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A RETURN TO THE OBSERVATORY BELOW THE BENCH*

BY MOSES LASKY**

FOR a mere practitioner an assignment to tell the highest judges in the land one's impressions of how they act and how they speak is, to say the least, a delicate one. Unlike the teacher of law, the poor lawyer occupies no Olympian coign of vantage outside the fray. Nor is he clothed in the armor of the black judicial robe to protect him from the consequences of being in the fray. When your Chairman, Chief Justice McAllister, asked me to speak to you, he wrote that he had in mind "something similar to the talk" I made to the Judicial Conference of the Tenth Circuit in 1961 at Oklahoma City. I remember that after that talk the newspapers of Oklahoma City shrieked in bold black headlines, "San Francisco Lawyer Raps Courts." Justice Hugo Black arrived in Oklahoma City later that day to greet the Conference and read the newspapers. The next day the headlines shrieked something like this: "Supreme Court Justice Raps San Francisco Attorney." Of course, the headlines were unwarranted. As a humane angler, I had filed the barbs off most of my hooks and had made no effort to land any judge on the bank.

After a somewhat expanded version of my talk appeared in the *California Law Review*,¹ the journal of the San Francisco Bar Association, quoting my opening sentence, which stated that "This article is the result of a summons to state what is wrong with appellate opinions,"² proceeded to say that Mr. Lasky "answered his summons, shooting at the King while subject to his awesome power."³ But one who twice stands before the King and shoots is baiting fortune. I propose, therefore, to proceed today with as much timorous prudence and humorless decorum as I can muster.

It is only an enormous respect for the functions of the courts and, by and large, for their efforts that leads me—or I should say lets me—turn any critical tongue on their conduct. Back in 1821 Justice Johnson of the United States Supreme Court observed that "The wretch beneath the gallows may repine at the fate which awaits him, and yet it is no less certain, that the laws under which he suffers were

* Address before the Conference of Chief Justices, August 6, 1965.

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¹ Lasky, *Observing Appellate Opinions From Below the Bench*, 49 Calif. L. Rev. 831 (1961).

² *Ibid.*

³ 12 The Brief Case 17 (1962).

made for his security."⁴ And so, gingerly loosening the noose around my collar, I reflect that the attorney who is critical of the courts is no less certain that he, too, is part of the same apparatus and the same noble endeavor; and that, if there are deficiencies in the bench and in its opinions, they may well stem from bad briefs and poor advocacy. But that reflection should not stay the critical hand, for simple praise serves no purpose.

Professor Grant Gilmore of the Yale Law School remarked about three years ago:

The profession of the law is a strange and a wonderful thing. . . . No lawyer worthy of the name can ever be either truly a conservative or truly a radical: at one and the same time we must somehow devote ourselves to the preservation of tradition, which we do not greatly respect, and to the promotion of change, in which we do not greatly believe. We are accustomed to the thought that to each of our propositions there is a polar opposite, equally true.⁵

Consequently, there may be falsehood in much of what I say, and yet I would be disloyal to truth not to say it.

Since my talk in 1961, I have become aware that there are appellate court seminars and schools for judges which evidence sober concern about opinions and the style of opinions.⁶ Yet the more I have reflected, the less important style, as style, seems. Let us shrug our shoulders with the realization that lawyers, as a whole, do not handle English gracefully and seem unable to escape the burden of useless and clumsy words. Even writers who write books to denounce this failing write badly. All judges were once lawyers and carry their congenital defect with them in their apotheosis to the bench. For every master of the pungent phrase, like Justice Robert Jackson of the United States Supreme Court, whose words carried clear thought beautifully, there are five judges whose expression postures, and twenty who somehow put words together more or less adequately.

Just recently, while discussing judicial opinions with a man of acutely analytical mind, I asked, "Why all the commotion about judicial opinions? Consistent with lucidity, should not an opinion be the shortest possible distance from Point A, the plainly- and honestly-stated facts of the case, to Point B, the conclusion, setting out just how the court's mind got from A to B?" "Not so," he replied;

⁴ Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821).

