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CHIEF JUSTICE JOSEPH WEINTRAUB: THE NEW JERSEY SUPREME COURT 1957–1973

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Joseph Weintraub was appointed Chief Justice of the New Jersey Supreme Court in August 1957. Before his appointment he had served as a trial judge for nine months and as an Associate Justice for ten months. He served as Chief Justice for sixteen years, and in that time he molded the New Jersey Supreme Court into one of the most effective and influential high courts in the nation. He demonstrated a flair for administration, an innovative judicial approach, and an unsurpassed intellectual depth. Joseph Weintraub influenced judicial thought throughout the country; he dominated the law in New Jersey.

The New Jersey Supreme Court from 1957 to 1973 provided an excellent forum for the utilization of Joseph Weintraub's talents. The Associate Justices combined judicial experience with acknowledged intellectual ability. The membership of the court remained intact for more than ten of the sixteen years.[1] Of all the honors bestowed upon Joseph Weintraub, his greatest must be the entirety of the work and achievements of the New Jersey Supreme Court during his tenure. The "Weintraub Court," as it became known, applied common sense and practical solutions to complex legal problems. It did not fear innovation. If its approach required novel legal analysis or criticism of accepted practices, the court would hesitate only to explain its departure from conventional analysis or practices. The Weintraub Court was a court of action—in procedure, in administration, and in substantive law.

Rules, administrative directives, and decisions emanating from the New Jersey Supreme Court in the last sixteen years have touched every aspect of law and legal practice. To catalogue the achievements of the court would prove an enormous task. This

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[1] The following six justices served with Chief Justice Weintraub from October 1960 to March 1971: Nathan L. Jacobs, John J. Francis, Haydn Proctor, Frederick W. Hall, C. Thomas Schettino, and Vincent S. Haneman.

Justices Hall and Schettino had replaced Harry Heher and William A. Wachenfeld, who both retired in early 1959. Justice Haneman replaced Albert E. Burling, who died in October 1960. Justice Haneman retired in March 1971, and was replaced by Justice Worrall F. Mountain.

Article seeks to detail the court's contributions in only selected areas, and thereby to demonstrate the style and approach which made the New Jersey Supreme Court an example of leadership for other courts throughout the nation. The areas selected—criminal justice, school financing, and reapportionment—reveal the significance of the court's contributions. Each area has undergone dramatic reanalysis in the past sixteen years, and in each Chief Justice Weintraub and the New Jersey Supreme Court have distinguished themselves.

I

CRIMINAL JUSTICE

Chief Justice Weintraub took particular interest in the criminal matters before his court and, in a field dominated by startling federal decisions, the New Jersey Court made significant contributions to criminal law, administration, and procedure. The list of significant decisions handed down during Chief Justice Weintraub's tenure cannot be digested in this survey. But the concerns of the Chief Justice and his approaches to criminal law can be illustrated through an analysis of his views on such important issues as criminal insanity and pretrial discovery.

A. *The Insanity Defense*

> My thesis is that insanity should have nothing to do with the adjudication of guilt but rather should bear upon the disposition of the offender after conviction, and that the contest among *M'Naghten* and its competitive concepts . . . is simply a struggle over an irrelevancy.[2]

Chief Justice Weintraub expressed these views at a judicial conference in 1964 and adhered to them in the criminal insanity cases before the New Jersey Supreme Court. In Chief Justice Weintraub's view the overriding consideration in such cases was the protection of society from the sick as well as the bad; the bad to be detained in prisons with the attendant disadvantages and stigma of incarceration and the sick to be detained and cared for in state hospitals until "restored to reason."[3]

Insanity does not constitute a defense in a criminal proceeding, but rather negates one of the basic elements of the state's

[2] *Insanity as a Defense*, 37 F.R.D. 365, 369 (1964) (panel discussion) (remarks of Joseph Weintraub, Chief Justice, New Jersey Supreme Court).

[3] N.J. REV. STAT. § 2A:163-3 (1951).

case—the mental capacity or *mens rea* of the defendant.[4] Even if the state can prove beyond a doubt that the defendant committed the alleged act—the *actus reus*—the law will not punish him under the *M'Naghten* Rule if he was "laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act, or if he did know it, that he did not know what he was doing was wrong."[5] The Chief Justice thought that the *M'Naghten* Rule, although imperfect, was the most precise test available because it speaks to the effect on the state of mind from a mental disease, not to doctors' varying concepts of mental disease. Furthermore,

> all the doctrines which would excuse an offender from criminal accountability because of insanity have the common characteristic of attempting to distinguish between the sick and the bad. And the distinction is made even though no scientific evidence separates the sick from the bad in terms of personal blameworthiness. Indeed, to a psychiatrist the sick and the bad are equally unfortunate. Blame is something he leaves to the moral judgment of philosophers, and they draw upon their unverifiable view of man and his endowments.[6]

Adherence to the *M'Naghten* Rule was reaffirmed by the New Jersey Supreme Court in *State v. Lucas,*[7] against arguments for adoption of the *Durham* Rule.[8] Proponents of the *Durham* Rule, which would acquit a defendant merely upon proof that his act was the product of a mental disease or defect, could not convince the court that psychiatric advances would sustain such a rule and still protect society from "grievous anti-social acts."[9] The concepts of mental disease and mental defects remained too vague.[10] In a concurring opinion, Chief Justice Weintraub urged that psychiatric advances be utilized in post-conviction disposition of the offender where they could best serve society and the individual.[11]

Chief Justice Weintraub's ideas on criminal insanity were best expressed in *State v. Maik,*[12] in which the defense of "temporary

[4] 37 F.R.D. at 369-70.

[5] Aponte v. State, 30 N.J. 441, 450, 153 A.2d 665, 669 (1959).

[6] State v. Maik, 60 N.J. 203, 213, 287 A.2d 715, 720 (1972).

[7] 30 N.J. 37, 152 A.2d 50 (1959).

[8] *See* Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

[9] 30 N.J. at 71-72, 152 A.2d at 68.

[10] *Id.* at 72, 152 A.2d at 68. In State v. Sikora, 44 N.J. 453, 210 A.2d 193 (1965), the court rejected the concept of "psychodynamics" which seeks to explain each man's actions as the unconscious result of his emotional make-up.

[11] 30 N.J. at 84-85, 152 A.2d at 75-76.

[12] 60 N.J. 203, 287 A.2d 715 (1972), *modifying* 114 N.J. Super. 470, 277 A.2d 235 (App. Div. 1971).

insanity" was argued. A Trenton State College student confessed to the murder of his friend and fellow student. The student explained to psychiatrists that he had committed the brutal stabbing because of a belief that the victim wanted to die. Psychiatrists agreed at the trial that the defendant suffered from schizophrenia which had remained dormant until severe stress or use of drugs brought about an acute psychotic eruption.

