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A TRIBUTE TO JACOB D. FUCHSBERG

Dean Howard A. Glickstein*

Judge Jacob D. Fuchsberg died on August 27, 1995. Judge Fuchsberg was not only a towering figure in the law but also one of the fathers of the Law Center. His death was a great loss both to the Law Center and to the legal profession.

Judge Fuchsberg attended the New York University School of Law where he was a member of the Law Review. He then embarked upon a distinguished legal career, both as a trial lawyer and later as a judge on the New York Court of Appeals. As a partner in the Manhattan law firm of Fuchsberg & Fuchsberg, Judge Fuchsberg distinguished himself as one of this country's preeminent trial attorneys. He was the first litigator in the nation to achieve a one million dollar verdict from a jury.

Judge Fuchsberg served as President of the New York State Trial Lawyers Association from 1957 to 1959, and as President of the Association of Trial Lawyers of America in 1963 and 1964. He also was an active and prominent member of various other professional organizations.

Judge Fuchsberg's distinguished legal career was capped by his election to the New York Court of Appeals as an associate judge in 1974. His opinions on the court were notable for their strong defense of civil rights and liberties. The Legal Aid Society of New York described Judge Fuchsberg as one of the "most defense oriented" judges.¹ Indeed, during the 1981-82 session, Judge Fuchsberg was the only judge to vote for the defendant in all ten criminal cases in which the court split 4-3.²

Judge Fuchsberg's opinions in criminal cases, whether the majority or the dissent, have been concerned largely with the rights of the accused.

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1. Eric Pace, *Jacob D. Fuchsberg, 82, Dies; Lawyer and Appellate Judge*, N.Y. TIMES, August 28, 1995, at B9.

2. *Id.*

In *People v. Belton*,³ Judge Fuchsberg argued against the proposition that police making a traffic stop may search the contents of the vehicle, concluding:

[i]t is now clear that even in cases where the seizure is based on probable cause to believe that the item taken from a vehicle contains contraband or evidence of a crime, the right to seize does not include the right to conduct a warrantless search of its contents, absent exigent circumstances.⁴

In a similar case, *People v. Shepard*,⁵ also implicating a defendant's right to privacy, Judge Fuchsberg stated in his dissent that "a conviction for possessing in one's own home . . . less than one ounce of marijuana puts the right to privacy to the test in a contemporary factual setting."⁶ Judge Fuchsberg analyzed the case in terms of the State using its police power to infringe on an individual's right to privacy in the name of morality.⁷ He asked whether the State can enter an individual's home and "dictate his right to there possess and use marihuana, tobacco, or for that matter, cholesterol-making apple pie."⁸ He concluded his dissent by stating "in a country where, though the government has its sphere, so does each American, and where to keep that of the individual entire, the Constitution and the courts will guard it from unreasonable and arbitrary restrictions"⁹

Judge Fuchsberg often spoke for the court in his defense of privacy rights. He delivered the court's opinion in *People v. Washington*,¹⁰ a major New York wiretap case. Here, the court held that the police must submit tapes for judicial sealing "[i]mmediately upon the expiration of

3. 55 N.Y.2d 51, 432 N.E.2d 745, 447 N.Y.S.2d 873 (1982). Defendant was convicted of attempted criminal possession of a controlled substance as a result of a traffic stop by a State Trooper who upon finding an envelope containing marijuana in the front seat of the vehicle, then proceeded to search defendant's jacket (located in the back seat) where the Trooper discovered a small amount of cocaine. *Id.* at 51, 432 N.E.2d at 746, 447 N.Y.S.2d at 874. On remand from the United States Supreme Court, the question was whether the search and seizure violated the New York State Constitution. *Id.* at 51, 432 N.E.2d at 745, 447 N.Y.S.2d at 873.

4. *Id.* at 67, 432 N.E.2d at 756, 447 N.Y.S.2d at 884 (Fuchsberg, J., dissenting) (citations omitted).

5. 50 N.Y.2d 640, 409 N.E.2d 840, 431 N.Y.S.2d at 363 (1980). Defendant was convicted of criminal possession of a controlled substance in the seventh degree for possessing and cultivating nine marijuana plants in his home. *Id.* at 643-44, 409 N.E.2d at 841-42, 447 N.Y.S.2d at 364-65.

6. *Id.* at 649, 409 N.E.2d at 845, 431 N.Y.S.2d at 368 (Fuchsberg, J., dissenting).

7. *Id.* at 651, 409 N.E.2d at 846, 431 N.Y.S.2d at 369 (Fuchsberg, J., dissenting).

8. *Id.* at 655, 409 N.E.2d at 846, 431 N.Y.S.2d at 372 (Fuchsberg, J., dissenting).

9. *Id.* (Fuchsberg, J., dissenting).

