter Justice Stone and the two newest members of the Court, Justices Robert H. Jackson and Wiley B. Rutledge, Jr., seemed poised to join the *Opelika* trio and overrule the earlier decision. Jackson's distaste for *Gobitis* was known within the Roosevelt administration while he was U.S. Attorney General before his appointment to the Court in 1941.[29] When Jackson wrote **The Struggle for Judicial Supremacy** a few months before he joined the Court, he cited *Gobitis* as inconsistent with the Court's usual "vigilan[ce] in stamping out attempts by local authorities to suppress the free dissemination of ideas, upon which the system of responsible democratic government rests."[30] On the U.S. Court of Appeals for the District of Columbia Circuit, a few months before Judge Parker wrote, Judge Rutledge dissented from a panel decision that upheld the convictions of two Jehovah's Witnesses for selling their religious literature on a public street without securing a license or paying a tax.[31] In an apparent reference to *Gobitis*, Rutledge lamented that the Witnesses "have had to choose between their

consciences and public education for their children."[32]

The Supreme Court periodically overrules prior decisions, but rarely one so freshly minted as the near-unanimous *Gobitis*. With the nation and the world watching, and with ultimate victory over the Axis by no means assured, however, *Gobitis* fell in *West Virginia State Board of Education v. Barnette*, often remembered as the "second flag-salute case." With unmistakable symbolism, the Court handed down the new decision on Flag Day, June 14, 1943.

Barnette left Justice Frankfurter in dissent, together with Justices Owen J. Roberts and Stanley B. Reed, who tersely noted their adherence to *Gobitis* but declined to join the Frankfurter opinion.[33] Responsibility for explaining the Court's unusual about-face fell to Justice Jackson, who may have seemed an unlikely candidate for the role. Justice Stone had ascended to the Chief Justiceship when Charles Evans Hughes retired in 1941, and, by assigning the *Barnette* opinion to himself, he could have vindicated his lonely stand in *Gobitis* for protecting "freedom of mind and spirit," an appeal to conscience that one historian says "still ranks as one of the Court's finest dissents."[34] Whatever the reason for the assignment, Justice Jackson did not disappoint the confidence that the Chief Justice placed in him.

III. Reason and Passion in Historical Perspective

Barely a week after the announcement of *Barnette, Time* magazine, under the headline "Blot Removed," wrote that the Court had "reaffirmed its faith in the Bill of Rights—which, in 1940 [in *Gobitis*], it had come perilously close to outlawing."[35] Justice Jackson accomplished his mission with a majority opinion that balanced reason and passion, twin guideposts familiar to historians and observers of contemporary American political and popular culture.

As complementary and sometimes antagonistic forces for assessing performance or behavior, reason and passion hold an imposing pedigree that now reaches to the highest levels of our national life. In **The Audacity of Hope**, Barack Obama wrote that "the Constitution envisions a road map by which we marry passion to reason, the ideal of individual freedom to the demands of community."[36] Discussing his own religious upbringing in his earlier memoir, **Dreams from My Father**, the future President also invoked the two forces, writing that his grandmother's family "read the Bible but generally shunned the tent revival circuit, preferring a straight-backed form of Methodism that valued reason over passion and temperance over both."[37]

The synergy of reason and passion dates from ancient times. Plato asked in **The Republic** whether "passion [is] different from reason," and concluded that "the one ruling principle of reason [is] that reason ought to rule."[38] Aristotle said that "[a]ll the acts of man are necessarily done from seven causes: chance, nature, compulsions, habit, reason, passion, desire."[39] "The law," concluded Aristotle, "is reason free from passion."[40]

The interplay between reason and passion helped shape American political thought from the nation's earliest years, beginning in earnest with the writings of Alexander Hamilton, James Madison, and John Jay in the *Federalist*, the essays that throughout 1787 and 1788 advocated ratification of the Constitution by the thirteen states. *Federalist No. 15*, for example, argued strenuously for replacing the weak Articles of Confederation because "the passions of men will not conform to the dictates of reason and justice, without constraint."[41]

Federalist No. 49 argued for avoiding frequent future constitutional conventions, where "[t]he *passions* . . . not the *reason*, of the public, would sit in judgment."[42] "[I]t is the reason of the public alone that ought to controul and regulate the government," the essay explained. "The passions ought to be controuled and regulated by the government."[43]

Federalist No. 50 disparaged the outcomes of earlier state constitutional conventions, where "*passion*, not *reason*, must have presided."[44]

Federalist No. 55 argued for limiting the size of the House of Representatives because "passion never fails to wrest the sceptre from reason" in a multitude.[45] "[T]he more numerous any assembly may be," *Federalist No. 58* continued, "the greater is known to be the ascendency of passion over reason."[46] *Federalist No. 63* counted on the smaller Senate to check the impulses of "the people stimulated by some irregular passion, . . . until reason, justice and truth, can regain their authority over the public mind."[47]

Long before George Washington presided over the Constitutional Convention, impulses to balance reason and passion guided his personal and public life. As a schoolboy not yet sixteen, he had fulfilled a school exercise by copying 110 "Rules of Civility and Decent Behaviour in Company and Conversation," drawn from an English translation of a book that French Jesuits had compiled in the late 1500s.[48] The 58th Rule left a lasting impression on the future President: "[I]n all Causes of Passion [ad]mit Reason to Govern."[49]

Washington's personal and public life so fully reflected the Rules that biographers have regarded them as "formative influences in the development of his character."[50] In 1783, for example, General Washington learned that some of his officers privately planned a meeting to discuss grievances against Congress, which had not paid them promised salaries or pensions; his Newburgh Address to the officers successfully dissuaded them from pursuing the plan, which he condemned as "addressed more to the feelings of passions than to the reason & judgment of the army."[51]

Shortly after returning home from the Constitutional Convention in 1787, Washington wrote that "[a]ll the opposition to [the Constitution] is . . . addressed more to the passions than to the reason."[52] Weathering criticism in 1795 that his administration yielded too much to Britain in Jay's Treaty, Washington wrote to Attorney General Edmund Randolph that he looked forward to a "time when passion shall have yielded to sober reason."[53] In his Farewell Address in 1796, Washington warned the nation not to "adopt[] through passion what reason would reject,"[54] advice that he would repeat during his brief retirement at Mount Vernon before his death in 1799.[55]

As one of history's great political philosophers and as an opponent of the Federalists before he became the nation's third President, Thomas Jefferson likely knew the writings of the ancient Greeks and surely knew the influence of the *Federalist* essays. "Let nothing be spared of either reason or passion," Jefferson wrote in 1810, "to preserve the public confidence entire, as the only rock of our safety."[56] During the War of 1812, he opposed suspension of U.S. exports as "dictated by passion, not by reason."[57]

In one of his earliest published speeches, delivered in 1838, twenty-eight-year-old Abraham Lincoln spoke out against a rash of lynchings for reflecting a "growing disposition to substitute the wild and furious passions, in lieu of the sober judgment of the Courts."[58] "Passion has helped us" by igniting the Revolution that won independence from Britain, the young Lincoln explained, but unrestrained passion "will in future be our enemy. Reason, cold, calculating, unimpassioned reason, must furnish all the materials for our future support and defence."[59]

Abolitionist leader and former slave Frederick Douglass wrote more generally about racial justice in 1855: "There is no relation more unfavorable to the development of honorable character, than that sustained by the slaveholder to the slave. Reason is imprisoned here, and passions run wild."[60]

In our own time, voices in public-policy debates frequently urge resort to reason, not passion.[61] The tandem also figures in Presidential messages and, as it has since at least 1837, in House and Senate proceedings.[62] During the House Judiciary Committee's Watergate hearings in 1974, for example, Congress

member Barbara Jordan of Texas riveted the nation with her opening statement that "[i]t is reason, and not passion, which must guide our deliberations, guide our debate, and guide our decision."[63]

Reason and passion also sometimes constrain judicial action. A civil judgment may be overturned or reversed on appeal, for example, when counsel's appeal to juror bias produces a verdict that "reflects passion rather than reason."[64] In cases charging capital crimes or other serious offenses, courts and commentators regularly summon jurors to return verdicts, judges to impose sentences, and citizens to retain attitudes that are grounded in reason, free from passion.[65]

In a 2006 commencement address, Secretary of State Condoleeza Rice told Boston College graduates about "five important responsibilities of educated people," including "the commitment to reason" and "the responsibility to find and follow your passion."[66] A year later, Massachusetts Governor Deval Patrick told local community college graduates that "[t]he willingness to face down passion and fear with reason and courage . . . is the hallmark of the active citizen."[67]

Writers have advanced various formulas for managing reason and passion.[68] So too have contemporary philosophers, political theorists, government figures, theologians and biographers, sometimes in the titles of books whose discussion strives to balance the two.[69] Commentators frequently cite the influence of calibrated reason and passion on public affairs, fiction and nonfiction books, movies, plays, opera, music, and sports.[70] Speaking to the La Jolla (Calif.) Music Society in 2004, for example, Justice Sandra Day O'Connor said that law and music each represent "a fusion of reason and passion."[71]

IV. Reason and Passion in Judicial Opinion-Writing

Throughout our nation's history, much has been said about the extent to which judges can or should let personal feelings affect the decision making process.[72] The debate continues today as partisans frequently accuse opponents of nominating and confirming "judicial activists," judges who assertedly decide important cases based on their own personal predilections rather than by strictly applying precedents, statutes, and other relevant sources of law.[73]

This debate is not the issue here. This article concerns, not how judges reach decisions, but how vigorous, forceful writing can justify and explain decisions to the lawyers and parties; to future courts, lawyers, and litigants under our system of stare decisis; and sometimes also to lay readers in cases such as *Barnette*, which touch on matters of wider social concern. The Court had decided *Barnette* by internal debate and vote in conference before Justice Jackson ever put pen to paper.

Judges write opinions, not as private citizens, but as public officers vested by constitution and statute with authority to speak with the force of law. Formulas do not decide cases, but in constitutional and nonconstitutional decisionmaking alike, "reason" loosely means application of relevant legal doctrine to the facts, and "passion" loosely means vigorous, forceful opinion-writing that justifies and explains the decision's grounding in fact and law.

On a collegial appellate court, the appropriate balance of reason and passion depends in significant measure on whether the judge is writing a majority, concurring, or dissenting opinion. The majority opinion determines the parties' rights and obligations while creating precedents and rationales for future cases. Reason may rein in passion, because the writer seeking to maintain the majority knows that our system of precedent means that every paragraph, sentence, and clause—including every passage tinged with emotion—remains grist for later citation and potential application. A later court may find a particular passage to constitute holding, or else to constitute dictum warranting distinction or some measure of persuasive effect, but the passage's effect

as a source of law derives from the court's constitutional and statutory authority to decide cases.

Writers of concurring and dissenting opinions may feel less constrained because their writings, by themselves, make no immediate law. If the writer so chooses, a concurrence, and particularly a dissent, can rely more on passion, freer from the need to maintain a coalition or to exercise circumspection in decision making. Dean Roscoe Pound said that on a court of last resort, a dissenting opinion "should express [the judge's] reason, not his feelings."[74] At one time or another, however, most of the recent Justices have seen the media call their dissents "passionate."[75]

"A dissent in a court of last resort," wrote Chief Justice Charles Evans Hughes is, "an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[76] The dissenter's appeal to posterity stands a better chance, however, with a disciplined dose of reason than with scarcely restrained passion. From one era to the next, Justices such as Oliver Wendell Holmes and John Marshall Harlan have held the title of a "Great Dissenter," but their influential dissents (like Justice Stone's *Gobitis* dissent) persuaded future Courts with reasoned legal blueprints delivered forcefully, and not with unadorned fist-pounding or shrill emotion.

Barnette demonstrates that focused passion may also invigorate a majority opinion's reasoned analysis. From the outset, every participant in the flag-salute drama sensed the high stakes at issue. Few claims of right command greater respect than sincere invocations of religious liberty, and few justifications for government action command greater force than invocations of national security in wartime. As the Court fulfilled its constitutional responsibility to apply the First Amendment during the struggle against totalitarian regimes, Justice Jackson sought to instruct that Americans would tolerate personal conscience, even when reverence for the flag was at stake.

The reasoned instruction would have fallen flat if *Barnette*'s majority had delivered what then-Professor Felix Frankfurter had disparaged in 1931 as "the inevitable lawyer's writing—the dull qualifications and circumlocutions that sink any literary barque or even freighter, the lifeless tags and rags that preclude grace and stifle spontaneity."[77] Turgid legalese would have decided the case for the parties, but would also likely have destined the decision for little more than swift deposit in the **U.S. Reports**, barely remembered among later decisions that would reaffirm similar constitutional propositions. Instead, Justice Jackson assured *Barnette*'s immortality by combining reason with passion to dismantle the four specific grounds that Justice Frankfurter had advanced in *Gobitis*.

> ***Gobitis* Ground #1: Granting some public school children exemptions from mandatory flag salute and recitation of the Pledge of Allegiance would make the government appear "too weak to maintain its own existence."[78]**

Justice Jackson scoffed at the notion that "the strength of government to maintain itself would be impressively vindicated by our confirming power of the state to expel a handful of children from school."[79] "Government of limited power need not be anemic government," he continued, with passion accompanying the statement of reason. "Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. . . . To enforce [the Bill of Rights] today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end."[80]

***Gobitis* Ground #2: By creating constitutionally based exemptions to mandatory in-school flag salutes, federal judges would become "the school board for the country."**[81]

The Fourteenth Amendment, Justice Jackson countered, "protects the citizen against the State itself and all of its creatures—Boards of Education not excepted."[82] Once again, passion took center stage. School boards "have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[83]

***Gobitis* Ground #3: Because exemptions from mandatory in-school flag salutes raise disciplinary issues beyond the competence of federal judges, exemptions should be won at the ballot box and not in the courts.**[84]

"The very purpose of a Bill of Rights," Justice Jackson responded with a firm passionate voice, "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[85]

"[W]e act in these matters," Justice Jackson continued, "not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed."[86]

***Gobitis* Ground #4: The Constitution permits mandatory in-school flag salutes because "[t]he ultimate foundation of a free society is the binding tie of cohesive sentiment."**[87]

"Those who begin coercive elimination of dissent," Justice Jackson wrote, "soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."[88]

"[W]e apply the limitations of the Constitution," he explained, "with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization."[89]

> To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.[90]

Justice Jackson closed his opinion with a reasoned, yet passionate endorsement of individual freedom that has been called "the most illuminating definition of Americanism in the history of the Court": "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[91]

V. Conclusion

A. "The Freedom to Disagree"

Because Justice Jackson was such a graceful writer, Justice Frankfurter reminisced years later, "his style sometimes stole attention from the substance."[92] Justice Jackson's dextrous admixture of reason and passion, however, should not overshadow the durability of *Barnette*'s First Amendment holding. *Gobitis* had applied the First Amendment's religion clauses. By ruling instead under the First Amendment's Speech Clause, *Barnette* conferred rights on all claimants who establish entitlement, not solely on claimants moved by religious belief.[93] After more than sixty years, *Barnette* remains the basis for the First Amendment right to "refrain from speaking."[94]

The distinction between a narrower religious freedom and a broader expressive freedom retains contemporary significance. In 2009, for example, ten-year-old Will Phillips, a fifth grader at the West Fork Middle School in Washington County, Arkansas, refused to stand and join his classmates in reciting the Pledge of Allegiance. The reason, he said, was that "I really don't feel that there's currently liberty and justice for all" because gays and lesbians could not exercise such rights as the right to marry and the right to adopt children.[95] Much like the Gobitas and Barnett children, who were about Will's age when they and their families took their stand decades earlier, Will endured taunts and harsh words from some classmates but support from others.[96]

Will Phillips and his supportive parents made no claim of religious freedom, but school authorities recognized that *Barnette* squarely confers the First Amendment right to free expression that the young man sought to exercise. Asked what it means to be an American, Will responded, "Freedom of speech. The freedom to disagree. That's what I think pretty much being an American represents."[97]

B. "[A]n Excellent Writer, Period"

"Solicitor General for life" was the title that Justice Louis D. Brandeis would have conferred on Robert H. Jackson, who argued more than four dozen appeals in the Supreme Court as Assistant Attorney General, Solicitor General, and Attorney General before his appointment to the Court in 1941.[98] But Justice Jackson leaves a record as much more than a lawyer who, as Justice Frankfurter put it, approached the bar "specially endowed as an advocate."[99]

Justice Antonin Scalia calls Justice Jackson his "hero," someone who "wrote beautiful opinions and was on the right side of things, too."[100] Professor Charles Alan Wright went a significant step further, calling Justice Jackson "the best writer ever to sit on the Court."[101]

Justice Jackson achieved his lofty status as the Court's paramount writer without relying heavily on law clerks or other ghostwriters to compose his work or turn a phrase for him. At President Harry S Truman's request, he took a leave of absence from the Court in 1945 to serve as chief United States prosecutor at the Nuremberg war-crimes trials. A young assistant, assigned to help prepare Jackson's closing argument to the international tribunal a year later, felt hurt when the Justice did not use any of his draft. Only later did the assistant learn that "Jackson did not like 'ghosts.' He felt that the words of a speaker or writer should be his own words and not those of another."[102]

In 1957, former Jackson law clerk William H. Rehnquist attested that "[e]ven a casual acquaintance with [Justice Jackson's] opinions during the 13 years he served on the Court indicates that he neither needed nor used ghost writers."[103] "The great majority of opinions which he wrote," Rehnquist continued, "were drafted originally by him and submitted to his clerks for their criticism and suggestions. Frequently such a draft would be batted back and forth between the Justice and the particular clerk working on it several times. The

Robert H. Jackson has been lauded as the best writer ever to sit on the Supreme Court. He did not attend college; other than apprenticing, his only formal education after high school was one year at Albany Law School.

contributions of the clerk by way of research, organization and, to a lesser extent, method of approach, was often substantial. But the end product was unquestionably the Justice's own, both in form and in substance."[104]

Six weeks before *Barnette*, Justice Jackson had stressed the Court's responsibility to "do our utmost to make clear and easily understandable the reasons for deciding . . . cases as we do."[105] *Barnette* delivered on the promise with a clear exposition of reason and passion because Justice Jackson held a distinct personal advantage. "Good legal writing," says Professor Richard C. Wydick, "does not sound as though it had been written by a lawyer."[106] Justice Jackson left a legacy of eloquence because, as in *Barnette*, he indeed did not "write like a lawyer." Professor Fred Rodell even speculated that Justice Jackson "wrote so unlegally well—with the force of plain and pointed talk replacing lawyers' jargon—because he never went through law school nor won a law degree; indeed, . . . he never even went through college, and one ungraduating year of law study . . . was his only formal education after high school."[107]

Justice Jackson was a largely self-taught writer, and he was both a skilled teacher and an avid learner. In 2003, Chief Justice Rehnquist was right that his mentor "was not simply an excellent legal writer, he was an excellent writer, period."[108]

ENDNOTES

[1] *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

[2] Richard A. Posner, **The Problems of Jurisprudence** 147 (1990).

