



TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 33
Number 1 *Symposium: Louis D. Brandeis - An
Interdisciplinary Retrospective*

Article 6

2017

Solving a Mystery: Justice Brandeis' Approach to Judicial Decision-Making

Judge Kermit V. Lipez

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Judges Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Lipez, Judge Kermit V. (2017) "Solving a Mystery: Justice Brandeis' Approach to Judicial Decision-Making," *Touro Law Review*. Vol. 33 : No. 1 , Article 6.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol33/iss1/6>

This Article is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

SOLVING A MYSTERY: JUSTICE BRANDEIS' APPROACH TO JUDICIAL DECISION-MAKING

*Judge Kermit V. Lipez, United States Court of Appeals for the First Circuit**

*Presented At The Brandeis Symposium At Touro Law Center
March 31, 2016¹*

I. INTRODUCTION

I decided to write about Justice Brandeis' approach to judicial decision-making to solve a small mystery. About a year ago, I read in Andrew Kaufman's biography of Justice Cardozo that Justice Brandeis stated to one of Cardozo's law clerks: "The trouble with your Judge is that he thinks he has to be one hundred percent right. He doesn't realize that it is enough to be fifty-one percent right."² That comment startled me. I thought Brandeis' observation was odd.

For judges and juries who must decide the facts in ordinary civil cases, we accept a preponderance of the evidence standard as a pragmatic necessity for the resolution of disputes. But for appellate judges deciding issues of law, there is no such necessity. We can and should impose on ourselves a much higher degree of certainty in our decision-making. Imagine the public outcry if a Supreme Court justice who cast the deciding vote in a controversial case said she was 51% confident that she was right. It would be difficult to justify using the power of the state to enforce such a tentative decision. Therefore, I would never quantify the appellate decision-making process as a 51% proposition. With so much time to study and reflect, with the benefit of collegial decision-making, and with the input of able law

* I wish to thank my talented law clerk, Anna Fodor, whose exhaustive research and astute editorial suggestions were so helpful to me in the preparation of this lecture.

¹ *Louis D. Brandeis: An Interdisciplinary Retrospective*, TOURO COLLEGE JACOB D. FUCHSBERG LAW CENTER, <http://www.tourolaw.edu/JewishLawInstitute/?pageid=998> (last visited Oct. 15, 2016).

² ANDREW L. KAUFMAN, *CARDOZO* 212 (1998).

clerks, I would place my certainty closer to 90%. Sure, the decision-making process itself often involves fits and starts, changes of direction, blind alleys, and discarded drafts. At the moment of decision there might still be some doubt. But 49%? No way. I could not issue a decision with such doubt.

So how could Brandeis make an observation that seems so antithetical to the appellate decision-making process that I have experienced? To answer that question, I decided to explore some of Justice Brandeis' letters, speeches, essays and opinions, and the views of those who worked with and studied him. I was limited to such sources because, so far as I can tell, Justice Brandeis did not keep a journal of reflections during his years on the Court, and he did not write a memoir.³ Nevertheless, on the basis of the available sources, I came to a new understanding of Justice Brandeis' 51% observation. Let me explain the travel that got me there.

II. THE CONFIDENCE OF LOUIS BRANDEIS

Self doubt was not an issue for Louis Brandeis; he had the confidence of a man who understood his superior gifts early in life. At Harvard Law School he set academic records that were unsurpassed for years.⁴ As a law student, in a letter to his brother-in-law, he criticized harshly a U.S. Supreme Court opinion that he thought was wrong on a point of evidence: "I am afraid those Supreme Court Judges [sic] will be refused admittance into paradise for the bad law they have been promulgating in this life. Many of them, surely, deserve the most dreadful punishment."⁵ In 1879, while working in Cambridge in a new law partnership with his Harvard Law School classmate Samuel Warren, Brandeis wrote to his brother Alfred that he had just returned from a Saturday afternoon tea with friends, "where we criticized the people and agreed on the stupidity of the world."⁶

³ See Paul A. Freund, *Introduction to ALEXANDER BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS XV* (1957).

⁴ See Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 OHIO ST. L.J. 1149, 1158 n.38 (2010).

