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The Other Goldberg

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Shortly before his retirement in 1990 Justice William J. Brennan, Jr., described Goldberg v. Kelly as the most important decision of his long career. I find it somewhat difficult to know what to make of this statement because, oddly enough, there are two decisions that go by that name. Both were written by Justice Brennan.

The first, decided in 1970, was indeed remarkable.[1] It required an adversarial hearing prior to the termination of welfare benefits and, in so doing, developed the law along two different axes. The so-called due process revolution of the 1960s was extended from the criminal to the civil domain, and the procedural protections traditionally afforded to the property of the privileged classes were now to be provided to the property of the less fortunate.

Although in outcome Goldberg v. Kelly was singular and in that sense a breakthrough, its underlying method of jurisprudence was not. Justice Brennan wrote for the majority and, in so doing, employed a method that characterized the Court's work for the prior twenty-year period and that produced a body of decisions—Brown v. Board of Education,[2] Reynolds v. Sims,[3] Gideon v. Wainwright,[4] New York Times v.

1. 397 U.S. 254 (1970).
2. 347 U.S. 483 (1954).
3. 377 U.S. 533 (1964).
4. 372 U.S. 335 (1963).

Sullivan,[5] and Engel v. Vitale[6] are a few examples—that have come to define judicial review as we know it and that for some time now have been an inspiration for all the world.

The method of all these decisions was, I believe, entirely rationalistic: the justices reflected upon the values and ideals of the Constitution and sought to understand what those ideals would require in the practical world they confronted. In Brown v. Board of Education the justices had to give content to the ideal of racial equality embodied in the Fourteenth Amendment and to ascertain whether the dual school system was consistent with that ideal, that is, whether segregated schools were inherently unequal. In Goldberg v. Kelly the value was not racial equality but procedural fairness—the nature of the process due to a citizen before the state could deprive that citizen of liberty or even property—yet the method that produced that decision was essentially the same.

In calling this method rationalistic, I mean to underscore its discursive nature: The justices listen to arguments about a broad range of subjects—the facts, the history surrounding the laws in question, earlier cases, and the precise wording of the text. This argument goes on with the lawyers, among the justices and their clerks, and among the justices themselves. The justices also think about all that they heard and try to evaluate the strengths and weakness of the arguments. Thinking itself is an interiorization of the discursive process, a continuation of the argument but now wholly within the individual. Thinking is, as Hannah Arendt put it, "the soundless dialogue between me and myself."[7] The process of deliberation comes to a conclusion at the moment of decision, at which time the decision is publicly announced and the justices set forth their reasons for it.

Given its discursive nature, the judicial decision may be seen as the paragon of all rational decisions, especially of a public character. It differs from other decisions only by virtue of the rules or standards determining what counts as a good as opposed to a bad argument, or what constitutes a good as opposed to a bad reason. A member of the city council trying to decide what should be done with public funds, or the superintendent of a park confronting a similar predicament, might consider facts, reasons, or arguments that a judge might not, because of differences in their offices, but each is obliged to decide questions rationally and thus engage

5. 376 U.S. 254 (1964).
6. 370 U.S. 421 (1962).
7. Hannah Arendt, *The Life of the Mind* (New York: Harcourt Brace Jovanovich, 1971), p. 185.

in the deliberative process that is the essence of judging and, for that matter, of law itself.

Some portion of this process is addressed to the elaboration of ends; some, to the means for achieving those ends. The latter goes by the name of instrumental rationality, by which a particular end is stipulated and the decision maker tries to identify the best means for achieving that end. Judgments of this type are almost technocratic and tend to dominate the remedial phase of a lawsuit, in which the judge formulates a plan for bringing a recalcitrant reality into conformity with the norms of the Constitution. What kind of decree, the judge might ask, would most effectively instill within the welfare bureaucracy a proper regard for procedural fairness? On the other hand, the explication of the ideal of procedural fairness, a judgment as to whether it requires a hearing prior to termination, and of what that hearing might consist of, is not technocratic or instrumental, but deeply substantive or normative. It focuses on ends, not means, and on the relationship of these ends or values to social practices, in this instance, the welfare system.

