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Memorial Dedication to Justice William J. Brennan, Jr.

Marsha S. Berzon

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The task today, as I understand it, is to comment upon Justice Brennan's 1986 speech here at Loyola on the critical role of lawyers in shaping American society[1]—and in the course of doing so, to reflect a bit on Justice Brennan's own impact on that role. I am most comfortable addressing those questions by beginning—as is the current academic fashion, I understand—with my own experiences, in this case, my experience as Justice Brennan's law clerk in the 1974-75 term.

I was Justice Brennan's first woman law clerk. I began clerking when sex discrimination law was in its infancy, the year after *Frontiero v. Richardson*[2] was decided. *Frontiero* was the case in which Justice Brennan tried but was unable to muster a majority of the Court in favor of a strict scrutiny approach to gender-based discrimination.[3]

Before Professor Steve Barnett of Boalt Hall called to tell me that the Justice wanted me to clerk for him, there were rumors afloat that the Justice had qualms about hiring a woman as a law clerk. Professor Barnett himself must have had some concern about how the Justice and I would get along, since he urged that he and I get together before I left for Washington to discuss how I should behave on the job. We did so over dinner. It turned out that Professor Barnett was particularly concerned that I be kind to Mary—then Mary Fowler, the indispensable secretary who was the center of office life, and now Mary Brennan. I am not sure why he thought that would be a problem, since Mary was, and is, one of the most cheerful, funny, thoughtful, friendly people I have ever met. We became good friends that year and have remained so ever since.

As to the Justice, if he did in fact have any hesitation—as many men of his generation well might have—about having a young woman join "his boys" in chambers, I certainly never perceived it. Rather, at

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1. *See* Justice William J. Brennan, Jr., *Commencement Address Delivered to Loyola Law School Class of 1986*, 31 LOY. L.A. L. REV. 725 (1998).

2. 411 U.S. 677 (1973).

3. *See id.* at 682.

coffee time every morning, Mary and I and the two other law clerks and the Justice sat together comfortably, discussing issues ranging from the Justice's experiences as a young lawyer in New Jersey to the case that would be heard the next day.

The informality of those discussions may have seemed a waste of precious time to an outsider. How many extremely busy lawyers or judges spend up to an hour a day with their staffs in an entirely unstructured meeting with no agenda, no narrow focus on work issues, and no attempt by the "boss" to direct the conversation, decide who is to speak in what order, or discourage disagreement?

Professor Barnett may also have been worried, although he did not say so, about the fact that I had a two-year-old child at the time, now very much grown up. The clerk's job is proverbially one of long hours and single-minded commitment. Justice Brennan did much more of the chamber's work himself than other justices, so the work load on clerks was by no means overbearing. Still, good child care arrangements were hard to come by on a clerk's salary, and my son Jeremy was in a day care program that ended at 5:30 or so.

The child care issue did not turn out to be a problem either. That year, Justice Brennan's daughter Nancy was living in Washington and going to graduate school. The Justice and his wife were taking much of the responsibility for caring for Nancy's daughter, Connie, who was just a year older than Jeremy and was also in a child care program that ended at 5:30. So the Justice and I would often leave at the same time to pick up the children, both of us, I suppose, taking work home to finish in the evening.

In fact, Justice Brennan became something of a surrogate grandfather to Jeremy. The last day of the clerkship, when I brought Jeremy to say good-bye, the Justice took the three-year-old on a "backstage" tour of the courtroom, bringing him through the curtains to sit in the Justice's chair before a group of astonished tourists. He also took us into the conference room, which I had never seen before. The Chief Justice, whose office was attached to the conference room, was none too pleased to hear the sounds of a tiny child in the inner sanctum and came in with a bit of a scowl on his face to see what was going on. When Jeremy saw the Chief Justice, his reaction, for some reason—a mother is tempted to think that she had just trained her child well, but I don't believe I'd ever taught Jeremy to shake hands—was to put out his right hand quite properly and shake hands with the Chief Justice. At that point, of course, the Chief's displeasure disappeared and he shared Justice Brennan's amusement at having a

three-year-old exploring the Conference Room where the nine Supreme Court justices meet to decide the nation's most significant legal disputes.

So what does all this have to do with the serious subject before us—the role of lawyers in dealing with the vital affairs that affect the whole pattern of human relationships under a government that derives its just powers from the consent of the governed?

Several things. First, one of the things clerking for Justice Brennan taught me—and I try to think of it often, since it is easy to forget in the fast-paced, contentious world of law practice—is that understanding and applying established legal principles often requires a conscious attempt at understanding the points of view of individuals in different situations.

For example, at the time I was clerking for the Justice, issues concerning gender equality were just beginning to arise with some frequency in the courts. The year I clerked, the major sex discrimination case in the Supreme Court was *Weinberger v. Wiesenfeld*,[4] a case concerning whether it was constitutional to deny social security survivor's benefits based on the wife's earnings to a man whose wife died in childbirth.[5] A woman whose husband had died would have received such benefits so that she could care for the child without working outside the home.

Men of Justice Brennan's generation—the generation that had written this statute and others like it in the first place—had grown up in a world in which married women rarely worked while their children were small, and in which the natural assumption would have been that on the death of a woman with small children, the father would in all likelihood ask a female relative to rear the child while he continued working. So the task of advocates seeking to eliminate gender discrimination—in this case, Ruth Ginsburg, now Justice Ginsburg due in small part at least to her work on the *Wiesenfeld* case,[6] was to help the justices hearing the case see beyond the assumptions of the world in which they had grown up to the actual financial and childcare arrangements of many families in recent years.

The case was assigned to Justice Brennan, and he asked me to help him with it. Both of us, as I said, had child care problems of our

4. 420 U.S. 636 (1975).

