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# Clerking for Scrooge

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## REVIEWS

### Clerking for Scrooge

Barry Cushman†

*The Forgotten Memoir of John Knox: A Year in the Life of a Supreme Court Clerk in FDR's Washington*, David J. Garrow & Dennis J. Hutchinson, eds. Chicago, 2002. Pp xxii, 288.

#### INTRODUCTION

Amid the vigorous debate that greeted the publication of Edward Lazarus's *Closed Chambers*,<sup>1</sup> David Garrow offered a distinctive view.<sup>2</sup> Where most observers subjected Lazarus's disclosures to searching ethical scrutiny, Garrow sought to historicize them. First, Garrow maintained that Lazarus's behavior was hardly singular. Surveying the substantial corpus of clerkship reminiscence literature, Garrow concluded that "[t]he historical record of the past six decades demonstrates that a host of professionally respected and academically celebrated former clerks"<sup>3</sup> had disclosed information about "case deliberations, Justices' private remarks, and opinion-drafting practices during their clerkships."<sup>4</sup> Second, Garrow assessed Lazarus's characterization of his own year at the Court as a term "that must rank with the New Deal watershed of 1937 and the year of *Brown*, 1954, as the most decisive in this century."<sup>5</sup> This, Garrow insisted, was "risible."<sup>6</sup>

Garrow had reason to link these two observations. For one of the exhibits in his case for the first claim was "an extremely revealing and

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<sup>1</sup> Edward P. Lazarus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* (Times 1998).

<sup>2</sup> David J. Garrow, "The Lowest Form of Animal Life"?: *Supreme Court Clerks and Supreme Court History*, 84 Cornell L Rev 855 (1999).

<sup>3</sup> Id at 875.

<sup>4</sup> Id at 886.

<sup>5</sup> Lazarus, *Closed Chambers* at 262 (cited in note 1).

<sup>6</sup> David J. Garrow, *Dissenting Opinion*, NY Times § 7 at 26 (Apr 19, 1998).

impressively detailed (but as yet unpublished) 978-page memoir” of the year a young man named John Knox spent clerking for Justice James Clark McReynolds.<sup>7</sup> The memoir is an account of the October, 1936 term—the term of the “New Deal watershed of 1937.”<sup>8</sup> Knox kept a diary during the term, and between 1952 and 1963 converted the diary into a memoir (pp vii–viii). Yet his own efforts to publish the memoir came to naught.<sup>9</sup> Knox did publish some of the highlights of the memoir in a 1984 article,<sup>10</sup> and after 1978 he deposited all or a portion of the manuscript at a series of libraries. But there it languished until rescued from obscurity by Garrow and Dennis Hutchinson, who have recently published an edition of the manuscript with the University of Chicago Press.

In the Foreword, Garrow and Hutchinson assert that the memoir’s “value lies both in what it reveals about the operations of the Supreme Court and in its depiction of a social culture now long gone—Washington, D.C., in the interwar years” (p x). Those anticipating arresting new scuttlebutt on the inner workings of the Court during the turbulent 1936 term will be disappointed. Perhaps the most interesting revelation, concerning the two-week delay McReynolds’s dilatory preparation of the dissent caused in the announcement of the *Labor Board Cases*, had already been disclosed in Knox’s 1984 article.<sup>11</sup> Because McReynolds and Knox worked at the Justice’s apartment at 2400 Sixteenth Street, N.W., rather than at the new Supreme Court building, Knox’s contact with the other justices and their clerks was quite limited.<sup>12</sup> Moreover, McReynolds was extraordinarily uncommunicative about the affairs of the Court. Not once, for example, did he and Knox discuss the President’s plan to enlarge the Court. Knox learned of Justice Van Devanter’s planned retirement only after it had been announced publicly.<sup>13</sup> Never once did McReynolds speak of Justice Roberts’s supposed “switch” (pp 188, 192, 216, 228). In fact, Knox and McReynolds appear to have discussed neither any of the other justices, nor their votes in particular cases, nor the business of the

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<sup>7</sup> Garrow, 84 Cornell L Rev at 864 (cited in note 2).

<sup>8</sup> Id.

<sup>9</sup> He “tried to sell his manuscript to at least two New York publishers, but the size and idiosyncratic style of the manuscript defeated his ambitions” (p ix).

<sup>10</sup> John Knox, *Some Comments on Chief Justice Hughes*, 1984 S Ct Hist Socy Yearbook 34.

<sup>11</sup> See id at 42–43.

<sup>12</sup> For example, Knox saw Brandeis’s clerk, Willard Hurst, only twice during the term, and wrote that he had “not talked with him for more than four minutes during the entire year” (p 246). He had one long conversation with Hughes clerk Richard Hogue at the end of the term (p 244), and in March began a series of meetings with Stone clerk Harold Leventhal (p 181). This was apparently the extent of his interaction with his fellow clerks.

<sup>13</sup> Knox was deeply disappointed by Van Devanter’s retirement during the Court fight, and even indulged the self-important fantasy that he might have talked the Justice out of it had he known of his plans in advance (p 232).

Court more generally. The relationship was formal, clerical, ministerial.

Yet in other respects this is the mother of all clerk-and-tell memoirs. The sheer volume of intimate personal detail revealed about the workings of the McReynolds household is unprecedented, and unlikely to be equaled by any other clerkship remembrance. And what is revealed is not a pretty picture. In his diary on January 22, 1941, Knox wrote:

Justice McReynolds unexpectedly resigns from the Supreme Court. . . . I was with him eight to ten hours a day, excluding Sundays, for a year or thereabouts. I appreciated his anti-New Deal view and agreed with it, but that was the only thing I could possibly agree with him on. He was selfish to an extreme, vindictive, almost sadistically inclined at times, inconceivably narrow, temperamental, and heaven knows what. All of his employees lived in a reign of terror and were crushed under foot without any hesitation on his part. When my year of duties were over I never even said good-by to him and wrote Justice Van Devanter . . . that McR. was "monstrously selfish."<sup>14</sup>

In the introduction to the manuscript, not reproduced in the Hutchinson and Garrow edition, Knox wrote that McReynolds

quarreled with his associates, believed in States' Rights, disliked and feared negroes, had only one Jewish friend who was permitted to come to his home, found great difficulty in expressing himself in writing and, sadly enough, was genuinely lazy.<sup>15</sup>

The balance of the memoir is devoted largely to the substantiation of these damning allegations. Suffice it to say that the case is very convincingly made.

Before we proceed to the yarn spun by the memoir, however, a brief word on this edition is in order. The manuscript has been for the most part faithfully reproduced and capably edited. The decision to exclude a weird conversation at the conclusion of the memoir between Knox and the ghosts of McReynolds and his messenger, Harry

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<sup>14</sup> John Knox, *John Knox Diary* (Jan 22, 1941) (unpublished manuscript available at Knox MSS, Special Collections, Alderman Lib, U Va, folder 10240-g). The Justice, Knox still maintained in 1979, had been "abrasive, contradictory, and unfathomable." John Knox, *A Tale of Racial Equality* 1 (1979) (unpublished manuscript available at Knox MSS, Special Collections, Alderman Lib, U Va, folder 10240-i).

<sup>15</sup> John Knox, *Experiences as Law Clerk to Mr. Justice James C. McReynolds of the Supreme Court of the United States during the Year that President Franklin D. Roosevelt Attempted to "Pack" the Court (October Term 1936)* vi (unpublished manuscript available at Knox MSS, Special Collections, Alderman Lib, U Va).

Parker,<sup>16</sup> for example, strikes one as judicious. There were, however, two editorial judgments I found perplexing. McReynolds's papers, housed at the University of Virginia, are notoriously sparse, and the amount of incoming correspondence that has been preserved is markedly thin. As Knox explains, this is because McReynolds burned most of it the day it arrived. During the Court-packing battle, numerous cards and letters were sent to McReynolds, and much of this correspondence was hostile in tone. While he continued to deliver the sealed envelopes to McReynolds's desk, Knox eventually took to confiscating the hostile postcards in order to spare the Justice (p 173). Knox saved several of these, and reproduced their texts in his manuscript. Garrow and Hutchinson include some of these in their edition (pp 173–74), yet for some reason chose to exclude a few of the juicier ones. Why, one wonders, deprive the public of an unsigned postcard from Jersey City addressed to “Old Sour Puss”?<sup>17</sup> Or of the following anonymous plum from Allentown, Pennsylvania:

Get the Hell off the bench as quickly as you can. 125 million people are against you. You are incompetent and corrupt. How much graft are you getting from the vested interests to help declare everything unconstitutional? After all, the constitution gives you no such authority. You are promoting class hatred. You are getting fat sitting on your lazy ass. You are getting a nice salary and later full pay for life. What do you care about all the misery existing on all sides, with people half fed and half clothed? Why should the public pay you a fat pension for always working against them? Corporation controlled judges have no sympathy at all for the poor and oppressed. They are getting theirs, what do they care about anybody else? History in every nation proves that the people always kill their tyrants in the end.<sup>18</sup>

The second curious editorial judgment concerns the decision to exclude entirely Knox's account of an important event that occurred early in his clerkship year. Knox was, of course, aware that McReynolds was not universally revered, and had been forewarned that the Justice's personality might on occasion make for unpleasant viewing. He was not prepared, however, for what was to occur on September 17, 1936.

That evening Knox dined at the home of Mr. and Mrs. Edward Everett Gann. Mrs. Gann (Dolly) was the sister of Hoover's Vice-President, Charles Curtis. After dinner Mr. Gann pulled Knox aside and insisted that he resign his position as McReynolds's secretary “at

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<sup>16</sup> See *id.* at 972–73.

<sup>17</sup> Knox, *Experiences As Law Clerk* at 650 (cited in note 15).

