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Judges' Writing Styles (And Do They Matter?)

Richard A. Posner†

I have been interested in the topic of judges' writing styles since I became a judge in 1981, and have written a fair amount about it.¹ But rereading what I have written I find that it lacks system and I welcome this opportunity to begin to repair the lack.

I shall start by trying to explain the elusive concept of "style" and to distinguish it from related concepts, notably "rhetoric." I shall also try to distinguish "good" from "bad" style and then, abstracting from the question of quality, sketch the two fundamental judicial styles. Borrowing a distinction from Robert Penn Warren, I call these styles the "pure" and the "impure" and associate them with two fundamental jurisprudential stances, the "formalist" and the "pragmatist." Formalists tend to prefer the pure style, pragmatists the impure. Last I consider whether judicial style has more than symptomatic significance—that is, whether it has significance independent of the clues (not always reliable, as we shall see) that it provides to the jurisprudence of the writer.

I. WHAT IS "STYLE"?

"Style," even when confined to writing (as distinct from a tennis player's or a dandy's "style"—or for that matter Oliver Wendell Holmes's "style," if one is thinking of the whole person or persona, rather than just the writing; or even "style" as a synonym for culture²), is one of those words that we are entirely

† Chief Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer in Law, The University of Chicago. I thank Guido Calabresi, William Domnarski, Frank Easterbrook, Ward Farnsworth, Robert Ferguson, William Landes, Lawrence Lessig, Martha Nussbaum, Cass Sunstein, and Erika Vanden Berg for their very helpful comments on a previous draft.

¹ See, in particular, *The Federal Courts: Crisis and Reform* 107-15, 230-36 (Harvard, 1985); *Goodbye to the Bluebook*, 53 U Chi L Rev 1343 (1986); *Law and Literature: A Misunderstood Relation* 281-99 (Harvard, 1988); *Cardozo: A Study in Reputation*, 33-57, 125-43 (Chicago, 1990). Interest in the subject is, I think, growing. See, for recent examples, Haig Bosmajian, *Metaphor and Reason in Judicial Opinions* (Southern Illinois, 1992); Mark Tushnet, *Style and the Supreme Court's Educational Role in Government*, 11 Const Commentary 215 (1994).

² The sense in which it is used in Peter Gay, *Style in History* (Basic Books, 1974),

comfortable in using but that is a devil to define. We can think of it most broadly as the specific written form in which a writer encodes an idea, a "message," that he wants to put across. His tools of communication are, of course, linguistic. But they include not only vocabulary and grammar but also the often tacit principles governing the length and complexity of sentences, the organization of sentences into larger units such as paragraphs, and the level of formality at which to pitch the writing. These tools are used not just to communicate an idea but also to establish a mood and perhaps a sense of the writer's personality.

The disadvantage of so broad a definition of "style" is that it merges style with rhetoric, and the two terms, although close in meaning, are best kept apart. "Rhetoric" is both broader and narrower than "style." It is broader because it has, since Aristotle, connoted a process of reasoning as well as the medium of verbal expression, a process that Aristotle contrasted with logic and other modes of exact reasoning as being the mode appropriate for debate and deliberation over matters of deep uncertainty.³ Some modern defenders go further and equate rhetoric with right reason, but we need not follow them.⁴

As a description of the medium of expression, however, "rhetoric" is narrower than "style," because its focus is on persuasion and that is only one function of expression. A judge might crack a joke in an opinion merely to amuse, or to show off, or to grip the reader's attention and thus make the opinion more likely to be remembered. The joke would affect the style of the opinion but it might not be intended to induce agreement with the outcome—though then again it might, by making the reader more receptive, as with the conventional speaker's opening joke.

Here is another stab at definition: "style" is what is left out by paraphrase. It thus is ornamental (which is not to say unimportant), or at least optional, dispensable⁵—or if not entirely

and in Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown, 1960). "[S]tyle" for this book refers to style of work, of craftsmanship, of doing, not to individual or period literary style." Llewellyn, *The Common Law Tradition* at 464.

³ For a recent analysis of legal rhetoric in the Aristotelian sense, see Lawrence Douglas, *Constitutional Discourse and Its Discontents: An Essay on the Rhetoric of Judicial Review*, in Austin Sarat and Thomas R. Kearns, eds, *The Rhetoric of Law* 225 (Michigan, 1994).

