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MR. JOHN LORD O'BRIAN: A BRIEF APPRECIATION

Francis M. Shea*

Mr. O'Brien was wont to refer to himself as one of the last of the Victorians. The content of that self-image may be suggested by the attributes that he selected, in a wholly different context, to laud the profession of which he was a part. In a speech to the New York State Bar Association he spoke of "the spirit of toleration, of urbanity and magnanimity which in all generations seems characteristic of English speaking lawyers." He could hardly have believed that each of his audience was deserving of the accolade. But certainly these attributes were a part of him in the highest sense. His respect for the individual, his faith in the efficacy of individual conscience, morality and effort were guides to his life. These things in which he put his deepest faith he believed could only flourish in a climate of tolerance. That tolerance as imposed on the state was for him summed up in the first amendment. His refinement and courtesy were unfailing if that be what urbanity is about. The nobility and courage of his mind and heart satisfied any test of magnanimity.

It is always tempting to speculate how such a man came to be. Maybe it is programmed in the genes, but I hope I may be forgiven if I doubt it. I know little of his youth, though I gather he thought of his mother as a remarkable woman. There may have been considerable influence there. Harvard in his time had some unusual men. Two philosophers made deep impressions on him, William James was one, Santayana the other. He developed, I suppose, at this time a lasting taste for the novels and poetry of the 19th century. He kept revisiting these all his life. He knew much of them by heart, a talent which is a lasting pleasure and ornament. At some early time Greek and Roman civilization, especially the Roman, became of deep attraction to him. I never saw any sign that he was technically competent in Roman law. But he was intimately familiar with its application in the life of its own original time, especially in the fields of civil liberties and the meaning of citizenship. Plutarch’s Lives was a work he must have read many times and he drew on it frequently for quotations agreeable to his own views.

Religion played an important role in forming Mr. O’Brien’s character. He became a lay reader in the Episcopal Church during his law school years and continued this service for some ten years. He remained active in the church’s

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1. See p. 73 infra.
affairs at least during his Buffalo years. I never heard him talk much about religion, but morality was a constant reference in all his writing and in his conversation whenever it turned to judgment about the serious happenings of the world.

Of great importance in what he was and became was a talent for attaching to himself men of the greatest worth: Henry L. Stimson, Charles Evans Hughes, Alfred E. Smith, Elihu Root, Louis D. Brandeis, Felix Frankfurter, Benjamin N. Cardozo, Robert H. Jackson, to name a few. These were not casual relations. He was bound to them and they to him by the commitments and struggles they had shared. I am sure an important influence on his life was that he could not see himself doing anything that might seem unworthy in their eyes.

Mr. O'Brian was a superb courtroom lawyer and a wise counsellor. My own view is that there is danger in disassociating the two. I do not mean in any way to depreciate the value of the lawyer who knows every nook and cranny of the law and the agency lore of some limited field. But one who has never tested his views before a court and jury can become somewhat over-sanguine about the unassailability of his opinions. In the past, opinions of counsel were rarely litigated, and even so now, though increasingly corporate advice may find its way into the courtroom. O'Brian had been bloodied enough in combat so he had no illusions of infallibility. But also in the courtroom you cannot escape commitment. So he was capable of assuming the responsibility of advising a course rather than expecting a client to take all the risks that the guidance of a well-hedged opinion puts upon the client. He was as comfortable and competent in trying a case as in arguing an appeal. Often this is not the case. First-rate trial lawyers are not always the best appellate advocates and vice versa.

Mr. O'Brian was the soul of courtesy in dealing with witnesses and with opposing counsel. There are other effective styles, especially in the trial court, but this was his and I suspect that witnesses are as frequently seduced as they are bludgeoned into important admissions. He was remarkably shrewd in his assessment of courtroom situations. The first case I prepared for him involved a claim by a home owner living adjacent to the quarry of our client. The claimant alleged that our dynamiting had shaken his house to pieces and wanted injunctive relief and appropriate damages. His chief witness was a Jesuit from Canisius College. The Jesuits had considerable learning in seismography. However, the priest in question had used a tumbling-pin seismograph, a very rough instrument, though I dare say adequate to the purpose. I had done long, arduous research on its inadequacies and briefed Mr. O'Brian with care. After the Jesuit finished his direct testimony, Mr. O'Brian said, "no questions." I was shattered. At lunch I boarded him for sacrificing all the devastating questions I had prepared. He asked me if I had noticed that there were six Irish, presumably Catholic, names in the jury box.

