



In Memoriam: Benjamin Kaplan

Citation

Lloyd L. Weinreb, In Memoriam: Benjamin Kaplan, 124 Harv. L. Rev. 1359 (2011).

Published Version

http://www.harvardlawreview.org/media/pdf/vol124_kaplan_tribute.pdf

Permanent link

<http://nrs.harvard.edu/urn-3:HUL.InstRepos:10906930>

Terms of Use

This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Open Access Policy Articles, as set forth at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#OAP>

Share Your Story

The Harvard community has made this article openly available.
Please share how this access benefits you. [Submit a story](#).

[Accessibility](#)

HARVARD LAW REVIEW

© 2011 by The Harvard Law Review Association

IN MEMORIAM: BENJAMIN KAPLAN

The editors of the *Harvard Law Review* respectfully dedicate this issue to Professor Emeritus Benjamin Kaplan.

*Justice Stephen G. Breyer**

When I think of Ben Kaplan's work, I recall a passage in Conrad's *Heart of Darkness*.¹ Marlow is looking at the wreck of a ship that he needs to proceed upriver. Someone asks in a philosophical tone of voice, what is it that a man needs? What is it that a man wants? Marlow thinks to himself, "What . . . did I want? What I really wanted was rivets, by Heaven! Rivets."²

Why did this passage spring to mind about fifteen years ago when I was asked about Ben's professional accomplishments? I thought of Conrad in part because Ben, like Felicia, loved to read. They read everything worth reading. And Ben liked Conrad.

I thought of Marlow and rivets in part because of Ben's habit of using metaphors in class. He would talk about Brandeis's "copper-riveted" opinions. He would refer to "salami, sliced very very thin." My classmate Michael Boudin told me that he had copied two pages of Ben's metaphors into the back of his Civil Procedure notebook. Metaphors like these caught the attention of the class. He would work them into a carefully crafted set of questions and answers that forced the students to learn the subject matter but which did not call attention to himself. They left the student not "with the dancer but the dance."³

* Associate Justice, Supreme Court of the United States.

¹ JOSEPH CONRAD, *HEART OF DARKNESS* (Tribeca Books 2011) (1902).

² *Id.* at 37.

³ See WILLIAM BUTLER YEATS, *Among School Children*, in *THE COLLECTED POEMS OF W.B. YEATS* 215 (Richard J. Finneran ed., Scribner Paperback Poetry 2d rev. ed. 1996) ("O chest-

To listen to Ben teach was to listen to the Socratic method at its best — used by a first-rate craftsman — and articulated by a true gentleman. When I looked for former students who recalled Ben’s lectures I could not find one who could remember a single harsh word Ben ever spoke. But I did find one former student whose happiest day in law school came when Ben, responding to his answer, joyfully shouted, “My God man, do you realize what you just said!”

I thought of Marlow too because of Ben’s work as a judge. He produced so many of his own valuable “copper-riveted” opinions. “How beautifully he writes,” one of his colleagues said. “And he always uses the right word. He made us stop saying ‘under the circumstances’ because a circumstance is something that ‘surrounds’ you,” not something that “you stand under.” The colleague added that Ben “made us use words like ‘sobriquet.’” And apparently he once spoke to the court in Latin, quoting something from Virgil, and his colleagues roared with approval. Still, it isn’t the Latin or the writing or the language that Ben used but the quality of his thought and analysis, his integrity and humanity, that animate his opinions and ensure that they will last.

Most likely, I thought of rivets because Ben taught us that copper rivets, whether used to hold together ships or opinions, matter. He wanted that phrase to stand for what Conrad wanted his metaphor to stand for: in Conrad’s words, “[t]o get on with the work — to stop the hole” in the ship,⁴ to get the job done, in Ben’s thought to take up the job at hand and to see that the job is done properly, elegantly too. And that is what Ben did.

That is why Ben, who lived many years, could look down from the “summit” of those years — “perched upon” what Proust called “living stilts,” “taller than church steeples.”⁵ He could survey from that “eminence” the years he spanned, from Milton Handler’s antitrust classes at Columbia Law School to the Massachusetts courts of the twenty-first century. He could review those many “copper-riveted” classes, those “copper-riveted” opinions, those “copper-riveted” writings, those many professional accomplishments, each radiating a kind of perfection.

That is why Ben Kaplan was far more than what Holmes called a “jobbist.” He was a craftsman. And he was the master of us all.

nut tree, great rooted blossomer,/ Are you the leaf, the blossom or the bole?/ O body swayed to music, O brightening glance,/ How can we know the dancer from the dance?”).

⁴ CONRAD, *supra* note 1, at 95.

⁵ 3 MARCEL PROUST, IN REMEMBRANCE OF THINGS PAST 1107 (C. Moncrieff, T. Kilmartin & A. Mayor trans. 1981).