⁵ Gilmore, *The Truth About Harvard and Yale*, 15 Harv. L. School Bull. 2, 3 (1964).

⁶ Leflar, *Some Observations Concerning Judicial Opinions, Address to Conference of Chief Justices*, 1960, 61 Colum. L. Rev. 810 (1961).

⁷ See note 11 *infra*.

"opinions are sometimes great beacons or social documents." Ruminating about this has led to the reflections I now give you.

Style, as style, is of no moment. Style is the man, but it is more than that. It is the very outward garb of function. In the phrase of the best architects and designers, form should follow function. Consequently, the style of an opinion should tell us what the judge conceives his function as a judge to be. I believe that it normally does so, even though the judge's conception of his function may be entirely subconscious. And since the judge's function is not necessarily the same from case to case, so his style will not be the same from case to case. Conversely, the style of an opinion should be true to the function, and it may well tell us how honestly that function is being performed.

These comments are all very cryptic. Let me try to clarify them. The task which the law performs is not the same from age to age. More precisely, the job that courts essay to do from age to age is not the same. This is not a statement either of approval or regret: it is a simple statement of history. Sir Francis Bacon, who has been called the "wisest, brightest, meanest of mankind,"⁸ said in his essay "Of Judicature,"⁹ "Judges ought to remember that their office is 'jus dicere', and not 'jus dare'; to interpret law, and not to make law, or give law."¹⁰ That assertion, however, no longer commands unanimous acquiescence. There are ages when the courts consolidate and systematize legal principles and draw out their consequences. There are succeeding ages when they simply apply with unquestioning acceptance a well-articulated body of law. And there are still other periods when they conceive of themselves as lawgivers and law-makers, with the job of rewriting and recasting law to meet their conceptions of social engineering.

You perceive how open-minded I am. I do not regard *stare decisis* with religious veneration. Indeed not, for if ever any wayward wind should place control of judicial machinery in my hands, I wish to be free of any charge of inconsistency when I sweep aside some precedents of the last few decades that disregarded prior precedents, and thus get back to sound law.

But that is an aside. I have said that the judge's conception of

⁸ Pope, *An Essay on Man*, iv (Clarendon ed. 1904).

⁹ Bacon's Essays, No. LVI (Bacon, *Selected Writings*, Modern Library ed. 1955). In *Linkletter v. Walker*, 381 U.S. 618 (1965), Mr. Justice Clark observed that Blackstone is cited as "the foremost exponent of the declaratory theory" and stated that Sir Matthew Hale had expressed a similar view thirteen years before Blackstone's birth. But Bacon anticipated Hale by a century.

¹⁰ Bacon, *supra* note 9.

what he is doing will affect his style, and if he honestly fulfills his conception, it will be an effective style. For example, if a judge thinks of the law as a complete and settled body of rules, well articulated and tightly fitted at the joints, his opinion will take the form of a demonstration by Euclid, substantially as follows:

1. The applicable rule of law is thus and so, whereby, if A is the fact, then such and such is the conclusion.

2. In this case A is the fact.

3. Therefore the appellant is right (or wrong).

Such an opinion will be short, if not sweet.¹¹ Although this kind of opinion has been derided as trying to "reduce the legal process to the technique of the slot machine,"¹² I am sure that a large number of appeals can be disposed of in just this way, because many appeals are inexcusable, and more would be so disposed of but for a compulsiveness to write.

But the Euclidean or slot machine style has its limits. New problems do arise which no rule answers in precisely the form in which it has already been announced. Realizing this, a judge may at the same time feel strongly that specific rules are but an application to special cases of something underlying, that behind all the rules there are enduring principles and basic conceptions which ought to control if the law is to have any consistency and unity so as not to produce sports in the decisions. Then the judge's function as a judge is to examine the rules, isolate the animating notions that led to them, as a chemist isolates the essence of a substance, and from this essence generate a rule for the special case. If *this* is the judge's view of his function, a different style of opinion will follow. It will be longer, it *may* have to be historic, and it *will* have to be learned. If well done, it will be the judicial operation at its finest.