[3] See, e.g., David R. Manwaring, **Render Unto Caesar: The Flag-Salute Controversy**

(1962); Shawn Francis Peters, **Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution** (2000); Vincent Blasi and Seana V. Shiffrin, "The Story of *West Virginia State Board of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought," in **Constitutional Law Stories** 443–45 (Michael C. Dorf ed., 2004); Irving Dilliard, "The Flag Salute Cases," in **Quarrels That Have Shaped the Constitution** (John A. Garraty ed., 1988); "The Flag Salute Cases," in **The Pursuit of Justice: Supreme Court Decisions That Shaped America** (Kermit L. Hall & John J. Patrick eds., 2006); Robert L. Tsai, "Reconsidering *Gobitis*: An Exercise in Presidential Leadership," 86 *Wash. U. L. Rev.* 363 (2008); Charles Alan Wright, "My Favorite Opinion—The Second Flag-Salute Case," 74 *Tex. L. Rev. 1297* (1996).

[4]See, e.g., Blasi and Shiffrin, supra note 3, at 448 (calling Barnette's majority opinion "among the most eloquent to be found in the whole of the **U.S. Reports**"); "The Flag Salute Cases" (Hall & Patrick), supra note 3, at 101 ("one of the greatest statements on civil liberties ever written"); Tsai, supra note 3, at 365 (discussing the "sparkling decision penned by Robert H. Jackson").

[5]Wright, supra note 3, at 1299.

[6]David McCullough, "The Course of Human Events," National Endowment for the Humanities: 2003 Jefferson Lecture in the Humanities: David McCullough Lecture, available at http://www.neh.gov/whoweare/mcculloughol; lecture.html (last visited Feb. 12, 2011).

[7]Id.

[8]Peter Irons, **The Courage of Their Convictions** 16 (1988).

[9]*West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626 (1943).

[10]*Barnette*, 319 U.S. at 626, 629–30; Peters, supra note 3, at 164–77.

[11]Albert Deutsch, **Our Rejected Children** xix, 162 (1950).

[12]Peters, supra note 3, at 186.

[13]Id. at 12–13, 183.

[14]*Minersville School District v. Gobitis*, 310 U.S. 586, 595, 626 (1940), overruled, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

[15]Dilliard, supra note 3, at 294–96; "The Flag Salute Cases" (Hall & Patrick), supra note 3, at 97.

[16]*Gobitis*, 310 U.S. at 604 (Stone, J., dissenting); Dilliard, supra note 3, at 297–98.

[17]*Gobitis*, 310 U.S. at 602.

[18]Irons, supra note 8, at 22; see also Shawn Francis Peters, "Rehearing 'Fighting Words': *Chaplinsky v. New Hampshire in Retrospect*," 24 *J. Sup. Ct. Hist.* 282, 283–84 (1999).

[19]Dilliard, supra note 3, at 298.

[20]Peters, supra note 3, at 8–16, 72–152.

[21]Robert L. Tsai, "The Law Clerk's Memo to Robert Jackson in Barnette," Legal History Blog, Apr. 16, 2009, available at http://legalhistoryblog.blogspot.com/2009/04/law-clerks-memo-to-robert-jackson-in.html (last visited Feb. 12, 2011).

[22]See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 447–48 (1944) (Murphy, J., dissenting) (the Jehovah's Witnesses "have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes"); Blasi and Shiffrin, supra note 3, at 443–45; Peters, supra note 3, at 237–38, 251 (discussing reaction on the Supreme Court); "The Flag Salute Cases" (Hall and Patrick), supra note 3, at 97; but see Tsai, supra note 3, at 374 ("The Justices might have been horrified at the ferocity of the reprisals, but they would have been unbelievably naive to think that their original decision did not expose recalcitrant students and their parents to a series of collateral legal and extra-legal ramifications.").

[23]Blasi and Shiffrin, supra note 3, at 445.

[24]*Barnette v. West Va. State Bd. of Educ.*, 47 F. Supp. 251 (S.D.W.Va. 1942), aff'd, 319 U.S. 624 (1943); David L. Hudson, Jr., "Woman in Barnette Reflects on Famous Flag-Salute Case," Dec. 28, 2009, First Amendment Center, available at http://www.firstamendment

center.org/analysis.aspx?id=22441 (last visited Feb. 12, 2011). The Barnett and Gobitas families achieved different outcomes in the Supreme Court, but they shared a common legacy: because of evident clerks' errors below, the Court's decisions misspelled their surnames.

[25]See, e.g., Paul Freund, "Appointment of Justices: Some Historical Perspectives," 101 *Harv. L. Rev.* 1146, 1154 (1988) (41–39 vote); Ernesto J. Sanchez, "John J. Parker and the Beginning of the Modern Confirmation Process," 32 *J. Sup. Ct. Hist.* 22 (2007).

[26]*Barnette*, 47 F. Supp. at 253; see also, e.g., *Hohn v. United States*, 524 U.S. 236, 252–53 (1998).

[27]*Jones v. City of Opelika*, 316 U.S. 584, 623–24 (1942) (dissenting opinion); see also *Barnette*, 47 F. Supp. at 253.

[28]*Barnette*, 47 F. Supp. at 253.

[29]Tsai, supra note 3, at 397–98.

[30]Robert H. Jackson, **The Struggle for Judicial Supremacy** 284 & n.48 (1941).

[31]*Busey v. District of Columbia*, 129 F.2d 24 (D.C. Cir. 1942) (Rutledge, J., dissenting), vacated and remanded, 319 U.S. 579 (1942), on remand, 138 F.2d 592 (D.C. Cir. 1943).

[32]*Busey*, 129 F.2d at 38.

[33]*Barnette*, 31 U.S. at 642–43.

[34]*Minersville School District v. Gobitis*, 310 U.S. 586, 606 (1940) (Stone, J., dissenting); Peters, supra note 3, at 60.

[35]"Judiciary: Blot Removed," *Time*, June 21, 1943, available at http://www.time.com/time/magazine/article/0,9171,766726,00.html?internalid = ACA (last visited Feb. 12, 2011).

[36]Barack Obama, **The Audacity of Hope: Thoughts on Reclaiming the American Dream** 113 (2008).

[37]Barack Obama, **Dreams from My Father: A Story of Race and Inheritance** 14 (2004).

[38]Plato, **The Republic**, Book IV, at 159–62 (B. Jowett, ed., 1960).

[39]**The Rhetoric of Aristotle**, 1.10, at 57 (Lane Cooper, ed., 1932).

[40]Aristotle, **The Politics of Aristotle** 146 (Ernest Baker, trans., 1946).

[41]**The Federalist**, The Federalist No. 15, at 89, 96 (Jacob E. Cooke, ed., 1961).

[42]*Id., The Federalist No. 49*, at 338, 343 (emphasis in original).

[43]*Id.*

[44]*Id., The Federalist No. 50*, at 343, 346 (emphasis in original).

[45]*Id., The Federalist No. 55*, at 372, 374.

[46]*Id., The Federalist No. 58*, at 391, 395–96.

[47]*Id., The Federalist No. 63*, at 422, 425. See also, e.g., *id., The Federalist No.* 10, at 56, 58 (1787) (Jacob E. Cooke, ed., 1961) (discussing the likelihood that political factions would arise in a political democracy: "As long as the connection subsists between [a man's] reason and his self-love, his opinions and his passions will have a reciprocal influence on each other."); *id., The Federalist No. 42*, at 279, 283 (urging a strong congressional commerce power lest the commercial states' "passion" for revenue drown out the "mild voice of reason" counseling national unity); id., *The Federalist No. 48*, at 332, 333–34 (1788) (stating that the executive and legislative branches would counterbalance one another "where the legislative power is exercised by an assembly, which is . . . sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes").

[48]**George Washington's Rules of Civility & Decent Behaviour In Company and Conversation** (Charles Moore ed., 1926); see also *id.* at x, xiv.

[49]*Id.* at 13 (brackets in original).

[50]*Id.* at ix.

[51]Quoted in David Ramsay, **The Life of George Washington** ch. 9, "Archiving Early America," available at http://www.earlyamerica.com/lives/gwlife/chapt9/ (last visited Feb. 12, 2011).

[52]George Washington to Charles Carter (Dec. 14, 1787), The George Washington Papers at the Library of Congress, 1741–1799,

available at http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw290261)) (last visited Feb. 12, 2011).

[53]George Washington to Edmund Randolph (July 31, 1795), The George Washington Papers at the Library of Congress, 1741–1799, available at http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw340194)) (last visited Feb. 12, 2011).

[54]George Washington, "Washington's Farewell Address 1796," available at http://avalon.law.yale.edu/18th_century/washing.asp (last visited Feb. 12, 2011).

[55]George Washington to John Luzac, Dec. 2, 1797, The George Washington Papers at the Library of Congress, 1741–1799, available at http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw360082)) (last visited Feb. 12, 2011) ("In times of turbulence, when the passions are afloat, calm reason is swallowed up in the extremes to [which] measures are attempted to be carried.").

[56]Thomas Jefferson to Caesar A. Rodney, Feb. 10, 1810, The Thomas Jefferson Papers at the Library of Congress, available at http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field(DOCID+@lit(tj110070)) (last visited Feb. 12, 2011).

[57]Thomas Jefferson to William Short, June 18, 1813, The Thomas Jefferson Papers at the Library of Congress, available at http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field(DOCID+@lit(ws03051)) (last visited Feb. 12, 2011).

[58]Abraham Lincoln, "The Perpetuation of Our Political Institutions: Address Before the Young Men's Lyceum of Springfield, Ill., Jan. 27, 1838," in **Abraham Lincoln: A Documentary Portrait Through His Speeches and Writings** 35–36 (Don E. Fehrenbacher ed., 1977).

[59]Id. at 43.

[60]Frederick Douglass, **My Bondage and My Freedom** 32 (John Stauffer, ed., 2003).

[61]See, e.g., "When Passion, Not Reason, Rules," *San Francisco Chronicle*, Aug. 6, 2004, at B8 (editorial) (California's "three strikes" sentencing law); "Do More for Bilingual Ed? Yes Judge's Ruling of State's Failure Is No Surprise," *Ariz. Republic*, Feb. 3, 2000, at 6B (bilingual education); William E. Gibson, "Bill Lowers Cuban Refugee Status," *Sun-Sentinel* (Fort Lauderdale, Fla.), Mar. 15, 1995, at 3A (immigration bill concerning Cuban refugees; quoting Sen. Paul Simon: "Our policy toward Cuba is one that has grown out of passion, not reason.").

[62]See Gilbert A. Lewthwaite, "Clinton Sees U.S. Keeping a Global Role," *Baltimore Sun*, Oct. 7, 1995, at 1A (President Clinton urged Congress to approve sending troops to Bosnia peacekeeping mission; "We must . . . beat back the forces of isolation with both intense passion and reason"); 13 Cong. Deb. 395 (1837) (remarks of Sen. Judah Dana; Senate resolution censuring President Andrew Jackson threatened to set a harmful precedent for "some future period of great excitement, when passion and prejudice shall triumph over reason"); see also, e.g., 146 Cong. Rec. S 11552, 11553 (Dec. 5, 2000) (remarks of Sen. Biden on the Bankruptcy Reform Act of 2000; "I hope reason will overcome passion.");136 Cong. Rec. S 8355, 8355 (June 20, 1990) (remarks of Sen. Akaka on the Flag Protection Act of 1990; "we should be guided by the light of reason, not the heat of political passion").

[63]Barbara Jordan, "Opening Statement to the House Judiciary Committee, Proceedings on the Impeachment of Richard Nixon," July 25, 1974, available at http://gos.sbc.edu/j/jordan3.html (last visited Feb. 12, 2011).

[64]*Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 395 (Mich. 2004) (reversing $21 million plaintiff's verdict in sexual harassment case).

[65]See, e.g., *Post v. Ohio*, 484 U.S. 1079, 1082 (1982) (Marshall, J., dissenting) (rejecting "license to conclude that judges are inhuman, incapable of being moved by passion as well as by reason"); Joshua Berman, "A Triumph for U.S. Justice: The Moussaoui Trial Could Easily Have Turned Into a Circus," *Chi.*

Sun-Times, May 9, 2006, at 32 (praising the jury for "balanc[ing] reason and passion by focusing on the facts" in trial of alleged terrorist); Bill Press, "Closed-Circuit TV Death of McVeigh Is a Sick, New Low," Orlando (Fla.) *Sentinel*, Apr. 15, 2001, at G3 (arguing that U.S. Justice Department decision to permit closed-circuit televising of the execution of Oklahoma City bomber Timothy McVeigh "undermines our system of justice—letting passion, not reason, rule"); Carl Rowan, "Reason Yields to Passion in O.J. Aftermath," *Chi. Sun-Times*, Oct. 15, 1995, at 39.

[66]"Secretary Condoleeza Rice Commencement Address at Boston College," May 22, 2006, on Educated Nation: Higher Education Blog, June 6, 2006, available at http://www.educatednation.com/2006/06/06/secretary-condoleezza-rice-commencement-address-at-boston-college/ (last visited Feb. 12, 2011).

[67]Connie Paige, "Patrick Rips Bush in Commencement Speech—Says Nation Is Governed by Fear," *Boston Globe*, May 18, 2007, at B3.

[68]See, e.g., John Locke, "The Second Treatise of Government," 13, 87–91, 125, in **Two Treatises of Government** 293–94, 341–44, 369 (P. Laslett ed., 1960) ("I desire to know what kind of government that is, and how much better it is than the State of Nature, where one Man commanding a multitude, has the Liberty to be Judge in his own Case, and may do to all his Subjects whatever he pleases, without the least liberty to any one to question or controle those who Execute his Pleasure? And in whatsoever he doth, whether led by Reason, Mistake, or Passion, must be submitted to?"); Alexander Pope, **Essay on Man**, Epistle ii, line 107 (1733–34) ("On life's vast ocean diversely we sail, Reason the card, but passion is the gale."); Robert C. Solomon, **No Passion's Slave: Emotions and Choice** 127 (rev. ed. 2001) (quoting British philosopher David Hume); William James, "Reason, Passion and the Religious Hypothesis," in William James, **The Will to Believe and Other Essays in Popular Philosophy**, ch. 1 (1897); see also Khalil Gibran, **The Prophet** 45 (1923) ("Your reason and your passion are the rudder and sails of your seafaring soul.").

[69]See, e.g., David A. Wilson, **Thomas D'Arcy McGee: Passion, Reason, and Politics, 1825–1857** (2008); Christopher Tilmouth, **Passion's Triumph over Reason: A History of the Moral Imagination from Spenser to Rochester** (2005); Cheryl Hall, **The Trouble with Passion: Political Theory Beyond the Reign of Reason** (2005); Richard S. Lazarus & Bernice N. Lazarus, **Passion and Reason: Making Sense of Our Emotions** (1994); Michael T. Kaufman, "Pierre Trudeau Is Dead at 80: Dashing Fighter for Canada," *N.Y. Times*, Sept. 29, 2000, at A1 (discussing former Canadian Prime Minister Trudeau's motto: "Reason Before Passion").

[70]Terence Samuel, "Bradley's Greatest Mistake Was to Run against Clinton's Legacy," *St. Louis Post-Dispatch*, Mar. 12, 2000, at A11 (arguing that Sen. Bill Bradley faltered in the 2000 Presidential primaries because "by design or by inclination, he is a man of reason rather than of passion"); Robert Parham, "Baptist of the Year: Al Gore," Dec. 28, 2007, EthicsDaily.com, Dec. 28, 2007, available at http://www.ethicsdaily.com/news.php?viewStory=12082 (last visited Feb. 12, 2011) (Baptist Center for Ethics named former Vice President Al Gore "Baptist of the Year" for his "clear call for moral responsibility, knitting together . . . reason and passion"); see also, e.g., Simon Houpt, "Radcliffe's Great, but the Play's an Old Nag," Globe & Mail (Canada), Sept. 28, 2008 (play); Andrew Druckenbrod, "Opera Theater Courts Byham as Its Venue," *Pittsburgh Post-Gazette*, Sept. 24, 2007, at E-1 (opera); Nate Chinen, "Three Bandleaders With Rapport First," *N.Y. Times*, Sept. 8, 2008, at 3 (music); Michael Ciment, "The Godfather: Coppola, Scorcese, Stone, and Loach Have All Been Influenced by Francesco Rosi," *The Guardian* (London), Dec. 3, 2005, at 14 (movie); Toni Bentley, "A 'Hyena in Petticoats,'" *N.Y. Times*, May 29, 2005, at 5 (book);

Hugh MacDonald, "Don't Look to Footballers for Role Models," *The Herald* (Glasgow), Jan. 8, 2004, at 3 (sports).

