Opinion Writers and Law Review Writers: A Community and Continuity of Approach

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"We are not final because we are infallible, but we are infallible only because we are final."

Justice Robert H. Jackson is responsible for this marvelous line.1 And so much wisdom abides in it. But even this most perceptive and gifted Supreme Court Justice failed to reckon with a formidable American institution that can seriously question the notion that appellate judges are final. We may be final as far as particular litigants are concerned,2 but a case can be made that the last, or final, word on the law is now a privilege entrusted to, or shall I say, acquired by, the law review writers and editors of our law schools.

It is the American law review, this serious institution of scholarly criticisms—sometimes volatile, sometimes impertinent, by nature opinionated but never villainous—it is the law review that constantly subjects the work of appellate courts to intense, critical scrutiny, to a jurisprudential dissection of our opinions, to a microscopic examination of the jural sinews and fibers that compose the body of our published work. Law reviews indeed constitute an

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2. Strictly speaking, the United States Courts of Appeals are not "final" appellate courts. The United States Supreme Court stands at the apex of the federal pyramid. But brute statistics indicate that, de facto, these courts are final. In the fiscal year ending June 30, 1977, terminated in all circuits were 16,426 cases. During the same period, the Supreme Court granted 162 petitions for review on writs of certiorari, denied 2,343, and dismissed 18 previously granted. [1976] DIR. AD. OFF. U.S. CTS. ANN. REP. Tables B1, B2.
extremely valuable, extra-judicial laboratory in which our various specimens are meticulously studied and then evaluated as healthy or pathological.

Although we judges come as unwilling patients to the scalpels and incisions of law review writers, any judge sensitive to the activity or reputation of his court should welcome the diagnosis and possible surgery; at least, I do. In a system of government where the executive and legislative branches are constantly subject to public review at the ballot box, but where appellate judges are lifetime or long-term, it is the law review that serves as an informal check and balance; informal and unstructured, to be sure, but nevertheless, a respectable and ever-present force.

Time and again I find myself discarding passages in draft opinions—enthusiastic passages that were the product of much zeal and hours, if not days, of labor. I discard them because, after reflection, I become convinced that my approach would not wash; that it would not survive calm, detached appraisal, the withering gaze of critical analysis—especially the inquisitorial scrutiny of a law review examination. And, at decision conferences, my colleagues and I, in planning the outline of a proposed decision, are not above asking one another if the design we are planning can withstand this same disciplined dissection. Thus, the role of the student law review as an unabashed and immodest critic of state and federal appellate courts is much to be desired and welcomed by the bench and bar.

In this spirit, it becomes appropriate to discuss rules and measures by which judicial opinions should be evaluated. I do not suggest anything revolutionary. Guidelines and standards for reviewing an opinion are the same as those utilized in writing an opinion. For this reason, I believe that the writer and the reviewer should approach an opinion from the same vantage point. A common approach would produce continuity, and thus yield meaningful analyses to the readerships of both opinions and law reviews.

3. In the Third Circuit, cases are usually heard by panels of three judges. The judge to whom the writing of the opinion is assigned prepares a draft opinion in accordance with the collegial decision of the judges at the decision conference. The opinion-writing judge may also choose to express views which he has reached after further study, but must circulate the final draft opinion to other members of the panel with a request for approval or suggestions.
I. INTRODUCTION

Professor Harry W. Jones of Columbia University, one of the true giants of contemporary jurisprudence in this country, has written:

When one asked Pound whether a recent Supreme Court decision was a "good" decision or a "bad" one, the old gentleman—for so I remember him with gratitude and considerable awe—had a way of answering not in terms of the correctness or incorrectness of the Court's application of constitutional precedents or doctrine but in terms of how thoughtfully and disinterestedly the Court had weighed the conflicting social interests involved in the case and how fair and durable its adjustment of the interest-conflicts promised to be.⁴

Thoughtful and disinterested weighing of the conflicting interests is the first rule impressed upon my law clerks. I suggest that it should be the guiding rule and measure applied both by judges in writing opinions, and by law review writers in analyzing opinions.

