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James Braxton Craven Jr.: A Tribute

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JAMES BRAXTON CRAVEN, JR.: A TRIBUTE

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When Judge Craven called me on the telephone to tell me there was a strong possibility he would be appointed to the Court of Appeals for the Fourth Circuit, I received the news with no great exultation. I had known him as a splendid trial judge, but I lacked the perception to foresee how readily and perfectly he would adapt to the quite different life of a circuit judge. It was not a sense of displeasure I experienced, but my enthusiasm about the prospect was somewhat less than overflowing. I clearly recall that my subjective response was greatly influenced by the fact that the reason Judge Craven gave for wishing to move from the Western District of North Carolina to the Court of Appeals was that "it would be such a great honor." From the perspective of the Court of Appeals, that seemed to me not a particularly good reason, and all of the implications of that simple statement were not then apparent to me.

Since then, I have many times felt a conscious sense of regret that I did not embrace the initial news more warmly and more enthusiastically. It was a defect in my own perception that was responsible, a fault for which I hope the reader will forgive me in light of the fact that there are imperfections in all of us. I sometimes try to console myself, however, with the speculation that Judge Craven himself may have flowered in the collegial atmosphere of the Court of Appeals, which he found highly stimulating, exciting and thoroughly congenial. Perhaps Brack Craven never really came into his own until he had become a circuit judge; perhaps the Brack Craven with whom I worked shoulder-to-shoulder on the business of this court and who I came to greatly admire and respect and to deeply love was a little different from the Brack Craven I knew during the five years he served as a district judge. Whatever the cause of the shortfall of my expectations in that spring of 1966, however, had I known Brack Craven then as I came to know him I would have whooped with joy when I received his news.

Judge Craven brought to the court an intriguing mixture of deep religious conviction, of idealism, of compassion and of glory in the pursuit of justice combined with hard, practical common sense, with a dedication to

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the pragmatic and with a capacity for analytic introspection which made him consciously aware of the direction in which each facet of his personality was pushing him as he strove for the maintenance of reasonable balance. He was not vacillating in his opinions, however. He maintained the balance of his mental and emotional being. He was positive in the expression of his opinions, sometimes more than necessarily emphatic. Yet, more than any other person I know, he had a capacity for open-minded re-examination of a view previously expressed and could concede error with a refreshing spontaneity when he concluded that his earlier expression had been wrong. Indeed, while he was firm in the expression of his views, he was wholly lacking in that sense of false pride that leads some of us, sometimes at least, to think that our views are unassailable and rest upon enduring truth.

All of this made him a fascinating friend and colleague.

Brack Craven did not wear his religiosity on his sleeve. He talked about it, if at all, only obliquely, but it was there in a deep-running stream. His was not a sudden, miraculous conversion; his conviction was the fruit of years of thought, study and experience.

He was the son of a Methodist minister. His childhood instruction could account for his knowledge of the Bible, but it could not account for the look of love which wreathed his face when he spoke of the Sermon on the Mount or the rather frequent references in his written articles to the Bible and to Christian ideals and ethics. He likened the evolving affirmative aspects of the Constitution to the Sermon on the Mount and the old negative restraints to the Ten Commandments.[1] His opposition to the Vietnam war was firmly planted upon "Christian doctrines of the unjust war,"[2] and he recognized the role of the church in the prevention and correction of victimless crimes, matters with which he thought the law had no business.[3]

While Judge Craven did not flaunt his religious conviction with his colleagues, he was quite overtly active in the Methodist Church. He had served as a delegate both to its Southeastern Jurisdictional Conference and to its General Conference. Remarkably for a lawyer-judge, he served for many years as a member of the Board of Visitors of the School of Divinity

1. Craven, *Integrating the Desegregation Vocabulary—Brown Rides North, Maybe*, 73 W. VA. L. REV. 1, 3-4 (1970-71).

2. Craven, *Paean to Pragmatism*, 50 N.C.L. REV. 977, 978 (1972). I never doubted the religious source of his position, though I did not understand the rationality of it. I had supposed it was a Christian act when we went to the rescue of our ally, who wished nothing more than freedom from armed intervention by its neighbor. Perhaps it became unchristian when we determined to fight a defensive war we could not win.