Such a judge, "conservative" as he may be, will on occasion conclude that some of the joints in the law have not been tightly fitted. He may conclude that some prior judicial carpenter has filled a badly mitred joint with a handful of plastic wood and painted it over. Some overruling of precedent is then in order.

¹¹ Compare Parker, *Improving Appellate Methods*, 25 N.Y.U. L. Rev. 1, 12-13 (1950):

In ordinary cases, the opinion of the court should do no more than state the facts briefly and succinctly, show how the questions in the case arise and declare and apply the law. The court is neither a law school nor a debating society, and the opinion is no place for a legal monograph or the airing of personal views on general matters. A large percentage of the cases involve merely the application of well settled principles of law to states of facts which are not unusual; and these should be disposed of with memorandum opinions showing merely the questions that arise in the case and how they are answered by the court.

¹² Merryman, *The Authority of Authority*, 6 Stan. L. Rev. 613, 672-673 (1954).

On the other hand, what has been happening this past thirty years with gathering acceleration is that many judges have embraced, or are embracing, quite a different notion of their function. They feel that their task is to remake law to suit their own view of social rightness or social desirability. Their conception of the task of courts is to legislate more, not less. Distinguished jurists have written persuasive articles to that effect.¹³ Wits have done it more pithily. In A. P. Herbert's *More Misleading Cases*¹⁴ the Lord Chancellor, in the imaginary case of *Sparrow v. Pipp*, refers to "the agreeable fiction . . . that [the] decision was there all the time, hidden and unborn in the inexhaustible womb of the Common Law," and says:

My Lords . . . this is nonsense. The Judges of our land are constantly making law, and have always done so. The pity is that there is not more Judge-made law. For most of His Majesty's Judges are much better fitted for the making of laws than the queer and cowardly rabble who are elected to Parliament for that purpose by the fantastic machinery of Universal Suffrage. To say that is not to say that the Judges of a hundred years ago are necessarily the persons best fitted to legislate for the circumstances of the present day. But that is the queer position to which our attachment to precedent has led us.¹⁵

In moderation this view is impeccable—like strychnine for a bad heart—but it is difficult to keep the dosage small. The Lord Chancellor in *Sparrow v. Pipp* continued:

One word more, my Lords. The question must soon arise: If we are prepared to amend the ancient Common Law, most of which is still sensible, what is to be our attitude to modern Statute Law, most of which is not? . . . My Lords, we are venerable, dignified, and wise, superior in almost every respect to the elected legislators of the House of Commons; yet . . . we find ourselves in the position of hired dispensers, compelled continually to dispense the prescriptions of a crazy doctor, which they know to be ineffective and even poisonous. . . . I give notice that from this day forth it is my intention to decide such disputes as come before me in accordance with my own good sense and judgment, ignoring both precedent and Parliament where they are opposed to me. As for the House of Commons, my Lords, the House of Commons be blowed!¹⁶

Do not laugh; I know not how many state supreme courts have gone so far, and there are decisions of the United States Supreme Court, like its "Bank Merger" decision,¹⁷ that I can fit into no other category.

¹³ See Traynor, *No Magic Words Could Do It Justice*, 49 Calif. L. Rev. 615 (1961).

¹⁴ Herbert, *More Misleading Cases* 57 (Methuen ed. 1934).

