# *THE GREAT DISSENTS OF THE "LONE DISSENTER":*

## *Justice Jesse W. Carter's Twenty Tumultuous Years on the California Supreme Court*

DAVID B. OPPENHEIMER AND ALLAN BROTSKY, EDITORS

Durham: Carolina Academic Press, 2010
lvi, 225 pp.

REVIEW ESSAY BY MICHAEL TRAYNOR*

"The thing that means more to me than anything else is being able to transmit to posterity through my decisions, both majority and dissenting, something that will be a guide to the future. . . . A decision that stands for all time means something. If a hundred years from now a lawyer gets up in court and says, 'This very lucid and illuminating decision was written by Mr. Justice Carter in 1955,' well, I won't be there to hear it, but it is the thought that a hundred years after I am dead and forgotten, men will be moving to the measure of my thoughts."[1] So spoke Jesse W. Carter, associate justice of the Supreme Court of California for twenty years (1939–1959), in his oral history, conducted by Corinne Lathrop Gilb.[2]

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1 Oral History of Jesse W. Carter, 4 California Legal History 298-299 (2009).

2 *See* Corinne Lathrop Gilb, *Justice Jesse W. Carter, An American Individualist*, 29 Pacific Historical Review 145, 157 (1960). Justice Carter's oral history was conducted in 1955.

In his essay on dissenting opinions,[3] Justice Carter stated, "The right to dissent is the essence of democracy — the will to dissent is an effective safeguard against judicial lethargy — the effect of a dissent is the essence of progress. . . . The majority opinion is, in form and substance, the collective, composed and edited view of the majority. In a dissenting opinion, however, the judge is on his own, and can express his personality, his philosophy and his uncensored convictions."[4]

Justice Carter was understandably proud of his opinions and their treatment in the Supreme Court of the United States, saying in his oral history that "I've had more of mine upheld than any other member of the Supreme Court of California. Not as many as I would like to have had upheld, but more than any of the rest of them."[5] He also furnished for his oral history a "List of Cases in which I Have Dissented Where the Supreme Court of the United States Has Agreed with My Dissent and Reversed the Supreme Court of California."[6]

In their new book, *The Great Dissents of the "Lone Dissenter": Justice Jesse W. Carter's Twenty Tumultuous Years on the California Supreme*

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3 Jesse W. Carter, *Dissenting Opinions*, 4 HASTINGS L.J. 118 (1952).

4 *Id.* at 118-119. His contemporary on the Supreme Court of Pennsylvania, Justice Michael A. Musmanno, also wrote an essay on dissenting opinions, stating, "Once it is proclaimed officially that a majority cannot err, you begin to encourage absolutism. And it has been demonstrated beyond all imagining of contradiction that when criticism is gagged, opposition suppressed, and constructive advice silenced, absolutism sprouts, for power feeds upon power, — and the tree of tyranny will soon bear its poisonous fruit of oppression." Michael A. Musmanno, *Dissenting Opinions*, 6 KAN. L. REV. 407, 416 (1958). *See also* Abraham E. Freedman, *The Dissenting Opinions of Justice Musmanno*, 30 TEMPLE L. Q. 253 (1957); Melvin M. Belli, *Book Review*, 4 U.C.L.A. L. REV. 164 (1956) (reviewing *Justice Musmanno Dissents, by Michael A. Musmanno, with introduction by Dean Roscoe Pound*, 1956).

5 Oral History, *supra* note 1, at 331.

6 The eight cases listed are Gospel Army v. City of Los Angeles, 331 U.S. 543 (1947); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948); Rochin v. California, 342 U.S. 165 (1952); Anderson v. Atchison, Topeka & S.F. Ry. Co., 333 U.S. 821 (1948); Garmon v. Building Trades Counsel [sic] [Council] of San Diego, 353 U.S. 26 (1957); California v. Taylor, 353 U.S. 553 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957); and Chessman v. Teets, 354 U.S. 156 (1957). He added, "In only one case has the Supreme Court of the United States reversed the Supreme Court of California where I prepared the majority opinion. This was *Richfield Oil Corp. v. St. Bd. Equalization*, 329 U.S. 69 (1946). . . ." Oral History, *supra* note 1, at 332-333.

