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JUSTICE BRENNAN AND THE HUMAN SIDE OF JUDGING

*Larry Kramer**

Speaking at this conference has become a nightmare for me. First, I am the last speaker on an afternoon panel, when everyone is feeling drowsy after a long and delicious lunch. Second, I have to follow Richard Arnold, and what could be worse than having to follow Richard. Third, now that I am here, I see that I am completely out of place. When the organizers of this conference invited me to speak, I asked who would be on the panel. They listed the names, and I thought, "Wow. Mikva, Aldisert, Arnold. It would be an honor to participate." But now that I am up here, I cannot stop thinking of a rally I saw after the Chicago Bulls won their fourth championship. They carried each of the trophies out, one at a time, for the crowd to cheer. Michael Jordan carried one, Scottie Pippen carried one, Dennis Rodman carried one, and they gave the fourth trophy to Steve Kerr. Now I suspect that even those of you who are not basketball fans know the names Jordan, Pippen, and Rodman. Well, I feel like Steve Kerr.

But here I am. It took me a long time to decide what to say, and a theme occurred to me only a few weeks ago, after I participated in a debate sponsored by one of the lawyers' chapters of the Federalist Society. The debate was entitled, "Justice Brennan: Hero or Villain?" There were no other choices—just hero or villain—and the point was to evaluate Justice Brennan's legacy. It was an interesting event for a number of reasons. I told the audience—I was the last speaker on that panel as well—that I felt as if I had been let into someone's bathroom or bedroom, the place where their hair comes down and they finally reveal what they *really* think about things. It was a scary experience. There was so much anger in the room. Members of the audience actually heckled me throughout the

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event—unable to repress their impatient fury. Others could not control the impulse to jeer. And I thought to myself, “The Warren Court and the Great Society ended a long time ago. After so many years in power, why are you so angry?” It was a reflection, though, of the audience’s deep frustration.

The attitude of the audience toward Justice Brennan was equally interesting. For as much as they reviled the Justice—and they did—they also respected him enormously. They respected him not for what he had done, but merely for the fact that he had done it. Under his guidance, they said, the Supreme Court remade American society. The changes may have been bad, but the audience members were nevertheless almost in awe at how the Justice had managed to make them. They seemed really to believe that we live in a society ruled by judges and that Justice Brennan deserves most of the credit—or blame. The unreality of this assumption is probably a topic for a different conversation, but I should at least note my skepticism. I am not skeptical about Justice Brennan’s role as a leader of the Court. Rather, I am skeptical about claims that the Supreme Court, or any court for that matter, has been a principal mover in bringing about significant social change. Further, I regard the claim that we live in a system run by judges as certifiable. The Framers understood the inherent limits of judicial activism better, it seems, than their conservative posterity. Courts have never managed to produce more than the most marginal changes in society unless they were guided by the legislative and executive branches. Be that as it may, the members of that audience—and I took them to be representative of a larger number of conservatives—were convinced that Justice Brennan led whatever changes the Supreme Court had managed to make. They saw him as an enormously effective Justice, a verdict with which I wholeheartedly concur.

The most interesting aspect of the meeting was the utter certainty of everyone in the room that Justice Brennan achieved what he did by being Machiavellian in the worst sense of the word: he knew what he was doing was wrong, they said, he knew it was illegal and inconsistent with the Constitution, but he did not care. Words like “arrogant,” “evil,” and “deceitful” slipped comfortably into the conversation to describe how Justice Brennan foisted his personal philosophy on the American people, and most of the audience was

happy to attribute the worst possible motives to explain the Justice's decisions.

I told them they were being unfair to Justice Brennan and to the many other people who shared his views by simply dismissing the whole crowd as two-faced and deceptive. It is always more sensible, I argued, to assume that one's opponents approach an issue with the same good faith we assume in ourselves. This was not a wholly successful tack, I am afraid. After hearing my arguments in defense of Justice Brennan's views, one member of the audience declared that he now understood why conservatives assumed that liberals must be lying because, he announced, no one could possibly believe the stupid arguments I was making. As much as the audience admired Justice Brennan for his effectiveness as a judge, it truly disliked him as a man.

I found myself surprised and more than a little angry at this grotesque misperception of who Justice Brennan was and why he was so effective. They had not just missed what it was that made Justice Brennan a special kind of judge, but they had it exactly backwards.

Before elaborating, let me mention a few things that, in my view, do *not* explain why Justice Brennan was special. First, his success as a judge was not attributable to his having an especially powerful intellect or being a dazzling legal analyst. Do not misunderstand, the Justice was extremely smart. The analysis in countless of his opinions is powerful and ingenious. The cases discussed by Judges Mikva and Aldisert—cases like *New York Times v. Sullivan*¹ and *Baker v. Carr*,² for example—were brilliantly conceived, particularly if one evaluates them in their historical context. The same could be said for many of the Justice's less momentous decisions, too many to list. Consider, for example, *Monell v. Department of Social Services*,³ in which Justice Brennan persuasively justified overturning an interpretation of Section 1983⁴ that precluded municipal liability;⁵ or his scholarly dissent in *Atascadero State Hospital v.*

1. 376 U.S. 254 (1964).

2. 369 U.S. 186 (1962).

3. 436 U.S. 658 (1978).

4. 42 U.S.C. § 1983 (1970).

5. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 658-704 (1978).

