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JOSEPH WEINTRAUB—A JUDGE FOR ALL SEASONS

John J. Francis†

Joseph Weintraub became Chief Justice of the New Jersey Supreme Court on August 19, 1957. He brought with him impressive evidence of natural and legal qualifications for that taxing post: election to Phi Beta Kappa for his undergraduate work at Cornell University, election to the Order of the Coif at its Law School where he was Editor-in-Chief of the *Cornell Law Quarterly,* and receipt of his law degree with special honors. In addition to an active trial and appellate court practice, he had been a special assistant to the state Attorney General in the conduct of important tax litigation, a New Jersey member of the Waterfront Commission of the New York Harbor, counsel to Governor Robert B. Meyner, and at the time of appointment to the New Jersey Supreme Court he was a judge of the superior court.

As Chief Justice, he was head of the judicial branch of the government and was possessed of more authority and more duty than any other chief justice in the country. The New Jersey constitution made him administrative head of all of the courts of the state: supreme, superior, county, district, juvenile and domestic relations, and municipal, now presided over by almost 675 judges. The designation was not simply a formal one; it was a working mandate. The New Jersey constitution required him to man the Appellate, Law, and Chancery Divisions of the New Jersey Superior Court, and vested him with broad power to transfer judges from one assignment to another as the need appeared.

It is impossible to describe within the limitations of this Article the extensive nature of the burden associated with the supervision of the New Jersey judicial system. Suffice it to say that, although assisted in the endeavor by an Administrative Director of the Courts, no day passed in the sixteen years of Chief Justice Weintraub's service which did not involve him in some discussion, some action, some correspondence relating to administration as distinguished from adjudication. Frequently, there were day-long conferences with assignment judges (presiding judges of single

† Member of the New Jersey Bar. Associate Justice, New Jersey Supreme Court, 1957-72. Judge, New Jersey Superior Court, Appellate Division, 1952-57; Essex County Court, 1948-52. Advisory Master, Court of Chancery, 1947-48. LL.B. 1925, Rutgers University; LL.M. 1947, New York University; LL.D. 1959, Rutgers University.

large counties or a group of smaller ones) about operation of the various courts in their counties and vicinages, and particularly about the constantly burgeoning trial lists. No judge in the state was more accessible to court committees engaged in studying various problems, such as the ever-present concern for improving rules of civil and criminal practice, or to bar association officers or committees, or to individual judges or members of the bar with real or imaginary problems, or to public officials, and, not infrequently, to ordinary citizens with complaints about judges or the conduct of courts.

There is no intention to linger on the administrative burdens of New Jersey's Chief Justice. The purpose of these few comments is simply to provide a backdrop for an evaluative discussion of Chief Justice Weintraub as the presiding judge of the Supreme Court of New Jersey.

Some conception of his capacity can be gained immediately by a look at the annual reports of the administrative director for the fifteen years, 1957 through 1972, which detailed the work of all the courts and of the individual judges for each of those years. The reports indicate that in spite of his administrative tasks, Chief Justice Weintraub authored more majority opinions than any other member of the New Jersey Supreme Court. His efforts were not confined to the routine cases. Not only did he take his full share of the cases, but whenever an important public issue was argued on appeal, and he felt that the public or the other branches of government would probably expect the court's pronouncement to come from the Chief Justice, at conference he would say, "I'll take it," no matter how involved or controversial the problem presented.

All of his opinions were written in longhand, and although his two law secretaries may have furnished additional research at his request after the oral argument, no law secretary ever wrote any part of the ultimate opinion. However, when the draft was circulated for consideration by his colleagues, and then taken up at the next court conference, he offered no stiff-backed resistance to suggestions which some of the justices thought might add clarification, or which might limit the principle espoused to the needs of the case, especially if that principle represented a change or revision of a common-law doctrine. But this amenability was more than matched by a sturdy reluctance to depart from or qualify the statement of legal principle made necessary in his judgment by the demands of justice in the case.

In some jurisdictions cases are assigned for opinion on a predetermined or rotation system in advance of oral argument. Chief Justice Weintraub has always opposed such a method. In his view the tendency of a preassignment system is consciously or unconsciously to lessen joint responsibility in the court's decisional process. In a related area, he often expressed the conviction that cultivation of "expert" judges should be avoided.

