PASSION IN LEGAL ARGUMENT AND JUDICIAL DECISIONMAKING: A COMMENT ON *GOLDBERG V. KELLY*

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AN INTRODUCTION TO PASSION

Judges' responses to injustice and human suffering are expressions of their emotional capacity to empathize with or distance themselves from the human stories that give rise to legal controversies. They are also reflections of their intellectual conception of the judicial role.

Justice Brennan has referred to the human attribute that moves judges to act to redress injustice and to alleviate suffering as "passion," by which he means

> the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason.[1]

"Passion," in Justice Brennan's usage, is not mere sentiment, pity, or irrational emotionalism. Rather, it is "[a]ny kind of feeling by which the mind is powerfully affected or moved."[2] It resembles its etymological cognate, compassion—"[t]he feeling or emotion, when a person is moved by the suffering or distress of another, and by the desire to relieve it."[3]

Brennan agrees with Cardozo in rejecting the notion that a judge may simply yield to " 'spasmodic sentiment, to vague and unregulated benevolence.' "[4] He argues that judging, properly understood, involves the interaction of reason and passion, of logic and experience, in a "dialogue between head and heart."[5]

Thus understood, the use of and appeal to passion in advocacy, and the response to and expression of passion in judicial decisionmaking, do not represent a rejection of reason and truth, or a manipula-

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1 Brennan, Reason, Passion, and "The Progress of the Law," 10 Cardozo L. Rev. 3, 9 (1988).

2 Oxford English Dictionary vol. VII 533 (1933, reprinted 1970).

3 Id. at 714.

4 Brennan, supra note 1, at 11 (quoting B. Cardozo, The Nature of the Judicial Process 141 (1921)).

5 Brennan, supra note 1, at 9.

tive evocation or self-indulgent display of human weakness. Rather, passion brings to the presentation and decision of cases an ability to hear, express, and respond to the stories of suffering and injustice that are the lifeblood of legal disputes—an "attention to the concrete human realities at stake."[6]

I. THE ROLE OF PASSION IN ADVOCACY AND IN JUDICIAL DECISIONMAKING

Justice Brennan has argued openly and forcefully for permitting emotion and intuition to play a part in judging, inviting us to consider passion's proper role in legal argument and judicial decisionmaking. His discussion of *Goldberg v. Kelly*,[7] a case in which the Court constitutionalized the American public welfare system, illuminates passion's role.

A. *An Abstract of* Goldberg v. Kelly

In *Goldberg*, legal services lawyers representing welfare recipients claimed that the termination of their clients' public assistance benefits, without the opportunity for a prior hearing, was a violation of due process. New York welfare officials responded that individuals were not entitled to continue receiving welfare benefits if they were no longer eligible. Further, the officials argued that the existing procedures adequately protected the interests of recipients, while also providing the administrative flexibility necessary to avoid improper expenditure of public funds.

The existing procedures did give an appearance of essential fairness to recipients. Prior to termination, a recipient was provided: written notice of the intended termination; the right to challenge the termination by submitting written reasons and documentary evidence; and the right to request that the written record be reviewed by a supervisor. Subsequent to termination, a recipient had various rights: to appeal; to a "fair hearing" conducted by an impartial referee; to judicial review of an adverse "fair hearing" decision; and to payment of all benefits determined to have been wrongfully withheld.

It was only by taking the Court behind this appearance, to the day-to-day realities of the lives of poor people—struggling to provide a bare minimum of basic necessities for themselves and their children, while confronting an inefficient, unpredictable, and often hostile welfare bureaucracy—that the plaintiffs' lawyers were able to convince

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[6] Id. at 20.