Although the beginning point for both writers and readers of judicial opinions may be the same, the manifested ends are sometimes dissimilar: the law contained in the opinions is the law as it is; the scholarship efforts of the law review writer culminate, more often than not, in the law as it ought to be.⁵ When there is a coalescing between the law that "is" and the law that "ought to be," a state of jurisprudential bliss exists between academia and the courts. More frequently, however, a chasm exists between "is" and "ought" which law reviews seek to bridge. While that effort is heartily commendable, many loose planks endanger the wayfarer on that noble crossing.

The multifaceted realms of "being" and "oughtness" have been analyzed and discussed through the ages. The tension between the opinion writer and the law review writer might well be a modern-day parallel of the clash between Roman verum, truth, and certum, certainty. But my concern here is not so much with philosophical origins of the problem as with the postulate that notwithstanding

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⁵. Thus, Professor Morris L. Cohen has observed that "American legal periodicals parallel in quality and variety the other secondary materials. They have been said to reflect the law as it was, as it is, as it is tending, and as it ought to be." M. Cohen, Legal Research in a Nutshell 197 (2d ed. 1971).
the innate tension, a meaningful, productive analysis requires a significant community and continuity of approach between the opinion writer and the reviewer.

As both a reader and writer of judicial opinions, I suggest that the desired approach includes four areas which, if given greater attention from both writers and reviewers, would greatly aid both groups in their quest to "thoughtfully and disinterestedly . . . [weigh] the conflicting social interests involved in the case." First, the terminology used by judges and critics alike evidences sloppiness in identifying the legal precepts which are components of various rationes decidendi. Second, there is often a failure to isolate precise contours of the jurisprudential dispute before the court. Third, there is sometimes a failure to avoid, or to identify, fallacies of reasoning. Finally, there is frequent failure to recognize and to evaluate the public policy judgments that inhere in judicial lawmaking.

II. IDENTIFYING THE LEGAL PRECEPTS

A discussion of the basic framework of a ratio decidendi must invoke the writings of that great master of the American legal tradition, Roscoe Pound, who stated that the requisite ingredients constitute "the body of authoritative materials, and the authoritative gradation of the materials, wherein judges are to find the grounds of decision, counsellors the basis of assured prediction as to the course of decision, and individuals reasonable guidance toward conducting themselves in accordance with the demands of the social order." It is extremely important to distinguish among the various forms of legal precepts because, as sociologist Philip Selznick puts it (and he puts it well), "If all laws are authoritative, some are more authoritative than others."

The importance to both writer and reviewer of ascertaining the relative weight to be accorded various precepts is heightened by the exigencies of translating into written word the respective writer's analysis. Thus, phraseology must be precise and analytical processes must be valid, if we are to have the desired continuity of

6. See Jones, supra note 4, at 1029.
7. Pound, Hierarchy of Sources and Forms in Different Systems of Law, 7 Tul. L. Rev. 475, 476 (1933) [hereinafter cited as Pound].
approach between writer and reviewer. Where Selznick has used the word "law," I shall use Pound's formulation, "legal precept," and define rules of law as precepts attaching a definite, detailed legal consequence to a definite, detailed state of facts. Rules are to be distinguished from principles, which are authoritative starting points for legal reasoning, employed continually and legitimately where cases are either not covered at all or not fully covered by rules in the narrower sense. Unlike rules, then, which emanate from specific factual complexes, principles do not attach a definite, detailed legal result to a definite, detailed state of facts. The distinction between rules and principles can be seen in the Restatement of Restitution, in which it is stated that certain basic assumptions in the restatement are stated in the form of principles. They cannot be stated as rules since either they are too indefinite to be of value in a specific case or, for historical or other reasons, they are not universally applied. They are distinguished from rules in that they are intended only as general guides for the conduct of the courts and are not intended to express that universality of application to particular cases which is characteristic of the statements made in subsequent chapters.

