JUSTICE WORRALL F. MOUNTAIN: AN APPRECIATION

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> I can hardly see the use of writing judicial opinions unless they are to embody methods of analysis and of exposition which will serve the profession as a guide to the decision of future cases. If they are not better than an excursion ticket, good for this day and trip only, they do not serve even as protective coloration for the writer of the opinion and would much better be left unsaid.
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> Justice Harlan F. Stone.[1]

I think it fair to assume that Justice Worrall F. Mountain would agree with this apt statement of the purpose underlying carefully crafted judicial opinions. When one reflects, on the occasion of Justice Mountain's retirement from the New Jersey Supreme Court, on the enormous contribution made to our jurisprudence by his opinions, one recognizes immediately that they have revealed a commitment to the salutary philosophy embodied in Justice Stone's extrajudicial comment. Indeed, perhaps more than any other member of the Court, Justice Mountain has demonstrated the ability to maintain the dual focus characteristic of our greatest jurists: deciding *this* case on *these* facts, while maintaining a cautious eye on the impact a given principle may have in future cases.

The importance of maintaining a proper balance between these two elements of the jurisprudential product cannot be overstated. To take too narrow a view in writing an opinion may deprive counsel and the lower courts of needed guidance for future cases. Indeed, the responsibility to provide such guidance is inherent in the requirement that cases be disposed of by written opinion.[2] Yet to stray too far beyond the bounds of the case at hand is to indulge in the writing of advisory opinions that may simply delight the law book publishers rather than enrich the collective body of jurisprudence.[3]

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[1] A. MASON, THE SUPREME COURT: VEHICLE OF REVEALED TRUTH OR POWER GROUP, 1930-1937 at 41 (1953) (quoting Justice Stone).

[2] *See* R. 2:11-3(a). *See also ABA* STANDARDS RELATING TO APPELLATE COURTS § 3.36 (b) (approved draft 1977).

[3] *See* Sullivan, *New Jersey Supreme Court Opinions: A Critique*, 102 N.J.L.J. 249, 250 col. 3 (Sept. 14, 1978).

It is not only the bench and bar who must be kept in mind in drafting an opinion. The ultimate legitimacy of the judicial branch depends upon public confidence in its workings, a confidence that depends at least in part on the issuance of decisions that set forth reasoned principles applied to specific facts. It was concern that the judiciary could not adequately perform this function in the field of zoning reform to the satisfaction of the bar and public alike that prompted Justice Mountain's concurring and dissenting opinion in *Oakwood at Madison, Inc. v. Township of Madison*.[4] He feared that the necessary reliance by the courts upon experts in fashioning remedies in such cases "will reflect rather the informed judgment of the chosen expert than a judicial application of settled principle to particular facts. Full realization of this is likely further to diminish the possibility of community acceptance."[5]

The proper balance between declaration and decision is well-illustrated by Justice Mountain's authorship of the series of opinions on equitable distribution which fleshed out the 1971 amendments to the New Jersey statutes governing divorce. In *Painter v. Painter*[6] and *Rothman v. Rothman*,[7] he took on for the Court the delicate task of construing the term "equitable distribution," a concept which drastically revised the State's laws governing property distribution. Both opinions set forth soundly-based principles which, while applicable to the facts at hand, have become the basic guidelines for counsel and matrimonial judges in dealing with the difficult practical aspects of separating no-longer-willing marital partners.[8]

In these cases and others Justice Mountain has evolved a classic style, not merely in the fulfillment of Justice Stone's requirements, set forth at the beginning of this piece,[9] but also in the mastery of such details as command of language, structuring of opinions, elucidation of legal reasoning, and impeccable use of authority. Examples of his consummate craftsmanship abound in each of these categories—more in number than this article can properly accommodate. What follow are merely illustrative instances, representative but by no means exhaustive.

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[4] 72 N.J. 481, 371 A.2d 1192 (1977).

[5] *Id.* at 626, 371 A.2d at 1265 (Mountain, J., concurring in part and dissenting in part).

[6] 65 N.J. 196, 320 A.2d 484 (1974).

[7] 65 N.J. 219, 320 A.2d 496 (1974).

[8] Later decisions by Justice Mountain further developing the principles laid down in *Painter* and *Rothman* in the same reasoned and comprehensive fashion include, Smith v. Smith, 72 N.J. 350, 371 A.2d 1 (1977), Carlsen v. Carlsen, 72 N.J. 363, 371 A.2d 8 (1977), and Stern v. Stern, 66 N.J. 340, 331 A.2d 257 (1975).

[9] *See* text accompanying note 1.

We might start with a favorite passage demonstrating Justice Mountain's facility for artful and succinct expression, in a decision written while he was sitting in chancery, wherein he rejected an insured's claim that due to an ambiguity, his contract of insurance should be construed to afford coverage:

> In the first place, it is important to bear in mind the difference between complexity and ambiguity. This was a complex underwriting transaction; it did not lend itself to simplicity of expression or format. Complexity born of necessity is not to be confused with ambiguity, whether accidental or artful.[10]

The use of precedent in the field of property law was skillfully brought to bear in *Newman v. Chase*,[11] which resolved the thorny problem of the remedies to be afforded the judgment creditor seeking satisfaction from an estate held in tenancy by the entirety. Faced with uncertainty in case law as to the exact nature and quaility of that estate peculiar to the marital relationship, Justice Mountain relied on the social policy expressed in relevant legislation in concluding that courts are invested with equitable discretion to grant or deny partition according to the merits of a given situation.[12] While *Newman* has been unfairly criticized as having trod upon the legislative province,[13] in fact the decision is an object lesson in the harmonizing construction of legislation and case law.

