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Edward de Grazia

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with deepest appreciation, warmest thanks
Bill Brennan Jr.

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A SYMPOSIUM

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HUMANE LAW AND HUMANISTIC JUSTICE

*Edward de Grazia**

Since Aristotle, jurists have denounced "passion" as the antithesis of law, with "reason" as law's thesis.[1] The onslaught of the great Realists—Holmes, Cardozo, Frank, and Llewellyn—scarcely dented the Blackstonian tradition that Law is a "brooding omniprescence" which any judge worth her salt should be able to find—with a bit of effort and the aid of Reason. The tradition proves resilient enough that when Justice William J. Brennan, Jr. today urges judges[2] to use *passion* in their decision-reaching and opinion-creating functions, he lays himself open to suspicion of impiety, or, what may be worse, an accusation of being engaged in "normative exhortations."[3] Said Aristotle, over 2,000 years ago, in his *Politics*:

> [H]e who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.[4]

Justice Brennan will have little trouble finding a place in history as one of the greatest of American judges.[5] As he makes his way into

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[1] The history is sketched in the contributions of Professors Lynne Henderson and Elizabeth Spelman and Martha Minow. See Henderson, The Dialogue of Heart and Head, 10 Cardozo L. Rev. 123 (1988); Minow & Spelman, Passion for Justice, 10 Cardozo L. Rev. 37 (1988).

[2] Although Justice Brennan's words were addressed in the first instance to an audience of lawyers, we may assume that he would like lawyers to increase the passionate content of their briefs and arguments to judges. For an exposition of the passionate approach to legal advocacy taken by one of the lawyers who persuaded the Supreme Court to decide *Goldberg v. Kelly*, 397 U.S. 254 (1970), the way it did, see Wizner, Passion in Legal Argument and Judicial Decisionmaking: A Comment on *Goldberg v. Kelly*, 10 Cardozo L. Rev. 179 (1988). On the inclination of lawyers to become "convinced of the correctness of their clients' positions" and what might be called their passionate espousals of their clients' causes, see Yablon, The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation, 6 Cardozo L. Rev. 917, 918 & n.5 (1985). Hans Kelsen designates as "legal politics" the act of the lawyer who, in the interests of his client, propounds to the judge a specific interpretation of a legal rule, among many possible ones, as the only "correct" one. See H. Kelsen, Pure Theory of Law 355-56 (1967).

[3] See Cohen, Justice Brennan's "Passion," 10 Cardozo L. Rev. 193, 193 (1988).

[4] Aristotle, Politics III ch. 1287a, ll. 28-32, in The Basic Works of Aristotle 1202 (R. McKeon ed. 1941). The context of the quoted passage indicates that Aristotle is presenting the argument of others ("men say") and not laying down a proposition of his own. Id. l. 23, at 1202.

[5] See Cole, A Justice's Passion, 10 Cardozo L. Rev. 221, 222 (1988). Former Justice

the third decade of work on the nation's highest judicial bench, Brennan's reputation for humanistic decisionmaking, creative opinion-writing, and placing fundamental political and civil rights within everyone's grasp, is unparalleled and secure. No jurist known to me has more effectively extended the freedoms of speech and press, and the right to vote; defended the life, liberty, and property interests of the poor, the powerless, and the deprived; or worked harder to place the dignity and worth of human beings on par with that of the state. It was, I suppose, because of such passionate predilections that early in his Supreme Court career this son of Irish immigrants and life-long Democrat won the distinction of being reportedly named by President Dwight D. Eisenhower one of "the two worst mistakes" he made while in office.[6]

Professor Charles Yablon has pointed out that Justice Brennan is among a scant handful of working judges to have thought and spoken seriously[7] about "how they decide cases."[8] Here Brennan has taken his cues from that most humane and literate of judges, the master Realist, Justice Benjamin N. Cardozo.[9] Both jurists seem agreed that for a judge to do justice under American law his work must be informed by humanistic values[10] or passion; that judges who refuse to acknowledge passion's role in their work are probably disingenuous or naive; and that while such judges may go around interpreting and applying law, they are not very likely to do so creatively, nor to perform their function in a way which does justice to their office, the parties, or the law.

