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## Dedication: Judge Alvin Rubin

*John Minor Wisdom\**

Edmond Cahn, who was one of the country's foremost legal philosophers, entitled his first book, *The Sense of Injustice*.<sup>1</sup> He explained the title:

Where justice is thought of in the customary manner as an ideal mode or condition, the human response will be merely contemplative, and contemplation bakes no loaves. But the response to a real or imagined instance of injustice is something quite different; it is alive with movement and warmth in the human organism. For this reason, the name "sense of injustice" seems much to be preferred . . . "Justice," as we shall use the term, means the *active process* of remedying or preventing what would arouse the sense of injustice.<sup>2</sup>

Alvin Rubin had a deep sense of injustice. It spurred his decision-making and imbued his opinion-writing with moral fervor. His sense of injustice was something like a religious faith that stirred him to action—judicial action to set things right.

I do not mean by this that he was an "activist" as that term is now applied to persons with whom conservatives disagree. Alvin had a profound respect for the law and the limitations it imposes on judges. But he also had a warm, compassionate feeling for all human beings, regardless of race, color, creed, or gender. And, with his encyclopedic knowledge of the law and towering intellect, he was able to find means of redressing unfairness, within the bounds of legal propriety, when others might have despaired and yielded to circumstances apparently beyond their control.

That is why I say, Alvin B. Rubin was born to be a judge—a great judge. His intellect, scholarship, and judicial leadership place him in a select group. In recent years, some of this small group graced the United States Supreme Court: Holmes, Brandeis, and Cardozo. Two others, with whom he would have melded, should have been on the Court but

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\* Senior Circuit Judge, United States Court of Appeals for the Fifth Circuit.

1. Edmond N. Cahn, *The Sense of Injustice* (1949). Jerome Frank presented the book to Justice Hugo Black. Judge Frank said that he put it in a class with Aristotle's *Politics and Ethics*. Hugo L. Black, *About Edmond Cahn*, 40 N.Y.U. L. Rev. 207 (1965).

2. Cahn, *supra* note 1, at 13-14.

for an accident of politics, as in Alvin's case: Learned Hand and Henry Friendly. These judges would have welcomed him on equal intellectual terms and as a kindred spirit. Alvin would have been especially comfortable, I think, with Brandeis and Cardozo because of their strong sense of injustice.

Almost twenty years ago Judge Rubin, in *United States v. McDaniels*, found racial discrimination in a case when the prosecutor had used all six of his peremptory challenges to excuse African-Americans from a jury. In his opinion, he wrote:

This feeling that justice is a supreme goal, this sense that it is a predicate to organized society, is no mere yearning, for it is only a fair proceeding, one that comports with our sense of justice, that we can with any legitimacy call another human being to account.<sup>3</sup>

In that opinion, he quoted from Cahn, *The Sense of Injustice*, Rawls, *A Theory of Justice*, and Madison, writing in the *Federalist Papers*. Twelve years later, in *Batson v. Kentucky*,<sup>4</sup> the United States Supreme Court reached the same conclusion Alvin reached.

That was a criminal case. In 1989, the question came up in a civil context before a panel over which Alvin presided. Writing for a majority of the panel and reversing the district court, Alvin held that *Batson* applied to a private person representing a private litigant and that to limit *Batson* to criminal cases "would betray *Batson's* fundamental principle [that] the state's use, toleration, and approval of peremptory challenges based on race violate the equal protection clause."<sup>5</sup> On a rehearing en banc, the majority of the Court concluded that the use of peremptories by litigants does not constitute state action.<sup>6</sup> In a strong and eloquent dissent Alvin wrote:

I regret that the majority cannot yet see that to permit a person to be rejected from a jury solely because of the color of his skin rejects the promise upon which this nation's independence was based and the guarantee that the Fourteenth Amendment provides: that all persons are created equal. In God's sight. In human right. And in regard to service on a federal jury.<sup>7</sup>

Justice Kennedy for the majority of the Supreme Court agreed with Judge Rubin's dissent in an opinion published just eight days before Alvin died.<sup>8</sup> On the day Alvin died, June 11, 1991, Justice Kennedy,

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3. *United States v. McDaniels*, 379 F. Supp. 1243, 1249 (E.D. La. 1974).

4. 476 U.S. 79, 106 S. Ct. 1712 (1986).

