Why Judges Have Nothing to Tell Lawyers About Writing

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Lawyers have always written badly and no doubt always will. Yet in the last decade, a number of law schools have attempted to alleviate the problem by including more legal-writing courses throughout the curriculum. This is a welcome development: Writing courses tend to produce better writers. But if the academic powers-that-be really want to improve the writing of lawyers, the best step would be to abolish the case method.

Studying appellate opinions undoubtedly has some educational value, but not for the prospective legal writer. Budding poets read Yeats, Eliot, and Stevens; young novelists immerse themselves in the works of Fitzgerald, Bellow, and Faulkner; historians learn from Tocqueville, Macaulay, and Gibbon. Law students are the great exception; they train for a lifetime of advocacy by reading few briefs but thousands of excerpted opinions. Lawyers who can write like Cardozo or Holmes will be wonderful writers and brilliant judges. They will also be lousy advocates.

Trite but true: The task of a judge is much different from that of a lawyer. And the differences surface in the writing of each. The job of a lawyer is to persuade; the job of a judge is to pronounce without appearing to have been persuaded. The lawyer traffics in conflict; the judge, in solutions. The lawyer writes for a small or even solitary audience; the judge, in theory at least, writes for the masses. Yes, Brandeis should be required reading for every law student. But it is Brandeis the advocate, not Brandeis the judge or law-review author, who ought to be the role model.

Of course, most judges are not exactly Brandeis, Cardozo, or Holmes. The authors of casebooks do not select

opinions for their literary merit; if they did, they would have trouble filling a single volume. One of the great unspoken truths of the legal profession is that most judges write terribly. Their work tends to be lengthy and unfocused, not to mention exceedingly boring. Part of the problem is that judges do not think they are assessed for their writing when, in fact, they are judged on little else. Of course, another part of the problem is that no one ever tells judges that they cannot write, at least no one who wants to win another case in that court. Think of the riddle that Jacob Stein, the Washington lawyer, likes to tell about judges. Question: What do you get when you cross a parrot and a wild lion? Answer: I do not know, but you had better listen to it.

For a case in point, take *David v. Heckler*,[1] written by U.S. District Court Judge Jack Weinstein, one of the federal judiciary's most distinguished judges and better writers. In that case, Judge Weinstein took the unusual and laudable step of finding that review letters sent by the Department of Health and Human Services to Medicare claimants were so badly written that they violated the recipients' due process rights. The problem is that, in the course of his decision, Judge Weinstein wrote sentences like this one:

> Doubt as to whether this type of claim should be construed as barred by section 205(h), 42 U.S.C. § 405(h), should be resolved in favor of finding jurisdiction since the availability of judicial review for constitutional questions is generally "presumed."[2]

What Judge Weinstein wrote is no worse than what can be found on any page of any case reporter. But talk about the pot calling the kettle black . . . .

1. 591 F. Supp. 1033 (E.D.N.Y. 1984).
2. *Id.* at 1040.

Even the best judicial writers are not particularly good models for young lawyers. For starters, the opinions that law students read and tend to imitate are often very old. A Brandeis or Cardozo opinion can be cherished in the same way one admires a Dreiser novel or even a closing argument by Darrow, but it is important to remember that 60 years later, no one writes or speaks that way anymore. Communicative styles are always evolving; in the media age, the pace of change has greatly accelerated. Television has changed the way people speak and write—as well as listen and read—more than any other technological innovation since the invention of the printing press over six centuries ago. Legal discourse before television is analogous to political discourse, advertising, or novels before television. Though not yet antiquated, it is no model of the way we communicate in the last decade of the 20th century. Thanks in part to television, Justice Scalia does not sound like Justice Taft, despite their similar philosophies.