⁴ See references in Posner, *Law and Literature* at 271 (cited in note 1).

⁵ Evidence that style is indeed dispensable at least in some forms of writing is that a badly written article by an economist is no less likely to be accepted for publication in a premier economic journal than a well written one. David N. Laband and Christopher N. Taylor, *The Impact of Bad Writing in Economics*, 30 *Econ Inquiry* 673 (1992).

dispensable, then an envelope that can come in different shapes and thicknesses. Students of trademark law will recognize the analogy to "trade dress." The very possibility of paraphrase demonstrates that content is compatible with a variety of styles and is therefore separable from any particular one, separable even in a sense from style itself. Some writings, it is true, are not effectively paraphrasable. This is true of most (short) poems. Whatever function poems serve, or at least whatever use we moderns make of poems, it is not to encode messages that can be paraphrased. So style is not optional in poetry. Two poems written in different styles might have the same paraphrasable content (about love, or nature, or God) but they would not have the same meaning. Some judicial opinions—those written by the masters—would lose something, and maybe a lot, in being paraphrased. But their essential meaning would not be lost. Even the best, the most distinctive, the most eloquent judicial opinion could be rewritten in a very different style and yet convey enough of the meaning of the original to be considered a close substitute for it.⁶

This notion of style as the range of options for encoding the paraphrasable content of a writing⁷ is useful for my purposes, as is the related notion of style as "good" writing. Once we acknowledge that there are different ways to "write up" an idea or other message, we open up the possibility that there is a better and a worse way. We enter the domain of handbooks of style, which contain all sorts of useful precepts⁸ that judges—and their ghost-

⁶ The contrary view (that judicial writing is as unparaphrasable as poetry—is indeed a form of poetry), the view of Richard Weisberg, is effectively criticized in Note, *Reading Literature/Reading Law: Is There a Literary Jurisprudence?*, 72 Tex L Rev 135, 141-44 (1993).

⁷ "Style" is used in approximately this sense in the discipline of stylistics, which studies writing styles, often with aid from statistics on sentence length, sentence type, and frequency of parts of speech. See, for example, Lucy Pollard-Gott and Lawrence T. Frase, *Flexibility in Writing Style: A New Discourse-Level Cloze Test*, 2 Written Communication 107, 108-09 (1985).

⁸ See, for example, Joseph M. Williams, *Style: Ten Lessons in Clarity and Grace* (Scott, Foresman, 2d ed 1985). The best style "handbook," though, is still George Orwell's essay, *Politics and the English Language*, in Sonia Orwell and Ian Angus, eds, 4 *The Collected Essays, Journalism and Letters of George Orwell* 127 (Camelot, 1968). There are actually handbooks of judicial style. They more or less parallel the general style handbooks, and are largely ignored—even, I think, unknown. See, for example, American Bar Association, *Judicial Opinion Writing Manual: A Product of the Appellate Judges Conference, Judicial Administration Division* 37-64 (West, 1991) (chapter entitled "Writing Style"); Ruggero J. Aldisert, *Opinion Writing* 177-225 (West, 1990) (last part of book, entitled "Writing Style"); Federal Judicial Center, *Judicial Writing Manual* 21-26 (US GPO, 1991); Joyce J. George, *Judicial Opinion Writing Handbook* 261-362 (William S. Hein, 3d

writers, the law clerks—regularly ignore. Such precepts as: go easy on adjectives, adverbs, italics, and other modifiers, qualifiers, and intensifiers; alternate (irregularly, not metronome style) long and short sentences; don't end a paragraph with a preposition; don't use agentless passives; go easy on parenthetical and other qualifying phrases; try to begin and end sentences with important words, because the first and the last positions in a sentence are the most emphatic; avoid jargon and clichés; punctuate for clarity rather than to conform to grammarians' fusty rules for the placement of commas and other punctuation marks; be clear; go easy on quotations, especially long block quotations; pay some attention to the music of one's sentences; don't bust a gut to avoid ever splitting an infinitive; disregard deservedly obscure and unobserved rules, such as never begin a sentence with "But" or "And."

Many judges and lawyers are disdainful of "fine" writing. They think it unprofessional, "literary," affected, overrefined. They are mistaken. One can be as "professional" as one likes yet still write well in the sense of avoiding stylistic "mistakes" that obscure readability with no offsetting benefit to any purpose of the writer.