[7] 397 U.S. 254 (1970); see Brennan, supra note 1, at 19-22.

the Court of the gross inadequacy of these procedures. And it was because the Justices listened and responded to the stories told by the plaintiffs' lawyers that the Court's majority acted to redress the injustices engendered by the procedures and to alleviate the suffering of people harmed by them. In Justice Brennan's words: "The brief for the recipient told the human stories that the state's administrative regime seemed unable to hear."[8]

B. *Approaches to Advocacy and Judicial Decisionmaking*

1. The Human Voice vs. The Professional Voice

In retrospect, what seems remarkable about *Goldberg v. Kelly* is the way in which both the plaintiffs' lawyers' argument, and Justice Brennan's opinion, spoke in what Julius Getman has recently called "human voice,"

> language that uses ordinary concepts and familiar situations without professional ornamentation in order to analyze legal issues.[9]

Typically, lawyers and judges speak in "professional voice," which Getman describes as "addressing questions of justice through the analysis of legal rules."[10] The Court could have done just that in *Goldberg* by adopting some version of the defendants' argument, which employed a dispassionate, conceptual balancing approach.

2. The Balancing Approach

An accepted method of due process analysis involves the Court balancing the plaintiffs' interests, the claimed deficiencies in existing procedures, the asserted benefits to the plaintiffs of the requested additional or different procedures, and the state's interest in maintaining the existing procedures.[11] Stating the analytic method in these terms, as a rule governing the weighing of "interests," invites lawyers and judges to distance themselves from the actual human experience of the aggrieved parties by arguing and deciding cases solely on the basis of abstract, conceptual, and logical factors. Thus, the Court could reasonably have "balanced" the competing interests in *Goldberg* in a way that would have upheld the existing procedures.

First, the court could have found that the plaintiffs' interest was not substantial, since poor people have no constitutional "right" to be

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8 Brennan, supra note 1, at 21.

9 Getman, Voices, 66 Tex. L. Rev. 577, 582 (1988).

10 Id. at 577. Getman further explains that, "the focus on general rules, which is one of the contributions of professional voice, ensures the use of language that removes some of the feeling and empathy that are part of ordinary human discourse." Id. at 578.

11 See, e.g., Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

financially supported by the Government[12] and are not entitled to receive benefits for which they are ineligible. Further, public assistance is a type of government benefit that can be terminated constitutionally without prior evidentiary hearings.[13]

Second, the Court could have determined that existing procedures were adequate to protect whatever interest the plaintiffs had, since the rate of error in termination decisions was at an acceptably low level. Welfare department statistics cited by the plaintiffs showed that only 500 out of 60,000 terminations, less than 1%, had been reversed as a result of administrative appeals.[14]

Third, the Court could have concluded that pretermination evidentiary hearings would be of little additional benefit to the plaintiffs over the extensive procedural protections already in effect. The procedures included: prior written notice of intended termination; right to present written facts and arguments challenging the proposed termination; right to request and receive pretermination review by a supervisor of the caseworker's termination recommendation; a prompt, posttermination "fair hearing"; judicial review; and payment of all benefits determined to have been wrongfully withheld.

Finally, the Court could have determined that mandating prior evidentiary hearings in cases where termination was recommended would create a substantial administrative burden, particularly given the likelihood of abuse by welfare recipients.

C. *The Balancing Approach Recast*

However, as Getman has observed: "In advocacy, being able to convey the client's sense of injury, needs, values, and feelings in a way that elicits understanding and empathy often is far more important than one's ability to cite the relevant rules and argue from them rigor-

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12 Instead, Justice Brennan stated: "The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right.' " Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (quoting Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969)).

13 Indeed, defense counsel relied on cases that permitted certain governmental acts without previously conducting an evidentiary hearing. See, e.g., Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) (due process not denied when government worker dismissed without a hearing); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (due process does not require hearing at time government seizes product with misleading label); Yakus v. United States, 321 U.S. 414 (1944) (due process does not require evidentiary hearing where wartime price regulations violated); North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (due process does not require notice and hearing when food which is unfit to eat is seized). However, the Court distinguished these cases on their facts—the cases cited did not "deprive an *eligible* recipient of the very means by which to live." *Goldberg*, 397 U.S. at 264.

