

## Justice Brennan

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# JUSTICE BRENNAN

PETER L. STRAUSS\*

The editors of the *St. John's Law Review* have given me the boon of a few pages in which to celebrate Justice Brennan with you. The problem for a former law clerk, for anyone who has known this man, is to know where to begin, and how to keep the appreciation within manageable compass.

We often think of judges as calculating rationalists, the best of them (like Holmes) people of piercing if sometimes rather sardonic intellect, professionals whom we call upon to transcend personal engagement, and professionals whom we celebrate for their powers of reason in manipulating the somewhat disembodied doctrines of law. From this perspective we measure their contributions to jurisprudence—the intellectual structures of law they have helped to build. William J. Brennan, Jr., is a giant in these respects, as the editors' dedication to him of these pages amply illustrates. He has indeed made an extraordinary contribution to the safeguarding of fundamental human freedoms and the Bill of Rights during his lengthy tenure on the Supreme Court. During his extraordinary decades on the Court, and under his leadership, the law moved closer to its ambition to be “no respecter of persons”<sup>1</sup> than it had ever been in our history—whether one measures that movement in terms of race,<sup>2</sup> gender,<sup>3</sup> political power,<sup>4</sup> or economic class.<sup>5</sup> His

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<sup>1</sup> *Griffin v. Illinois*, 351 U.S. 12, 19 n.16 (1956) (quoting *Jeffries v. State*, 9 Okla. Crim. 573, 576, 132 P. 823, 824 (1913)).

<sup>2</sup> *Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958) (holding that Little Rock School district was bound by Supreme Court's prior decision in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), that enforced racial segregation in schools is denial of equal protection and holding that it must desegregate its schools).

<sup>3</sup> *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (holding that sex-based classifications are inherently suspect and require strict judicial scrutiny, and striking down statute providing automatic dependent status for spouses of male service members but requiring spouses of female members to prove dependent status).

<sup>4</sup> *Baker v. Carr*, 369 U.S. 186, 209-10 (1962) (holding that allegations that state apportionment statute deprived certain qualified voters of equal protection of laws was justiciable constitutional cause of action).

name is more closely associated with the development of our first amendment liberties than any since Holmes and Brandeis—and those Justices were generally in dissent.

Here, however, I want to stress more personal qualities of warmth and personal engagement. These qualities are ones that have always marked his face-to-face interactions with others. If you, dear reader, have not had the pleasure of a Brennan greeting embrace, you must simply imagine the glow, the interest in you, the drawing in, the utter lack of pretension or self-importance. Among his law clerks in chambers, he might as well make the coffee as you or his secretary would—whoever got there first; if your child was sick, he would work a little harder(!) to give you time to be with her. In discussion, all subjects were open, and candor was the rule. Children and spouses, once met, were enthusiastic subjects of later conversations; he expected to be as involved in your family as you were in his. No letter waited a day for a thoughtful and warm response.

The law clerk's relationship with a judge holds not a little peril for the judge. The whole idea is that the judge hasn't the time to do all that is needful, and takes on clerks to supply the extra effort. But then, the clerk has not the experience, the maturity in law, or ultimately the responsibility of decision; a clerk's misstep is likely to embarrass the judge much more than the clerk. Judges respond in various ways. Work assignments may be structured to emphasize the more routine or more readily double-checked of chamber's duties—evaluation of certiorari petitions, preparation for oral argument, secondary responsibilities in opinion-drafting. In working with law clerks, a judge may choose to emphasize his or her personal exposure to the clerk's errors, to point out errors or failings that—uncaught—would have served to embarrass. Radiating confidence, Justice Brennan took just the opposite tack: he could assess the certiorari petitions so much more quickly than we, and he certainly didn't want to waste our time in preparing him for arguments he could assess himself; why didn't we put our effort into the opinions he had asked us to help him draft? He reviewed that work with care, of course—a cartload of books went into chambers along with the draft, and much changed opinions often

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<sup>5</sup> *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (holding that procedural due process requires that public assistance payments to welfare recipients may not be discontinued without predetermination evidentiary hearing).

emerged—but the only words we heard were words of thanks and appreciation. You could review the changes for yourself to see where things hadn't been quite as he wanted; but silence and more changes than usual were the strongest criticisms his clerks were likely to hear.

