

# J. Skelly Wright

By THOMAS C. GREY\*

My Yale professors warned me about Judge Wright before I went to work for him in 1968. I remember best the late Alexander Bickel's portrayal. In one case, the Judge had held a hearing at a patient's bedside on a hospital's request that he order a blood transfusion.<sup>1</sup> To Professor Bickel, this symbolized Warren-era judicial activism—a judge “bursting” from his courtroom, “rushing” to the hospital “with robes flapping.” On another occasion, I recall Professor Bickel analogizing Judge Wright's judicial intervention into the District of Columbia schools to a coup by a Latin American junta.<sup>2</sup>

These bits of Bickelian hyperbole were only colorful expressions of views put less memorably by others among my teachers.<sup>3</sup> So was born in my mind the apparition of Judge Wright as revolutionary, as an incongruously robed Man on Horseback, striking with the sword of justice at those whom his messianic intuition identified as oppressors. With some fantasy like this in the back of my mind, I half anticipated my clerkship, not as a respectable job for a young law graduate, but as a romantic mission, an assignment as subaltern to a great and feared rebel.

In fact, Judge Wright did become a hero to me, but a hero very different from the fantasy. Before describing the Judge as he is, I must linger for a moment more on the Wright of my imagination. That apparition was not a private invention of mine, for I remember contemporaries asking me, with a voyeuristic excitement at the illicit, just what it was like to clerk for so wild and unrestrained a judge. (My protests against the characterization were discounted as the results of clerkly

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1. Application of the President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964).

2. The case in question was *Hobson v. Hanson*, 269 F. Supp. 401 (D.C. Cir. 1967), *aff'd sub. nom.* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

3. Judge Wright himself regarded Professor Bickel as the most formidable critic of the approach to constitutional adjudication with which he identified. See Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

loyalty.) What led our elders to create this Wright-apparition in their own minds and then in ours?

A full answer would illuminate much about the history of American law in the middle years of this century. Judge Wright himself has noted the different formative experiences of my teachers' generation and my own: for them, the New Deal and the Court-packing plan, Hitler and Stalin, World War II and the Cold War; for us, the Brown case, the sit-ins, the Vietnam War.<sup>4</sup> One might also consider the likely effects of legal realism on my teachers' generation. A few of the most able and vivid of the previous generation's teachers had embraced a deep scepticism that proclaimed the death of the old gods of the Law—not only the old-fashioned dream of a rational common law inhabiting a heaven of concepts, but even the progressive and policy-infused conception of law held by a Pound or a Cardozo.<sup>5</sup>

Such a radical scepticism, pressed with energy and ability as it was, must be profoundly disturbing to young future law professors. If the Law is really dead, the judges remain, with disputes to settle, with considerable powers at their disposal, but without a creed to guide or confine them. And the law professors also remain, still with institutions to study and skills to teach, but without a doctrine to expound—oracles of the law no longer. I suspect that behind the jurisprudence of neutral principle and legal process out of which the Wright-apparition arose, lay the repressed but never exorcised terror of radical legal scepticism, a terror threatening not only caste, prestige and status, but also the ideal of the rule of law itself.<sup>6</sup>

The Judge Wright I came to know during my year as his law clerk did not fit the image associated with this terror. Of course, on his record he is a judge more than usually courageous and independent of immediate public opinion, and one with a stronger than usual sense of substance over form.<sup>7</sup> Apart from these qualities, themselves traditionally admired judicial virtues, he bears little resemblance to the image of

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4. *See id.* at 804.

5. Radical legal scepticism is most often identified with Jerome Frank; *see, e.g.*, J. FRANK, *LAW AND THE MODERN MIND* (1930). The jurisprudential work of Thurman Arnold falls within the same tradition; *see, e.g.*, T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935). To me, the best statement of the radical realist position remains Gilmore, *For Wesley Sturges: On the Teaching and Study of Law*, 72 *YALE L.J.* 646, 651-53 (1963).

6. The sense of outrage provoked by extreme realism is well expressed by Professor Bickel in A. BICKEL, *THE LEAST DANGEROUS BRANCH* 78-84 (1962).

7. These qualities of Judge Wright were all perhaps best displayed in his handling of the New Orleans school desegregation case. *See* J. W. PELTASON, *FIFTY-EIGHT LONELY MEN* 221-43 (1961).

the existential hero or Nietzschean superman in a robe.<sup>8</sup>

Let me recollect him as I came to know him a decade ago.<sup>9</sup> To take a small matter first, the Judge is steady, orderly and efficient in his work habits. He works hard during regular hours, and there is none of the coffee-and-shirt-sleeves red-eyed melodrama that is standard in Washington and in many judicial chambers. He runs a smoothly functioning office: the splendid Martha Scallon efficiently manages the secretarial work; the clerks clerk; the judge judges; and the work gets done, often ahead of time, without much fuss.

The Judge is a professional at his main job—deciding. It is a revelation to watch him move, without apparent effort, from informing himself about some matter to making up his mind what to do about it. He does not indulge himself in the standard Washington nonsense about the “lonely agony of decision.” Perhaps for that reason, he is unusually willing to reconsider a question if new arguments are forthcoming. I recall approaching him cautiously early in my clerkship to urge that he dissent in a case in which he had already voted with the rest of the panel. An opinion had been circulated, and the case was ready to come down. I was surprised that he heard me out so patiently, and then amazed when, after pressing me on a few points, he put me to work on a draft dissent. In other cases, I argued with him at length and unsuccessfully; he was never offended by what others might have taken as an impertinent challenge from a young clerk, just out of school, with little experience of life and a high opinion of himself.