<sup>18</sup> *Id.* at 609.

once.”<sup>19</sup> In Knox’s original manuscript, written in 1952, Gann explained:

[T]he last time I saw McReynolds I decided that he was hopeless. I went over to his apartment with several friends to call. We were going to pay him what we thought would be considered a real honor, and there was a distinguished visitor with us. McReynolds, however, proved indifferent and forbidding. I concluded finally that he is not really interested in the work of the Court any more. He’s old, evidently bored with life and would probably retire now if he could do so without letting other conservatives on the Court ‘down.’ I don’t believe he has anything really to live for—except to make people like you uncomfortable and unhappy. In short, I think it is a mistake for you to spend a year with him—especially as you will be working right in his apartment and under his domination.<sup>20</sup>

The surprised Knox responded that he could not resign:

Being a law clerk to a Justice of the Supreme Court of the United States is one of the most sought after honors at the Harvard Law School. If I leave now, after only a month in Washington, everyone will naturally think that I was fired for some kind of inefficiency. Besides, I haven’t any other job to turn to.<sup>21</sup>

Returning to his apartment that evening, Knox reflected, “I was determined not to resign as a law clerk to Justice McReynolds, despite the advice that Mr. Gann had given me. However, I went home that night somewhat worried about the unexpected difficulties that might lie ahead.”<sup>22</sup>

Following page 79 of the manuscript, however, are two unnumbered pages of “CONFIDENTIAL COMMENTS CONCERNING PAGE 79,” written nearly thirty years later in 1981.<sup>23</sup> In these comments Knox reveals “*the real and basic reason* why Mr. Gann did not approve of my serving as a law clerk and private secretary to Justice McReynolds.”<sup>24</sup> It turns out that Gann and company’s call on McReynolds on the evening in question had been unexpected. As Knox explains:

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<sup>19</sup> Id at 77.

<sup>20</sup> Id.

<sup>21</sup> Id at 80.

<sup>22</sup> Id at 86.

<sup>23</sup> John Knox, *Confidential Comments Concerning Page 79*, in Knox, *Experiences as a Law Clerk* (cited in note 15) (unnumbered pages located after page 79 and added on Apr 6, 1981).

<sup>24</sup> Id.

Once the men were in the apartment, however, it became evident to Mr. Gann that a woman (whose identity I did not inquire about) was in the apartment under circumstances which Mr. Gann considered to be compromising to the Justice's reputation. I made no distinct inquiries of Mr. Gann to explain the incident in detail, and I did not even ask just when it had happened. He merely felt that I—an obviously naive young man just out of law school—should not be working for a man who had a woman in his apartment in the evening and apparently under suspicious circumstances.<sup>25</sup>

Knox continues, "Mr. Gann's request did not influence me in the least. I couldn't have cared less how the Justice spent his evenings. One thing I was certain of—and that was my intense desire to be a Supreme Court law clerk 'come hell or high water.'"<sup>26</sup> McReynolds "had, in fact, been a 'ladies' man' for years on end, and I think he was rather to be complimented for the fact that women were still pursuing him long after he had passed the 'prime of life.'"<sup>27</sup> Whatever may have induced Mr. Gann to do so, and whatever the merits of his reasons, the fact that a member of the Republican elite sought to persuade Knox to resign his clerkship with McReynolds is surely worth knowing.

## I. THE PLAYERS

Let us now properly introduce our cast of characters. After completing his law degree at Northwestern in 1934, John Knox spent two years at Harvard pursuing an LL.M. But Knox did not come to his clerkship through the usual Harvard channels. Felix Frankfurter had long been selecting clerks for Justices Holmes, Brandeis, and Cardozo; but the liberal Jewish professor was not a confidante of the notoriously anti-Semitic McReynolds, and John Knox was not one of Felix's bright young Happy Hot Dogs. (Indeed, he had barely passed Frankfurter's Public Utilities course (p xviii).) Knox was instead what can only be described as a Supreme Court groupie. He began writing Holmes while still a lonely and miserable high school student in suburban Chicago. While in law school he initiated a correspondence with many of the other justices, whom he frequently favored with birthday salutations. He paid a visit to Justice Holmes at Beverly Farms in the

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<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> Id. The possibility that this story may have been more widely circulated suggests a possible double meaning to *The New York Times* account of McReynolds's dissent from the bench in the Labor Board Case of *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 US 58 (1937). The headline read, "McReynolds Sharp in Dissent Speech"; the subtitle continued, "Derides 'Pants' Control." *NY Times* A20 (Apr 13, 1937).

summer 1930, where he met and photographed the Justice and his clerk, Alger Hiss. He later paid visits to several of Holmes's colleagues. Knox also struck up a considerable correspondence with the veterans of various wars, and became an avid collector of autographs. By 1935 his relationship with Justice Cardozo had developed to the point where Knox felt comfortable importuning the Justice for a seat at Holmes's funeral. Nor, at a time of severe unemployment, was he averse to exploiting the relationships cultivated by his relentless correspondence for his vocational advantage. In November of 1935 he wrote letters of application to each of the ninety-six members of the United States Senate. Just in case the Senators might like to know what he looked like, Knox enclosed a photograph taken with Justice Holmes at Beverly Farms, "to identify myself better" (p xvii). Oh, and by the way, speaking of Justice Holmes, "I am sorry he is dead now" — why? — "for he would have been glad to recommend me" (p xvii).

Though this cheeky gambit apparently bore no fruit, Knox's persistent correspondence with Van Devanter, whom he had been pestering since 1932, ultimately yielded the clerkship with McReynolds. McReynolds had confided in Van Devanter that he would be needing a new law clerk for the coming term. Knox dutifully kept Van Devanter apprised of his career objectives and job prospects, and the Justice, mindful of McReynolds's requirement that the clerk be "a 'WASP' conservative who never smoked cigarettes" (p 6), in turn informed his colleague of Knox's interest in a secretarial position. On the day of his graduation from Harvard, Knox was summoned to Washington for the interview.

At the interview, Knox was given two important indications concerning the nature of the position. The first concerned the nature of his duties; the second, what would be the nature of his relationship with the Justice. The questions posed by McReynolds indicated that Knox truly would be a "secretary": McReynolds was interested almost exclusively in Knox's handwriting and his ability to type and take dictation (pp 9–10).<sup>28</sup> When Knox explained that he could take dictation at a rate of one hundred words per minute on a stenotype, McReynolds inquired what that was. On hearing Knox's description, he exploded, "I wouldn't have one around the house! What I want is a law clerk that can take dictation with a pencil, not with some machine you have to carry around with you" (p 10). After a pause, McReynolds concluded, "I'm afraid you won't do" (p 10). Panicked, Knox asked to

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<sup>28</sup> Knox's duties would include answering the telephone, typing, taking dictation, preparing one-page summaries of petitions for certiorari, some legal research, and handling McReynolds's social correspondence. This last involved mastering a calling card protocol so mandarin in its complexity that the Justice, a thirty-year veteran of Washington society, became confused explaining it to his secretary.



use the six weeks McReynolds planned to be away on vacation to “brush up” on—in fact it was to learn—his pencil shorthand. McReynolds approved, but only with the understanding that those six weeks would be uncompensated. Leaving the interview, Knox mused that there was something about McReynolds “that caused me to feel that here was a man who had very little sense of humor—at least towards secretaries” (p 11). He had “retained his formality throughout the entire interview” (p 11).

Knox’s generous and avuncular guide through the shoals of this most peculiar clerkship was Harry Parker, a devout Roman Catholic (p 38) and the Justice’s messenger since 1919. Knox, Parker, and Mary Diggs, McReynolds’s cook and maid, worked together on a daily basis in McReynolds’s commodious apartment. Harry is clearly the book’s hero, and deservedly so. Knox took “an instant liking to” Harry, who “exuded friendliness” (p 12). And throughout Knox’s clerkship, “Harry remained ever faithful and always willing to tender whatever advice and assistance he could” (p 107). Harry talked the Justice into giving Knox a higher salary than he had initially agreed to—which was still well below what many of the other clerks received (p 256)—and gave Knox advice on such practical matters as where to eat on his budget (p 16). Most importantly, Harry counseled Knox on the “don’ts” of the McReynolds clerkship. He warned Knox that if McReynolds ever called the apartment during the day and found that Knox was not there—something that McReynolds would later do just to check on him—he would be fired (pp 13, 116).<sup>29</sup> Harry cautioned Knox not to let the Justice catch him with his suit coat off (p 32), not to smoke or drink, not to date anyone, and not to get too friendly with any of the Justice’s lady friends if he hoped to keep his job. “If anyone is going to do any dating,” Harry cautioned Knox, “it will be the Justice and nobody else” (p 13).

And finally, there is the Justice himself: the man whom Harry and Mary referred to as—you guessed it—“Pussywillow.” What do we learn about him? His favorite meal was softshell crabs (p 22); he drove a 1929 convertible six-cylinder Buick coupe and wore “long gauntlets of the type that motorists must have used around 1912” (p 25); and he was “an expert driver” (p 25), although perhaps a bit of a leadfoot: On a trip to West Point, Knox “began to fear that McReynolds would be arrested for speeding” (p 26). He was an extraordinarily noisy bather (p 88), and stayed trim by doing “setting up” exercises every morning before breakfast (p 33). He was also something of a worrywart. Harry told Knox that he and the Justice were “always stewing and getting upset about things that never happen” (p 22), and McReynolds

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<sup>29</sup> Harry was right. See note 81.

“worked himself into such a fret trying to write his dissent in the Social Security case that . . . he came down with an attack of the gout and could not even leave the apartment for his usual afternoon walk” (p 229).<sup>30</sup>

McReynolds distrusted FDR as a man who said one thing and did another, and supported Alf Landon in 1936 (p 110). He was a devoted reader of the *Literary Digest*, and Knox thought he appeared to take comfort from its polls predicting a Landon victory (pp 111, 120). Knox therefore anticipated that McReynolds would be much harder to work for after Roosevelt’s landslide triumph. Yet he records that the morning following the election, McReynolds seemed in a cheery mood. He “gave no indication that he was disturbed in the slightest degree by the astonishing results of the election” (p 145). In fact, he never even mentioned it. “Despite the turn of events, life at 2400 remained in the same placid groove immediately after the election as just prior to it” (p 155).