Style as discretionary (as underdetermined by content, by meaning) and style as writing well, point to a third sense of style—style as "literary." Writings count as literature when they are detachable from the specific setting in which they were created⁹—when, in other words, they have something (no one is quite sure what) that enables them to become or to be made meaningful to an audience different from the one for which they were written. Style is one of the features of written expression that facilitates this portability, for style is often less local, less time- and place-bound, than content (though sometimes more: style can be an impediment to understanding). We might have lost interest in a particular legal issue discussed in a judicial opinion, but the style of the opinion may make us want to read the opinion anyway; and then the opinion will have outlived the occasion of its creation.

The effect of style on portability is an important factor in the reputation of judges. Even a brilliant analysis of yesterday's legal

ed 1993) (chapter entitled "Writing Effectively"); Richard C. Wydick, *Plain English for Lawyers*, 66 Cal L Rev 727 (1978).

⁹ John M. Ellis, *The Theory of Literary Criticism: A Logical Analysis* 42-53 (California, 1974).

problems is unlikely to hold much current interest, especially since a major effort at historical reconstruction may be required to determine that the analysis *is* brilliant. The sparkling, vivid, memorable opinion is not so chained to the immediate context of its creation. It can be pulled out and made exemplary of law's abiding concerns.

There is still a fourth sense of style that I need to bring before the reader: style as signature, or "voice." We "recognize" a person by his "voice," in both the literal and the figurative senses of these words. At a time when judges were thought to be (and perhaps thought themselves to be) oracles in almost a literal sense, the ideal judicial voice would have sounded something like the voice of God. But here I begin to stray into the issue of the relation between judicial style and judicial philosophy, and that is for later.

The idea of style as voice plays a rationalizing role with respect to the contemporary scandal (as some think it to be) of delegating opinion writing to law clerks. If you try to embarrass a professor of constitutional law by saying, "What are you doing teaching 'opinions' written by your last year's law students? Why not just teach the answers they gave to your exam questions?" the professor will reply defensively: "I know that Justice X and Justice Y delegate much of the opinion writing in their chambers to their law clerks, and yet each chambers has a distinctive 'voice.' X's opinions don't sound like Y's—they sound like X's, even though written by a constantly reshuffled deck of law clerks. The voice of the judge is audible." Everything in this imaginary quotation is true except the last sentence. Law clerks often prepare for their job by reading a bunch of their boss's old opinions (sometimes the judge tells them to do this), and then model their own style on that of the opinions they read. By this process, a chambers style, not perhaps *very* distinctive but distinctive enough to be recognizable, does indeed evolve. All that this shows, however, is that style can be a corporate characteristic.

One can imagine styles that are quite similar but that can still be ranked by quality, either because the better writer has avoided the pitfalls against which the handbooks warn or because he or she is a gifted writer—one who writes well without regard to, and often while defying, the codified rules. But one can also imagine styles that differ not in quality but in kind—styles that have different vocabularies, diction, "tone," and so forth, and yet are equally good from a stylistic standpoint (that is, apart

from their content). This possibility, which is fundamental to the question of judicial style, is explored in the next Part.

II. THE PURE AND THE IMPURE JUDICIAL STYLE

Anyone who has read a large number of judicial opinions from different courts and different eras, and who is sufficiently interested in style to have registered the stylistic aspects of the opinions, will have noticed that judicial style is not uniform. I am speaking here of uniformity of kind rather than of quality, though there obviously is great variance in the latter as well. Some opinions have a lofty, formal, imperious, impersonal, "refined," ostentatiously "correct" (including "politically correct"), even hieratic tone, while others tend to be more direct, forthright, "man to man," colloquial, informal, frank, even racy, even demotic.