One afternoon, I recall my co-clerk and I asking the Justice in the course of conversation what was the most troubling case he had ever sat on. The answer, which came easily enough, underscores the human qualities I am seeking to address, and how they reflected themselves in his judging. It was a case that had come before him early in his tenure on the New Jersey Supreme Court, in which he had cast the deciding vote.<sup>6</sup> The judicial image here is not Holmes, but Solomon—wisdom not as reason alone, but as reason informed by passion.

Joe and Louise Lavigne had married in 1947, and gave birth to Diane in 1949, shortly before Joe's graduation from college. Family stresses led them to place Diane in foster care when she was seven months old, and they then virtually abandoned her. The agency returned Diane to the Lavignes when the foster parents became unavailable after seven months; two months later, still stressed, they agreed to release her for adoption (they testified that the agency refused to accept a foster care placement again). Diane was at this point sixteen months old. She was placed in an adoptive home at age one and a half, but the adoption had not yet become final when, eight months later, changing circumstances led the Lavignes to conclude that they now *could* care for their daughter, and they first asked and then sued to have Diane returned to them. The four judges of the lower New Jersey courts who heard the case before it came to the Supreme Court had all agreed that parents could seek to reclaim custody during the year that New Jersey law permitted an adoption agency to rescind a placement. They also found that the Lavignes had demonstrated themselves to be fit parents, with their stresses now behind them, so that their natural biological relationship with Diane should be permitted to prevail.<sup>7</sup> As the state's one-year trial period itself suggested, they

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<sup>6</sup> *Lavigne & Lavigne v. Family and Children's Soc'y of Elizabeth*, 11 N.J. 473, 95 A.2d 6 (1953).

<sup>7</sup> *See Lavigne & Lavigne v. Family and Children's Soc'y of Elizabeth*, 19 N.J. Super. 401, 407, 88 A.2d 640, 643 (Super. Ct. App. Div. 1952); *Lavigne & Lavigne v. Family and Children's Soc'y of Elizabeth*, 18 N.J. Super. 559, 577, 87 A.2d 739, 747-48 (Super. Ct. App. Div. 1952), *rev'd*, 11 N.J. 473, 95 A.2d 6 (1953).

argued, Diane could be expected to adjust to the loss of her adoptive "parents" once she had been returned to her biological family—for which she might otherwise spend a lifetime in search.<sup>8</sup>

What made the case hard for the Justice, he told us, was not so much the law as his own parenthood. His daughter was about Diane's age at the time; empathizing with both sets of parents (he harbored no doubts that the Lavignes deeply and genuinely repented their earlier decision), he saw terrible hurt on both adult sides of the controversy, and no clearly better resolution for Diane. What he recalled as ultimately shaping his judgment—and so deciding the case—was an interchange with the Lavignes' counsel refusing to recognize the mutuality of pain in the case. The argument was that within a year Diane would have forgotten her adoptive parents entirely; it would be as though they had never existed for her. "My daughter is about Diane's age; are you saying, counsel, that if she were to be placed with another family, within a year she would have forgotten me entirely?" As in that earlier, biblical exchange, counsel for one side had been led to put the case in terms that denied the inevitable tragedy of the outcome.