While instrumental reasoning dominates the remedial phase, substantive or normative reasoning—that is, the refinement and elaboration of ends—is the essence of the right-declaring phase of adjudication. In my view, that aspect of adjudication is foundational, for the authority of the judiciary is linked to substantive rationality.[8] The independence of the judiciary and its commitment to public dialogue are the source of the judiciary's special claim to competence, and thus the source of its authority, yet the competence that is produced by independence and public dialogue has more to do with normative than technocratic judgments. We give power to the judiciary because it is "the forum of principle," to use Ronald Dworkin's phrase,[9] not because it has a corner on the social technologies of the world, not because it is more adept than the legislature or the executive in devising the best means for realizing some stipulated end. In fact, we allow the judiciary the power to make instrumental judgments and to be decisive in that domain—to be supreme in the formulation and administration of remedy—only as a way of protecting or safeguarding its declarations of principle or right. In celebrating the Warren Court, and the body of doctrine that it has created, one has in mind more what that institution said about ends, values, ideals—its explication of equality, free speech, religious liberty, procedural fairness,

8. Owen Fiss, "The Forms of Justice," *Harvard Law Review* 93 (1979): 1.

9. Ronald Dworkin, "The Forum of Principle," *New York University Law Review* 56 (1981): 469.

or the more general value of human dignity—than the technologies it devised to achieve those ends. This is true of Goldberg v. Kelly, which was, in my judgment, largely an exercise in, and a triumph of, substantive rationality.

Triumph it was, but the travails of that case and the entire jurisprudence that it exemplified began in the early 1970s, almost at the very moment that decision was rendered. Goldberg v. Kelly marked the end of one era and the beginning of another; it was handed down as American culture turned inward and we began to lose faith in the Constitution as an embodiment of a public morality to be known and elaborated through the exercise of reason. In the academy, those doubts informed and accounted for the rise and extraordinary success of the law and economics movement—a movement that, granted, believed in reason, but only of the instrumental variety.

Law and economics is premised on the idea that there are no public values or ideals about which judges should reason. Ideals exist, but only at a personal or individual level, and as such are not fundamentally different from an individual's interests, desires, or preferences—none of which are especially amenable to reasoned elaboration. Law and economics also assumes that it is arbitrary for any social institution, but especially the judiciary, to choose among these preferences; all are entitled, to use Robert Bork's formula, to equal gratification.[10] In practical terms this means that there can be only one end for social institutions: maximizing the total satisfaction of individual preferences, or as Richard Posner has characterized it, increasing the size of the pie, rather than deciding how it should be divided.[11] The task that remains for the judiciary under this formulation is essentially technocratic: devising or choosing the rules that are the best means for increasing the size of the pie. To say, as law and economics does, that "law is efficiency" implicitly hypothesizes a single, uncontested end and relegates the judge to the formulation of rules—the instruments—that best serve that end.

Law and economics, and its special brand of instrumentalism, has not been confined to the academy. It has had an impact on private law and has even managed to find its way to the High Court. I am referring to Justice Powell's three-pronged test of Matthews v. Eldridge,[12] which bears

10. Robert Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (1971): 1, 10.

11. Richard Posner, "Wealth Maximization and Judicial Decision-Making," *International Review of Law and Economics* 4 (1984): 131, 132.

12. 424 U.S. 319 (1976).

a striking similarity to a formula that Richard Posner had proposed earlier.[13] For Posner, the judge confronted with a claim for new procedure must compare the cost of the proposed procedural innovation against the benefits it was likely to produce, and those benefits are to be calculated by multiplying the costs of an error by the chance of its occurring if the proposed procedure is not instituted. In Matthews v. Eldridge Justice Powell wrote:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute provided safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[14]

As can be seen, Justice Powell's formula confuses the matter slightly by adding to the equation a term that was already there (the value to the individual of the new procedure was already reflected in the error costs), but in spirit and conception, Powell's formula is the same as Posner's. Both understand procedure in wholly instrumental terms, as though it were a machine dedicated to reducing erroneous outcomes. They believe the machine should be acquired if the costs of buying and operating it are less than the benefits likely to be produced, that is, if the machine is efficient.

