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Isaiah and His Young Disciples: Justice Brandeis and His Law Clerks

TODD C. PEPPERS*

Introduction

It cannot be said that Louis Dembitz Brandeis has suffered from a lack of scholarly attention. Brandeis is considered to be one of the most influential Justices in the history of the U.S. Supreme Court, and scores of books and law-review articles have been written about Brandeis the lawyer, the political insider, the Zionist, and the Justice. A case can be made, however, that history has not fully recognized the important and lasting contribution that Brandeis made to the development of the institutional rules and norms surrounding the Supreme Court law clerk, an oversight that this essay seeks to rectify.

Brandeis was not the first Supreme Court Justice to hire law clerks. Upon his elevation to the Supreme Court in 1882, Justice Horace Gray started the practice of hiring recent Harvard Law School graduates to serve as his legal assistants.¹ Justice Gray instituted the tradition of hiring law clerks while serving as the Chief Justice of the Massachusetts supreme judicial court, and one of the young Harvard Law School men Gray hired was Brandeis himself. Nor was Brandeis responsible for much of the early mythology surrounding the relationship between Justice and law clerk. It was the “Magnificent Yankee,” Justice Oliver Wendell

Holmes, Jr., who summoned a generation of Harvard Law School graduates to serve as private secretaries, social companions, surrogate sons, and caretakers to “God’s grandfather.”² It would be Brandeis’ clerkship model, however, that led to the professionalization of the clerkship institution. From the hiring of his first law clerk, Brandeis demanded that each law clerk have a strong work ethic, possess superior legal writing and research skills, and abide by the fiduciary relationship between Justice and law clerk. While future Justices have differed from Brandeis in the type of substantive job duties assigned to their law clerks, the

expectations about the duties of confidentiality and loyalty as well as the skills to be possessed by law clerks remain unchanged. This essay will explore the Brandeis clerkship model, arguing that Brandeis' rules for and expectations of his law clerks not only were unique for their time, but also forever shaped the clerkship models adopted by future generations of Justices.

Before turning to Justice Brandeis, a brief aside about one of the primary sources used in this essay. In the early 1980s, author and attorney Lewis J. Paper had the rare opportunity to interview twelve surviving Brandeis law clerks as he prepared to write his book on the late Justice.³ His interview notes offer a fascinating peek into the world of the Brandeis clerkship and contain many details and tidbits never before discussed in any book or article. Mr. Paper donated his interview notes to the Special Collections Department at Harvard Law School, and he has graciously allowed me to quote from them in this article.

The Selection of Justice Brandeis' Law Clerks

The selection of law clerks by the Justices on the White, Taft, and Hughes courts varied dramatically from the selection practices of the modern Court. While today's Justices pore through hundreds of applications, often assisted by a screening committee, in the early years of the clerkship institution law students at Harvard, Yale, and Columbia found themselves tapped by faculty members to work at the Supreme Court for such Justices as Holmes, William Howard Taft, and Harlan Fiske Stone. Upon arriving at the Supreme Court, Brandeis began following Holmes' practice of having Harvard Law School professor Felix Frankfurter select his clerks. In a December 1, 1916, letter to Frankfurter, Brandeis wrote that Frankfurter's selection of Calvert Magruder as his first law clerk strengthened the Justice's confidence in Frankfurter,⁴ and two years later Brandeis stated that Frankfurter

now had unlimited discretion to select his clerks—while adding that “[w]ealth, ancestry, and marriage, of course, create presumptions; but they may be overcome.”⁵ Brandeis later supplemented his list of non-binding hiring preferences, telling Frankfurter that “other things being equal, it is always preferable to take some one whom there is reason to believe will become a law teacher.”⁶

The twenty-one men selected by Frankfurter had a few common characteristics. Of course, they were all Harvard Law School men. Eighteen of the twenty-one clerks were members of the *Harvard Law Review*, many had worked—either during their third year of law school or during a subsequent year of graduate school—as Professor Frankfurter's research assistants, and a few had prior clerkship experience with such appellate court judges as Learned Hand and Julian Mack.⁷ Another characteristic that many of the law clerks shared was religion. Brandeis biographer Philippa Strum states that the “overwhelming majority” of Brandeis' clerks in the 1920s and 1930s were Jewish. Strum writes that Brandeis' selection practices stemmed from the fact that (1) he preferred clerks who had the potential to be law professors, and (2) he believed that ““a great service could be done generally to American law and to the Jews by placing desirable ones in the law school faculties,”” given the fact that ““in the Jew [there is] a certain potential spirituality and sense of public service which can be more easily aroused and directed, than at present is discernible in American non-Jews.””⁸

Typically, Brandeis never interviewed—or even met with—potential law clerks prior to their selection by Frankfurter. At least one law clerk found Brandeis' habit of not interviewing prospective law clerks to be odd. Adrian S. Fisher, who clerked during October Term 1938, asked then-Professor Frankfurter “if I could meet the Justice before, just to make sure he didn't think he was getting a pig in the poke or anything, but Felix looked at me like that was a real strange request, and

so I never met Brandeis before my clerkship began.”⁹ David Riesman (October Term 1935) was one of the few clerks to meet with Brandeis prior to his clerkship.¹⁰ After traveling to Washington, D.C. and meeting with Justices Brandeis, Benjamin Cardozo, and Holmes in 1934, Riesman returned to Cambridge and immediately contacted Frankfurter. “I wrote to Felix that I would much prefer to clerk for Cardozo instead of someone who reminds me of my stern father [to wit, Brandeis]. Felix Frankfurter rejected this in a very stern letter to me. He said it was precisely for those reasons that it would be good for me.”¹¹ The idea of somebody declining an offer to clerk for Justice Brandeis is a bit astonishing, and, as discussed below, Riesman’s entire clerkship experience can be viewed as the exception to the norm.

Perhaps because the law clerks did not interview prior to their clerkship, they found their first encounter with the legendary jurist to be daunting. Former law clerk H. Thomas Austern (October Term 1930) describes Brandeis as a combination of “Jesus Christ and a Hebrew prophet,” confessing that “in the first few months I was scared to death of him.”¹² Austern’s description is echoed by Fisher, who recalls that his first impression was that Justice Brandeis “seemed to be a combination of Isaiah the prophet and Abraham Lincoln. A raw-boned characteristic. He had a rough-hewn look, [and] a grave, almost diffident courtesy.”¹³ Even former law clerk Dean Acheson (October Terms 1919 and 1920), writing his memoirs after a career on the international stage, remains struck by Brandeis’ appearance:

The Justice was an arresting figure; his head of Lincolnian cast and grandeur, the same boldness and ruggedness of features, the same untamed hair, the eyes of infinite depth under bushy eyebrows, which in moments of emotion seemed to jut out. As he grew older, he carried a



Dean Acheson, who clerked for Brandeis in the 1919 and 1920 Terms, went on to serve as Secretary of State under Harry S Truman. “Please remember that your function is to correct my errors, not to introduce errors of your own,” Brandeis once admonished him.

prophetic, if not intimidating aura. It was not in jest that later law clerks referred to him as Isaiah.¹⁴

Given such a description of Justice Brandeis, it is hardly surprising to learn that it would take months before the clerks felt entirely comfortable in the presence of such a biblical figure.

The law clerks received little, if any, advice or instruction from Frankfurter. “He [Frankfurter] did say you were expected to work very hard, meaning mornings, afternoons and evenings, and you would have to cut down on your social life,” recalls Fisher. “[It] was also implied that you should not be married. Nothing explicit, but it seemed clear.”¹⁵ Through Frankfurter, Brandeis issued warnings and assigned homework to his future law clerks. Brandeis instructed Frankfurter

to inform incoming law clerk Willard Hurst (October Term 1936) “that he will be expected to be familiar with all my opinions by Sept. 15th and that the pass mark is 99 1/4 percent. Also say that he should otherwise familiarize himself with the tools of the trade,” lamenting the fact that an earlier law clerk did not fully appreciate the scope of Shepard’s Citations.¹⁶ Brandeis subsequently added to the reading list, writing later that “[w]ould it not be well to have Hurst read, before the Autumn, ‘Business of the USSC,’¹⁷ and Charles Warren’s ‘S.C. in U.S. History’¹⁸ so as to get in the background.”¹⁹

The Brandeis Clerkship Model

The Brandeis law clerks reported for duty at Justice and Mrs. Brandeis’ private residence—originally at their Stoneleigh Court apartment on Connecticut Avenue, and later at a second apartment building at 2205 California Street Northwest. At both locations, Justice Brandeis used a smaller, second apartment to house offices for himself and his clerk. Regarding the California Street apartment, Brandeis biographer Strum writes: “Willard Hurst found the office apartment overflowing with papers and books. The bathtub was filled with folders of clippings and references to bits of irrelevant information Brandeis came across while doing research, information that interested him as well as data that might provide useful some day. . . . The kitchenette was piled with manuscripts and corrected proofs.”²⁰

Even after the construction of the Supreme Court building, Justice Brandeis and his law clerk worked at the apartment.²¹ In 1920, Congress authorized the Justices to employ both a law clerk and a stenographic assistant, but Brandeis did not hire either a secretary or a second law clerk. “Why Brandeis dispensed with secretarial aid was never explained, but I surmise that he was loath to share the confidences of the office more widely than the absolute minimum,” writes former law clerk Paul A. Freund (October Term 1932).

