

Justice Alan B. Handler: A Man of Reason

*The Hon. Virginia A. Long**

For all the world, on September 8, 1999, when I assumed Justice Handler's seat on the New Jersey Supreme Court, an irrevocable link was forged between us. Closer scrutiny of that link reveals a pentimento: an underlying bond, longer and deeper than mere accession would ordinarily dictate.

We met on a perfect spring day in 1965. He was the First Assistant Attorney General, and I was a second-year law student interviewing for a summer clerkship in the Division of Law. At our meeting, which included, among other things, the subjects of movies and sports (I did the movies; he did the sports), he was, as he is today, glitteringly intellectual, wry, witty, self-effacing, and plainly lit from within. After the meeting, the job that had previously seemed merely a good idea to me became an object of intense desire. Luckily, he hired me and later invited me back and swore me into my first position as a lawyer.

In those days, there were no Assistant Attorneys General, no Deputy Assistants, and no Section Chiefs. Alan Handler chose the deputies and oversaw us. His oversight included personal review of all legal documents issuing from the office, particularly appellate briefs, which he addressed with unusual vigor and the eye of a great editor. He could expose the limitations of any argument on sight and mentally restructure a brief without ever lifting a pencil. He could make remarkable improvements by merely eliding a word here or adding one there.

In the process, he was entirely encouraging and kind. No young lawyer ever left his office crushed or defeated, even if a rewrite was in order. A student of human nature once observed that it is wise to keep away from people who belittle your ambitions and cleave to those great souls who make you believe you can be great. You never had to keep away from Alan Handler, who fostered and supported the talents and aspirations of a generation of lawyers by giving us not only professional experience, but a sense of our own worth and

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potential.

He was also a great teacher. He taught us that decent and honorable behavior is always in style; that theory and practice are two essential sides of the same coin; that neither scholarship nor intuition, standing alone, is adequate; and that a lawyer should speak and write in his or her own voice because only that voice is powerful and genuine enough to persuade. Above all, by his example, he taught us to be kind. Those lessons, which he lives by, have stood me in good stead during my thirty-four years as a member of the bar. Thus it is with affection, enthusiasm, and a long history that I have undertaken to participate in this festschrift.

That said, it is nevertheless a difficult task to summarize a judicial career such as Justice Handler's, not only because of its length, but also because of its breadth. Citing any single case necessarily says too little. For this tribute, however, Justice Handler was asked to pare down the universe of potential subjects and to identify particular cases revelatory of his jurisprudential principles. Among his choices was *State v. Hunt*,¹ and I take my cue from him. In the next few pages, I will try to set forth what it is about the *Hunt* opinion that I see as emblematic of Justice Handler's career.

In 1977, Justice Brennan stressed the importance of state constitutional law as an independent source of individual freedoms without which "the full realization of our liberties cannot be guaranteed."² *Hunt* exemplifies the invocation of the state constitution as a "font of individual liberties."³ The case arose because the police, without a warrant, seized Merrell Hunt's toll billing records from New Jersey Bell Telephone Company. Hunt argued that the evidence eventually discovered in his toll billing records should be excluded.

The majority held that, under the New Jersey Constitution, Hunt had a protectable privacy interest in toll billing records possessed by the telephone company.⁴ In so doing, the Court rejected the reasoning of the United States Supreme Court in *Smith v. Maryland*,⁵ which had declared that under the Fourth Amendment there is no reasonable personal or societal expectation of privacy in dialed

¹ 91 N.J. 338, 450 A.2d 952 (1982).

² William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

³ *Id.*

⁴ *See Hunt*, 91 N.J. at 347, 450 A.2d at 956.