⁵ Letter from Louis D. Brandeis to Otto A. Wehle (Nov. 12, 1876), in 1 LETTERS OF LOUIS D. BRANDEIS: (1870–1907): URBAN REFORMER, 11–12 (Melvin I. Urofsky & David W. Levy eds., 1971) [hereinafter 1 LETTERS].

⁶ Letter from Louis D. Brandeis to Alfred Brandeis (July 31, 1879), in 1 LETTERS, *supra* note 5, at 44.

Brandeis believed that the projection of confidence was an important attribute for a lawyer.⁷ In 1893, in a long letter to William Harrison Dunbar, a young associate in the Warren and Brandeis law firm, he wrote that Dunbar should strive to impress clients “with the confidence which you yourself feel in your powers. That confidence can never come from books; it is gained by human intercourse.”⁸

As a corollary to his confidence, Brandeis was not a worrier. In a 1939 conversation with his niece, Fanny, Brandeis observed that “for all his philosophy, Justice Holmes worried.”⁹ Fanny asked him if he ever worried.¹⁰ Brandeis responded emphatically: “No, never - not even when I had trouble with my eyes. That was when I was about nineteen. The doctor told me I had better give up all idea of the law [B]ut with my temperament I could go on [T]here was never anything organically wrong with my eyes.”¹¹ Fanny pressed her inquiry: “If you didn’t worry about yourself, didn’t you worry about the world or about people you cared about?”¹² Brandeis demurred: “I always went on the principle of ‘Do what you can and hope for the best’ - I worked on the problem at hand. All those years before I went on the Court, that was my philosophy.”¹³

III. BRANDEIS AS A LAWYER

Before Brandeis joined the Court, he spent approximately forty years in law practice.¹⁴ Brandeis had been torn between a career as a law professor and a practicing lawyer.¹⁵ He acknowledged in an 1879 letter that “law as a logical science has very great attractions for me.”¹⁶ But so did “the wrangling of the Bar. . . . It is merely a ques-

⁷ Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), in 1 LETTERS, *supra* note 5, at 108.

⁸ Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), in 1 LETTERS, *supra* note 5 at 108.

⁹ *Conversation with Louis D. Brandeis about World War II*, LOUIS D. BRANDEIS SCHOOL OF LAW LIBRARY, (Sept. 15, 1939), <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/conversation-with-louis-d.-brandeis-about-world-war-ii>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Louis D. Brandeis Legacy Fund for Social Justice*, BRANDEIS UNIVERSITY, <http://www.brandeis.edu/legacyfund/bio.html> (last visited Oct. 15 2016).

¹⁵ *Id.*

¹⁶ Letter from Louis D. Brandeis to Charles Nagel (July 12, 1879), in 1 LETTERS, *supra*

tion of selecting between two good things. . . . I question only which I am good for.”¹⁷

In choosing the “wrangling of the Bar” over an academic career, Brandeis made a choice of enormous import for his future work on the Supreme Court. In law practice, the logical science of the law was of secondary importance. A lawyer, he explained, must “reason from the facts within his grasp.”¹⁸ The “accuracy of his facts could be a more powerful argument than the logic of his law.”¹⁹ He understood “that a case may be won or lost before a legal question is ever raised.”²⁰ He considered it “axiomatic that since facts determined law, the law had to reflect the realities of contemporary life.”²¹

Brandeis was immersed in those realities throughout his career as the “people’s lawyer,” a phrase that he used in his famous 1905 address to the Harvard Ethical Society on “The Opportunity in the Law.”²² He believed that “[t]he controlling force is the deep knowledge of human necessities,” and that “[n]o hermit can be a great lawyer.”²³ A lawyer should “[l]ose no opportunity of becoming acquainted with men, of learning to feel instinctively their inclinations, of familiarizing . . . [himself] with their personal and business habits.”²⁴ He warned that “[a] lawyer who does not know men is handicapped. It is like practicing in a strange city.”²⁵

By the time Brandeis arrived at the Supreme Court in 1916, he had already used his “deep knowledge of human necessities”²⁶ and his fondness for facts “stripped for action”²⁷ to win many great legal

note 5, at 39.

