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In Honor of William J. Brennan, Jr.

Daniel J. O'Hern

FOREWORD

IN HONOR OF WILLIAM J. BRENNAN, JR.

DANIEL J. O'HERN*

I am honored to have been asked to write a Foreword to your symposium issue celebrating the Bicentennial of the Bill of Rights. I am especially pleased that the issue is dedicated to retired Justice William J. Brennan, Jr., as an acknowledgment of his contributions to safeguarding and extending the basic freedoms set forth in the Bill of Rights. I am also pleased to join in the issue with a person as creative as Professor Charles L. Black, Jr., with his unique perception of the relationship between the civilizing influences of law and poetry.

I leave it to others to comment on the legal achievements of Justice Brennan. His substantive accomplishments are towering, and their detailed analysis will engage the best of legal minds for decades. I prefer to share with your readers some reflections on the personal qualities of Justice Brennan that so favorably struck me in the fortunate year that I spent with him as a clerk on the United States Supreme Court. His concern for the life of the Court and for the quality of its work was exhaustive and all-encompassing. Most significant to me was the intense quality of humanity that he brought to his work from the very beginning. That quality brings to mind the timeless message of the eighty-second Psalm and Justice Brennan's fulfillment in his lifetime of that Psalm.

Let the weak and the orphans have justice.
Be fair to the wretched and destitute.
Rescue the weak and needy.

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* Justice of the New Jersey Supreme Court. Daniel J. O'Hern clerked for former Associate Justice Brennan during the 1957 Term.

Save them from the clutches of the wicked.[1]

The world has turned many times since that wonderful day when fate granted me the opportunity to become a clerk of Justice Brennan for the Supreme Court's October 1957 Term. It is so difficult now to recall the temper of that time, following shortly after the McCarthy era. The American public had a consuming curiosity about confidential advisors to their high officers of government. The Justices' law clerks came in for what was described as "some rather ill-tempered and ill-intentioned scrutiny." The law clerks were characterized as a "second team," as "ghostwriters," and, more insinuatingly, as "wielders of unorthodox influence." The charge was made that "the influence they exert comes from the political Left."[2] How amusing all of this seems now! Actually, all that any of that band of law clerks ever achieved with Justice Brennan was lifelong friendship. To this day, he remembers not only the two of us who clerked for him, but each and every clerk for the Court during that Term. And so enduring is that personal relationship that we have from time to time visited with him as a group and renewed memories of that wonderful year.

I am sure that none of us had any sense at that time of the majestic influence that Justice Brennan was to have on the life of American law. Who could have foreseen that he would serve on the Court longer than all but a handful of Justices and help to bring about one of the most remarkable transformations in American law? One thing is certain: we were surely not the ones to bring about this transformation. For the truth of the matter is that law clerks have no such influence on men such as Justice Brennan—and today we may say women. His philosophy was as clear and fixed then as it is today. In *Speiser v. Randall*,[3] he set forth the principles from which he has never departed:

> Where one party has at stake an interest of transcending value—as a criminal defendant his liberty . . . the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights.[4]

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[1] *Psalms* 82:3-4.

[2] N.Y. Times, Apr. 27, 1958, § 6 (Magazine), at 16.

[3] 357 U.S. 513 (1958).

[4] *Id.* at 520-21, 525.

That philosophy had been clear as early as 1953 from his dissent in *State v. Tune*[5] in which he would have allowed a capital defendant to inspect before trial a copy of his own confession. In his characteristically plain way, he expressed the views that would carry him throughout his career:

> It shocks my sense of justice that in these circumstances counsel for an accused facing a possible death sentence should be denied inspection of his confession which, were this a civil case, could not be denied.[6]

> [W]e ought not in criminal cases, where even life itself may be at stake, forswear in the absence of clearly established danger a tool so useful in guarding against the chance that a trial will be a lottery or mere game of wits and the result at the mercy of the mischiefs of surprise.[7]

> In the ordinary affairs of life we would be startled at the suggestion that we should not be entitled as a matter of course to a copy of something we signed.[8]

> [T]he majority['s] view [denying discovery] sets aside the presumption of innocence and is blind to the superlatively important public interest in the acquittal of the innocent.[9]

> The holding of this case gives the majority's protestation that "In this State our courts are always mindful of the rights of the accused" a hollow ring. The assurance seems doubly hollow in light of the emphasis upon formalism in this case while it has been our boast in all other causes that we have subordinated the procedural niceties to decisions on the merits.[10]

These themes were repeated throughout Justice Brennan's career, the emphasis on the human aspect or individual justice of the case and a disdain for formalism.

