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Ethical Judicial Opinion Writing

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INTRODUCTION

The judiciary's power comes from its words alone—judges command no army and control no purse. In a democracy, judges have legitimacy only when their words deserve respect, and their words deserve respect only when those who utter them are ethical. Opinion writing is public writing of the highest order; people are affected not only by judicial opinions but also by how they are written. Therefore, judges and the opinions they write—opinions scrutinized by litigants, attorneys, other judges, and the public—are held, and must be held, to high ethical standards. Ethics must constrain every aspect of the judicial opinion.

One way to judge judges is to read their opinions. Although a judge's role in the courtroom is a crucial judicial function, only those in the courtroom witness the judge's conduct, and most of them are concerned with their case alone. Judicial writing expands the public's contact with the judge. Writing reflects thinking, proves ability, binds litigants, covers those similarly situated, and might determine the result of an appeal. Judges hope that what they write will enhance confidence in the judiciary and bring justice to the litigants. The heart of a judge's reputation and function rests with the use of the pen.

Judges must resolve controversies. Processes in the courtroom might influence a judge's decision, but the written opinion rationalizes issues, explains facts, and settles disputes.[1] Opinions open windows into judges' minds and show how judges fulfill their duties. They provide accountability because they are available to the public, the litigants, and higher courts to read and review.

An opinion's quality is determined by tone, organization, style, method, and

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1. Judith S. Kaye, *Judges As Wordsmiths*, 69 N.Y. ST. B.J., Nov. 1997, at 10, 10 [hereinafter Kaye, *Wordsmiths*].

reasoning. Because opinions offer a glimpse into a judge's mind, they must be credible, impartial, dignified, and temperate. As one scholar explained, "Recognizing the extent to which [judicial] opinions are subject to scrutiny by the legal community, contributing substantially to legal scholarship, education, and history, it is crucial that the content of these opinions meet high ethical standards."[2]

To meet these high ethical standards, a judge must ensure accuracy and honesty in research, facts, and analysis. Opinions must exhibit the qualities of good moral character: Candor, respect, honesty, and professionalism.[3] These qualities are not the only considerations in opinion writing, but they offer a required starting point.

The way an opinion is written can tell the reader as much about a judge as the opinion's substance. Sloppy writing shows that the judge put insufficient time into writing the opinion. An opinion that presents a slanted version of the facts or gives short shrift to a seemingly meritorious argument might suggest that the judge did not explore both sides of an issue.[4] Lambasting or lampooning lawyers or litigants might indicate bias.[5] An attempt to shoehorn facts into a particular result when further research might yield a clearer, more convincing, and different result might show poor reasoning.[6] Perhaps most important of all, poorly drafted opinions "all too often reach the wrong result from an objective, or philosophically neutral, point of view."[7] Ethical judicial opinion writing inextricably intertwines style and substance.

There is no one right way to write a judicial opinion. This article does not seek to define the perfect judicial opinion. Rather, this article intends to show how form and substance must be laced with ethical considerations. Part I defines the concept of ethics as applied to judicial opinion writing. Part II explains the function and importance of opinions to the judiciary and the public. Part III explores the different types of audiences of judicial opinions. Part IV contains a general discussion of different opinion writing styles commonly used in judicial opinions. Part V discusses the ethical considerations present in pure opinions: Judicial writings whose constituent characteristics are highly formalized. Part VI explores the ethical considerations present in less formal judicial writings,

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2. Jamie S. Dursht, *Judicial Plagiarism: It May Be Fair Use But Is It Ethical?*, 18 CARDOZO L. REV. 1253, 1295 (1996).

3. *See* MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 125 (2002) [hereinafter SMITH, ADVANCED LEGAL WRITING]. Professor Smith offers these writing guidelines to evince good character: (1) focus on the litigants' behavior, not on the litigants; (2) focus on behavior that relates to the matter under discussion; and (3) do not evince hostility toward an attorney. *Id.*

4. William J. Palmer, *Appellate Jurisprudence as Seen by a Trial Judge*, 49 A.B.A. J. 882, 883 (1963).

5. Steven Lubet, *Bullying from the Bench*, 5 GREEN BAG 11, 14 (2001).

6. Douglas K. Norman, *Legal Staff and the Dynamics of Appellate Decision Making*, 84 JUDICATURE 175, 176 (2001) [hereinafter Norman, *Dynamics*].

7. AM. BAR. ASS'N APPELLATE JUDGES CONFERENCE, JUDICIAL OPINION WRITING MANUAL ix (1991) [hereinafter ABA OPINION WRITING MANUAL].

otherwise known as impure opinions. Part VII reviews ethical considerations specific to pure and impure opinions. Finally, part VIII discusses the use of law clerks in writing opinions.

I. JUDICIAL ETHICS IN THE CONTEXT OF THE JUDICIAL OPINION

Before engaging in a meaningful discussion of what an ethical opinion is, it is necessary to define the term "ethical." The dictionary defines "ethical" as "of or pertaining to morality or the science of ethics" and "pertaining to morals."[8] The dictionary definition of "moral" is "of or pertaining to human character or behavior considered as good or bad; of or pertaining to the distinction between right and wrong, or good and evil, in relation to the actions, volitions, or character of responsible beings."[9] From the dictionary definition of "ethical," it is clear that judges should be of good character: virtuous, righteous, and responsible.[10] Most would agree that judges should possess these qualities, but what must a judge do to meet those standards? It is easy to define extreme misconduct in the negative—like taking bribes in exchange for favorable rulings. It is difficult, however, to define what moral conduct is in the affirmative. It is just as difficult to determine what qualities an ethical opinion possesses. It is easy to identify certain kinds of immoral behavior with respect to writing, such as plagiarism[11] or libel,[12] but beyond the obvious are no hard-and-fast rules of what constitutes ethical judicial writing.

Judges occupy a special position in the legal community. They are in a unique position to influence it. Judges can give momentum to—or stop—trends developing in the legal profession. A judge's influence on the legal community is not limited to the lawyers and litigants. Judges are professional writers[13] who can and should use opinions to influence the legal profession for the better. One way to improve the profession is to put an end to legalese in judicial opinions. Many law-journal articles are devoted to translating "legal writing" into plain English

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8. THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 856 (1993) [hereinafter NEW SHORTER OXFORD].

9. *Id.* at 1827.

10. Cuthbert W. Pound, a Chief Judge of the New York Court of Appeals, stated that: "the judge should no doubt . . . be both lawyer and philosopher of the highest grade, blessed with saving common sense and practical experience as well as sound comprehensive learning, but such men are rare." Cuthbert W. Pound, *Defective Law—Its Cause and Remedy*, 1 N.Y. ST. B. ASS'N BULL., Sept. 1929, at 279, 285.

11. *See generally* Dursht, *supra* note 2, at 1259 ("'Every schoolchild is taught the impropriety of claiming credit for someone else's work.'") (quoting William A. Henry, III, *Recycling in the Newsroom*, TIME, July 29, 1991, at 59).

12. *See generally* Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273 (2003).

13. *See generally* George D. Gopen, Essay, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333 (1987).

for all to understand.[14] Despite this centuries-old criticism,[15] little has been done to rectify the situation. If judges wrote opinions in plain English, they would set a trend in the legal profession toward clearer writing.

Another criticism of modern legal practice is the lack of civility among members of the legal profession.[16] A judge who lacks civility on the bench or in an opinion bolsters incivility in the profession.[17] By demonstrating civility on the bench and demanding the same from the lawyers who appear before them, judges can encourage civility.[18] Judges should always be conscious of their role in the legal world and behave accordingly.

To define ethics in the context of opinion writing, one good place to start is the *Model Code of Judicial Conduct* ("*Model Code*").[19] But reflecting its status as a model, judges and the public often use the *Model Code* (which does not specifically address judicial opinion writing) as a guide rather than as a set of binding rules; the *Model Code* is only binding when a specific state adopts all or part of it. The guidelines the *Model Code* provides with respect to judicial conduct can be viewed as standards that should be reflected in judicial writing. A judge's written opinions cannot be separated from a judge's judicial ethics.

Judicial opinions, more than any other part of a judge's job, influence the public perception of the judiciary—and public perception of the judiciary is a key concern of the *Model Code*.[20] From a narrow perspective, a litigant will see from reading the opinion how the judge reached a decision. From a broad perspective, the public witnesses its rights defined, and to some extent its rights created or altered, in judicial opinions.[21]

Canon 1 of the *Model Code* provides that "[a] judge shall uphold the integrity and independence of the judiciary."[22] Subsection A of the same canon explains what upholding integrity and independence means: "A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the

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14. *See, e.g.*, Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519 (1984-1985); Patricia M. Wald, "*How I Write Essays,*" 4 SCRIBES J. LEGAL WRITING 55 (1993) [hereinafter Wald, *How I Write*]; George Rose Smith, *A Primer of Opinion Writing, For Four New Judges*, 21 ARK. L. REV. 197, 209 (1967); Gopen, *supra* note 13.

15. Gopen, *supra* note 13, at 333.

16. Lubet, *supra* note 5, at 14.

17. *Id.*

18. *Id.*

19. MODEL CODE OF JUDICIAL CONDUCT (2004) [hereinafter MODEL CODE]. The American Bar Association recently issued its Final Draft Report to amend the current *Model Code*. *See* ABA, http://www.abanet.org/judicialethics/finaldraftreport.html (last visited Mar. 15, 2008). Note that federal judges have their own code of judicial conduct, called the *Code of Conduct for United States Judges*. *See* http://www.uscourts.gov/guide/vol2/ch1.html (last visited Mar. 15, 2008).

20. *See generally* MODEL CODE Canon 3.

21. *See, e.g.*, Blake D. Morant, *Electoral Integrity: Media, Democracy, and the Value of Self Restraint*, 55 ALA. L. REV. 1, 1 (2003) (discussing impact of Bush v. Gore, 531 U.S. 98 (2000), on public's view of judiciary).

22. MODEL CODE Canon 1.

judiciary will be preserved."[23] The drafters of the *Model Code* were aware that to be effective, the judiciary must maintain legitimacy[24]—and to maintain legitimacy, judges must live up to the *Model Code*'s moral standards when writing opinions. If the public is able to witness or infer from judges' writing that judges resolve disputes morally, the public will likewise be confident of judges' ability to resolve disputes fairly and justly.[25]

Canon 2 provides that "[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."[26] At its basic level, it prevents judges from acting on bias[27]—including racist or sexist beliefs. It also ensures that judges comply with the law and promote public confidence in the integrity of the judicial system.[28] Canon 2 was written in general terms to proscribe a broad range of activity.[29] The comments to Canon 2 explain that the "test" for the appearance of impropriety is "whether the conduct [at issue] would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired."[30] Canon 2 is designed to ensure that a judge's conduct promotes the image of a fair, competent, and impartial judiciary and to prevent conduct that might tarnish that image. Poor judicial writing will do more than just tarnish a judge's reputation; it will also sully the reputation of the judiciary as a whole and good government as well. Judges have an obligation to ensure that their written work reflects the integrity, impartiality, and competence they are expected to exhibit from the bench. These qualities are as important as justice and fairness. Without integrity, impartiality, and competence, neither justice nor fairness is possible.[31]

Canon 3 prescribes that "[a] judge shall perform the duties of judicial office impartially and diligently."[32] The comments to Canon 3 require the judge to be patient and to allow each litigant to be heard.[33] The judge must also give due consideration to the litigants and their claims, regardless of any initial impulse or thought about the validity of a particular claim. Further, judges are expected to recuse themselves if they have a personal bias against a litigant or a litigant's

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23. MODEL CODE Canon 1(A).

24. MODEL CODE Canon 1 cmt.

25. Adherence to these moral standards is important because "liberty or property interests [are] at stake." Marshall Rudolph, *Judicial Humor: A Laughing Matter?*, 41 HASTINGS L.J. 175, 187 (1989).

26. MODEL CODE Canon 2.

27. MODEL CODE Canon 2. Based on that canon and other issues of propriety, some states require that opinion writing be gender neutral. *See, e.g.*, NEW YORK STATE JUDICIAL COMMITTEE ON WOMEN IN THE COURTS, FAIR SPEECH: GENDER NEUTRAL LANGUAGE IN THE COURTS (2d ed. 1997).

28. MODEL CODE Canon 2(A) cmt.

29. MODEL CODE Canon 2(A) cmt.

30. MODEL CODE Canon 2(A) cmt.

31. RONALD DWORKIN, LAW'S EMPIRE 166 (1986).

32. MODEL CODE Canon 3.

33. MODEL CODE Canon 3.

lawyer.[34] In the fight against bias, the best judge is the one who realizes that all people are biased. That judge "is more likely to make a conscientious effort at impartiality than one who believes that elevation to the bench makes him at once an organ of infallible logical truth."[35] Thus, "[a]n ethical judge must demand of herself that she identify and understand her own biases and how they affect her reaction to a case."[36]

Subsection (B)(4) of Canon 3 is especially pertinent. It provides that "a judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity . . . ."[37] Canon 3 emphasizes that judges should always act professionally and respectfully to all. A judge must never patronize or offend the losing side. The judge must treat all with dignity and respect.

Because judges represent the judiciary to the public and serve as role models in the legal profession,[38] we expect them to live up to high standards, both on and off the bench. Therefore, there is a societal interest in selecting only the most qualified people with the right temperament to be judges.

Much of the legal profession revolves around the judiciary: Judges resolve disputes, attorneys seek to settle cases rather than risk an unfavorable result from a judge, and transactional work is geared toward avoiding the judicial system.[39] Lawyers also rely on the rules of precedent to advise clients and assess risk. As Mortimer Levitan insightfully remarked:

> If lawyers ever lose their capacity for believing that precedents enable them to predict what the courts will do in the future, they would advise their sons to study dentistry or plumbing or some other respectable and highly remunerative profession. A lawyer would experience only frustration from his practice if candor compelled him to advise his client: "The courts held this way last month, but heaven only knows how they'll hold next month!" And the bewildered client—what would he do? Probably seek a lawyer with more illusions or less candor.[40]

The legal community pays close attention to precedent that judges hand down. Precedent steers lawyers in advising and representing their clients.

This article does not mean to suggest that the judicial system is rife with

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34. MODEL CODE Canon 3(E)(1)(a).

35. Morris R. Cohen, *The Place of Logic in the Law*, 29 HARV. L. REV. 622, 638 (1916).

36. David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509, 514 (2001).

37. MODEL CODE Canon 3(B)(4).

38. Lubet, *supra* note 5, at 14 (questioning why lawyers should be polite to an abusive judge who insults and demeans them).

39. Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 558 (1984-1985).

40. Mortimer Levitan, *Professional Trade-Secrets: What Illusions Should Lawyers Cultivate?*, 43 A.B.A. J. 628, 666 (1957).

unethical judges who write poor opinions. To the contrary, most judges write hundreds—if not thousands—of legal opinions in their tenure and do a good job. Given mounting caseloads and time pressures in the modern-day opinion-writing process, it is impossible and unrealistic to expect every opinion to be perfect. To create a good opinion, however, ethics must be paramount. No ethical judge ought ever write an unethical opinion.

II. WHY WRITE OPINIONS?

To write an effective, ethical opinion, the judge must be conscious of the purposes of opinion writing. To understand these purposes, it is helpful to understand the history of the American written opinion.

The American legal system originated as a "speech centered" one modeled on English jurisprudence. In the English system, and in most common-law systems, oral argument is the dominant form of advocacy; the only written item is a short "notice of appeal" giving a one- or two-sentence synopsis of the issue to be argued,[41] and judgments are rendered orally at the end of the proceeding.[42] In the early American legal system, during the colonial period, "[o]ral arguments lasting several days were not uncommon."[43] But as the United States increased in size and cities flourished, oral advocacy took a backseat to written advocacy. The country's size undoubtedly played a role in this shift: "Because individuals had to travel great distances in order to attend political meetings and participate in government, the written and printed word were becoming an important means of political and governmental communication."[44] It was inevitable "that the courts would eventually come to rely on the written or printed word as a means of communication between lawyers and judges who were separated by significant distances."[45] The American legal system is now a "writing centered" system in which parties must often request time for oral argument. Some judges do not always hear oral argument, and for the most part oral argument, when granted, is limited to a short duration. As the legal system moved away from oral advocacy, it also moved away from oral decision making.

The shift to a writing-centered system is evident in *Marbury v. Madison*. The Supreme Court held that "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases,

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41. R. Kirkland Cozine, *The Emergence of Written Appellate Briefs in the Nineteenth-Century United States*, 38 AM. J. LEGAL HIST. 482, 483 (1994).

42. Daniel J. Meador, *English Appellate Judges from an American Perspective*, 66 GEO. L.J. 1349, 1364-67 (1978).

43. Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1179 (2004).

44. *Id.* at 1180.

45. *Id.*

must of necessity expound and interpret that rule."[46] Most understand *Marbury* to mean that under the separation of powers doctrine, the judicial branch interprets laws that the legislative branch enacts and the executive branch enforces. For judges, *Marbury* means more than that. *Marbury* requires judges to give reasoned opinions, not merely judgments, in cases that call for explanation. The judicial opinion is integral to the function of the American judicial system. Opinions are the vehicles by which the judiciary elucidates, expounds upon, and creates rights for Americans.

Justice George Rose Smith once pointed to the democratic process as a reason to write opinions: "Above all else to expose the court's decision to public scrutiny, to nail it up on the wall for all to see. In no other way can it be known whether the law needs revision, whether the court is doing its job, whether a particular judge is competent."[47] Justice Smith recognized that judges are not untouchable beings. Judges serve their audience. With this service comes the need for judges to be trusted. Writing opinions makes obtaining trust easier; it allows an often opaque judicial institution to become transparent.

Writing judicial opinions essentially serves four functions. First, "opinions are written to tell the parties why the winner won and the loser lost."[48] The law forbids vigilante, or "self help," justice.[49] If individuals believe they will receive unexplained outcomes in the judicial forum, reliance on self-help might become the norm.[50]

Second, written opinions "constrain arbitrariness."[51] A written opinion explains the decision to the parties, especially the losing party.[52] The losing party must be satisfied that its arguments have been considered and fairly evaluated. A written opinion also assures the public that the decision is the product of reasoned judgment and thoughtful analysis, rather than an arbitrary exercise of judicial authority.[53]

Third, written opinions ensure correctness.[54] Writing an opinion reinforces the judge's decision-making process. It forces the judge to evaluate whether the

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46. Marbury v. Madison, 5 U.S. 137, 177 (1803).

47. Smith, *supra* note 14, at 200-01.

48. McGowan, *supra* note 36, at 567; *accord* FEDERAL JUDICIAL CENTER, JUDICIAL WRITING MANUAL 1 (1991) [hereinafter FEDERAL JUDICIAL CENTER] ("[O]pinions communicate a court's conclusions and the reasons for them to the parties and their lawyers.").

49. McGowan, *supra* note 36, at 567.

50. *Id.*

51. Thomas E. Baker, *A Review of Corpus Juris Humorous*, 24 TEX. TECH L. REV. 869, 872 (1993) (citing Bd. of Regents v. Roth, 408 U.S. 564, 589 (1972) (Marshall, J., dissenting)); Moses Lasky, *Observing Appellate Opinions from Below the Bench*, 49 CAL. L. REV. 831, 838 (1961) [hereinafter Lasky, *Observing Appellate Opinions*].

52. Lord Devlin, *Judges and Lawmakers*, 39 MOD. L. REV. 1, 3-4 (1976).

53. *See generally* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

54. Baker, *supra* note 51, at 872.

reasoning and the facts warrant the conclusion reached.[55] Many "[m]isconceptions and oversights of fact and law are discovered in the process of writing."[56] A judge's writing process must begin early, and a judge must edit until the deadline. A structured and unrushed writing process in which the judge organizes thoughts in advance, rewrites, and edits will allow the attorneys, the litigants, and those unfamiliar with the case to understand the opinion on their first read. If a judge has difficulty explaining a concept or decision, then more research—which might itself unearth other relevant cases or good ideas—is required to make everything understandable. A judge struggling with an opinion must reevaluate all reasoning and accept that a conclusion different from the one the judge originally planned to reach might be correct. Ultimately, a judge must always be happy with an opinion. A judge who is not happy with an opinion is a judge who has not taken seriously the responsibility to ensure that an opinion is correct.

Fourth, written opinions are the common law. They encapsulate much of legal discourse. In our system of stare decisis, courts must look backward and forward to evaluate the bases and implications of their decisions.[57] For appellate opinions of courts of last resort,

> the test of the quality of an opinion is the light it casts, outside the four corners of the particular lawsuit, in guiding the judgment of the hundreds of thousands of lawyers and government officials who have to deal at first hand with the problems of everyday life and of the thousands of judges who have to handle the great mass of the litigation which ultimately develops.[58]

Opinion writing helps judges structure their decisions as dialogues that consider the common law's past and future.[59] Additionally, written opinions provide both upward and downward guidance in the court system. An intermediate appellate court writes to supervise and guide trial courts. In turn, a jurisdiction's highest appellate court supervises the intermediate appellate court to bring uniformity to the law.[60] Judges must be conscious that their writings will become part of the common-law doctrine and be relied on by other courts. An unethical opinion

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55. *See* Mary Kate Kearney, *The Propriety of Poetry in Judicial Opinions*, 12 WIDENER L.J. 597, 599 (2003) ("Judges write opinions to explain their resolution of a case, to place that case in the context of past decisions, and to offer precedent for future decisions." Doing so enables them to "clarify [their] thoughts as [they are] reduce[d] . . . to paper"); FEDERAL JUDICIAL CENTER, *supra* note 48, at 1 ("[T]he preparation of a written opinion imposes intellectual discipline on the author, requiring the judge to clarify [the judge's] reasoning and assess the sufficiency of precedential support.").

56. Baker, *supra* note 51, at 873; *accord* Reed Dickerson, *Legal Drafting: Writing as Thinking, or, Talk-Back from Your Draft and How to Exploit It*, 29 J. LEGAL EDUC. 373 (1978).

57. *See* Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 819 (1961) [hereinafter Leflar, *Judicial Opinions*].

58. Henry M. Hart, Jr., *The Supreme Court, 1958 Term-Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 96 (1959).

59. *See* McGowan, *supra* note 36, at 570 ("Opinions record the life experience of rules.").

60. *See* Baker, *supra* note 51, at 873.

carries negative implications that can reach beyond the parameters of the individual case for which it was written.