Tone depends on many things, notably though not only the choice of words and phrases and the decision to embrace or avoid contractions, colloquialisms, humor, and jargon. By "jargon" I do not mean the names of legal doctrines, which could hardly be dispensed with in judicial opinions. I mean turns of phrase characteristic of legal writing but avoided in good writing—such words or phrases as "absent" (when used as a preposition), "implicate" (to mean relate to or invoke, as in "the due process clause implicates privacy concerns"), "ambit," "chilling effect" (to describe the effect of the regulation of speech on the marketplace of ideas and opinions), "-based" (as in "autonomy-based justification"), "habeas" (for habeas corpus), "construction" (to mean interpretation), "instant" (for present, as in "the instant case"), "facially" (to mean "on its face"), "impeach" (to mean "contradict"), "even had we agreed that . . ." (for "even if we had agreed that . . ."), "mandate" (as a verb meaning to order or require), "prong" (to describe one element of a multifactor test or standard), and "progeny" (cases that follow or derive from an earlier case are the earlier case's "progeny"). These usages are eminently avoidable. If they were not, they would not mark a style; styles are optional. These usages mark prose as legalese and impart a tone of high professional gravity. Nominalizing—that is, using nouns as adjectives (as in "privacy concerns" or "social security disability benefits claim")—works in a similar way by turning phrases that a lay person might have used into specialized terms. The disappearance of an older legal jargon, with its "aforesaid" and its substitution of "one" for a first name ("a witness, one Jones, testi-

fied that . . .”), allows modern judges to think that their opinions are free from jargon. They should think again.

Tone is also shaped by the length and structure of sentences. Suppression of ornamentation and parentheticals, simplicity and brevity, and short sentences and sentence fragments all tend, generally, to “lower” the tone of a writing, to make it more like speech. But the qualification implicit in “generally” is important. The elimination of all ornamentation may impart an impersonal, bureaucratic, and hence formal tone to a writing, while an excess of brevity may lend it an oracular, dogmatic, imperative, and thus, again, a formal tone. And a string of short sentences can create the impression of a harangue—the “Brandeisian jackhammer.”¹⁰

The avoidance of headings and subheadings (and of course of footnotes) has a “lowering” effect as well. The absence of these “scholarly” appendages marks an opinion as informal, even conversational; no one speaks in footnotes and headings. Coordinate sentence structure, in which clauses are connected by “but” and “and,” lowers tone, too, while the arranging of clauses in hierarchies by means of subordinating or concessive conjunctions such as “although” raises it. A proclivity for technical terms and acronyms raises tone; a fondness for everyday speech lowers it. Tone is raised by polish, lowered by candor, “straight talking,” and spontaneity (or the pretense of these things), as we can see in the contrast between Brutus’s and Antony’s funeral orations in *Julius Caesar*. Oddly, a predilection for rare words that are not terms of legal art can raise tone by making an opinion seem pompous and learned yet equally can lower it by making the opinion seem self-indulgent, even frivolous. Personality generally lowers, impersonality raises (with an important qualification noted later); so frequent use of “I” marks an opinion as “low”—or would but for a pretty unshakable convention that a majority opinion, which is to say an opinion joined by more than one judge, is styled as jointly authored (“we hold,” never “I hold”). Certitude raises tone; dubiety or tentativeness lowers it. Configuring an opinion as a story, debate, or exploration lowers; configuring it as dogmatic announcement, *de haut en bas*, raises. The “high” style is declaratory, the “low” exploratory.

I have been using the metaphor of height to contrast what I contend are the two basic styles of judicial writing, as of writing generally. The problems with this metaphor are that the pejora-

¹⁰ Posner, *Cardozo* at 44 (cited in note 1).

tive connotations of "low" are well-nigh unshakable and that the judges such as Holmes who have used what I have been calling the "low" style are by and large the judges who were intimate with high culture, fussy about their style, aristocrats of writing and thought, judicial Coriolanuses even. I shall substitute a parallel contrast, that between "pure" and "impure," proposed by Robert Penn Warren in a famous essay on poetry.¹¹ It should be a little easier to persuade that an "impure" style of writing might surpass a "pure" style.

Warren was writing at a time when the most celebrated modern poets, such as Yeats and Eliot, were in self-conscious revolt against the characteristic style of much nineteenth-century Romantic and, particularly, Victorian poetry. Tennyson's poetry, for example, is very refined, like Victorian culture generally—"correct," smooth, polished, sonorous, and proper. He was, after all, the poet laureate of Victoria's England. "Pure" poetry as exemplified by Tennyson avoids "low" subjects and diction, upholds conventional values, expresses conventional emotions, is self-consciously "poetic" and "elevated." As a corollary of all these things, it lacks a certain tang and texture, as well as conversational immediacy. As Warren puts it, "[T]he pure poem tries to be pure by excluding, more or less rigidly, certain elements which might qualify or contradict its original impulse. In other words, the pure poems want to be, and desperately, all of a piece."¹²