*Justice Raya Dreben**

Simply put, Ben Kaplan was a giant, a truly great human being.

I knew Ben for almost sixty years, as my teacher, as a dear friend, and as a colleague on the Massachusetts Appeals Court.

The following is from a letter I wrote to him in 1981, when he received an honorary degree from Harvard:

What impressed me most as a quaking young law student, was that when you turned to a student with “What? What?” You took seriously his or her reply. Not that our answers carried any force on their own, but somehow you managed to give them weight, to read into them far more than we had intended. By some magic you infused them with insight even with wisdom, by adding mere words — but what words.

I will not discuss his role as a magnificent teacher — others will do so — but will only mention the excitement, the vividness, the terror of being called upon in class.

There are many stories about Ben as a teacher. Justice Jacobs tells of a student who, when called on, answered “unprepared.” Pressed, he continued, “I know nothing about the matter.” Ben replied, “Neither do I, now we can both speak freely.”

Another, told by Justice Sikora, is that one day in Austin Hall the lights went out. Ben ignored the event. The room remained dark, and after about seven minutes or so when the students began to murmur, Ben called out, “Ladies and gentlemen, calm down. This is not New Haven. We promised you Veritas; we did not promise you Lux et Veritas.”

Ben retained his humor and modesty when he became a justice of the Massachusetts Supreme Judicial Court. Replying to my congratulations, he wrote, “About my future as a judge, all I am reasonably sure of is that I won’t accept bribes.” At his swearing-in ceremony, he gave tribute to his great friend Ammi Cutter, his predecessor on the court, by saying: “I hope to follow in his footnotes.” In view of the splendid discussion of Ben’s legacy as a judge by Justice Breyer, I will not touch on his role as judge. I will only note that Ben’s opinions have such weight, that although it is rare to mention the author of an appellate opinion, other than that of a United States Supreme Court Justice, more often than not, a citation to a Kaplan opinion is prefaced with “As Justice Kaplan wrote.”

* Associate Justice on Recall, Massachusetts Appeals Court.

Sometimes when a judge on the Appeals Court would come to Ben about a case and point out that a Supreme Judicial Court opinion stood in the way, Ben would say “ignore it.” Of course Ben didn’t mean that the Supreme Judicial Court case was to be ignored, but as he wrote in an article on intermediate appellate courts,¹ an article that lent dignity to such courts — he lent dignity to all whom he touched — he urged us to speak our minds if we considered a case outworn and wrong in the light of changed conditions. A shift of personnel or an erosion of the line of cases by the court itself might provide us with an impetus to reach a different result. Even if we felt bound to follow the Supreme Judicial Court, we not only could, but should express our views freely to encourage change by that court. As in his Holmes Lectures, he suggested that “there is more danger from timidity than from boldness of decision.”²

Ben was formidable not only as a teacher and as a judge. When once I mentioned *Swann’s Way*, Ben reminisced how he and Felicia had taken turns in reading aloud the entire seven volumes of Proust’s opus — in French!

Ben’s close friend, Victor Brudney, who like Ben went to City College, relates that both had the same Latin teacher, a stiff formal man with a black moustache. His parting advice to the students was that they should emulate Gladstone who, on meeting a fellow Oxonian, would recite a line from Horace in order to elicit the next line. One day Victor met Ben on Martha’s Vineyard, and greeted him with a line from Horace. Ben replied by reciting the whole Ode.

Ben’s abiding sense of fairness is revealed in a moving YouTube clip of Ben’s comments at the 50th anniversary of the Nuremberg proceedings.³ In expressing some optimism for a future international criminal court, he noted that there had been a serious defect in the proceedings — there was unequal justice. The victors were the judges of the vanquished.

In later years, a group of us took turns driving him to court. Ben never learned to drive although with a twinkle in his eye he said, “I understand the theory.” The drives were precious and wonderful moments for us as were our visits to him when he became housebound.

His kindness and courtesy to the judges was matched by his caring for the personnel of the court. A staff attorney told me how moved

¹ See Benjamin Kaplan, *Do Intermediate Appellate Courts Have a Lawmaking Function?*, 70 MASS. L. REV. 10 (1985).

² Benjamin Kaplan, *Encounters with O.W. Holmes, Jr.*, 96 HARV. L. REV. 1828, 1851 (1983).

³ *Ben Kaplan Remembers Nuremberg*, YOUTUBE, <http://www.youtube.com/watch?v=aq5Wko5j93U> (last visited Feb. 26, 2011).

she was when, after her father died, Ben called her mother, whom he did not know, to offer his condolences.