III. THE OPINION'S AUDIENCE

Judges write opinions for different audiences, but they write primarily for professionals, for the public, and for the litigants in the case.[61] Judges must always know when to write (as opposed to deciding a matter orally), for whom to write, and when and how to publish. Unfortunately,

> [t]oo often . . . judges write as if only the writer counted. Too often they write as if to themselves and as if their only purpose were to provide a documentary history of having made a judgment. Instead, they must realize that the purpose of an opinion is to make a judgment credible to a diverse audience of readers.[62]

Judges may write for more than one audience. Judges can write not only for the litigant and the public but at the same time also for professionals, including lawyers, professors, law students, and other judges.[63] A judge may write an opinion to convince others in the profession that a certain view of the law and its purpose is correct or incorrect.[64]

Appellate and trial opinions have different audiences and purposes. Appellate judges often write opinions to resolve controversies in their jurisdiction or to correct an erroneous trial-court opinion. For this reason, appellate opinions are mostly directed at lawyers and judges. But appellate opinions are also the primary source of material for the casebooks that law students use to learn the law; law students may be an opinion's secondary audience. Trial judges also write for the legal profession because they ensure that their opinions survive possible appellate review. In that respect, trial judges must explain their reasoning fully.

Frequently, trial judges write directly for the litigants, especially when a case involves settled issues or when a pro se litigant is involved. An opinion is the way judges convey the judgment of a case. Judgments are primary; opinions merely explain judgments: "judicial opinions are simply explanations for judgments—essays written by judges explaining why they rendered the judgment they did."[65] It is important for litigants to understand how and why the judge reached a particular result. Judges have a duty, running directly to the litigants, to render legally sound decisions.

Although the public is not the primary consumer of judicial opinions, judges

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61. *See* Kearney, *supra* note 55, at 601 (describing "wide audience" that opinions reach).

62. Dwight W. Stevenson, *Writing Effective Opinions*, 59 JUDICATURE, Oct. 1975, at 134, 134.

63. Wald, *How I Write*, *supra* note 14, at 58.

64. RUGGERO J. ALDISERT, OPINION WRITING 26 (1990).

65. Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 62 (1993).

must also keep the public in mind when writing opinions. This is more important now that opinions are becoming increasingly accessible to the public through the Internet. The public becomes an audience for a judicial opinion when the opinion changes the law or its application. That change, in turn, changes the way people or entities interact. Journalists are often called on to communicate to the public the substance of opinions involving issues of public interest.[66] Important decisions should be written so that people can easily understand how their rights are affected.[67]

The idea that judicial opinions should be accessible to the public is uniquely American. The English believe that the legal system is accountable mostly to litigants and, therefore, that the judicial decision-making process should take place in open court—where litigants can hear the opinion of all the judges.[68] For Americans, accountability in the judicial system stems from the fully deliberated written judicial opinion. The belief is that the judiciary, as the third branch of government,[69] is accountable to more than the litigants. The judiciary is accountable to the legislature to interpret and follow the law and to the public to apply the law. The judiciary's integrity depends on clear, impartial, and fair opinions. The underlying legal principle of stare decisis—that courts in the same jurisdiction apply the law in the same manner as higher courts—means that American judges do not "just write decisions, [they] write precedents."[70]

Judges must always bear their audience in mind when writing opinions. Before the writing process begins, a judge should consider (1) who is the reader of the opinion; (2) what resolutions the opinion makes; (3) what speaking voice should be used when writing the opinion; and (4) what relation should the judge express with the reader—in other words, the decision's tone.[71] As to the first point, judges must bear in mind who is likely to read their opinions.[72] Whether the opinion is designed for litigants, lawyers, the judiciary, or the public, it is vital for judges to write with their audience in mind. Second, judges must realize that not everyone will agree with their opinions. The losing lawyer, the losing litigant, and, in some

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66. FEDERAL JUDICIAL CENTER, *supra* note 48, at 6.

67. *See* Nadine J. Wichern, *A Court of Clerks, Not of Men: Serving Justice in the Media Age*, 49 DEPAUL L. REV. 621, 667 (1999) (observing that "[g]enerally, judges only speak to the public through their opinions" and opining that "[t]he primary function of written opinions should be to inform the law's consumers").

68. Ehrenberg, *supra note* 43, at 1164.

69. Judicial accountability and transparency of judicial opinions are fundamental concepts supporting the idea of the judiciary as a co-equal governmental branch. Smith, *supra* note 14, at 200–01.

70. Kaye, *Wordsmiths*, *supra* note 1, at 10; *accord* Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81, 100 (1994). The American practice of explaining a ruling's rationale contrasts starkly with the way opinions are written in France. French judges hand down decisions as fiats without explanation. Additionally, French courts may change jurisprudence dramatically without an explanation from the court. From an American perspective, the French system's lack of accountability and reasoning would be considered unethical.

71. Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. REV. 915, 921 (1961), *reprinted in* 6 SCRIBES J. LEGAL WRITING 115, 123 (1998).

72. *Id.* at 921-22, *reprinted in* 6 SCRIBES J. LEGAL WRITING 115, 124 (1998).

instances, an appellate court might all disagree.[73] Realizing that, judges should write persuasive opinions while presenting the facts honestly, and perhaps even conceding a point or two to the losing side.[74] Third, judges must choose whether the opinion will be written in a formal (or "pure") style[75] or in an informal (or "impure") style. Fourth, judges must decide on the opinion's tone.[76] Keeping these considerations in mind will help judges tailor their decisions to reach all who will be affected by what they write.

IV. THE OPINION'S STYLE

For judges, words are critical. Literary style is important to a judge seeking to write an ethical opinion. If good opinion writing is critical to the good administration of justice, literary style is critical to good opinion writing. As Robert Leflar wrote:

> Some judges argue that literary style has little or nothing to do with the quality of opinions, that style is "dressing" merely, and that the functions of opinions are served wholly by their substantive content. This simply does not make sense. For one thing, every judge has a writing style, whether he knows it or not . . . . Whatever it is, it determines how effectively the substantive content of opinions is conveyed . . . .[77]

Style and substance are important ingredients in a good opinion.

An opinion that "presents a sound statement of the law will hold its own regardless of its literary style . . . . But, the fact that substance comes before literary style does not warrant the conclusion that literary style is not important."[78] Although literary style is important, a satisfactory "objective is not a literary gem but a useful precedent, and the opinion should be *constructed* with good words, not plastered with them."[79] There is not—and should not be—only one way to write an opinion. As one prominent judge explained, once we accept that there are different ways to write an opinion, we become open to the

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73. *Id.* at 922, *reprinted in* 6 SCRIBES J. LEGAL WRITING 115, 124 (1998).

74. *Id.*

75. Justice Cardozo described the high style as "the voice of the law speaking by its consecrated ministers with the calmness and assurance that are born of a sense of mastery and power." BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 10 (1931), *reprinted in* 52 HARV. L. REV. 471, 475 (1939), *and in* 48 YALE L.J. 489, 493 (1939), *and in* 39 COLUM. L. REV. 119, 123 (1939) [hereinafter CARDOZO, LAW AND LITERATURE].

76. Gibson, *supra* note 71, at 125-26.

77. Leflar, *Judicial Opinions*, *supra* note 57, at 816.

78. Am. Bar Ass'n Sec. of Jud. Admin., Committee Report, *Internal Operating Procedures of Appellate Courts* 34-35 (1960-1961) [hereinafter "ABA Committee Report"].

79. BERNARD E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS § 103, at 204-05 (1977) (emphasis in original).

possibility that there are better and worse ways to write opinions.[80] There are many useful approaches to writing effective opinions.

Judges must write precisely, simply, and concisely. They must state the rule on which the decision turns. They must apply law to fact. They should spark interest: "[A] judicial opinion need not be a dull, stereotyped, colorless recital of facts, issues, propositions, and authorities but can be good writing and make good reading."[81] Using good grammar and correct usage are also important in opinion writing. Doing so makes the opinion readable. It sends a message that the judge took the time to write a grammatically correct and clear opinion. It shows that the judge took the opinion seriously.

Good legal writers, like all good writers, follow certain axioms: Do not end sentences with prepositions; refrain from writing in passive voice; and avoid splitting infinitives. These axioms are tools to enhance one's writing style, yet they should not always be followed; exceptions sometimes prove the rule.[82] Good writers will stray from grammatical convention when necessary to enhance the clarity of their writing.[83]

A judicial opinion must be more than semantically and grammatically correct. Writing style is a judge's signature—the judge's own imprimatur on the law. The importance of style is encapsulated in Llewellyn's aphorism: "Ideals without technique are a mess. But technique without ideals is a menace."[84] For this reason, judges should shun chameleon writing, which adopts the winning litigant's style and changes from case to case. Moses Lasky said it best:

> Then there is the opinion manufactured in what Judge Cardozo, I believe, called the "style agglutinative," by scissors and paste pot. In consequence, there are notable judges whose opinions vary both in style and legal attainment according to the brief of the party for whom they have decided to decide; the opinion consists of reassembled segments clipped from the prevailing briefs.[85]

Chameleon writing shows no individual thought or reasoning. Judges should not allow their writing to be a cut-and-paste job. Rather, within the constraints of grammar and ethics, each judge may express a unique writing style. Judges—particularly federal judges—should similarly avoid the temptation to rely too heavily on their clerks' writing styles. For judges to speak with their own voice, they need to avoid not only the litigants' language but that of their cyclic clerks as well.

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80. *See* Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1423 (1995) [hereinafter Posner, *Judges' Writing Styles*].

81. WITKIN, *supra* note 79, at § 103, at 202-03.

82. *See* Posner, *Judges' Writing Styles*, *supra* note 80, at 1424.

83. *See generally* Gopen, *supra* note 13, at 348-53.

84. Karl N. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 662 (1935).

85. Lasky, *Observing Appellate Opinions*, *supra* note 51, at 831-32.

Judges sometimes use styles foreign to traditional opinion writing. Some have argued that styles found in popular culture may be utilized in opinion writing.[86] Judges have borrowed from the conventions of poetry, limericks, and even rap to write stylized opinions.[87] Although many judges have tried their hand at using these styles of opinion writing, most fail to write good law or even good poetry.[88]

An example of an opinion becoming more famous for its style than its substance is a much-publicized decision rendered in the Michigan Circuit Court.[89] In *Mathers v. Bailey*, the plaintiff, a childhood acquaintance of the rapper Marshall Mathers (otherwise known as Eminem, or Slim Shady), brought a claim for invasion of privacy and false light for rapping that the plaintiff had bullied him when they were in middle school together.[90] Following a well-reasoned opinion that explained the facts and the law in connection with Eminem's summary-judgment motion, the court granted Eminem's motion.[91] The judge then tried her own hand at rap by creating thirty-six lines of lyrics that included the following: "Bailey also admitted he was a bully in youth/Which makes what Marshall said substantial truth/This doctrine is a defense well known/And renders Bailey's case substantially blown."[92] The "rap" was unnecessary to the court's decision and served only to publicize it.[93] This opinion underscores the point that using poetry or rap as a style in an opinion undermines the court's authority. Using these styles turns the opinion into a spectacle rather than a legal tool.[94]

The problem with writing an opinion in nontraditional styles is that the judge must fit the case's substance into the desired format rather than allow the facts and law to lead the writer and reader to a logical conclusion that the law supports.[95] Often the traditional way is the better way. Opinions are not the place to experiment with writing styles.

As articulated by Judge Richard A. Posner, there are essentially two types of opinions—the pure opinion and the impure opinion.[96] The pure opinion is a formal opinion written with legalese and with a tone of "high professional

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86. *See, e.g.*, ALDISERT, *supra* note 64, at 196.

87. *See* Gerald Lebovits, *Poetic Justice: From Bad to Verse*, 74 N.Y. ST. B.J., Sept. 2002, at 44, 48 [hereinafter Lebovits, *Poetic Justice*].

88. *Id.* at 48.

89. *See* Mathers v. Bailey, No. 2001-3606-NO, 2003 WL 22410088 (Mich. Cir. Ct. Oct. 17, 2003).

90. *See id.* at *1.

91. *See id.* at *6 n.11.

92. *Id.*

93. *See, e.g.*, Bill Hoffmann, *Rappin' the Gavel: Judge Busts a Rhyme as She Clears Eminem*, N.Y. POST, Oct. 22, 2003, at 29; Anthony Harwood, *SHADY M'LADY Rap-style Ruling in Pounds 600k Case*, SCOT. DAILY REC., OCT. 21, 2003, at 3.

94. *See* Lebovits, *Poetic Justice*, *supra* note 87, at 48.

95. *See* Susan K. Rushing, *Is Judicial Humor Judicious?*, 1 SCRIBES J. LEGAL WRITING 125, 137 (1990).

96. *See* Posner, *Judges' Writing Styles*, *supra* note 80, at 1421.

gravity."[97] Far removed from conversation, it is often solemn, impersonal, and matter of fact. The judge's voice is masked with details, numerous and lengthy quotations from previous judicial opinions, and a serious tone.[98] Although attorneys and other judges might be able to decipher the pure opinion, it is inaccessible to the average reader.[99] By contrast, the impure opinion is conversational and written in simple, accessible language.[100] Judges who write in the impure style not only render judgment but also explain the decision to the layperson.[101] The impure opinion is candid, relaxed, and sometimes humorous,[102] whereas the pure opinion is replete with heavy rhetoric. Adelberto Jordan explained the pure versus impure dilemma:

> Judges may face a dilemma in trying to write opinions that are figurative, quotable, humorous, or unique. While they may want to forsake the wooden form of judicial opinion writing (issue, facts, law, application, conclusion), they must, in some way, maintain the dignity and integrity that, at least in part, gives the judiciary its legitimacy.[103]

Judges often fall into the mold of either writing pure or impure opinions. The choice is based on the judge's own personality, the traditions of the court on which the judge sits, or the opinion's intended audience.

Judges who often write for other judges (in higher or lower courts), lawyers, and litigants tend to write in a pure style.[104] The judge wants to ensure that the opinion is reasoned, based on precedent, and authoritative. The pure style is best for lawyers and judges concerned about the decorum of the judicial opinion.[105] The pure opinion is exemplified by Justices Louis Brandeis, William Brennan, Benjamin Cardozo, Felix Frankfurter, and the second John Harlan. The pure opinion "is characteristic of the vast majority of opinions written by law clerks, which means most opinions in all American courts today."[106] Indiana Court of Appeals Judge Paul Buchanan favored the pure approach when he wrote that "[u]sing a structured opinion results in more than efficiency and readability . . . . The discipline of organizing, dividing, and identifying the parts of an opinion is a process which, if honestly pursued, necessarily produces brevity, clarity, and

97. *Id.* at 1426.
98. *Id.* at 1429.
99. *See id.*
100. *Id.* at 1427.
101. *Id.* at 1430.
102. *Id.*
103. Adelberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693, 695 n.11 (1987).
104. *See* Posner, *Judges' Writing Styles*, *supra* note 80, at 1431.
105. *See id.*
106. *Id.* at 1432.

accuracy."[107] Judges writing for the public will write candidly and simply in the impure style. Impure opinions tend to be fact-based and use almost no legalese. The impure style is best for the layperson because the candor and simplicity that characterize the style make impure opinions easier to understand. Neither style, however, is free from ethical considerations.

V. ETHICAL CONSIDERATIONS IN A PURE OPINION

Purists believe in the solemnity and dignity of the law. A pure opinion reflects that belief. Purists do not strive foremost for readability; they write with other goals in mind. A pure opinion embodies the high, dignified place the judicial system has in American society. Purists use an impersonal tone, lay out facts and legal propositions in great (sometimes excruciating) detail, pay much deference to precedent, use technical terms without definition, and scrupulously comply with citation conventions.[108] At its extreme, the pure opinion is written in a lofty and formalistic tone. Purists organize, divide, and identify the essential elements of a case to provide accuracy. There are several dangers to writing in the pure style: (1) over-citation; (2) over-reliance on authority instead of reasoning; (3) overuse of footnotes; (4) failing to connect facts to law; (5) using Latinisms; and (6) hiding reasoning behind pretentious language. The pure opinion sacrifices clarity and readability, and relies on reason in favor of dogmatic, unyielding, and inflexible rules. At its extreme, the pure opinion is mechanical.

A. THE OPINION'S LENGTH

Some purists believe that a judicial opinion should be a scholarly exposé on the law. Pure opinions can be lengthy, verbose, and repetitious. A careful and methodical opinion does no disservice to the law, but it risks alienating the reader. It is probably true that as the length of an opinion increases, the number of readers decreases. Purists must be conscious not to alienate readers with their trademark dense writing style and length.

An opinion's length is often determined by the nature and complexity of the facts and the issues, by the audience the judge intends to reach, and by the judge's hopes for publication.[109] Judges must account for all these factors in writing their opinions. A memorandum opinion should not be used when disposing of a case by reversal or remand.[110] Litigants, especially losing litigants, want to be assured that the court considered the issues and engaged in a reasoned and fair

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107. Paul H. Buchanan, Jr., *For Structured, Digestible, Streamlined Judicial Opinions*, 60 A.B.A. J., Oct. 1974, at 1249, 1251.

108. Posner, *Judges' Writing Styles*, *supra* note 80, at 1429.

109. Gerald Lebovits, *Short Judicial Opinions: The Weight of Authority*, 76 N.Y. ST. B.J., Sept. 2004, at 64, 64 [hereinafter Lebovits, *Short Judicial Opinions*] (citing FEDERAL JUDICIAL CENTER, *supra* note 48, at 4).

110. ALDISERT, *supra* note 64, at 20.

analysis.[111] The public wants to be assured that if it relies on the judiciary, then cases will be decided fairly.[112] Judges and lawyers want an opinion to be well-reasoned so that it has some precedential value.[113]

The most important factors determining the opinion's length are "the complexity of the facts and the nature of the legal issues."[114] These factors determine whether a case requires a "full dress" opinion, a memorandum opinion, or a summary order.[115] Cases that involve issues about which the controlling law is uncertain, or which contain complex material facts, require more exposition and analysis than cases involving clear precedents or simple material facts.[116] Although some judges might want to write long opinions, opinions must be no longer than they need to be. Reducing the number of longer opinions might lead judges to write more thoughtful ones. Judge Bruce M. Selya offered good advice in two law-review articles. Judge Selya proposed that when it comes to judicial opinions, less is better; judges should write less, but think more.

> Two centuries ago, Lord Mansfield lived by the following heroic maxim: "I never give a judicial opinion upon any point, until I think I am master of every material argument and authority relative to it." In these more hectic times, judges are faced with the choice of either reducing the number of full-dress opinions or lowering the level of mastery to which they aspire. The better choice is clear. Unless we are to defenestrate the ideal of Lord Mansfield—and I think we all agree that we should cling to it—judges must begin to think more and write less.[117]
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> I do not pretend that it will be a walk in the park. Despite all the bromides, judges have fierce pride of authorship—and this pride is, on balance, a good thing. It is the pride of the craftsman, sticking to his last. To complicate matters, using fewer citations will make some judges uneasy, worried that either their devotion or their scholarship will be called into question. Finally, eschewing routine citations will drive some law clerks to tears. But I think that, if judges can steel themselves to abjure rote recitations of established legal principles, forgo superfluous citations, and work consciously toward economies of phrase, the game will prove to be well worth the candle. With apologies to Robert Browning, the reality is that "less is more." If appellate judges do not come to accept and act upon this reality, we will simply spend our days writing more

111. Lebovits, *Short Judicial Opinions, supra* note 109, at 64.

112. 112. *See id.*

113. *Id.*

114. FEDERAL JUDICIAL CENTER, *supra* note 48, at 4.

115. *Id.* at 3.

116. *Id.*

117. Bruce M. Selya, *Judges on Judging: Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 OHIO ST. L.J. 405, 414 (1994) (footnote omitted) (quoting Rex v. Wilkes, (1770) 98 Eng. Rep. 327, 339 (K.B.)).

> and more about less and less for audiences that are increasingly alienated, or bored, or both.[118]

Writing should be thorough but economical. In the search for brevity, however, judges should not be abrupt.[119] Judges must strive to be concise: "Brief opinions hold the reader's attention, allow readers to move on to other things, and distill the opinion's essence."[120] Unfortunately, opinions have been getting longer. For example, between 1960 and 1980, the average length of federal court of appeals opinions increased from 2863 words to 4020 words; the average number of footnotes increased from 3.8 to 7; and the average number of citations rose from 12.4 to 24.7.[121] Long opinions can cloud issues, obscure facts, and cause the reader to become disinterested or confused.

B. THE DANGERS OF LENGTHY OPINIONS

Lengthy opinions can be dangerous blueprints for impressionable law students. Judicial opinions are the building blocks on which future lawyers model their legal-writing skills. If judges write in a particular way, then students will take their cues from that style in crafting their own writing: "For better or worse, the opinion affects the basic writing pattern of the profession."[122] Appellate opinions are the main source of educational material in casebooks that law professors use to teach the next generation of lawyers.

The first time that lawyers-to-be read opinions in earnest is during their first year of law school. Law schools teach students to "think like lawyers," a way of thinking different from the way most people think.[123] Because law students must learn a new way of thinking, they seek examples of what it means to think, speak, and write like a lawyer. From the first day of class, law students are exposed to definitive opinions that have shaped the law. Those opinions may not be the perfect style or framework for writing judicial opinions. Students often receive a distorted view of how a lengthy opinion is actually written and how the case is

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118. Bruce M. Selya, *Favorite Case Symposium: In Search of Less*, 74 TEX. L. REV. 1277, 1279 (1996) (footnote omitted).

119. *See* Lebovits, *Short Judicial Opinions*, *supra* note 109, at 60. For a clipped opinion, see Denny v. Radar Industries, Inc., 184 N.W.2d 289 (Mich. App. 1970), in which the entire opinion reads: "The appellant has attempted to distinguish the factual situation in this case from that in Renfroe v. Higgings Rack Coating & Manufacturing Co., Inc. (1969), 17 Mich. App. 259, 169 N.W. 2d 326. He didn't. We couldn't. Affirmed. Costs to appellee." *See also* ALDISERT, *supra* note 64, at 7 (judges err when "[t]hey fail to set forth specific reasons for choosing one line of cases over others, saying, 'We think that is the better view' and, 'We prefer the majority view' without explaining why").

120. Lebovits, *Short Judicial Opinions*, *supra* note 109, at 64; Kaye, *Wordsmiths*, *supra* note 1, at 11 ("[A]s the length of writings grows, the number of people who actually read them likely dwindles.").

121. *See* Lebovits, *Short Judicial Opinions, supra* note 109, at 64 (citing RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 72 (1985)).

122. DAVID MELLINKOFF, LEGAL WRITING: SENSE AND NONSENSE 70 (1982).

123. *See* Alan M. Lerner, *Law & Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solver*, 32 AKRON L. REV. 107, 109 (1999).

decided substantively. Textbook editors pare down long opinions in casebooks, thereby distorting students' perceptions of the case and how the law operates.[124]

Although legal-writing instructors encourage their students to write concisely, the use of judicial opinions in legal education by the casebook method might contribute to the lengthening of opinions. In their indirect role as educators, judges realize that it is incumbent on them to explain fully their decision-making process. Judges may also believe that the public's increased participation in the law warrants a complete explanation of a decision. Concerns about transparency and accountability to the public may lead judges to over-explain their reasoning, making for longer decisions.

