My Rabbi

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Find yourself a teacher.
Pirkei Avot 1:6

David Feller was, first, my teacher. Then he became my Rabbi. The rest, which follows, is commentary.

I first encountered David in 1972. He was 56, freshly appointed to the American Association of University Professors’ Committee N on the Representation of Professional and Economic Interests, a euphemism for collective bargaining. I was twenty-nine and had been staff counsel to the Association for five years. The AAUP had just gone through a tumultuous debate on whether it ought to become a labor union—more accurately, whether it would permit its local chapters to serve in that capacity—contrary to the teaching of its founders in 1915 and contrary to the views of its leadership, including Sandy Kadish. Activist members argued to the Tide of History: that with the extension of the National Labor Relations Act to cover private higher education in 1970 and the enactment of public sector collective bargaining laws that included the faculties of public institutions in a number of states, surely a harbinger of many more to come, collective bargaining was the Wave of the Future for the professoriate; and, if the AAUP didn’t catch the wave, it would be doomed to irrelevance and to eventual demise. The activists won the day.¹

In keeping with Association practice, how it was to deal, both operationally and in the matters of policy, with the enormous consequences of that decision was assigned to a committee which, in the AAUP’s vernacular, was given a letter designation. Whence David’s appointment. As I recall, he came to us via Sandy Kadish’s recommendation.² If we were to be a union, we would at least be the best union possible. And so David’s learning and experience and wisdom were to be brought to bear, to guide the Association through those critical, early years.

¹ Albert J. Hamo Professor of Law, The University of Illinois.
² Sandy Kadish, himself a former labor lawyer, was at this time serving as the dean of Boalt Hall, UC Berkeley.

2. Sandy Kadish, himself a former labor lawyer, was at this time serving as the dean of Boalt Hall, UC Berkeley.
David, who was relatively new to the academy, thus found himself thrust on a committee of professors who were absolutely new to collective bargaining, from faculties that had negotiated their first collective agreements or, in once case, had actually gone on strike. John Sands, a member of the National Academy of Arbitrators, has a set piece on, “Why Collective Bargaining is Like Sex.” One reason he gives is: Anyone who’s done it once thinks he’s an expert. And so David, having run the Steelworkers Union (as rumor has it) and having shaped so much of the American system of collective bargaining, found himself on a committee of experts. How he endured the narrishkeit I never did quite figure out, save for his love of the ridiculous and his genuine curiosity about how collective bargaining might be made to work in this milieu. But survive he did, and more. He went on to chair the committee, from 1976 to 1981, and to be elected to the Association’s governing board, the Council, from 1975 to 1978. The AAUP’s endurance as an organization, conjoined with its success in the field of collective bargaining, is attributable in good measure to David’s guidance.

One minor instance of David’s contribution to the Association stands out in my recollection because I had to eat a small crow as a result of his quickness of mind. It was when David was a Council member and I was General Counsel. A novel policy question had arisen, which was to play out in the courts, concerning the ability of a college or university to lower its mandatory age of retirement (this before the Age Discrimination in Employment Act prohibited any mandatory retirement age). The AAUP had agreed with the Association of American Colleges in 1950 to a joint statement providing that when a retirement plan is changed, provision should be made for those “adversely affected” by the change, but it set out no standard to define who they were. The AAUP’s interpretations of these joint pronouncements, though unilaterally issued, have great weight in the academic world and are taken seriously by the courts. In other words, how we interpreted the clause was significant business.

I drafted an interpretation: that one is adversely affected if he or she is within twenty years of the existing retirement age; at that point, I reasoned (looking to some actuarial stuff I dug up), one’s reliance interest could be said sufficiently to have crystalized. My draft had first to be passed upon by the Association’s Committee A on Academic Freedom and Tenure, its most important and powerful committee, dominated, at the time, by a constellation of academic lawyers. They approved, and so it went on to the Council for adoption as policy.

I cannot but recall the Council meeting. David arrived late, wearing some sort of jump suit. His clothes were rumpled, his eyes red. He looked like hell and, during a break, I told him so. He explained that he had worked late into the night, caught the “red eye” to D.C. and barely made it
to the meeting.

“Why?”

“Because I wanted to see if I could do at 60 what I used to do at 40.”

“Can you?”

“No.”

Alas for me, but good for the Association, his mind was oblivious to his physical exhaustion. I presented my draft, bearing Committee A’s imprimatur, reported on the need for it and its rationale. Adoption was to be a matter of form. David had scarcely scanned the thing when he took the floor: “The way you’ve written this, if the college had a retirement age of 65, and you’re 44, the college could lower its retirement age to 45 and retire you next year. What you want to say is that it can’t apply the new age to someone who is within 20 years of it, the lower age, not the existing age.” The draft was amended, I went off to hang myself on a participle, and the AAUP was saved from considerable embarrassment.

In 1975, I was a newly minted law professor, struggling unsuccessfully to kill a row of hybrid tea roses in my backyard when my wife called me to the ’phone: “There’s someone named ‘Clark Kerr’ who wants to talk to you,” she said. Once over my astonishment, I learned that Kerr, then heading the Carnegie Council on Policy Studies in Higher Education, wanted to commission a study of public sector collective bargaining law with an eye toward proposing model legislation for faculties in higher education. He had approached David and David had agreed, on condition that I do the work. Whence my “collaboration” with him.

I use the term advisedly because my draft made rather a hash of it all: I was like a puppy in a butcher shop, not knowing where to turn—and at every turn one could take a bite out of a piece of policy—with the heady prospect ever before me that my work would somehow shape the law. David took the project in hand, pitched my stuff (and there was a lot to pitch) and wrote a draft of his own. We then proceeded to work through his text paragraph by paragraph, line by line. At every juncture when I raised a point I’d get a story in return:

Me: David, how does this proposal on the duty to bargain fit in with *Fibreboard*? Don’t we need to discuss that?