One of his most touching qualities was that he, genuinely, I think, did not recognize his own tremendous achievements and talents. Sometimes he would muse that he had accomplished little in life and even questioned whether he had shown sufficiently his affection for his family. At his funeral when I heard how beautifully and lovingly his grandson Adam spoke of his grandfather and Jim of his father, I so wished Ben could have been present.

We at the Appeals Court considered him a treasure. When I told one of my colleagues that I adored Ben, he replied, "We all did," and so it was.

*Justice Ruth Bader Ginsburg**

Benjamin Kaplan was my wise, witty, and most engaging teacher, my instructor through his lucid speech and writings to this very day, my model of what a great teacher and jurist should be. Ben's Civil Procedure class at Harvard, 1956–1957, was my first exposure to law school teaching. The learning adventure he created for his students was unlike any I had experienced before or since.

Grand master of Socratic teaching, Kaplan used the method to keep his students alert, but never to put them down, wound, or embarrass. When a student called on offered a halting, less than fully baked, response to a question he posed, Kaplan would often rephrase the answer crisply, shoring up the responder's confidence and strengthening the grasp of the entire class on the day's materials. The casebook he developed with his elder Harvard Law School colleague, Richard H. Field, then in its first edition,¹ was an innovation. Field and Kaplan concentrated not on ancient writs and forms of action, but on the Federal Rules of Civil Procedure. In the opening weeks, we were given a synoptic view of the phases of a litigation. Then, with a sense of procedure's mission "to secure the just, speedy, and inexpensive determination" of controversies,² we took up each segment of the system with an enhanced understanding of its place in the whole.

* Associate Justice, Supreme Court of the United States.

¹ RICHARD H. FIELD & BENJAMIN KAPLAN, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE (1953).

² FED. R. CIV. P. 1.

Ben's writings were at my side in the early 1960s. Engaged by Columbia Law School's Project on International Procedure principally to coauthor a book on the Swedish style of civil proceedings,³ I found in Kaplan's accounts of German Civil Procedure⁴ an excellent guide to comparative law inquiries. When I began teaching Civil Procedure at Rutgers Law School in 1963, the notes I had preserved from Professor Kaplan's course supplied enormous aid and comfort. Ben was then Reporter to the U.S. Judicial Conference Advisory Committee on Civil Rules. His four articles, each explaining Rules amendments that were made with his secure hand at the helm,⁵ are resources I have consulted time and again.

In 1972, Ben was appointed to the Massachusetts Supreme Judicial Court, and had to resign from service as Co-Reporter, together with David L. Shapiro, of the American Law Institute's *Restatement (Second) of Judgments*.⁶ At that time, Ben and David asked if I would take up the laboring oar in drafting the Restatement's chapter on relief from judgments. I was then teaching at Columbia Law School and superintending the American Civil Liberties Union Women's Rights Project. The latter effort, I knew, would consume my waking hours for a near decade. Though I was obliged to resist the invitation, it buoyed my spirits to be considered fit for the job by legal scholars as brilliant as they were kind and compassionate.

Having transferred to Columbia Law School for my third year as a law student, I missed the opportunity to enroll in Professor Kaplan's Copyright course. But my introduction to that subject came from Ben's celebrated Carpentier Lectures at Columbia, published in 1967 under the title *An Unhurried View of Copyright*. The work was republished in 2005 with commentaries from friends, among them, I am proud to relate, my daughter, Jane C. Ginsburg.⁷

³ RUTH BADER GINSBURG & ANDERS BRUZELIUS, CIVIL PROCEDURE IN SWEDEN (1965), generously described in Benjamin Kaplan, Book Review, 79 HARV. L. REV. 460 (1965).

⁴ In order of publication: Benjamin Kaplan, Arthur T. von Mehren & Rudolf Schaefer, *Phases of German Civil Procedure I*, 71 HARV. L. REV. 1193 (1958); Benjamin Kaplan, Arthur T. von Mehren & Rudolf Schaefer, *Phases of German Civil Procedure II*, 71 HARV. L. REV. 1443 (1958); and Benjamin Kaplan, *Civil Procedure — Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409 (1960).

⁵ In order of publication: *Amendments of the Federal Rules of Civil Procedure, 1961–1963 (I)*, 77 HARV. L. REV. 601 (1964); *Amendments of the Federal Rules of Civil Procedure, 1961–1963 (II)*, 77 HARV. L. REV. 801 (1964); *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967); and *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II)*, 81 HARV. L. REV. 591 (1968).

⁶ The *Restatement*, completed by Geoffrey Hazard, was published in 1982.