Even leaving aside television, judges still do not have much to teach law students about the type of writing lawyers do, because there are four rhetorical differences between an opinion and a brief. First, they are written for different audiences. A brief is usually written for an audience of between one and nine judges, all of whom are supposed to read the brief in a similar fashion. In contrast, an opinion is written for a variety of readers—the parties, the lawyers, a reviewing court, other judges, the law reviews, the legal community, and even the press. All these groups have different needs and expectations as readers. Newspaper reporters have a similar problem since they write for a wide audience, but the ideology of their profession solves it for them: They usually select

something close to the lowest common denominator and write for that audience. Judges do not have it that easy.[3]

Second, opinions make different types of arguments. The goals of a brief are not so different from the goals of essay writing, debating, or copywriting on Madison Avenue. The aim is to persuade the reader to rule in your favor and, far less important, to develop the law in a manner favorable to your client. Judicial opinions have a unique rhetorical style, perhaps because they are meant to assuage so many audiences at once. On the one hand, judges want to justify their result. On the other, they want the losers to feel that their arguments were heard, and therefore they often give a point-by-point dissection of what are, after all, the weaker arguments. For an audience of reviewing judges, judicial writers have to appear to be following precedent; the system encourages over-reliance on citations and footnotes. In writing for law-review editors, the goal is often the opposite—the reviews search for opinions that strike out in new directions. And so on.

Third, judicial writing is read differently from ordinary prose. Judges are paranoid writers—and with good reason. The ordinary writer, or litigator, can write a piece with confidence that it will be read once or twice for its plain meaning. But not judges. Their pieces are read with scrutiny for logical flaws or mistakes. Unless the language is unequivocal, it will often be quoted in contexts different from what the opinion-writer might have envisioned. To deal with future readers, judges become self-conscious about word selection and often repeat themselves. And their writing suffers.

Finally, judges usually do not write about people. A judicial opinion is a story about the universal application of principles. The more objective and rational it appears to be, the better. Any writing about people tends to focus on the sub-

3. *See* Stark, *Arbitration Decision Writing: Why Arbitrators Err,* 38 ARB. J. 30, 31 (1983).

jective; stories about people usually appeal to our emotions. Therefore, by necessity, an opinion tends to relegate its characters to a minor role: *Palsgraf* tells us little about what happened to Mrs. Palsgraf but everything we would want to know about the doctrine of foreseeability; *Erie v. Tompkins* tells us what happened to *Swift v. Tyson*, but not to Mr. Tompkins.

That is fine for judges. But it is hard to write well or make any kind of compelling argument without talking about people. *A Day in the Life of the Reasonable Man* is unlikely to appear on the best-seller list anytime soon. Good advocates make a strong legal case in their argument section and tell a good story in their fact section. Judges do not.

There are, of course, many other differences between the tasks and writing of judges and of lawyers. It is also true that—the influence of television aside—judicial writing has gone downhill since the halcyon days of Holmes, Cardozo, and Jackson. Current opinions read more like law-review articles—not surprising given that many are ghostwritten by former law-review editors. Today's opinions are noteworthy for their heavy reliance on footnotes, separate concurrences, and pompous forms of argument. As Michael Barone, the journalist, has pointed out, courts are supposed to be organs of government, not debating societies, a fact that many law professors and even judges seem to have forgotten.[4]

It is also true that legal writing—particularly the writing of judges—cannot be judged on literary merit alone. As the Italian scholar Piero Calamandrei once wrote, "If we bear in mind the seriousness of the function they are supposed to perform, . . . we cannot evaluate opinions on purely esthetic criteria unless we hold that justice can be reduced to the level

4. Barone, *Our Overworked Justices Should Fire Some Law Clerks*, Wash. Post, Nov. 24, 1982, at A16, col. 1.

of a literary diversion or a schoolboy's theme.[5] Still, opinions are hardly the best diet for the lawyer-to-be. When in doubt about anything, lawyers usually head for the library and read more cases. If law schools really want to improve the writing of lawyers, they should make their students study briefs, complaints, newspapers, advertisements, even direct-mail letters. But no more opinions, please. No more opinions.

5. P. CALAMANDREI, EULOGY OF JUDGES 79 (J. Adams & C. Phillips trans. 1942).