*Court*, Professors David Oppenheimer and Allan Brotsky, editors, and their scholarly chapter authors, have made a valuable contribution to legal history as well as to judges, scholars, lawyers, and others interested in the dynamics of judicial decision-making, the relevance to modern law and life of a justice's dissents from over fifty years ago, and, in particular, the life and views of Justice Carter. The book begins with their informative preface, which includes a succinct summary of the material to follow; a foreword by Justice Joseph R. Grodin; a biography of Justice Carter by J. Edward Johnson[7]; an essay by Justice William J. Brennan, Jr., *In Defense of Dissents*[8]; and an essay by Judge William A. Fletcher, *Dissent.*[9] It then continues with thirteen chapters, each by a separate author. Each chapter discusses Justice Carter's dissent in a particular case and reproduces the salient portions or all of the dissent under discussion.[10] The book provides

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7 Johnson's essay, *Jesse W. Carter: Seventy-Fifth Justice, September 12, 1939–March 15, 1959*, is reprinted in the book from his HISTORY OF THE SUPREME COURT JUSTICES OF CALIFORNIA, 1900–1950, vol. II (1966).

8 Justice Brennan's essay is based on his Mathew O. Tobriner Memorial Lecture at Hastings College of the Law on November 18, 1985 and is also published in 37 HASTINGS L.J. 427 (1986).

9 Judge Fletcher's essay is based on his remarks on February 26, 2008, at the Jesse Carter Memorial Lecture Series at Golden Gate University School of Law and is also published in 39 GOLDEN GATE U. L. REV. 291 (2009).

10 Susan Rutberg, *Justice Carter's Role in the Caryl Chesssman Cases: Due Process Matters*; Rachel A. Van Cleave, *Justice Carter's Dissent in* People v. Gonzales: *Protecting Against the "Tyranny of Totalitarianism;"* Helen Y. Chang, *Justice Carter's Dissent in* People v. Crooker: *An Early Step Towards Miranda Warnings and the Expansion of the Fifth Amendment to Pre-Trial Confessions*; Mark Stickgold, *"The Hysteria of Our Times": Loyalty Oaths in California*; Frederic White, *Justice Carter's Dissent in* Hughes v. Superior Court of Contra Costa County: *Harbinger of the 60s Civil Rights Movement and Affirmative Action?*; David Zizmor & Clifford Rechtschaffen, Payroll Guarantee Association, Inc. v. The Board of Education of the San Francisco Unified School District: *Denying Hecklers the Right to Veto Unpopular Speech*; Jessica L. Beeler, *Justice Carter's Dissent in* Takahashi v. Fish & Game Commission: *Taking a Stand Against Racial Discrimination;* Marci Seville, *Justice Carter's Passionate Defense of Workers' Rights: Challenging the Majority's "Legal Legerdemain;"* Michael A. Zamperini, *Justice Carter, Contributory Negligence and Wrongful Death: A Call to Get Rid of a "Bad Law with Bad Results;"* Marc H. Greenberg, Kurlan v. CBS: *Justice Carter's Prescient Dissent — A Glimpse into the Future of Copyright Protection in the Entertainment Industry*; Markita D. Cooper, *Justice Carter's Dissent in* Gill v. Hearst Publishing Co.: *Foreshadowing Privacy Concerns for an Age of Digital Cameras, Video Voyeurism, and Internet*

two handy appendices, the first, *Statement of Justice Jesse W. Carter of the Supreme Court of California Relative to His Refusal to Sign the So-Called State Loyalty Oath*, and, the second, an introduction by Janet Fischer, to *The Jesse Carter Collection,* a valuable resource at Golden Gate University School of Law with its own Web site.[11] At the end, the editors provide a detailed fifteen-page index, which also guides the reader to the pages on which the texts of Justice Carter's dissents are noted.

