

Observing Appellate Opinions From Below the Bench[†]

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THIS ARTICLE is the result of a summons to state what is wrong with appellate opinions—not to discuss them with balance, suspended judgment, or cool objectivity, but to proclaim their faults and vices. A summons like that leaves an uncloistered practitioner nonplussed. Knowledge that he must continue to practice before judges warns him to be discreet. Fidelity to the summons commands him not to be. I have chosen to be faithful to the call, confident at the moment of decision that others would rise to challenge overstatement, and content at the moment of publication that others have already offered a counterpoise.¹

What, then, is there to say about judicial opinions? Does one speak of style? There are all kinds of styles. One of the commonest is the heavy footed legalese, with the “suches” and the “saids,” the “hereins” and the “theretofores.” But it ill befits a lawyer to throw stones at *that* glass house. By way of reaction, there is the judge who overindulges a literary bent by excursions into irrelevant history or the use of clever, but amorphous, phrases that either say nothing at all or endlessly bedevil clear thought to the misery of succeeding courts and counsel. I can remember an opinion in a National Labor Relations Board case that started off with the tidbit that in 1755 Admiral Byng was shot on his quarterdeck for cowardice. I never did find out what that had to do with the decision.

There is also a growing trend toward constructing an opinion like a brief, harnessed in all the paraphernalia of chapters, headings, and footnotes. With that we come a long way from Justice Holmes’ ideal of what an opinion should be when he mildly protested to Brandeis that “an opinion should . . . [not] be like an essay with footnotes, but rather should be *quasi* an oral utterance.”²

Then there is the opinion manufactured in what Judge Cardozo, I believe, called the “style agglutinative,” by scissors and paste pot. In conse-

[†] Based on an address before the Judicial Conference of the Tenth Judicial Circuit of the United States at Oklahoma City, Oklahoma, July 6, 1961, printed verbatim in 32 OKLA. S.B.J. 1551 (1961).

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¹ See Traynor, *No Magic Words Could Do It Justice*, 49 CALIF. L. REV. 615 (1961); McKay, Book Review, 49 CALIF. L. REV. 778 (1961) (reviewing LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960)).

² 1 HOLMES-LASKI LETTERS 675 (Howe ed. 1953).

quence, there are notable judges whose opinions vary both in style and legal attainment according to the brief of the party for whom they have decided to decide; the opinion consists of reassembled segments clipped from the prevailing briefs.

But I shall not speak of style. As Justice Holmes once plaintively wrote to Harold Laski,

In most cases the difficulty is rather with the writing than with the thinking . . . I am amused (between ourselves) at some of the rhetorical changes suggested [in my opinions by my brethren] . . . I am pretty accommodating in cutting out even thought that I think important, but *a man must be allowed his own style*.³

"Style," it was said some 200 years ago, "is the man himself." A judge's style is the judge, and were I to criticize style, I would be criticizing judges. And that is not what I intend to do—at least not in that way.

Forsaking a discussion of style of judicial opinions, I turn to consider what purpose or function the lawyer expects appellate opinions to perform. Three functions readily come to mind. The functions of an appellate opinion are to state the law, to mollify the litigants, and to make the judges think. And the purpose of this paper is to explore the question whether appellate opinions in fact discharge these functions. And how far? And in exploring those questions I describe what some thirty-two years of observation and reflection tell me is going on before our eyes. Of course, what I am going to say is not true of all opinions, by any means. With over 3000 a year in the federal appellate courts alone, there are bound to be some beyond criticism. But there ought to be immeasurably more.

At first blush one would say that in a system of jurisprudence such as ours, *a* function of the appellate opinion is to "state the Law"; in fact, that this is *the* function. This seems so obvious as to be a platitude and a truism. It is indeed a platitude, but I am afraid that it is not true. Why not true? one may ask. Where else are the Bench and Bar to find their precedents, where the lawyer guides for advice and the judge guides for decision? But in fact decisions are fast ceasing to be precedents.

I was deflowered of my innocence in the very first case I ever argued, over thirty years ago. On a demurrer to a complaint in the state court I smugly cited a decision of the California Supreme Court squarely in point, only to be told by the judge, "I know. That's what it says. But I don't like it, and I won't follow it." But despite that shock whose tremors I still feel, I do not refer to that kind of thing.