Responding to the trial judge's charge that "if the psychosis was triggered by the voluntary use of LSD or hashish, the defense of insanity could not stand,"[13] the jury returned a verdict of murder in the second degree. The appellate division reversed the conviction on the ground that the trial judge should have directed an acquittal by reason of insanity.[14]

On appeal to the New Jersey Supreme Court, Chief Justice Weintraub agreed with the trial court's reasoning that voluntary use of drugs or liquor does not excuse criminal responsibility. He emphasized the need to protect society:

> The required element of badness can be found in the intentional use of the stimulant or depressant. Moreover, to say that one who offended while under such influence was sick would suggest that his sickness disappeared when he sobered up and hence he should be released. Such a concept would hardly protect others from the prospect of repeated injury.[15]

But the Chief Justice saw *Maik* as an exception to this rule. The use of drugs did not cause Maik's underlying schizophrenia, but rather it triggered the eruption of the psychotic condition which lasted after the drugs had worn off. The Chief Justice considered the exception to be "compatible with the philosophical basis of *M'Naghten,*"[16] but thought that the more crucial question was whether, once acquitted on grounds of insanity, the defendant could be dealt with in a manner consistent with the protection of society.

The New Jersey statutes require that a person acquitted of a criminal charge by reason of insanity be confined to a state hospital until "restored to reason."[17] Chief Justice Weintraub saw the interests of society best protected, in Maik's case, by confinement

[13] 60 N.J. at 212, 287 A.2d at 719 (paraphrasing trial court instructions); *see* 114 N.J. Super. at 475, 277 A.2d at 238.

[14] 114 N.J. Super. 470, 277 A.2d 235 (App. Div. 1971).

[15] 60 N.J. at 214, 287 A.2d at 721.

[16] *Id.* at 216, 287 A.2d at 722.

[17] N.J. REV. STAT. § 2A:163-3 (1951).

until the underlying schizophrenia no longer posed a threat of erupting:

> Hence, while a psychotic episode, though temporary in the sense that a defendant may be relieved of its grip and thereupon be in "remission," will be accepted as a state of insanity which may excuse under *M'Naghten,* insanity continues notwithstanding remission so long as the underlying latent condition remains, and the defendant will not be "restored to reason" within the meaning of the statute unless that condition is removed or effectively neutralized if it can be.[18]

The Chief Justice suggested the possibility of conditional release of such persons, subject to medical assurances, if the court deemed it feasible.

B. *Pretrial Discovery*

In the field of criminal procedure the New Jersey Supreme Court has focused on concepts of "fairness," striving to give an accused effective means of proving his innocence. Rigid doctrines of constitutional magnitude have been avoided and the court has made extensive use of its rule-making powers where the piecemeal, case-by-case approach has proved ineffective. The court's efforts in improving pretrial discovery exemplify these attitudes. Its rulings had been granting broader discovery to criminal defendants, absent the prosecutor's showing of societal harm, but by 1966 the court realized the need for an overall study of the problem and a comprehensive set of rules for clarity and fairness was consequently formulated.[19]

The New Jersey Supreme Court's movement in the area of pretrial discovery gained significance in the 1958 decision of *State v. Johnson.*[20] The court allowed a defendant's motion for discovery of all his pretrial statements and confessions. The defendant alleged that he could not adequately recall them and needed the statements to prepare for trial. Chief Justice Weintraub spoke for the court:

> We start with the premise that truth is best revealed by a

[18] 60 N.J. at 218-19, 287 A.2d at 723.

[19] *See, e.g.,* N.J. SUP. CT. R. 3:13-3(a), (b). A review of the Commentary accompanying each section of the ABA Project on Minimum Standards for Criminal Justice, *Discovery and Procedure Before Trial* (Tent. Draft, May 1969), will indicate the many areas of pretrial discovery in which the New Jersey Supreme Court has received recognition through these rules. *See, e.g., id.* § 2.1, at 58-59, 65, 67, 69; *id.* § 2.6, at 91.

[20] 28 N.J. 133, 145 A.2d 313 (1958), *appeal dismissed,* 368 U.S. 145, *cert. denied,* 368 U.S. 933 (1961).

> decent opportunity to prepare in advance of trial. We have embraced that tenet with respect to civil litigation, and absent overriding considerations, it should be as valid in criminal matters. It is of no moment that pretrial inspection is not constitutionally assured. . . . We are not limited to constitutional minima; rather we strive for practices which will best promote the quest for truth. . . .
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> It is difficult to understand why a defendant should be denied pretrial inspection of his own statement in the absence of circumstances affirmatively indicating disservice to the public interest.[21]

In the 1966 decision of *State v. Tate*,[22] the defendant, under indictment for murder, sought to depose the state's witnesses. Chief Justice Weintraub found no constitutional right in such a request and was forced to reject it on practical grounds. The burdens already on the processes of criminal justice precluded adoption of such a time-consuming procedure. The advantage of pretrial settlements, which in many cases result from civil depositions, would not be present in the criminal milieu. The defendant would have to be satisfied with a list of the state's witnesses, bills of particulars, and, for use in cross-examination, the statements of witnesses to the police and grand jury. In the course of his opinion, the Chief Justice did make suggestions for possible reform of the criminal justice system:

> Perhaps the investigatorial arms of government should be deemed the impartial servants of the defense as well as the prosecution, with the work product available to both, subject only to such restrictions as the personal security of a witness may demand. In a sense that proposition would be but an extension of the settled view that the prosecution must seek only a just result, and that the duty is the State's to produce or offer to the defendant whatever it has that could help him. To open the State's file before trial would have the virtue of relieving the prosecutor of the burden of deciding correctly what should be revealed in obedience to his ethical obligation. Further, the defense may see significance in facts which to the prosecutor are but neutral.[23]

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[21] *Id.* at 136-37, 145 A.2d at 315.

[22] 47 N.J. 352, 221 A.2d 12 (1966).

[23] *Id.* at 355-56, 221 A.2d at 14. In this context one should note the cases of State v. Miller, 41 N.J. 65, 194 A.2d 728 (1963), and State v. Williams, 46 N.J. 427, 217 A.2d 609 (1966), wherein the court allowed a private investigator (*Miller*) and an expert witness (*Williams*) to be retained at county expense to aid the defense of an indigent. These cases present another indication of the court's search for "fairness" and an effective means of defense in the area of criminal justice.

