Judicial Writing: An Observation by a Teacher of Writing*

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Before me are four appellate opinions: (1) *Meinhard v. Salmon*[1]; (2) *Baltimore & Ohio Railroad Company v. Goodman,* Administratrix[2]; (3) *Lamb v. Hall*[3]; and (4) *Brown v. Board of Education of Topeka.*[4] Cardozo and Andrews wrote the first, Holmes the second; Lumpkin the third; and Warren the last. They do not represent the whole range of legal writing, certainly, but they do illustrate some characteristics worth commenting on. They also suggest an often-ignored point of view about the pedagogy of writing: getting a person to write well is like making him intelligent, industrious, sensible, disciplined, controlled, imaginative, thoughtful of others, and modest. The platitude "the style is the man" means that what makes writing good is really the quality of the mind and character behind it; as the ancient Quintilian says, "a good oration is a good man speaking." This is why the writing of Judge Cardozo and Judge Andrews is better than that of Judge Lumpkin. Their jurisprudence or grammar is not necessarily better or more correct, but their minds are richer, more perceptive, their authority surer and more persuasive. Their styles reflect intelligence and character that have been working together for a long time.

This is not to say that good writers, like heroes, are born not made, or that writing cannot really be taught. Writing can be taught, if the pupil is disciplined and amenable, with an ability to

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1 294 N.Y. 458, 164 N.E. 545 (1928).

2 275 U.S. 66 (1927).

3 145 Ga. 331, 89 S.E. 193 (1916).

4 347 U.S. 483 (1954).

read and imitate. But we need to dissipate the general misunderstanding of what is involved in writing decently and clearly and what it takes to get a human being to do it. As I once said in another essay,[5] far too many people look upon the process of writing as a task somewhat similar to the one a garage mechanic faces in reassembling an automobile engine. According to their assumption, the first job of the writer is to see that all necessary parts are on hand (in writing, these are thought to be the equivalent of "ideas"). Then he must see that all parts are clearly labeled, at least in the mind (these are "words," and a dictionary has a large supply if he needs more). Then he must see that he has the proper tools (this is merely "grammar"; either he has it or he doesn't, and if he doesn't he can borrow it or make something else do). Then he must see that the parts go in the right order (sentences) and are properly connected (paragraphs). Then he steps on the starter and drives off (final sentence and happy conclusion).

Nothing could be further from the truth. In the first place, "ideas" are not things having an existence independent of words themselves, and it is people who think they have and say such things as "If I could only find the words to express the ideas I have" who have put permanent creases in our foreheads. Until an idea exists in the form of words that say something, it probably isn't an idea at all, but merely a grunt in the mind. In the second place, in the process of writing itself, grammar and punctuation and sentences and so forth are not separately packageable items, like carburetors and spark plugs. Before and after writing they can be discussed as things apart, but once the writing itself begins they need to lose their separate identities and work together nicely, like the ingredients in a good soup: if they don't, the result is not writing, but a kind of lumpy or watery hash, indigestible to all but the cook himself (and even he may have his doubts about it). Finally, and most important of all, writing clearly demands so

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[5] Bowen, Robert O., ed. "A Conservative View," *The New Professors*, Holt, Rinehart-Winston, 1960.

much from the thinking, sorting, and focusing powers of the human mind that it is inseparable from being educated in general. It is no wonder that most people want to believe it is something else and try to operate on the basis that writing clearly is only a matter of memory or of exhortation or of "creative self-expression."

The truth is that writing is very hard work. That is one of the first things I tell my students, chiefly to get vanities softened up. Art is long, life is brief; a person writing for any kind of audience he respects finds that he must figuratively chain himself to his desk to get it done. On the one hand, there are the wide-ranging, the disorganizing, the loose and imaginative aspects of his mind, all busily turning up details, examples, exceptions, wishing to be free, dreaming of mellifluous rhetorical periods. On the other hand, there is the excising, the organizing, the focusing side of his mind, trying to bring some order to the here-and-present, working to make sense out of all the chaos, yet not over-simplifying or being sensational or journalistic. If he is like most good writers I know, he will do almost anything to escape, even to mowing the lawn or taking his mother-in-law for a drive.