The Judge’s willingness both to listen and to talk helps make him the easiest of men to work for. His openness is simply one aspect of a nature almost wholly lacking in self-importance. I saw in him none of the posturing, none of the publicity seeking, none of the need to insist on his status and wisdom that seem the occupational diseases of judges.

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8. Nietzsche himself put a somewhat overripe statement of the terror facing the radical realist judge in the mouth of his Zarathustra: “Can you furnish yourself with your own good and evil and hang up your own will above yourself as a law? Can you be judge of yourself and avenger of your law?”

“It is terrible to be alone with the judge and avenger of one’s own law. It is to be like a star thrown forth into empty space and into the icy breath of solitude.” F. NIETZSCHE, *THUS SPAKE ZARATHUSTRA* 89 (trans. W. Kaufmann, 1961).

Compare Grant Gilmore’s restatement of the jurisprudence of Wesley Sturges: “Theory is a dead end, doctrine is absurd, rules of law are merely meaningless sequences of words . . . . [He] came early to a conception of the law which was cold, bleak and barren—like a winter landscape. There was no comfort, no solace, no softness in what he saw.” Gilmore, *supra* note 5, at 653-54.

9. I speak of the Judge in the present tense though, of course, most of my knowledge of him came during the year of my clerkship; from what I have seen of the Judge since then, he has not changed in any essential respect.

He deals with his clerks as junior collaborators rather than as servants, and treats everyone he works with—guards, elevator operators, messengers—with dignity and respect.

The Judge's straightforward and unpretentious character infuses his judicial work. He takes pride in his opinions, but if forced to choose between an eloquent, self-expressive opinion and a less satisfactory one that carries a majority with it, he will take the latter. He knows that an imaginative separate opinion can help push the law ahead, but he is not inclined to rely on this insight where by doing so he might provoke a bad result. In this modest sense, he is indeed a "result-oriented" judge.

His prose style is direct and lucid when he drafts opinions himself. When he edits a clerk's draft, he does so like the former English teacher he is, with a pencil ready to strike purple passages, excess modifiers, and passive constructions. The eloquent passages in his opinions are simple and unadorned, like the then-bold conclusion of his 1956 New Orleans school desegregation opinion: "[W]e are, all of us, freeborn Americans, with a right to make our way, unfettered by sanctions imposed by man because of the work of God."<sup>10</sup>

Unpretentious himself, the Judge has an eye for self-importance in others. One of the pleasures of working for him is to hear his commentary on the passing scene, studded with terse and wry observations on the ever-recurrent phenomenon of Potomac pomposity. I recall his ironic recitations of a particularly vacuous and self-congratulatory "Law Day" slogan. At other times he simply repeats in a tone of sincere amazement some new piece of windbagery.

The Judge's knack for spotting pretense deeply affects the substance of his judging. He learned about politics in Louisiana, a place in which political mendacity and corruption seem to be local folk arts; indeed, he made his mark there as the prosecutor of a major political scandal. In Washington, he has become a close student of national politics, which I believe he sees as something like the Louisiana version played on a larger stage, with smoother actors and better script-writers. A favorite quote of his is Jesse Unruh's "Money is the mother's milk of politics."<sup>11</sup> He is not a cynic about government, believing as he firmly does in the practical reform of the political process. But he is a realist, and his knowledge of the actual workings of Congress and the federal

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10. *Bush v. Orleans Parish School Bd.*, 138 F. Supp. 337, 342 (1956).

11. *TIME*, Jan. 5, 1968, at 44 (statement of Jesse Unruh, former Speaker of the California Assembly). For both his realism and his belief in reform, see especially Wright, *Politics and the Constitution: Is Money Speech?* 85 *YALE L.J.* 1001 (1976).

agencies have left him unimpressed by the notion that the popular and democratic nature of existing political institutions require judicial restraint.

The Judge's realism serves a sense of justice that reaches beyond the requirements of formal equality. He likes Anatole France's observation that the law in its majestic equality prohibits rich and poor alike from begging on the streets and sleeping under bridges. He sometimes says, "Justice for the rich, mercy for the poor." It is a pungent way of putting his fundamental belief that real justice requires taking account of the realities of class and wealth.

In this aspect as elsewhere, the Judge's public philosophy and private character are in harmony. He is not the sort of humanitarian who has no use for particular human beings. I remember him as an exceptionally thoughtful boss, always alive to family problems or other special circumstances in the lives of his clerks, and always ready to help where he can. He has followed my life since I finished clerking with unusually concrete, detailed and helpful concern, and I know that he has done the same with other former clerks. He is not only respected and admired but loved by those who have worked most closely with him.

This, then, is a man different from the picture I had of Judge Wright as a law student, attractively flamboyant in some ways as that picture was. But the attractions of the real person are more lasting than those of the robed rebel warrior of my dreams (and my teachers' nightmares). He is a kind and decent man, with a sense of human comedy and human limitation; a judicial craftsman of high but practical idealism; a prophet, not of some private vision, but of democracy and human equality; a hero in the traditional American grain.