Although Pound described other important guides to the formation of *rationes decidendi*, the most important distinction for our

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10. *Restatement of Restitution*, Introductory Matters at 11 (1937). Roscoe Pound has explained:

A principle is an authoritative starting point for legal reasoning from which we seek rules or grounds of decision by deduction. Principles are the work of lawyers. They organize experience of interpreting and applying rules or experience of advice to litigants or tribunals or experience of judicial decision by differentiating cases and putting generalized propositions behind the differences. They compare a long developed experience of decision in some field, referring some cases to one general starting point for reasoning and others to some other such starting point, or they find a more inclusive starting point for a whole field. They come into the law with the advent of legal writing and juristic speculation, so that the presence of this element as a controlling factor is the mark of a developed legal system. Principles as such appear first at the end of the stage of strict law. But an earlier form in the shape of legal proverbs or maxims goes back to the beginnings of law.

11. These include "conceptions," "doctrines," and "standards." See Pound, *supra* note 7, at 484-85. In order, they complete an inverted pyramid with the "rule" at its base. "Conceptions" may be viewed as authoritative categories to which types or classes of transac-
purposes is that between rules and principles. Confusion of these two precepts is most often the basis for misunderstanding the crux of an opinion, either because the opinion writer misconceives or misuses the terms, or because the reviewer is guilty of the same practice. One may appreciate the words of Professor Robert E. Keeton in this regard:

The contrast between principles and rules that is relevant . . . concerns methods of change rather than susceptibility to change. The narrow propositions commonly called rules are on occasion changed abruptly; that is, precedents are overruled. The broadest propositions, to which the term 'principle' is applied, are as near to immutability as anything in law.\(^\text{12}\)

Ronald Dworkin makes the point that rules are applicable on an "all-or-nothing" basis: "If two rules conflict, one of them cannot be a valid rule."\(^\text{13}\) It is here that we usually resort to principles, because "[p]rinciples have a dimension that rules do not—the dimension of weight or importance. When principles intersect, one who must resolve the conflict has to take into account the relative weight of each."\(^\text{14}\)

I insist that the legal precept be properly labeled or identified—but not for the sake of elegantia juris or preciousness. There are much more pragmatic considerations. When a specific holding of a case is suddenly anointed with the chrism of “principle” there is a very real effect on the doctrine (yes, I think it’s a doctrine) of stare decisis. The danger of a commentator or a writer of a subsequent opinion lifting a naked holding of a given case to the dignity of a legal “principle” may give to a single appellate decision a precedential breadth never intended. It may confuse the dispute-settling

\(^{12}\) R. Keeton, Venturing to Do Justice 22 (1969).


\(^{14}\) Id. at 27.
role of a court with its responsibility of institutionalizing the law. Institutionalization in the common law tradition, in Harlan Fiske Stone's felicitous expression, is "preeminently a system built up by gradual accretion of special instances." And, in my view, the accretion is not gradual if you pile on an improper dimension to a specific instance.

I candidly confess to a suspicion, and it is not more than that, that a divergence of basic philosophy may exist between the traditional common law lawyer-judge and the American legal academician. Many legal commentators, both on and off the bench, appear to have an infatuation with the Continental tradition of codification. If the law is moving, stop it; freeze it; codify it. Thus appears the current penchant for Uniform and Model Codes on everything from commercial and criminal law to class action procedures, the mighty efforts of the Restatements of the Law, and the frenetic activities of the American Bar Association to procreate "standards" with undiminished vigor.

It is my thesis that every holding of every case does not deserve that same size black letter law treatment that some commentators or codists wish to give it. If American case law is to develop properly in the common law tradition, it is essential that the effect of specific instances, i.e., the rules of law in the narrow, Poundian sense, be given proper weight. But only proper, honest weight. And often, describing a rule as a principle, or a doctrine, is interfering with the measure of proper weight. It's putting a jurisprudential thumb on the scale.

