DISCRETIONARY REPORTING OF TRIAL COURT DECISIONS: A DIALOGUE

Legislator: As the official state reporter, could you explain briefly the major functions of your office?

Reporter: There is a duty to report our courts' decisions and opinions as much as to give notice of our statutory law.[1] Those who cite Moses as the first law reporter[2] may conceive of the task of collecting and publishing opinions as essentially ministerial but I would say that my major function is the selection of the opinions which are to be published.[3] Our state statute requires publication of all appellate court opinions and selected lower court opinions.[4] Many states publish no lower court opinions,[5] but this state has decided that there are some that have value as precedent or are of public interest.[6] Our aim is to provide the bar with a single, convenient record of all significant opinions,[7] while limiting the number of opinions published[8] so as not to impose on practitioners an unnecessary burden of reading. Certainly we don't want the bar to have to bear the high cost of publication just to fill already overcrowded libraries with opinions that add little to the development of the law.[9] It is worthwhile

[1] See Nash v. Lathrop, 142 Mass. 29, 6 N.E. 559 (1886); HOLDSWORTH, LAW REPORTING IN THE NINETEENTH AND TWENTIETH CENTURIES 2 (Anglo-American History Series 1, No. 5, 1941).

[2] See Pollock, *English Law Reporting*, 19 L.Q. REV. 541 (1903).

[3] See MORAN, THE HERALDS OF THE LAW 61 (1948).

[4] *E.g.*, CONN. GEN. STAT. REV. § 51-21 (1960); OHIO REV. CODE ANN. § 2503.20 (Page 1954).

[5] *E.g.*, CAL. GOV'T CODE § 68890; PA. STAT. ANN. tit. 17, § 1731.1 (1962); see HOOD-PHILLIPS, A FIRST BOOK OF ENGLISH LAW 139 (1960).

[6] See, *e.g.*, N.Y. JUDICIARY CODE § 431:

> The law reporting bureau shall report every cause determined in the court of appeals and every cause determined in the appellate divisions of the supreme court, unless otherwise directed by the court deciding the case; and, in addition, any cause determined in any other court which the state reporter, with the approval of the court of appeals, considers worthy of being reported because of its usefulness as a precedent or its importance as a matter of public interest.

Another formulation of the proper criteria for selective reporting is said to involve a "new and important issue of law, or a matter of general public interest . . . ." CAL. CT. R. 976 (1964). For a discussion of various criteria suggested by English jurists see MORAN, *op. cit. supra* note 3, at 61-75.

[7] See Goodhart, *Reporting the Law*, 55 L.Q. REV. 29, 30-31 (1939).

[8] See Flavin, *Decisions and Opinions for Publication*, 12 SYRACUSE L. REV. 137 (1960). See also Letter From James M. Flavin, State Reporter for New York, to Morris L. Cohen, June 25, 1963, on file in Biddle Law Library, University of Pennsylvania: "We are quite pleased with the reduction in the number of opinions being published."

[9] "[E]very case which is decided means a development of the principle which is applied. The practical difference is that in the majority of cases the application is so easy, and the development of the existing principle so infinitesimal, that the case is not worth reporting, and therefore, for *practical* purposes, adds nothing to the law."

MORAN, *op. cit. supra* note 3, at 75 (quoting GELDART, ELEMENTS OF ENGLISH LAW 24 (1953)). In contrast, Professor Goodhart argues:

> It is more inconvenient to find that one leading case is not reported than to have twenty unimportant cases in the books. With a proper system of in-

reminding ourselves of Bacon's admonition that the greater the number of reported decisions the less satisfactorily the case law system will work.[10] Indeed it is a wonder that our decentralized system of courts and reporting has produced as good a case law system as it has.[11]

Legislator: If I am correct, there is no general private publication of lower court decisions,[12] so your uncontestable determination,[13] without hearing or argument, can prevent a court opinion's ever being used by a lawyer in serving a client or by a judge in deciding a case.

Reporter: To begin with, one must remember that there are no opinions written in a great number of trial court decisions,[14] and my decision doesn't bar *all* circulation of those that are written. Copies are given to the lawyers who argue the case and a copy is kept on file with the court clerk.[15] Thus a lawyer desiring a copy of an opinion can purchase it at

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dexing it is possible for a reader to skip those cases which he does not need, but *there is no way in which he can conveniently consult an important case which has been omitted.*

GOODHART, *supra* note 7, at 33. (Emphasis added.)