14 Brief for Appellees at 57, Goldberg v. Kelly, 397 U.S. 254 (1970) (No. 62) [hereinafter Appellees' Brief]. Of course, only 1000 appeals were taken, so the reversal rate in those cases was a staggering 50%. Id.

ously."[15] Thus, the plaintiffs' argument, presented simply, employing narrative, and appealing openly to the sympathy and intuition of the judges, recast the balancing analysis.

II. COUNTERING ADMINISTRATIVE PROCEDURE WITH THE "FACTS OF LIFE"

A. *The "Facts of Life"*

1. The Plaintiffs' Brief

Typical of the stories of the twenty named plaintiffs, told in the plaintiffs' brief, was that of Esther Lett.

> Mrs. Esther Lett received AFDC for herself and four nieces and nephews until Feb. 1, 1968. On Feb. 11 she received a notice of discontinuance for "failure to disclose assets." The specific basis of termination was a letter from the Board of Education, in response to an apparently routine inquiry from the welfare department, to the effect that Mrs. Lett was currently employed by them. This letter was completely erroneous; Mrs. Lett had been employed in the Head Start program in the summer of 1967 and occasionally as a substitute teacher during the Fall, but had no further or regular employment. The department had been made fully aware of Mrs. Lett's previous employment through her caseworkers and as the result of a previous fair hearing, seven months before, at which the State held that Mrs. Lett had been wrongfully terminated. Mrs. Lett's attorney requested a fair hearing on Feb. 19. There was still no reply when, on Feb. 22, Mrs. Lett, explaining that she was starving, attempted to obtain emergency assistance at the emergency welfare center. She was denied aid on the grounds that she had concealed assets. Her attorney lent her money so that she might immediately obtain a meal, and the Legal Aid Society provided more so that her children would have food for the weekend. The attorney called the caseworker for the second time and sought to inspect the letter from the Board of Education. He then went personally to the office of the Board of Education and verified the mistake. When the attorney called the supervisor at the welfare department to advise her of the mistake, the supervisor stated that the records had been transferred and hung up. On Feb. 27 Mrs. Lett and her attorney then went to the center to which the records had been transferred for emergency aid; the attorney left only when he was assured that the case would be taken care of. Mrs. Lett waited all day and fainted during the afternoon because of lack of food. When she was revived she was told that aid would not yet be forthcoming since it had not been

[15] Getman, supra note 9, at 583.

> authorized. At 5:00 she was given $15 and was told to return three days later. During this period Mrs. Lett and the children depended on the charity of her neighbors, who are welfare recipients. At one point during this harrowing experience, they were all forced to go to Harlem Hospital for treatment of severe stomach disorders resulting from spoiled chicken and rice donated by a neighbor. Aid was reinstated after the filing of this lawsuit.[16]

The story of Esther Lett, and of the nineteen other named plaintiffs, are told in narrative form in the plaintiffs' brief.[17] The stories are repeatedly evoked and retold throughout the brief, in an open effort to appeal to the hearts—and minds—of the Justices.[18]

2. Brennan's Response

Justice Brennan's opinion makes clear that at least he heard the stories and understood the hardship inflicted upon welfare recipients by erroneous termination of their benefits.

> For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. . . . Thus the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.[19]

B. *The Bureaucracy*

1. The Plaintiffs' Brief

The brief continually refers to acts in the record that belied the defendants' claim that existing procedures afforded due process to welfare recipients. Attorneys told stories of cases in which they were involved that disclosed bureaucratic delay, indifference, bungling, and error that bordered on the incredible.[20]

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16 Appellees' Brief, supra note 14, at 82-84 (citations to Appendix omitted).