[71]Mark Swed, "Justice O'Connor Fails to Make Case," *L.A. Times*, Aug. 14, 2004, at 1.

[72]See, e.g., Benjamin N. Cardozo, **The Nature of the Judicial Process** 167–68 (1921); William J. Brennan, Jr., "Reason, Passion and 'the Progress of the Law,'" 42nd Annual Benjamin N. Cardozo Lecture, 10 *Cardozo L. Rev.* 3, 3 (1988).

[73]See Judicial Activism against Arizona, *Wash. Times*, July 29, 2010, at B2 (editorial) (Democratic appointee's "judicial activism is out of step with the law, out of step with politics and out of step with the good of the country"); "Clean Water at Risk," *N.Y. Times*, June 20, 2006, at 16 (editorial) ("For all the talk of liberal judicial activists, it was Justice Antonin Scalia and his fellow conservatives who voted to substitute their own preferences for a decision made by the executive branch . . . interpreting a statute passed by Congress.").

[74]Roscoe Pound, "The Heated Judicial Dissent," 39 *Am. Bar Ass'n J.* 794, 796–97 (1953).

[75]See, e.g., Charles Lane, "Court Splits Over Commandments," *Wash. Post*, June 28, 2005, at A1 (Justice Scalia); David G. Savage, "Thousands of Cases in Doubt After Decision on Sentencing," *L.A. Times*, June 26, 2004, at A15 (Justices O'Connor and Breyer); David Von Drehle, "Court Mirrors Public Opinion," *Wash. Post*, June 24, 2003, at A1 (Justice Thomas); "A Blow to Sexual Bullying," *Hartford Courant*, June 3, 1999, at A14 (Justice Kennedy); Joan Biskupic, "Viewing More As an Affair of States," *Wash. Post*, Apr. 1, 1999, at A10 (Justices Stevens, Souter, Ginsburg and Breyer); James J. Kilpatrick, "Marshall's Power Was In His Passion for Justice," *The Oregonian* (Portland, Ore.), Jan. 26, 1993, at B9 (Justice Marshall); David G. Savage, "After 33 Years, Brennan Is Still for Underdogs," *L.A. Times*, Oct. 1, 1989, at 1 (Justice Brennan); Anthony Lewis, "Glimmers of Hope in Abortion Rulings," *St. Louis Post-Dispatch*, July 9, 1989, at 3B (Justice Blackmun).

[76]Charles Evans Hughes, **The Supreme Court of the United States** 68 (1928); see also, e.g., William O. Douglas, "The Dissent: A Safeguard of Democracy," 32 *J. Am. Jud. Soc'y* 104, 107 (1948) (a dissent "may salvage for tomorrow the principle that was sacrificed or forgotten today").

[77]Felix Frankfurter, "When Judge Cardozo Writes," *The New Republic*, Apr. 8, 1931, available at http://www.tnr.com/article/politics/when-judge-cardozo-writes (last visited Feb. 12, 2011).

[78]*Minersville School District v. Gobitis*, 310 U.S. 586, 596 (1940).

[79]*West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 636 (1943).

[80]*Barnette*, 319 U.S. at 636–37.

[81]*Gobitis*, 310 U.S. at 598.

[82]*Barnette*, 319 U.S. at 637.

[83]*Barnette*, 319 U.S. at 637.

[84]*Gobitis*, 310 U.S. at 597.

[85]*Barnette*, 319 U.S. at 638.

[86]*Barnette*, 319 U.S. at 640.

[87]*Gobitis*, 310 U.S. at 596.

[88]*Barnette*, 319 U.S. at 641.

[89]*Barnette*, 319 U.S. at 641.

[90]*Barnette*, 319 U.S. at 641–42.

[91]Nat Hentoff, **Living the Bill of Rights** 143 (1998) ("most illuminating"); *Barnette*, 319 U.S. at 642.

[92]Felix Frankfurter, "Mr. Justice Jackson," 68 *Harv. L. Rev.* 937, 938 (1955).

[93]*Barnette*, 319 U.S. at 634–35.

[94]See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citing *Barnette* for this proposition).

[95]David Koon, "A Boy and His Flag," *Ark. Times*, Nov. 11, 2009.

[96]*Id.*; see also James F. Van Orden, "'Jehovah Will Provide': Lillian Gobitas and Freedom of Religion," 29 *J. Sup. Ct. Hist.* 136, 137, 142 (2004).

[97]Koon, supra note 95.

[98]E. Barrett Prettyman, Jr., "Robert H. Jackson: 'Solicitor General for Life,'" 1992 *J. Sup. Ct. Hist.* 75, 75–76, 83, 84 n.69.

[99]Frankfurter, supra note 92, at 939; see also "Advice from Justice Jackson," 5 *J. App. Prac. & Process* 215, 216 (2003) ("one of the greatest appellate advocates of his generation.").

[100]"A Voice for the Write: Tips on Making Your Case from a Supremely Reliable Source," 94 *ABA. J.* 37, 40 (May 2008).

[101]Charles Alan Wright, supra note 3, at 1299.

[102]Henry T. King, Jr., "Remarks," in Symposium: The Nuremberg Trials: A Reappraisal and Their Legacy, 27 *Cardozo L. Rev.* 1553, 1558 (2006).

[103]William H. Rehnquist, "Who Writes Decisions of the Supreme Court?," *U.S. News & World Rep.*, Dec. 13, 1957, at 74–75 (1957).

[104]*Id.*

[105]*Douglas v. City of Jeannette*, 319 U.S. 157, 182 (1943) (separate opinion).

[106]Richard C. Wydick, **Plain English for Lawyers** 4 (5th ed. 2005).

[107]Fred Rodell, **Nine Men: A Political History of the Supreme Court from 1790 to 1955** 279 (1955).

[108]William H. Rehnquist, "Foreword," in Eugene C. Gerhart, **Robert H. Jackson: Country Lawyer, Supreme Court Justice, America's Advocate** iii (2d ed. 2003).

Justice Hugo Black and His Law Clerks: Match-Making and Match Point

TODD C. PEPPERS*

Introduction

> What greater or better gift can we offer the republic than to teach and instruct our youth?
>
> —Marcus Tullius Cicero[1]

Much has been written about Supreme Court law clerks and the important role that they play in assisting the Justices processing the work of our nation's highest court. While law clerks in the late nineteenth century primarily served the role of stenographers and research assistants, today these young men and women—all recent graduates of elite law schools—work in close quarters with their individual Justices, reviewing petitions for writ of certiorari, preparing the Justices for oral argument, and assisting in the drafting of legal opinions. At the end of their clerkships, the clerks find that they are faced with a dizzying selection of job opportunities—from teaching at a top law school to becoming a highly compensated associate at an elite law firm (with the attendant six-figure signing bonus) or working for the federal government.

As a scholar who has studied law clerks for the last decade, I have found that often the most fascinating aspect of the "clerkship institution" lies not in the job duties or subsequent professional achievements of law clerks, but in the personal bonds that form between a small handful of the Justices and their clerks. While the modern Supreme Court Justice is authorized to hire four law clerks each Term (the Chief Justice can employ five clerks), in the early decades of the twentieth century, the

Justices hired only one or two clerks per Term. The combination of a smaller staff, fewer law-clerk responsibilities, and home offices for the Justices meant that the clerks had the rare opportunity to interact with their Justices in less formal and more relaxed settings. Thus, we have wonderful stories of Oliver Wendell Holmes, Jr. and his "legal secretaries," who balanced the Justice's checkbook, accompanied him on sightseeing jaunts, and reveled in the Magnificent Yankee's "tall talk" of the Civil War. Or tales of Felix Frankfurter and his clerks, with whom he fiercely debated the finer points of art, music, and politics while embracing them as surrogate sons. Even the poor souls who clerked for James McReynolds have left behind invaluable glimpses into the personal life of their employer, such as the recently published diary of former law clerk John Knox and his captivating account of suffering through a year with the grouchiest man to have sat on the Supreme Court Bench.

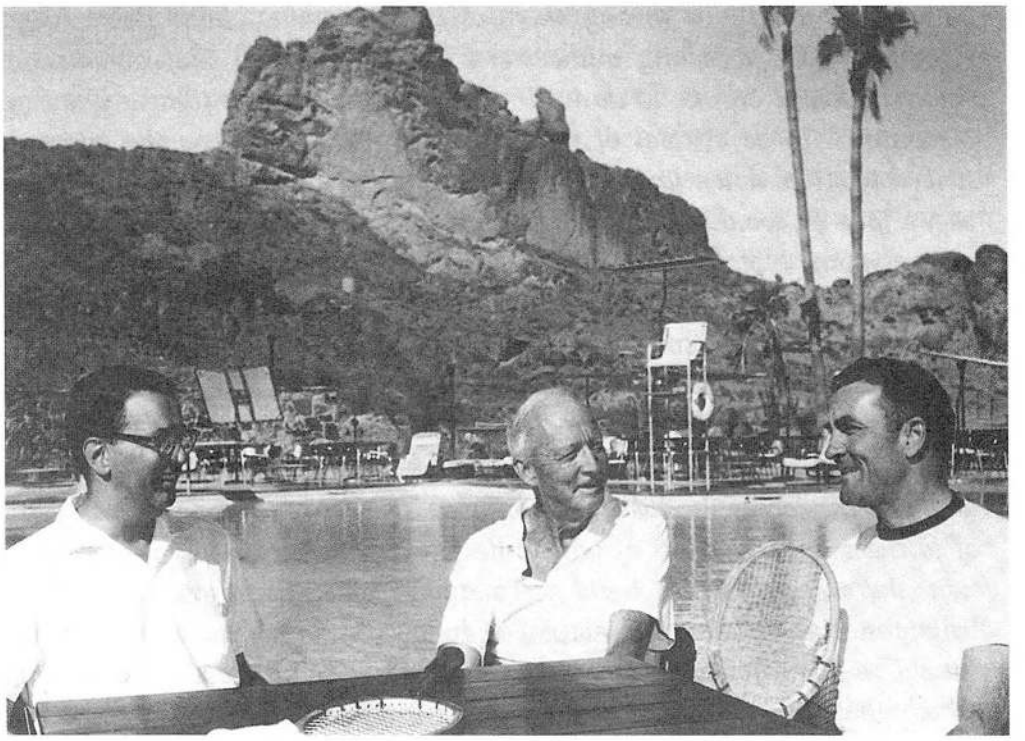
After reviewing the law-clerk files in the personal papers of Justice Hugo Black, as well as talking with his children and his former law clerks, it became quickly apparent that the Black law clerks were also fortunate enough to have enjoyed a warm and lasting relationship with their Justice. While a few former Black law clerks have written about their working relationship between the Justice and his law clerks, this article briefly discusses two main elements of the clerkship experience that have not been fully fleshed out: the Justice's role as an Alabama-born Pygmalion to a generation of young clerks and the important role that tennis played in the clerkship experience.

Mr. Justice Black and His Clerks

Like other Justices on the Supreme Court, Justice Black hired law clerks to assist with the work of the Court. Each year, his law clerks would assist in reviewing cert. petitions, doing legal research, and editing opinion drafts. These job duties, however, were only one dimension of the Black clerkship. As the Justice himself once remarked to a law-clerk applicant, "I don't pick my law clerks for what they can do for me, I pick my law clerks for what I can do for them."[1]

And what the Justice could "do for them" extended beyond legal training. Hugo Black, Jr. explains that his father took a personal interest in all of his young clerks and "attempted to change their lives."[2] "[H]e was truly interested and concerned about the way they conducted their private lives as well as the way they performed in their professional lives," adds Justice Black's daughter, Josephine Black Pesaresi.[3] Referring to her father as a "natural born teacher," Pesaresi explains that the Justice "always looked at the whole person and felt that strength of character, including most predominately kindness, integrity, and humility, must be part of every aspect of anyone's life." For Justice Black, the worst transgression a law clerk could commit was being "puffed up" with self-importance.

The law clerks themselves were well aware of the Justice's interest in their professional skills and personal failings. "The Judge was a delightful teacher and friend, and became almost a second father," writes former law clerk J. Vernon Patrick (October Term 1955). "He quickly noted my deficiencies and set about to improve me."[4] Over the years, the Justice gave his law clerks unsolicited advice on their personal appearance and habits (such as not turning off the electricity when they left a room, talking on the telephone too long, or the pretentious practice of using a first initial in their name), their driving skills, their social graces, and even their weight. In a letter to former law clerk C. Samuel Daniels (the father of mystery writer Patricia Cornwell), Justice Black praises Daniels for resuming recreational tennis. "This is not only a good game at which you are excellent, but from what the grapevine has told me I am inclined to think that you might stand the loss of a few pounds. I cannot imagine the trim, handsome Sam Daniels remaining corpulent. . . ."[5]



Hugo L. Black was photographed after playing tennis with former law clerk John P. Frank and Cavett Roberts at the Racquet Club in Phoenix, Arizona, in 1957.

The advice, however, went beyond the superficial. When interviewing future law clerk Larry Hammond (October Term 1971), Justice Black startled the young applicant by announcing that he had decided to meet with Hammond because he knew that the young man stuttered. Black proceeded to show Hammond several books on stuttering and hypothesized it was a psychological condition. Hammond later humorously recalled that he was literally "tongue-tied" during the interview, since he hadn't dreamed that his stuttering would be a topic of conversation.[6]

Justice Black also took a great interest in the intellectual development of his clerks, sharing his love of reading with them. Writes former law clerk Daniel J. Meador (October Term 1954):

> "Have you read these books?" This question from Justice Black was heard by many a new law clerk shortly after coming on the job. "These books" usually referred to some of his volumes of Tacitus, Thucydides, Plutarch, or Livy, or to *The Greek Way* [by Edith Hamilton], or to some other historical work he might happen to be reading at the moment. On getting a negative response, as he did all too often, Black would say something like: "Well, they're your first assignment. What they have to say about human nature and history is more relevant than anything I can think of to the issues now before the Court."[7]

According to Meador, Justice Black believed that the lessons to be gleaned from these authors served two purposes: not only were the writings relevant in understanding the complex issues facing the Supreme Court, but they would make his clerks better members of

Justice Black, daughter Josephine "Jo-Jo" Black, and law clerks at a gathering at the Justice's home.

society. "He would rather have had his clerk spend his reading time on literature of that sort than on a book on federal jurisdiction. He seemed to think that his clerks had had enough technical indoctrination in law school."[8] Echoing Meador, former law clerk Guido Calabresi (October Term 1958) recalls the Justice telling his clerks that "'you cannot be a lawyer if you haven't read Tacitus.'"[9]

Even illness could not stop the Justice from assigning books to his law clerks to read. During the year that Melford O. "Buddy" Cleveland clerked for Justice Black, the Justice was suffering from an extraordinarily painful bout of shingles. Despite illness, the education of his law clerks continued. "I remember one night in particular when your foot was in such pain that you had to hold it high off the floor," writes Cleveland. "[Y]et you kept searching for a book for me to read, not for your work but for my education."[10]

As a side note, it should be pointed out that the Justice's reading assignments were not limited to his law clerks. Josephine Black Pesaresi recalls that the family milkman had shared his tales of domestic disharmony with the Justice, prompting her father to give him a copy of **The Greek Way**. And when the Justice was hospitalized at the Bethesda Naval Hospital for prostate problems, Pesaresi was amused to discover that her father—who was reading the collected works of Bertrand Russell—had assigned his doctors and nurses reading from the British philosopher and was threatening to give reading quizzes to the medical staff.

Occasionally, Justice Black used the law clerks themselves to make what the Justice deemed necessary changes in their personal habits. After selecting George C. Freeman, Jr. (October Term 1956) to be his clerk, Justice Black told him that he had picked Freeman and his co-clerk (Robert A. Girard) with a dual motive in mind:

> He told me later on in the year, "You know, I picked you and Bob . . .

> because you are opposites and I thought that the two of you had something to teach each other. Bob's a very intense, hard-driving, ambitious fellow who married young and has stayed in the books. He's the kind of fellow who just works all the time. Your problem is you've never worked hard in your life. And I figured if I put the two of you together, he'd speed you up and you'd slow him down. And that would be good for both of you.[11]

Freeman responded: "Well, I said 'Judge, it's like putting the hare and the tortoise in yoke together. But in this case the hare didn't go to sleep. And my little legs are mighty worn.'" It might have been this fatigue that once caused Freeman to take an ill-advised nap on a couch in the Justice's Chambers. "I will never forget waking up from an after-lunch nap on the sofa in the clerks' office just in time to see the Judge tiptoeing in to close the connecting door to his chambers." Rather that admonishing the mortified Freeman, the Justice quietly said "'Go right ahead, George. The only reason I am closing the door is that the Chief and I can't hear each other over your snoring.'"[12]

Justice Black's Pygmalion-like efforts extended to the romantic lives of his clerks. Justice Black once explained to a former law clerk that he could not comprehend why men and women permitted so much time to pass between engagement and marriage. "Many things can happen during that period of time, but the main thing that can happen . . . is that you and the young lady will lose the pleasure of each other's association during that time."[13] Accordingly, Justice Black pushed his law clerks to get married. Former Black law clerk Marx Leva (October Term 1940) writes that Justice Black was "the man who made me get married—which is a function usually reserved, I believe, for shot-gun carrying 'father-in-laws.'"[14] According to Leva, shortly after his clerkship ended "it came to the Judge's attention that I had (in a rash moment, no doubt) expressed the intention of getting married after the war, when I would (so I hoped) be back from sea duty." Leva soon received "an irate longhand letter from the Judge, advising me that under no circumstances would such conduct be tolerated by him." Concludes Leva: "Being a compliant fellow (and being under some pressure to the same effect from Shirley), I was married on October 31, 1942, under the watchful eye of the Judge."[15]

Yet the Justice had not finished giving Leva advice on love and marriage. "A short time after my marriage, while my LST was still based in Norfolk, I received a second irate longhand letter from the Judge," writes Leva.

