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THE CAREFUL SCHOLARSHIP OF JUSTICE CHARLES HOROWITZ

Richard Cosway*

How appropriately the editors of this review have elected to dedicate some of its pages to honor a distinguished lawyer and judge whose legal career has closely paralleled the history of the publication itself. The name of Charles Horowitz appears on the masthead of the first two volumes, first as member and then as president of its editorial board. In later years, he has written for the *Review,* citing and analyzing decisions of the courts on which he later sat. That other *Review* authors have not always agreed with him[1] will neither shock, wound, nor surprise him. After all, the initials "C.H.," matching no other student's name on the *Review's* masthead at the time, identify the author of two notes in the volume for which he served as president of the board, and the conclusion reached in both is that the court arrived at an erroneous decision.[2] There is no reason to believe that after years of experience in practice and on the bench, he would deal differently with a legal opinion. There is, however, reason to believe that at the time he was in law school, he could not have foreseen the types of problems with which he was later forced to come to grips as a judge on this state's court of appeals and supreme court.

A breakdown of the approximately 270 Horowitz decisions into subject-matter categories would, in view of the circumstance that cases are assigned by lot among the judges who write, give some clue to the division of the court's time. The seamless web of the law, coupled with the subjectivity involved in the classification of particular cases—obviously many cases involve a variety of issues—makes a scientific analysis virtually impossible. Further, one cannot, by counting cases or even pages, ascertain the time and effort spent in thinking through, solving, and then writing an opinion stating a reasoned conclusion in a particular case. But a rough approximation would demonstrate that nearly one-fourth of the opinions which Justice Horowitz has written are on criminal cases. Closely related are the many cases which turn on constitutional problems, for many criminal cases obviously cause issues of those dimensions to

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1. *See, e.g.*, Note, *Civil Rights—Homosexual Teacher Dismissed: A Deviant Decision*, 53 WASH. L. REV. 499 (1978).

2. Note, *Payment—Presumption of Payment—Proof of Payment by Circumstantial Evidence*, 2 WASH. L. REV. 54 (1926); Note, *Municipal Corporations—Governmental Powers—Proprietary Powers—Ultra Vires Torts*, 2 WASH. L. REV. 136 (1927).

arise either substantively or, more likely, procedurally. A very rough guess is that a little more than ten percent of the cases involve those kinds of matters. First and fourth amendment issues appear to predominate. Contract disputes, including insurance policy interpretation cases, appear to represent roughly twelve percent of the cases, only slightly more than those cases which could be classified as tort actions. Important environmental law[3] and state equal rights amendment opinions[4] are lost in a mere counting of cases.

Even less scientific, yet perhaps more productive of meaningful insight into the work of Justice Horowitz, is the selection here of the particular cases about which to write. Unfortunately, analysis of the style of a judge's opinions is much too dependent on the eye of the analyst to permit any pretense of objectivity. An attempt to broaden the basis of evaluation by trying to ascertain how others, such as law review writers and judges in later cases, have received a judge's opinion must be sketchy and distorted. Public outcry and reaction in the press are even more likely to be unrepresentative and misleading, because they emphasize the unpopular decision, and more frequently than not, tend to miss the real significance of a decision.

A very recent decision which stirred up that kind of public interest and concern is *State v. Martin*,[5] which involved the effect of a guilty plea of first degree murder on the imposition of the death sentence. The effect of the case is that the death penalty is not possible in the case of a defendant who elects to plead guilty, a result not necessarily consonant with the views of a majority of the public. The court held, however, that the result was demanded by the way the particular statute was drafted; and the solution, if a different result is to be reached, rests with the legislature. In reaching a different solution, though, the legislature must heed the concurring opinion of Justice Horowitz, which emphasizes constitutional overtones not stressed by the majority opinion and largely missed by the public outcry.

With this too extensive disclaimer, we should turn to some specific

3. Department of Natural Resources v. Thurston County, 92 Wn. 2d 656, 601 P.2d 494 (1978), *cert. denied*, 101 S. Ct. 98 (1980); Weyerhaeuser Co. v. King County, 91 Wn. 2d 721, 592 P.2d 1108 (1979); Save A Valuable Environment (SAVE) v. Bothell, 89 Wn. 2d 862, 576 P.2d 401 (1978); Department of Ecology v. Pacesetter Constr. Co., Inc., 89 Wn. 2d 203, 571 P.2d 196 (1977); Moran v. State, 88 Wn. 2d 867, 568 P.2d 758 (1977); Weyerhaeuser Co. v. Department of Ecology, 86 Wn. 2d 310, 545 P.2d 5 (1976) are the important cases in which Justice Horowitz wrote an opinion. Hama Hama v. Shorelines Hearing Bd., 85 Wn. 2d 441, 536 P.2d 157 (1975) involved an ambiguous statute; Justice Horowitz dissented.