Nor do I refer to a foursquare habit Courts of Ultimate Error are developing of overruling cases they do not like, a habit whereby, in Justice

³ 2 HOLMES-LASKI LETTERS 938-39 (Howe ed. 1953). (Emphasis added.)

Owen Roberts' words, an opinion is like a "restricted railroad ticket, good for this day and train only."⁴ The power of Courts of Ultimate Error, like the Supreme Court of the United States and, in the bulk of their actions, state supreme courts, is limited only by self-restraint, and self-restraint is like the lady in Byron's *Don Juan*. While whispering "I ne'er will yield," it doth often yield.⁵

What I do refer to when I suggest that opinions are coming less and less to "state the law" is the fact that where one arrives depends upon the place where he starts and the train that he takes. The conclusion one reaches depends on the premises he selects. Holmes often said that he would "admit any general proposition that anyone wants to lay down and decide the case either way."⁶

The bald fact is that there is such an enormous quantity of law, such a vast arsenal of supposed principles, that one does not have to overrule a precedent. There is a much simpler procedure. You simply ignore it.

A. P. Herbert, in his *Misleading Cases in the Common Law*, has the Lord Chancellor utter these words in one of his imaginary opinions:

Now, I have had occasion to refer before to the curious delusion that the British subject has a number of rights and liberties which entitle him to behave as he likes so long as he does no specific injury or harm. There are few, if any, such rights, and in a public street there are none; for there is no conduct in a public thoroughfare which cannot easily be brought into some unlawful category, however vague. If the subject remains motionless he is loitering or causing an obstruction; if he moves rapidly he is doing something which is likely to cause a crowd or a breach of the peace; if his glance is affectionate he is annoying, and if it is hostile he is menacing, and in both cases he is insulting; if he keeps himself to himself he is a suspicious character, and if he goes about with two others or more he may be (a) a conspiracy or (b) an obstruction or (c) an unlawful assembly; if he begs without singing he is a vagrant, and if he sings without begging he is a nuisance.⁷

And so it is. There is hardly any set of facts that cannot be made to look right or wrong, actionable or not, depending on what rules one wishes to highlight and what one wishes to ignore. One need not fall back on humorists like Herbert for illustration. I select an example that came across my desk at the moment of writing this paper. Everyone knows the elementary principle that courts do not decide moot cases. Why? Because to do so would be to give advisory opinions, and this courts may not do; to do so

⁴ *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (dissenting opinion).

⁵ BYRON, *DON JUAN*, canto I, stanza 117, line 8: "And whispering 'I will ne'er consent'—consented."

⁶ 1 HOLMES-LASKI LETTERS 390 (Howe ed. 1953).

⁷ HERBERT, *MISLEADING CASES IN THE COMMON LAW* 189 (1930).

would exceed the judicial power.⁸ But of late years we hear of another rule; if the issue arises in a kind of case that will ordinarily become moot before it can be appealed, as in labor controversies, and if the issue is thought to be of "public importance" so that the public should be advised what the law is, then the case is said not to be moot.⁹ In other words, courts will give advisory opinions if they want to. Indeed, other than certain rules of the law merchant about bills and notes, this may well be one of the few rules to which a practitioner may cling with certainty: Courts will do what they want to do.

It is a poor judge indeed who cannot write an opinion persuasive on its face; he need merely stand mute about principles that lead to an undesired conclusion and invoke a body of law that logically leads to a different one. And if that body of law would not muster up to the job were all the facts stated, it is easy not to state all the facts. The face of the opinion never tells the passing reader.

Anyone can personally give examples without end. In a case that now looms large in legal literature, I can recall vainly opposing a preliminary injunction. Yet, only a little later, I read an opinion in another case by the identical judge denying a preliminary injunction, in which he relied on the very citations and principles I had so vainly submitted to him and which he had not then even mentioned.

I can recall an oral argument in the United States Supreme Court where I insisted that the Court could not affirm the judgment from which I was appealing unless it overruled certain of its own decisions. One of the justices replied from the bench, "You are right, we would have to overrule them, and we should." And then when the Court's opinion came down—affirming, I sadly recall—it simply said, "We put those cases to one side."¹⁰ It did not say, "we overrule them." It did not say, "they are distinguishable for this or that reason." It did not say, as it might, "Other times, other rules" or with the Preacher of Ecclesiastes, "To everything there is a season."¹¹ It said, with sublime simplicity, "we put them to one side"—inside, outside or offside, I have often been asked and have never known.