⁷ Robert A. Gorman & Jane C. Ginsburg, *Authors and Publishers: Adversaries or Collaborators in Copyright Law?*, in BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT REPUBLISHED (AND WITH CONTRIBUTIONS FROM FRIENDS) (2005). Jane is now Morton L. Janklow Professor of Literary and Artistic Property Law and Co-Director of the Kernochan Cen-

During my years as a judge on the U.S. Court of Appeals for the D.C. Circuit, whenever I tackled a procedural conundrum, I sent a copy of the opinion to Ben, counting his approval my most satisfying grade. On the Supreme Court as well, I have benefitted from the work of his bright mind, graceful pen, and caring heart.⁸ He was and remains the teacher I hold in highest esteem.

*Marjorie Heins**

Ben Kaplan was a teaching legend at Harvard Law School when I started there in 1975. But he had already migrated from campus to court, so I could not experience the Kaplan phenomenon in class. Thanks to a lucky accident, I became his law clerk in the fall of 1978.

Ben did not choose his clerks through the collective hiring process used by the other justices on the Massachusetts Supreme Judicial Court. He took applications separately, during the spring of applicants' second law school year. The reason, so it was believed (and I have no reason to doubt), was that he wanted to compete for the top students with federal appeals court judges. My classmate and colleague on the *Harvard Civil Rights–Civil Liberties Law Review*, Cass Sunstein, landed the coveted Kaplan clerkship in the spring of 1977. I interviewed with the SJC the following fall and was hired as a “floater,” to be assigned to different justices as needed.

Chief Justice Edward Hennessey then persuaded the legislature that each justice really needed two clerks. And so Ben found himself, in the summer of 1978, looking for a second clerk well after the cream of the law school crop had made their employment plans for the coming fall. He found my name among the floaters, and thanks to a reassuring recommendation from Cass, I got the job. Ben's note notifying me of the change in my status was characteristically ironic, expressing the hope that I would not be too disappointed.

ter for Law, Media and the Arts at Columbia Law School. She first met Professor Kaplan well before she was two, when she accompanied me and my then-2L husband, Martin D. Ginsburg, to many an HLS event.

⁸ See, e.g., *Greenlaw v. United States*, 554 U.S. 237, 244 n.3 (2008); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997).

* Director, Free Expression Policy Project. Ms. Heins is the author of *NOT IN FRONT OF THE CHILDREN: “INDECENCY,” CENSORSHIP, AND THE INNOCENCE OF YOUTH* (2001), which she dedicated to Justice Kaplan.

So, Cass and I became the two students in Ben's daily private seminar. Precision, both in thinking and writing, was the constant theme. As we soon discovered, you never got anything past Judge Kaplan. You also found your vocabulary considerably expanded. "Lucubration" was one of Ben's favorite words; was it some obscure sexual reference? I had to look it up.

The elegance of his prose made Kaplan opinions unique. Cass and I tried all that year to imitate his distinctive voice in the opinions we drafted under his instructions. He changed virtually every word. Once, a footnote that I drafted survived intact.

For a man of such massive talents, Ben was genuinely self-deprecating. I could never persuade him to write his memoirs. Nothing important happened to me, he would say. But he would occasionally reminisce — for example, about his days as a young associate in New York in the 1930s, where he worked with the ACLU's Morris Ernst on the *Ulysses* case, persuading the federal courts that James Joyce's scandalous novel was not obscene and therefore should be admitted to the United States.¹

A few years later, he worked with Ernst on the landmark First Amendment case of *Hague v. CIO*.² After his retirement from the bench and just before taking a teaching post at Suffolk Law School, he did write a combination of memoir and legal analysis of *Hague*,³ and he sent me a draft, with a cover letter that was characteristically modest, but with just that soupçon of irony: "Dear marjorie," he wrote. "Here's the draft. I have had it in mind to offer the paper to the Suffolk Law Review as I enter on my duties, if it could be made acceptable."

After Ben's death, the *Boston Globe* and *New York Times* published radically different obituaries in his honor. The *Globe* described his years as a teacher and judge in Massachusetts;⁴ the *Times* focused almost exclusively on his work after World War II, preparing the legal theories that Justice Robert Jackson would use at Nuremburg to prosecute Nazi war criminals.⁵ Both articles were right — there were many Ben Kaplans. But how could the *Times* have ignored his achievement as co-author of the classic law school casebook on civil

¹ *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

² *Hague v. Comm. on Indus. Orgs.*, 307 U.S. 496 (1939).

³ Benjamin Kaplan, *The Great Civil Rights Case of Hague v. CIO: Notes of a Survivor*, 25 SUFFOLK U. L. REV. 913 (1991).

⁴ Bryan Marquard, Obituary, *Benjamin Kaplan, 99, Esteemed Jurist, Law Professor*, BOSTON GLOBE, Aug. 20, 2010, at B12.