In his foreword, Justice Grodin aptly states: "There is a pattern to his dissents. They reflect a strong willed commitment to a constellation of values that include self reliance, individual liberty, procedural fairness, distrust of the state, respect for juries, protection of the underdog, empathy for working people, and cautious support for unions and collective bargaining. It is a constellation which cannot easily be characterized as 'liberal' or 'conservative,' but against the backdrop of Carter's life experiences, the constellation takes shape as the expression of a fiercely independent spirit."[12]

In his Carter Lecture, *Dissent*, Judge Fletcher identifies and explains the various functions of dissent, including drafting a dissent that "ends up persuading the majority"; making "the majority opinion better"; keeping "the majority honest"; predicting "the legal and practical consequences of the majority opinion"; making "clear to the losing party or parties that their arguments were heard and understood"; calling "for law reform by the legislature"; and appealing to "the judgment of other judges."[13] The final function, and, for purposes of the Oppenheimer and Brotsky book, the most important one, is appealing "to the judgment of a later time. . . . Golden Gate University Law School is justly proud to count among its alumni Justice Carter, a dissenter in this proud tradition."[14]

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*Excess;* Michele Benedetto Neitz, *The Plight of the Derivative Plaintiff: Justice Carter's Dissent in* Hogan v. Ingold; and Janice Kosel, *Carter's Dissent in* Simpson v. City of Los Angeles: *A Precursor to the Animal Rights Movement*.

11 http://www.ggu.edu/lawlibrary/jessecarter (last visited Dec. 1, 2010).

12 Joseph R. Grodin, *Foreword,* in The Great Dissents of the "Lone Dissenter": Justice Jesse W. Carter's Twenty Tumultuous Years on the California Supreme Court (David B. Oppenheimer & Allan Brotsky, eds., 2010) xix, xx [hereinafter Oppenheimer & Brotsky].

13 Fletcher, *supra* note 9, Oppenheimer & Brotsky at li-lv.

14 *Id.* at lvi.

The Oppenheimer and Brotsky book emphasizes Justice Carter's prescience and the prophetic quality of his "great dissents." This emphasis honors Justice Carter's vision of posterity and contributes to the timeliness of the book and the relevance today of considering Justice Carter's dissenting views.

For nineteen of Justice Carter's twenty years on the Supreme Court of California (1940–1959), he and my father, Justice and later Chief Justice Roger J. Traynor, were colleagues, sometimes in the majority and sometimes in separate concurring or dissenting opinions.[15] In 1948, when the Supreme Court of California, by a 4–3 vote, held California's anti-miscegenation law unconstitutional in *Perez v. Sharp,*[16] I was thirteen. I remember generally the controversy over that case and the importance of securing four votes to overturn California's racially discriminatory law. My father wrote the majority opinion in which Chief Justice Gibson and Justice Carter concurred, with Justice Edmonds concurring in the judgment; Justices Carter and Edmonds each wrote separate concurring opinions; and Justices Shenk, Spence, and Schauer joined in a dissenting opinion. [17]

In expressing "his personality, his philosophy and his uncensored convictions,"[18] Justice Carter frequently used strong language. "It caught the eye of the press and he became widely known because of it."[19] It also caught the eye of Dean Roscoe Pound who wrote, "In the last ten volumes

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15 *See, e.g.,* Frederic White, *Justice Carter's Dissent in* Hughes v. Superior Court of Contra Costa County*: Harbinger of the 60s Civil Rights Movement and Affirmative Action?,"* Oppenheimer & Brotsky at 59, 62 at nn.11, 12, noting that Justice Carter wrote one of the two dissents and that Justice Traynor wrote the other. *See also* note 21, *infra*.

16 32 Cal.2d 711 (1948).

