

JACK!

*Steven L. Winter**

In the fall of 1982, I was planning a month-long trip to Italy with a friend. Debby Greenberg had organized a conference on comparative affirmative action at the Rockefeller Foundation's Bellagio Center that summer, and Jack and Debby traveled around Italy while there. Jack invited me and my "spousal analog"—a coinage of his own that never failed to make him chuckle—over for dinner to share travel tips with us. Jack did the cooking: lamb chops with weisswurst from a local Yorkville butcher, steamed broccoli, and a nice French red. After dinner, he brought out an art book, *Wonders of Italy*,¹ which he insisted we bring along with us. Only later, after I had slipped on the muddy floor of San Marco in Venice and destroyed the binding, did I learn that the book was out of print: When I went to replace it, I was told by a bookseller in Florence that the publishing house had long since closed.

We planned to start our trip at Lake Como. Jack said we had to go to Bellagio. He gave us the names of a quaint hotel and his favorite restaurant there. He also gave us the name of the director of the Bellagio Center; he said we should call him to arrange a private tour of the villa and its beautiful grounds, which occupy the tip of the peninsula facing the Alps to the north. When we arrived in Bellagio, I called the director's office. It was late in the day, and he had already left. His secretary, who was very nice, promised to put our names on the guest list for the next day. The next morning, we went to the side entrance as she had directed, pushed the buzzer on the intercom, and identified ourselves. Someone else answered and brusquely asked our business. I tried to explain that we had an appointment, but there was neither a guest list nor a note of any kind. A frustrating, slightly testy exchange ensued. I rehearsed the story of the call and the arrangement with the director's secretary to no avail. Finally, in exasperation, the voice on the other end of the intercom said, "Who do you *know*?"

"Jack Greenberg," I replied. The buzzer immediately sounded, and the door swung open.

Jack opened a lot of doors for a lot of people. School doors, prison doors, factory doors, doors of opportunity, and doors of conscience. In October of my clerkship year, I met with Jack to talk about my job search. He apologized that there were no openings at the NAACP Legal Defense and Education Fund (LDF) but was very helpful in providing leads on other public interest jobs. Six months later, after I had given up hope and accepted a position at Paul, Weiss,

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1. Joseph Fattorusso, *Wonders of Italy: The Monuments of Antiquity, the Churches, the Palaces, the Treasures of Art* (16th ed. 1974). The book was first published in 1925; Jack's edition was from the mid-1950s. Copies are still available from used booksellers online.

the phone rang. “Judge Hays’s chambers,” I answered. “May I speak with Steve Winter; this is Jack Greenberg.” I had recognized his voice immediately. “It’s me, Jack. What’s up?” Came the droll reply, “I hope you haven’t sold your soul for the rest of your life.”

Famously, Jack had been recruited by Milton Handler to join Kaye Scholer on graduation. Jack declined; he had his heart set on LDF. Thurgood Marshall was, at first, reluctant. So, Walter Gellhorn arranged a position for Jack at the Legislative Drafting Service at Columbia Law School. Jack spent a year there on a project on New York antitrust law while Walter lobbied Thurgood on Jack’s behalf. The rest was, as they say, history. Jack had a portrait of Thurgood hanging on the wall directly across from his desk. It was inscribed in Thurgood’s hand: “To Jack, The best successor a man could have.” Many years later Handler was overheard at a cocktail party saying that Jack had squandered his talents. Debby lit into him, “This country would still be living under apartheid if it weren’t for Jack.”

If ever there were a person who embodied the adage “don’t judge a book by its cover,” it was Jack. His default expression was a kind of scowl, his head cocked to one side with his strong chin tucked down toward his chest. Indeed, for the first six months, I thought Jack was angry at me. In the spring of 1976, Jack had invited Tony Amsterdam to talk to his clinical seminar on Race and Poverty Law about the upcoming Supreme Court arguments in the five death penalty cases.² My friends who were taking the class said I should come; I thought I should ask the professor’s permission, but they assured me Jack would be fine with it. There were so many people in the seminar room that day that the only spot I could find was on the floor facing Jack. All through the class, he seemed to be glowering at me in displeasure. It was only when I got to know him the following fall when I took the seminar myself that I realized his scowl had nothing to do with me at all: That was just Jack’s normal expression.

