

## ANECDOTAGE

*Leonard W. Levy\**

Justice Felix Frankfurter was probably the foremost influence on my thinking about the Supreme Court. In 1953, as a young instructor at Brandeis University, I had published several articles lambasting judicial decisions that sustained Jim Crow laws. One of the articles appeared in *The New Republic*, for which Frankfurter had regularly written about the Court when he was a professor at Harvard Law School. Professor Frankfurter could be censorious and biting. My own articles were written in a similar spirit. One, which apparently outraged Frankfurter, dealt with “frauds and fallacies” in the law of segregation. I savaged not only *Plessy v. Ferguson* but decisions following *Plessy*, including the 1927 case of *Gong Lum v. Rice*,<sup>1</sup> in which the Court sustained a Mississippi ruling that classified a Chinese child as black and segregated her.

Frankfurter wrote a letter to my boss at Brandeis, his good friend Max Lerner, demanding to know who was the arrogant young instructor who dared to criticize even opinions of the Court that the “revered” Justices Oliver Wendell Holmes and Louis D. Brandeis had joined. Showing me Frankfurter’s letter, Lerner suggested that I answer it and give him a copy. The response took a couple of weeks, as I researched the law on fraud; I defended my view of the Court’s failures, covering not only the law of segregation but, on the issue of genteel criticism, precedents of rancorous language by Professor Frankfurter. My letter led to a correspondence and as a result, Frankfurter invited me to Washington as his guest to hear the arguments in *Brown v. Board of Education*. He also asked me to meet him in his chambers.

The moment I entered his chambers, Frankfurter sharply exclaimed, “There’s that damn Jeffersonian liberal!” He started baiting me and finally succeeded in provoking an argument in which I sought to defend liberal judicial activism rather than judi-

---

\* Leonard W. Levy, All-Clairemont Andrew W. Mellon Professor of Humanities, Emeritus, is the author of 35 books, most recently, *A License to Steal: The Forfeiture of Property*.

1. 275 U.S. 78 (1927).

cial self-restraint. At the time, I was considering a book on the Court and the Bill of Rights, in which I expected to champion the position of Hugo Black. Frankfurter made several sharp remarks about Black's inconsistencies and against Black's activist impulses. He also was remarkably spirited in slamming my views. The argument grew intense and I lost my sense of deference. I must have been brazen in my counter-assault, discrediting several of Frankfurter's opinions for inconsistencies.

While talking animatedly, and pacing before his big desk, I suddenly noticed that Frankfurter's face was vividly reddening. Then the slight, distinguished-looking scholarly jurist rose from his high-backed chair and slowly approached me with a clenched fist. I froze and thought, "My God, I'm going to be struck by a Justice of the Supreme Court of the United States." He came around the side of the desk, walked right up to me, flushed and tightfisted, and suddenly, poking a finger under my nose, he declared, "Good point, young man!" Then he returned to his chair, sat back, and beamed at me. He seemed delighted that I had supported my argument even at his expense.

Frankfurter taught me to criticize my most cherished beliefs by demanding valid evidence for any proposition. I learned to see at least two sides to every question and to appreciate the values of judicial self-restraint even more than those of judicial activism. Frankfurter became, for me, a model of intellectual rectitude. And he became a friend. He invited me to his home whenever I was in Washington. Once, when lunching with him, I was thrilled to hear him tell his servant to hold all calls "except from Dean" (Acheson). I had the pleasure of presenting Frankfurter with an honorary degree at Brandeis University.

He was instrumental in my receiving a Guggenheim Fellowship. I had a good project and several all-star scholars as references, including Paul Freund and Mark Howe of the Harvard Law School, and Henry Steele Commager and Richard B. Morris of the Columbia University Department of History, but I have always believed that Frankfurter's letter made the difference. The Secretary-General of Guggenheim Foundation was a man with a formidable reputation, the greatly respected Henry Allen Moe. Frankfurter wrote him the following letter, with a copy to me: "Dear Moe: Levy is a very bright young man. Someday he may write something important. Give him a fellowship. Felix Frankfurter." The fellowship enabled me to begin research on the origins of the right against self-incrimination, eventually resulting in a book that won the Pulitzer Prize. Frankfurter was

important, too, in helping me decide whether I should accept the offer to become the first Dean of the Graduate School of Arts and Sciences at Brandeis University. I wanted the position but felt guilty about betraying scholarship. Frankfurter, in response to my request for advice, urged me to accept, saying that Edward Gibbon could never have written his *Decline and Fall* had he not had the experience of being a sergeant-major in the British army. I did not know at the time that he probably never was, but I accepted the Deanship.

