A TRIBUTE TO THE HONORABLE WALLACE P. CARSON, JR.—INTRODUCTION[1]

CHIEF JUSTICE PAUL J. DE MUNIZ, OREGON SUPREME COURT[*]

From 1982 to 2006, Oregon's judiciary had the benefit of the thoughtful and steady leadership of Chief Justice Wallace P. Carson, Jr. In behalf of his colleagues on the court, I am pleased to participate in this written tribute to his service and to enshrine permanently for Oregon's judicial history our profound appreciation for his valuable and sustained contribution to Oregon's judicial system.

Chief Justice Carson was born in Salem, Oregon, where his father practiced law in a firm founded by his grandfather in 1889. Other than undergraduate school at Stanford University and military service in Korea and Taiwan, Chief Justice Carson's life has been anchored firmly in Salem. Following his graduation from Willamette University College of Law in 1962, Carson joined his father and uncle in private law practice in Salem. Four years later, Carson made his debut into Oregon politics, successfully running for the Oregon House

sense, and for the bipartisan approach that he took to the legislature's law-making function.

Carson's productive legislative career ended in 1977 when Democratic Governor Robert Straub appointed him to the Marion County Circuit Court. As a circuit court judge, Carson again distinguished himself by his respectful treatment of litigants and lawyers, and by his careful and measured approach to his role as a judge. Five years later, in 1982, Governor Victor Atiyeh recognized Carson's immense talents as a judge and appointed him to the Oregon Supreme Court. In 1991, his court colleagues acknowledged Carson's unmatched work ethic and exceptional administrative skills, unanimously electing him Oregon's thirty-sixth chief justice.

During his nearly 25 years on the Oregon Supreme Court, Chief Justice Carson came to be regarded as a person and jurist of great integrity and a selfless public servant by everyone associated with Oregon's judiciary and legal profession. Attempting to relate his many contributions to the Oregon judiciary during his entire judicial career, and particularly the 14 years that he served as chief justice, is fraught with the risk of serious oversight. Instead, two endeavors during his tenure as Oregon's longest-serving chief justice immediately come to mind as symbols of the breadth and impact of his steadfast and imaginative leadership.

The first example occurred in 2003, when Oregon's judicial branch was hard hit by the biggest economic downturn in its history. Unprecedented budget shortfalls ordered by the legislature compelled Chief Justice Carson to confront unforeseen administrative challenges in guiding the response of our state judiciary. Those challenges included the loss of numerous employees statewide, the closure of courthouses one day a week, and the unflattering spotlight on Oregon in the national media. However, due to Chief Justice Carson's leadership, those dark times passed in less than one year, and he was able to restore normal courthouse operations. Oregon's judicial system weathered the storm, but many Oregon judges and lawyers now realize that the damage could have been much worse if the judiciary had not had the benefit of Chief Justice Carson's thoughtful and disciplined leadership throughout that economic crisis.

The second example is the steadfast support that Chief Justice

Carson devoted to diversifying the Oregon State Bar and improving the opportunities for minority lawyers in Oregon. In 1992, the Oregon Supreme Court established the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System. By 1994, when the Task Force issued its 120-page report, many such reports had been published by courts throughout the country. In most states, those reports received initial fanfare but were then placed on a shelf to gather dust and never considered again. However, in keeping with

CHIEF JUSTICE WALLACE P. CARSON, JR.: CONTRIBUTIONS TO OREGON LAW

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In December 2006, Chief Justice Wallace P. Carson, Jr. retired from the Oregon Supreme Court, marking the close of another remarkable chapter of Justice Carson's 41 years of public service in Oregon state government. Justice Carson's contributions to the state of Oregon—and particularly to Oregon law—cannot be overstated.

Many of Justice Carson's contributions to Oregon law are systemic in nature and difficult to quantify. Among other things, Justice Carson will be remembered for his work in promoting the importance of an independent judiciary, his contributions to legal professionalism in Oregon, his work in advancing gender and ethnic equality in Oregon's courts, and his leadership in Oregon's judiciary and legislature. Justice Carson's contribution to Oregon jurisprudence, however, also cannot be overlooked. That contribution, although equally difficult to quantify, is found in the published opinions of the Oregon Supreme Court from 1982 to 2006.

This tribute does not attempt to provide a comprehensive examination of Oregon jurisprudence during Justice Carson's 24-year tenure on the Oregon Supreme Court; neither does it attempt to summarize the entirety of Justice Carson's written opinions. Instead, this tribute seeks to highlight some of the notable developments in Oregon jurisprudence during Justice Carson's term on the court that are reflected in both Justice Carson's own opinions and the court's opinions as a whole.

This tribute first provides a brief overview of Justice Carson's legal background and the influences on his judicial outlook. The

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tribute then discusses the values reflected in Justice Carson's work as a jurist, displayed both through his authored opinions and in the context of the Oregon Supreme Court's jurisprudence as a whole during his tenure and under his leadership.

I. JUSTICE CARSON'S LEGAL BACKGROUND AND VALUES

Justice Carson's judicial outlook cannot be appreciated fully without some understanding of his legal and professional background prior to his service on the Oregon Supreme Court. Among his many professional accomplishments, Justice Carson's experiences as a state legislator and a state circuit court judge undoubtedly were two major influences on his appellate work.

Justice Carson is a native of Salem, Oregon. He obtained his

and, therefore, the law becomes more stable."[12]

Justice Carson's judicial decisions demonstrate his commitment to judicial values of clarity, stability, and predictability in the law. Rather than attempt to survey the entirety of those decisions, this tribute highlights a few of Justice Carson's opinions in the context of the development of Oregon jurisprudence as a whole from 1982 to 2006.

II. JUSTICE CARSON AND OREGON JURISPRUDENCE FROM 1982 TO 2006

Oregon jurisprudence advanced significantly during Justice Carson's 24-year tenure on the Oregon Supreme Court from 1982 to 2006. During that time period, the court established many of its statutory and constitutional construction methodologies, which continue to shape Oregon law today. Additionally, Oregon became a national leader in recognizing the primacy of state law, both statutory and constitutional. The development of Oregon jurisprudence from 1982 to 2006 reflects the collective work and influences of all the justices on the court—both those still serving today and others retired from the court. As discussed below, Justice Carson's influence and contributions to that collective body of work are significant.