He escapes the agony finally, of course, only by completing the writing, by having it before him. What is before him and how it is put together — its vocabulary, the length or brevity of his sentences, the way he handles subordination and coordination, his transitions or lack of them, in short his structure — what is before him is a rather good reflection of himself, of how the world is composed and what he thinks it is composed of: not his denominational dogmas or his obvious political affiliation or his visible and public morality, but those unexpressed assumptions, hidden attitudes, unarticulated notions which he has about things and which make up what philosophers would call his "system," his own climate of opinion, his own little island of personality.

I do not mean that clear writing always reflects a good moral man and that bad writing always reflects a less respectable one. Murderers, thieves, adulterers and lawbreakers of every description have been known to write well, and law-abiding and modest and

even brilliant men have been known to write poorly. I mean only that when a man writes he adopts a rhetorical position as a speaker, as a speaking voice, as it were, and that in doing so he puts a good part of his personality on the line, he puts a foot forward. Though a certain imagination is involved in manipulating this position effectively, and though some people can do it better than others, either because of inherited gifts or training, no man can escape his own personality completely. If he reaches his generalizations by ignoring a part of reality or by a sloppy use of details, or if he has a trick of passing off assumptions as facts and insights as eternal truths, of using all the *ad hominem, ad populum*, begging-the-question devices which have their sweet plausibility, all of these will indicate how much the agony of writing brings out any latent crookedness in a writer. His over-concern with the mere sound of what he writes will indicate how big a stuffed shirt he really is. And how thoroughly he can submit himself to revision, to cutting out, will indicate the actual toughness of his spirit, his real sense of mercy for the reader, who symbolizes a helpless and deserving humanity.

My point has been to suggest the limits of instruction in writing. The world is crowded with teachers of writing and full of brochures and essays and books and workshops and summer conferences about writing. All of the teachers earn their money, I believe, and very little of the written advice is useless. Writing as an art may be beyond the reaches of the schoolteachers and the textbooks, but writing as an adequate and necessary skill is a process and a habit: people can be taught through drill and through the study of models (and occasionally through inspiration) such elements of writing as basic sentence structure, punctuation, spelling, and even the devices of how to begin a piece of writing and how to end it. Most people, in short, if they are reached in time, can be taught the elements that raise writing from illiteracy to adequacy, to respectability. All that they need, in addition to good advice and criticism, is time and desire, practice, practice, and practice.

But the problem for the legal profession is the same one that faces academics or any group that depends on clear communication for sustenance and viability. The important questions are something like these: how do we make writing graceful instead of merely adequate; how do we make what is ponderously clear into something lucid; how do we excise the rambling and the clumsy and get something sweet, short, and concise; how do we make what is flat and impersonal into something lively and human and concrete? These are not easy to answer for they involve attitudes as well as things, personality as well as facts. But a number of people within the legal profession have expressed themselves on writing, and quite sensibly.[6] They concern themselves not only with advice about words (don't use a long one where a short one will do) and sentences (be brief and simple), but one of them, *Internal Operating Procedures of Appellate Courts*, goes to some length in giving advice about the structure of a good opinion. The most useful of all, however, I find to be by George Rose Smith,

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[6] Beardsley, C. A. "Judicial Draftsmanship," 24 Wash. L. Rev. 146 (1949).

Carroll, B. F. "The Problems of a Legal Reporter — Views on Simplifying Appellate Opinions," 35 A.B.A. J. 280 (1949).

Gerhart, E. C. "Improving Our Legal Writing: Maxims from the Masters," 40 A.B.A. J. 1057 (1954).

Gregory, H. B. "Shorter Judicial Opinions," 34 Va. L. Rev. 362 (1948).

Hardy, G. W., Jr. "A Brief Opinion on Brief Opinions," 20 La. L. Rev. 559 (1960).

Leflar, R. A. "Some Observations Concerning Judicial Opinions," 61 Colum. L. Rev. 810 (1961).

McComb, M. F. "A Mandate from the Bar: Shorter and More Lucid Opinions," 35 A.B.A. J. 382 (1949).

McComb, M. F. "The Writing and Preparation of Opinions," 10 F.R.D. (Dec., 1951).