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

The conception of judge as lawmaker, except, as Holmes said, "interstitially," has always baffled me. Robert G. Ingersoll once remarked that judges must be made out of men and that by being made judges men's prejudices are not diminished and their intelligence is not increased. Judge Learned Hand expressed the same thought more mildly.¹⁸ John Stuart Mill in his *Essay on Liberty* was less flattering; he remarked that "judges, with that extraordinary want of knowledge of human nature and life which continually astonishes us in . . . lawyers, often help to mislead" juries.¹⁹ Yet, as the Lord Chancellor's tart remarks show, the conception of judge as lawmaker contains a kind of tacit assumption that judges are uniquely fitted for the task, and I have puzzled over how to reconcile this divine conception with the peculiar set of political accidents by which one man instead of one thousand others happens to obtain judicial appointment. A present justice of the California Supreme Court, on the occasion of introducing a group of new appointees to the San Francisco Bar Association, explained how each became a judge. "Each," he said, "happened to know a Governor."²⁰

I am rescued from my puzzlement by recourse to the Calvinistic Doctrine of the Elect. God moves in mysterious ways, His wonders to perform. The fact that a lawyer successfully knew a governor is itself God's endorsement of his ability to be a lawmaker, just as the great barons of business a century ago knew that the fact of amassing great wealth was evidence that God had elected them for some purpose of His own.

This conception of the judge's function raises curious reflections about the theories of judicial selection currently avowed by all right-thinking men. When the judge's job is conceived of as merely finding, stating, and applying the law, the man to elevate to a judicial position should be one who is both learned and judicious. Popular election is no way to find that kind of man. In a non-theocratic age law-making comes from the people, not from God. If the judge is to be a lawmaker, then democracy might ask why he should not be elected after the people have been told what notions he has about what the laws should be.

But this horrid thought had best be abandoned in a hurry as an unforgivable heresy. The conception of the judge as legislator has

¹⁸ "[J]udges are by no means always men of common sense. They are quite like the rest of us." Hand, *The Spirit of Liberty* 107 (Knopf ed. 1952).

¹⁹ Mill, *On Liberty*, ch. III, n.3 (Everyman's Library ed. 1940).

²⁰ Judge Learned Hand once remarked that he thought "it most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." Hand, *The Bill of Rights* 70 (Harvard ed. 1958).

gained such widespread acceptance, open or covert, as to work a change of legal theory regarding the retroactive application of a new rule announced by a court in a decision overruling former decisions. It used to be hornbook law that the new rule applies to past events because it was always the true rule and always existed, hovering in the ambient blue, simply awaiting with patience its time to be discovered. Four years ago a dissenting justice of the California Supreme Court exclaimed, "the majority takes the highly unusual position that the old overruled rule shall be applied to the instant case and that the new rule shall be applied prospectively only. . . . [T]hat amounts . . . to conceding that the new rule is an exercise of the legislative rather than the judicial function."²¹ Nevertheless, what was there done, if highly unusual then, is no longer so. More and more frequently, when announcing a new rule, courts declare that it is to apply only prospectively.²²

Now if a judge conceives that the function which he is to perform is to be a lawmaker, the style of his opinion will be different from any style yet described. It will tend to be long. It may well be philosophical, historical, sociological or philosophico-historical, politico-economical, historico-sociological or what have you. It can afford to be literary if done with restraint, but I dare the assertion that more often than not its length will add nothing at all to its substance. The length will either be an elaborate deployment of forces before the castle, leaving the court on the other side of the moat, which in the end it must surmount by a leap; or it will be an elaborate façade covering the meagerness of the foundation for the conclusion. The foundation will be seen to be either an assumption of the conclusion itself or some notion or outlook on life expressible in about one sentence. Sometimes one must construct the sentence or piece together the assumption from all that is written. Often the reader can find the sentence or assumption in the opinion itself if he but engage in a sort of archaeological excavation with patience, trowel and camel's hairbrush to sweep away shards of miscellaneous erudition.

I say this with no disparagement. The longer I am at the bar, the more it seems to me that every rule or principle of law ultimately

²¹ Peters, J. concurring and dissenting in *Aced v. Hobbs-Sesack Plumbing Co.*, 55 Cal. 2d 573, 12 Cal. Rptr. 257, 360 P.2d 897, 905 (1961).

