

The Opinion as Essay, The Judge as Essayist: Some Observations on Legal Writing

By William Domnarski*

One currently popular theory about lawyers is that rather than killing them as Shakespeare once suggested, we should be enrolling them in composition classes. The problem of awkward, impenetrable legal prose has been with us in America, if we are to believe Jefferson, since the first days of the republic. Despite this, it has not been until the last decade that the problem has been addressed with vigor, with academics and practitioners alike responding to the increasing criticism of legal writing with books and articles offering solutions in the form of model prose and basic instruction in grammar, usage, and diction to help the legal writer transform his legalese into readable English.

The critical discussion of defective legal writing and what to do about it has taken a new turn with a recent article in the *Harvard Law Review* in which Steven Stark argues that the problem with poor legal writing is not with the lawyer's training in the mechanics of composition but with the lawyer himself and the nature of the prose he writes.¹ The lawyer is encouraged to obfuscate, for example, Stark explains, to hide his feet of clay from the client, and he is encouraged as well to manipulate language in an Orwellian way to reach his goals as an advocate, a role that defines and necessarily limits the legal writer's allegiance to truth.

The judge, as well as the lawyer, is subject to Stark's analysis. Indeed, Stark discusses lawyers and judges interchangeably. He argues that both are hamstrung in their attempt to break free of legalese because of their obligation to use precedent, their inability to use humor or stylistic devices to brighten their prose, and their directive to focus only on the facts, in a sort of "nothing but the facts, mam" Dragnet-style approach, at the expense, he contends, of developing, as a novelist would and as the reader desires, the characters of the principals in the litigation under examination.

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1. Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389 (1984).

But while Stark offers some insight into the problems of legal writing, it would be a mistake to lump, as he does, lawyers and judges together for an analysis of the current problems with legal writing because to do so would ignore the fundamental differences between judges and lawyers as legal writers and between the legal prose each group writes. The failure to distinguish between judges and lawyers and their respective prose would not only have the effect of subjecting judges to undeserved criticism more appropriately leveled at lawyers, but it would also fail to recognize and praise the high quality prose of judges, for whatever complaints might be filed against lawyers for their prose, the same cannot be said of judges, who clarify and illuminate the law to the society they serve.

Any analysis of legal writing as that art is practiced by lawyers and judges must begin with our recognition that the lawyer is not a professional writer. This is not to suggest that the lawyer is not paid to write, for surely the lawyer is paid to draft documents, correspondence, motions, memoranda, and briefs. These writing chores are, however, incidental to the lives of most lawyers. They spend far more of their time dealing with clients, negotiating with other lawyers, and appearing in court, where they display their oral, not written, skills. Moreover, of the writing that lawyers do undertake, much of it is ministerial in nature, with the lawyers filing documents they have drafted in their capacity as the middlemen in business and real estate transactions.

More important, when the lawyer's writing is not defined by the ministerial nature of the task, it is defined by his role as an advocate. The lawyer's more substantive legal work—the briefs and memoranda he files in support of motions, for example—necessarily asserts principles of law aimed at carrying the day. The lawyer is concerned with the law's relationship to only one person or entity—his client. Moreover, added to this limited scope of concern are the tone and approach that must complement it. His becomes an approach to justice in the most limited sense, that is, the lawyer advocates justice for his client at the expense, if necessary, of all others. He is concerned only with his client's claim. As a result, his prose assumes a hard edge, a dogmatic, assertive tone. This dogmatism, in turn, highlights the lawyer's greatest liability as a writer—his suspect credibility. Almost by definition, the lawyer writes not what he believes to be true but what will best advance his client's interests. This does not mean, of

course, that the lawyer deceives or misrepresents to advance his client's interests. It means only that the lawyer does not write for himself, that his interest is not in the relationship of the law to society, of which the individual case forms but one part, but in the relationship between the legal principles he is asserting and his client's chances of prevailing.

In contrast to the lawyer, the appellate judge must be considered a professional writer. The writing of the opinion, after all, is his principal task. True, he must also see to oral argument and perhaps some administrative matters, but it is the opinion that he is paid to write. And write he does. The number of opinions he writes might alone establish the appellate judge as a professional writer. Justice Brennan of the United States Supreme Court, for example, has in his nearly thirty years on the high court written more than fifteen hundred opinions. Holmes, to cite another example, had written more than a thousand opinions *before* being appointed to the United States Supreme Court. Nor are these justices alone in the size of their oeuvres, as both judges Traynor and Friendly, to cite only two examples, have written approximately a thousand opinions in their careers.