Events following the election, however, show some evidence of strain. Some time during the first half of January, Knox

noticed a subtle change beginning to take place in the Justice’s conduct of his affairs, and as the month progressed he began to exhibit marked signs of irritability and uneasiness. I wrote in my diary as follows: “The Justice has been tipped off to something, but I don’t know yet what it is. He is either fearing inflation or being forced to resign. He has had me go back through his records to 1903, he has been calling up his stock brokers, etc” (p 163).

Whether McReynolds knew or surmised in January that the Court-packing plan was coming, Knox concludes, “I have no way of knowing for sure. But for many years I have assumed that he did know, for he became more and more uneasy as he occupied himself with day-to-day routine Court work” (p 164).

This is very unlikely. The Court-packing plan came as an enormous surprise even to very highly-placed officials in the Democratic Party when it was announced on February 5.<sup>31</sup> It is more likely that McReynolds’s behavior indicates that he was contemplating retirement under the provisions of Representative Hatton Sumners’s judicial retirement bill, which Sumners introduced in the House on Janu-

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<sup>30</sup> The “Social Security case” was *Steward Machine Co v Davis*, 301 US 548 (1937), which involved the constitutionality of the Social Security Act of 1935. See text accompanying note 37.

<sup>31</sup> See James T. Patterson, *Congressional Conservatism and the New Deal* 90–91 (Kentucky 1967); Merlo J. Pusey, 2 *Charles Evans Hughes* 753–54 (MacMillan 1951); Joseph Alsop and Turner Catledge, *The 168 Days* 69–70 (Doubleday, Doran 1938).

ary 11.<sup>32</sup> As Knox later wrote, McReynolds “could not have foreseen the exact type of attack the President contemplated making upon the Supreme Court” (p 169).

Yet the Court struggle was not without its stresses. Soon after the hostile anonymous letters and postcards began arriving,

Harry announced that the Justice should not go out alone for fear of his being assaulted in broad daylight. “Better let me go with you!” he would say. “Somebody might hit you over the head if you go walking alone!” “I’ll go alone—like I always have!” McReynolds would reply heatedly. “If anybody dares hit me, why, why, I’ll strike him with this walking stick! I can put up a good fight yet!” (p 174).

On one occasion he exclaimed before leaving, “To think that the President would bring us to this!” (p 174); but this would be his only reference to the Court-packing plan. Knox “could not help but admire McReynolds for his grit and nerve” (p 174). McReynolds continued to stand his jurisprudential ground throughout the Court fight, and Knox concludes that “all nine Justices were men of such pronounced individuality and honesty that it can certainly be assumed that their decisions were in no way influenced by the election returns or by the President’s proposal” (p 203).

McReynolds appears to have been equally if not more greatly irritated by the amount of work he had to do in the spring of 1937. One of McReynolds’s defining characteristics, on Knox’s account, was sloth. One manifestation of this was McReynolds’s frequent practice of merely noting his dissent rather than preparing a dissenting opinion. For example, Knox reports that McReynolds elected to adopt this tactic in the *Anniston*<sup>33</sup> case in order to save himself the trouble of responding to a “learned dissertation” by the Chief Justice (p 227). Nor was Knox impressed with the amount of time McReynolds put into the preparation of those opinions he actually did write. The first opinion of the term went through only two drafts, and McReynolds spent only about three and one-half hours working on it, including the hour he had spent studying the briefs of the case before he had begun his dictation (p 141). He devoted only slightly more time to his second opinion (p 142).<sup>34</sup> Laboring over opinions in a “scholarly” manner was apparently not Mac’s style.

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<sup>32</sup> HR 2518, 75th Cong, 1st Sess, in 81 Cong Rec H 169 (Jan 11, 1937).

<sup>33</sup> *Anniston Manufacturing Co v Davis*, 301 US 337 (1937) (addressing the constitutionality of three provisions of the Revenue Act of 1936).

<sup>34</sup> Knox was not impressed by the quality of the product: He “felt that scores of members of the 1936 class at the Harvard Law School could have produced a better opinion than the one McReynolds wrote” (p 142).

When Van Devanter assigned the dissent in the Wagner Act manufacturing cases<sup>35</sup> to McReynolds, therefore,

it was evident that the Justice himself was considerably disgruntled. The news that he had been selected as the white hope of the conservatives was just about the last thing he wanted to hear. It would have to be a very lengthy opinion. The writing of it would be very arduous and time consuming as the dissent would be an immensely important one. . . . Composing it would mean hours and hours of work which McReynolds had not been planning on doing (p 189).

McReynolds accordingly “fumed” and “dawdled along as if in a fit of resentment” (p 204), moving “like a dinosaur” (p 189). The majority opinions were soon ready and “could have been read from the bench at the March 29 opinion day had Justice McReynolds completed his assignment” (p 189). This prompted an embarrassing call from one of Hughes’s clerks, inquiring, “[W]hen are you going to finish that dissent? . . . What is holding up your Justice? Can’t you get those four fellows together long enough to decide what to say?” (p 190). In order to assist McReynolds, the four conservatives eventually decided to hold conferences at his apartment.<sup>36</sup> McReynolds finally emerged from one of these meetings and announced to Knox that he was going to employ the “paste and shears” method, quoting verbatim from lower court opinions excerpted in the briefs rather than composing his own prose (p 192).

McReynolds was in a similarly “difficult” (p 228) and “cantankerous mood” (p 229) while preparing his dissent in the Social Secu-

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<sup>35</sup> See *Friedman-Harry Marks*, 301 US at 58 (upholding the National Labor Relations Act as applied to garment manufacture); *NLRB v Fruehauf Trailer Corp*, 301 US 49 (1937) (upholding the National Labor Relations Act as applied to the manufacture of trailers); *NLRB v Jones & Laughlin Steel Corp*, 301 US 1 (1937) (upholding the National Labor Relations Act as applied to the steel industry).

<sup>36</sup> These meetings, held after the vote had been taken in the *Labor Board Cases*, are the only such conservative caucuses reported by Knox. Joseph Rauh maintained that Brandeis, Stone, and Cardozo held Friday afternoon caucuses to prepare for the Saturday conference in response to the regular caucuses the Four Horsemen held “as they drove together to and from the court building on argument and conference days.” Joseph L. Rauh, Jr., et al, *A Personal View of Justice Benjamin N. Cardozo: Recollections of Four Cardozo Law Clerks*, 1 Cardozo L Rev 5, 9 (1979). See also Katie Louchheim, *The Making of the New Deal: The Insiders Speak* 59 (Harvard 1983). Yet from Knox’s account it appears that McReynolds drove to the Court and the conference either alone, with Knox, or with Harry. Ambrose Duskow, who clerked for Cardozo during the 1933 term, and Alan Stroock, who clerked during the tumultuous 1934 and 1935 terms, maintained that, to the best of their knowledge, there was no such liberal caucus during their tenures. See Rauh, et al, 1 Cardozo L Rev at 18, 21 (recollections of Ambrose Duskow and Alan M. Stroock). Indeed, it would appear that Cardozo and Brandeis did not enjoy close relations. See id at 21 (recollection of Alan M. Stroock).

rity case, *Steward Machine Co v Davis*.<sup>37</sup> Knox dreaded reporting for work only to endure another of the Justice's "temperamental outbursts" (p 236), which Knox chalked up to the fact that McReynolds was "working under pressure" (p 236). One is tempted to attribute them to the fact that he was working at all. For here again the Justice embraced the labor-saving device of quoting extensively from the work of another: this time, from President Franklin Pierce's 1854 veto of a congressional bill granting federal lands to the states "for the benefit of indigent insane persons."<sup>38</sup>

McReynolds could be gracious and gallant with women<sup>39</sup> and children (pp 27–28), which Knox thought "revealed a deeply hidden facet of the Justice's character—namely, a liking for children and a regret that he did not have a family of his own" (p 29). Yet his relations with women sometimes became complicated. On the opening day of Court, Knox committed what he called his "First Great Blunder" (pp 90–92). Answering a telephone call for McReynolds, Knox thought he recognized the voice of lady friend A. Unfortunately, the caller was in fact lady friend Z, who evinced considerable displeasure when Knox mistakenly addressed her as "Ms. A." Ms. Z became furious that the Justice might still be going out with "that woman" (p 90), and demanded to speak to the Justice at once. After pacifying Ms. Z, McReynolds read the mortified Knox the riot act. "Mr. Knox!," he hollered, "I did not hire you to conduct a guessing game! . . . I don't know why I have a secretary who doesn't even know how to answer the phone. Oh, bring me another grapefruit!" (p 90).

Knox would soon become involved even more intimately in the Justice's relations with his lady friends. Knox records that he "tried earnestly to develop some small interest in the Washington social scene but this I was completely unable to do" (p 106). "[T]here seemed to be something grotesque about Washington society during those early days of the New Deal" (p 106). He was put off by "the New Deal parvenus" who were "constantly 'on the make'" (p 106). The "noisy" Washington cocktail parties compared unfavorably with the "quiet and elegant drawing rooms" of "the stately old homes on Beacon Hill," where the bread "had long been baked" (p 106). By November, Knox had reached "the very nadir of my loneliness in Washington" (p 145).

<sup>37</sup> 301 US 548 (1937) (upholding constitutionality of Title IX of the Social Security Act).

<sup>38</sup> Id at 600. In the companion case of *Helvering v Davis*, 301 US 619, 646 (1937) (upholding social security tax), McReynolds and Butler merely noted their dissent.