In one of the TVA cases, in the trial court, Wendell Wilkie was the star witness for the utilities. On direct he said nothing that was very damaging. When
he finished his direct, Lawrence Fly, then General Counsel of TVA, was on his feet, ready to tear into him on cross-examination. O'Brian pulled him back and said, "I think he saved his heavy artillery for cross-examination. I'd let him alone." Fly said, "No questions." Wilkie stepped down and was heard to mutter mild profanity about O'Brian being in back of all this.

But shrewdness rarely wins cases. Cases may be lost by a misplaced "why" in the course of cross-examination, and I have seen experienced lawyers caught in that mistake. The best lawyer rarely gives his client more than a 10 or 20 percent advantage over the ordinary practitioner. Cases that can be won are won by wrestling with them long enough so that the key cases and the key issues are as familiar as the palm of one's own hand. No notes are required. One can walk the terrain as one might blindfolded to his own door. If it is a sizable case this requires absolutely reliable help. O'Brian never spared himself in the preparation of a case. Every inch of it was a part of him and he had extraordinary capacity for enlisting great talent with unremitting loyalty to him. His staff at the War Production Board was probably one of the best that has been recruited for government or elsewhere. Yearly they assembled to celebrate the joy they had in working with O'Brian.

Turning now to his capacity for appellate advocacy, this again is most difficult to describe. The effective styles are quite diverse. John W. Davis, George Wharton Pepper, Robert H. Jackson, Charles Fahy, or at the British Bar, William Jowitt, Stafford Cripps, David Maxwell Fyfe, Hartley Shawcross had little in common as I heard them. Mr. O'Brian was certainly the equal of any.

I think perhaps the talent is well intimated by Sir Charles Grant Robertson, describing the effective House of Commons man:

[L]ong experience has shown that influence and status depend mainly on two gifts—speech, not necessarily the eloquence which will move a large audience, and the indefinable quality that wins in differing and inexplicable ways confidence in the sincerity and judgment of the speaker.2

O'Brian had these gifts. There was a photograph of Brandeis in his office inscribed: "To John Lord O'Brien, a friend of the Court and of Louis D. Brandeis." But it was not only Brandeis who felt so. Butler, McReynolds, Van Devanter and Sutherland of the "old Court" though disagreeing with his views had deep respect for his integrity and character; perhaps more than respect. It may not be an exaggeration to say that they had affection for this urbane man who so frequently appeared before them.

I remember the first brief I drafted for O'Brian. He was generous, as he always was with his juniors, in praising its worth. But, he said, you have

2. C. Robertson, Chatham and the British Empire (1967).
neglected the arguments *ad hominem*. They should never be noticeable but never neglected.

His argument in the *Ashwander* case on behalf of the TVA was a classic of appellate advocacy. A layman reading it now would probably not be greatly impressed, but the knowing would I am sure give it its due. He was hard pressed by Butler, Sutherland and McReynolds. The thrust of their questions was to induce him to take an exaggerated position but he never let the argument get out of focus. He made the appropriate concessions that undercut any effort to make him overstate the case. His manners were impeccable in dealing with the hostile questions, but he was firm and unshakable in thrusting forward to the heart of the case. He had a few helpful precedents to cite but the tough cases in the Supreme Court are rarely won on precedents. The gist of his argument was that the big dams were constitutionally justified by the purposes they served of flood control and increasing the navigability of the river. As an incident, a special kind of property was created—the energy in the waters falling over the dam. It was property that must be seized at once or forever wasted. It was property held in trust for the American people. To say that the people’s property must be wasted was an unacceptable proposition. The hydroelectric facilities under constitutional attack alone could seize and save it. This was the *ad hominem* argument at its best.

Mr. O’Brian served his country well. At times he derived great benefits from the service; at times it was given at great personal sacrifice. It was never refused when the country’s need was great, though he turned down many offers of preferment.