> [T]he Judge had heard . . . that it was my then intention not to have any children until after my return from sea duty. According to the Judge's letter, this plan of action (or, perhaps, inaction) was even worse, if possible, than my previous plan of not getting married until after my return from sea duty. In his letter, the Judge waxed eloquently on the prospect of my early demise as a result of German submarine warfare or otherwise, and expressed grave doubts, also on my chances of having children, at my advanced age, after the war. All in all, he felt that the facts of the situation—as in any Hugo Black decision—permitted only one outcome—namely, children before sea duty, rather than after.

This time, however, Justice Black's persuasive powers failed to persuade his former clerk and his bride. Concludes Leva: "To sum up . . . my one victory over the Judge—other than my numerous victories on the tennis course, of course—consisted in the post-war arrival of Leo Marx Leva (1946) and Lloyd Rose Leva (1947)."[16]

Leva was not the only clerk for which the Justice played cupid, as former law clerks Drayton Nabers, Jr. (October Term 1965) and

Freeman can attest. Regarding Nabers, Justice Black served as a self-appointed godfather to Fairfax Virginia Smothers, the daughter of former United States Senator William Howell Smothers of New Jersey. Both Black and Smothers served together in the United States Senate, and the Justice's first wife, Josephine Black, was Fairfax Smother's godmother. Nabers started his clerkship on July 1, 1965, and by August 9 he found himself on a date with Faixfax Smothers—courtesy of Hugo Black. Nabers met with the Justice shortly before the date, and he recalls the Justice giving him the following advice. "Let me tell you something. Fairfax is a lovely lady. And young women come to Washington to find husbands. She has been here for over two years now—if she wants you, she is going to get you." Adds Nabers: "[A]s predicted by the Judge, we were married in December of 1965."[17]

The Justice also worked his matchmaking magic with Freeman, who writes that "the Judge picked out my wife for me before he or I ever knew she existed."[18]

> When I left the Judge to go to Richmond he suggested that I ought to find there an attractive cousin of Graham's [wife of Hugo Black, Jr.] for a wife. The first cousin I brought back to Washington for the Judge's inspection was pronounced deficient in only one respect—she had not gone to Bryn Mawr like Graham. Subsequently that cousin decided on another young man and to ease my rejection introduced me to another cousin! Fortunately Cousin Anne had gone to Bryn Mawr. That settled it.

Like many Justices in the 1950s and 1960s, Justice Black also came to the rescue of law clerks whose clerkships were in jeopardy because of their draft status. After having his request for an occupational deferment for law clerk Stephen J. Schulhofer (October Term 1967) denied by two local draft boards, Justice Black wrote a lengthy letter to the Presidential Appeal Board of the Selective Service System that laid out in great detail the "vital assistance" provided to him by law clerks such as Schulhofer. In the letter, the Justice sharply concludes: "I cannot believe it is more important to the Government to have Mr. Schulhofer in the Army than it is for me to continue in his work with me."[19] Schulhofer received his deferment.

In return for the life lessons imparted by the Justice, the law clerks gave the Justice their undivided loyalty. They defended Justice Black's reputation from the slings and arrows of biographers and critics, and, in the case of former law clerk Neal P. Rutledge (October Term 1951), literally almost took a bullet for the Justice. Rutledge has humorously noted that he "may be the only person who was shot at in the Supreme Court." One night Rutledge found himself working late in Justice Black's Chambers at the Supreme Court. During his late-night session, Rutledge discovered that he needed some files from the secretary's office. Because of the lateness of the hour and the fact that Justice Black was at home, Rutledge decided to save time by cutting through the Justice's personal office. Entering the office, he flipped on a light. As he crossed the room, a rifle shot came crashing through the Justice's window. Rutledge's Marine training kicked in, and he fell to the floor to avoid the unfriendly fire before crawling to a telephone. "Of course, I got on the telephone immediately because it looked like it was an attempt to assassinate the Justice, and I called the Justice at home to warn him," recalls Rutledge. "This was when his first wife, Josephine Black, was in her final stage of illness. The Justice was not worried about himself, but was worried that the news would disturb his wife. So we were all sworn to secrecy." In hindsight, Rutledge does not believe it was an assassination attempt. "I really think—in light of the fact that no other attempt was made on his life—that someone just saw the light come on and started to shoot away." Nevertheless, Rutledge

has the dubious honor of being the only Black law clerk to come under hostile fire during his clerkship.[20]

On the rare occasions when the Justice was low, it was the law clerks who came to his rescue. This was never more evident than in the months and years following the death of his wife, when his daughter proposed that the clerks live with her father. "My father was lonely, depressed and grieving after my mother's death," recalls Pesaresi. "And he was in terrible pain from shingles. I knew my father enough to know that he was the happiest when he was teaching other people. By having the clerks living with him, he could talk about his books and his philosophy."[21] Clerks who lived with the Justice included C. Sam Daniels (October Term 1951), Cleveland (October Term 1952), and Charles A. Reich and David J. Vann (October Term 1953). Former law clerk Reich provides a wonderful description of what it was like to live and work with Justice Black.

> David and I occupied our own quarters on the ground floor of Justice Black's beautiful old home at 619 South Lee Street in Alexandria, Virginia. Our windows looked out on a grape arbor and tennis court. Our day began when the Judge, in his bathrobe, knocked on our door to tell us that breakfast, which he prepared, was almost ready. At breakfast, in the kitchen, he liked to read aloud from the *Washington Post*, with many humorous asides. He especially enjoyed the Herblock cartoons. We each had a car, and we rotated cars and drivers for the daily trip to Washington and to the Court. Together we arrived at the Court at 10:00 a.m. Usually we had lunch together in the Court's public cafeteria. Between 12:00 p.m. and 12:10 p.m. the line was open to Court employees only, and the Judge liked to time our trip downstairs so that we just made the tail end of the employees' line. At precisely 3:50 p.m., just ahead of the afternoon rush hour, we departed for Alexandria. Dinner was served at about 6:00 p.m. by Lizzie Mae Campbell, the Judge's longtime cook and housekeeper. Then the three of us would climb the stairs to the Judge's second floor study for a session that would last until bedtime. For me, this was the most remarkable and inspiring part of our day together.[22]

While, by all accounts, the living arrangements were harmonious, former clerk Cleveland learned the importance of keeping track of his house key:

> One night I tried to sneak into his house through a window because I had left my key inside. My friend, Jiggar [sic], the dog, attacked me like a lion, and the Judge boomed out from his bedroom window with the voice of ten men, "Who is trying to break into my house?"

The clerks themselves realized the toll that Josephine Black's death had taken on the Justice. "I do not know whether I have ever sufficiently expressed to you my admiration for the great courage which you showed during the term I worked for you," writes Cleveland. "You never wavered through illness and numerous defeats."[23]

It is evident that Justice Black's attempts to teach and educate his law clerks was sparked by the open affection that he felt for "his boys,"[24] and evidence of this affection is found in Justice Black's personal papers. Justice Black once observed that "my clerks stand almost in the relationship of my family to me,"[25] and a wonderful example is contained in a letter written by Justice Black to Mrs. George Brussel, Jr., the mother of law clerk Reich. The Justice writes:

> Each of my clerks has a secure place in his affections. I think my affection for your Charles began the first time

Justice and Mrs. Black were photographed in his office during his 80th birthday party celebration. From left to right: former law clerk Margaret Corcoran; former law clerk Frank Wozencraft; Wozencraft's son, Tommy; former Holmes law clerk Tommy "the Cork" Corcoran; former New Dealer and Washington lawyer Benjamin V. Cohen; Mrs Elizabeth Black; former law clerk John P. Frank; Frances Lamb, Justice Black's secretary; former law clerk Nicholas Johnson.

> he came to see me, when he smiled. There is something peculiarly warm and appealing in his smile. And he has the kind of integrity and humanity about him that I like . . . My prediction is that many people will live happier and better lives because of Charlie.[26]

Justice Black's law clerks were equally open in their affection for their mentor. "Your influence, as much as that of any man, has made me whatever it is I am," writes former law clerk Nicholas Johnson.[27] In a letter to Justice Black, former law clerk Charles F. Luce (October Term 1943) writes:

> During the year that I was privileged to work with you I learned more about many things than in any other comparable period of my life. Your devotion to mankind and to a legal system which will serve mankind has been a constant inspiration in the nineteen years since I was in your office. In making major decisions I have frequently found great help by asking the question: "What would the Judge think I should do?" I know that the other men who were lucky enough to be associated with you feel the same way as I do.[28]

And in discussing their affection for the Justice, more than one former clerk lamented the loss of the rare gift of their clerkship. "Though it [private practice] is interesting, that rewarding feeling of 'laboring in the cause of

righteousness' is somehow missing," writes Freeman. "I miss it; even though I realize that I could not continue to dwell forever on Olympus."[29]

As more tangible signs of their devotion, former clerks showered their Justice with gifts on birthdays and holidays. Through the years, the postman delivered a steady stream of hams, avocados, pears, oranges, Wisconsin cheese, peanuts, smoked fish, jam, English walnuts, chestnuts, grapefruit, sorghum, and pickles to the Justice's residence. Former law clerk Sidney M. Davis (October Term 1944) set the standard for gift-giving, and over a twenty-five year period, he presented Justice Black with expensive ties on his birthday and on Christmas. "I can't cease to admire your taste in the selection of ties," admitted Black in a letter to Davis. "I never buy ties that expensive myself and so that may be responsible for the fact that the ones I buy are not equal to yours."[30]

Justice Black, His Law Clerks, and Tennis

If improving the lives of his law clerks was one constant element of Justice Black's clerkship practices, the second was sharing his love of tennis with his clerks. "The most important things in my father's life were Alabama, the Constitution, his books, and the tennis court—and not necessarily in that order," explains Josephine Black Pesaresi. "A choice between the tennis court and the Supreme Court was a hard choice to make for Daddy." She adds that her father used to say that he could retire from the Supreme Court as long as he had tennis.

Justice Black did not start playing tennis until he was a middle-aged man. Biographer Roger Newman writes that "[t]he Senate doctor had told him that no man in his forties should play singles, he liked to say, so he waited until he was fifty."[31] Tennis satisfied the Justice's need both for exercise and for competition. "My father was ahead of his time in understanding the importance of exercise. He did floor exercises every day of his life," explains Pesaresi. "Things like walking and golf bored him, but he loved tennis because it involved competition." Hugo Black, Jr. recalls that the Black children nicknamed their father "the Great Competitor," noting that the Justice "never liked to lose at anything." While Justice Black loved tennis, and practiced endlessly, his children offer different assessments of his skills. While Pesaresi describes her father as a "fair, very consistent" and "accurate" player, Hugo Black, Jr. describes him as "mediocre." "He just hit the ball over the net and figured that most people couldn't hit it back; he didn't hit the ball to a spot, he hit it straight."

Regardless of his skill, his devotion to the game was unquestioned; when the Justice suffered an injury to his right elbow, he taught himself to play tennis left-handed. "Maybe I shall be able to play tennis with your 'left-handed' son when he gets a little older," wrote Justice Black to former law clerk (and frequent tennis partner) C. Samuel Daniels. "Due to a strained right wrist I have been playing with my left hand for the last month."[32]

The key to Justice Black's game was endurance, and, in his sixties and seventies, he played tennis four to six hours a day. "He played tennis every day in the summer and he could outlast anybody," recalls Pesaresi. Hugo Black, Jr. echoes this sentiment. "Although he had played some real experts, he would never accept defeat after losing a match but would always insist on playing again until the other guy either quit from sheer exhaustion or was beaten."[33]

The law clerks were aware of the Judge's strategy of outlasting his opponents. "The Judge never succeeded in defeating his first law clerk on the tennis court in any set," brags Jerome "Buddy" Cooper (October Terms 1937–1939). "Oh, to be sure, an occasional game was dropped to him, and at the end of every losing set, while the clerk gasped, the Judge always inquired 'Why don't we play just one more set? I believe I could beat you.'"[34] Adds

former law clerk George M. Treister (October Term 1950), himself an excellent tennis player and a past captain of the UCLA tennis team:

> The Judge is the only man I've ever known who made me feel a coward when I wanted to quit playing tennis after four or five sets. It mattered not that my hand was blistered through the heavy tape; in such cases he never permitted a graceful way out. He held that snow and darkness were the only valid excuses. And these he surely would have enjoyed if he could have established jurisdiction over the weather and the rotation of the earth.[35]

With these marathon tennis sessions, the law clerks learned the important lesson that "a man needs a strong mind *and a strong body*."[36] When it came to competing with his children, however, Justice Black had his limits. Once his children were able to defeat their father on the tennis court, they never again faced him in singles competition.

Occasionally, Justice Black would show a flash of anger over his own tennis game. "He was then, as now, an even-tempered man, but I learned in time to recognize the days when he had had a bad day on the court—the tennis court," writes former clerk Sidney Davis. "[S]uch occasions came to be known by me as 'Tennis the Menace' days."[37]

The Justice's tenacity and competiveness meant that he fought for every point. Hugo Black, Jr. recalls a match between his father and Treister, who was an outstanding tennis player in his own right. Having grown tired of the Justice's competitiveness, Treister hit a slice shot in such a manner that the only way it could be returned was for the Justice to run into the garden wall (the assumption being that Justice Black would let the shot go). The Justice chased the ball into the wall. Treister hit the shot again. Black again pursued it. An astonished Treister watched as Justice Black crashed into the wall again and again, forcing the young man to abandon the strategy before the Justice gravely injured himself.[38]

On the tennis court, even Justice Black's famous sense of courtliness toward women was eclipsed by his competitive nature. Former clerk John W. Vardaman, Jr. (October Term 1965) remembers playing mixed doubles with the Justice against Elizabeth Black (the Justice's second wife) and fellow law clerk Drayton Nabers, Jr. Concerned about the skill of his younger opponent, and the lack of skill evidenced by Vardaman, the Justice gave his law clerk the following advice: "[W]hen the ball comes to you, hit it to Elizabeth."[39]

Justice Black built his clay tennis court in the backyard of his Alexandria townhouse. The Justice selected a clay court because it was "the only acceptable style of court, in his view."[40] The court shared the large backyard with rose and vegetable gardens, a grape arbor, and a small fish pond, and a table and chairs were placed in the shade of cherry, black walnut, and pecan trees for post-tennis conversation and relaxation. For at least one law clerk, the most memorable part of the tennis matches was the fellowship that followed the marathon sessions. "It wasn't the tennis per se [which enriched the clerkship experience]," explains Vardaman. "It was the opportunity to go out to the house, play tennis, and then socialize with the Judge and Elizabeth. It turned the relationship from professional to personal." Vardaman remembers that tennis would be followed by wide-ranging conversations between the Justice and his clerks on such topics as Vietnam, politics, constitutional history, the Court, and famous personalities that the Judge had known. "He provided us with a fascinating view of history ... [I]t made for such a rich experience to sit with the Judge and have so much fun."[41]

The Justice and his law clerks maintained the tennis court, which Nabers nicknamed "the hottest court in the land." "Weather permitting, and sometimes when it didn't, the Judge would roll and line the tennis court," recalls Treister. "His displays of energy were overwhelming. I

Hugo Black, Jr., Josephine Black Pesaresi, and the surviving Black law clerks at a 2008 gathering at the Supreme Court.

gained the impression that I was of little real help in this technical task." Not surprisingly, the Justice would not bow to Mother Nature. "On occasion there was not much incentive [in rolling and lining the court] since it obviously was going to rain before the court could be readied, yet he insisted on the gamble. On these days he seemed to take rain as a personal insult."[42]

According to former law clerk Frank M. Wozencraft, Justice Black created a second, temporary tennis court during October Term 1949. Wozencraft writes that the tennis court was located in "the attic" of the Supreme Court, and that the Justice and his clerk played with tennis balls that Supreme Court Marshall Thomas E. Waggaman had "dyed orange in a fruitless effort to improve the visibility."[43] Thus, at least for one Term of court, Hugo Black presided over the highest court in the land.

Justice Black politely suffered through matches with those clerks whose tennis skills were suspect, although he did take precautions to minimize the loss of new tennis balls. Early into his clerkship, Vardaman was invited to play tennis with Justice Black. Vardaman had never played tennis, and he accepted the Justice's invitation with "considerable apprehension." Prior to the match, Vardaman decided to warm up by hitting some practice balls—and immediately missed the first ball lobbed to him. "The Judge did not miss the significance of this inauspicious beginning for he immediately announced that we would play with old balls that day lest one of my errant shots send a new ball over the fence into the neighboring yard."[44]

The frugal Justice Black was not deterred when a wild tennis shot resulted in a lost ball. Nabers writes of playing a doubles match with outgoing law clerk James L. North (October Term 1964) and the Blacks. During the practice session prior to the game, a tennis ball disappeared into the thick foliage that grew along a brick wall adjacent to the court. "Because the

ball was of an older vintage," explains Nabers, "it was, without much ado, replaced by another ball from the Judge's basket." After a three-hour match, the exhausted law clerks and Mrs. Black sat down to rest in the shade—only to notice that Justice Black had disappeared.