The ability to properly identify, and distinguish among, the various components of rationes decidendi is an ability which should be developed in the writer or reviewer even prior to his or her taking pen to hand. Only where both parties begin with a firm grasp of the relative dimensions of the legal precepts involved in a dispute can they be assured that they will use consistent and proper designations, and thus produce meaningful analysis. Ideally, the components will be clearly identified in the opinion, precluding any guess, or value judgment, on the reviewer's part. Thus, where a judge properly identifies the guiding principles, or controlling rule, the

reviewer may merely restate the court's initial precept identification and then focus his or her analysis on the *choice* of those precepts. If after close examination, however, it appears that an opinion contains imprecise or improper labelling, we return to square one and the reviewer's initial job is somewhat more complex. Such ambiguity itself warrants comment by the reviewer, who must ferret out some common nomenclature on which the opinion can be reviewed.

III. IDENTIFYING THE PRECISE DISPUTE

Analysis of the judicial process reveals four functions involved in the decision of a case: (1) finding the facts; (2) finding the law, i.e., choosing the legal precept applicable to the facts found; (3) interpreting the precept; and (4) applying the precept to the facts at hand. At the onset, a judge will evaluate the facts to determine which are material to settlement of a dispute.\(^7\) Selection of the relevant law then envelops these facts in a particular arena of competing legal precepts or competing analogies. The next step, interpretation, may be "clear-cut," as with some precepts of contract or tort law, or it may involve broad principles subject to disparate analyses.\(^8\) Finally, reasoned elaboration should support the application of the precepts, so found and so interpreted, to the facts at hand.

Professor Herbert Wechsler has aptly observed that the role of the critic "is the sustained, disinterested, merciless examination of the reasons that the courts advance, measured by standards of

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17. But, recall what Jerome Frank has observed: It is sometimes said that part of the judge's function is to pick out the relevant facts. Not infrequently this means that in writing his opinion he stresses (to himself as well as to those who will read the opinion) those facts which are relevant to his conclusion—in other words, he unconsciously selects those facts which, in combination with the rules of law which he considers to be pertinent, will make "logical" his decision. A judge, eager to give a decision which will square with his sense of what is fair, but unwilling to break with the traditional rules, will often view the evidence in such a way that the "facts" reported by him, combined with those traditional rules, will justify the result which he announces. If this were done deliberately, one might call it dishonest, but should remember that with judges this process is usually unconscious and that, however unwise it may be, upright men in other fields employ it, and sometimes knowingly . . . . J. FRANK, LAW AND THE MODERN MIND 134-35 (1930) (footnote omitted), reprinted in R. ALDISERT, THE JUDICIAL PROCESS 698 (1976).

18. H.L.A. Hart cites constitutional law as one example of this "open texture" area. See R. ALDISERT, THE JUDICIAL PROCESS 493 (1976) [hereinafter cited as ALDISERT].
Thus, effective interplay between the writer and reviewer of a judicial opinion requires that the judge elaborate and justify his or her disposition of the four basic functions, and that, likewise, the reviewer remain within these bounds in examining the opinion.

We have seen that the proper terminology involves basically an intellectual grasp of concepts on the part of the individual writer or reviewer. Identification of the precise dispute implicates both a preferred methodology of analysis and an understanding of terms. The introduction of a preferred procedure heightens the importance of the community and continuity of approach between writer and reviewer. When both exposition by the judge and examination by the critic are set within the framework of the four basic functions, determination of whether the ultimate decision in a case accords with the Jones-Pound measures of being “right as possible” or “good” will be a more effective endeavor.

For example, the writer and reviewer may differ on the preferred disposition of any of the four functions. The level at which disagreement occurs (if it occurs at all) may well dictate the entire tenor and depth of a law review article. Thus, if the reviewer’s sole dispute with an opinion writer is over application of a given precept to the facts at hand, there is no point in fashioning a long legal essay on finding the facts, choosing the legal precept, or interpreting it.