10. 46 N.Y.2d 116, 385 N.E.2d 593, 412 N.Y.S.2d 854 (1978).

the period of an eavesdropping warrant.”¹¹ The court further held that manpower shortages or technical difficulties which result in unreasonable delays do not excuse the police from submitting the tapes for sealing.¹²

In addition to a concern for privacy rights, Judge Fuchsberg also was concerned with the requirements of due process and a defendant’s right to a fair trial. In *Legal Aid Society of Sullivan County v. Scheinman*,¹³ Judge Fuchsberg asked in his dissent, “[i]s it unconstitutional for a defendant charged with a crime, conviction of which could bring imprisonment, to be compelled to have his case tried before a Judge who is not a lawyer?”¹⁴ Judge Fuchsberg argued that this violated the defendant’s constitutional rights, stating “it ‘is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.’”¹⁵

While Judge Fuchsberg’s opinions evidence his sensitivity for the rights of the accused, his protection of civil rights was not limited to criminal cases. He confronted some of the most challenging public policy issues of our time. Affirmative action was the issue in *Fullilove v. Beame*,¹⁶ where Judge Fuchsberg wrote:

“affirmative action” is basically a concept representative of the conviction that full equality of employment opportunity cannot be achieved simply by decrying discrimination or even by decreeing that discrimination cease; rather it proceeds on the assumption that, unless these are accompanied by positive or ‘affirmative’ steps to speed the elimination of the stubborn vestiges of discrimination, this noxious condition will continue to feed on itself, and the goal of equal opportunity will remain beyond reach.¹⁷

11. *Id.* at 122, 385 N.E.2d at 596, 412 N.Y.S.2d at 857.

12. *Id.* at 124, 385 N.E.2d at 597, 412 N.Y.S.2d at 859.

13. 53 N.Y.2d 12, 422 N.E.2d 542, 439 N.Y.S.2d 882 (1981). In this case defendant was convicted of disorderly conduct in a trial presided over by the Justice (who was not a lawyer) of the local criminal court of the Town of Mamakating. *Id.* at 15. 422 N.E.2d at 543, 439 N.Y.S.2d at 883.

14. *Id.* at 18, 422 N.E.2d at 545, 439 N.Y.S.2d at 885 (Fuchsberg, J., dissenting).

15. *Id.* at 23, 422 N.E.2d at 548, 439 N.Y.S.2d at 888 (Fuchsberg, J., dissenting) (citations omitted).

16. 48 N.Y.2d 376, 398 N.E.2d 765, 423 N.Y.S.2d 144 (1979).

17. *Id.* at 379-80, 398 N.E.2d at 766, 423 N.Y.S.2d at 145.

Equal educational opportunity was the issue in *Board of Education, Levittown Union Free School District v. Nyquist*.¹⁸ There the question was whether New York State's system of school financing violated the provisions of New York's Constitution mandating the "maintenance and support of a system of free common schools wherein all the children of this state may be educated."¹⁹ Judge Fuchsberg was the lone dissenter from an opinion upholding the challenged school financing structure. He concluded that the New York Constitution precluded "the unequal and inadequate public schooling which children in property poor or fiscally overburdened areas of the State must endure."²⁰ "Poor children," he wrote, "no less than rich, and the Nation of which both are a part, are entitled to an education that prepares today's students to face the world of today and tomorrow."²¹ Judge Fuchsberg expressed his strong commitment to education. He wrote:

In any meaningful ordering of priorities, it is in the impact education makes on the minds, characters and capabilities of our young citizens that we must find the answer to many seemingly insoluble societal problems. In the long run, nothing may be more important - and therefore more fundamental - to the future of our country. Can it be gainsaid that, without education there is no exit from the ghetto, no solution to unemployment, no cutting down on crime, no dissipation of intergroup tension, no mastery of the age of the computer? Horace Mann put it pragmatically that education is not only "the great equalizer of men", but, by alleviating poverty and its societal costs, more than pays for itself.²²

Judge Fuchsberg retired from the court of appeals in 1983. His faith in the law as an engine for protecting the rights of the individual was undiminished. "Unlike in the 1960's," he said at the time of his retirement, "when America fought in the streets for its rights, today we are waging the fight in the courthouses. We are making progress, and it has to be done through the law."²³

On one of his visits to the Touro Law Center, Judge Fuchsberg reminisced about his legal career. He told the students that he regretted that the demands of his practice had prevented him from spending as much time as he would have liked with his children when they were growing up. He said that he had partly made up for this when, after his retirement

18. 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982).

19. N.Y. CONST. art. XI, § 1.

20. *Id.* at 57, 439 N.E.2d at 374, 453 N.Y.S.2d at 659 (Fuchsberg, J., dissenting).

21. *Id.* at 60, 439 N.E.2d at 375, 453 N.Y.S.2d at 660 (Fuchsberg, J., dissenting).

22. *Id.* at 51, 439 N.E.2d at 371, 453 N.Y.S.2d at 655 (Fuchsberg, J., dissenting).

23. Pace, *supra* note 1, at B9.

from the court of appeals, he founded the Jacob D. Fuchsberg Law Firm and included as his partners two of his children, Rosalind and Alan.

Judge Fuchsberg demonstrated his love of education and of the law through his service as a member of the Board of Trustees of Touro College at the time of the College's inception in the early 1970's. Judge Fuchsberg was an early and persistent advocate for the establishment of the Law Center, and worked tirelessly in aiding the Law Center to achieve provisional and later, full accreditation from the American Bar Association.

Throughout his distinguished legal career, Judge Fuchsberg was a crusader and a guardian of the rights of the people. With his death, the country has lost one of its greatest lawyers, and the Law Center one of its greatest friends. Those associated with this Law Center, however, will never forget the name, or the vision, of Jacob D. Fuchsberg.