<sup>39</sup> Though he would not hire one as a secretary: "I have no use for women secretaries and always prefer my law clerks to do secretarial work, too. I have had women working for me in the past and have always had to discharge them. They ultimately became very possessive and wished to run the whole show" (p 17).

Enter one Mrs. Savage, a wealthy, middle-aged widow and one of the Justice's lady friends, who lived on the floor above McReynolds at 2400. She and Knox struck up what Knox repeatedly insists was an entirely platonic relationship, which nevertheless worked a "magical change" in his social life (p 146). He was now regularly included in the many social functions she hosted, except, of course, for those to which McReynolds was also invited. Both understood that the relationship must remain a secret from the Justice. And so it did. But it did not long remain a secret from Harry, who accused Knox of being a "gig-olo" on more than one occasion, and warned him that it would "be curtains" should McReynolds discover the relationship: "Pussywillow," Harry solemnly intoned, "is real jealous of all his lady friends" (p 148). Knox was prepared to take the risk. "After all," he insisted, McReynolds "isn't married to her, and he can't tell her who to invite to dinner" (p 148).

This particular subplot reached its farcical climax on the afternoon of Sunday, April 25. Knox and a friend were attending a tea party given by Mrs. Savage, when the Justice appeared at her door, unexpected and uninvited. The maid delayed McReynolds at the entrance while Mrs. Savage hustled Knox into a nearby bedroom. This would require that Knox negotiate one end of a long hall, at the other end of which stood McReynolds. The resourceful Mrs. Savage then managed to distract the Justice so that he did not notice his young charge scampering into his lady friend's boudoir, where Knox remained until McReynolds had been piloted into the parlor. With the coast now clear, Knox made his stealthy escape from the apartment.

Knox spent several anxious days wondering whether McReynolds had detected his presence *chez Savage*, but ultimately concluded that the quick thinking of his hostess had rescued him from disaster. And he maintained that this episode secured for him a distinguished place in the annals of jurisprudence. "[N]ever before in the History of the Court," he plausibly assumed, "had a law clerk hidden himself in a hostess's bedroom to avoid being seen by his Justice" (p 221).

## II. LIFE WITH JUSTICE McREYNOLDS

McReynolds's anti-Semitism has long been notorious. Knox, however, arrived to the clerkship completely oblivious to this. One day in September he blithely announced to Harry, "I think I'll call up Justice Brandeis and ask to see him" (p 36). Harry's response was bracing: "Have you gone out of your mind? . . . Don't you know that we has absolutely no relations with Justice Brandeis?" (p 36). Knox was perplexed. "Doesn't he come over here now and then to discuss cases that are up for decision?" "Come over *here*?" exclaimed Harry in

amazement. "Oh, you got so much to learn! Of course he never comes over here. Don't you realize that Justice Brandeis is Jewish?" (p 36). When Knox innocently inquired what that had to do with anything, Harry explained that the only Jew ever permitted to enter the apartment was the owner of Garfinkel's department store, and that Cardozo wouldn't be admitted even were he a Gentile. Cardozo had once had the temerity to suggest some modifications to the wording of one of McReynolds's circulated opinions, and this had so enraged the Justice that he no longer spoke to his junior colleague (pp 36-37).

One is not surprised to learn as well that McReynolds moved in frankly anti-Semitic social circles. One day, for example, at Mary's urging, Knox read a letter to McReynolds from a hospitalized lady friend, who described the revulsion she felt when a Jewish doctor "even touched me with his hands. What lengths these Jews will go to in order to make a conquest!" (p 99). Mary, seeing Knox's appalled reaction, exclaimed, "[Y]ou know he don't like no Jews and neither do his lady friends!" (p 100).

Just as he despised Jews, McReynolds deprecated and condescended to blacks, to whom he unselfconsciously referred as "darkies" (pp 51, 123). Two episodes are illustrative. Knox recounts an instance in which McReynolds dictated a letter to a black man living near his hometown of Elkton, Kentucky, requesting that the man perform a service for him. McReynolds "was in something of a quandary as to how to address the letter and how to end it—since it was, after all, a letter from a Justice of the Supreme Court to a 'darkey'" (p 160). So he directed Knox to address the letter to "Mr. Gano \_\_\_\_\_, colored" (p 160). "The word ['colored'] was also to be put on the envelope—to facilitate delivery of the letter, so the Justice said" (p 160). McReynolds then instructed Knox to send the letter without his signature.

Earlier in the term McReynolds scolded Knox for his behavior toward Harry and Mary. "I realize that you are a Northerner who has never been educated or reared in the South," McReynolds began,

but I want you to know that you are becoming much too friendly with Harry. You seem to forget that he is a negro and you are a graduate of the Harvard Law School. And yet for days now, it has been obvious to me that you are, well, treating Harry and Mary like equals. Really, a law clerk to a Justice of the Supreme Court of the United States should have some feeling about his position and not wish to associate with colored servants the way you are

doing. . . . I do wish that you would think of my wishes in this matter in your future relations with darkies (p 51).<sup>40</sup>

Knox was put off by this encounter, but principally because McReynolds was not aware of the proud southern heritage of many of Knox's ancestors (p 52). Throughout the term, though, Knox flouted the Justice's views on the interaction of the races in small but subversive ways. The best example occurred one day in February when McReynolds was out at the noon hour. Mary invited Knox to eat with her and Harry in the kitchen, but set two tables: one for herself and Harry, and the other for Knox. When Knox asked why she had done this, "Mary became somewhat embarrassed and made no reply" (p 176). Knox "realized in a flash that she had set two different tables as she and Harry were negroes and I was white. She had assumed that I would not care to eat at the same table with two colored persons, regardless of how well I might know them" (p 176). To Mary's surprise and delight, Knox continued, "Mary, I don't want to eat alone. I'm not the Justice, you know, and he always looks so lonely sitting there in the dining room all by himself. So let me sit with you and Harry" (p 176).<sup>41</sup> Yet Knox does not attempt to portray himself as an integrationist hero. He confesses that they "began to eat in a rather embarrassed silence," and he "wondered for a fleeting moment if some of my friends would not derisively call me a 'nigger lover' if they could only see me sitting at that table with two negro servants" (p 176).

McReynolds's conceptions of domestic and racial hierarchy were manifest in his treatment of Harry and Mary, of whose feelings he was frequently thoughtless. He was contemptuous of Harry's plans to send his sons to college, suggesting that a job in the Supreme Court cloakroom was more suitable (p 20). On his autumn duck hunting expeditions McReynolds would bring Harry along to fetch the fallen birds from the icy water like a dog (p 24). He reduced Mary to tears for neglecting to dust the top of a door, denouncing her as incompetent (p 21). One morning Knox arrived early enough to overhear McReynolds bathing: "For at least five minutes there was a sound of great splashing and gurgling—the likes of which I had never heard issuing out of any bathroom anywhere before" (p 88). Once McReynolds had emerged, Knox

could scarcely believe what I saw. Water seemed to be a quarter of an inch deep on the floor, and it was splashed all over the walls, too. Bath towels were tossed carelessly on the side of the

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<sup>40</sup> Knox reports that thereafter he, Harry, and Mary had been "afraid to speak to each other while McReynolds was in the apartment" (p 254).

<sup>41</sup> McReynolds always ate alone at a corner table in his dining room. Harry would stand in attendance nearby, speaking only when spoken to.



tub instead of being hung up in their proper places. Everything, in fact, seemed to be a complete wreck, as if a tornado had just passed through the room. "Why, it will take Mary a half-hour to clean up this mess!" I thought to myself (p 88).

Predictably, however, we learn the most about McReynolds's abuse of our self-pitying narrator. Several incidents are revealing. As was the custom among Harvard students of the day, Knox wore a green eyeshade when reading. On his first day at work for McReynolds, Knox discovered that he wasn't in Cambridge anymore. "What in the world is that!," the Justice demanded of him "in a tone of voice which sounded both astonished and offended at the same time" (p 18). Knox explained, "[W]hy, it's my eyeshade. We all wore eyeshades at school, and I brought this one down here with me" (p 19). "Take it off!" ordered the Justice. "It looks like hell. I don't ever want to see it again" (p 19).<sup>42</sup> Knox complied, but "felt offended in some vague sort of way" (p 19). This was his first indication that "each time McReynolds found himself becoming friendly or informal with anyone in his household, he would suddenly retreat behind a wall of formality and issue a pronouncement that would leave no doubt as to our lowly status in the scheme of things" (p 19). McReynolds would not allow Knox and Harry to listen to Edward VIII's abdication speech over the radio. Knox records that his "feelings for McReynolds, which were already in a confused state, were never quite the same again. He went down still another degree in my estimation. The Justice had, I felt, prevented our listening to the broadcast out of sheer unadulterated cussedness" (p 153). On a day Knox was invited to a reception at the White House, McReynolds deliberately kept him taking dictation so late that it made it difficult, if not impossible, for Knox to arrive at the reception on time. Knox instead ate a leisurely dinner and took in a movie, "but not before I had cherished some very negative thoughts about the Justice. 'That bastard,'" Knox thought to himself (p 161). "Ever since he came back from Court today he acted like a cat toying with a mouse" (p 161).

The signature episode of abuse occurred early in the term. Before leaving town for a few days, McReynolds instructed Knox to prepare the draft of an opinion while he was away and to have it ready upon his return. Thrilled by the honor of this great responsibility, Knox immediately went to work, canceling social plans and working on the opinion all day Sunday. By the end of the day he had completed three

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<sup>42</sup> Knox did not always approve of McReynolds's attire, either: He thought the Justice's wearing of a bow tie on the bench was "a little flippant" (p 115), though he never told him it "looked like hell."

drafts. Monday morning he was busy working on the fourth draft when Harry surmised what he was doing and broke the news that

Pussywillow just gave you something to write so as to keep you busy while he is out of town. . . . He's done the same with other secretaries, too, but no matter how hard you work he'll just throw your opinion away. . . . It just don't mean a thing—all this work: Pussywillow did it to make you stay in on Sunday while he was having a nice train ride to New York (p 134).