Jack was laconic, droll, knowing, avuncular, and wise. The day that I presented my big project to the seminar, I made sure to arrive early and sat next to Jack at the front of the room. As the other students drifted in, Jack leaned over to me and said in a soft, confidential tone, “It’s a good paper.” I knew immediately that I had a future at LDF, because Jack rarely said *anything*. Jack was just a bit shy—which, I surmise, accounted for that forbidding expression. As a young lawyer at LDF, I noticed that most of my peers were reluctant to bother him. But I often stuck my head into Jack’s office to seek advice about a case. Jack always seemed delighted—even surprised—that someone wanted his input. He would immediately relax the scowl and, after we had finished

2. *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion); *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion). The Court upheld the so-called “guided discretion” statutes in *Gregg* and *Proffitt*, 428 U.S. at 258; *Gregg*, 428 U.S. at 206–07, and struck down the mandatory statutes in *Woodson* and *Roberts*, 428 U.S. at 334–35; *Woodson*, 428 U.S. at 302–03. It upheld the atypical Texas statute in *Jurek* as providing sufficient narrowing criteria. *Jurek*, 428 U.S. at 276. Tony argued for the petitioners in *Jurek*, *Woodson*, and *Roberts*.

discussing the case, launch into stories of the early days with Thurgood or about his time in the Navy.

Jack had a knowing and wry sense of humor. His appreciation for the surreal was no doubt honed in the war.³ He has often told the story of commanding a gun battery during the barrage that preceded the assault on Iwo Jima, the noise of the guns so loud that it was impossible for his men to hear his orders or for him to hear those of his superior. Less well known is that Jack served on the ship that was the model for one of the signature scenes in the *Caine Mutiny*.⁴ In Herman Wouk's tale, another ship sends over a gallon of frozen strawberries, which are served with ice cream for dessert in the officers' mess. The captain has a paranoid fit when he finds that the remaining strawberries have been eaten during the night. That happened on Jack's ship, only the mess steward—who had been a baker—found the strawberries when they were in port taking on supplies and the purloined dessert was strawberry tarts. I asked Jack whether his captain made them stand on deck in the hot sun in a vain attempt to get someone to confess. He laughed. "Yes," he said. "Everyone knew who had eaten the tarts, but nobody talked."

Jack's droll sense of humor served him well as a young lawyer fighting an unjust legal system. Early in his career he worked on a case—handled by the veteran African American lawyer Austin Walden in Atlanta—involving an African American man, Ozzie Jones, who was convicted and executed for the rape of a white woman. Jones's defense was that it was impossible for him to have committed the rape because he had just recently been circumcised. The court concluded that, though painful, intercourse would have been physically possible and, therefore, that counsel had not erred in failing to call the physician as a defense witness.⁵ Jack told the story with grim humor. Earlier, Jack had worked with Thurgood on the Groveland case.⁶ Jack told funny stories about both cases, but it was those experiences that inspired him to lead the campaign against the death penalty for rape. "I vowed that if I could I would end that someday."⁷ And he did. In *Coker v. Georgia*, which was argued by David Kendall (an LDF staff attorney at the time), the Court held that the imposition of the death penalty for rape violated the Eighth Amendment.⁸ I did some research for David on that case; in fact, *Coker* was the first thing I worked on as a student in Jack's seminar.

3. Cf. Joseph Heller, *Catch-22* (50th Anniversary ed. 2011).

4. Herman Wouk, *The Caine Mutiny* (reprt. 1992). The novel was made into a movie, directed by Stanley Kramer, in 1954. Wouk adapted the court-martial portion of the story for a Broadway play earlier that same year.

5. *Jones v. Balkcom*, 79 S.E.2d 1, 6 (Ga. 1953).

6. See Gilbert King, *Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America* (2012). The case received national coverage and was regularly raised by the Soviets in the U.N. Security Council; I have written about its notoriety and the implications of the case for legal theory. See Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind* 317–23 (2001).

7. Sheldon Ekland-Olson, *Who Lives, Who Dies, Who Decides?: Abortion, Neonatal Care, Assisted Dying, and Capital Punishment* 367 (2d ed. 2015).

8. 433 U.S. 584, 600 (1977).

Jack was a great legal tactician. Sometimes on a grand scale. Following the trail blazed by Charles Hamilton Huston and Thurgood Marshall, LDF didn't just bring cases; it engaged in well-planned campaigns. When Title VII was passed, Jack commissioned a manpower study to decide where to bring cases for maximum impact.⁹ LDF targeted the three primary industrial employers in the South: steel, tobacco, and paper. In attacking the death penalty, Jack didn't just defend cases as they arose; he recruited academics to demonstrate empirically the racial bias in the system.¹⁰ Things did not always work out as planned: Deindustrialization in the 1970s and 1980s undercut many of the gains;¹¹ the Court accepted the findings of the Baldus study but rejected its legal relevance in *McCleskey v. Kemp*.¹² But that's where Jack's wry sense of humor and worldly wisdom were really helpful.