A. Promotion of Stability and Predictability in the Law

Stability and predictability in the law are judicial values strongly reflected in the jurisprudence of the Oregon Supreme Court during Justice Carson's tenure on the court. Most notably, during that time period, the Oregon Supreme Court adopted methodologies for judicial decisionmaking that are now well-established, and sometimes controversial, features of Oregon jurisprudence.[13] Although inconsistencies arguably may exist in application from case to case, Oregon courts consistently construe Oregon statutes in accordance with the methodology set out in *PGE v. Bureau of Labor and*

12. *Id.*

13. *See, e.g.*, Jack L. Landau, *The Intended Meaning of "Legislative Intent" and Its Implications for Statutory Construction in Oregon*, 76 OR. L. REV. 47 (1997) (evaluating statutory interpretation methodology set out in *PGE v. Bureau of Labor and Industries*, 859 P.2d 1143 (Or. 1993)).

court's methodologies for judicial decisionmaking, beginning first with statutory issues and the application of *PGE v. Bureau of Labor and Industries*[19] to interpret the meaning of the statute at issue.[20] After construing the scope of the statute and determining that the defendant's actions had violated it, Justice Carson addressed each of the defendant's constitutional challenges to the statute by first considering his state challenges and then turning to his federal challenges.[21] In addition to providing a good example of Justice Carson's writing style and strong adherence to the supreme court's methodologies, the decision in *Delgado* is notable for its clarification of the differences between state and federal constitutional vagueness challenges.[22]

The Oregon Supreme Court's decision in *State v. Ferman-Velasco* is also illustrative of Justice Carson's judicial style.[23] In *Ferman-Velasco*, the court considered the constitutionality of ORS 137.700, the state mandatory sentencing statute commonly known as "Ballot Measure 11."[24] In addressing the defendant's constitutional challenges, the Oregon Court of Appeals produced a fractured, *en banc* decision that ultimately affirmed the constitutionality of the statute.[25] Authoring a unanimous opinion for the Oregon Supreme Court, Justice Carson agreed with the majority of the court of appeals that the statute was constitutional.[26] In reaching that conclusion, Justice Carson applied the court's typical methodical approach, first addressing each of the subconstitutional issues before turning to the state and federal constitutional questions.[27] Indeed, even more than its

Finally, *Conway v. Pacific University*[28] is an example of Justice Carson's judicial restraint and opinion-writing style in the context of Oregon common law. At issue in *Conway* was whether an employer had a special relationship with its employee that created a duty of care for the employer to avoid making negligent misrepresentations to the employee. In answering that question negatively, Justice Carson's opinion began with a historical view of the tort of negligent misrepresentation in Oregon, followed by a careful explanation of the distinctions between a breach in contract and a breach in tort.[29] With those considerations in mind, Justice Carson compared the relationship at issue in *Conway* with other relationships that carry a heightened duty of care.[30] Based on that comparison, Justice Carson concluded that no special relationship existed in the case at bar, precluding a claim for negligent representation.[31] The court's holding in *Conway* reflects the judicial restraint that was typical in most of Justice Carson's opinions addressing common-law questions.[32]

Other examples of Justice Carson's promotion of clarity and consistency in the law are too numerous to list. A review of the opinions that he produced in his 24-year tenure on the court, however, reveals his consistent efforts to achieve those qualities. The jurisprudence of the Oregon Supreme Court as a whole during Justice Carson's tenure—particularly the court's adoption of, and adherence to, methodologies to guide judicial decisionmaking—similarly reflects those same values.

B. Primacy of State Law

In addition to adopting the various methodologies for judicial decisionmaking that are now firmly established in Oregon jurisprudence, Oregon also became a national leader in recognizing the primacy of state law during Justice Carson's tenure on the court. Although independent state constitutional interpretation now has

28. 924 P.2d 818 (Or. 1996).

29. *Id.* at 821-823.

30. *Id.* at 823-825.

31. *Id.*

32. *See, e.g.*, Welch v. Bancorp Mgmt. Advisors, Inc., 675 P.2d 172 (Or. 1983). Exceptions exist, of course, as they tend to for all judges. *See, e.g.*, Chesterman v. Barmon, 753 P.2d 404 (Or. 1988).

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> . . . Finally, I hope that reliance on state law will eliminate the practical consequences of the troublesome effects of shifts in the United States Supreme Court's interpretation of the federal Constitution during the course of litigation in a state court.[36]

Notably, in *'Last Things Last,'* Justice Carson particularly addressed the use of state constitutional analysis as a means to stabilize and provide needed clarity to search-and-seizure jurisprudence.[37] In defending the Oregon Supreme Court's departure from reliance on federal Fourth Amendment jurisprudence towards reliance on the search-and-seizure provisions of article I, section 9 of the Oregon Constitution,[38] Justice Carson observed:

> If you say that there was indeed a "bright line" in the federal system and that the law of search and seizure was all very clear, then perhaps some of the criticism of Caraher is warranted. With all respect to our colleagues on the federal Supreme Court, the federal law on the subject was not all that clear or consistent.[39]

Justice Carson's own opinions in the area of search-and-seizure law under article I, section 9 are among his most important contributions to Oregon state constitutional jurisprudence. Beginning with his decision in

exclusionary rule exists to preserve individual article I, section 9 rights and not—as is true under the federal constitution—to serve as a deterrent to law enforcement.[41] That view persists to this day, mandating a state constitutional analysis that differs significantly from the federal analysis.[42]

In the years following *Davis*, Justice Carson contributed to other facets of article I, section 9 jurisprudence. Although his opinions in this area are too numerous for meaningful discussion in this article, several of those opinions merit acknowledgement. *State v. Vu* falls into that category.[43] Justice Carson authored the opinion for the court in *Vu*, clarifying the standard for "voluntariness" for both consenting to police searches and making statements in response to law enforcement. *State v. Ainsworth*[44] is another example worth mentioning, for its contribution to clarifying the meaning of a "search" for purposes of article I, section 9. Finally, in *State v. Hall*, Justice Carson wrote his most recent significant article I, section 9 opinion, providing guidance as to police conduct that implicates the protections against unreasonable seizures under article I, section 9 and resolving a long-standing debate about the consequences of such illegalities on evidence obtained in subsequent consent searches.[45]

Without delving too deeply into Justice Carson's article I, section 9 opinions, some general observations can be made. As with his other decisions, Justice Carson authored his article I, section 9 opinions with an eye toward producing a body of search-and-seizure law that was workable and clear to those who must apply it every day—that is, law enforcement, the criminal bar, and the trial courts. Justice Carson's article I, section 9 opinions are also notable for their commitment to individual rights, while also striving to craft law reflective of the practical realities of policing.