[10] Holdsworth, *The Case-Law System: Historical Factors Which Controlled Its Development*, in THE LIFE OF THE LAW 44, 45 (Honnold ed. 1964):

> The law is likely to be burdened with so great a mass of decisions of different degrees of excellence, that its principles, so far from being made more certain by the decisions of the new cases, will become sufficiently uncertain to afford abundant material for the infinite disputations of professors of general jurisprudence. A limitation is needed in the number of reported cases.

[11] See THE LIFE OF THE LAW 47 (Honnold ed. 1964) (editor's comment).

[12] This is basically true in many states. West Publishing Company prints the *New York Supplement*, which, as of February 1963, parallels the official *New York Miscellaneous Reports*. Letter From John H. Thill, of West Publishing Company, to Professor Morris L. Cohen, April 28, 1965, on file in Biddle Law Library, University of Pennsylvania. Many New York City court opinions and decisions are also published daily in the *New York Law Journal*. The relatively new *California Reporter* publishes many of that state's lower court opinions. In Pennsylvania, the county bar associations publish the lower court opinions of each county, some of which appear in *Pennsylvania District & County Reports*. In order to stop private publication of unreported decisions, Ohio passed a statute declaring that only officially reported decisions would be recognized by the courts. See 1 OHIO ST. L.J. 135 (1935). However, this rule has not been generally followed. See Gustin v. Sun Life Assur. Co., 154 F.2d 961 (6th Cir.), *cert. denied*, 328 U.S. 866 (1946). New Jersey also requests that judges cite reported cases only. N.J. MANUAL FOR USE IN PREPARING AND TYPING JUDICIAL OPINIONS 2 (1961).

[13] In Musmanno v. Eldredge, 382 Pa. 161, 114 A.2d 672 (1955), Justice Musmanno of the Pennsylvania Supreme Court brought an action in that court to compel publication of his dissenting opinion in an earlier case. The court denied his prayer on the grounds that he had been polled as joining in the court's original per curiam opinion of the earlier case. The *Musmanno* opinion did not speak to the contention, Brief for Appellant p. 51, that a mandamus could issue to compel a court reporter working under a discretionary statute to publish an opinion. Even assuming that mandamus could issue, the problem of who would have standing to bring the action would still remain unresolved.

[14] An unfortunate example of a failure to write an opinion occurred in Erickson v. Dilgard, No. 11974/62, Sup. Ct. Nassau County, N.Y., Oct. 1, 1962, a decision which, if reported, might have exerted significant influence on the presently developing area of rights to refuse vital medical treatment on religious grounds. See Comment, 113 U. PA. L. REV. 290, 295 (1964).

[15] See, *e.g.*, Garfield v. Palmieri, 193 F. Supp. 137, 143 (S.D.N.Y. 1961) (dictum), *aff'd*, 297 F.2d 526 (2d Cir.), *cert. denied*, 369 U.S. 871 (1962).

slight cost from the clerk, and all opinions remain available. I believe that some firms and bar associations have standing orders with clerks.[16]

Legislator: Excuse me, but it is not always so easy to get a copy from the clerk. I wrote to the court for a copy of the New York City trial court's unreported opinion in the Lenny Bruce obscenity case.[17] I never received a reply.[18] Perhaps if I'd persisted I might have gotten a copy, but the point is that this court clerk channel can easily be blocked by a parochial or biased clerk.

Reporter: That's a risk you run when dealing with any official.

Legislator: Including the reporter who decided not to publish the *Bruce* opinion! Getting back to the court clerk channel, I do feel that, in a sense, all court decisions and opinions are public property[19] and should be available upon request. At any rate, let me ask you this—how is a lawyer to be aware of what decisions were made by what court in order to know to ask for a copy?

Reporter: Although it's admittedly haphazard, and only helpful for fairly contemporaneous cases, lawyers often learn about unreported decisions by word of mouth, newspaper coverage, or squibs in legal periodicals. I don't quite understand this public property argument, or the fuss about getting an opinion from the clerk. The reason the opinions are unreported is that there is no need for lawyers to have them.

Legislator: Subject, of course, to the possibility of human error. By the way, are unreported cases ever used as support by courts?

Reporter: Well, occasionally you find lawyers citing unreported cases in their arguments or briefs.[20] Perhaps this occurs somewhat more often when a federal court is applying state law. In such cases a lower state court decision has more significance as binding precedent than in actions brought in a state court.[21] But this is the exception, and an unreported decision is rarely significant in a case. I imagine that if such a decision *were* significant, and neither lawyer knew of it before trial, the court would make sure that the unreported opinion was brought to light, so that no harm would be done.