Other times Jack's tactical judgment was manifest in his attention to detail. Representative John Lewis said at an LDF fundraiser I attended that, when Dr. Martin Luther King, Jr., and his inner circle were planning what became the famous "Bloody Sunday" Voting Rights march, it was Jack and James Nabrit (LDF's associate director) who told them, "There's one federal judge in Alabama who believes in the Constitution, and if the march starts in Selma and ends in Montgomery it will fall in his jurisdiction." The judge, of course, was the great Frank Johnson. Judge Johnson handed Jack and Jim a yellow, eight-and-one-half-by-fourteen-inch legal pad and said, "Go write me an order," pointing to his law library. There were no chairs, so they sat on the floor and wrote out the proposed preliminary injunction longhand.¹³

In the mid-1970s, an African American who owned a trucking company in St. Louis was having trouble getting a certificate of convenience (which, in those days before deregulation, was necessary to operate interstate) from the Interstate Commerce Commission (ICC). He asked Jack if LDF would take the case and sue the ICC for discrimination. Jack agreed to take the case but decided that the better strategy was to raise the antitrust angle: I was the seminar student assigned to write the memo arguing that, in determining "the public interest" under the statute, the ICC was required to promote competition in interstate trucking. LDF raised that claim in the administrative process—Mel Leventhal was the LDF staff lawyer who handled the case—and the ICC agreed to settle the claim and grant the certificate of convenience.

9. Interview by Joseph Mosnier with Jack Greenberg, Professor, Columbia Law Sch., in N.Y.C., N.Y., at 17 (July 18, 2011) [hereinafter Greenberg Interview], http://cdn.loc.gov/service/afc/afc2010039/afc2010039_crh0034_greenberg_transcript/afc2010039_crh0034_greenberg_transcript.pdf [<http://perma.cc/5N6S-VAYE>].

10. Ekland-Olson, *supra* note 7, at 368–87; see also David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* 44–45, 310 (1990) (noting studies that were undertaken per the explicit request of LDF).

11. Greenberg Interview, *supra* note 9, at 17 ("Of course, we had no way of knowing that the steel industry would collapse and it would all move to Japan and Europe, no way of knowing that . . . tobacco, which was one of the big things, was going to come under fire.")

12. 481 U.S. 279, 313 (1987).

13. The reported decision is *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965).

Jack had a special talent for institution building. He was a prodigious fundraiser. The LDF was largest, most vibrant, and had its most extensive reach during his years at the helm.¹⁴ Jack helped expand LDF's network of cooperating attorneys across the South. He set up an internship program at LDF that trained and then sent African American lawyers back into their communities with foundation money to help set up a legal office.¹⁵ He was a principal founder of the Mexican American Legal Defense and Educational Fund but also played a role in the development and support of the Puerto Rican Legal Defense Fund, the Asian American Legal Defense Fund, and the NOW Legal Defense Fund. At Columbia, he set up the International Human Rights Fellows program, which placed Columbia students in human rights law offices around the world. I have been an academic for over thirty years. I have watched as people tried to build or expand law schools, centers, and institutes at several universities, and I have seen how hard that can be. Jack had a genuine and rare gift for such institution building.

Jack was a terrific boss. As a young lawyer, you felt that he believed in you and always had your back. I talked with Mike Meltsner, who worked with Jack in the 1960s, and we immediately agreed that the word that best captures Jack's style of leadership is *empowering*.

And Jack was a wonderful mentor. Justice Holmes taught us that one must study history to understand the law.¹⁶ Jack taught me that every legal issue has a social and historical context that shapes pathways for successful advocacy. The legal realists taught us that rights are meaningful only to the extent that the law provides remedies. Jack taught me how to make complex remedies real. Most of all, Jack taught us all that it is possible to live a great and committed life in the law.

At his final valedictory as President of Antioch, Horace Mann told the graduating class of 1859, "Be ashamed to die until you have won some victory for humanity."¹⁷ Jack won so many victories and opened so many doors that those of us who were lucky enough to have known him can shed only tears of pride.

14. LDF held a Seventy-Fifth Anniversary Alumni Reunion at the Ford Foundation on September 16, 2015. LDF 75th Anniversary Alumni Reunion, NAACP Legal Def. & Educ. Fund, <http://www.naacpldf.org/event/ldf-75th-anniversary-alumni-reunion> [http://perma.cc/2F32-CA26] (last visited Feb. 1, 2017). The alumni were introduced decade by decade. Not only was my cohort (those who worked at LDF in the 1970s) the largest, but as we stood up, our group let out a spontaneous roar.

15. Southern Oral History Program, *supra* note 9, at 9.

16. Oliver W. Holmes, Jr., *The Path of the Law*, 10 *Harv. L. Rev.* 457, 469 (1897) ("The rational study of law is still to a large extent the study of history."); see also *id.* at 476 ("The way to gain a liberal view of your subject is . . . to discover from history how it has come to be what it is; and, finally, so far as you can, to consider the ends which the several rules seek to accomplish.").

17. Lawrence A. Cremin, *Horace Mann's Legacy*, in *Horace Mann, The Republic and the School: Horace Mann on the Education of Free Men* 3, 27 (Lawrence A. Cremin ed., 1957). The line is engraved as the epitaph on Mann's tombstone.