I do not mean that opinions never serve as precedents. They often are the guide and the only guide one has in threading one's way through new legislation, as the courts slowly start grinding it up—or down. But one becomes a lawyer only when he has sadly learned that nothing is more misleading than a case directly in point.

⁸ 12 U.S. SUPREME COURT DIGEST, *Supreme Court of the United States* § 11 (1949).

⁹ See, e.g., *Di Giorgio Fruit Corp. v. Department of Employment*, 56 A.C. 43, 47, 362 P.2d 487, 489, 13 Cal. Rptr. 663, 665 (1961).

¹⁰ *California State Auto. Ass'n v. Maloney*, 341 U.S. 105, 108 (1951).

¹¹ *Ecclesiastes* 3:1.

An eminent teacher of law has recently insisted that the work of appellate courts is "reckonable,"¹² and a distinguished judge has asserted that "the lawyer who troubles to read with care the appellate opinions pertinent to his client's problem is in a fair way to predict the outcome and hence the risks of litigation."¹³ The time-worn practitioner may be forgiven a raised eyebrow. I have elsewhere had occasion to note that the dockets are full of cases that win or lose themselves and that only ignorance, ineptness, or stubbornness of litigant or counsel brings them into the courts at all.¹⁴ But apart from the notable exception of that kind of case, the practicing attorney may well murmur to himself that the experience of one whose daily duty it is to make predictions in order to counsel well is quite different from that of judge or teacher, who has no such duty at all.

Well, if the function of the judicial opinion is not to serve as a lamp to the dim of sight and a guidepost to the lost, then surely it serves another purpose. It serves to mollify the litigants. It tells them, their counsel, and the court below why the judgment has been affirmed or reversed. It tells the losing party where and why his arguments were in error. It serves that most important function of seeing that the law not only does justice but shows that it does justice.

But does it? Of course, no losing attorney ever thought well of the court's opinion. But my observations go beyond the fact that the common law allows counsel three weeks of grousing. Over and over again important principles of law are pronounced in cases where the matter had either not been briefed at all or only sketchily. Often, encountering in opinions statements of law that surprised me, I have gone to the briefs to see how the matter was argued, only to find that they were empty on the subject or gave the most cursory discussion.

Take, for example, *Conley v. Gibson*.¹⁵ There the Supreme Court held that rule 8 of the Federal Rules of Civil Procedure, which prescribes what is necessary to state a claim for relief, established "notice pleading." If in the complaint the plaintiff merely says, "I am unhappy," and adds, "and I can be made happy if defendant will give me something," that is notice pleading. Some years before *Conley v. Gibson*, at an annual Judicial Conference of the Ninth Circuit, there was a thorough examination of rule 8. In the report of the discussion I am quoted as saying "There is . . . no sound justification for construing Rule 8 as creating 'notice pleading.'"¹⁶

¹² LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 4 (1960).

¹³ Traynor, *No Magic Words Could Do It Justice*, 49 CALIF. L. REV. 615, 623 (1961).

¹⁴ Lasky, *Essentials of Successful Trial Advocacy*, in *CALIFORNIA CIVIL PROCEDURE DURING TRIAL* (Cont. Ed. Bar 1960).

¹⁵ 355 U.S. 41 (1957).

¹⁶ 13 F.R.D. 253, 276 (1952).

This was a conclusion I reached after a careful objective study (no one had paid me a fee). For a number of years thereafter the Ninth Circuit and others required a little sinew in a complaint,¹⁷ until *Conley v. Gibson* shot the horse out from underneath us. I then consulted the briefs in *Conley v. Gibson* to see how much of the literature on the subject, how much of the pros and cons, had been brought before the court. They contained—nothing, not a syllable. *Conley v. Gibson* is now a famous case, for this precedent, on an important matter never argued. Justice Hugo L. Black, after reading a copy of the present paper as delivered at the Judicial Conference of the Tenth Circuit, has written that