The first significant step in such a reform was the call in the *Tate* opinion for a special judicial seminar which led to the adoption of the 1966 rules for the New Jersey courts. Rule 3:13, which was extensively revised in 1967, grants discovery *as of right* to the defendant with reference to

(1) designated books, tangible objects, papers or documents obtained from or belonging to him;

(2) records of statements or confessions, signed or unsigned, by the defendant or copies thereof;

(3) defendant's grand jury testimony;

(4) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are known by the prosecuting attorney to be within his possession, custody or control;

(5) reports or records of prior convictions of the defendant.

In addition, the Rule provides that the defendant can seek discovery at the court's discretion, and subject only to the state's "showing of good cause" to the contrary, of: (*1*) all *relevant* "books, papers, documents or tangible objects, buildings or places . . . which are within the custody or control of the State"; (*2*) the "names, and addresses of any persons the prosecuting attorney knows to have relevant evidence or information"; (*3*) "any relevant records of statements, signed or unsigned, by such persons or by codefendants which are within the possession, custody or control of the prosecuting attorney and any relevant record of prior convictions of such persons if known to the prosecuting attorney"; (*4*) "any relevant grand jury testimony of such persons or codefendants."

These state court rules go further than Rule 16 of the Federal Rules of Criminal Procedure, upon which they were modeled, because the federal rule places all of the defendant's discovery at the discretion of the court. They stand as concrete evidence of the Weintraub Court's firm belief that the case-by-case approach of the federal courts is an inferior means by which to insure an effective and efficient criminal justice system.

C. *Weintraub as Critic*

Chief Justice Weintraub received considerable notoriety as a critic of the decisions, policies, and methods of the United States Supreme Court in the area of criminal justice. Some of the advantages afforded the accused by the Warren Court's constitutional

pronouncements could not be justified, he felt, in light of every individual's right to protection of his person and property. The setting of these rights in constitutional terms, furthermore, forestalled efforts by the state courts, which have the primary responsibility in criminal prosecutions, to find more effective means to assure fairness to the accused while also protecting the rights of society. Chief Justice Weintraub also found offensive the United States Supreme Court's case-by-case approach to the serious problems of criminal procedure which provided patchwork guidance to the state courts and engendered a flood of post-conviction applications.

Perhaps the strongest criticism levelled at the United States Supreme Court came in response to its adoption of the exclusionary rule for all state as well as federal courts. Prior to *Mapp v. Ohio,*[24] the New Jersey Supreme Court had rejected the rule which required suppression of evidence of guilt obtained by illegal searches and seizures.[25] Chief Justice Weintraub opposed the rule because the results it produced—helping the guilty escape conviction—could not be justified by its purpose—punishing law enforcement officials for fourth amendment violations:

> All the competing rights involved belong to the individual. The State has none—it has only duties, and powers with which to discharge them. To set criminals free is to exact a price, not from some pain-free societal entity, but from innocent individuals who will be their next victims. There are other hurts as well, for the suppression of proof of guilt must weaken respect for the reach of the law, thereby increasing the toll of victims and injuring as well those offenders who might have been deterred from a career of lawlessness. Some would add their belief that current doctrines tend to corrupt officials who, struggling to cope with the dirty realities of crime, strain to bring the facts within unrealistic concepts. These trespasses upon the first right of the individual to be protected from attack should not be suffered unless it is plain that some larger individual value is served.[26]

In the recent case of *State v. Bisaccia,*[27] the Chief Justice questioned the effectiveness of the exclusionary rule after ten years of application. The law remained unclear as to whether, as under the *Bisaccia* facts, an honest mistake in the address provided in a search warrant required suppression of the evidence thereby

[24] 367 U.S. 643 (1961).

[25] Eleuteri v. Richman, 26 N.J. 506, 141 A.2d 46, *cert. denied,* 358 U.S. 843 (1958).

[26] State v. Gerardo, 53 N.J. 261, 264, 250 A.2d 130, 131 (1969), *application of bail denied,* 400 U.S. 859 (1970).

[27] 58 N.J. 586, 279 A.2d 675 (1971).

seized. The Chief Justice opted against rigid application of the rule. In light of its unfortunate side effects, the exclusionary rule should be applied only where its purpose of correction of malfeasance by law enforcement officials can be achieved. And this was not the case in *Bisaccia*.[28]

Chief Justice Weintraub recognized that

> [o]thers may take a different view of what is just, and of course we would not deny them their right to do so. The question is whether the Constitution of the United States dictates a single answer. It seems evident to us that it leaves judges free to disagree. This is as it should be. The Constitution must not be busied with issues that are *minutiae* in a grand scheme of things; it serves best as a majestic presence, unperturbed by claims of absolute verity in matters economic, social, moral, spiritual, medical or penological. It is very human, and very wrong, to see one's image in every nook of the Constitution. There must be tolerance of disagreement, for without it there can be no experimentation or ready accommodation to a changing scene. Of greater importance, the judiciary must not lose popular acceptance as the final arbiter of the Constitution in historic disputes. This unique mystic value could be lost if the Constitution, construed to be weighted down with matters of legislative calibre, could command no higher regard.[29]

The federal concept of "waiver" of constitutional rights and the expansion of post-conviction relief in the federal courts also came under criticism by Chief Justice Weintraub. He viewed the doctrine of waiver as more conclusional than instructive,[30] and the New Jersey Court's strong views on the subject led to a head-on collision with the Court of Appeals for the Third Circuit.[31] The

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[28] *Id.* at 591-92, 279 A.2d at 677-78.

[29] State v. DeStasio, 49 N.J. 247, 260-61, 228 A.2d 636, 644, *cert. denied*, 389 U.S. 830 (1967).

A fine example of the Chief Justice's willingness to shun constitutional approaches in this area is State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971). In that case the court allowed access to a migrant worker camp for a field worker and an attorney who wished to see their clients. The case was argued on a variety of constitutional grounds, including the first and sixth amendments. The Chief Justice stated:

> The policy considerations which underlie [our] conclusion may be much the same as those which would be weighed with respect to one or more of the constitutional challenges, but a decision in nonconstitutional terms is more satisfactory, because the interests of migrant workers are more expansively served in that way than they would be if they had no more freedom than these constitutional concepts could be found to mandate if indeed they apply at all.

Id. at 302-03, 277 A.2d at 372. The value of the property rights asserted by the defendant could not equal the value of the human rights at stake.

[30] *See, e.g.*, State v. McKnight, 52 N.J. 35, 243 A.2d 240 (1968).