Such a model for deciding procedural questions can be criticized, and has been, on the ground that it assumes an intellectual capacity that simply does not exist. Operationalizing the cost-benefit methodology requires quantifying factors that cannot be quantified, and any attempt to engage in such an exercise will be worse than useless—it will tend to drive out of the decisional process the "soft variables," those values that are most important to any understanding of procedural fairness.[15] For me, however, the failure of law and economics and the Matthews v. Eldridge approach is of another order: it derives not simply from the

13. Richard Posner, "An Economic Approach to Legal Procedure and Judicial Administration," *Journal of Legal Studies* 2 (1973): 399, 441–42.

14. 424 U.S. at 334–35.

15. Jerry L. Mashaw, "The Supreme Court's Due Process Calculus for Administrative Adjudication in Matthews v. Eldridge: Three Factors in Search of a Theory of Value," *University of Chicago Law Review* 44 (1976): 28, 48.

attempt to quantify that which cannot be quantified, but from the reduction of due process and, for that matter, the entire judicial judgment to instrumental terms.

From my perspective a justice charged with the duty of construing the due process clause, as Justice Brennan was in Goldberg v. Kelly, should be seen as engaged in a process of trying to understand what it means for a society to be committed to procedural fairness, and to elaborate that understanding in a certain practical context. According to law and economics and Matthews v. Eldridge, however, the judicial task is transformed into one of choosing an instrument, a means, or a technology that would serve some specific and relatively uncontested end, such as reducing the number of erroneous outcomes, or stated more generally, increasing the size of the pie. Such a view trivializes and distorts the judicial task entailed in the explication of due process and can be faulted on that ground; it also might be said that it puts the authority of the judiciary into question, for the instrumentalization of reason eradicates that portion of the judicial decision that is the foundation of its authority—the deliberation about ends and values—and thus puts the judiciary on the defensive. There is no good reason for the judiciary to second guess the legislature or the executive on purely instrumental questions, and as a result, an attitude of deference and passivity on the part of the judiciary becomes all the more appropriate.

Since the late seventies Matthews v. Eldridge has governed and has produced a body of decisions that, predictably, deprived Goldberg v. Kelly of any operative force. *Goldberg* remained on the books, and though it has not controlled the decisions of the Court, it functioned in the academy, in the law reviews, and in certain sectors of the profession as a critical counterpoint—as a reminder of what law once was and might one day be. It stood as a monument to our own little enlightenment. But matters became unusually complicated in 1987 when, much to my surprise, a second version of Goldberg v. Kelly appeared, not in the *U.S. Reports*, to be sure, but in the *Record of the Association of the Bar of the City New York*.[16] I am referring to Justice Brennan's speech before the association in September of that year, a speech in which he gave another account of the jurisprudential method that produced that deci-

16. William J. Brennan, Jr., "Reason, Passion, and the Progress of the Law," The Forty-Second Annual Benjamin N. Cardozo Lecture, *The Record of The Association of the Bar of The City of New York* 42 (1987): 948. The speech was reprinted in *Cardozo Law Review* 10 (1988): 3, and all references are to that version of the speech.

sion. He stayed clear of the intrumentalism of law and economics and of Matthews v. Eldridge but nonetheless challenged my understanding of Goldberg v. Kelly as a triumph of substantive rationality. He introduced a new element into the decisional process: passion.

Justice Brennan did not deny any role for reason (either of the instrumental or substantive kind) but insisted that any account of Goldberg v. Kelly that did not include room for the emotional or affective elements would be incomplete and inadequate. He also quoted a passage from one of the briefs describing the plight of some of the welfare recipients involved in the case and characterized that passage in terms of a form of discourse that seems especially tied to the emotive faculty. He saw the brief as telling "human stories."[17] While arguments, whether they be of fact or principle, seem especially addressed to the faculty of reason, storytelling is often seen as being more suited to stirring emotions.