“That, and perhaps his general avoidance of belongings.”²² Justice Brandeis’ official Court staff was rounded out by a series of aging messengers.

The law clerks typically reported to duty in late September, often overlapping with the outgoing clerk for several days of “breaking in.” The clerks’ primary job duties were assisting in the preparation of opinions and related legal research. Brandeis alone began the process by drafting the statement of facts. “This was a chore that Brandeis took upon himself,” comments Freund. “[I]t seemed to me . . . that this was a token, a mark of his intellectual scruple, that before either he or his law clerk should set to work expounding the law, the facts of the case should have been thoroughly assimilated, understood and made part of himself as an earnest that his work would be grounded in an appreciation of the true nature of the controversy before him.”²³ The statement of facts in the cases assigned to Brandeis can be found in his personal papers, written in his distinctive hand on lined paper “with a large black fountain pen that might have been a relic of the Iron Age.”²⁴

Brandeis did not always produce a complete first draft. “He would most frequently write out a few pages, have them printed, revise them, add a few more pages, and the whole printed again, and so forth.”²⁵ At some point the printed pages would be handed off to the clerk for comment and revision. Brandeis did not want either himself or his clerk to treat the other’s work as gospel. Writes Acheson:

My instructions regarding his work were to look with suspicion on every statement of fact until it was proved from the record of the case, and on every statement of law until I had exhausted the authorities. If additional points should be made, I was to develop them thoroughly. Sometimes my work took the form of a revision of his; sometimes of a memorandum of suggestions to him.²⁶



Justice Brandeis was photographed with his wife, Alice, in their carriage in 1921. Clerks reported for duty at the Brandeis home and rarely accompanied the Justice to the Court.

Conversely, Acheson adds, Brandeis might use portions of his clerk's original draft opinion or instead begin anew.²⁷ "On occasion, some sentences in the law clerk's memoranda would find their way into the opinion," writes Freund. "[M]ore often they suffered the fate of the Justice's own first drafts—radical revision, transposition, strengthening and polishing."²⁸ Freund's description of this laborious drafting process is reflected in the Louis Brandeis Papers at Harvard Law School, where multiple opinion drafts—some covered with the Justice's handwritten edits, others with typed insertions of questions or proposed changes by the law clerks—can be found in a single case file.

It is apparent that Brandeis considered his clerk a partner—although not an equal one²⁹—in a joint task. This partnership extended through the opinion-drafting process. Freund writes that both Justice Brandeis and his law

clerk received copies of revised opinions from the Supreme Court printing office.³⁰ In describing the final editing process, Acheson comments that "[a] touching part of our relationship was the Justice's insistence that nothing should go out unless we were *both* satisfied with the product. His patience and generosity were inexhaustible."³¹ Hurst recalled that Justice Brandeis himself referred to the relationship between law clerk and Justice as a partnership, albeit with the law clerk in a more junior role. "[Y]ou were expected to have the responsibilities of a partner. He expected me to pull no punches and read everything with a critical eye. He didn't want any petitions for rehearing because of any error on his part. I was not to stand in awe of him but was to tell him frankly what I thought."³²

Of course, this "partnership" placed tremendous stress upon the clerk. "The illusion was carefully fostered that the Justice was

relying, indeed depending, on the criticism and collaboration of his law clerk,” writes Freund. “How could one fail to miss the moral implications of responsibility?”³³ These implications were forever seared into the collective memory of the Brandeis law clerks as the result of a blunder committed by the young Acheson, who served as Brandeis’ law clerk during October Terms 1919 and 1920. After discovering that there were two incorrect legal cites in an opinion he was preparing to announce from the Bench, Brandeis returned to his home office and sternly announced to Acheson: “Please remember that your function is to correct my errors, not to introduce errors of your own.”³⁴ James M. Landis (October Term 1925) received a similar lecture from Brandeis after failing to correct some erroneous legal citations: “Sonny, [said Brandeis] we are in this together. You must never assume that I know everything or that I am even correct in what I may say. That is why you are here.”³⁵ William A. Sutherland (October Terms 1917 and 1918), who himself suffered the embarrassment of letting an incorrect legal cite remain in a draft opinion, recalls that Brandeis was not angry when his young clerk committed such an error, “but he made you feel that you certainly didn’t want to have something like that happen again.”³⁶

Law clerks did not prepare Bench memoranda, and, if they did review the occasional cert. petition, it was at the start of the Term when the pace was slow. Writes Acheson:

In two respects my work with Justice Brandeis was different from the current work of many law clerks with their chiefs. This is sometimes closely concerned with the function of deciding. The Justice wanted no help or suggestions in making up his mind. So I had nothing to do with petitions for certiorari. . . . [T]he Justice was inflexible in holding that the duty of decision must be performed by him unaided. . . . He was equally

emphatic in refusing to permit what many of the Justices today require, a bench memorandum or précis of the case from their law clerks to give them the gist of the matter before the argument. To Justice Brandeis . . . this was a profanation of advocacy. He owed it to counsel—who he always hoped . . . would be advocates also—to present them with a judicial mind unscratched by the scribblings of clerks.³⁷

Freund suggests another, more practical reason for why the clerks did not discuss the cases with Brandeis prior to oral argument: “[H]e would consider it an unnecessary drain on resources.”³⁸

A few additional topics were never discussed between law clerk and Justice: the results of the Court’s weekly conferences and Brandeis’ opinions of other Justices. Unlike future Justices, Brandeis did not come back from the Supreme Court’s conferences and unburden himself to his law clerks. His docket book was kept locked, only to be burned at the end of the Term by the Marshal of the Court.³⁹ Nor did he complain or gossip about the other Justices,⁴⁰ perhaps due to what one clerk perceived as the Justice’s “adulation for the dignity of the Supreme Court.”⁴¹

The other main responsibility for a Brandeis clerk was legal research. Not surprisingly, the inventor of “the Brandeis brief” gave his clerks daunting research assignments. “[W]e worked like hell for Brandeis checking cases and doing research,” recalls Sutherland.⁴² While Justice Brandeis expected his clerks to provide “the most exacting, professional, and imaginative search of the legal authorities,” Acheson states that successful *legal* research “was more often than not the beginning, not the end, of our research.”⁴³ Thus, Acheson’s research time was spent equally in the Supreme Court Library and in the Library of Congress, collecting statistics and historical data “with civil servants whose only

recompense for hours of patient help to me was to see an uncatalogued report of theirs cited in a footnote to a dissenting opinion.”⁴⁴ A good example of the exhausting research projects assigned to the law clerks can be found in the clerkship of Henry J. Friendly (October Term 1927), who spent weeks at the Library of Congress preparing a report on the wire-tapping laws of the forty-eight states.⁴⁵ Such visits were common to all clerks, who “came to know intimately the labyrinths of the Library of Congress.”⁴⁶

At times, the research projects allowed the law clerks a glimpse of the legendary Brandeis memory. Strum recounts an instance in which Brandeis not only instructed his law clerk to journey to the Library of Congress, but provided helpful instructions on how to locate both the book and the material contained therein: “While working on a patent case, he told one clerk, ‘There is a book in the Library of Congress published about 1870; a small volume with a green cover; and in chapter three the point in this case is discussed.’”⁴⁷ The clerk subsequently discovered that Brandeis was correct on all three counts.

Strum neatly summarizes the law clerk–Justice relationship from the perspective of the law clerks: “The clerks went to Brandeis each year in trepidation, worked with exhilaration, and left in exhaustion.”⁴⁸ Since Brandeis assumed that his law clerks would provide nothing less than excellence, they were not praised when they achieved that standard. Recalls Austern:

One time we had this case, the Jewel⁴⁹ [sic] case, involving a question of radio copyrights. And I set up this elaborate contraption with balls and pendulums to show the impact of frequency modulation. And we sat there, with his legs crossed, watching my little demonstration for 40 minutes. And after it was all over he just said thank you, and that was it. He rarely said anything you did was a great job.

He assumed, since you were there, that you would do a great job.⁵⁰

Adds Acheson: “Justice Brandeis’s standard for our work was perfection as a norm, to be bettered on special occasions”—a standard that the law clerk might not know if he ever achieved, since the Justice “was not given to praise in any form.”⁵¹ If the law clerks did receive praise for their work, it tended to come from either Frankfurter or Mrs. Brandeis. For a group of young men, fresh out of law school and working for a great man, operating without positive feedback from the Justice must have felt akin to doing a high-wire act without a net.

While former law clerk Friendly undeniably met the standard of excellence demanded by Justice Brandeis,⁵² he humorously lamented the fact that his skepticism about technology cost Brandeis the opportunity to be the first jurist to pen a legal opinion that referenced television. The opinion was Justice Brandeis’ famous dissent in *Olmstead v. United States*,⁵³ a case involving whether the government’s warrantless wiretapping of the telephone calls of a suspected bootlegger violated the Fourth Amendment. In support of his powerful argument that “[t]he progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping,” Brandeis originally pointed to the nascent technology of television in an opinion draft. Friendly recalls that in early drafts of the *Olmstead* dissent, Brandeis argued that television would permit the government to look into people’s homes—a technological point with which Friendly took issue:

And I said: Mr. Justice, it doesn’t work that way! You can’t just beam a television set out of somebody’s home and see what they’re doing. He said: That’s just exactly what you can do. So we batted the ball across the net a few times, and I said: Well, I really think it’s silly for two lawyers to be discussing this—why don’t I go

to the Library of Congress and get you some articles about this. Which will explain what television really is. Well, he said, that's fine. And of course you're going to be wrong. Well, I didn't say anything. So, I got the articles, and unhappily, I was right. And so, he had to strike that sentence.⁵⁴

"Unhappily, the reference was deleted in deference to the scientific skepticism of his law clerk," writes Freund, clearly tongue-in-cheek, "who strongly doubted that the new device could be adapted to the uses of espionage."⁵⁵ Cheerfully admits Friendly: "And in the course of events, he [Brandeis] was right! And I was wrong."