[31] Less than two weeks after the Third Circuit decided United States *ex rel.* Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965), which held that waiver at the interrogation stage

Chief Justice chafed under rules allowing one federal judge, ten years after a conviction, to

> pit his experienced or sometimes inexperienced assessment against the seasoned evaluations of a host of State judges, and . . . thereby undo the State court judgment without so much as an intimation of a shadow of a shadow of a doubt as to the truth of the conviction.[32]

Chief Justice Weintraub incorporated these views into his attack, in *State v. Funicello,* on the United States Supreme Court's views on criminal justice.[33] *Funicello* concerned the validity of New Jersey's first-degree murder statute, which allowed a defendant to escape risk of the death penalty by pleading guilty. The New Jersey Supreme Court heard a fifth amendment attack on the statute based on *United States v. Jackson.*[34] *Jackson* declared invalid the federal kidnapping statute imposing the death penalty following conviction in a jury trial but not following conviction in a nonjury trial. In July 1968, the New Jersey Supreme Court decided *State v. Forcella,*[35] which found the state statute valid. Forcella and his co-petitioner, Funicello, sought a writ of certiorari from the United States Supreme Court. The petition was held in abeyance for three years until disposed of by memorandum in June 1971: "Judgments, insofar as they impose the death sentence, reversed and . . . remanded to the Supreme Court of New Jersey for further proceedings."[36]

The New Jersey Supreme Court, in a per curiam opinion, dutifully followed the cryptic opinion of the United States Supreme Court, declared the death penalty provisions of its statute unconstitutional, and resentenced the defendant to life imprisonment.[37]

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requires that the police offer such waiver and that it be intelligently and understandably refused, Chief Justice Weintraub issued a directive to the New Jersey courts to ignore the Third Circuit holding. The New Jersey Supreme Court shortly decided a case in which it gave stricter range to the concept of waiver. *See* State v. Ordog, 45 N.J. 347, 212 A.2d 370 (1965), *cert. denied,* 384 U.S. 1022 (1966); *cf.* State v. Coleman, 46 N.J. 16, 214 A.2d 393 (1964), *cert. denied,* 383 U.S. 950 (1966).

[32] State v. Funicello, 60 N.J. 60, 72-73, 286 A.2d 55, 61-62, *cert. denied,* 408 U.S. 942 (1972).

[33] 60 N.J. at 69-84, 286 A.2d at 59-68.

[34] 390 U.S. 570 (1968).

[35] 52 N.J. 263, 245 A.2d 181 (1968), *rev'd,* 403 U.S. 948 (1971).

[36] 403 U.S. 948 (1971). Chief Justice Weintraub, in his concurring opinion, also took direct issue with the authorities cited by the federal court. Three cases cited in the memorandum opinion—Witherspoon v. Illinois, 391 U.S. 510 (1968); Boulden v. Holman, 394 U.S. 478 (1969); and Maxwell v. Bishop, 398 U.S. 262 (1970)—dealt with the qualifications of jurors in capital cases, not with the option to avoid the death penalty by pleading guilty. *See* 60 N.J. at 66-67, 286 A.2d at 58.

[37] 60 N.J. at 65-69, 286 A.2d at 57-59.

But Chief Justice Weintraub could not understand the United States Supreme Court's summary disposition of so important a matter of state criminal justice. He took the occasion to fully rebuke the Federal Court for its shoddy methods and strained logic: "Judicial management is high among present priorities. . . . The case before us dramatizes the failure to provide direction and suggests the Federal and State judiciaries cannot meet their responsibilities unless some rules are changed."[38] Implicit in Chief Justice Weintraub's attack was a concern over the shift in rule making authority in criminal procedure from the state courts, which still have the primary responsibility for law enforcement, to the federal courts, which are far removed from the ultimate effects of their rulings.

The issue in *Funicello* went beyond its particular constitutional holding, however, to expose the weakness of the Federal Supreme Court's attempts to handle criminal procedure on a case-by-case basis:

> Had the Supreme Court of New Jersey handed down an opinion like *Jackson,* one of the assignment judges responsible for judicial administration in the several vicinages of the State, would have immediately telephoned the Chief Justice, as administrative head of the judiciary, and asked quite bluntly for some guidance as to what was expected. Specifically, the question would be whether the State Supreme Court intended to declare the homicide statute unconstitutional, and if so, whether the death penalty or the non vult plea survived. That guidance would be imperative, for the trial bench must know what to do with murder indictments. But there is no established line of communication between the State Supreme Court and the Federal Supreme Court whereby such information, so obviously needed for intelligent management of judicial business, can be had.[39]

The one avenue of access to the Federal Supreme Court, petition for certiorari, took three years and resulted in a summary disposition. Yet, the Chief Justice observed, the implications of that disposition could be enormous because most states have some procedure to avoid the risk of death by a plea of guilty.[40]

The Chief Justice made an assessment of the Federal Supreme Court's labors and offered some suggestions:

> The management problem is not all confined to capital punishment. The judicial process in the entire area of criminal law is a mess. A school boy, if he knew what we do, would stop

[38] *Id.* at 69, 286 A.2d at 59-60.
[39] *Id.* at 75, 286 A.2d at 63.
[40] *Id.* at 81, 286 A.2d at 66.

> and wonder. Changes must be made if the judiciaries, State and Federal, are to serve their common employer.
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> It would be well to reunite the power to lay down the rules with the responsibility for the end result. Perhaps the concept of two separate judicial systems is anachronistic. Perhaps the federal courts should try all State crimes; surely the State courts would still have more than enough to do. I appreciate that some of the new constitutional precepts reflect a purpose to protect minorities from discrimination. No one can quarrel with that objective; a constitution can have no role more vital. Perhaps it would have been better to have gone directly to that end by removing to the federal court for trial any case in which the possibility of such injustice might be feared.
>
> In any event, there must be some effective channel of communication if we are to overcome the problem generated by the shift of constitutional authority to the Federal Supreme Court. The case-by-case method of making law is intolerably inefficient. We are not dealing with some sometime issue. The criminal law teems with activity which every day touches the safety of more than two hundred million people. The police, the prosecutors, and the judges must know promptly what may and may not be done.[41]

If the state courts are to be denied the right to make the rules in an area where they carry the burden of judicial responsibility, state court judges must remain vigilant that the rules formulated for them serve the needs of society and the needs of the state judicial system. Chief Justice Weintraub saw the methods and policies of the United States Supreme Court as detrimental to society and his courts. Direct criticism represented the only course remaining to correct these methods and policies.

II

School Financing

An attack on New Jersey's local property tax system for financing public education came to the New Jersey Supreme Court at the height of a nationwide legal controversy. The 1971 decision of the California Supreme Court in *Serrano v. Priest*,[42] held that California's financing system violated the equal protection guarantees of the fourteenth amendment. As the New Jersey Supreme Court reviewed its own system, an attack on a similar system in Texas was pending in the United States Supreme Court.[43] The

[41] *Id.* at 83, 286 A.2d at 67.

