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Pickup Basketball

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The second floor of a nondescript building on Pennsylvania Avenue was the longtime home of The Barrister. Until it was razed to make way for what is now the Department of Justice, The Barrister was a gentleman's club without equal in all of Washington, D.C.

Beyond its foyer and cloakroom, The Barrister included a lounge that opened into a large dining room. The lounge had a small bar along one end, and what wasn't paneled with mahogany was paneled with decanters or mirrors. Seven conversation-conducive settings, each containing darkly upholstered wing-backed chairs surrounding a low table, were arrayed around a central fireplace. The New Dealers typically began to arrive at about six o'clock, and many wouldn't leave until after they had said their piece—or midnight, whichever came later.

January of 1935 was among the coldest months in recent memory. Thick wool coats filled the cloak room, overhanging rows of overshoes. When Abe Fortas arrived at about 6:20, he stood for a moment in the foyer without taking off his coat, seemingly waiting for the heat from the fire to warm his face. Fortas, at 25, was already recognized as one of the brightest of the young New Dealers, having recently forged an academic record at the Yale Law School that was so impressive that he was asked to join the law school faculty upon graduation. He was joined almost immediately by William O. Douglas, his professor while at Yale. Following his graduation, Fortas had worked periodically with Douglas on empirical studies related to securities. They soon adjourned to a table near the fire, inclined as Douglas was to feel nearer the outdoors.

" . . . things have changed since you left," Douglas observed.

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"I can imagine. How is the administration treating you?" Fortas asked. Douglas was widely known as a nonconformist, much to the chagrin of those who tried to harness his great talent.

"As well as can be expected," Douglas said. "I think that they're afraid of me, though I'm not exactly sure why. No sense in disabusing them of that notion . . . ."

"Excuse me," boomed a deep voice. "I'm deeply sorry to disturb you, but I'm told that we share an interest in the American West."

Douglas didn't recognize Earl Warren, then District Attorney for Alameda County, California. Warren would soon be elected the Attorney General of California, and later its three-term Governor. He was a bear of a man, and his hair had not yet begun to turn toward the trademark gray that would characterize him in his later years. Warren, a Californian, and Douglas, a Washington state native, were among several prominent Westerners who would later come to Washington D.C. to work for the federal government.

"I don't believe we've met. I'm Bill Douglas, and this is my young protégé, Abe Fortas," Douglas said.

"I'm Earl Warren. I've been told that you are destined for great things in Washington, Mr. Douglas," Warren replied. He was right. Just two years later, at the age of 38, Douglas would be named the head of the recently formed Securities Exchange Commission, and after being appointed to the Supreme Court in 1939, he would go on to serve for 34 years, longer than anyone else in history.

"Well, I hope that your source is otherwise more reliable," Douglas replied. Douglas was normally aloof, but on this occasion he was warm, almost inviting. It could have been due to Douglas's upcoming trip to Goose Prairie, his summer home in Washington, or the two glasses of sherry that Douglas had had before Warren's arrival.

As Warren joined his future colleagues at the table, a roar of laughter erupted from the back corner of the lounge. Second term Alabama Senator Hugo Black had just finished regaling the assembled group with another of his many stories, told with the skill of a seasoned politician. Charles Evans Hughes, the current Chief Justice of the Supreme Court, was also at the table, along with Supreme Court Justice Louis Brandeis and two others. Hughes's presence at a table with Black would have astonished

detached political observers, because Black had led the Senate fight against Hughes when the latter was nominated by Herbert Hoover for the position of Chief Justice. Five years later even Black had to concede that Hughes was a jurist and administrator of the highest order, and the two got on well whenever they met.

Slowly, the fire rustled and the room cooled as the winter wind swept through the open door and into the lounge. As an attendant ran to close it, Robert H. Jackson and John Marshall Harlan walked through the door, each shaking off the effects of the cold. Jackson and Harlan were both New York lawyers, and although Jackson was the more senior, people who saw them together assumed from Harlan's erect bearing and formal manner that he was at least as old as Jackson. Harlan would later assume Jackson's seat on the Supreme Court when the latter was felled by a heart attack at the age of 62. Jackson was then General Counsel to the Internal Revenue Service, and Harlan had come to Washington from New York to observe oral argument at the Supreme Court. The room had begun to fill, and the table at which they were seated was roughly between Douglas's and Black's.

