A Passion for Justice

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I had the great honor and privilege to serve for one splendid year as a law clerk to Judge J. Skelly Wright. It was an extraordinary experience because Judge Wright was an extraordinary man. In law school, I learned from my professors about holdings, precedents, judicial reasoning, and legal argumentation. From Judge Wright, I learned about justice.

Judge Wright had a passion for justice. He believed with every fiber of his being that law is about justice and that the deepest responsibility of the judge is to assure justice for those who are too weak or too despised to attain it for themselves. Judge Wright thought of the law not as a body of infinitely manipulable logical abstractions, but as the living embodiment of our society's highest aspirations. It was his unyielding quest to achieve those aspirations that most singularly distinguished his jurisprudence.

When I think back on the many battles Judge Wright fought within the D.C. Circuit in the year I served as his law clerk, three cases in particular come to mind. I mention these, not because they are among Judge Wright's most memorable or influential opinions, but because they touched me personally and because they exemplify his profound commitment to fairness, decency, and human dignity.

A central component of Judge Wright's understanding of legal doctrine was his insistence that justice should drive the scope and operation of legal technicalities—and not the reverse. The very day I arrived on the job, in August, 1971, Judge Wright asked me to draft a memorandum in the case of *Doe v. McMillan*.[1] He explained that he and Judge MacKinnon disagreed on the result and that Senior Judge Miller, the swing vote on the panel, had reserved judgment. My task was to draft a memorandum that would bring Miller about to "our" point of view.

As we sat across his desk, Judge Wright described the case: The House Committee on the District of Columbia had written a lengthy report on the District's public school system. The report included derogatory material about a number of specifically named students. The students and their parents and guardians had sued (under fictitious names to protect their

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1. 459 F.2d 1304 (D.C. Cir. 1972), *aff'd in part and rev'd in part*, 412 U.S. 306 (1973).

anonymity) to enjoin the publication and distribution of the report unless the names of the students were deleted.

As he outlined the case, Judge Wright grew alternately sad and furious. He explained that one disciplinary letter alleged that a named student had invited a male substitute teacher to have sexual relations with her; other letters accused named students of disrespect, profanity, vandalism, assault and theft; and twenty-one test papers, published with the students' names, bore failing grades. The Judge was incredulous. "How can the United States Congress even *think* of such a thing," he roared. "There's just no *need* for the names! What's the matter with people like that?" he sighed.

Fired up, I spent the next ten days drafting what seemed to me a dazzling memorandum, but to no avail. Almost immediately after receiving the memorandum, Judge Miller joined Judge MacKinnon's opinion holding that the suit was barred by the Speech or Debate Clause, the principle of separation of powers, and the doctrine of official immunity.

In an angry dissent, Judge Wright accused the majority of a "disheartening callousness to the legitimate interests of appellant children."[2] As he saw the matter, the "right of individuals to live their lives and maintain their personalities and affairs free from undue exposure to the outside world is a central premise of our constitutional and legal framework."[3] The degrading and humiliating "public disclosure of the failures and inadequacies" of these children would "inevitably lead to disillusionment with the society that permits such unfairness" and destroy "the very foundation" upon which they must prepare for "socially productive" lives.[4]

Judge Wright recognized, of course, that "the power of Congress to conduct investigations and to publish its conclusions is broad," but he insisted that that power "is not unlimited."[5] Although conceding that each branch of government "must avoid the temptation to encroach upon the powers and duties of the coordinate branches,"[6] Judge Wright noted that " 'such deference cannot yield to an unnecessary and unreasonable dissipation of precious constitutional freedoms.' "[7] He thus concluded that, in the circumstances of this case, "the mere possibility of conflict" between the branches could not "justify avoidance of the judiciary's constitutional duty to protect and ensure the rights of citizens."[8]

Although Judge Wright failed to persuade his brethren in *Doe*, a year later the Supreme Court unanimously reversed the court of appeals' deci-

2. *Id.* at 1320.
3. *Id.* at 1325.
4. *Id.* at 1326-27.
5. *Id.* at 1324.
6. *Id.* at 1321.
7. *Id.* (quoting Watkins v. United States, 354 U.S. 178, 204 (1957)).
8. *Id.*

sion and reinstated the children's suit, albeit (and perhaps not surprisingly) on narrower grounds than those urged by J. Skelly Wright.[9]

Of course, we were not always in dissent. Often, Judge Wright was able to persuade his brethren to his point of view—even when this point of view led in a direction different from that taken by the Supreme Court. In *United States v. Robinson*,[10] for example, the court of appeals considered the permissible scope of a search incident to a lawful arrest for a violation of a motor vehicle regulation. After stopping Robinson for operating a motor vehicle after revocation of his operator's permit, a police officer conducted a full search of Robinson's person and discovered heroin in a package of cigarettes the officer had removed from Robinson's pocket. Robinson claimed that the search of the cigarette package exceeded the bounds of a constitutionally permissible search. In a bitterly divided five-to-four decision, the court of appeals invalidated the search. Judge Wright wrote the opinion of the court.