Hugo Black was scarcely as open minded as Frankfurter. Black once rebuked me for not having submitted the manuscript of my book, *Legacy of Suppression*, for criticism by people who agreed with his absolutist interpretation of freedom on the press. Black was always the partisan: Justice Black differed not much from Senator Black. A former clerk to Black once told me that Black had underlined much of the book and made aspersive marginal asides. The Justice required him to spend an entire summer checking the footnotes and sources for *Legacy of Suppression*, looking for mistakes. He found none. Black, he said, insisted that the book was wrong even if its facts were right, because of its interpretation. I thought the evidence dictated the interpretation.

A close friend of Black's, Professor Edmond Cahn of New York University Law School, tried to persuade him that *Legacy of Suppression* had some merit. Cahn reviewed the book very favorably for the *New York Herald Tribune Book Section* and recommended it to Black. In the first draft of his reply to Cahn, Black wrote of *Legacy*, "In brief my judgment is that it is probably one of the most devastating blows that has been delivered against civil liberty in American for a long time." I do not know whether Black ranked me above or below Joe McCarthy. In any case, he regretted that, despite Cahn's description of me as a "great libertarian," I "had seen fit to take this reactionary view of the First Amendment's purposes." Cahn assured Black that the First Amendment would survive my book, but Black moodily replied, "I hope you are right but I am afraid you are not in believing that Dean Levy's book has done no damage to the First Amendment." Black absolutely refused to read my *Jefferson and Civil Liberties: the Darker Side*, because the subtitle indicated that he would disagree with my viewpoint. He was no different from the great Jeffersonian scholar, Julian Boyd, editor of Jefferson's papers, who admitted that he had not read the book but

condemned it anyway, because, he wrote, if I was right, he had wasted the best years of his life.

Frankfurter's reaction to *Legacy of Suppression* had been wholly favorable. In a letter to me he said he found the book "fortifying and cheering" at a time when too many professing liberals succumbed to what Brandeis called the most odious of doctrines, that the "good justifies the means." Frankfurter wrote me that he would "rather have said what you say of all than have written *McCulloch v. Maryland*"—high praise because Frankfurter thought that the opinion by John Marshall was the greatest in our history

In *Brown v. Board of Education*, Thurgood Marshall, then leader of the NAACP Legal Defense Fund, answered the arguments of counsel who defended segregation. Shortly after he concluded, the Court adjourned and I returned to Frankfurter's chambers. We were chatting when Justice Robert S. Jackson burst into the room and, without taking any notice of me, blurted out excitedly, "Wasn't that colored fellow magnificent! He simply creamed John W. Davis." Frankfurter, obviously upset by Jackson's breach of judicial reticence in the presence of an outsider, broke in on him, introduced me to him, and changed the subject. It had been an electrifying moment. Later, according to scholars, Jackson was indecisive for a while on the outcome of the case. I had glimpsed a different Jackson.

Chief Justice Earl Warren arrived in Boston on a cold November day in 1957 to spend the Commencement weekend at Brandeis and to receive an honorary degree. I presented him and was his host on behalf of the university for the weekend. Warren carried informality to extremes. I went to the hotel dressed in a tuxedo to meet him and escort him to a formal dinner. Learning his room number at the hotel desk, I knocked at his door. He did not inquire who was knocking. In a hearty voice he just boomed out, "Come in, come in! It's open." I opened the door and walked in to see the Chief Justice of the United States, a big ruddy man, standing there before me in his old-fashioned BVDs. The next day, when we had some time together, he wore a torn baggy sweater as we composed a speech for him to deliver to an interfaith meeting a few days later.