17 I do not have a recollection, however, of any conversations with my father about Justice Carter or his opinions. When I gave the Carter lecture in 2006 on the subject of judicial independence, I referred to Justice Carter's independent spirit being "attended by a love of the outdoors" and said "I have a distant memory of once visiting his ranch in San Anselmo with my family when I was very young and of our friendly, burly, and gracious host." Michael Traynor, *Judicial Independence: A Cornerstone of Liberty*, 37 Golden Gate U. L. Rev. 487, 489 (2007) (Jesse Carter Distinguished Lecture Series).

18 Carter, *supra* note 3, 4 Hastings L.J. at 119.

19 J. Edward Johnson, *Jesse W. Carter, Seventy-Fifth Justice, September 12, 1939–March 15, 1959*, in Oppenheimer & Brotsky at xxi, xxv.

of the California Reports (30-39 Cal.2d) one of the justices writes a dissenting opinion in an average of six cases to a volume and one case in eighteen of the total number of cases reported for six years."[20] He then said, "But this is the least of the matter. We are told that in one of them, 'The people have the right to expect that the members of this court will possess the courage and integrity necessary to declare unconstitutional any legislation which contravenes the rights of the people as set forth in the equal protection clauses of both constitutions. This court should invoke these constitutional guarantees to protect the rights of those who are wronged by such legislation and *should not be servile to* any *interest or influence regardless of the power it wields.*'"[21]

Pound added, "Perhaps the high-water mark of judicial imitation of forensic advocacy is reached by the same judge . . . in twenty-two pages of vigorous dissent [in which] we are told that the majority 'reached a new low in search for a reason to reverse a judgment' (p. 823), that there was 'not a scintilla of reason or common sense in such a holding' (p. 824), that it was 'so lacking in consideration of the realities of the situation that it may be said to be naïve' (p. 824), that 'the reactionary philosophy of the majority opinion is so out of harmony with present day concepts

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20 Roscoe Pound, *Cacoethes Dissentiendi: The Heated Judicial Dissent*, 39 A.B.A. J. 794, 795 (1953) (italics are Pound's).

21 *Id*. at 795-796 (italics are Pound's), citing Justice Carter's dissenting opinion in Werner v. Southern California Newspapers, 35 Cal.2d 121, 129 (1950). On the majority opinion in *Werner, see* Harry Kalven, Jr., *Torts: The Quest for Appropriate Standards*, 53 Calif. L. Rev. 189, 196-197 (1965): "In *Werner* the issue is the constitutionality of the California retraction statute which limits a plaintiff to special damages in a libel action against radio stations and newspapers unless he has first requested and has failed to receive a retraction or correction. In upholding the constitutionality Chief Justice Traynor reviews with sympathy various criticisms of the law of libel. He concludes that the arbitrariness of the distinction between libel and slander, and consequently between the occasions where general damages are or are not permitted, and the dangers of excessive recoveries under general damages where in fact there has been no injury are sufficient considerations to provide a basis for reasonable legislative judgment restricting the cause of action for libel. Further, the tendency of the law of libel to inhibit the free flow of communication is a factor to which the legislature may properly give weight. . . . [T]he device for limiting the action, employed by the legislature in *Werner* makes some sense; it substitutes, in effect, retraction for general damages. . . ."

of trial procedure that it resembles some of the skeletons of the dead past' (p. 825), and that 'it should be apparent to every unprejudiced mind, as it is to me, that the majority in seizing upon this motion as the sole ground for a reversal of the judgment in this case, is simply creating a mythical error which exists only in hypertechnical illusion' (*Ibid.).* Finally he sums up: 'In essence what these four judges have done here is to blindly announce a court-made rule which not only finds no support in history, precedent, experience, custom, practice, logic, reason, common sense or natural justice but is in utter defiance of all of these standards" (p. 826).[22]

Shortly after Pound published his critique, Justice Carter explained to an audience of lawyers that "I claim the privilege of using language appropriate to the occasion to express my view and I am not disposed to permit even dean emeritus Roscoe Pound of the Harvard Law School to tell me what language I should use when depicting the gross injustices which may result from a majority decision of the Supreme Court of California. . . . A decision which is only a mild departure from settled principles should not be dealt with the same as one which outrages justice and lacks even a semblance of reason or common sense to support it."[23]

