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JUSTICE SIDNEY W. WERNICK: IN MEMORIAM

*Edward S. Godfrey**

A common sentiment has it that we should bear the death of our elders with a kind of sensible equanimity. The idea seems to be that the old folks have had their turn, served out their usefulness, and, by their departure, have beneficently made more room for the rest of us. Or, more charitably, in a culture that still resonates now and then to Biblical thought, perhaps we are moved to that common sentiment by the mournful cadence of the Ninetieth Psalm, which warns us of the "labour and sorrow" attending survival of the "strong" beyond three score and ten.¹ Whatever the explanation for the sentiment, the recent death of Justice Sidney W. Wernick, though he was nearly eighty-two years of age, is not easy to accept with equanimity. The people of Maine have sustained a serious loss.

The official title of the post that Justice Wernick held since June of 1984, "active retired justice of the Supreme Judicial Court," hardly reflects the fact that he continued to work in the mainstream of legal affairs up to the time of his death, presiding in superior court over often complex and difficult trials and teaching each fall at the University of Maine School of Law as an adjunct professor during almost all that period. The bench and bar and the law school will feel directly the loss from his departure. Less directly, yet surely with some effect, all citizens of the state have been deprived of an exemplar of learning, civility, and common sense in the administration of justice. In an era of entrenched ill will on the part of many citizens and groups of citizens toward one another and toward their government, there is a special need for judges who are, and are widely perceived to be, careful and fair in reaching their judgments. The state is fortunate in having a judiciary of exceptional ability and integrity, but the loss of a distinguished and experienced judge with those qualities is occasion for deep civic regret.

Justice Wernick had an unusual series of tenures in the judiciary of Maine. He served as a municipal court judge in Portland back in the days before the state district court system was established.² He

* Retired Justice, Maine Supreme Judicial Court; Dean and Professor Emeritus, University of Maine School of Law; A.B., 1934, Harvard University; J.D., 1939, Columbia University.

1. *Psalms* 90:10 (King James): "The days of our years *are* threescore years and ten; and if by reason of strength *they be* fourscore years, yet *is* their strength labour and sorrow; for it is soon cut off, and we fly away."

2. The Maine District Court system was established in its modern form as a court of record by P.L. 1961, ch. 386.

was appointed to the superior court in July of 1969,³ but served only about fifteen months before being “elevated” (as the Maine Reporter puts it) to the Supreme Judicial Court.⁴ He had thus been an associate justice of the Supreme Judicial Court for about six years when your writer was appointed to that court in August of 1976 and first had the opportunity of observing him in action. We served on the high court together until he retired in the summer of 1981 to resume private practice.⁵ He remained off the court nearly three years, during the last portion of which he served as chairman of the state labor relations board; he then came back on the high court as an active retired justice by appointment on June 24, 1984.⁶

I never observed Justice Wernick in his role as a trial judge in superior court. It is my understanding that in the often complex cases that he was specially assigned to hear in that court as an active retired justice, he was noted for his thorough preparation for trial, quick grasp of the basic issues, and firm insistence that counsel address those issues before going into peripheral matters. All reports agree that, though he was far from being a martinet, there was no wasted time in his court, and that good lawyers liked to try their cases before him.

Much of my own initial briefing as a rookie judge on the high court came from Justice Wernick. Like other appellate courts, the Supreme Judicial Court of Maine (referred to in Maine as “the Law Court” when it acts in its appellate capacity) has its own traditions and protocol which channel the formation of collegial decisions. Learning the nuances of that etiquette requires a few months on the job for any new member. The process has at least one wholesome effect: it tends to dim any notion the new judge may have entertained that the judiciary was waiting on his or her coming. Justice Wernick had a gracious, subtle way of imparting the desired etiquette, sometimes simply by example. In particular, his own participation from the bench in oral argument was an efficient blend of respectful attention to what counsel were saying with measured questioning of counsel as required to clarify important issues.⁷

3. Me. Rptr., 248-256 A.2d VII n.2.

4. Me. Rptr., 267-275 A.2d VII n.4.

5. He retired (not “active”) on August 24, 1981. Me. Rptr., 418-427 A.2d VII n.1.

6. Me. Rptr., 467-478 A.2d VII n.1. An active retired justice of the Maine Supreme Judicial Court may be assigned by the chief justice of that court to sit in superior court. ME. REV. STAT. ANN. tit. 4, § 6-A (West 1989).

7. Justice Wernick enjoyed oral argument and thought that fairly often the insights developed in the direct colloquy between court and counsel were helpful in reaching a decision. For another appellate judge’s moderately optimistic view of the usefulness of oral argument in the process of reaching judgment, see FRANK M. COFFIN, ON APPEAL 130-31 (1994). Judge Coffin’s conclusion: “The final assessment might properly be characterized as creative disorder.” *Id.* at 131.

