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Dear Boss: A Law Clerk's Tribute to Justice Brennan

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Abstract

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KEYWORDS: law, clerk, tribute

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E. Joshua Rosenkranz*

Dear Boss,

An unfamiliar voice on my answering machine was the first to tell me you retired. He claimed to be a booker from *Nightline* who wanted to ask a former law clerk some background questions about you. Bad joke, I thought. The next message, a commiserating friend bearing the same report, convinced me otherwise. Bad dream. Countless messages repeated the theme. Try as I might, I could not rouse myself. The harsh reality crept in: Bad news.

I did not return any of my numerous messages that day. As to Ted Koppel, he would understand that I would rather speak with his booker next time, when he bears good news. As to my friends and colleagues who offered empathy, I was grateful. But I doubted that they would understand how I felt, and I lacked the words and the energy to articulate it. It has taken me until now to assimilate the barrage of thoughts and emotions your retirement triggered. Even now I write with the disheartening caveat that my words could never do you justice. I pray only that they do not cross the line separating heartfelt homage from maudlin mush.

In the moments after I eased the telephone receiver into its cradle, I was puzzled not so much by your decision to retire as by my own profound sense of loss. I thought I had prepared myself for the news. At times, part of me even wished it would arrive already. After thirty-four years wedded to the Supreme Court — forty-one years to the bench — you deserve some time to yourself. And after seven years wedded to each other, Mary and you deserve some time together. So I would never begrudge you the rest you so richly deserve. Nevertheless, the news left me with a void. While I probably could not have articulated the loss precisely, I knew it was different from the loss that so many in the general public felt.

Like others, I worry about the future of the law. From any legal perspective, your retirement is a loss. The Court's liberal minority lost

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its anchor. The American people lost their most loyal and vocal advocate for equality, liberty, privacy, and justice. Every downtrodden individual in the country — the homeless, the needy, the victim of bigotry, the religiously oppressed, the political gadfly, the handicapped, the immigrant, the criminal defendant, the prisoner — lost a sympathetic ear. The Court lost whatever balance it had; you would no longer be there to defy all odds and whomp up an occasional astounding victory as if out of a top hat. Each of these losses is distressing.

As profound as these losses are, however, they are not the losses that I most lament. Perhaps that is because everyone else is so preoccupied with the survival of the Republic that my anxiety would be redundant. More likely, it is because I consider the hysteria exaggerated.

I share (or, more accurately, I inherited) your faith in the Court. I therefore have little fear that anyone could dismantle the jurisprudential fortress you built over a lifetime. You built it of durable stuff — compassion, justice, and eternal truths. The passage of time and the heat of debate have served only to temper it. The onslaught of eager new judicial personnel may fret your fortress's parapets, but will never penetrate its walls.

Nor am I among those who bemoan your retirement as if it squelched your dissenting voice. Even if you never utter another word of comment on the law (an unfathomable thought, indeed), your voice, immortalized in 140 volumes of United States Reports, will continue to "soar with passion and ring with rhetoric."¹ Like you, I am optimistic that your dissents of yesterday will become next century's laws. You have penned much of the script that the Court will follow when it hands down edicts to my children.

So, you see, Boss, my confidence that the law and the Court will survive your departure is not so much a slight as it is a salute to the central role you have played.

Like everyone who has known you, I was saddened also by your acknowledgement that poor health forced you off the bench. It goes without saying that I feel your pain.

I confess that your submission opened up an emotion other than pure empathy, a feeling as disturbing as it was elusive. It seemed at first incongruous. Before I met you, I thought of you as a superhero — a warrior of boundless strength, undying commitment, limitless compassion, incisive intellect. You reinforced and deepened that impression

1. Brennan, *In Defense of Dissents*, 37 HASTINGS L.J. 427, 431 (1986).

with every contact we had. As infantile as it may seem (especially for one as irreverent as I), I was never willing to entertain the possibility that any harm could penetrate you. When you publicly acknowledged a weakness, I thought you would have to relinquish your superhero status.