Lewis F. Powell believes that "Bill Brennan will rank among the top Justices of the Court," in the judgment of history. Taylor, Rehnquist's Court: Tuning Out the White House, N.Y. Times, Sept. 11, 1988, § 6 (Magazine), at 98. Stuart Taylor Jr., a former New York Times Supreme Court correspondent, says: "[S]ome consider [Brennan] the most influential Justice of the 20th Century." Id.

[6] Chief Justice Earl Warren was reputed to be Eisenhower's other big "mistake." (Warren also was a native-born son of immigrant parents and a passionate judge.) I have not been able to trace to its source this attribution to Eisenhower, which may be apocryphal. Justice Brennan has informed me that he too has never seen the statement verified. "At first," he says, "it was only spoken of as the single worst mistake—meaning Warren. Later, it was his *two* worst mistakes—Warren and me." Telephone interview with Justice William J. Brennan, Jr., Associate Justice of the Supreme Court (Sept. 14, 1988).

[7] Brennan first examined the humanistic goals of law, and the role of the Supreme Court in working toward those goals, in his Edward Douglass White Lecture of March 19, 1965, published as W. Brennan, The Role of the Court—The Challenge of the Future, in An Affair With Freedom 315-32 (S. Friedman ed. 1967).

[8] Yablon, Judicial Process as an Empirical Study: A Comment on Justice Brennan's Essay, 10 Cardozo L. Rev. 149, 149-54 (1988).

[9] See B. Cardozo, The Nature of the Judicial Process (1921).

[10] See Professor Richard Weisberg's brilliant fusion of humanistic values and passion in Weisberg, Judicial Discretion, Or the Self on the Shelf, 10 Cardozo L. Rev. 105 (1988).

But what is this doing of justice?

Hans Kelsen has argued that from the standpoint of a pure science of law "justice is an irrational ideal,"[11] with this exception: "justice" can be thought of scientifically (i.e., without muddling morality, religion, politics, or sociology into the brew) in relation to "legality." Says Kelsen:

> [I]t is "just" for a general rule to be actually applied in all cases where, according to its content, this rule should be applied. It is "unjust" for it to be applied in one case and not in another similar case. . . . Justice, in the sense of legality, is a quality which relates not to the content of a positive [legal] order, but to its application.[12]

In Kelsen's theory, then, justice denotes *equality* of law application: judgments and decisions are just and the applications of legal rules to concrete cases will be just if (and only if) the rules in question are actually applied to the cases at hand as to all other cases to which they should be applied.

The legal rules in question may be administrative, judicial, statutory, or constitutional; they may be embodied in or derived from a regulation of the FCC or of the Newark police, a law of the State of New York, a decision by the Massachusetts Supreme Judicial Court, or a constitutional provision such as the due process clause or the guarantee of freedom of the press. What is essential to the doing of justice is for the judge to be faithful to the principle of legality and apply the rule wherever, by its content, it ought to be applied. If I interpret Brennan and Kelsen correctly, the good judge, the conscientious one, is she who passionately devotes herself to affirming and confirming the principle of legality[13] (also thought of as the "rule of law"[14]) in her judicial acts.

This analysis does not in itself resolve, however, the jurisprudential questions that persistently arise: How should the conscientious judge find the rule that should be applied to the case before her (the question of identification); and how should that rule be formulated

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[11] H. Kelsen, General Theory of Law and State 13 (1961).

[12] Id. at 14.

[13] I would like to suggest that Brennan's decision and opinion in Goldberg v. Kelly, 397 U.S. 254 (1970), were the result of his passionate devotion to the principle of legality, in Kelsen's meaning. Brennan was led to conclude that the welfare recipients were denied due process of law, in the sense of legality, inasmuch as they were denied the right to a full and fair hearing before being deprived of "life" and "property" interests; all other persons and businesses similarly situated, receive prior notice and a full and fair hearing before being denied or deprived of comparable rights. See id. at 266. The due process clause reflects, but does not exhaust, the meaning of the principle of legality.

[14] See J. Rawls, A Theory of Justice 235-43 (1971).