After reading your speech, I sent to our library for the original briefs and records for the *Conley* case and I agree that I found no discussion in the briefs of your phrase, "notice pleading." [The phrase is the opinion's.] As our opinion pointed out, however, there was argument that the complaint had been properly dismissed originally because of its alleged failure to set forth specific facts to support its general allegations of discrimination. After looking once more at the complaint in that case, I am inclined to believe that *Conley v. Gibson* is not an impressive illustration to support the general thesis against appellate court decision of points not fully briefed by counsel. In fact I have to admit that I think Mr. Herbert could have written a very excellent humorous story about the case of *Conley v. Gibson* had the lower court's dismissal of that case been affirmed under the circumstances shown by the full record and briefs, or even, had that particular question been dignified by setting the case down for reargument.

I doubt not, as a specific case, *Conley v. Gibson* was correctly decided. But what it is endlessly cited for and what makes it famous is not its decision of the particular case but its pronouncement about an important rule of procedure, unbriefed and unargued.

On this matter I feel strongly that, if a court thinks of a point that has not been argued, it should call on counsel for their views before basing a decision on that point; it might well get enlightenment.

Of course, there are famous examples where courts have wanted no enlightenment; the court has simply seized on the case before it as a convenient vehicle to change the law. And were it not the particular case it would have been another. Quick to mind come cases like *Erie R.R. v. Tompkins*,¹⁸ famous for its holding that federal courts in diversity cases are bound by the views of the state court on common law questions, a point that had not been argued at all. Just the other day, in *Mapp v. Ohio*,¹⁹ the Supreme Court overruled the long standing rule that the federal constitution does not exclude illegally seized evidence in state courts. Here, and in

¹⁷ *Steiner v. 20th Century-Fox Film Corp.*, 220 F.2d 105 (9th Cir. 1955); *Sidebotham v. Robison*, 216 F.2d 816 (9th Cir. 1954); *Gold Seal Co. v. Weeks*, 209 F.2d 802 (D.C. Cir. 1954).

¹⁸ 304 U.S. 64 (1938).

¹⁹ 367 U.S. 643 (1961).

the *du Pont-General Motors* case,²⁰ the crucial point of the decision had been barely mentioned in the briefs.

A curious converse is that opinions frequently duck a question that has been thoroughly argued and rest the decision on a relative trifle. More than once I have seen elaborate research given to what seemed to me to be an important question to which elaborate and, I thought, scholarly treatment had been given in the briefs. And lo! The subsequent opinion of the court did not even mention the point, but went off on some other ground, sometimes to my satisfaction, sometimes not. And later I have seen the very issue decided, often as not wrongly, in a case where the point was only incidental or not argued at all.

The conclusion to be deduced is that you can lead a horse to water but you cannot make it drink. You can lead a court to the pure fountain of limpid truth but you cannot make it swallow what it does not like. Is it unfair to say that courts often shy away from deciding questions where the conclusion that seems unavoidable is one that they do not wish to reach, and will await a time when the error of deciding the way they wish has not been made so starkly evident? I can recall a judge of one of our state appellate courts remarking to me at a dinner table, "Your briefs are always hard to get around," and my wry reply, "But you always manage to do so, don't you?"

I know that there is a Law of Judicial Parsimony, which states that a court should decide no more than it must. That law has merit, for it prevents courts from deciding matters not thoroughly presented. But sometimes courts extend this "law" to the point of deciding no more than is necessary to get the case off the desk. Judicial Parsimony then becomes judicial shortchange. And this often happens. Litigants are entitled to an opinion that charts a course for them to follow or tells them where they stand. And too often they do not get it. The court's opinion slithers out through some pinhole, and back the case goes for further anguished and expensive litigation. I have recently brought to a conclusion certain important litigation that had been going on for seventy years. It first reached the California Supreme Court in 1904, reached the appellate courts four times afterward, and even found its way into the federal courts before it finally ended with a decision on the merits that could have been rendered on the first appeal, fifty-six years ago.²¹ A year ago in the *Anheuser-Busch*²² case

²⁰ *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

²¹ *Mulcahy v. Hibernia Sav. & Loan Soc'y*, 144 Cal. 219, 77 Pac. 910 (1904); *Maguire v. Hibernia Sav. & Loan Soc'y*, 23 Cal. 2d 719, 146 P.2d 763 (1944); *Bennett v. Hibernia Bank*, 47 Cal. 2d 540, 305 P.2d 20 (1956); *Doyle v. Hibernia Bank*, 156 Cal. App. 2d 16, 319 P.2d 412 (1957); *Spencer v. Hibernia Bank*, 186 Cal. App. 2d 702, 9 Cal. Rptr. 867 (1960); *Gentry v. Hibernia Bank*, 152 F. Supp. 469 (N.D. Cal. 1957).

