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Memorial Dedication to Justice William J. Brennan, Jr.

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*Michael Rubin**

The first time I ever saw Justice Brennan in person was in the Fall of 1974, when I was a first-year law student at Georgetown University Law Center. I lived on Capitol Hill, just two blocks from the Court. I would often visit the Supreme Court on my way to or from class to observe oral argument and, toward the end of the Term, to listen to the announcement of decisions.

Many of the oral arguments I heard during that first year were surely beyond my ability to follow. But I kept coming back, probably attracted more by the spectacle of the Supreme Court than by any hope of learning a bit of substantive law. Sitting in the back of the courtroom that first year, I remember becoming increasingly excited about the possibilities that life might hold as a practicing attorney. When I began law school, my goal was to work for the Civil Aeronautics Board. I had worked in the travel business after graduating from college, and I thought that my background might help me find employment with the industry's government regulators—who, of course, became the victims of airline deregulation long before I was ready to enter the job market. I certainly had no expectation that six years later I would be back in the District of Columbia, living in my old law school apartment—while paying a much higher rent—spending my working days in an ongoing constitutional law tutorial with one of the greatest Justices of this century.

I had read several of the Warren Court decisions in college, and I must have known a little about Justice Brennan's reputation for gregariousness and charm. I recall, therefore, being somewhat surprised, sitting in the back of the courtroom during that first year of law school, at how serious and almost stern the Justice appeared at oral arguments.

I am reminded today of those first impressions, because I had somewhat the same sense of the sterner side of Justice Brennan when I read the text of his 1986 Loyola Commencement Speech. To my recollection, that side of Justice Brennan was not often shown. In

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other speeches I have read, and certainly in person, the liveliness of the Justice's personality and forcefulness of his argument were always prominently featured. During roughly the same period that Justice Brennan delivered the Loyola Commencement Address, for example, he delivered well-publicized speeches at Georgetown University¹ and before the ABA² to criticize the "original intent" doctrine of constitutional construction. Those speeches were pure Brennan—forceful, passionate, and deadly in their aim.³ That is also the Justice Brennan that I best remember, particularly in the later years of the Burger Court when I clerked, when so many of his opinions were on the dissenting side.

The Loyola address strikes a different tone, however. Certainly the substance of the speech accurately captured the essence of the Justice's thinking about the importance of a lawyer's commitment to issues of public policy. So too did the speech's familiar themes of freedom, equality, and individual rights echo the themes he sounded in hundreds of opinions throughout his long and distinguished career. But although I can hear the cadence of his voice in the text of the speech, in my view its tone fails to convey how deeply he felt about the issues he was discussing—and Justice Brennan was nothing if not a man of deep feeling.

Toward the end of his Loyola address, the Justice said: "In the final analysis the *obligation* rests on the individual lawyer, whatever may currently be his position within the profession, whether he is in a large or small firm or is an individual practitioner, to devote himself, however it may be possible, to some project involving the public interest."⁴ Maybe it was his choice of the word "obligation" that gives me pause. Perhaps Justice Brennan used that term because he grew up in an era when it was more common for people to make life choices based on "obligation" and to pursue careers in public service

1. See Address by Justice William J. Brennan, Jr. at Georgetown University (Oct. 12, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 11, 14-15 (1986).

2. See Justice William J. Brennan, Jr., Address to American Bar Association Section on Individual Rights and Responsibilities (Aug. 8, 1996) (transcript on file with *Loyola of Los Angeles Law Review*).

3. See, e.g., Linda Greenhouse, *A Justice for All*, N.Y. TIMES MAG., Jan. 4, 1998, at 39 (noting that in a 1987 speech Justice Brennan characterized his majority opinion in *Goldberg v. Kelly* as a decision that could be seen "as injecting passion into a system whose abstract rationality had led it astray").

4. Justice William J. Brennan, Jr., *Commencement Address Delivered to Loyola Law School Class of 1986*, 31 LOY. L.A. L. REV. 725, 731 (1998) (emphasis added).

out of a sense of duty rather than a more self-interested free choice. But I spend a lot of time each fall interviewing prospective associates and summer clerks, and I cannot say that I have met many law students in recent years who appear to be motivated by a sense of duty, or obligation, in their career choices.

Let me suggest that, despite the sternness of Justice Brennan's message, he fully understood the extraordinary personal satisfaction that can result from pursuing the path of public service—because that is the path that he, and countless of his clerks and others whom he influenced, have pursued.

