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## Memorial Dedication to Justice William J. Brennan, Jr.

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*Fred Woocher\**

Thank you. And thank you for including me on such an esteemed panel. I am especially privileged to be here with Justice Mosk and Judge Reinhardt, who in many ways, I think, are the Justice Brennans from their respective courts. And it's indeed a pleasure to be back once again in the company of Mrs. Mary Brennan, whom those of us up here lovingly knew as Mary Fowler, the warden of the law clerks.

One of the more perverse aspects, of course, of clerking for a Supreme Court Justice is that you attain the pinnacle of your legal career in your second year out of law school. And it doesn't take too long to realize that all you have to look forward to in the next thirty or forty years of your professional life is trying to find something that can remotely compare to it. So, one of the nicer things about having been asked to be here today is that it has given me a chance to reflect back on those wonderful and heady days with "The Boss," as we used to call Justice Brennan.

In reading Justice Brennan's Commencement Address from over a decade ago, I was struck by how the Justice's own life and career seemed to exemplify many of the themes that were contained in those remarks. His central point—that because so many of society's most pressing and most perplexing problems are placed in the hands of the legal system for resolution, lawyers are uniquely situated, therefore, to play a creative role in American social progress—was certainly not lost on the Justice himself. He was keenly aware that the issues before the Court and the decisions it would render would shape American society for years to come. And, as many have said already, he brought this larger vision of the law's role in shaping society to his legal jurisprudence.

I have occasionally seen Justice Brennan's opinions characterized and criticized as "result oriented." Although I never discussed the issue with him, I suspect that the Justice would not necessarily have viewed that characterization as criticism. For, despite the undeniable brilliance of his intellect, the Justice never treated the law as

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an abstract intellectual exercise, but rather, as his commencement speech suggests, as a vehicle for protecting what he described there as the “God-given and constitutionally guaranteed, inherent rights of ‘life, liberty and the pursuit of happiness’ of all human beings.”<sup>1</sup> To constantly try to achieve such a result would certainly be considered no sin.

There is another theme in Justice Brennan’s commencement remarks that resonates throughout his own work in life. That is the concern that was expressed and quoted by the Justice in that speech by Justice Stone a half century earlier when he bemoaned the fact that so many of the best and brightest lawyers of his day had been drawn into the service of business and finance, while the problems of the disadvantaged and the outcast were so often neglected by the legal profession.<sup>2</sup> I surely don’t need to remind anyone present here today how the effort to ensure equal justice for all—for the poor, for members of minority groups, for criminal defendants, for all those who, as Justice Brennan described in his Commencement Address, “do not partake of the abundance of the American life”—was a predominant theme in the Justice’s jurisprudence. Ensuring equality of rights and freedom of opportunity was what Justice Brennan thought the work of the Supreme Court, the legal profession, and the law itself should be about. I haven’t conducted a comprehensive search of the United States Reports, but I know that you won’t find Justice Brennan’s name on many tax or admiralty opinions—at least not unless Chief Justice Burger assigned the opinion to him against his will. I can assure you that we didn’t spend much time discussing those cases with the Justice at our daily coffee sessions. No, for Justice Brennan there were far more important issues for the Court to concern itself about than even extraordinary business and commercial disputes.

Likewise, Justice Brennan’s personal career choice echoed his own call for lawyers to eschew the perpetual pursuit of treasure in lieu of a commitment to public service. It is easy to say, with the aid of hindsight, that it was no great sacrifice for William J. Brennan, Jr. to choose a career path leading to a seat on the United States Supreme Court. But I am quite certain that a man as modest as Justice Brennan did not have such lofty expectations in mind when, in 1949, he gave up what was undoubtedly a lucrative position as a name

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1. Justice William J. Brennan, Jr., *Commencement Address Delivered to Loyola Law School Class of 1986*, 31 LOY. L.A. L. REV. 725, 732 (1998).

2. *See id.* at 3.

partner in one of Newark's largest and most prominent law firms to accept an appointment as a trial judge on the New Jersey State Superior Court.

Not that Justice Brennan didn't care about money, mind you—the Compensation Clause of Article III, Section 1, of the Constitution was right up there with the First, Fifth, and Fourteenth Amendments in Justice Brennan's book. I can still remember the special interest he took in that provision when, midway through our year at the Court, Congress attempted to repeal the automatic annual cost of living pay increases it had authorized a few years earlier. He was quite sure—and I gather the Court later issued an opinion to that effect—that the Compensation Clause prohibited any retroactive roll-back of the judge's salaries. But it was obvious that in dedicating himself to a life of public service at the expense of an inevitably more prosperous career in the private practice of law, Justice Brennan indeed practiced what he preached to those young Loyola graduates a decade ago.

Which brings me to a third and final theme that I see reflected, more subtly perhaps, in Justice Brennan's Commencement Address and in his own life. And that is that despite his everlasting commitment to the goals of equality and freedom for all, Justice Brennan was at bottom a pragmatist. Commentators have long noted how Justice Brennan was such a force on the Court because of his uncanny ability to forge a consensus among his colleagues, and he amazed Court watchers in his later years on the Court with an ability to pull majorities together for his positions even when the Court had moved to the right and the numbers appeared to be stacked against him. While always striving to achieve the lofty ideal, he recognized that sometimes half a loaf was indeed better than no loaf at all. As the Justice used to remark, "I only have to be able to count up to five."

I saw that same combination of principle and pragmatism in his Commencement Address on the role of lawyers generally in society. On the one hand, there is the Justice's principled call for the aspiring lawyers sitting before him never to lose consciousness of the sacred aspects of the profession, to devote themselves to the service of their fellow men and women, and his insistence that the "primary mission of the profession must be to preserve individual freedom—freedom of thought and freedom of action—to the fullest extent possible."<sup>3</sup>

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3. *See id.* at 6.

On the other hand, there was the pragmatic side of the Justice, too: his implicit acknowledgment that it was unreasonable to expect that all law school graduates would become full time poverty or civil rights lawyers.<sup>4</sup> A more realistic expectation would be, as he put it, that every lawyer should have, at any given time, at least one public service project to which he or she is in some manner actively devoting his or her professional ability.<sup>5</sup>

I remember when I sought the Justice's advice on my own career path shortly after finishing my clerkship. Like many in my position, I was fortunate to be confronted with a choice between accepting a prestigious high-paying job with a major law firm in Washington, D.C., or returning to Los Angeles to take a relatively lower-paying offer with a non-profit public interest law firm. The Justice, of course, was much too clever and much too considerate to come right out and recommend one option over the other. But he managed to get his message across that, despite the seemingly stark contrast between a lucrative private practice and a less remunerative public interest career, there were ways to combine the private practice of law with a commitment to public service—that one could do well *and* do good.

That ultimately is the message that I would take from Justice Brennan's life and from his Commencement Address: that not only lawyers themselves, but society as a whole, will do well from doing good. That if every lawyer devotes a fair share of his or her time and commitment, and if society devotes a fair share of its resources, to doing good by serving the disadvantaged and the less fortunate, we will all do well in the end, and we will be more enriched by it.

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4. *See id.* at 5.

5. *See id.* at 6.