⁵ Bruce Weber, Obituary, *Benjamin Kaplan, 99; Crucial Figure in Nazi Trials*, N.Y. TIMES, Aug. 25, 2010, at B9.

procedure?⁶ It was simply known as Field & Kaplan; no further description was necessary. Casebooks come and go; few attain immortality. Field & Kaplan did. And his brilliant 1966 lectures, *An Unhurried View of Copyright*, were decades ahead of their time in foreseeing the free speech implications of intellectual property law.⁷

I delighted in visiting Ben after his retirement, updating him on news in the worlds of First Amendment and copyright, being interrogated about the latest Supreme Court decisions, and sharing legal gossip. After his death, I found notes I had written to myself toward the end of my clerkship. Here are some excerpts:

Training is perhaps the pivotal function of a Kaplan clerkship — not only in how to approach a problem (with precision) but in how to resolve it (with integrity). From the flow of the entire opinion to the shape and rhythm of each sentence, the use of language as a means of persuasion and delight is paramount. Perhaps the chief lesson is that there are clumsy and graceful ways of saying anything, and the battle is only half won when you decide exactly what it is you want to say. The other half is deciding how to say it.

. . . .

He is always restless, never wholly satisfied with an opinion. Every sentence of even an unsigned rescript opinion gets his full attention. Once in single justice session, a lawyer ventured that not much, after all, could be gleaned from a rescript. “Or a sonnet?” was the Kaplan rejoinder.

. . . .

His abiding sweetness and gentleness of spirit are his overriding virtues; despite an occasional outburst of petulance, he truly cares for his clerks; he gives of himself as much as he demands. Many of his assignments can only be understood as exercises intended to instruct, or strengthen us at weak points. We are his protégés, the only remaining pupils of a naturally gifted teacher, whose great pleasure is to bestow his riches on us.

. . . .

He is gentle, too, with lawyers, even to the most ill-prepared; he only points out by indirection the deficiencies of their arguments. Nor does he flaunt his superiority; in response to an attorney’s comment that he felt odd making arguments about equitable powers to an old teacher of procedure, Kaplan quipped: “Don’t hold it against me.”

. . . .

His erudition is indisputable. He has that depth of familiarity with classical literature that is able to apply its wisdom and timeless phrasing effor-

⁶ RICHARD H. FIELD & BENJAMIN KAPLAN, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE (1953).

⁷ BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT (1967).

tlessly to cases at hand. Thus, in a late draft of the girls' athletics case,⁸ he wrote in emphasizing the limits of the holding: 'Sufficient unto the day is the evil thereof.'⁹ He thought it was from Luke; I had no idea. In fact it's from the Sermon on the Mount in Matthew; we had each gone home that night to find it.

Ben had a favorite quotation, from Leonard Woolf's memoir: "The journey, not the arrival, matters."¹⁰ With his wit, erudition, and endless pleasure in teaching and judging, Ben made every step of the journey count. He was an extraordinary mentor. I felt uniquely blessed to be his friend.

*Arthur R. Miller**

Benjamin Kaplan was my mentor and role model, not simply in law school but for the better part of my professional life. Speaking autobiographically, that transcends the fact that he was a great teacher, legal scholar, and justice of the Massachusetts Supreme Judicial Court. Of course, he unlocked the mysteries and drew me into the worlds of civil procedure and copyright,¹ as he did for so many others, but he did much more.

In first-year civil procedure² he made you understand the importance of mastering the skills needed for being an effective lawyer, the responsibility of representing a client to the best of your ability, of what it means to be an officer of the court, why one should strive to honor the letter and spirit of the rule of the law, and the potential so-

⁸ *Attorney Gen. v. Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d 284 (Mass. 1979) (holding that an absolute ban on boys playing on girls' athletic teams violated the Massachusetts Equal Rights Amendment).

⁹ *Matthew* 6:34 (King James).

¹⁰ LEONARD WOOLF, *THE JOURNEY NOT THE ARRIVAL MATTERS: AN AUTOBIOGRAPHY OF THE YEARS 1939-1969* (1969).

* University Professor, New York University School of Law; formerly Professor, Harvard Law School, 1971-2007.

¹ He coauthored casebooks that transformed the methodology of teaching both courses. RICHARD H. FIELD & BENJAMIN KAPLAN, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* (1953); BENJAMIN KAPLAN & RALPH S. BROWN, JR., *CASES ON COPYRIGHT* (1960). The first gave birth to the integrated full first-year procedure course; the second legitimized copyright as a law school subject and served as the progenitor of today's wildly popular intellectual property offerings. Ben also taught equitable remedies. He and I prepared materials for the course but because of his ascension to the Bench they never were completed and published.