From discussions with the Justice about career choices and the legal profession, I am sure he would have agreed that there are several reasons more compelling than a sense of obligation why an individual lawyer might choose to practice law in a manner that would enable him or her to “play [the] creative role in American social progress” that Justice Brennan described in his speech.⁵ Certainly there are few fields that offer as much opportunity as public interest law for an individual seeking to have an impact on the social issues of the day. In these times, when lawyers at all stages of their careers are looking to find more meaning in their lives, it seems self-evident that choosing to work on issues of public policy, whether in the public or private sector, is one way for an individual lawyer to have a broad impact on issues that concern the community.

As a state court judge and a United States Supreme Court Justice, William J. Brennan, Jr., had an extraordinary impact on the issues of his day. That impact began to be felt before many of his law clerks were born and will undoubtedly extend well into the next century. For a practicing attorney, however, the opportunities to have such an impact are more limited, at least in the context of a day-to-day legal practice. Yet by devoting oneself to a law practice that grapples with issues of public policy, on whichever side of the issues the individual lawyer feels most comfortable, it is possible both to have a broad impact on issues that matter and to derive immense satisfaction from the process. I am quite sure that the Justice would have agreed that it can be enormously satisfying to work on behalf of clients and causes that you believe are just—which many would say is the ultimate goal of the public interest lawyer.

For such a passionate man, it is surprising that Justice Brennan in his speech made the practice of public interest law sound almost

5. *Id.* at 3.

like eating spinach. I suppose there are some crusading public interest lawyers who would embrace the spinach analogy, characterizing themselves as Popeye-like figures fighting the evil forces of Bluto in the world. But for most, it is enough that the practice of public interest law provides not only a great intellectual challenge, but also an opportunity to become involved with the most important, interesting issues of the day, while attempting to make a positive difference in a great many peoples' lives.

The Justice well knew, and often commented, that all the care and analysis he put into his opinions would matter little unless he could command a majority of the court. I remember, as undoubtedly many of his other clerks do, how joyfully he would waggle his right hand with all five fingers extended and give a triumphant whoop upon receiving a fifth "join" memo on a draft opinion. At the same time, I can also remember when the results of his analysis—while perhaps equally sound, insightful, or thoughtful—amounted to no more than "comments in a dissenting opinion."⁶

Justice Brennan unquestionably placed great importance on obtaining, and retaining, a majority—in short, winning. Yet I think the Justice would have agreed that his greatest overall job satisfaction came from the simple act of devoting a career to working on cases and causes that he thought made a difference. Why was it that Justice Brennan, well into his 80's, would be at his desk in the Supreme Court building before 7:30 or 8:00 most mornings, even before many of his clerks had arrived? Surely the answer has something to do with how passionately he cared about the cases and opinions that he was working on and the ultimate importance of what he was doing.

The Justice in his Loyola speech included a quotation from an earlier commencement address delivered by Harvard Law School Dean James Vorenberg, in which Dean Vorenberg stated: "There is no universal 'right' way to lead a life in the profession There are many ways of working on the side of the angels."⁷ Certainly the dean had it right. As we all know from our own experiences, both private and professional, reasonable and intelligent minds invariably differ on all issues of public importance—whether affirmative action, the

6. See *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 176 n.10 (1981) ("The comments in the dissenting opinion about the proper cases for which to look for the correct statement of the equal protection rational-basis standard, and about which cases limit earlier cases, are just that: comments in a dissenting opinion.").

7. See Brennan, *supra* note 4, at 1.

right to die, or the death penalty. One reason why Justice Brennan in his First Amendment cases placed so much emphasis on the importance of ensuring equal access to the marketplace of ideas and to the protection of free speech rights, I suppose, was to nurture those differences, and thus hopefully to improve the quality of public discourse and decisionmaking throughout all levels of society.

Justice Brennan had enormous respect for those who did not share his views—and even married one of them, as anyone who has talked politics with Mary Brennan would know! At the law clerks' morning coffees with the Justice and Mary Fowler, as she was known then, he urged us to speak our minds and put our best efforts into our analysis of the issues—not to parrot what we thought his position might be, but to challenge him and each other, and thoroughly discuss all viewpoints. But however much he welcomed those discussions, once the Justice made up his mind, that was it. Once he had weighed all the arguments and had decided what the Constitution required or what Congress had meant in the statute under discussion, he was virtually unshakable, and he stated his analysis with all the passion and eloquence at his command.

To me, what the Justice left unstated in his 1986 commencement address is that the obligation every lawyer should feel is the obligation of each lawyer to find his or her own way of working “on the side of the angels”—not his, not mine, not anyone else's. If someone is fortunate enough to be able to practice law in that manner, that lawyer might well be able to bring some of the same passion to the practice of law that Justice Brennan brought to the practice of judging throughout his long and fruitful career. And when that happens, the practice of law can be the best job in the world—or really, the second best, because as many of my co-panelists would agree, the best job was the one we had during that special year when we were fortunate enough to clerk for Justice Brennan.