Justice Wernick's opinions for the Law Court were not always easy reading.⁸ Especially during his earlier years on the court, when cases were assigned to him involving the applicability of then recent rulings by the Supreme Court of the United States on individual rights, his opinions were meticulously careful in appraising the bearing of all the facts before the court and in avoiding overbroad generalization.⁹ He adopted a similar approach in cases where the court was called upon to rule in any area of law new to the court, as in cases arising under recently enacted statutes.¹⁰ In the interpretation of any legislation, including administrative rule-making, he was likewise sensitive to the particularities of the case before the court. To him each investigation of legislative purpose was unique and could not be evaded by superficial resort to some canon of construction. He expressed his philosophy on the point quite plainly in *Fuller v. State*.¹¹ At issue was whether a certain provision of a later enacted statute had repealed a provision of an earlier one by implication. In his opinion for the court, he wrote:

Furthermore, while cases will often refer to, and apply, various principles of statutory interpretation, the emphasis must remain that such rules are utilized only as aids and guides rather than as controlling determinants.

The inquiry which confronts us cannot, therefore, be undertaken correctly by a mechanical, routine, rigid, or automatic adoption of any factors, single or conglomerate, which might have been held to be controlling in any other situation. We must examine all of the features characterizing the subject-matter presently before us¹²

8. See, e.g., *White v. Edgar*, 320 A.2d 668 (Me. 1974), a certification proceeding in which the court entertained a request from the United States District Court, District of Maine, for a ruling on the constitutionality of certain Maine statutes under the Maine Constitution. Maine officials had given the statute the practical effect of blocking prisoners from voting in state and municipal elections. The case presented complicated and delicate issues involving the relationship between federal and state courts when federal courts entertain pendent state claims and state law bearing on those claims is uncertain.

9. See, e.g., *State v. Little*, 343 A.2d 180 (Me. 1975) (search and seizure); *Perkins v. McGonagle*, 342 A.2d 287 (Me. 1975) (attachment for debt); *State v. Dubay*, 313 A.2d 908 (Me. 1974) (custodial search); *State v. Simmonds*, 313 A.2d 120 (Me. 1973) (effective assistance of counsel); *State v. Collins*, 297 A.2d 620 (Me. 1972) (admissibility and voluntariness of a confession); *B.P.O.E. Lodge v. Ingraham*, 297 A.2d 607 (Me. 1972) (racial discrimination); *State v. Richards*, 296 A.2d 129 (Me. 1972) (search and seizure); *State v. Stone*, 294 A.2d 683 (Me. 1972) (search and seizure; illegal arrest).

10. See, e.g., *Union Trust Co. v. Hardy*, 400 A.2d 384 (Me. 1979) (truth in lending).

11. 282 A.2d 848 (Me. 1971).

12. *Id.* at 851. On the canons of statutory construction, see LIEF H. CARTER, *REASON IN LAW* 109-13 (2d ed. 1984).

Insistence upon close attention to the particularities of each case that comes up for review is a mark of sound appellate judging even though it diminishes the sweep of the reasoning offered in support of the decision.¹³ The narrowing effect of paying close attention to the facts of the case in an opinion did not trouble Justice Wernick, who perceived that a state appellate court's function, though difficult to perform well, is normally a modest one even when large economic, political, or social interests are at stake. That perception does not rule out an awareness on the part of the court that every case—even the easiest and most “predetermined,” to use Cardozo's expression¹⁴—requires making a rational choice, mostly *sub silentio* in easy cases, between competing policies. That awareness, coupled with an instinct for justice, comes into play in any case where precedents clash and also in the unusual case where long-standing precedents no longer make sense in a changed matrix of laws reflecting basically changed conditions. Justice Wernick's grasp of all this is reflected in his careful opinion for the court in *Moulton v. Moulton*,¹⁵ removing the common-law bar of spousal immunity in actions for negligent injury.

The first twelve years Justice Wernick served on the high court were marked by a steadily mounting appellate case load and by an increasingly heavy responsibility, vested in the Supreme Judicial Court by legislation, for the general administration and supervision of the entire judicial system of the state.¹⁶ To carry out effectively that responsibility required, among other things, setting up system-wide procedures and forms and making arrangements for uniform reporting of statistics and progress.¹⁷ Although the chief justice, acting through the state court administrator, bore the principal burden of installing that system, during 1975 and 1976 the associate justices participated actively in the planning and discussions, formal and informal, leading to its establishment.