At the outset, Judge Wright conceded that under traditional doctrine a police officer may ordinarily conduct a full search of the person incident to arrest. This did not end the matter, however, for Judge Wright invoked what he viewed as the central principle of Fourth Amendment jurisprudence: "[A] search will comply with the requirements of the Fourth Amendment only if its scope is no broader than necessary to accomplish legitimate governmental objectives."[11] With this principle in mind, Judge Wright identified the two "legitimate objectives" of searches of the person incident to arrest: (1) "seizure of the fruits, instrumentalities and other evidence of the crime," and (2) "removal of any weapons that the arrestee might seek to use to resist arrest."[12]

Having thus laid the foundation for his conclusion, Judge Wright observed that, unlike most crimes, traffic offenses ordinarily involve no need to search for "fruits, instrumentalities or other evidence of the crime." Accordingly, the only legitimate objective the arresting officer could have had in searching Robinson was his interest in assuring that Robinson was unarmed.

Turning to this objective, Judge Wright distinguished between routine traffic arrests, in which the officer simply issues a notice of violation and allows the offender to proceed, and cases like Robinson's, in which the officer effects an "in-custody" arrest in order to transport the offender to the stationhouse for booking. Judge Wright concluded that the first situation is analogous to an ordinary investigatory stop and that, in such circumstances, the arresting officer is limited to a *Terry* frisk, which is permissible only if the officer reasonably believes that the individual is armed

9. Doe v. McMillan, 412 U.S. 306 (1973).
10. 471 F.2d 1082 (D.C. Cir. 1972) (en banc), *rev'd*, 414 U.S. 218 (1973).
11. *Id.* at 1091.
12. *Id.* at 1093.

and presently dangerous. In the second situation, however, Judge Wright recognized that the safety concerns are accentuated because of the "prolonged proximity of the accused to police personnel following the arrest."[13] Accordingly, Judge Wright concluded that, in making such an arrest, the officer may routinely conduct a limited frisk for weapons, but may not conduct a full search of the person, for such a search would be broader than necessary to accomplish the legitimate governmental interests implicated by the arrest.

The key to Judge Wright's opinion in *Robinson* was his insistence on the core Fourth Amendment principle that a search may be no broader than necessary to serve the government's legitimate interests. In his view, any search that reached beyond those bounds would unjustifiably infringe upon the individual's reasonable expectations of privacy. Judge Wright was especially concerned that the rule urged by the government, authorizing a full search incident "to *any* lawful arrest, would give dangerously broad discretion to the police officers who would apply it."[14] The "practical effect" of such a rule, he observed, would be "fearsome to imagine," for " 'the lowly offense of a traffic violation—of which all of us have been guilty at one time or another' " would then provide the trigger for a wide range of instrusive and highly discretionary searches.[15] Indeed, such a rule would "endanger the rights" of any person whom "a police officer—for whatever secret motive or for no reason at all—wishe[d] to search without the hindrance of normal Fourth Amendment protections."[16]

A year later, the Supreme Court, in a six-to-three decision, overruled Judge Wright's decision.[17] The Court held that the police may routinely conduct a full search of the person incident to any lawful arrest—even for traffic offenses that involve no fruits, instrumentalities, or evidence. As the Court put it: "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification."[18]

I saw Judge Wright on the day the Supreme Court handed down its decision in *Robinson*. He was disappointed and, to my astonishment, he was surprised. It was not especially difficult to predict the outcome of Fourth Amendment cases in the heyday of the Burger Court,[19] and I knew of no one who expected the Court to affirm. Judge Wright, however, was surprised. Although he understood the makeup and direction of

13. *Id.* at 1098.
14. *Id.* at 1108 (emphasis in original).
15. *Id.* (quoting Amador-Gonzalez v. United States, 391 F.2d 308, 318 (5th Cir. 1968)).
16. *Id.*
17. United States v. Robinson, 414 U.S. 218 (1973).
18. *Id.* at 235.
19. *See* Stone, *O.T. 1983 and the Era of Aggressive Majoritarianism: A Court in Transition*, 19 GA. L. REV. 15 (1984).

the Supreme Court as well as anyone, he simply could not bring himself to believe that others could not see the light of justice, which in cases like *Robinson* burned so bright and clear for him.