Longer opinions also do a disservice to practicing lawyers. Lawyers today must stay abreast of legal developments and are subject to enormous time pressures. Lawyers have little luxury to study opinions. The increase in opinion length[125] makes it less likely that a lawyer will thoroughly examine the pertinent case law or be able to extrapolate an opinion's pertinent issues, holdings, and nuances.

The public can also be affected by an opinion's length. Litigants will feel dissatisfied with a court's ruling if they cannot understand its reasoning. The possibility that an opinion's length might alienate the public reinforces a perception of law and of the judiciary as something unattainable, unusable, out of a layperson's reach and comprehension. This result is one the judiciary should avoid.[126]

A lengthy decision might suggest excessive reliance on a law clerk's work.[127] As Judge Ruggero J. Aldisert cautioned, "When I see an opinion heavily overwritten, it is a signal to me that it is the product not of a judge, but of a law clerk, a person who is generally not sophisticated or perhaps confident enough to separate that which is important from what is merely interesting."[128] A judge should be wary of the implications that lengthy opinions can have.

C. SHORTENING OPINIONS

Eliminating dicta is one way to shorten an opinion. Dicta—often added to placate, or even impress, the opinion's audience—distracts the reader from the issues.[129] Although some doctrines have arisen from dicta,[130] it is not the way to

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124. Abner J. Mikva, *For Whom Judges Write*, 61 S. CAL. L. REV. 1357, 1359 (1988).

125. *See id.* at 1358 (comparing length of old cases with more modern ones).

126. MODEL CODE Canon 1.

127. For more on the role of law clerks, see *infra* Part VIII, The Role of Law Clerks.

128. ALDISERT, *supra* note 64, at 86.

129. Mikva, *supra* note 124, at 1367.

130. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) ("[W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for correspondingly more searching judicial inquiry.").

develop legal precedent. A judicial opinion should resolve only the pertinent controversy and not discuss superfluous matters.[131] Dicta should be limited because it has the potential to obscure holdings, make incorrect predictions, pressure officials in other branches of government, and "over explain" the case.[132] Dicta is primarily a concern for appellate judges, whose opinions are binding legal precedent. But dicta can also lead trial judges to interpret appellate decisions erroneously.[133]

Judges can shorten their opinions by using fewer string citations. Unless there is reason to show the number of cases concurring with a particular rule, it is unnecessary to cite numerous cases that stand for the same proposition, especially when all the cases cited hail from the same court. Most times a judge need cite only the seminal, the most recent, or the most on-point, controlling pronouncement.[134] That other circuits, districts, or divisions follow the same precedent might be interesting, but absent further reason—such as noting a conflict of authority—noncontrolling precedent should be deleted from the opinion. Not only does eliminating unnecessary citations shorten the opinion, but it also increases the opinion's clarity by eliminating potentially confusing and irrelevant citations. The exception is that "if an opinion breaks new ground . . . the court should marshal existing authority and analyze the evolution of the law sufficiently to support the new rule."[135]

Similarly, opinion length can be controlled by limiting what has been stated in earlier case law. The rules from the cases, not the cases themselves, should be emphasized. Over-reliance on authority spells a purist approach to the law: cases matter more than the reasoning in those cases; distinctions among cases are ignored; and reasoning is hidden by long, dull discussions of authority. Those who rely excessively on authority tend to discuss factual minutiae in paragraph upon paragraph, resulting in disorganized opinions.

Unless the weight of the authority is important, the better approach in the pure opinion is to cite cases for their rules and to discuss the facts of cases only to distinguish or analogize them to the facts of the case under consideration.[136] In our common-law democracy, judges must follow binding precedent and legal rules of statutory interpretation. But not all precedents are binding, and not all statutes can be interpreted at face value. As Illinois Chief Justice Walter Schaefer

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131. *E.g.*, JOYCE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 242 (4th ed. 2000) ("[D]icta in opinions . . . [is] not encouraged.").

132. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1410 (1995) [hereinafter Wald, *Rhetoric of Results*].

133. *See generally* Richard B. Cappalli, *The Disappearance of Legal Method*, 70 TEMP. L. REV. 393, 400 (1997).

134. FEDERAL JUDICIAL CENTER, *supra* note 48, at 18.

135. *Id.*

136. *See* DEBORAH A. SCHMEDEMANN & CHRISTINA L. KUNZ, SYNTHESIS: LEGAL READING, REASONING, AND WRITING 41, 42 (1999) (explaining how to fuse cases to articulate governing rule or pattern).

explained, "lawyers tend to treat all judicial opinions as currency of equal value . . . . Yet, when the judicial process is viewed from the inside, nothing is clearer than that all decisions are not of equivalent value to the court which renders them."[137] Professor John Henry Merryman noted the problem a half-century ago when he wrote that

> [b]y emphasizing "the law" to the exclusion of "the legal process," by perpetuating the illusion that all there is to decision of a case is location of the appropriate rule . . . these works perpetuate an unsophisticated concept of the legal process in which the actual bases of decision are concealed not only from the society he serves but from the judge who decides.
>
> A first step in freeing himself from this view of law is that the judge recognize that headnotes from previous decisions, no matter how carefully arranged, how accurately copied, how smoothly run together into text, no matter how carefully weighed, distilled and condensed into higher abstractions, do not of themselves decide cases . . . . [Judges should] ignore the false front of mechanical jurisprudence . . . .[138]

Judicial writing is more complicated than merely citing cases and reciting facts.

Judges should also carefully select the facts they incorporate in an opinion. A judge must include all relevant facts. If the judge, consciously or not, believes that relating "the full relevant truth about a case would weaken the convincingness of a decision [the judge] want[s] to deliver, [the judge] ought to question that decision with soul-searching cogitation."[139] An under-inclusive presentation of the facts might suggest that the decision is poorly reasoned. This is especially relevant for trial judges because appellate reversals are often based on a trial judge's erroneous interpretation of the law. Rarely are cases reversed because the trial judge has presented the facts inaccurately.[140] Although an opinion must contain all relevant facts—omitting relevant facts is always worse than including too many facts—the opinion should omit all irrelevant facts.[141] Including too many facts makes an opinion unnecessarily dense and less readable. When presenting the facts, judges should include all relevant facts and eliminate unnecessary, peripheral facts.[142]

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137. Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 7 (1966).

138. John Henry Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613, 673 (1954).

139. Palmer, *supra* note 4, at 883.

140. *See id.*

141. *Id.*; FEDERAL JUDICIAL CENTER, *supra* note 48, at 15. In a study examining lawyers' reactions to a typical judicial opinion and to the same opinion rewritten following the guidelines of the "plain English" movement, Professor Kimble found that of the sixty-one percent of survey respondents who preferred the "plain English" opinion, the greater number preferred it because it left out unnecessary detail. *See* Joseph Kimble, *The Straight Skinny on Better Judicial Opinions*, 9 SCRIBES J. LEGAL WRITING 1, 6-7 (2003-2004) [hereinafter Kimble, *Straight Skinny*].

142. *See* Palmer, *supra* note 4, at 883.

Controlling sentence structure and grammar also helps shorten an opinion. Long sentences with multiple propositions should be broken into two or three separate sentences. There are several benefits to explaining a point in one or two short sentences instead of one long, confusing sentence. A clearly written sentence eliminates the need to repeat or re-explain a point in different words. A reader will have an easier and faster time reading two or three clear sentences once, rather than reading one complicated sentence two or three times. Clear sentences keep the opinion flowing, make it understandable, and allow the reader to get through the entire text of the opinion quickly.

In striving for concision and succinctness, judges should recall their role in molding the common law. When drafting an opinion that lays down a new rule of law or modifies an old one, a judge should keep in mind the opinion's impact as precedent.[143] The opinion "should present sufficient facts to define for other readers the precedent it creates and to delineate its boundaries."[144] It should also contain a sufficient analysis of the precedents and relevant policies to establish the rationale for the holding.[145] An opinion that fulfills these roles without verbosity is the proper length, regardless of raw word count.

Justice Oliver Wendell Holmes's opinion in the companion cases of *Herbert v. Shanley Company* and *John Church Company v. Hilliard Hotel Company*[146] is an example of a pure opinion. It is both succinct and well-reasoned. The cases concerned whether the petitioner in a copyright dispute was entitled to royalties for free performances of the petitioner's music. Justice Holmes decided the case in a few paragraphs. The first two state the facts and procedural history. In the third and final paragraph, he issued his ruling: "If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected."[147] Justice Holmes used the remainder of the paragraph to expand on the holding. We do not suggest that all opinions use this Holmesian brevity,[148] but much can be said for an opinion that is brief and on-point. Even though short, comprehensive opinions are harder and more time-consuming to write, they are easier to read. In a legal system plagued by lengthy pleadings and verbose orators, "less can be more when the goal is elucidation and persuasion."[149]

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143. FEDERAL JUDICIAL CENTER, *supra* note 48, at 4.

144. *Id.* at 5.

145. *Id.*

146. 242 U.S. 591 (1917).

147. *Id.* at 594.

148. Judge Abner Mikva agrees that "[i]n our age of legal complexity, then, a purely Holmesian approach is untenable." Mikva, *supra* note 123, at 1363.

149. Kaye, *Wordsmiths*, *supra* note 1, at 11.

D. LEGALESE

Plain expression is necessary for a legal system extensively based on judicial review.[150] Legalese has no place in judicial opinions. Justice George Rose Smith defined legalese as "a word or phrase that a lawyer might use in drafting a contract or a pleading but would not use in conversation with his wife."[151] A pure opinion is easily identified by its legalese. There are two criticisms of legalese: "[I]ts style is strange, and it cannot be understood."[152]

Legalese has been criticized since Shakespeare's day,[153] yet it is still common in today's judicial opinions. Using legalese contributes to a pure opinion's high style. It is axiomatic that all legal writing responds substantively and stylistically to the "language of the law."[154] Legalese is the language of lawyers, containing words that do not often appear outside the legal profession. Some legalese is necessary, having become terms of art over years of development.[155] But most legalese is unnecessary.[156]

The law is riddled with legal terms of art necessary to the practice of law. A term of art is defined as a "short expression that (a) conveys a fairly well-agreed meaning, and (b) saves the many words that would otherwise be needed to convey that meaning."[157] Words like "plaintiff," "hearsay," and "felony" are terms of art;[158] they have distinct meanings a synonym cannot replace. Even though a word frequently appears in litigation documents, that does not mean it is untranslatable. For example, "inter alia" should be replaced with "among other things," and "among other things" is itself often a verbose phrase.

Judges often use phrases from dead or foreign languages. It is said that Latin is a dead language still alive in legal writing, including judicial opinions. The average person has no understanding of Latin (except perhaps *e pluribus unum*), but judges regularly include phrases like "*lex loci delecti*" or "*malum prohibitum*" in their opinions. French also appears frequently in opinions, in phrases such as "*vis-à-vis*," "*cestui qui trust*," or "*dehors* the record." Non-English words and legalese make an English-language opinion prohibitive to the public. These words and phrases invariably force most readers to look up the phrase—or possibly just stop reading the opinion altogether. English translations should be

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150. *See* McGowan, *supra* note 36, at 531 (advocating against using debased language and quoting George Orwell's observation that if a writer writes "straightforward English then, if nothing else, 'when you make a stupid remark its stupidity will be obvious, even to yourself'").

151. Smith, *supra* note 14, at 209.

152. Benson, *supra* note 39, at 520.

153. Gopen, *supra* note 13, at 333.

154. Elizabeth A. Francis, *A Faster, Better Way to Write Opinions*, 4 JUDGES' J., Fall 1988, at 26, 28 [hereinafter Francis, *Faster, Better*].

155. Benson, *supra* note 39, at 561.

156. *Id.*

157. *Id.* at 562.

158. *Id.*

used instead.

Judges must translate legalese into language comprehensible for those not trained in the law. Judges should control the use of the law's "professional dialect"[159] and compose comprehensible opinions. Perhaps the purists believe their audience consists of only those who understand legalese—judges and lawyers. But legalese segregates a whole other audience: the public. If the public cannot understand an opinion because of the legalese, then the public cannot understand the law's ongoing evolution or, worse, the grounds on which cases are decided. Using language that is difficult to understand diminishes the public's perception of judicial integrity and alienates a public that cannot gauge whether a decision is fair.

Proponents of legalese argue that using legal terms of art ensures that the opinion's plain language will be interpreted in the manner intended.[160] They also maintain that legalese ensures that a term will be interpreted in the same way in the future as it has been in the past. Further, they contend that legalese is understood by those in the legal profession, is designed to keep people out of court, and gives litigants the best chance of winning if they do wind up in court.[161]

If legalese were as precise as some claim, then it would be unlikely that litigation would turn on the meaning of a word or a phrase.[162] Litigation that turns on the meaning of a word or phrase in a contract or a judicial precedent might have been avoided had plain English been used.[163] Words carry no special meaning beyond their plain-English counterparts.

Why, then, do judges continue to use legalese? One theory is that judges, as professionals, enjoy having power over others; they use legalese to dominate others.[164] Another theory is that a judge's ability to use language not readily understandable to the rest of society allows the judge to maintain social status—only those select few can interpret and understand what is said.[165] Yet another theory is that legalese is a cover for lazy writing and helps overburdened judges. When trying to get a point across, it is easier to fill a document with complex phrases than to pare down complicated language into plain English.[166]

It is more time-consuming and difficult to write an accurate and effective opinion understandable to laypersons than one that is unintelligible. But if opinions are to be accessible, the burden is on judges to take the time to make them so. The Chief Judge of New York, Judith S. Kaye, has written about the

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159. *See* Francis, *Faster, Better*, *supra* note 154, at 29.
160. Benson, *supra* note 39, at 561.
161. *Id.* at 558.
162. *See id.* at 558-59.
163. *See id.*
164. Gopen, *supra* note 13, at 343-45.
165. *Id.*
166. *Id.* at 342-43.

commitment judges must make to writing readable opinions:

> First, we need to make sure that our communications are accessible. For sitting judges, this starts with sensitive courtroom behavior and speaking clearly—in English, not in Latin, not in French, and not in pettifog . . . . We need to say what we mean in a way that people can understand.[167]

Instead of using a phrase from a dead or foreign language, judges should write in plain English.

On an ethical level, legalese hides. Purist judges obscure their thinking by using the inherently unclear language of legalisms. Legalese is imprecise and often muddles lawyers as much as it does lay people.[168] Judges should use clear, precise words to reveal rather than hide their thinking.

E. FOCUSED WRITING

The importance and function of judicial opinions underscores the need for opinions to be focused. Some pure opinions contain not only facts and relevant law but also unnecessary discussions.

Focused writing is not rushed writing. Although a court should decide no more than it must, "sometimes courts extend this 'law' to the point of deciding no more than is necessary to get the case off the desk."[169] As a result, "the court's opinion slithers out through some pinhole, and the case goes back for further anguished and expensive litigation."[170]

Judges must render just and reasoned decisions. Some judges treat an opinion as an opportunity to write a brilliant essay on the legal topic presented in the case. But opinions are not the place to write scholarly exposés. As noted by Professor Richard B. Cappalli, opinions should favor pedestrian virtues:

> Rhetoric need not be utilized for its power of persuasion because, right or wrong, the precedent binds. The appellate court's primary duty is to reason and write clearly and succinctly, with constant vigilance against future misreadings and distortions. This duty can be executed quite well with pedestrian English and only mildly sophisticated reasoning.[171]

Opinions should not be written primarily to be cited or to be incorporated in law-school casebooks—even though an opinion will create law if it is memorable. Regardless whether a judge is cognizant that a certain decision will be

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167. Judith S. Kaye, *Rethinking Traditional Approaches*, 62 ALB. L. REV. 1491, 1497 (1999).

168. *See generally* Joseph Kimble, *The Great Myth That Plain Language Is Not Precise*, 7 SCRIBES J. LEGAL WRITING 109 (2000); Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES J. LEGAL WRITING 51 (1994-1995).

169. Lasky, *Observing Appellate Opinions*, *supra* note 51, at 837.

170. *Id.* (noting that "[j]udicial [p]arsimony then becomes judicial shortchange"); *see* Seminars for Circuit Court Judges, 63 F.R.D. 453 (1972).

171. Richard B. Cappalli, Viewpoint, *Improving Appellate Opinions*, 83 JUDICATURE 286, 286 (2000).

published because of the novel issues or facts or the political importance of the case,[172] the opinion should always be edited, scrutinized, and polished.

A judge must also be careful not to stray into politics when writing an opinion. The decision should focus only on the issue before the court and not what the legislature should not do, or discuss political realities outside the actual case. An example of an opinion venturing into politics is found in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[173] At the end of his concurrence, Justice Harry Blackmun, who believed that a woman's right to choose is afforded constitutional protection, wrote, "I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issues before us today. That, I regret, may be exactly where the choice between the two worlds will be made."[174] Justice Blackmun's observation was poignant, and arguably correct, but his discussion did not belong in the opinion.

Opinions are not law-review articles, historical treatises, or op-ed pieces. Some opinions require additional commentary, such as opinions involving a technical subject or groundbreaking new law. Still, commentaries on broader political and social policies or "better" examples of statutes that the legislature should have written are not always proper. Policy-oriented dicta are inappropriate. This dicta oversteps the court's role as an interpreter of laws and bullies legislatures or agencies into adopting judicially approved laws. They also suggest to the reader that the case was decided on a social or political agenda and not on the facts and the law. Judges, particularly the purists, must focus their opinions on the issues squarely before the court. Judges should prefer "lean and tight" opinions rather than opinions that exercise in "show and tell."[175]

F. LANGUAGE CHOICES

Because purists rely strongly on formalism, their word choices can result in unnecessarily complicated opinions.[176] For example, a writer's "voice" can either clarify the facts or make them murky. Passive voice can also make an opinion murky. Single passives invert a sentence's order. Double passives hide the actor or the sentence's subject. Compare the double passive "the defendant's motion was denied erroneously" with the active "the trial court erroneously denied the defendant's motion." The former leaves the reader wondering who

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172. *See* Ahmed E. Taha, *Publish or Paris? Evidence of How Judges Allocate Their Time*, 6 AM. L. & ECON. REV. 1, 3-6 (2004).

173. 505 U.S. 833, 943 (1992).

174. *Id.* (Blackmun, J., concurring). For a more detailed discussion of the background and motives behind Justice Blackmun's comment in *Casey*, see McGowan, *supra* note 36, at 582-87.

175. Wald, *Rhetoric of Results*, *supra* note 132, at 1408. *See generally* Kimble, *Straight Skinny*, *supra* note 141, at 6-7.

176. For two articles that discuss ethical language choices in legal writing generally, see Gerald Lebovits, *Legal-Writing Ethics—Part I*, N.Y. ST. B.J., Oct. 2005, at 64; Gerald Lebovits, *Legal-Writing Ethics—Part II*, N.Y. ST. B.J., Nov./Dec. 2005, at 64.

was wrong in denying the motion. Common sense tells practitioners it was a court, but only the second sentence makes it clear to all readers who did what to whom.

The use of nominalizations can further obscure the law to laypeople. Nominalizations, which turn verbs into nouns, fail to give the reader enough information. Compare "an instance of the commission of torture appeared on the record" with "upon examining the record, we find that the police officer tortured the prisoner." Avoiding nominalizations helps judges write clearly.

Subject complements also impair a reader's understanding of an opinion. Subject complements appear after the verb "to be" and after linking verbs like "to appear" and "to become." For example, "angry" is the subject complement of "the judge became angry." This language choice is deceptive because the reader does not know what made the judge angry.

The unnecessary use of flowery language (also known as "ten-dollar words") obscures the law to laypeople and impairs comprehension even by judges and lawyers. Judge Bruce M. Selya of the Court of Appeals for the First Circuit is famous[177] for using in his decisions what he calls "neglected"[178] words—including, for example, sockdolager,[179] algid,[180] longiloquent,[181] and decurtate.[182] Read this introduction from one of his opinions to see whether you understand it:

> This matter arises on an infrastructure of important concerns involving the prophylaxis to be accorded to attorneys' work product and the scope of trial judges' authority to confront case management exigencies in complex multidistrict litigation.[183]

This opinion goes on to make the reader's job difficult, and to make the reader feel dumb, by using "armamentarium," "auxetic," "etiology," "interdicts," "interposition," "maladroit," "neoteric," "quadripartite," "tenebrous," and "transmogrification."[184] The judge even used the phrase "abecedarian verity"[185]—

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177. *See* David Margolick, *At the Bar: Sustained by Dictionaries, a Judge Rules that No Word, or Word Play, is Inadmissible*, N.Y. TIMES, Mar. 27, 1992, at B16.

178. *See* http://howappealing.law.com/20q/2004_03_01_20q-appellateblog_archive.html (last visited Mar. 15, 2008) (interview of Judge Bruce M. Selya by appellate practitioner Howard Bashman).

179. Defined as something that ends or settles a matter: A decisive blow or answer. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2161 (1993). A Westlaw search conducted on March 1, 2008, revealed that Judge Selya used this word in approximately fifty-seven decisions, most recently in United States v. Jiminez, 512 F.3d 1, 4 (1st Cir. 2007).

180. Defined as "cold, chill, chilly." 1 OXFORD ENGLISH DICTIONARY 312 (2d ed. 1989); *see, e.g.*, Correia v. Fitzgerald, 354 F.3d 47, 52 (1st Cir. 2003).

181. Longiloquence is defined as speaking at great length. NEW SHORTER OXFORD, *supra* note 8, at 1624; *see, e.g.*, Vargas–Ruiz v. Golden Arch Development, Inc., 368 F.3d 1, 2 (1st Cir. 2004).

182. Defined as cut short, shorten, abridge. NEW SHORTER OXFORD, *supra* note 8, at 612; *see, e.g.*, Matos *ex rel.* Matos v. Clinton Sch. Dist., 367 F.3d 68, 70 (1st Cir. 2004).

183. *In re* San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1007, 1009 (1st Cir. 1988).

184. *Id. passim*.

meaning "basic truth"—to make his readers' comprehension as un-abecedarian as possible.

Judges who wish to demonstrate the breadth and depth of their vocabulary by peppering their opinions with words that send the reader rushing for the nearest unabridged dictionary would be better advised to exercise their intellect with crossword puzzles and competitive Scrabble.

Passives, nominalizations, subject complements, and flowery language conceal reasoning. Well-written opinions leave no mandate vague. Judges should use language that increases the reader's ability to understand the court's reasoning and its consequences, not language that leaves the reader uncertain and doubtful.