The central theme and organizing principle of all of his years on the Court has been to fulfill the role of the judge as the impartial guardian that stands between the citizen and the state. He summarized this judicial concern for the individual in *Fay v.*

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[5] 13 N.J. 203, 98 A.2d 881 (1953).
[6] *Id.* at 231, 98 A.2d at 896 (Brennan, J., dissenting).
[7] *Id.* at 228, 98 A.2d at 894-95 (Brennan, J., dissenting).
[8] *Id.* at 232, 98 A.2d at 897 (Brennan, J., dissenting).
[9] *Id.* at 234, 98 A.2d at 898 (Brennan, J., dissenting).
[10] *Id.* at 235, 98 A.2d at 898 (Brennan, J., dissenting).

Noia,[11] a 1963 decision that extended the scope of the writ of habeas corpus. In speaking of the varied expressions of the writ of habeas corpus as a great constitutional privilege, he wrote: "Behind them may be discerned the unceasing contest between personal liberty and government oppression."[12] He quoted Justice Holmes in stating that "Habeas Corpus cuts through all forms and goes to the very tissue of the structure."[13] Again a desire to get away from formalities and get to the heart of the issue.

I have often pondered whence came Justice Brennan's sense of injustice. Did it spring, perhaps, from some inherited distrust for English authority? If so, it is consistent then with the great ideals of our society.

> The founders of our institutions, deeply distrustful of judges beholden to the Crown, sought to guarantee forever liberty under law. To preserve their freedoms, they created three branches of government, and vested executive, legislative, and judicial powers in these separate agencies to guarantee the independence of each.[14]

In describing the need for such judicial independence, Justice Frankfurter recalled the words of John Adams in the First Constitution of Massachusetts:

> It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.[15]

In every sense, Justice Brennan fulfilled this ideal of the judge who was as free, impartial, and independent as the lot of humanity will admit. Though he may now gain some surcease from his labor, is not the preservation of the Bill of Rights by an independent judiciary the enduring legacy of Justice Brennan's life on the Court? He has given us an ideal that each may follow. It could never have been said more eloquently than by his successor, Justice Souter, at his own confirmation hearings: "Justice Brennan is going to be

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[11] 372 U.S. 391 (1963).

[12] *Id.* at 400-01.

[13] *Id.* at 411.

[14] *In re* Randolph, 101 N.J. 425, 433-34, 502 A.2d 533, 537 (1985) (citing Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 962 (1983) (Powell, J., concurring)), *cert. denied*, 476 U.S. 1163 (1986).

[15] Pennekamp v. Florida, 328 U.S. 331, 355 (1946) (Frankfurter, J., concurring).

remembered as one of the most fearlessly principled guardians of the American Constitution that it has ever had and ever will have."[16] In doing so, Justice Brennan has allayed the fears of Professor Charles L. Black, Jr., who was quoted as saying:

> Law in latter days has gained much in realism, in hard-headedness, in disdain for orotundity and rhetorical glitter. This gain, like all gains, comes with its built-in peril—in this case the deadly peril of the loss of the poetry of law. . . . The poetry of law is the motive for solving problems, the sacred stir toward justice, our priceless discontent at the remoteness of perfect law.[17]

Justice Brennan has never lost that sacred stir toward justice; nor has he yielded to discontent at the remoteness of perfect law. Like the psalmist, he knows that this is an imperfect world and that judges, like poets, can only strive to give it meaning.

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[16] N.Y. Times, Sept. 15, 1990, at 1, col. 6 (quoting Article XXIX of Declaration of Rights of the Constitution of Massachusetts, 1780).

[17] Hartley, *Introduction* to C. BLACK, OWLS BAY IN BABYLON iii-iv (1980).