In general, the dissents of Justice Carter that are collected in the Oppenheimer and Brotsky book do not seem unduly heated in their language. In one, he went so far as to say, "It is the old story of the will of the people and the Legislature being defeated by reactionary court decisions;" the statute's "nullification by this court is not only a travesty on social justice but an insidious abuse of judicial power."[24] Although the collected dissents are forceful in their reasoning and expression, and

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22 *Id*. at 796, quoting from Justice Carter's dissenting opinion in Sanguinetti v. Moore Dry Dock Co., 34 Cal.2d 812, 823-845 (1951). For further discussion of the Pound critique and ensuing correspondence between Carter and Pound, *see* Johnson, *supra* note 19, Oppenheimer & Brotsky at xxv-xxvii.

23 Jesse Carter, Address at The Lawyers' Club of San Francisco, *Recent Trends in Court Decisions in California* (Mar. 18, 1953), 5 Hastings L.J. 133, 143 (1954). *See also* Johnson, *supra* note 19, Oppenheimer & Brotsky at xxvii.

24 Hawaiian Pineapple Co. Ltd. v. Indus, Accident Comm'n, 40 Cal.2d 656, 668 (Carter, J., dissenting), discussed and quoted in Marci Seville, *Justice Jesse Carter's Passionate Defense of Workers' Rights: Challenging the Majority's 'Legal Legerdemain,'* Oppenheimer & Brotsky at 97, 109-110.

readers of them may well have different views, overall, they do not seem extreme to me. Perhaps that helps explain why these particular dissents had lasting power and why Oppenheimer and Brotsky and their colleagues identified them as "great dissents."

A dissenting justice's language may have a current effect on collegiality among fellow justices. Justice Ruth Bader Ginsburg, in her influential essay, *Remarks on Writing Separately*,[25] suggests the exercise of restraint "before writing separately."[26] In her Madison Lecture, *Speaking in a Judicial Voice*,[27] she questioned "resort to expressions in separate opinions that generate more heat than light,"[28] citing Dean Pound.[29]

It is not clear whether — if at all — and, if so, to what extent Justice Carter's language, which Justice Grodin describes as "often vitriolic,"[30] impaired collegiality on his court. In his essay, J. Edward Johnson concludes that "Carter's associates on the Court took his language in good part. It did not lessen cordial personal relations or make for a climate of hostility. The purports of Carter's views were respected on their own merits. His associates were impressed with the lengths to which Carter went in study and research, his phenomenal memory in oral discussions, citing book, page, line of cases he relied upon, and calling to their attention verbatim words they had uttered and written. This, with the fact that the Supreme Court of the United States might well agree with him, inspired respect and esteem, even in the heat of the battles."[31] Indeed, at Justice Carter's memorial service, his colleague, Justice B. Rey Schauer, in his response for the Court, said that although Justice Carter was "[c]austic

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25 Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 Wash. L. Rev. 133 (1990). *See also* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 131 U. Pa. L. Rev. 1639 (2003); Michael Traynor, *Judge Richard Arnold: His Collegiality and Concurring Opinions*, 58 Ark. L. Rev. 545, 547 (2005) ("Typically, a concurring opinion by Judge Richard Arnold is deferential to his colleagues and makes a single point, briefly and clearly").

26 Ginsburg, *supra* note 25, 65 Wash. L. Rev. at 134.

27 Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y. U. L. Rev. 1183 (1992).

28 *Id.* at 1194.