The principal burden of Justice Brennan's discussion of Goldberg v. Kelly before the Bar Association was to criticize the welfare bureaucracy for having become captured by "the empire of reason";[18] but I take him to be making a point about all government officials, including judges. He said as much, and underscored the role of passion in judicial decision—in Goldberg v. Kelly itself—by taking Justice Cardozo as his point of departure: Of Cardozo, Justice Brennan said, "He attacked the myth that judges were oracles of pure reason, and insisted that we consider the role that human experience, emotion, and passion play in the judicial process."[19]

Many factors account for the tremendous stir caused by Justice Brennan's speech, not the least of which is that it coincided with the emergence of a new jurisprudential movement in the academy—spearheaded by critical race theorists[20] and certain feminists[21]—that also places a premium on passion and storytelling. These scholars write from the left, and

17. Ibid., p. 21.
18. Ibid.
19. Ibid., p. 5
20. See, e.g., Richard Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative," *Michigan Law Review* 87 (1989): 2411; Patricia Williams, "Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism?" *University of Miami Law Review* 42 (1987): 127; Derrick Bell, "The Civil Rights Chronicles," *Harvard Law Review* 99 (1985): 4.
21. See, e.g., Martha Minow and Elizabeth Spelman, "Passion for Justice," *Cardozo Law Review* 10 (1988): 37. Some read Carol Gilligan, *In a Different Voice* (Cambridge: Harvard University Press, 1982), in these terms, but in fact she has been meticulous in presenting the ethic of care as being based on reason, not one of its alternatives.

appear the natural successors to the critical legal studies movement, which emphasized the role of passion.[22] But unlike critical legal studies, the movement I am referring to believes in rights, in the redemptive possibility of law, and in fact draws their inspiration, in one way or another, from a range of theoretical works that is very broad.[23] I am sure Justice Brennan would be surprised to learn that his speech lent comfort and support to a new jurisprudential movement, especially one so hostile to much of the Court's work, but it has turned out that way, and a number of these scholars have in turn returned the favor by endowing his speech with a measure of visibility and energy that is indeed stunning. Judging from my students and some of the commentary published in reaction to Brennan's speech,[24] the second version of Goldberg v. Kelly stands at the verge of supplanting the original.

Mention of Cardozo makes it worth emphasizing at the outset that I do not believe that Justice Brennan was engaged in an exercise in realism and thus merely restating the obvious: judges are people, and as much as they strive to be rational, emotion and passion inevitably creep into the judicial process. If that were all that were involved, I would have no objection. The presence of passion could be safely acknowledged, though on the understanding that it must always be disciplined by reason. My concern arises, however, from the fact that Justice Brennan was not content with repeating the realist's observation but instead quickly moved from the descriptive to the normative. He celebrated passion as a factor that *should* enter the decisional process and criticized Cardozo for not sufficiently encouraging or valuing, as opposed merely acknowledging, the "dialogue between heart and head."[25] For Brennan, passion must be seen as a part of the judicial ideal.

Rational deliberation, whether it be about ends or means, is no easy endeavor. It requires an enormous amount of mental and physical effort, and it always leaves one with an uneasy feeling: Have I done the right thing? I speak from rather mundane personal and professional experi-

22. Roberto Unger, *Passion* (New York: Free Press, 1984). Duncan Kennedy's "fundamental contradiction" had been framed in terms of passion—the love of others and the fear of others. Kennedy, "The Structure of Blackstone's Commentaries," *Buffalo Law Review* 28 (1979): 205.

23. Here I especially have in mind the work of Martha Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (Cambridge: Cambridge University Press, 1986), and some of the writing of the law and literature movement. See, e.g., Paul Gewirtz, "Aeschylus' Law," *Harvard Law Review* 101 (1988): 1043.

24. See Stephen Wizner, "Passion in Legal Argument and Judicial Decisionmaking: A Comment on Goldberg v. Kelly," *Cardozo Law Review* 10 (1988): 179.

25. Brennan, "Reason, Passion, and the Progress of the Law," p. 12.

ences, and I am sure the arduousness of the task increases with the magnitude of the responsibility. The sense of uncertainty that a justice must feel, either at the moment of decision or reflecting on past decisions, must be excruciating. It always struck me as a measure of Justice Brennan's greatness that he was not overwhelmed by self-doubt, that for over thirty years, he was able to push on to judgment day in and day out, although he acknowledged, in a paraphrase of Cardozo that dramatically understates the matter, that "judging is fraught with uncertainty."[26]

The temptation to look for ways of curbing that uncertainty is always great. This was, I believe, one of the driving forces behind the rise of law and economics and by implication the Matthews v. Eldridge formula. Evoking the scientism that surrounds economics and the formal language of mathematics associated with that discipline, law and economics, especially at the hands of Posner, promised a method—cost-benefit analysis—that might avoid or relieve the uncertainty of judging. Here was a method that was determinate and certain. There was, of course, nothing to this promise—it presupposed an end that was either vacuous or deeply contested and, in any event, depended on a capacity to quantify values or contingencies that cannot be quantified. But the appeal of the promise could not be denied, and there are passages in Brennan's speech that suggest that his turn to passion might have been impelled by a similar consideration. It may be viewed as an attempt to curb the uncertainty of the law and adjudication or, to use a familiar jurisprudential metaphor, fill the "gaps of the law" that might remain if there were nothing but reason.