From the law clerks' perspective, Brandeis' natural remoteness was exacerbated by his method of communication. Recalls former law clerk Louis L. Jaffe (October Term 1933):

I worked in a little apartment at Stoneleigh Court. Brandeis worked in his own apartment, and I really saw very little of him. He would slip a paper under the door leaving me instructions in the morning before I got there, and I would slip my work under his door when I finished. He was really a very remote, distant person. I had very little direct personal contact with him. It took me a while to get over the pique of that, not having any contact with him.⁵⁶

Brandeis typically met with his law clerks for a thirty-minute meeting around 8:30 a.m. and again in the early evening around 6:00 p.m. to 7:00 p.m. The law clerks typically continued working after the evening meeting. An early riser, Brandeis was often at work when the clerks arrived in the morning—a fact that made former clerk Freund "feel like a laggard keeping banker's hours."⁵⁷ Freund was not the only law clerk impressed by Brandeis' work ethic. Recalls Austern: "I remember one time preparing a memo and staying up all night until

about 5:30 [a.m.], going down to his apartment and slipping the memo under the door, and see it retrieved from the other side of the door."⁵⁸ Brandeis would sometimes work in his office in the second apartment before returning to his bedroom/study in his own apartment in the afternoon. Despite these meetings, at least one former clerk admitted that "it was a lonesome job."⁵⁹

With the job, however, came freedom. Justice Brandeis did not impose set office hours on his clerks, and his only concern was that the assigned work be completed on time. Recalls Freund:

It had become the custom by my time for clerks to work at all hours, but some had rather individual habits. One predecessor, who has since become an industrialist [Robert G. Page], made a practice of going out at night on the social circuit, then coming straight to the office in the early hours of the morning for a stint before returning home. On one occasion, having arrived at the office at one or two a.m., he was overtaken there at five o'clock, which was the Justice's opening of the work day. . . The Justice entered the office, just above his residence in the apartment building, and greeting his clerk, "Good morning, Page," in a perfectly casual way, as if it were the most natural thing in the world for a law clerk to be about at five in the morning in white tie and tails.⁶⁰

There is a sense that the limited interactions between the Justice and his law clerk diminished over time, a pattern perhaps explained by Brandeis' slowly declining health. "You have to remember that we didn't talk much because this man was hoarding his energy," explains Fisher, Brandeis' last law clerk. "It was almost like being in Floyd Patterson's training camp. He [Brandeis] wasn't going to

expend any energy on something he didn't have to do."⁶¹

The day-to-day ritual of clerking for Brandeis was shaped not only by the Justice but also by his wife. "I should say that Mrs. Brandeis looked after him like he was a baby," recalls Sutherland. "She wouldn't let him work more than two hours in a row, for example. So every two hours he took the stairs down, took a quick walk around the block, came back for a five minute nap, and then started working again."⁶² Mrs. Brandeis' protectiveness of her husband occasionally led to the odd job assignment for the law clerks. Freund recounts the time when Justice Brandeis was scheduled to meet President-elect Franklin Delano Roosevelt at the Mayflower Hotel in Washington, D.C. The day prior to the meeting, Freund was dispatched to the hotel by Mrs. Brandeis to "make sure that there were no open windows because Justice Brandeis was very susceptible to colds." Upon arriving at the hotel, the hotel staff told Freund that Mrs. Brandeis' fears were unfounded, since FDR "did not like drafts either."⁶³

The sense of isolation felt by some of the Brandeis law clerks was further exacerbated by Justice Brandeis' imposition of a strict duty of confidentiality, a precursor to the rules and norms that bind modern law clerks. "I remember the first thing he said. 'In this job you will hear and see a lot that's confidential,'" states Freund. "'There has never been a leak from this office and I don't expect there to be any leaks.'"⁶⁴ The duty of confidentiality extended not only to the general public, but to the Supreme Court law clerks in other Chambers as well.⁶⁵ Brandeis' requirement of confidentiality pre-dated the "Code of Conduct for Law Clerks of the Supreme Court of the United States," which the Supreme Court formally adopted in the late 1980s. The Code imposes upon Supreme Court law clerks a duty of complete confidentiality and loyalty. Finally, Brandeis' sense of institutional loyalty meant that he imposed a duty of confidentiality upon himself. "Throughout the history of the Court

there have been justices who in private conversation or correspondence have referred to colleagues in salty and not always complimentary terms," explains Magruder. "I never heard Justice Brandeis indulge himself in this relatively harmless sport. Nor did he ever betray any exasperation when his associates did not see things his way."⁶⁶

The duties of the law clerks extended beyond the law. The clerks were drafted to help host the weekly teas that Washington society expected Mrs. Brandeis to hold.⁶⁷ At the teas, the law clerks served multiple roles, including guest, waiter and bouncer. Landis explains that his duties included making sure "both that the guests were served and that the Justice should not be cornered too long by anyone of them."⁶⁸ Acheson paints a wonderfully vivid picture of the setting:

The hostess, erect on a black horse-hair sofa, presided at the tea table. Above her, an engraved tiger couchant, gazing off over pretty dreary country, evoked depressing memories of our dentist's waiting room. Two female acolytes, often my wife and another conscripted pupil of Mrs. Brandeis's weekly seminar on child education, assisted her. The current law clerk presented newcomers. This done, disciples gathered in a semicircle around the Justice. For the most part they were young and with spouses—lawyers in government and out, writers, conservationists from Agriculture and Interior, frustrated regulators of utilities or monopolies, and, often, pilgrims to the shrine.⁶⁹

The former clerks believed that the teas were not merely social occasions, but served multiple functions. Freund states that Brandeis "often invited people to tea who had just done something that he admired," adding that the invitation itself was a "sort of accolade" and that the invited guest would receive the Justice's full attention and a volley of "penetrating

questions.”⁷⁰ Acheson writes that they allowed Justice Brandeis to discuss the two topics that he found most compelling: “the Greek Genius . . . and the Curse of Bigness. These themes crossed like the lines on a telescopic sight on any unfortunate who was reported to be going, not back to his home town, but to New York or Chicago or Philadelphia.”⁷¹ Riesman suggests, however, that the teas also served as an information-gathering session for the Justice. “At the Sunday teas he treated people like oranges, squeezing them of information and then tossing them away.”⁷²

Brandeis’ courtly side emerged at the teas. “Brandeis would never sit if a lady were in the room standing,” states Austern. “So at these teas we had, Mrs. Brandeis had me running around making sure all the ladies were sitting down.”⁷³ Law clerks remember that Brandeis could be charming to his guests, including the relatives of his law clerks. Former law clerk Nathaniel L. Nathanson (October Term 1934) recounts a story of taking his mother to tea at the Brandeis residence: “He [Brandeis] was a pretty tough cookie, I thought, and I had told my mother about him . . . [but] he was as charming as could be at that tea, and afterwards my mother kept asking me how I could say all those things about him.”⁷⁴ Mrs. Brandeis herself would make sure that visitors were not monopolizing the Justice’s time, often limiting them to ten minutes with the Justice before shooing them towards the tea tray. And Mrs. Brandeis would monitor the clerks to ensure they were following strict Washington protocol. “[Mrs. Brandeis] had learned how seriously people in Washington took their titles, and the clerk was admonished to be certain to get them right.”⁷⁵

Law clerks were also invited to join the Brandeises for dinner. Former clerk W. Graham Claytor, Jr. (October Term 1937) remembers that Mrs. Brandeis’ protective nature extended to dinner as well, where she reminded guests that dinner started promptly at 7:00 p.m. and the Justice was expected to retire by 9:30 p.m. While the conversation and company may

have been first-class, the food was not. Austern remarks that Mrs. Brandeis “would cut a slice of roast beef you could see through,”⁷⁶ and Riesman is even less charitable: “Dinner there was gastronomically ghastly.”⁷⁷ The law clerks also served as bouncers at these evening functions. Landis states that the law clerk was responsible for guaranteeing that the Brandeis guests left at 10:00 p.m., and that any failure in this essential duty would result in an “accusing” stare from Mrs. Brandeis.

Besides teas and dinners, the daily grind was interrupted with trips between the Brandeis and Holmes residences. Because Brandeis and Holmes did not like the telephone, the law clerks’ responsibilities included carrying materials between the two homes. This purely secretarial responsibility gave clerks the opportunity to interact with the great Holmes.⁷⁸ The visits also gave the Brandeis clerks the chance to socialize with the Holmes clerks, encounters that gave one clerk a brief glimpse of Holmes’ insecurity about his friendship with Brandeis. Recounts former clerk Sutherland:

[O]ne time I remember Holmes’ clerk asked me to lunch. And he said to me, “What does Brandeis think of Holmes?” And I said, just out of curiosity, why do you want to know? And he said, “Because Holmes keeps asking me and I want to know what to tell him.”⁷⁹

Sutherland clerked during October Terms 1917 and 1918, and perhaps the bond between Brandeis and Holmes had not fully developed. By the time Holmes retired from the Court, the mutual affection felt by the two Justices was undeniable.