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[16] See 1 OHIO ST. L.J. 135 (1935).

[17] People v. Bruce, Crim. Ct., Part 2-B: N.Y. COUNTY, N.Y., Nov. 1964.

[18] Both the *Review* and Professor Morris L. Cohen, Librarian of the University's Biddle Law Library, wrote the clerk for a copy of the *Bruce* opinion and received no reply. A copy was finally obtained through a service available to subscribers of *United States Law Week* only.

[19] Each citizen is a ruler,—a law-maker,—and as such has the right of access to the laws he joins in making and to any official interpretation thereof. If the right of property enters into the question, he is part owner, and as such cannot be deprived of equal access by his co-owners.
Banks & Bros. v. West Publishing Co., 27 Fed. 50, 57 (C.C.D. Minn. 1886) (official state reporter cannot bar private publishers from printing court opinions in action for copyright infringement).

[20] See, *e.g.*, Gustin v. Sun Life Assur. Co., 154 F.2d 961 (6th Cir.), *cert. denied*, 328 U.S. 866 (1946).

[21] *Ibid.*

Legislator: At least as important as the courtroom work of the lawyer is the advice he gives clients. You mentioned that some large firms receive unpublished opinions, thus the wealthy firm is given an advantage.

Reporter: The larger firms derive many advantages from their size and wealth. Large firms have access to resources, even evidence and talent, that smaller firms do not have. But what significant advantage do the large firms get from knowing more of the unreported trial court decisions?

Legislator: It would seem that behind many requests for legal advice is the desire to know how a local lower court is reacting to fact situations in applying broad legal principles.[22] I think it unrealistic to assume that lower courts always follow the law as enunciated by the appellate courts.[23] But even assuming appellate precedents are followed, it is nonetheless true that written law has both a letter and a spirit. Both usually leave leeway in which a lower court "personality" operates. Moreover, lower courts make a small, though significant number of erroneous decisions, and people who wish to stay clear of the law are not content with the assurance that they can win on appeal. After all, an appeal is a tax on time and money that is often greater than litigants wish to pay. I'm also sure that the degree of certainty with which success can be expected in the trial court has a considerable effect on the position of parties bargaining in pretrial settlements. As to criminal proceedings, I imagine that prosecutors, who decide what shall or shall not be prosecuted in a given locale, have access to the pertinent lower court decisions. A citizen wishing to stay clear of the criminal law would also like to have such access. And the parties' knowledge of past trial court decisions is probably very significant in that area we don't like to talk about—plea bargaining.

Reporter: I agree that the lawyer who has a clear insight into the workings of his local court can often be of much greater service to the client than one who doesn't. That is one reason why lawyers try to work with local counsel whenever they are away from their home town.[24] But such insight isn't going to be gained by making available opinions that are not presently reported. That insight comes only from daily work with the local

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[22] The sale of the *New York Law Journal's* publication of many New York City lower court opinions and of *Clark's Digest Annotator*, which is a bound index of all the lower court cases reported in the *Journal*, seems to be evidence of the importance of lower court decisions to the practitioner.

[23] [Y]ou cannot then rest content upon their [judges'] *words*. It will be their *action* and the available means of influencing their action or of arranging your affairs with reference to their action which make up the "law" you have to study. And *rules*, through all of this, are important so far as they help you see or predict what judges will do or so far as they help you get judges to do something. That is their importance. That is all their importance, except as pretty playthings. But you will discover that you can no more afford to overlook them than you can afford to stop with having learned their words.

LLEWELLYN, THE BRAMBLE BUSH 14-15 (1951).

[24] Perhaps one of the strongest arguments in favor of Pennsylvania's system of separate county bar association qualifications is that it ensures a litigant's having local counsel.

courts, judges and juries. The reasons why judges reach certain decisions and juries return certain verdicts are not often gleaned from the opinions written; such reasons probably wouldn't be articulated even if an opinion were published in every case. And it is because some lower court opinions *will* contain information significant to the bench and bar that we do publish selected lower court opinions.