For organization and legal exposition one can turn to any of Justice Mountain's opinions to find the methodical discussion of precedent followed by the fashioning of appropriate principles and their application to the relevant facts. A recent example is *In re Farber*,[14] a decision attracting national interest, in which Justice Mountain was assigned the sensitive task of balancing the rights of a free press with the rights of a criminal defendant. In the otherwise highly-charged atmosphere infecting that case the opinion stands as an oasis of reason and rationality.

Such a considered style as is revealed in Justice Mountain's body of work cannot exist independently of an ordered mind in which all decisions are principled ones, in form as well as in substance. Indeed,

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[10] Bryan Constr. Co. v. Employers' Surplus Lines Ins. Co., 110 N.J. Super. 181, 184, 264 A.2d 752, 754 (Ch. Div. 1970), *aff'd*, 116 N.J. Super. 88, 281 A.2d 97 (App. Div. 1971), *aff'd in part and rev'd in part*, 60 N.J. 375, 1290 A.2d 138 (1972).

[11] 70 N.J. 254, 359 A.2d 474 (1976).

[12] *Id.* at 264–65, 359 A.2d at 479.

[13] Note, *Real Property—Purchaser of One Spouse's Interest in an Estate by the Entireties is not Entitled to Partition as a Matter of Right in New Jersey*, 8 SETON HALL L. REV. 112, 132–33 (1976).

[14] 78 N.J. 259, 394 A.2d 330 (1978).

his stylistic approach seems to have an analog in a judicial philosophy that is admittedly conservative, especially as respects the role of the judiciary in a tripartite form of government.[15] An innate sense of order and restraint also manifests itself in Justice Mountain's attitude concerning the relationship of a single judge to the Court as a whole. While disagreement with one's colleagues is an inevitable aspect of sitting on an appellate court, he has always been a reluctant dissenter, being of the view that one should dissent only out of a deep personal conviction.[16] Nevertheless, when conviction has moved him to speak in dissent, he has always couched his disagreement in the same reasoned and precise manner as marks his majority opinions.[17] Taking issue with the majority in *Anderson v. Somberg*,[18] Justice Mountain showed himself to be a master of understatement:

> This Court has reached an extraordinary result in a very remarkable way. As I shall hope to make clear, the structure of argument as presented in the Court's opinion is rested upon an assumed factual premise which does not exist. In part because of this, the concluding and most significant part of the argument suffers from the defect of visiting liability, in a wholly irrational way, upon parties who are more probably than not totally free of blame. I respectfully dissent.
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> I of course agree with the Court that it is most unfortunate that this plaintiff should go uncompensated. Every humanitarian instinct impels the hope that when an unconscious patient is injured in some unforeseen and unforeseeable way, due reparation will be forthcoming. It is to the manner in which the Court would seek to fulfill this hope that I object.[19]

No bombast. No querulous remonstration. None of the churlish carping which unfortunately sometimes creeps into other minority opinions one might read elsewhere (including, I very much regret to say—but must because my clerks insist it is so—some of those emanating from these chambers). Just the same temperate, measured, almost stately quality of expression that characterizes Justice

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[15] *See* Boeche, *Justice Mountain: An Ivory Tower Man Steps Down*, The Daily Record (Morristown, N.J.), June 19, 1979, at 18 (Northwest N.J. ed.).

[16] The Star-Ledger (Newark, N.J.), June 29, 1979 at 18, col. 4–5.

[17] *See, e.g.*, Robinson v. Cahill, 70 N.J. 155, 162–66, 358 A.2d 457, 460–62 (Mountain, J., dissenting), *injunction dissolved*, 70 N.J. 465, 360 A.2d 400 (1976); Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 623–31, 371 A.2d 1192, 1263–67 (1977) (Mountain, J., concurring in part and dissenting in part).

[18] 67 N.J. 291, 338 A.2d 1 (1975).

[19] *Id.* at 305–06, 308 (Mountain, J., dissenting).

Mountain's writings for the majority—an attitude which prompted the New Jersey Law Journal to observe the departure from the Court of Justice Mountain's "pristine Dickensian prose."[20]

Finally, I am reminded of Professor Charles Fried's recent complaint that the drastic decrease in the esthetic quality of the subject has made the study of law "much less fun."[21] Particularly he asks one to

> [c]ompare judicial opinions of today to those of, let's say 40 or 50 years ago; they are prolix, use inflated rhetoric, full of pompous moralisms, replete with amateur economics and sociology, and are sprinkled with barbarous neologisms.[22]

Justice Mountain has stood against this flow. Those of us who have been given the privilege of serving with him have come to regard him—again in Professor Fried's words—as "a public resource, an intellectual anchor to windward, a source of structure, stability and sanity."[23]

Only a gentleman and a scholar could say in his judicial opinions what Worrall Mountain has said, in just the way he has said it.

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[20] *Editorial: Hail and Farewell and Hail!*, 104 N.J.L.J. 4 (1979).

[21] Fried, *Today's Law Is No Fun*, The National Law Journal, January 15, 1979, at 10, col. 2–3.

[22] *Id.*

[23] *Id.*