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Introduction—The Brennan Legacy: The Art of Judging

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INTRODUCTION

*David W. Burcham**

This is the second year that the *Loyola of Los Angeles Law Review* has sponsored a symposium as a tribute to the late Justice William J. Brennan, Jr. Last year, the symposium focused on the contributions that Justice Brennan made to the law generally and to lawyering in particular. This year we have narrowed the focus, examining Justice Brennan's legacy in the art of judging. To consider this subject, we offer the insights of three distinguished federal judges—all of whom at one time during their careers served as Chief Judge of their respective circuits—and of a distinguished scholar who served as a law clerk for Justice Brennan.

The Honorable Abner Mikva argues that Justice Brennan's approach to deciding cases demonstrated that a judge could use the traditional tools of judicial interpretation and still "do justice and move the legal landscape forward." In interpreting the broad sweeping clauses of the Constitution, Justice Brennan did not attempt to confine himself to contemporary notions of what the drafters of those provisions may have intended or meant in 1789. Rather, those broad and generalized phrases—like the Eighth Amendment's proscription against "cruel and unusual punishments"—invite succeeding generations of judges to infuse them with meaning that reflects evolving standards of decency and morality. Judge Mikva opines that Justice Brennan's greatest accomplishment on the Court was his opinion in *Baker v. Carr*,¹ which was joined by six other justices. The principle of "one person, one vote" established by *Baker*, restricted states' ability to configure voting districts in a way that effectively disenfranchised a large number of citizens. Judge Mikva also asserts that this principle laid the doctrinal foundation for the Voting Rights Act of 1964.

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1. 369 U.S. 186 (1962).

Judge Richard Arnold provides a personal account of how his approach to judging has been influenced by Justice Brennan. Judge Arnold describes Justice Brennan's decisional process as applied to a little-known case that the Court heard during the term that Judge Arnold clerked for Justice Brennan. Judge Arnold identifies several lessons that emerged from this process. First, a judge should perform judicial functions quickly. Second, opinions do not need to be lengthy; indeed, brevity is often a virtue. Third, opinions should be written in clear concise prose and should not be stilted or full of legalisms. Fourth, judges should realize that a great deal about the judging process never becomes public; "internal cogitation" has its place and a judge need not explain it in lengthy detail. Finally, there is no such thing as a "little case." Cases always involve a controversy between two or more parties, and a judge must never lose sight of the fact that each decision made should seek to advance the cause of justice.

In an interesting historically-based piece, Judge Ruggero J. Aldisert traces the conceptual underpinnings of Justice Brennan's style of judging to Oliver Wendell Holmes, Roscoe Pound, and Benjamin Cardozo. Each of these three judges espoused a judicial philosophy that judges should consider the effect of their judicial decisions on society and social welfare, and eschew adherence to a "mechanical jurisprudence of legal conceptions only." Judging necessarily and legitimately involves interstitial lawmaking. Judge Aldisert argues that Justice Brennan not only accepted this philosophy, but extended it to those cases that involved settled legal precepts that he felt were inconsistent with evolving standards of morality. Justice Brennan sought to decide cases in a manner so that "the quality of human life can be spirited, improving and unimpaired." But, Judge Aldisert argues, this approach contains inherent limitations because it has the tendency "to supplant the common law tradition of principled decision-making." Judge Aldisert suggests that predictability is an essential attribute of our legal system, and that it is severely threatened when a judge's "idiosyncratic views of desirable social welfare" are brought about by judicial decision.

Finally, Professor Larry Kramer suggests that Justice Brennan was special, not because he surpassed the intellectual stature of Justices like Frankfurter, Black, Douglas, Harlan, Stevens, Scalia,

Rehnquist, or White, or because he was an extraordinarily successful coalition builder, but because his greatness derived from who he was as a person. Professor Kramer observes that Justice Brennan was someone who did not hate. He was extraordinary because he “had a genuine, almost automatic empathy for everyone and everything.” Justice Brennan’s continuing legacy is that as a person and as a judge he inspired people to strive to be better.