A number of aspects of the original Goldberg v. Kelly decision remain shrouded in uncertainty even today. One arises from the risk, and it is only a risk, that the introduction of pretermination adversarial hearings might reduce the funds available for actual or potential welfare benefits. Is that risk a sufficient basis for declining to require pretermination hearings? This strikes me as the central dilemma of Goldberg v. Kelly, and although reason gives no easy answer to it,[27] neither does passion. In his speech Justice Brennan focused on the hardship that would be imposed on the individuals whose benefits might be wrongly terminated and, in

26. Ibid., p. 4.

27. In *Goldberg v. Kelly*, Brennan disposed of the issue in these terms: "Thus, the interest of an eligible recipient in uninterrupted receipt of public assistance, coupled with the state's interest that his payments not be erroneously terminated, clearly outweighs the state's concern to prevent any increase in its fiscal and administrative burdens." 397 U.S. at 266.

the name of passion, specifically invited an empathetic understanding of their situation. Of course, those people deserve our sympathy, but no more or less than those whose welfare checks might be reduced by the institutionalization of the pretermination procedure, assuming the risks that I spoke of were to materialize. Sympathetic figures appear on both sides of the issue, a fact underscored by the division among the justices. Justice Brennan, the author of the majority opinion, is indeed a passionate person, but so was Justice Hugo L. Black, who in dissent spoke out on behalf of those whose welfare checks might be reduced as a result of the new procedural requirement. It may be that one group of recipients is more deserving of our sympathy than the other, but even if that is so, there is no reason to believe that the question of desert—of determining who is more deserving of our sympathy—would itself be resolved on the basis of some feeling.

Often, but not always, our passions seem directed toward or attached to particulars: More often than not, we love particular people or activities, rather than abstract ideas. Building on this insight, one might be tempted to say that passion helps resolve the uncertainty present in Goldberg v. Kelly because it points toward favoring or at least protecting the particular individuals whose welfare benefits are about to be terminated—the plaintiffs in the suit. This might explain why in his Bar Association speech Justice Brennan quoted at length a passage from one of the briefs describing the hardship suffered by four welfare recipients (Angela Velez, Esther Lett, Pearl Frye, and Juan DeJesus) and their families.

While mention was indeed made in the briefs of Angela Velez, Esther Lett, Pearl Frye, and Juan DeJesus, little was known of them by the justices in the actual case other than their names. These persons did not function as particulars, to whom the justices might have become passionately attached; they were used as verbal mannequins, stand-ins for a group of persons consisting of all welfare recipients. Justice Brennan recognized as much when he disposed of the mootness objection that arose from the fact that some or all of the named plaintiffs had already been restored to the rolls. As already noted, Justice Black dissented and in his opinion expressed concern for those who might be in desperate straits because of the newly imposed requirement of adversarial hearings, and though he did not use proper names to make his point, his concerns were no more general or particularized than Justice Brennan's. Both were speaking of aggregates or classes of people. Goldberg v. Kelly was no more about particular named persons, who might suitably be the object of our affections, than Brown v. Board of Education was about Linda

Brown. Both were about social groups and what the Constitution promises them.[28]

In suggesting that passion is no more a determinate guide to judgment than reason, thus far I have focused on the multiplicity of the objects of our affections; I have assumed that the passion was singular (sympathy) but that it may be distributed on both sides of the issue. The indeterminacy of impassioned judgment becomes even more pronounced, however, when we vary that assumption and acknowledge the multiplicity of passions as well: Like all of us, judges are complicated human beings who harbor not only feelings of sympathy but also feelings of fear, contempt, and even hate. A sympathetic attitude to the recipient whose welfare is about to be terminated might point in one direction, say, in favor of the pretermination hearing, as Brennan hypothesized, but imagine the judge (also) feeling that those recipients claiming a right to the hearing might well be the trouble makers who are driving the welfare system into bankruptcy. Once our horizons are thus enlarged, so as to account for both sympathy and its antithesis, the uncertainty of decision will be as acute and as profound as it is under "the empire of reason"; the "gaps of the law" will remain as persistent as ever.