(the question of definition). Both questions concededly are problematic to the idea of "justice as legality" because despite the teachings of traditional jurisprudence the answers to such questions are not—they cannot be—definitively answered (determined) by the legal order. What this says is that there is something essentially indeterminate about the judicial function—some measure of irreducible indefiniteness in the process by which the judge, according to law, determines the result, reaches her decision—in any presented case. This means that there is not, cannot be, a single correct outcome, or decision—not even for the most conscientious of judges, the judge who is perfectly dedicated to reaching judgment in accordance with the principle of legality. Any postulated distinctly "correct" outcome is a fiction of traditional jurisprudence.

Whether the process of identifying and defining the rule that ought to be applied to the concrete case at hand be called "law-finding," "lawmaking," "law-applying," or "law-interpretating," the judicial act demanded is essentially creative and relatively "free"; it is an act which is not entirely determined by given (or construed) facts, nor by existing law or precedent: *something must come from the judge herself*. This something will be nonlegal or extralegal, a product of the judge's personal morality or sense of justice, her reason and her passion, her heart and her head, combined.

Once the judge selects the rule that should be applied to the case before her, the rest of her job consists of explicating the reasons why the rule should control her decision, that is to say, why it and not some other rule—and notably not the rule proposed by the losing party—should apply. The judge should go on to suggest what this application signifies for the law, past as well as future. Since the identification-definition of the rule that should be applied to the case is decisive for (controls) the outcome of the case (the judgment), it may be said—as Street said—that judgment "precedes" law.[15]

The actuality of judging, of the decision-reaching process, seems to be that the judge is moved to choose or "will" that rule which provides her with the outcome desired—an outcome which usually is the same as the outcome prayed for by the party whose "side" she has already discerned to be just. Ideally, this outcome is explained by the judge in a written opinion which persuades the other party, and the legal community, of the justice of the decision. Nevertheless, the point I wish to make plain is that it is the judge's act, in *selecting* the rule to be applied to the case, and not the act of her applying the rule,

[15] See 3 T. Street, The Foundations of Legal Liability 4 & n.5 (1906).

which is peculiarly judgmental, relatively free, and potentially creative.

Where does passion enter into the process? The judge's job to find and formulate *the* legal rule that ought to be applied to the case needs to be informed by passion—in Brennan's sense of the word—if the decision is to be just and its explication creative.[16] This passion is not the sort of passion or dispassion some judges occasionally have displayed, for example: for capitalism and against socialism; for a "stern Puritanism" and against "the commercialization of sex"; for "law and order" or "national security" and against rights for criminal defendants, Japanese-Americans, Jews, Blacks, women, homosexuals, the poor, the mentally ill, aliens, dissenters, Marxist-Leninist professors, and other deprived, despised, or dangerous persons. It is instead a passion for locating justice between the parties[17] and all others similarly situated; for affirming and confirming the principle of legality, and the rule of law[18] each time the issue is presented; and it is a passion to decide the cases presented in ways which give life to transcendent human and humanistic values rather than authoritarian or paternalistic ones;[19] values which will expand the law's regard for human dignity, individual liberty and human rights, the freedoms of speech and press, the fairness of hearings and trials, and the rights of personal privacy and intimacy. It is also, if I interpret Brennan correctly, a passion to redress the social injustices that arise due to accidents of birth, rearing, and education for rich and poor, smart and stupid, citizen and stranger, white, black, red, yellow, and brown—injustices that should not be ratified or enlarged by law.

The analysis I have made of Brennan's exegesis of passion, reason, and progress in the law implies a problematic program for law and jurisprudence on at least two counts. First, how can a seemingly anomalous and renegade element like passion be fitted into the law without mauling law's fabric, its ideological structure, its integrity as a system for doing justice, the very principle of legality, and the rule of law itself? Second, why should humanitarian passion rather than, say, authoritarian or paternalistic passion, light the way for our judges?

The first question finds its answer, I suggest, in the admission by

[16] Thoughtful recommendations are made by Elizabeth Spelman and Martha Minow regarding the ways in which a conscientious judge might go about using passion in her decision-reaching and opinion-writing activity. See Minow & Spelman, supra note 1, at 50-60.

[17] Minow & Spelman and Henderson illuminate how a judge might go about doing this. See Minow & Spelman, supra note 1, at 52-54; Henderson, supra note 1, at 132-39.

[18] See Rawls, supra note 14.

