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*9 IN MEMORIAM: WILLIAM J. BRENNAN, JR.

Richard A. Posner [FNa1]

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When a public man dies in his nineties, the maxim *de mortuis nihil nisi bonum* is suspended, and it is permitted without breach of decorum to mingle affectionate tribute with critical assessment. Justice **Brennan** was largely free of pettiness and vanity, and so might actually have preferred a form of remembrance in which warm affection was seasoned with an effort at cool evaluation.

When I think back to my year of clerking for him (mid-1962 to mid-1963), the dominant recollection is of a gracious, considerate, outgoing, unpretentious, genial, and undemanding boss, a man of liberal, but not radical, political and social views who gave his law clerks a great deal of welcome latitude in drafting his opinions. But his qualities as a boss, and as a person, are not what is of interest to me here, although I do want to relate the personality and the approach to judging that he revealed back then, and that I believe were constants throughout his judicial career, both to his undoubted very great influence and success as a Supreme Court Justice and to the questions that can be raised about the limits of that success.

Eulogies to appellate judges invariably emphasize the judge's intellect and learning, often to the exclusion of other elements in a successful judicial career. Part of the reason for this emphasis is that the eulogies are mostly written by law professors, in whom those qualities tend to be highly developed and admired; another part is that the principal work product of appellate judges, the judicial opinion, tends to bristle with scholarly pretension, although in truth judicial opinions are rarely either original or deep. Scholarly ability is an asset for a judge, nevertheless, because law is a highly intellectualized branch of *10 politics and social control. But judicial success often (not always--there are plenty of exceptions) depends to an even greater degree on other things, notably personality, length of service, and having like-minded colleagues. By "personality" I mean the ability to function effectively in a collegial setting. It is the ability not only to compromise (which is obvious), but also to show respect for one's opponents, to be or at least appear to be moderate, to eschew self-aggrandizement, to understand the sensitivities of one's colleagues, to be nonthreatening, to hide one's own light under a bushel--to be, in short, in a noninvidious sense, "political." It is the ability that Frankfurter so strikingly lacked.

Personality won't get you far, however, without like-minded colleagues; for you're not going to sweet-talk or charm another judge out of that judge's fundamental convictions. If you are out of step with the majority, as the second Justice Harlan was throughout most of his tenure on the Supreme Court, you will not have a great impact on the development of the law (though you may be greatly admired, as Harlan is greatly admired) unless you have a Holmesian gift of prophecy. Harlan's tenure was relatively brief, moreover, by the standard of influential Justices, and the briefer a judge's tenure is, the less likely he is to have a substantial run in which he's a part of the majority (the fate also of Cardozo). Length of service on a court is also important because of the unpredictability, often the sheer randomness, of a judicial docket and judicial assignments. It takes many years of being a

judge in a court of general jurisdiction to have heard, and been assigned to write the majority opinion in, enough related cases to be able to construct a coherent personal jurisprudence.

In these important determinants of judicial success Justice **Brennan** was uncommonly fortunate. For a quarter of a century, from the time of his appointment until the replacement of Stewart by O'Connor, **Brennan** was part of a liberal bloc of either four or five Justices that could usually pick up a vote or two from other Justices as well; in the briefer period between the replacement of Frankfurter by Goldberg and Warren by Burger, he was part of a commanding liberal majority. His personality made it natural that he would be assigned a disproportionate share of the majority opinions in the most important cases in which he was in the majority. At the outset of his service, the other members of the liberal bloc were Warren, Black, and Douglas. Black and Douglas had the reputation of being radicals; and by the time **Brennan** arrived, Douglas was erratic and disaffected and unwilling to write opinions that would command the respect of the legal profession, while Black was displaying a quirky populist streak and an autodidact's dogmatism. Warren, being the Chief Justice, did not want to become too identified with the controversial left wing of the Court, even if it was his own wing. That left **Brennan**. Later, the liberal bloc expanded, but by then **Brennan** had accrued a degree of seniority that *11 made him its natural spokesman; and the new recruits had certain disabilities for playing a Brennanite role, such as Goldberg's vanity and Fortas's busy moonlighting as a Presidential advisor.