17 Id. at 75-91.

18 Upon abrupt withdrawal of aid . . . the immediate and overwhelming problem the [plaintiffs] confronted was not legal wrangling with the welfare department. It was to survive willy nilly from day to day without subsistence income; to obtain sleeping quarters and daily food for themselves and their children by dint of will and catch as catch can.

Id. at 4.

19 Goldberg v. Kelly, 397 U.S. at 264 (emphasis in original).

20 See, e.g., Appendix at 29a-35a, Goldberg v. Kelly, 397 U.S. 254 (1970) (No. 62) [hereinafter Appendix] (affidavit of the author). For example, one attorney reported that he had

The plaintiffs' brief summarized these lawyers' experiences with the welfare bureaucracy:

> [I]n almost every appeal there is month upon month of delay during which time the family is denied the statutory assistance grant .... [T]he state's own statistics show that in almost no case is the decision rendered within three months. This systematic delay is not attributable to the complexity or protractedness of the hearing itself. Each hearing typically takes less than one hour.[21]

Again, the plaintiffs' counsel repeated the refrain, which was the theme of their argument:

> But even were the State or federally imposed time limits of 30-60 days not merely exhortatory, the subsequent hearing would remain nominal and inadequate . . . the consequences of withdrawal are immediate and intense from the very day the expected check fails to arrive. Neither rent nor daily need for food and other necessities can be postponed.[22]

In the face of this inefficient and time-consuming process, welfare recipients who were dependent on the minimal financial support provided by the welfare system were expected, somehow, to survive.[23]

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handled "well over one hundred welfare cases," that the "time allotted for . . . 'fair hearings' was frequently insufficient," that consequently such hearings were frequently interrupted before completion and not resumed "for several weeks," and that "a period of *two months* frequently elapsed before determinations were reached." Id. at 296a-97a (Affidavit of Cesar Perales, Esq.). Another attorney, who stated that he, too, had represented "more than one hundred welfare recipients in the City of New York," reported that "[n]inety-nine percent of the recipients who come to me with a termination case are returned to the welfare rolls after it is demonstrated that the termination was illegal." The attorney continued:

> During the last two-and-one-half years, I have not participated in one hearing in which the State has conformed to the time limitations established by its own regulations. The average time from initial request to the receipt of a hearing decision is from four to five months. Hearings are scheduled for a particular hour, and referees will adjourn a hearing arbitrarily without regard to the client's need for a speedy decision. When a hearing is adjourned, it is usually not rescheduled for at least six weeks. Cases that are scheduled for eleven o'clock in the morning will not be allowed to run into the afternoon, and will be adjourned not to a day certain, but to a date solely in the discretion of the State. Cases are adjourned at five o'clock regardless of the issue, even though they were scheduled initially for a four o'clock hearing. Referees will allow any type of hearsay evidence to be presented by Department personnel in support of their position. Documents relied upon by the Department are not made available to the client's attorney nor are they subject to inspection at the hearing.

Id. at 289a-91a (Affidavit of David Gilman, Esq.).

21 Appellees' Brief, supra note 14, at 60-61.

22 Id. at 61.

23 New York currently [1969] provides 66¢ per person per day for food. No allowance whatsoever is made for necessities such as home furniture, school clothing, winter coats and boots, or for "luxuries" such as newspapers, telephone calls, babysitters, suspenders, cosmetics, cigarettes, birthday presents or parties, or any form of entertainment. Since costs for the non-food components of the budget—

Meanwhile, the "fair hearing" referees were ultimately reversing 50% of the terminations that were appealed—terminations that had been put into effect months earlier by the New York City welfare department.[24]

Vague termination standards, broad discretion accorded poorly trained caseworkers, and public sentiment against welfare recipients that was shared by many of the workers, resulted in a high incidence of administrative error in caseworker decisions to terminate benefits. Again, the plaintiffs' stories revealed the arbitrariness and irrationality of the apparently fair termination procedure.

