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MR. JUSTICE BRENNAN AND THE LITTLE CASE

*Judge Richard Arnold**

Dean McLaughlin, Mr. Moderator, Mrs. Brennan, Your Honors, ladies and gentlemen, and friends, it's a real pleasure for me to be here this afternoon. I have never been to this law school before. I have barely even been to Los Angeles before, but I'm glad to be in California, which I'm proud to say is where one of my daughters lives, and I would go anywhere to have a chance to honor Justice Brennan. It's a joy for me to share a few thoughts with you about Justice Brennan and the art of judging.

I call this little talk, "Mr. Justice Brennan and the Little Case." It will become obvious to you in a moment why I've chosen that title. We've heard of *Baker v. Carr*.¹ We've heard of *New York Times v. Sullivan*,² and we've heard of *Elrod v. Burns*.³ How many of you have ever heard of *Michalic v. Cleveland Tankers, Inc.*?⁴ Raise your hands. No one. There's a reason for that. The case didn't amount to a whole lot so far as jurisprudence is concerned, but it is a case written by Justice Brennan from which I think we can draw some instruction.

Of course every law clerk thinks that the job, when you were a law clerk, was the most important job you ever had, and in most cases, that's true. I feel that way. I'm going to give you some reminiscences about a particular case that was decided during my term as a law clerk. Before I do that I'm going to drop a footnote. I don't know how one makes footnotes in oral addresses, but this is a footnote. I disapprove strongly of law clerks who write about what happened while they were law clerks, and I tell my law clerks that I

* United States Circuit Judge for the Eighth Circuit.

1. 369 U.S. 186 (1962).
2. 376 U.S. 254 (1964).
3. 427 U.S. 347 (1976).
4. 364 U.S. 325 (1960).

never want to hear uttered anywhere else in the world any word that I say in these chambers. I say that because you may think that I'm about to break the rules, but I'm not really, because Justice Brennan gave me permission to speak about things of this nature, and besides that I'm not going to tell you much of anything secret, anyhow.

On Thursday, October 20, 1960, a case was argued called *Michalic v. Cleveland Tankers, Inc.* This was a case involving a man who worked on a ship and was injured when a wrench he was using slipped and dropped on his foot. The defendant says the plaintiff dropped the wrench on his foot. The plaintiff says the wrench dropped on my foot. In any event, this case was brought in a United States District Court partly in admiralty and partly at law. I won't go through all of that business about the silver oar. You're familiar with it. The Jones Act and the admiralty law of unseaworthiness were both involved in the complaint. When it came time for the case to go to the jury, the District Court directed the verdict, and the case never went to the jury. The Court said there wasn't enough evidence to show that the incident was any fault of the employer, either because the wrench was unreasonably dangerous or because the employer had negligently allowed the wrench to wear out. There was no reason to allow this case to go to the jury. The Court of Appeals for the Sixth Circuit affirmed,⁵ and then the case went up to the Supreme Court of the United States.

It was argued on Thursday, October 20. The next day the Court had its conference. Now in those days—I know you're all tired of hearing about how bad and hard things were in the old days—but in those days the Court worked on Saturdays. So they had their conference not only on Friday but on Saturday morning also. The Justice would come back from the conference and tell us law clerks what had happened. That was a great thing for us to be told what had happened in a conference of the Supreme Court of the United States. One of the things that he said when he got back was that the *Michalic* case was going to be reversed by a vote of five to three. That's eight; what about the ninth person? Well, Justice Frankfurter, as you will recall, disdained this whole type of case. He would not vote one way or the other except to say that he would dismiss the writ of certiorari

5. 271 F.2d 194 (6th Cir. 1959).

as improvidently granted, because this kind of case, involving only whether some seaman had been negligently injured, was not worthy of the attention of the Supreme Court. That was his view, and that was a big controversy, as you will recall, during the 50's and 60's.⁶

The Justice came back and announced to us, and I quote, "We got Clark." That meant that Justice Clark had voted to reverse the case. Some of the wags among the law clerks—law clerks are some of the worst gossips in the world, and we had a great sense of self importance—but it was said by us law clerks who were all knowing that Justice Clark decided these kinds of cases by what was called the Clark Rule. The Clark Rule was, "He was hurt, wasn't he?" So whether for that reason or for some other, Justice Clark voted to reverse, along with four others, including Justice Brennan.