G. PLAGIARISM

Extensive reliance on legal authority marks a pure opinion. Using lots of legal authority is not unethical: the authority an opinion cites bolsters its legitimacy. But judges—especially purists, who use numerous sources in their opinions—must be wary of the fine line between citation and plagiarism. Judicial plagiarism occurs when judges write opinions that use material from copyrighted sources, such as law reviews, but neglect to credit their sources.[186] Plagiarism is literary theft and is regarded in certain fields, most notably academia and journalism, as unethical.[187] To violate copyright law, the new work must "substant[ially]" incorporate copyrighted material.[188] Because of the nature of opinion writing, in which different concepts from different sources must be combined to form the opinion, it is unlikely that judges will use source material substantial enough to violate copyright laws. At most, judicial plagiarism takes place when judges use a few sentences from a source and fail to credit the source. Judges must be cautious of using copyrighted sources, including case headnotes, which are not binding authority and should not be cited.[189]

Courts have uniformly condemned plagiarism, regardless whether the culprits are students, lawyers, doctors, or professors.[190] Even a judge who plagiarized a

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185. *Id.* at 1015.

186. Dursht, *supra* note 2, at 1253.

187. *Id.* at 1254 ("[S]tudents who plagiarize may be subject to such disciplinary sanctions as the withholding of a college degree, expulsion, and censure. Professionals have had their licenses revoked, employees have been dismissed, lawyers have been publicly censured, and professors have been suspended and dismissed.") (footnotes omitted).

188. Laurie Stearns, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513, 528 (1992).

189. *See* Matthew Bender & Co., Inc. v. West Pub. Co., 240 F.3d 116, 120 (2d Cir. 2001).

190. *See, e.g.*, *In re* Hinden, 654 A.2d 864, 865-66 (D.C. 1995) (affirming public censure of attorney for plagiarizing treatise); Klinge v. Ithaca College, 634 N.Y.S.2d 1000 (Sup. Ct. 1995) (affirming loss of professor's tenure for plagiarism); Alsabti v. Bd. of Registration in Medicine, 536 N.E.2d 357 (Mass. 1989) (revoking license of doctor who plagiarized articles); Napolitano v. Trustees of Princeton Univ., 453 A.2d 279, 284 (N.J. Super. Ct. Ch. Div. 1982) (withholding student's degree for plagiarizing).

law-review article was condemned for his actions.[191] A court held that the judge violated the *Model Code*, even though the *Code* does not address plagiarism, because the judge's actions "erode[d] public confidence in the judiciary."[192] Plagiarism in judicial opinions detracts directly from the legitimacy of the judge's ruling and indirectly from the judiciary's legitimacy.

Although judges must cite sources, the line becomes blurred when the issue is plagiarism from legal briefs that litigants submit. An argument exists that "lifting" language from a public document filed with the court should be permitted because legal documents are not copyrighted material. The argument further goes that the litigants want the court to adopt their language and reasoning. The contrary argument is that to preserve the appearance of neutrality, judges should compose opinions using their own language and reasoning so that the litigants can see that the court considered the arguments and had its own thoughts. This article does not suggest that purist judges are more likely—inadvertently or not—to plagiarize. Rather, it is more of a consideration for purists than for impure writers because purists tend to cite more legal authority than impurists.

H. RELIANCE ON QUOTATIONS

Limited use of quotations is relevant for the purist opinion writers, who can overuse them for the same reasons they might overly rely on authority: To mask independent thought and evade responsibility for their decisions. Quotations should be relevant and short.[193] The reader wants to know what the judge thinks, how the judge analyzed the cases, and how the judge weighed the facts. Quotations hinder judges from writing what they think. Judges should "[q]uote [only] essentials, memorable sound bites, succinct things others have said better than [they] can, authoritative sources, and anything in dispute."[194] Other than those limited uses of quotations, judges should expunge all others from their opinions.

When judges limit their use and length of quotations, quotations can be helpful. Quotations help prove that the argument is reliable and that the reader need not consult the source of the information to confirm the reliability of the statements made. Quotations are sometimes more authoritative, especially when the words come from a higher court, than a paraphrased statement.[195] But too many quotations detract from the opinion's authoritativeness. Overusing quotations reveals a writer's lack of analysis.

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191. *See In* re Brennan, 447 N.W.2d 712, 713-14 (Mich. 1989).

192. *Id.*

193. Gerald Lebovits, *You Can Quote Me: Quoting In Legal Writing—Part I*, 76 N.Y. ST. B.J., May 2004, at 64, 64.

194. *Id.*

195. *See id.*

Sources for quotations should also be reliable and lend weight to the opinion. An individual a judge chooses to quote must be reputed to be "principled, intelligent, sincere, and knowledgeable."[196] Conversely, judges should refrain from quoting obscure sources. The reader will then be left questioning the source and the judge's reasons for using it.

To ensure that quotations are not ignored, judges should integrate a quotation into the writing with a sentence before it to introduce the quotation and a sentence following it to explain the quotation or to place it in context. When used properly, quotations can add authority and connect to precedents. When used improperly, quotations make the opinion confusing, make it seem as though the judge did not consider the issues, and make the reader ignore the quotation.

I. METADISCOURSE

Purists should guard against verbiage, especially metadiscourse. Metadiscourse is "cliché-driven discourse about discourse."[197] Metadiscoursive writers inform their audience about what they are writing when they should simply get to the point. Infamous phrases include "as a matter of fact," "bear in mind that," "I would venture to suggest that," "it can be said that," or "it goes without saying that."[198] Metadiscourse takes up space and adds nothing to a judicial opinion.

Metadiscourse also detracts from the opinion's authoritativeness. Compare "It is horn-book law that government actors may not discriminate on the basis of race" with "Government actors may not discriminate on the basis of race." The latter sentence is direct. The former is muted by the throat-clearing phrase at the beginning. The American Bar Association condemned overwrought and overstated metadiscourse in a report written mostly by Ninth Circuit Judge (and previously Washington Supreme Court Chief Justice) Frederick G. Hamley:

> Avoid expressions such as "a cursory examination is sufficient" or "this point need not long detain us." The losing lawyer will feel the examination has been too cursory and that the court should have detained itself a little longer. The phrase "no citation of authority is needed" is redundant. If the citation of authority is not needed the informed reader will know it. But where this expression is used many will suspect that a citation was really needed but could not be found.[199]

Opinions should be quiet. Judges should be confident that the opinion's meaning and relevance are powerful without needing any introductory phrase.

Metadiscourse can further convey the wrong message. Judges often use

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196. *Id.*

197. Gerald Lebovits, *Writers on Writing: Metadiscourse*, 74 N.Y. ST. B.J., Oct. 2002, at 64, 64 [hereinafter Lebovits, *Metadiscourse*].

198. *See id.*

199. ABA Committee Report, *supra* note 78, at 37.

metadiscourse to show their audience that they have carefully considered the issue by using phrases like "a thorough review of the record," "a complete review," or "a careful review." One would hope that all decisions are considered carefully so that there would be no need to highlight that the judge thought about the case. Highlighting metadiscourse has a negative effect. It sounds "hollow, contrived, and overly defensive—and at best "readers may find them offputting."[200]

Instead of talking about how they analyzed the facts, judges should present relevant facts candidly. Instead of talking about how they researched the law extensively, judges should discuss the law extensively. Instead of relaying how carefully they considered the issues, judges should analyze the law thoroughly.[201]

J. DOCTRINES AND MAXIMS

A pure opinion's formalism dramatically increases when the court relies on maxims or doctrines without the reasoning to explain them. By their nature, maxims are too vague or broadly drawn to be applied practicably in all cases. In 1887, Lord Esher wrote that "maxims are almost invariably misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them."[202] Even though some of our greatest jurists have written maxims, judges should avoid relying on them reflexively.

A maxim is "a self-evident proposition assumed as a premise in mathematical or dialectical reasoning . . . [or] a pithily-worded [proposition], expressing a general truth drawn from science, law, or experience."[203] Judge Cardozo created a lasting legal maxim in *Wagner v. International Railway Company* when he wrote that "danger invites rescue."[204] In *Wagner*, two cousins were riding on a train traveling over a trestle. One cousin was thrown from the train through the doors that the train company's employees left open. The second cousin walked across the trestle to find the body of his cousin and fell in the darkness and injured himself. The trial court's jury charge allowed the jury to find that the defendant would be negligent only if the plaintiff was acting on the defendant's specific instructions when he left the train to rescue his cousin. Thus, unless the defendant ordered the plaintiff to leave the train, the plaintiff's voluntary act of rescue broke the chain of causation. The jury found for the defendant, and the New York Court of Appeals reversed, holding that the defendant's original negligence in causing the first cousin to fall out sustained a finding of negligence toward the second

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200. *Lebovits, Metadiscourse*, *supra* note 197, at 61 (citing SMITH, ADVANCED LEGAL WRITING, *supra* note 3, at 137, 151).

201. *See id*.

202. Yarmouth v. France, (1877) 19 Q.B.D. 647, 653.

203. NEW SHORTER OXFORD, *supra* note 8, at 1720.

204. *See* Wagner v. Int'l Ry. Co., 133 N.E. 437, 437 (N.Y. 1921).

cousin.[205] The court found it reasonably foreseeable that someone might try to rescue the victim of the defendant's negligence because "danger invites rescue."[206] Judge Cardozo found that the act of choosing to rescue another is not enough to break the chain of causation of the defendant's original negligence toward the rescuer placed in peril.[207]

Judge Cardozo acknowledged the dangers of using maxims when he warned against "the extension of a maxim or a definition with relentless disregard of consequences . . . "[208] By understanding the context of the maxim "danger invites rescue," we can understand what the maxim means. A person who negligently places another in danger is liable for injuries caused to rescuers because it is foreseeable, and socially desirable, that someone might attempt to rescue the person in peril. If the maxim is taken in the abstract—without explaining the reasoning behind it—it is impossible to understand how to apply the maxim properly.

A maxim is meaningless as precedent unless a judge explains it. The same is true about blindly applying a doctrine. Doctrine is defined as "that which is taught; instruction, teaching; a body of teaching."[209] The difference between a doctrine and a maxim is that a doctrine is a general statement of the law, to which there might or might not be an exception. Ethical considerations for doctrines differ from ethical considerations for maxims. Judges must be sure they understand a maxim and use it in the appropriate context. A doctrine, by contrast, is a free-standing general principle of law. Judges must be sure to use doctrines appropriately. A judge may misuse a doctrine if the judge is not diligent in finding exceptions to it. To be ethical, a judge must determine whether using a general doctrine is appropriate and whether any exceptions exist.

Justice Holmes wrote in *Lochner v. New York* that "[g]eneral propositions do not decide concrete cases."[210] In *Lochner*, the Court considered state law that forbade bakers from working more than forty hours a week.[211] Lochner was a baker who worked sixty hours a week.[212] The New York Court of Appeals found that New York had the authority to pass a law protecting workers.[213] In reversing, the United States Supreme Court relied on a doctrine that provides that the Fourteenth Amendment to the United States Constitution protects the absolute

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205. *See id.* at 438.
206. *See id.*at 437.
207. *See id.*
208. Haynes v. N.Y. Cent. R.R. Co., 131 N.E. 898, 900 (N.Y. 1921).
209. NEW SHORTER OXFORD, *supra* note 8, at 719.
210. 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).
211. *Id.* at 62-63.
212. *Id.*
213. *See* People v. Lochner, 69 N.E. 373, 378-79 (N.Y. 1904), *rev'd*, Lochner v. New York, 198 U.S. 45 (1905).

freedom to contract unless a state passes a valid law under its police powers.[214] The Court defined "police powers" narrowly and limited the concept to laws that prohibit using contracts to engage in unlawful or immoral behavior, including protecting the health or safety of contracting parties.[215] It found insufficient grounds for the police power to trump the right to enter into contracts freely because other laws existed and ensured that bakers had sanitary workplaces.[216] Justice Holmes found the majority's analysis inadequate. In his dissent, he cited other examples in which the Court found a valid exercise of police power in similar circumstances.[217] Justice Holmes argued that the Court should look to the individual circumstances of the case instead of simply relying on general doctrine.[218]

Justices Cardozo and Holmes recognized the ethical danger in relying on maxims and legal doctrines to resolve issues, rather than discussing their underlying reasoning. Judges, especially the purists, should follow their reasoning: they should cite maxims and generalized doctrines only if they also explain the background and use them in context.

VI. ETHICAL CONSIDERATIONS IN AN IMPURE OPINION

The author of an impure opinion believes that the law should be practical and that an opinion should be accessible. The impure opinion is conversational and candid, flowing not in any rigid, structuralized format but in an explorative one. An impure opinion's content depends on what the impure writer believes a layperson would consider important. Differences between pure and impure opinions result in different ethical considerations for judges writing in the impure style.

A. GRAMMAR

An impure opinion is marked by an informal tone. A judge who writes impure opinions must not dispense with basic writing principles and conventions to write an accessible opinion. It is undeniable that "[a] careless comma, a stray phrase, [or] a fanciful footnote"[219] can change the opinion and its principles. Given the nuances and complexities of language, a judge must ensure that an opinion conveys intended meaning and that it does not take on a new meaning when future litigants dissect it.[220] Judges must be wary not only of simple sentences

214. *See* Lochner v. New York, 198 U.S. at 53.
215. *Id.* at 53-58.
216. *Id.* at 61-62.
217. *See id.* at 75 (Holmes, J., dissenting).
218. *See id.* at 76 (Holmes, J., dissenting).
219. Kaye, *Wordsmiths*, *supra* note 1, at 10.
220. *Id.*

being too broad and of short sentences narrowing the scope of a rule. They must also be aware of the possible interpretations of the opinion and should correct it for vagueness. An opinion open to different interpretations because of poor grammar is unacceptable It would be intellectually dishonest if opinions were left intentionally vague.

B. PERSONAL EMBELLISHMENTS

Although impure opinions are not constrained by legalese, over-reliance on precedents, or rigid organization, impurists are likely to embellish their writing with their personal style. Personal embellishments are an enjoyable part of writing: "Few things are more pleasurable in opinion-writing (opinion-reading as well) than encountering exactly the right phrase that perfectly encapsulates both the case holding and the larger principle."[221] The right phrase becomes eternal and almost as recognizable as the opinion itself.[222]

The desire for recognition is not foreign to the judiciary. Many judges write opinions not only to apply the law correctly but also to be remembered for it.[223] A judge can establish a reputation for personal embellishments. Judges Richard A. Posner, Alex Kozinski, and Samuel B. Kent come to mind. Judge Posner is the presiding godfather of American celebrity judges because of his prodigious writing talents and his melding of law with economic theory.[224] Judge Kozinski has gained fans for his memorable opinions and for his writings on topics like video games and snowboarding.[225] Judge Kozinski is so popular that an unofficial Web site is devoted to his writings.[226] Judge Kent's comical decisions have found fans, and detractors, in lawyers, who e-mail them to one another.[227]

Republic of Bolivia v. Philip Morris Cos., Inc.[228] is a favorite opinion of Judge Kent's fans and a good example of his humor. In *Bolivia*, Judge Kent transferred a case the government of Bolivia had originally brought in Brazoria County, Texas, to the federal district court in Washington, D.C.

> The Court seriously doubts whether Brazoria County has ever seen a live Bolivian . . . even on the Discovery Channel. Though only here by removal, this humble Court by the sea is certainly flattered by what must be the worldwide renown of rural Texas courts for dispensing justice with unparal-

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221. *Id.* at 11.

222. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 844 (1992) ("Liberty finds no refuge in a jurisprudence of doubt.").

223. *See* Jenny B. Davis, *The Limelight Rules: Some Celebrity Judges Can't Help Getting Big Heaps of Attention*, 88 A.B.A. J., Apr. 2002, at 28, 28.

224. *See id.*

225. *See id.* at 29.

226. *See* The Unofficial Judge Alex Kozinski Site, http://notabug.com/kozinski/ (last visited Mar. 15, 2008).

227. *See* Davis, *supra* note 223, at 28.

228. 39 F. Supp. 2d 1008 (S.D. Tex. 1999).

> leled fairness and alacrity, apparently in common discussion even on the mountain peaks of Bolivia![229]

Judge Kent's personal embellishments did nothing more than showcase his attempt at humor.

Not every case presents the opportunity or need to provide an encapsulating quotation. Style is amorphous and constantly changing, but danger arises in constructing "immortal phrases."[230] Phrases that once resonated with generations may "stick[] in the throat" of future readers.[231]

For example, in explaining the applicability of the bespeaks-caution doctrine in a securities action,[232] one court noted that "[t]he doctrine of bespeak caution provides no protection to someone who warns his hiking companion to walk slowly because there might be a ditch ahead when he knows with near certainty that the Grand Canyon lies one foot away."[233] This quotation emphasizes that the bespeaks-caution doctrine does not protect issuers if the situation against which the issuer warned is certain to occur and if the warning is insufficient to allow an investor to make a fully informed decision about the investment. Although the quotation may be humorous to a securities or corporate lawyer, to a layperson—or even a practitioner of another type of law—the quotation is a confusing description of a legal concept that could have been described better in simple, non-allegorical terms.

Improper personal embellishments, which usually take the form of catchphrases and melodrama, do not belong in opinions. Despite a desire to make an opinion more accessible by crafting a catchphrase that encapsulates a legal rule, the opinion's ruling or its main point is best summarized by a theme rather than a catchy phrase. Furthermore, melodrama in opinion writing is maddening.[234]

C. HUMOR

Humor in the judicial system is not funny. In a judicial opinion, "[l]ightening wit is typically unenlightening. A judicial opinion demands propriety and

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229. *Id.* at 1009 (ellipses in original).

230. Kaye *Wordsmiths*, *supra* note 1, at 11.

231. *Id.*

232. *See In re* Prudential Sec., Inc., Ltd. Partnerships Litig., 930 F. Supp. 68, 72 (S.D.N.Y. 1996) (explaining that bespeaks-caution doctrine protects security issuers from liability under Security Exchange Commission's Rule 10b-5 if issuer's forward-looking statements are accompanied by meaningful cautionary statements and warnings about investment risks to allow investors to make informed decision about whether to invest).

233. *Id*. at 71-72.

234. For some narcissistic melodrama, see Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 923, 943 (1992) (Blackmun, J., concurring & dissenting) ("I fear for the darkness . . . ."; "I am 83 years old. I cannot remain on this Court forever . . . ."); Webster v. Reproductive Health Srvs., 492 U.S. 490, 538 (1989) (Blackmun, J., concurring & dissenting) ("I fear for the future.").

professionalism."[235]

The root of the word "humor" is "humus," which means to bring low, to the ground.[236] Although some pure opinions evince flashes of humor, humor is more common in impure opinions. When a judge uses humor in an opinion, the lawyer or litigant—who is often the target—can do little but accept or appeal the decision.[237] A lawyer or litigant has no opportunity to respond to what is said in an opinion: it is the final word in the case.[238] Even if lawyers or litigants could respond, it is doubtful that they would, given the power judges hold in the courtroom.[239] Professor Prosser felt strongly about avoiding judicial humor: "[T]he bench is not an appropriate place for unseemly levity. The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig."[240]

Litigants consciously place the court in a position of power to resolve controversies; they expect to be treated fairly and with dignity. Humor can defy both expectations. When litigants or lawyers are the subjects of judicial humor, they may feel that the judge did not take the case seriously or consider the issues in the case thoroughly. The court is in a position of power over the litigant, who has a serious personal stake in the litigation, and judges should not use their position to bring the litigant down.[241] It is undignified for judges to use their power to make fun of or humiliate litigants.

Humor does nothing to advance the opinion's reasoning or the force of the law, and those the court attacks may feel the sting for years to come.[242] Litigants seek both justice and sensitivity from the court.[243] If one accepts the proposition that a judge who directs biting humor at a litigant or an attorney commits an act of aggression, it is easy to see why humor is offensive. It is not a fair fight: The judge gets to have the first and last word on the matter.[244] The subject of the judge's ridicule has no recourse but to accept the joke and the accompanying humiliation.[245] As Justice Smith wrote, "For a judge to take advantage of his

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235. Gerald Lebovits, *Judicial Jesting: Judicious?*, 75 N.Y. ST. B.J., Sept. 2003, at 64, 64 [hereinafter Lebovits, *Judicial Jesting*]. "It's one thing to have a sense of humor and grace the bench, or to be clever during an after-dinner speech. It's another to express humor in writing." *Id.*

236. Richard Delgado & Jean Stefancic, *Scorn*, 35 WM. & MARY L. REV. 1061, 1063 (1994).

237. Rudolph, *supra* note 25, at 191.

238. Lubet, *supra* note 5, at 12.

239. *Id.* at 15.

240. THE JUDICIAL HUMORIST: A COLLECTION OF JUDICIAL OPINIONS AND OTHER FRIVOLITIES vii (William L. Prosser ed. 1952).

241. *Id.*

242. *See, e.g.*, Lubet, *supra* note 5, at 12-13; FEDERAL JUDICIAL CENTER, *supra* note 48, at 22.

243. Nancy A. Wanderer, *Writing Better Opinions: Communicating With Candor, Clarity, and Style*, 54 ME. L. REV. 47, 67 (2002).

244. *See id.*

245. *Id.*

criticism-insulated, retaliation-proof position to display his wit is contemptible, like hitting a man when he's down."[246] Judges must be careful to ensure that their style is not offensive and does not make light of the important task they must fulfill.

Some opponents of judicial humor have gone so far as to suggest amending the *Model Code* to proscribe judicial humor as inappropriate.[247] But because it has not yet been amended, courts have taken to censuring judges who inappropriately use humor. In one decision, the Supreme Court of Kansas publicly censured a state trial judge for writing a demeaning opinion in rhyme in a criminal case.[248]

Supporters of humor in judicial opinions argue that humor helps demystify the law.[249] They believe that humor "help[s] crystallize a point, put it in context, and breathe life into the set of facts that the law has formalized."[250] For example, in *Donelon v. New Orleans Terminal Co.*, Judge Irving Goldberg used humor to explain why the plaintiffs could not pursue state court remedies:

> Appellants themselves issued the invitations to dance in the federal ballroom, they chose their dancing partners, and at their own request they were assigned a federal judge as their choreographer. Now that the dance is over, appellants find themselves unhappy with the judging of the contest. They urge us to reverse and declare that "Good Night Ladies" should have played without the partial summary judgment having been granted and without the preliminary injunction having been issued. This we have declined to do, and in so doing we note that this is not The Last Tango for the Parish. Appellants still have an encore to perform and their day in court is not yet over.[251]

Although humor might succeed in rare instances, more often it is a crutch.

Another argument favoring humor is that judges can show a lighter side of the

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246. Smith, *supra* note 14, at 210.