¹⁷ Letter from Louis D. Brandeis to Charles Nagel (July 12, 1879), in 1 LETTERS, *supra* note 5, at 39.

¹⁸ Louis D. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555, 557 (1905) [hereinafter Brandeis, *Opportunity in the Law*].

¹⁹ MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 488 (2009).

²⁰ Walton H. Hamilton, *The Jurist’s Art*, 31 COLUM. L. REV. 1073, 1080 (1931).

²¹ UROFSKY, *supra* note 19, at 477.

²² Brandeis, *Opportunity in the Law*, *supra* note 18, at 555, 559.

²³ Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), in 1 LETTERS, *supra* note 5, at 107.

²⁴ Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), in 1 LETTERS, *supra* note 5, at 106.

²⁵ Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), in 1 LETTERS, *supra* note 5, at 108.

²⁶ Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), in 1 LETTERS, *supra* note 5, at 107.

²⁷ Letter from Louis D. Brandeis to Felix Frankfurter (Dec. 1, 1920), in 4 LETTERS OF LOUIS D. BRANDEIS: 1916–1921: MR. JUSTICE BRANDEIS 514, 515 (Melvin I. Urofsky & Da-

victories. These victories included his successful challenge to the plans of a railway company to run a rail line across the Boston Common,²⁸ his fights for cheaper consumer rates from gas companies,²⁹ his peacemaker role in the Garment Workers Union Strike,³⁰ and his storied advocacy in *Muller v. Oregon*,³¹ a women's labor law case in which Brandeis introduced social science to the American legal system in the "Brandeis Brief."³²

However, there was some cost for Brandeis in those legal victories. During the bitter fight over his nomination by President Wilson in 1916 to the Supreme Court, one of the petitions against him claimed "that he does not possess the 'judicial temperament' that would fit him for the duties of . . . [a] Supreme Court judge."³³ That charge prompted a strong defense of Brandeis by his close friend, Felix Frankfurter, in the pages of the *New Republic*.³⁴ Acknowledging that Brandeis was "not amiable in a fight," Frankfurter justified this quality by the high stakes of Brandeis' battles.³⁵ Frankfurter stated that "[t]he law has not been a game to him, the issues he has dealt with have been great moral questions. He has often fought with great severity. He has rarely lost. His great fights have been undertaken in the public interest."³⁶

These great fights would now take place in a different forum. Given his confidence and his history of success, Brandeis had little reason to question the fallibility of his own judgment when he became a member of the Supreme Court.

IV. THE NATURE OF SUPREME COURT DECISION-MAKING

The Supreme Court was a good fit for Brandeis. The Court did not enjoy the enhanced power to control its own docket that it has

vid W. Levy eds., 1975) [hereinafter 4 LETTERS].

²⁸ UROFSKY, *supra* note 19, at 131-32.

²⁹ UROFSKY, *supra* note 19, at 140-49.

³⁰ See UROFSKY, *supra* note 19, at 244-53.

³¹ *Muller v. Oregon*, 208 U.S. 412 (1908).

³² *Id.* at 419.

³³ David W. Levy, *The Lawyer as Judge: Brandeis' View of the Legal Profession*, 22 OKLA. L. REV. 374, 395 (1969).

³⁴ Felix Frankfurter, *Brandeis*, NEW REPUBLIC (Feb. 5, 1915), <https://newrepublic.com/article/62501/brandeis/>.

³⁵ *Id.*

³⁶ *Id.*

today, as a primarily certiorari court, until 1925.³⁷ Therefore, Brandeis had ample opportunities to apply the traditional skills of a legal craftsman to correct legal errors by the lower courts.³⁸

Although consequential, decisions correcting legal errors from the lower court did not always engage the creative energies that Brandeis applied to the constitutional law cases and their difficult generalities—unreasonable searches and seizures, freedom of speech, the commerce clause powers, and equal protection of the law. These constitutional law cases posed special challenges for the justices, described by Professor Walton Hamilton of Yale Law School in a 1931 essay on Brandeis' Supreme Court work:

[W]here a changing social necessity impinges upon the established law, the jurist must possess a double competence; he must employ alike legal rule and social fact, and where they clash, as inevitably they will in a developing culture, he must effect the best reconciliation that may lie between them. The judge must become the statesman without ceasing to be the jurist; the quality of his art lies in the skill, the intelligence, and the sincerity with which he manages to serve two masters.³⁹

Justice Brandeis was blessed with the double competence described by Hamilton because he had a vast knowledge of social fact from his years of law practice, and was always a brilliant student of the legal rules. Moreover, the constitutional cases played to some of his deepest impulses—a distrust of large institutions, governmental or private, and a strong belief in the worth of the individual.⁴⁰ At times, as Justice Holmes observed about his colleague, he “was an advocate rather than a judge. He is affected by his interest in a cause.”⁴¹

There seems to be a mix of admiration and unease in Holmes' observation, along with some exaggeration. Brandeis knew how to hold his fire. In non-constitutional cases, which Brandeis described as “ordinary cases,”⁴² he usually joined his colleagues, even if he dis-

³⁷ See UROFSKY, *supra* note 19, at 584.

³⁸ See *Dean v. Davis*, 242 U.S. 438 (1917).

³⁹ Hamilton, *supra* note 20, at 1077.

⁴⁰ Hamilton, *supra* note 20, at 1084.

⁴¹ UROFSKY, *supra* note 19, at 578.

⁴² UROFSKY, *supra* note 19, at 579.

agreed with them. As Brandeis explained: “[T]here is a good deal to be said for not having dissents. You want certainty & definiteness & it doesn’t matter terribly how you decide, so long as it is settled.”⁴³

For constitutional cases, moreover, he believed deeply in principles of judicial restraint—refraining from constitutional dicta, adhering to the doctrine of constitutional avoidance, and refusing to hold an act of Congress void unless it clearly exceeded congressional powers.⁴⁴ However, if he felt his colleagues had reached an errant constitutional decision, he no longer cared about settled law:

[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.⁴⁵

Committed to this process of trial and error, Brandeis wrote the great dissents that justified Holmes’ observation about him; he was a judge deeply “affected by his interest in a cause.”⁴⁶

V. BRANDEIS ON THE COURT: HIS DECISION-MAKING PROCESS

There was a curious duality in the perceptions of Brandeis during his years on the Court. Judge Henry Friendly, a former Brandeis law clerk, described Brandeis’ “Olympian calm,”⁴⁷ and Professor Hamilton wrote that Brandeis’ “opinions seem to reveal a mind rather quickly made up”⁴⁸ Yet Brandeis’ outward calm and ease of decision-making could not mask his intensity. As Judge Friendly observed: “Everyone who knew Brandeis was struck by his intensity. President Roosevelt recognized this when he took to addressing Brandeis as ‘Isaiah.’ This quality was manifest in Brandeis’ appear-

⁴³ UROFSKY, *supra* note 19, at 579.

⁴⁴ See Letter from Louis D. Brandeis to Felix Frankfurter (Sept. 19, 1922), in 5 LETTERS OF LOUIS D. BRANDEIS, 1921–1941: ELDER STATESMAN, 63–64 (Melvin I. Urofsky & David W. Levy eds., 1978) [hereinafter 5 LETTERS].

⁴⁵ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 383, 406–08 (1932) (Brandeis, J., dissenting) (footnotes omitted).

⁴⁶ UROFSKY, *supra* note 19, at 578.

⁴⁷ Henry J. Friendly, *Mr. Justice Brandeis: The Quest for Reason*, 108 U. PA. L. REV. 985, 993 (1960).

⁴⁸ Hamilton, *supra* note 20, at 1089.

ance, in his acts and in his writings.”⁴⁹

Perhaps as a way of controlling the intensity, Brandeis followed strict routines in his daily life. He took brisk, lengthy walks for exercise.⁵⁰ He pursued an early to bed, early to rise regimen, often being in bed by 10 P.M., and working at his desk by 5 A.M.⁵¹ He believed that “[t]he bow must be strung and unstrung; work must be measured not merely by time but also by its intensity; there must be time also for the unconscious thinking which comes to the busy man in his play.”⁵² True to this philosophy, Brandeis always ceased work for the month of August, explaining: “I soon learned that I could do twelve months’ work in eleven months, but not in twelve.”⁵³

He also followed strict routines in his decision-making, including his use of law clerks. Brandeis had been a law clerk himself for Chief Justice Gray of the Massachusetts Supreme Judicial Court.⁵⁴ Brandeis described Chief Justice Gray’s “mode of working:”

He takes out the record & briefs in any case, we read them over, talk about the points raised, examine the authorities’ arguments—then he makes up his mind if he can, marks out the line of argument for his opinion, writes it, & then dictates it to me.