[42] 5 Cal. 3d. 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

[43] San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

plaintiffs in the New Jersey case, *Robinson v. Cahill,*[44] argued on the basis of *Serrano* that a property-based tax system rested on the invidious classification of wealth and denied equality in the fundamental right of education. The plaintiffs further argued that the system failed to fulfill the *state* constitution's demand of a "thorough and efficient" education for all of the state's children.[45]

Chief Justice Weintraub's extensive opinion in *Robinson,* striking down the New Jersey system on state constitutional grounds, stands as the leading case on this issue. The *Serrano* opinion, which was based on federal equal protection theories, was substantially undercut by the United States Supreme Court in *San Antonio Independent School District v. Rodriguez.*[46] *Robinson* followed *Rodriguez* by only two weeks and revived the school funding controversy which had seemingly been dampened by the federal decision. *Robinson* rests on the state constitutional clause that the legislature must provide a "thorough and efficient" education to all children, a clause which is common to many of the states which now face, or will soon face, a similar challenge to their school financing system.[47]

The trial court in *Robinson* had relied in large part on the rationale of *Serrano v. Priest* in holding that New Jersey's system, as it stood in 1972, violated the equal protection guarantees of the state and federal constitutions.[48] Chief Justice Weintraub dealt with this issue first.

Equal protection had become, in the last twenty years, an ever-growing concept, with the courts struggling fitfully to contain its expansiveness within workable theories. Originally, legislation creating classifications would be upheld if a rational basis could be found for the classification.[49] But the United States Supreme Court seemingly qualified the rationality doctrine by calling for a stricter justification—a "compelling state interest"—in two respects: (*1*) if the classification was found to be "suspect,"[50] and (*2*) if the legisla-

[44] 62 N.J. 473, 303 A.2d 273 (1973), *modifying* 118 N.J. Super. 223, 287 A.2d 187 (L. Div. 1972).

[45] *Id.* at 508, 303 A.2d at 291.

[46] 411 U.S. 1 (1973).

[47] *See, e.g.,* ARIZ. CONST. art. XX, § 7; DEL. CONST. art. 10, § 1; ILL. CONST. art. VIII, § 1; PA. CONST. art. X, § 1; TEX. CONST. art. VII, § 1.

[48] 118 N.J. Super. at 270-80, 287 A.2d at 212-16.

[49] *See* Cox, *The Supreme Court, 1965 Term—Forward: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV. 91, 94-99 (1966); *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1076-1132 (1969).

[50] *See, e.g.,* Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954).

tion touched on a "fundamental right."[51] Race represented the prime "suspect" classification, and now some courts and commentators urged wealth to be so considered. Voting, in the context of the reapportionment cases, represented the first "fundamental right," and some urged education as another. *Serrano* held the nation's attention as a forceful exponent of both of these views.

But these broader equal protection standards adopted by the California Supreme Court were rejected by the United States Supreme Court in *Rodriguez*. The several opinions in the Federal Court's decision reviewed the conflicting equal protection theories the Court had spawned, and the majority opinion attempted to reorder these theories. Wealth had never been delcared a suspect classification, Justice Powell stated for the majority, and education cannot rank as a fundamental right. Under the Court's new formulations, only those rights explicitly or implicitly guaranteed in the Federal Constitution ranked as fundamental. The stricter "compelling state interest" justification would not be applied to school financing legislation. The Court held that the reliance in the Texas system on local governments to finance education was not irrational and, therefore, the system was valid.[52]

Reviewing the New Jersey system of public education in light of the *Rodriguez* pronouncement, Chief Justice Weintraub found the New Jersey legislation to be rationally based and, therefore, valid on federal equal protection grounds.[53] But the Chief Justice took the opportunity to express some thoughts about the duality of federal equal protection standards. He viewed the "fundamental right" concept established in *Rodriguez* as "immediately vulnerable, for the right to acquire and hold property is guaranteed in the Federal and State Constitutions, and surely that right is not a likely candidate for such preferred treatment."[54] And he quarreled with the Supreme Court's basic approach to constitutional questions—an approach which relied on such undefined concepts as "fundamental rights" and "compelling state interests." The use of such terms only obscured the issues and forestalled productive discussion. Chief Justice Weintraub preferred a simpler, but more efficient, approach:

> Mechanical approaches to the delicate problem of judicial intervention under either the equal protection or the due process

[51] *See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).

[52] 411 U.S. at 28-39.

[53] 62 N.J. at 488-89, 303 A.2d at 280-82.

[54] *Id.* at 489, 303 A.2d at 282.

> clauses may only divert a court from the meritorious issue or delay consideration of it. Ultimately, a court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial.[55]

A discrimination with an invidious base may be declared "suspect," but the effect of such a finding would be only to shift the burden of proof to the state. The test of "arbitrariness" would remain the same, but "the inquiry may well end, for it is not likely that a State interest could sustain such a discrimination."[56]

For state constitutional purposes, therefore, Chief Justice Weintraub and the New Jersey Supreme Court would not accept the notions of wealth as a suspect classification or education as a fundamental right. Wealth can be the basis for both the imposition of a burden, *i.e.,* taxes, or the enjoyment of a benefit; invidiousness should be judged in context, not in stock generalization.[57] School attendance in New Jersey is not conditioned on fees or individual net worth, nor are local governments limited in their expenditures. Education does not differ from "sundry other essential services," the Chief Justice declared, in that "the sums made available for education by local taxation have been influenced by the size of the tax base available for all activities of local government and by the judgment of local authorities as to how much shall be raised for all local needs."[58]

The plaintiffs argued that the court should declare fundamental those rights for which the state remains responsible pursuant to the state constitution; the education clause demands that the state legislature maintain public schools. But this approach also fell under the Chief Justice's analysis. All "governmental" services are state obligations because all local governments are agents of the state.[59]

Despite the failure of the equal protection argument, Chief Justice Weintraub found that the state's school financing system could not be upheld when measured against the state constitution's demand that the legislature maintain "thorough and efficient" schools. The Chief Justice held for the court:

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[55] *Id.* at 489-90, 303 A.2d at 282.
[56] *Id.* at 491, 303 A.2d at 282.
[57] *Id.* at 492-93, 303 A.2d at 283.
[58] *Id.* at 493, 303 A.2d at 283.
[59] *Id.* at 496-98, 303 A.2d at 285-86.