> Judges bring different experiences to the court. There is a natural disposition to assign opinions on the basis of interest and background in particular subjects. That disposition should be resisted. If it is not, the work of the court in a given area may represent the thinking of but one man. More importantly, expertness may breed complacency and hamper rethinking or new thinking. Every member of a court should be "expert" in all matters. It calls for more work, but the dividends are rewarding and in any event the law should be the intelligent product of the entire court.[1]

Every judge, he thought, should have the opportunity through the writing of opinions to demonstrate the full scope of his reasoning powers and should not be presented to the public as a specialist largely limited to decision-making in one field of the law.

The New Jersey Supreme Court under Chief Justice Weintraub functioned with an uncomplicated but effective decisional process. Arguments of appeals were held every other Monday and Tuesday, with court conferences on those appeals on the intervening Tuesday. After the argument and before the conference, it was the duty of each justice to consider each case and reach a tentative conclusion in his own mind as to the proper result. The Chief Justice had an additional burden, usually discharged on Saturdays and Sundays. After he had reached tentative conclusions in the cases, he then decided, again tentatively, upon the justice to whom the opinion in each case would be assigned, assuming that justice was in the majority at the conference.

In explaining this process, Chief Justice Weintraub referred to a number of factors which entered into the tentative selection of the opinion writer: (*1*) the workload of each member of the court, which he said did not merely mean the number of pending cases, because some cases require more time, (*2*) the work capacity of each member of the court, if there were differences due to ill health or individual capability, and (*3*) the ability of the particular justice to hold a majority, if the court were sharply divided. If the

[1] J. Weintraub, "Writing, Consideration & Adoption of Opinions," paper delivered at Conference of Chief Justices, Baltimore, Maryland, Aug. 24, 1960.

subject called for close careful writing, the individual capacity might decide the selection. Associated with this selection process was his effort to achieve an equal division of significant cases, so as to avoid any injury to an ego.

When the justices assembled for the Tuesday conference, no one of them knew until the Chief Justice called on him to discuss a particular case that he would write the opinion if the views he expressed received the support of the majority. Consequently, each justice came prepared to discuss each case to be decided. Obviously, this method of operation tended to produce maximum preparation for conference discussion.

After the justice called upon reviewed the appeal and announced his feelings about the desirable result, Chief Justice Weintraub continued the discussion, suggesting his own views. Each of his colleagues then set forth his opinion, normally in order of seniority, until a majority decision was reached. Generally, the exchange of viewpoints was a keen intellectual exercise; occasionally, as might be imagined, it was not easy to reconcile disparate opinions of strong-minded men as to the just result or the basis on which the result should be reached or expressed. When the discussion became heated, Chief Justice Weintraub's talent as a moderator was at its best. If there was a majority for a result but sharply differing opinions as to the rationale supporting the result, he had an uncanny knack for blending the arguments into an agreeable common approach or achieving acceptance of a single basis of decision by persuading the protagonists of the differing viewpoints to hold for another day grounds which were not essential to the result, or if neither course was acceptable, then saving the day by the alternative means of a concurring opinion.

If the justice first requested to state his conclusions turned out to hold the minority view, by unwritten rule he was expected, with rare exceptions, to express that view in a dissenting opinion. However, when he was joined by other members of the court, it was understood that they would agree among themselves on the author of the dissent. A practice requested by Chief Justice Weintraub and agreed upon by his colleagues was that on receipt of the draft of the majority opinion, the justice charged with the task would put aside whatever he was working on and write the dissent or concurrence. Delay in public announcement of the decision thus was kept to a minimum.

It was understood that the result agreed upon at conference, even if unanimous, was tentative. If the holder of the opinion

found, upon closer scrutiny or additional research, that it "would not write," he was privileged to write the opinion the other way and circulate it with an explanatory note, or to request that the case be taken up again at the next conference. On occasion, although not very frequently, one or the other of these courses was followed and, perhaps surprisingly, the new view carried the day. If it did not, the changed conclusion was voiced in a dissent, and Chief Justice Weintraub chose a new writer for the majority.

