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Introduction

Craig Wright

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I welcome this opportunity to discuss the various factors that go into the decision-making process at the level of a court of last resort. It would surely be disingenuous to assert that the philosophy of various members of the Ohio Supreme Court is not the product of their life experience and background. I hesitate to single out individual members of the present Court, but will share my own view as to what formed my beliefs early in my legal career.

All my forbearers were members of the party of Jefferson and Jackson–albeit conservative in bent. My father was an elected Democrat and an official in the administration of Franklin Delano Roosevelt during Roosevelt's third term of office. When I entered Yale University law school, it was hardly viewed as a citadel of conservatism. In point of fact, it was the focal point of radical thought in the law. More than one commentator has suggested that my opinions, while on the Court, reflected a clear conservative turn. Why so? The culprits were two brilliant but in my view, mistaken, faculty members who held forth in New Haven during the late 1940's and throughout the 1950's.

Professors Myers McDougal and Harold Lasswell had constructed a very comprehensive set of values and they strongly believed that all appellate court judges should apply same to the cases put before them for decision. This very interesting system could certainly be applied to some of the more anachronistic case law coming out of the 15th and 16th Century Common Law. However, within a month or so of exposure to same, I concluded the system simply would not work well under the judicial system framed by our own founders and developed through the 19th and 20th centuries. The principal reason that I did not share their views was because I was convinced their basic premise would fall apart, as over the longer term it would provide *no consistency* and little predictability. This conclusion was based on the simple fact that judges and justices most certainly disagree among themselves about the virtue of some

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[1]J.D., Yale, 1954; B.A., University of Kentucky, 1951. Prior to Mr. Wright's service as a judge, he had a long established private practice in the corporate and administrative fields. Mr. Wright possesses an unique perspective of the law due to his previous service as a special agent in the Army Counter-Intelligence Corp. His illustrious judicial career began in 1971 as a Common Pleas Judge and culminated with his election to the Ohio Supreme Court in 1984. Mr. Wright retired from judicial service in 1996 and is presently affiliated with the firm Chester, Willcox & Saxbe, Columbus, Ohio. There are many notable highlights in Mr. Wright's professional career, including an appointment by then Government Richard Celeste to the Ohio Recovery Council from 1983-1990, and also serving on the Commission for Impaired Lawyers for the ABA in 1993. Mr. Wright's accomplishments are not limited to professional responsibilities. He has also served on numerous charitable committees, including Board of Trustees, Grace Brethen Church, 1968-1974, and Trustee, Sheperd Hill Hospital, 1983-1990.

particular set of values. Thus, with the change of membership on a particular Court, an entirely different conclusion might be reached on the same set of facts.

Professor McDougal admitted this was a problem and also readily conceded that predictability in the law was one of the *highest* considerations for any court of last resort. Indeed, he cited with approval many of the written works of Oliver Wendell Holmes and Benjamin Cardoza on this particular subject. Holmes recognized the reality of judicial activism but vigorously held to the virtue of judicial restraint. This particular view, as it developed in twentieth century jurisprudence, was primarily the result of his handiwork. Holmes believed in filling in the blanks on constitutional mandates that were purposefully left vague and was quite willing to interpret statutes that were likewise obscure. However, he believed strongly that the judicial function was *not* to strike down laws with which a court *simply disagreed* and to defer to our democratically elected members of Congress.

Two other members of the law school faculty who shaped my views on civil liberties and the Bill of Rights were devotees of the views of Justice William O. Douglas who, of course, believed the Bill of Rights should be enforced in accordance with the letter of the law. The Yale faculty believed that to take a different view would be anti-democratic and to fly in the face of the form of government that has been our country's strength for 200 years. To do otherwise, they believed, would be to ignore hardships endured by our founders at the hand of the Crown.

I came to believe that judges *should* be activists in defense of the Constitution. Like the late Barbara Jordan, I have an abiding faith in that document and my view with respect to the Bill of Rights has remained steadfast over the years. I consider it to be whole, complete and total. I believe I can assert, without fear of contradiction, that when I was sworn in as a Justice on this State's highest Court, I had no intention of being an idle spectator to the diminution or subversion of basic constitutional rights.

From this early philosophically defining period, I recognized that judges on a court of last resort have always been plagued with a need for a rule of law which is certain, predictable and will meet the policy needs of changing society. I agree with the New York Court of Appeals judge who declared, "If adherence to precedent offers not justice but unfairness, not certainty but doubt and confusion, it loses its right to survive." However, I believe that to abandon the desirable values of certainty and predictability, proponents of change must demonstrate that the benefit to society *greatly* outweigh the uncertainty created. Like Cardoza, I place a very high value on judicial commitment to both fairness and certainty in the law.

As far as personal predilections with respect to "policy-making," I think populist jurisprudence is repugnant. Perhaps it is unfashionable to state that judges should support, follow and interpret the legislation produced by the legislative branch as it is *written* and likewise to apply the Constitution as it is *written*. Many judges are all too willing to make it up as they go along. Some few members of the judiciary seem to have the notion that, "I am going to do what I think is right and let the law catch up with me." I reject this point of view and find it contrary to the oath of office given to all members of the judiciary.

There still exists in this country a considerable number of judges who firmly believe that the American public expects the judiciary through its decisions to

become deeply involved in the management of society. This tendency is rooted in the feeling that society has suffered deeply from the failures of the executive and legislative branches, and that judges must single-handedly make *things right*. I think this view wrongly misinterprets the judicial function.

In closing, let me pass on several tips for appellate attorneys. Regardless of their predilections, every member of the Ohio Supreme Court appreciates artful writing. Be concise, avoid footnotes—they distract the reader. Lead with your best argument, pro or con. If your introduction is articulate and compelling, the battle is almost won. Above all considerations, remember you are writing for the *reader*, not yourself. If you hold to this admonition, you should fare well. Keep in mind the Court is literally deluged weekly with the written word. Endeavor to get and keep the reader's attention as the Court generally resolves the issues before it on the basis of the written word. If you consider the foregoing advice, you will be well on your way to success.