²² *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960).

the Supreme Court resolved a conflict of interpretation of the Robinson-Patman Act between the Tenth Circuit²³ and the Seventh,²⁴ but limited its decision so narrowly that the bar was left in a complete quandary on what to advise clients. *Anheuser-Busch* then went back to the Court of Appeals, was decided by the same court for the same party as before,²⁵ and this time the Solicitor General refused to apply for certiorari. In the decisions rendered in the Supreme Court on the last day of the 1960 term both Justice Black and Justice Harlan complained of decisions that promised nothing but further aggravated litigation.²⁶

And so in this Odyssey, this search for some still living function of the judicial opinion, I come to another possibility. The function of an opinion is to "make the judges think." This, I believe, is the idea underlying a provision of the California Constitution²⁷ and the constitutions of other states requiring appellate courts to write opinions in all cases. Where a judge need write no opinion, his judgment may be faulty. Forced to reason his way step by step and set down these steps in black and white, he is compelled to put salt on the tail of his reasoning to keep it from fluttering away. In the passage I quoted earlier Holmes said that the difficulty is with the writing rather than the thinking. I am sure he meant that for the conscientious man the writing tests the thinking.²⁸

I know that, as a lawyer called on for a legal opinion, I have more than once started with a preconceived conclusion, only to find, as I wrote the opinion in longhand, that the opposite conclusion insisted on appearing. But a lawyer's opinion to his client must observe a Spartan objectivity. His ipse dixit lends no divinity to his conclusion. Quite to the contrary, an appellate court's conclusion ordinarily is self-validating. Its mere say-so makes it so.

Recently a friend—the director of an art gallery, of all things—disclosed his shady past to me. He had studied law, but had abandoned it because, said he, it seemed to him that judicial opinions were an elaborate screen thrown up to conceal the true reasons for the court's decision. I marvelled at the observation because I have sometimes fought manfully against a similar horrid suspicion. How much truth there is in this judgment only judges can know. Those on the outside can only guess from appearances—

²³ *Atlas Bldg. Prod. Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959).

²⁴ *Anheuser-Busch, Inc. v. FTC*, 265 F.2d 677 (7th Cir. 1959), *rev'd*, 363 U.S. 536 (1960).

²⁵ *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835 (7th Cir. 1961).

²⁶ Black, J., dissenting in *International Ass'n of Machinists v. Street*, 367 U.S. 740, 785 (1961) and *Lathrop v. Donohue*, 367 U.S. 820, 865-66 (1961); Harlan, J., concurring in the judgment in *Lathrop v. Donohue*, *supra* at 848.

²⁷ CAL. CONST. art. VI, § 24.

²⁸ Responding to this paper at the panel discussion where it was originally delivered, a judge of one of the Federal Courts of Appeals said (confessed?) that judges often reach a conclusion and then sit down to rationalize it in an opinion, only to find that the conclusion will not "jell."

or infer from incautious indiscretions of judges' law clerks. But I wonder how often a court's conclusion has been reached first and then an opinion constructed to support the conclusion according to traditional patterns and techniques of the law. Like Procrustes and his iron bed, the opinion lops off some of the facts or some of the law if they are too much for the desired conclusion or stretches them if they fall somewhat short.

While this paper was being gestated, I saw the opinion of a state trial judge. The plaintiff, who prevailed, assailed a statute as having been lobbied through the legislature by a pressure group for the purpose of handicapping competition. The trial court's opinion addressed itself to an argument of the defendants and with refreshing candor said

However appealing the practical answer to this argument may be—that it only evidences the strength of the lobby . . . —juridicial precepts demand that the answer be sought elsewhere.

In other words, since accepted legal techniques would not permit it to ignore a statute simply because it was an unfair piece of pressure group legislation, the court placed its decision on other grounds. It "interpreted" the statute. While I think it interpreted the statute rightly—a partner of mine represented the prevailing party—nevertheless, with thousands of canons of interpretation to be found in Sutherland's three volumes on *Statutory Construction*,²⁹ "interpretation" is a pretty supple instrument.