3. Craven, *Foreword to Corrections: A Symposium on Prison Reform*, 45 MISS. L.J. 601, 602 (1974).

of Duke University. He found that service exciting and rewarding, far more so than his briefer service on the Board of Trustees of that university.[4]

One who has not embraced Christianity or any other established religion may be devoted to the pursuit of justice, but Judge Craven's religious convictions explain the fervor with which he believed in the pursuit of justice as a judge's highest calling. This was the principal theme of the article *Paean to Pragmatism*.[5] It is evident everywhere in his advice to appellate lawyers,[6] though he said he could not define justice. His problems with definitions, however, were peripheral; to him the essential components were woven into a vision constantly to be held before him and constantly to be pursued. If, as in a rainbow, there was vagueness along the edges, the clear central colors were there to behold and embrace.

His notion of justice was closely related to the concept of the welfare of people. His concern was with people and individuals. Legal principles or concepts of property which left a people or a person to suffer without redress were not to control unless there was some very good reason they must do so. Brack Craven's attitude had in it a large measure of compassion. That a plaintiff in a personal injury accident had been horribly injured seemed to him to require a judge to orient his approach to the case toward the provision of an adequate monetary award.[7] He did not doubt that the perpetrators of violent crimes should go to prison, but conditions in those prisons troubled him deeply, and he frequently expressed a sense of relief that, as a Circuit Judge, he no longer was required to determine the sentence.[8]

His notions of justice, however, were not the product of a simplistic humanitarianism.

Their essence may best be described as fairness.

His sympathy was with the paraplegic plaintiff, but he would not have another saddled with the economic loss unless he found fairness in doing so. He was wont to approach the decision in every case or to test any tentative conclusion with the question to himself, frequently vocalized, "Is it fair?" If he thought it unfair, he struggled toward a different result, bowing only in the face of overwhelming legal force. When such force was present, however, he readily accepted the inevitable, recognizing that his own notion of fairness in the particular case was not always the ultimate touchstone. He

4. While serving on the Board of Trustees, he continued to serve on the Board of Visitors of the Divinity School.

5. Craven, *supra* note 2.

6. Craven, *How to win an appeal*, TRIAL BRIEFS (Feb.-Mar. 1977).

7. *Id.*

8. It is not surprising, of course, that such a judge would have thought there was an urgency in providing some means of sentence review.

was a disciplined judge. Thus, although he thought it highly unfair to send to prison young men with selective conscientious objection to service in the Vietnam war, he applied the rule laid down by the Supreme Court, as judges of inferior courts must.[9]

Disciplined he was, though imaginative. It was the judge's role that he played, and he never equated his subjective notions of fairness with a delusion that he might impose upon society the principles by which it was to be governed. When the law and its application were clear and settled and irreversible, qualms about fairness did not lead him to rail against what he was powerless to change. When, however, there was room for an honest judge to move, and his mental honesty was very evident, his concept of fairness determined his direction.

His devotion to pragmatism was closely akin to his devotion to fairness. He believed that the law should not be vacuous, that the law was not a body of principles to be mouthed and ignored, and that the great constitutional restraints were not to be proclaimed and then left without effective legal means of enforcement. Undoubtedly, *Ex parte Young*[10] was his favorite case. He regarded it as an effective repeal of the eleventh amendment when state action was in violation of the provisions of the United States Constitution; it was the foundation of all the modern cases which effectively subjected the states to the constraints of the fourteenth amendment.[11] He liked to quote the words of Professor Wright: " '[I]n perspective the doctrine of Ex parte Young seems indispensable to the establishment of constitutional government and the rule of law.' "[12]

Of course, he recognized the logical inconsistency in treating the action of an official of a state as the action of the state for the purpose of applying the fourteenth amendment, but solely as the unauthorized action of the individual for the purpose of applying the eleventh amendment. But to him, the doctrine of *Ex parte Young* was a compelling necessity, and he enjoyed quoting Emerson's words: "A foolish consistency is the hobgoblin of little minds."[13]

Though devoted to such great causes as justice and fairness to an unusual degree, Judge Craven had within him a built-in set of controls which made him highly disciplined in his performance as a judge. He was extraordinarily introspective. He recognized that he, like all men, had predilections. He would even use the word "bias." Because justice is to be