Tennyson was a very great poet, but it is possible also to enjoy, or even to prefer, a "rougher," sometimes even bawdy, sometimes startlingly direct, freer-form poetic style, one that is more concrete, more personal, franker, wittier, more intellectual and that has a wider emotional register and range of subject matter and employs a more varied diction, one closer to that of everyday life (to prose, even). It is the style of Shakespeare,¹³ of Donne and the other "metaphysical" poets, of Byron, and among modern poets of T.S. Eliot (despite the evident resemblances between Eliot and Robert Browning, one of Tennyson's contemporaries), Wallace Stevens, Yeats (after 1910 or so), and Auden, to name a few. Warren speaks of "resistances," of "the tension between the rhythm of the poem and the rhythm of speech . . . ;

¹¹ *Pure and Impure Poetry*, in Robert Penn Warren, *Selected Essays* 3 (Random House, 1958) (1942 essay).

¹² *Id.* at 16.

¹³ As Samuel Johnson put it, Shakespeare's "dialogue is level with life." *Preface to the Plays of William Shakespeare*, in R.D. Stock, ed., *Samuel Johnson's Literary Criticism* 139, 143 (Nebraska, 1974).

between the formality of the rhythm and the informality of the language; between the particular and the general, the concrete and the abstract; . . . between the beautiful and the ugly; between ideas."¹⁴ Other "New Critics" speak of irony, paradox, complexity, polysemy, ambiguity.¹⁵

No one I suppose considers Shakespeare, and few consider even Eliot, inferior to Tennyson. They are merely different. And it is a difference echoed in judicial opinions. Most judicial opinions are carefully drafted to emphasize the difference between their diction and that of ordinary speech, which is just the sort of difference that poets like Shakespeare, Byron, and Eliot like to blur. Yet no careful reader, making due allowance for differences in linguistic conventions between the nineteenth century and today, will fail to note the personal, direct, and conversational tone of judges like Holmes and Learned Hand, which is so different from the usual tone of judicial opinions.

Judicial opinions in the pure style tend to be long for what they have to say, solemn, highly polished and artifactual—far removed from the tone of conversation—impersonal (that matter of "voice" again), and predictable in the sense of conforming closely to professional expectations about the structure and style of a judicial opinion. If we had a judicial laureate, that is how he or she would write. The standard "pure" opinion uses technical legal terms without translation into everyday English, quotes heavily from previous judicial opinions, includes much detail concerning names, times, and places, complies scrupulously with whatever are the current conventions of citation form, avoids any note of levity, conceals the author's personality, prefers familiar and ready-made formulations to novelties, and bows to the current norms of "political correctness" (corresponding to the euphemisms for which the Victorians became notorious) at whatever cost in stilted diction. The familiarity of the pure style makes it invisible to practitioners of the style and to the intended audience of lawyers. But it is not at all a plain or transparent style. Its artificiality is revealed by a comparison with the prose of a nonlawyer dealing with a similar issue—for example, a philosopher writing about intention compared to a judge in a criminal case writing

¹⁴ Warren, *Pure and Impure Poetry* at 27 (cited in note 11).

¹⁵ See, for example, Cleanth Brooks, *The Well Wrought Urn: Studies in the Structure of Poetry* (Harcourt Brace Jovanovich, 1947); W.K. Wimsatt, Jr., *The Verbal Icon: Studies in the Meaning of Poetry* (Noonday, 1954).

about intention—as well as by a comparison with the less common “impure” style of judicial opinions.

Impure stylists like to pretend that what they are doing when they write a judicial opinion is explaining to a hypothetical audience of laypersons why the case is being decided in the way that it is. These judges eschew the “professionalizing” devices of the purist writer—the jargon, the solemnity, the high sheen, the impersonality,¹⁶ the piled-up details conveying an attitude of scrupulous exactness, the fondness for truisms, the unembarrassed repetition of obvious propositions, the long quotations from previous cases to demonstrate fidelity to precedent, the euphemisms, and the exaggerated confidence corresponding to the declamatory mode of “pure” poetry. These and other devices constitute what Robert Ferguson has felicitously summarized as the “rhetoric of inevitability.”¹⁷