41. *Id.* at 807.

42. *See, e.g.*, State v. Hall, 115 P.3d 908, 919-921 (2005) (discussing differences

C. Oregon Constitutional Law

In addition to construing state constitutional provisions that are similar to certain federal constitutional provisions, the Oregon Supreme Court is often faced with questions concerning unique state constitutional provisions—that is, provisions with no federal counterparts. Of course, during their tenures on the court, all justices have an opportunity to address such issues in written opinions. In his 24 years on the court, Justice Carson similarly authored a number of opinions concerning unique state constitutional opinions. Of those opinions, one of the most notable—and undoubtedly one with some of the most far-reaching effects—is the opinion that Justice Carson authored in *Armatta v. Kitzhaber*.[46]

Armatta concerned a voter-initiated amendment to the Oregon Constitution, "Measure 40," that purported to guarantee a variety of "crime victims' rights." In challenging the validity of the measure, the plaintiffs contended, among other things, that the measure impermissibly encompassed two or more amendments, in violation of article XVII, section 1 of the Oregon Constitution, which provides, in part: "When two or more amendments shall be submitted . . . to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately."[47]

requirement to any significant degree, Justice Carson's opinion in *Armatta* undertook an exhaustive review of the text of the requirement, the text of related constitutional provisions, and the historical record surrounding adoption of the requirement to determine whether it imposed a substantive limitation of some sort and, if so, the nature of that limitation.[51] Consistently with the judicial values discussed earlier in this tribute, the opinion adhered to the court's constitutional construction methodology, carefully reviewing each of the relevant considerations and then clearly summarizing those considerations before reaching an ultimate conclusion as to the meaning of the separate-vote requirement. The summary in particular is demonstrative of Justice Carson's continual efforts to provide a

> so desire, including modifying or repealing a provision of the Bill of Rights, so long as the proposed change or changes comply with the constitutional requirements for amending the constitution. . . . Our holding here is that Measure 40 contains two or more constitutional amendments that must be voted upon separately under Article XVII, section 1.[57]

Not surprisingly, that closing statement is consistent with the judicial values that Justice Carson demonstrated during his tenure on the court, discussed in this tribute—for example, his belief that the court's role was to construe statutory or constitutional provisions consistently with the intent of the legislature or the voters, rather than in accordance with any personal policy preference or general judicial philosophy.

In addition to invalidating Measure 40, the Oregon Supreme Court's decision in *Armatta* had a broader effect: In highlighting the Oregon Constitution's separate-vote requirement for constitutional amendments, it immediately impacted the nature of challenges to voter-initiated amendments—a common avenue of constitutional amendment in Oregon. That impact on the initiative-petition landscape has borne out in a series of separate-vote cases that the Oregon Supreme Court has decided since *Armatta*.[58] Ultimately, in deciding those cases, the court has built on the foundation and principles that Justice Carson set out in the *Armatta* decision.

III. CONCLUSION

Justice Carson's opinions speak volumes about his judicial values and his approach to deciding cases. Justice Carson approached each case methodically, reviewing and carefully considering the parties' briefs, his own research and examination of the law, and the opinions of his fellow justices. Justice Carson's deliberate writing always considered his audience, striving for law that was both workable and clear.

57. *Id.* at 68 (internal citations omitted).

58. *See* Lincoln Interagency Narcotics Team v. Kitzhaber, 145 P.3d 151 (Or. 2006); Meyer v. Bradbury, 142 P.3d 1031 (Or. 2006); League of Or. Cities v. State, 56 P.3d 892 (Or. 2002); Swett v. Bradbury, 43 P.3d 1094 (Or. 2002); Lehman v. Bradbury, 37 P.3d 989 (Or. 2002).

Justice Carson's mark on Oregon law, however, goes far beyond just his own opinions to include his contributions to the collective progress and development of Oregon jurisprudence over the last 24 years. During his tenure on the Oregon Supreme Court, Justice Carson contributed to the recognition of the primacy of state law, the development of methodical approaches to judicial decisionmaking, and the stability of Oregon law. Although Justice Carson would be quick to point out that the development of Oregon jurisprudence during his tenure on the supreme court is reflective of the collective efforts of the court as a whole, Justice Carson's judicial leadership and values have left a mark on Oregon jurisprudence that will stand the test of time. Justice Carson's retirement from the supreme court leaves a grateful Oregon benefiting from the legacy of his life of achievement, his devotion to public service, and his commitment to the rule of law.

CARSON, C.J., DISSENTING

KEITH M. GARZA*

I. INTRODUCTION

The title of this tribute arguably is more than a little misleading. In the course of his more than 14 years as Oregon's longest serving chief justice, the Honorable Wallace P. Carson, Jr. filed only one dissenting opinion. Indeed, during his nearly 25 years on Oregon's highest bench—and having been presented with thousands of opportunities to part company with his colleagues—Chief Justice Carson authored a meager nine dissents and joined in only 34 others.[59] So how can an essay about what is at best a sliver out of a quarter century's worth of jurisprudence advance an understanding about Chief Justice Carson's judicial philosophy and impact? It can in at least two ways.

First, the lack of dissenting material speaks volumes about Chief Justice Carson's view of what a state court of last resort, and an individual justice's role on that court, should be. As discussed in Section II below, for Chief Justice Carson, the Oregon Supreme Court first and foremost was and remains a law-announcing court. Consistently, with that defining view, he saw collegiality among the justices as going beyond mere pleasantries in the hallway and polite discussions at conference. Instead, for a law-announcing court to perform its function well, collegiality must be infused within the decisional process itself. In such an environment, the role of

separately filed opinions, though important, is limited.

