JUSTICE WILLIAM J. BRENNAN, JR.: THE LAW OF FREE EXPRESSION AND THE ART OF CIVILITY

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Justice Brennan's Supreme Court tenure is commonly divided into two stages.[1] The early stage was marked by his opinions written for the "activist" *Warren* Court while the later stage is remembered by his authoring numerous dissents during the time of a more "conservative" Court.[2] While a somewhat useful analytical tool, this distinction has a tendency to produce a caricature of a Justice whose power (or lack of it) rested on fluctuating circumstances. In reality, Justice Brennan's enduring influence is the product of legal acuity combined with untarnished personal integrity.

It would be a mistake to force Justice Brennan's thirty-four years on the Supreme Court[3] into a single strain of thought.[4] This tribute by the *CommLaw Conspectus*, however, provides the opportunity to view Justice Brennan's legacy in light of his constitutional and personal views on communications. Constitutionally, Justice Brennan believed in the power of dialogue to enhance democracy and hence, he was the staunchest defender of the freedom to speak.[5] Personally, Justice Brennan modeled his own communication on the pillars of rationality and civility.[6]

Justice Brennan's communications jurisprudence is based on the notion that the powerless or unpopular person in civil society should never be kept out of the democratic process through forced silence. Alternatively, it is proper to assert that, according to Justice Brennan, the person with the power of speech is never powerless in our democracy. Three decisions written by Justice Brennan manifest this principle brilliantly.

In *NAACP v. Button*, the Court held unconstitutional Virginia's prohibition of the NAACP's practice of soliciting plaintiffs for desegregation cases on the ground that such solicitation was protected as an exercise of political expression and right of association.[7] The facts and underlying history of the case were simple. In the tumultuous years following the watershed *Brown v. Board of Education*,[8] potential desegregation plaintiffs were oftentimes justifiably afraid to come forward and speak, while segregated states such as Virginia used their legis-

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1 *See generally* Harry A. Blackmun, *A Tribute to Mr. Justice Brennan*, 26 HARV. C.R.-C.L. L. REV. 1 (Winter, 1991); Thurgood Marshall, *A Tribute to Justice William Brennan, Jr.*, 104 HARV. L. REV. 1 (Nov., 1990).

2 This distinction has become accepted legal dogma to the point that legal scholars may feel the need to refer the "early" or "later" Brennan as one might refer to the early or later Wittgenstein.

3 Justice Brennan's official period of Supreme Court service ran from October 16, 1956 to July 20, 1990.

4 Indeed, aside from the difficulty of synthesizing the myriad of legal issues with which Justice Brennan dealt, a biographer would be forced to account for the instances when the Justice admitted to failings in his earlier thought. For example, in his dissent in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84 (1973), he concluded that his previous definition of "obscenity"—outlined in the Court's *Roth v. United States*, 354 U.S. 476 (1957), decision—as "material which appeals to the prurient interest of the average person and lacks redeeming social importance" should be withdrawn for its inability to "reduce the vagueness to a tolerable level."

5 Indeed, I think that Justice Brennan was genuinely excited by the Court's ability to assure to all within society the right to speak freely. Only five years ago, when he wrote to congratulate this Journal on the publication of its first issue, he wrote: "The introduction of a new scholarly law journal devoted to communications law is in occasion to cheer." William J. Brennan, Jr., *Remarks*, 1 COMMLAW CONSPECTUS 1 (1993).

6 As the reader will see, the comparison of Justice Brennan's constitutional and personal approach to communications will put to bed the notion that his legal writings were informed primarily by his personal "agenda." Because, while Justice Brennan firmly held that "offensive" speech could still be constitutionally protected, his own approach to speaking and writing provided a model of civility in discourse.

7 *See generally* 371 U.S. 415 (1963).

8 *See generally* 347 U.S. 493 (1954).

lative power to silence those who were not afraid to speak.

Justice Brennan provided two answers to Virginia's contention that the NAACP's "solicitation" of plaintiffs was wholly outside First Amendment protection. "The first is that a State cannot foreclose the exercise of constitutional rights by mere labels. The second is that abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion."[9] This is classic Brennan—brief, forceful and elegant. The first answer asserts that state legislation cannot win simply by begging the constitutional question. The second answer combines an analysis of motive with the content of speech in order to decide the legitimacy of the state's objection.[10]

Unlike *NAACP v. Button, Goldberg v. Kelly*[11] is not a First Amendment case since the major issue was couched in terms of a Fourteenth Amendment due process claim. In *Goldberg,* Justice Brennan wrote for the Court in holding that welfare benefits were property within the scope of the Fourteenth Amendment's due process clause and as such, could not be revoked in the absence of an evidentiary hearing—*prior* to the termination of benefits—in which the welfare recipient had the option to participate.