5. *Edmonson v. Leesville Concrete Co.*, 860 F.2d 1308, 1314 (1989), rev'd 895 F.2d 218 (5th Cir. 1990), rev'd 111 S. Ct. 2077 (1991).

6. *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218 (5th Cir. 1990), rev'd 111 S. Ct. 2077 (1991).

7. *Id.* at 238.

8. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991).

deviating from his usual policy, wrote a letter to Alvin in which he said that he "admired" the dissenting opinion in *Edmonson*. The letter was on his desk for signature when he learned that Alvin was no longer with us. Justice Kennedy then wrote, the same day, a warm letter to Janice Rubin expressing his sympathy and, considerately, enclosed the unsigned letter.<sup>9</sup> This footnote to history tells us something about both men.

Alvin Rubin was graduated from L.S.U. Law School in 1942, first in his class and Editor-in-Chief of the Louisiana Law Review. After graduation, he enlisted in the army as a private, served four years, much of it in three combat zones, and was discharged in 1946 with the rank of captain. 1946 was a memorable year for Alvin. That year he became a partner in the firm of Sanders, Miller, Downing, Rubin, and Kean, of Baton Rouge, with whom he practiced law until he became a judge. That year he began his long career as a teacher in L.S.U. Law School. And in that year, 1946, Alvin and Janice Ginsberg were married. Theirs has been an outstandingly strong marital partnership, an inspiration to his young law clerks and to all. Not surprisingly, Alvin and Janice were co-authors of the Louisiana Trust Handbook.

Alvin was a superb litigator in the twenty years he practiced law. He was active in the American Bar Association, served as a member

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9. Letters from Justice Anthony Kennedy, United States Supreme Court, to Judge Alvin Rubin, United States Fifth Circuit Court of Appeals, and Janice Rubin (June 11, 1991) (on file with Janice Rubin). I am authorized to publish these two letters:

Dear Janice,

I thought that the enclosed letter might be of some historical interest to you.

I had written an opinion for our Court which we issued June 3, 1991 adopting the position Al had taken in dissent. It is my policy not to communicate with judges even after an opinion had been issued. But I had been thinking about Al, knowing how courageous he was in the face of his illness. So, today, I dictated the enclosed letter. It was on my desk for signature when a telephone call advised me that he is no longer with us.

I take the liberty of sending you the unsigned letter as a small expression of the great admiration I had for Al, as a man and as a jurist.

Mary and I send you and your family our expressions of deepest sympathy upon your loss.

Yours,  
Tony

Dear Al,

I could not tell you when we spoke in San Francisco, but I can tell you now how much I admired your dissenting opinion in *Edmonson v. Leesville Concrete Co.*

It was good to see you at the ALI. That was my first visit, and I found it a most impressive organization. Mary and I send our best to you and Janice.

Sincerely,

of its House of Delegates, was chairman of three of its committees, and was a member of the Board of Editors of the ABA Journal.

In 1966 President Johnson appointed him United States Judge for the Eastern District of Louisiana, and he removed to New Orleans. He had an incredible record of affirmances. After Alvin had served eleven years as a district judge, President Carter appointed him to the Court of Appeals for the Fifth Circuit, which at that time and until 1981 had jurisdiction over Alabama, Georgia, and Florida, as well as Louisiana, Mississippi, and Texas. He was appointed to the seat I vacated when I took senior status. He returned to Baton Rouge to a home on the corner of Runnymede and Magna Carta streets, a fitting address for one who treasured the United States Constitution and the enduring values that helped to produce it.

Alvin Rubin was a hardworking judge who kept long hours. Yet he was a well rounded man who participated in an astounding number of activities. In Baton Rouge, he was President of the Congregation B'Nai Israel and long time secretary to United Givers. He received the Brotherhood Award of the National Conference of Christians and Jews and the Baton Rouge Golden Deeds Award for Outstanding Civic Achievement. He loved L.S.U. Law School and taught there from 1946 to 1989. He taught at various times at Southern University Law School, Duke Law School, and Tulane Law School summer sessions. He served on the visiting committees of Harvard, Chicago, Cornell, and Miami law schools. He served as distinguished judicial visitor, lecturer, or moot court judge at more than 25 law schools. As a judge, he served as a member of the Board of the Federal Judicial Center and on many committees of the Judicial Conference of the United States. He was a frequent lecturer in programs for continuing judicial education. He also served as a chairman or member of two ABA Task Forces and on numerous other professional committees. He was on the Board of the Federal Judicial Center from 1987 and on the Board of Editors of *The Manual for Complex Litigation*, from 1983 until he died. He was President of the Burden Foundation, a member of the Masonic Order 32nd Degree, and active in numerous other civic activities. On top of all this, he was the co-author of five books (one with Janice Rubin) and author of 50 articles published in various law reviews and learned journals.