A proper acknowledgment of the multiplicity of passions not only reinforces doubts about the usefulness of introducing passion in the decisional process, but also brings into focus the special danger that would be entailed in using the passions as a basis, even a partial basis, for judicial decisions. The danger I allude to arises from the rather obvious fact that although some passions are good, others are quite bad. In a comment on Justice Brennan's speech, Edward de Grazia draws a distinction between the passions to be allowed and those to be disallowed: he calls one "humanistic" and the other "authoritarian" and then uses "respect for human dignity" as the standard for distinguishing the two categories.[29] Love is to be allowed; hate is not.

As a gloss on Justice Brennan's overarching ambition,[30] Professor de Grazia's scheme seems unobjectionable, but one must wonder at the utility of the entire exercise because de Grazia can rescue passion only by reference to an ideal—"respect for human dignity"—that is itself in

28. Owen M. Fiss, "Groups and the Equal Protection Clause," *Philosophy & Public Affairs* 5 (1976): 107.

29. Edward de Grazia, "Humane Law and Humanistic Justice," *Cardozo Law Review* 10 (1989): 45.

30. See also William A. Parent, "Constitutional Values and Human Dignity," this volume.

need of rational elaboration. We need to know, for example, whether fear shows disrespect, or whether it might be a special form of respect. The need to answer questions like this, or otherwise elaborate the ideal of "respect for human dignity," adds a new element of uncertainty into the decisional process. Even more importantly, it renders the entire turn to passion redundant. Once we come to understand what it means to respect the dignity of another, it is unlikely that we need to have recourse to passion in the first place.

Even assuming that somehow we could sort the passions in the way that Justice Brennan or Professor de Grazia wishes, and thus be certain that we are permitted only love, and not hate and its many cognates, there is still reason to be critical of passion as an appropriate basis for public action. By its very nature, love, or at least earthly love, not only invites a certain partisanship (nepotism in all its forms), but allows the person possessed by a love to favor one individual or another for purely arbitrary reasons, for no reason at all, or for reasons that are ineffable.[31] An unanalyzed and unanalyzable sentiment—passion in all its glory—may be an appropriate basis for decision if what is at stake is choosing a friend or a lover, or deciding why I might give more of my resources to my child than some charity, or deciding why I might garden rather than write an article. But it seems to be highly questionable basis for decision when what is at stake is the solemn action of a court of law.

Allowing passion to play a role in the decisional process of the Supreme Court—even if the passion be the most beneficient imaginable or even if the role be a modest or partial one—would be inconsistent with the very norms that govern and legitimate the judicial power: impartiality and the obligation of the judiciary to justify their decisions openly and on the basis of reasons accepted by the profession and the public. These features of the judicial process are not infallible, obviously, but they do at least place the judiciary under a discipline that is gone once passion becomes an appropriate basis of decision. Why, we are left to ask, should the passions of those who happen to be justices rule us all?

At several points in his lecture Justice Brennan seems to be making a point not about passion, but about social reality and the perception of reality. He criticized "*formal* reason"[32] or "*pure* reason"[33] and, speaking of Goldberg v. Kelly, he said that the Court "sought to leaven reason

31. Minow and Spelman, "Passion for Justice," p. 47, speak of "nonarbitrary passion," but that strikes me as an oxymoron.

32. Brennan, "Reason, Passion, and the Progress of the Law," p. 17 (emphasis added.)

33. Ibid., p. 10 (emphasis added).

with experience."[34] In this regard, he seems to be recommending that decisions should be based on a true appreciation of social reality, and on that interpretation I am in complete agreement with him. It is important, however, to distinguish Brennan's insistence on empiricism from his claim that reason be leavened with passion or that the commitment of the judge to reason be qualified by allowing a role for passion. Passion is not experience or a privileged means of gaining access to experience, even if the experience in question be the suffering of those on welfare. Experiences may trigger passions, but they may also stir thoughts and be the subject of reflection. Granted, reason sometimes operates at a totally abstract level, wholly removed from experience, as it does in mathematics, but it need not, and when it comes to making practical judgments, as in the case of ethics or law or politics, that is hardly the ideal. In these domains, the best judgment is one that is fully sensitive to and cognizant of the underlying social reality.