In the usual course, when a majority opinion draft was circulated for review before consideration on the next conference day, it was expected that each justice would study the draft carefully and write or telephone the author about any comments or suggestions for change. Here, the overworked Chief Justice was most helpful. He would devote himself immediately to the opinion and then walk into the chambers of the writer, if the justice had adjoining chambers, or write or telephone, and in a most considerate fashion offer any constructive suggestions or criticisms he had as to form or substance. He did this without pompousness and without arrogance; he did it modestly but without undue humility. He performed the task as a man devoting himself solely to the achievement of the very essence of justice.

At this point a digression to refer to proceedings at the oral argument of appeals may be appropriate. The bar of New Jersey have come to know that the members of the court are prepared for such arguments. They have read the briefs, the record, if possible, or pertinent parts of it, and a memorandum reviewing the case by a law secretary of one of the justices. Consequently, the argument becomes a dialogue between court and counsel on the crucial issues, and the attorney who is not steeped in his case or who is prone to making inaccurate references to the record, quickly finds himself in deep trouble. When a question was asked and an unresponsive answer begun, Chief Justice Weintraub, whose mind had been churning along at jet speed, occasionally said "No, no, no," and pressed for a direct answer. Some attorneys without much experience in oral arguments have been heard later to express the reaction that the Chief Justice's spontaneous remarks were sharp or disparaging. Nothing could be further from the truth. Persons aware of his disposition for kindness and compassion know his rejective comment was instinctive and impersonal and arose from his complete dedication to the true function of the court. In fact, if counsel appeared flustered or upset, no one moved in more quickly or sympathetically to help him out than the Chief Justice.

Returning to the post-argument court conference, a unique procedure instituted by the Chief Justice is worthy of mention. Occasionally, it was necessary to reach a decision in a complicated or highly technical case, such as a utility rate regulation case, or on a business or real property tax assessment problem. Even though experts had testified at the trial or hearing level and the problems involved were briefed and argued on appeal, sometimes justices were troubled about their clear comprehension of the technical aspects of the case. When this difficulty first arose, Chief Justice Weintraub commented that it was important to remember that judges are not God, and therefore some further enlightenment should be sought. His suggestion was that with consent of counsel the court should sit down informally with them and their experts and discuss the unclear issues until understanding was reached as to the theses of the experts and the points of disagreement with respect to their application in the case. This course was followed, perhaps a half dozen times over the years, without objection by counsel, who left the conference knowing from the open discussion that the justices now comprehended the issues presented for decision. It should be said also that although judicial purists of an earlier period might disapprove of such an unorthodox procedure, the New Jersey Supreme Court has had no oral or written criticism of it from the bar. If the Chief Justice were criticized for sponsoring such an informal explanation of the appeal record, undoubtedly he would respond as did Chief Justice Taft of the United States Supreme Court in 1924: "A man who is never attacked is never useful, and one of the results of a long life's experience is to minimize the importance of such attacks."[2]

The views of Chief Justice Weintraub on concurring and dissenting opinions were well known to his associates. He had said forcefully that a concurring opinion should not be written merely to restate the majority view; it should not be written just to pick or carp at the majority opinion, or to demonstrate a greater writing facility than its author, or because of personal dislike for him. If the concurrence did not contribute something of its own, it should not be written, and even then, in the interest of solidarity, he felt that an effort should be made to bring the additional view within the ambit of the majority opinion. He constantly endeavored to achieve that result, because in his eyes the greatness of a court is more important than that of an individual.

But the Chief Justice did agree that concurring opinions have

[2] A.T. MASON, WILLIAM HOWARD TAFT, CHIEF JUSTICE 287 (1965).

a beneficial place in the operation of appellate courts. If a judge finds the result just but cannot accept the majority's basis for the decision, it is entirely fitting that he should express his own views on the subject. Such a course is preferable to simply saying, "I concur in the result," which rarely satisfies the trial court or the bar. Moreover, a proper concurring opinion may have its greatest value in expressing different and perhaps newer approaches to the issue in the case for future consideration. In performing that function it may well be the forerunner of a change in the law, and it will alert the bar to the possibility that the majority opinion may not be or should not be the eternal solution of the issue.