> The trial court found the constitutional demand had not been met and did so on the basis of discrepancies in dollar input per pupil. We agree. We deal with the problem in those terms because dollar input is plainly relevant and because we have been shown no other viable criterion for measuring compliance with the constitutional mandate. The constitutional mandate could not be said to be satisfied unless we were to suppose the unlikely proposition that the lowest level of dollar performance happens to coincide with the constitutional mandate and that all efforts beyond the lowest level are attributable to local decisions to do more than the State was obliged to do.
>
> Surely the existing statutory system is not visibly geared to the mandate that there be "a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years." Indeed the State has never spelled out the content of the educational opportunity the Constitution requires. Without some such prescription, it is even more difficult to understand how the tax burden can be left to local initiative with any hope that statewide equality of educational opportunity will emerge.[60]

This holding rests firmly in the history of public education in New Jersey. From a thorough study of early reports of the State School Board, the Chief Justice learned the basis and background of the education clause which had been added to the New Jersey Constitution in 1875. In 1871, when free schools were established, the state legislature sought to meet all operating expenses through the statewide property tax. Local taxation was not discouraged for school districts "with more than ordinary enterprise" which desired more than a "thorough and efficient" education for their children.[61] In fact, local taxation was essential to provide schoolhouses. But the minimum education had to be provided for all.[62] As an 1895 case stated, the purpose of the education clause amendment was to afford "to every child such instruction as is necessary to fit it for the ordinary duties of citizenship."[63] Chief Justice Weintraub brought the minimum standard up to date: "The Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."[64]

Equality of dollar input per pupil was rejected as a naive and

[60] *Id.* at 515-16, 303 A.2d at 295.

[61] *See* NEW JERSEY SCHOOL REPORT FOR 1868, at 22-24, cited in Robinson v. Cahill, 62 N.J. 473, 508, 303 A.2d 273, 290 (1973).

[62] Much of the information relied on was found in the New Jersey School Reports for the years 1871-90. *See* 62 N.J. at 508, 303 A.2d at 290.

[63] Landis v. Ashworth, 57 N.J.L. 509, 512, 31 A. 1017, 1018 (Sup. Ct. 1895).

[64] 62 N.J. at 515, 303 A.2d at 295.

counterproductive approach to the complex educational problems faced by urban, suburban, and rural schools; equality in educational result was rejected as an impossible approach which failed to recognize individual and group differences. The goal is educational opportunity. The state must see that a minimum level of educational opportunity is afforded to all children.[65] The Chief Justice did not see reliance on local governments as inherently invalid in providing this required level of opportunity. But he reminded the legislature of its duties if it seeks to use such methods and coupled that reminder with a warning:

> We repeat that if the State chooses to assign its obligation under the 1875 amendment to local government, the State must do so by a plan which will fulfill the State's continuing obligation. To that end the State must define in some discernible way the educational obligation and must *compel* the local school districts to raise the money necessary to provide that opportunity. The State has never spelled out the content of the constitutionally mandated educational opportunity. Nor has the State *required* the school districts to raise moneys needed to achieve that unstated standard. Nor is the State aid program designed to compensate for local failures to reach that level. It must be evident that our present scheme is a patchy product reflecting provincial contests rather than a plan sensitive only to the constitutional mandate.[66]

As to remedies, the court scheduled further argument.[67] The trial court had ordered that certain state moneys appropriated for school aid be distributed according to its order rather than according to the state statutes.[68] But the New Jersey Supreme Court recognized that the educational system of the state could not remain in flux while the court struggled to develop an equitable program of state school aid; the legislature is the proper body to formulate complex plans of state appropriation. The legislature was given until January 1, 1975, to devise and implement a plan for state financing of public education compatible with the principles of the state constitution. Absent such legislative action, however, the court has retained jurisdiction to act alone.[69]

III
Reapportionment

The New Jersey Supreme Court entered the reapportionment thicket in 1960 when, in *Asbury Park Press, Inc. v. Woolley*,[70] it

[65] *Id.*
[66] *Id.* at 519-20, 303 A.2d at 297.
[67] *Id.* at 520-21, 303 A.2d at 298.
[68] 118 N.J. Super. at 280-81, 287 A.2d at 217.
[69] Robinson v. Cahill, 63 N.J. 196, 198, 306 A.2d 65, 66 (1972).
[70] 33 N.J. 1, 161 A.2d 705 (1960).

questioned the validity of the apportionment of the General Assembly under the state constitution. The 1947 New Jersey Constitution had provided for a bicameral legislature: a Senate to consist of one senator from each county, and a General Assembly of sixty members apportioned essentially by population.[71] In 1960, the General Assembly was apportioned on the basis of the 1940 census,[72] despite significant population shifts since that census was taken.

In *Woolley*, several citizens sought a declaration from the court that the continued 1941 apportionment violated the state constitution's demand for reapportionment after each federal census. The court, through Justice Francis, discarded the argument that the issue was not justiciable and proceeded to outline both the impropriety of the 1941 apportionment and the remedies available to correct the injustices. The court then withheld decision to give the legislature the opportunity to correct the faults.

With Chief Justice Weintraub as its spokesman, the New Jersey Supreme Court was called upon to face the difficult question of the validity of the New Jersey legislative structure under the equal protection standards adopted by the United States Supreme Court in *Reynolds v. Sims*.[73] The string of New Jersey apportionment cases from 1964 to the present serves as an example to other state and federal courts of the Weintraub Court's ability to work with its coordinate branches of government to achieve practical solutions in a sensitive area of law and politics. The New Jersey Supreme Court has had to supervise the restructuring of the state legislature amid an intense rural-urban clash and a strong two-party system.[74] Despite its activity, however, the court has not found it necessary to take the task of reapportionment upon itself. Sensitive to political implications and legislative prerogatives, the court has been able to perform its constitutional duties through the use of deadlines and threatened sanctions.

A. *The Interim Plan*

Following the United States Supreme Court's action in *Reynolds v. Sims* and related cases, the New Jersey Supreme Court an-

[71] N.J. CONST. art. IV, § 2, para. 1; *id.* art. IV, § 3, para. 1; *id.* art. IV, §§ 2-3 (1844). This structure was originally established in New Jersey's 1766 Constitution which provided for a Legislative Council of one member from each county and a General Assembly of three members from each county. N.J. CONST. art. III (1766).

[72] *See* New Jersey Laws, ch. 310, § 1 (1941).

[73] 377 U.S. 533 (1964).