⁵ 442 U.S. 735 (1979).

telephone numbers.⁶ While recognizing the propriety of parallel interpretations of federal and state constitutional provisions with similar historical roots and purposes, the *Hunt* majority based its divergent interpretation upon the “equities” favoring a New Jersey citizen’s privacy interest, particularly the State’s policy of legislative protection of telephonic communications predating New Jersey’s Constitution of 1947.⁷

Justice Handler’s famous concurrence in *Hunt* approved of the decision of the majority to afford Hunt greater protection under the New Jersey Constitution than was available under the United States Constitution.⁸ Reiterating the principle delineated in *PruneYard Shopping Center v. Robins*⁹ that each state has a “sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution[,]”¹⁰ Justice Handler cited his majority opinion in *State v. Schmid*¹¹ for the proposition that “state constitutions exist as a cognate source of individual freedoms and that state constitutional guarantees of these rights may indeed surpass the guarantees of the federal [C]onstitution.”¹²

Justice Handler felt constrained, however, to point out the danger of unprincipled action and condemned “state courts turning uncritically to their state constitutions for convenient solutions to problems not readily or obviously found elsewhere.”¹³ He decried the “erosion or dilution of constitutional doctrine.”¹⁴ Justice Handler cautioned the Court to be mindful of the traditional closeness of federal and state constitutional theory and of the principle that, while federal precedents are not controlling, they are nevertheless important guides on the subjects that they squarely address.¹⁵

To accommodate these sometimes competing values and to reduce the randomness of the process, Justice Handler painstakingly developed a seven-point divergence methodology to identify and explain the standards for determining when to invoke our state

⁶ See *id.* at 742.

⁷ See *Hunt*, 91 N.J. at 345, 450 A.2d at 955.

⁸ See *id.* at 358, 450 A.2d at 962 (Handler, J., concurring).

⁹ 447 U.S. 74 (1980).

¹⁰ *Hunt*, 91 N.J. at 359, 450 A.2d at 962 (Handler, J., concurring) (quoting *PruneYard*, 447 U.S. at 81).

¹¹ 84 N.J. 535, 423 A.2d 615 (1980).

¹² *Hunt*, 91 N.J. at 360, 450 A.2d at 963 (Handler, J., concurring) (quoting *Schmid*, 84 N.J. at 553, 423 A.2d at 624).

¹³ *Id.* at 361, 450 A.2d at 963 (Handler, J., concurring).

¹⁴ *Id.*

¹⁵ See *id.* at 363, 450 A.2d at 964 (Handler, J., concurring).

constitution as an independent source for protecting individual rights.¹⁶ Those criteria include, but are not limited to, textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state tradition and history, and public attitudes.¹⁷ Significantly, Justice Handler declared the rationale for the test he developed: "the discovery of unique individual rights in a state constitution does not spring from pure intuition but, rather, from a process that is reasonable and reasoned."¹⁸

The reverberations from *Hunt* have been great. In this state, for example, the Supreme Court has invoked the *Hunt* divergence criteria to recognize a "due process right to an entrapment defense under principles of state constitutional doctrine[;]"¹⁹ to invalidate the use of defendant's uncounseled post-indictment statements;²⁰ to reject the so-called "good faith" exception to the exclusionary rule on the basis of the privacy interests of our citizens;²¹ and to find that the public and the press have a protectable state constitutional interest in access to all pre-trial proceedings in criminal prosecutions.²² Courts in numerous other jurisdictions have also cited Justice Handler's opinion in *Hunt* as a basis for formulating their own divergence criteria.²³

While Justice Handler was not the first New Jersey jurist to declare that our citizens may be entitled to greater state constitutional protections than those afforded under the United States Constitution,²⁴ he was the first to introduce criteria²⁵

¹⁶ See *id.* at 364-68, 450 A.2d 965-67 (Handler, J., concurring).

¹⁷ See *id.*

¹⁸ *Hunt*, 91 N.J. at 367, 450 A.2d at 967 (Handler, J. concurring).

¹⁹ *State v. Johnson*, 127 N.J. 458, 474, 606 A.2d 315, 323 (1992).

²⁰ See *State v. Sanchez*, 129 N.J. 261, 274, 609 A.2d 400, 407 (1992).

²¹ See *State v. Novembrino*, 105 N.J. 95, 146, 519 A.2d 820, 850 (1987).

²² See *State v. Williams*, 93 N.J. 39, 57-58, 459 A.2d 641, 650 (1983).