Second, the few pages of dissenting text that Chief Justice Carson elected to leave to posterity themselves tell us something about his views of the highest function of a court of last resort. More than that, though, his dissenting opinions offer some of Chief Justice Carson's sharpest statements about the proper function of the judiciary in a constitutional government. And, perhaps most tellingly, his dissenting prose allows us an insight into Chief Justice Carson the man. There is something to the adage that "it is not how you win, but

II. GLEANING FROM RELATIVE SILENCE

Chief Justice Carson's view of the supreme court foremost as the law-announcing tribunal of this state, together with his understanding of what that view means for the day-to-day decision making at the court, I suspect is one forged out of his more than 40 years' worth of public service. That service included time spent in all three branches of Oregon's government. More than anything, it has always seemed to me that the polestar to which Chief Justice Carson has looked is the rule of law:

> Whether as a legislator, a lawyer in private practice, a member of the Oregon National Guard, or a judge, it has been impressed upon me consistently that ours is a government of laws. Unlike Plato, we do not search out philosopher kings; instead we rely on the rule of law to provide both the backbone of our government and the skin out of which we cannot grow. And with the same certainty that a state reflects the soul of its citizenry [as Plato said], so too is the state the sum of its laws and, by extension, its people.[62]

The judiciary's role in a government of laws—indeed, its emphatic "province and duty" according to Chief Justice John Marshall—is "to say what the law is."[63] But to Chief Justice Carson, the term judiciary does not cut thin enough. Trial judges, of whom he was one for five years, go it alone when they interpret and announce the law and do so without setting precedent. Appellate judges, however, are part of a collegial court and do set precedent. But, since 1969, we have two tiers of appellate adjudication in Oregon.[64] And that fact was not unimportant to Chief Justice Carson when it came to the role of second opinions in appellate judicial decisionmaking. He has said more than once that he appreciates dissents in court of appeals opinions. Dissents from that court serve the important purpose of assisting the supreme court in deciding whether to allow review.

Dissenting opinions in decisions from the supreme court, however, do not serve such a function. As to matters of state law, the law that the justices announce is not subject to further review except

62. *Id.*

63. Marbury v. Madison, 5 U.S. 137, 177 (1803).

64. 1969 Or. Laws ch. 198 (creating Oregon Court of Appeals).

by the Oregon Supreme Court itself. As to matters of federal law that might happen to present themselves, Chief Justice Carson has offered his own personal doubts as to the amount of attention that the United States Supreme Court would pay to the separate writings of state court justices in deciding whether to grant certiorari. However, having a state court of last resort announce state law unanimously whenever possible sends a clearer message to judges, lawyers, and litigants. Decisionmaking by something approaching consensus also promotes stability in the law and reduces the instances in which issues are re-litigated simply when the membership of the court changes.

If not already well-established during his tenure as an associate justice (or perhaps even before that), Chief Justice Carson's desire to have the supreme court speak with one voice steeled early into his service as chief justice. In a tribute to his predecessor, Chief Justice Edwin Peterson, co-authored with then-Justice Susan Graber, Chief Justice Carson had this to say:

> Leading a group of judges has been likened to herding cats. Each of the members of the supreme court is independently elected, and—not surprisingly—independent-minded in his or her approach to the court's tasks. In that potentially discordant environment, Chief Justice Peterson was a marvel of concordance. He coaxed and conciliated, commented and cajoled. In writing his own opinions, he was always receptive to new ideas, alternative approaches, and criticism. In critiquing the work of others, he offered fresh insights and sensible editing. He consistently sought consensus and a reduction in the number of separate opinions written by individual judges.[65]

In the early years of Chief Justice Carson's leadership, through the 1995-96 term, the court issued between 70 and 80 percent of its decisions unanimously. In 1997 and 1998, between 80 and 90 percent of the decisions were issued without separate opinion. From 1999 through 2005, on average, the court decided 90 percent of its cases with one opinion (including 97 percent unanimous decisions in 2001). Chief Justice Carson used the term "fractiousness" —the quality of

65. Wallace P. Carson, Jr. & Susan P. Graber, *A Tribute to Edwin J. Peterson*, 73 OR. L. REV. 731, 736 (1994).

being fractious, or "tending to cause trouble [. . . and] likely to function in unpredictable and troublesome ways" —to describe the court's unanimity in decision making.[66] His choice of that term seems particularly apt in understanding his support for unanimous decisions.

That is not to say that there was in Chief Justice Carson a slavish devotion to deciding a case unanimously at all costs. Section III, below, shows why that is not the case. Nor is the foregoing to say that his colleagues on the court had nothing or little to do with the court's "fractiousness" rating during his time as chief justice. (Either Chief Justice Carson was a masterful cat herder (he never has owned more than a single cat at a time), or his colleagues on the court shared in his vision and worked with him to create a model of decisionmaking that placed a high premium on unanimity.) And finally, it is not to say that a court striving to speak with one voice is a court without its critics. Finding consensus takes time and can lengthen the decisional process to the frustration of both the litigants and the public who want an answer to important questions of state law. Moreover, reaching consensus sometimes can mean agreeing to the narrowest issue, or the least common denominator, that a case presents. That, in turn, can have the effect of diluting the law that the court announces.

What all the above is to say is that Chief Justice Carson's view of the highest function of the Oregon Supreme Court is, like the way he lives his life, principled. One cannot help but wonder how many associate justices who joined the court with Chief Justice Carson at the helm shared his views when they first arrived, and how many came around to that way of thinking after being there a while. Although Piper, the collie that Chief Justice Carson and his wife Gloria have shared a home with for five years, may not like it, the Chief should consider adopting a few more cats. He almost certainly would do quite well keeping them in order.

III. PARTING COMPANY WITH THE MAJORITY

Judge Frank Coffin of the First Circuit has described appellate courts in terms of the "paradox of collegiality."[67] On the one hand, "the opinions of a truly collegial court are bound to be better in

66. WEBSTER'S THIRD NEW INT'L DICTIONARY 900 (unabridged ed. 2002).

67. FRANK M. COFFIN, ON APPEAL 229 (1994).

substance, style, and tone than the effusions of one judge supporting a result commanding the votes of a majority without any effort to harmonize nuanced differences of view."[68] On the other hand:

> [A] dissent . . . is more like a broadsword. It takes more resolution and commitment [than a concurrence] to wield it, and there is the expectation of drawing at least a little blood. In any event, there is a feeling of unjudicial glee as one shucks off the normal restraints of writing for a panel and proceeds to thrust and parry with gay abandon.[69]

Chief Justice Carson liked writing dissenting opinions. "They're fun," I remember him saying. He wrote not a single dissent, however, during the time that I spent with the Oregon Supreme Court. The several attempts I made to persuade him to part company with the rest of the court were politely declined. I vaguely recall once muttering to his judicial assistant as I left his chambers something to the effect of "I wish he would have more fun."

