4-1-1999

The Brennan Legacy: The Art of Judging

Ruggero J. Aldisert

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*Judge Ruggero J. Aldisert**

I. INTRODUCTION

What does a judge do when he or she decides a case?

Benjamin Cardozo posed this question in 1921 and answered it in what has become a classic of American legal literature, *The Nature of the Judicial Process*.[1] Drawing from his wealth of scholarship and experience as Chief Judge of the New York Court of Appeals, he described the ingredients that enter "that strange compound which is brewed daily in the caldron of the courts."[2] Cardozo's analysis and philosophy examined the accepted definition of the judicial process: What courts do and should do, and how judges reason and should reason in deciding particular cases.[3]

We paraphrase the broad question put by Cardozo three-quarters of a century ago and attempt to answer these questions:

What did William J. Brennan, Jr. do when he decided a case?

What was the Brennan "Art of Judging?"

Is there a legacy from this art and, if so, who are its beneficiaries?

Before we consider these questions, however, we must seek to understand the Brennan philosophy of law. To do this, we must first distinguish between *the* philosophy of law in general and *a* philosophy of law.

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1. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1949).

2. *Id.* at 10.

3. *See* H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 969 (1977).

II. BACKGROUND

A. Distinctions Between "the" Philosophy of Law and "a" Philosophy of Law

The philosophy of law is a broad inquiry into what the relationship between people in society and between people and government ought to be. Legal philosophy examines the chief ideas that are common to rules and methods of law in the sense described by Roscoe Pound: "[A] body of philosophical, political, economic, and ethical ideas as to the end of law . . . ."[4] It is an inquiry into those elements that are common to all judicial systems, and a search for the universal concept of law, a study that goes beyond the particularities of individual systems, past or present—in the various states of the United States, the federal experience, or other countries. Legal philosophy deals with the various disciplines that bear directly on the solution to a galaxy of problems: inquiries into intricacies of terminology, legal methods, the role of precedent, statutory interpretation, underlying rationale, the use of different types of authority, the efficacy of various controls and their operation in diverse factual scenarios, and the basic issues concerning the values that are implemented.

On the other hand, *a* legal philosophy addresses the specific answers to these queries. These answers come from respectable thinkers, both in academia and on the bench, and each articulates, or at least demonstrates, some particular legal philosophy. A legal philosophy is expressed in the form of a quest for justice; a need to declare the law as it *should* be. Giorgio Del Vecchio explained that a "[p]hilosophy of Law seeks precisely that which *must* or *ought* to be in Law, in contrast to that which *is*, bringing an ideal truth into comparison with an empirical reality (deontology—science of what ought to be)."[5]

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4. ROSCOE POUND, I JURISPRUDENCE 363 (1959).

5. GIORGIO DEL VECCHIO, PHILOSOPHY OF LAW 4 (Thomas Owen Martin trans., Catholic Univ. of America Press 8th ed. 1953) (1930) ("Philosophy of law is the course of study which defines Law in its logical universality, seeks its origins and the general characteristics of its historical development, and evaluates it according to the ideal of justice drawn from pure reason.").

III. BRENNAN'S PHILOSOPHY OF LAW AND ITS ORIGINS

Justice Brennan's philosophy was clear cut and easily identifiable. Whether it is capable of simple definition is problematic, but I am attracted to a statement by Professor Harry W. Jones, the late Cardozo Professor of Jurisprudence at Columbia Law School, which I believe accurately describes Justice Brennan's philosophy of law:

> Law is not a form of art for art's sake; its ends-in-view are social, nothing more and nothing less than the establishment and maintenance of a social environment in which the quality of human life can be spirited, improving and unimpaired.[6]

But having a philosophy is not enough. Philosophers often offer ambitious programs to advance the cause of social progress, but these programs cannot succeed in the courts until and unless they take hold in the judge's imagination. To implement his or her philosophy, a judge must fashion, in Holmes' words, the "implements of decision."[7]

Justice Brennan found these implements, or shall we say a methodology of decision-making and decision-justifying, in the teachings of this century's great American legal philosophers—Oliver Wendell Holmes, Roscoe Pound, and Benjamin N. Cardozo.