²² Numerous cases can be cited. See, e.g., the extensive discussion in *Linkletter v. Walker*, 381 U.S. 618 (1965); *Safarik v. Udall*, 304 F.2d 944 (D.C. Cir.), cert. denied, 371 U.S. 901 (1962); *In re Lopez*, 42 Cal. 188, 198, 398 P.2d 380 (1965). See also Traynor, *Badlands in an Appellate Judge's Realm of Reason*, 7 Utah L. Rev. 157 (1960); Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907 (1962).

rests on some short conception of good or bad, more assumed than demonstrable.

For example—but I pause in some trepidation. With examples one treads on toes and opens himself to the charge that he is merely expressing his own opinions. Nevertheless, examples may be needed to give “verisimilitude to an otherwise bald and unconvincing narrative,” in Gilbert and Sullivan’s words. An article on malpractice suits in the *Wall Street Journal* referred to an unidentified New York case where the plaintiff, who had sustained burns from X-ray treatment administered by a radiologist, was later told by a dermatologist that she might get cancer from the burns. She never did get cancer, but years later she recovered large damages from the radiologist for the fear of cancer created by the dermatologist’s statement. The New York Court of Appeals was quoted as saying that a “‘wrongdoer is liable for the ultimate result’ of his mistake.”²³ Interested in the unique application, I ran the case down, *Ferrara v. Galluchio*.²⁴ The decision was said to be based on a settled principle: “‘Liability for damages caused by wrong ceases at a point dictated by public policy or common sense.’ In the present case neither public policy nor common sense is offended by this jury verdict.”²⁵ There it is—a nice, usable principle, which is properly translated thus: “This is how we hold because this is how we feel.”

On June 23, 1965, the New York Court of Claims held²⁶ that an infant born because of a rape committed upon a patient while in a state mental hospital has a cause of action against the state for the damages of being born. With refreshing candor, the court gave its reasons thus: “In simple paraphrase, ‘The law is what the law should be.’”²⁷

I give another example. This being an age when few problems, if any, lie outside the United States Supreme Court’s confidence in its capacity and wisdom to solve, in the first of the legislative reapportionment cases²⁸ that Court jettisoned the onetime-elementary principle that federal courts will not intervene in political questions.²⁹ Then, last year, in six more cases³⁰ involving the systems of six states

²³ *Wall Street Journal*, July 12, 1965, p. 1.

²⁴ 5 N.Y.2d 21, 176 N.Y.S.2d 996 (1958).

²⁵ 176 N.Y.S.2d 996, 1000 (1958).

²⁶ *Williams v. State*, N.Y.Ct.Cl., June 23, 1965, reported 34 U.S. L. Week 2025.

²⁷ *Ibid.*

²⁸ *Baker v. Carr*, 369 U.S. 186 (1962).

²⁹ *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

³⁰ *Reynolds v. Simms*, 377 U.S. 533 (1964); *Lucas v. Colorado General Assembly*, 377 U.S. 712 (1964); *W.M.C.A., Inc. v. Lomenzo*, 377 U.S. 633 (1964); *Maryland Committee v. Tawes*, 377 U.S. 656 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *Roman v. Simcock*, 377 U.S. 695 (1964).

for selecting legislative representatives, the Court held them all unconstitutional and announced the dogma of "one man, one vote" for both houses of state legislatures. Some 144 pages of Court opinions were consumed to reach this conclusion, not to mention concurrences and dissents, spread over 232 pages of official reports. But conduct your archaeological excavation through this mass of intellectual detritus, and you will find the foundation in these sentences: "Legislatures represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."³¹ And eighteen pages later, "Again, people, not land, or trees or pastures vote."³² I concede that I have never seen or heard of land, trees or pastures voting, but I wait for the second shoe of the logic to drop. I still wait.