In many ways, Judge Wright's sensibilities about the human condition were prophetic. Consider, for example, *United States v. Moore*,[20] which took more than two years to decide, provoked six separate opinions totalling more than 120 pages in the Federal Reporter, and—when the dust settled—yielded no majority position. The issue presented was whether an individual suffering from the disease of addiction could be criminally punished for possessing drugs to satisfy the needs of his addiction. Observing that "stigmatization of such persons as criminals, rather than treatment of them for their disease, raises serious questions of constitutionality, is contrary to established common law notions of criminal responsibility, and is not mandated by Congress' intent in adopting the relevant legislation," Judge Wright, writing for four of the nine judges, urged the adoption of "a new principle: a drug addict, who by reason of his use of drugs, lacks substantial capacity to conform his conduct to the requirements of the law may not be held criminally responsible for mere possession of drugs for his own use."[21]

Because "the public's understanding" of addiction is "rife with confusion, uncertainty and misconception,"[22] Judge Wright sought to put the issue into historical and medical perspective. After lengthy analyses of both the criminalization of addiction and the evolving medical understanding of the disease, he concluded that our past social and political "policies have branded these unfortunate individuals as the outcasts of society and forced them unnecessarily to lives of crime and degradation."[23] As Judge Wright saw the matter, "the misery of the addict is not his alone, for as members of a common society we all share in the responsibility for the conditions which have helped to make him what he is."[24]

At the core of Judge Wright's legal analysis in *Moore* was the "concept of criminal responsibility," which "by its very nature" is " 'an expression of the moral sense of the community.' "[25] Judge Wright explained that in "western society, the concept has been shaped by two dominant value judgments—that punishment must be morally legitimate, and that it must not unduly threaten the liberties and dignity of the individual in his relationship to society."[26] Hence, "there has historically been a strong conviction in our jurisprudence" that "criminal responsibility" may be assessed only when "a man elects to do evil, and if he is not a free agent, or is

20. 486 F.2d 1139 (D.C. Cir. 1973) (en banc).
21. *Id.* at 1209-10.
22. *Id.* at 1227.
23. *Id.* at 1229.
24. *Id.* at 1234-35.
25. *Id.* at 1240 (quoting United States v. Freeman, 357 F.2d 606, 615 (2d Cir. 1966)).
26. *Id.* (footnotes omitted).

unable to choose or to act voluntarily, or to avoid the conduct which constitutes the crime, he is outside the postulate of the law of punishment."[27] In Judge Wright's view, the defense of addiction was the natural outgrowth of "the gradual development of such defenses as infancy, duress, insanity, somnambulism and other forms of automatism, epilepsy and unconsciousness, involuntary intoxication, delerium tremens, and chronic alcoholism."[28]

Although Judge Wright accepted without question society's paramount interest in preventing drug abuse, he maintained that the criminalization of addiction had proved "tragically counter-productive" and had caused "not only a dramatic increase in organized crime, but a harvest of street crime unknown in our history."[29] In his view, society's legitimate interests could "be fully vindicated through a program of civil commitment with treatment."[30] The defense of addiction, he concluded, reflected "the humanism as well as the pragmatism of the common law," promised at least a partial solution to "a grave social problem," and offered "hope that treatment of addicts, rather than criminal stigmitization," would "bring peace to our cities."[31]

The conflict within the D.C. Circuit in its deliberations over *Moore* was intense. Over the course of two years of internal debate and argumentation, there were constantly shifting alliances and majorities. At one point, Judge Wright had the support of five of the nine judges; to his delight, he was subsequently joined by a sixth. But then, to his even greater disappointment, he lost two of his original supporters who ultimately shied away from what seemed to them too daring a position. It was not too daring for Judge Wright. His sense of judicial responsibility was clear. As Judge Wright put the point in what is perhaps the most powerful and most revealing statement in all 120 pages of the *Moore* opinions, "no matter how low [the addict] sinks, he cannot lose his right to justice; and the lower he sinks, the greater is his claim to our concern."[32]

We live in an era in which the terms "judicial activism" and "liberalism" are often hurled as insults. This is a tragedy of our times. Judge Wright was both a "judicial activist" and a "liberal." He wore both labels proudly. No doubt, Judge Wright had his share of faults and more than his fair share of detractors. But this is a better, more decent, more civilized society because of his indelible contributions. Judge Wright represented the very best in the American judiciary, for he understood as few others do the true, the guiding, the fundamental "original intention" of

27. *Id.* at 1240-41.
28. *Id.* at 1241-42 (footnotes omitted).
29. *Id.* at 1209.
30. *Id.* at 1246.
31. *Id.* at 1260.
32. *Id.* at 1235.

our legal institutions. J. Skelly Wright understood that, when it achieves its highest aspirations, the American judiciary is driven by a passion for justice.