I believe that each of these great legal philosophers was influenced by Rudolf Von Jhering, the founder and leader in Germany of social utilitarians in the last quarter of the nineteenth century. Von Jhering preached that it was not enough for a jurist to know that law is a development. He or she must also perceive how the law developed, for what purposes it developed, and to what end.[8] He broke with the prevailing *Begriffsjurisprudenz*, or "jurisprudence of conceptions."[9] Applying the "jurisprudence of conceptions," the judge

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6. Harry W. Jones, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023, 1025 (1974).

7. John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 896 (1940).

8. *See* 1 RUDOLF VON JHERING, LAW AS A MEANS TO AN END 9-10, 271-77 (Isaac Husik trans., 1968) (1903).

9. HENDRIK JAN VAN EIKEMA HOMMES, MAJOR TRENDS IN THE HISTORY OF LEGAL PHILOSOPHY 214-15 (1979); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 610 (1908).

deduced the decision in every case by a purely mechanical-logical process.[10] Von Jhering rejected this and instead called for what he termed *Wirklichkeitsjurisprudenz*, or "a jurisprudence of results," in which legal precepts would be tested by their results—their practical application—rather than by logical deduction alone.[11]

In a trilogy of memorable lectures delivered from 1897 to 1921, Holmes, Pound, and Cardozo drew upon Von Jhering's theory, and legitimized a methodology for use in the twin elements of the judicial process—the process of decision and the process of justification. The first of the trilogy was Holmes' 1897 lecture, *The Path of the Law,*[12] delivered at the dedication of the new hall at Boston University, in which Holmes stated:

> I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious . . . .[13]

Likewise, at the beginning of the century, Roscoe Pound advocated pragmatism as a legitimate philosophy of law.[14] He decried the conceptual jurisprudence of our system, the slavish adherence to precedents and the rules and principles derived therefrom.[15] In a 1906 address to the American Bar Association in St. Paul, Minnesota, Pound sounded a call for the end of what he called mechanical jurisprudence: "The most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules."[16] Pound trumpeted a theme more softly played by Holmes a decade earlier—that the social

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10. *See* HOMMES, *supra* note 9, at 212-14.

11. *See id.* at 215; Pound, *supra* note 9, at 610.

12. Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457 (1897).

13. *Id.* at 467.

14. *See* Pound, *supra* note 9, at 609.

15. *See id.* at 614-21.

16. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 731 (1906), *reprinted in* 8 BAYLOR L. REV. 1, 8 (1956).

consequences of a court's decisions were legitimate considerations in decision-making.[17]

Cardozo delivered *The Nature of the Judicial Process*[18] at the 1921 Storrs lectures at Yale. He espoused what he called the method of sociology: "The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence."[19] To address novel questions of law, Cardozo said that judges must turn to the social welfare, defined "as public policy, the good of the collective body," or "the social gain that is wrought by adherence to the standards of right conduct, which find expression in the *mores* of the community."[20]

Thus, Holmes, Pound and Cardozo laid the basis for modern jurisprudence: Judges should consider the effect of their judicial decisions on society and social welfare, rather than adhering solely to a mechanical jurisprudence of legal conceptions. Professor Calvin Woodard, the great legal philosopher from the University of Virginia, suggests that this theory draws on Jeremy Bentham's utilitarian thesis:

> [T]he advocates of Sociological Jurisprudence seized upon this aspect of Bentham's message. Like him, they insisted that law has a practical, real world moral purpose, though they defined that purpose more in terms of social justice, and the balancing of social interests, than [Bentham's] "the greatest happiness of the greatest number."[21]

The underpinnings of what has been called the sociological method run counter to the widely-held notion that only the legislative branch of government should formulate and promulgate public policy. A substantial body of thinking argues that, in a representative democracy, law-making authority should not extend to judges but should be restricted to legislators, who are openly responsible to the electorate.[22] The major premise of this body of thinking is an

17. *See* Holmes, *supra* note 12, at 468-74.
18. CARDOZO, *supra* note 1.
19. *Id.* at 66.
20. *Id.* at 72.
21. Calvin Woodard, *Thoughts on the Interplay Between Morality and Law in Modern Legal Thought*, 64 NOTRE DAME L. REV. 784, 795 (1989).
22. *See* Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interprative Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV.