[74] *See* A. SHANK, NEW JERSEY REAPPORTIONMENT POLITICS: STRATEGIES AND TACTICS IN THE LEGISLATIVE PROCESS (1969).

nounced its decision in *Jackman v. Bodine.*[75] Chief Justice Weintraub, writing the majority opinion as he did in all the decisions in this area, outlined the issues before his court: "One is whether the legislative article of our State Constitution is invalid in the respects alleged by plaintiffs. The other, if such invalidity is found, is what must be done to meet the federal demand."[76]

The Chief Justice noted initially that the legislative provisions of the New Jersey Constitution "on their face, do not meet the quoted test of *Reynolds v. Sims*" that both houses of a bicameral legislature be apportioned substantially on a population basis.[77] Accordingly, the Chief Justice moved to provide judicial relief. The court once again showed its practicality and its willingness to prod the legislature into proper action:

> We need not explore the abstract question whether a legislature, thus constituted in violation of the equal protection clause, can exercise the legislative power. The answer is provided abruptly by sheer necessity. The familiar doctrine which prevents collateral attack upon past acts of "*de facto*" officials rests upon an underlying need for governmental order. That need is even more imperative when the spectre proposed is a government without legislative power. The answer must be that the legislators continue in office with the powers of their branch of government, subject however to the duty of the State to bring the legislative branch into harmony with the Federal Constitution with diligence.
>
> The duty to comply with the equal protection clause rests upon the three branches of State Government and upon the people of the State as well. The question is what part must be played by each.[78]

"[T]he judiciary should not itself devise a plan except as a last resort," the Chief Justice continued, due to the political implications inherent in reapportionment and because such a plan "will likely seem so attractive to some as to impede the search for common agreement."[79] But the court refused to sanction further elections under the existing scheme of apportionment.[80] The legislature was directed to devise an interim plan for the next general election in 1965 and a permanent plan for the 1967 elections.

The state later moved to forego an interim plan for the 1965 elections in expectation that the Constitutional Convention then

[75] 43 N.J. 453, 205 A.2d 713 (1964).
[76] *Id.* at 457, 205 A.2d at 715.
[77] *Id.* at 459-60, 205 A.2d at 716.
[78] *Id.* at 473, 205 A.2d at 724.
[79] *Id.*
[80] *Id.*

being planned would soon devise a permanent plan in time for the 1967 elections. The court rejected this move to prolong the malapportioned legislature, but did approve a move to maintain the existing General Assembly for the purposes of the 1965 interim plan.[81] Shortly thereafter, the legislature submitted its plan for the 1965 Senate elections; the court reviewed and approved the plan for that one election year. The new Senate maintained the integrity of all of the counties through the creation of multi-county districts; membership totaled 29 and the average weighted deviation for all 14 districts was 9.4 percent.[82]

A Constitutional Convention was convened in the spring of 1966 and that fall the voters of New Jersey adopted substantial revisions to their state constitution. The new legislative structure, to serve for the 1967 and subsequent elections, created a Senate resembling the interim Senate: multi-county districts and multi-member single county districts were to be used to fulfill the requirement that "[e]ach Senate district shall be composed, wherever practicable, of one single county, and, if not so practicable, of two or more contiguous whole counties."[83] The Senate would be a 40-member body and the Assembly an 80-member body, apportioned within Senate districts, two assemblymen to each senator.[84] Another constitutional provision adopted in 1966 created a bipartisan Apportionment Commission to handle apportionment after each census.[85]

B. *The Invalidity of the New Constitutional Provisions*

The newly-created Apportionment Commission followed the dictates of the 1966 constitutional provisions and submitted a plan creating 15 Senate districts to be used until the 1970 census figures became available. The population deviations in the Senate districts ranged +13.5 percent to −13.8 percent from the standard district. A challenge to this plan came to the New Jersey Supreme Court prior to the 1967 elections.

The court felt compelled to reduce the largest deviations in this plan by rearranging the contiguous counties in the three

[81] Jackman v. Bodine, 44 N.J. 312, 317, 208 A.2d 648, 650 (1965).

[82] Jackman v. Bodine, 44 N.J. 414, 209 A.2d 825 (1965). The court stated: "[W]e are mindful that we are dealing with a plan for the temporary reapportionment of the Legislature rather than its permanent structure. We appreciate also the practical problems involved in making a transition from the historical representative pattern . . . ." *Id.* at 417, 209 A.2d at 826.

[83] N.J. CONST. art. IV, § 2, para. 1.

[84] *Id.* art. IV, § 2, para. 3.

[85] *Id.* art. IV, § 3, para. 1.

districts in which such deviations occurred and, contrary to the state constitution, dividing Gloucester County. The Senate deviations were thereby reduced substantially while at the same time improving the apportionment of assemblymen to these districts. The court stated:

> [D]eviations from absolute equality may be tolerated to the end that existing political boundaries will be respected and gerrymandering thus discouraged, provided of course that the deviations be not unreasonable. But where, as here, the same objective can readily be achieved by another arrangement of the same contiguous counties, resulting in a substantially reduced deviation, that arrangement must be accepted.[86]

At the same time, the court struck down the constitutional requirement that assemblymen be allocated to each district by doubling the number of senators from that district. Such a method would "accentuate any disparity which exists in the Senate" and would create an "artificial inequality in the General Assembly" which offends the federal constitutional mandate for mathematical equality.[87] Assemblymen were to be apportioned without reference to the apportionment of senators even if that resulted in an odd number of assemblymen in any one district. The court ordered the Apportionment Commission to undertake this task for the 1969 elections and, for the upcoming 1967 elections, the court by its own order shifted several Assembly seats from one Senate district to another.[88]

When the court reviewed the 1969 Assembly districts prepared by the Apportionment Commission, it reiterated that *Reynolds v. Sims* allowed deviations from population equality to preserve political subdivisions for the purpose of avoiding gerrymandering[89]

[86] Jackman v. Bodine, 49 N.J. 406, 415, 231 A.2d 193, 198 (1967).

[87] *Id.* at 416-17, 231 A.2d at 199.

[88] *Id.* at 416-18, 231 A.2d at 199-200; *see* Jackman v. Bodine, 50 N.J. 127, 232 A.2d 419 (1967).

[89] In Jones v. Falcey, 48 N.J. 25, 222 A.2d 101 (1966), an attack on New Jersey's 1966 congressional redistricting act, the Chief Justice spoke to the way a court should approach gerrymandering:

> The trial court described such issues as non-justiciable. Perhaps it would be more accurate to say such issues are beyond judicial condemnation, not because the controversy is beyond the jurisdictional authority of the Court, but rather because the Constitution does not prescribe a single approach or motivation for the drawing of district lines, and hence the Constitution is not offended merely because a partisan advantage is in view. Indeed, it would be difficult to separate partisan interests from other interests, since partisan interests may well be but a summation of such other interests. In addition, it would seem impossible for a court to pass upon the validity of political interests without itself making a political judgment or appearing to do so. For these reasons the view generally taken in this new area of judicial activity is that, if the mathematics are acceptable, it rests with the voters,

and maintaining governmental relations with the state. But the court went further, indicating grave doubts about "whether the basic plan of apportionment in our State Constitution is compatible with Federal Constitutional requirements as to either the Senate or Assembly," due to the adherence to boundaries based on whole counties.[90] The court did not resolve this issue, pending the redistricting to follow the 1970 census figures, but it did order further argument prior to the 1971 elections.