Opinions are rarely so candid as was this one. Judicial opinions have perhaps been assuming the nature of a fugue. A fugue, one may define for the benefit of those made tone deaf by years of listening to legal jargon, is a musical form in which one theme appears on the surface but quite another is subtly going on below. This judicial phenomenon makes the lawyer's task both onerous and perhaps impossible. More and more lawyers feel that considerations which would be spurned if openly presented are what in fact produce the decision. Yet counsel does not dare either to invoke these considerations openly or to answer them openly, for fear of being regarded as imputing a non-judicial attitude to the court.

In consequence briefs, arguments, and opinions almost resemble an elaborate formalized, oriental, conventional dance, and one must be specially trained to interpret the meaning of it all.

Too often one can only speculate about the unstated considerations that produced the decision. Occasionally we know. My mind turns to the recent suits arising out of cases of poliomyelitis caused by use of Salk polio vaccine. Juries repeatedly found that the defendant manufacturer, Cutter Laboratories, was utterly innocent of fault, that it had exercised extreme caution. The cardinal and unique facts of the case were that Cutter had simply

²⁹ SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (3d ed. 1943).

taken Salk's procedures and theories and the requirements of the U.S. Public Health Service, as prescribed for it by the government, and meticulously prepared the vaccine accordingly. Yet an absolute liability was fastened on Cutter by a generous extension of the doctrine of implied sales warranties. A sizeable literature tells us that the animating impulse behind the decisions extending products liability is the assumption that the manufacturer can better stand the loss by hiking prices or by carrying insurance. But suppose a defendant were to call expert witnesses to show that prices could not be hiked, or that insurance was not obtainable, or that the assumption was otherwise false. Some pretty sober articles have been written showing how false the assumption can be.³⁰ I say, suppose a defendant offered such evidence. Does anyone doubt that it would be rejected as irrelevant?

When the *Cutter* opinion issued on appeal,³¹ there was no mention at all of the cardinal facts just mentioned, the facts that made the case so dreadfully important. For aught that the opinion disclosed, the case was a run of the mill products liability case. As was vainly protested in a petition for rehearing, the opinion was "like a performance of 'Hamlet' without a Hamlet."

Often opinions give even less satisfaction. Sometimes no reasoning conforming to accepted legal techniques can be found to reach a desired conclusion. Then the conclusion is reached by fiat. And the fiat is set forth in words that, according to rules of grammar, form a sentence, but, according to rules of reason, form no sense, simply saying nothing at all. In his lecture "No Magic Words Could Do It Justice,"³² Justice Traynor deplors the use of "magic words" in lieu of painstaking analysis. "Magic words" or non-sense, are they not the same? And while Justice Traynor was speaking of "magic words from the legal lore of the year before much too long ago"³³ being used to perpetuate dead law, quite as much non-sense is uttered to rip new law from an unripe womb by Caesarian section.

I was first introduced to the phenomenon of sententious non-sense by Wiley Rutledge, then my teacher, later Justice of the United States Supreme Court, when he called attention to a passage in Chief Justice White's opinion in the famous *Standard Oil* case,³⁴ which laid down the Rule of

³⁰ For example, Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172, 1176-77 (1952):

No one has suggested that the courts hear proof in each case on the risk bearing capacity of the particular litigants If such issues were contested, trials would be long and costly and often beyond the competence of judge and jury.

³¹ *Gottsdanker v. Cutter Labs.*, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960).

³² Traynor, *No Magic Words Could Do It Justice*, 49 CALIF. L. REV. 615 (1961).

³³ *Id.* at 621.

³⁴ *Standard Oil Co. v. United States*, 221 U.S. 1 (1910).

Reason for interpreting the Sherman Act. Prior decisions allowed no leeway from a strict application of the law and to establish his Rule of Reason White had to overrule them. This he did by saying of the rule established by those cases and his Rule of Reason:

From this it follows, since . . . [the two rules], in their ultimate aspect, come to one and the same thing, that the difference between the two is therefore only that which obtains between things which do not differ at all.³⁵

By the time the reader recovers from the staggering blow to his reason of such a statement, he has been run over by fifteen more pages of opinion.