attractive populist argument that the people, those intimately affected by the promulgation of law, should have the right to endorse or reject the voting record of the law-maker every two, four or six years.[23]

Facially, the argument is persuasive. Yet, when a state court invents "the law of products liability, abolishes sovereign, or charitable tort immunity, redefines the insanity defense, or restricts the range of self-exculpation in contracts of adhesion, its action is rarely attacked as undemocratic."[24] It was not until the Supreme Court began the process of selective incorporation of the Bill of Rights through the Fourteenth Amendment,[25] holding the states to higher standards of responsibility to their inhabitants, that we began to experience the heated public discussions on the jurisprudential ideologies of our judges.

Ample authority supports the law-making function of courts that operate in the common law tradition. There seem to be few limits to changing judge-made law because, as Cardozo stated:

> A rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the *mores* of the day, may be abrogated by the courts when the *mores* have so changed that perpetuation of the rule would do violence to the social conscience . . . . This is not usurpation. It is not even innovation. It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by the judges of the past.[26]

This brings us to William J. Brennan, Jr., a modern day legal philosopher, who not only accepted the philosophy of Holmes, Pound, and Cardozo, but also extended it. This extension is what I

761, 772-73 & n.48 (1989).

23. *See id.*

24. Hans A. Linde, *Judges, Critics and the Realist Tradition*, 82 YALE L.J. 227, 248 (1972).

25. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (holding a criminal defendant is entitled to a jury trial in state courts by virtue of the Sixth and Fourteenth Amendments); Griffin v. California, 380 U.S. 609 (1965) (holding that a state court judge's instruction to the jury that they may infer the defendant's guilt from his refusal to testify violates the Fifth and Fourteenth Amendments).

26. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 136-37 (1924).

perceive to be the cornerstone of any discussion on "The Brennan Legacy: The Art of Judging."

IV. THE BRENNAN "ART OF JUDGING"

Although Holmes, Pound, and Cardozo applied the sociological method only to *novel* questions of law,[27] Brennan applied it to settled precepts that he felt no longer kept pace with evolving community moral standards.[28] He liked to apply what Pound described as a "standard": a legal or moral precept expressing "general limits of permissible conduct to be applied to the circumstances of each case."[29] Professor Karl Llewellyn once said that standards "seem to be those vague but useful pictures with which one approaches a wide and varied field of conduct to measure the rights of a particular situation . . . ."[30]

What were these generous, vague, and useful pictures to which Justice Brennan turned? Two of them were found in the Constitution—the First and Fourteenth Amendments. Brennan thereby initiated the "First Amendmentization" and the "Fourteenth Amendmentization" of our society. Others were found in Brennan's eclectic methods of construing statutes. He did not hold fealty to any particular method of statutory interpretation. He did not limit himself to the old order of the "Mischief Rule"[31] announced in the sixteenth

27. *See supra* text accompanying notes 12-20.

28. *See* discussion *infra* Part IV.A.

29. Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 485 (1933).

30. Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 434 (1930).

31. "[F]or the sure and true . . . interpretation of all statutes in general," certain things must be discerned, namely "[w]hat was the common law before the making of the Act . . . [and] what was the mischief and defect for which the common law did not provide." *Heydon's Case*, 76 Eng. Rep. 637, 638 (Ex. 1584).

century *Heydon's Case*,[32] or the "Golden Rule"[33] or the "Literal Rule"[34] of Lord Atkinson.

Rather, to achieve his desired objective, Justice Brennan would apply "Intentionalism," "Literalism," "Textualism," and "Purposivism," or any combination thereof,[35] so long as he could reach the result he wanted. The Brennan polestar was to decide a case by considerations of public policy or social welfare so that "the quality of human life can be spirited, improving and unimpaired."[36] In so doing, he pulled down thunder from the sky with precedent-shattering decisions.

