

SATURDAY, DECEMBER 26, 1992

Lawyer's Viewpoint

Judicial Opinions

By John Ritter

"I have a service you can't refuse," said the smooth talking telephone salesman as he extolled his appellate case reporting service. "It has weekly reports of state, federal appeals and U.S. Supreme Court decisions, is perfectly indexed to every legal point discussed, contains case summaries, and it's not expensive," he gushed. My boredom surprised me because I'm still the same lawyer who loved my law school immersion in appellate cases, and whose first proud job after law school was writing state Supreme Court opinions as a judge's law clerk. Appellate cases were important to me then; they were important when I taught property law as a full time law professor, and they were important when I lectured first year law students on the difference between dictum and holding in precedents like *Pier-son v. Post*. Today I am convinced law schools spend too much time on appeals — they are such a small part of general law practice that the time devoted to them in law school is inordinately high.

"I'm not interested," I told the salesman and hung up the phone. No need to tell him why or explain; besides I needed to analyze my lack of interest for myself — was it just boredom after 25 years of reading appeals, or was it a real turnabout in attitude about the value of precedent?

When I graduated from law school I believed, as did the Founding Fathers, that the common law embodied right reason and that immutable, higher law

principles existed for judges to discover and apply in specific cases. This is the natural law philosophy, recently embraced by Judge Clarence Thomas. I thought the Supreme Court Judge I clerked for was a heretic when he told me he thought it was more important to decide a case properly for the two parties involved than to create an important precedent for posterity.

But then, that was minor compared to my discovery that a judge would change his vote on a case to suit his selfish needs. One day the Chief Justice informed my judge that the judge who was supposed to write the 4 to 3 majority opinion in one of our cases was sick and that he was reassigning the opinion to be written by my judge. I wish I had not heard his response because it was my baptism into legal realism: "If I have to write that opinion," he threatened, "then I'm changing my vote to the other side." So much for my belief in the purity of appellate decisions as precedent.

Today, when federal judges are touted and appointed for their views on abortion and crime, who could believe that unchanging, immutable legal principles are waiting to be discovered and applied by judges? Not I, that's for sure. In fact, I'm starting to believe that civil law lawyers may be correct when they criticize the common law for looking backward instead of forward. In my opinion our system of precedent needs to be replaced by a system that looks to the future and to fairness, and not just to what has been done in the past.