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MORNING COFFEE WITH JUSTICE BRENNAN

EVAN CAMINKER*

Legal scholars and practitioners alike have recognized Justice William J. Brennan, Jr. as one of the greatest influences on Public Interest Law in the history of American jurisprudence.¹ On July 24, 1997, Justice Brennan died at the age of 91, leaving a legacy of over 1300 opinions written over the course of 34 years on the United States Supreme Court.²

The Public Interest Law Journal asked Professor Evan Caminker to write a personal remembrance of Justice Brennan, recounting the manner in which he worked to advance the public interest. Professor Caminker clerked for Justice Brennan during his last term on the Supreme Court, and has spent his subsequent career advancing the public interest through legal practice and scholarship.

Justice William Joseph Brennan, Jr., exemplified the ideals of lawyering in the public interest, albeit from the bench rather than the bar. Justice Brennan enjoyed unparalleled success in his quest to shape the content of public law through a relentless pursuit of social justice during 34 years of constitutional jurisprudence. Less directly, but perhaps no less significantly, Justice Brennan inspired several generations of public-minded lawyers to commit themselves to building on the edifice of his constitutional vision through litigation and law reform efforts. In a more limited but still significant sphere, Justice Brennan fostered the maturation and inspiration of over one hundred law clerks who, whatever their ultimate professional niches in the legal system, emerged from

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¹ See, e.g., Linda Greenhouse, *William Brennan, 91, Dies; Gave Court Liberal Vision*, N.Y. TIMES, July 25, 1997 at A1 (President Clinton's statement that Brennan's "'devotion to the Bill of Rights inspired millions of Americans, and countless young law students, including myself'"); David Halberstam, *The Common Man as Uncommon Man*, in REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 22, 24-25 (E. Joshua Rosenkranz and Bernard Schwartz, eds., 1997) (citing with agreement federal Judge John J. Gibbons' observation that "Brennan was 'more humane than Holmes, broader in outlook than Brandeis, more practical and flexible than Black, a finer scholar than Warren, more eloquent than Hughes, more painstaking than any of them. He appears, in other words, to be the most outstanding justice in our century'"); Laurence H. Tribe, *Sticks and Carrots: The Doctrine of Unconstitutional Conditions*, in REASON AND PASSION, *supra*, 123, 132 (Brennan "articulated a set of basic principles that composes the modern doctrine of unconstitutional conditions and protects individuals and businesses alike from unjustified government encroachment").

² See Greenhouse, *supra* note 1, at A1.

their clerkship year enthused and well-trained to battle social injustice howsoever defined.

I was one of that very fortunate group of clerks, indeed one of his last. Like the hundred before me, I emerged from that cherished experience having consumed an unceasing flow of exemplars of public interest lawyering — visions of social justice, of the rule of law, of professional perseverance, of personal integrity, and of human caring. And it all began with morning coffee.

Each day, Justice Brennan gathered his law clerks in chambers for “morning coffee.” At first, this ritual sounded daunting: who would not feel an immense pressure to show his or her best, notwithstanding the very early hour? Later, the ritual could easily have become burdensome, given the impossible-to-manage workload we bore as the Term progressed. Yet it soon became clear to us all that, distractions aside, morning coffee with “the Boss” would prove to be the most uplifting and exciting part of any day, so much so that it was extremely infrequent that one of us would be assessed the standard fine of a quarter for entering chambers a single tick late. During these precious gatherings, which could span 30 minutes to three hours depending on the day’s schedule, we would discuss upcoming cases on the docket, spar about cases under submission, and hone ideas for opinions in progress. But morning coffee also meant conversation about public events outside the Court, ranging from the Redskins to politics, as well as about the more private worlds of family and personal aspirations, and back incessantly to the Redskins. In both obvious and subtle ways, morning coffee revealed the man’s true measure, and his youthful exuberance (at 84 years) for enhancing the world around him, both through his shaping of the most amorphous of constitutional landscapes, and through his treasured relationships with family, friends, and colleagues. It is highly appropriate that we celebrate Justice Brennan’s contribution to the work and spirit of public interest law, for he truly embodied its essence both through the product of his work and the way he lived his life.