> Randolph Young was terminated for "mismanagement of funds" after he was robbed of $20; and Mary Holmes was terminated for "mismanagement" when she used rent security money to purchase a bed for her daughter who had been sleeping with her . . . Pearl Frye was terminated for failure to keep an appointment with the caseworker . . . Ina Sidor was terminated because a newly appointed caseworker suspected that she owned a car and some stock, even though those very reasons had been rejected in an appeal from a previous termination . . . John Kelly was terminated for being missing after a dispute [with his caseworker] over where he should live; he remained missing after he and a private social worker made repeated attempts to see the caseworker. Minerva Rodriguez was also deemed "missing" because she was not at home on two occasions when the caseworker made an unscheduled visit to the home.[25]

The defendants asserted that the problem of erroneous terminations was effectively addressed by the prior notice provided to recipients, and the opportunity afforded them to submit written facts and reasons why the proposed termination was not warranted. The plaintiffs' attorneys answered this assertion with yet another recitation of the facts of life.

> Marshalling the evidence and submitting persuasive argument under this procedure to reveal error, misinformation and misjudgment would try the wit of astute counsel. It is obvious that for persons, many of whom are functionally illiterate, legally unversed, and without access to counsel, no less instant access, this opportunity to be heard is "cruelly ironic." How does one cast doubt on the credibility of third persons of whom the client is not aware or assail the shortcomings in a record that is not revealed, even in

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rent and utilities—are fixed, any purchase of an item not provided for must be made from the 66¢ a day allotted for food.

Id. at 26 n.27 (citing N.Y. Soc. Serv. L. § 131(a) (1969)).

[24] Id. at 57 (citing New York City Department of Social Services Fair Hearing statistics).

[25] Id. at 32-33 (references to Appendix omitted).

summary form? How does one establish one's own veracity or introduce the testimony of witnesses in a written statement prepared on a one or two days' notice?[26]

2. Brennan's Response

Justice Brennan heard this emotional recitation and responded:

> The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing . . . . Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance . . . Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision.[27]

C. *The Identical Interests of the Public and the State*

1. The Plaintiffs' Brief

The plaintiffs' counsel portrayed in graphic and emotionally compelling terms the total dependence of welfare recipients on their meager public assistance grants, the arbitrary and punitive behavior of many welfare department caseworkers in terminating those benefits, the overwhelming obstacles faced by recipients in attempting to obtain relief from erroneous termination decisions, and the high reversal rate of terminations when appeals were actually taken.[28] The plaintiffs' attorneys went on to argue boldly that the interests of public assistance recipients and of the state were not in conflict, but were actually identical:

> [T]he government is fulfilling its constitutional responsibility in the twentieth century, "to insure domestic tranquility" and "to promote the general welfare" by providing that our most impoverished citizens will have the bare minimums essential for existence, without which our expressed constitutional liberties become meaningless.[29]

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26 Id. at 47 (citations omitted).

> In almost all termination cases I have handled, the issues involved questions of fact often under vague regulations and the veracity of witnesses. In my experience there is seldom an issue that can be resolved solely through the submission of documents. The issues involve questions of fact and interpretation of regulations.

Appendix, supra note 20, at 290a (Affidavit of David Gilman, Esq.).

27 *Goldberg*, 397 U.S. at 268-69 (citations omitted).

28 See supra note 14.

29 Appellees' Brief, supra note 14, at 39.

This argument transformed the state's asserted interest in protecting the public treasury and in procedural flexibility into a dramatic assertion of a constitutional "right to life" for all citizens, a governmental interest of fundamental constitutional importance transcending any bureaucratic concern for economy or efficiency.

2. Brennan's Response

It was a passionate plea, to which Justice Brennan responded with equal passion:

> [I]mportant governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. . . . Public assistance . . . is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.[30]

The Court's characterization of public assistance to the poor as carrying out important *constitutional* objectives reflected the impact of the plaintiffs' stories—and their lawyers' arguments—on Justice Brennan and his colleagues in the majority.