A. Brennan's Decision-Making and Decision-Justifying Methodology: His Legacy and Its Intended Beneficiaries

Justice Brennan was devoted to individual freedom and a desire to advance social welfare for those traditionally disempowered: Prisoners, minorities and the poor. His moral values were most visibly displayed in opinions that addressed the Civil Rights movement in the South. Thus, in *Baker v. Carr*,[37] he distinguished a line of Guaranty Clause cases in order to permit judicial review of a state apportionment scheme—typical of those that existed in the South

32. *Id.*

33. "[G]iv[e] the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience . . . ." River Wear Comm'rs v. Adamson, 2 App. Cas. 743, 764 (H.L. 1877) (Blackburn, L.J.).

34. "If the language of a statute be plain, admitting of one meaning . . . it . . . must be enforced though it should lead to absurd or mischievous results." Vacher & Sons, Ltd. v. London Soc'y of Compositors, 1 App. Cas. 107, 121 (H.L. 1912) (Atkinson, L.J.).

35. *See* RUGGERO J. ALDISERT, THE JUDICIAL PROCESS: TEXT, MATERIALS AND CASES 193-312 (2d ed. 1996) (explaining "Intentionalism" as a rule of interpretation that ascertains legislative intent; "Literalism" as Lord Atkinson's "Literal Rule" from Vacher & Sons, Ltd. v. London Soc'y of Compositors, 1 App. Cas. 107, 121 (H.L. 1912); "Textualism" as the "Golden Rule" from River Wear Comm'rs v. Adamson, 2 App. Cas. 743, 764 (H.L. 1877); and "Purposivism" as analogous to the "Mischief Rule" in *Heydon's Case*, 76 Eng. Rep. 637, 638 (Ex. 1584)).

36. Jones, *supra* note 6, at 1025.

37. 369 U.S. 186 (1962).

during the 1950s and 1960s—in which the voting power of minorities was significantly diluted. By phrasing the issue as one concerning equal protection rather than the Guaranty Clause,[38] Justice Brennan was able to convince six of his colleagues on the Court that a traditionally unreviewable area of law was, in fact, justiciable.[39]

Similarly, the Civil Rights movement provided Brennan a forum for the significant expansion of the First Amendment. In *New York Times Co. v. Sullivan*,[40] an Alabama police commissioner brought a libel claim against the newspaper and signatories to a paid editorial advertisement critical of police action aimed at preventing black citizens from exercising their right to vote.[41] If the common law had been applied, the Court would have been required to find in favor of Sullivan on the basis of libel per se. Justice Brennan rejected that outcome and held that in order to maintain the viability of open and robust debate, the First Amendment must extend to protect criticisms of public officials made without "actual malice."[42] Any contrary approach would "[impose] fear and timidity . . . upon those who would give voice to public criticism."[43] He wrote: "The rule [of libel per se] thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments."[44] Therefore, he sounded the death knell for the centuries old defamation law insofar as public officials were concerned.

Although political patronage was an active part of the American political process at the time the Bill of Rights was adopted, Justice Brennan decided, 200 years after the Declaration of Independence, that political patronage violated the First Amendment. In *Elrod v. Burns*,[45] he declared that "[t]he cost of the practice of patronage is the restraint it places on freedoms of belief and association."[46] In this case the First Amendment triumphed.[47] Twenty years later,

38. *See id.* at 226-27.
39. *See id.* at 237, 266.
40. 376 U.S. 254 (1964).
41. *See id.* at 256.
42. *See id.* at 279-80.
43. *Id.* at 278.
44. *Id.* at 279.
45. 427 U.S. 347 (1976).
46. *Id.* at 355.
47. *See id.* at 373 (holding that the practice of patronage dismissals is un-

however, the question remains whether a society is better off having strong political parties endowed with a patronage base, or adhering to the modern concept that voters should choose the best candidate that money can buy.