Now at least two cautions are present for a judge who conceives his judicial function to be either elimination of the plastic wood in the joints or playing the part of the lawmaker. First, he must be intellectually honest. Second, he who essays the task of scholar had better be sure that he is a scholar; he who wishes to devise a new rule from the reason of rules had better be sure that he really knows his history; and he who wishes to cerebrate law from the nature of things had better be sure that he apprehends the nature of things.

I select as an example the field of manufacturer's products liability, because this is a subject that almost every high state court and many federal courts have grappled with, and an area in which courts throughout the country have been restless with the law. Court after court has searched for any crumb from any other court with which to feed a conclusion. For some twenty-five years courts have sought to expand products liability by creating attenuated rules of *res ipsa loquitur* to reach the goal on a negligence theory, or novel rules of contract law to reach the goal on a theory of implied warranty. Some dashing and righteous opinions have been written,³³ with the writer apparently conceiving of himself as a new Cardozo writing a new *MacPherson v. Buick*.³⁴ Yet never have I read a single such opinion that did not seem to be thoroughly unsound in history and logic.³⁵ In

³¹ Reynolds v. Simms, 377 U.S. 533, 562 (1964).

³² *Id.* at 580.

³³ E.g., Spence v. Three Rivers Bldrs. & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958); Parish v. Great Atlantic & Pacific Tea Co., 177 N.Y.S.2d 7 (1958).

³⁴ MacPherson v. Buick Motor Co., 217 N.Y. 382, 389, 111 N.E. 1050 (1916).

³⁵ Occasionally an opinion induces vicarious embarrassment. Since liability on a theory of implied warranty is a contractual liability, it presupposes a contractual relationship, *i.e.*, "privity of contract." Since "privity of contract" is often tersely referred to simply as "privity," one may observe a circumvention of the privity requirement by the semantic

this feeling I have just recently been vindicated. Only two months ago an opinion of the distinguished Chief Justice of California confessed that "only by some violent pounding and twisting" . . . could the warranty doctrine be made to serve this purpose."³⁶ Long ago Sir Francis Bacon had said, "Judges must beware of hard constructions and strained inferences; for there is no worse torture than the torture of laws."³⁷ In California the whole sorry spectacle was finally swept aside by a frank *coup de main*, an opinion which kicked away the whole jerrybuilt scaffolding and said, forthrightly, that a manufacturer is absolutely liable without negligence and without warranty. In essence the opinion held, "This is the rule of law because we think it ought to be so."³⁸

As an interesting aside, while moving to absolute liability for manufacturers, although the legislature has said nothing on the subject, the California Supreme Court has moved *away* from absolute liability for bigamists and statutory rapists³⁹ because the legislature has said nothing on the subject. Now in California you may marry a married woman if you do not "reasonably" know that she is married, and you may sleep with a minor girl if you "reasonably" believe her to be of age. In view of this emphasis on "reasonable" belief I add, *sotto voce*, that I would have supposed that one's reasoning faculties are not keenly honed at moments like these.

If the warranty decisions in products liability cases were not the result of bad history and poor logic, they were the result of something less defensible. There are judges who are "result-oriented." Do not blame me for coining this frightful piece of jargon; I find it grating to the ear. "Result-oriented" means that anything goes that serves to reach a goal. A few judges are "result-oriented" all the time; some are much of the time; more are some of the time. "Result-orientation" expresses itself in a particular kind of opinion. It is more likely to be long than not. It is likely to be heavily laden with citations, but the citations will not stand analysis as supporting the propositions for which they are cited. Bacon knew the phenomenon; he referred with disapproval to judges who "pronounce that which they do not find, and by show of antiquity . . . introduce novelty."⁴⁰ The "result-oriented" opinion reads like a lawyer's brief, the worst

fallacy of talking about privity of estate or privity of succession. *Peterson v. Lamb Rubber Co.*, 54 Cal.2d 339, 5 Cal. Rptr. 863, 353 P.2d 575 (1960).

³⁶ *Seely v. White Motor Co.*, 45 Cal. Repr. 17, 403 P.2d 145, 149 (1965).