² This was in 1955-56 when it was a year-long ninety-hour course.

cietal value of pursuing a career at the Bar. Looking back at the experience, it really was a course in professionalism. He never said so, but that wasn't necessary. It was apparent, and the class instinctively understood, that he cared deeply that we all absorbed the material and his subliminal messages so that we all would become a credit to the profession.

Although you feared being called on — a common apprehension among 1Ls especially in those *Paper Chase* days — for some of us the key concern was that you didn't let the "old man" down. (Ben, of course, was only in his forties then.) His enormously expressive face would betray anguish over a patently erroneous response. Thus, hyper-preparedness was the order of the day.

It took me a long time before I truly felt at ease with Ben. As a student, he frightened me. He didn't mean to, but, as a teacher, his devotion to the classroom mission projected a stern and demanding image. As he stared into the Langdell classroom, his flashing, deep-set eyes darting over his hawk-like nose presented a penetrating visage that created a sense of immediacy and intensity. Daydreaming was not an option. Indeed, you didn't want to. Ben magically painted pictures with his words, literary allusions, and historical references. Cases and hypotheticals came alive. Messrs. Pennoyer and Neff were real; you could visualize Justice Robert Jackson at Nuremberg, a young Lieutenant Colonel Benjamin Kaplan at his side. You just wanted to watch and listen to an artist at work. He was a wordsmith par excellence. Material such as the arcane common law forms of action, now largely ignored and thought unteachable by procedure teachers, took on meaning. If I closed my eyes when he described the great battle for supremacy between the English courts of law and those of equity, Professor Kaplan seemed wigged and robed and was transformed into Lord Chancellor Kaplan.

He mesmerized me that first year and, the following fall, after vetting my neuralgic memo for the *Harvard Law Review* on the deficiencies of its copyright practices³ he asked me to be his research assistant during the summer following my second year. I remember thinking God willing I will have sixty years to be at a law firm, but there is only one summer to work for Ben Kaplan. To me, it was a no-brainer and I instantly accepted. I often wonder how many law students today would make the same decision for their second law school summer.

³ In his copyright course Ben would demonstrate how the *Review's* noncompliance with the 1909 statute's formalities caused much of its work product to fall into the public domain. I was tasked with correcting the flaws.

Working with him that summer on a research project for the Copyright Office in connection with the then-nascent revision of the Copyright Act of 1909 was an intellectual feast and revealed his nuanced thinking and deep concern about the public policies embedded in the Constitution's Copyright and Patent Clause.⁴ These thoughts were later embellished in his brilliant and truly visionary public lectures entitled *An Unhurried View of Copyright*.⁵

My duties included a number of weekends of "work" at the Kaplan home on Martha's Vineyard. Looking back at it, sitting on the Chilmark beach, digging for clams, or picking blueberries while discussing the merits and demerits of our nation's lengthy term of copyright protection with all of its technicalities was a bit surreal, but a wonderful way for this acolyte to have his mind stretched by a Master.

Later on, when I was a young lawyer, and then a junior academic, we continued our adventures in connection with the actual revision of the Copyright Act⁶ and shepherding amendments to the Federal Rules of Civil Procedure through the rulemaking process. As to the former, Ben was deeply concerned that the copyright industries would so monopolize the raw materials of copyright that the intellectual productivity of the country's authors would not be readily accessible for educational and other important public purposes that should not be burdened by a copyright toll. The then-emerging information technology companies had acquired a spate of publishing houses, which seemed to make the threat of oligopolistic control over words as well as bits and bytes realistic. Since he always was averse to projecting himself in the public arena — for reasons I never understood — he sent me forth to take up the cudgels with the Copyright Office and the relevant congressional committees. Thus, I played the ventriloquist's dummy, inevitably drawing the ire of the publishers.

As to federal procedure, when he became the Reporter to the U.S. Judicial Conference Advisory Committee on Civil Rules, he impressed me into service as an assistant reporter in my "spare" time. At one point that even included having me released from military duty for a lengthy weekend through the good offices of Chief Justice Earl Warren, who wrote my commanding general that my absence from Camp Drum was in furtherance of the nation's business. Much of that

⁴ U.S. CONST. art. I, § 8, cl. 8.

⁵ BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* (1967). This slender volume contained the James S. Carpentier Lectures he delivered at Columbia University. It also was republished as BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT REPUBLISHED (AND WITH CONTRIBUTIONS FROM FRIENDS)* [yours truly among them] (2005), done in coordination with Suffolk University Law School, Intellectual Property Law Concentration in Boston, Massachusetts.

⁶ This eventually became the Copyright Act of 1976. Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-810 (2006)).

