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Memorial Dedication to Justice William J. Brennan, Jr.

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*Stanley Mosk**

Thank you very much Judge Reinhardt, Dean McLaughlin, Mrs. Brennan, and members of the panel and friends.

I certainly appreciated discussion of the several characteristics of Justice Brennan and his influence on the law. No doubt his role in the modern history of American justices is secure.

Yet, it's undeniable that Justice Brennan was not always right—that is, right by a majority of a vote of his colleagues. There were times when it seemed as if he were a romanticist drowning in a sea of pragmatism. But, let me tell you, in view of the introduction, a true story that reveals how Justice Brennan, and frankly, I with him, could be innocently deceived and then apparently reach a dubious conclusion.

As mentioned, we were part of a seven man team selected by New York University to make a study of British judicial procedure. We went over to spend two solid weeks in London. And, of course, you get to know a person pretty well when you are with him morning, noon, and night, as we were with Justice Brennan. In our study, we were tremendously impressed with British judges. As perhaps you know, judges in England seldom, if ever, take a case under submission. No matter how long the matter runs, they announce their decision immediately from the bench. We were tremendously impressed with the ability and caliber of British judges who were able to do that sort of thing. Justice Brennan, as our Chairman, expressed his admiration, and members of the panel agreed with him. We expressed that admiration to our host, who was Lord Denning. However, Lord Denning said—I'll never forget this—"Well, that creates problems at times." He said it, of course, with a British accent, which I don't have. Lord Denning said, "I've got to tell you about a colleague of mine. He heard a case that went on for several weeks, and argument by counsel went on for several days." They do have unlimited oral argument in England. And he said, after the oral argument, his colleague immediately announced his decision right from the bench. Then, as Denning described it, his colleague went back into his

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chambers and his clerk helped him off with his wig and his robe. Suddenly the judge stopped, he shook his head and he slapped his side. He said, "There I go . . . I did it again. I said 'plaintiff' when I meant 'defendant.'" So, Justice Brennan and the other members of our group decided then and there that perhaps our more contemplative method in this country has something to commend it.

My next occasion with Justice Brennan came when I went back to Washington as Attorney General of California to argue a case before the U.S. Supreme Court, the case of *Arizona v. California*,¹ involving water from the Colorado River. I must, with due immodesty, confess that I thought I gave a peroration perhaps the best since Patrick Henry when I said, "The real issue in this case is whether water is to be used for people in California or for asparagus in Arizona." Well, I sat down after that great oration, and there was a tap on my shoulder, a bailiff handed me a note from Justice Brennan. It said, "Stanley, are you free this evening? Will you come over to the house for dinner?" Well, I gladly accepted, although I wondered what would have happened if somebody from Arizona had seen me going into Justice Brennan's home. During the course of the dinner, I was very circumspect: I didn't even ask for a glass of water. Ultimately, it seems the justices preferred asparagus because we lost that case eight to one.

Nothing we say here today can possibly add much to the knowledge of or the contribution of Justice Brennan to American justice. In his thirty-four years on the Supreme Court, he made an indelible impression in many ways, in many areas—civil liberties, race relations, family relations, privacy rights, religion, race, poverty, politics, equal participation in a democracy—just to mention a few concepts to which he made a significant contribution. Controversial in many subjects . . . yes. But, a permanent effect on the thinking of society . . . an emphatic yes. Yet, with all of his obvious attributes—many of them mentioned here today—Justice Brennan was essentially a modest man. When he was sworn into the Supreme Court as a member of the court, he was quoted as remarking, "I feel like the mule at the Kentucky Derby. I don't expect to distinguish myself, but I do expect to benefit by the associations."² It's impossible in the time we have to mention all or even a substantial portion of the insightful opinions written by Justice Brennan and the significant effect they've had on

1. 373 U.S. 546 (1963).

2. KIM I. EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR. AND THE DECISIONS THAT TRANSFORMED AMERICA 99 (1993).

the judicial process, but let me mention just a few.

Justice Brennan's opinion in *Fay v. Noia*³ was a scholarly and effective defense of habeas corpus and a firm denial of limitations on the exercise of the great writ. Unfortunately, limitations on the exercise of the writ had developed in many state courts. Procedural rules had placed restrictions on the exercise of the writ, despite the lack of any such limitations enumerated in the Constitution. Justice Brennan authored more than twenty-five majority opinions rejecting arbitrary limitations on the use of the great writ. His opinion in *Fay v. Noia* was a remarkable piece of scholarship. I don't know whether any of these law clerks here today worked on it, but if they did I want to commend them. His analysis, in effect, defined the role of the great writ in our history, and for a time it stifled the numerous limitations placed on the exercise of the writ, particularly in state courts. I wish I could say that *Faye v. Noia* had a permanent effect. Unfortunately, many state courts sadly, including ours in California, choose to deny petitions for the writ on mere procedural grounds—the petition is late, it's repetitive, it's not in proper form. These and other similar restrictions have frequently prevented writ petitions from being heard on the merits. As a matter of fact, in 1996 Congress passed a law that included "reform" of habeas corpus.⁴ How a constitutional right can be reformed is a matter of mystery to me, and I'm certain it would have been to Justice Brennan.

What I find almost unbelievable is the number of areas in the law in which Justice Brennan had a significant impact. He is, of course, widely known and, unfortunately, generally disregarded for his considered opposition to the death penalty on Eighth Amendment grounds. We came close to the Brennan views on capital punishment when Chief Justice Donald Wright of the California Supreme Court wrote in the *Anderson*⁵ opinion that the State, in putting a person to death in the gas chamber, was violating, not the Eighth Amendment, but our California Constitution. Wright pointed out and made quite an effect of the fact that the Eighth Amendment prohibits cruel *and* unusual punishment, but our State Constitution prohibits cruel *or* unusual punishment. And, on that basis, for a time the death penalty was outlawed in California until the people, by initiative, decided otherwise. However, Justice Brennan persisted in his

3. 372 U.S. 391 (1963).

4. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

5. *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

view on the death penalty and Thurgood Marshall consistently agreed with him.⁶ He never wavered in his belief that, just as it is wrong for an individual to kill, it's equally wrong for the state to kill, even in retaliation.

His effect, unfortunately, as I mentioned, has not been significant in this area. Today there are more than 3000 men and women on "death row" in the United States. California leads the nation, as we do in so many other areas, with more than 450 occupants of our "death row." I must confess that I would be relieved if some day in the not too distant future, the Brennan/Marshall point of view would prevail. As an aside, according to the Guinness Book of Records, the first country to abolish the death penalty was Liechtenstein in 1789, and that little nation seems to have survived ever since. So has France, which has not had a public guillotine since June 17, 1939.

In a recent book on Justice Brennan, written by no less than thirty authors, Derrick Bell discussed Brennan's opinions in the racial area.⁷ He told of efforts to distinguish, even to discredit, Brennan's views in this sensitive field. I liked the anecdote Bell used to suggest that such efforts could not prevail. He told about the rights that many white people need as well as black people. Brennan sought to eliminate this fact in face of its rejection by so many whites who feared the racial equality would somehow diminish rather than enrich their lives. For these Derrick Bell told about a group of young usurpers trying to humiliate a wise man, a wise elder, before a large gathering of his followers. "Wise man," they called out, "use your wisdom to tell us whether the bird we hold in our hands is alive or dead." There is a prolonged silence. One youth tasted victory. If the wise man claimed the bird was alive, they planned to crush it to death. And if he said it was dead, they were going to let it loose so it could fly away. So, they said, "Well, old man," they taunted him, "tell us, if you can, is the bird alive or dead?" "The answer," the wise man replied, "the answer is in your hands."⁸

Justice Brennan took giant steps to bring about equality of the sexes in government, in the judiciary, and in the economic world. In *Frontiero v. Richardson*⁹ in 1973, he maintained that women could

6. See, e.g., *Sorola v. Texas*, 493 U.S. 1005 (1989) (Brennan, J., dissenting and Marshall, J., joining).

7. See Derrick Bell, *Racial Realism in Retrospect*, in *REASON AND PASSION* 199 (E. Joshua Rosenkranz & Bernard Schwartz, eds., 1997).

8. *Id.* at 206.

9. 411 U.S. 677 (1973).

not be arbitrarily eliminated from jury service. He wrote, "our [n]ation has had a long and unfortunate history of sex discrimination [S]uch discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."¹⁰

I find it interesting in sort of a bizarre way that, many years after *Swain v. Alabama*,¹¹ the Supreme Court persisted in holding that there could be no limitation whatever on the right of attorneys to exercise peremptory challenges of prospective jurors. And here, I think, is the value of the Brennan theory of state's rights or federalism. Under *Swain* there could be no limitation on peremptory challenges. And I remember as a trial judge, I would try a criminal case—there would be a black defendant, a white prosecutor, white witnesses—and the prosecutor would challenge every black, or every minority for that matter, who was put in the jury box. That defendant would get a fair trial; I would make sure of that, but he would never believe that he had a fair trial so long as every person of his race was excluded from deciding the facts.

Well, *Swain v. Alabama* was the law for awhile until our court, our State of California court, using the concept of federalism, decided in the *Wheeler*¹² case that there could be no limitations on the use of peremptory challenges, except if they were used for a racially discriminatory purpose.¹³ As a matter of fact, we expanded the concept to include, not only race, but any cognizable group, so that it would include ethnicity, sex, race, religion, and so forth.¹⁴ Thus in *Wheeler* we decided, contrary to *Swain*, that there could be no challenges for racially discriminatory purposes. Seven years later the United States Supreme Court in *Batson v. Kentucky*¹⁵ came around to our point of view. That emphasizes to me the importance of the exercise of federalism by our states.

Justice Brennan consistently argued for equality in voting rights.¹⁶ He was very much opposed to the sixty-six and two thirds or

10. *Id.* at 684 (footnote omitted).

11. 380 U.S. 202 (1965).

12. *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

13. *See id.* at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 902-03.

14. *See id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.

15. 476 U.S. 79 (1986).

16. *See United Jewish Orgs. v. Carey*, 430 U.S. 144, 168-78 (1977) (Brennan, J., concurring in part); *Katzenbach v. Morgan*, 384 U.S. 641, 643-58 (1966); *see also* Lani Guinier & Pamela S. Karlan, *The Majoritarian Difficulty: One Person, One Vote, in REASON AND PASSION 207* (E. Joshua Rosenkranz & Bernard Schwartz, eds., 1997) (discussing Justice Brennan's evolutionary role in legislative reapportionment).

sixty percent requirement for the passage of bond issues. But, unfortunately, most of the states still require that exorbitant vote in order to authorize bond issues.

Some five centuries ago Ben Johnson wrote of the applause, delight and wonder of a person. Of course, he was referring to Shakespeare, but I apply those same phrases to William Brennan. I understand the applause, the approval, the delight, and his clear composition and the wonder at his consistent devotion to principle. The result is an enduring influence on the law and on our modern society. From 1956 to 1990 William J. Brennan served on the Supreme Court, and in his opinions, his contribution to democracy, and his personal characteristics as a judge and a warm human being he became a role model for judges, lawyers, law students and scholars throughout the land.