³⁷ Bacon's Essays, No. LVI, Of Judicature.

³⁸ *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963).

³⁹ See *People v. Hernandez*, 39 Cal. Rptr. 361, 393 P.2d 673 (1964).

⁴⁰ Bacon, note 37 *supra* at 179.

possible style for a judicial opinion. It discloses this kind of judge for what he is and ought not to be, an advocate. I suggest that an opinion should never read like a brief.⁴¹ I would rather make my briefs sound like judicial opinions, for subconsciously I am a believer in "sympathetic magic." Sympathetic magic, you know, is the art of producing a desired event by performing one similar in nature, and I entertain the hope that a brief written like a judicial opinion might produce a real one in facsimile.

"Result-oriented" opinions are often put together by a two-platoon system. The judge has two platoons of cases for a variety of propositions. One platoon says that the law is A. The other says that it is non-A. Depending on which goal he wishes to push the ball across, the coach—pardon me, the opinion writer—trots out Platoon A or Platoon non-A. More than once I have been amused to see Judge Smith trot out Judge Jones' Platoon non-A in dissent from Judge Jones' opinion, while a little later Judge Jones will trot out that same platoon in a dissent from Judge Smith. From case to case judges sometimes make a badminton bird of the recrimination that their brethren are usurping the legislative function.⁴²

An opinion writer is entitled to the greatest leeway in his law as in his reasoning, for they are his. But honesty allows no leeway in his statement of the facts, for they are not his. There is no substitute whatever for adherence to the exact and precise record in the case. No "result-orientation" can justify omission of a single relevant fact or the inclusion of a single factual statement that is false. This should go without saying. Unfortunately it needs saying.

Allied to the result-oriented opinion is the "Case of The Innocent Bystander." A judge or a court has been awaiting a case in which to convert a pet notion into law or to denounce an aggravation. Along comes an actual controversy which hazily resembles what is needed for the purpose. It is seized upon, an opinion is rendered, and as a result the case described in the opinion is not what the parties thought they were litigating. The losing party is the innocent bystander who just happened to be in the way.

Then there is an allied sin: the sin of going outside the record for facts that may or may not be so. Like so many of the Devil's works, this is sometimes dressed up appealingly; for example, under the lustrous name of "Brandeis brief." Roaming outside the record to

⁴¹ "An opinion is not a controversial tract, much less a brief in reply to the counsel against whose views we decide." *Holmes v. Rogers*, 13 Cal. 191, 202 (1859).

⁴² See, for example, Mr. Justice Black's dissent in *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965), and Mr. Justice Harlan's concurrence in the judgment in the same case, 381 U.S. at 499.

make assertions of fact which are subject to serious dispute and which the appellate process furnishes no adequate procedure for trying, and making assertions of social policy which is far better argued before a legislative committee, are inexcusable.

A very distinguished jurist has written:

We should not be misled by the cliché that policy is a matter for the legislature and not for the courts. There is always an area not covered by legislation in which the courts must revise old rules or formulate new ones, and in that process policy is often an appropriate and even a basic consideration. The briefs carry the first responsibility in stating the policy at stake and demonstrating its relevance; but if they fail or fall short, no conscientious judge will set bounds to his inquiry. If he finds no significant clues in the law books, he will not close his eyes to a pertinent study merely because it was written by an economist or perhaps an anthropologist or an engineer.⁴³

The first part of this quotation leads me to ask, "How many of you would say 'Amen' to Bacon's statement that 'Judges ought to remember that their office is *jus dicere*, and not *jus dare*'?"⁴⁴ How many would agree with his quotation from the Talmud, "Cursed is he that removeth the landmark." I think the answer probably lies in the ditty:

"The Devil was sick,
the Devil a monk would be;
the Devil was well,
the Devil a monk was he."