²³ See, e.g., *Gannon v. State*, 704 A.2d 272, 276 & n.4 (Del. 1998) (citing several *Hunt* factors in discussion of "expansion beyond federally guaranteed individual liberties by a state constitution"); *State v. Bobo*, 803 P.2d 1268, 1273 n.5 (Utah Ct. App. 1990) (referring attorneys to Justice Handler's *Hunt* factors for instruction on which points should be developed and analyzed in arguing for innovative interpretations of a state constitution); *State v. Gunwall*, 720 P.2d 808, 812-13 (Wash. 1986) (relying on several of Justice Handler's *Hunt* criteria to develop Washington's own nonexclusive criteria relevant to determining whether, in a given situation, the state constitution "should be considered as extending broader rights to its citizens than does the United States Constitution").

²⁴ See *State v. Johnson* 68 N.J. 349, 353-54, 346 A.2d 66, 68 (1975) (rejecting the United States Supreme Court's conclusion in *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973), that a consent to search is valid even though defendant did not know he had

justification that provides a measure of precision, consistency, uniformity, and, ultimately, predictability in the difficult and often irksome task of deciding when to invoke state constitutional guarantees. *Hunt* was thus a watershed in the development of state constitutional doctrine.²⁶

Hunt is also notable because of what the decision says about Justice Handler: that he has a deep appreciation of the genius of the New Jersey Constitution, the fragile boundaries of which (in his words) “demarcate an implied ethic of public discourse within which ideologies and interests, through warring, war intelligently and constructively”;²⁷ a wholesome respect for individual rights; a devotion to principle even at the expense of outcome; a wholly generous spirit; mental and moral clarity; a full comprehension of complex constitutional theory; and a fundamental recognition of the need to render theory corporeal or risk relegating it to inaccessibility. The seven-point methodology of *Hunt* is a simple and straightforward vehicle, allowing ordinary mortals the opportunity to apply difficult principles of constitutional interpretation for the purpose of protecting the rights of our fellow citizens.

Stylistically, Justice Handler’s concurrence in *Hunt* also speaks volumes. It is easy reading, made up of apparently effortless, graceful prose, meticulous and sonorous articulation, and elegant phrasing. It is evidence that Justice Handler is not only an extraordinary thinker, but also an unparalleled writer; that he is never reduced to adopting the formulations of others; and that he speaks in his own voice, not doomed to a life of tepid half-expression, but, to paraphrase Emerson, always “insistent on himself, presenting every argument with the cumulative force of a whole life’s cultivation.”²⁸ The concurrence reveals a man to whom the joy of rational thinking is

a right to withhold consent).

²⁵ See Leigh A. Morrissey, *State Courts Reject Leon on State Constitutional Grounds: A Defense of Reactive Rulings*, 47 VAND L. REV. 917, 933 n.113 (1994).

²⁶ See, e.g., Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 209 (1998); Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1019 (1997); Jennifer Cutcliffe Juste, Note, *Constitutional Law—The Effect of State Constitutional Interpretation on New Mexico’s Civil and Criminal Procedure—State v. Gomez*, 28 N.M. L. REV. 355, 364 (1998).

²⁷ In Memoriam Honorable Richard J. Hughes, 136 N.J. XXXI, XLIII (1993).

²⁸ In his *Essay on Self-Reliance*, Ralph Waldo Emerson states: “Insist on yourself; never imitate. Your own gift you can present every moment with the cumulative force of a whole life’s cultivation; but of the adopted talent of another you have only an extemporaneous half possession.” RALPH WALDO EMERSON, *Essay on Self-Reliance*, in THE PORTABLE EMERSON 160 (Carl Bode & Malcolm Cowley eds., Viking Penguin 1981) (1840).

preeminent. *Hunt*, like all of Justice Handler's opinions, is a treasure. His body of work stands as a monument to reason, which is as much in his blood and bones as it is in his writings. Oliver Wendell Holmes may well have been describing Justice Handler when he said:

[Such a person] knows that, a hundred years after he is dead and forgotten, men who have never heard of him will be moving to the measure of his thought—the subtle rapture of postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more real than that which commands an army.²⁹

With his retirement from the Court, Justice Handler has recently crossed a threshold into a new life. With his thinking and writing and his heart, he long ago passed over the lintel into greatness.

²⁹ OLIVER WENDELL HOLMES, JR., *The Profession of the Law*, in THE COLLECTED WORKS OF JUSTICE HOLMES 473 (Sheldon M. Novick ed., vol. 3, Univ. of Chicago Press 1995) (1886).