By 7:30, those in the lounge who had not eaten were moving to the dining room, and those who had arrived early were finishing their dessert and taking their coffee in the lounge. Among them was Felix Frankfurter, the Harvard Law School professor, and his former student William Brennan. As usual, Frankfurter was engaged in Socratic dialogue with Brennan and two others as they moved toward the lounge. Before being seated, Frankfurter used Brennan's introduction as a reason to interrupt the discussions at both Douglas's and Black's tables. Frankfurter would be appointed to the Supreme Court in 1939 by Franklin Roosevelt, and he couldn't resist pausing to try to impress Hughes and Brandeis, whose seat Frankfurter coveted and would someday fill.

Frankfurter's and Warren's deep baritones rose above the rest, and those who were listening, including Harlan and Jackson, were intrigued. The subject of Frankfurter's evening lecture was individual rights, and although he could argue all sides of any issue equally well, one would have to conclude that he was generally in favor of them. Black and Douglas, though engaged in their tables' conversations, also were tempted to join the battle with Frankfurter given their respective interests in the subject. They didn't, not because they were reluctant to subject themselves to Frankfurter's considerable intellect, but because

of the insensitivity it would have shown to their respective guests.

In time, though, those within earshot turned their attention from Black's stories, Warren's questions, and Harlan's quiet discussion with Jackson to Frankfurter's debate with young Brennan. Brennan's contemporaries had long since given up debating Frankfurter, leaving Brennan, 29, to defend himself against the master. Frankfurter, sensing that Brennan too might abandon the fight, was beginning his final argument.

"Oh Felix, take it easy on the lad," said Hughes. "Pick on someone your own size." This was meant to sting Frankfurter who, at 5 feet 4 inches, was six inches shorter than most others in the room. Frankfurter, sensing bigger prey, turned to Hughes.

"Mr. Chief Justice, we'd be honored if you would join our group." Hughes smiled. Black was clearly in the mood for some fun, and Brandeis, who was under the weather, was happier to be entertained than to entertain.

"Please go easy on me, Felix. I am old and slow." Hughes fooled no one. Black and the others opened their chairs up so that their table and Frankfurter's were adjacent. "Perhaps Mr. Harlan and Mr. Jackson would like to join us as well," Hughes said.

Hughes was also from New York, and had made it his practice to stay abreast of the political and legal landscape in his home state. Though neither Harlan nor Jackson had yet argued before the U.S. Supreme Court, both were known to Hughes to be among the best lawyers in New York, which, some felt, made them among the best lawyers in the United States. Harlan and Jackson moved their table in and their chairs back, so that each could see the others. The group formed a U, which was open toward the fire and Douglas's table. Gradually, inevitably, Douglas, Fortas, and Warren also joined the discussion, which rapidly toured politics, Roosevelt, Germany, Hollywood, and finally law. Frankfurter thought it a great opportunity to lecture a higher audience.

" . . . and so, I respectfully submit that the framers of the 14th Amendment had no such intention," Frankfurter said. Douglas could stand no more.

"Bullshit, Felix," Douglas growled. "You just like older precedent better than newer." Black nodded subtly.

"If I may offer a contrary view, what could have been simpler for the framers than to have indicated expressly that certain or all of the Bill of Rights applied . . . ." Harlan began.

Just then, an elderly gentleman with snow white hair, stooped shoulders, and a shuffling gait passed into the room, observed by only the bartender. He took up a chair directly behind Jackson, from which he could hear everyone, but see no one.

" . . . have trouble accepting this 'incorporation' theory, however well or poorly advanced," Harlan concluded. This time it was Hughes and Brandeis who were nodding, subtly. They were understandably reserved, given their current vocations, but inclined to participate, given their avocations.

"This has the makings of the finest legal dialogue outside Chief Justice Hughes's conferences," said Warren.

"Or inside," Brandeis deadpanned. Hughes cast a withering glare.

"I propose an old-fashioned schoolboy debate," Frankfurter exclaimed, "with Mr. Chief Justice Hughes as the arbiter, or judge. I will trust him to choose the subjects and set the ground rules, if he should agree."

Hughes paused, started to speak, and then paused again. Finally, gazing at the fire, he began. "This goes against my judgment, but I suppose if the topics are without basis in known fact, there should be no barrier to our participation, Louis." Brandeis shrugged.