That thought passed quickly though. You could still be my superhero without being superhuman. In fact, that made so much more sense. In the first place, you have always been more content to view yourself as a "flesh-and-blood human being[]" than as a "demigod[] to whom objective truth has been revealed."² More importantly, it is your humanity, limitations and all, that makes you so worthy of admiration and emulation. Your personal victories are all the more awe inspiring when viewed in light of constraints you overcame to achieve them; the most extraordinary feat becomes unremarkable when the absence of obstacles preordains success. Similarly, I could never even aspire to emulate you without some sense that you and I suffer some of the same human constraints.

The sense of loss that struck me hardest and has lingered longest stems from something that none of the pundits or commentators, in all their hysteria, ever mentioned. Not that I can blame them for missing it. It derives from an experience they never had: Your retirement means the end of a line of Brennan law clerks.

I wonder whether you could ever fully appreciate how deeply you have touched each of us law clerks — 109 in all. I trust that you could sense our love and admiration better than I am about to describe it.

I went to law school because I wanted to be Atticus Finch, Harper Lee's unflinchingly ethical and kindhearted lawyer who undertook the hopeless defense of a black laborer unjustly accused of raping a white woman.³ Law school taught me perhaps how to reason like a lawyer, but Atticus taught me what it means to be a lawyer.

When I joined your Chambers one year out of law school, you became my Atticus of the judiciary. I already knew how judges reason, but you taught me what it means to be a judge. Not until I saw you in action did I fully understand that the judge's final question in every case should be not, "is this logical?," but "is this right?" As you have so eloquently put it, "[s]ensitivity to one's intuitive and passionate responses, and awareness of the range of human experience, is . . . not

2. Brennan, *Reason, Passion, and "The Progress of the Law"*, 10 CARDOZO L. REV. 3, 5 (1988).

3. H. LEE, *TO KILL A MOCKINGBIRD* (1960).

only an inevitable but a desirable part of the judicial process, an aspect more to be nurtured than feared.”⁴ You taught me that “the greatest threat to” liberties “is formal reason severed from the insights of passion.”⁵ A judge “who operates on the basis of reason alone” can never adequately address “[w]hether the government treats its citizens with dignity,” because such a judge cuts himself off “from the wellspring from which concepts such as dignity, decency, and fairness flow.”⁶

Your opinions are rife with illustrations of these principles. For me these principles come alive more in your approach to the death penalty than anywhere else. It should be no surprise to anyone that you were the first on the Court to argue that an execution is, under all circumstances, “cruel and unusual punishment.”⁷ That proposition followed naturally from your conviction that everyone, “even the vilest criminal[,] remains a human being possessed of common human dignity,”⁸ and that the state’s “calculated killing of a human being” amounts to the most cynical “denial of the executed person’s humanity.”⁹

You penned those words in 1972, fifteen years before my clerkship began. Yet the words, and the sentiments they carried, recurred more often during my year at the Court than anything else you wrote. Whenever a state has executed a human being, you have issued the same words, purporting to convey no more than the reaffirmation that you were “[a]dhering to [your] view.” In the dark-eyed night, when most executions occurred, I often telephoned the Clerk’s office to convey that you were filing “the standard dissent,” as if there was something prosaic about it: Another death, another dissent.

There wasn’t. The words remain the same, but each execution is a wrenching experience in your Chambers. Each execution sends another pang through your heart. Even though some find you “simply contrary, tiresome, or quixotic,”¹⁰ you refuse to play any part in an injustice that so thoroughly hacks away at “common human dignity.” Your repeated incantation in the face of majority will is your way of saying what Atticus captured in the precept, “before I can live with other folks I’ve got to live with myself. The one thing that doesn’t abide by majority

4. *Id.* at 10.

5. *Id.* at 17.

6. *Id.* at 21-22.

7. U.S. CONST. amend. VIII.

8. *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring).