Legislator: Well, I keep thinking of the *Bruce* case.[25] There's an opinion that should have been published.[26] It applied a constitutional standard, the meaning of which is far from clear,[27] to the uncommon

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[25] People v. Bruce, Crim. Ct., Part 2-B: N.Y. County, N.Y., Nov. 1964. In that case a divided three-judge trial court held that nightclub performances by comedian Lenny Bruce violated the state's obscene performance statute. In the statement of facts, the court listed certain words "used about one hundred times in utter obscenity," and provided abstracts of twelve of the "anecdotes and reflections [often relating to well known people] that were similarly obscene." The opinion further describes some of the comedian's gestures, such as one feigning masturbation, found to be obscene.

The finding of obscenity was based on a determination that, while the monologues did not excite prurient interests, they insulted and debased sex.

[26] This feeling seems to have been shared by many readers of the *New York Law Journal*. In a published response to their requests for publication of the opinion, the *Journal* stated that printing the opinion "was impossible within Law Journal standards." 152 N.Y.L.J. Dec. 4, 1964, p. 1, col. 5.

Responding to an inquiry by the *Review*, James M. Flavin, State Reporter for New York, gave the following explanation for not reporting the case:

> I think, if you have read the majority opinion in People v. Bruce, you will have found that it is rather short, that it merely summarizes the performance, and concludes that the defendant is guilty. It is essentially a factual determination with no discussion of what you have referred to as "an unsettled area of constitutional law." Moreover, the Bruce case is only one of a great number of cases in the State dealing with obscenity statutes, from which a selection must be made.

Letter to the *University of Pennsylvania Law Review*, February 4, 1965, on file in Biddle Law Library, University of Pennsylvania. West Publishing Company, which prints those lower court opinions forwarded to it by the state reporter in the *New York Supplement*, see note 12 *supra*, did not receive a copy of the *Bruce* opinion. Letter From Hobart M. Yates, West Publishing Company, to Professor Morris L. Cohen, December 10, 1964 on file in Biddle Law Library, University of Pennsylvania.

[27] Commenting on his experience as a member of the *Bruce* court, dissenting Judge Creel asserted:

> [I]n a total absence of any guideposts or other directives from such higher courts I fear we proceeded not unlike an explorer plunged into a vast uncharted virgin area in pursuit of a mirage of some fabled lost golden city. . . . The most current judge-made-law as to obscenity has been established without any relation to, and indeed in controversion of, "community standards" of obscenity, in a judicial absolutist application of a judicially declared doctrine of absolute freedom of expression. . . .

Creel, *Notes and Views*, 152 N.Y.L.J., Nov. 24, 1964, p. 1, col. 4. The Illinois Supreme Court, faced with a similar prosecution of Lenny Bruce, People v. Bruce, 31 Ill. 2d 459, 202 N.E.2d 497 (1964), felt compelled to reverse the lower court conviction in light of Jacobellis v. Ohio, 378 U.S. 184 (1964). In *Jacobellis*, the most recent Supreme Court description of the exception of obscenity from constitutional protection, there was no opinion of the Court, but four separate concurrences and three dissenting votes. Mr. Justice Stewart, concurring, could find no more precise description of "hard-core pornography" than "I know it when I see it . . . ." *Id.* at 197. One judge has responded that:

> The writer of this opinion has also felt that he would "know it when he saw it" but a reading of some of the published materials held to be constitutionally protected tends to raise doubts regarding one's perceptive abilities in such matters.

Haldeman v. United States, 340 F.2d 59 (10th Cir. 1965).

situation in which an act held to be obscene consisted of a performance and was not lust inciting.[28] Because the obscene act was not recorded, the facts are not otherwise available to the practitioner or scholar, as they might be in the case of a book.[29] Knowledge of the facts and opinion might be helpful to another comedian preparing a night club act for a New York City performance. It would also be useful to night club owners who may be liable under the statute for obscene performances given on their premises.[30]

Reporter: Well, perhaps there *was* unwise use of discretion with regard to the *Bruce* opinion, especially since law reports seem traditionally to have been immune from bowdlerization, probably because of their professional audience. Perhaps there should be more opinions reported in the