But I am treated in every respect as a person of coordinate position. He asks me what I think of his line of argument and I answer candidly. If I think other reasons better, I give them; if I think his language is obscure, I tell him so; if I have any doubts I express them and he is very fair in acknowledging a correct

⁴⁹ Friendly, *supra* note 47, at 985.

⁵⁰ See Letter from Louis D. Brandeis to Alice Goldmark Brandeis (Dec. 1, 1918), in 4 LETTERS, *supra* note 27, at 367.

⁵¹ See Letter from Louis D. Brandeis to Alice Goldmark Brandeis (Dec. 3, 1918), in 4 LETTERS, *supra* note 27, at 369; Todd C. Peppers, *Isaiah and His Young Disciples: Justice Louis Brandeis and His Law Clerks*, in IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 67, 75 (Todd C. Peppers & Artemus Ward eds., 2012).

⁵² Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), in 1 LETTERS, *supra* note 5, at 109.

⁵³ Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), in 1 LETTERS, *supra* note 5, at 110.

⁵⁴ Letter from Louis D. Brandeis to Charles Nagel (July 12, 1879), in 1 LETTERS, *supra* note 5, at 38.

suggestion or disabusing one of an erroneous idea.⁵⁵

Brandeis applied this model to his own work with the gifted law clerks who worked for him, “albeit with the law clerk in a more junior role.”⁵⁶ As one law clerk put it: “He expected me to pull no punches and read everything with a critical eye. He didn’t want any petitions for rehearing because of any error on his part. I was not to stand in awe of him but was to tell him frankly what I thought.”⁵⁷

There was, however, one critical difference between the way in which Chief Justice Gray worked with Brandeis and the way in which Brandeis worked with his law clerks: Brandeis discussed the cases with Chief Justice Gray as part of the Justice’s decision-making process.⁵⁸ By contrast, Dean Acheson, another Brandeis clerk, recalls that,

The Justice wanted no help or suggestions in making up his mind . . . [T]he Justice was inflexible in holding that the duty of decision must be performed by him unaided. He was equally emphatic in refusing to permit what many of the Justices today require, a bench memorandum or précis of the case from their law clerks He owed it to counsel . . . to present them with a judicial mind unscratched by the scribblings of clerks.⁵⁹

There was also a more practical reason for Brandeis’ refusal to discuss the cases with law clerks before making a decision. According to Paul Freund, yet another famous Brandeis law clerk, “he would consider it an unnecessary drain on resources.”⁶⁰ Indeed, Brandeis had little patience with endless debating about the merits of a case even with colleagues. He disapproved of the approach of Harlan Fiske Stone, the future Chief Justice, when Stone first joined the Supreme Court because he thought Stone was too indecisive and too inclined to discuss endlessly the pros and cons of each case.⁶¹ He

⁵⁵ Letter from Louis D. Brandeis to Charles Nagel (July 12, 1879), in 1 LETTERS, *supra* note 5, at 38.

⁵⁶ Peppers, *supra* note 51, at 72.

⁵⁷ Peppers, *supra* note 51, at 72.

⁵⁸ Letter from Louis D. Brandeis to Charles Nagel (July 12, 1879), in 1 LETTERS, *supra* note 5, at 38.

⁵⁹ Peppers, *supra* note 51, at 72-73.

⁶⁰ Peppers, *supra* note 51, at 73.