In many instances, however, the reviewer will dispute not so much the application of a given legal precept, but the court’s choice of that precept, i.e., the court’s judgment regarding the similarity of fact situations under comparison. Edward H. Levi has explained that “the scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced. The finding of similarity or difference is the key step in the legal process.”

To understand why disagreement between writer and reviewer occurs most frequently on this level, we need only consider again one of the basic distinctions between a judicial opinion and a law review

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20. See section II supra.
article. An opinion treats a narrow fact situation, a specific case or controversy; a law review article often treats a broader subject, using the single opinion as a springboard for discussion. The good judge will identify, isolate, discern the precise dispute, and usually say no more, but the reviewer will use the identified dispute as a vehicle for extended analysis of the law involved in the decision. The opinion writer's specificity and discrimination require maximum judicial restraint, as well as constant supervision of the staff who would assist in this endeavor;\textsuperscript{2} the reviewer may—and should—give freer rein to certain value judgments as to what something \textit{should} be.

Disagreement between opinion writer and reviewer over the choice of legal precepts, then, must be tempered by an understanding of these distinctions. Thus enters the importance of identifying the precise dispute: not until both writer and reviewer have clearly identified the dispute, and some common ground is found, may the reviewer's jump to the "ought" begin. The good reviewer will resist the temptation to criticize unfavorably a judge merely for his or her choice of precepts when those precepts rest on a valid identification of the precise dispute. Of course, when the reviewer can demonstrate that the writer misapprehended or misrepresented the dispute, this should be done. But such a situation is not the stuff of which scholarly contributions are made. I suggest that the most fruitful approach is for the reviewer to parallel as closely as possible the court's dispute identification, and proceed to an analysis of the precepts beyond that on which the court, in the exercise of its judicial function, may embark. Examining the life and future of those precepts, judge-made or statutory, which the court deemed relevant, as well as the court's application of the law, can be a most exciting challenge. And awareness by both writer and reviewer of the importance of proper dispute identification again moves us toward the desired community and continuity of approach—leaving, it must be noted, maximum room for the reviewer's creativity and depth of analysis.

\textsuperscript{23} Oftimes, a judge is surrounded by recent alumni of the school of "reviewers." We judges are parties of a self-fulfilling, if not self-defeating, prophecy. We surround ourselves with clerks who have law review training in the constant quest for consummate minutiae.
Published opinions are the principal means of carrying out the decisional process and, as such, qualify as "performative utterances." Professor J.L. Austin appears to have contrived the word "performative." When combined with the word "utterances," the term defines an expression that is not only articulated but also operative. Because judicial opinions fit this description, we can say that a court's public performance in reaching a conclusion is at least as important as that conclusion.

Thus, as well as exercising an awareness of the need to properly identify the general components of a case and the precise dispute addressed by a court in this exercise of the four basic functions of the judicial process, the reviewer should examine an even more particular aspect of the opinion—the construction of its legal reasoning. Felix Frankfurter said that "[f]ragile as reason is and limited as the law is as an expression of the institutionalized medium of reason, that's all we have standing between us and the tyranny of mere will and the cruelty of unbridled, unprincipled, undisciplined feeling." Legal reasoning is the essence of the process of justification, providing links in the chain of development of all areas of law.

Although reasoned exposition traditionally takes the form of a logical syllogism, there is, of course, much more to the judicial process than dryly logical progression. In exercising a choice of legal precepts, for example, the opinion writer does not necessarily appeal to any rational or objective criteria; essentially, he or she exercises

25. Here, too, lies the "operative" distinction between a court's opinion and a law review article. Both are legal utterances; only the opinion is performative.
27. It affects not merely the development of "rules" or "principles"; today, American courts are judicially formulating public policy, a result of the judiciary's shift from the traditional to the sociological methods of decision making. See section V infra; B. Cardozo, The Nature of the Judicial Process 65-76 (1921); Jones, supra note 4, at 1030-31; Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605 (1908).
28. The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case.
a value judgment and should be recognized flatly as doing so. A frequent error of law reviews is to permit the reviewer who, at bottom, disagrees with the opinion writer's choice of major precept to embark on an attack of the court's "reasoning." In fact, notwithstanding the nature of the published opinion, law reviews conduct little analysis or criticism of reasoning qua reasoning. I suggest that more attention should be focused on the methods utilized by the opinion writers to justify their decisions, i.e., the reasoning itself. Just as it is not too much to ask whether one disagrees with the choice of the "authoritative starting point," and if so, why, it is not too much to ask whether the reviewer's quarrel is with the formal correctness of the syllogism used and, if so, where.