When the United States Supreme Court orders its jail deliveries by reversing your convictions, doing so on some new interpretation of one of the first eight amendments, imported into the fourteenth by intuition, your regard of Bacon may be great. Otherwise you, too, may say that Bacon has been dead these 350 years, and, as you may have observed by now, I do not entirely disagree.

However, the last sentence of the quoted passage about economists, anthropologists and engineers is another matter. If what the engineer, economist or anthropologist has written is so indisputably correct that a court can properly take judicial notice of it, a judge should not "close his eyes." Although there may be a case for the engineer, I find little case for the economist and would be hesitant about the anthropologist. I have cross-examined economists, and I know how the chrome surface of their learning in books develops holes when pitted against a live lawyer. A sociologist or economist who might

⁴³ Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. Chi. L. Rev. 211, 219 (1957).

⁴⁴ See note 10 *supra*.

disintegrate under cross-examination if called as an "expert witness" should not become the foundation of new law by being quoted in a judicial opinion without ever having been called at all. If what some social scientist has written outside the record seems significant to an appellate court, I suggest that the court remand the case for evidence on the subject. If there is no procedure for that course, then devise some. The adversary system of reaching conclusions of fact and law is still meritorious.

In days when judges conceived of their task as being to find the law, they welcomed the lawyer's aid. If courts now conceive of their function as the remaking of the law, then more than ever do they need that aid. Yet I discern a growing disdain in appellate courts for the art of advocacy, an attitude that the bar is to be endured rather than welcomed. On a hasty survey I find that almost every federal court of appeals and the appellate courts of about a quarter of the states limit the number of pages that a brief may contain. There should be no such limitation. The penalty for boring or badly organized or repetitious length should be the ineffectiveness it will certainly have. The very fact that *stare decisis* no longer holds sway forces briefs to be longer, for it is no longer sufficient for counsel to state a proposition and cite a case of the highest court in the jurisdiction plainly supporting it. Counsel must cite his case and then demonstrate that it was correctly decided in the first instance; otherwise he may find it overruled by reasoning he could have answered. There is even a tendency to prohibit petitions for rehearing or to limit them to the futility of three or five pages. Heretofore they have only been ignored. While petitions for rehearing are not often successful, every so often one is. And every such episode would have been a case of justice gone wrong if no petition, or no adequate petition, had been allowed.

Even worse is what is done to oral argument. I do not now refer to the limitation of time for oral argument, almost universal in this country, or even to the fact that most American appellate courts allow but one-half hour to a side, which, by the way, is adequate for the kind of case that should not have been appealed at all but wholly inadequate for a case where courts feel tempted to make law.

What I do refer to is an intolerance or impatience with oral argument. There used to be a presiding judge in one of California's appellate courts who would interrupt counsel to ask, "Is that argument in your brief?" If counsel said, "Yes," the judge would say, "Then we don't want to hear argument on it. We can read." If,

forewarned, counsel said, "No," the judge would say, "This Court will not permit you to introduce new arguments you have failed to put in your brief."

I have heard and read statements by judges that the briefs and arguments of counsel are often superficial, missing the important issues, and of no help at all. But there is the other side. I have won cases on appeal on points I did not present because after study I had discarded them as unsound, and I have lost cases on appeal on points which could have been answered had they been presented before they first appeared in the opinion.

May I earnestly make a suggestion. Let courts read the briefs before argument and, if new points occur to them or issues are thought to be inadequately covered, notify counsel and give them the opportunity for further briefing. Also advise counsel in advance of oral argument what subjects the court would most like to hear discussed.

Near the outset of my remarks I quoted from Professor Gilmore of Yale.⁴⁵ Professor Gilmore also said: "I am tempted to say that law is the art of the impossible: it is a matter of squaring circles, of reconciling irreconcilables, of finding needles in haystacks and of persuading lions to lie down with lambs."⁴⁶ In that effort bench and bar should be a partnership. The fact that one partner has the last word is no reason to turn a deaf or impatient ear to the other.

⁴⁵ See note 5 *supra* and accompanying text.

⁴⁶ *Id.* at 3.