"It seems to me as though you're picking up sides for a basketball game," Brennan said. Though young, he was not shy. "That being the case, we need an even number. If Mr. Chief Justice Hughes doesn't participate, someone else ought not participate." The group fell silent. Douglas would normally leave even without being asked, but he was looking forward to cutting Frankfurter to ribbons.

"May I be of service?"

All turned to the gentleman seated behind Robert Jackson, whom none had noticed before then. All immediately recognized him, for his countenance was as well known to them as his work. His legacy to the law was unsurpassed, and when he stepped down from the Supreme Court in 1932 after 30 terms, Oliver Wendell Holmes left a void not yet, if ever, filled. Holmes was now 94, and would die within two months of old age. He was revered by everyone present, all of whom now felt

somewhat sheepish at the thought of sounding like intoxicated law school students before the greatest Associate Justice of all time.

"My hearing has gone to hell of late, but anything I can't hear won't be worth scoring," Holmes said, rising. The others parted before him, and he took his place in a deep maroon chair before the fireplace. The flames seemed to leap over the top of the chair, which added measurably to his aura. Sensing that Holmes was serious about the exercise, and that his eyesight was at least as bad as his hearing, each of the others adjusted his chair so that Holmes could see them all.

"You each get one paragraph; four sentences. No semicolons, Felix," Holmes ruled. "The subject will be individual rights. To make it fair, the first man on a subject can choose his position, but the second will then have longer to formulate an opposing argument." Holmes was warming to the task, as were the others.

"Senator Black, would you begin?" Holmes asked. Black was widely considered one of the finest extemporaneous speakers of his generation, and his skills had been honed on the stump. "Please address yourself to this. Is there a right to privacy in the United States Constitution? Will you, sir, oppose?" Holmes motioned toward Robert Jackson. "Of course," Jackson said.

Black, still holding his wine glass, rose. He needed only moments to fashion his argument. As he would many times in future years, Black began with the First Amendment. "Gentlemen, the First Amendment, in every of its terms, stands on the foundational principle that there is a penumbra or zone of privacy surrounding everyone entitled to its protection against governmental intrusion. Beyond the First Amendment's right of assembly, for example, there is the Third Amendment's prohibition against the quartering of soldiers, the Fourth Amendment's right to be free from unreasonable searches, and the Fifth Amendment's right against self-incrimination. A citizen's right to privacy is much older than the Bill of Rights, and is unquestionably embodied in it. To argue otherwise is to exalt semantics over substance." Black raised his glass in toast to his colleagues, bowed to Jackson, and sat down.

"Well done, Senator Black." Jackson, who would later be tapped as the lead Nuremberg war crimes trial prosecutor, was at least Black's equal as an orator. "It is more than fitting that a legislative official should create a Constitutional right to privacy,

though I submit that the Senator took the wrong side of the argument. One cannot derive from constitutional amendments a guarantee as broad and ill-defined as the right to privacy, which is mentioned nowhere in those amendments, in the body of the Constitution, or in any case ever before decided by the Supreme Court. Of course, one of the most effective ways of expanding a constitutionally guaranteed right is to substitute for certain critical words other words more expansively interpreted by the author. Under the authorship of Senator Black, we now have a Constitution in which no less than four amendments recite a right to privacy, where I and the Court heretofore had found none." Jackson smiled at Black, nodded, and sat down.

"Well done," Holmes said. "Professors Frankfurter and Douglas, let me put a finer point on the issue. Does the United States Constitution control a woman's right to voluntarily end her pregnancy, or does state law?"

Frankfurter rose, and hooked his thumbs in the small side pockets of his vest. He paced for a few moments, presumably more for dramatic effect than because he actually needed any time to prepare. "Were I to consult Senator Black's pocket copy of the Constitution, I would find that it assuredly never uses the term 'privacy,' though it uses a good many others to secure a fixed set of rights to the citizens of the United States." Black was known for carrying the Constitution with him wherever he went, and typically used it to demonstrate that the First Amendment truly included the words "Congress shall make no law," with the emphasis on "no." "Privacy of the sort argued for by Senator Black, applied to a woman's right to abort a fetus, is not even a distant relative of the freedom from searches and seizures and the like protected by the Constitution. If by privacy Senator Black means a general right of a person to be free from government intrusion into consensual transactions, this type of 'liberty' is one protected, if at all, by the 14th Amendment, in which case such a deprivation is guaranteed not absolutely, only against deprivation without due process of law. The boundaries of this 'right,' if they are to be set, must be set by state governments, for they are not set by the Constitution." Frankfurter barely acknowledged Douglas, certain as he was that his argument would be adjudged the better of the two.