In the day-to-day operations of a court of last resort the unanimous opinion is a desirable objective. But as has been said by some writers, chronic unanimity is inconsistent with man's nature, especially in these troublesome times when social, economic, and governmental theories are in a swirl. Throughout his tenure, Chief Justice Weintraub's view has been that dissenting opinions are wholesome instruments and not, as some argue, "crabgrass in the jurisprudential lawn." Chief Justice Hughes described the dissent in a court of last resort as "an appeal to the brooding spirit of the law."[3] Chief Justice Weintraub preferred the pragmatic and hopeful spirit of Justice Holmes, who felt that dissent frequently led not only to a sharpening of the thinking embodied in the majority opinion and to curtailment of expansive expressions there, but also to a statement of the law of the future. As Holmes put it:

> Law is the business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it, and, when I perceive what seems to me the ideal of its future, if I hesitated to point it out and to press toward it with all my heart.[4]

Chief Justice Weintraub expressed his feelings to his colleagues in more earthy terms. He would say that no judge should ever set aside his conviction simply to achieve unanimity; his duty is to present his views to his brethren at conference, try with all his might to have them accepted, and, if unsuccessful, to express them in dissent. He may then rightfully hope that what he has written will point the way for development of the law of the future.

The Chief Justice espoused the practice, and it was invariably followed, that a dissent be circulated before the taking of final action on the majority opinion. This gave the majority writer a

[3] M. PUSEY, CHARLES EVANS HUGHES 293 (1951).

[4] O. HOLMES, COLLECTED LEGAL PAPERS 194 (1920).

chance to tone down the language which may have drawn the ire of the dissenter, and generally it eliminated the angry dissent. Moreover, it afforded the majority writer a chance to meet the discordant view and sometimes brought about withdrawal of the dissent. Occasionally, when the court was closely divided and both opinions were laid out for consideration, a well reasoned dissent carried the day.

There is little a chief justice can do directly about the form of his colleagues' written opinions. Every man has his own style and generally he is not very receptive to suggestions which in his view do not effect substance but do upset the cadence of his opinion. Assuming a chief justice is himself a competent writer, his influence comes largely from the example he sets, and the persuasiveness of the views he expresses on the subject of opinion writing. On many occasions Chief Justice Weintraub suggested a working standard in practical down-to-earth terms. It was his view—and he followed it in practice—that from an opinion of a court of last resort the losing party should know precisely why he lost, the winning party should know precisely why he won, and, where appropriate, the trial judge should receive a clear explanation of the nature of his error. Finally, by clear language, the opinion should educate the bar on what the governing principle of law will be for the future.

Chief Justice Weintraub was generally opposed to long opinions. He liked a "fair number of short, cryptic sentences [which] are easy to read and have more punch."[5] However,

> [t]here should be a change of pace, for an endless succession of them would be choppy, but a series of long, complicated sentences is apt to be obscure and surely is wearying. One need but read the digests in the decennial system to appreciate how indigestible can be sentences of that character. If the reader must stop and go over it again, the sentence needs rewriting. And the long paragraph has a deterrence of its own. It is better to break it into smaller morsels.
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> I like little words. They are spry; they dance; they paint pictures. I would not use a multisyllable word when a four letter word will do. A succession of ponderous words, usually of latin derivation, lumbers along. They are drab and their weight delays the reader.[6]

In accord with Sir Francis Bacon, Chief Justice Hughes, and Justice Holmes, Chief Justice Weintraub did not believe the judges' function was to write literature. He always has opposed

[5] J. Weintraub, *supra* note 1, at 7.
[6] *Id.* at 7-8.

cultivation of a facility to side-step responsibility with a rhetorical phrase. Such a view does not imply that the composition of good judicial writing necessarily must be different from the composition of other forms of good writing. It simply means that clear statements of the substantive merits of a case, undecorated by adjectival flourishes, must have priority over literary style. The Chief Justice agreed that judges should think "things" and not words, and with Bacon's caution that there should not be a too

> "affectionate study of eloquence," so that men begin "to hunt more after words than matter, and more after the choiceness of the phrase, and the round and clean composition of the sentence, and the sweet falling of the clauses, and the varying and illustration of their works with tropes and figures, than after the weight of matter, soundness of argument, life of invention or depth of judgment."[7]

It is not within the permissible limits of this subject to illustrate by a discussion of the form or substance of specific opinions the manner in which the Chief Justice practiced what he believed and advocated. But hopefully a few characteristic examples plucked at random from the many opinions which have left his footprints on the sands of judicial time may show how much can be said with an economy of words.