In his final years on the Bench, the aging Brandeis may have leaned more heavily upon his law clerks. His last law clerk, Fisher, recalls working on both cert. petitions and some opinion drafts, and the strapping former-rugby-player-turned-law-clerk was pressed into service as an elevator:

[Mrs. Brandeis] called in the afternoon and said the elevator was broken, Justice Brandeis was already on his way back from the Court, and what was I going to do about it. Clerks were expected to do everything. Well, I went down there and found the janitor . . . [a]nd we found a chair. And when Brandeis walked in, we had him sit in the chair, and we carried him up five flights of stairs. And I'll never forget that. Brandeis in his overcoat and derby hat, serene as could be, taking it all in stride as though there [was] not the slightest problem, looking straight ahead.⁸⁰

Unfortunately for Fisher, his bout of manual labor was not yet complete. "Mrs. Brandeis came down in all a flutter, and she too had a weak heart, so after we took Brandeis up, we had to come back and carry Mrs. Brandeis up in the chair."⁸¹

Unlike modern law clerks, but perfectly keeping with the Brandeis tradition, the Justice and his former law clerks did not have formal reunions. Nor did Brandeis condone lavish celebrations or expensive gifts in his honor.

When, on the approach of his eightieth birthday, the former secretaries of Mr. Justice Brandeis planned a visit in his honor, word came that, more than the pilgrimage, the Justice would welcome a message from each of the group recounting the public service that he had of late been performing. The would-be pilgrims had known in their hearts that the devotion the Justice cherished most from them was devotion to his conception of the lawyer's calling.⁸²

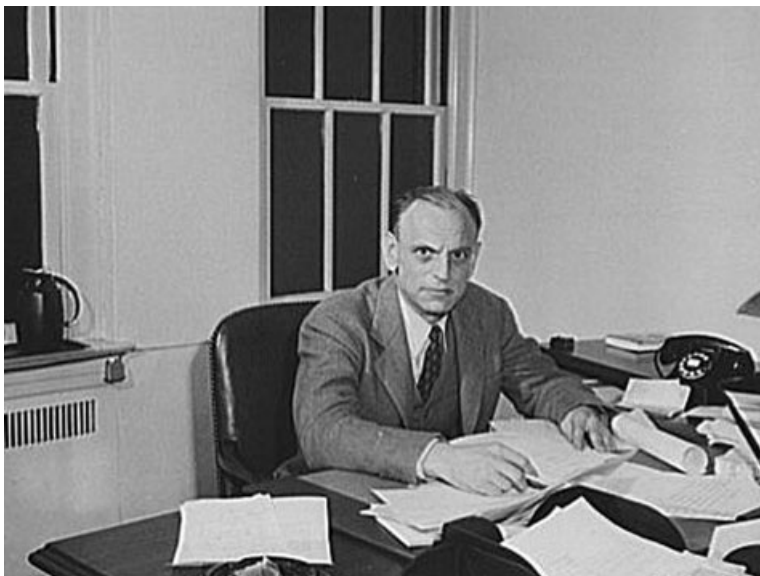
When recounting this story years later, Judge Magruder paused and added, "[M]y letter was rather short."⁸³

The Bonds between Isaiah and His Young Disciples

For the Brandeis law clerks, their relationship with Justice Brandeis took on a familiar pattern—distant, polite and formal at first, with the chill of the early relationship replaced with warmth and occasional flashes of Brandeis' humor. Comments Nathanson: "[Justice Brandeis] did not immediately clasp his law clerk to his bosom as a member of the family as well as a working associate. On the contrary, he seemed to keep personal relations at a minimum—especially at first—and to be deliberately testing the mettle of his assistants."⁸⁴ Once the law clerks passed Justice Brandeis' unspoken litmus test, however, the Brandeis clerks discovered that "beneath that aloofness, there was a great serenity—and also a sense of fun. But it was so distilled."⁸⁵ One example of Brandeis' unique sense of humor: "I never forget asking him about an article with which I disagreed strongly, and I said how could the author say those things," states Austern. "And he said, 'Mr. Austern . . . you'll find this world is full of sons of bitches, and they're always hard at work at it.'"⁸⁶ Despite these flashes of humor, the law clerks remained in awe of Brandeis' emotional self-control, intellect, self-discipline, and formidable memory.

While law clerk and Justice might grow closer over the course of their year together, the relationship—perhaps with the exception of Brandeis' with Dean Acheson—did not evolve into friendship. "It was difficult to get to know [Brandeis]," recalls Sutherland. "You could admire him, but he wasn't the kind of person to mold in with as old friends."⁸⁷ Despite the distance between Justice and law clerk, Brandeis' assistants were fiercely loyal to "Isaiah." "There was some quality about him that made people want to work for him and please him," states Sutherland.⁸⁸

While aloof, Brandeis took an interest in his law clerks' lives and well-being. A touching example of this concern can be seen in the fact that when Brandeis retired from the



James Landis became chairman of the SEC and dean of Harvard Law School after his Supreme Court clerkship.

Supreme Court in 1939, his primary concern was finding his current clerk, Fisher, immediate employment. “Frankfurter told me that he [Brandeis] called Felix in and told him, and after Frankfurter, who was then a Justice, went through how terrible it all was, Brandeis said, ‘Well, that’s not why I called you here. What are we going to do with Adrian?’”⁸⁹ This concern is also reflected in Brandeis’ correspondence with Frankfurter. For example, upon learning that former clerk Landis would remain at the Security and Exchange Commission until he started at Harvard Law School, Brandeis wrote that Landis was “unwise” to work so hard and “needs a vacation & time for meditation.”⁹⁰

Moreover, Brandeis took a keen interest in the career paths selected by his law clerks, and his correspondence with Felix Frankfurter is sprinkled with references to the professional achievements of his clerks and suggestions regarding future advancement.⁹¹ Brandeis preferred law clerks who might become teachers or public-interest lawyers, and he employed both direct and indirect tactics in achieving these goals, often discussing with Frankfurter his own career plans for his law clerks before he shared said plans with the clerks

themselves. During Harry Shulman’s clerkship, Justice Brandeis quickly concluded that the young man “is too good in mind, temper, and aspirations to waste on a New York or other law offices . . . Can’t you land him somewhere in a law school next fall?”⁹² What Brandeis later referred to as “our plans for his teaching” were not revealed to Shulman himself until two months later, and subsequently it was Brandeis who “practically dictated” Shulman’s letter of acceptance to Yale Law School.⁹³ As for law clerk Henry M. Hart, Jr., the Justice wrote to Frankfurter that “[t]here has been no ‘opportunity’ of sounding Hart [out about teaching at Harvard Law School]. Of course I can, without occasion, take up the subject with him. But would that be wise? Hadn’t he better be asked by [Professor Samuel] Williston to talk with me?”⁹⁴

Brandeis’ efforts to fill the halls of prominent law schools with former law clerks extended to clerks in other Chambers. In a February 14, 1925 letter to Frankfurter, Brandeis wrote that he had met with Charles Dickerman Williams, a Yale Law School graduate and law clerk to Chief Justice William Howard Taft. “If he is as good as he looks, he ought to be in law-teaching,” observed Brandeis. “It might

be worthwhile to make some enquiries about him from the Yale Faculty. Perhaps that would induce them to give him a try there & save his soul.”⁹⁵

Brandeis voiced his displeasure when his former clerks did not follow his advice. In an October 13, 1929 letter to Frankfurter, Brandeis wrote that “[t]he satisfaction I had in having Page and Friendly with me is a good deal mitigated by the thought of their present activities [private practice]. Of course, it is possible that they, or at least Friendly, may reform and leave his occupation.”⁹⁶ Brandeis was particularly vexed that Friendly did not become a law professor, referring to Friendly’s time in private practice as a “trial period” and periodically pondering aloud about the “possibility of wrenching Henry Friendly loose” so he could make his preordained return to Harvard Law School.⁹⁷

Riesman keenly recalls Brandeis’ disappointment regarding his decision to enter private practice. “[H]e was contemptuous of me because I wanted to go back to Boston to a law firm.”⁹⁸ Brandeis was “vehement” that Riesman must “be a missionary” who used his talents to benefit the less fortunate. “The fact that I had friends in Boston and had season tickets to the Boston Symphony was totally frivolous and unworthy of consideration. Friendship was not a category in his life.”⁹⁹ Those law clerks who followed Brandeis’ suggestions, however, found that the prophet was not infallible. “He never urged me to go into teaching,” states Fisher, “but he did urge me to go back to Tennessee, which I did and it proved to be a real mistake.”¹⁰⁰

With his confidantes, Brandeis could be sharply candid in his assessment of his law clerks. His first law clerk was Calvert Magruder, who later served as a federal appeals court judge. In a March 25, 1920 letter to Thomas Nelson Perkins, Brandeis wrote: “He [Magruder] has a good legal mind and good working habits—and is a right-minded Southern gentleman. He is not of extraordinary ability or brilliant or of unusual scholarship, but

he has stability.”¹⁰¹ Upon learning that former clerk William Gorham Rice, Jr. (October Term 1921) was a candidate for a deanship, Brandeis observed to Frankfurter that “[d]espite his mental limitations, he [Rice] may be the best man available for Wisconsin,”¹⁰² and predicted that Louis Jaffe—having “found himself”—would be “much better at teaching than he was as secretary.”¹⁰³

Brandeis’ unvarnished assessment of his clerks extended even to Acheson. Although Brandeis requested that Acheson remain his assistant for a second year, he was not wholly impressed with his young clerk’s abilities. In a November 25, 1920 letter to Frankfurter, Brandeis wrote:

Acheson is doing much better work this year, no doubt mainly because of his greater experience; partly, perhaps, because I talked the situation over with him frankly. But for his own sake he ought to get out of this job next fall. I don’t know just what his new job ought to be. It should be exacting. If I consulted my own convenience I might be tempted to ask him to stay.¹⁰⁴

There is no indication in Acheson’s memoirs as to “the situation” that was the subject of a discussion between the two men.