David: *Fibreboard*? Let me tell you what really went on in *Fibreboard*.

And so it went. I was on the receiving end of an extended, one-on-one tutorial in labor law and labor history, in much of which David was a participant or observer or both. (Of course, David is rightly regarded for his shaping of the law of labor arbitration before the U.S. Supreme Court, but the slightest glance at the library of labor’s legal history will reveal David’s
hand: on the AFL-CIO’s Ethical Practices Committee,\(^3\) in a behind-the-scenes effort to steer the Landrum-Griffin Act,\(^4\) in the internal workings of the Steelworkers Union,\(^5\) and as “chief architect,” or, to the Wharton School crowd, the evil genius behind the successful effort to get the NLRB and the courts to consider coalition bargaining kosher.\(^6\) And so I can boast without exaggeration that David was my teacher, and I do.

Now to how he became my Rabbi. But first, let me digress. I’m sure others will elaborate on the richness of David’s sense of humor, his infectious laugh, his love of good company, food and wine, his love of malapropisms,\(^7\) and of his inexhaustible hoard of stories of which he was a gifted raconteur. What struck me about David, from the moment we met, in addition to all these, was his enjoyment, his savoring—there is no other word for it—of the ironies of life. Though we hadn’t talked lately about those AAUP years, I suspect it was not lost on him that the AAUP had chosen to catch the wave at the moment of its cresting: The Supreme Court withdrew the Act from most private college faculties in 1980; and, though some more states did enact public sector bargaining laws, the movement subsided. The Great Wave of the Future ebbed. Our study never had the impact I had hoped, though one or two of our legislative proposals—David’s drafting, not mine—found its way through the California Legislature into law. But I do know that he took positive delight in the fact that he persuaded the Supreme Court (in a brief *amicus curiae* on behalf of the National Academy of Arbitrators) that, when it came to a collective agreement’s arguably sweeping labor protective law into its grievance arbitration procedure, the strong presumption he had persuaded the Court to adopt in *Warrior & Gulf*\(^8\) should run with equal strength in exactly the opposite direction.\(^9\)

Now to how David came to be, for me, a Sage. In 1981, I was selected for the first time as a labor arbitrator. What was wonderful about this was that I’d never actually seen an arbitration let alone even been involved in one. So, in a blind panic, I called David to ask a very simple question, “What do I do?” I had expected he’d refer me to a text or give some

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7. If I recall correctly, he kept a virtual file of them from Gilda’s experience on the Berkeley City Council. One of his favorites was of the man who appeared before the Council exasperated by having been run from pillar to post in city government over some matter. “I feel,” he complained, “like I’m on a treadmill...and I’m running out of thread.”
practical pointers. He did neither. Instead, he offered only this: "Just remember—you don't do this for a living." The full impact of his sagacity didn't seep in until much later, when I found myself blackballed by a union and an employer out of displeasure with two respective awards.

Some years later, confronted with an especially complex and vexing case, I called David to ask about billing. In true Talmudic fashion, he answered my question with a question: "For how much of your indecision can you expect the parties to pay?"

His full ordination (in my eyes) came a few years later when I was asked to serve as an expert witness in a labor dispute in the entertainment industry. They'd gotten on to me because the issue concerned the relationship of individual contracts of employment to the collective bargaining process. This is rare in the industry, for employees don't have individual contracts. But it was an issue for the collectively represented professoriate, and I'd written about it. Whence the party's interest in me. And, because it involved trips to New York (with my wife), luxury hotels and fine restaurants, all at the party's expense, plus a Wall Street rate of compensation, was I ever interested in them. In preparing my testimony, I recalled another work setting in which both collective bargaining and individual contracts co-exist, *i.e.* in maritime transport, and that David had a keen interest in seafaring labor. So, in an excess of caution, I called him, my teacher, literally on the eve of my departure to New York, just to check out my thoughts.

My reasoning was quite correct, he thought, but why was I asking? I explained the situation. It led to the following colloquy:

**David:** You've been nominated to the National Academy of Arbitrators. It has an ethical rule prohibiting testimony as an expert witness in a labor dispute. You can't do it.

**Me:** But I'm not a member yet. And anyway, all I will say on the stand is what I've already said in print. I don't see how this compromises me.

**David:** Look up the rule. It wouldn't be right, even if you're not yet a member.

[I put the 'phone down and looked up the rule.]

**Me:** The rule has a grandfather clause; it applies only to members admitted after April 21, 1976! *This* is a rule of ethics? You can testify, but I can't? Are you more ethical than I am?

[Pause.]

**David:** Well, I wouldn't do it.

So I didn't. I called the party and, red-faced for such late notice, removed myself from the matter. That is how David became my Rabbi. And he cost me a fortune.
I’ve a good friend in my town: Descendant of a distinguished rabbinical family, a Holocaust refugee who had fled to the East, a noted professor of Slavic Studies. He and his family return to Israel to vote. His daughters vote Labor. He votes Likud. I asked him why. “My daughters do not realize,” he said, “that there are wolves in the woods.” When he leaves for speaking commitments abroad, which is often, I save my *New York Times* for him. “Why,” I asked, “would you want old news?” “It’s not for the news, I read the obituaries.” He read my face. “Look, there’s the usual quotient of politicians and sports figures and businessmen, some no-goodniks and, occasionally, a real monster, but from time to time one finds people who not only made a positive contribution in their lives but who also were genuinely good. I find it reassuring to know that such people still exist.” When David’s obituary appeared in the *New York Times*, I made sure to bring it to my friend’s attention.