Although *Goldberg* is remembered for its novel understanding of the property claim, the beauty of the case may be found at a more basic level. In Justice Brennan's understanding, the welfare recipient—often uneducated, probably poor, sometimes simply down on his or her luck—has the right to be heard before the state takes action so that his or her speech may be considered in the decision-making process.

Texas v. Johnson[12] is, in many ways, the quintessential freedom to speak case even though its subject of flag-burning is a non-verbal form of communication. Justice Brennan wrote for the Court in a 5-to-4 decision which held that the government's interest in preventing flag desecration was an impermissible content-based restriction on the freedom of speech.

Justice Brennan noted the "bedrock" First Amendment principle that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[13] Moreover, he acknowledged the historic principle that a primary "function of free speech under our system of government is to invite dispute."[14]

The crux of the opinion, however, turned once again to the notion of motive for behavior as opposed to the behavior itself. The State of Texas, which criminally prosecuted Johnson for burning a flag at the 1984 Republican National Convention, did not maintain that flag-burning *per se* was criminal, since the preferred method of disposing of torn or dirty flags is by burning.[15] Rather, the state maintained that the motive for burning the flag, *viz.*, to make a political statement offensive to some, was criminal.[16] Justice Brennan asserted that to accept the state's argument on the issue of motive would be to permit the state to "prescribe what shall be orthodox."[17]

The fascinating aspect of the *Johnson* decision is in the application of its principles to the disagreement between the majority and the dissenters on the Court. While the dissenters found the Court's decision to be an abomination to the flag, Justice Brennan asserted that "the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength."[18] While the principles of Justice Brennan's decision would consistently allow an opposing opinion to exist unfettered by the threat of criminal repercussions, it is uncertain that the dissenting opinions could be freely voiced if their reasoning was followed since they are 1) minority views and 2) arguably offensive to the principles of the flag championed by the majority.[19]

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9 371 U.S. at 429.

10 This second answer will resurface in a discussion of *New York Times v. Sullivan, infra.*

11 *See generally* 397 U.S. 254 (1970).

12 *See generally* 491 U.S. 397 (1989).

13 *Id.* at 414.

14 *Id.* at 408.

15 *See id.* at 400.

16 *See id.* at 401.

17 *See id.* at 415.

18 *See Johnson,* 491 U.S. at 418.

19 The case provides an excellent example of the *reductio ad absurdum* argument. If the minority's opinion is accepted (*viz.*, that unpopular and offensive speech may be justifiably squelched) and we add the (true) premise that the minority's understanding is offensive (in the majority's opinion) to the

These three cases provide an accurate, albeit limited, portrayal of Justice Brennan's defense of the freedom to speak in the face of attempted governmental suppression. It was a libel case, however, that provided perhaps the finest example of Justice Brennan's commitment to the freedom to speak in opposition to those in power.

New York Times Co. v. Sullivan was a quasi-governmental suppression of speech case couched in a civil libel suit.[20] Sullivan, a Montgomery, Alabama, City Commissioner, brought suit against four African-American clergymen and the New York Times for an admittedly inaccurate advertisement appearing in the *Times* which was paid for by the clergymen in order to solicit funds to support civil rights activities.[21] The flavor of the case was likened to sedition since the inaccurate comments were directed toward government agencies under Sullivan's direction, not toward Sullivan himself.[22] The trial jury was instructed to find for Sullivan as a "public official" if the inaccurate statements[23] in question reflected negatively on the agencies under his direction.[24] The jury returned a verdict for Sullivan which was affirmed by the Supreme Court of Alabama.[25]

Echoing his previous opinion in *NAACP v. Button,* Justice Brennan maintained that the Supreme Court would not turn a blind eye to First Amendment principles solely because the Alabama courts asserted that the Constitution did not protect libelous statements. Rather, he asserted that in "deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law."[26]

Arguing the maxim that a demand of absolute truth from the speaking citizenry would be tantamount to a chilling of political expression, Justice Brennan stated that a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount leads to . . . 'self-censorship.'"[27] This line of reasoning led to the now famous constitutional test requiring "public" persons to prove that a statement was made with actual malice, *i.e.*, knowledge of falsity or with reckless disregard of whether it was false or not, in order to prove libel.[28]

Justice Brennan's communications jurisprudence reflects a healthy skepticism of governmental authority. He possessed a "show me, don't tell me in conclusory terms" attitude. It is, then, perhaps unsurprising that his personal demeanor reflected a style of persuasion and civility as opposed to heavy-handedness.