Acheson, Jaffe, Magruder, and Rice were not the only law clerks whose abilities and limitations were bluntly summarized by the Justice. During October Term 1928, Frankfurter’s vaunted track record of selecting perfect assistants was singlehandedly ended by the antics of new clerk Irving Baer Goldsmith. One week into Goldsmith’s clerkship, Brandeis wrote Frankfurter that Goldsmith had arrived hours late to work on two different days, making excuses about being “poisoned by seafood,” the hotel failing to provide a requested wake-up call, and fatigue from his first week of the clerkship. Brandeis was unconvinced, writing: “His excuses are barely plausible. I suspect his habits are bad—the victim of drink or worse

vices. I have a sense of his being untrustworthy; and something of the sense of uncleanness about him.”¹⁰⁵

While Frankfurter made arrangements for an immediate replacement, Brandeis hesitated, worried that Goldsmith’s abrupt firing “would be a severe blow to G. and might impair his future success for an appreciable time.”¹⁰⁶ After having a frank discussion with Goldsmith, during which the young man promised “total abstinence from drink” and to maintain a lifestyle that would “give him his maximum working capacity,”¹⁰⁷ Brandeis permitted Goldsmith to remain in his position. Brandeis never regained confidence in Goldsmith, however, later writing that “he lacked the qualities which would have made him desirable in a law school, or in any important public service.”¹⁰⁸

Few law clerks became close enough to Brandeis to be considered confidantes and friends. The one exception to this rule was Dean Acheson. Even during his clerkship, Acheson was able to temporarily draw Brandeis’ focus away from work and engage him in discussions on pressing political, social, and economic issues of the day, and in later years it would be Acheson who would ask Brandeis to swear him in as Assistant Secretary of State and would spend evenings with Brandeis, gossiping and sharing “the latest dirt.”¹⁰⁹ Acheson and his wife often joined Justice and Mrs. Brandeis for holiday dinners. Brandeis grandson Frank Gilbert recalls that Freund also became close to the Justice after his clerkship and visited Brandeis and his extended family at his summer cottage in Chatham, Massachusetts. And the correspondence between Frankfurter and Brandeis contains multiple references to Freund and former James Landis, including a discussion of Landis’s engagement in 1926 and Brandeis’ willingness to loan Landis \$2,000 (presumably to cover expenses associated with the pending nuptials).¹¹⁰

Upon the Justice’s death, Acheson was the Brandeis law clerk who delivered the eulogy at the Justice’s small memorial service at his California Street residence. Referring to the

Brandeis law clerks as “the fortunate ones,” Acheson revealed that Brandeis’ affection for his law clerks ran deeper than they imagined. “I have talked, over the past twenty years, with the Justice about these men. I have heard him speak of some achievement of one of us with all the pride and of some sorrow or disappointment of another with all the tenderness of a father speaking of his sons.”¹¹¹ Walter B. Raushenbush, the grandson of Louis and Alice Brandeis, attended the memorial service, and over sixty years later he still recalls being struck by Acheson’s poise, as well as his “moving and eloquent” remarks.¹¹²

While Justice Brandeis declined his law clerks’ offers of celebration and tribute, after his death his clerks honored the memory and service of their formal employer in a variety of different ways. Several of them published “tribute” pieces in law reviews and legal journals in the decades following the Justice’s passing, arguably becoming the originators of a literary tradition now followed by scores of former law clerks from all levels of federal and state courts. The clerks also commissioned a bust of the late jurist, which was presented to the Harvard Law School in January 1943. At the presentation, Magruder spoke of Justice Brandeis’ “almost paternal concern” for and continuing interest in “his boys.”¹¹³ In short,



Paul Freund taught at Harvard for thirty-seven years and was a leading expert on constitutional law. He famously turned down President Kennedy’s offer to be Solicitor General because he was writing the *Oliver Wendell Holmes Devise History of the Supreme Court*. He is pictured here during his clerkship in the 1932 Term.

these post-clerkship activities are compelling evidence in support of Strum's assertion that the clerks "left Brandeis's service with admiration bordering on adulation."¹¹⁴

A Collective Portrait of the Brandeis Law Clerks

From 1916 to 1939, Brandeis hired twenty-one Harvard Law School graduates to serve as his law clerks at the Supreme Court. As with modern clerkships, the clerks began working at the Court in the summer after graduation and—with two exceptions—remained with the Justice for a single Term of Court. William A. Sutherland and Dean Acheson each clerked for Justice Brandeis for two years, perhaps due to the effect of World War I on the number of law students attending Harvard Law School.

Fulfilling Brandeis' wish to fill the halls of major law schools with his clerks, eleven of his former clerks became law-school professors and deans. Of these, perhaps the most famous is Paul A. Freund, who became a long-time Harvard Law School professor and one of the leading experts on constitutional law. Other Brandeis law clerks to teach at Harvard Law School included Henry M. Hart, Jr., Louis L. Jaffe, James M. Landis, Calvert Magruder, and William E. McCurdy. Of these, Landis's career witnessed the most spectacular fall from grace. After teaching at Harvard Law School in the late 1920s, Landis served on both the Federal Trade Commission and the Security and Exchange Commission, becoming chairman of the SEC in 1935, before returning to Harvard Law School as its new dean in 1937. Landis later served as chairman of the Civil Aeronautics Board during the Truman administration and as an advisor to President John F. Kennedy, only to see his professional career unravel in the 1960s after his conviction and brief incarceration for failing to file income taxes. Landis was found drowned in his swimming pool in July 1964.

David Riesman joined his former colleagues at Harvard University, but not as a law

professor. While Riesman briefly taught at the University of Buffalo Law School, the publication of his book **The Lonely Crowd**¹¹⁵ led to his appointment as a professor of sociology at Harvard in 1958. Harry Shulman went to Harvard Law School's chief rival, joining the Yale Law School faculty in 1930 and quickly establishing a reputation as a top scholar in labor law. Shulman became the dean of Yale Law School in 1954, only to have his academic career cut prematurely short upon his death at the age of fifty-one in March 1955.¹¹⁶ Adrian S. Fisher served as a law school dean at the Georgetown University Law Center, and later taught at the George Mason School of Law, but he also had a long career as an arms-control negotiator.¹¹⁷

Two additional clerks, J. Willard Hurst and William G. Rice, spent their teaching careers at the University of Wisconsin School of Law. Hurst gained renown as a prominent legal historian, while Rice focused his academic studies on international law.¹¹⁸ Nathaniel L. Nathanson taught at Northwestern University School of Law and coauthored a textbook on administrative law with Harvard Law professor Jaffe.¹¹⁹

A number of Brandeis law clerks became prominent lawyers. Of these practicing attorneys, four found a semipermanent home at the Washington, D.C. law firm of Covington & Burling. Dean Acheson practiced at Covington & Burling between stints of public service, and he was joined there by H. Thomas Austern and W. Graham Claytor, Jr. Claytor practiced with Covington and Burling from 1938 to 1967 and from 1981 to 1982, taking breaks to serve as the president of Southern Railroad and AM-TRAK as well as Secretary of the Navy in the Carter Administration.¹²⁰ In the 1950s, Fisher also worked at the firm.

Covington & Burling, however, did not have a monopoly on those former Brandeis clerks practicing law. William A. Sutherland founded the Atlanta-based law firm of Sutherland, Asbill & Brennan, and Warren Stilson Ege opened the Washington office of the law firm Jones, Day, Reavis and Pogue.