The handful of impure judicial stylists prefer the bolder approach (to critics, brazen) of trying to persuade without using stylistic devices intended to overawe, impress, and intimidate the reader. They like to be conversational, to write as if it were for the ear rather than for the eye. They like to avoid quoting previous decisions so that they can speak with their own tongue—make it new, make it fresh. (Avoidance of the ready-made was an important element of the “wit” that Eliot admired in the metaphysical poets.) They like to be candid and not pretend to know more than they do or to speak with greater confidence than they feel. They eschew unnecessary details, however impressive the piling on of them might be. They like to shun clichés, to be concrete, to entertain; to seem to enjoy writing; to imitate the movement of thought—unfriendly critics call their style “stream of consciousness.” Of the impure stylists we may say, as Warren did of Eliot and other moderns, “they have tried, within the limits of their gifts, to remain faithful to the complexities of the problems with which they are dealing . . . they have refused to take the easy statement as solution.”¹⁸

Paradoxically, the impure judicial stylists generally take more pains over style than the pure stylists do. Unless one is a particularly gifted writer, it takes much effort to make an opinion

¹⁶ Compare Arthur L. Palacas, *Parentheticals and Personal Voice*, 6 Written Communication 506, 512 (1989).

¹⁷ Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 Yale J L & Hum 201, 213-16 (1990). See also Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 Hastings L J 805, 820 (1987) (Richard Terdiman, trans).

¹⁸ Warren, *Pure and Impure Poetry* at 30 (cited in note 11).

seem effortless! The pure style, despite its artificiality, comes more easily to a legally trained person than the impure style. For one of the things that law school and legal practice teach, all unconsciously but not the less effectively for that, is to forget how one wrote before one became a lawyer.

"Voice" goes with "ear." We should therefore expect the choice of styles to be influenced by the "implied audience" for a judicial opinion—the audience at which the judge seems particularly to be aiming. For many judges the implied audience consists primarily of the judge or judges of the lower court whose decision is being reviewed and the lawyers for the parties. Anyone else is an (authorized) eavesdropper. The lawyers and the lower court judge are the most knowledgeable and interested professional consumers of the appellate court's opinion. Consummate insiders, they are adepts in reading (including reading between the lines of) a "pure" judicial opinion. The author wants to persuade them that in reaching its result the court has carefully considered all the points in the case and has not deviated from "the law" in the typical sense in which the lawyers and the lower court judge will have conceived it—has not pulled any rabbits out of hats. For this rhetorical purpose, the "pure" style is the best because this tiny, focused, professional audience has settled expectations concerning the appropriate diction and decorum of a judicial opinion, just as the Victorian public had settled expectations concerning poetic diction and decorum.

At the other extreme of the stylistic spectrum, the primary implied audience of the most boldly impure judicial stylist consists not of legal insiders but of those readers, both laypeople and lawyers, who can "see through" the artifice of judicial pretension. Here is to be found the "one in a thousand" for whom Holmes once said that he wrote. Now, one in a thousand may add up to a larger number than the lawyers and lower court judge in a single case, especially if the potential audience includes lay people. The impure judicial stylist may have a larger audience than the pure, just as Shakespeare has a larger audience than Tennyson.

I have overdone the contrast between the two styles. There are few completely pure stylists among judges and even fewer completely impure ones, if complete impurity is even an intelligible concept. The difference between the styles can be subtle. The author of the impure opinion, being in a minority so far as stylistic preference is concerned, may have to pull his punches in order to persuade the other judges to join his opinion. (Holmes used to complain a lot about the changes in his opinions that his fellow

Supreme Court Justices forced him to make.) And there are plenty of judges who seem to fall right in the middle. For the pure and the impure do not divide up the whole world of judicial opinions between them. They mark the ends of a spectrum.

The pure tendency is illustrated by the opinions of Cardozo, Brandeis (especially his majority opinions), Frankfurter, Brennan, and the second Harlan, and is characteristic of the vast majority of opinions written by law clerks, which means most opinions in all American courts today. The pure style is the inveterate style of law review editors, from whose ranks most of the clerks are drawn. On the impure side can be found most opinions of Holmes, Douglas, Black, Jackson, and Learned Hand.¹⁹ In the middle, the most notable opinions may be those of Henry Friendly. Inclusion of Douglas in the list of impure judicial writers should make clear that impure judicial opinion writing is not always superior to pure, any more than all impure poetry is superior to all pure poetry. Cardozo, mostly a purist, was one of the finest judicial writers in our history.