4. The dissenting opinion in Marchioro v. Chaney, 90 Wn. 2d 298, 582 P.2d 487 (1978) and the early decision in Darrin v. Gould, 85 Wn. 2d 859, 540 P.2d 882 (1975) are significant.

5. 94 Wn. 2d 1, 614 P.2d 164 (1980) (Horowitz, J., concurring).

matters with which the court and Charles Horowitz in particular have dealt.

Surely among the most dramatic and significant issues to come before the courts in the period of Justice Horowitz' tenure was the prolonged and hard fought controversy about Indian treaty fishing rights. Many segments of the non-Indian society cannot comprehend why Indians, comprising less than one percent of the state's population, should be entitled to something approaching fifty percent of the fish harvested in certain rivers. To implement such an allocation seems to many to be an obvious denial of the equal protection of the laws, guaranteed by the Constitution. In situation after situation and case after case, this was a principal argument asserted.

The argument for the Indians was that the Indian share was the result of a treaty. To resolve the disputes in a judicial forum required a determination of whether the treaty or the equal protection argument had primacy, assuming that they could not be reconciled. The principal state administrative agency charged with implementing the appropriate fishing rights policy found itself squarely in the middle of the conflict between policies. More importantly, that agency was also in the middle of a confrontation between state and federal courts,[6] with the state courts trying in every conceivable way to implement the equal protection argument and the federal courts insisting throughout that the existence of treaties made the equal protection argument irrelevant. Justice Horowitz wrote dissenting opinions in at least two cases, *Puget Sound Gillnetters Association v. Moos*[7] and *Purse Seine Vessel Owners Association v. Moos*.[8] In the latter case, different dimensions to the controversy were drawn by the existence of a set of regulations adopted by an international commission (involving the United States and Canada), from which the State Department had withdrawn consent. The former case was a more direct demonstration of the pulls and tugs of the Indian fishing rights controversy because at issue was the power of the Department of Fisheries to carry out a federal court injunction implementing treaty rights. While the majority of the Washington Supreme Court agreed that it should issue no mandate to the Department of Fisheries, the message was clear that, in the view of the state court, the Department's sole authority was to administer in the interests of conservation and not in the interests of Indian treaty rights. An unmistakable invitation and encouragement were thus extended to the Department

6. The critical federal decision is United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). *See* Johnson & Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587 (1979).

7. 88 Wn. 2d 677, 565 P.2d 1151 (1977).

8. 88 Wn. 2d 799, 567 P.2d 205 (1977).

to refuse to carry out the federal injunction. Justice Horowitz' opinion concluded that while the refusal of the mandate was certainly proper, invitation to violate the injunction was wrong. State courts are powerless, he noted, to prevent the contempt proceedings in federal courts, sure to follow, as long as the injunctive order is not modified. In a related case, *Fishing Vessel Association v. Tollefson*,[9] Justice Horowitz joined the dissenting opinion written by Justice Utter. These cases were eventually consolidated in the United States Supreme Court, where the Horowitz-Utter view prevailed.[10] The Horowitz opinion in *Puget Sound Gillnetters Association v. Moos*[11] reviews the historic controversy and represents the prevailing judicial view unless and until some legislative action occurs.

Few situations so dramatically demonstrate the choices often posed between values as did these many fishing rights cases. In another place, Justice Horowitz has written of this kind of choice,[12] and in at least two opinions, he has remarked on the difficulty of choosing without data to demonstrate the impact of the choice.[13] The immense power possessed by a court, or perhaps the immense responsibility vested in a court, in deciding matters upon which authority is sparse or nonexistent and values clash has been addressed by Justice Horowitz also. In that kind of case, the judge must rely on his experience, education, morality, practicality, and wisdom, but in addition he must often rely on research in nonlegal disciplines. One interesting use of research tools is a case in which a statute dealing with a city's eminent domain power referred to "streets, boulevards and drives," differentiating among them in extending the city's powers outside its boundaries.[14] To determine how those words differ in meaning Justice Horowitz turned to not one, but several dictionaries, and since the statute was an early one, used definitions in early dictionaries. This painstaking attention to detail and exhaustive use of references is representative of the scholarship regularly found in a Horowitz opinion.

A much more significant case, and one which was probably very difficult to decide, is *Gaylord v. Tacoma School District No. 10*,[15] involving the discharge of a school teacher for "immorality," a term used in the school district's policy statement as a basis for discharge, and in the Re-

9 89 Wn. 2d 276, 571 P.2d 1373 (1977).

10. Washington v. Washington State Commercial passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

11. 92 Wn. 2d 939, 603 P.2d 819 (1979).

12. Horowitz, *Values and Decision-Making: Some Observations on the Role of Non-Legal Factors in the Appellate Process*, WASH. APP. PRAC. HANDBOOK § 3.4 (1980).