247. *See, e.g.*, Baker, *supra* note 51, at 875 (citation omitted).

248. *See In re* Rome, 542 P.2d 676, 685-86 (Kan. 1975). The Court admonished:

> Judges simply should not 'wisecrack' at the expense of anyone who is connected with a judicial proceeding who is not in a position to reply . . . . Nor should a judge do anything to exalt himself above anyone appearing as a litigant before him. Because of his unusual role a judge should be objective in his task and mindful that the damaging effect of his improprieties may be out of proportion to their actual seriousness. He is expected to act in a manner inspiring confidence that even-handed treatment is afforded to everyone coming into contact with the judicial system.

Id.

249. *See* Jordan, *supra* note 103, at 700.

250. *Id.* at 700-01; s*ee also* Delgado & Stefancic, *supra* note 236, at 1071-72 (noting that many great writers have used humor to "point out flaws and foibles of human nature" and to "chide official figures they saw as abusing their authority").

251. 474 F.2d 1108, 1114 (5th Cir. 1973). Judge Goldberg is known for his humorous analogies and similes. In a case involving Kentucky Fried Chicken and a claim of equity, he wrote that "the bizarre element [in this case] is the facially implausible—some might say unappetizing—contention "that the man whose chicken is 'finger-lickin' good' has unclean hands." Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 372 (5th Cir. 1977). For a discussion of Judge Goldberg's prose, see Jordan, *supra* note 103, at 709-14.

law and humanize a case.[252] And some judges argue that humor "adds life to the otherwise rigid format of judicial opinions"[253]—a reason a judge might choose to write in an impure style. Some impurists view the law as aggrandizing disputes with legalese. They believe that humor helps reshape the decision, makes it understandable, and keeps it simple.

Most of the time, litigants come to court in their personal capacities to resolve intensely personal matters. Sometimes, however, powerful entities, like large corporations or government agencies, come before the court. Some suggest that when entities use their power to take advantage of others or act inappropriately, the use of humor may be appropriate.[254] They argue that using humor to redress abuses of power adds an exclamation point to the court's admonishment and increases the likelihood that similar abusive conduct will be avoided in the future.[255]

Various commentators explain that no binding rule applies to humor in opinions. Rather, it can be used in certain circumstances. As Justice Cardozo stated: "In all this I would not convey the thought that an opinion is the worse for being lightened by a smile. I am merely preaching caution."[256]

Carving out instances when humor is appropriate only exacerbates the problem. If humor is to be part of an opinion at all, it must not dominate the opinion. That is, "[t]he humor must be brief."[257] But the potential for harm means that the safest course is to eliminate humor from judicial opinions. All litigants deserve to be treated with respect. An impure opinion is already written comprehensibly; the supposed need to use humor to make the opinion more readable and understandable is academic. Humor only reduces the authority of the opinion and the judge. Expressing this same view, Judge George H. Carley wrote a special concurrence to distance himself from a majority opinion of Georgia Court of Appeals:

> I cannot join the majority opinion because I do not believe that humor has a place in an opinion which resolves legal issues affecting the rights, obligations, and, in this case, the liberty of citizens. The case certainly is not funny to the litigants. I concur in the judgment only.[258]

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252. *See* Jordan, *supra* note 103, at 701. In *Stambovsky v. Ackley*, Justice Israel Rubin, in concluding that a house was inhabited by ghosts "as a matter of law" and, accordingly, that its seller must take it back for failing to divulge that fact, remarked that "a very practical problem arises with respect to the discovery of a paranormal phenomenon: 'Who you gonna' call?' as the title song to the movie 'Ghostbusters' asks." 572 N.Y.S.2d 672, 675 (N.Y. App. Div. 1st Dep't 1991). It is difficult to caution against humor when a court's comments are benign. Problems arise because judges decide for themselves what humor is benign and what is inappropriate.

253. Jordan, *supra* note 103, at 699-700.

254. *Delgado & Stefancic*, *supra* note 236, at 1095-96.

255. *See id.* at 1096-97.

256. CARDOZO, LAW AND LITERATURE, *supra* note 75, at 484, *reprinted in* 52 HARV. L. REV. at 484.

257. Lebovits, *Judicial Jesting*, *supra* note 235, at 64.

258. Russell v. State, 372 S.E.2d 445, 447 (Ga. App. Ct. 1988) (Carley, J., concurring).

Litigation is not funny. Humor serves no purpose in an opinion meant to "create legal precedent and reflect reasoned judgment."[259] Serious opinions and humorous opinions are not separate and distinct; they are different manifestations of style.

D. POETIC OPINIONS

Judges should not construct opinions in the form of poems.[260] Although "[p]oetic justice is always entertaining,"[261] it is "rarely poetic or just."[262] Poetic opinions undermine the key aspect that is central to judicial opinions—they lack "a clearly articulated holding supported by precedent."[263] Litigants, especially the losing side, may feel as though the court treated their issues and arguments frivolously.[264] And the public will conclude that the court spent more time constructing the verses than contemplating the law.[265] As Justice Oliver Wendell Holmes observed, "The law is not the place for the artist or poet. The law is the calling of thinkers."[266] Judges should spend more time contemplating the law than creating verses.

Poetry also produces bad law because legal analysis is shortchanged for rhyme.[267] Readers are likely to assume that the judge is more concerned about the rhyme than reaching the just result. Indeed, "the appearance of impropriety makes it inappropriate for judges to use verse in their opinions."[268]

Despite the problems with using the judicial opinion as a creative writing platform, numerous opinions have been written in rhyme. One New York City Criminal Court judge penned an opinion mimicking Clement Clarke Moore's

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259. Lebovits, *Judicial Jesting*, *supra* note 235, at 64.

260. Some judges are widely known for their poetic opinions. For example, Justice Michael Eakin, currently of the Supreme Court of Pennsylvania, has penned several poetic opinions. *See, e.g.*, Porreco v. Porreco, 811 A.2d 566, 575 (Pa. 2002) (Eakin, J., dissenting); Busch v. Busch, 732 A.2d 1274 (Pa. Super. Ct. 1999). Judges from varied courts have also included poetry in their opinions. *See* United States v. Syufy Enters., 903 F.2d 659, 661-63 (9th Cir. 1990) (Kozinski, J.); United States v. Batson, 782 F.2d 1307, 1309 (5th Cir. 1986) (Goldberg, J.); Anderson Greenwood & Co. v. NLRB, 604 F.2d 322 (5th Cir. 1979) (Goldberg, J.); *In re* Love, 61 B.R. 558 (S.D. Fla. 1986) (Cristol, J.); Mackensworth v. Am. Trading Transp. Co., 367 F. Supp. 373 (E.D. Pa. 1973) (Becker, J.); Nelson v. State, 465 N.E.2d 1391, 1391 (Ind. 1984) (Hunter, J.); Fisher v. Lowe, 333 N.W.2d 67 (Mich. App. Ct. 1983) (Gillis, J.); Columbus v. Becher, 180 N.E.2d 836 (Ohio 1962) (Zimmerman, J.); Van Kleeck v. Ramer, 156 P. 1108, 1115 (Colo. 1916) (Scott, J., dissenting).

261. Lebovits, *Poetic Justice, supra* note 80, at 48.

262. *Id.*

263. *Id.*

264. *Id.* at 44.

265. *Id.*

266. Oliver Wendell Holmes, CASE & COMMENT, Mar.-Apr. 1979, at 16.

267. *See* Kearney, *supra* note 55, at 608 ("[W]hile the poems may be entertaining, the reasoning and explanation of the law is often deficient.").

268. *Id.* at 609; *see also* Porreco v. Porreco, 811 A.2d 566, 572 (Pa. 2002) (Zappala, C.J., concurring) (expressing "grave concern that the filing of an opinion that expresses itself in rhyme reflects poorly on the Supreme Court of Pennsylvania").

"A Visit From St. Nicholas":

> 'Twas Game Six of the Series when out of the sky,
> Flew Sergio's parachute, a Met banner held high.
> His goal was to spur our home team to success,
> Burst Beantown's balloon claiming Sox were the best.
> The fans and the players cheered all they did see,
> But not everyone present reacted with glee.
> "Reckless endangerment!" the D.A. spoke stern.
> "I recommend jail—there's a lesson he'd learn!"
> Though the act proved harmless, on the field he didn't belong
> His trespass was sheer folly, and undeniably wrong.
> But jail's not the answer in a case of this sort,
> To balance the equities is the job of this court.
> So a week before Christmas, here in the court,
> I sentence defendant for interrupting a sport.
> Community service, and a fine you will pay.
> Happy holiday to all, and to all a good day.[269]

The opinion is witty. But its summary of events is more suitable for a magazine.

Poetic opinions sometimes hold no punches in insulting the litigants, even the winning litigants. In *United States v. David Irving*,[270] a federal district judge set aside a defendant's conviction for taking off his wet clothes in a nearly deserted parking lot because the magistrate judge failed to record the proceedings. The defendant's attorney included the following verse in his papers. The district judge incorporated the verse in his opinion, but it provided little solace to the defendant:

> There was a defendant named Rex
> With a minuscule organ for sex.
> When jailed for exposure
> He said with composure,
> De minimis non curat lex.[271]

Parties seeking justice should not become fodder for entertainment in the hands of a judge who would reduce the parties to caricatures.

Those who support, or perhaps merely tolerate, poetic opinions argue that those opinions capture the reader's attention.[272] Similarly, some say that the public might be more likely to read poetic opinions because they find them more

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269. *See* Lebovits, *Poetic Justice, supra* note 80, at 48 (citing People v. Sergio (N.Y. Crim. Ct. 1986) (Flug, J.), *reprinted in And to All a 'Play Ball!'*, N.Y. TIMES, Dec. 20, 1986, at 1).

270. Lebovits, *Poetic Justice*, *supra* note 80, at 44 (citing United States v. Irving, No. 76-151 (E.D. Cal. 1977) (McBride, J.) (unpublished opinion)).

271. *Id.* The last line is Latin for "the law does not concern itself with trifles."

272. *See* Kearney, *supra* note 55, at 603.

accessible.[273] It has also been asserted that writing a poetic opinion requires a judge to be succinct and distill the analysis.[274] One benefit to a poetic opinion is that "[t]he subject of the opinion may lend itself to a light touch."[275]

Those who are opposed to opinions believe that poetic opinions run the risk of trivializing a grave subject.[276] The poetic opinion might grab a reader's attention, but it will be the verse rather than the opinion's substance that will get the most attention.[277] The Kansas Supreme Court looked at whether a magistrate judge violated the *Model Code* by writing an opinion in verse explaining his decision to place a prostitute on probation for soliciting an undercover police officer.[278] The opinion began:

> This is the saga of _ _
> Whose ancient profession brings her before us.
> On January 30th, 1974,
> This lass agreed to work as a whore. Her great mistake,
> as was to unfold,
> Was the enticing of a cop named Harold.[279]

The court concluded that although the magistrate had the discretion to pen the opinion as a poem, he was not permitted to hold "out [the] litigant to public ridicule or scorn."[280] The court warned that "[j]udicial humor is neither judicial nor humorous."[281] Poetic opinions are "verbal narcissism"[282] that isolate litigants, are based on limited reasoning, and do not dispense justice. Poems have

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273. *See, e.g.*, Robert E. Rains, *To Rhyme or Not to Rhyme*, 16 LAW & LITERATURE 1, 7-9 (2004) (suggesting that the "vice of the verse" is its accessibility to the lawyers rather than the litigants, thus "judges [should] not reason in rhyme").

274. *See* Kearney, *supra* note 55, at 605. In her article, Professor Kearney cited then-Judge Eakin's analysis in Busch v. Busch, 732 A.2d 1274, 1278 (Pa. Super. Ct. 1999), in which he sought to distinguish the case from Ebersole v. Ebersole, 713 A.2d 103 (Pa. Super. Ct. 1998):

> This contrasts with the Ebersole facts
> As our case has something that Ebersole lacks.
> There, a catch-all phrase lumped all the many
> "Financial assets" of the marriage, "if any."
> This aggregation was too vague to be fair,
> As one couldn't tell what assets were there.
> No matter how much Mr. Busch may implore us
> This isn't the same as the contract before us.

See Kearney, *supra* note 55, at 605 (quoting, with some alterations, Busch v. Busch, 732 A.2d at 1278).

275. Kearney, *supra* note 55, at 603.

276. *Id*. at 613 (stating that a poetic opinion's trivializing subject matter is dangerous in cases concerning domestic violence, an area of law that has historically received "second-class status").

277. *Id*. at 614.

278. *See In re* Rome, 542 P.2d 676, 679-80 (Kan. 1975).

279. *Id.* at 680.

280. *Id.* at 685.

281. *Id.* at 685.

282. Kearney, *supra* note 55, at 604.

no place in judicial opinions.

E. RESPECT

More lamentable than humor or poetic opinions is scorn. Impurists need to ensure that through their informal tone, their opinions do not degrade or insult litigants. According to a number of observers, there has been a general "decline of civility in the courts."[283] As role models for lawyers, judges should not contribute to that lack of civility.[284]

A judge's use of scorn suggests that bias might have motivated the judge.[285] If a judge describes a claim as inane or a lawyer as inept, the reader will wonder whether the judge was too distrustful to pay close attention to the litigants' arguments.[286]

Further, an opinion that makes clear what the court thinks about a particular lawyer will affect the lawyer's ability to advocate effectively the next time the lawyer appears before the authoring judge.[287] A lawyer might pull punches, especially about a unique or novel argument, for fear that the judge will regard the argument as "asinine" or "idiotic."[288] Also, once a lawyer has been scorned in an opinion, the question arises whether the lawyer will be taken seriously in future cases.[289] The same holds true for lawyers who have not yet come before a judge with a reputation for humiliating litigants and lawyers. They, too, might be reluctant to advance novel arguments for fear of becoming objects of the judge's scorn.

Respecting litigants appearing before the court seems to be self-evident. But even the Supreme Court is guilty of breaching this rule.[290] Two historical cases aptly illustrate the Court's use of caustic language against litigants. The first is *Plessy v. Ferguson*.[291] In *Plessy*, the Court upheld a state provision that required black passengers to ride in "black only" cars, thereby affirming the "separate but equal" treatment of African-Americans.[292] The plaintiffs argued that separating passengers by race degraded them and violated their rights under the Fourteenth Amendment to the United States Constitution.[293] Dismissing this argument,

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283. *See, e.g.*, Lubet, *supra* note 5, at 14.

284. *See* Michael Cavendish, *Civility in Written Advocacy*, BENCHER (AM. INNS OF CT.), July/Aug. 2005, at 10-11 ("The best teachers of civil behavior and its virtues are our judges.").

285. Lubet, *supra* note 5, at 14.

286. *Id.* at 14-15.

287. *Id.* at 15.

288. *Id.*

289. *Id.*

290. Worse, according to some, when the Supreme Court employs scorn in its opinions, it is frequently in cases involving disempowered litigants. *See* Delgado & Stefancic, *supra* note 236, at 1063.

291. 163 U.S. 537 (1896).

292. *See id.* at 551-52.

293. *Id.*

Justice Henry Billings Brown noted that if African-Americans found the railroad's treatment offensive, it was "solely because the colored race chooses to put that construction upon it."[294] A second example is *Buck v. Bell*.[295] Justice Holmes in that case upheld an order to sterilize a woman asserted to be mentally retarded and the mother of a child who was also mentally retarded.[296] Justice Holmes's infamous comment can be found in the conclusion of his curt opinion, in which he remarked that, "three generations of imbeciles are enough."[297]

Unfortunately, these cases have not dissuaded the Court from continuing to degrade litigants on occasion.[298] In *United States v. Sioux Nation of Indians*,[299] Chief Justice William H. Rehnquist, in his dissent, objected to the majority's detailed history of the Sioux Nation and its explaination why the Sioux were entitled to compensation for their land.[300] Chief Justice Rehnquist's described the Sioux as historically skilled in warfare, robbing, killing, and "'inflict[ing] cruelty without a qualm.'"[301] His description had nothing to do with the Sioux Nation's claim. His description served only to bolster his point that the Sioux did not come to the table with clean hands.[302]

Rather than attacking the lawyers or litigants directly, some judges attack claims using terms like "'absurd' and 'unsubstantiated, self-serving, contradictory, and inconsistent' to explain their decision."[303] The Court of Appeals for the Fifth Circuit reprimanded one plaintiff for bringing a "patently meritless" case and warned the plaintiff that similar, repeated conduct may warrant "the ultimate denial of access to the judicial system absent specific prior court approval."[304] Although the court's language might have been justified in that case, the public in reading only the decision and not considering the reasoning behind it will view the judiciary unfavorably. The public will see the judiciary as unnecessarily harsh. The Fifth Circuit could have reached the same result by stating that "in light of the time and resources the court and defense attorneys expended in

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294. *Id.* at 551.

295. 274 U.S. 200 (1927).

296. *Id.* at 205.

297. *Id.* at 207.

298. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 190 (1986) (framing the issue as whether homosexuals have fundamental right to engage in sodomy rather than whether they have a fundamental right to be left alone); Wyman v. James, 400 U.S. 309, 321-22 (1971) (upholding law requiring home visitation for providing federal benefits and noting that "what [plaintiff] appears to want from the agency that provides her and her infant son with the necessities for life is the right to receive those necessities upon her own informational terms, to utilize the Fourth Amendment as a wedge for imposing those terms, and to avoid questions of any kind").

299. 448 U.S. 371 (1980).

300. *Id.* at 435 (Rehnquist, C.J., dissenting).

301. *Id.* at 436-37 (Rehnquist, C.J., dissenting) (quoting SAMUEL ELIOT MORISON, OXFORD HISTORY OF THE AMERICAN PEOPLE 539-40 (1965)).

302. *Id.* at 435 (Rehnquist, C.J., dissenting).

303. Delgado & Stefancic, *supra* note 236, at 1084 (quoting *Harris v. Marsh*, 679 F. Supp. 1204, 1225, 1267 (E.D.N.C. 1987)).

304. Jackson v. Carpenter, 921 F.2d 68, 69 (5th Cir. 1991).

connection with plaintiff's claims, which have no legal basis, the court dismisses the case and orders that the plaintiff use the judicial system only with specific court approval."

Sarcasm, a form of ridicule, also has no place in opinion writing.[305] Judges should refrain from using sarcasm to attack litigants, whether directly or—by mocking their claims—indirectly.[306] Even amici authors are part of the judicial process and should be not be the subject of disrespect.[307] Although some scholars argue that mockery can be appropriate when directed at powerful figures and government entities,[308] it is always prudent and judicious to give all litigants the same respect.

Judges must be careful to treat distraught litigants, including mentally challenged or even delusional litigants, with respect.[309] Delusional litigants are, regrettably, common enough that law-review articles have been written about them.[310] The issue for the opinion writer—recalling that how a judge writes counts as much ethically as what a judge decides—is how to resolve these claims. Below are some examples of how opinion writers have treated delusional claims:

- After discussing Stephen Vincent Benét's classic short story "The Devil and Daniel Webster," the court considered whether it had jurisdiction over the defendant, Satan.[311]
- A persecuted woman who believed she was a cyborg sued Presidents Jimmy Carter and Bill Clinton, and others, for 5.6 billion dollars.[312] She claimed that the defendants reinstituted slavery, played loud rock music, and used airplanes and helicopters to strafe her dorm room. In an extensive opinion, the court dismissed the suit, respectfully but firmly.[313]

A judge should treat the court system and the litigants with dignity. In doing so, the judge will gain the readers' trust and assure them that all litigants will be treated equally.

Unless a case is about attorney misconduct, judges should also refrain from using their opinions to discipline or chide attorneys. Taking the time to point out

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305. James D. Hopkins, *Notes on Style in Judicial Opinions*, 8 TRIAL JUDGES' J., July 1969, at 49, 50 ("[S]arcasm directed toward the parties is seldom in good taste."), *reprinted in* Robert A. Leflar, *Quality in Judicial Opinions*, 3 PACE L. REV. 579, 586 (1983).

306. *See* Delgado & Stefancic, *supra* note 236, at 1095; Hopkins, *supra* note 305, at 51.

307. *See* Cont'l Ill. Corp. v. Comm'r, 998 F.2d 513, 515 (7th Cir. 1993) (commenting that "[t]he parties and the amici have favored us with more than two hundred pages of briefs, rich in detail that we can ignore").

308. *See generally* Delgado & Stefancic, *supra* note 236.

309. *See* Gerald Lebovits, *The Devil's in the Details for Delusional Claims*, 75 N.Y. ST. B.J., Oct. 2003, at 60, 64.

310. *See, e.g.*, Sean Munger, Comments, *Bill Clinton Bugged My Brain!: Delusional Claims in Federal Courts*, 72 TUL. L. REV. 1809 (1998).

311. *See* United States *ex rel.* Mayo v. Satan & His Staff, 54 F.R.D. 282, 283 (W.D. Pa. 1971) (Weber, J.). Satan & His Staff is the most famous case on the subject, and the most cited.

312. Tyler v. Carter, 151 F.R.D. 537, 537-538 (S.D.N.Y. 1993), *aff'd*, 41 F.3d 1500 (2d Cir. 1994).

313. *Id.* at 537, 540.

annoying or unprofessional behavior detracts from the opinion's force and undermines it by devoting part of the opinion to irrelevant facts. A famous example is *Paramount Communications. Inc. v. QVC Network Inc.*, in which the Delaware Supreme Court publicly chastised an attorney for directing some colorful language toward opposing counsel during a deposition.[314] The court included a transcript of the offending comments and concluded that it was powerless to discipline an attorney not admitted to the Delaware bar. The court stated that it would instead ban the attorney from appearing in Delaware in the future if he did not explain his behavior within thirty days of the issuance of the opinion.[315] The court believed it had a duty to create a degree of professional courtesy. The reprimand served only to distract from the court's resolution of the controversy.

Another scathing opinion is *Bradshaw v. Unity Marine Corp.*[316] Judge Kent began by attacking the defendant's brief:

> Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact—complete with hats, handshakes and cryptic words—to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions.[317]

Judge Kent then moved on to attack the plaintiff's counsel:

> The Court commends Plaintiff for his vastly improved choice of crayon—Brick Red is much easier on the eyes than Goldenrod, and stands out much better amidst the mustard splotched about Plaintiff's briefing. But at the end of the day, even if you put a calico dress on it and call it Florence, a pig is still a pig.[318]

Judge Kent's derision of the lawyers detracted from his resolution of the case. He was seemingly so frustrated by the quality of the lawyers' work that he gave the appearance of deciding the case begrudgingly. Instead of using a different way to let the lawyers know what he thought of them (like ordering them to rewrite their briefs, as one commentator suggested),[319] the judge opted to attack

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314. Paramount Communications. Inc. v. QVC Network Inc., 637 A.2d 34, 52-56 (Sup. Ct. Del. 1994).
315. *See id.* at 56–57.
316. 147 F. Supp. 2d 668 (S.D. Tex. 2001).
317. *Id.* at 670.
318. *Id.* at 671.
319. Lubet, *supra* note 5, at 13.

them. His decision to use the opinion to deliver a harsh reprimand brings into question whether he decided the case fairly.[320]

Another example of the judiciary's scolding of attorneys occurred in 1996 when Presiding Judge Daniel P. Anderson of the Wisconsin Court of Appeals wrote a concurring opinion only "to lament the untimely demise of common courtesy in the legal profession."[321] The judge pointed out that an attorney's failure to warn opposing counsel that a default judgment would result was an "example of the hostile environment that is the leading cause of the collapse of common courtesy."[322] As in *Paramount Communications*, the court's decision did not hinge on the attorney's behavior, which should have been dealt with in another way.