Knox refused to believe that this could be “just some sort of trick to keep me busy over the weekend” (p 134), and continued work on the opinion all that day, hoping to “prove that I can write a Supreme Court opinion even though I came just out of law school!” (p 135). The next day, after Knox had proudly presented McReynolds with his draft, the Justice summoned Knox to his study. “Sit down and open up your notebook,” he directed. “We will now start writing the opinion as it should be written!” (p 136). And “in a few minutes he quietly reached across the desk and silently, almost gently let my opinion glide down into the wastebasket” (p 136). At that point Knox “experienced a terrible sinking feeling in the pit of my stomach—as if something had just died that I had once very much believed in” (p 136).

In a letter to his parents written in the spring of 1937, Knox summarized the dynamics of the McReynolds household:

He has had 22 secretaries in 23 years. None please him. He is always griping about something. He invents things to gripe about just to be kicking. Harry has said all along that no man should put up with his nonsense for more than one year. That is why he told me to resign. . . . He is continually bawling out Harry for no reason at all. Says Harry has no brains, can't do anything, etc. He has a rule and he measures everything on the mantle-piece in the morning. If one thing has been moved when it is being dusted, he has a fit for the rest of the day. If I even sit down in a chair to telephone, he will measure to see if I moved the chair. From morning to night it is a continual madhouse around here. For this reason Harry thinks any young man will be permanently upset for life if he endures it more than one year. . . . I could tell you much more but won't. Better destroy this letter.<sup>43</sup>

This, in other words, was the clerkship from hell. Nor was Knox singled out for such treatment. His successors fared no better. Harry Parker wrote to Knox in January of 1938, “Pussywillow gets worse. Mr. McHale [Van Devanter's former secretary, hired by McReynolds

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<sup>43</sup> John Knox, *Portions of a Letter to Parents* (May 3, 1937) (unpublished manuscript available at Knox MSS, Special Collections, Alderman Lib, U Va, “Correspondence” folder).

when Van Devanter retired] is having a hard time. I am sure he would not stay if he could get anything else to do. . . . You are lucky you got out and don't have to go through what we have to it is next to hell."<sup>44</sup> In April of 1940, Knox recorded in his diary:

Gertrude Jenkins (Justice Harlan F. Stone's Secretary) wrote a long and confidential letter on April 11 giving the latest news about the Supreme Court of the U.S. Concerning my old boss, Justice McReynolds, Gertrude wrote: "He certainly is a mess . . . Musser hates him and is leaving the end of this year, even though he did promise to stay on two terms. Why he doesn't get off the Bench I don't know. Well, I do know too. It's just cussed mean-ness. He knows everyone would be jubilant and he won't give them that much happiness."<sup>45</sup>

Beneath this, Knox wrote: "Musser is the present Law Clerk. I held that position from June, 1936, until July 1, 1937, and it nearly prostrated me."<sup>46</sup>

### III. CLERKSHIPS AND JUDICIAL REPUTATION

In 1972, Albert Blaustein and Roy Mersky published a survey of sixty-five law, history, and political science professors rating all of the justices to sit on the Supreme Court from its establishment through 1969.<sup>47</sup> Twelve justices were ranked "great," fifteen as "near great," fifty-five "average," and eight as "below average." Of the eight rated "failures," three were among the four Horsemen: Van Devanter, Butler and, of course, James Clark McReynolds.<sup>48</sup> Indeed, of the ninety-six justices ranked ordinally in their 1993 survey, Justice McReynolds placed dead last.<sup>49</sup>

<sup>44</sup> *Harry Parker to John Knox*, (Jan 20, 1938) (unpublished manuscript available at Knox MSS, Special Collections, Alderman Lib, U Va, folder 10240-a).

<sup>45</sup> John Knox, *John Knox Diary* (Apr 18, 1940) (unpublished manuscript available at Knox MSS, Special Collections, Alderman Lib, U Va, folder 10240-k).

<sup>46</sup> *Id.* Based on interviews with seven former clerks to McReynolds as well as clerks to other justices, Chester A. Newland concluded that:

McReynolds was plagued with troubles in locating and retaining clerks. . . . Because of his strong language and asperity toward his subordinates, the atmosphere was too demeaning for some of his assistants. And, as his reputation spread, the Justice Department and acquaintances of the justice apparently found it difficult to locate clerks for him.

Charles A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 Or L Rev 299, 306-07 (1961).

<sup>47</sup> Albert P. Blaustein and Roy M. Mersky, *Rating Supreme Court Justices*, 58 ABA J 1183 (1972).

<sup>48</sup> *Id.* at 1186. Sutherland was ranked as "near great." *Id.* at 1185.

<sup>49</sup> See William G. Ross, *The Ratings Game: Factors That Influence Judicial Reputation*, 79 Marq L Rev 401, 445-49 (1996).

Alongside this ranking literature has emerged a body of work devoted to its explanation and analysis. William Ross's canvass of the factors that influence judicial reputation is the most comprehensive to date.<sup>50</sup> From among the various factors identified, Ross and others tend to agree that the principal reason for the low rankings of Van Devanter, McReynolds, and Butler is their opposition to economic regulation in general and the New Deal in particular.<sup>51</sup> It is difficult to disagree with this assessment. History is written by the winners,<sup>52</sup> and in opposing the growth of federal and state regulatory power, the Four Horsemen chose the losing side.<sup>53</sup> Yet it would be misleading to suggest that they simply "backed the wrong horse." On the contrary, it appears that, unlike some of their colleagues, they were unconcerned with, if not utterly indifferent to, their future judicial reputations. I want to suggest that their failure, or unwillingness, to *invest* in their reputations has contributed to the disesteem in which they have been held now for decades. Beyond refusing to trim their jurisprudential sails better to suit the prevailing currents of their day, there are at least two other senses in which they, and particularly McReynolds, neglected to invest in their reputations. Both of them have to do with their handling of the evolving institution of the judicial clerkship, and both of them are apparent in the memoir of John Knox. These concern the sorts of fellows they hired as their clerks, and, in the case of McReynolds, the character of the relationship established between justice and clerk.

As the editors observe in their Foreword, the 1930s was a time of transition for the institution of the Supreme Court clerkship. On the one hand, many of the justices continued to follow the early practice of employing stenographic assistants, for which Congress had first appropriated funds in 1886. These assistants were typically graduates of local Washington, D.C. law schools, and their terms of service often extended for a number of years. Others, such as Holmes, Brandeis, Stone, and Cardozo, followed the practice innovated by Justice Horace Gray (at his own expense) when he came to the Court in 1882. Here the

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<sup>50</sup> See *id.*

<sup>51</sup> See *id.* at 406–17.

<sup>52</sup> In the context of the New Deal, see G. Edward White, *The Constitution and the New Deal* 297–98 (Harvard 2000) (discussing the emergence of the phrase "the Four Horsemen" in reference to Justices Van Devanter, McReynolds, Sutherland, and Butler and their subsequent demonization). In the context of Supreme Court Justices generally, see David P. Bryden and E. Christine Flaherty, *The "Human Resumes" of Great Supreme Court Justices*, 75 Minn L Rev 635, 656 (1991) (noting the correlation between characteristics law professors find desirable in justices and the characteristics of elite professors).

<sup>53</sup> The degree of this opposition is typically overstated by a significant margin. See Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 Va L Rev 559, 560–61 (1997) (noting that the Four Horsemen repeatedly supported liberal case outcomes in low visibility cases).

model was a one-year, post-graduate research assistantship, to be awarded to the top graduates of the nation's most elite law schools—typically Harvard, or in Stone's case, Columbia. By 1939, when Van Devanter, Sutherland, and Butler had been replaced by Roosevelt appointees, this would become the dominant model. But it was not the model McReynolds embraced when he hired John Knox.<sup>54</sup>

Alexander Bickel once sagely observed, "Great judges project their influence into the future—in ways that are beyond the printed word—through their law clerks."<sup>55</sup> One need only reflect for a moment on the ease of obtaining biographical information on those who clerked for Holmes, Brandeis, Cardozo, or Stone in order to appreciate how powerful the projection of their influence—and their images—has been. These men typically rose to positions of great distinction in law practice, law teaching, or government service.<sup>56</sup> Biographical information on the men who clerked for the Four Horsemen is much harder to find. Perhaps only two of them later went on to achieve levels of public distinction even remotely comparable to those attained by their counterparts in other chambers.<sup>57</sup> For many of the others, we do not even have reliable information concerning where they received their legal educations. Of those for whom we do have some biographical information, it appears that nearly all of them attended less distinguished law schools and compiled less sparkling résumés than did their counterparts in other chambers. After their clerkships, which occasionally lasted several years, they typically entered either solo or small private practice, or relatively low-level government

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<sup>54</sup> The leading authority on the history of the Supreme Court clerkship remains Newland, 40 Or L Rev at 299 (cited in note 46). See also Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 Vand L Rev 1125 (1973). The details of the duties of clerks to the various justices and the relationships forged between the justices and their clerks is scattered in various letters, biographies, memoirs, and remembrances. It would be useful or, I should say, would have been useful, to have them collected in one work on the evolution of the modern clerkship.

<sup>55</sup> Alexander M. Bickel, *Politics and the Warren Court* 145 (Harper & Rowe 1965).

<sup>56</sup> For a catalog of the impressive subsequent achievements of clerks for Holmes, Brandeis, Stone, and Cardozo, see I. Scott Messinger, *The Judge as Mentor: Oliver Wendell Holmes, Jr., and His Law Clerks*, 11 Yale J L & Hum 119, 120, 141–42 n 90 (1999); Barrett McGurn, *Law Clerks—A Professional Elite*, 1980 S Ct Hist Socy Yearbook 98, 101–02.