More important, the appellate judge perceives himself as a professional writer, often displaying a possessiveness about his work that marks him as having a professional's knowledge and concern that he and he alone will be judged by what appears on the page. He knows further that the standard to be met is that of a professional writer. In this regard Judge Medina, Learned Hand's colleague on the Second Circuit of the United States Court of Appeals, reports that Hand, like many other accomplished judicial writers, "wouldn't even let a law clerk write a sentence, not one sentence. He would let the law clerk criticize. He would hand what he had written to the law clerk and let him make all the suggestions he wanted to make. But not one word of that opinion was anybody else's but Learned Hand's."²

Words—the right words—matter to the appellate judge and underscore his status as a professional writer. Holmes, for example, summed up the key goals of his career in the law in a letter to a long-time correspondent, writing that "the thing I have wanted to do and want to do is to put as many new ideas into the law as I can, to show how particular solutions involve general theory, and

2. Quoted in SCHICK, *LEARNED HAND'S COURT* 107 (1970).

to do it with style."³ It was this desire to "do it with style," in fact, that prompted some of Holmes' greatest frustrations on the United States Supreme Court. His letters are replete with complaints about his brethren's irritating habit of tinkering with his prose, sometimes taking the humor, sometimes the sting, out of it. Holmes was so troubled by the impositions of his brethren that, even more than considering slipping something by them a challenge, he more than once in his letters associates their editing to castration. The implications of such comments are obvious. For Holmes style truly mattered. In a revealing passage in a letter to his great and good friend Harold Laski, Holmes, the professional writer and judge, writes that "in most cases the difficulty is rather with the writing than with the thinking. To put the case well and from time to time hint at a vista is the job. I am amused (between ourselves) at some of the rhetorical changes suggested, when I purposely used short and brutal words for an antithesis. . . . I am pretty accommodating in the cutting out of even thought that I think important, but a man must be allowed his own style."⁴

The judges who have cared passionately about their writing are legion. Many are known, for example, for the number of revisions they felt compelled to go through to get exactly what they wanted. Brandeis, who once observed that there was no such thing as good writing, only good rewriting, often revised his opinions six or seven times, a task made even more notable when one considers that during his years on the United States Supreme Court, according to one of his law clerks, Brandeis did not employ a secretary or typist, preferring instead to send successive longhand drafts to the printer.⁵ According to his son, Hugo Black shared Brandeis' obsession with revision. In his remembrance of his father, Hugo Black, Jr. writes that "he could not rest until he had finished an opinion, and I have seen him do as many as six drafts before he had one ready to circulate. He searched his mind for the precise word, often using a thesaurus or his old Webster's Second unabridged to find it, and he would always select a one-syllable word over a two-syllable word."⁶ Just how much can words mean to a judge? Consider, as the quintessential example, Holmes' lament to Frederick Pol-

3. BURTON, ed., *HOLMES — SHEHAN CORRESPONDENCE* 56 (1977).

4. HOWE, ed., *HOLMES-LASKI LETTERS* 939 (1953).

5. See MCGRAW, *Louis D. Brandeis Reappraised*, 54 *AM.SCH.* 525 (1985).

6. BLACK, JR., *MY FATHER: A REMEMBRANCE* 135 (1975).

lock that "after I sent back the proofs the other day [of a recently written case] I was depressed to think that one little phrase 'for the joy of it' was an echo of Ruskin. I hate to drop into something ready made that is not the immediate expression of one's thought, organizing every word."⁷

To the extent that Stark identifies the lawyer's role as an advocate as an inhibiting force in the prose he writes, he is surely correct. But it is of course obvious, as a corollary to this proposition, that a judge's freedom to develop an idea in a search for truth and for a result consistent with an imperative to serve broader social goals, distinguishes his legal prose from a lawyer's. Equally important in this regard is the nature of the judicial opinion, which is intended to be a public document in which the court fulfills its obligation of shaping law for the whole of society. As Judge LeFlar has observed, "opinions are the public voice of appellate courts, and so represent the judiciary to the public, but they are not voices merely. They are what courts do, not just what they say. They are the substance of judicial action, not just news releases about what the courts have done, though they have that function too."⁸