[19] See Reich, Law and Consciousness, 10 Cardozo L. Rev. 77 (1988).

traditional jurisprudence that "gaps in the law" are inevitable and that the application or interpretation of law and legal rules characteristically leaves room for the exercise of judicial discretion.[20] This is another way of saying what these jurists are disinclined to say openly: that law cannot determine the decisions of judges and that the conscientious application of law to a concrete case or controversy cannot supply only one valid outcome or decision.

Kelsen has shown that the interpretation of law by a law-applying organ (usually the judge) characteristically reveals a relative indefiniteness with regard to the decision.[21] This indefiniteness is brought about by extraneous circumstances which the law-making organ does not and to some extent cannot foresee. These are of two sorts: an *intentional* indefiniteness meant by the lawmaker to give the law-applying organ room to continue the discretionary process of determination and an *unintentional* indefiniteness. Unintentional indefinitenesses occur where the law or legal rule is formulated in such a way that an essential word or clause seems to have more than one meaning, which is to say that it is ambiguous; or where the organ finds a discrepancy between the wording of the rule (its expression) and the will (intention) of the rulemaker—regardless of how this will is to be found out, from sources other than the words themselves; or where two equally "valid" provisions of the rule as worded seem partly or wholly to contradict each other.[22]

In all these cases of law's intended and unintended indefinitenesses not one but several possibilities are open to the law-applying and law-interpreting organ. Thus the law to be applied or interpreted constitutes "only a frame" within which several applications or interpretations are possible. Any of these acts of application-interpretation are valid or legal, however, if they stay within the frame.

Says Kelsen:

> [L]egal interpretation can only be the ascertainment of the frame which the law that is to be interpreted represents, and thereby the cognition of several possibilities within the frame. The interpretation of a [law], therefore, need not necessarily lead to a single decision as the only correct one, but possibly to several, which are all of equal value, though only one of them in the action of the law-

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20 Professor Yablon speaks of the indeterminate number of cases in which the judge finds that the applicable law has "run out." See Yablon, supra note 8, at 154.

21 See H. Kelsen, supra note 2, at 348-51. Critical Legal Studies theorists also maintain that the relationship between authoritative doctrinal materials (legal rules) and the behavior of legal decisionmakers is "indeterminate." See Unger, The Critical Legal Studies Movement, 96 Harv. L. Rev. 561, 570-72 (1983); Yablon, supra note 2.

22 H. Kelsen, supra note 2, at 350.

applying organ (especially the court) becomes positive law.[23]

Continuing, Kelsen says:

> Traditional jurisprudence, however, expects from interpretation not only the ascertainment of the frame, but the fulfillment of another task, and sees in the latter actually its main function: interpretation is [supposed] to develop a method that makes it possible *correctly* to fill the ascertained frame. Traditional theory will have us believe that the statute, applied to the concrete case, can always supply only *one* correct decision and that the positive-legal "correctness" of this decision is based on the statute itself. This theory describes the interpretative procedure as if it consisted merely in an intellectual act of clarifying or understanding; *as if the law-applying organ had to use only his reason but not his will*, and as if by a purely intellectual activity, among the various existing possibilities only one correct choice could be made in accordance with positive law.[24]

In short, traditional jurisprudence erroneously speaks as though the law-interpreting organ has need only of reason, the law's reason, and not volition or will, the judge's will, to correctly reach judgment in a concrete case.[25] This may explain, at least in part, why some jurisprudential traditionalists appeal to judges to work toward "neutral principles" only, and decry "judicial activism";[26] this school recoils from any concession that law is *essentially* indefinite and legal decisions *essentially* indeterminate. Moreover, this school consciously

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[23] Id. at 351.

[24] Id. (emphasis added).

Aristotle's idea of "choice" resembles Kelsen's idea of "will." Says Aristotle: "The origin of action—its efficient, not its final cause—is choice, and that of choice is desire and reasoning with a view to an end." Aristotle, Ethics VI, ch. 1139a, ll. 32-33, in The Basic Works of Aristotle 1024 (R. McKeon ed. 1941). Aristotle uses "desire" the way Brennan uses "passion." If we think of choice, in the context of the judicial decisionmaking process, as choice of result or outcome, then "the origin of *action* [the judge's decision regarding result or outcome]—its efficient, not its final cause—is *choice* [of which side to favor], and that of choice is desire [passion] and reasoning [reason] with a view to an end [the doing of justice]." Id. (emphasis added).

