Columbia Law School

From the SelectedWorks of Hon. Gerald Lebovits

June, 2019

Thoughts on Legal Writing from Fred Rodell

Gerald Lebovits

Available at: https://works.bepress.com/gerald_lebovits/339/

NEW YORK STATE BAR ASSOCIATION
Journal
NYSBA
JUNE/JULY 2019
VOL. 91 | NO. 5

DIVERSITY: A Moral Imperative

Stonewall 50: Reflecting on the LGBTQ Rights Movement in New York State

The NY Attorney Who Fought for Marriage Equality

What's In a Name? For Transgender People, Everything

A Lesbian Lawyer Looks at "LGBT" Diversity

LAW PRACTICE MANAGEMENT: THE YIN-YANG OF ONLINE AND IN-PERSON NETWORKING

Thoughts on Legal Writing from the Greatest of Them All: Fred Rodell

"There are two things wrong with almost all legal writing. One is its style. The other is its content."[1]

Fred Rodell, a Yale law professor for more than four decades, is most famous for his biting commentary on the American legal profession – in particular, on its legal writing. He was among the first to advocate for clear, accessible legal language. He's also the founder of America's legal-writing curriculum, inspiring the legal-writing courses now mandatory at nearly every law school in the common-law world. Throughout his illustrious career, he published many works, including *Woe Unto You, Lawyers!* in 1939. But it's his 1936 *Virginia Law Review* article, "Goodbye to Law Reviews," that landed him an immortal place in legal education.

Fred Rodelheim Jr. was born in 1907 in Philadelphia, Pennsylvania, changing his name to Rodell when he was 16. He attended Haverford College (1926), going on to graduate from Yale Law School (1931). He had no desire to practice law. He never took the bar exam. Academia was his outlet for his begrudging passion for the law.

During his time as a Yale professor, Rodell, although well-liked by many, never shied from making enemies, including Harvard Law School and Justice Felix Frankfurter.[2] He had no fear critiquing his own alma mater, a practice that many, including himself, believed barred him from receiving an endowed faculty chair.[3]

Rodell passed away in 1980 at 73, refusing to allow his loved ones to hold a funeral

Gerald Lebovits (GLebovits@aol.com), an acting Supreme Court justice in Manhattan, is an adjunct at Columbia, Fordham, and NYU law schools. For her research he thanks Francesca Nagle (Benjamin N. Cardozo School of Law), his judicial fellow.

or memorial service for him. But his legacy continues through his words, his students, and the continuous development of legal-writing training for law students, lawyers, and judges.[4]

STYLE

> *"It does not matter that even in the comparatively rare instances when people read to be informed, they like a dash of pepper or a dash of salt along with their information. They won't get any seasoning if the law reviews can help it."*[5]

When Rodell published his contempt for law reviews, he took his first swings at their writing style. His main concern with law journal writing and the profession altogether was with tone.

Rodell's article immediately disputed what he saw as legal writing's "cardinal principle": that "nothing may be said forcefully and nothing may be said amusingly."[6] When he discussed the issue of "force," he spoke directly to the over use of passive and metadiscoursive phrases like "It would seem" and "It is suggested," on which writers lean to avoid discrediting their words by attaching "pronouns of the first person."[7]

Rodell observed that lawyers who personalize their thoughts delegitimize their claims. He found it absurd that a professional "taboo" prohibits stating that a Justice, "in a long-winded and vacuous opinion, managed to twist his logic and mangle his history so as to reach a result which is not only reactionary but ridiculous." The profession's norm is to promote the perception of objectivity and detachment. Rodell wrote that "[l]ong sentences, awkward constructions, and fuzzy-wuzzy words that seem to apologize for daring to venture an opinion are part of the price the law reviews pay for their precious dignity."