We awaited the assignment of opinions, and on Monday, October 24, the opinions were assigned by letter from the Chief Justice. Justice Brennan was assigned the *Michalic* case and a tax case called *Knetsch v. United States*,⁷ which was utterly insignificant. That was it. He was a little bit disappointed because there were so-called big cases, important constitutional issues floating around, but he was either in dissent, or the Chief Justice picked somebody else to be the writer. In any event, a funny thing then happened. The Justice gave me the *Knetsch* case to draft, and Dan Rezneck, my co-clerk, was given a big job, the writing of a dissent in a case called *Communist Party v. Subversive Activities Control Board*,⁸ which you can read if you like. He took *Michalic* to write himself.

It seemed odd to us at the time that a great judge, a person well known for his devotion to constitutional liberties, would take a personal-injury case as his own favorite to write about. But he did. He started working. This was no law clerk, now. The Justice did all this case himself. He began work on Tuesday the 25th. The thought occurred to him, as he got into it, that there might be more to it than just whether the wrench was defective. There was an issue then about jury trials, whether or not certain kinds of admiralty claims, if they were joined with Jones Act claims, could be tried to a jury. If not, which came first? Did the jury decide the issues common to

6. See, e.g., *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500 (1957).

7. 364 U.S. 361 (1960).

8. 367 U.S. 1 (1961).

both claims first, or did the judge sitting in admiralty decide the issues common to both claims first? That made a big difference. The Justice thought to himself, maybe there's more to this case than the wrench. He spent three days researching that issue—this happens to judges a lot, and it never surfaces. An idea comes to you, and you follow it, and it turns out to be a rabbit trail. About three days into researching this issue, he came upon a statute—irritating things, statutes—28 U.S.C. Section 1873, with which you all no doubt are familiar, which provides that if a ship is on the Great Lakes, admiralty cases get tried to juries anyway. The great issue that might have been an important jurisdictional decision disappeared from this case after three days of research, by him, mind you, not law clerks.

So the opinion was written and circulated right away. On Tuesday, November 2, the result was clinched when Justice Clark concurred in the opinion. Justice Harlan's dissent, which is three pages long, arrived immediately. The justices in the majority reconcurred in the opinion. On Friday the 5th, when the Court conferred, we were told that *Michalic* was ready to come down, and on Monday, November 7, 1960, the *Michalic* decision was handed down from the bench, and Mr. Michalic got his jury trial. What happened about the wrench on remand, I do not know. That is probably something I should have determined.

What does all this have to do with the art of judging? I think about Justice Brennan often as I go about my own job of deciding cases and writing opinions. Hardly a day goes by that I don't think of something he said to me, or something that he did, or some principle that he had which I can apply in my own work. There are several of those principles that come out of this seemingly insignificant opinion. In the first place, he was quick. This case took 17 days from oral arguments to the handing down of a decision. It was not unanimous. There was a dissent. There was a separate statement by Frankfurter. Three judges dissent, and still it takes only 17 days. That means not only that Justice Brennan was quick, but also that Justice Harlan, who wrote the dissent, was quick. This is a virtue that many judges seem to have forgotten. My brother, who is a judge on the same court on which I sit, is fond of saying that the first duty of a judge is to decide the case, whichever way it goes, the second duty is to decide it for the right party, and the third duty is to do it

fast. People want to know the answer. They want a result. It's important to them of course that the result be in their favor, but if they're going to lose anyway, it's important for them to know quickly. The virtue highlighted here is quickness, promptness, no agonizing over these matters, but just deciding them. That is a virtue that judges should have in mind, and one that all of us attempt to have in mind.