New Jersey's 1966 constitutional revisions now also stood in jeopardy of the federal equal protection demands. In this context, Chief Justice Weintraub used later opinions to place the rationale of *Reynolds v. Sims* in perspective as to the importance given to mathematical equality among districts:

> One-man one-vote reflects an ideal that every man's vote should equal another's. The ideal is unattainable because that equality could be had only in an election at large—here statewide—and an election at large would be undesirable because it would deny other democratic values. This is so because in such a contest the winner may take all, and this would foreclose the value of check and dissent. Further, important interests might have no spokesmen. Then, too, voting would be blind, since voters could not know enough about so many candidates. For those reasons it is better, and compatible with the equal protection clause, to apportion the power to elect among clusters of citizens. Those clusters however are constituted solely on the basis of geography, and when that is done, a man's vote is no longer assured equality at large. The value of the vote of a member of a statewide majority may then be nullified if he is of the minority in the geographic district in which he must vote, or his vote may be enhanced or diminished in relation to a vote in another district depending upon the percentages of voter eligibility, voter registration, and voter indifference on election day in the respective districts.[91]

The Chief Justice therefore viewed the issue as "whether it is not tolerable to accept some further, and perhaps countervailing, imbalance in the drawing of district lines if to do so will tend to

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rather than the Court, to review the soundness of the partisan decisions which may inhere in the lines the Legislature drew. Actual experience of course may generate exceptions to that approach.

Id. at 32-33, 222 A.2d at 105. One such exception, the Chief Justice noted, would be lines drawn on the basis of race, religion, or ancestry, but he felt that the claims the plaintiffs made that the voting power of blacks in the city of Newark was being substantially diluted by the congressional redistricting act were not provable. *Id.* at 34-35, 222 A.2d at 106.

[90] Jackman v. Bodine, 53 N.J. 585, 588, 252 A.2d 209, 210, *cert. denied*, 396 U.S. 822 (1969).

[91] Scrimminger v. Sherwin, 60 N.J. 483, 489-90, 291 A.2d 134, 138 (1972).

advance the purpose of districting."[92] And in this context the 1.5 to 1 ratio between the most and least populous districts authorized by the New Jersey Constitution was deemed not "inherently bad," although recent United States Supreme Court decisions[93] require that such deviations be justified by the state and "the best plan is the one with the least population deviation."[94]

The 1970 census further confused the New Jersey apportionment picture. The plan devised by the Apportionment Commission could not fulfill the mathematical demands of the federal cases. The New Jersey Supreme Court held that the state constitutional dictate that counties remain inviolate for Senate districts would be suspended in light of the new figures. Only 10 single county districts remained in the 1970 plan of 15 districts; the other 11 counties were bunched into 5 districts. The justification for maintaining whole counties—"the public advantage gained by assuring each county a separate voice in its relations with the State"[95]—would not be achieved even in the present formulation and, therefore, the deviation of 28.83 percent could not be maintained. Eleven counties would not have an independent voice in the Senate; single county districts with multiple representation would

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[92] Jackman v. Bodine, 55 N.J. 371, 378, 262 A.2d 389, 393, *cert. denied,* 400 U.S. 849 (1970).

[93] *See, e.g.,* Kilgarlin v. Hill, 386 U.S. 120 (1967); Swann v. Adams, 385 U.S. 440 (1967).

[94] 55 N.J. at 382-83, 262 A.2d at 395. In this opinion, however, the Chief Justice questioned the efficacy of the multi-member districts, the mainstay of the New Jersey system, particularly as to their effects on minorities:

> We assume a legislature may not be apportioned on racial, religious, national, ethnic, or economic lines, *i.e.,* by allotting a *pro rata* number of representatives to each identifiable group to be elected exclusively by the voters of tbat group no matter where they reside. Apart from the impossibility of recognizing all such conceivable interests, an apportionment upon that basis would run against the central concept of *Reynolds v. Sims* that the apportionment of population shall be made only in terms of geography, with no notice whatever of constituencies beyond their numerical count. Of course in practical politics minority interests nonetheless have a voice, for obviously in the selection of a slate a political party cannot be indifferent to a minority, at least if its members are sufficiently numerous. But the question is whether the equal protection clause requires single-member districts to insure the maximum chance of election by minorities, and so requires even though such districting may benefit only a minority which is concentrated geographically and even though the value of the votes of others within the district who are not members of that minority may thereby be effectively nullified.

Id. at 385, 262 A.2d at 396-97. The New Jersey Supreme Court did not need to decide the issue of multi-member districts at this time and the issue went unresolved. But the Chief Justice placed the issue in the proper contours for the United States Supreme Court which might someday have to face the question. In its next reapportionment decision the New Jersey Supreme Court had to suspend the multi-member districting requirements of the state constitution as insufficient to fulfill the mathematical demands of equal protection. *See* Scrimminger v. Sherwin, 60 N.J. 483, 291 A.2d 134 (1972).

[95] Scrimminger v. Sherwin, 60 N.J. 483, 495, 291 A.2d 134, 141 (1972).

have a larger influence in the Senate than they should be afforded. Counties could no longer constitute the building blocks of apportionment and must be replaced by municipalities.[96]

The New Jersey legislative reapportionment story does not gain significance from the details of the plans submitted or the court's comments upon them. Its import lies in the workings of the New Jersey Supreme Court in the complex task of implementing difficult standards upon the state's political structure. The court took a practical approach which produced results and avoided collisions with the legislature and the governor. Realizing the limits of the judiciary in this delicate area, it coaxed the more appropriate organs of government into the proper action.

CONCLUSION

The New Jersey Supreme Court, under the leadership of Joseph Weintraub, served the state and the nation well. Through practicality, common sense, and sound legal scholarship, the New Jersey Supreme Court has led the nation's courts in judicial administration and decision making. Praise and recognition for the work of the New Jersey Supreme Court in this period represents praise and recognition for Joseph Weintraub, for he constituted the motivating force and the guiding light which sparked the court to excellence.

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[96] *Id.* at 495-98, 291 A.2d at 141-43.

Since the court decided *Scrimminger,* the United States Supreme Court has issued several opinions suggesting wider latitude in state legislative apportionment matters. *See* White v. Weiser, 412 U.S. 783 (1973); White v. Regester, 412 U.S. 755 (1973); Gaffney v. Cummings, 412 U.S. 735 (1973); Mahan v. Howell, 410 U.S. 315 (1973). In his last reapportionment opinion, Chief Justice Weintraub held that New Jersey's constitutional legislative structure could not be salvaged by these decisions because of the breadth of its required mathematical deviations. But the Chief Justice did suggest that the argument that as many Senate districts as possible be placed within whole counties might be constitutionally supported. A date was set for further argument on the matter and consideration of districting plans so drawn. *See* Davenport v. Apportionment Comm'n, — N.J. —, 308 A.2d 3 (1973).