“business,” I must confess, was done at an old portable typewriter while sitting in the back seat of the Kaplan family car, Ben in the front, his wonderfully talented wife Felicia⁷ at the wheel, devouring a footlong hot dog as she often did on drives to Martha’s Vineyard. Our dirty little secret to this day has been that certain critical elements of Federal Rule 23 on class actions⁸ were drafted in that car in the bowels of the Vineyard ferry, the rest on the beach in front of their Island home.⁹ As draft gave way to draft I felt like an apprentice to a craftsman. Ben could rotate the language of a potential rule provision as one would a diamond in the sunlight and see its flaws and imperfections. We polished endlessly.

And now, after more than fifty years of teaching his subjects — civil procedure and copyright — there is only one answer I can give to the question he asked me repeatedly over the years (as if asking it of himself), what was I going to do when I grew up? Time has made the answer clear. It has been to try to follow in his footsteps and to be a mentor to others as he was to me. Dear Ben, thank you for enriching and guiding my life.

*Martha Minow**

“He did it all.” So said one lifelong friend of Ben Kaplan’s, pointing to his pivotal work developing legal theories framing the indictments at the Nuremberg Trials in 1945; his essential invention of the modern field of civil procedure — as a law school course, as a body of workable rules, and as a practice administered with fairness and precision. But that was not enough. His work on copyright included seminal articles and the first casebook on the subject. His classic work, *An Unhurried View of Copyright*, remarkably anticipated back in 1967 the world of computer networks, sharing and storing information, and

⁷ In a different genre, poetry and satire, she was a wordsmith herself. FELICIA LAMPOR, MINK ON WEEKDAY’S (ERMINE ON SUNDAY’S) (1950); FELICIA LAMPOR, SCRAP IRONY (1961).

⁸ Neither of us can claim the skills of Nostradamus. Although everyone connected with the revision of the rule saw the procedure as essential in the civil rights field, no one foresaw the range of its application or the firestorm of controversy that would follow over the next half century.

⁹ Under his leadership, the Advisory Committee revised the joinder rules in ways that improved their functionality in the growing environment of complex litigation and modernized the rules relating to transnational litigation.

* Dean and Jeremiah Smith, Jr., Professor, Harvard Law School.

offered thoughtful, witty, and well-reasoned insights into the importance of making room for imitation and circulation in contexts barely imaginable at the time.¹

His students at Harvard Law School viewed him as the greatest — most rigorous, most humane, most insightful — teacher. So remember students who went on to become judges and Justices, administrators and professors.

As justice of our Commonwealth's highest court, he was meticulous and thorough. He judged with vision and restraint. I asked him once with the eagerness of youth about the receivership he imposed on the Boston Housing Authority, putting the court in charge of running public housing. He exclaimed, "we didn't want to do it! But the BHA failed to meet minimum requirements, again and again. We needed the law enforced. So we had to do it." No arrogance, no pride in power, just rightness, well measured, getting the job done.

No wonder no one let him retire. He was called back to serve on the Massachusetts Appeals Court after mandated retirement from the Supreme Judicial Court. I confess I did not realize for several years after joining the faculty at Harvard Law School that he had formally left the faculty a decade before; he remained a critical presence in the civil procedure faculty discussions and in the life of the school.

His was a marriage of true love and devotion with the astonishing Felicia. Together they produced remarkable children, grandchildren, and great-grandchildren — and they held dinners and soirees people remember to this day for the wit, smarts, and rhymes. He had friendships that seamlessly integrated intellectual connection with personal depth. Leave it to Ben to say to a friend not far from death: "I am sending over this article, let's talk about it," and then he would visit and do just that.

One former student, clerk, and colleague, Cass Sunstein, shared this with me when I asked for reflections:

He was immensely careful, fair, a brilliant writer, listened to everything, never made a mistake, had a commitment to justice but also to detail, did big things but with real craft, knew everything, so tough-minded, lacked narcissism, was exceptionally kind (and without an ounce of sentimentality) — and finally, in a post-script, Cass said "To know him was to love him."

Ben Kaplan was a towering giant in the law. His legendary wisdom and analytic precision set the standard for Harvard Law School, for the drafting, teaching, and application of law, and for rigorous judging. The generations of students and litigants guided by his work

¹ BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT (1967).

as professor and justice ensure that his legacy will long endure. For friends and colleagues, his wisdom, wit, and spark will burn bright.

*Lloyd L. Weinreb**

It falls to me to bring these remembrances to a close. Ben Kaplan was more than a friend. He was also, for many of us, teacher, mentor, colleague, counselor, and, always, a companion whose company we treasured.