Justice Brennan’s most public contribution to and inspiration of public interest law obviously came through his constitutional jurisprudence. Spanning five separate decades, opinion after Brennan opinion aspired to inscribe into doctrine the fundamental value choices he saw reflected in the Constitution he revered, as appraised through the lens of contemporary society and its pressing needs. But his process of formulating those opinions, first glimpsed in our morning coffee sessions, was every bit as revealing of his abiding interest in the public welfare as the end-products themselves.

The corpus of Justice Brennan’s works in various fields of public law might well read like treatises derived from abstract first principles of constitutional interpretation. Indeed, Justice Brennan occasionally received reprints of scholarly articles professing to explain how his first amendment or political rights or criminal procedure jurisprudence was derived from some abstract intellectual theory or tradition. I recall that sometime during the Term, a nationally respected scholar sent the Justice a law review article analyzing in fine detail how Justice Brennan’s first amendment jurisprudence was best explained as an outgrowth of his commitment to Alexis de Tocqueville’s vision of American democracy. Jus-

tice Brennan read the article carefully, and praised it highly for its insight and craft. But, he noted to me with a wry smile, there was an obvious difficulty with the thesis: he had never read de Tocqueville! To be sure, this protest sounded apocryphal to me, and the twinkle in Brennan's eye seemed to belie his claim. But the intended message was clear: Brennan's jurisprudence was not derived through top-down deduction from abstract postulates, no matter how embedded in constitutional discourse.

Rather, Justice Brennan's jurisprudence was driven by his recognition of the real plight of real people touched by the law. The starting point for every case discussion during morning coffee was, of course, the hard law itself, both text and precedent. But it usually was not long before Justice Brennan would articulate a vision, one almost invariably sketched out in his previous opinions for the Court, which focused on basic social principles and human needs in contemporary society. To be sure, text and precedent frequently presented constraining influences, and the Justice would appropriately give them their due. Yet his heartfelt passion for the fundamental values embedded within the Constitution and the individuals those values purport to serve was never left unexpressed in chambers and, one can easily surmise, was never very deep beneath the doctrine that flowed from his pen. Indeed, as he put it himself in his pithy public statement upon retiring from judicial service: "It is my hope that the Court during my years of service has built a legacy of interpreting the Constitution and federal laws to make them responsive to the needs of the people whom they were intended to benefit and protect."³

It is hardly surprising, then, that Justice Brennan's most oft-recalled opinions appeal to our most enduring and cherished values, rather than formalisms and abstractions. He spoke eloquently of the plight of the downtrodden and outcast; the scourge of bigotry; the vulnerabilities of the accused; the precious need for individual autonomy and freedom of expression in a just social order.

Moreover, Justice Brennan continually reminded his clerks during morning coffee drafting discussions of the importance of using the written opinion to "speak to the people," rather than merely to speak about the law. Like any good public interest lawyer, he was well aware that in the long run, judicial decisions could secure constitutional values only insofar as those values resonated to an appreciable degree within the hearts and minds of the people being governed. Thus, not only did people-focused constitutional values serve as a compass for his decisionmaking, but he also used his written opinions as a platform for inspiring the public to cherish these same values. Particularly when Brennan suspected that people would decry a judicial decision based on their initial sensibilities, he would appeal to the fundamental value commitments that he believed lay beneath the surface of public sentiment. In one of his last opinions for the Court prior to his resignation, for example, Justice Brennan asked the people to appreciate his unpopular invalidation of a federal flag-burning statute by searching within themselves for their true commitment to the freedom of speech:

³ Justice William J. Brennan, Jr., Press Release, July 20, 1990 (on file with author).