Simmons, R. G. "Better Opinions — How?" 27 A.B.A. J. 109 (1941).

Wall, M. K. "What Courts Are Doing to Improve Judicial Opinions," 32 J. Am. Jud. Soc. 148 (1949).

Weissman, D. L. "Supreme Court Cases: A Note on Legal Style," 14 Law. Guild. Rev. 138 (1954).

Internal Operating Procedures of Appellate Courts, report by a Committee of the Section of Judicial Administration of the American Bar Association, 1961.

"The Current Opinions of the Supreme Court of Arkansas: A Study in Craftsmanship," published in the *Arkansas Law Review* in the spring of 1947.

Nonetheless, advice about writing which tells us to be concrete, simple, brief, to pick the short word instead of the long one, to begin at the beginning, to be interesting, is essentially exhortation, pleasant music but not meat. It lacks the element of comparability; it doesn't exist in a context that lets us deal with the real world. Consider, for instance, the matter of simplicity. We know it is a virtue and respect it; we should like to write English that is to the point. But it is sometimes not possible to be both simple and honest; the world is an enormously complicated place and sometimes writing has to reflect it. The opinions given down by Judge Cardozo and by dissenting Judge Andrews in *Meinhard v. Salmon* represent a case in point. The problem here really hangs on the definition of "fiduciary loyalty." Cardozo goes into long flights of analysis about it; he probes into traditions, motives. He is a complex man, trained to go behind appearances, and he sends his inquiring mind over the whole issue. He comes up finally with a definition of fiduciary loyalty that appears to make it extend far beyond any commercial arrangement between two people. But Judge Andrews, the dissenting one, is clearly a sophisticated man, too, and he finds Cardozo's opinion much too involved; the question, he says, is not really complex, and his explanation of his position is a model of excised clarity.

Indeed, the two opinions reflect the eternal debate between honest and sophisticated men about the nature of things. Judge Cardozo is obviously a man of great refinement and learning, wide ranging, with literary ambitions. There is a touch of Dr. Johnson about him. He writes a sentence as a proposition and then adds several more sentences, refining the proposition, buttressing it, qualifying it. He likes adjectives and formal rhetorical structure.

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the

> market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

There is a feeling for suspense here, even for melodrama. Andrews, on the contrary, is Occam's razor; his sentences tend to be short; they fall like hammer blows, each one driving the nail further. His job is to show that what is seemingly complicated is not really so, that the issue must not be allowed to get out of hand but must be kept simple:

> Under the circumstances here presented, had the lease run to both the parties, I doubt whether the taking by one of a renewal without the knowledge of the other would cause interference by a court of equity. An illustration may clarify my thought: A and B enter into a joint venture to resurface a highway between Albany and Schnectady [sic]. They rent a parcel of land for the storage of materials. A, unknown to B, agrees with the lessor to rent that parcel and one adjoining it after the venture is finished, for an iron foundry. Is the act unfair? Would any general statements, scattered here and there through opinions dealing with other circumstances, be thought applicable? In other words, the mere fact that the joint venturers rent property together does not call for the strict rule that applies to general partners.

It is possible to say, of course, that Cardozo is windy and pretentious, that Andrews is tight and controlled. But is not the statement a gross oversimplification? With both jurists, we are dealing with the legal mind at its best, full of details that come from formal learning and a knowledge of the world itself but also of all of the individual cases which bear upon the question. At the same time, we sense the enormous compulsion toward generalization, of making a statement that sums up and explains all the

details and makes them applicable. Who is the better writer? Both Cardozo and Andrews operate with great skill and honesty, and perhaps this is judgment enough.

The point is that flat advice about being simple, about being direct in writing is not always relevant. It depends on the context, and the context depends on one's view of the world. One finds this tension between complication and simplicity running through a great deal of legal writing. Literary critics like to take a piece of simple sheet music and make an orchestration of it; lawyers, on the other hand, or at least the ones I have been reading here, like to work a symphony down into something that will go into a player piano. Consider, for instance, the opinion of Justice Holmes in the *Baltimore & Ohio Railroad Company v. Goodman* opinion. Holmes certainly writes with remarkable and plausible clarity, even though one feels occasionally that he is purposefully making phrases for posterity. But he is brief and uncluttered; he is to legal writing what Hemingway is to the American novel. His rhetorical position is always that of the sensible man trying to cut away the underbrush and come to the issue. When he is successful, what he writes is indeed quotable, as I think this is: "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him." It would be interesting to see what Holmes would have done with *Meinhard v. Salmon*; clearly he would have been on the side of Andrews, at least rhetorically, but I doubt that he would have found the solution so quickly.