In *Fay v. Noia*,[48] Justice Brennan championed the rights of prisoners by expanding the scope of federal habeas corpus review, holding that the petitioner's failure to exhaust state court remedies did not preclude federal review of his habeas petition.[49] The petitioner and two co-defendants had been convicted on the basis of illegally obtained confessions.[50] Fearing the prospect of the death penalty if his conviction was vacated and a new trial ordered, Noia chose to forego appeal of his life sentence.[51] The co-defendants, however, appealed and were subsequently released from custody.[52] Twenty years after his conviction, Noia sought habeas relief.[53] Even though Brennan's view is no longer accepted,[54] to identify his legacy today, we should consider the language he used at that time: "For such anomalies, such affronts to the conscience of a civilized society, habeas corpus is predestined by its historical role in the struggle for personal liberty to be the ultimate remedy. If the States withhold effective remedy, the federal courts have the power and the duty to provide it."[55]

Perhaps Justice Brennan's desire to reach what he considered a just and socially responsible outcome is best depicted in *United Steelworkers of America v. Weber*,[56] a case that interpreted Title VII of the Civil Rights Act of 1964 in the context of a private, voluntary race-conscious affirmative action plan.[57] Justice Brennan recognized that the argument of both the company and the union was based on the statutory language that "[I]t shall be an unlawful employment practice for any employer [or] labor organization . . . to discriminate

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constitutional under the First and Fourtheenth Amendments).

48. 372 U.S. 391 (1963).
49. *See id.* at 398, 399.
50. *See id.* at 395.
51. *See id.*
52. *See id.*
53. *See id.* at 397 n.3.
54. *See infra* note 68 and accompanying text.
55. *Fay*, 372 U.S. at 441.
56. 443 U.S. 193 (1979).
57. *See id.* at 193.

against any individual because of his race, color, religion, sex, or national origin. . . ."[58] He rejected the statute's plain language and resorted to snippets of Title VII's legislative history, concluding that the affirmative action plan followed by the employer and the union did not violate the statute by giving employment preferences to blacks.[59] Justice Brennan wrote:

> It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.". . . The prohibition against racial discrimination in . . . Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose . . . . Examination of those sources makes clear that an interpretation of the sections that forbade all race-conscious affirmative action would "bring about an end completely at variance with the purpose of the statute" and must be rejected.[60]

Thus, although he recognized that adherence to the language of the statute would dictate a different result, he looked beyond the statute to portions of the legislative history and found a way to reach what he considered the socially desirable result.[61]

However, in an attempt to reach a "socially desirable result," Justice Brennan preferred Emerson's description of hobgoblins and little minds[62] and refused to become a slave to consistency. This is especially true in his references to the state judiciary. Dissenting in *Stone v. Powell*,[63] he believed that federal habeas corpus review was necessary even in claims based on Fourth Amendment violations, because he *distrusted* the state judiciaries' ability to protect prisoners' civil rights:

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58. 42 U.S.C. § 2000e-2(d) (1994).
59. *See Steelworkers*, 443 U.S. at 197.
60. *Id.* at 201-02 (citations omitted).
61. *See id.* at 203-04.
62. 2 RALPH WALDO EMERSON, *Self Reliance*, *in* THE COLLECTED WORKS OF RALPH WALDO EMERSON 33 (Belknap Press of Harvard Univ. Press 1979) (1841).
63. 428 U.S. 465 (1976).

> State judges popularly elected may have difficulty resisting popular pressures not experienced by federal judges given lifetime tenure designed to immunize them from such influences, and the federal habeas statutes reflect the congressional judgment that such detached federal review is a salutary safeguard against *any* detention of an individual "in violation of the Constitution or laws . . . of the United States."[64]

Yet, one year later, in his law review article, *State Constitutions and the Protection of Individual Rights*,[65] he appealed to state judiciaries to look to their state constitutions to encompass rights not covered by the federal constitution,[66] and wrote:

> [D]ecisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues . . . . [S]tate court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.[67]

In these two instances, Justice Brennan appears to have both distrusted and endorsed the state judiciaries. However, this anomaly may be reconciled by the Brennan art of judging: The right reasoning is that which advances social welfare; in this instance, the cause of personal liberty.

In the end, the legacy of the Brennan art of judging comes to this: He would achieve law's utilitarian purpose by promulgating an appropriate declaration of "public policy" or "social welfare" in the guise of interpreting a clause of the Constitution or a Congressional statute.

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64. *Id.* at 525 (Brennan, J., dissenting).
65. 90 HARV. L. REV. 489 (1977).
66. *See id.* at 502-03.
67. *Id.* at 502.