But a look at his separate opinions—his dissents and his concurrences—shows that both Justice and Chief Justice Carson did have some fun along the way. More than that, however, those opinions reflect the same principled approach that guided the other aspects of his judicial and administrative career. He wrote separately only when there was a good and proper purpose to be served.

A. WPC Dissents: An Overview

Some of the time, Chief Justice Carson parted company with the majority when, in his view, the court was wrong on the law. Examples of that include *State ex rel. Frohnmayer v. Oregon State Bar* (whether State Bar is "state agency" or "other public body" for purposes of public records law),[70] *Nissel v. Pearce* (whether a person

intoxicants stated a strict liability crime.[81] The majority concluded that the statute did not contain a scienter requirement.[82] Chief Justice Carson actually agreed with that analysis and, but for an intervening and in his view contrary Oregon Supreme Court decision (one in which he acknowledged he had joined), would have concluded likewise: "[A] lone dissenter does not have the power to overrule a case, and, accordingly, I must treat it as the law in Oregon."[83]

Another of Chief Justice Carson's dissents that seems to fall under the category of the "proper role of the court" is *Warm Springs Forest Products Industri*

> usages" of the Confederated Tribes, I would not speculate about how the tribes "believe that they would best be served" . . . in their deliberations about whether to conform their commercial law to Oregon's. The majority's views about how the tribe should decide that question of public policy are particularly regrettable because they are unnecessary.[89]

Finally, a couple of Chief Justice Carson's dissents were pedestrian: he believed that the majority incorrectly applied the facts at hand to the applicable law. One of those cases was a lawyer disciplinary proceeding in which Chief Justice Carson concluded the Oregon State Bar failed to prove by clear and convincing evidence that a lawyer knew a particular averment in an affidavit was false.[90] In the other, Chief Justice Carson, and two other justices, disagreed with the rest of the court that the particular wording of a jury instruction improperly required the jury to acquit on the primary offense first before considering lesser-included offenses.[91] The majority said yes; the dissenters said no.[92]

So concludes a brief overview of each of Chief Justice Carson's nine dissents. The brevity of that overview itself offers some testament to the fact that Chief Justice Carson walked the walk with respect to his view that a court of last resort best performs its law-announcing function when it speaku

B. WPC Dissents: Between the Lines

"Polite" is one of the adjectives most often used to describe

For the most part, however, when Chief Justice Carson wanted to get a message out to the bench, bar, and public, he did it in a workmanlike and easily understandable way, and usually, but not always, without fanfare. And for those who have known and spent time with Chief Justice Carson, that is entirely in keeping with who he is.[97]

IV. CONCLUSION

Justice William O. Douglas once wrote that "[t]he right to dissent is the only thing that makes life tolerable for a judge of an appellate court."[98] And there seems to be competition between at least two United States Supreme Court Justices, John Marshall Harlan and Oliver Wendell Holmes, Jr. for the title of "The Great Dissenter." In a culture that arguably tends to glamorize, or at least to publicize, dissent, Chief Justice Carson stands well out of the limelight. Chief Justice Carson used the separate opinion as a limited tool and for its historically accepted purpose. That is entirely consistent with his views of the judiciary generally and the Oregon Supreme Court specifically. And I, for one, think that we are the better for it.

TRIBUTE TO WALLY CARSON

NEIL BRYANT*

The following are my thoughts concerning Wally Carson from the perspective of a friend, lawyer, and legislator. Of Wally's many admirable qualities, the two I enjoy the most are his optimism and sense of humor. I always look forward to seeing him because I will leave the conversation smiling.

My first memory of Wally is as a Republican senator, when he was the minority leader. A famous photograph was taken at this time of the entire Republican caucus in a phone booth, and Senator Carson was their leader. If the Endangered Species Act had been passed at this time, the Republican senators would have been listed as endangered.

Some time later, in 1992, I was elected to the state senate to represent central Oo3T9enate rson fearsd tochaus drte th16.2(r)-078ive of 102 ski.12ena5.2(toucce18

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LAWYER-CLIENT CONFLICTS OF INTEREST LAW: CONTRIBUTIONS OF CHIEF JUSTICE WALLACE P. CARSON, JR. DURING A TIME OF DYNAMIC CHANGE

EDWIN J. PETERSON*

Wallace P. Carson, Jr. served as chief justice of the Supreme Court of Oregon for more than 14 years, from September 1, 1991 through December 31, 2005. He served on the court more than 24 years, from July 1, 1982 through December 31, 2006. His commitment to the bench, to the bar, and to society, as well as his convictions concerning honesty and integrity, and specifically, the honesty and integrity of Oregon lawyers and judges, leave a lasting thumbprint on Oregon's history.

From the beginning, he displayed a keen interest in the standards of performance of Oregon lawyers. Through much of the 1980s and 1990s, Justice and, later, Chief Justice Carson chaired an Oregon State Bar/Supreme Court of Oregon working group (commonly referred to as the DR/BR Committee), concerning the substantive and procedural rules of lawyers' ethics. During this time, dynamic changes occurred in the law concerning lawyer-client conflicts of interest. If all the Oregon rules of legal ethics were contained in one structure, the room reserved for lawyer-client conflicts of interest would be designed by Wallace P. Carson, Jr. He contributed immensely to the growth and development of lawyer-ethics law in this state, particularly in the areas of conflicts of interest.