We are aware that desecration of the flag is deeply offensive to many. But . . . “[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering.⁴

Similarly, Justice Brennan would often remind us of our unavoidable human connection to the plight of people of all stations and fortunes. In a memorable dissent from a decision rejecting an equality-based challenge to the penalty of death, he chided that

It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. . . . [T]he way in which we choose those who will die reveals the depth of moral commitment among the living.⁵

Both when deciding cases and writing opinions, Justice Brennan harmonized a fidelity to law with a commitment to do right. Indeed, for him the two aspirations were inseparable. Without the second, the first lacked direction; without the first, the second lacked structure. To paraphrase a most eloquent expression of another former clerk, Virginia Seitz, Justice Brennan never found so much law that there was no room for justice; nor found so much passion that there was no room for law. Lawyers who dedicate themselves to championing the public interest, whether through impact litigation or individual client representation, would do well to emulate Justice Brennan’s attitude toward jurisprudence. Successful and well-intentioned law reform efforts must necessarily focus not merely on idealized abstractions, but also on the complex relationship between the needs of the public and the operational and inspirational effects of legal doctrine.

Moreover, successful law reform efforts must be championed by individuals who elicit the respect and admiration of their opponents as well as their general constituency. Justice Brennan remained on friendly terms even with his most ardent professional foes. And without question, a major explanation for his remarkable success over the decades at culling together somewhat surprising coalitions for quite liberal positions was his personal modesty. He presented his ideas to his colleagues with a quiet confidence in the rightness of his views, but without a trace of an invested personal ego. His unassuming nature, I believe, encouraged colleagues to concentrate on the force of his ideas rather than to worry about the extent of his power. And his modesty was honest, not professionally manipulative. This important but oft-masked distinction was clearly revealed time and again during morning coffee discussions of the previous evening’s social events. Justice Brennan would frequently regale us with stories of his ex-

⁴ *United States v. Eichman*, 496 U.S. 310, 318-19 (1990) (citing *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

⁵ *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987).

citement at having been seated next to a well-known poet or scientist at some embassy dinner — without the slightest awareness that he surely brought at least an equal or greater thrill to his dinner companion!

Even more generally, Justice Brennan's inspiration for a true public interest ethic lies as much in his approach to life as in his approach to work. Justice Brennan treated all human beings, both near and far, friend and foe, with the utmost caring, dignity, and respect. With regard to Court employees, Justice Brennan was legendary for his ability to remember the small details of their lives, always asking after their latest child or recent vacation when passing them in the elevator or halls. And Justice Brennan clearly embraced his law clerks as part of his extended and adored family. On a most personal note, he took to calling me "Ev" rather than "Evan," as only my mother before him had done. This simple gesture exemplified his knack for intuitively sensing how to reach others and make them feel a special personal connection both to him and the larger human family. His approach to people simultaneously revealed and celebrated the fundamental interconnectedness of us all, a theme that properly informs all law reform efforts to better human society.

The lessons about law and life that I learned from a year's worth of morning coffees are perhaps best captured by a story of the last such gathering. My official tenure and that of my co-clerks was scheduled to end on Friday, July 20. The following Monday morning, we were supposed to join Justice Brennan for coffee to meet with his new set of four clerks who, like us the year before, had been waiting with indescribable anticipation for their first meeting with the Justice. That very Friday, however, Justice Brennan was forced after consultation with his doctors to make the most difficult decision in his 34 years with the Court: to retire from it. He came into the office and composed resignation letters to the President and his colleagues, and post-dated them for Monday the 23rd. Why not just announce his retirement, effective immediately? Because he was fiercely committed to meeting with his new clerks and breaking the bad news to them personally, rather than having them learn of it through the Friday evening media just as they celebrated their new beginning. As it turned out, a leak from outside his chambers enabled the media to catch wind of his decision early Friday afternoon, and he was forced to redate and transmit his resignation letters immediately. But he remained quite angry and frustrated at his inability to cushion the inevitable disappointment of his new clerks at the next morning coffee, which would sadly prove to be their last as well as first. I still find it stunning that, even in his last official act as Supreme Court Justice, Brennan was less concerned about his own well-being than the feelings of four young persons whom he had never even met, and with whom he would quite unfortunately never develop a long-term personal relation. But that was just his way.

The story of this last morning coffee succinctly reveals a central lesson of Justice Brennan's public spirit. One can spend a life's work focusing on the betterment of society, through Supreme Court jurisprudence, through public interest law, or through any other public-service calling. But a true commitment to public service starts at home, in the details of everyday life. To me, this lesson is perhaps Justice Brennan's most profound legacy to the public interest bar.