This insistence on treating decision in its human dimension was often evident during my term with the Justice—perhaps never more strongly so than in *Schmerber v. California*,<sup>9</sup> a case that arose late in the Term and in which, again, the Justice cast the deciding vote. The question was whether a driver suspected of drunk driving had a fifth amendment privilege to refuse cooperation with a blood test on grounds that it might be incriminatory. The Justice eventually wrote a well-respected opinion holding that the fifth amendment privilege did not apply, but that the relevant constitutional constraint was the fourth amendment's protection against unreasonable searches and seizures. What stands out in memory is the difficulty he encountered in coming to this judgment. He was assigned the opinion, we understood, because it was evident in conference that he would be the fifth vote for whatever would be the result in the case. He wrestled for days, if not weeks, with which way that would be; at the center of that concern, I came to believe, was less the implication for doctrine than the readily imagined, human encounter between Mr. Schmerber and

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<sup>8</sup> *Lavigne*, 18 N.J. Super. at 576, 87 A.2d at 747.

<sup>9</sup> 384 U.S. 757, 760-61 (1966) (holding that there is no fifth amendment privilege to refuse blood transfusion).

the forces of the state. As any who have read his opinions quickly understand, protecting the citizen from the state has been a major theme of his work; and the forcible extraction of blood—minor an operation as it is—involves a significant degree of constraint.<sup>10</sup> Yet he also well understood that the stakes in human carnage were high; and here the manner in which the state couched its argument, stressing its own recognition of the demands of dignity, permitted him to find a route that kept that constraint within acceptable bounds.

Perhaps nowhere in the Justice's canon is this quality more apparent than in his decision for the Court in *Goldberg v. Kelly*.<sup>11</sup> The case has been celebrated for giving impetus to the due process explosion<sup>12</sup> and criticized for its lack of realism in addressing due process issues.<sup>13</sup> For today, its important characteristic lies in its responsiveness to the terrible human facts revealed in the record before the Court. From the characteristics of these plaintiffs and their dealings with New York social service officials emerges an understanding of what procedures are called for to make those encounters meaningful for them. *Their* illiteracy, *their* disadvantage in dealings with officials, the suspicion in which *they* may be held, the desperation of *their* circumstances if even general relief is withheld, the humane premises of the programs under which they seek assistance—all contribute to the Court's striking result. One can believe, indeed I do, that a focus on individuals can be manipulated by counsel for effect, especially in programmatic litigation such as this was; that, correspondingly, such a focus can mislead, can produce results that, on the whole, are more costly than beneficial to the groups the decision purports to favor. Justice Black's dissent warns of consequences that appear to have been borne out, and by the time the Court revisits the issue in *Mathews*

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<sup>10</sup> Cf. *Rochin v. California*, 342 U.S. 165, 172-73 (1952) (holding that evidence obtained by forcible "stomach pumping" of defendant under direction of deputy sheriff's violated due process clause of fourteenth amendment). *Rochin* is a decision with whose result (if not its technique) Justice Brennan clearly agrees.

<sup>11</sup> 397 U.S. 254 (1970).

<sup>12</sup> *Goldberg v. Kelly Symposium*, 56 BROOKLYN L. REV. 729 (1990) (symposium on due process clause of fourteenth amendment).

<sup>13</sup> E.g., Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1299-1304 (1975); Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge*, *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 58 (1976).

*v. Eldridge*,<sup>14</sup> it is addressing due process issues in terms of systemic impact rather than the facts of this case. Nonetheless, the humaneness of this opinion, its insistence on the dignity of even the least among us, captures that side of the Justice I want here to celebrate.

History has taught us again and again the risks we take in looking to the judiciary and judicial modes of action for the determination of large issues of policy in competition with the people's representatives. For general rules, as Holmes remarked in another context, citizens' rights are best "protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."<sup>15</sup> The judicial forte lies not in the creation of general policy, but in measuring the power of particular circumstances that arise in dispute. To measure that power with a yardstick that insists upon the worthiness of us all and that reaches toward the pain of personal encounter is the most difficult and the most praiseworthy. It would be so easy to take refuge behind the distance of "objectivity" and law's hard reason. It is this openness to humanity that, for me, marks Justice Brennan's most precious gift.

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<sup>14</sup> 424 U.S. 319 (1976) (holding that due process does not require evidentiary hearing prior to termination of social security disability benefits).

<sup>15</sup> *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).