> Shortly thereafter Jim and I pushed ourselves from our chairs and began looking for the mysteriously absent Judge to see if we could be of any help. We found him in [an] Atlas-like posture with a ten foot aluminum ladder hoisted on his back. Since I smelt no fires, saw no treed cat, and knew that his peaches were not yet ripe, I was rather baffled. "I'd better get that ball down out of the vines before it slips my mind," he explained. At once I understood more clearly the work that would be expected of me this year.[45]

Perhaps aware of the Justice's thriftiness, former clerks used the holidays to make gifts of tennis balls to the Justice. In a letter to former law clerk Treister, Justice Black thanks him for the box of tennis balls—writing "you know where my heart is." The Justice muses in the letter that he does not know if he has ever played with "nylon and Dacron balls," but assures his former clerk that "I know I shall enjoy these."[46]

Even when faced with the most dismal of tennis partners, Justice Black remained undaunted. When Freeman confessed to the Justice that he did not know how to play tennis, the Justice accused him of being "modest" and demanded to see the evidence for himself. "It soon became clear that I was a disaster," recalls Freeman. "The following Friday, the Judge came into my office and said, 'George, I have made an appointment for you with the tennis pro at the Army Navy Country Club tomorrow at ten o'clock. Listen carefully and follow his instructions. This will take a number of Saturdays for you to come up to speed.'"[47] The Judge's prediction proved to be overly optimistic, as Freeman struggled to master the basics. "Thereafter I slowly started getting a few backhands, but my serves remained almost unattainable," writes Freeman. "Fortunately, in the Fall our work on cases began to pick up and I came to look forward to having to work in the office on Saturdays as a 'God Send.'"

A few clerks, however, were judged to be beyond the help of a good tennis pro (former law clerk Guido Calabresi (October Term 1968), for one, recalls Justice Black's "total distain—expressed as politely as possible—of playing tennis with so puny a player as I"[48]) and instead satisfied the Judge's competitive nature by serving as a fourth for bridge. "We would often play after the Friday conference, and the Judge was often tired because he was losing 5 to 4 on civil liberty cases," recounts Calabresi. "A good clerk would have loved to help him win [to cheer him up], but he was so competitive that he would not be happy if he knew that you were helping him win." So Calabresi came up with an ingenious solution that involved former law clerk Reich (October Term 1953).

> During my clerkship, we routinely played with Charlie Reich and another individual. What we decided to do—and I don't know if Charlie realized this—is to arrange so that Charlie would never be the Judge's partner. We told the Judge that we made this arrangement because Charlie loved the Judge too much, and was too emotional, to be the Justice's partner, but it was really because Charlie—who is brilliant—is too quixotic for bridge. Thus, by putting Charlie on the other team we made sure that the Judge would always win.[49]

If Justice Black became wise to his law clerks' affectionate duplicity, he never mentioned it to them.

Conclusion

Today it is common to refer to the Justices' Chambers as "nine little law firms." This description is particularly apt when it comes to the law clerks, whose role has evolved into that of a law-firm associate who is called upon to master complex areas of the law, counsel the senior partner/Justice as to the best method of resolving tricky legal issues, and draft complex legal documents—namely, judicial opinions.[50] While the modern Justices appear to have cordial relationships with their law clerks and to socialize with them outside of the Court, it is evident that the clerkship models of Oliver Wendell Holmes, Jr., Felix Frankfurter, and Hugo Black are relics of the past. Perhaps this is why the former Black law clerks speak so glowingly of their clerkship experiences—because they were the beneficiaries of a rare and fleeting opportunity to become the students and tennis partners of one of the most remarkable individuals to sit on the Supreme Court of the United States. As a testament to their lasting devotion, the remaining Black law clerks still hold regular reunions where they reminisce about their days with "the Judge" and raise a glass in his honor.

ENDNOTES

*Todd C. Peppers is the author of **Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk** (Stanford University Press, 2006), coauthor with Laura Trevvett Anderson of *Anatomy of an Execution: The Life and Death of Douglas Christopher Thomas* (Northeastern University Press, 2009), and the coeditor with Artemus Ward of the forthcoming book **Behind the Bench: Portraits of United States Supreme Court Law Clerks and Their Justices** (University of Virginia Press, spring 2011).

[1]Shelley Rolfe, "Justice Hugo Black: Two Former Law Clerks Recall One of the Court's Towering Figures," *Richmond Times-Dispatch*, sec. F, December 12, 1971.

[2]Author's interview with Hugo Black, Jr.

[3]Author's interview with Josephine Black Pesaresi.

[4]J. Vernon Patrick, "Confessions of the Law Clerks: Extracted for the 80th Birthday of Mr. Justice Black," Feb. 27, 1966.

[5]Letter from Justice Black to C. Samuel Daniels, October 18, 1960, Daniels File, Box 459, Personal Papers of Hugo Black, Library of Congress.

[6]Author's interview with Larry Hammond.

[7]Daniel J. Meador, **Mr. Justice Black and His Books** (Charlottesville: University of Virginia Press, 1974), 30.

[8]*Id.* at 31.

[9]Author's interview with Guido Calabresi.

[10]Letter from Melford O. "Buddy" Cleveland to Hugo Black, June 28, 1962, Cleveland File, Box 459, Personal Papers of Hugo Black.

[11]George C. Freeman, Jr., "Confessions of the Law Clerks: Extracted for the 80th Birthday of Mr. Justice Black," Feb. 27, 1966.

[12]*Id.*

[13]Letter from Hugo Black to Guido "Guy" Calebresi, November 4, 1960, Calabresi File, Box 459, Personal Papers of Hugo Black.

[14]Marx Leva, "Confessions of the Law Clerks: Extracted for the 80th Birthday of Mr. Justice Black," Feb. 27, 1966.

[15]*Id.*

[16]*Id.*

[17]Author's interview with Drayton Nabers, Jr.

[18]Freeman, *supra* note 11.

[19]Letter from Hugo Black to Presidential Appeal Board, January 26, 1968, Personal Papers of Hugo Black.

[20]Author's interview with Neal P. Rutledge.

[21]Author's interview with Pesaresi.

[22]Charles A. Reich, "A Passion for Justice," 26 *Tuoro Law Review* 393, 398 (2010).

[23]Letter from Melford O. Cleveland to Hugo Black, June 28, 1962, Cleveland File, Box 459, Personal Papers of Hugo Black.

[24]During October Term 1966, Justice Black hired Margaret J. Corcoran as one of his law

clerks. Corcoran was the daughter of renowned Washington insider Tommy "The Cork" Corcoran, and by all accounts she was a poor pick as a law clerk.

[25]Letter from Hugo Black to John K. McNulty, Feb. 14, 1971, McNulty File, Box 465, Personal Papers of Hugo Black.

[26]Letter from Hugo Black to Mrs. George Brusell, Jr., March 12, 1963, Reich File, Box 466, Personal Papers of Hugo Black.

[27]Letter from Nicholas Johnson to Hugo Black, January 23, 1970, Johnson File, Box 464, Personal Papers of Hugo Black.

[28]Letter from Charles F. Luce to Hugo Black, October 4, 1962, Luce File, Box 465, Personal Papers of Hugo Black.

[29]Letter from George C. Freeman, Jr. to Hugo Black, November 6, 1957, Freeman File, Box 462, Personal Papers of Hugo Black.

[30]Letter from Hugo Black to Sidney M. Davis, March 2, 1970, Davis File, Box 460, Personal Papers of Hugo Black.

[31]Roger K. Newman, **Hugo Black: A Biography** (Fordham University Press, 1997), 302.

[32]Letter from Hugo Black to C. Samuel Daniels, October 24, 1957, Daniels File, Box 459, Personal Papers of Hugo Black.

[33]Hugo Black, Jr., **My Father: A Remembrance** (New York: Random House, 1975), 110.

[34]Jerome A. Cooper, "Confessions of the Law Clerks: Extracted for the 80th Birthday of Mr. Justice Black," Feb. 27, 1966.

[35]George M. Treister, "Confessions of the Law Clerks: Extracted for the 80th Birthday of Mr. Justice Black," Feb. 27, 1966.

[36]Letter from Melford O. "Buddy" Cleveland to Hugo Black, June 28, 1962, Cleveland File, Box 459, Personal Papers of Hugo Black (emphasis in the original).

[37]Sidney M. Davis, "Confessions of the Law Clerks: Extracted for the 80th Birthday of Mr. Justice Black," Feb. 27, 1966.

[38]Author's interview with Hugo Black, Jr.

[39]Author's interview with John W. Vardaman, Jr.

[40]Daniel J. Meador, "Hugo Black and Thomas Jefferson," *The Virginia Quarterly Review* (Summer 2003): 459–68.

[41]Author's interview with Vardaman.

[42]Treister, "Confessions of the Law Clerks," Feb. 27, 1966.

[43]Frank M. Wozencraft, "Confessions of the Law Clerks: Extracted for the 80th Birthday of Mr. Justice Black," Feb. 27, 1966.

[44]John W. Vardaman, Jr., "Confessions of the Law Clerks: Extracted for the 80th Birthday of Mr. Justice Black," Feb. 27, 1966.

[45]Drayton Nabers, Jr., "Confessions of the Law Clerks: Extracted for the 80th Birthday of Mr. Justice Black," Feb. 27, 1966.

[46]Letter from Justice Hugo Black to George Treister, January 14, 1957, Box 467, Personal Papers of Hugo Black.

[47]Author's correspondence with George C. Freeman, Jr.

[48]Guido Calabresi, "Confessions of the Law Clerks: Extracted for the 80th Birthday of Mr. Justice Black," Feb. 27, 1966.

[49]Author's interview with Guido Calabresi.

[50]Professor Mark Tushnet was the first to suggest that the modern court could be thought of as individual law firms, with the Justices holding the position of senior partners and the law clerks as junior associates. See Mark Tushnet. "Thurgood Marshall and the Brethren," *Georgetown Law Journal* 80 (August): 2109, 2110–11.

The Supreme Court and Juvenile Justice

JUDITH S. KAYE*

For so many things I thank the Historical Society profoundly, but place right at the top of my list the delightful opportunity your invitation has given me to read the prior Annual Lectures—interesting, exciting, thoroughly intimidating—touching on the Court's history, its cases, its people, even its wives (the subject of Justice Ginsburg's 1999 lecture). Wholly apart from the Society's many initiatives to preserve the Court's history and increase public awareness of its contributions to our nation, the now nearly three dozen Annual Lectures alone offer an amazing insight into this great institution.

Justice Samuel Alito opened his 2008 lecture by explaining that he chose his subject—the origin of the baseball antitrust exemption—on a dark, cold December day, when thoughts of spring brought to mind thoughts of baseball. Hence he treated us to a session with our Great American Pastime, centered on the Court's 1922 decision, *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs.*[1]

I too made my choice of subject on a dark, cold December day, contemplating this magnificent spring afternoon, when my favorite sport—ice hockey—would soon be packing its bags for the season. (And wouldn't you know, the New York Rangers were out of it again!) My thoughts thus turned to other arenas and, not surprisingly, settled on the subject of children, a subject that dominated my many sleepless nights as Chief Judge of the State of New York, where—like state courts throughout the country—we have a staggeringly high docket of Family Court cases, touching every aspect of children's lives. Just now in New York (the subject of several scathing reports on our juvenile detention facilities) and in Pennsylvania (the site of a juvenile judge corruption scandal)—indeed, throughout the nation—attention is riveted on juveniles, children accused of what for adults might be criminal conduct. How do we balance today's vexing crime and incarceration statistics with modern developmental science regarding troubled young people? After considerable reflection, my initial plan to address children generally thus narrowed a bit to juveniles, due process,

and the Supreme Court's watershed decision of May 15, 1967, *In re Gault.*[2]

Most Americans know what "Miranda" stands for, even if they're not sure about the origin of custodial warnings. Every law student recognizes Dollree Mapp, John Terry, and Clarence Earl Gideon as important figures in the Supreme Court's criminal procedure cases of the 1960s. Outside the juvenile-justice community, however, how many Americans know the name Gerald Gault? Few, I suspect, are aware that the appeal on young Gerald's behalf struck at the heart of the assumed benevolence of our juvenile courts, agencies, and institutions, and in so doing shook the roots of the juvenile-justice system nationwide. Who is Gerald Gault, and what circumstances led him to the Supreme Court of the United States?

I. The Facts

On June 8, 1964, at about 10 a.m., Gerald Francis Gault and a friend, Ronald Lewis, were taken into custody by the Sheriff of Gila County, Arizona. At the time of his arrest, Gerald Gault was fifteen years old and serving six months' probation for being in the company of a boy who stole a wallet from a woman's purse. Three years later, in his opinion for a divided Court, Justice Abe Fortas described the events that followed. In reciting the facts and holding, I barely resist the temptation to read his words verbatim—the story as told is fascinating.

The June 8th arrest resulted from a telephone complaint by a neighbor of the boys, Mrs. Cook, following her receipt of a lewd or indecent phone call. In Justice Fortas's words, "the remarks or questions put to [Mrs. Cook] were of the irritatingly offensive, adolescent, sex variety."

When the sheriff picked up Gerald Gault at home and took him to the local Children's Detention Home, his mother and father were both at work. The sheriff left no notice that their son had been arrested and took no other steps to tell them. When his mother arrived home at about six o'clock, Gerald was not there. His older brother was sent to look for him at the trailer home of the Lewis family, and he learned that Gerald was in custody. Gerald's mother and brother went to the Detention Home, where the deputy probation officer, Charles Flagg, who was also superintendent of the Detention Home, told Mrs. Gault "why Jerry was there," and that a hearing would be held in Juvenile Court at three o'clock the following day.

The next day, Officer Flagg filed a petition, supported by his affidavit, without serving the Gaults. Indeed, they did not see the petition until a habeas corpus hearing two months later. The petition recited only that Gerald was a delinquent minor under the age of eighteen in need of the protection of the court, and it sought a hearing and order regarding his care and custody. There was no hint of what he supposedly had done wrong.

Also on June 9, Gerald, his mother, his older brother, and Probation Officers Flagg and Henderson appeared before Juvenile Court Judge Robert McGhee in chambers. Gerald's father was not present, as he was at work out of the city. Nor was Mrs. Cook, the complainant, at the hearing. No one was sworn, and no record of any sort was made. Information about the June 9 hearing, as well as a June 15 hearing, was drawn entirely from the testimony of the Juvenile Court Judge, Mr. and Mrs. Gault, and Officer Flagg at the habeas corpus proceeding conducted two months later.

It appears that, at the June 9 hearing, Judge McGhee had questioned Gerald about the telephone call, but there was disagreement as to just what he had said that day. His mother later testified that Gerald said he only dialed Mrs. Cook's number and handed the telephone to his friend, Ronald; Officer Flagg testified that Gerald had admitted making the lewd remarks, but Judge McGhee himself recalled that Gerald "admitted making one of these [lewd] statements." Whatever Gerald's actual testimony

on June 9, Judge McGhee ended the hearing by saying that he would think about it.

Remarkably, Gerald was taken back to the Detention Home, rather than being sent home with his family, and was detained until June 11 or 12, when he was driven home. The record does not disclose why he was kept in the Detention Home or why he was released. On the day of his release, Mrs. Gault received a note signed by Officer Flagg, saying "Mrs. Gault: Judge McGhee has set Monday June 15, 1964 at 11:00 A.M. as the date and time for further Hearings on Gerald's delinquency." Twice in his writing—once in the facts, once in the analysis—Justice Fortas observed that the officer's note was written on plain paper, not official letterhead.

June 15 Hearing

On June 15, Gerald, his parents, Ronald Lewis and his father, and Officers Flagg and Henderson appeared before Judge McGhee. Witnesses at the later habeas corpus proceeding again differed in their recollections of what Gerald's testimony had been at the June 15 hearing. According to Judge McGhee, while "there was some admission of some of the lewd statements, he didn't admit any of the more serious lewd statements." Again, Mrs. Cook did not attend. Mrs. Gault's request that Mrs. Cook be present was denied. Imagine: throughout this entire course of events, the only person who actually spoke to Mrs. Cook was Officer Flagg—just once, over the telephone.

Also at the June 15 hearing, the probation officer filed a "referral" report, again not disclosed to Gerald or his parents. The report listed the charge as "Lewd Phone Calls." At the conclusion of the hearing, Judge McGhee committed fifteen-year-old Gerald as a juvenile delinquent to the State Industrial School "for the period of his minority [that is, until 21—nearly six years], unless sooner discharged by due process of law." Arizona law did not permit an appeal in juvenile cases. A petition for writ of habeas corpus was filed with the Supreme Court of Arizona and referred to the Superior Court for hearing.

At the Superior Court hearing on the petition, Judge McGhee was vigorously cross-examined as to the basis for his actions. He testified that he had taken into account the fact that Gerald was on probation. Asked under what section of the Code he had found the boy delinquent, Judge McGhee answered that Gerald came within the Arizona delinquency statute providing that a "delinquent child" includes one "who has violated a law of the state or an ordinance or regulation of a political subdivision thereof"—here specifically, a section of the Arizona Criminal Code providing that a person is guilty of a misdemeanor who "in the presence or hearing of any woman or child . . . uses vulgar, abusive or obscene language." Quite a crime! The prescribed penalty, for an adult, was $5 to $50, or imprisonment for not more than two months. For Gerald, a juvenile, the prescribed penalty turned out to be roughly six years.

Judge McGhee stated that he acted as well under a provision of Arizona's delinquency statute defining a "delinquent child" as one who is "habitually involved in immoral matters." As to the basis for his conclusion that Gerald was habitually involved in immoral matters, Judge McGhee testified that, two years earlier, Gerald had been the subject of a "referral" for stealing a baseball glove from another boy and lying to the Police Department. He recalled there had been no hearing, and no accusation relating to this incident, due to lack of material foundation. The Judge also testified that Gerald had admitted making other nuisance phone calls in the past that were "silly calls, or funny calls, or something like that." The Superior Court dismissed the writ of habeas corpus, and the Arizona supreme court affirmed.