9. *Id.* at 290.

10. Brennan, *supra* note 1, at 437.

rule is a person's conscience."¹¹ It is your own statement, "as an individual: 'here I draw the line.'"¹²

You defend that line with the vigor and valor of a knight defending the king's palace. I learned this one day when I handed you a draft of a dissent from the Court's decision to deny a stay of execution. It was a particularly troublesome case. This indigent prisoner would not be facing execution if his court-appointed trial lawyer had been minimally competent. The last paragraph of my draft contained the most spirited attack that I had ever drafted. I said to you, "Boss, please focus closely on the last paragraph. I think it may cross the line." You took the draft with one hand and held my arm with the other and interrupted, "Josh, when it comes to state-sponsored death, there is no line."

We lost that one. The prisoner met his death on schedule at precisely 1:00 a.m. (midnight in Louisiana). At 1:45 a.m., I left my office. On my way home I gazed up at the inscription that capped the Court's towering columns: the facade of "Equal Justice Under Law."

The hypocrisy still burned in my mind the next morning, when I delivered the news to you. I asked you the same question Atticus's son asked after the jury of twelve white men returned a cowardly guilty verdict: "How could they do it, how could they?" Atticus's answer was: "I don't know, but they did it. They've done it before and they did it tonight and they'll do it again and when they do it — seems that only children weep."¹³

Your response, eloquent in its silence, was at the same time disturbingly similar and comfortingly different. First, you held up five fingers, a gesture whose meaning we understood all too well: "Five justices have the power to do whatever they want. They've done it before and they did it last night and they'll do it again." Then you uncharacteristically turned away from me. As you did, I saw a tear in the corner of your eye. To this day, I am not sure why you tried to hide it from me. Didn't you realize that it meant everything to me to know that Atticus was partially wrong? Sometimes the children are not alone.

Remarkably, though, your tears are never bitter or prostrate. Through thick and thin, you retain your optimism that one day — and it will be "a great day for our country, [because] it will be a great day

11. H. LEE, *TO KILL A MOCKINGBIRD* 109 (1960).

12. Brennan, *supra* note 1, at 437.

13. H. LEE, *supra* note 11, at 215.

for our Constitution”¹⁴ — the Court will look back at the enormity of its mistake and adopt your view. That optimism, as much as your compassion and keen intellect have combined to make you a model judge.

As much as you taught me about being a judge, you taught me even more about being a human being.

My mind wanders to you often, more often these days than even when I first left those marble halls. The picture of you that usually comes to mind is not the picture one might expect. It is not the portrait that peers at me from the wall of my office, that robed figure who would look austere but for the sparkle in his eyes. It is not the image of you on the bench, listening intently to every twist of every argument, hanging on to every word of your colleagues’ questions for the slightest hint of their inclination. It is not even the picture of you that I grew most accustomed to seeing: the Boss, dwarfed behind that enormous double desk that used to be Louis Brandeis’, poring over an opinion.

The picture that comes to mind most often is this: You are talking to someone in the hallway or on the stairs — a guard, a gardener, a janitor. You pick up your previous conversation with him, and remember it as if he were your closest friend. You talk about him, and never about yourself. You use his name in every sentence. Or you call him, “Pal.” You grasp onto his arm while talking, and you never let go as long as the conversation lasts. (We used to call it “taking the pulse.” I would bet that each of your law clerks at some point dreamt up some inane topic to discuss with you, just to feel the assurance of your grip.) As you part, you reiterate how delighted you are to have seen him. And he believes that he has made your day just by talking to you. He feels that way not because you put on a good act, but because it is true.

That same tenderness permeates every one of your relationships, whether with friends, colleagues, family, or passing acquaintances. Your law clerks all felt it. I will never forget the first time I handed you a proposed draft of a dissent. I had spent weeks planning it, researching it, and writing it. In keeping with our routine, my three co-clerks all tinkered with it before you laid eyes on it. You took the draft and exclaimed, “Oh, splendid, Josh. Thank you very, very much.” To hear your tone, one would have thought I had just contributed profoundly to the law.

