Legal Writing Today*

Richard A. Posner

Legal writing by federal judges and the lawyers who appear before them is today generally *serviceable*, in the sense of being pretty clearly written, pretty careful, businesslike, grammatical. But it tends to lack distinction — to be in fact mediocre or pedestrian — in several respects. (I said "judges and . . . lawyers," but I shall mainly be discussing judicial writing, on the theory that brief-writing is largely derivative from it — the lawyers take their cues from the judges.)

First, there is a noticeable lack of candor and, *second* and related, a notable lack of concreteness in judicial opinions. These are pragmatic failings; more precisely, they are stylistic failings caused by a failure to be pragmatic. They are conspicuous in a case like *Bush v. Gore*[1] (the decision that resolved the 2000 Presidential election deadlock), to which I'll return.

Third, there is an overuse of jargon, one of the marks of what I've called elsewhere the "pure" style of judicial opinion-writing.[2] It is a style self-consciously professional; its antithesis, what I call the "impure" style, is simple, nontechnical, colloquial, narrative, essayistic.

Fourth is a lack of economy of expression — lack of considerateness for the audience for judicial opinions. Under this rubric can be grouped the tendency to overkill, to repetition, to tedium, and the clutter of citations, facts, quotations, and boilerplate, which are such characteristic features of judicial prose.

Fifth is the preoccupation with trivia that is so marked a characteristic of the legal mind. It is the hypertrophy of the high degree of verbal *care* that is a genuine asset of the well-trained lawyer.

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* This is the revised text of a luncheon talk given at the annual meeting of Scribes in Chicago on August 4, 2001.

[1] 531 U.S. 98 (2000) (per curiam).

[2] RICHARD A. POSNER, LAW AND LITERATURE 287-94 (revised and enlarged ed. 1998).

Sixth is a surprising reluctance to use pictures in cases, mainly in the area of intellectual property (above all, trademarks and copyright), where visual resemblance is the key to the decision. In one opinion I criticized the bar for thinking that a word is worth a thousand pictures. The aversion to the visual is of limited significance in judicial writing, but it is an excellent example of the flight from concreteness to abstractness that is such a pronounced feature of the legal professional's style of thinking and writing.

Seventh and last is the pall that "political correctness" casts over judicial writing, particularly with respect to gender; insistence on gender neutrality of pronouns is a recipe for stilted prose.

The underlying problems are an exaggerated formalism, which is to say a desire to make a judicial opinion seem rigorous, logical, technical, even esoteric (not the everyday practical reasoning that judicial decision-making, much of the time, really is); a sheer lack of knowledge of, experience in, and aptitude for good writing; an excess of specialization related to the rise of law clerks and ghostwriting generally, which has made writing seem an eminently delegable component of judicial performance; the absence of a national culture of rhetoric, such as England had until recently; and, closely related, the philistine character of American culture, in which writing well, along with other aspects of humane culture, is not highly valued.

Both characteristics of judicial prose that I've been emphasizing — its serviceable character and its lack of distinction — are likely to become even more pronounced in the future. The decline of the humanities is likely to continue as more and more educational emphasis is placed on computers and other aspects of technology, as the rise of ethnic diversity engenders ever greater anxiety over the traditional cultural hegemony of "dead white European males," and as literature continues to lose ground to electronic communication and entertainment. The trend bodes ill for judicial writing. At the same time, variance in the quality of judicial prose is likely to decline as judicial writing is brought ever more under the aegis of ghostwriters (the law clerks and staff attorneys) drawn from the best law schools.

But is this problem — the decline of great judicial prose (the prose of a Holmes, a Cardozo, a Robert Jackson) — one of those problems that is hopeless but not serious? Not completely; rhetoric remains, given the frequently political and indeterminate character of American law, an important resource of judicial decision-making. This is well illustrated by *Bush v. Gore* as well as by *Clinton v. Jones*,[3] the case in which the Supreme Court refused President Clinton's request for a temporary immunity from having to defend against Paula Jones's sexual harassment case (the immunity to expire when he left office). Had the Court granted Clinton's request, he would not have been deposed in Jones's case and the train of events that resulted in his impeachment would have probably been derailed, to the benefit of the country. But to create the immunity sought, without giving the impression that victims of sexual harassment are second-class citizens, would have required considerable rhetorical adroitness, which the current Justices lack.

Bush v. Gore is a similar failure of rhetorical skill and daring. The strongest ground for terminating the recount of the Florida Presidential votes was the not-improbable consequences if the recount continued and showed Gore ahead, throwing the election in effect into Congress. Those consequences included unprecedented political bitterness, the reality or suspicion of unsavory political deals, further trips to the Supreme Court, and even the appointment of an Acting President when Clinton left office on January 20, 2001. But to have articulated this ground without giving the impression of a Court excessively "pragmatic" and unprincipled would, again, have required considerable rhetorical adroitness, which the Justices lack.

So I think the decline of judical writing is a serious problem, and I don't think there are any good solutions — but since it is un-American to be fatalistic, I shall suggest a few possibilities for improvement:

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[3] 520 U.S. 681 (1997).

1. Judges can make clear in their opinions and in their occasional speeches to bar groups and in writing for the bar what they want to see in the lawyers' briefs (essentially, the opposite of the seven deficiencies with which I began), for if the briefs improve, so will the opinions, given the judges' heavy dependence on the briefs. Although I am more outspoken than most judges in my complaints about legal writing, I am not alone, and in fact I am confident that the changes in brief-writing that I am urging would be applauded by the vast majority of judges.

2. Judges can take on the opinion-writing task themselves. When I was chief judge, I suggested to new judges of my court that they write their own opinions and let the law clerks do the research, criticize the opinions, and so forth, but not write them. I said that maybe at first the judge, if he or she didn't come out of a background in which writing was a big part of the job (academia, for example), would find it tough sledding to write a decent opinion. But practice makes perfect; opinion-writing would become easier for the judge as the years rolled by; eventually he would develop a proficiency that no law clerk, working for only one year, could develop; and by freeing the law clerk to spend more time on research, the judge would be able to write better-researched, as well as better-written, opinions.

3. It's an excellent mental discipline for a judicial opinion writer to pretend that he's writing for a lay audience. It helps him to avoid unnecessary jargon, turgid and abstract prose, footnotes, long quotations, tedious repetitions, and the other earmarks of professional legal writing. I commend this mental exercise to all judges and other writers of judicial opinions.

4. Finally, this very journal can use the newly revived idea of "shaming penalties" to frighten the judges into writing better. Every year it can — and should; this is an entirely serious suggestion — publish, with the name of the judge, the worst sentence in a judicial opinion issued during the previous year. I guarantee that this device will get the attention of the judges!