Supreme Court Appeal

Appellants' jurisdictional statement and brief to the Supreme Court of the United States

urged the Court to hold the Juvenile Code of Arizona invalid because, contrary to the Due Process Clause of the Fourteenth Amendment, the Arizona statute allowed a juvenile to be taken from the custody of his parents and committed to a state institution in which basic due-process rights were denied—namely, the right to notice of charges, to counsel, to confrontation and cross-examination; the right against self-incrimination; the right to a transcript of the proceedings; and the right to appellate review.

Arizona's Answer

The State of Arizona answered that it would be the first to agree that a juvenile is entitled to due process of law in juvenile court, but argued that the essential question posed is "what constitutes due process in such a proceeding."[3] The state urged that one must be mindful of the nature of the juvenile proceeding and its devout attempt to avoid an adversarial approach to juvenile problems. Arizona maintained that in the spirit of the traditional juvenile court, its Juvenile Code was framed precisely to protect a child of tender years and provide the child due process of law.

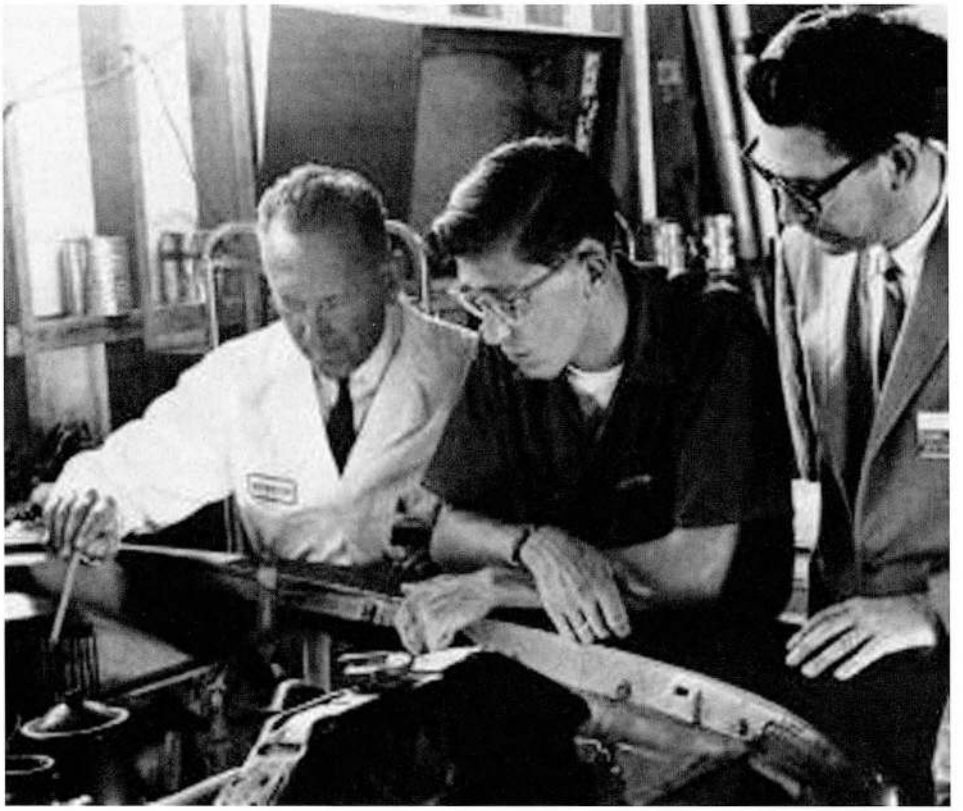
Forty-six years later, it is difficult to understand the legal mind-set that could subject a child and his parents to the state's utterly unfettered discretion—benevolent or not—resulting in Gerald's case in a penalty of nearly six years for commission of a minor offense while on probation for an accessorial, nonviolent act. Indeed, in affirming the Superior Court, the Arizona supreme court pointed out that Arizona's Juvenile Code would even have allowed Judge McGhee to commit Gerald until age twenty-one without *any* further showing of delinquency during his six-month probation period if he felt that served Gerald's welfare and the interests of the state.[4]

In preparing this lecture, I came to understand that, for most of its history leading up to *Gault*, the Supreme Court was not often asked to consider the constitutional rights of children themselves. Rather, children formed the backdrop for the Court's consideration of competing claims regarding their welfare brought by opposing entities such as Congress, the states, parents, and schools. There were, for example, child labor law cases pitting the federal government against the states, and challenges to state authority requiring that schoolchildren recite the Pledge of Allegiance, or prohibiting teaching foreign languages in elementary school, or mandating public education for children not meeting one of several explicit exemptions.

Thus, through the mid-twentieth century, when children appeared at all in Supreme Court cases, more often than not they tended to be the context for adjudication of the rights of others, not their own. Until 1962, the Court had not passed on the legality of code procedures or police practices respecting juveniles. *Gault* and its immediate predecessors put the rights of juveniles center stage. Moreover, it was a time in Supreme Court history of unprecedented procedural reform of federal and state criminal-justice systems. Debate raged about incorporation of the Bill of Rights into the Fourteenth Amendment, about the scope of that amendment's due-process protections, and about the standard of review of due-process challenges to state action. While there was wide agreement that the words "due process of law" applied to the adjudication of juveniles—even the Arizona supreme court agreed that Gerald Gault had a right to due process—what did that encompass?

Answering the Question

In *Gallegos v. Colorado*,[5] just five years before *Gault*, in setting aside a youngster's confession, Justice William Douglas answered that the only guide to the meaning of due process was the "totality of circumstances," including the youth of the petitioner, long detention, failure to send for his parents, failure immediately to bring him before a juvenile court judge, and failure to see to it that he



Gerald Gault, whose delinquency case rose to the Supreme Court in 1967 and became the basis for a landmark decision, is shown here being trained in automotive work.

had the advice of a lawyer or friend.[6] *Gallegos* was followed by *Kent v. United States*,[7] a District of Columbia juvenile proceeding in which Justice Fortas speculated in his writing for the five-Justice majority that juveniles faced with incarceration yet unprotected by the constitutional guarantees afforded adults might "receive the worst of both worlds."[8] A procedural error with respect to waiver of jurisdiction, however, required remand and prevented the Court's giving its full attention to the issue.

The stage thus was set for *In re Gault*—the Supreme Court's first full-fledged foray into juvenile justice, and for Justice Fortas in particular. He not only had tilled the soil in his *Kent* opinion but also as a lawyer some years earlier had successfully represented both Monte Durham in the D.C. Circuit's overturn of the McNaghten Rule (thus allowing for evidence of the science regarding defendant's mental state) and Clarence Earl Gideon in the Supreme Court's monumental right-to-counsel case.[9]

II. The Court's Decision

On May 15, 1967, the Court announced its decision in favor of the Gaults. Justice Fortas wrote for the Court—passionately and at length—joined by Chief Justice Earl Warren and Justices Douglas, Tom Clark, and William Brennan. Justices Hugo Black and Byron White filed separate concurrences. Justice John Marshall Harlan concurred in part and dissented in part. Justice Potter Stewart was the sole dissenter; he would have dismissed the appeal.

I was struck, reading Justice Stephen Breyer's 2009 Annual Lecture on *Dred Scott*,[10]

by his reference to the communicative power of a single word in the Court's extensive writings in that case. The word Justice Breyer highlighted from *Dred Scott* was "calm," as used by Justice Benjamin Curtis in his dissent from the now-infamous Taney writing concluding that "a negro, whose ancestors were imported into the country and sold as slaves" is not entitled to sue as a citizen in the courts of the United States.[11] As Justice Curtis wrote, "a calm comparison" of the words of the Declaration of Independence with the individual acts and opinions of its authors would have shown the error, the utter repugnancy, of the majority's conclusion.[12]

For me, the analogy is to Justice Fortas's description of the Arizona proceedings as a "kangaroo court"[13] —in essence, an out-and-out mockery of justice, the ultimate condemnation of a judicial proceeding. Even more poignantly, he wrote: "The condition of being a boy does not justify a kangaroo court." I think of the high drama of those words, and I think of Justice Stewart's contrasting characterization, in dissent, of *Gault* as an "obscure"[14] Arizona case that was better left to the state's benevolent discretion. Could there be a starker contrast—one side believing that in this case Gerald Gault had received all the process that was due him, the other labeling the proceeding a downright mockery of justice. That contrast, for me, captures the essence of the tension, the dilemma, that persists to this very day: precisely what is encompassed by "due process" in the adjudication of juveniles? Where, and how, and by whom, are the lines to be drawn?

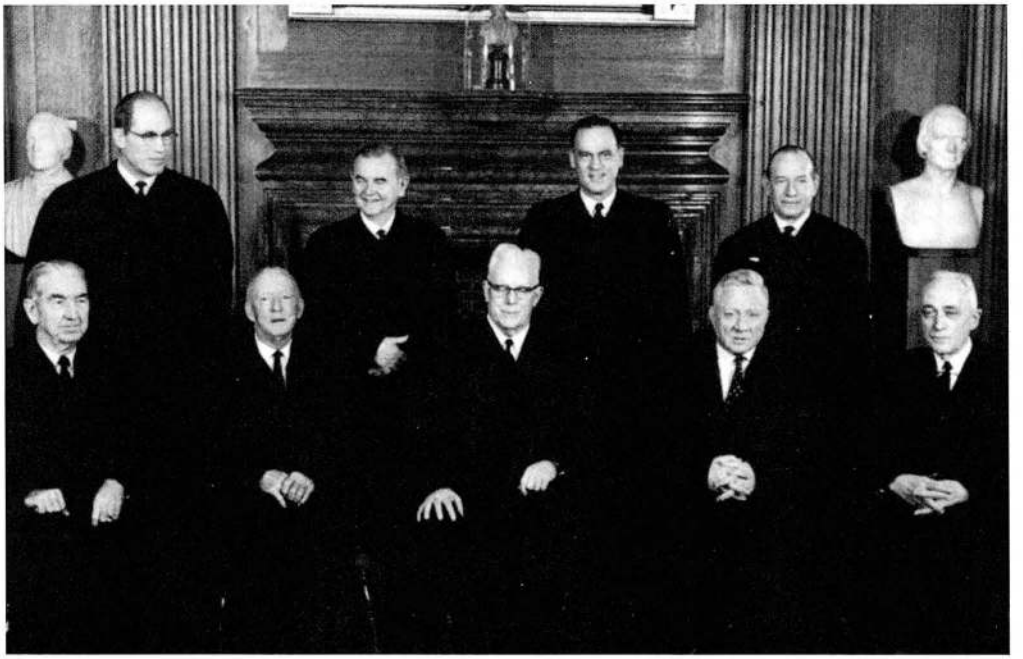
Opening Thoughts

Justice Fortas began his opinion for the Court with the observation that, from the inception of specialized juvenile courts in 1899, jurisdictions had insisted upon wide differences in the procedural rights accorded adults and juveniles, and he recounted at length the history underlying those differences. The early reformers were appalled about the application of adult procedures and penalties to children, who could be given long prison sentences and mixed in jails with hardened criminals. They were convinced that society's role was not simply to ascertain whether the child was guilty or innocent but rather how the child could be treated and rehabilitated, that juvenile court procedures—from apprehension through institutionalization—should be clinical, not punitive. They sought to achieve these ends, without "constitutional grief," by insisting that juvenile court proceedings were not adversarial because the state proceeded in *parens patriae*—in Justice Fortas's view a murky phrase, its historic credentials of dubious relevance, with no presence whatever in the history of criminal jurisprudence.[15]

Civil Proceedings

The reformers, moreover, had argued for the right of the state, as *parens patriae,* to deny a child procedural rights, asserting that, unlike an adult, a child had a right "not to liberty, but to custody."[16] Thus, when a child was delinquent, the state could intervene—not to deprive the child of any rights, because the child had none, but to provide the "custody" to which the child was entitled. For this reason, juvenile proceedings were considered civil, not criminal, and not subject to requirements normally constraining a state seeking to deprive a person of liberty.

Noting that the highest motives and most enlightened impulses motivated this peculiar system for juveniles—a system unknown to our law in any comparable context—Justice Fortas pronounced its constitutional and theoretical underpinnings debatable. However benevolently motivated, unbridled discretion was frequently a poor substitute for principle and procedure. Refusing to succumb to either sentiment or folklore, Justice Fortas declined to credit the claim that juveniles benefited from special procedures applicable to them that offset their denial of normal due process. In his view, due-process standards,



Pictured are the members of the Court who heard the *Gault* case. Justice Abe Fortas (standing at right) wrote the majority opinion, which recognized the rights of juveniles but was careful not to extend to them all the rights of adult defendants.

intelligently administered, would not compel the states to abandon or displace the substantive benefits of the juvenile process.

Justice Fortas next used statistics to dispute the argument that the absence of constitutional protections reduced crime, or that the juvenile system, functioning free of constitutional inhibitions as it had largely done, was effective to reduce crime or rehabilitate offenders. He saw no reason why, consistent with due process, a state could not continue to provide and improve the confidentiality of records of police contacts and court action relating to juveniles where appropriate. He also cited recent studies suggesting that the appearance and actuality of fairness, impartiality, and orderliness—in short, the essentials of due process—would prove the more therapeutic practice for court-involved youth. Indeed, one study had concluded that where stern discipline followed procedural laxness, the contrast could harm a child, who might feel deceived or enticed. Without appropriate due process, even the juvenile who had violated the law might feel unfairly treated and therefore resist rehabilitation.

After reviewing the relevant statistics, Justice Fortas turned to the reality underlying Gerald Gault's appeal. A boy is charged with misconduct and committed to an institution where he may be restrained for years. "It is of no constitutional consequence—and of limited practical meaning—that the institution . . . is called an Industrial School" when it is in actuality "an institution of confinement in which the child is incarcerated."[17] The child's world becomes "'a building with whitewashed walls, regimented routine and institutional hours. . . .' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees and 'delinquents' confined with him for anything from waywardness to rape and homicide."[18] Given this reality, Justice Fortas continued, "it would be extraordinary if our Constitution did not require the procedural

regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution," he declared, in words that have resonated through the decades, "the condition of being a boy does not justify a kangaroo court."[19]

Justice Fortas further observed that where, as here, the juvenile has a home and a family, the judge should have made a careful inquiry as to the possibility that the boy could be disciplined and dealt with by them, despite previous transgressions. Instead, the judge here focused on points that were little different from those relevant to determining any violation of a penal statute. Indeed, "the essential difference between Gerald's case and a normal criminal case [was] that safeguards available to adults were discarded in Gerald's case[, yet] the summary procedure and long commitment was possible because Gerald was 15 years of age instead of over 18."[20]

Defined Rights

Despite the pitch of his writing, Justice Fortas fashioned a holding that recognized for juveniles only some, notably not all, of the rights of adult defendants. He concluded, first, that due process of law required notice of the proceeding equal to that deemed constitutionally adequate for adults. Second, in proceedings that might result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to counsel. Third, the constitutional privilege against self-incrimination was as applicable to juveniles as to adults. Fourth, absent a valid confession, a court cannot determine delinquency or order commitment to a state institution in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with the law and constitutional requirements.[21] Although the Court declined to hold that juveniles were entitled to a transcript of proceedings and to an appeal, Justice Fortas noted that failure to provide an appeal, to record the proceedings, to make findings, or to state the grounds for a juvenile court's conclusion could burden the machinery for habeas corpus, saddle the reviewing court with the need for record reconstruction, and impose upon the juvenile judge the unseemly duty of testifying under cross-examination concerning the hearings before him.[22] The message to the states is clear: Do it anyway.

All in all, Justice Fortas's writing was what the Pennsylvania supreme court later called "a sweeping rationale and a carefully tailored holding."[23] Significantly, Justice Fortas did not explicitly join the debate regarding the extent to which appellants' due-process claims were cognizable against the state of Arizona by virtue of the Fourteenth Amendment's incorporation of the Bill of Rights, though his opinion for the Court appears to adopt "selective incorporation."

At the other extreme, Justice Stewart, in dissenting, criticized the Court for using this "obscure" Arizona case to impose criminal trial restrictions upon thousands of juvenile codes and juvenile courts throughout the nation.[24] Justice Stewart saw the decision as both unsound as a matter of constitutional law and unwise as a matter of judicial policy. The Arizona courts had found that Gerald Gault's parents knew of their right to counsel and right to subpoena, cross-examine, and confront witnesses; that they knew the possible consequences of a finding of delinquency; and that Mrs. Gault knew the exact nature of the charge against Gerald from the day he was taken to the detention home.

Defined Danger

There was thus, in Justice Stewart's view, no need in this case for the Court to decide any of those issues, and—even more important—a distinct danger that the Court's decision equating juveniles with adults would simply invite a long step backward into the horrors of the nineteenth century. He gave one pointed example in text—a twelve-year-old boy charged with murder was hanged to death, after adult criminal

court proceedings that were in the view of the New Jersey courts "all very constitutional"—and he footnoted a second example, where a death sentence was upheld for a ten-year-old convicted on his own confession of killing his bedfellow.[25]

Plainly, like Justice Fortas, Justice Stewart was passionate about the subject, but he would have left well enough alone, in the capable and caring hands of the state juvenile courts, fearing that this was just a terribly wrong step for the Supreme Court to take.

A powerful, portentous difference—but hardly the end of the debate among the *Gault* Justices. Would that there were only two sides to every story! The writings of Justices Harlan and Black centered on the third side to the *Gault* story and the fourth: proper interpretation of the Due Process Clause of the Fourteenth Amendment as applied to the states.