I am embarrassed to confess that, for a moment, you had me believing that was true. Just then something drew my eyes to the book-

14. Brennan, *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 *HARV. L. REV.* 313, 331 (1986).

shelf to your left. The bottom three shelves were filled with those tired old books — probably 50 or so — with dusty red bindings. Each bore the same title: “The Opinions of Mr. Justice Brennan.” The first one was dated 1956. As I turned to leave, my head still in the clouds, the absurdity hit me. You were thanking me, as if the opinion would never have been written but for me; as if the U.S. Reports would have had twenty-three blank pages under the caption, “BRENNAN, J., dissenting.” You really meant it. But you had been authoring Supreme Court opinions without my help for six years longer than I had been alive.

Even so, no matter how many corrections you make, you return every draft, emblazoned with the word, “SPLENDID,” followed by a battalion of exclamation points. (The running joke is, we can tell how much you really like a draft by counting the exclamation points. Any less than four is the Brennan equivalent of, “this sucks.”)

Your gentleness and generosity to those around you is surpassed only by your graciousness. At the last clerk’s reunion, one of my predecessors recounted a particularly telling illustration, with which we are all familiar. The only task, outside of our legal work, that you ever permitted us to perform for you was to prepare your coffee when we met with you each morning at 9:00 a.m. sharp. Like the Levites’ offerings, it became a ritual that was passed down from one “Coffee Clerk” to the next. “Decaf, black, no sugar,” was the formula. “Be sure it is very weak, like dishwater.” Finally, “always check to see how much he drank, because he will never tell you if you’ve done it wrong.”

There is a humorous, and equally telling, epilogue to this story. I was the designated Coffee Clerk among my generation of clerks. (The honor fell automatically to the only one of us who was unmarried and therefore had no claim of entitlement to be in bed at 7:30 a.m., when you arrived at the Court.) You polished off the cup on the first day. I congratulated myself heartily for mastering the technique, and painstakingly adhered to the same formula every morning for a year with equally satisfying results.

It was not until two years later that I learned the truth, Boss. The revelation came from your last Coffee Clerk. As she tells it, one morning the whole group went down to the cafeteria because the Chambers coffee machine was on the blink. She noticed you serving yourself undiluted decaf, and adding milk and sugar. Only through rigorous cross-examination did she extract your confession that this was how you have always preferred your coffee. As an avid coffee drinker, I am incredulous at the grace of a man who could tolerate years of drinking our ~~rapid concoction~~ just to avoid any possibility of embarrassing us.

All these reminiscences bring me back to a comment that a friend made not too long ago. It referred to the time you, Mary, and I went out to dinner in Georgetown. We were with close friends, so I abandoned the formality that I might have displayed in public, and called you, "Boss" — like we all did in Chambers — rather than "Justice." Months later, one of our dinner companions commented to me that the title sounded too informal, even disrespectful. I explained that he could not have been further from the truth: "Boss" is a term of endearment, a way of expressing both our love and our deep admiration for you. "Boss" evokes all those wonderful images of you — on the bench delivering opinions brimming with passion and dissents rife with optimism; behind your massive desk, scrawling, "Splendid," on a clerk's draft; listening patiently to an admiring acquaintance; advising and caring for your clerks. At least eleven other people in the building could be called "Justice," but no one else merits the title, "Boss."

Just after you resigned, *The New York Times* interviewed a would-be law clerk, who no longer had a Brennan clerkship to complete her legal education. Her closing thought was this: "His clerks called him 'Boss' and I don't think I ever will. I felt kind of sad that that would never happen."¹⁵ I suspect she could not have appreciated the full significance of her words.

I feel privileged to be among the group who will always call you "Boss." I lament the loss for all those would-be law clerks over the years who will not have the chance.

15. N.Y. Times, Aug. 24, 1990, at B6, col. 1.