29 Pound, *supra* note 20.

30 Grodin, *supra* note 12, Oppenheimer & Brotsky at xix.

31 Johnson, *supra* note 19, Oppenheimer & Brotsky at xxvii.

in dissent, he was jovial in companionship. Generous in giving friendship, he cherished his friends."[32]

Apart from any impact it may have on current collegiality, the language of a dissent bears on the public perception of judges. As Judge Patricia Wald has written, "Although judges may indeed develop immunity to internecine barbs over the years, the public perception such barbs produce can only demean courts."[33] Giving numerous examples, she continues: "Regular dissenters such as Justice Scalia are particularly prone to stylish stabs. . . . Lively reading, perhaps; good for the courts, no."[34]

Although they would scarcely agree on substance (if at all), both Justices Carter and Scalia when dissenting reflect their passionate convictions that the majority opinion is wrong. Beyond the expression of uncensored convictions about the law, however, Justice Scalia's robust and frequent displays of sarcasm and scathing remarks about other people, including his colleagues, make Justice Carter's language look tame.

The language of a dissent may also bear on its posterity. In Justice Ginsburg's words, "The most effective dissent, I am convinced, 'stand[s]

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32 B. Rey. Schauer, *Response for the Court*, at the memorial service for Justice Jesse W. Carter, May 6, 1959, *available at* http://www.ggu.edu/lawlibrary/jessecarter/memorial (last visited Dec. 1, 2010).

33 Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1382 (1995), citing former Deputy Solicitor General Philip Allen Lacovara, *Un-Courtly Manners: Quarrelsome Justices are no Longer a Model of Civility for Lawyers*, 80 ABA J. 50, 50 (Dec. 1994).

34 Wald, *supra* note 33, at 1383; *see* Richard Delgado and Jean Stefancic, *Scorn*, 35 Wm. & Mary L. Rev. 1061, 1077 (1994): "In the short time he has been on the bench, Justice Antonin Scalia has distinguished himself for his quick tongue and acerbic wit. In two cases having to do with environmental standing, he appears to have crossed the line between lively language and impermissibly caustic speech," citing and quoting from Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) and Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). For a selection of Justice Scalia's views, *see* Kevin A. Ring (ed.), Scalia Dissents: Writings of the Supreme Court's Wittiest, Most Outspoken Justice (2004). For a generally complimentary view, *see* Yury Kapgan, *Of Golf and Ghouls: The Prose Style of Justice Scalia*, 9 Legal Writing J. Legal Writing Inst. 71, 74 (2003): "I argue that dissenting opinions are particularly suited to Scalia's style as well as his message — his sharp wit, biting critiques, elaborate use of metaphors, and preference for bright-line rules find refuge in dissent." The author also compares and contrasts Justice Scalia's style with Justice Musmanno's. *Id.* at 106-108. *See also* note 4 *supra*.

on its own legal footing'; it spells out differences without jeopardizing collegiality or public respect for and confidence in the judiciary."[35] Her forceful and reasoned dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*,[36] which led to the Lilly Ledbetter Fair Pay Act of 2009,[37] is a recent and famous example.[38]

For appellate judges in other cases, whether in California or other jurisdictions, who might be considering a dissenting opinion by Justice Carter as the basis for an advance in the law or the limitation of a precedent, his sometimes heated expression of his uncensored convictions is a warning signal. For example, Justice "Scalia's penchant for writing in his own voice may likewise explain his difficulty at garnering consensus."[39] Justice Carter's similar penchant may also help explain his reputation as the "lone dissenter."

Like appellate judges, lawyers advocating such an advance or limitation, are also apt to be circumspect in quoting from Justice Carter's dissenting opinions in their briefs and arguments. Scholars likewise might be circumspect in their articles and books. One hopes, however, that judges, lawyers, and scholars will heed Justice Grodin's advice, "If one focuses upon substance, rather than style, Jesse Carter's position on the frontier of legal change is clearly discernible, and quite remarkable."[40]

It is puzzling, however, that a justice for whom influence on posterity meant more than anything else, would, by his sometimes heated language, create a potential impediment to the persuasiveness and effectiveness of his dissenting opinions on future courts. Justice Carter of course had a right to express himself vigorously. The question is whether he also expressed himself persuasively to future audiences, even if one might

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35 Ginsburg, *supra* note 27, 67 N.Y. U. L. Rev. at 1196.