All this was **Brennan's** good fortune, but in addition his personality made him the ideal Justice to be assigned to write for the Court in cases in which the Court was sharply divided, which naturally tended to be the most important cases. When a court is sharply divided, the risk of losing a majority and the greater risk of not being able to get majority backing for an opinion become powerful reasons for assigning the case to a judge in whom the collegial personality is well developed. To get and keep a majority **Brennan** was ever willing to subordinate his own views, not of the proper outcome but of the best route to it. In this he was assisted by not being terribly interested in doctrinal niceties; these he left largely to his law clerks. If a Justice crucial to the majority objected to some of the reasoning in a **Brennan** opinion, out it went even if the result was to undermine somewhat the opinion's coherence and logical force. A careful study of his opinions would reveal, I expect, a stronger interest in reaching the desired result in the specific case than in maintaining a consistent view of the weight of precedent, the role of history, the freedom of interpretation, or other issues of judicial technique. Of course **Brennan** was not unique in these respects, or these priorities; and he was careful, in the period of the liberals' ascendancy, to keep his opinions free from inflammatory rhetoric, to eschew conceptual rigidity, and, a related point, to avoid taking the most extreme positions on the most sensitive issues, such as the view espoused by Black and Douglas that the First Amendment privileges obscenity. **Brennan's** quixotic campaign against the constitutionality of capital punishment, and his signing on to essentially the Black-Douglas position on obscenity, came after the fall of the liberal majority. This was not an accident. At the opposite extreme are opinions like Roth [FN1] and Baker v. Carr, [FN2] in which **Brennan** planted mere seeds of new constitutional doctrines, leaving their germination to later cases.

Brennan was not the "intellectual leader" of the "Warren Court." The intellectual leader, if there was one, was Black; but a more accurate description would be that when **Brennan** was appointed there was already, against a background of intermittent judicial activism of both the Right and the Left stretching back to the earliest days of the Supreme Court, a tendency within the Court toward liberal judicial activism, and that this tendency was greatly accelerated by the appointment of additional liberals (like **Brennan**, and later Goldberg, Fortas, and Marshall) and by the political and intellectual ferment of the *12 1960s. **Brennan's** role was that of a facilitator of the judicial revolution that is encapsulated in the phrase "Warren Court." It was an important role, one for which **Brennan** was uniquely equipped; but his place in legal history, like that of any man of ac-

tion, will be largely determined by history's verdict on that revolution. For his reputation is hostage to history in a way that Holmes's reputation, for example, is not. You can disagree with everything that Holmes ever said or thought yet regard him as a very considerable figure in American law because of his intellectual creativity and his rhetorical power; he altered the conception of the judge and the structure of legal thought. You could admire a more modest judge for his fidelity to the written word of the Constitution or statutes, or to precedent, or for other signs of mastery of the traditional judicial craft. But in the case of a judge, such as **Brennan**, whose achievement lay not in the texture of his thought or writing but rather in his influence on the content of the law, evaluation of the judge--not assessment of his historical importance, which in **Brennan's** case is assured, but evaluation of the enduring quality of his work--requires consideration of whether his influence was good or bad.

We do not know; we may never know. **Brennan** helped make constitutional law a much bigger presence in American life than it had been. His opinions placed constitutional limitations on the law of defamation and of obscenity, on the apportionment of state legislatures, on the regulation of sex, on the administration of prisons and other public institutions, on the criminal justice systems of the states, on the administration of welfare programs, and on the treatment of women and aliens. One of his statutory opinions (Weber [FN3]) legalized affirmative action in employment. It would be naive to think these results somehow compelled by authoritative sources of law of which **Brennan** was merely the recorder. The justification for **Brennan's** jurisprudence, as of any activist jurisprudence Left or Right (and **Brennan** was more honest about his activism than most judges), must be sought in its results--in whether it has made, or is likely to make, the country better off or worse off, in the long run as well as the short run, in either a material or a spiritual sense.