In Justice Harlan's view, concurring and dissenting, the majority had both gone too far and fallen short in assessing the procedural requirements of the Fourteenth Amendment, and perhaps worst of all, it had failed to identify with any certainty the standards to be applied.[26] Justice Harlan suggested three criteria to measure procedural due-process requirements in juvenile court proceedings. First, to assure fundamental fairness, no more restrictions should be imposed than are imperative; second, the restrictions imposed should preserve, as far as possible, the essential elements of the state's purpose; and finally, the restrictions chosen should permit later orderly selection of additional protections that might ultimately prove necessary. In this way, the Court could guarantee the fundamental fairness of the proceeding, yet permit the states to continue development of an effective response to juvenile crime.[27]

A Middle Ground

Measured by the standard of fundamental fairness, Justice Harlan proposed a sort of middle ground, underscoring that there were compelling reasons to defer imposition of additional requirements. The Court could avoid imposing unnecessary restrictions and escape dependence upon classifications that could prove to be illusory. Moreover, he observed that both juvenile crime and juvenile courts were under earnest study throughout the country—as continues to this day, I might add—and he feared that by imposing rigid procedural requirements, the Court could inadvertently discourage state efforts to find better solutions and thus hamper enlightened development of the juvenile court systems. Provision of notice, counsel, and a record, in his view, would permit orderly efforts to determine later whether more satisfactory classifications could be devised and, if so, whether the Fourteenth Amendment required additional procedural safeguards. In that Gerald and his parents were not provided adequate notice, they were not advised of their right to counsel, and no record was maintained of the proceedings, Justice Harlan concluded that Gerald had been deprived of his liberty without due process of law.

Justice Black's View

Justice Black essentially agreed with Justice Stewart's dissent that the Court should not have passed on the issues presented because they were not squarely presented, but he also felt obliged to weigh in on "due process." He joined in the majority view that juvenile courts had failed their purpose. The Arizona law had denied the Gaults and their son the right to notice, right to counsel, right against self-incrimination, and right to confront witnesses. They were entitled to all of these rights, not because fairness required them, but because those rights were specifically granted them by the Fifth and Sixth Amendments, made applicable to the states through the Fourteenth Amendment.[28]

Justice Black's words principally were directed to what he viewed as Justice Harlan's misreading of the Due Process Clause to allow

the Court "'to determine what forms of procedural protection are necessary to guarantee the fundamental fairness of juvenile proceedings' 'in a fashion consistent with the "traditions and conscience of our people."'" He saw nothing in its words or history to permit such interpretation, and argued that "'fair distillations of relevant judicial history'" were no substitute for the words and history of the clause itself. Justice Black maintained that the phrase "due process of law" had through the years evolved as the successor in purpose and meaning to the words "law of the land" in Magna Carta, and that nothing done since the Magna Carta intimated "that the Due Process Clause gives courts power to fashion laws in order to meet new conditions, or to fit the 'decencies' of changed conditions, or to keep their consciences from being shocked by legislation, state or federal."[29]

Freedom in this nation, Justice Black warned, would be far less secure the very moment that judges could determine which safeguards "'should' or 'should not be imposed' according to their notions of what constitutional provisions are consistent with the 'traditions and conscience of our people.'" Judges with such power, even while professing "'to proceed with restraint,' will be above the Constitution, with power to write it, not merely to interpret it"—"the only power constitutionally committed to judges."[30]

Having previously voiced his support for "full incorporation" of the Bill of Rights through the Fourteenth Amendment, Justice Black noted that the *Gault* case concerned Bill of Rights amendments; that the "procedure" power Justice Harlan had claimed for the Court related "solely to Bill of Rights safeguards"; and that Justice Harlan had also claimed for the Court "a supreme power to fashion new Bill of Rights safeguards according to the Court's notions of what fits tradition and conscience." Because Justice Black did not believe that the Constitution vested "such power in judges, either in the Due Process Clause or anywhere else," his vote to invalidate the Arizona law was not on the ground that it was "unfair," but rather on the ground that it violated the Fifth and Sixth Amendments, imposed on the states by the Fourteenth Amendment.[31]

And there it is, five views of the law, each expressed with intensity and authority—in all, eighty-one power-packed pages of the **U.S. Reports**.

I close this discussion of the *Gault* writings with a personal recollection from my own treasured years at the New York State Court of Appeals. In instances where a case fractured our court and generated several separate writings, often I would ask myself: In finally, absolutely and definitively resolving this case before us, hasn't the court now given good solid support for every possible conclusion? In *Gault*, I believe the answer clearly is yes.

III. Gault's Trail in the Supreme Court

No surprise, then, that the decision has had an interesting life in the Supreme Court since May 15, 1967. And I use the word "interesting" advisedly, having been told by a friend that "interesting" is most appropriate to describe a bad blind date. In short, it's a transparent attempt to avoid a frank answer.

Though *Gault* is a landmark of juvenile justice, it has in fact shown up in a variety of Supreme Court cases—even in the 1969 affirmance of Timothy Leary's conviction for drug trafficking.[32] Just a moment's diversion to touch on those cases before returning to the appeals involving juveniles.

Plainly, throughout the ensuing decades *Gault* has had a role in the Supreme Court's articulation of the contours of constitutional procedural protections in criminal cases, underscoring that due process and fair trial are flexible concepts that require identifying and accommodating the interests of individuals and society.

Outside the world of procedural rights in criminal cases, the Court has invoked *Gault* in shaping rights relative to summary court-martials, prison discipline, civil commitments

of mental patients and the like—a category roughly definable as "quasi-criminal" cases—like the juvenile delinquency proceeding in *Gault* itself, in some respects akin to criminal cases, in others not. Here the Court has drawn significant distinctions, depending on the nature of the proceeding, exemplified in 1984, in *Allen v. Illinois*, by Justice William Rehnquist's narrowing of *Gault*'s majestic declaration that "our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty."[33] At issue in *Allen* was the Illinois Sexually Dangerous Persons Act, which could result in indeterminate commitment to a maximum-security psychiatric institution. In concluding that the loss of liberty does not equate a proceeding with a criminal prosecution for purposes of the Sixth Amendment, the Court carved out as determinative the state's interest in treating sexually dangerous persons under its *parens patriae* as well as police powers, which of course went the other way in *Gault*.

That brings to mind another majestic declaration from Justice Fortas's pen that has undergone refinement by the Supreme Court: "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[34] From among the several noncriminal Supreme Court decisions citing *Gault*, I am drawn especially to the abortion and birth-control cases citing Fortas's powerful words in attempting to define the extent of state power to regulate the conduct of minors not constitutionally regulable when committed by adults. As Justice Lewis F. Powell observed in 1979 in *Bellotti v. Baird*,[35] upholding a Massachusetts statute requiring parental consent for underage abortions, those words are only the beginning of the very difficult analysis that must be made, necessarily recognizing the peculiar vulnerability of children, their inability to make critical decisions in an informed, mature manner, and the important parental role in child-rearing. Thus, although children may be protected by the same constitutional guarantees against governmental deprivations as are adults, the Court since *Gault* has made clear that the state is entitled to adjust its legal system to account for children's vulnerability and their needs for concern, sympathy, and parental attention. A delicate balance indeed.

Scope of Due Process

And that perception returns us to the subject of the day: precisely what is encompassed by procedural "due process" in adjudicative proceedings involving juveniles, who may face removal from home and years of commitment to a state institution? What has been *Gault*'s trail, first in later Supreme Court decisions addressing that question, and then finally—and briefly—in the world beyond the Supreme Court?

Wouldn't you know, the very next juvenile due-process case to arrive at the Supreme Court—some have suggested an even more significant case, in that it signaled how the Court would actually apply *Gault*—came from my own former court, the New York State Court of Appeals: *In re Winship*,[36] in 1970. I have to admit that, as a judge, it seemed to me that once *certiorari* was granted, the judges of the court under review should themselves have the option to present the appeal to the Supreme Court. (Just joking.) Take my word for it: no one on Earth has researched more exhaustively or feels more strongly for affirmance than the majority writer, no one more strongly for reversal than the dissenter. Talk about passionate—they would do a phenomenal job!

Reasonable Doubt

In *Winship*, it was the state court dissenter, Chief Judge Stanley Fuld, who ultimately prevailed in the Supreme Court, extending incorporation into juvenile proceedings of additional federal procedural rights not explicitly found in the Bill of Rights, the reasonable-doubt standard—and by the way, in so doing, making the reasonable-doubt standard part of

the Due Process Clause guarantees for adults as well. In Justice Brennan's stirring words for the majority, "We made clear [in *Gault*] that civil labels and good intentions [to save the child] do not themselves obviate the need for criminal due process safeguards in juvenile courts, for '[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.'"[37]

Justices Harlan and Black—one concurring, one dissenting—continued their debate regarding the proper scope of the Due Process Clause. While reemphasizing that there was no automatic confluence between criminal due process and juvenile due process, Justice Harlan in this instance agreed with the majority that the reasonable-doubt standard was an expression of fundamental procedural fairness, merely requiring juvenile court judges to be more confident in their belief that the youth did the act charged.[38] Justice Black, rejecting the reasonable-doubt standard, reiterated his view that the explicit language of the Bill of Rights, and not any individual judge's notions of "fairness," should define due process of law.[39]

And a new voice—Chief Justice Warren Burger, joined by Justice Stewart—dissented from what he saw as "the further straitjacketing of an already overly restricted" juvenile justice system. He lamented (as Justice Stewart had done in *Gault*) that each step the Supreme Court took toward adding rights was turning the clock back to the nineteenth century, pre–juvenile court era. In his words, "What the juvenile court system needs is not more but less of the trappings of legal procedure and judicial formalism; the juvenile court system requires breathing room and flexibility in order to survive, if it can survive the repeated assaults from the Court." Like Justice Fortas in *Gault*, Chief Justice Burger also drew from the animal kingdom to express his fear that, by adding greater judicial formalism to juvenile court proceedings, the Supreme Court was "'burn[ing] down the stable to get rid of the mice.'"[40] Oh, my!

The Ensuing Decades

So how in the ensuing decades have the "kangaroo" and the "mice" fared in the Supreme Court of the United States? Are juvenile adjudication proceedings more like criminal cases, or not? And what is the standard for determining the process due: totality of the circumstances, fundamental fairness, strict incorporation, selective incorporation of the Bill of Rights, or something else? Which has prevailed—*Gault*'s "sweeping rationale," or its "carefully tailored holding," or the informality, flexibility and breathing room of the beneficent juvenile courts? Each camp, you recall, had ardent advocates in *Gault*.

There was not long to wait for an answer. In *McKeiver v. Pennsylvania*,[41] in 1971, the Court drew the line at the right to jury trials in juvenile adjudications, fixing the standard of review as Justice Harlan's "fundamental fairness" and limiting the concept of fundamental fairness to rights associated with the fact-finding process. Juveniles, Justice Harry Blackmun wrote, are entitled to some but by no means all of the constitutional rights accorded to adult criminal defendants; trial by jury is not a necessary component of accurate fact-finding, and requiring jury trials would effectively remake juvenile proceedings into full-blown adversarial contests. In denying the enlargement of due process to include the right to trial by jury, the Court's majority underscored the need to maintain what it called the intimacy of the juvenile proceeding, expressing reluctance to curtail the opportunity for states to experiment further and seek in new and different ways the elusive answers to the problems of the young, through fairness, concern, sympathy, and paternal attention. Only Justice Douglas, joined by Justices Black and Marshall, dissented, seeing acceptance of the juvenile as a person entitled to the same protection as an adult—including the right of trial

by jury—as "the true beginning of the rehabilitative process."[42]

I highlight just a couple of the Court's subsequent decisions touching on juveniles.

Again in *Breed v. Jones*,[43] in 1975, the Court weighed in on the side of the benevolent, "intimate"[44] state juvenile-justice experiment, noting that although the system had fallen short of the high expectations of its sponsors, it still offered broad social benefits that can survive constitutional scrutiny. Here the Court spoke unanimously in extending to juveniles the protection against double jeopardy in transfer proceedings to the adult court system. The Court was not persuaded that requiring transfer proceedings to be held prior to adjudicatory hearings would unduly strain juvenile court resources, yet on the other hand the added protection would promote fundamental fairness. *Breed* was the first case where the Court reached a unanimous conclusion in striking the "due process" balance, and the last to add to the balance specific constitutional protections for the juvenile.

A Fateful Day

For me, the ambivalence regarding troubled young people is well illustrated by two decisions handed down the very same day—June 20, 1979. In one, *Fare v. Michael C.*, the Court reversed the California supreme court, concluding that a sixteen-year-old knowingly waived his constitutional rights—including the right to counsel and right against self-incrimination—when he asked to see his probation officer,[45] provoking Justice Thurgood Marshall's ringing invocation in his dissent of *Gault*'s admonitions regarding confessions by minors.[46] But in the second case decided that day, *Parham v. JR*, the Court reversed a three-judge District Court for the Middle District of Georgia, concluding that Georgia procedures for admitting a child for treatment to a state mental hospital on parental consent were constitutionally insufficient to satisfy the child's substantial liberty interest in not being unnecessarily confined.[47] Significantly, both lower courts learned on June 20, 1979 that they had gotten it wrong—the first erred too much on the side of the child, the second too much on the side of the state. A fine balance indeed!

In 1984, in *Schall v. Martin*,[48] the balance tipped even further away from *Gault*'s "sweeping rationale" and toward the broad discretion of state juvenile courts, the Court through Justice Rehnquist grounding its conclusion on what Justice Fortas two decades earlier had disparaged as the "murky" soil of *parens patriae*.[49]

In *Schall*, a facial challenge to provisions of New York's Family Court Act, the issue was pretrial detention for a class of youngsters based on a finding of serious risk that they might commit what would be a crime before the return date. Both the district court and the Second Circuit had held in favor of the juveniles, because the statute was administered in such a way that detention served as punishment imposed without proof of guilt established in accordance with the requisite constitutional standard. The six-Justice Supreme Court majority, however, concluded that preventive detention serves a legitimate state interest, and that (recognizing the state's superior *parens patriae* interest) the procedural safeguards were sufficient to authorize the detention of at least some juveniles charged with crimes. As Justice Rehnquist wrote, "[t]he harm suffered by the victim of crime is not dependent on the age of the perpetrator."[50] On the other side, championed with equal fervor, are the countervailing considerations articulated by Justice Marshall—including bodily restraint of the juvenile for presumptively innocent conduct, stigmatization, and the feeling of young detainees that society at large views them as hostile and "irremediably 'delinquent'"—all tipping toward a more rigorous constitutionally guaranteed liberty interest for the juveniles.[51]

I conclude these few highlights from Supreme Court history invoking *Gault* with the Court's 1993 decision in *Reno v. Flores*,[52] involving a facial challenge by a class of

Gault shakes hands with Norman Dorsen, the lawyer who argued his case. Dorsen later became general counsel and then president of the American Civil Liberties Union, arguing or appearing as amicus in countless cases before the Supreme Court, including *Gideon v. Wainwright*, the Pentagon Papers case and the Nixon Tapes case. Gault was his very first argument in the Supreme Court.

unaccompanied alien juveniles held in custody by what was then the Immigration and Naturalization Service, pending deportation proceedings, pitting any liberty interest arising from custodial detention on the one hand against the state interest in preserving and promoting the welfare of children on the other. Here again, the balance tipped in favor of the state. In joining Justice Antonin Scalia's opinion upholding institutional custody, Justice Sandra Day O'Connor meticulously traced the path of decisions involving children generally, from *Gault* in 1967 to *Santosky v. Kramer*[53] in 1982, concluding that, where a juvenile has no responsible adult available, where the government does not intend punishment, and where the conditions of custody are decent and humane, there is no constitutional violation.[54] That conclusion evoked the dissent of Justice John Paul Stevens, joined by Justice Blackmun: "If the Government is going to detain juveniles in order to protect their welfare, due process requires that it demonstrate, *on an individual basis*, that detention in fact serves that interest."[55]

The world changes. The Court changes. Technology changes—the Geralds of today no doubt texting, tweeting, twittering (hopefully not sexting) instead of telephoning. And the struggle to strike a balance endures.

IV. *Gault*'s Legacy

Often courts are left wondering how things actually turned out for the flesh-and-blood human beings before them. In Gerald's case, we are fortunate enough to know. He spent his career in the Army and throughout his life has

Gault spent his entire career in the Army. In 2007, he described the impact of his case: "Then I had no rights. But now my children, the children of the community, children of the world have rights."

remained an upstanding member of the community. Asked about the impact of his appeal, he responded: "Then I had no rights. But now my children, the children of the community, children of the world have rights. They have rights to an attorney, and to be able to question their accuser. . . . I feel it was well worth the fight. And I think my folks do, too. I really do."[56]

Interesting. What do you think, I wonder? Fortunately, I am in a position today, in this exalted Chamber, where I do not have to answer any questions. And by the way, neither do you. But I do believe that *Gault* has been a good subject for the Annual Lecture of the Supreme Court Historical Society. Here's why.

First, of course, the case unquestionably marks an important chapter in the history of the Supreme Court of the United States. Although *In re Gault*, unlike *Gideon v. Wainwright*,[57] never inspired a popular film starring the likes of Henry Fonda, the case has generated a great deal of activity and commentary.[58]

But second, the subject of juvenile justice commands extraordinary public interest today. In New York alone, the Department of Justice has recently concluded a two-year investigation by documenting brutal instances in our juvenile detention facilities, where many nonviolent first-time young offenders are housed, threatening to sue the state if the shortcomings are not addressed.[59] Our Governor's Task Force has its juvenile-justice recommendations;[60] our chief judge has his.[61] Front-page stories across the nation have addressed a whole host of issues involving adolescents—from zero-tolerance school-discipline policies,[62] to family cycles of self-destruction, to heavy racial disparities,[63] to the devastating impact of the current economic crisis on already troubled teenagers. Efforts are under way to find innovative policy and practice models, a response both to the growth of punitive reactions by the states (including transfers to the adult criminal-justice system) and to the inarguable statistical correlation

between juvenile incarceration and, not greater rehabilitation, but rather, higher recidivism rates.