36 550 U.S. 618, 643 (2007) (Ginsburg, J., dissenting, joined by Justices Stevens, Souter, and Breyer).

37 Pub. L. No. 111-2, 123 Stat. 5 (2009).

38 Judge Fletcher discusses her dissent more fully in Fletcher, *supra* note 9, Oppenheimer & Brotsky at lv. Another example of a powerful separate opinion that may persuade a future audience is Justice Carlos Moreno's concurring and dissenting opinion in Strauss v. Horton, 46 Cal.4th 364, 483, 500 (2009) that "Proposition 8 is not a lawful amendment of the California Constitution."

39 Kapgan, *supra* note 34, 75 Wm. & Mary L. Rev. at 98.

40 Grodin, *supra* note 12, Oppenheimer & Brotsky at xx.

agree with his conclusions about how the cases in which he dissented should have been decided.

Justice Carter must have understood that posterity necessarily involves an audience that has not grown accustomed to him, as his colleagues were while engaging in the give and take of collegiate decision-making. Such an audience is also selective, searching primarily for precedents and paying little attention to dissents unless they are tellingly on point and persuasive years after they were written. Recognizing that he could not persuade a current majority while seeking to move others in the future to the measure of his thoughts, he might more often have considered language that could persuade not merely a dissenting colleague or two but instead a future majority, including the crucial deciding vote.

Justice Carter also knew how to forge a majority opinion, to do what is necessary to secure the fourth and critical vote, and to persuade current colleagues. His persuasiveness as the author of a majority opinion continues. In a recent securities case, for example, the Supreme Court of the United States cited approvingly his famous opinion for the Supreme Court of California in the tort case of *Summers v. Tice*:[41] "Indeed, an inference at least as likely as competing inferences can, in some cases, warrant recovery. See *Summers v. Tice* . . . (plaintiff wounded by gunshot could recover from two defendants, even though the most he could prove was that each defendant was at least as likely to have injured him as the other)."[42] It bears asking whether Justice Carter's dissenting opinions might have had even more influence on future majorities had he written less heatedly.

No matter how lucid and illuminating a judge's opinions may be, if they come with a heated language discount they are less likely to be influential.

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41 33 Cal.2d 80 (1948).

42 Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 324 n.5 (2007) (Ginsburg, J.) (preliminary print). I note in passing that Justice Scalia, who concurred in the judgment, said, "*Summers* is a famous case, however, because it sticks out of the ordinary body of tort law like a sore thumb." Justice Scalia, however, cited no authorities for his opinion. By contrast, and as the majority opinion stated, 551 U.S. at 324 n.5, "Since the publication of the Second Restatement [of Torts] in 1965, courts have generally accepted the alternative-liability principle [of *Summers v. Tice*, adopted in] § 433B(3), while fleshing out its limits" (citing Restatement (Third) of Torts § 28(b), Comment *e*, p. 504 (Proposed Final Draft No. 1, Apr. 6, 2006). Appellate lawyer Sanford Svetcov kindly referred me to the *Tellabs* case.

Randall T. Shepard, Chief Justice of Indiana, has wisely advised that "a carefully thought-out and appropriate dissent can 'salvage for tomorrow the principle that was sacrificed or fotgotten today . . . [and] keep the democratic ideal alive in days of regression, uncertainty, and despair.'"[43]

The model of careful reasoning, craftsmanship, and language, however, does not preclude forceful expression or require mild or sedate words, especially in a dissent. As Judge Wald writes, "It is, of course, possible to write a calm, moderate, restrained dissent, but the question arises: if the difference between the majority and dissent is so mild, why write at all? Logically, a dissent can usefully point out better alternatives to the majority's result or reasoning, or dangers in the development of the law which, while not earthshaking, are nonetheless worth noting. In the main, such workmanlike dissents do not, however, excite or incite changes in judicial thinking. A sense of urgency and of impending doom is almost a *sine qua non* of the dissenting voice."[44]