THE OREGON LAWYER DISCIPLINE SYSTEM

ORS 9.527 invests the Supreme Court of Oregon with the responsibility to "disbar, suspend or reprimand" a bar member who has committed an act of misconduct specified in the statute, including a violation "of the rules of professional conduct adopted pursuant to

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ORS 9.490."[99] Former ORS 9.490(1), during much of the time referred to in this article, provided in part:

> (1) The board of governors, with the approval of the state bar given at any regular or special meeting, shall formulate rules of professional conduct, and when such rules are adopted by the Supreme Court, shall have power to enforce the same. Such rules shall be binding upon all members of the bar.[100]

Before 1995, "approval of the state bar given at any regular or special meeting" meant approval by the bar membership at a town-hall-type meeting, usually at the annual meeting of the Oregon State Bar. In 1995 the legislature amended ORS Chapter 9 to inaugurate a house of delegates system of governance for the state bar.[101] The legislature also amended ORS 9.490(1) to read as follows:

> (1) The board of governors, with the approval of the *house of delegates* given at any regular or special meeting, shall formulate rules of professional conduct, and when such rules are adopted by the Supreme Court, shall have power to enforce the same. Such rules shall be binding upon all members of the bar.[102]

Lawyers, therefore, can be disciplined for violating specified statutes (most of which are found in Oregon Revised Statutes Chapter 9), or for violating the Oregon Rules of Professional Conduct (formerly the Code of Professional Responsibility). This makes for an interesting mix of governmental power. The legislature created the Oregon State Bar by enacting a statute.[103] The Supreme Court of Oregon is a creature of the Oregon Constitution.[104] Pursuant to ORS 9.490(1), the supreme court adopts applicable rules of professional conduct, but only after the rules have first been "formulated" by the board of governors and approved by the house of delegates. The court, with the assistance and cooperation of the bar, enforces the rules.

99. OR. REV. STAT. § 9.527 (2005).

100. OR. REV. STAT. § 9.490(1) (2005) (amended 1995).

101. S*ee* OR. REV. STAT. §§ 9.136-990 (2005).

102. OR. REV. STAT. § 9.490(1) (emphasis added).

103. S*ee* OR. REV. STAT. §§ 9.005-755 (2005).

104. OR. CONST. art. VII, § 1.

The bar has a unique role. Local professional responsibility committees investigate the conduct of attorneys.[105] The state professional responsibility board reviews complaints about the

In 1970, the Supreme Court of Oregon adopted the Code of Professional Responsibility [hereinafter "Code"]. With amendments from time to time, the Code continued to govern the conduct of Oregon lawyers until 2005, when the court adopted the Oregon Rules of Professional Conduct. The road of permissible conduct under the Code was not always clear to practicing lawyers. It was not always clear to supreme court justices either.

In 1983, Arno H. Denecke, former chief justice of the Supreme Court of Oregon, wrote:

> The Oregon Code of Professional Responsibility was a positive first step when adopted. Nevertheless, modern complexities have made it inadequate, particularly for furnishing guidance in the most troublesome areas. . . . [T]he time has come to reexamine the basic tenets in this sensitive and perplexing area.[110]

He maintained that the Code "offers no guidance" in the areas of "conflict of interest problems with former clients."[111]

One year later, Thomas H. Tongue, former justice of the Supreme Court of Oregon, wrote specifically on the confusing state of the law concerning conflicts of interest under the Code.[112] He began by noting that the Supreme Court of Oregon had decided more than 40 cases involving conflicts of interest since 1970, stating that "[p]erhaps the most important development in the law of legal ethics . . . in recent years has been on the subject of lawyers' 'conflicts of interest.'"[113]

Quoting from *In re Jans*, Justice Tongue wrote that a cardinal rule of legal ethics says "[i]t is never proper for a lawyer to represent clients with conflicting interest no matter how carefully and thoroughly the lawyer discloses the possible effects and obtains consents."[114] He added that the holding in *In re Jans* went beyond the

Ethics 273 (2d ed. 1970)); *In re* Banks, 584 P.2d 284, 293 (Or. 1978); *In re* Hershberger, 606 P.2d 623, 626 (Or. 1980).

110. Arno H. Denecke, *Complexities of Modern Practice Require Changes in Oregon Ethics Code*, 19 WILLAMETTE L. REV. 621, 621 (1983).

111. *Id.* at 637.

112. Thomas H. Tongue, *Oregon "Conflict of Interest" Cases Under the 1970 Code of Professional Responsibility*, 20 WILLAMETTE L. REV. 391 (1984).

113. *Id.*

114. *Id.* (quoting *In re* Jans, 666 P.2d 830, 833 (Or. 1983).

express language of then DR 5-105(C) and DR 5-104, and that the *Jans* rule went "beyond what for many years has been regarded by lawyers as proper conduct, *as in cases in which two clients come to a lawyer and, to minimize the expense, ask him to prepare simple contracts between them* . . . . By forbidding such consent even upon consent after full disclosure, the court imposed new restrictions which appeared to prohibit these long-established practices."[115]

Justice Tongue was critical of the court for holding, in 1984, that "an attorney may represent multiple clients with *potentially* differing interests 'if it is *obvious* that he adequately can represent the interests of each and if each consents after full disclosure.'"[116] He asserted that the court had "disciplined [lawyers] for conduct which, prior to 1970, would not have been regarded as improper by many, if not most lawyers," and that "[i]n some other cases the court refused to discipline lawyers for conduct which, prior to 1970, would have been regarded as improper by many, if not most, lawyers."[117] Concluding that "[i]t is . . . difficult to reconcile the severe penalties . . . in some of such cases, with reprimands or dismissals in some other cases," he called for the Oregon State Bar and the supreme court to "give serious consideration to the adoption of substantial changes in that code of ethics . . . ."[118]

That was the confusing state of lawyer-client conflicts law in Oregon until 1985, when two positive and constructive decisions clarified the law concerning lawyer conflicts of interest. They are *In re Brandsness*[119] and *In re Johnson.*[120]

POST-1984 CONFLICT OF INTEREST D-1984

Board – responsible at the time for deciding claims of lawyer unethical conduct under procedural rules of the Oregon State Bar – concluded that the lawyer's representation of the wife ceased when he

> and
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> 3. The present matter is significantly related to a matter in which the accused represented the former client.[129]

The court concluded that a lawyer-client relationship previously existed between the lawyer and the wife, and that the representation of the husband put the lawyer in a position adverse to the former client. As to the third factor –whether the present matter was "significantly related" to the matter in which the lawyer had previously represented the former client– the court decided this issue by reference to two sub-tests.[130]

The first sub-test was matter specific, and prohibited the lawyer from representing a client against a former client if "[r]epresentation of the present client in the subsequent matter would, or would likely, inflict injury or damage upon the former client in any matter in which the lawyer previously represented the former client."[131] The second sub-test was "information specific," and prohibited the lawyer from representing a client against a former client if "[r]epresentation of the former client provided the lawyer with confidential information the use of which would, or would likely, inflict injury or damage upon the former client in the subsequent matter."[132] The court concluded that in representing the wife in the purchase and organization of the business "the accused's representation of [the wife] . . . was more than merely incidental to his representation of her husband" and, therefore, there was a matter-specific conflict.[133]

Brandsness gave lawyers and judges a clearer roadmap, concerning when lawyers could represent parties adverse to former clients.