Unfortunately, the task of declaring what is appropriate "public policy" or "social welfare" permits no easy definition. Like beauty, desirable "public policy" or appropriate "social welfare" rests in the eye of the beholder. To formulate what is deemed desirable public policy or appropriate social welfare is like turning to a jurisprudential genie for assistance. However, once the genie is released from its bottle, it is not easily confined and takes on many hues and permutations.

We see the genie at work in today's Supreme Court. The Justices have adopted the Brennan method of proclaiming what is and what is not appropriate or desirable.[68] But, the Brennan methodology and its subsequent use by the present Court meet at an intersection with a resounding crash demonstrating the danger of relying on community standards instead of hefty, hearty legal rules and principles.[69]

In assessing the Brennan legacy on the art of judging, we cannot overstate the care that is necessary in selecting judges today. Result-oriented judges must be chosen with particular care. Thus, we need not interest ourselves with a judge's behavior on the bench, his or her *judicial* temperament, the darling consideration urged by lawyers who want a judge who is tasteless, odorless and colorless. Rather, it is more important to know the prospective judge's philosophy, the judge's *jurisprudential* temperament.

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68. The current Court's approach can be seen most clearly in cases involving legislation aimed at benefiting traditionally disadvantaged minorities. Where Justice Brennan used result-oriented methodology to expand constitutional protections for minorities, the current Court uses the same approach as a basis for holding that "equal protection" means that all people should be treated equally under the law, and that any legislation that singles out a certain group for special treatment will be subjected to a heightened level of constitutional scrutiny. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that an affirmative action plan in case of minority set-asides for guardrail contract is subject to strict scrutiny); Shaw v. Reno, 509 U.S. 630 (1993) (holding that the legislative apportionment scheme was so irregular on its face that it could only have resulted from race-conscious gerrymandering); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding unconstitutional an affirmative action plan that required city to award percentage of subcontracts to minority business enterprises).

69. *See supra* note 68 and accompanying text.

There is an enormous difference between *judicial* temperament and *jurisprudential* temperament. Some judges have lower thresholds than others, and are more inclined to find solace in shades and fringes rather than the black letter law. But, when they adjudicate in this manner, it means that they have exhausted the guidance that hefty, hearty precedents can provide, and feel they must turn to other resources. These resources are found in the body of broad moral standards that form the basis of legal philosophy.[70] For this, we look to the observations of Illinois Supreme Court Justice Walter V. Shaefer:

> If [the judge] views the role of the court as a passive one, he will be willing to delegate the responsibility for change, and he will not greatly care whether the delegated authority is exercised or not. If he views the court as an instrument of society designed to reflect in its decisions the morality of the community, he will be more likely to look precedent in the teeth and to measure it against the ideals and the aspirations of his time.[71]

Thus is presented the problem when practitioners of the judicial process move from legal rules and legal principles in the gradual tradition of the common law to sudden bold new interpretations that find justification only in newly-defined public policy.

B. The Emergence of Divergent Views: Using Brennan's Decision-Making Methodology to Advance an Altered Justification

We now come to the final dimension of the Brennan legacy: His art of judging may produce extremely fragile results subject to the jurisprudential temperament of those who sit on the Court. Sociological jurisprudence now seems enshrined as a legitimate and appropriate tool in decision-making and decision-justifying. The methodology and the techniques of making the decisions have

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70. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 37 (1977). Professor Dworkin suggested that when this occurs, the decision depends "on the judge's own preferences amongst a sea of respectable extra-legal standards, any one in principle eligible, because if that were the case we could not say that any rules were binding." *Id.*

71. Walter V. Shaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 23 (1966).

remained constant, but they are being used by new judges who have different views of public policy, changed concepts of what constitutes "the standards of right conduct," and "the *mores* of the community," and changed ideas of "the social ideals of the community."

Consequently, the results fashioned by those implements have shifted dramatically. Although Brennan's methodology was result-oriented, his legacy has not preserved the results that it attained in the past. Instead, his legacy is the present Court's use of his methodology to reach decisions in which Justice Brennan never would have joined.[72]

Thus, we see the danger of any judicial process that is based primarily on the notion of proper public policy and desirable social welfare. Chanting the mantra, "What was good for Justice Brennan is good enough for us," the Court's new majority brings the methodology to full flower. While the method may be in full flower, the results advocated by William J. Brennan, Jr. are wilted and decomposing.