In developing an idea in the opinion that effects on the whole of society, as opposed to asserting a principle to advance a client's cause, the appellate judge can, and indeed should, draw upon a wide range of cultural resources. Not surprisingly, judges have often turned to sociology, history, literature, and philosophy in fashioning new rules of law. Moreover, because the law develops in a gradual, continuous movement—as Holmes put it, judges legislate "only interstitially; they are confined from molar to molecular motions"⁹—the use of precedent is consistent with the judge's obligation. To complain, as Stark does, of the reliance of courts on precedent at the expense of matters of interest that should be included in the opinion is to misunderstand the function of precedent in shaping an idea. Judges do not, nor should they, write on a clean slate, even when addressing issues of first impression. The law is an organic whole, making it imperative that judges plug themselves into the broader cultural context. As Holmes once noted, the law is an abstraction "wherein, as in a magic mirror, we

7. HOWE, ed., *HOLMES-POLLOCK LETTERS* 271 (1941).

8. LeFlar, *Some Observations Concerning Judicial Opinions*, 61 *COLUM. L. REV.* 810 (1961).

9. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1921) (Holmes, J.).

see reflected not only our own lives, but the lives of all men that have been."¹⁰ Moreover, it follows that if the life of the law is experience, not logic, as Holmes also observed, the judge must graft that experience onto his analysis of the issues before him, especially if those issues are ones of first impression.

Distinct from every other form of legal writing, the judicial opinion is perhaps most akin to the essay, with the judge, as a professional writer, assuming the role of the essayist. Indeed, the essay has traditionally been the genre in which ideas are explicitly developed. Poetry and fiction also develop ideas, of course, but in each genre the ideas are developed more subtly, more implicitly, than is true in the essay. The essayist plucks an idea out of the universe, gives it a palatable, recognizable context, and then develops it, relying greatly upon the web of human experience to deepen the context so that the idea finds an analogue in the reader's experience, which in turn yields the explosion of insight. Consider, in this regard, the vast array of resources Dr. Martin Luther King relies upon in his famous "Letter from Birmingham Jail" essay to make the idea of justice come alive in the reader. Like the essay, the opinion gives an idea a context and develops it, with the critical distinction between the essay and the opinion being that the judge aims not so much to connect with the individual experience but with the broader experience of a society, as that experience is reflected in our concept of the individual's relationship to society.

In failing to recognize that the judge works in a genre distinctively different from the various genres that the lawyer works in, Stark fails as well to recognize that the judge has at his disposal the various stylistic and rhetorical devices that the essayist has available to him.¹¹ As a general matter, it is the freedom of the genre, in conjunction with the talents and vision of the judges, that has spawned an impressive body of judicial writing that qualifies as great literature. Few would deny, for example, that such great essays as "Shooting an Elephant" or "Once More to the Lake," to choose but two great essays from two great essayists, qualify as great literature, making it clear that the threshold qualification for great literature is a prose vehicle that allows for the development

10. LERNER, ed., *THE MIND AND FAITH OF JUSTICE HOLMES* 29 (1943).

11. See generally, Domnarski, *The Tale of the Text: The Figurative Prose Style of Connecticut Supreme Court Justice Leo Parskey*, 18 *CONN. L. REV.* — (1986).

of an idea. The judicial opinion is such a vehicle, and the anthologies of "law as literature" attest to the compatibility of judicial form and content and the form and content of great prose literature.¹²

Stark, in short, fails to appreciate the expansiveness of the judicial opinion as a genre when he implicitly argues that the judge, to use the negative of Holmes' phrase, cannot live greatly in the law.¹³ Surely judges have been able to live greatly in the law. The hundreds of judicial masterpieces attest to this. To assert the contrary is either to ignore or belittle the contributions that judges have made to our culture through their prose.

12. See, e.g. BLOM-COOPER, *THE LANGUAGE OF THE LAW* (1965).

13. LERNER, ed., *THE MIND AND FAITH OF JUSTICE HOLMES*, at 31.