III. STYLE AND STANCE

Let me try to redeem my promise to relate the two styles to two jurisprudential stances, which I call formalist and pragmatic.²⁰ By the use of the term "formalist" I mean to emphasize the logical, impersonal, objective, constrained character of legal reasoning. The formalist firmly believes in right and wrong, truth and falsehood, and believes that the function of a judicial opinion is to demonstrate that the decision is right and true. The pragmatist, while not doubting that right and wrong and true and false have useful roles to play in a variety of "language games," is inclined to doubt that the decision of cases sufficiently finely balanced, or at least nonroutine, to have been appealed to and to require decision by means of a published opinion is consistently one of those games. The pragmatist thinks that what the judge is doing in deciding the nonroutine case is trying to come up with the most reasonable result in the circumstances, with due regard for such systemic constraints on the freewheeling employment of

¹⁹ Don't be fooled by the florid character of some (not all, or even most) of Hand's prose. It reflects the culture in which he grew up. He was born in 1872. With a similar adjustment in perspective, John Marshall's opinions can be seen as notable examples of the impure style.

²⁰ I discuss these at length in my book *The Problems of Jurisprudence* (Harvard, 1990).

"reason" as the need to maintain continuity with previous decisions and respect the limitations that the language and discernible purposes of constitutional and statutory texts impose on the interpreter.

I suspect that formalists fool themselves when they think, as some of them do, that judges can really decide difficult cases with the tools of formalism. Still, it is a common enough delusion, although in this country one more common among law professors and law students than among judges and practicing lawyers. Either way, the pure style fits naturally with formalist content. Yet there are exceptions. Hugo Black wrote with great (sometimes too great) simplicity, yet often in defense of formalist positions, such as his conception of free speech as an "absolute" or his belief that the draftsmen and ratifiers of the Fourteenth Amendment had intended to make every single right in the Bill of Rights fully effective against the states. Yet one does not sense much distance between his personal and his judicial views, so perhaps in his case the impure style and the formalist content were both mirages. Another exception is Cardozo, who was a pragmatic judge, a master of narrative, and generally a graceful writer, but who cultivated an artifactual, highly polished, "professionally" smooth legal insider's style too quirky to satisfy the most fastidious purist but instantly distinguishable from the "craggier," more colloquial, racier style of a Holmes, a Hand, or a Jackson.²¹ In *Hynes v New York Central R.R. Co.*,²² Cardozo actually wrote a paean to legal realism in what might be thought the prose counterpart to the style of Tennyson's poetry.²³ To complete the picture, I point out that the pure style is an excellent disguise for the shy pragmatist or, for that matter, the willful or partisan judge.

In repeatedly complaining about the impersonality of the pure style, I run the risk of seeming to endorse the very emotionality, sentimentality, and egoism that was characteristic of much Romantic and Victorian poetry and that T.S. Eliot and other modernists denounced. The arch-sentimentalist, and some might even say the arch-egoist, of the American judiciary is the recently

²¹ For examples, see Hand's opinions in *Nichols v Universal Pictures Corp*, 45 F2d 119 (2d Cir 1930), and *Fishgold v Sullivan Drydock & Repair Corp*, 154 F2d 785 (2d Cir 1946); and Jackson's opinions in *West Virginia State Board of Education v Barnette*, 319 US 624 (1943), and *Johnson v United States*, 333 US 10 (1948); and almost any opinion of Holmes—I will give an example shortly.

²² 231 NY 229, 131 NE 898 (1921).

²³ See Posner, *Cardozo* at 48-55 (cited in note 1).

retired Justice Blackmun. Blackmun did not try to disguise or discipline the strong feelings that many of the Court's cases aroused in him; he seemed (not only in his opinions but also in his public comments about the Court) to have insisted on "letting it all hang out." Although his opinions in these cases depart from the professional norms that I am associating with the "pure" style and are certainly not lacking in "voice," the departure is not in the direction of the school of Donne or Eliot. The "voice" is rather that of Joyce Kilmer or Norman Rockwell. Whatever the merit of Blackmun's positions on such matters as abortion, capital punishment, sexual equality, the exemption of baseball from the antitrust laws, or the duty of states to protect people from private violence, the opinions in which he expressed his heartfelt views on these subjects are embarrassing performances precisely because they seem the unmediated expression of self. They are maudlin (*DeShaney*²⁴), melodramatic (*Webster*²⁵), unreasoned (*Roe*,²⁶ *Callins*²⁷), narcissistic (*Casey*²⁸), sophomoric (*Roe's* his-

²⁴ "Poor Joshua!" *DeShaney v Winnebago County Department of Social Services*, 489 US 189, 212, 213 (1989) (dissenting opinion). Blackmun's dissent bizarrely implies (surely unintentionally) that if Joshua DeShaney's mother had been allowed to seek damages under federal law, rather than just under state law (where the damages would have been lower and the plaintiff's attorney's fees would not have been reimbursable), the irreversible brain damage inflicted on Joshua by his father might have been reversed.

