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## Tribute to Justice William J. Brennan Tribute

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# TRIBUTE

## TRIBUTE TO JUSTICE WILLIAM J. BRENNAN

*Nadine Strossen\**

My friendship with Justice William J. Brennan—who has been described by his admirers and detractors alike as one of the most influential Justices in history—was so special precisely because, paradoxically, it wasn't special. While he treated me with infinite graciousness, attentiveness, and respect, I know that he bestowed the same generous attentions on all who were fortunate enough to cross his path.<sup>1</sup> One of the greatest judges and most extraordinary human beings I have ever known, he was also one of the least pretentious.

When Justice Brennan retired from the Supreme Court in 1990, there was an exceptional outpouring of reminiscences about his unusually influential contributions to law and justice, not only in the U.S., but also on a worldwide scale.<sup>2</sup> These tributes to his pathbreaking professional accomplishments were matched by profuse, affectionate accolades for his luminous personal qualities. Colleagues, family, friends, former law

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1. See David H. Souter, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 1, 2 (1997) ("The hard thing is . . . to speak words that can do any justice to friendship as immoderate and as prodigal as Bill Brennan's friendship was. He made us members of a huge family by adoption, and when we were with him every one of us always felt like the favorite child."); accord, Frank I. Michelman, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 37, 40 (1997) ("[H]is friendship [was] a blessing and a joy to all upon whom it fell—and we are legion . . .").

2. See Owen Fiss, *A Life Lived Twice*, 100 YALE L. J. 1117 (1991) ("Not since the retirement of Justice Holmes in the early 1930's has the nation been more generous in its tributes to a retiring justice.").

clerks, journalists, historians, all who knew him were unanimous in singing his praises as someone who had touched all their lives in an unforgettable way—showing the same sincere concern and compassion for every individual human being as his opinions and other writings reveal for humanity.<sup>3</sup>

When Justice Brennan died seven years later, the outpouring of tributes was renewed and redoubled. From the popular press to the scholarly law journals, we were treated to reminders of the singular accomplishments and qualities of this unforgettable judge and person.

Because so much has been written about Justice Brennan's incomparable influence, especially in the area of greatest concern to me—civil liberties—I will not now presume to add to this large, and growing, body of literature. Elsewhere, I have discussed particular aspects of Justice Brennan's rich, fertile jurisprudence concerning religious liberty,<sup>4</sup> freedom of expression,<sup>5</sup> and privacy.<sup>6</sup>

What I have found particularly moving, as I have pored through the tributes that so many others have made to this surpassingly special man, was the constant theme of the personal recollections and vignettes: his unceasing and unstinting generosity and graciousness toward everyone he encountered. In an era where the public as a whole—and, in particular, our young citizens—are increasingly disillusioned with and cynical about public officials and lawyers, it behooves us to consider the shining, positive example offered by William Brennan.

He was more influential than any other lawyer or public official in recent memory, and will no doubt have an enduring impact on law and public policy for generations to come, all over the world. Thus, he showed that an individual can make an enormous difference on a grand scale. At the same time, though, he showed that an individual can make an enormous difference on a small, but also significant scale—namely, in the lives and spirits of other individuals with whom he comes in contact.

I would like to share just a few personal recollections of the vivid way in which William Brennan inspired me—not only through his mag-

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3. See Judith S. Kaye, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 14, 14 (1997) (describing Justice Brennan as “[A] jurist who happily—perhaps uniquely—conjoined a passion for human rights with a love of human beings”).

4. See Nadine Strossen, *Justice Brennan and the Religion Clauses*, 11 PACE L. REV. 491 (1991).

5. See Nadine Strossen, *Freedom of Speech in the Warren Court*, in *THE WARREN COURT: A RETROSPECTIVE* 68 (1996).

6. See Nadine Strossen, *Contemporary Challenges to Privacy Rights*, 43 N.Y. L. SCH. L. REV. 1 (forthcoming Spring 1999).

nificent Supreme Court opinions and other influential public pronouncements, but even more uniquely through his contagious personal warmth, optimism, idealism, and faith in his fellow human beings and in the system of justice they had created and were administering.