When the weekend was over, I was glad to take Warren back to Logan Airport to catch his plane. The intense activities at school and being on my best behavior with the Chief Justice had wearied me. That Sunday afternoon was unnaturally cold and windy. The heating system at Eastern Airlines wasn't working

properly. We stood in a long line of overcoated people as we awaited the call for Warren's plane to be boarded. An official of the airlines recognized Warren and approached us, saying, "Mr. Chief Justice, kindly step this way to our VIP room. It has a hot-air heater, and we will be glad to make you comfortable while you wait and give you a drink." I was relieved at the prospect of the rescue, but Warren astonished and dismayed me when he replied: "Thank you so very much. I should be pleased to accept your offer. And," with a sweeping gesture of his arm, "all these good folk in line are invited too?" The flustered airline official replied that he could not accommodate more than the two of us because the VIP facilities were too small. Warren quietly responded, "In that case, I'll just wait here, thank you." We waited our turn with everyone else. The press had not been present. The sentiments Warren expressed were genuine. He was a folksy democrat and would accept no special favors.

That episode with Warren reminds me of a later time when I had lunch with Eleanor Roosevelt in the faculty dining room at Brandeis. On the way out, she excused herself and walked through the doorway leading to the kitchen. I thought she had made a mistake and followed her into the kitchen to advise her on the location of the ladies' room. I found that she was where she wanted to be, shaking hands with the cooks and waitresses, thanking them for lunch.

Thurgood Marshall on another occasion was also a degree recipient whom I presented. At the time, in 1961, he was the Solicitor General of the United States, having resigned a seat on the federal court of appeals. I addressed him as Judge Marshall, but he was as relaxed and informal as a big puppy. He affected slangy speech and a buddy-buddy attitude. At breakfast, he asked me whether I had seen the *New York Times* story on the Freedom Riders. A racially-mixed group of young people riding a bus through the South had been set upon in Anniston, Alabama. Their bus had been overturned and burned. We discussed the episode for a few minutes, and Marshall then confided in me, "You know, I could never have joined them. I just couldn't have been a Freedom Rider." Not quite believing him, I asked, "Why not?" "It's my back," he replied, "I have a broad yellow streak up my back" —and he roared with laughter.

A wholly different sort of person was Chief Justice Warren Burger, whom I first met in Birmingham in 1976 on the occasion of the centennial of Justice Black's birth. We were both speakers at the event. Burger was said to have arrived in a private plane,

and he took the entire top floor of the hotel with his nine bodyguards, who worked eight hour shifts in batches of three each. I have never met a more starchy person than Burger. Pomposity enshrouded him like a miasma that blanketed him with his own sense of self-importance.

I resented the treatment accorded to me as well as others when a party was given for the speakers. Before we could enter the room, Burger's guards frisked us for weapons and searched brief cases and purses. I tried to engage him in conversation but was as unsuccessful as others. In 1971 the Court had decided, in *Bivens v. Six Unknown Agents*,<sup>2</sup> that the Fourth Amendment permits damage suits for injuries sustained in an illegal federal search. Burger had dissented in an opinion recommending that Congress should enact a statute establishing a remedy against the government in order to provide compensation for persons whose Fourth Amendment rights had been violated. It was an interesting idea. Moreover, the Court had merely held that the wronged individual had a right to sue. I wondered what had happened subsequently. So I asked Burger about the outcome of the case when it was returned to the lower courts. Did *Bivens* win his suit? Did Congress ever give consideration to Burger's idea? He seemed not to know what I was speaking about and when I tried to explain, to remind him of the case, he grunted, "I don't know" and turned away.

At another Commencement, Brandeis University honored the two Massachusetts senators, Leverett Saltonstall and John F. Kennedy. My colleague, John P. Roche, had the luck of presenting the junior senator, Kennedy, while I was assigned to Saltonstall, a stuffy fellow. The four of us spent considerable time together. When the marshal of the academic procession called out that we would march out in five minutes, Kennedy excused himself. He leaned against a wall, pulled an envelope out of his pocket, and made notes on it for a few minutes. At the Commencement, Saltonstall read a dull speech for an hour. When Kennedy got his turn, he put the envelope before him on the lectern and spoke brilliantly for about ten minutes in beautiful English and with some wit. He received a grand ovation.

---

2. 403 U.S. 388 (1971).