There is fertile ground upon which to criticize the reasoning in opinions. The reviewer's responsibility to do so, however, must extend beyond superficial critiques of "the court's reasoning" or broad accusations of fallaciousness. Any material fallacy of logic should be identified with particularity. For instance, when there occurs a fallacy of irrelevance, often referred to as irrelevant conclusion or ignoratio elenchi, it should be identified as such and explored. The writer, in this instance, proves a point unrelated to the issue presented or, conversely, disproves a point similarly irrelevant. The fallacy results in spending time and effort to prove something that has not been asserted and which, most likely, bears little relevance to the cause. In another form of the same fallacy, the writer assumes that he has proven his own point by disproving those of another.

Another common fallacy is the fallacy of accident, or dicto simpliciter, which occurs when the writer, confronted with a special, exceptional case, attempts to apply a general rule. Thus, the case which exists as an exception is brought within a universal statement from which it previously was exempted. A converse fallacy also frequently appears: the fallacy of selected instances, or the fallacy of hasty generalization. This consists of amassing a few instances and establishing a generalization or rule based on those alone. The fallacy is in the lack of a representative number of particular instances to form a valid foundation. Dean Pound suggests, in this regard,

29. William S. and Mabel Lewis Sahakian have compiled an extensive anthology of material fallacies, including those discussed herein. See W. SAHAKIAN & M. SAHAKIAN, IDEAS OF GREAT PHILOSOPHERS 11-23 (1966).
that often commentators will hastily generalize a holding into a principle.\textsuperscript{30}

The fallacy of false cause, or \textit{post hoc}, involves reasoning from mere sequence to consequence, from what merely happened in chronological order to the assumption of a causal connection. Then there is \textit{petitio principii}, or begging the question. In order to prove that A is true, B is used as proof, but since B requires support, C is used in defense of B, but C also requires proof and is substantiated by A, the proposition which was to be proved in the first place.\textsuperscript{31}

V. IDENTIFYING PUBLIC POLICY

The aspect of opinions most often at the root of a law reviewer's disenchantment but, unfortunately, the aspect least articulated in the reviews, is that of the value judgments exercised by the court\textsuperscript{32} in setting a definite public policy for a jurisdiction. We are all so sophisticated enough today to acknowledge that judges are lawmakers.\textsuperscript{33} Indeed, because of political tensions, often the state and federal legislatures are quick to enact legislation in broad, vague, ambiguous terms in order to leave to the courts the determination of public policy.\textsuperscript{34} For example, the law flowing from the Sherman

\textsuperscript{30} A good deal of complaint grows out of too much inclination to generalize in a hurry, and too much inclination on the part of text writers to lay down something on the basis of a particular case as a universal proposition. It gets into the encyclopedias, gets reported in the reports, and before you know it, you have something that is a hasty feeling, or groping for a principle masquerading as an established principle in the law. Pound, Survey of the Conference Problems, 14 U. Cin. L. Rev. 324, 331 (1940).

\textsuperscript{31} An example of this would be: "Orphans are unhappy." "How do you know?" "An orphan told me." "How did you know he was an orphan?" "Because he was unhappy."

\textsuperscript{32} We must always bear in mind that an opinion of the court is a collegial effort. A draft opinion is subject to intra-court criticisms, the end product often being the result of alterations and additions by the other judges who would join in it. Thus, it is sometimes more a product of compromise than a true reflection of the opinion writer's value judgments.