For the last several years of Justice Brennan's life, I had the unforgettable experience of visiting with him regularly. We had a standing arrangement that, whenever I was in Washington with some unscheduled time, I would stop by his chambers for lunch or just a chat.<sup>7</sup> By that time, I had become President of the ACLU. But Justice Brennan's graciousness and hospitality toward me—and the personal encouragement and inspiration with which he infused me—had begun long before, when I was simply an anonymous young lawyer who let him know that I shared his commitment to civil liberties. I have no doubt that he conveyed similar warmth and encouragement to countless other young lawyers—and innumerable individuals in other walks of life—throughout the land, thus exercising a pervasive influence even beyond that achieved through his landmark judicial rulings.

In 1994, the ACLU's New Jersey affiliate honored the Garden State's native son, William J. Brennan, and I was in turn honored to be invited to deliver one of the tributes at the awards banquet. Following his doctor's orders, Justice Brennan was unable to attend the banquet in person. Accordingly, since I would not be able to speak with him at the banquet, I wrote him a letter in advance of that occasion, enclosing the text of my remarks. I also used the opportunity to recount to the Justice my first personal encounter with him, which I vividly recalled, and which I still bring to mind whenever I am tempted to feel discouraged about the ongoing civil liberties challenges we face. The relevant portion of my letter reads as follows:

Even beyond your incomparable contribution to human rights, I want to tell you what a source of inspiration and encouragement I find you to be. I've had the pleasure of talking with you in person on several occasions—all memorable—but the one that most stands out in my mind is the first. It was during the fall of 1985; Ed Meese was Attorney General, and had just given a couple of provocative, inflammatory, widely-publicized speeches, in which he lashed out at the Supreme Court's rights-protective rulings (especially in Establishment Clause cases); you were speaking at N.Y.U. Law School, where I was then teaching.

I was in such despair about the spectre of a U.S. Attorney General attacking the Bill of Rights and the Supreme Court's enforcement of these rights, that I went wailing up to you about how dreadful this development was. You immediately

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7. I am indebted to Floyd Abrams, the prominent First Amendment attorney and mutual friend and colleague of Justice Brennan's and mine, for launching this arrangement.

seized my hands, pressed them between yours, and with a twinkle in your eye, and an overwhelming, contagious spirit of optimism and idealism, you said to me, "But he hasn't actually had any impact, has he?" Indeed, he had not, and now, almost a decade later, I have to recognize that both the Court and the Bill of Rights seem to have weathered the Reagan-Meese assault quite intact!

Since that conversation, I've gone on to become ACLU president, a position in which I constantly am a close-up witness to all manner of frightening attacks on all our rights, and on the defenders of those rights. While I of course take all of these assaults seriously, I couldn't respond as effectively as possible if I didn't also view them with the type of good humor, hope, and long-range perspective that you displayed to me during that conversation, almost ten years ago. Justice Brennan, you really passed on to me very meaningful encouragement—and courage.

With completely characteristic courtesy, Justice Brennan promptly responded to this letter with even further encouragement. Two years later, when the ACLU of New Jersey saw fit to honor me—also a native of the Garden State—with an award, I again wrote Justice Brennan, this time to tell him how honored and humbled I was to be following in his footsteps in this respect.<sup>8</sup> Once again, he promptly responded with a graciousness that would be extraordinary for anyone else, but was completely typical for him. In a letter that is now hanging on my office wall, he wrote: "The ACLU of New Jersey should be congratulated on its selection. I can think of no one more deserving."

That letter is now hanging on my wall not at all to shore up my ego. Quite to the contrary, it is there to remind me of the great soul—and small ego—of William J. Brennan. And to inspire me to try to emulate his kindness and generosity.<sup>9</sup>

8. Even so outstanding a judge and human being as Justice Brennan's successor on the Supreme Court, David H. Souter, refused to compare himself to Justice Brennan. During his confirmation hearings on his high Court nomination, then-Judge Souter was asked to make such a comparison, which prompted the following response: "No one following Justice Brennan . . . could possibly say a word to put himself in a league with Justice Brennan. All you can do is . . . say . . . 'I will do the best I can.'" *Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before the Committee on the Judiciary, United States Senate*, 101st Cong. 186 (1990) (statement of Hon. David Souter). Likewise, when Judge Souter was asked during these hearings for his assessment of Justice Brennan, he said: "Justice Brennan is going to be remembered as one of the most fearlessly principled guardians of the American Constitution that it has ever had and ever will have." *Id.*

9. See Souter, *supra* note 1, at 2.

He'd bring up some pedestrian opinion that I'd delivered, and he'd tell me it was not just a very good opinion but a truly great one. . . . And I'd sit there and listen to him, and after a while, I'd start to think that maybe he was right. Maybe it was pretty good. And when, inevitably, I'd realize again that it wasn't, I'd still feel great myself.