Contemporaneously, but certainly not coincidentally, scientific research on adolescent development—the neurological, psychological, and behavioral differences between children and adults—has burgeoned.[64] Surely the field has come a long way since 1967, when the Court's focus was less on the unique vulnerability of adolescents and more on the procedural protections of our Constitution. The literature on adolescent brain development and related issues is voluminous today. Most recently, in *Graham v. Florida*,[65] the Court's rejection of life without parole as a violation of the Eighth Amendment, Justice Anthony Kennedy drew from those sources, referencing in particular juveniles' impulsiveness, difficulty thinking in terms of long-term benefits, and reluctance to trust adults. Where will this new science take the Court next? Though we now have proved scientifically what we have always known instinctively about kids, still we struggle to strike a good balance between their rights and their wrongs.

Clearly juvenile justice remains a critical subject today, the best idea by far being delinquency prevention—early intervention, social services to keep kids in their schools and with their families, education rather than incarceration, an idea we all can be part of. It's the children's future to be sure—but it's our future, our nation's future too.

And finally, yes, I do agree with Gerald Gault that it was worth the court battle. A full century after the Fourteenth Amendment was adopted, the Supreme Court in *Gault* for the first time recognized the constitutional status—the "personhood"—of juveniles, and for the first time put a spotlight on what always must be special about our specialized juvenile-justice system, given both its subjects and its objects. That is a powerful message.

Of only one thing am I certain: that the absolute last word on the enormously complex and consequential subject of juvenile justice—as opposed to the absolute last word of this lecture—has yet to be spoken.

Epilogue

Gerald Gault's counsel at the Supreme Court, Norman Dorsen (a former law clerk to Justice Harlan), later became general counsel and then president of the American Civil Liberties Union (ACLU), arguing or appearing as amicus in countless cases before the Supreme Court, including *Gideon v. Wainwright*,[66] the *Pentagon Papers* case,[67] and the *Nixon Tapes* case.[68] *Gault* was his very first argument in this Chamber. Dorsen is currently Counselor to the President of New York University and the Stokes Professor of Law at NYU School of Law, where he has taught since 1961 (coincidentally, when I was a student there). President Bill Clinton awarded Dorsen the Eleanor Roosevelt Medal for contributions to human rights in 2000, and in 2007 the Association of American Law Schools presented him with its triennial award for "lifetime contributions to the law and to legal education."[69]

Amelia Dietrich Lewis was an Arizona cooperating attorney with the ACLU who represented the Gaults at the state habeas corpus proceeding and in the Arizona supreme court. Her representation had focused chiefly on parental custody rights, but with the entry of the ACLU it shifted to the due-process rights of juveniles. A pioneer among women lawyers, Ms. Lewis was admitted to the New York Bar in the 1920s and worked in the New York City juvenile justice system until 1957, when she moved to Arizona. When she sat for the Arizona bar examination, only one other woman was taking the exam—Sandra Day O'Connor. Ms. Lewis received an award from the American Bar Association for her work on *Gault* and practiced law until she was eighty-nine years of age. She died two years later, in 1994.[70]

Frank A. Parks, an assistant attorney general in Arizona, represented the state on the brief and in oral argument. Parks had been admitted to the Arizona bar the prior year. He

left to join a private litigation firm in 1967, the same year the Supreme Court decided *Gault*, and developed a specialty in medical-malpractice defense litigation. He cofounded the Sanders and Parks law firm in 1973 and served as its president until 1984. He was the recipient of the 1999 Arizona Medical Association Distinguished Service Award. Mr. Parks is now retired.[71]

Following the Supreme Court victory, Gerald Gault was released from confinement, having been detained for close to three years. A year later, he joined the Army and spent his career there, rising to the rank of sergeant. According to Professor Dorsen, Gault apparently has a spotless record and is an upstanding member of his community.[72]

Later interviewed about his landmark case, Gault reminisced: "Lord, here I am, I didn't do anything wrong. I'm in court being tried, and now I'm being sentenced until I'm 21 years old. I didn't know what to think. Looking back, I was really dazed about it ... The first time being pulled away from Momma and Daddy—it kind of put me in shock ... I seen my folks later that evening at the ... juvenile hall ... Mom and daddy talked to me. They told me exactly what they were doing, and why they were doing it and how they were going about it ... I figured right then, hey, if my folks are willing to fight like that and get that worked up about it, I should too."[73]

When the "dean of boys" at Fort Grant State Industrial School called to tell him that he had won his case and would be released, and that there were reporters waiting to interview him, Gerald asked why reporters wanted to talk to him. The "dean" said, "Your case went all the way to the Supreme Court. Juvenile cases don't do that." Gerald replied, "Wow! I guess one did ..."[74]

ENDNOTES

*Supreme Court Historical Society Annual Lecture, June 7, 2010. The author thanks Marjorie McCoy, former Deputy Clerk of the Court of Appeals of the State of New York, for partnering with her in this endeavor. From the first moment to the last, their constant exchange of ideas, comments, and drafts added immeasurably to the joy of preparing and presenting this lecture. Additionally, she thanks Shari Graham, a valued colleague at the firm Skadden, Arps, Slate, Meagher & Flom, for her assistance in preparing the lecture for publication.

[1]*Federal Baseball Club of Baltimore v. Nat'l League of Professional Baseball Clubs*, 259 U.S. 200 (1922).

[2]*In re Gault*, 387 U.S. 1 (1967).

[3]Brief for the State of Arizona, *In re Gault*, 387 U.S. 1 (1967) at 8.

[4]*In re Gault*, 99 Ariz. 181, 193 (1965).

[5]*Gallegos v. Colorado*, 370 U.S. 49 (1962).

[6]*Gallegos*, 370 U.S. at 55. As an aside, I note that in my years as a judge on New York State's high court, I came to appreciate that the amorphous, highly deferential "totality of the circumstances" test most often—but obviously not always—translated into "conviction affirmed."

[7]*Kent v. U.S.*, 383 U.S. 541 (1966).

[8]*Kent,* 383 U.S. at 556.

[9]*Durham v. United States*, 214 F.2d 862 (1954); *Gideon v. Wainwright*, 372 U.S. 335 (1963). See also Christopher P. Manfredi, **The Supreme Court and Juvenile Justice** (Lawrence: University Press of Kansas, 1998), pp. 58, 74.

[10]Stephen G. Breyer, "A Look Back at the *Dred Scott* Decision," 35 *Journal of Supreme Court History* 110 (2010).

[11]*Dred Scott v. Sandford*, 60 U.S. 393, 403 (1857).

[12]*Dred Scott*, 60 U.S. at 574.

[13]*In re Gault*, 387 U.S. at 28.

[14]*In re Gault*, 387 U.S. at 78.

[15]*In re Gault*, 387 U.S. at 16.

[16]*In re Gault*, 387 U.S. at 17.

[17]*In re Gault*, 387 U.S. at 27. As a matter of fact, I might add, this Industrial School later did become an Arizona state prison for male convicts.

[18]*In re Gault*, 387 U.S. at 27.

[19]*In re Gault*, 387 U.S. at 27–28.
[20]*In re Gault*, 387 U.S. at 29.
[21]The right against self-incrimination and the rights to confrontation and cross-examination provoked Justice White's concurrence, on grounds that the record was inadequate and those holdings unnecessary. *In re Gault*, 387 U.S. at 64 (White, J., concurring).
[22]*In re Gault*, 387 U.S. at 58.
[23]*In re Terry*, 438 Pa. 339, 345 (1970).
[24]*In re Gault*, 387 U.S. at 78.
[25]In re Gault, 387 U.S. at 80. Indeed, the Ohio Association of Juvenile Court Judges (joined in by the Kansas Association of Probate Juvenile Judges) and *amicus curiae* argued in support of affirmance.
[26]*In re Gault*, 387 U.S. at 65.
[27]*In re Gault*, 387 U.S. at 71–72.
[28]*In re Gault*, 387 U.S. at 59, 60–62.
[29]*In re Gault*, 387 U.S. at 62.
[30]*In re Gault*, 387 U.S. at 63.
[31]*In re Gault*, 387 U.S. at 63–64.
[32]*Leary v. United States*, 395 U.S. 6, 54 (1969) (Stewart, J., concurring).
[33]*Allen v. Illinois*, 478 U.S. 364, 372 (1984).
[34]*In re Gault*, 387 U.S. at 13.
[35]*Bellotti v. Baird*, 443 U.S. 622 (1979).
[36]*In re Winship*, 397 U.S. 358 (1970).
[37]*In re Winship*, 397 U.S. at 365–66.
[38]*In re Winship*, 397 U.S. at 375 (Harlan, J., concurring).
[39]*In re Winship*, 397 U.S. at 377 (Black, J., dissenting).
[40]*In re Winship*, 397 U.S. at 376.
[41]*McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).
[42]*McKeiver*, 403 U.S. at 566 (Douglas, J., dissenting).
[43]*Breed v. Jones*, 421 U.S. 519 (1975).
[44]*McKeiver*, 403 U.S. at 545.
[45]*Fare v. Michael C.*, 442 U.S. 707 (1979).
[46]*Fare*, 442 U.S. at 728.
[47]*Parham v. J.R.*, 442 U.S. 584 (1979).
[48]*Schall v. Martin*, 467 U.S. 253 (1984). See also Janet Fink, "Determining the Future Child: Actors on the Juvenile Court Stage," in F. Hartmann, ed., **From Children to Citizens, The Role of the Juvenile Court** II, 271 (Springer-Verlag 1987), describing *Schall v. Martin* as the Court's "most significant retrenchment from Gault." The entire chapter—Chapter 15—is a terrific reference.
[49]*In re Gault*, 387 U.S. at 16.
[50]*Schall*, 467 U.S. at 264–65.
[51]*Schall*, 467 U.S. at 291 (Marshall, J., dissenting).
[52]*Reno v. Flores*, 507 U.S. 292 (1993).
[53]*Santosky v. Kramer*, 455 U.S. 745 (1982).
[54]*Flores*, 507 U.S. at 315-319 (O'Connor, J., concurring).
[55]*Flores*, 507 U.S. at 343 (Stevens, J., dissenting) (emphasis in original).
[56]National Juvenile Defender Center, "Gault at 40," Interview with Gerald Gault, available at http://www.njdc.info/gaultat40/gault_interview.php (last accessed March 1, 2011).
[57]Gideon v. Wainwright, 372 U.S. 335 (1963).
[58]"The Promise of *In re Gault*: Promoting and Protecting the Right to Counsel in Juvenile Court," 60 *Rutgers L. Rev.*, an entire issue of stimulating articles commemorating *Gault*'s fortieth anniversary, exemplifies the bountiful commentary the case continues to generate.
[59]Letter, Loretta King, Acting Assistant Attorney General, to the Honorable David A. Paterson, Governor of N.Y., Aug. 14, 2009, Department of Justice, available at http://www.justice.gov/crt/about/spl/documents/NY_juvenile_facilities_findlet_08-14-2009.pdf (last visited Feb. 12, 2011) (detailing Department of Justice's investigation of the Lansing Residential Center, Louis Gossett, Jr. Residential Center, Tryon Residential Center, and Tryon Girls Center).
[60]Governor David Paterson's Task Force on Transforming Juvenile Justice, "Charting a New Course: A Blueprint for Transforming Juvenile Justice in New York State," Dec. 14, 2009, Vera Institute of Justice, available at http://www.vera.org/paterson-task-force-juvenile-justic-report (last visited Feb. 12, 2011).

[61]Jonathan Lippman, "Reforms Proposed for Juvenile Justice," *New York Law Journal*, May 3, 2010, at 11.

[62]American Bar Association Juvenile Justice Committee, "Zero Tolerance Policy," Feb. 2001, American Bar Association Juvenile Justice Policies, available at http://www.abanet.org/crimjust/juvjus/zerotolreport.html (last visited Feb. 12, 2011).

[63]USHRN Working Group on Juvenile Justice, "Response to the Periodic Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination," Feb. 2008, available at http://www.juvenilejusticepanel.org/resource/items/U/S/USHRNWGroupJJUSFailureICERD08.pdf (last visited Feb. 12, 2011).

[64]The mounting literature on juvenile crime and punishment, particularly the scientific data, is simply breathtaking. Professor Jeffrey Fagan's eighty endnotes accompanying his excellent article, "The Contradictions of Juvenile Crime and Punishment," in 139 Daedalus, *Journal of the American Academy of Arts and Sciences* 3: 43, 57–61 (summer 2010), offer a good sample of the ongoing research.

[65]*Graham v. Florida*, 130 S.Ct. 2011 (2010). As Mark Hansen wrote recently, Justice Kennedy said "no recent data provided reason to reconsider the Roper decision and its observations about juveniles. If anything, he said, the evidence has become stronger and more conclusive in the five years since. Scientists say research demonstrates what every parent of a teenager probably knows instinctively: that even though adolescents may be capable of thinking like adults, they are mentally and emotionally still children." Mark Hansen, "What's the Matter with Kids Today: A Revolution in Thinking about Children's Minds Is Sparking Change in Juvenile Justice," *ABA Journal* 50, 52 (July 2010). The author speculates regarding ramifications of the new research for juvenile justice generally.

[66]*Gideon v. Wainwright*, 372 U.S. 335 (1963).

[67]*New York Times Co. v. United States*, 403 U.S. 713 (1971).

[68]*United States v. Nixon*, 418 U.S. 683 (1974).

[69]Norman Dorsen, biographical sketch, *NYU Law*, available at https://its.law. nyu.edu/facultyprofiles/profile.cfm?section = bio& personID = 19885 (last visited Feb. 12, 2011).

[70]Wolfgang Saxon, "Amelia Lewis, 91, Victor in Case That Changed Juvenile Justice," *New York Times*, Nov. 19, 1994, available at http://www.nytimes.com/1994/11/19/obituaries/amelia-lewis-91-victor-in-case-that-changed-juvenile-justice.html (last visited Feb. 12, 2011).

[71]Frank A. Parks, Attorney Profile, Sanders & Parks P.C., available at http://www.sandersandparks.com/Bio/FrankParks.asp (last visited Feb. 12, 2011).

[72]Norman Dorsen, "Reflections on In re Gault," 60 *Rutgers L. Rev.* 1, 10 (Fall 2007).

[73]National Juvenile Defender Center, "Gault at 40," Interview with Gerald Gault, available at http://www.njdc.info/gaultat40/gault_interview.php (last accessed March 1, 2011).

[74]*Id.*

Contributors

Douglas E. Abrams is an associate professor of law at the University of Missouri.

Robert M. Jarvis is a law professor at Nova Southeastern University.

Judith S. Kaye has been of counsel at Skadden Arps since 2009. She served as Chief Judge of the New York Court of Appeals for fifteen years until her retirement in 2008, longer than any other Chief Judge in New York's history.

Marc Lendler is a professor of American government at Smith College.

Todd C. Peppers is the Henry H. and Trudye H. Fowler Professor of Public Affairs at Roanoke College and a lecturer in law at Washington and Lee University School of Law.

Illustrations

All illustrations are from the Library of Congress except as listed below:

Page 5 (top), Courtesy of Bauersfeld, Burton, Hendricks & Vanderhoof, LLC
Pages 50 and 55, Courtesy of Todd C. Peppers
Page 51, Courtesy of Charles Reich
Page 58, Courtesy of John Black
Pages 68, 75, and 76, Courtesy of Patricia Puritz and the National Juvenile Detention Center

Cover image: Hugo L. Black and his wife, Josephine, shortly after his appointment to the Supreme Court. Library of Congress.

Errata

Ross E. Davies has issued a correction to his article, "The Judicial and Ancient Game: James Wilson, John Marshall Harlan, and the Beginnings of Golf at the Supreme Court," published in the July 2010 (vol. 35, no. 2) issue of the *Journal.* Specifically, he takes issue with this sentence on page 129: "I have found no evidence that anyone else who was on the Court when Harlan returned from Murray Bay with his clubs for the 1897 Term had ever played the game—not Stephen J. Field (1863–1897), Horace Gray (1882–1902), Melville W. Fuller (1888–1910), David J. Brewer (1890–1910), Henry B. Brown (1891–1906), George Shiras, Jr. (1892–1903), Edward D. White (1894–1921), or Rufus W. Peckham (1896–1909). Moreover, of Harlan's eight 1897 colleagues, only a couple—Chief Justice Fuller and Justice Brewer—would eventually pick it up."

Ross writes: I was wrong. Justice Gray did take up golf. He said so in an August 19, 1900, letter to Chief Justice Fuller. Writing from his house in Nahant, Massachusetts, Gray reported that he was "[r]eading and thinking and making notes about Marshall [Gray was preparing a speech about Chief Justice John Marshall that he would deliver at a bar association event in Richmond, Virginia in February 1901], with healthful interspersing of driving and golfing and otherwise enjoying the healthful open air. . . ." Horace Gray to Melville Fuller, August 19, 1900, in Box 5, Papers of Melville W. Fuller, Library of Congress, Manuscript Division. Wider and more careful reading would have brought this fact to my attention. Gray's golfing was reported, for example, in the June 1904 issue of the *Proceedings of the American Academy of Arts and Sciences*: "He loved to be out of doors, went often into the woods fishing and shooting; notwithstanding his great size he rode on horseback until middle life, and later took up the game of golf." Francis C. Lowell, "Horace Gray," 39 *Proceedings of the American Academy of Arts and Sciences* 627, 637 (June 1904).