For *Meinhard v. Salmon* is really far more complicated; it involves definitions of motives and relationships, whereas the *Baltimore v. Goodman* case seems to me to involve merely an ability to fix upon the central determining circumstance and then to fix the responsibility for it. Here, Holmes is perhaps better compared with Judge Lumpkin in the *Lamb v. Hall* case of 1916. Lumpkin is certainly no Holmes; his very name makes one suspicious of what he writes, but except for a couple of sentences which I shall quote for you in a moment, Lumpkin seems to have

the traditional juristic skill in finding the point and coming to it. He is graceless and somewhat overdependent upon sources, but his sentences do move him ahead, though it is true that all of his decision might have been given in one paragraph instead of three long ones. Even though the sentences in the last half of the second paragraph reach an awkwardness indicating that Judge Lumpkin must surely have two left feet, the awkwardness does not do any organic damage to the sense; it only postpones the final emergence of it. The sentence I'm speaking of particularly is this one: "The demurrer raised the point that the amended petition failed to set out what was the duty which the plaintiff alleged required him at any time to be at the place where he was injured, and that it failed to show what duty required him to be there at the particular time of the injury." This sentence requires at least three readings; one thinks he is reading underwater for a moment, and he finds nothing to match it until four or five sentences later when he comes upon:

> Mere general allegations that he was in the proper place, and that it was necessary and customary for him to be there in the performance of his duty, and that this was one of the usual places in which he had to be in order to perform his duties, were not sufficient as against a special demurrer which called upon him to show what duties rendered it necessary or proper for him to be at that place (which was upon the railroad track) generally or at that particular time.

This time the reader almost drowns before he reaches the surface, but in truth one finds this kind of writing coming out of all sorts of places as well as courts of law.

The kind of writing I have been talking about here is expository prose; the form of writing is the essay. In its highest flights, the essay is usually categorized along with the poem, the play, the story as one of the four modes of literature. Molière's character was pleased to discover that he had been speaking prose all of his life; lawyers may have been writing not only prose but literature as well. It is something to tell their children. But quite seriously,

the line between communication and literature is not an arbitrary one; all the qualities necessary to make a piece of writing good communication are necessary to make it good literature. If the difference between literature and communication can be defined at all, it is a difference of degree, not of kind. Holmes is literature; Lumpkin is communication, but they faced similar problems and tried to answer them in similar ways. Chief Justice Warren in *Brown v. Board of Education* is half-and-half. He is not a particularly graceful writer but he is a good, stout, sensible one, with the ability to marshal details to support his generalization, and with knowledge about setting up a question clearly:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.
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> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

My own interest in Warren's opinion is that it illustrates a particular problem lawyers have in writing decent exposition. The two intellectual qualities necessary for such writings are in a certain warfare with each other: the first is the need to be specific and detailed, to have supporting facts, to have enough learning and experience to feel the reality of life, its complexity, its refusal to be

simple. This is an attitude that poets, that cynics and realists, have in abundance. One of G. Lowes Dickinson's characters says it beautifully. "To my restricted vision, placed as I am upon the earth, isolated facts obtrude themselves with a capricious particularity which defies my powers of generalization." It is a sentence to bring tears of regret also to the eyes of jurists, all of whom, whether they like it or not, must have a drive toward generalization, a need to turn up the operating principle, to find the sum in addition, to state the law, so as to make the facts something more than capricious particularities. A respect for richness and variety in the real world, and a feeling for order, for policy, for the principle of action in the ideal one: in a sense this is why jurists will always have a writing problem. They have to be sure their rhetoric reflects a solution justified by the facts of yesterday and today and yet suitable for what may happen tomorrow. It is not, accordingly, an easy rhetoric to manage.