The court's activity in rule-making was unusually intense, also, during the Wernick years. The original rules of civil procedure and criminal procedure had been promulgated by the court well before

13. Especially in a case where the appellate court holds strong views that its decision is not only correct but highly important for the public weal, the writer of the opinion may be tempted to support the outcome with propositions of excessive breadth.

14. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 212-13 (Margaret E. Hall ed., 1947).

15. 309 A.2d 224 (Me. 1973).

16. P.L. 1975, ch. 408, § 1, ¶ 3 (effective June 3, 1975) provided, “The Supreme Judicial Court shall have general administrative and supervisory authority over the Judicial Department and shall make and promulgate rules, regulations and orders governing the administration of the Judicial Department.” The provision is now codified as ME. REV. STAT. ANN. tit. 4, § 1, ¶ 3 (West 1989).

17. P.L. 1975, ch. 408, § 1, ¶ 4 (codified as ME. REV. STAT. ANN. tit. 4, § 1, ¶ 4 (West 1989)).

1971,¹⁸ but there continued to be a brisk business in fine-tuning them. During Justice Wernick's tenure from 1970 to 1981, the court promulgated the Code of Judicial Conduct, the Rules of Evidence, the order establishing the Committee on Judicial Responsibility and Disability, the Maine Administrative Court Rules, the Maine Bar Rules governing the conduct of attorneys, and the Maine Rules of Probate Procedure.¹⁹ In all those supervisory and rule-making activities, Justice Wernick played an important role, offering wise and experienced counsel.

From 1982 to 1993, Justice Wernick taught the course entitled *The Legal Process* at the University of Maine School of Law. In contrast to my direct knowledge of his work as an appellate judge, what I actually know about his prowess as a professor of law is quite limited, even though we were adjunct colleagues on the law school faculty much longer than the five years we served together on the Law Court. I do know that he enjoyed his classes and that the centerpiece of his course was the remarkable set of materials entitled "The Legal Process: Basic Problems in the Making and Application of Law,"²⁰ compiled by Professors Henry Hart and Albert Sacks of the Harvard Law School,²¹ which Justice Wernick supplemented with some interesting materials of his own. Further of his performance as a teacher I can offer only the following report: At four dif-

18. The Maine Supreme Judicial Court had promulgated the Maine Rules of Civil Procedure in 1959, 155 Me. 477 (1959), and the Maine Rules of Criminal Procedure in 1965, 161 Me. 549 (1965). For the pertinent rules-enabling legislation, see ME. REV. STAT. ANN. tit. 4, §§ 8, 9 (West 1989).

19. The Code of Judicial Conduct was promulgated on February 26, 1974 (Me. Rptr., 313-319 A.2d LXXXVII); the Rules of Evidence on May 13, 1975 (Me. Rptr., 336-343 A.2d LXXXVIII); the order establishing the Committee on Judicial Responsibility and Disability on June 26, 1978 (Me. Rptr., 385-388 A.2d LXII); the Maine Administrative Court Rules on June 26, 1978 (Me. Rptr., 385-388 A.2d XXXI); Maine Bar Rules 1, 2, and 4-10 on October 9, 1978 (Me. Rptr., 392-395 A.2d XXIII); Maine Bar Rule 3 (Code of Professional Responsibility) on May 1, 1979 (Me. Rptr., 396-400 A.2d LVII); and the Maine Rules of Probate Procedure on December 1, 1980 (Me. Rptr., 418-427 A.2d XXXI-XXXII).

20. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

21. See BAILEY KUKLIN & JEFFREY W. STEMPEL, *FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER* 159 (1994). "In 1958, Hart and Sacks completed a 'tentative' draft of a legal process text that, despite having the decidedly unsnappy title of *The Legal Process*, has been highly influential, earning the description as the most frequently cited unpublished manuscript in the world." *Id.* The Hart and Sacks materials were finally published in book form by Foundation Press in 1994, after preparation by Professor William Eskridge, Jr., of Georgetown University, and Professor Philip Frickey, of the University of Minnesota. See *supra* note 20. Justice Wernick was familiar with the Hart and Sacks materials before he was appointed to the Law Court, and I believe they had considerable influence on his approach to appellate judging, especially in the interpretation of statutes.

ferent times in the past dozen years, I have taken occasion to ask graduates who I knew had taken the course, "How was it?" Two answered, "One of the best courses in law school"; one answered that it had been *the* best course in law school; the fourth, who had taken the course in 1987, merely answered, "Wonderful!" All of which has led me to conjure with the possibility that, for all his excellence in the life just ended, Sidney Wernick will return, in his next incarnation, as a great teacher.