Justice Carter was an important, indeed, heroic voice for his time and for the future. Professor Leon Green, a prominent torts scholar, described him as "one of the great liberal judges of the century"[45] and suggested, "It may be, as has been true of other great common law judges, that Judge Carter will only gain his full stature after his death."[46] Daniel S. Carlton, in an eloquent tribute to his former law colleague, which reviewed Justice Carter's extraordinary career as a trial and appellate lawyer, district attorney, city attorney, state senator, and justice, concluded, "All of us are

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43 Randall T. Shepard, *Perspectives: Notable Dissents in State Constitutional Cases: What Can Dissents Teach Us?*, 68 Albany L. Rev. 337, 342 (2005), quoting from William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 Judicature 104 (1948).

44 Wald, *supra* note 33, 62 U. Chi. L. Rev. at 1413.

45 Leon Green, *"He Never Declined to Do Battle for His Convictions*, 10 Hastings L.J. 359, 363 (1959).

46 *Id*. at 369. Green also commented, "His advocacy breathes the atmosphere of the trial court, a sense of outrage at the injustice done his client. From no other source could he have acquired the strong words of his dissenting opinions. In the Supreme Court when he had made up his mind as to the justness of the cause, his advocacy for the position he took assumed all the color of his trial experience. Apparently he had no greater joy than springing to the kill of some error he found in the opposing position. He was no mere jabber; he swung with all his might." *Id*. at 364.

a little more secure in our rights and homes by reason of the devotion of Judge Carter to our cause."[47] Professor Susan Rutberg, in her chapter on Justice Carter's role in the Chessman cases, notes that "Carter's reminder to his colleagues that all defendants, regardless of public opinion, are entitled to due process of law seems even more relevant today, when many court watchers believe that result-oriented judges are all too frequently the norm."[48] Dean Frederic White, in his chapter on Justice Carter's dissent in *Hughes v. Superior Court,*[49] concludes: "George Bernard Shaw once wrote, 'all progress depends on the unreasonable man.' Justice Carter's judicial colleagues may often have thought that some of the opinions he expressed in dissents were intractable, stubborn and unreasonable, perhaps all three. Perhaps. But he was right."[50]

With the Oppenheimer and Brotsky book at hand, appellate judges who are considering a dissent will have both an informed and useful reference to the vital role that dissenting opinions play in our jurisprudence and a striking example of a forthright and powerful dissenter. So will lawyers and scholars as well as members of the public who take an interest. Professors Oppenheimer and Brotsky and their fellow authors deserve praise for their timely analysis of Justice Carter's dissenting views and his influence on the law. They also strengthen Justice Carter's welcome place in the pantheon of great state supreme court justices. ✯

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47 Daniel S. Carlton, "*He Died As He Lived — Fighting*", 10 Hastings L.J. 353, 359 (1959). Carlton also noted that Justice Carter's "language was strong and perhaps misunderstood. However, he always maintained a great respect and personal affection for his associates on the court; perhaps even to a greater degree than they realized." *Id.* at 357-358. Before Justice Carter joined the Supreme Court of California, he was an extraordinarily able lawyer who contributed to the development of California law. *See, e.g.,* Douglas R. Littlefield, *Jesse W. Carter and California Water Law: Guns, Dynamite, and Farmers, 1918–1939*, 4 Calif. Legal History 341 (2009).

48 Susan Rutberg, *Justice Carter's Role in the Caryl Chessman Cases: Due Process Matters*, Oppenheimer & Brotsky at 3, 15. She also refers to recent critiques of the death penalty. For a recent op-ed, *see* Michael Traynor, *The Death Penalty — It's Unworkable*, Los Angeles Times, Feb. 4, 2010.

49 32 Cal.2d 850 (1948), *affirmed*, 339 U.S. 460 (1950); White, *supra* note 15, Oppenheimer & Brotsky at 69.

50 *Id.* at 69, citing George Bernard Shaw, "Man and Superman: Maxims for Revolutionists" (1903).