In a January 29, 2007 email to the author, Jeffrey Sapiro, Manager of the Oregon State Bar Regulatory Services/Discipline Office, stated:

> The beauty of *Brandsness* was that it gave us a concrete methodology to analyze former client conflicts. Before that, debate over whether a former client conflict did or did not exist in any given set of facts was fairly nebulous, based primarily on the important but vague concept of client loyalty. *Brandsness* provided a more practical analytic tool. Even though the rules and terminology have changed, I still

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129. *Id.*

130. *Brandsness*, 702 P.2d at 1104.

34. *Id.*

35. *Id.*

133. *Id.*

> walk through the *Brandsness* test in my head whenever looking at a former client conflict problem.[134]

Two months later, the court further clarified lawyer-client conflicts law in *In re Johnson,*[135] a case involving an alleged conflict between *existing* clients. Concerning DR 5-105, the court noted the following:

> Since its adoption by this court in 1970, DR 5-105 has undergone a judicially-crafted metamorphosis. . . . The rule is couched in terms of the effect upon the exercise of the lawyer's independent judgment but has been interpreted to concern conflicts of interest which, in turn . . . are measured by conflict between the interests of two or more existing clients (a so-called 'open file' conflict).[136]

The court held that when the interests of two or more present clients are in actual conflict, the lawyer cannot represent either of them.[137] The court then referred to a different level of conflict –a "likely conflict"– stating: "Where the lawyer's independent professional judgment only is *likely* to be adversely affected, the

client against another existing client if the conflict was "likely," provided that both consent to the representation after full disclosure. The DR 5-105(D) amendment permitted a lawyer to represent a client against a former client whether there was an actual or likely conflict of interest, provided that both clients consented after full disclosure. "Full disclosure" was defined in DR 10-101(B) as follows:

> (B) "Full disclosure" means an explanation sufficient to apprise the recipient of the potential adverse impact on the recipient of the matter to which the recipient is asked to consent. Full disclosure shall also include a recommendation that the recipient seek independent legal advice to determine if consent should be given. Full disclosure shall be contemporaneously confirmed in writing.

There matters pretty much stood until the court adopted an entirely new body of ethical rules, the Oregon Rules of Professional Conduct, effective January 1, 2005.[143] Oregon Rules of Professional Conduct sections 1.7-1.11 retain, for the most part, the salient provisions of former DR 5-105.

CONCLUSION

The common law is, at times, a beautiful thing to behold. Rarely

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Matters are significantly related if either:

(1) Representation of the present client in the subsequent matter would, or would likely, inflict injury or damage upon the former client in connection with any proceeding, claim, controversy, transaction, investigation, charge, accusation, arrest or other particular matter in which the lawyer previously represented the former client; or

(2) Representation of the former client provided the lawyer with confidential information the use of which would, or would likely, inflict injury or damage upon the former client in the course of the subsequent matter.

(D) Former Client Conflicts - Permissive Representation. A lawyer may represent a client in instances otherwise prohibited by DR 5-105(C) when both the current client and the former client consent to the representation after full disclosure.

(E) Current Client Conflicts - Prohibition. Except as permitted by DR 5-105(F), a lawyer shall not represent multiple current clients in any matters in which their interests are in actual or likely conflict.

(F) Current Client Conflicts - Permissive Representation. A lawyer may represent multiple current clients in instances otherwise prohibited by DR 5-105(E) when their interests are not in actual conflict and when each client consents to the multiple representation after full disclosure . . . .

Supreme Court of Oregon Order No. 88-64, August 30, 1988.

143. For a copy of the rules, see http://www.osbar.org/docs/rulesregs/ORPC.pdf.

fast. Often unclear. It labors along, ultimately reaching workable results. Between 1970 and 2005, the Supreme Court of Oregon, in a series of decisions and rule changes, and with assistance from the bar, shaped the law of lawyer-client conflicts of interest into a coherent whole.

The Oregon State Bar became an integrated bar in 1935. From its inception, it has worked cooperatively with the Supreme Court of Oregon to ensure a qualified, honest, reliable, legal profession. Innumerable rule changes have been discussed, debated, and voted on by the bar and court since that time to improve the standards of conduct for Oregon lawyers and the processes used to evaluate, investigate and act on complaints about their conduct.

Justice and, later, Chief Justice Wallace P. Carson, Jr. made significant contributions to Oregon's system of lawyer discipline. He worked closely with the bar, in his always warm and friendly manner, in discharging the supreme court's "management" responsibilities to promulgate both substantive ethics rules for Oregon lawyers and procedural rules for lawyer disciplinary proceedings. In his role as a member of the court hearing appeals of cases involving alleged misconduct by Oregon lawyers, no one better understood the need for understandable court decisions and clear rules of professional conduct. His convictions and his dedication to drafting clear opinions and fair and workable rules were an example to all of us who worked with him. I doubt that there is (or ever will be) a plaque or award honoring Justice Carson for his work in the disciplinary arena, but he certainly deserves one.