I encountered Ben first when I was a student in his third-year course on Copyright. Others have spoken about his skill as a teacher. Sitting in the class, one would have said that it was not skill but a vocation. The mantle of a teacher seemed — although he frequently denied it — to fit comfortably on him. Copyright in 1962 was an unpopular area of the law. Practitioners were few; they regarded copyright as a mystery and themselves as its initiates. For Ben, if it was a mystery, it was not because it was secretive but because, in those days before the enveloping complexities of technology, copyright was about books and art and music. Ben made his class a celebration of the joys of the mind and spirit. He treated his students as co-celebrants, qualified not merely to listen and record but to participate. In those hierarchical days, it was a heady experience, which for many of us was the capstone of our legal education.

Just a few years after that, I joined him on the faculty as a very junior assistant professor. And a few years after that, the troubles at the end of the decade of the sixties broke over our heads. Academia being what it is, all the conflicts, uncertainties, and disagreements about the Vietnam War and the civil unrest that accompanied it became concentrated at Harvard Law School in the students' demand that the grading system be changed. A Committee on Grades was appointed, and Ben and I were asked to serve, he as a wise counselor and I as the still unfledged new kid on the block. Service on the committee was arduous and unpleasant. Everyone wanted to have his say before us and usually said it at length. After enduring months of being harangued, we were all angry. Finally, we voted, rather indecisively — and went away mad. Later, Ben asked me to come by his office. As gently as could be, he urged me not to let that experience cause me to withdraw

* Dane Professor of Law, Harvard Law School.

from the affairs and, indeed, the politics of the law school. As I learned later, Ben did not often offer such advice. I think he was wary of intervening in the lives of others. It was an unguarded moment for us both. It seemed to me that I heard in his voice a trace of regret that he had himself not played a more active role in the governance of the school.

Now, more than forty years and a warm, close friendship later, those two early encounters seem to me to exemplify strands running through Ben's life that are a source of the affection and admiration in which he was held. Ben delighted in the life of the mind. He was engaged by all the artifacts of intellect, studied and pondered them, and spoke easily and insightfully about them. He was erudite, but he wore his erudition lightly. It was all for the fun of it, which was reason enough. Conversing with Ben about Proust or about a Mozart sonata, one had the same sense that he communicated to his students, that literature and music are among life's great gifts, an immeasurable source of delight.

Others have spoken about Ben's towering intellect. He was everywhere acknowledged as a great lawyer, legal scholar, and jurist, in private and public practice, at Harvard Law School, and as a justice and judge. He worked assiduously in all those roles, searching for a proper resolution of each of the issues he encountered and for its precise expression. He often deprecated his own work, but one knew all the same how much effort he gave to it and how much he valued the accuracy and elegance of what he said and wrote.

He paired this seriousness of purpose with an incisive, understated sense of humor that in conversation characteristically touched his face with a nuanced smile. *An Unhurried View of Copyright*,¹ the book that grew out of lectures that Ben gave at Columbia Law School in 1966, is probably the best book about American copyright ever written, not so much because the lectures broke new ground — although they turned over familiar ground in novel ways — but because they were suffused with his love of the things that copyright protected — actually overprotected in Ben's view. But it is not the book but the title of the book that I want to mention.

As the copyright scholars know, titles of books are not the subject of copyright. Ben, in fact, lifted the title of his lectures and book from another book that at that time had attracted some attention. The book was *An Unhurried View of Erotica*,² by one Ralph Ginzburg whose later ventures into erotica landed him in jail — and in the Supreme

¹ BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* (1967).

² RALPH GINZBURG, *AN UNHURRIED VIEW OF EROTICA* (1958).

Court.³ By today's more liberal standards, Ginzburg's book was about as titillating as *Rebecca of Sunnybrook Farm*.⁴ When I asked Ben some years later whether he had not copied Ginzburg's title, he said simply, "Of course." It was an unobtrusive, amiable bit of poking fun at his own scholarship, which only someone quite sure of his scholarship and with a very good sense of humor besides would have chanced.

Sure enough of his own work, because he knew the care and effort that produced it, Ben was, I think, at a deeper level, skeptical about the human capacity for knowledge and about the human condition altogether. If his smile and the good humor behind it kept skepticism at bay, nevertheless it was there and colored his vision. A few years ago, when his memory had scarcely begun to fade, he told me that he had been thinking hard about the past and that, as he said, he "knew no more about himself than [he had] a year ago." His skepticism was, I think, profound, although he did not proclaim it or inveigh against it. He was also, I believe, a stoic. He would have allowed that life had been good to him. But the limits of the human condition were unmistakable and not to be overcome. He acknowledged them and accepted them without complaint and without bitterness. He would have scoffed at the comparison, but in that combination of clear-eyed skepticism and unflinching stoicism was the wisdom of *Ecclesiastes*. It shaped and enriched his life, as he enriched ours.

³ *Ginzburg v. United States*, 383 U.S. 463 (1966).

⁴ KATE DOUGLAS WIGGIN, *REBECCA OF SUNNYBROOK FARM* (1903).