13. Geise v. Lee, 10 Wn. App. 728, 519 P.2d 1005 (1974), *rev'd*, 84 Wn. 2d 866, 529 P.2d 1054 (1975); Janisch v. Mullins, 1 Wn. App. 393, 461 P.2d 895 (1969).

14. City of Kent v. Lamb, 1 Wn. App. 737, 463 P.2d 661 (1969).

15. 88 Wn. 2d 286, 559 P.2d 1340 (1977), *criticized in*, Note, 53 WASH. L. REV. 499 (1978).

vised Code of Washington[16] as grounds for revocation of a teaching certificate. The immorality specifically alleged was homosexuality, and with what the dissenting justice referred to as "scholarly research," Justice Horowitz, writing for the majority, explored the meaning of the term in both contexts. His opinion cites as many as twenty-one different books, as diverse as the *Kinsey Report*, the *Catholic Encyclopedia*, the *Encyclopedia Judaica*, the *Britannica* and *Americana*, and some technical medical publications and medical dictionaries, on the meaning of homosexuality and whether it is immoral.

But the eventual decision is not found in dictionaries, in treatises, in logic, or even in law books. As Justice Horowitz has written elsewhere:

> Yet, within the area of his permitted discretion, a judge's scheme of values, notions of duty, devotion to logic, personal background and experiences, overall philosophy, and notions of public policy, morality and ethics all have a bearing upon the choices he makes in adopting one mode of reasoning rather than another to justify his decision. . . . For this reason, candidates for the judiciary may be questioned by judicial panels regarding these personal factors as bearing upon their qualifications for office.[17]

Lest the reader be alarmed by this seemingly broad insertion of a judge's own value system into the decision process, the Justice adds that this discretion is not unfettered. But all law, he says, is "both an explicit and implicit expression of value judgments, whether it be a judicial decision, a statute, or a provision of a constitution."[18]

In times of great stress, a choice of values is often difficult, and in those times most of all, a clear explanation of the rationale of whatever choice is made is essential. The period of the Vietnam war, especially the days and months soon after the episode at Kent State University, was such a period; and in that period a case unfolded in Washington in which then-Judge Horowitz wrote an opinion which must rank among those of which he is very proud.[19] The defendant in the case had taped a peace symbol to an American flag and had displayed the flag upside down in the window of his apartment. His purpose was to display the flag as a force for peace, in opposition to the invasion of Cambodia. Though he did not know it, a state statute forbade improper use of the flag for exhibition or display, defined as placing designs, drawings or advertisements on the flag, or exposing to public view any flag so marked. A conflict in values between the interest in preservation of the integrity of the flag and the

16. WASH. REV. CODE § 28A.58.100(1) (1979).
17. Horowitz, *supra* note 12, at § 3.4.
18. *Id.* at § 3.5.
19. State v. Spence, 5 Wn. App. 752, 757, 490 P.2d 1321, 1324 (1971).

interest in free expression of ideas was thus posed, and the defendant was convicted. In setting aside the conviction on the ground that the statute was unconstitutional, Judge Horowitz, then on the Washington Court of Appeals, wrote a carefully detailed, but brief, history of the use and symbolism of flags, concluding that the American flag

> does not serve to freeze past or existing institutions or past or existing points of view. Born out of vicissitudes of change, and itself a striking and eloquent manifestation of that change, it would be strange indeed if it proved inhospitable to the constitutionally protected appeal for change by lawful means. Hence, the flag is both an appeal for loyalty to existing America, its policies and its ideals, and an invitation for peaceful change to bring America closer to heart's desire.[20]

Then, with citations to judicial authority, he concluded that the defendant's symbolic speech was clearly within the protection of the first amendment, even when used on the face of the flag.

> If the flag mirrors American experience, past and present; and if respect for the flag cannot constitutionally be compelled by a mandatory flag salute; and if symbolic opposition to the flag cannot be prohibited; and if symbolic as well as actual speech is entitled to constitutional protection; and if the suppression of free expression cannot be upheld in the absence of an independent governmental interest to be protected, unrelated to the suppression of free expression and not broader than is necessary for that purpose; and if offense to the sensibilities of the average citizen is not enough to condemn the exercise of free speech—can it be said to really matter, on a balancing of interests, whether the words or symbols are used away from the flag or representations thereof even though in closest proximity thereto, or whether such words or symbols are used on the flag itself.[21]

Emotions ran high at the time the defendant had acted and, indeed, at the time that language was written. United States participation in the war in Vietnam, while constantly shrinking, was not yet over, and probably a popular vote on the issue before the court, while close, would not come out with the Horowitz majority opinion. Indeed, public opinion aside, the Supreme Court of Washington rejected the Horowitz view.[22] The ultimate authority, the United States Supreme Court, however, agreed with the attitudes and conclusions in the Horowitz decision.[23]