<sup>57</sup> Norris Darrell, who clerked for Butler in 1923 and 1924, went on to a distinguished career with Sullivan & Cromwell and served as President of the American Law Institute for fifteen years. See *Norris Darrell*, *Newsday* 45 (Aug 16, 1989); *Norris Darrell, Lawyer and Tax Expert*, 90, *NY Times* B5 (Aug 15, 1989); *Who's Who in American Law* 198 (Marquis Who's Who 2d ed 1979). Darrell was married to Mary Hand, the daughter of Judge Learned Hand. It was Darrell who, as literary executor of Hand's estate, persuaded Gerald Gunther to write Hand's biography. See Gerald Gunther, *Learned Hand: The Man and the Judge* xix (Knopf 1994). Francis Kirkham clerked for Justice Sutherland during the 1931 and 1932 terms, and for Chief Justice Hughes during the 1933 and 1934 terms. For details on his distinguished career in private practice and government service, see *Death: Francis R. Kirkham*, *Deseret News* 11 (Oct 27, 1996); *Francis R. Kirkham*, *San Fran Chron* A20 (Oct 26, 1996); *Who's Who in American Law* 471 (Marquis Who's Who 6th ed 1990).

posts.<sup>58</sup> Take, for example, Raymond Wallace Radcliffe, a graduate of the National Law School, who was McReynolds's last law clerk.<sup>59</sup> Following his clerkship, Radcliffe worked as a personnel investigator for the Civil Service Commission until 1946.<sup>60</sup> He then became a real estate broker in Prince George's County, Virginia, in 1966 establishing his own firm, which he continued to operate until his death in 1982.<sup>61</sup>

And what became of John Knox? After leaving McReynolds, he failed the bar exam three times. For the next ten years he bounced from one short-term legal job to another, without much hope of being made partner. He was fired after less than a year at what later became Mayer, Brown, Rowe & Maw, and was asked to leave after just over two years at understaffed wartime Cravath. He then spent nine years trying to save his family's declining mail-order business selling self-help books to salesmen, before accepting a position as a claims adjuster for Allstate in 1956. He remained with Allstate until his retirement in 1973 (pp 272–75).

Of all of the men who clerked for the Four Horsemen over the collective eighty-five years they sat on the Supreme Court, not one of them went on to become a law professor. By contrast, Holmes and Stone sent many of their alumni on to legal academia,<sup>62</sup> and over half of Justice Brandeis's clerks joined law faculties, many of them at elite institutions.<sup>63</sup> Indeed, this was by design. Brandeis sought to use the clerkship to develop "a new pool of Jewish law professors."<sup>64</sup> He preferred to receive clerks who seemed likely to enter legal academia,

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<sup>58</sup> Consider, for example, the following clerks of McReynolds about whom the Supreme Court's database yields no information other than their names and the years of their clerkships: Leroy E. Reed (1914), Blaine Mallan (1916), Andrew P. Federline (1921), Tench T. Marye (1921), John T. Fowler, Jr. (1922, 1926), Milton S. Musser (1938–39), and John T. McHale, Van Devanter's last clerk (1929–36) and Knox's replacement as McReynolds's clerk for the 1937 term. As for clerks T. Ellis Allison (1917–18), and Carlyle S. Baer (1921), the database adds only that they did not attend law school. See *Supreme Court of the United States Law Clerk Database: Law Clerks Report* (on file with author) (listing McReynolds's clerks). For none of these clerks do we have any information concerning their post-clerkship careers. For other clerks, we have at least some sketchy information. Maurice J. Mahoney, for example, who clerked for McReynolds beginning with the 1927 term, worked as an attorney in the Tax Division of the Department of Justice until 1941, and then became Executive Secretary of the Copperweld Corporation in Pittsburgh, retiring in 1964. See *Maurice Mahoney, Steel Firm Official*, Wash Post B7 (Mar 8, 1978). Similarly scanty information is available from various editions of the *Martindale-Hubbell Law Directory* and *Who Was Who in America* on S. Milton Simpson (1915, portions of 1919), Harold Lee George (1919), Norman Burke Frost (1921), and J. Allan Sherier (1935).

<sup>59</sup> *Supreme Court Database* (cited in note 58).

<sup>60</sup> R. W. Radcliffe, 67, Wash Post B10 (Sept 24, 1982).

<sup>61</sup> Id.

<sup>62</sup> See Bickel, *Politics and the Warren Court* at 145 (cited in note 55) (discussing various clerks who had successful careers in legal academia).

<sup>63</sup> See id.

<sup>64</sup> Philippa Strum, *Louis D. Brandeis: Justice for the People* 359 (Harvard 1984).

and worked diligently to obtain teaching positions for his most promising alumni, many of whom became professors at Harvard.<sup>65</sup>

I do not suggest that the work of a law professor, at Harvard or elsewhere, is more worthy than that of a real estate broker or an insurance adjuster. I merely observe that the road to judicial reputation runs through legal academia, not through Allstate. The Four Horsemen were in many ways the last remnants of a dying age. McReynolds and company were still employing stenographic “secretaries” while several of their illustrious colleagues were routinely selecting as their clerks the most promising young graduates of the nation’s best law schools—young men (and later women) who would become peculiarly invested in the reputations of their justices, and would both promote the reputations of their mentors and reflect glory on their images. The Four Horsemen either did not grasp or were unconcerned with this central emerging technology of judicial reputation-making.

Holmes did grasp it. Indeed, as Scott Messenger has shown in his able study of the relationship between Holmes and his clerks, he virtually invented it. Messenger characterizes that relationship as

an intergenerational bargain in which wisdom, advice, and a certain amount of social capital are exchanged by an elderly judge for the companionship and affection of an ambitious young lawyer. In the particular case of Holmes and his clerks, this bargain fostered intense bonds of loyalty between young men at the start of promising legal careers . . . and an aging icon . . . who was concerned . . . about his own reputation as a judicial figure. By adopting the posture of mentor towards his young apprentices, Holmes instilled in them . . . a vision of himself as a heroic American that his apprentices would one day project to the public and to posterity.<sup>66</sup>

One needn’t fully embrace the metaphor of bargained exchange in order to appreciate the basic insight. One would expect a positive clerkship experience involving the forging of close personal ties to a judge to incline a young lawyer to speak often and well of his mentor. Should the former clerk achieve a position of prominence, one would anticipate that his views would have greater influence in shaping others’ perceptions of that mentor. By cultivating a platoon of over-achievers, justices like Holmes, Brandeis, Stone, and Cardozo effectively created a corps of highly-placed alumni who would for years sing their praises and burnish their reputations. McReynolds’s infliction of an abusive “reign of terror” on a callow and ineffectual auto-

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<sup>65</sup> See *id.* at 359–60, 397.

<sup>66</sup> Messenger, 11 *Yale J L & Hum* at 121 (cited in note 56). See also *id.* at 122, 143 (discussing Holmes’s use of mentorship in his campaign to enhance his judicial reputation).

graph hound, by contrast, was not a strategy optimally designed to inspire undying fealty. Instead, as this memoir so persuasively demonstrates, it was far better calibrated to alienate him so thoroughly that he would devote his miserable middle age to a labor of vilification.

In the reminiscences of those who clerked for Cardozo and Holmes, there is a recurring paternal metaphor. As Joseph Rauh wrote of his clerkship, for example, "I was Justice Cardozo's *son* for two years. It was a beautiful relationship."<sup>67</sup> Similarly, Augustin Derby wrote of Holmes, who always addressed his clerks as "Sonny":<sup>68</sup>

Toward him, from the beginning of my association, I felt as I have felt toward few but my own father. . . . The Justice really needed no secretary. He took each year a man in that capacity, and tried to educate him and be a father to him. . . . Association with the Justice in the privacy of his home was delightfully intimate and informal. He took his secretaries into his confidence. . . . The Justice was childless. I had not imagined that any secretary would undertake to speak to him of this; but long after my day one of them had the courage, or audacity, to ask him whether it had not been a great regret to him that he had had no children. His answer in effect was, "Why should it be[?] I have had all of you young men year after year."<sup>69</sup>

Not every justice established such filial relations with his clerks. Yet even in those chambers where the relationship was more reserved, former clerks frequently describe the relationship as a partnership. The term is used, for instance, in recollections of Brandeis<sup>70</sup> and Stone.<sup>71</sup> Here again one finds testimony of personal warmth and affection.<sup>72</sup> And many clerks of that era recount that the warm personal ties forged during the clerkship year were sustained for years afterward through visits, correspondence, and clerkship reunions held by the justices.<sup>73</sup>

<sup>67</sup> Joseph Rauh, Jr., quoted in John Greenya, *Super Clerks*, 6 Wash Law 36, 37 (May/June 1992).

<sup>68</sup> G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* 468 (Oxford 1993) (quoting Donald Hiss).

<sup>69</sup> Augustin Derby, *Recollections of Mr. Justice Holmes*, 12 NYU L Q Rev 345, 346, 349–52 (1935).

<sup>70</sup> See James Landis, *Mr. Justice Brandeis: A Law Clerk's View*, 46 Pub Am Jewish Hist Socy 467, 468 (1957) (describing the Brandeis clerkship as a "junior partnership with the greatest Justice of the Supreme Court . . . excepting none"); Paul A. Freund, *Mr. Justice Brandeis: A Centennial Memoir*, 70 Harv L Rev 769, 775–76 (1957) ("The relations between law clerk and Justice were those of a working partnership.").

<sup>71</sup> See Bennett Boskey, *Mr. Chief Justice Stone*, 59 Harv L Rev 1200 (1946) ("He considered us his partners, though necessarily junior partners, in the exciting business of judging.").

<sup>72</sup> See Alfred McCormack, *A Law Clerk's Recollections*, 46 Colum L Rev 710, 717 (1946) (discussing clerkship experience and the personal side of Justice Stone).