It is more difficult to convict an innocent person today than it used to be, in part because of the constitutionalization of criminal procedure, in which **Brennan** played a big part. But if an innocent person is convicted, he will be punished more heavily today. Criminal punishments are more severe than before the Warren revolution, in part, perhaps, in reaction against the lenity of **Brennan** and his colleagues. Thirty-five years after *Baker v. Carr*, no one is sure what the effect of constitutional review of legislative apportionment has been on public *13 policy. The liberal approach to pornography and sex is increasingly questioned, and not only by conservatives, while forms of affirmative action prevalent in education and employment are increasingly seen as a cause of rancor in race relations--and "institutional reform litigation" a cause of white flight, of the decline of the public schools, and even of homelessness. Judicial tinkering with the welfare system (the invalidation of state durational residency requirements in *Shapiro v. Thompson*, [FN4]) the imposition of due process safeguards in *Goldberg v. Kelly* [FN5] may have accelerated the system's demise by making it more costly; and the proliferation of constitutional rights may have contributed to the creation of an entitlement mentality that is deflecting people from a proper sense of responsibility for their failures. Punitive damages in libel suits against the media are actually more frequent now than in the old days because the "actual malice" rule of *New York Times Co. v. Sullivan* [FN6] fixes on the defendant who is found to have libeled a public figure the label of a wrongdoer. Congress has now largely dismantled the elaborate structure of habeas corpus and prisoner civil rights that **Brennan** and his colleagues erected, and there seem to be few regrets. **Brennan**-style liberalism, particularly with regard to school prayer, sexual liberty, and criminal rights, proved to be a political albatross that may have contributed to the election of Republican Presidents and that the current Democratic President has largely repudiated. To liberal judicial activism we may largely owe the unprecedented unpopularity of federal judges, which may limit their ability to correct new injustices. It's as if the fundamental constitutional law promulgated by the Warren Court were the law of unintended consequences.

I am raising doubts, not uttering certitudes. The causality of social change is complex and poorly understood. And the unintended consequences of Brennanite activism, even if they are consequences (they are cer-

tainly unintended), may be a price worth paying for making civil rights and civil liberties enforceable and not merely symbolic, as they largely were before the Warren Court began its gallop. My point is mainly that the statesman judge must be judged by the criteria of statesmanship, implying close attention to long-term social and political consequences.

The heyday of the Warren Court coincided roughly with the period of our expanding commitment to the defense of South Vietnam. We tend to forget that the early 1960s was a period in which the political establishment was optimistic about the ability of elites, whether secretive foreign policy and military officials or secretive judges, to shape events. That optimism is long past and invites critical reflection. The *14 war is more likely to be pronounced a largely unmitigated disaster, but I do not see how anyone could responsibly pronounce the Warren revolution a largely unqualified success. Only when its contribution to the nation's well-being has been dispassionately assessed from a perspective longer than is available to us today will it be possible to measure the value of Justice **Brennan's** contribution to American law. At this early date all that is possible--but it is a lot--is to affirm **Brennan's** historical importance as a central figure in a judicial revolution, to note the magnitude of his influence on the law and public policy of today, and to identify the personal qualities and surrounding circumstances that enabled him to play so large a part.

[FN1]. Chief Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School.

[FN1]. *Roth v. United States*, 354 U.S. 476 (1957).

[FN2]. 369 U.S. 186 (1962).

[FN3]. *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

[FN4]. 394 U.S. 618 (1968).

[FN5]. 397 U.S. 254 (1970).

[FN6]. 376 U.S. 254 (1964).

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