TABLE ONE: The Law Clerks of Justice Louis Brandeis

Name of Clerk	Clerkship	Undergraduate	Law School	Law Review	Subsequent Legal Career*
Calvert Magruder	1916–1917	St. John's College	Harvard	Note Editor	Chief Judge, U.S. Court of Appeals for the First Circuit
William Anderson Sutherland	1917–1919	Univ. of Virginia	Harvard	n/a	Attorney, Sutherland, Asbill & Brennan
Dean Gooderham Acheson	1919–1921	Yale	Harvard	Treasurer	Secretary of State
William Gorham Rice, Jr.	1921–1922	Harvard	Harvard	n/a	Professor, University of Wisconsin School of Law
William Edward McCurdy	1922–1923	Harvard	Harvard	Book Rev. Ed.	Professor, Harvard Law School
Samuel H. Maslon	1923–1924	U. of Minnesota	Harvard	Note Editor	Attorney, Maslon, Edelman, Borman & Brand
Warren Stilson Ege	1924–1925	Dartmouth	Harvard	President	Attorney, Jones, Day, Reavis and Pogue
James McCauley Landis	1925–1926	Princeton	Harvard	Case Editor	Dean, Harvard Law School; Chairman, SEC
Robert Guthrie Page	1926–1927	Yale	Harvard	President	President, Phelps Dodge Corporation
Henry Jacob Friendly	1927–1928	Harvard	Harvard	President	Judge, U.S. Court of Appeals for the Second Circuit
Irving Baer Goldsmith	1928–1929	Michigan	Harvard	Member	Attorney, Mayer, Brown & Platt
Harry Shulman	1929–1930	Brown	Harvard	Member	Dean, Yale Law School
H. Thomas Austern	1930–1931	NYU	Harvard	President	Attorney, Covington & Burling
Henry Melvin Hart, Jr.	1931–1932	Harvard	Harvard	President	Professor, Harvard Law School
Paul Abraham Freund	1932–1933	Washington U.	Harvard	President	Professor, Harvard Law School
Louis Leventhal Jaffe	1933–1934	Johns Hopkins	Harvard	Member	Professor, Harvard Law School
Nathaniel Louis Nathanson	1934–1935	Yale	Harvard	n/a	Professor, Northwestern Law School
David Riesman	1935–1936	Harvard	Harvard	Legislation Ed.	Sociology Professor, Harvard University; author, The Lonely Crowd
James Willard Hurst	1936–1937	Williams College	Harvard	Note Editor	Professor, University of Wisconsin School of Law
William Graham Clayton, Jr.	1937–1938	Univ. of Virginia	Harvard	President	President, AMTRAK; president, Southern Railway; Attorney, Covington & Burling
Adrian Sanford Fisher	1938–1939	Princeton	Harvard	Note Editor	Dean, Georgetown University Law Center; arms-control negotiator

* Includes only significant and sustained professional accomplishments.



Two former Brandeis clerks and future Harvard Law School professors—Louis Jaffe (left) and Paul Freund (right)—were photographed together.



Brandeis' second-to-last clerk, William Graham Clayton, Jr., became a lawyer for Covington & Burling and had stints as president of Amtrak and Secretary of the Navy under Jimmy Carter.

Samuel H. Maslon helped start the Minneapolis law firm of Maslon, Edelman, Borman & Brand, but he balanced the private practice of law with a brief and part-time teaching career (he taught at the University of Minnesota School of Law in the 1930s), public service (helping found the Metropolitan-Mount Sinai Hospital in Minneapolis as well as a public television station), and the arts.¹²¹ Irving B. Goldsmith, whose antics during the early days of his clerkship almost led to his firing, practiced law in Chicago, Illinois before dying at the relatively young age of 39.¹²²

Two former clerks had long and distinguished careers on the federal bench: Magruder and Henry J. Friendly. Magruder taught at Harvard Law School for approximately twelve years before being appointed to the Court of Appeals for the First Circuit in 1939. Friendly was a partner at the New York law firm of Cleary, Gottlieb, Friendly and

Hamilton before being appointed to the Court of Appeals for the Second Circuit by President Eisenhower.¹²³

Arguably, only one law clerk, Robert Page, ran afoul of Justice Brandeis' warning against "the Curse of Bigness." While he practiced law for a number of years, Page left private practice in 1947 to become president of the Phelps Dodge Corporation, an international mining company, eventually rising to the position of chairman of the board prior to his death in 1970.¹²⁴ Justice Brandeis might have been mollified, however, to learn that Page was also a supporter of the Legal Aid Society.

Conclusion

While Louis Brandeis reshaped the institutional rules and norms surrounding the utilization of Supreme Court law clerks, he did not write on a blank institutional slate. Brandeis built upon the early practices of Justices Horace Gray and Oliver Wendell Holmes, Jr., and these three jurists are bound together when it comes to discussing the origin and evolution of the clerkship institution. When Brandeis arrived at the Supreme Court in 1916, Holmes was the only Supreme Court Justice routinely hiring Harvard Law School students as his clerks—a tradition that Holmes adopted when he replaced Gray on the Supreme Court. The practice of hiring law clerks, however, was not foreign to Brandeis. As noted earlier, from 1879 to 1881 he clerked for Gray during Gray's tenure as Chief Justice of the Massachusetts supreme judicial court, and he subsequently hired three of Gray's former Supreme Court law clerks—William Harrison Dunbar, John Gorham Palfrey, and Ezra Ripley Thayer—to work at the Boston law firm of Brandeis, Dunbar, and Nutter.

In sum, Brandeis followed the practice of both Gray and Holmes in having a Harvard Law School professor select a top-law school graduate to clerk for one year at the Supreme Court. Where Brandeis differed from Gray and Holmes, however, was that he used his law clerks differently. While clerking for Gray,

Brandeis performed substantive legal work. In a July 12, 1879 letter, Brandeis described his job duties for Gray as follows:

He takes out the record and briefs in any case, we read them over, talk about the points raised, examine the authorities and arguments, then he makes up his mind if he can, marks out the line of argument for his opinion, writes it, and then dictates to me. But I am treated in every respect as a person of co-ordinate position. He asks me what I think of his line of argument and I answer candidly. If I think other reasons better, I give them; if I think his language obscure, I tell him so; if I have any doubts, I express them. And he is very fair in acknowledging a correct suggestion or disabusing one of an erroneous idea.¹²⁵

From this description, one can see parallels between the Gray and Brandeis clerkship models. Both Justices considered their law clerks to be partners and encouraged candid discussion and debate over language, structure, and legal arguments contained in the opinions. Where Gray and Brandeis differ, however, is that Gray involved his law clerks in debating how the case should be decided, whereas Brandeis "was inflexible in holding that the duty of decision must be performed by him unaided."¹²⁶

When it came to substantive responsibilities, Brandeis' clerkship model diverged more dramatically from Holmes'. "Holmes wanted a clerk for a son," observes Hurst. "Brandeis wanted a working clerk."¹²⁷ While Justice Holmes asked his law clerks to review cert. petitions and occasionally find a cite to Holmes' "favorite author" (himself), his clerks were a combination of private secretary and companion. Holmes biographer Francis Biddle writes that Harvard Law School Professor John Chipman Gray, the half-brother of Horace Gray, was well suited to the task of selecting clerks: "Gray knew the kind of boys Holmes wanted—they must be able to deal with the *certiorari*,

balance his checkbook, and listen to his tall talk. And they would have more chance of understanding it, thought Gray, if they also were honor men.”¹²⁸

While Brandeis might debate the threat posed by large corporations, the flaws of the National Recovery Administration, or the role of unions in America with his clerks, Holmes’ “tall talk” was of a more esoteric type:

[Holmes] wanted someone to talk about literature and philosophy. Here’s a typical example. Holmes said to his clerk one day, “Young man, what would you do if you saw a miracle?” And the clerk thought about it, and said . . . he didn’t know what he would do if he were confronted by a miracle. And Holmes said he knew. “Why I would say, miracle, I’m so surprised, because I always thought cause and effect would outlast even me.”¹²⁹

When not asking his law clerks metaphysical questions, Holmes would regale them with tales of the Civil War, have them admire the spring flowers blooming around the District of Columbia, and ask them to take him to visit his future grave at Arlington National Cemetery.

Whether or not by design, the former law clerks to both Brandeis and Holmes shared one critical responsibility after their clerkships: burnishing the legends of the two Justices. If one pores through the biographical materials on Brandeis and Holmes, it quickly becomes apparent that these clerks are the chief defenders of their respective Justice’s place in the judicial pantheon. The one glaring exception is the aforementioned David Riesman, the lawyer-turned-sociologist who initially sought to decline the Brandeis clerkship. “I have taken a harsher look at him [Brandeis] since I left, in part because of all the adulation that surrounds him with Mason’s book¹³⁰ and other writings, which I felt was misleading.”¹³¹ Riesman is unique among the Brandeis clerks. If other clerks have felt irritation at the larger-than-life

treatment of their former employer by biographers, they have remained silent.¹³²

Justice Louis Brandeis left the Supreme Court in 1939, but in many ways his clerkship model has become the standard for the clerkship institution. While modern Justices have admittedly deviated from the Brandeis model in terms of the types of job duties assigned to their law clerks,¹³³ what remains unaltered is Brandeis’ expectation that a Supreme Court law clerk graduate from a top law school, possess a strong work ethic, have superior legal writing and research skills as well as the internal fortitude to serve as a sounding board and critic to the Justice’s work product, and appreciate the importance of loyalty and confidentiality. In creating these standards, Brandeis, like Gray and Holmes, left his own distinct mark on the clerkship institution.

ENDNOTES

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¹See Todd C. Peppers, “Birth of an Institution: Horace Gray and the Lost Law Clerks,” *Journal of Supreme Court History* 32 (November 2007): 229–48.

²For a wonderful article on the relationship between Holmes and his law clerks, see I. Scott Messinger, “The Judge as Mentor: Oliver Wendell Holmes Jr. and His Law Clerks,” *Yale Journal of Law & the Humanities* 11 (Winter 1999): 119–52.