<sup>73</sup> See John S. Monagan, *The Grand Panjandrum: Mellow Years of Justice Holmes* 121



In striking contrast, the relationship between McReynolds and Knox was utterly lacking in warmth and intimacy.<sup>74</sup> Knox was not “Sonny,” he was not even “John.” He was “Mr. Knox!” (p 90). He was not a surrogate son or even a junior partner. He was an employee, and an expendable one at that. Early in the term Harry cautioned Knox not to “talk back” when McReynolds was unreasonable. “‘He’ll tell you to leave if you do,’ said Harry. ‘And after you’re fired he’ll say that there are plenty of other fish in the sea—meaning plenty of other secretaries available.’”<sup>75</sup> McReynolds showed no interest in Knox as a person, and gave him almost no feedback on his work. He never invited Knox to socialize or dine with him, even on Saturday evenings when he waited for Hughes’s messenger to deliver the opinion assignments. McReynolds would eat his dinner, leaving Knox to sit pining in his office with an empty stomach (p 128). During the course of

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(University 1988) (discussing personal exchanges and experiences with Justice Holmes during clerkship); Strum, *Justice for the People* at 358 (cited in note 64) (discussing continued mentoring and relationships between Justice Brandeis and his former clerks); Francis Biddle, *Justice Holmes, Natural Law, and the Supreme Court* 12 (Macmillan 1961) (noting that many former clerks once attended a surprise birthday party for Justice Holmes); McCormack, 46 Colum L Rev at 717 (cited in note 72) (noting that Stone’s former clerks often attended dinners and parties thrown by Stone and continued to correspond with the Justice after their clerkships); Francis Biddle, *Mr. Justice Holmes* 194–95 (Scribner’s Sons 1942) (recalling an event at which fifteen of Holmes’s twenty-six former secretaries gathered together with the Justice).

<sup>74</sup> Indeed, Knox forged far warmer personal relations with several of McReynolds’s colleagues than he did with his own justice. He frequently called on Cardozo, who seemed lonely and encouraged Knox to visit often. Cardozo was very kind to Knox, who came to feel both great affection and something bordering on reverence toward the Justice, whom he referred to as “the great one whom I knew and loved” (p 244). Knox also visited Justice Stone “several times at his home. He always proved to be very friendly and informal, and I held him in the highest esteem” (p 120). Knox regarded Van Devanter affectionately as “quite fatherly” (p 58), but did not visit with him during the term. One evening in September the Justice informed Knox that he would no longer be able to see or advise him “without offending Justice McReynolds. I felt that he would be very much put out if he ever discovered that I was giving advice from time to time to his secretary. . . . I just *can’t* see you again very soon without incurring the ill will of Justice McReynolds” (pp 49–50).

<sup>75</sup> Knox, *Experiences as a Law Clerk* at 80 (cited in note 15). Harry then braced Knox with the revelation

that the Justice, once discharged a secretary for just overlooking one error in the final proof of an opinion. The Circuit from which a case had originated was referred to incorrectly. . . . McReynolds was reading the opinion during a session of Court when the Chief Justice suddenly noticed the mistake. . . . Hughes brought the error to McReynolds’ attention. Despite the fact that all the other Justices had failed to catch the same mistake, . . . McReynolds rushed back to the apartment and immediately fired his secretary. “You have embarrassed me before the Chief Justice!” he declared in anger. . . . [T]he secretary then pleaded for a second chance as it was in the middle of the term, his wife was going to have a baby, and he didn’t have any other source of income. But the Justice was adamant, and since then he has insisted that his secretaries not only be infallible proof readers but also bachelors.

Id at 80–81. Holmes and Brandeis also had no-marriage rules. See Messinger, 11 Yale J L & Hum at 126–27 (cited in note 56); David Riesman, *Becoming an Academic Man*, in Bennett M. Berger, ed, *Authors of Their Own Lives: Intellectual Autobiographies by Twenty American Sociologists* 22, 40 (California 1990).

the clerkship McReynolds introduced Knox to only one of his guests, John W. Davis. Such a courtesy was so unusual that it caught Knox completely by surprise (p 197).<sup>76</sup> Knox came to recognize the limits of the relationship when “the most successful secretary” McReynolds ever had employed<sup>77</sup> paid a call at the lunch hour. McReynolds, who was eating in the dining room, did not invite his former secretary to take a seat. He stood at the threshold of the room and talked with the Justice for three or four minutes. “The Justice maintained a cool, detached formality toward his caller and scarcely gave any indication that he had ever seen the young man before” (p 53).<sup>78</sup> One quickly discerns that the notion of a McReynolds clerk reunion dinner—at least one at which the Justice was present—would have been ludicrous. It was then that Knox realized that “[t]here was really no hope that I could ever successfully penetrate the high wall of cold formality which the Justice had built around himself” (p 53).

One of Knox’s efforts to penetrate that wall reveals the depths of McReynolds’s interpersonal deficits. “One afternoon toward the end of September 1936,” Knox reports, “I ventured to inquire of Justice McReynolds what advice he would give to a young lawyer just starting out in the practice of his profession” (p 68). McReynolds initially seemed surprised by the question, and “remained silent for some moments” (p 68). Apparently, it had been so long since anyone had ventured to ask him such a question that the man had absolutely no idea how to respond. Incredibly, he promised to get back to Knox in a day or two. “Three entire days passed, however, and the Justice never once referred to my request for advice. I finally concluded that he had either forgotten the incident entirely or had just decided to ignore it” (p 69). On the fourth day, however, Knox noticed McReynolds pacing up and down the hallway of his apartment in a beautiful silk lounging robe. “Then all of a sudden he marched quickly to the door of my office, entered, and sat down” (p 70). The time to deliver the precious advice had at long last arrived. First, McReynolds began, “A man must have sound principles and stand by them these days, and he should not

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<sup>76</sup> Compare Brandeis, who introduced his clerks to influential people in Washington at his weekly teas, see Strum, *Justice for the People* at 362 (cited in note 64); Holmes, whose clerks had daily tea with the Justice and Mrs. Holmes, see Monagan, *The Grand Panjandrum* at 56 (cited in note 73), and regularly lunched with Holmes and such distinguished guests as Cardozo, Frankfurter, Tom Corcoran, and Owen Wister, see White, *Justice Oliver Wendell Holmes* at 468–69 (cited in note 68); and Cardozo, who regularly dined and socialized with his current and past law clerks, see Andrew L. Kaufman, *Cardozo* 482 (Harvard 1998).

<sup>77</sup> This was probably Maurice Mahoney, who clerked for McReynolds from 1927–34 (p xxi).

<sup>78</sup> Knox himself was accorded a similar reception when he met briefly with the Justice in connection with a visit to Harry and Mary in the summer of 1938. McReynolds looked at Knox “as if he had never seen me before in all his life,” and spoke in a “cordial but distant manner” (p 261).

endorse every wild scheme that comes along" (p 70). This led to a lengthy diatribe against the New Deal, Harvard Law School, and Felix Frankfurter.<sup>79</sup> In due course McReynolds returned to the subject. A young lawyer should make all the contacts he could, "but in sincerity" (p 72).

Also, don't be a bachelor! I think a lawyer can be more successful as a general rule if he has a wife and family to work for. They will keep him alert and on his toes, and there will be the companionship of his wife through the years. And another thing! Don't ever wear a red tie. It is much too effeminate for a lawyer to do. I don't like red ties! (p 73).

One is left wondering how many great cases might have been decided differently had certain advocates displayed greater sartorial *savoir faire*.

Knox was perplexed and frustrated by his inability to connect with his justice. "At first I had been attracted to the Justice," he reports, "and then somehow repelled. There was a certain brusqueness and arrogance about him that seemed to be infused into his temperament along with his good qualities. One instant he could be distinguished and a moment later unceremonious and almost crude" (p 69). He was confirmed in his impression that McReynolds's volatile temperament didn't include "much of a sense of humor" (p 83), and by March he kept his conversation "to a minimum and seldom spoke unless spoken to" (p 193). "I no longer made any effort to penetrate the wall of austerity and silence behind which he had now retreated. . . . We were now formally compatible but that was about all"

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<sup>79</sup> Throughout the term, McReynolds continuously denigrated Harvard Law School and Felix Frankfurter. When Knox first arrived at the Court, a building attendant said to him, "'Say, did you hear what Justice Stone said when he heard McReynolds had a new secretary right out of Harvard?' . . . He said, 'May Heaven have mercy upon him!'" (p 47). On one occasion McReynolds remarked:

"Some of these lawyers are certainly vague in their discussions these days! . . . But I suppose I should not criticize them. They are just trying to interpret these New Deal laws, and they are certainly vague, too." Looking me squarely in the eye he said, "Yes! Statutes carelessly drawn by young men just out of the Harvard Law School. Frankfurter's proteges too, I suppose!" (pp 113-14).

On another occasion McReynolds complained to Knox:

I suppose you know that Washington is full of impractical lawyers, and I must say that many of them seem to have come from Harvard. You might as well realize right now that I think the Harvard Law School is highly overrated! . . . I also hope that you did not come under the influence of Professor Frankfurter when you were in law school. There was some doubt in my mind about Justice Van Devanter's selection of any law clerk who had graduated from a school where Frankfurter teaches. He is certainly one man not to be trusted! Even though he is dangerous to the welfare of this country, he evidently has a powerful influence at the White House (p 70).