Opinions are an improper forum to eulogize the demise of courtesy in the legal profession or to change attorneys' behavior before the courts. There are other ways to discipline attorneys, rather than taking them to task in a written opinion. A judge can warn bad lawyers in court, call them into chambers, order them to rewrite their briefs, or sanction them.[323] Disrespecting lawyers in the opinion detracts from the flow of the opinion. Personal attacks are immaterial to the issues being decided.

Respect and courtesy should likewise exist among judges and extend to judges of other courts and within the same court.[324] An opinion that veers into a personal attack on another judge is often deficient in legal analysis. *Commonwealth v. Robin*[325] provides an example of a personal attack that failed to reveal anything but the judge's contempt for his colleagues. In *Robin*, the Pennsylvania Supreme Court decided that local governments cannot ban Henry Miller's *Tropic of Cancer*.[326] The lone dissenter, Justice John Musmanno, was convinced that the book was obscene and argued that the book's ban should stand.[327] In his opening paragraph, he wrote that his colleagues had done more harm to the people of Pennsylvania than if they had let loose a thousand rattlesnakes.[328]

People v. Arno[329] is another example of a court's lack of collegiality. There, the majority of the California Court of Appeals wrote that it was necessary to "spell

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320. *Id.* at 14.

321. Miro Tool & Mfg., Inc. v. Midland Machinery, Inc., 556 N.W.2d 437, 440 (Wis. Ct. App. 1996) (Anderson, P.J., concurring).

322. *Id.*

323. Lubet, *supra* note 5, at 13.

324. *See* McGowan, *supra* note 29, at 515-27 (using Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997), and its subsequent history (including internal court memoranda) to retell in-fighting among Ninth Circuit judges through their opinions in this case and concluding that when judges lose sight of the issues at hand they get caught up in personal bickering).

325. Commonwealth v. Robin, 218 A.2d 546 (Pa. 1996).

326. *See id.* at 547 .

327. *Id.* at 561 (Musmanno, J., dissenting).

328. *Id.* at 547.

329. 153 Cal. Rptr. 624 (Cal. App. 1979).

out" a response to the dissent's argument in an obscenity case.[330] The majority wrote seven consecutively numbered sentences, the first letters of which spelled out the word "S-C-H-M-U-C-K."[331] The message was childish and delivered childishly.

Appellate judges also lack respect when they ridicule trial judges. The appellate judge may believe that the trial judge misinterpreted the law and wants to let the trial judge know it. The appellate judge may also be motivated by a personal dislike for the trial judge.[332] Both situations have the potential to create ethical problems. In the first instance, the trial court's decision should be reversed, but the appellate judge should avoid attacking the trial judge.[333] In the second instance, appellate judges should consider recusing themselves if they are incapable of deciding the case fairly because of their feelings toward the trial judge.[334] When an appellate judge attacks a trial judge, the litigant—who is not responsible for the court's internal conflicts and probably is unaware of the situation—will likely conclude that the appellate judge decided the case based on the appellate judge's feelings toward the trial judge and not on the case's merits.[335]

Judges should be mindful of the writings of Second Circuit Judge Calvert Magruder, who wrote that judges "should approach [the] task of judicial review with a certain genuine humility" and "never unnecessarily try to make a monkey of the judge in the court below."[336] His advice applies to all involved in the judicial process, from other judges, to the attorneys, and to the litigants. A judge must maintain a sense of common courtesy in order to dispense justice fairly and ethically.

F. POPULAR CULTURE

Few laud the use of popular culture—literature, music, movies—in judicial opinions. Opinions serve as precedent and are meant to build on prior cases and to provide a foundation for the future. Planting an opinion in a particular time period by referring to popular culture takes away from the opinion's decorum and its ability to be a transitory piece of writing, moving from the present to the future and connecting with the past.

Despite the need for opinions to be transitory, many impurist judges fall prey to inserting popular culture, often by use of an analogy. Justice Harry Blackmun fell

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330. *Id.* at 628 n.2.
331. *See id.*
332. Palmer, *supra* note 4, at 884.
333. *See* FEDERAL JUDICIAL CENTER, *supra* note 48, at 19.
334. *See* MODEL CODE Canon 3(E)(1).
335. Palmer, *supra* note 4, at 884.
336. Calvert Magruder, *The Trials and Tribulations of an Intermediate Appellate Court*, 44 CORNELL L.Q. 1, 3 (1958).

victim in *Flood v. Kuhn*,[337] in which the Supreme Court listed eighty-eight baseball greats and footnoted two baseball verses in exempting baseball from antitrust laws.[338] There is little doubt that injecting popular culture into opinions makes some opinions easier to comprehend: They are easier to relate to. The need for an opinion to be understood in the present, however, cannot overshadow the need for an opinion to be understood in the future. References to current culture will end up obscuring, rather than clarifying, the opinion. Consider the following passage from *United States v. Dumont*:

> The Grateful Dead play rock music. Their style, often called "acid rock" because it mimics the effects some persons obtain after using LSD . . . is attractive to acid-heads. Wherever the Dead appear, there is a demand for LSD in the audience. Demand induces supply. Vendors follow the band around the country; law enforcement officials follow the vendors.[339]

These opening lines from Judge Frank H. Easterbrook's opinion in *Dumont*, while exceptionally clever, are irrelevant to the issues in the case.

Another reason to avoid using popular culture in opinions is to maintain the decorum of the judicial system. The same reasons that counsel against using humor in opinions also suggest that judges must limit, or better yet eradicate, any use of popular culture in their opinions. Using popular culture has resulted in banal opinions that irrelevantly use lines from the Saturday Night Live Wayne's World skits and the 1992 movie, *Wayne's World*—"In short, PRIME TIME's most bogus attempt at removal is 'not worthy' and the Defendants must 'party on' in state court."[340] Although "mores and culture affect decision making,"[341] judges should be wary of showcasing their erudition.[342] Knowledge about popular culture is different from including it in a judicial opinion.[343] Including popular culture in a judicial opinion will not make the judge more popular or the opinion more memorable for its legal conclusions.

G. AUTHORITY

To make judicial opinions more understandable to the public, impurists limit their citations to legal precedent. The problem with using authority in impure opinions is the opposite of using it in pure opinions. Impurists tend not to cite enough authority; purists tend to cite too much. Fewer citations do not, however, correlate to less reliance on precedent. Precedent is an integral part of a judicial

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337. 407 U.S. 258 (1972) (Blackmun, J.).
338. *Id.* at 262, 263 n.4-5.
339. 936 F.2d 292, 294 (7th Cir. 1991).
340. Noble v. Bradford Marine, Inc., 789 F. Supp. 395, 397 (S.D. Fla. 1992) (emphasis in original).
341. Gerald Lebovits, *A Pox on Vox Pop*, 76 N.Y. ST. B.J., July/Aug. 2004, at 61, 64.
342. *Id.*
343. *Id.*

opinion. A judge should always articulate the legal principle or test underlying the court's opinion. Often, the principle is established in past cases and simply adopted in the current opinion. Written opinions, as opposed to oral opinions, have many purposes, but the writer "should concentrate on a single goal—to write an opinion supported by adequate authority that expresses the decision and rationale of the court in language and style that generate confidence in the reader that justice has been fairly and effectively administered."[344] Judges must include just the right amount of authority in their opinions.

The most important thing the opinion must do is "state plainly the rule upon which the decision proceeds. This is required in theory because the court's function is to declare the law and in practice because the bar is entitled to know exactly what rule it can follow in advising clients and in trying cases."[345] In cases of first impression, judges should fashion the principle themselves. Even so, all opinions should contain the sources from which the principle is derived.

Although one school of thought contends that no case has precedential value because all cases can be distinguished from each other,[346] most lawyers believe in two coexisting doctrines of precedent: (1) a narrow one to distinguish troublesome decisions; and (2) a broad one to analogize cases to obtain a similar result.[347] Judges should be aware of this dichotomy and balance the two doctrines. They should fairly analogize and distinguish cases by affording each comparison the same latitude and reliance.

The Supreme Court has long cautioned against excessive use of precedent:

> [T]his court in a very special sense is charged with the duty of construing and upholding the Constitution . . . it ever must be alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of the fundamental law of the land.[348]

Moreover, the rules from the cases, not the cases themselves, should be emphasized. According to former New York Chief Judge Cuthbert Pound, "judges too often fail to recognize that the decision consists in what is done, not in what is said by the court in doing it."[349] The same is true of legal fictions. Judge Robert Keeton advises: "Avoid legal fictions, if possible. If you conclude that precedent requires you to invoke a legal fiction, explain what you are doing and why."[350] Nevertheless, an opinion that is easy to understand might still

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344. ABA OPINION WRITING MANUAL, *supra* note 7, at 1.

345. 1 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 8b, at 624 (Peter Tillers rev. ed., 1983).

346. *See* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 734 (1987) (citing Max Radin, *Case Law and Stare Decisis: Concerning Präjudizienrecht in Amerika*, 33 COLUM. L. REV. 199 (1933)).

347. *Id.* (citing KARL LLEWELLYN, THE BRAMBLE BUSH 74-75 (1951)).

348. Dimick v. Schiedt, 293 U.S. 474, 485 (1935).

349. Pound, *supra* note 10, at 282.

350. ROBERT E. KEETON, JUDGING 144 (1990).

receive the public legitimacy it needs without making use of excess precedent. Impurists must maintain legitimacy in the legal profession's eyes. To ensure that an impure opinion maintains legitimacy, impurists must adequately cite and rely on legal precedent.

VII. ETHICAL CONSIDERATIONS IN BOTH PURE AND IMPURE OPINIONS

Every judge, whether purist or impurist, must be aware of the ethical considerations that arise regardless of an opinion's style.

A. PERSUASIVENESS

Opinions must combine honesty with persuasiveness. As Justice James D. Hopkins noted, an "opinion . . . is an essay in persuasion."[351] Honesty and persuasiveness are not mutually exclusive. The judge's goal is to motivate the reader to agree with the opinion and to give the reader grounds to do so. As Chief Judge Judith S. Kaye of New York stated: "Writing opinions is a lot like writing briefs. Both are, at bottom, efforts to persuade."[352] When an opinion is of relative first impression or deviates from precedent, an opinion writer may summarize the holding and then "add[] a literary touch, stressing the policy or other persuasive considerations that call for this conclusion."[353] To write persuasively yet ethically, judges must emphasize content, not the writing itself.

Although judges should write persuasively, they must avoid writing polemics or writing emotionally. As the Supreme Court of California wrote long ago, "An opinion is not a controversial tract, much less a brief in reply to the counsel against whose views we decide. It is merely a statement of conclusions, and of the principal reasons which have led us to them."[354] Some opinions "read[] like a lawyer's brief, the worst possible style for a judicial opinion. It discloses this kind of judge for what he is and ought not to be, an advocate."[355] Thus, "[a]n ethical judge cannot be a polemicist."[356] Opinions are not pulpits or vessels to espouse personal beliefs. Opinions are meant to be reasoned and solemn. It is through reasoning and solemnity that a judge's opinion becomes persuasive.

B. THE FACTS

The most important rule when drafting facts is to ensure that they are accurate.

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351. Hopkins, *supra* note 305, at 49, *reprinted in* Robert A. Leflar, *Quality in Judicial Opinions*, 3 PACE L. REV. 579, 584 (1983).

352. Kaye, Wordsmiths, *supra* note 1, at 10; Alan B. Handler, *A Matter of Opinion*, 15 RUTGERS L.J. 1, 2 (1983).

353. WITKIN, *supra* note 79, § 79, at 140.

354. Holmes v. Rogers, 13 Cal. 191, 202 (1859) (petition for rehearing).

355. Moses Lasky, *A Return to the Observatory Below the Bench*, 19 SW. L.J. 679, 688-89 (1965).

356. McGowan, *supra* note 36, at 515.

When citing the facts, judges should not rely on the litigants' statements of facts. Instead, judges should verify the record. Litigants, who have an interest in the litigation, may shade facts, and it is unwise for a judge to adopt verbatim the findings of fact that the prevailing party sets forth in its memorandum of law.[357] Doing so suggests that the judge did not evaluate the facts independently. Trial judges must engage in fact finding and resolve conflicts between different versions of the facts presented by the testimony or in the litigants' papers. If the court considers only the facts one side presents, the court has already made its decision. When factual conflicts arise, judges must do their best to state the full version of the facts by drawing from both sides' presentations of the facts.

Judges must also take care not to recite irrelevant facts. They serve no purpose except to distract and confuse the reader. The goal, according to Professor Timothy P. Terrell, is to sift, not regurgitate the facts. A poorly organized opinion, he explains,

> is usually encumbered with loads of detail—every fact presented seems to find its way into the court's description of the background of the legal dispute . . . . Although the urge behind overinclusion is the defendable one of thoroughness, a truly controlled presentation is also *focused*. That impression requires a writer to sift the material of the document rather than simply reproduce all of it and then try to make sense of it all.[358]

Colorful but legally irrelevant facts, procedure, and evidence cloud an opinion.

Although the recitation of the facts must be accurate and complete, some information should be omitted, like nonessential facts that impinge on the privacy rights of children or non-parties. Judges should also omit grossly graphic sexual scenarios, even when quoting someone else, unless the scenario is critical to the opinion. In *Lason v. State*, an opinion this article will not reprint, one Chief Justice of Florida did not follow that advice.[359] Contrast that opinion with the classic *United States v. Thomas*, which considered whether two Navy airmen were guilty of attempting to rape a deceased woman they believed was drunk.[360] The court wrote that "[t]he evidence adduced at the trial presents a sordid and revolting picture which need not be discussed in detail other than as necessary to decide the certified issues."[361] The court wisely omitted the graphic details.

In addition to a complete, but succinct, rendition of the facts, judges must present a fair version of the facts. Judges must construct and recount facts

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357. Kristen Fjeldstad, Comment, *Just The Facts Ma'am—A Review of the Practice of the Verbatim Adoption of Findings of Fact & Conclusions of Law*, 44 ST. LOUIS U. L.J. 197, 197 (2000); *see also In re* Las Colinas, Inc., 426 F.2d 1005, 1008-09 (1st Cir. 1970).

358. Timothy P. Terrell, *Organizing Clear Opinions: Beyond Logic to Coherence and Character*, 38 JUDGES' J., Spring 1999, at 4, 38.

359. *See* Lason v. State, 12 So. 2d 305, 305 (Fla. 1943).

360. *See* United States v. Thomas, 32 C.M.R. 278 (Ct. Mil. App. 1962).

361. *Id.* at 280.

neutrally. If facts are presented selectively and with characterization, the judge risks applying law to a situation that did not occur.[362] A "judge [who] consciously or unconsciously feels that to relate the full relevant truth about a case would weaken the convincingness of a decision . . . ought to question that decision . . . ."[363] Presenting facts neutrally ensures that the facts are not skewed to "fit" the opinion's outcome. Law belongs to the judge, but facts belong to the litigants.

In an exceptional example, former Attorney General and Fifth Circuit Judge Griffin B. Bell wrote that facts "must be stated as favorably as possible to the losing party . . . . The opinion lacks judicial advocacy absent the best view of the facts for the losing party."[364] That is not the conventional view. The opinion must address the facts the losing party presents to show the losing side that its position has been considered.[365] Thus, Justice Hopkins had "[o]ne cardinal rule: do not omit facts which are stressed by the unsuccessful party or a doctrine which may be at war with the ultimate disposition."[366] But once the opinion writer includes the facts in controversy and states them fairly, the writer need not slant them toward the losing side.

Resolving conflicts in the facts is one of an opinion's core functions. Facts should not be used merely to set the stage for the opinion. Judges are cognizant of relevant and controlling precedent. Judges will naturally emphasize facts and distinguish the case from unhelpful precedent and emphasize facts and analogize the case to favorable precedents.[367] This connection between fact and precedent is a compelling reason for a judge to present facts honestly. Judges must cogently set out facts that also support the view not taken and explain why those counter-facts are not determinative.[368] Composing facts as a story is acceptable if that story is told objectively. A well-reasoned opinion considers both sides of an argument and does not tailor facts to make a decision seem more obvious than it actually is. The reason is that "[t]he one-sided approach weakens the [opinion's] analytical rigor."[369]

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362. Wald, *Rhetoric of Results*, *supra* note 132, at 1386; *see also* McGowan, *supra* note 29, at 554-55 (commenting that even if "intellectual honesty" does not compel judges to state facts neutrally, then they should care enough to be neutral because their opinions serve as precedent).

363. Palmer, *supra* note 4, at 883.

364. Griffin B. Bell, *Style in Judicial Writing*, 15 J. PUB. L. 214, 216-17 (1966).

365. To ensure that the facts stated in the opinion are accurate, it is important to check fact references in the parties' briefs against the record, rather than simply to rely on the facts as the litigants in the briefs presented them. *See* FEDERAL JUDICIAL CENTER, *supra* note 48, at 16.

366. Hopkins, *supra* note 305, at 50.

367. Wald, *Rhetoric of Results*, *supra* note 132, at 1387; s*ee also* Francis, *Faster, Better*, *supra* note 154, at 28 (stating that structures that permit judges to weigh facts have persuasive intent and sometimes makes cases appear comparable to one another when they are not).

368. Wald, *Rhetoric of Results*, *supra* note 132, at 1389.

369. McGowan, *supra* note 36, at 555.

The opinion in *Steffan v. Perry*[370] illustrates the problem of presenting facts neutrally. Joseph Steffan was a midshipman-in-training at the Naval Academy who admitted he was a homosexual.[371] He was given the choice of resigning from the Naval Academy or risk having the Naval Academy's superintendent recommend his discharge.[372] Steffan decided to resign, but he sued on constitutional grounds to overturn the regulations under which he would have been discharged.[373] The district court granted summary judgment, and the case was appealed to the Court of Appeals for the District of Columbia.[374] The majority recounted the conflict between a gay midshipman and Navy regulations in dry, bureaucratic language. The court took two pages to detail the Navy regulations disqualifying homosexuals from service before it even mentioned Steffan's name.[375] In contrast, the dissent began by telling Steffan's story: His outstanding performance in the Naval Academy.[376] The Navy regulations did not appear until several pages into the dissenting opinion.[377] The varied presentation of the facts lead the reader to different outcomes. Each rendition justifies each outcome. This case, among many others, illustrates that judges should first apply the law to neutral facts. Judges should not characterize the facts to apply to the outcome of the case.

Judges must also present the facts fully because factual skewing and selectivity are not obviously discernable to the reader. If a judge mischaracterizes precedent or misinterprets a statute, the reader can go to the library to question the source. Case records, on the other hand, are not readily available to the public.[378] Furthermore, the likelihood of a case being reviewed on appeal over a factual misstatement is rare. The higher the court, the greater the presumption that any error in a decision is attributable to a legal error.[379]

The opinion should make explicit credibility determinations. A trial judge who hears contested testimony should note that fact by using phrases like "the court finds that," the court "credits the testimony of," and the court "afforded great weight to."[380] An appellate opinion should recount the trial judge's findings so that the opinion's reasoning can be put in context. Few things will frustrate a trial judge more than an appellate reversal that either does not recount the trial findings of fact or which distorts the trial facts. Trial and appellate opinions

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370. 41 F.3d 677 (D.C. Cir. 1994) (en banc). For a discussion of this case, see Wald, *Rhetoric of Results*, *supra* note 132, at 1386-88.

371. *Steffan*, 41 F.3d at 683.

372. *Id.*

373. *Id.* at 683-84.

374. *See id.*

375. *Id.* at 682.

376. *See id.* at 701 (Wald, J., dissenting).

377. *See id.* at 706-07 (Wald, J., dissenting).

378. Wald, *Rhetoric of Results*, *supra* note 132, at 1389-90.

379. *Id.* at 1390.

380. Wanderer, *supra* note 243, at 56.

should also cite the record when referring to important facts. Because facts are central to opinions, presenting facts honestly is vital to an opinion's outcome and ensures that the public understands the court considered the case objectively.

A judge should also use concrete nouns and vigorous verbs, not abstractions or conclusions, to recite relevant facts. Concreteness provides context and persuades the reader that a result is correct. Being concrete means being specific; it means showing, not telling. As Judge Patricia M. Wald advised, write in "Joe Six-Pack language. You would be surprised how often abstract concepts conceal a failure to come to grips with the precise issues or facts in [a] case."[381] Writing non-abstractly is what separates great judges from merely competent ones: "The power of vivid statement [is what] lifts an opinion by a Cardozo, a Holmes, a Learned Hand out of the swarm of humdrum, often numbing, judicial opinions, rivets attention, crystallizes relevant concerns and considerations, provokes thought."[382]

C. THE CLAIM OR ISSUE DEFINITION

One of the most important aspects of opinion writing is one of the most ineffable. How a judge defines a claim or issue can determine how the judge will decide the claim or issue—and whether the reader will agree with that opinion. As Justice Felix Frankfurter wrote, "[i]n law . . . the right answer usually depends on putting the right question."[383] The right question will make the reader believe that the judge gave the right answer.

In *United States v. Morrison*,[384] the Supreme Court considered the constitutionality of the Violence Against Women Act ("VAWA"). The dissent defined the issue as whether society needs to use the federal courts to compensate victims of gender-based violence to punish its perpetrators.[385] The majority, which found VAWA unconstitutional, defined the issue as the extent to which the Constitution's Commerce Clause permits federal law to be imposed on the states.[386] Both the majority's and the dissent's issue framing makes the reader agree with their assessment. Their issue framing suggests that how the judge comes out depends on how the judge went in.