The second point about this opinion: It was short—eight pages. Imagine that! An opinion of the Supreme Court of the United States only eight pages long! No word processors of course; no computers; only two law clerks in the chambers. And you can see in this particular case, it would not have mattered if he had had ten law clerks, because he did this himself. I think that brevity is also a virtue that some of us judges might have better in mind. It isn't necessary to write the great American novel, or even the great American law-review article, to decide a lawsuit. The important thing is to tell the parties what the answer is, and to tell them briefly why you think so. This opinion is a great success in those terms.

In the third place, the opinion is written in English. I urge you to read it. It won't take you but 15 minutes, maybe less than that. It's not stilted. It's not full of legalisms. After all, it is about a wrench. But it is possible, and those of you who read F.3d and the U.S. Reports and other august sources of law, know that it would have been entirely possible, to expatiate at great lengths about the wrench. We read opinions every day in the law reports that read that way. Justice Brennan could have gone into a tremendous disquisition about the distinction between negligence, which is based on fault, and unseaworthiness, which is liability without fault. Incidentally, if you think about that very long, it makes your head hurt, because it really isn't so, but the distinction is one of the received doctrines of the law, and you could have written pages if not volumes on that subject.

And then there was the business about the jury trial, which Justice Brennan was saved from having to address by the statute that he found. This shows up in the opinion only in a footnote, which simply notes the existence of the statute.⁹ This footnote could have been

9. See *Michalic*, 364 U.S. at 331 n.4.

expanded into a tremendous essay, but it was not. I think that Justice Brennan showed a sense of restraint in just writing what needed to be written to decide the case instead of going on at great length about unnecessary matters.

In fact, this leads me to the fourth observation about how this case reflects the art of judging. A great deal about judging never becomes public because it's inside the judge's head. Judges, as they sit down to write, or as they sit down to research, or as they sit down to try to decide something, or as they listen to proof, whatever it is that they're doing, they have thoughts. Many of these thoughts never see the light of day, but they are an important part of making up your mind and coming to a conclusion. This business about the jury trial and the research that the Justice did, while it never saw the light of day, never had fruition in terms of anything written on a page, I think is a good example of that. A great deal of what a judge does is to decide not to put something in an opinion. A great deal of what a judge does is private, it's internal cogitation, it never comes out, and that is as it should be.

Finally, I think the case shows, and I think Justice Brennan believed this, there's really no such thing as a little case. In the present day, the Supreme Court takes no more than 90 cases to decide on the merits each year. Back then they took many more cases. Now they seem to take only cases with great issues, at least that's the theory. They take only cases with great issues—constitutional questions, some statutory construction—hardly ever do you see a case taken just because an injustice was done in the lower courts. Yet I submit to you that this is an excellent reason for the Supreme Court to grant review of a case. But whether you agree with that or not, and certainly the shades of Frankfurter and Harlan would not, the rest of us judges, state and federal, know that after all justice is our primary job—to get the thing right, no matter what legal issue is involved. I think this case illustrates that principle. There really isn't such a thing as a little case. A case is always a controversy between two or more citizens, or non-citizens maybe, who have a claim for justice based on the facts. The important job of the court is to listen to the parties and decide where justice lies. It isn't the primary job of courts to seek out cosmic legal issues or to try to state new principles. It's not the job of the lower courts at any rate. It's our job to

do the ordinary work of the grist of the mill day in and day out and make sure that the individual citizen, the little person (I hate that phrase but you know what I'm talking about) gets his or her due—or it may be the big corporation that gets its due—whoever should win the case.

For example, in our present day legal diet, I think of social-security cases. Some of you may know that the federal district courts and the courts of appeals have tons of social-security cases, in which the issue is very much like the issue raised by Mr. Michalic. Is an individual person disabled within the meaning of the Social Security Act, so that he or she is entitled to disability insurance payments from the government?

Well, that isn't going to make any law reviews, probably. It certainly isn't going to make much constitutional law. It's not going to be a hot topic in a confirmation hearing, but it is vitally important for the people involved, and judges should not be disdainful of that. There are proposals, as you may know now, for the federal courts to be divested of their social-security jurisdiction. Many judges would like to get rid of the cases, because they're dull, they're insignificant, they don't titillate the legal imagination. I personally hope that we don't get rid of them, because people like Mr. Michalic or people like a social-security claimant need a place to go where they can be heard by a generalist judge who is not so routinized that these cases become just one more instance on an assembly line. I think that's one of the important things that I took away from Mr. Michalic's case.