(p 181). "I had by now simply lost all interest in the Justice as a man" (p 193).<sup>80</sup> By early June, however, apathy had turned to enmity. "He is, all in all," Knox would write, "the most contemptible and mediocre man I ever came in contact with," "unbelievably stingy" and "gravely unbalanced" (p 246). "His selfishness and vindictiveness are unbelievable" (p 246).<sup>81</sup>

The tone of virtually every other contemporary clerk's account of his experiences with his justice, not surprisingly, provides a marked study in contrast. This is, of course, not to suggest that former clerks have never uttered remarks critical of their justices. It is instead only to highlight the singularity of Knox's sustained indictment. Edwin McElwain's account of his clerkship with Hughes<sup>82</sup> is suffused with admiration for his extraordinary talents and, while not marked by effusive affection, is certainly far from antagonistic. Alfred McCormack's and Bennet Boskey's recollections of their years with Stone are marked by unmistakable admiration and affection,<sup>83</sup> and the testimonials of Cardozo's clerks would be the envy of any judge.<sup>84</sup> Biographical treatments of Justice Holmes written by his former clerks are similarly sympathetic and admiring, if not reverential.<sup>85</sup> And when

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<sup>80</sup> Walking home from his final visit with Cardozo at the end of May, Knox thought to himself, "I was secretary to the wrong Justice" (p 244). The likelihood that Cardozo would not have considered him a promising candidate for the position does not appear to have occurred to Knox.

<sup>81</sup> These sentiments would only be amplified by what occurred two weeks later. The term of Court ended in early June, and McReynolds left Washington for a trip to Kentucky. Knox's term of employment was scheduled to end July 1. He was woefully behind in his preparation for the June 26 bar examination, and, with very little Court work to be done, began to devote nearly all of his time to study. The weather had turned sultry, and so Knox spent most of the day studying at the air-conditioned Court building rather than in McReynolds's stuffy apartment. McReynolds returned on the morning of the 16th to discover that Knox was not at his post. When Knox returned to the apartment the morning of the 17th, McReynolds called him into his office and reminded him that he was not being paid to take a bar examination. If he did not abandon his plans to take the bar, his position and salary would be terminated immediately. With the exam now nine days away, Knox was in too deep to relent. With less than two weeks remaining in Knox's clerkship, McReynolds summarily fired him (pp 245-53). The angry letters Knox wrote to Van Devanter and his parents describing this episode have not survived (pp 256-57).

<sup>82</sup> Edwin McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 Harv L Rev 5, 26 (1949) (discussing the working details of the Court when Hughes was Chief Justice and speaking admirably of Hughes's abilities).

<sup>83</sup> See McCormack, 46 Colum L Rev at 718 (cited in note 72) ("The Chief Justice was a friend to his law clerks. He had an invigorating influence on their lives; and they held him in great affection."); Boskey, 59 Harv L Rev at 1200 (cited in note 71) ("All of us who served as Chief Justice Stone's law clerks had for him a real affection and esteem.").

<sup>84</sup> See, for example, Louchheim, *The Making of the New Deal* at 55-67 (cited in note 36) (Joseph L. Rauh, Jr. noting "Justice Cardozo was a saintlike human being"); Joseph L. Rauh, Jr., et al, 1 Cardozo L Rev at 5 (cited in note 36) (recollections of Joseph L. Rauh, Jr., Melvin Siegel, Ambrose Daskow, and Alan Stroock).

<sup>85</sup> See Mark DeWolfe Howe, *Justice Oliver Wendell Holmes: The Proving Years, 1870-1882* (Harvard 1963); Mark DeWolfe Howe, *Justice Oliver Wendell Holmes: The Shaping Years, 1841-1870* (Harvard 1957); W. Barton Leach, *Recollections of a Holmes Secretary*, 1941 Harv L Sch

Holmes's public reputation was suffering in the post-War years in the wake of a series of articles associating Holmes's skepticism with the horrors of totalitarianism.<sup>86</sup> Holmes's former clerks and biographers, former Attorney General Francis Biddle<sup>87</sup> and Harvard Law Professor Mark DeWolfe Howe,<sup>88</sup> rose to their mentor's defense. Similarly, with the notorious exception of David Riesman's,<sup>89</sup> the reminiscences of Brandeis clerks range from the admiring<sup>90</sup> to the positively worshipful.<sup>91</sup> In 1982, political scientist Bruce Murphy published a book claiming that Brandeis had inappropriately enlisted and paid then-Professor Frankfurter to promote political causes to which the Justice was committed. Among the highly critical reviews of the book was one

Bull 12; Biddle, *Mr. Justice Holmes* at 10 (cited in note 73) (characterizing Holmes as an "extraordinary creature who happened also to be a great judge"); Derby, 12 NYU L Q Rev at 346, 349-53 (cited in note 69) (describing association with Holmes as "intimate and informal" and suggesting his secretaries revered Holmes for the "greatness of his personal qualities" and his "rare charm, and warm friendship"). See also Alger Hiss, *Recollections of a Life* 31, 51 (Holt 1988) ("No young lawyer who spent a year with this model of the upright man could fail to wish to emulate him in conduct and character."); Louchheim, *The Making of the New Deal* at 21-46 (cited in note 36) (Thomas Corcoran, James Rowe, and Alger and Donald Hiss recounting fond experiences and personal relationships with Holmes during their employment as secretaries).

<sup>86</sup> See G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U Chi L Rev 51 (1971).

<sup>87</sup> See Biddle, *Justice Holmes* at 30 (cited in note 73) ("I loved and admired Justice Holmes.").

<sup>88</sup> See Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 Harv L Rev 529, 537 (1951) (arguing that "to suggest that [Holmes] was saying that might makes right . . . distorts his thesis beyond recognition").

<sup>89</sup> See, for example, Riesman, *Becoming an Academic Man* at 40 (cited in note 75) ("I also did not share the exalted view of Brandeis most of [the former clerks] had."); Louchheim, *The Making of the New Deal* at 74-75 (cited in note 36) (Riesman noting that "according to some biographers, I am the only clerk who has been critical of the Justice"); Alfred S. Konefsky, *The Voice of Willard Hurst*, 18 L & Hist Rev 147, 151-55 (2000) (former Brandeis clerk Willard Hurst being interviewed about Brandeis by Samuel J. Konefsky).

<sup>90</sup> See Konefsky, 18 L & Hist Rev at 151-56 (cited in note 89) (Hurst implicitly defending Brandeis against charges made in Konefsky's earlier interview with Riesman); Paul A. Freund, *Justice Brandeis: A Law Clerk's Remembrance*, 68 Am Jewish Hist 7 (1978) ("He was, in short, a moralist-cum lawyer, whose special genius it was to perceive moral issues in what others saw as vast impersonal, inevitable trends, and to devise institutional arrangements designed to salvage moral values in a modern technological age."); Dean Acheson, *Morning and Noon* 78-103 (Houghton Mifflin 1965) (discussing the experience of working with Brandeis); Dean Acheson, *Recollections of Service With the Federal Supreme Court*, 18 Ala Law 355 (1957) (same); Freund, 70 Harv L Rev at 791 (cited in note 70) ("The distinctive quality of Brandeis is that with immense resourcefulness he found ways to build the ancient ideals we profess into the structure of twentieth-century America.").

<sup>91</sup> See Louis L. Jaffe, *An Impression of Mr. Justice Brandeis*, 8 Harv L Sch Bull 10, 11 (Apr 1957) ("I have never known a man in whom character, idea and action were so actively integrated."); Landis, *Mr. Justice Brandeis*, 46 Pub Am Jewish Hist Socy at 467, 473 (cited in note 70) (confessing, "Yes, I am an idolater," and characterizing Brandeis as "the greatest Justice of the Supreme Court of the United States"). See also Strum, *Justice for the People* at 358 (cited in note 64) ("Most of the clerks left Brandeis's service with admiration bordering on adulation."); Louis L. Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 Harv L Rev 986, 1003 (1967) (characterizing Brandeis as a "great judicial statesman").

written by Myron Bright and David Smorodin,<sup>92</sup> who solicited the views of former Brandeis clerks<sup>93</sup> on the matter. Like Holmes's alumni, these former clerks appeared eager to come to the defense of their mentor.

McReynolds has for decades been the subject of devastatingly unflattering commentary, yet one searches in vain for even a remotely comparable effort at rehabilitation on the part of one of his secretaries. Indeed, Knox does not simply neglect to defend his justice—he gleefully takes up the cudgels against his former employer. Such extravagant disloyalty is unseemly, and would be appalling were one not inclined to think it in some measure deserved.

### CONCLUSION

Harry Parker would work for McReynolds until the Justice retired in 1941. He thereafter continued in service with Justice Jackson until retiring in 1953, the year of his death (p 271). When the requiem mass was sung for Harry Parker in St. Augustine's Catholic Church in Washington, Chief Justice Earl Warren and five of his associates were on hand to pay their respects (p 266).<sup>94</sup> In death as in life, McReynolds was a study in contrast. As Knox later wrote: "Retribution, I am sorry to say, came at last to Justice McReynolds. In a lonely hour . . . he was stricken with cancer and died virtually alone. . . . He is buried in a forgotten Kentucky cemetery."<sup>95</sup> None of his fellow justices attended the funeral.<sup>96</sup> For James McReynolds's "failure" had run much deeper than simply embracing an unpopular jurisprudence or issuing poorly-crafted opinions. His shortcomings were much more fundamental, and thus far more tragic. With this memoir, he reaps the whirlwind.

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<sup>92</sup> Myron H. Bright and David T. Smorodin, *A Flawed Tale*, 16 Loy LA L Rev 205, 206 (1983) (suggesting "the book fails as a serious, scholarly work because it is burdened by sensationalism and innuendo").

<sup>93</sup> See *id.* at 211 (Willard Hurst), 216 (H. Thomas Austern), 220 (W. Graham Claytor, Jr.).

<sup>94</sup> The Associate Justices present were Robert Jackson, Felix Frankfurter, Tom Clark, Sherman Minton, and Harold Burton. *Ex Ante: Harry Parker Revealed*, 5 Green Bag 2d 359 (2002).

<sup>95</sup> Knox, *Experiences As Law Clerk* at vi (cited in note 15). Knox reports that "not a single relative or old friend was present" at McReynolds's bedside when he died (p 264).

<sup>96</sup> Nor had they sent him the customary letter of appreciation upon his retirement (pp 261–62).