\textsuperscript{33} John Chipman Gray often quoted Bishop Hoadley: "Nay, whoever hath an \textit{absolute authority to interpret} any written or spoken laws, it is He who is truly the Law Giver to all intents and purposes, and not the Person who first wrote and spoke them." J. GRAY, THE NATURE AND SOURCES OF THE LAW 125 (2d ed. 1925).

Holmes assured us "[t]hat judges do and must legislate, but they can do so only interstitially . . . ." Southern Pac. v. Jensen, 244 U.S. 205, 221 (1916) (dissenting opinion).

These latter-day recognitions appear to be far removed from Francis Bacon's admonition: "Judges ought to remember that this office is \textit{Jus Dicere}, and not \textit{Jus Dare}, to interpret law, not to make or give law."

\textsuperscript{34} Judge Charles D. Breitel of the Court of Appeals of New York has discussed the difficulty which arises from this situation:

Legislative inaction, total or partial, in a troubled area may indicate a rejection of
Antitrust Act\textsuperscript{35} is essentially judge-made law, emanating from a skimpy statutory text.\textsuperscript{36} Similarly, the Taft-Hartley Act\textsuperscript{37} gave the federal courts virtually carte blanche authority under section 301 to promulgate a federal common law for labor relations. Other statutes do not even furnish polestars for the court's guidance. Some merely create procedural devices for the resolution and clarification of important issues and delegate to administrative agencies and the courts the actual resolution of these problems, or demonstrate the failure of legislative bodies to arrive at a consensus.\textsuperscript{38}

The vast majority of rules of conduct, whether promulgated by the legislature or by a court, spell out policy choices.\textsuperscript{39} Some judges are free to recognize this in their opinions, others are not. Judge Andrews' noted dissent in \textit{Palsgraf v. Long Island Railroad}\textsuperscript{40} provides the best exposition of this point. With all due respect to the author of the majority opinion, the great master Benjamin Nathan Cardozo, a judge whom I respect as much as I do any judge in the history of American law, I am nevertheless persuaded that Judge Andrews was the more candid when, addressing the question of proximate cause, he wrote:

\begin{footnotes}
36. The purpose of the antitrust laws is to promote competition and to inhibit monopoly and restraints upon freedom of trade in all sectors of the economy to which these laws apply. This purpose is as plenary as the statutory language which embodies it. Hence, the antitrust laws have not merely been open to doctrinal elaboration, they have required it; the process of adjudication, more than a means of enforcement, has been an indispensable element in the formulation of the law.
39. Whether contracts must be supported by consideration; whether a defendant in an accident case should be spared liability because of plaintiff's contributory negligence; whether minors should be relieved of legal consequences that might otherwise apply to their actions—these and a host of other issues treated in the common law are basically questions of general public policy.
\end{footnotes}
What we do mean by the word "proximate" is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. Take our rule as to fires. Sparks from my burning haystack set on fire my house and my neighbor's. I may recover from a negligent railroad. He may not. Yet the wrongful act as directly harmed the one as the other. We may regret that the line was drawn just where it was, but drawn somewhere it had to be. We said the act of the railroad was not the proximate cause of our neighbor's fire. Cause it surely was. The words we used were simply indicative of our notions of public policy. Other courts think differently. But somewhere they reach the point where they cannot say the stream comes from any one source.

It is all a question of expediency. There are no fixed rules to govern our judgment. There are simply matters of which we may take account.

Once again, it is all a question of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind. 41

Yet there are bounds. There cannot be judgment by fiat. There must be a reasoned accommodation of the conflicting claims and interests at stake. The "performative utterance" must include a societally acceptable explanation. In sum, the opinion that would meet the Harry Jones/Roscoe Pound test of "how thoughtfully and disinterestedly the Court had weighed the conflicting social interests involved in the case and how fair and durable its adjustment

41. Id. at 352-54, 162 N.E. at 103-04. As early as 1888, Justice Homes would say:
The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient to the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.

of the interest-conflicts promises to be'" should set forth a reasoned elaboration of the interest-conflicts resolution.