I served Justice Brennan as a law clerk during the 1974 Term. I entered the Brennan chambers struck and impressed by the dominance of his legal thinking. By that time, he had already authored *NAACP v. Button, Goldberg v. Kelly and New York Times v. Sullivan* in addition to the landmark *Baker v. Carr,*[29] *Katzenbach v. Morgan,*[30] Green v. *County School Board,*[31] and *Bivens v. Six Unknown Agents.*[32]

Yet, as I worked with Justice Brennan, I found that I was as much or more impressed with the man than the judge. Obviously, this in no way discounts the judge; he will easily stand as one of the five greatest Justices in the Court's history. Rather, it is to give special honor to the man.

In reviewing the Brennan corpus while preparing this tribute, I read a 1962 volume of the *Catho-*

principles that the flag represents, then by the minority's own reasoning, its opinion may be justifiably squelched.

The minority did not doubt the power of Justice Brennan's logic. Indeed, one of the majority's dissents began with the quote, "a page of history is worth a volume of logic." *Id.* at 421 (Rehnquist, C.J., dissenting).

20 *See generally* 376 U.S. 254 (1964).

21 *See id.* at 256.

22 *See id.*

23 Some of the inaccuracies were innocuous (African-American students sang the National Anthem, not "My Country, 'Tis of Thee'", *id.* at 258-59) while others were more inflammatory (police were present in large numbers on Alabama State College Campus, but did not "ring" the campus, *id.* at 259).

24 *See id.* at 256.

25 *See New York Times,* 376 U.S. at 256.

26 376 U.S. at 269.

27 *Id.* at 279.

28 *See id.* at 279-80.

29 *See generally* 369 U.S. 196 (1962) (allowing equal protection challenges to state apportionment of legislative districts and opening the door to judicial reapportionment according to one-person, one-vote guidelines).

30 *See generally* 384 U.S. 641 (1966) (holding that Congress may create remedies to protect constitutional rights, such as the Voting Rights Act's prohibition of English literacy tests as prerequisites to voter registration, even when the Supreme Court had not required such protection).

31 *See generally* 391 U.S. 430 (1968) (invalidating "freedom-of-choice" school desegregation plan and requiring implementation of race-conscious pupil assignment).

32 *See generally* 403 U.S. 388 (1971) (recognizing implied private right of action for damages for violations of constitutional rights committed by federal agents).

lic University Law Review, which was devoted to the work of Justice Brennan during his first five years on the Supreme Court. As history, the volume is interesting for a variety of reasons, but most specifically for one author's[33] portrayal of the young Justice. The portrayal, entitled *The Common Sense of Mr. Justice Brennan*,[34] describes him as the voice of reason between the, "liberal" Justice Black and the "conservative" Justice Frankfurter. He is described as "conciliatory and moderate," with a "negotiator's manner."[35] Indeed, 36 years later, the author's descriptions of the Brennan style and the Brennan opinion remain valid:

> The distinguishing quality of Brennan's pattern of thought is what may be called massive common sense. His approach to every case is practical, specific, factual. Unlike Black or Frankfurter, he rarely lays down sweeping *dicta*. He gives the impression of reasoning inductively from the facts before him rather than deductively from his own set of first principles. This, in turn, accounts for the characteristic tone of his opinions. While some of his colleagues give the impression of writing for posterity rather than any present audience, Brennan invariably addresses himself to his brethren on the Court and his professional colleagues in the law. He is conciliatory and moderate. His is the negotiator's manner; one catches in his opinions the overtones of the conference room mediator and the earnest debater, seeking to persuade rather than overpower. Those overtones are missing in the opinions of several of his colleagues. Brennan is neither prophet nor professor nor publicist. His tone is that of the practical man who, even when most deeply convinced of the rightness of his own position, does not wholly forget that one or another of his colleagues who differs with him today may join him in making a different majority tomorrow. This is not to suggest that there is anything weakly placating or self-deprecatory in Brennan's work; he has at his command a resource of lucid, sturdy prose. But he foregoes the witticism, the epigram, the twisting personal thrust, if, indeed, these literary devices occur to him; and although he occasionally rises to indignation, it is an impersonal kind of indignation, and his language is characteristically calm and good-humored. One does not turn to Brennan's opinion's to enjoy their high style, discursive erudition, or the working out of an iron logic, but one does find in them a body of reasonable argument reflecting a patient open-mindedness and a decent, humane spirit.[36]

The article closes with the hope that the young Justice would "serve as a bridging influence within the Court between the absolutist defenders of liberty and the sometimes unrestrained advocates of self restraint."[37]

It was this mediator, this negotiator, this voice of reason that I came to know and hold in the highest regard. While history will surely remember Justice Brennan as the voice of a Court that tempered the excesses of authority, the legal community should also remember him as the preceptor of civility.