III. THE SPIRIT OF *GOLDBERG V. KELLY*

A. *The Forerunners*

Justice Brennan has described the significance of *Goldberg v. Kelly* "as injecting passion into a system whose abstract rationality had led it astray."[31] The case is special, but not unique in that respect. Allowing the facts of life to inform judicial consideration of claims that those policies and programs deny individuals their constitutional rights is an accepted, if rarely controlling, mode of constitutional jurisprudence. One need only recall in our time the case of *Brown v. Board of Education*,[32] for a striking example of the Supreme Court responding to the stories of how a government policy actually affected people, rather than acquiescing in the abstract logic of a sterile legal doctrine.

For another example, consider the landmark case of *In re*

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30 397 U.S. at 264-65.

31 Brennan, supra note 1, at 20.

32 347 U.S. 483 (1954).

Gault,[33] where the majority of the Court was able to see through the benign intentions and sentimental pretensions offered as justification for an informal children's court, to the harsh realities experienced by youths caught up in the juvenile justice system.

In the words of Justice Fortas, speaking for the majority, which included Justice Brennan:

> [W]e confront the reality. . . . A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated. . . . Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.[34]

B. *Passion in the Family Law Arena*

The passionate mode of constitutional analysis, exemplified by *Goldberg*, appears frequently in dissenting opinions. Justice Brennan's dissenting opinion in *Parham v. J.R.*[35] is a prime example. In *Parham*, the Court upheld state laws permitting parents and legal guardians to "volunteer" children into state mental hospitals. In an abstract and doctrinaire opinion, the majority purported to recognize and uphold parental authority as against state intervention in family life. The stories of the child plaintiffs, even in Chief Justice Burger's dispassionate recitation in the majority opinion, cry out for a different result.[36]

At the request of his mother, J.L. had been admitted to a state mental hospital in 1970 at the age of six. His diagnosis was "hyperkinetic reaction of childhood."[37] He was still there five years later when the case was filed because his parents would not take him home and, in fact, had voluntarily terminated their parental rights the year before. Hospital staff had recommended that J.L. be placed in a foster home, but that recommendation had not been carried out.

J.R., the other named plaintiff, had been declared a neglected child and removed from his parents' custody at the age of three

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33 387 U.S. 1 (1967).
34 Id. at 27 (citation omitted).
35 442 U.S. 584 (1979).
36 Id. at 589-90.
37 Id. at 589.

months. He had been placed by state authorities in a succession of seven different foster homes, and was eventually volunteered by social workers into a state mental hospital at the age of seven. His diagnosis, not surprisingly, was "unsocialized, aggressive reaction of childhood."[38] Years later, when the lawsuit was filed, he remained in the hospital solely because state authorities had failed to implement a hospital recommendation that he be placed in a foster home.

In the face of these facts, which the trial court had found to be "representative" of the plaintiff class of children volunteered into state mental hospitals, the majority opinion set forth an argument employing abstract conceptions of parental responsibility, family autonomy, state intervention in the family, and the best interests of children. The majority's opinion reflected the Justices' capacity to distance themselves emotionally from the plaintiffs' stories, as well as their intellectual inclination to "fit" social problems into legal categories on the basis of abstract and conceptual considerations, rather than responding "to the concrete human realities at stake."[39]

The Chief Justice recited the plaintiffs' stories without listening to them. Justice Brennan heard the children's stories, and in a passionate dissent rejected the majority's analysis: "In these circumstances, I respectfully suggest, it ignores reality to assume blindly that parents act in their children's best interests when making commitment decisions and when waiving their children's due process rights."[40]

The majority took the opportunity presented by the *Parham* case to uphold and constitutionalize a presumption that parents act in their children's best interests. While that may be a useful and proper political value in a pluralist democracy, it hardly responds to the suffering and injustice experienced by the plaintiffs. They were "children," as Justice Brennan observed, "abandoned by their supposed protectors to the rigors of institutional confinement."[41]

Another family law case decided by the Court not long after *Parham* provided Justice Brennan with another opportunity to write a passionate dissent. In *Lassiter v. Department of Social Services*,[42] the Court employed an abstract due process balancing approach to uphold the denial of appointed counsel to an indigent mother in a proceeding in which her parental rights were terminated. The major-

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38 Id. at 590.