Scanlon, which makes an impressive case for limiting sovereign immunity under the Eleventh Amendment to diversity cases.⁶ But while Justice Brennan was a first-rate lawyer, he served with many equally impressive colleagues. One simply cannot say that, as a lawyer or an intellectual, Justice Brennan surpassed Justices like Frankfurter, Black, Douglas, Harlan, Stevens, Scalia, Rehnquist, or White. Yet he did surpass them as a judge.

Nor is Justice Brennan's greatness attributable to his success as a coalition builder. The Justice was indeed a coalition builder—though by the time I clerked for him, in 1986, “building a coalition” mostly meant putting into the opinions whatever was necessary to get that difficult fifth vote, with the idea that we could sort out whatever mess we created in later cases. The Justice was, in this sense, a successful accommodationist, with the patience to let his positions unfold slowly. His ability to mold the Court's doctrine over time thus was indeed remarkable. But, again, in my view, this was not what made the Justice special.

What made Justice Brennan special as a judge was who he was as a person. He was extraordinary in many ways, but in one quality especially. He was, so far as I observed, someone who did not hate: someone without anger, without malice, without bitterness. He is the only person I have ever met about whom this could be said. The rest of us have things that get under our skin, things that make us spiteful and small. And whether we like it or not, whether we admit it or not, that dark side plays a part in molding our judgments, often without our knowing it. This simply was not true of Justice Brennan. Hate simply was not in him or part of him. To be sure, he sometimes acted as if he were angry, as if he disliked someone or hated something. But his heart was never really in it. The cheeriness that everyone who met him experienced was always there, peeking through. It was as if, in expressing anger, Justice Brennan was going through the motions, trying to act like the rest of us. But a grin and a self-conscious chuckle were invariably just beneath the surface.

This is a slightly different point from one that is often made about Justice Brennan: that he was a lovely, charming man. He *was*

6. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247-302 (1985) (Brennan, J., dissenting).

a lovely charming man. But that was a product of the quality I am talking about, which was inborn. Justice Brennan had a genuine, almost automatic empathy for everyone and everything. I could be wrong here—there are people on this panel and in the audience who knew the Justice far better than I did. But this was my impression, viewed from the peculiar, and peculiarly close, vantage afforded to a law clerk. I should add, as well, that I worked for Justice Brennan during the dark days, or what we thought of as the dark days: when the Justice had long ceased winning frequently, when we were producing two to three times as many dissents as opinions for the Court, when we talked about “defensive denials” of certiorari and could call the clerk’s office to tell them to run the “usual” dissent in capital cases because we were running it so often.

What made Justice Brennan an extraordinary judge was how this unique personal quality shaped and was part of his judging. This thought first occurred to me at a talk given by another former Brennan clerk, Richard Posner. Judge Posner has devoted considerable time and effort to the study of reputation, including a book about Justice Cardozo subtitled “A Study in Reputation” in which he tries to decipher the source of Cardozo’s immense prestige.⁷ There are, I suppose, many different qualities that can make a judge memorable or earn a great reputation. In the case of Justice Brennan, however, it was his ability to let who he was as a person shape who he was as a judge.

Justice Brennan believed in the goodness of people. He believed in the dignity of each individual and in the capacity of each person to be better. He believed these things not in some abstract philosophical sense, but in his blood, naturally and instinctively. He confronted evil, of course, and he saw people do terrible things. His opposition to racism and sexism and the death penalty was heartfelt. But the way he responded to these wrongs was motivated less by anger at the perpetrators than by a belief that they could learn, could change, could be better. The Justice understood that people make mistakes and commit evil acts. He understood that people are often less than their best selves. He understood that institutions made up of people acting in complete good faith could still do terribly wrong

7. See RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1990).

things. But his decisions and his judgments reflected a deep and abiding faith in the possibility of progress. He believed that the Constitution could inspire and encourage us to be better and to do better.

A lot of complex issues still need to be sorted out before we can turn such ideas into a jurisprudence. There are questions that need to be asked about the role of judges and precedent, about separation of powers and democracy, about translating concepts over time and fidelity to text and to history. But fundamentally, it was this simple quality of believing in people and never hating them that lay at the heart of Justice Brennan's jurisprudence and that constituted the fundamental motivating force behind his choices and his judgments.

I am loath to say much by way of predicting Justice Brennan's legacy. His work may or may not stand the test of time. We may one day find that everything he did or tried to do has been rejected, his major decisions repudiated or abandoned. Yet even then, I suspect, he will be remembered as one of the great Justices of the Supreme Court, if only for the goodness and the humanity of his opinions and his life.

I have spent much of the past five years studying history, and one of the remarkable things I have observed is how history has a curious way of remembering well those who—like Justice Brennan—act on the basis of hope and faith that we could be better rather than cynicism that we could be worse. It is why, given a choice, most of us would rather be Jefferson than Adams, or Madison rather than Hamilton, or Lincoln rather than Taney—or anyone else in Lincoln's generation. It is why most of us would rather be Louis Brandeis or Earl Warren than George Sutherland or Felix Frankfurter. It is why the public that rejected Richard Nixon still embraces Bill Clinton. For all his weaknesses and flaws, most people sense that Clinton believes in them, whereas no one who heard those awful tapes could see Nixon as anything other than a spiteful, hate-filled man. Not that history forgets the cynics or the haters, but it favors men and women who are like Justice Brennan, and for good reason. As a person, and so as a judge, and a public figure, Justice Brennan inspired people to strive to do better. It is an admirable legacy.