[25] David Hume saw that reason, without sentiment, taste, or feeling, is morally inert: it may take us from ends to means, but it is incapable of setting ends. Passion is needed to set fire to Reason. "Reason being cool and disengaged is no motive to action, and directs only the impulse received from appetite or inclination . . . . Taste, as it gives pleasure or pain, and thereby constitutes happiness or misery, becomes a motive to action, and is the first spring or impulse to desire and volition." D. Hume, Enquiries Concerning Human Understanding and Concerning the Principles of Morals 294 (L.A. Selby-Bigge 3d ed. 1975) (1751).

[26] Professor (later Judge) Robert H. Bork has been a leading exponent of the "neutral principles" school. In his view, correct constitutional interpretation requires judges to be "neutral" not only in their "application" of such principles but "as well in the *definition* and the *derivation* of principles." Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 7 (1971). Bork's views reflect the influence of Alexander Bickel. See A. Bickel, The Supreme Court and the Idea of Progress 94-97 (1970).

and unconsciously engages in an ongoing effort to reinflate the ever-collapsing theorems that law application-interpretation is a determinate process, not a relatively free and discretionary one; and that the good, conscientious, and principled judge has but a single valid decision to reach—a decision determined by the law. These are nothing but legal fictions which traditionalists employ "to maintain the ideal of legal security."[27]

The trouble with that view of the decisionmaking process is that it leaves no room for what Kelsen refers to as the law-applying organ's, the judge's, *will*. And Kelsen's "will" is, roughly speaking, what, in this symposium Justice Brennan means by "passion,"[28] Charles Reich means by "conscience,"[29] and Lynne Henderson calls "empathy."[30] It is also, I suggest, akin to Justice Cardozo's "subconscious loyalties"[31] and that great jurist's "complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge."[32] And it is what Judge Jerome Frank referred to as "the human element in the judicial process," the judge's "sympathies" and "antipathies,"[33] as well as what Karl Llewellyn had in mind when he spoke of the way in which the mine-run of cases supply the judge with "a constant occasion and vehicle for creative choice and creative activity, for the shaping and on-going reshaping of our case law."[34]

According to Kelsen, the reaching of a concrete decision "within the frame of a general norm in the process of applying the law, is a function of the will,"[35] according to which "a cognitive activity of the law-applying organ" takes place.[36] Nevertheless, the cognition is not

> cognition of positive law, but of other norms that may flow here

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[27] See H. Kelsen, supra note 2, at 356.

[28] See Brennan, Reason, Passion, and "The Progress of the Law," 10 Cardozo L. Rev. 3, 12-13 (1988).

[29] See Reich, supra note 19, at 88.

[30] See Henderson, supra note 1, at 134.

[31] B. Cardozo, supra note 9, at 175.

[32] Id. at 167.

[33] See Frank's remarkable discussion of this matter in *In re* J.P. Linahan, 138 F.2d 650, 652-53 (2d Cir. 1943).

[34] Llewellyn, The Common Law Tradition: Deciding Appeals 99 (1960). Holmes, of course, was the trailblazer:

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

O. W. Holmes, The Common Law 1 (1881).

[35] Kelsen, supra note 2, at 353.

[36] Id.

> into the process of law—creation—such as norms of morals, of justice, constituting social values which are usually designated by catch words such as "the good of the people," "interest of the state," "progress," and the like. From the point of view of positive law nothing can be said about their validity.[37]

These "other than legal norms" which "flow into" the decision-making and opinion-writing processes, into "the cognitive activity" of the judge are, of course, norms of the sort comprehended by Justice Brennan's "passion," and Justice Cardozo's "subconscious loyalties." If, from the point of view of the Kelsenian positivist, "nothing can be said about their validity," from the point of view of the traditional jurist they are looked upon as illegal, invalid, and not kosher; they are supposed to corrupt law, bring injustice, and spoil things. This is why a jurist like Julius Cohen treats Justice Brennan's invitation to passion as a sort of impiety.[38]