I've been told that a speech which is any good will make one point and that's all. The point is this: when I pick up the next apparently inconsequential case, and I assure you that most of the cases that I pick up are apparently inconsequential, I will try to think of Justice Brennan and Mr. Michalic and remember that there are no little cases. An individual's lawsuit, although it doesn't raise constitutional issues, may be the most important thing in that person's life. It's not only my duty as a judge, but my privilege as a holder of the public trust to take up that case as it comes and do the very best job I can with it. If big constitutional issues come, and that happens occasionally, we try to step up to the plate and decide them. But for the most part, our daily task is to decide cases that never make the

headlines in anybody's newspaper. In doing that, we must never forget that we're dealing with more than legal abstractions. We are deciding real disputes that matter to real people. That is the highest calling of the judge. Justice Brennan is my model in pursuing that calling. Thank you.

COMMENT BY JUDGE ARNOLD:

There are a lot of flippancies that judges trade with each other on that subject with which I'm sure you're only too familiar. One of them is that the job of the district judge is to search for truth, and the job of the appellate judge is to search for error. My brother, when he was—I'm fond of quoting my brother because he's a real scholar. He writes books. He used to say that the appellate judges thought they were art critics, and then when he became an appellate judge, he realized that there wasn't much art around. I don't really know. I think in the 20 years since I was a district court judge, we've seen a tremendous increase in volume, tremendous pressures to decide cases without thinking very much about them, tremendous pressures to avoid deciding cases. I mean, some judges will do almost anything to avoid deciding a case on the merits and find some procedural reason to get rid of it, coerce the parties into settling or whatever it might be. I wish that judges, instead of worrying about how to get rid of a case without deciding it on the merits, would just sit down, pick up the next case, and decide it, and not worry so much about the other 500 cases that are sitting on their desk. You can do only one thing at a time. And if when you're doing that one thing, your mind is on the next thing, you're not going to do it very well. I don't think that I've answered your question, but I don't know the answer to your question.

QUESTION:

Judge Arnold, I understand that Justice Brennan would have his clerks attend a yearly reunion. I was just wondering what that was like. Do you remember the clerks and the cases you worked on?

ANSWER BY JUDGE ARNOLD:

I've been at every one of those dinners except maybe two. The first one that I attended was in a room, a very small room, and there were six of us there. We thought we were being told secrets in those days. He had a way of bringing you into his confidence, and later on you would realize that he hadn't really told you the real secret. But

you had a sense of being, even after you left the clerkship, you were still part of the enterprise, and that was a wonderful thing. Of course, as the years go by and more people are at the dinners, the sense tends to diminish somewhat, but I remember very well that we had one, I was talking to Mary about this at lunch, at the Four Seasons in Washington, and he went around the room—the first thing that I remember about it was that I had just gotten reversed by the Supreme Court in an opinion written by Justice Brennan.¹⁰ That's the only case I ever had when I was a district judge that was important enough to get up there. He was kind enough to say that he thought the point on which they had reversed me probably hadn't been raised terribly well in my court. It hadn't been raised at all, by the way. Another thing that happened that night that I thought was so characteristic of Justice Brennan. He went around the room, and he took each term beginning with 1956, recognized the law clerks by name who were there, and then mentioned the most important cases that had been decided that term and which law clerk had worked on those cases. If he had any notes, I couldn't see them. I was sitting at the table with him. I don't think that he had any notes. That was a remarkable thing and I can tell you it made us feel wonderful.

QUESTION:

What was it really like working with Mary Brennan?

ANSWER BY JUDGE ARNOLD:

Mary was wonderful, and Mary would express her opinion about cases. That is really secret. She has not given me permission to repeat anything that she said, and I shall not do so.

10. See *Barrantine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (reversing 615 F.2d 1194 (8th Cir. 1980), which had affirmed Judge Arnold's opinion).