"The rules of this exercise are absurd. No one . . ." Douglas began to say, as he stood up near the fire.

"You have two sentences left, Mr. Douglas," Holmes said.

"Very well."

"Now you have one. Will you concede victory to Professor Frankfurter?" Holmes said, laughing. Now it was Douglas's chance to offer a withering glare.

"For the reasons offered by Senator Black, which I incorporate by reference," Douglas began, now smiling himself, "the right to privacy has been part of the Constitution since its inception, and naturally includes within its scope the right most sacred to every free person: to make medical judgments about that person's body unfettered by the legal shackles of the State; for if this liberty be taken away all others shall surely follow." Douglas ignored Frankfurter, who was cleaning his spectacles, and sat down.

"Fine recovery, Professor Douglas," said Holmes. "Now, since 1896, it has been the law of this land that 'separate but equal' facilities for blacks and whites satisfy the requisites of our Constitution. Mr. Harlan, I believe you may be acquainted with the controlling law: *Plessy v. Ferguson*." Harlan's grandfather, also named John Harlan, had been the lone dissenting justice in *Plessy*, so Harlan's position had been preordained. "Would the next two in line please address the application of *Plessy* to segregated educational facilities for children?"

Harlan rose. "I submit that the controlling law is not that of *Plessy v. Ferguson*, but that of the Constitution. Education is among the most vital public functions, and it is among our country's greatest successes. In respect of civil rights common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by everyone within the United States under at least the 13th and 14th Amendments to the Constitution."

Harlan took his seat. He had used one more sentence than allotted, but had evaded detection by eloquently quoting his grandfather almost verbatim.

Warren was in a difficult position, notwithstanding the informal nature of the occasion. He leaned forward, and in a serious tone not heard yet that evening, said "The division of the

education of our nation's children by race is the single greatest enduring tragedy of this Nation. I cannot address it in terms other than those." No one disagreed, and several mumbled their concurrence. Holmes crossed out Warren's name for scoring purposes, as well as Douglas's to keep it even.

Brennan glanced at Fortas nervously. Given the arrangement of their chairs, it appeared as though Brennan would debate Brandeis, and Fortas would oppose Chief Justice Charles Evans Hughes. Brandeis's scholastic marks while at the Harvard Law School were the highest in its storied history, and withstood formidable assaults by the likes of Brennan and Frankfurter for more than 100 years. But Holmes's vision, or sense of humor, wasn't that bad.

"Mr. Justice Brandeis and Mr. Chief Justice Hughes. To what degree do the individual rights of the President of the United States supersede the office, and to what degree does the office supersede the individual rights of the President?" Hughes had lost the 1916 Presidential election to Democrat Woodrow Wilson, and was plainly amused at Holmes's question. He waited on Louis Brandeis who, given his condition, remained seated while he spoke. Brandeis framed the issue first.

"I can imagine two circumstances in which this issue might arise: in regard to the investigation of a president's actions, and in regard to the investigation of a president's communications. As to the former, the President is subject to judicial process in both the civil and criminal spheres for his actions; the Founders rejected the monarchical notion that '[t]he King can do no wrong.' As to the latter, though I recognize as I must a presumptive executive privilege, when the asserted privilege is based only on the generalized interest in confidentiality, it must yield to a demonstrated, specific need for evidence in a pending trial. In short, it is not the office that supersedes the individual rights of the President, but our system of justice." Several raised their wine glasses in salute.

Hughes then rose and took up the challenge, though he was plainly less comfortable speaking than listening under these circumstances. Hughes was an almost mythical figure in his own right, and instantly commanded the respect of even those who had never met him. He had not only served on the Court for two separate periods, but was a former two-time Governor of New York, Secretary of State, and Republican party candidate for President in 1916.