⁶¹ UROFSKY, *supra* note 19, at 577.

even mocked Stone privately: “I think it’s wrong, but. [sic] I think it’s right, but.[sic][He d]oesn’t know and doesn’t take trouble to find out.”⁶²

Once Brandeis made his decision—and Judge Friendly observes that “on many of the great issues it had been made long before the case was argued”⁶³—there remained “the engrossing task of endeavoring to persuade his colleagues, or at least four of them.”⁶⁴ Brandeis lavished far more time on the drafting of opinions than on the decision-making process itself.⁶⁵ To be sure, there is an indication in Brandeis’ Supreme Court files that he occasionally changed his mind while writing a decision that he had been assigned to write.⁶⁶ But these instances are the exception.

Brandeis’ drafting process followed an almost unvarying routine. He “wrote out in longhand on a yellow legal-size pad the nub of the case, the question posed, the Court’s decision, and the rationale.”⁶⁷ Brandeis would then send the resulting document, which was rarely longer “than a page and a half,” to the court printer.⁶⁸ When he got it back the next day he would begin to revise and expand the opinion, starting with the statement of facts, which he always wrote himself.⁶⁹ While Brandeis wrote this skeletal draft, he was waiting for his law clerk to bring him the results of research that Brandeis assigned to him.⁷⁰ When he got that research, he would insert it into the text of the opinion by cutting up the memo and pasting it in the appropriate place.⁷¹ Brandeis would go through many drafts in this way, sometimes as many as fifteen or twenty.⁷² For Brandeis, the drafting process appeared to be less a test of the correctness of his decision than the painstaking effort to explain to his colleagues and the world why he was right.

Brandeis’ research for his opinions involved one revolutionary step—he was the first Supreme Court Justice to cite a law review

⁶² UROFSKY, *supra* note 19, at 577.

⁶³ Friendly, *supra* note 47, at 986.

⁶⁴ Friendly, *supra* note 47, at 986.

⁶⁵ See BICKEL, *supra* note 3, at 22.

⁶⁶ See BICKEL, *supra* note 3, at 22.

⁶⁷ UROFSKY, *supra* note 19, at 473.

⁶⁸ UROFSKY, *supra* note 19, at 473.

⁶⁹ UROFSKY, *supra* note 19, at 473.

⁷⁰ UROFSKY, *supra* note 19, at 473.

⁷¹ UROFSKY, *supra* note 19, at 474.

⁷² UROFSKY, *supra* note 19, at 474.

article in an opinion.⁷³ Brandeis believed strongly in the importance of law journals. As he explained: “I incline to think that the law schools and their journals will ultimately furnish the most effective means for recall of erroneous judicial decisions.”⁷⁴ Brandeis understood that, as a judge, he held the “duty of decision” in each case before him; thus, he left it to law students and professors, with the benefit of hindsight, to expose the mistakes of the judges.⁷⁵ To that end, in a 1922 letter to then-Professor Felix Frankfurter, Brandeis urged Frankfurter to cultivate in law students the virtues of accuracy and thoroughness, although he acknowledged that some would have the advantage of natural talent.⁷⁶ As Brandeis put it: “High ability, resourcefulness, imagination, the essentially legal mind, come, like kissing, by favor of the gods”⁷⁷ The essentially legal mind and kissing—only a man of Brandeis’ genius could make that connection.

VI. CONCLUSION

So, in conclusion, what do I now make of Justice Brandeis’ observation that “the trouble with [Cardozo] is that he thinks he has to be one hundred percent right. He doesn’t realize that it is enough to be fifty-one percent right?”⁷⁸

I think appellate judges, if asked to consider the issue, would calibrate their decision-making certainty at different levels. I placed mine at 90% because, like most judges, I experience the journey to certainty as an incremental process beyond the halfway point. When I have only an inclination about an outcome—my 51% point—I must do more thinking about the case, more research, more discussion with law clerks, and more drafting, before I have enough confidence in my inclination to treat it as a decision. My 90% figure is, in part, a description of that arduous journey.

My late colleague Frank Coffin, a gifted jurist by any measure, described in his book, *The Ways of a Judge*, the appellate judge’s

⁷³ UROFSKY, *supra* note 19, at 473.

⁷⁴ Letter from Louis D. Brandeis to Thomas Reed Powell (June 8, 1923), in 5 LETTERS, *supra* note 44, at 97.