The Brennan methodology seems enshrined as a legitimate and appropriate tool in decision-making and decision-justifying, largely due to Justice Brennan's brilliant use of it. This is what we can describe as "*How* we do it." But, "*How* we do it" was only one half of the judicial process that he employed. The other half is what we may call "*Why* we do it," or more specifically stated, *why* sociological jurisprudence was utilized instead of adhering to the common law tradition of decision-making and decision-justifying. In the Brennan legacy, "*How* we do it" was used for a deliberate purpose—to improve the quality of human life among those who were disenfranchised, those who felt powerless in the criminal justice system, those who suffered from employment discrimination, and those who endured the daily pain of social and neighborhood ostracism.

There was always a reason for defining new concepts, always a reason for "*Why* we do it," for abrogating past decisions and past philosophies, and for plowing new ground. And if we can concede, as we must, that the Brennan techniques were utilized to advance the cause of the voiceless and the oppressed because the other branches of government had failed to protect basic rights, we must then

72. *See supra* note 68 and accompanying text.

question whether it is legitimate to utilize these same techniques today when persuasive reasons are not given for their use,[73] and when no identifiable explanation is set forth to depart from traditional decision-making techniques, including orthodox criteria of when to depart from precedents.[74] This is the critical question when we consider the Brennan art of judging. We can ask whether the implements of decision used to achieve political equality and social as well as economic justice may legitimately be used when no purpose has been stated to depart from the common law tradition of incremental judicial law making, and when the methodology is employed for reasons other than to better the plight of the traditionally disadvantaged.

V. CONCLUSION

Wholesale judicial declarations of public policy and social welfare—as envisioned by Holmes, Pound, Cardozo and Brennan—were not intended to supplant the common law tradition of principled decision-making. There has to be what Holmes called "predictability in the law,"[75] and this is difficult, if not impossible, to find through expression of idiosyncratic views of desirable social welfare. Perhaps we are seeing too much of it today. Perhaps we are seeing too much decision-making decided "by the size of the Chancellor's foot" and not seeing sufficient expressions of adequate judicial reasoning, but only a naked statement of a judge's own preferences in a sea of extralegal standards.

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73. Surely, "reasons" are being stated in these race-related cases, but the jury is still out on whether these may be called "persuasive reasons." Thus in *Shaw v. Reno*, 509 U.S. 630, 650 (1993), we are told:

> [R]eapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.

Id. at 650.

74. For when to depart from precedent, see cases collected in *Payne v. Tennessee*, 501 U.S. 808, 848-49 (1991) (Marshall, J., dissenting), and in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265. 270-71 (1995).

75. Davis, *supra* note 7, at 896.

Good reason is the only support for judicially-created law. Where good reason is absent, the rule of law is always suspect. Perhaps Justice Felix Frankfurter said it best upon his retirement after twenty-three years on the Court: "[F]ragile as reason is and limited as law is as the expression as the institutionalized medium of reason, that's all we have standing between us and the tyranny of mere will and the cruelty of unbridled, undisciplined feeling."[76]

William J. Brennan, Jr.'s genius was that he combined the "medium of reason" with total faithfulness to an end-in-view of law, described as "the establishment and maintenance of a social environment in which the quality of human life can be spirited, improving and unimpaired."[77] He was more than a patron of the interplay between morality and law in modern legal thought; he was its caretaker. His legacy then finds majesty in the words of Professor Calvin Woodard:

> What better measure is there of the value of a legal system, or indeed of the rule of law, itself, than the quality of life of those subject to it? And, if this approach stresses the morality of results, it also puts a huge moral burden on the hand that wields the tool of law.[78]

76. Felix Frankfurter, *Between Us and Tyranny*, TIME, Sept. 7, 1962, at 15.

77. Black v. Bayer, 672 F.2d 309, 319 n.14 (3d Cir. 1982) (quoting Harry W. Jones, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023, 1025 (1974)).

78. Woodard, *supra* note 21, at 796.