On humor, Rodell stated that "I know no field of learning so vulnerable to burlesque, satire, or occasional pokes in the ribs as the bombastic pomposity of legal dialectic."[8] Again, Rodell pointed to the profession's need to be stuffy. As he later claimed, the desire for "The Law" to remain inaccessible, understood only by those who've learned the jargon, may be its greatest shortcoming. "[T]he English language," he explained, "is most useful when it is used normally and naturally," and normal people turn to humor to add dimension to their thoughts.[9] Why, he noted, should this be forbidden when discussing the law?

Rodell militated against footnotes, too. He stated that "[e]very legal writer is presumed to be a liar until he proves himself otherwise with a flock of footnotes."[10] Rodell opined about two types of footnotes: the explanatory and the probative.[11] The explanatory footnote allows authors to articulate the "obscure and befuddled" argument in the text.[12] The probative footnote, "a long list of names of cases that the writer has had some stooge look up and throw together for him, ... [a]re what make the legal article very, very learned."[13] A footnote, to Rodell, is something that's become "the thing to do" but is rarely useful.[14] Writers should make their case in the text without restating it at the bottom of a page. Alternatively, a writer whose points are made succinctly shouldn't try to conform to a lawyer's stylistic norm. "In any case," Rodell reasoned, "the footnote foible breeds nothing but sloppy thinking, clumsy writing, and bad eyes."[15]

CONTENT

> *"[T]he articulate among the clan of lawyers might, in their writings, . . . recognize that the use of law to help toward their solution is the only excuse for the law's existence, instead of blithely continuing to make mountain after mountain out of tiresome technical molehills."*[16]

Rodell minced no words introducing his readers to the second "thing wrong" in legal writing. It's "the content of legal writing that makes the literature of the law a dud and a disgrace."[17] The legal profession, although drowning in pomp and circumstance, has a critical role in society. The real "job" of lawyers is to use their advanced knowledge of the law and the legal system to solve problems. Rodell's concern is that the profession has taken a turn too far into the theoretical realm and forgotten its practical role. A serious imbalance arises while lawyers and legal scholars think about hurdles in the law, rather than tackling the tangible issues before them. The irony of Rodell's sentiment can't be understated. He chose never to practice. He dedicated his legal mind, instead, to the scholarly pursuit of the law.[18]

IMPACT

> *"[T]he law is nothing more than a means to a social end and should never, for all the law schools and law firms in the world, be treated as an end in itself."*[19]

Following Rodell's death in 1980, a student reflected on the main lesson he learned from his former professor: "The purpose of our writing is to explain and persuade. We are more likely to be successful in those goals if we

are able to express ourselves simply and clearly."[20] This student, Charles Alan Wright, was in Rodell's first-ever Legal Writing Seminar. Rodell's seminar became the first of its kind; it taught law students how to write like and for non-lawyers.[21]

At the time, Wright regaled, Yale Law Dean Wesley A. Sturges was so intrigued by this new way to teach he dropped by the class.[22] Rodell asked Sturges to read aloud a paragraph from an article Sturges wrote in the *Yale Law Journal*. Rodell then asked Sturges to explain what that paragraph meant. When the Dean obliged, in conversational English, Rodell inquired: "Why didn't you write it that way?"[23]

Ultimately, Rodell's seminar laid the foundation for a legal-writing curriculum many other law schools adopted, an accomplishment that made him proud.[24] As longtime friend Justice William O. Douglas wrote upon Rodell's retirement, "[o]ne who took his course did not memorize; he thought in depth."[25]

Law school deans and future professors aren't the only ones Rodell influenced. Justice Abe Fortas, a former student, was one of several Supreme Court Justices to cultivate a relationship with Rodell. Upon the professor's passing, Justice Fortas wrote, "Here's to Give 'em Hell Fred Rodell. Irresponsible, irreplaceable, irrecusable, irrefragable, irrefutable, irreversible, irrevocable, irremovable, and totally irresistible."[26] Hanging in Rodell's home was a picture of the 1968 Supreme Court. On it, a note from the Chief Justice: "To Fred Rodell, [in] whom this court has had no greater friend, from his friend Earl Warren."[27]