⁷⁵ Peppers, *supra* note 51, at 72.

⁷⁶ Letter from Louis D. Brandeis to Felix Frankfurter (Feb. 3, 1922), in 5 LETTERS, *supra* note 44, at 44.

⁷⁷ Letter from Louis D. Brandeis to Felix Frankfurter (Feb. 3, 1922), in 5 LETTERS, *supra* note 44, at 44.

⁷⁸ KAUFMAN, *supra* note 2, at 212.

“state of prolonged indecisiveness” in hard cases.⁷⁹ Judge Coffin added this metaphor: “I see the process rather, as a series of shifting biases. It is much like tracing the source of a river, following various minor tributaries, which are found to rise in swamps, returning to the channel, which narrows as one goes upstream.”⁸⁰

I do not think Justice Brandeis would describe his decision-making process as “a state of prolonged indecisiveness” or “a series of shifting biases” as he fought his way upstream through swamps and tributaries. Favored with a rare genius, Brandeis made his decisions quickly, largely through his own counsel, without much fuss. For him, that 51% figure did not reflect uncertainty. Rather, it reflected his speedy arrival at a confident judgment. I am not suggesting, of course, that Brandeis did not work hard. Nothing could be further from the truth. But he saved his hardest work for explaining decisions, not making them.

That was not true of Justice Cardozo. Their approach to decision-making could not have been more different. Henry Friendly, observing both of them, said that Brandeis “knew nothing of what Judge Hand, in his moving tribute to Justice Cardozo, has called ‘the anguish which had preceded decision.’”⁸¹ Cardozo arrived at the Supreme Court in March 1932.⁸² Brandeis made his 51% comment to the Cardozo law clerk during the 1933-34 term of the Court.⁸³ It was offered, according to the law clerk, in “reaction to Cardozo’s conscience.”⁸⁴ By then, Brandeis had observed the anguish which preceded Cardozo’s decisions, and the physical toll it may have had on Cardozo, who had his first heart attack in 1930, around the age of 60, and who was in declining health during his six years on the Supreme Court.⁸⁵ Yet, according to one account, Cardozo “was a tireless worker exhausting himself by the close of each term. He used

⁷⁹ FRANK M. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 63 (1980).

⁸⁰ COFFIN, *supra* note 479, at 63.

⁸¹ Friendly, *supra* note 47, at 986.

⁸² *Benjamin Cardozo*, BIO., <http://www.biography.com/people/benjamin-cardozo-40728#new-york-court-of-appeals> (last visited Oct. 15, 2016).

⁸³ Ambrose Duskow et al., *A Personal View of Justice Benjamin N. Cardozo: Recollections of Four Cardozo Law Clerks*, 1 *CARDOZO L. REV.* 5, 16, 18 (1979).

⁸⁴ *Id.* at 18.

⁸⁵ ARTEMUS WARD, *DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT* 139 (2003).

work as a way to escape, if not beat, illness.”⁸⁶

Observing Cardozo and his declining health, Brandeis may have been worried about Cardozo and, with the law clerk as an intermediary, delivered a message to Cardozo that he should not drive himself so hard.⁸⁷ Cardozo, hearing the message, responded skeptically: “The trouble with that is when you think you are fifty-one percent right it may really only be forty-nine percent.”⁸⁸ Hence, for Cardozo, the journey from inclination to certainty would remain much longer than Brandeis’. The men were simply different kinds of geniuses. Brandeis’ gifts were not easily transferable. With his confidence, his refusal to worry, his grounding in the world of affairs, his understanding of the “human necessities” of life,⁸⁹ his insistence on time for play, and his adherence to the routines of his decision-making, he had a remarkable judicial career without the anguish of decision-making. There is no probability in that judgment. I am 100% confident that I am right.

⁸⁶ *Id.*

⁸⁷ KAUFMAN, *supra* note 2, at 212.

⁸⁸ KAUFMAN, *supra* note 2, at 212.

⁸⁹ Letter from Louis D. Brandeis to William Harrison Dunbar (Feb. 2, 1893), *in* 1 LETTERS, *supra* note 5, at 107.