One need look only at one of his many dissents to see the power of his civility and persuasion. While it is not uncommon for a minority dissenter to criticize the ruling of "the majority," Justice Brennan instead refers magisterially to those in the majority as "the Court."[38] Moreover, Justice Brennan had a collegial habit of noting points of agreement with "the Court" before discussing his criticisms."[39] Finally, and most importantly, Justice Brennan never manifested any element of acrimony in either his written opinions or his spoken word.[40]

In contrast to those who believe in the power of "hardball," Justice Brennan succeeded in using the tools of congeniality and rationality. Even though Justice Brennan admitted that he "was much happier when I wasn't writing as many dissents,"[41] his reluctance to regress to impertinence served him well. For example, his well-reasoned dissenting opinions in *General Electric Co. v. Gilbert*[42] and *Grove City College v. Bell*[43] influenced Congressional action to adopt his position.[44]

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33 William v. Shannon.

34 11 CATH. U. L. REV. 3 (Jan., 1962).

35 *Id.* at 3-4.

36 *Id.*

37 *See id.* at 14.

38 *See* Richard S. Arnold, *Mr. Justice Brennan—An Appreciation*, 26 HARV. C.R.-C.L. L. REV. 7, 10 (Summer, 1991).

39 *See id.*

40 In fact, in an article commenting on judicial civility, the most inflammatory language ascribed to Justice Brennan was use of the term "wooden" to describe one of his colleague's opinions. In an era when the high-water mark of judicial incivility amounts to biting sarcasm and implied allegations of outright stupidity, a single use of the term "wooden" during a thirty-four year tenure should stand as no less than remarkable. *See generally* Edward McGlynn, Gaffney, Jr., *The Importance of Dissent and the Imperative Judicial Civility*, 28 VAL. U.L. REV. 583 (Winter, 1994).

41 Kaplan, *A Master Builder*, NEWSWEEK, July 30, 1990, at 19, 20, *quoted in* Norman Dorsen, *A Tribute to Justice William Brennan, Jr.*, 104 HARV. L. REV. 15, 17 (Nov., 1990).

42 *See generally* 429 U.S. 125, 146 (1976) (Brennan, J., dissenting).

43 *See generally* 465 U. S. 555, 581 (1984) (Brennan, J., dissenting).

44 In *Gilbert*, the Court held that discrimination on the basis of pregnancy was outside of Title VII of the Civil Rights Act of 1964 (codified at 42 U.S.C. § 2000e *et seq.* (1988)). When Congress passed the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2096 (codified at 42 U.S.C. § 2000e, k (1988)), it cited Justice Brennan's dissent which asserted that the Court's opinion was incongruent with gen-

So how can one sum up the career of this brilliant, compassionate, far-sighted advocate of our freedom?

Judicially, his legacy has stood the test of time and his work remains largely intact. Furthermore, he lived to see the building of a "vital center" on the current Court after his retirement from the bench. In this sense, he fulfilled the expectations of his contemporaries who reviewed his work after a short five years on the Supreme Court.

Personally, this was a man who could have no great regrets. His professional success, great as it was, was exceeded by his personal integrity and sense of fair dealing. This was a man who forged relationships built on reason and compassion. He was, and is, an archetype for the modem lawyer and the modem man.

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der discrimination jurisprudence. *See* Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669, 678 (1983).

In *Grove City,* the Court held that an institution receiving federal funds for one function could not be prevented from discriminating in other areas. When Congress passed The Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (codified in scattered sections of 20 U.S.C., 29 U.S.C. and 42 U.S.C. (1988)), it adopted Justice Brennan's dissenting view in providing that no institution receiving federal assistance in any amount may discriminate in any of its activities on the basis of race, sex, age or disability. *See* Franklin v. Gwinnett County Pub. Schools, 503 U.S. 60, 73 (1992).