In a damage action holding a broker liable for tortious interference with the prospective pecuniary advantage of a competitor, a volume was stated in a few words:

> The law protects a man in the pursuit of his livelihood. True, he cannot complain of every disappointment; others too may further their equal interests, and if the means are fair, the advantage should remain where success has put it. But if the act complained of does not rest upon some legitimate interest or if there is sharp dealing or overreaching or other conduct below the behavior of fair men similarly situated, the ensuing loss should be redressed.[8]

On another occasion he revealed this unique capacity in disposing of a constitutional contention in terms easily understood by the ordinary citizen. A defendant in a homicide case who had been given all the *Miranda* warnings said that his confession was involuntary because he did not realize its inculpatory nature. Consider the answer:

> There is no right to escape detection. There is no right to commit a perfect crime or to an equal opportunity to that end.

[7] C.D. BOWEN, FRANCIS BACON, THE TEMPER OF A MAN 10 (1963).

[8] Harris v. Perl, 41 N.J. 455, 461, 197 A.2d 359, 363 (1964).

> The Constitution is not at all offended when a guilty man stubs his toe. On the contrary, it is decent to hope that he will. Nor is it dirty business to use evidence a defendant himself may furnish in the detectional stage. Voluntary confessions accord with high moral values, and as to the culprit who reveals his guilt unwittingly with no intent to shed his inner burden, it is no more unfair to use the evidence he thereby reveals than it is to turn against him clues at the scene of the crime which a brighter, better informed, or more gifted criminal would not have left. Thus the Fifth Amendment does not say that a man shall not be permitted to incriminate himself, or that he shall not be persuaded to do so. It says no more than that a man shall not be "compelled" to give evidence against himself.[9]

Consider also this example rejecting an abstruse defense of lack of mental capacity in a murder case. A medical witness who described himself as a psychodynamically-oriented psychiatrist in substance stated that there is no free will; man is a helpless victim of his genes and his lifelong environment, and that unconscious forces from within dictate his behavior without his being able to alter it. So, when the accused killed, it was an automatic reaction motivated by the predetermined and predestined influence of his unconscious.

In holding that a world of reality cannot accept such a thesis as a defense, the Chief Justice wrote:

> Abstractly, the cause-and-effect thesis could suggest a stultifying determinism whereunder every stroke of man's pen was ordained when time first stirred. But the psychiatrist, awed by it all, wisely leaves that subject to the philosopher. Besides it is not easy for an inquiring mind to believe it is on a string stretching from infinity. Nonetheless the cause-and-effect thesis dominates the psychiatrist's view of his patient. He traces a man's every deed to some cause truly beyond the actor's own making, and says that although the man was aware of his action, he was unaware of the assembled forces in his unconscious which decided his course. Thus the conscious is a puppet, and the unconscious the puppeteer.[10]

Chief Justice Weintraub is worthy of this issue of the *Cornell Law Review* commemorating his retirement, and those of us who have joined in the event are honored to participate. It is not easy for a person who has enjoyed his friendship and association as a bench colleague for fifteen years, and who has a weakness for adjectives, to write about one of the truly great judges of our time

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[9] State v. McKnight, 52 N.J. 35, 53, 243 A.2d 241, 250 (1968).

[10] State v. Sikora, 44 N.J. 453, 475-76, 210 A.2d 193, 205 (1965).

without embarrassing him. But the light of his record will not dim; it will point the way for future generations of judges in their search for truth and justice. He leaves the bench with his spiritual and mental arteries as youthful as when he donned the robe. His colleagues will remember him as the complete judge, one who has earned distinction as a judge for all seasons.