Part of framing an issue or claim may result in a judge's resolving a case on a point of law neither side argued. The New York Court of Appeals has offered a famous justification for considering issues sua sponte: "To say that appellate courts must decide between two constructions proffered by the parties, no matter how erroneous both may be, would be to render automatons of judges, forcing

381. Wald, *How I Write*, *supra* note 14, at 59.
382. RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 136 (1990) [hereinafter POSNER, REPUTATION].
383. Rogers' Estate v. Comm'r, 320 U.S. 410, 413 (1943).
384. 529 U.S. 598 (2000).
385. *Id.* at 665.
386. *Id.* at 608-09.

them merely to register their reactions to the arguments of counsel at the trial level."[387]

Some great cases have been decided sua sponte, including *Erie Railroad Company v. Tompkins*.[388] Deciding cases sua sponte, however, leads to bitterness among counsel and sometimes even within the court.[389] If the litigants do not address a dispositive issue, the judge should consider asking counsel before oral argument to brief or orally argue the issue rather than making a sua sponte decision. This technique is consistent with due process, causes little delay, and saves the majority from encountering dissents and considering motions to reargue.[390] Requesting additional argument from the litigants also leads judges to write better, more ethical opinions. In the American adversary system of justice, especially at the appellate level, decisions are often only as good as the lawyers who appear before the court.

D. ORDERING CLAIMS AND ISSUES AND THE RULES WITHIN ISSUES

An opinion must resolve claims or issues in a logical order. But opinions need follow no single logical order—every case is different. Below are some guidelines for ordering opinions.

Judges should be wary of deciding claims and issues in the order the litigants present them. Advocates are trained to start with the argument that has the greatest likelihood of success. Judicial-opinion writers have a different agenda. Moreover, "slavishly following the briefs, point by point . . . makes the opinion seem mechanical."[391] Adopting the litigants' organization can suggest that the court did not exercise independent judgment:

> A quick, and therefore seductively attractive, way to organize any opinion is to let the parties supply its pieces and order . . . . Reasoning by reacting *could* be effective in certain circumstances, but more often it is a sign of judicial despair or fatigue. Some judges seem to believe that this form of organization is the only method for the court to demonstrate appropriate respect for the arguments of the litigants, carefully responding in turn to each side's points. But respect of this sort does not require the judge to concede the structure of his or her opinion to the parties. Respect is owed not just to the parties, but to the court as well.[392]

The goal is for judges to decide claims and issues in a manner befitting the case and the court.

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387. Rentways, Inc. v. O'Neill Milk & Cream Co., 126 N.E. 271, 274 (N.Y. 1955).

388. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

389. *See, e.g.*, *id.* at 82 (Butler, J., dissenting); *Rentways*, 126 N.E. at 275 (Conway, C.J., dissenting).

390. For two good discussions of this question, see Albert Tate, Jr., *Sua Sponte Consideration on Appeal*, 9 TRIAL JUDGES' J., July 1970, at 68; Allen D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477 (1958-1959).

391. Smith, *supra* note 14, at 206.

392. Terrell, *supra* note 358, at 39.

Judges should decide threshold issues before deciding the merits. A threshold issue is often a procedural one, such as whether the court has jurisdiction to consider the merits. Sometimes a threshold issue is substantive, such as a statute of limitations question. Depending on the ruling, threshold issues can be dispositive.

After resolving threshold issues, judges should put essential matters first, and resolve the large claims or issues before deciding less significant matters. One technique, from the pure opinion, is to use topic sentences and thesis paragraphs to tell readers, up front, how the court will resolve the issue. This technique is particularly valuable in appellate opinion writing: "like the opening paragraph of the opinion, the initial paragraph presenting a point of error may be brought to a close by revealing the appellate court's conclusion as to whether the trial court reversibly erred on that point."[393] This pure-style writing rule also applies to opinions that consider multiple issues. If all the claims are equally large, the judge should first resolve the claim that most affects the litigation. Thus, in a criminal appeal in which a defendant seeks a new trial or, in the alternative, a reduced jail sentence, the appellate court should first decide whether to grant a new trial. If the court grants a new trial, it should not consider the request for a reduced sentence.[394]

A judge must also move logically through statutory or common-law tests. Often a decision depends on whether a litigant satisfied a multi-factor test enumerated in a statute or a seminal case. A writer must resolve the claim in the sequence in which the statute or case laid out the factors. The reader will understand relationships more easily that way, and the writer will avoid awkward cross-referencing. Deciding claims and issues in the order in which they arose facilitates understanding if the claims and issues arose chronologically.

Everything else being equal, judges should resolve issues by a hierarchy of authority: constitutional questions first, then statutory questions, then common-law questions.

E. INNUENDO

An opinion should rely on facts and law—no room exists for assumptions or innuendos. Litigants are defenseless against the opinion writer who imputes impure motives. An example of moralistic assumption-making appears in *Main v. Main*:

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393. Douglas K. Norman, *An Outline for Appellate Opinion Writing*, 39 JUDGES' J., Summer 2000, at 26, 32.

394. From time to time, appellate courts instruct trial judges on how to handle issues at a retrial. It is appropriate for an appellate court, in its discretion, to advise a trial judge so that a difficult question will be resolved correctly or so that an error will not be repeated. Guidance for a retrial "not only simplif[ies] the task of the trial judge but also minimize[s] the chances of another appeal in the case." WITKIN, *supra* note 79, § 87, at 157.

> At the time of the trial plaintiff was 66, and the defendant 42, years of age. Defendant had been twice married, once widowed and once divorced. Plaintiff had been twice married and twice divorced—each time at the suit of his wife. He had subsequently been defendant in an action for breach of promise, and had sought the graces of other women with a fervor not altogether Platonic. The parties did not drift into love unconsciously, as sometimes happens with younger and less experienced couples. Both knew from the start exactly what they wanted. She wanted a husband with money—or money with a husband. He wanted a wife to adorn his house and insure that conjugal felicity of which fate and the divorce court had repeatedly deprived him.[395]

If the court's assumptions are incorrect, a litigant becomes the innuendo's victim. Innuendo improperly lowers the court's opinion to impressions and gossip rather than law.

F. CANDOR

Candor is an essential component of a judicial opinion. The expectation that litigants candidly present the facts and law before the court requires a similar judicial response. The requirement that judges give reasons for their decisions serves a vital function: constraining the judiciary's exercise of power.[396] Some argue that the reasoning in judicial opinions is a "*post hoc* rationalization of a decision determined by instinct or hunch."[397] Even if a judge arrives at an outcome instinctively, reasoning must underlie the judge's decision.[398] Candor in judicial opinions helps readers comprehend the outcome that the judge determined. Judges like Robert H. Jackson, John Marshall Harlan, and Henry J. Friendly are known for the candor they displayed in acknowledging the difficulties of decision-making and the strength of competing arguments.[399] Candor does not automatically ensure that judges will be lauded for their intelligence, style, and craft. But lack of candor, when discovered, reveals a lack of integrity.[400]

Candor has its limits, however. The judicial opinion should never describe the judge's effort to render a fair decision. The public and the litigants presume that the courts are fair. Judge Posner explained: "Many judges voting to uphold

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395. Main v. Main, 150 N.W. 590, 591 (Iowa 1915) (Weaver, J.) (denying divorce).

396. Shapiro, *supra* note 346, at 737.

397. *See id.* at 737-38.

398. Kevin W. Saunders, *Realism, Ratiocination, and Rules*, 46 OKLA. L. REV. 219, 222 (1993) (quoting Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 278 (1929) ("[A]fter canvassing all the available material at my command, and duly cogitating upon it, [I] give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision . . . .")).

399. Shapiro, *supra* note 346, at 740.

400. *Id.* at 741.

statutes that they personally dislike will say so, to make themselves sound more impartial. This is an ethical appeal, but of a somewhat crass and self-congratulatory sort."[401] To declare the great pains the court endured to achieve fairness is unnecessary and defensive: "[T]o 'tell all,' with complete and unmitigated candor, is not always a virtue in judicial opinions or elsewhere. Restraint may also be a virtue for reasons sometimes of decency and sometimes of wise planning."[402] The circumstances surrounding the decision-making procedure will not make the opinion any more or less correct than the reasoning the judge uses. Many decisions are hard to make, but judges should not describe how hard it was to make the decision.

Judges should avoid revealing their personal thoughts about the issues in the case in the guise of candor. Composing an opinion with unmitigated candor is not always a virtue in judicial opinions or elsewhere. Justice Oliver Wendell Holmes made an ethical appeal to the reader in *Lochner v. New York* when he wrote: "The case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should study it further and long before making up my mind."[403]

Justice Holmes's point was to show how deliberative he was when faced with an important decision. A judge is presumed to deliberate on each decision carefully. Judges who state how difficult the decision-rendering process was, in an effort to convince the reader of the judge's hard work and diligence, more often than not leave their readers unpersuaded.

Similarly, judges should not explain to the reader the amount of research that went into deciding the case. Doing so asks the reader to believe the court because of all the work the court put into the opinion. The court should discuss only the results of its legal research. The court will illustrate through written analysis that it worked hard in research and writing. Judges often congratulate themselves for conducting "a through review of the record," "exhaustive research," and "a close reading" of the papers. Judges sometimes tell their readers that they engaged in "careful deliberation" and engaged in a "complete review" of the record. Expressions of candor should be eliminated.

Do judges use highlighting strategies to assure skeptical readers that they spend their time deciding cases rather than at the golf course? Or do judges use these strategies out of habit? Either way, verbiage that tells a reader that a judge is honest, smart, deliberate, detail-oriented, impartial, articulate, or empathetic has a negative effect.

Judges who tell people that they are fair are fair game for those who would argue that they are unfair. That happened in *Gideon v. Wainwright*, in which Justice Hugo Black, with understated sarcasm, noted in the opinion's first

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401. Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1381 (1986).
402. Leflar, *Judicial Opinions*, *supra* note 57, at 819.
403. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

paragraph that the Florida "Supreme Court, 'upon consideration thereof' but without an opinion, denied all relief" to the defendant, who had argued that "'[t]he United States Supreme Court says I am entitled to be represented by Counsel.'"[404]

Sometimes the judge has a hunch or intuition about how an opinion should come out. Although a hunch may play a role in the decision's outcome—if the judge's research warrants it—the opinion must be justified.[405] Judges usually do not have the luxury of time to research and write thoroughly. Judges who must issue an opinion before being convinced of its correctness should be encouraged by the following observation:

> An opinion can withstand any infirmity except vacillation. An umpire who promptly, resolutely, and incorrectly calls a strike when the ball was wide by a mile doesn't harm the game of baseball; the national pastime could be ruined, however, by an umpire who massaged his chin, then scratched his head, and finally confessed that since he wasn't sure whether it was a ball or a strike, he might as well call it a two-base hit.[406]

Judges are encouraged to bring finality to disputes even if they are not always certain of the decision. Thus, being candid may, in exceptional cases, require a "tentative" conclusion.[407] Opinion writers who render tentative conclusions are said to be *dubitante*. A judge who is tentative expresses findings of fact and conclusions of law with reservations. A tentative opinion is a draft opinion issued by a judge prior to the final decision. Many judges are uncomfortable with the idea of issuing tentative opinions: "tentative opinions [are] as welcome[] as a porcupine at a dog show."[408]

Judges may have a difficult time striking a balance between being honest and giving too much information. Even the most beloved judges have, on occasion, expressed too much candor. For example, in *People v. Davis*, New York Court of Appeals Chief Judge Charles D. Breitel in dissent remarked:

> Speaking for myself alone among the dissenters I find capital punishment repulsive, unproven to be an effective deterrent (of which the *James* case [] is illustrative), unworthy of a civilized society (except perhaps for deserters in time of war) because of the occasion of mistakes and changes in social values

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404. Gideon v. Wainwright, 372 U.S. 335, 337 (1963). Justice Black's "impure style" opinion in *Gideon* is especially brilliant. He did not have to say in his first paragraph what the issues are or who will win. The imagery from his procedural references suffices to tell the reader what the case is about and who will win and why.

405. Hutcheson, *supra* note 398, at 280-81.

406. Levitan, *supra* note 40, at 630, 666.

407. For the pros and cons of writing tentative opinions, see Philip M. Saeta, *Tentative Opinions: Letting a Little Sunshine into Appellate Decision Making*, 20 JUDGES' J., Summer 1981, at 23-24.

408. *Id.* at 24 (quoting Justice Robert S. Thompson) (citing LOS ANGELES TIMES, Aug. 1, 1980, Part V, at 3).

> as to what are mitigating circumstances, and the brutalizing of all those who participate directly or indirectly in its infliction.[409]

Several factors can test a judge's limits to candor: Precedents, collegiality, litigants, lawyers, personalities, and politics. Discussing life-and-death struggles over euthanasia and jury nullification, former Yale Law School Dean (and now Second Circuit Judge) Guido Calabresi argued that judges should dissemble when values conflict and the options are tragic.[410] New York University and Cambridge University joint-appointee Ronald Dworkin, perhaps today's leading philosopher of jurisprudence, believes that when legal and moral rights conflict and a judge is faced with making a difficult moral decision, sometimes the judge should lie for the high goal of rendering a just decision.[411]

G. TONE AND TEMPERAMENT

Judges should always maintain a professional, neutral tone. Regardless of the judge's personal feelings, the tone should stay restrained, patient, dignified, and courteous. As Professor Terrell explains, "style has to do with the relationship of writer to reader, a relationship that can be, for example, authoritarian or collegial or deferential."[412] On the other hand, the "tone of an opinion . . . depends for its legitimacy on autocratic claims to professional authority, or, less arrogantly, on invocations of reasoned discourse, or, even more familiarly, on appeals to simple humanity or fundamental values."[413] The *Model Code of Judicial Conduct* requires judges to maintain neutrality:

> Expressions of bias or prejudice by a judge . . . may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.[414]

To maintain the professional tone expected in an opinion, judges must remain impartial.

To avoid sounding antagonistic, the court should not address every point a losing party raises, unless all the issues are necessary to decide the case.

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409. 371 N.E.2d 456, 468 n.* (N.Y. 1977) (Breitel, C.J., dissenting).

410. *See* GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 17-28 (1978).

411. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 326-27 (1978) (noting that when a judge is faced with a case where legal and moral rights conflict, the judge could resign, follow the law, or draft an opinion that is a lie); *accord* Shapiro, *supra* note 346, at 731.

412. Terrell, *supra* note 358, at 38 ("[S]tyle can be understood as the writer's projection to the reader of the writer's image of his or her professional character.") (citing STEVEN ARMSTRONG & TIMOTHY P. TERRELL, THINKING LIKE A LAWYER: A LAWYER'S GUIDE TO EFFECTIVE WRITING AND EDITING § 8, at 5-10 (1992)).

413. *Id.*

414. MODEL CODE Canon 4(A) cmt.

Addressing each point will "remove the decision from the really vital issues of each case and . . . transform the opinion into a list of rulings on academic legal assertions."[415] Excessively dwelling on every one of the losing side's arguments may also doom the opinion to a lengthy dissertation on irrelevant topics. It is critical for judges to explain why the court got it right, not why the loser got it wrong.[416] The losing side's relevant arguments must be addressed and never dismissed out of hand.[417] In doing so, the court must treat all litigants with dignity.[418]

Judges must also ensure that their tone is restrained. Judges must be careful to make sure that their opinion is patient, not arrogant, flippant, or influenced by provocation. At the same time, judges must maintain a dignified tone while never obscuring the real reason for the decision.[419]

United States Supreme Court Justices and others have not always maintained a dignified tone. In expressing scornful views about homosexuals, women's rights, immigrants, or victims of sexual harassment, these judges have allowed their readers to believe that their scorn motivated their legal rulings. Below are examples:

- Relying on values expressed from Roman law to Blackstone to uphold a statute that criminalized sex between consenting adults in private, concurring Chief Justice Warren E. Burger wrote: "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would . . . cast aside millennia of moral teaching."[420]
- A majority of the Supreme Court forbade gender-based discrimination in peremptory jury challenges.[421] The dissenting Justices scoffed that the majority's decision "is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes (or, as the Court would have it, the genders) and how sternly we disapprove the male chauvinistic attitudes of our predecessors."[422]
- A concurring Justice believed that the National Endowment for the Arts (NEA) discriminated on the basis of viewpoint. According to the concurrence,

> It takes a particularly high degree of chutzpah for the NEA to contradict this proposition, since the agency itself discriminates—and is required by law to

415. Wigmore, *supra* note 345, at § 8a, at 617.

416. *See* Terrell, *supra* note 358, at 39.

417. Wald, *How I Write*, *supra* note 14, at 58.

418. *See generally* Lubet, *supra* note 5, at 14.

419. *See generally* Robert A. Leflar, *Honest Judicial Opinions*, 74 N.W. U. L. Rev. 721 (1979).

420. Bowers v. Hardwick, 478 U.S. 186, 196–97 (1986) (Burger, C.J., concurring) ("Blackstone described 'the infamous crime against nature' as an offense of 'deeper malignity' than rape . . . .") (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 215 (1775)).

421. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994).

422. *Id.* at 156 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (opening sentence).

> discriminate—in favor of artistic (as opposed to scientific, or political, or theological) expression. Not all the common folk, or even all great minds, for that matter, think that is a good idea. In 1800, when John Marshall told John Adams that a recent immigration of Frenchmen would include talented artists, "Adams denounced all Frenchmen, but most especially 'schoolmasters, painters, poets, & C.' He warned Marshall that the fine arts were like germs that infected healthy constitutions."[423]

- At trial, bank employees asserted that a bank vice president caused them emotional distress by falsely accusing them of making "dial-a-porn" toll calls from the bank's telephones.[424] The vice president forced the employees to listen, with others present, to a recording of a call that "presented a woman having sexual relations with a man, and telling him how she wanted him to do it."[425] Deciding that the plaintiffs' claims were untimely, the court wrote: "Enforced exposure to salacious dialogue notwithstanding, the record establishes no justification for us to rescue these six suitors from their self-dug hole. In calling upon us for extrication, plaintiffs have dialed yet another wrong number."[426]

Lamentably, in these famous and infamous opinions, what remains with the reader is not the outcome of the case but the tone in which the outcome was delivered. The tone in these cases says more about the decision-making process than about the law. These passages suggest a bias in the decision-making process.

H. MODESTY, HUMANITY, AND HUMILITY

People who know judges agree that "there have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity."[427] Judicial modesty is hard to master, but modesty must be mastered:

> "Most writers are beset by the healthy worry that they won't be read. The writer-judge suffers no such humbling agony. For a time at least, whatever the judge writes is law; readership not always meek but guaranteed. A tendency to write as though the whole world were waiting. Can pompousness be far away?"[428]

But judicial pomposity is a wasted effort. Most people care about things more important than judicial opinions: "[F]ew citizens will sit down with a volume of

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423. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 597 (1998) (Scalia, J., joined by Thomas, J., concurring) (quoting JOSEPH J. ELLIS, AFTER THE REVOLUTION: PROFILES OF EARLY AMERICAN CULTURE 36 (1979)).

424. Rodriguez-Antuna v. Chase Manhattan Bank Corp., 871 F.2d 1, 1 (1st Cir. 1989).

425. *Id.*

426. *Id.* at 3 (Selya, J.).

427. Bridges v. California, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting).

428. MELLINKOFF, *supra* note 122, at 122.

our opinions, yet many will spend days on jury duty, seek an order of protection in family court, or live in a neighborhood where they see the effects of the criminal justice system's revolving door."[429] And pomposity in opinion writing violates the function of justice, which is to offer just solutions, not brilliant opinions, as Piero Calamandrei wrote in his *Eulogy of Judges*:

> In the hope of seeing their "brilliant" opinions published in the law reports or having them create favorable impressions when promotion is being considered, there is a danger that some judges will treat the decisions as the point of departure for a brilliant essay rather than a bridge of passage to the just conclusion—the true function of the judicial process. The judge who is intent only upon presenting a casual reader with the delight of a literary masterpiece, instead of offering a just solution to the suffering of the parties, fails to comprehend the holy function of justice . . . .
>
> [T]he best judge is the one in whom a ready humanity prevails over cautious intellectualism. A sense of justice, the innate quality bearing no relation to acquired legal techniques, which enables the judge after hearing the facts to feel which party is right, is as necessary to him as a good ear is to a musician; for, if this quality is wanting, no degree of intellectual pre-eminence will afford adequate compensation. [430]

Judicial opinions are not meant to be literary masterpieces. Nor are they meant as vehicles to display a judge's intelligence. Whatever style a judge chooses to use in a judicial opinion, modesty is essential.

For an example of an immodest opinion, see *Bianchi v. Savage*.[431] Although the landlord-tenant issue in the case had minimal legal significance, the court treated the issue as if civilization itself depended on the court's ruling. The judge's lack of modesty is endless: (1) the use of the royal "we" and "us"; (2) the capitals; (3) the italics; (4) the italicized capitals; (5) the adverbs and adjectives ("grossly," "unjust"); (6) the Latin in the text ("contra"); (7) the metadiscourse ("we are aware that"); (8) the exclamation mark; (9) the self-congratulatory phrases (not being "blindly" bound by another court); (10) saving time and money; (11) exalting substance over form; (12) the "torch has been passed to us"; (13) "a beginning must be made"; (14) "challenged to tread" on an issue novel to the court; (15) "judicial courage"; (16) the (inaccurate) mention that the case is "of very first impression"; (17) the pretense at modesty (that some have "intellects far greater than ours"); and (18) the excessive degree of confidence in

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429. Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts are Run*, 48 HASTINGS L.J. 851, 853 (1997).

430. PIERO CALAMANDREI, EULOGY OF JUDGES 85–86 (1935) (John Clark Adams & C. Abbot Phillips, Jr., trans., 1942) (quoted with some changes in ROBERT A. LEFLAR, APPELLATE JUDICIAL OPINIONS 109 (1974)).

431. 373 N.Y.S.2d 976 (City Ct. White Plains 1975). This opinion, written by an Acting City Judge in New York, should be read in the unofficial version; the State Reporter charitably lowercased the capitals in the Official Reports.

the appellate process ("Appellate Courts will reverse us if we err"):

> We are aware this result is contra to *353 Realty Corp. v. Disla*, 81 Misc.2d 68, 364 N.Y.S.2d 676 (1974), but we do not feel bound as a matter of Stare Decisis doctrines to blindly follow the determination of the Civil Court of the City of New York, in the case at bar. To do so here would work a grossly unfair and unjust result on the parties because they would be right back in court litigating what is really only ONE KEY ISSUE in this matter. What a waste of time, talent, money, energy, and exercise in futility that would be all around!
>
> REASONING:
>
> A. This Court is now and always will be concerned with EXALTING SUBSTANCE OVER FORM, and LAW OVER PROCEDURE . . . .
>
> C. The Substantive issue before us is one of very first impression in the State of New York. We must not lack the judicial courage to plunge in where intellects far greater than ours have not yet been challenged to tread. It is questionable courage in any event because Appellate Courts will reverse us if we err. A beginning must be made and the torch has been passed to us.[432]

In *Bianchi*, the court pretended as if it had gone to a place where no one had ever gone before. Compare the *Bianchi* court's writing with Justice Holmes's more modest opening sentence in his dissent in *Haddock v. Haddock*: "I do not suppose that civilization will come to an end whichever way this case is decided."[433]

Judicial pomposity has been the subject of much satire. Mortimer Levitan, in a remarkable piece of legal satire, commented on modesty on the bench.[434] Here is an excerpt from his master-work:

> Courts, in order to make their products more acceptable, must be endowed with superhuman knowledge, infinite wisdom and virtual infallibility. Everybody, then, should be indoctrinated with the idea that judges possess those supernatural qualities—everybody, that is, except the judges themselves. A judge should always remain sufficiently human so that if he overhears a whispered conversation about a divine figure in a black robe, he'd know instantly that the subject under discussion was not the judiciary.[435]

Another favorite, from *Iolanthe*, is the Lord Chancellor, who thought highly of himself when he said:

> The Law is the true embodiment
> Of everything that's excellent.