Modern jurisprudence presses an inexhaustible inventory of "social interests" upon jurists for attention. I have previously commented that with public policy often appearing as a polestar, Dean Pound's "A Survey of Social Interest" should be mandatory reading for today's law student and the subject of refresher courses for lawyers, legislators, and judges. Pound recognized that "in the common law we have been wont to speak of social interests under the name of "public policy," but he emphasized that the extent to which the latter-day technique of "balancing interests" may be considered valid depends, in the first instance, on identifying all the interests.

The expression "balancing interests", first so described by Justice Hugo Black, is useful, perhaps, but seriously misleading. The expression implies that the subject matter of the judicial process may be precisely quantified. It may not. The best that can be hoped is that all the interests at stake in a given case are identifiable. Having identified the interests at stake, a judge can at least consider them, but it is doubtful that he is ever really able to "balance" them. The judge's accommodation of the competing interests—his or her priorities, if you will—in resolving the interest-conflicts will be durable and acceptable to the extent that a reasoned accommodation of the interests is regarded and accepted as fair.

Just as the opinion writer will strive to recognize and accommodate the relevant interests in a case, it is the reviewer's responsibility to couch any discussion in the same light. Where the law reviewer simply indicates that he or she dislikes the particular result in the case, without more, or simply expresses a value judgment, without more, the review should be sloughed off as sophomoric. Where the law reviewer merely disagrees with the court's decision because the writer—student or professor—favors certain interests or
groups over others, where it is simply a question of whose ox is being gored, then, although the reviewer's right to disagree is to be respected, it is not legitimate to camouflage this basic policy disagreement as a criticism of an opinion writer's legal ability or scholarship. If what is to be written is essentially a criticism of a judge's political or social philosophy, it may more properly belong in a political science journal than in a law review. But a continuity of approach between opinion writer and reviewer in identifying and dealing with the various interests will yield a very important area in which various critiques should be made: where the law reviewer can demonstrate that the court has not taken cognizance of all the interests, or that there is a better adjustment that is available, then the criticism is acceptable and, indeed, warranted. 46

VI. CONCLUSION

Thus we end as we began. There are rules and measures of a good opinion which must be followed by the opinion writer. Those who would review the opinion must use the same rules and measures. The rule or measure is a complex ideal embracing standards for assessing and criticizing decisions that purport to be legal, whether made by a legislature or by a court, whether elaborating a rule or applying it to a specific case.

Most definitions of law invoke a normative system and a master ideal. Thus, St. Thomas Aquinas reminded us that law is "an ordinance of reason for the common good, promulgated by him who has the care of the community." 47 But positive law, whether it comes from the legislature or from the court, includes an arbitrary element. For those who must obey it, it is to some extent brute fact. It is, in Philip Selznick's formulation, to some extent "brute fact and brute command": "[T]his arbitrary element, while necessary and inevitable, is repugnant to the ideal of legality. Therefore, the proper aim of the legal order, and the special contribution of legal

46. Of course, there may be a simpler reason for the disagreement in what I hope is the rare case in which a judge has simply overlooked a controlling statute or precedent. In that case, too, a judge ought to accept the reviewer's criticism. It is apparent, however, that the enduring law review analyses will be those discussing interests, not a specific failing whose importance does not extend beyond one case.

scholarship, is progressively to reduce the degree of arbitrariness in the positive law."

The function of the modern American law review is exactly that: progressively to reduce the degree of arbitrariness in the positive law. However, just as a judge must resort to reasoned elaboration instead of judicial fiat, so must criticism of a judge's work be free from law review fiat. Thus appears the critical importance of continuity between writer and reviewer in the various approaches discussed herein. In effecting a proper and consistent approach, we are able to evaluate decisions not in terms of "right" or "wrong," nor in terms of subjective agreement or disagreement with the result, but rather in terms of the thoughtful and disinterested weighing of conflicting social interests. And thus will opinion writers, reviewers, readers, and, indeed, the development of the law itself, be served.