His first major post was as United States Attorney for the Western District of New York. He was appointed by Theodore Roosevelt, but continued to serve under Taft and Wilson. This was a great opportunity. It gave him a wide and favorable reputation, enhanced his skills and established his confidence in his capacity to meet, in the courtroom, on equal terms, some of the most notable members of the bar of that time.

In 1917, Mr. O’Brian became head of what was later known as the War Emergency Division of the Department of Justice. He was charged with the civil administration of the war statutes, except for the Trading With the Enemy Act. The most sensitive aspect of his job was exercise of the power of internment of alien enemies. In wartime, hysteria is always close to the surface, but O’Brian was never caught up in it. The pressures from the military were considerable, but he held his ground and his decency and, to use a phrase in which he placed great store, fair play prevailed. I remember Felix Frankfurter commenting, when he was suggesting I go with O’Brian, that it was a noble performance. When contrasted with the “Red Raids” conducted by Attorney General Mitchell Palmer in late 1919 and early 1920, it is evident that there was no want of hysteria during this time and that two sturdy men, Attorney General Gregory and Mr. O’Brian, quelled its indecencies. Even compared with our performance in the
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Second World War, which on the whole was commendable, except for the dismal business of the internment in concentration camps of the west coast Japanese, Gregory's and O'Brian's performances were admirable indeed. We must not take for granted the few O'Brians of this world. If we venerated our dead he would be entitled for that exemplary performance to great veneration.

In 1929, O'Brian became the Assistant to the Attorney General and head of the Antitrust Division where he served through 1932. During this period he argued some 20 cases in the Supreme Court and earned a great reputation. After returning to private practice at the end of 1932, he began to accumulate large and important clients. He was always very modest about his charges. I remember Mr. Slee, who was his senior, at least on the letterhead of the firm, once saying to me that if O'Brian would take care of the courtroom and leave the billing to him they would shortly be rich. It takes some time to build up a great practice, and O'Brian permitted such diversions as the TVA litigation to interfere with single-minded devotion to the accumulation of great wealth. But by the late thirties he was at the height of his earning power, and on the way to the accumulation of great wealth. Then, at the end of 1940, he was asked to become General Counsel to the Office of Production Management, later the War Production Board. It was a tremendous personal sacrifice. The then Attorney General, Robert H. Jackson, was given the job of persuading him. The job offered was not high in the hierarchy of federal office, but of enormous importance. A vain man might have hesitated; O'Brian accepted without hesitation. WPB's power to allocate raw materials gave it the power of life and death over American industry. The opportunity for corruption and abuse was incomparable. Yet, I have never heard a breath of suspicion about it. This was in no small measure O'Brian's doing, though he generously ascribed the integrity of the organization to others. O'Brian was under great pressure to use the enormous power over allocations to enforce War Labor Board and Office of Price Administration decisions. If a record were built and a showing made that because of labor troubles a concern could not make the best use of the materials allocated to it, he was prepared to modify or withdraw the allocation. He strongly resisted, however, any executive order routinely using WPB powers to enforce the War Labor Board decisions. He considered it morally wrong to use WPB powers for any purpose other than that entrusted to it, to secure the highest war production performance. All of industry admired O'Brian, but he once wryly remarked to me that few, if any, of his important old clients came back to him after he returned to private practice.

It may well be that our largest debt to O'Brian is for what he did to keep alive and practice "the spirit of remonstrance" during what is now commonly referred to as the "McCarthy era." He coined the phrase "the spirit of remonstrance" in a speech to the New York Bar Association in which he chided the
Bar for its apathy in the face of the recrudescence of barbarism and the death of morality and common decency under Hitler. He felt that apathy was losing us the moral leadership we had long enjoyed in the world, but more importantly signalled the decay of our own moral fiber. Our democracy, defined by Jefferson as one which derived its powers solely from the consent of the governed, to O'Brian meant government by effective public opinion. This in turn depended on open and intelligent discussion. It depended on individuals, not necessarily the headline figures, but individuals who would speak out and be heard and could cut through the complexity and confusion of modern affairs and reduce the great problems of the times to simple moral issues. O'Brian had the fullest confidence in the good sense of the American people, in their capacity to distinguish right from wrong and their fundamental sense of decency and fair play. As he put it himself:

One explanation of their [the American public’s] occasional indifference to the operations of government is that the complexity of government organization and its multiform functions baffle and bewilder the average citizen. He rarely understands the true significance of the many policies practiced, particularly by the central government. But what is significant and above all other developments is that whenever political or social issues are clarified and take on the aspect of a moral issue, the American public react promptly and powerfully.