³Lewis J. Paper, **Brandeis: An Intimate Biography** (Englewood Cliffs: Prentice Hall, 1983). A graduate of Harvard Law School (J.D.) and the Georgetown University Law Center (LL.M.), Mr. Paper is also the author of **John F. Kennedy: The Promise and the Performance** (1975) and **Empire: William S. Paley and the Making of CBS**

(1987). Mr. Paper is presently a partner at the law firm of Dickstein Shapiro, LLP.

⁴Melvin I. Urofsky and David W. Levy, eds., **The Letters of Louis D. Brandeis**, vol. 5 (Albany: State University of New York Press, 1975): 268.

⁵*Id.*

⁶*Id.* at 320.

⁷Prior appellate clerkship experience would not become the norm for Supreme Court law clerks until the 1960s.

⁸Philippa Strum, **Louis D. Brandeis: Justice for the People** (Cambridge: Harvard University Press, 1984): 359 (quoting correspondence with Felix Frankfurter).

⁹Lewis J. Paper, interview with Adrian S. Fisher, August 11, 1980, Washington, D.C.

¹⁰Law clerk Henry J. Friendly and his parents separately met with Justice Brandeis prior to Friendly's clerkship, apparently due to concerns over Friendly's future career plans. On October 28, 1926, Justice Brandeis spent one hour discussing with Friendly's parents "[t]heir misapprehensions as to facts & relative values of Practicing Lawyer v. Professor of Law." Brandeis writes that "[t]he only definite advice I gave them was to leave their son alone; to let him make up his own mind & not merely to say so, but let him see & know that they will be happy in whatever decisions he makes." Melvin I. Urofsky and David W. Levy, eds., **"Half Brother, Half Son:" The Letters of Louis D. Brandeis to Felix Frankfurter** (Norman: University of Oklahoma Press, 1991): 257. Ironically, Brandeis himself did not follow his own advice and spent the next decade urging Friendly to become a law school professor.

¹¹Lewis J. Paper, interview with David Riesman, May 5, 1981, Cambridge, Massachusetts. Of all the Brandeis law clerks, Riesman appears to be the only former clerk to speak critically of Justice Brandeis—or at the very least the one former clerk to view Justice Brandeis as mortal. During his interview with Paper, Riesman confessed that "I felt very ambivalent about my work with Brandeis. I was very critical of him. But I also felt that I had let him down, and I felt terribly guilty about that. I always had the impression that Freund and the other clerks had done so much for him, and I didn't feel like I made a real contribution." Riesman concedes that "I'm sure I didn't start things off on the right foot when I told him at the very beginning that I thought Zionism was nothing more than Jewish fascism. And he said he wouldn't discuss it with me because I had no understanding of history." According to Brandeis' grandson, Frank Gilbert, former law clerk Paul Freund recounted a slightly more nuanced exchange in which the Justice first asked whether Riesman had read a specific list of books on the topic and, after Riesman's reply that he had not, then stated that there was no further purpose in discussing the topic. Author's telephonic interview with Frank Gilbert, January 15, 2008.

¹²Lewis J. Paper, interview with H. Thomas Austern, January 12, 1981, Washington, D.C.

¹³Paper, interview with Fisher.

¹⁴Dean Acheson, **Morning and Noon** (Boston: Houghton Mifflin, 1965): 47.

¹⁵Paper, interview with Fisher. Justice Holmes also had a strong preference for unmarried law clerks, but for a different reason: he wanted unattached clerks who could go to parties at night and return the next day to share the latest gossip with him.

¹⁶Urofsky and Levy, **Half Brother, Half Son**, 574.

¹⁷Felix Frankfurter and James M. Landis, **The Business of the United States Supreme Court: A Study in the Federal Judicial System** (New York: MacMillan Company, 1927).

¹⁸Charles Warren, **The Supreme Court in United States History** (Boston: Little, Brown & Company, 1928).

¹⁹Urofsky and Levy, **Half Brother, Half Son**, 579.

²⁰Strum, **Justice for the People**, 355.

²¹All of the Justices continued working at home after completion of the Supreme Court building in 1935. Beginning with Hugo Black's appointment in 1937, all newly appointed Justices and their staffs worked primarily in their Chambers at the new Court building. By the time Chief Justice Fred Vinson was appointed in 1946, all nine Justices and their staffs were working full-time at the Court.

²²Paul A. Freund, "Historical Reminiscence—Justice Brandeis: A Law Clerk's Remembrance," *American Jewish Historical Society* 68 (1978): 7–18, 9.

²³Paul A. Freund, "The Supreme Court: A Tale of Two Terms," *Ohio State Law Journal* 26 (1965): 225–38, 226.

²⁴Freund, "A Law Clerk's Remembrance," 9.

²⁵Alexander M. Bickel, **The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work** (Cambridge: Harvard University Press, 1957): 16.

²⁶Acheson, **Morning and Noon**, 80–81.

²⁷*Id.* at 80.

²⁸Freund, "A Law Clerk's Remembrance," 10.

²⁹Not surprisingly, the law clerk's duties often varied with Justice Brandeis' assessment of his young assistant's abilities. "His relationship with a particular clerk seemingly determined the degree of the clerk's independence," writes Strum. "To some, Brandeis merely gave drafts to check and flesh out with citations; others Brandeis encouraged to write first or later drafts, and the two would engage in mutual criticism of each other's ventures." Strum, **Justice for the People**, 356–57.

³⁰Paul A. Freund, "Mr. Justice Brandeis: A Centennial Memoir," *Harvard Law Review* 70 (March 1957): 776.

³¹Acheson, **Morning and Noon**, 81.

³²Lewis J. Paper, interview with J. Willard Hurst, May 31, 1980, Madison, Wisconsin. James Landis felt the same, referring to himself as being in "a junior partnership with the greatest Justice of the Supreme Court." James M. Landis, "Mr. Justice Brandeis: A Law Clerk's View," *American Jewish Historical Society* (1957): 468.

- ³³ Freund, "A Centennial Memoir," 776.
- ³⁴ Acheson, **Morning and Noon**, 80.
- ³⁵ Landis, "Mr. Justice Brandeis," 468.
- ³⁶ Lewis J. Paper, interview with William A. Sutherland, November 7, 1980, Washington, D.C.
- ³⁷ Acheson, **Morning and Noon**, 96–97. See also Freund, "A Law Clerk's Remembrance," 10: "Never in my experience did Brandeis invite the law clerk's view concerning how a case should be decided—that was distinctly the judge's responsibility—but the law clerk's ideas about the structure and content of the opinion were highly welcome."
- ³⁸ Lewis J. Paper, interview with Paul Freund, February 11, 1981, Cambridge, Massachusetts.
- ³⁹ Dean Acheson writes that "one of the joys of being a law clerk was to open the [docket] book on Saturday afternoon and learn weeks ahead of the country what our masters had done," but it appears from Paper's interviews with subsequent law clerks that Justice Brandeis abandoned the practice of giving his law clerks access to his docket book at some undetermined point in time after Acheson's clerkship. Acheson, **Morning and Noon**, 85. Supreme Court historian Artemus Ward hypothesizes that Brandeis may have changed his docket book practices after a scandal involving allegations that Ashton Embry, law clerk to Justice Joseph McKenna, was leaking information on pending decisions to a band of confederates. See John B. Owens, "The Clerk, the Thief, His Life as a Baker: Ashton Embry and the Supreme Court Leak Scandal of 1919." *Northwestern University Law Review* 95, no. 1 (Fall 2002): 271–308.
- ⁴⁰ Lewis J. Paper, interview with Nathaniel L. Nathanson, December 17, 1980, Washington, D.C.; Calvert Magruder, "Mr. Justice Brandeis," *Harvard Law Review*, vol. 55 (December 1941): 193–94.
- ⁴¹ Paper, interview with Austern.
- ⁴² Paper, interview with Sutherland.
- ⁴³ Acheson, **Morning and Noon**, 82.
- ⁴⁴ *Id.* Landis describes a research project that required that he review every page of sixty-odd years of Senate journals. Landis, "Mr. Justice Brandeis," 471.
- ⁴⁵ Leonard Baker, **Brandeis and Frankfurter: A Dual Biography** (New York: Harper & Row, 1984): 214. Baker adds: "A few days before the argument, to Friendly's chagrin, telephone companies filed an *amicus curiae* brief with identical information." *Id.*
- ⁴⁶ Paul M. Freund, in Bickel, **Unpublished Opinions**, xix.
- ⁴⁷ Strum, **Justice for the People**, 355.
- ⁴⁸ *Id.*
- ⁴⁹ *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931).
- ⁵⁰ Paper, interview with Austern.
- ⁵¹ Acheson, **Morning and Noon**, p. 78.
- ⁵² Friendly clearly met Brandeis' standards. In a May 20, 1928 letter to daughter Susan Brandeis Gilbert, Brandeis wrote that "[t]here is even enough work on hand to satisfy my voracious secretary [Friendly]." Melvin I. Urofsky and David W. Levy, eds., **The Family Letters of Louis D. Brandeis** (Norman: University of Oklahoma Press, 2002): 465.
- ⁵³ *Olmstead v. United States*, 277 U.S. 438 (1928).
- ⁵⁴ David Epstein, oral history interview with Henry J. Friendly, July 1, 1973.
- ⁵⁵ Paul. A. Freund, "The Evolution of a Brandeis Dissent," *Manuscripts* 10 (1958): 18–25, 34.
- ⁵⁶ Lewis J. Paper, Interview with Louis L. Jaffe, February 10, 1981, Cambridge, Massachusetts. Claytor echoed Jaffe's description of the minimal interactions with Brandeis, stating that "[b]asically we communicated by writing." Lewis J. Paper, interview with W. Graham Claytor, Jr., October 15, 1980, Pentagon. Alice Brandeis Popkin, granddaughter of Louis Brandeis, admits that she is surprised to hear her grandfather described in such terms: "He was not a distant person. Whenever I talked to my grandfather, he would look you straight in the eye. He was a very warm and loving person." Author's interview with Alice Brandeis Popkin, April 16, 2008.
- ⁵⁷ Paper, interview with Freund.
- ⁵⁸ Paper, interview with Austern.
- ⁵⁹ Paper, interview with Hurst.
- ⁶⁰ Freund, "The Supreme Court: A Tale of Two Terms," 226.
- ⁶¹ Paper, interview with Fisher.
- ⁶² Paper, interview with Sutherland.
- ⁶³ Paper, interview with Freund.
- ⁶⁴ *Id.* Professor Urofsky suggests, however, that Justice Brandeis was not offended if his clerks shared gossip from other Chambers with him. Author's correspondence with Urofsky. Once all nine Justices and their staffs began working exclusively at the new Supreme Court building, a "clerk network" quickly developed and clerks were generally encouraged by the Justices to aid in coalition formation. See Artemus Ward and David L. Weiden, **Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court** (New York University Press, 2006): 159–70.
- ⁶⁵ Nathaniel L. Nathanson, "Mr. Justice Brandeis: A Law Clerk's Recollections of the October Term, 1934," *American Jewish Archives* 15 (April 1963): 6–16.
- ⁶⁶ Calvert Magruder, "Mr. Justice Brandeis," *Harvard Law Review* 55 (1941): 193–94.
- ⁶⁷ Acheson, **Morning and Noon**, 49.
- ⁶⁸ Landis, "Mr. Justice Brandeis," at 470.
- ⁶⁹ Acheson, **Morning and Noon**, 50.
- ⁷⁰ Paper, interview with Freund.
- ⁷¹ Acheson, **Morning and Noon**, 50.
- ⁷² Paper, interview with Riesman.
- ⁷³ Paper, interview with Austern.
- ⁷⁴ Paper, interview with Nathanson.
- ⁷⁵ Strum, **Justice for the People**, 362.
- ⁷⁶ Paper, interview with Austern.