Alvin received numerous awards; I mention only a few. In 1978, he was elected as one of the first two honorary members of the LSU chapter of Phi Beta Kappa. He received the LSU Law School's First Distinguished Alumnus Award and was elected to the LSU Hall of Fame. In 1989, he was selected as the recipient of the American Civil Liberties Union Award. In 1990, he received honorary Doctor of Laws degrees from L.S.U. and Loyola University of the South. He was a Fellow of the American Academy of Arts and Sciences and a member of the American Law Institute.

I have felt close to Alvin because in general we agreed on constitutional issues and on civil rights issues. I felt a special closeness because we both received a legal education from civil law traditionalists, and we both "believed the codal system sounder than the common law system."<sup>10</sup> He, "when the rare opportunity presented itself, sought to apply civilian precepts."<sup>11</sup> Judge John Brown used to complain about my bringing in by the tail Domat, Pothier, and Las Siete Partidas.

Alvin was a superb appellate judge. What a pleasure it was to sit on the same panel with him. He was always exceptionally well prepared, and he frequently engaged in research beyond the briefs. Often in advance of the oral argument he would have our Clerk of Court address questions to the attorneys, sharpening the focus on the important issues. Before the argument, he had already thought out the answers to his penetrating questions. During the argument, he was courteous to the lawyers but persistent in his questioning. In conference, he was persuasive, self-controlled, listened carefully, but held firmly to his position if his basic feeling for fairness was brought into play. After the conference, he wrote opinions that were thoroughly researched and beautifully expressed. His opinion-writing was in the "grand style" described by Llewellyn. He wrote simply, clearly, and with an obvious distaste for ornate, belabored, or pretentious writing. The text was not cluttered with citations; these belonged in footnotes. I came to rely heavily on his suggestions with regard to the substance of my own opinions. He had such a profound knowledge of the law in so many fields and understood as well all the implications of any statement of law that I welcomed his suggestions for modifications in my opinions. He was a very helpful and tactful collaborator. And, in spite of his extraordinary knowledge and intellectual power, he was completely free of vanity.

Judge Rubin wrote perhaps a thousand opinions, many fortifying civil rights and liberties. One that illustrates the high quality of his judicial craftsmanship is *Ruiz v. Estelle (Ruiz III)*.<sup>12</sup> The New York Times called it "the most important prisoners' right[s] suit in American history." Judge Rubin affirmed a sweeping reform of the Texas prison system, but he did so in a carefully balanced decision. He recognized that certain prison conditions constituted cruel and unusual punishment under the Eighth Amendment, certain others violated the due process clause of the Fourteenth Amendment, but other conditions were part of the penalty that criminal offenders pay for their offenses against

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10. Alvin B. Rubin, *Hazards of a Civilian Venturer in a Federal Court: Travel and Travail on the Erie Railroad*, 48 La. L. Rev. 1369, 1370 (1988).

11. *Id.*

12. 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042, 103 S. Ct. 1438 (1983).

society. Reminding federal and state officials of their constitutional duty, he wrote:

The Federal Constitution is a charter for all officials, federal and state. All those who wield the power of the sovereign must be equally obedient to its commands and faithful in insuring its protections. They take the same oath we do—to uphold and defend it.<sup>13</sup>

Alvin Rubin, more than any other judge I know, reached the hearts and minds of young people at a formative time in their lives. Lucky indeed are the bright young men and women who clerked for him and profited from his warmth toward them, his feeling for humanity, and the religious fervor for his calling. Lucky indeed are all Americans, of all races and creeds, that at a time and place in our history when the United States Constitution was severely challenged, Alvin Rubin was there to meet the challenge with his highly developed sense of injustice.

He was a man, take him for all and all, I shall not look upon his like again.<sup>14</sup>

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13. *Id.* at 1163.

14. William Shakespeare, *Hamlet*, act 1, sc. 2.