39 Brennan, supra note 1, at 20.

40 *Parham*, 422 U.S. at 632 (Brennan, J., dissenting).

41 Id. at 639.

42 452 U.S. 18 (1981).

ity opinion represents the antithesis of *Goldberg v. Kelly*. In "balancing" the mother's interest in maintaining a legal relationship to her child, the state's interest in protecting the child's welfare, and the risk that the mother's lack of an attorney might lead to an erroneous result, the Court held that existing procedures were sufficient to satisfy the requirements of due process.

Justice Brennan, invoking the spirit of *Goldberg v. Kelly*,[43] told Ms. Lassiter's story.[44] In language reminiscent of *Goldberg*,[45] he rejected the majority's assertion that Ms. Lassiter was capable of defending herself without the assistance of court-appointed counsel:

> The legal issues posed by the State's petition are neither simple nor easily defined. The standard is imprecise and open to the subjective values of the judge. A parent seeking to prevail against the State must be prepared to adduce evidence about his or her personal abilities and lack of fault, as well as proof of progress and foresight as a parent that the State would deem adequate and improved over the situation underlying a previous adverse judgment of child neglect. The parent cannot possibly succeed without being able to identify material issues, develop defenses, gather and present sufficient supporting non-hearsay evidence, and conduct cross-examination of adverse witnesses.[46]

Having demonstrated that defending oneself in a termination of parental rights case would be beyond the abilities of any parent, even one who was affluent, educated, and sophisticated, Justice Brennan applied his own "balancing" approach to the realities of the typical termination case, such as the one brought against Ms. Lassiter: "When the parent is indigent, lacking in education, and easily intimidated by figures of authority, the imbalance may well become insuperable."[47]

CONCLUSION

Justice Brennan's opinions in cases such as *Goldberg*, *Parham*, and *Lassiter* are expressions of his emotional capacity to respond to the human stories from which legal controversies arise, as well as his intellectual conception of his role as a judge. For Justice Brennan, judicial decisionmaking involves a convergence of logic and experience, reflection and intuition, precedent and creativity, reason and passion.

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[43] Id. at 49.
[44] Id. at 52-56.
[45] See *Goldberg*, 397 U.S. 254, 268-69 (1970).
[46] *Lassiter*, 452 U.S. at 45-46.
[47] Id. at 46 (citations omitted).

The expression of passion in Justice Brennan's jurisprudence does not reflect a rejection of, indifference to, or carelessness about the pursuit of truth. Indeed, in Brennan's view, permitting passion to play a part in advocacy and judging is often essential to finding, recognizing, and telling the truth.

Similarly, an advocate's proper use of and effort to evoke passion is not a sophistic or rhetorical appeal to irrationality or sentiment, but a means of achieving justice by helping the Court to hear and understand the real human dimensions of a legal controversy.

The opposite of truth is not passion, it is falsehood. Refusal to acknowledge and respond to "the concrete human realities" that are the lifeblood of many legal disputes, by following an abstract, conceptual, logical approach to judging, does not reflect a greater commitment to truth, but at most an intellectual preference for a dispassionate, rationalistic method of deciding cases. However, in Justice Brennan's words:

> Only by remaining open to the entreaties of reason and passion, of logic and experience, can a judge come to understand the complex human meaning of a rich term such as "liberty," and only with such understanding can courts fulfill their constitutional responsibility to protect that value.[48]

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[48] Brennan, supra note 1, at 11.