Justice Carson's legacy is that improvements in the law come from hard work and a deep commitment to strong and honest communication between institutions with interrelated and interdependent roles in the processes involved. The Supreme Court of Oregon and Oregon State Bar would not be the strong and vibrant institutions they are today without the unwavering and decades-long personal commitment of Justice Carson to both.[144]

144. I sent a draft of this article to George Riemer, former General Counsel of the Oregon State Bar. He responded with his suggestions and with this closing comment, which I publish with his permission:

> I think you understate the contributions of Chief Justice Carson in the overall area of lawyer discipline. I cannot think of any justice that interacted with the organized bar on lawyer ethics and discipline issues over the last two decades more than Wally. The DR/BR committee was the forum for interaction between the court and bar on

POSTSCRIPT

Others will write of the humanity of Chief Justice Carson. I will, however, mention undertakings in which he played a significant role. The work of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System began early in his tenure as chief justice, in May 1992.[145] Its report stands as a monument to the courage of Chief Justice Carson and other Oregon lawyers and judges, who were willing to look at themselves and at the court system and ask such questions as, "Am I prejudiced?" and "Do people of color get a fair shake in Oregon courts?"

Promptly after the task force report issued in May 1994, he appointed a committee to implement the recommendations of the Task Force. That committee, originally chaired by then court of appeals judge and current Chief Justice Paul J. De Muniz, issued its first report in January 1996.[146] The committee, now known as the Access to Justice for All Committee, continues to this day.

In 1995 Chief Justice Carson also participated in the creation of the Oregon State Bar/Oregon Supreme Court Commission on Professionalism. He signed the order creating the commission and was one of the original commission members. He faithfully attends commission meetings.

Chief Justice Carson carried the law into the community. He willingly gave up evenings and weekends to represent Oregon's legal system at ceremonies, events, and community gatherings. He put a human face on the laws and systems that govern Oregon's citizens.

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these important issues. Wally chaired this committee throughout its tenure. Wally was the glue between the court and bar. He listened to the bar's concerns on innumerable issues, and he always worked to find solutions to identified problems. His legacy is that, working together, the court and bar can continue to improve an already effective lawyer disciplinary process. It is not perfect and never will be, but the justices have to maintain strong lines of communication with the organized bar to continue to do so. If the justices don't take the time to interact with the bar regarding the regulation of the profession, they abdicate their role as the ultimate authority for the proper conduct of lawyers in Oregon. Wally stands out as a judge who truly cared about how lawyers conducted themselves and also truly cared about the fairness of the process used to determine if a lawyer had in fact engaged in inappropriate conduct.

145. A complete copy of the Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System May 1994 may be found at 73 OR. L. REV. 823 (1994).

146. See the report at http://www.ojd.state.or.us/osca/cpsd/courtimprovement/access/documents/ICReport.pdf.

He spoke about the workings of the legal system and the courts in direct language that bridged the gap between citizens and the courts.

WALLACE P. CARSON, JR.—A CELEBRATION

JUSTICE W. MICHAEL GILLETTE*

The resignation as chief justice and subsequent retirement of the Honorable Wallace P. Carson, Jr.[147] from the Oregon Supreme Court represent a great many things to the legal life of Oregon, many of which are touched upon by the other contributors to this volume. I take the liberty of presuming that I have been asked to submit my own thoughts on those events because I have had the opportunity to work with Justice Carson—er, excuse me, Wally—on the supreme court for a long time and have come to know him well. Whether that or some other reason is the motivation, however, the privilege is one I happily accept.

Wally Carson is that rarity—a true and instinctive gentleman. He is kind to everyone, tolerant of everyone, encouraging to everyone. And so he has been throughout the third of a century during which I have had the chance to know him. The reasons for those qualities, apart from his own sunny and optimistic nature, are principally family. Wally is the scion of one of Salem's most prominent families, a family filled with lawyers who practiced law in Salem. And, from Wally's own stories of his childhood and family life, it seems obvious that the family also was one that placed the highest value on scholarship and public service. But it also is clear that the family concerned itself with manners. Respectful behavior toward others seems to have been a hallmark of what Wally saw and heard from his earliest days. Those lessons took.

Wally had the opportunity to practice law with his father and uncle while he took his first fling at public service, gaining election to the Oregon House of Representatives. He followed that with election to the Oregon State Senate. When I first met him, his party was in a

* The Honorable W. Michael Gillette has been an associate justice of the Oregon Supreme Court since 1986. Prior to his appointment to the supreme court, Justice Gillette served on the Oregon Court of Appeals for more than nine years. Before becoming a judge, Justice Gillette held numerous positions with the Oregon Department of Justice, including Solicitor General and Chief Trial Counsel. He also served as Assistant Attorney General in American Samoa and as a Deputy District Attorney in Multnomah County. Earlier, he practiced law in Portland, Oregon, with the law firm of Rives and Rogers. Justice Gillette graduated from Whitman College in 1963 (Bachelor of Arts) and from Harvard Law School in 1966.

147. Hereinafter commonly referred to—because he would not have it any other way—as "Wally."

As a colleague, Wally was just what anyone who knew him would expect. Philosophically and intellectually, he had no set agenda. He went where the law (as he understood it) took him. He was as open-minded a human being as anyone could ask—comfortable in his own mind, but less interested in winning an argument than in getting the answer right. And he continued his interest in writing field manuals—his opinions were characterized, more than most others, by an effort to describe what should happen next. (He also had a particularly charming eccentricity—he loved maps. Thus, when it came time for the court at its weekly conference to decide whether to allow review in a decision of the court of appeals, the petition for review was virtually assured of at least one affirmative vote if it had a map in it. A few lawyers, aware of this characteristic, even began (somewhat whimsically) to attach maps to their briefs when the maps had nothing to do with the case.)

With respect to others' opinions, Wally was unfailingly tolerant, trying to concentrate on the opinions' principal analytical points, not on their style. His comments and recommendations always had a practical turn, bringing some of us back from abstraction with the reminder that real judges and real lawyers had to live with what we wrote. Whenever any opinion of the supreme court had a very practical aspect, Wally was probably a contributor.

I have not tried to write this brief appreciation of Wally objectively, because that would lie beyond my poor powers. I revere him as a human being and treasure him as a colleague. He has been, he is, and he always shall be my friend.

And how shall I summarize my friend? Wallace P. Carson, Jr. is a kindly, bright, gentle, unfailingly decent, wholly dedicated public servant whom nothing daunts, whom nothing defeats, who readily gives intellectual quarter but who neither asks nor requires it for himself. He has served his state with a steadfast dedication to its future. He has made a life of the law and, in doing so, brought the law to life.

So might it be said of all of us.