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432. *Id*. at 978-79.
433. Haddock v. Haddock, 201 U.S. 562, 628 (1906) (Holmes, J., dissenting).
434. *See* Levitan, *supra* note 40, at 630.
435. *Id.*

It has no kind of fault or flaw,
And I, my Lords, embody the Law. [436]

Judges, however, have faults and flaws. At times they are neither excellent nor the true embodiment of the law, although they may think so.

Scholarship is humility, not the vanity press. Trial judges should cite their own opinions only if they must. On the other hand, appellate courts should quote from and cite their own opinions to show adherence to precedent. T.S. Eliot was right: "Humility is the most difficult of all virtues to achieve."[437] As former Second Circuit Judge Harold R. Medina wrote, "we cannot deny the fact that a judge is almost of necessity surrounded by people who keep telling him what a wonderful fellow he is. And if he once begins to believe it, he is a lost soul."[438]

I. DISSENTS AND CONCURRENCES

Unanimity in the law promotes collegiality, reduces the number of motions for reargument, and promotes public confidence.[439] Concurrences and dissents should not be written unless a judge has something significant to add beyond personal dissatisfaction with the result of a case.[440] Oftentimes concurrences are written to obtain a plurality.[441] Although concurrences may be helpful, unexplained concurrences have little value and end up frustrating litigants and readers.[442]

When judges write dissents, they object to the result reached in the case. The dissent is written for the future in the hope that another court, perhaps an appellate court, will agree with the reasoning: "A sense of urgency and of impending doom is almost a *sine qua non* of the dissenting voice."[443] Dissents fail when they are overly collegial and when the dissent becomes a method of

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436. PLAYS & POEMS OF W.S. GILBERT 245 (Random House 1932). According to Judge Posner, the four yellow stripes on each sleeve of Chief Justice Rehnquist's robe were "inspired by the costume worn by the Lord Chancellor in a production that Rehnquist had seen of Gilbert and Sullivan's operetta Iolanthe." RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 168 (1999). The suggestion is that the Chief Justice tried to emulate the Lord Chancellor.

437. T.S. Eliot, *Shakespeare and the Stoicism of Seneca, in* SELECTED ESSAYS 130 (Faber & Faber 1964).

438. Harold R. Medina, *Some Reflections on the Judicial Function: A Personal Viewpoint*, 38 A.B.A. J., Jan. 1952, at 107-08.

439. *But see* GEORGE, *supra* note 131, at 234 ("Separate opinions . . . compelled by an abiding belief in an intellectual, factual, or analytical difference, [signify] a healthy judiciary.").

440. *See generally* Ruth Bader Ginsburg, *Remarks On Writing Separately*, 65 WASH L. REV. 133 (1990); Alex Simpson, Jr., *Dissenting Opinions*, 71 U. PA. L. REV. 205, 216 (1923) ("[N]o dissent should be filed unless it is reasonably certain a public gain, as distinguished from a private one, will result.").

441. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 353-54 (1974).

442. Ira P. Robbins, *Concurring In Result Without Written Opinion: A Condemnable Practice*, 84 JUDICATURE 118-19 (2000) (observing that unexplained concurrences in state supreme court cases decided by a plurality have led federal courts to question their precedential value).

443. Wald, *Rhetoric of Results*, *supra* note 132, at 1413.

judicial jabbing.[444] Model Code Canon 19, at one time urged that dissents be limited, "except in case[s] of conscientious difference of opinion on fundamental principal."[445] Although Canon 19 is no longer in the *Model Code*, its message continues to be relevant.

Dissenting and concurring opinions should offer explanations to justify their use. A dissent or concurrence can have a powerful effect on the court's opinion, and the availability of concurrences and dissents limits judicial advocacy by judges in the majority, fosters judicial accountability, and provides a safety valve for judges to blow off steam.[446]

J. BOILERPLATE LANGUAGE

Judges must write quickly to keep up with ever-increasing caseloads. However, using boilerplate to speed up the opinion-writing process does not solve the problem: "The virtue of [boilerplate] is also their vice. They are a quick, cheap substitute for knowledge and independent thinking."[447]

Judges should avoid the temptation to write boilerplate decisions even when the case involves a basic, routine issue. A judge recycling language from previous decisions or hallmark cases engages in improper use of boilerplate, raising an opinion's form over its substance. A judge who uses boilerplate will fail to do justice in the case; the judge should instead write a reasoned decision based on the specific facts before the court. The purpose, audience and style of each judicial opinion may be different. But judges should not conform each case and set of facts to boilerplate decisions: "High-volume courts may wish to codify patterns for efficiency's sake, but courts should carefully examine standardized language and other fixed language for aim, audience, and style before committing to them."[448]

Judges should also refrain from relying on language from well-trod cases. The court may be faced with distinguishable facts or novel issues, and judicial efficiency might be perverted when judges use boilerplate. A judge who uses boilerplate might ignore important facts or issues that do not fit within the boilerplate opinion's four corners. It is unacceptable for a judge to force a case into a boilerplate decision. A judge's job is to maintain the integrity and vitality of the law. Cookie-cutter decisions leave readers with a sour taste.

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444. *See* Maurice Kelman, *Getting In The Last Word: The Forensic Style In Appellate Opinions*, 33 WAYNE L. REV. 247, 248 (1987).

445. CANONS OF JUDICIAL ETHICS Canon 19 (1924).

446. For two pieces on separate writing, see Hugh R. Jones, *Cogitations on Appellate Decision-Making*, 34 REC. ASS'N B. CITY OF N.Y. 543, 549-58 (1979); Stanley H. Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923 (1962).

447. MELLINKOFF, *supra* note 122, at 101 (noting that forms provide "pre-packaged law," allowing writers to save time. But forms are "taken on quick faith, by the ignorant, the timid, and the too busy—law and all; needed or not").

448. Elizabeth A. Francis, *The Elements of Ordered Opinion Writing*, 38 JUDGES' J., Spring 1999, at 8-9.

K. CLEAN-UP PHRASES

Clean-up phrases may suffice in most civil cases. Clean-up phrases include:

> "This court has considered appellant's remaining contentions and concludes that they lack merit [or that no extended discussion is necessary]."
>
> "Because we dismiss the complaint for failure to state a cause of action, we need not reach defendant's contention that the trial court's jury charge was erroneous."

In criminal cases, Judge Aldisert recommends that "whether on direct appeal or collateral review—the better practice is to list the issues that have been rejected by the court without having been discussed. This is important in order for a record to be kept of what the court has considered, no matter how frivolous the contention."[449] Many trial and appellate courts enumerate rejected issues or claims. This practice is beneficial for several reasons: It aids state trial and appellate courts assess motions; it helps federal courts on habeas corpus review; and it satisfies defendants, counsel, and the public that the court addressed all the litigants' contentions. Listing rejected claims takes but a few extra minutes and will not detract from an otherwise elegant opinion.

L. TIMELINESS

Judges have a duty to issue timely decisions. A judge who ignores or fails to issue a timely decision may face disciplinary sanctions or at least administrative correction. One New York State Supreme Court justice faced disciplinary sanctions when he delayed issuing decisions in eight cases, ranging from seven months in a tort case to over nine years in an admiralty case.[450] The litigants needed to commence proceedings in order to compel the justice to issue the decisions in four of those cases. The New York Court of Appeals noted that the justice's "handling of the cases" showed his "serious administrative failings."[451] But the court, over a strong dissent, did not discipline the judge. According to the court, the judge's actions were "not the kind of derelictions commonly associated with misconduct warranting formal penalties."[452] It held that there was "no persistent or deliberate neglect of his judicial duties rising to the level of misconduct."[453]

It is hard to fathom why the court did not find that the justice's actions rose to

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449. ALDISERT, *supra* note 64, at 87-88.

450. *In re* Greenfield, 557 N.E.2d 1177, 1177-78 (N.Y. 1990).

451. *Id.* at 1178. The court reasoned that it was the justice's own optimism in assuming that he could "do more than his share" that led to his predicament. Ultimately, the court reasoned that it was the justice's stubbornness and perfectionism that contributed to his situation. It was his failure "to ask for help" or to "write a decision which did not meet the high standards which he had set for himself" that led to the excessive delays.

452. *Id.* at 1180.

453. *Id.* at 1178.

the level of "persistent or deliberate" neglect of judicial duties. One reason for the court's decision might have been that the court sympathized with the justice's predicament and took into account his experience and commitment. Most believe, however, that judges who fail to issue timely decisions act unethically, and numerous courts have disagreed with the *Greenfield* decision.[454] Judges must, according to Model Code Canon 3 A(5), dispose of all court business promptly. Late justice is injustice.

VIII. THE ROLE OF LAW CLERKS

Using law clerks to research and draft opinions is a necessity for all judges with clogged calendars.[455] Most opinion writing has evolved into a process between the judge and the law clerk.[456] Using law clerks to draft opinions is not unethical, but the judge's voice and reasoning must resonate through the opinion. The law clerk should not be the arbiter and the judge merely the overseer.[457]

Justice Harlan Fiske Stone allowed his law clerk, Louis Lusky, to write the most significant footnote in Supreme Court history.[458] Footnote four of *United States v. Carolene Products*, which created the strict-scrutiny standard in constitutional jurisprudence, is a startling example of how law clerks can mold the law.

In his book about the Supreme Court, Chief Justice Rehnquist explained the contributions his law clerks made to the opinion writing process.[459] He told his law clerk how he voted in conference with the other Justices and then assigned the clerk the task of writing the opinion's first draft.[460] The Chief Justice then edited the opinion with the final say on the opinion's content and language.[461] This process is common among appellate judges. Modern law clerks have the

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454. *See, e.g.*, *In re* Kilburn, 599 A.2d 1377, 1378 (Vt. 1991) (collecting cases).

455. *See* Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 697 (2001); Gerald Lebovits, *Judges' Clerks Play Varied Roles in the Opinion Drafting Process*, 76 N.Y. ST. B.J., July/Aug. 2004, at 34, 34 [hereinafter Lebovits, *Judges' Clerks*]. According to Judge Posner, "most judicial opinions are written by the judges' law clerks rather than by the judges themselves . . . ." POSNER, REPUTATION, *supra* note 382, at 148; *see also* Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1100 (2004) (recognizing "reality of current judicial life that few judges draft their own opinions from scratch"); Wichern, *supra* note 67, at 647 ("Ideally, a presiding judge should write the first draft of an opinion. As caseloads have grown, this ideal has arguably become unattainable.").

456. Norman, *Dynamics*, *supra* note 6, at 175.

457. *See* FEDERAL JUDICIAL CENTER, *supra* note 48, at 11; *see also* WITKIN, *supra* note 79, at § 10, at 16 ("It is the task of stating the reasons for the decision, not the authority to decide, that is delegated.").

458. *See* Laura Krugman Ray, *Judging the Justices: A Supreme Court Performance Review*, 76 TEMP. L. REV. 209, 215 (2003).

459. *See* WILLIAM H. REHNQUIST, THE SUPREME COURT 260-63 (rev. ed. 2001).

460. *See id.*

461. *See id.*

power to shape an opinion because they create the first draft.[462] With the increased responsibility law clerks bear, some see modern judges as administrators who manage judicial work through their law clerks rather than as traditional jurists.[463]

Opinion writing is collaborative between judge and clerk, but decision-making is not.[464] Whether the law clerk prepares the initial drafts or the final edits, the entire adjudicative function and decision-making process must remain exclusively with the judge. To maintain control, judges, when using law clerks, should keep in mind the following principles. First, judges should always make sure that they discuss the opinion with the clerk and that the clerk is familiar with the facts underlying the opinion.[465] A judge who does not keep close tabs on the opinion will be unable to gauge whether the opinion is written correctly. The judge will be able to catch only the most glaring errors.[466] Second, judges should listen to their clerk's feedback and take the clerk's views seriously.[467] Listening to the clerk helps strengthen the relationship between the judge and the clerk and encourages an open discussion of the issues involved in the opinion.[468] Third, notwithstanding the clerk's involvement, "[e]very word and citation must be the authentic expression of the judge's thoughts, views, and findings."[469]

Although the opinion must be the judge's work, it is important for judges who rely on their clerks to keep an open mind and communicate with the clerk. The clerk might not have the judge's experience, but a clerk is doing the research and has greater familiarity than the judge with the facts and law.[470] Keeping an open dialogue with the clerk ensures that the clerk is free to express views about the opinion, even when the clerk disagrees with the judge.[471] If the clerk happens to be correct, then an open relationship will foster a better opinion. Along similar lines, a judge should not decide the outcome of a case and then force the clerk to write within the confines of that outcome.[472] The judge must be flexible if it turns

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462. Lebovits, *Judges' Clerks*, *supra* note 455, at 35. Because of the involvement of law clerks in drafting and decision making, some consider it unethical for law clerks to write judicial opinions. *See, e.g.*, McGowan, *supra* note 36, at 555 ("Judges should write their own published opinions. They should not have law clerks or anyone else do the writing for them.").

463. *See, e.g.*, Judith Resnik, *Judicial Independence and Article III: Too Little and Too Much*, 72 S. CAL. L. REV. 657, 665 (1999).

464. *See* Norman, *Dynamics*, *supra* note 6, at 175.

465. *Id.* at 176 (focusing on the role of legal staff in appellate courts, but most points in the article are useful for any judge with legal staff).

466. *Id.*

467. *Id.* at 177.

468. *Id.*

469. Lebovits, *Judges' Clerks*, *supra* note 455, at 35; *accord* Kozinski, *supra* note 455, at 1100 (explaining that a judge must "study an opinion closely, deconstruct its arguments, examine key portions of the record and carefully parse the precedents" before the opinion may be called the judge's own).

470. Norman, *Dynamics*, *supra* note 6, at 177.

471. *Id.*

472. *Id.*

out that precedent contradicts the judge's initial thoughts. Judges should delegate work to their clerks if necessary, but the delegation should not result in the clerk's usurping the judge's job.[473] Instead, judges should stay abreast of the opinion writing. Litigants, lawyers, and the public expect judges, not clerks, to decide cases.

To avoid the appearance that another individual created the work, a judge should not credit the law clerk's work on an opinion.[474] In New York, the Law Reporting Bureau has put into effect the Court of Appeals's policy forbidding judges from thanking their law clerks or interns in opinions. The Law Reporting Bureau will not print any part of an opinion that acknowledges the contributions of a law clerk or intern. Before this rule went into effect, judges lauded the clerks' and interns' contributions. For example, in *Wolkoff v. Church of St. Rita*, the judge thanked his summer intern for the contributions he made to the opinion: "The hard work, thorough research and scholarship of Edward Larsen, New York Law School Intern participating in the Richmond County Bar Association Summer Intern Program, is gratefully acknowledged and in large measure credited in the formation of this opinion. Mr. Larsen has the sincere thanks of this Court."[475] Today, this type of praise could pass for a letter of recommendation.

The opinion in *Acceptance Insurance Company v. Schafner*[476] is an even more extreme example. There, the judge's contribution to an opinion issued under his name was a footnote stating that the opinion was "prepared by William G. Sommerville, III, Law Clerk, in which the Court fully concurs."[477] The example is extreme in that the judge acknowledges that he wrote only the footnote to the opinion and that the remaining portion of the opinion was the law clerk's handiwork. This creates a topsy-turvy world—one in which the clerk has been elevated to the position of judge and the judge has been lowered to the position of clerk.

The process borders on the unethical when judges abdicate their judicial responsibility and leave the entire decision in the law clerk's hands either by failing to follow up on the law clerk's research or by failing to edit the law clerk's writing. The judge at this point hands the reigns to an unelected and unappointed court employee. Judges who give the entire duty of writing opinions to law clerks harm the litigants, the legal profession, the public, and themselves.

A judge may use a law clerk, student intern or extern, special master, or referee to assist in opinion writing. A judge may not, however, use an outside expert for that purpose. In *In re Fuchsberg*, an associate judge of the New York Court of Appeals asked law professors to draft his opinions in three cases before the

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473. *Id.* at 176-77.
474. *See, e.g.*, Parker v. Connors Steel Co., 855 F.2d 1510, 1524-25 (11th Cir. 1988).
475. *See* Wolkoff v. Church of St. Rita, 505 N.Y.S.2d 327, 334 (N.Y. Sup. Ct. 1986) (Kuffner, J.).
476. 651 F. Supp. 776 (N.D. Ala. 1986) (practice criticized in *Parker*, 855 F.2d at 1524-25).
477. *Id.* at 778.

court.[478] The judges of the Court of Appeals, who reviewed their colleague's disciplinary complaint, rejected the judge's "explanation that he looked upon the law professors he consulted as 'ad hoc' law clerks."[479] The court censured the judge and noted that "[t]he substantial incorporation of outside experts' language in a Judge's opinion suggests, without more, that the expert is influencing the decision-making process. To that extent such a practice impairs the public's confidence in the independence and integrity of the judiciary . . . ."[480] The court expressed its hopes that the judge, and others similarly situated, would attend to the ethical canons in the future "and act in a way that does not cast the slightest doubt on the independence, impartiality, and integrity of the judiciary."[481]

In another disciplinary proceeding, a Circuit Court Judge from Milwaukee County hired a law professor and friend to write thirty-two opinions. The law professor had extensive discussions with the judge about dispositive motions and assisted the judge in drafting opinions. The Supreme Court of Wisconsin found that the judge violated the former *Code of Judicial Ethics* rule prohibiting a judge from having private communications designed to influence the judge's decision.[482] The court also found that the judge engaged in "ex parte communications."[483] Ultimately, the court found that Judge Tesmer deserved a reprimand for her actions. Judges who engage in similar conduct can and should be reprimanded, censured, or removed from office.

IX. CONCLUSION: WRITING IN THE MIDDLE

Is it more ethical to write in the pure style or the impure style? Where does the answer lie? Purists include Justices Brandeis, Brennan, Cardozo, Frankfurter, and the second Harlan.[484] Impurists include Justices Black, Douglas, Learned Hand, Holmes, and Jackson.[485] Although individual tastes differ, one would be hard-pressed to say that any of these judges could not write well. Thus, like many things, the answer lies in the middle. The most effective opinions will incorporate ideas from both the pure and impure styles: an effective, ethical opinion will incorporate the techniques that make impure opinion readable as well as the techniques that make pure opinions detailed sources of legal information.

Judicial opinions should be the result of a dynamic and disciplined interplay of

478. *In re* Fuchsberg, 426 N.Y.S.2d 639, 646 (N.Y. Ct. Jud. 1978) (per curiam).
479. *Id.* at 649.
480. *Id.* at 648.
481. *Id.* at 649.
482. *In re* Judicial Disciplinary Proceedings Against Tesmer, 580 N.W.2d 307, 309 (Wis. 1998) (per curiam).
483. *Id.* at 316.
484. Posner, *Judges' Writing Styles*, *supra* note 80, at 1432.
485. *Id.*

conceptual and empirical analysis.[486] Nothing breeds more disrespect and contempt for the judiciary than the appearance that a court treated one litigant differently from the other.[487] At a basic level, an opinion must convince its audience—the judiciary, lawyers, or the public—that the judge considered all points of view and "that opposing evaluations of the case have been understood and seriously weighed."[488]

Much of the practice of law involves communicating with peers, albeit in a formalized manner.[489] Judges participate in this dialogue through the words in their opinions. The role of a judicial opinion extends beyond merely functioning as precedent. Judicial opinions now serve as teaching tools for students and lawyers, as primers on law, and as guides for future action. But some ideals have not changed. As stated over 200 years ago, writing opinions "will ensure *a careful examination of the cases*, *and result in well considered opinions*, because they must come before the jurists of the country and be subjected to the severest criticism."[490]

To be ethical, judicial opinions must live up to high moral standards. Judges must promote the image of fairness and integrity in the judicial system. Judges must be free of bias and the appearance of bias, treat attorneys and litigants with dignity and respect, and act as role models for the legal profession. Judges should follow these principles in all aspects of their professional lives, especially when writing judicial opinions. Judges must never lose perspective on their place in the larger judicial system. From day to day, a judge might be pressured, angry with the lawyers or litigants, or confronted with an unusual or humorous case. In the process of writing opinions and deciding cases, it is possible to develop bad habits or to forget that a judicial opinion is meant to do more than just resolve a controversy for those before the court in that moment of time. Each judicial opinion contributes to the body of the common law and in some way—small or large—affects the public perception of the judiciary. When judges write, they must have ethics on their minds. Doing so improves the judiciary, the legal profession, and the public's perception of the judicial branch.

Crafting a judicial opinion that is respectful, well-reasoned, factually honest, and carefully written encourages public respect for the judiciary and acceptance of its opinions.[491] Only the "kind of law that conforms to the ideals of

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486. John B. Nesbitt, *The Role of Trial Court Opinions in the Judicial Process*, 75 N.Y. ST. B.J., Sept. 2003, at 39-40.

487. *Id.*

488. Wanderer, *supra* note 243, at 53 (quoting Gibson, *supra* note 70, at 124).

489. Nesbitt, *supra* note 486, at 40.

490. Powers v. City of Richmond, 893 P.2d 1160, 1195 (Cal. 1995) (Lucas, C.J., dissenting) (citing 2 E.B. Willis & P.K. Stockton, Debates and Proceedings of the Constitutional Convention of the State of California 951, col. 1 (1880) (italics in original)) (quoting delegate Wilson during 1879 California Constitutional Convention).

491. Wanderer, *supra* note 243, at 51.

democracy"[492] will contribute to society's growth. Every judge assumes the responsibility to ensure that justice is dispensed. For "[i]f the function of opinions is to inform or to persuade, judges have failed unless their words actually convey their ideas to their readers."[493] To fulfill this role effectively, judges must be able to explain where justice lies.

492. *Id.* (quoting Palmer, *supra* note 4, at 885).
493. Wanderer, *supra* note 243, at 61.