Chief Justice Hughes' later opinions often followed a similar technique, like his decision in the *Gold Clause* cases.³⁶ Reading them seemed to me like riding a train through the Rockies. Everything is clear, the sun is shining brightly. Suddenly all goes black. You are in a tunnel, and when you emerge you have arrived at your destination. But how?

Every day one can pluck examples from the advance sheets. One of the commonest runs about like this:

Counsel argues that every man has the right to act thus and so. True, he may, and it is equally true that the cases uniformly so hold. But his conduct must be legitimate, and here it was not.

Of course, whether the conduct is illegitimate is precisely the question in hand. If a man has a right to act thus and so, his action is legitimate. How his conduct has become illegitimate, beyond mere say-so, we are not told.

Let me give you some recent examples picked up at random. In a case involving refusal to sell, where there was a finding that the refusal was not the result of any combination, conspiracy, or attempt to combine or conspire with anyone, the court said:

The law recognizes that a manufacturer, in the battle for business, has a right to sell to whom he pleases. It follows that he has a right to stop dealing with a dealer because he thinks the dealer is acting unfairly in trying to undermine his trade. . . . He is, however, limited to a legitimate use of this weapon. . . . [A] manufacturer's right to stop selling to a wholesaler can be used legitimately; but it may not be used to accomplish an unlawful purpose.³⁷

Or take this one from one of the opinions in the recent *Sunday Blue Law* cases:

The religious regime of every group must be respected—unless it crosses the line of criminal conduct.³⁸

³⁵ *Id.* at 66.

³⁶ *Norman v. Baltimore & O. R.R.*, 294 U.S. 240 (1935); *Perry v. United States*, 294 U.S. 330 (1935).

³⁷ *A. C. Becken Co. v. Gemex Corp.*, 272 F.2d 1, 3-4 (7th Cir. 1959).

³⁸ *McGowan v. Maryland*, 366 U.S. 420, 575 (1961). (Douglas, J., dissenting.)

Of course, the very question in the case is whether the conduct is criminal. If the law under consideration was valid, the conduct *was* criminal. The ultimate conclusion of the particular opinion is, to my mind, correct, but a statement like this does nothing to reach it.

Opinions often dispose of a point by the statement, "It is well settled that so and so is true." Where this is literally true, no more need be said; the short statement is enough. But sometimes the words must be read idiomatically. They are like the radio announcer's sepulchral statement, "When you hear the sound of the gong, it will be ten seconds after six." In other words, "when you have read these words, it will be well settled that so and so is true." Or "We have just done it with our little hatchet."

Sometimes not even this much is done; after stating a contention of the parties, an opinion will dispose of it by the mere Olympian pronouncement, "We hold otherwise."

At this juncture I can imagine some readers fretting that in the guise of talking about judicial opinions I have been talking about the judicial process. My plea is one of confession and avoidance. I have been doing exactly what judicial opinions often do: In the guise of saying one thing, I have actually been saying another. And yet, paradoxically, I have come to a fourth function of the appellate opinion.

The learning of James Fenimore Cooper's *Leatherstocking Tales* may be more valuable to a practitioner than a comprehensive knowledge of Williston or Wigmore or the ability to speak on terms of easy familiarity with the sections of the Internal Revenue Code. The practitioner may guide his client better if he examines the ground for broken twigs to see where the trail goes or holds up a moistened finger to the breeze to see whence the wind blows. He will look to opinions for bent twigs and rustling leaves rather than for signposts or formal weather predictions.³⁹

I wonder whether law is any longer a scientific set of principles, the culmination of an elaborate structure built up patiently over the ages by countless conscientious men by the application of thought and reason. Maybe it never was. But such was the ideal and the hope, and one who loves the law as I do would be grieved to think it a lost ideal. Law may have more and more become a procedure for putting into effect, by force of the state, views of those who command the power to utter them of what is good for society. Perhaps we ask too much of law when we ask it to be a system for doing justice. Perhaps it is enough to be a method of settling quarrels without the drawing of swords in the streets. I can remember asking a jus-

³⁹ Compare Justice Traynor's statement that "many a thoughtful lawyer has developed a sense of the trend of precedent reliable enough to assure a high degree of correlation between his predictions and actual decisions." Traynor, *supra* note 32, at 623.