Is it fair to depict as spurious the moral norms that the advocate of "passion" calls to judicial service and not those that the professors of "reason" import? In answer, here, compare Brennan's open sympathy for the welfare recipients in *Goldberg v. Kelly*[39] with the barely concealed antipathy which Justice Byron White and Chief Justice Warren E. Burger disclosed toward the homosexually oriented plaintiff, and those similarly oriented, in *Bowers v. Hardwick*.[40]

In coming out for passion Justice Brennan is calling for the judicial evocation of humanist norms in American law at those points where the law's "gaps" and intended and unintended "indefinitenesses" invite a flow of moral ideas into the law-creation processes. Brennan is calling for the rise of a humanistic jurisprudence within the framework of American constitutional law, a jurisprudence which will crown all living persons with the "human dignity" that he perceives to be an overarching value of law.

"From its founding," said Brennan in *Goldberg v. Kelly*, "the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."[41] In the speech which provides the focus for this symposium, he stresses that the thrust of the due process clause is to protect "the essential dignity and worth of each individual."[42] "Due process," he says "asks whether government has treated someone fairly, whether individual dignity has been

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37 Id.

38 See Cohen, supra note 3, at 196-97.

39 397 U.S. 254, 264 (1970).

40 478 U.S. 186, 190-92 (1986); id. at 196-97 (Burger, C.J., concurring).

41 397 U.S. at 264-65.

42 Brennan, supra note 28, at 15.

honored, whether the worth of an individual has been acknowledged."[43] Again: "[i]f due process values are to be preserved in the bureaucratic state of the late twentieth century, it may be essential that officials possess passion—the passion that puts them in touch with the dreams and disappointments of those with whom they deal."[44] And, in the Edward Douglass White Lecture which he gave twenty-three years ago, said Brennan: "The new jurisprudence constitutes . . . a recognition of human beings, as the most distinctive and important feature of the universe which confronts our senses, and of the function of law as the historic means of guaranteeing that preeminence."[45]

Traditionalist jurists have collaborated to produce what Brennan describes as "the characteristic complaint of our time"—not that "government provides no reasons, but that its reasons often seem remote from the human beings who must live with the consequences."[46] Yet "the Framers bequeathed to us a vision of rulers and the ruled united by a sense of their common humanity. In this vision, the essence of the relationship between state and citizen is the relationship between one human being and another."[47]

Brennan's passion is acutely democratic; it aspires to a constitutional jurisprudence of radical equality—a jurisprudence that will mobilize the application and interpretation of constitutional norms in such a way that government, the state, and their highest officials will come to stand before the law on no higher ground than the lowliest human being. That is what Brennan means when he says that the essence even of the relationship between *state* and citizen is the relationship "between one human being and another."[48] The citizen should be equal to the state in the eyes of the law and in the scales of justice. The arguments of the state, for all their latent force and aspirations toward an "Empire of Reason," are to be listened to no more attentively and are to be assigned no more weight, than the arguments of the evicted Angela Velez, the hungry Pearl Frye, the starving Esther Lett, and the homeless Juan DeJesus in *Goldberg v. Kelly*.

In the "gaps" which our lawmakers inevitably leave, and in those interstices of the law where legal indeterminacy and indefiniteness logically reign, the judge has the right and the duty to rule; she is to interpret and apply the law—according to Brennan—with a passion-

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[43] Id. at 16.
[44] Id. at 19.
[45] W. Brennan, supra note 7, at 321.
[46] Brennan, supra note 28, at 22.
[47] Id.
[48] Id.

ate respect for the dignity of human beings and a passionate regard for their welfare.

If this is authentically done by judges, notably by the Justices of the Supreme Court, then norms respecting human dignity and the welfare of the individual person will be transformed from norms of morals and justice into norms of positive law;[49] will be written, possibly indelibly, into the decisional frames within which our judges otherwise merely are free, otherwise merely have a discretion, to apply the highest norms that humanity has been able so far to imagine.

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[49] From the point of view of positive law nothing can be said about [the] validity [of norms of morals and justice]. . . . [T]hey are norms that are not of positive law. With respect to this law, the establishment of a legal act, so far as it takes place within the framework of the legal norm to be applied, is free, that is, within the discretion of the organ called upon to establish the act—unless positive law itself delegates some meta-legal norms like morals or justice; but then these norms are transformed into norms of positive law.

Kelsen, supra note 2, at 353-54.