In his 2007 opinion in *Funny Cide Ventures, LLC v. Miami Herald Pub. Co.*, Florida Judge Gary M. Farmer Sr. wrote an entire foreword announcing his stylistic shift due to a "maverick law Professor."[28] He quoted Rodell's 1936 "Goodbye to Law Reviews" and expressed his desire to "make a good act of contrition" and "do some penance" for his "generous contribution to this legal ennui" against which Rodell fought so hard.[29] Judge Farmer sought to build off Rodell's call for clarity and accessibility by sometimes bringing into an opinion "some of the forms associated with fiction."[30] "Good fiction," he wrote, "is set in human experience."[31] These words embody Rodell's message.

In 2014, the *Virginia Law Review* published an article revisiting Rodell's now-infamous piece from 80 years earlier. Although the author, Judge Henry T. Edwards, took issue with Rodell's harsh voice, Edwards agreed with many of the views, chief among them the push for the legal education to emphasize practice over theory.[32] Rodell would be pleased to see scholars care about putting knowledge to use.

Fred Rodell's teachings on writing have had more impact on legal-writing education than any law professor before or since. The problems he critiqued haven't been wholly corrected, as he himself noted in the quadranscentennial reprinting and revisiting of "Goodbye to Law Reviews."[33] Much legal writing remains inaccessible and opaque. Luckily, Rodell left us with some humorous advice: "The best way to get a laugh out of a law review is to take a couple of drinks and then read an article, any article, aloud. That can be really funny."[34]

The Legal Writer will continue its series on what we can learn from the great writing teachers—lawyers and non-lawyers.

---

1. Fred Rodell, *Goodbye to Law Reviews*, 23 Va. L. Rev. 38 (1936-1937).
2. Charles A. Wright, *Goodbye to Fred Rodell*, 89 Yale L.J. 1455, 1456 (1980).
3. Jean R. Hailey, *Fred Rodell Dies*, Washington Post (June 7, 1980), https://www.washingtonpost.com/archive/local/1980/06/07/fred-rodell-dies/eb21df2d-3228-4611-a08a-0b9754d52535/?noredirect=on&utm_term=.9c6db7d2f252.
4. Wright, *supra* note 2, at 1455.
5. Rodell, *supra* note 1, at 39.
6. *Id*. at 38.
7. *Id*. at 39.
8. *Id*. at 40.
9. *Id*. at 45.
10. *Id*. at 41.
11. *Id*.
12. *Id*. at 40.
13. *Id*. at 41.
14. *Id*.
15. *Id*.
16. *Id*. at 43.
17. *Id*. at 42.
18. Reed Dickerson, *Review of* Woe Unto You, Lawyers! *by Fred Rodell,* 25 Wash. U. L.Q. 296 (1940) (book review), *available at* https://openscholarship.wustl.edu/law_law-review/vol25/iss2/5/.
19. Rodell, *supra* note 1, at 45.
20. Wright, *supra* note 2, at 1457-58.
21. *Id*. at 1457.
22. *Id*. at 1458.
23. *Id*.
24. Hailey, *supra* note 3.
25. William O. Douglas, Foreword, 84 Yale L.J., 1, 2 (1974).
26. Hailey, *supra* note 3.
27. Sydney Zion, *Fred Rodell*, The Nation (June 21, 1980), https://www.thenation.com/article/fred-rodell/.
28. *Funny Cide Ventures, LLC v. Miami Herald Pub. Co.*, 955 So. 2d 1241, 1243 (Fla. Dist. Ct. App. 2007).
29. *Id*.
30. *Id*.
31. *Id*.
32. Harry T. Edwards, *Another Look at Professor Rodell's* Goodbye to Law Reviews (Nov. 20, 2014, 12:10 PM), http://virginialawreview.org/sites/virginialawreview.org/files/Edwards_Book.pdf.
33. Fred Rodell, *Goodbye to Law Reviews Revisited*, 48 Yale L.J. 279, 280 (1962).
34. Rodell, *supra* note 1, at 40.