That Judge Horowitz' view eventually prevailed must, of course, be a source of satisfaction to him. But the reason for pride does not lie primarily therein. Many readers of this piece will have no recollection of the

20. *Id.* at 757, 490 P.2d at 1324.
21. *Id.* at 761–62, 490 P.2d at 1326.
22 State v. Spence, 81 Wn. 2d 788, 506 P.2d 293 (1973).
23. Spence v. Washington, 418 U S. 405 (1974).

frustration and despair in the attitudes of so many young persons represented by the defendant in the case. Even in the time span required for the case to reach the United States Supreme Court, the stress had been so far relieved as to obscure recollection of the environment in which the case arose. Perhaps the curtailment of American involvement in Vietnam had also been so far accomplished at the time Judge Horowitz wrote as to becloud the seriousness of the feelings being expressed by the defendant. But even then, feelings were strong, so the need for a well-reasoned, dispassionate opinion was obvious. And all readers of the opinion of Judge Horowitz would surely agree that his work demonstrates a painstaking effort, both factually and analytically, to state the case so as to be as meaningful as possible both to the litigants and to others who may have reason to read it.

Does a judge have a particular audience in mind when writing an opinion? Is the audience addressed always the same? An implicit choice seems to be made, whether consciously or not, in every opinion written by every judge. This may be only a consequence of the nature of the legal issues, but technical lawyer-oriented problems are obviously addressed by judges, including Justice Horowitz, differently from less tedious kinds of questions. In many of the opinions he wrote in criminal cases, for example, Charles Horowitz wrote as if he were trying to communicate to the defendant the seriousness of the conduct charged and the efforts that had been made to give that defendant a fair trial. On the other hand, in certain very complex matters, such as conflicts problems, Horowitz opinions are addressed to the technician.[24] In developing fields of law, such as the state Equal Rights Amendment[25] and environmental law,[26] the opinions seem to be addressed to the general public.

But whatever the audience, scholarship, care, thorough research, and sensitivity to the parties are hallmarks of all that Justice Horowitz has written. No person is treated as anything other than a fellow human being. Other judges on other courts occasionally deal with the parties as if they were exhibits in the case, using them as characters in a play, emphasizing foibles even to the extent of ridicule. Charles Horowitz' opinions deal with each human being with respect and dignity. He realizes that their names will become part of the permanent record of our court system and our written history, and he protects their names and their identities.

The role of value choices in the decision process has been the underpin-

24. Illustrative are the dissenting-in-part opinions in O'Brien v. Shearson Hayden Stone, Inc., 90 Wn. 2d 680, 586 P.2d 830 (1978) and 93 Wn. 2d 51, 605 P.2d 779 (1980) (additional opinion) and the opinion in Rogoski v. Hammond, 9 Wn. App. 500, 513 P.2d 285 (1973).

25. *See* cases cited in note 4 *supra*.

26. *See* cases cited in note 3 *supra*.

ning of this piece. One final aspect of this power to choose is probably a subject pursued in court sessions, in seminars for judges, and in books about the judging process. The choice is frequently presented about how far to go in resolving an issue. There is a danger in dealing with details not as thoroughly argued nor as sharply defined by the facts as they may be in another case. Should the judge choose in favor of the narrowest possible approach, or should he attempt to give clues about how peripheral details are to be handled? Does the judge give as complete an answer as possible, or does he leave to other litigants, at their cost in time and money, the task of further implementation of a principle? Impressionistic though it is, a permissible conclusion is that Justice Horowitz' long years as a practicing lawyer have demonstrated to him the value of an opinion which provides more rather than less outreach. Where he can do so, he seeks as complete a resolution of the problems as is possible, even though his colleagues on the court would not go as far as he. Two cases, *Ackerley Communications, Inc. v. Seattle*,[27] and *Rogoski v. Hammond*,[28] seem to demonstrate this more than any others. In both instances, the Horowitz opinion was the majority opinion, so others agreed that he had not gone beyond appropriate limits. *Rogoski* in particular represents a detailed analysis of a problem—the constitutional implications of prejudgment attachment—confronting attorneys throughout the state at the time and gives clear guidelines for its resolution. The opinion is representative of the best scholarship extant about the particular problem, reading much like a treatise, interpreting and extrapolating then-new United States Supreme Court opinions. Yet, in an essentially practical way, it is a handbook for practitioners. This kind of careful scholarship, coupled with practical guidance born of experience, is the essence of what we were able to expect from the work on the court of Justice Charles Horowitz.

27. 92 Wn. 2d 905, 602 P.2d 1177 (1979).
28. 9 Wn. App. 500, 513 P.2d 285 (1975).