9. Craven, *supra* note 2, at 978.
10. 209 U.S. 123 (1908).
11. Craven, *supra* note 2, at 984-88.
12. *Id.* at 986 (quoting C. WRIGHT, THE LAW OF FEDERAL COURTS 186 (2d ed. 1970)).
13. See Judge Craven's use of the proverb in Craven, *supra* note 1, at 1.

administered with an even hand, however, a recognized predilection is suspect; to Judge Craven, his devotion to the pursuit of justice and fairness was a suspect predilection. It was to be given reign when, in the legal context of the moment, there appeared no good reason not to do so and when giving it reign would not take him beyond the bounds of appropriateness or propriety or reasonableness. He staunchly shunned the verge of foolishness, a term he readily applied to an attempt to have the court compel the dispersal of a handful of white children among the schools of an otherwise wholly black school system. He thoroughly embraced the principle of integration, but he foresaw the flight of the white children and was unwilling to have the law applied to produce quite impractical results.[14]

Moreover, he recognized that questions of fairness are frequently hard and difficult. What is fair can appear to vary with the light that is thrown upon the subject. He frequently told the story of a drunk who wandered into a church one Sunday morning to hear the minister say, "The Lord giveth and the Lord taketh away." In a loud voice the drunk responded rhetorically, "What can be fairer than that?"

Moreover, he was possessed of a Christian humility. He was staunch in his opinion when he thought he was right, but he was always aware of the possibility that he might be wrong. He said as much in his writing[15] and frequently voiced the thought in his conversations with his brother judges. This surely contributed to the open-mindedness with which he would reconsider a previously expressed view when some new consideration or thought was suggested by one of his brothers. Several times in telephone calls to me he would announce a change in his position by beginning with the words, "Mr. Chief Judge, I should have learned long since never to disagree with you." He never learned it, of course. He was completely independent, and, more frequently than not, when disagreement arose between us he persevered in his view. But who could ever be angry with a colleague so willing to rethink his position and so willing to graciously recede from it when his second thought convinced him that he should?

Another facet of his humility was the readiness with which he would agree to strike language he used when language, rather than the result, excited disagreement. But this was not only an aspect of his sense of humility. Judge Craven felt deeply that we worked together collegially as a team and that whenever possible we should speak together in one voice.[16]

14. *See, e.g.*, Craven, *The Impact of Social Science Evidence on the Judge: A Personal Comment*, 39 LAW & CONTEMP. PROB. 150, 154 (Winter 1975).

15. Craven, *supra* note 2, at 977.

16. A probable mark of his humility was the fact that he failed to report either to Who's Who or to the Administrative Office for its biographical sketches of federal judges his service on the Duke Board of Trustees and the Board of Visitors of the Duke Divinity School.

A religious idealist, a devoted pragmatist, a kind and compassionate man and a fair-minded and disciplined judge all rolled into one, Judge Craven was a delight to his colleagues in conference and in the debate in which we engaged through the mails and informal telephone conversations. He revelled in the collegiality of our court and spoke with pride of the fact that although we usually sit in panels of three, a copy of every proposed opinion is sent not only to the other panelists, but to the other members of the court as well, and non-sitting judges are encouraged to enter into the debate when there is substantial room for debate. These collegial exchanges were made all the more enjoyable for the rest of us because Judge Craven was the kind of judge and the kind of man that he was.

Brack Craven was a great judge. He was a great friend. He and I were most fortunate in that the judges of our court have been, without exception since I came on the court in 1957, congenial and warmly friendly in their personal relations. There was great warmth in Judge Craven's relations with his brothers. Serious discussions were frequently enlivened by his colorful language and analogies. A gifted storyteller with an engaging wit, Brack Craven had an imaginative mind and warmth of feeling that made him a delightful companion whether at work or at play. At work and in those few moments of play we enjoyed when we dined together, Judge Craven earned the great respect and deep love of his brothers.

And so Brack Craven has gone on to that other world in which he believed, where the God of us all smiles upon the good and the great. Here, too, he lives on in our hearts, where there also is something of immortality.