As I already acknowledged, passion tends toward the particular and, in that sense, does not pose the danger of abstractness or remoteness, as do certain formal systems of reason, like mathematics. But it is important to understand that passion creates the opposite danger: so thorough an involvement in the particular as to confuse the particular with social reality. The description in appellees' brief of the plight of Angela Velez, Esther Lett, Pearl Frye, and Juan DeJesus and their families—in truth no more a story than a letter to Ann Landers is a work of literature—might trigger an emotional response, but it would be a mistake of the first order for the Court to let these "human stories" stand for the social reality over which it governs.

Because it lays down a rule for a nation and invokes the authority of the Constitution, the Supreme Court necessarily must concern itself with fate of millions of people, all of whom touch the welfare system in a myriad of ways—some on welfare, some wanting welfare, some being denied welfare, some dispensing welfare, some creating and administering welfare, some paying for it. Accordingly, the Court's perspective must be systematic, not anecdotal: it must not focus on the plight of four or five or even twenty families, but consider the welfare system as a whole, which can be understood only as a complex interaction between millions of people and a host of bureaucratic and political institutions. The methods by which a court comes to know and understand a system as far-ranging and as complex as welfare are complicated and, as in the case

34. Ibid., p. 21.

of Goldberg v. Kelly itself, always in need of further refinement and improvement, but to describe these informational methods as "story-telling," as has become fashionable these days on the left, trivializes what is at stake, unfairly disparages the enormous progress modern society has made in developing sophisticated techniques for assembling, presenting, and evaluating empirical information, and throws into doubt the basic aspirations of all these informational processes, namely, finding the truth.[35] A story is a story, sometimes a very good one, even if completely untrue.

For over twenty years Goldberg v. Kelly and its jurisprudential method has been embattled, as has the entire legacy of the Warren Court. As I noted, for the most part it had to be saved from the instrumentalism of law and economics and Matthews v. Eldridge. Justice Brennan's 1987 Bar Association speech, as is true of the work of critical race theorists and a number of feminists, can be understood as part of this struggle—as a rejection of the theoretical underpinnings of law and economics and Matthews v. Eldridge and an expression of the profound inadequacy of what, for the controlling majority of the Supreme Court these days, passes as reason. On this view, Justice Brennan's speech and the new version of Goldberg v. Kelly should be welcomed and embraced and applauded by all who care about law. I am troubled, however, by the terms of his critique, for by valorizing passion, as opposed to calling for an understanding of reason in all its fullness, Justice Brennan appears to have surrendered reason to the instrumentalists and left the idea of substantive rationality more exposed than ever. His celebration of passion not only seems unresponsive to our present needs, which, as far as I am concerned, requires more reflection, not less, but also endangers so much that is good about the law. Qualifying the judiciary's commitment to reason undermines its authority and weakens the principal means we have for guarding against abuses of the judicial power. It reduces the pressure on the justices to reflect deliberately and systematically on the issues before them and to justify their decision in each and every particular.

Of course, on the issue of what actually moved the justices in Goldberg v. Kelly, Justice Brennan will have the last word (I guess), but only by putting the authority of that decision into question. Goldberg v. Kelly might be a great case and, as Justice Brennan said, the most important decision of his career, but no part of its grandeur derives from the pos-

35. The relation between storytelling and debunking the idea of truth is explicit in Delgado, "Storytelling for Oppositionists and Others," n. 20.

sibility that some of the justices were emotionally responding to the "human stories" of Angela Velez, Esther Lett, Pearl Frye, and Juan DeJesus. The issue before the Court was whether the welfare system as a whole was being operated in accordance with the ideal of procedural fairness, and in reaching judgment, the justices were guided by reason and reason alone. On that account, Goldberg v. Kelly—the real Goldberg v. Kelly—stands as a magnificent achievement, resisting attacks from both the right and the left, reminding us all of that extraordinary age of American law when we understood all that reason promised and did what was necessary to realize that promise.