tice of the California Supreme Court, at a dinner table, what percentage of the cases he thought was properly decided. He countered, "Do you mean 'justly,' or according to law?" After a quick double take I replied, "either way." He said, "fifty per cent." And I agreed, although thinking, perhaps, of the other fifty per cent. This may be where the law necessarily had to come in what Chief Justice Warren recently called in the *Blue Law* cases "this day and age of increasing state concern with public welfare legislation,"⁴⁰ a time when, to use Justice Frankfurter's words in the same cases,⁴¹ "the state's interest in the individual becomes more comprehensive," always bearing in mind that "state" means whoever for the moment has the power to speak in the name of the state.

This may be good or bad. I pass no judgment, any more than I pass judgment, in this article, on the correctness of any of the decisions I have selected as examples. I have been speaking of the process by which conclusions are reached—and expressed—and not about the conclusions themselves. But good or bad, the departure from previously settled principles is a juristic revolution. It has recently been argued that courts should "legislate" more, not less.⁴² But a judicial readiness to legislate must involve a correlative responsibility at least to listen to considerations that call for pause. In the course of calling for more judicial legislation the bar has been chided for inability to write "Brandeis briefs" to help the courts determine whether to legislate or not.⁴³ But one may rejoin with Hotspur's reply to Glendower. "I can call spirits from the vasty deep," said Glendower. "Why, so can I, or so can any man; but will they come when you do call for them?"⁴⁴ No few counsel *can* write a "Brandeis brief." But when they do, as, for example, in opposition to judicial legislation that a court is resolved to perpetrate, as likely as not the brief is ignored without a whisper of rec-

⁴⁰ *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961).

⁴¹ *McGowan v. Maryland*, 366 U.S. 420, 461 (1961).

⁴² Traynor, *supra* note 32.

⁴³ See Traynor, *supra* note 32, at 627. In passing, I suggest that one should not be blinded to the nature of the so-called "Brandeis brief" by the luster of the name appended to it. A "Brandeis brief" is too often one that roams outside the record, advances assertions of fact subject to serious dispute, but which the appellate process furnishes no adequate procedure for trying, or makes assertions of social policy far better argued before a legislative committee.

For example, not too many years ago it became generally recognized that the common-law rule against survival of causes of action for injury to the person was out of date. The real question was not whether the rule should be changed, but how far the change should go. This was a policy question. The Supreme Court of California literally raped the old code sections to sweep away the rule. *Hunt v. Authier*, 28 Cal. 2d 288, 169 P.2d 913 (1946); *Moffat v. Smith*, 33 Cal. 2d 905, 206 P.2d 353 (1949). A thunderstruck bar called upon the legislature, which had to cure the excess of the court by substituting its own view of social policy after a canvass of the problem. CAL. CIV. CODE § 956; see Livingston, *Survival of Tort Actions—A Proposal for California Legislation*, 37 CALIF. L. REV. 63 (1949).

⁴⁴ SHAKESPEARE, *KING HENRY IV* PART I, act III, scene 1.

ognition. Thus in the *Cutter* poliomyelitis cases,⁴⁵ which undeniably involved a question of the greatest importance, regardless of how the court might see fit to decide it, the Supreme Court of California declined even to grant a hearing after decision by the district court of appeal.

If the juristic revolution is to be worked, it should be openly disclosed and thus openly brought to the test of public acceptance. More and more the opinions of the Supreme Court of the United States are openly doing this and less and less are they engaging in pious subterfuges⁴⁶ or "magic words." The controversy they arouse can thus revolve around substance instead of festering in frustration or breeding suspicion that judicial opinions are masks to hide rather than lamps to disclose the operation of the judicial mind.

I have said that there is a fourth function of the judicial opinion and this is it: To disclose the juristic revolution openly, if it is the judicial purpose to work one. But there is a distance yet to travel and a responsibility yet to shoulder before one can say that this fourth function is being fairly discharged or even recognized.

⁴⁵ *Gottsdanker v. Cutter Labs.*, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960).

⁴⁶ See Justice Jackson's comment in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950), about the former practice of resorting "to strained interpretation of the power over navigation" to uphold federal projects of reclamation, irrigation, or other internal improvement.