⁷⁷Paper, interview with Riesman. Philippa Strum recalls Alger Hiss telling her the story of attending a dinner party at the Brandeis residence during his Holmes clerkship: “He remembered Poindexter, LDB’s man of all work, taking a plate of asparagus around to the guests. Hiss got the plate relatively early and took what he thought was a reasonable helping. To his horror, he realized afterwards that the plate was not going to be replenished and his healthy helping meant that there would not be enough for everyone else.” Author’s correspondence with Strum.

⁷⁸Almost forty years later, Henry Friendly’s only regret regarding his clerkship was the lack of contact with Justice Holmes: “[O]ne of the only criticisms I have of Brandeis. . . I think he only took me around there [to meet Holmes] once. I wish he’d done it more.” Epstein, interview with Friendly.

⁷⁹Paper, interview with Sutherland.

⁸⁰Paper, interview with Fisher.

⁸¹*Id.*

⁸²Paul A. Freund, “Mr. Justice Brandeis,” *Harvard Law Review* 55 (1941): 195–96.

⁸³Paper, interview with Gilbert.

⁸⁴Nathanson, “A Law Clerk’s Recollections,” 9.

⁸⁵Paper, interview with Nathanson.

⁸⁶Paper, interview with Austern. Another example of Brandeis’ sense of humor was found in his explanation as to why he had Acheson work for two—as opposed to one—year as his law clerk. “Whenever Brandeis was queried about it in Acheson’s hearing, the latter recalled, ‘He would speak of a concern for my prospective clients.’” Strum, *Justice for the People*, 362.

⁸⁷Paper, interview with Sutherland.

⁸⁸*Id.*

⁸⁹After helping Brandeis organize his papers, Fisher subsequently clerked with Frankfurter.

⁹⁰Urofsky and Levy, *Half Brother, Half Son*, 597.

⁹¹*See generally id.*

⁹²*Id.* at 395.

⁹³*Id.* at 402, 410.

⁹⁴*Id.* at 470.

⁹⁵*Id.* at 193. While Williams subsequently entered government service as an Assistant United States Attorney, he spent the bulk of his career in private practice and never taught in a law school. For a glimpse into the life of a Taft law clerk, see C. Dickerman Williams, “The 1924 Term: Recollections of Chief Justice Taft’s Law Clerk,” *Supreme Court Historical Society Yearbook* (1989): 40–51.

⁹⁶Melvin I. Urofsky and David W. Levy, eds., *The Letters of Louis D. Brandeis, Volume V (1921–1941): Elder Statesman* (Albany: State University of New York Press, 1978): 404.

⁹⁷Urofsky and Levy, *Half Brother, Half Son*, 457, 531.

⁹⁸Paper, interview with Riesman.

⁹⁹*Id.*

¹⁰⁰Paper, interview with Fisher.

¹⁰¹Urofsky and Levy, *The Letters of Louis D. Brandeis*, 454.

¹⁰²Urofsky and Levy, *Half Brother, Half Son*, 371.

¹⁰³*Id.* at 581.

¹⁰⁴*Id.* at 510.

¹⁰⁵*Id.* at 359.

¹⁰⁶*Id.*

¹⁰⁷*Id.* at 360.

¹⁰⁸*Id.* at 404.

¹⁰⁹Strum, *Justice for the People*, 358; Baker, *Brandeis and Frankfurter*, 185. Strum points out that Supreme Court scholars owe a debt of gratitude to Acheson, for it was he, during his clerkship, who convinced Justice Brandeis to keep copies of drafts and other related materials in his official Court files. Strum, *Justice for the People*, 357.

¹¹⁰Urofsky and Levy, *Half Brother, Half Son*, 248–49.

¹¹¹Dean Acheson, “Mr. Justice Brandeis,” *Harvard Law Review* 55 (December 1941): 191–92.

¹¹²Author’s telephonic interview with Walter B. Raushenbush, January 28, 2008.

¹¹³Strum, *Justice for the People*, 359 (quoting from minutes of the presentation).

¹¹⁴*Id.* at 358.

¹¹⁵David Riesman with Reuel Denney and Nathan Glazer, *The Lonely Crowd; A Study of the Changing American Character* (New Haven: Yale University Press, 1950).

¹¹⁶“Yale Law Dean Rites Tomorrow,” *Boston Herald*, March 21, 1955.

¹¹⁷“Adrian S. Fisher, 69, Arms Treaty Negotiator,” *The New York Times*, March 19, 1983.

¹¹⁸As a Wisconsin Law School student in the 1950s, Brandeis’ grandson Walter Raushenbush took classes from both of his grandfather’s former clerks. He recalls both professors fondly, describing Hurst as a “remarkable and demanding teacher who was full of interesting ideas.”

¹¹⁹Louis L. Jaffe and Nathaniel Nathanson, *Administrative Law: Cases and Materials* (Boston: Little, Brown, 1968).

¹²⁰Richard D. Lyons, “W. Graham Claytor, Architect of Amtrak Growth, Dies at 82,” *The New York Times*, May 15, 1994.

¹²¹“Samuel H. Mason, 87, lawyer, KTCA founder,” *Star Tribune*, May 14, 1988.

¹²²“Irving B. Goldsmith,” *Chicago Daily News*, July 24, 1941.

¹²³“From Clerk to Judge,” *The New York Times*, March 11, 1959.

¹²⁴“Robert Page, 69, of Phelps Dodge,” *New York Times*, December 27, 1970.

¹²⁵Urofsky and Levy, *The Letters of Louis D. Brandeis*, 38.

¹²⁶Acheson, *Morning and Noon*, 96–97.

¹²⁷Paper, interview with Hurst.

¹²⁸Francis Biddle, **Mr. Justice Holmes** (New York: Charles Scribner's Sons, 1942): 12.

¹²⁹Paper, interview with Sutherland.

¹³⁰Alpheus T. Mason, **Brandeis: A Free Man's Life** (New York: The Viking Press, 1946).

¹³¹Paper, interview with Riesman.

¹³²Modern law clerks have been less hesitant in criticizing the Justices. *See generally* David Margolick, Evgenia Pertz, and Michael Shnayerson, "The Path to Florida," *Vanity Fair* (October 2004): 310–20; Edward Lazarus, **Closed Chambers: The First Eyewitness Account of**

the Epic Struggles Inside the Supreme Court (New York: Random House, 1998); Bob Woodward and Scott Armstrong, **The Brethren: Inside the Supreme Court** (New York: Simon and Schuster, 1979).

¹³³*See generally* Todd C. Peppers, **Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk** (Stanford University Press, 2006); Ward and Weiden, **Sorcerers' Apprentices**; Chester A. Newland, "Personal Assistants to Supreme Court Justices: The Law Clerks," *Oregon Law Review* 40 (1961): 299–317.

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