5. *See id.* at 637-38.

6. Mr. Wiesenfeld, the father, testified at Justice Ginsburg's Senate confirmation hearings. Mary Deibel, *Brief Judiciary Session Bodes Well For Ginsburg*, SAN DIEGO UNION TRIB., July 24, 1993, at A6.

own that year, although not such poignant ones as Mr. Wiesenfeld had. And just having me working on the case with him was obviously confirmation of what the Justice had written in *Frontiero* and wrote again in *Wiesenfeld*—that the ideas and actual practices of people in this country about the appropriate activities of men and of women were changing. In the *Wiesenfeld* case, Ruth Ginsburg successfully communicated her position that the social security survivor's benefits statute was based on notions of invariable gender roles so outmoded as to be irrational in the current economic world.[7] A unanimous Court ruled for her client, although not all the Justices agreed with the reasoning of Justice Brennan's majority opinion.[8]

One interesting footnote to the *Wiesenfeld* case: When Justice Ginsburg was appointed to the Court, I wrote to congratulate her and mentioned that I had clerked for Justice Brennan the year *Wiesenfeld* was decided. She wrote back to thank me and to tell me what had become of the younger Wiesenfeld, who was a small child at the time of the Supreme Court case: He was going to law school.

Another, and related, critical message that I carried away from my clerkship was that law is, and ought to be, a fundamentally collegial process in which thousands of lawyers and their clients, over hundreds of years and across the country, bring their powers of reason to interpret incrementally the various legal materials relevant to determining the set of rules governing our lives. As Justice Holmes said, "The glory of lawyers, like that of men of science, is more corporate than individual. Our labor is an endless organic process."[9]

The Supreme Court, of course, does not necessarily operate directly in the collegial way one might think, that is, with impassioned, in-depth oral discussions among the justices as a group about legal principles in general or about how a particular case should be decided. But in a more subtle sense, the Supreme Court, and courts in general, involve an ongoing discussion not all that different from the one that went on in Justice Brennan's chambers over coffee every morning: Lawyers try to frame issues as we neophyte lawyer/clerks did with the Justice, and if the process is working, those presentations suggest connectives and consequences that the judge or judges might not have thought of unaided. Again if the process is working—and it

7. *See Wiesenfeld*, 420 U.S. at 642-45.

8. *See id.* at 655 (Rehnquist, J., concurring).

9. Oliver Wendell Holmes, Daniel Richardson, *in* THE OCCASIONAL SPEECHES OF OLIVER WENDELL HOLMES 56, 57 (Mark DeWolfe Howe ed., 1962).

usually does, despite the idiosyncratic perceptions of reality we all develop through our own personal experience—the decisionmakers are moved by information and thoughts presented to them, and by the analyses of other decisionmakers—primarily, other judges speaking through published decisions concerning similar cases—to reconsider and put aside their own instinctive views when viewing the factual and legal issues before them.[10]

Unlike Justice Brennan's coffees, of course, the formal legal process operates in a structured way, and your child's latest clever saying is not mixed in with a discussion of the niceties of First Amendment jurisprudence. Yet for lawyers, if necessarily not for clients, there is a refreshing equality of discourse in the legal process in which our arguments on behalf of our clients have a fair chance to become part of a larger mix that ultimately governs all of our lives. So my point, I guess, is that in a very real sense, *all* lawyering essentially affects the public welfare, not only the particular projects one sets aside for that purpose, because almost any legal argument a lawyer makes on behalf of his or her client can find its way into a governing rule of law affecting other people at other times.

The third and final lesson I drew from my year in Justice Brennan's chambers is that people in the law—judges, juries, and lawyers—usually rise to the occasion, just as three-year-old Jeremy did in somehow figuring out how to act appropriately in front of the Chief Justice of the United States. Perhaps this is just a way of repeating the last point—that the legal system provides a means of presenting to decisionmakers ideas they may not have considered before and expects that there will be respectful attention paid. In lower courts, one often loses sight of this ideal because of the absurdly crowded dockets such courts often handle. And that is a major loss, because decisionmakers who do not have the time to think, research, and consider are likely to make decisions based on their own limited experiences rather than on the basis of decided law, statutory language, and a concerted effort to give reasoned consideration to the various ways sensible people could look at the problem. But the hierarchical court system, which invites each level of the judiciary to look critically at the reasoning process of other decisionmakers, is something of a corrective for such forced haste. What that means is that one learns—as an observer of and participant in the elucidation

10. I am assuming in this discussion, of course, that the issue being decided is an open one in the pertinent jurisdiction, and not one as to which there is controlling precedent or a clear statutory answer.

of principles of law through litigation—to have *patience*. It may take years before the most sensible construction of the relevant legal materials concerning the proper legal principle to govern a particular situation in fact emerges as the predominant rule applied by the relevant judicial bodies. But most often, I have found, it is the fittest legal rules that do survive the give-and-take of the adversary process and of the cacophony of different legal analyses and conclusions that can arise among the various courts addressing an issue.

In short, I see lawyers not as "indispensable middlemen,"[11] or women, as Justice Brennan put it, but as translators—translators from the events of real life into terms the legal system can understand and work with. Justice Brennan taught me that in that task of translation, one must not lose sight of the world one is translating *from*, so that the law continues, as it has in the past, to reflect the real needs of real people as they try to work out their lives. And in so doing, lawyers necessarily affect the "vital affairs that affect the whole pattern of human relationships"[12] in almost any legal endeavor, not simply in pursuits specifically set aside for that purpose.

Thank you for inviting me here today.

11. Brennan, *supra* note 1, at 2.
12. *Id.* at 7.