"As to the same points raised by the eminent jurist from Massachusetts, I respectfully disagree. The President's official actions are unquestionably beyond the ken of the judiciary, and his unofficial actions cannot be subject to suit in all but the most extraordinary circumstances lest the President be repeatedly and unnecessarily subjected to litigation during his term in office. As to his communications, I submit that without full, frank, and unfettered discussions with those on whose opinions he must rely, the President is ill-equipped to conduct the business of the nation, and we shall all suffer for it more surely than by the failure to pierce the privilege of the Chief Executive."

Hughes sat down, and Holmes reminded him that he had one more sentence under the rules. "I'm reserving it for summation," Hughes replied with a smile.

"It appears as though we've saved the best for last. I don't believe I have met either of you," Holmes said. Fortas and Brennan fairly leaped out of their chairs at the opportunity to introduce themselves to Holmes. After they returned to their seats, Holmes began again.

"Are you lads familiar with the circumstance of Miss Carrie Buck of Virginia?" Holmes asked. Brennan immediately smiled and Fortas winced, but both nodded. Buck, then 21, was an inmate at the Virginia Colony for Epileptics and the Feeble Minded, and was the daughter of a "feeble-minded" mother and the mother of an illegitimate feeble-minded daughter. The State of Virginia, under a law passed in 1924, had directed that Ms. Buck be sterilized to prevent her from bearing any more children. The Supreme Court upheld the State's action in an 8-1 decision. In as memorable a phrase as was ever offered by the Court, the majority stated:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state . . . in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

Holmes had authored the opinion, with Brandeis in the majority. Brennan was smiling because he would be allowed to choose his position, which Fortas and the others assumed would track Holmes's on behalf of the Court. Fortas wasn't looking forward to taking issue with Holmes, though the latter was clearly expecting it.

"Please provide us with your views on that case. You may begin, Mr. Brennan." Holmes sat back in his chair.

Brennan rose and cleared his throat. With all the authority he could muster, Brennan said "Buck versus Bell was wrongly decided." The group exploded in laughter, led by Holmes, who paused long enough to wipe a tear from his eye. Even Brennan was momentarily overcome, but he regained his composure and continued. "The act at issue very clearly denied Ms. Buck equal protection and due process of the law under the 14th Amendment to the Constitution, and, for the reasons enumerated by Professor Douglas, which I incorporate by reference," Brennan said, acknowledging Douglas, "the constitutional right to privacy renders the act unconstitutional as well."

"No semicolons, Mr. Brennan," Holmes reminded.

"Yes, your Honor." Brennan continued. "The equal protection argument has been well documented in the reports of the Court, if not particularly well made in Ms. Buck's case. As for due process, the manifest burdens imposed on the freedom and liberty of our citizens supersede any proffered state interest in preserving the fisc. It is the Court's duty to stand for those least able to stand for themselves when faced with the resources of the State, and that the Court did not do for the unfortunate Ms. Buck."

Fortas launched his own argument with his usual self-deprecating humor. "My own ancestry amply demonstrates that three generations of idiots are decidedly enough." Again, the group laughed long and loud before Fortas could resume. "The act provides sufficient due process of law, through appeals to every appellate court in Virginia, and applies to a defined class of people that is neither overbroad nor underinclusive. The right of privacy contended for by Mr. Brennan has no basis in either the Constitution or in the reported cases of the Supreme Court, and it is not lightly to be created lest it grow without boundary to protect, for example, the privacy right of a common criminal to be free from any manner of search or seizure by police. Lastly, it is the duty of an advocate to advance and protect

the rights of the least of our society, not the Court, and I therefore join in the opinion of the majority." Fortas bowed first to Holmes; then to Brandeis. Harlan was later to say that Fortas was the most brilliant advocate to appear before the Supreme Court during Harlan's time on it, and he had done nothing to dispel such a reputation this night.

When Fortas finished, all smiled, none more than Holmes. It was as if he sensed that this was his final window on the future of the law. He was the first to rise, and all rose after him. Brennan helped him on with his coat and overshoes, and guided him toward the door. The others also donned their winter gear and walked outside into the snowy weather.

Before Holmes could leave, Frankfurter, ever the competitor, asked "Who won?" Holmes slowed, then wheeled toward Frankfurter. Looking straight at Frankfurter, his blue eyes blazing through the snowfall, Holmes shot back "Warren!" And then he was gone.