. . . .

How do we say farewell to the man who made us out to be better than we were . . . ?

*Id.*

Not only did I never write Justice Brennan a letter that went unanswered; I also learned from his longtime, devoted secretary, Mary Elmore, that no letter to him went unanswered. In one way, that made her life very demanding; as she once said to me, he even sent thank-you letters in response to thank-you letters! In another way, though, being in the orbit of such a generous human being made Mary's life a joy. In her words, working for him "spoiled" her; she felt she could never work for anyone who was less kind, considerate, and caring—in short, she could never work for anyone else!

Indeed, during Justice Brennan's final years, as I regularly visited him, I became bound in friendship not only with the Justice himself, but also with Mary and the others who were working most closely with him—his driver, Romeo Cruz, and his law clerks. Justice Brennan's warmth toward all of us was contagious, as was their devotion toward him. Contrary to the old cliché that "No man is a hero to his valet," the more closely one worked with Justice Brennan, the more heroic he loomed.

Justice Brennan treated everyone with the same respect and kindness, not just the proverbial "VIPs." In truth, to him, everyone was a VIP.

Justice Brennan's gigantic professional accomplishments were in substantial part facilitated by his special personal qualities. Yes, he also had a brilliant legal mind, but the consensus is that his intellectual leadership was greatly enhanced by his enormous personal warmth and charm. Likewise, Justice Brennan's modesty, kindness, and respect toward everyone—seemingly paradoxically—enhanced his power. This point was made by *New York Times* columnist Anthony Lewis, in the wake of Justice Brennan's death, as follows: "[H]is colleagues felt his respect for them—and felt in him an intellectual force that was the stronger because it was accompanied not by arrogance but by modesty."<sup>10</sup>

The day after Justice Brennan died (just one month after I had last seen him), I was speaking at the Eighth Circuit Judicial Conference in Minneapolis, where one of the other speakers was the Supreme Court Justice for the Eighth Circuit, Associate Justice Clarence Thomas. Justice Thomas paid spontaneous, eloquent tribute to Justice Brennan, in words that were particularly moving because they made so clear that Justice Brennan's personal warmth had clearly bridged the ideological gulf be-

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10. Anthony Lewis, *Abroad at Home; Reason and Passion*, N.Y. TIMES, July 28, 1997, at A17.

tween himself and Justice Thomas. Despite his very different views, Justice Thomas could not have been more respectful in his tribute to Justice Brennan's professional and personal qualities, describing him as not only "brilliant" and "persuasive," but also "kind" and "compassionate." Among other accolades, Justice Thomas said of his high Court predecessor, "I don't think there was a more decent or more brilliant human being." Moreover, shoring up Tony Lewis's point, Justice Thomas fondly and smilingly recalled of Justice Brennan: "It was so hard to say no to him!"

Justice Brennan's compassion and concern for everyone certainly shone through his judicial rulings. He respected the essential dignity and "intrinsic worth"<sup>11</sup> in even the most despised individuals, and stood up for their basic human rights. This was true, for example, even of convicted prisoners on death row, who are disproportionately members of racial minorities.<sup>12</sup> In Justice Brennan's compelling words:

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.<sup>13</sup>

In the same vein, Justice Brennan wrote the following words, also focusing on the death penalty: "Even the most vile murderer does not release the state from its obligation to respect dignity, for the state does not honor the victim by emulating his murderer."<sup>14</sup>

I would like to close this reminiscence and tribute with a statement from the great writer, Henry James, which sums up the enduring legacy that William Brennan left, in both historic and human terms: "'Three things in human life are important . . . . The first is to be kind. The second is to be kind. And the third is to be kind.'"<sup>15</sup>

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11. *Gregg v. Georgia*, 428 U.S. 153, 229 (1976) (Brennan, J., dissenting).

12. See *Virginia, Be Not Proud*, WASH. POST, Mar. 21, 1999, at B08.

13. *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting).

14. William J. Brennan Jr., *What the Constitution Requires*, N.Y. TIMES, Apr. 28, 1996, § 4, at 13.

15. Attributed to Henry James in Richard Bernstein, *Books of the Times; Gay and Conservative: It Can Be Done*, N.Y. TIMES, Jan. 27, 1997, at B20 (reviewing DAVID BRUDNOY, *LIFE IS NOT A REHEARSAL: A MEMOIR* (1997)).