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[28] The central theme of the opinion was its prohibition of language which "clearly insulted sex and debased it." The elaborate factual statement seems to emphasize the court's desire to give notice that language need not be sexually exciting to be obscene. An opinion so explicit is rare in obscenity cases. The holding finds some support in the New York Court of Appeals' statement that Henry Miller's *Tropic of Cancer* was obscene because "throughout its pages can be found a constant repetition of patently offensive words used solely to convey debasing portrayals of natural and unnatural sexual experiences." People v. Fritch, 13 N.Y.2d 119, 124, 192 N.E.2d 713, 717, 234 N.Y.S.2d 1, 6 (1963) (overruled by Larkin v. G. P. Putnam's Sons, 14 N.Y.2d 399, 200 N.E.2d 760, 252 N.Y.S.2d 71 (1964). The present Supreme Court statements regarding the obscenity exception from constitutional protection do not squarely speak to this issue. See Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 395-99 (1963). This excellent article, which the *Bruce* trial court seems to have miscited for support, suggests that since the purpose behind state obscenity statutes is the enforcement of a morality evaluated more by conformity to religious tenets than by reason, they may be violative of substantive due process. In a companion article, Professor Louis B. Schwartz discusses various sections of the *Model Penal Code*, including § 207.10(2), the obscenity provision which has been embraced by the Supreme Court, Roth v. United States, 354 U.S. 476, 488 n.20 (1957), and which was cited by the *Bruce* court. Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 677-81 (1963). Although decided after publication of these articles, the *Jacobellis* case does not answer the questions they raise.

[29] People v. Fritch, *supra* note 28 lists the pages of *Tropic of Cancer* on which obscene material can be found. *Id.* at 124 n.5, 192 N.E.2d at 716 n.5, 243 N.Y.S.2d at 6 n.5 (1963). See also Haldeman v. United States, 340 F.2d 59, 61 n.3 (10th Cir. 1965). The original *Fritch* opinion quoted passages from the book. In explaining the inclusion of these quotations, Judge Scileppi stated:

> We do so to bring to the attention of the bar the factual basis for our conclusion that the book is obscene, as well as to demonstrate that this conclusion is not predicated upon any preconceived notions or predilections on our part.

The opinion was later rewritten, and the quoted sections excised in the published version. Judge Scileppi explained this revision as follows:

> After due consideration, I personally concluded that the same should be omitted from the official reports. There is no stated official policy in our court against the publication of language such as that which was deleted, although a number of individual judges felt it advisable to do so.

Letter From Judge John F. Scileppi to Professor Morris L. Cohen, April 28, 1965, on file in Biddle Law Library, University of Pennsylvania. While deletion of the *Fritch* quotations places the bar at a disadvantage in finding the facts pertinent to *Tropic of Cancer's* obscenity, the loss is not nearly so severe as that in the *Bruce* case, where the operant facts were recorded in no place other than the opinion itself.

[30] In the *Bruce* case, the trial court also found the nightclub owner guilty. Thus by its wide publicity, see, *e.g.*, N.Y. Times, Nov. 5, 1964, p. 47, col. 8, the decision warns of danger, while the failure to publish the actual details of the offense prevents interested parties' learning what acts are to be avoided.

obscenity area, where discussion of the actual facts is so rare. But are you going to change a system that is working well because of one or two weaknesses? What changes could you make? You must either publish all opinions or no opinions in order to eliminate discretion.[31] Is either choice an improvement over the present system?

Legislator: I'm still not sure why we don't publish the opinion if the judge thinks it important enough to be submitted for publication. By being able to control which opinions are to be published, don't you exercise political control over the bench? Why not just leave the decision to the judges?

Reporter: First of all, I do *not* possess any such political control! Moreover, although some reporters are selected by the executive branch, I am selected by the judges of the state court.[32] I represent the opinion of the bench in deciding which court opinions ought to play a part in the development of case law.[33] If the decision were left to the individual judge we might open up a whole field of competition among them.[34] It is hard for a lower court judge to estimate the significance of his opinion on a statewide basis. When you get down to it, you as a legislator must decide whether better published opinions may be obtained by leaving the determination to each individual judge or to an official chosen for his ability to make that determination.

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[31] Another way to limit discretion is to increase the number of reporters making the decision, but this may become too cumbersome. New Jersey has a committee of three instead of one state reporter. N.J. Ct. R. § 1.32 (1964).

[32] See, *e.g.*, CAL. GOV'T CODE § 68890; CONN. GEN. STAT. ANN. § 51-212 (1958); PA. STAT. ANN. tit. 17, § 1690.1 (1962); N.J. Ct. R. § 1.32 (1964).

[33] HOLDSWORTH, *op. cit. supra* note 1, at 6, 8.

[34] Compare the statement of the New York State Reporter, Letter From James M. Flavin to Professor Morris L. Cohen, June 25, 1963, on file in Biddle Law Library, University of Pennsylvania:

> After the adoption of new rules for the selection of opinions for publication, the Judges themselves began sending in to us fewer and fewer opinions which they regarded as suitable for publication. The result is that we do not find that we have to mark many opinions as "not acceptable."