The so-called loyalty order promulgated on March 21, 1947 made government employees subject to dismissal for disloyalty. “Subordinate loyalty boards were set up in government agencies and a board or review of eminent citizens was appointed to hear appeals.” The board of review was chaired by an old friend and former colleague of Mr. O’Brien’s, Seth Richardson, and, O’Brien thought highly of the personnel of that board. But he condemned the “drastic departures from traditional procedures. For the first time citizens’ rights under the First Amendment of freedom of speech, of thought, and of association were made subject to administrative action.” Persistently, O’Brien protested against men being deprived of their reputations and their livelihoods on charges of anonymous informants, without opportunity to confront their accusers or subject witnesses against them to cross-examination. Before I looked into the matter I thought O’Brien’s protests came in 1955 in his superb Godkin Lectures at Harvard. But not so. He commenced his public and published remonstrances in 1948 and repeated his protests persistently, during the height of the panic down through the Godkin Lectures.

3. See p. 73 infra.
7. See p. 75 infra.
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In the first place, while not discounting the seriousness of the Communist threat, he thought it was greatly exaggerated. The American people were not dupes. After three years of reviewing hundreds of cases "[t]he Loyalty Review Board reported to Congress that not a single instance of espionage or sabotage had been discovered . . . ."8 He was of the view that our self-inflicted wounds were greater than those any foreign powers could inflict upon us.

To him the suggestion that these loyalty proceedings were "merely 'hiring' inquiries and . . . not trials within the constitutional sense,"9 that no one had a vested right to public employment, etc., was unacceptable. Conviction of a felony carried no more serious consequences than what was in reality conviction of disloyalty to the United States. As he said:

What a shock would come to any lawyer if he were to witness a criminal trial and a conviction for crime based upon secret and undisclosed evidence. Yet, from a practical standpoint, is there any essential difference in terms either of the individual right or of the public interest between that situation and the result under the procedure on charges of disloyalty?10

One may have to bow to the fact that judges are no more immune to panic than others, but one is not bound to accept the results without protest. Said O'Brian in this connection, "[w]hether or not the use of secret evidence and of information furnished by anonymous informants violates the due process clause in a technical legalistic sense, there can be no doubt that these practices do violate the ancient historic traditions of fair play."11 Calling upon his favorite source, he continued:

When Festus two thousand years ago reported to King Agrippa that his predecessor Felix had bequeathed to him a Roman prisoner named Paul and that the chief priests and elders desired to have judgment against him, he added:

To them I answered, It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him.12

He quoted further:

When the younger Pliny, as Governor of Bithynia, requested the Emperor Trajan to advise him as to the treatment of a new sect

8. J. O'Brian, supra note 4, at 28.
9. Id. at 33.
11. J.L. O'Brian, supra note 4, at 61.
12. Id. at 61-62 (footnote omitted).
known as the Christians, Trajan instructed him to let the people alone unless they were found to be in violation of the law. In that case they were to be prosecuted like other offenders. But, added the Emperor,

[A]nonymous accusations must not be admitted in evidence as against anyone, as it is introducing a dangerous precedent, and out of accord with the spirit of our times.¹³

I must, before I end, speak of O'Brian as a companion. I doubt if there ever has been any better. An evening with him was always a joy. He had lived roughly half the years since the founding of the Republic. He had known most of the notable figures since the turn of the century. He had seen them intimately in relaxed and trying times. His memory for the significant, the striking, the amusing conduct of men was extraordinary. He wasn't given to irrelevant anecdotes, but his conversation was embellished by a wealth of stories. He believed as Plutarch believed that in biography and, derivatively, in any just appraisal of matters of large moment "small instances and minor characteristics were often more revealing than participation in great events." He was never malicious, his affections were generously given, but when he spoke of men, one came away with new insights, sometimes not always flattering. He was an admirable companion. His loss is deeply felt by many.

¹³. Id. at 62 (footnote omitted).