²⁵ *Webster v Reproductive Health Services*, 492 US 490, 537 (1989) (concurring and dissenting opinion).

I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided.

...

For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.

Id. at 538, 560. His fear proved unwarranted.

²⁶ *Roe v Wade*, 410 US 113 (1973). On the rhetorical ineptitude of the opinion, see Richard A. Posner, *Sex and Reason* 337 (Harvard, 1992).

²⁷ *Callins v Collins*, 114 S Ct 1127, 1128 (1994) (dissenting opinion). As Justice Scalia pointed out, Justice Blackmun's belief that the death penalty cannot be administered constitutionally is based in significant part on the existence of inconsistent lines of Supreme Court decisions, and the Court could eliminate the inconsistency by choosing between the lines. *Id.* at 1127-28 (Scalia concurring).

²⁸ *Planned Parenthood of Southeastern Pennsylvania v Casey*, 112 S Ct 2791 (1992).

I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.

...

I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today.

tory of abortion from ancient Persia on²⁹ and the ode to baseball in *Flood v Kuhn*³⁰), and gratuitously indecorous (*Michael M.*³¹).

A narcissistic style is different from a pure style, but it is similar in having what might be called an inward orientation—albeit inward toward the judge, rather than inward toward the professional culture. The impure style points outward, toward the world outside statutes and opinions. Dr. Johnson contrasted great poets such as Shakespeare who write about life, with lesser poets who write about the work of their predecessors. The former:

take their sentiments and descriptions immediately from knowledge. The resemblance is therefore just; their descriptions are verified by every eye and their sentiments acknowledged by every breast. Those whom their fame invites to the same studies partly copy them, and partly nature, till the books of one age gain such authority as to stand in the place of nature to another; and imitation, always deviating a little, becomes at last capricious and casual. Shakespeare, whether life or nature be his subject, shows plainly that he has seen with his own eyes; he gives the image which he receives, not weakened or distorted by the intervention of any other mind; the ignorant feel his representations to be just and the learned see that they are complete.³²

Most judges, like most poets, “copy” the work of their predecessors. They make small additions to the swelling corpus of judicial opinions, which now number in the millions. A few judges, while not unmindful of the constraints imposed and the resources supplied by this corpus, look outward to the world of action that law regulates and the world of thought from which the ideas and values of the law ultimately derive. These few try to conform their decisions to this outer world. They need a style suitable to it and not merely to a professional discourse.

I have said that particular styles seem to cohere with particular jurisprudential stances. But I have also indicated that

Id at 2844, 2854-55. Mistaken again.

²⁹ 410 US at 130-47.

³⁰ 407 US 258, 260-64 (1972).

³¹ *Michael M. v Superior Court*, 450 US 464, 483 n * (1981) (concurring opinion) (extended quotation, irrelevant and in places obscene, from the transcript of a statutory rape case).

³² Johnson, *Preface to the Plays of William Shakespeare* at 163 (cited in note 13). I have regularized the spelling and punctuation in this passage.

stance cannot automatically be inferred from style. This raises the question of authenticity. A writing has an implied author (a "voice" in a sense that goes beyond signature) as well as an actual author. The implied author is the author whose character and values we infer from the writing itself, as distinct from the character and values that we might infer from a personal acquaintanceship with the author or from a good biography of him.³³ As is well known, the actual and the implied author of a work are often divergent, sometimes shockingly so. (They seem shockingly *convergent* in the case of Justice Blackmun.) Why shouldn't this be equally true of judicial writing? A comparison of Holmes's correspondence with his opinions or Hand's preconference memoranda with *his* opinions shows these two famously "impure" opinion writers³⁴ assuming a loftier, more formal, more "grown-up" tone in their opinions than in their private writings. Style is artifice. We cannot exclude the possibility that if the impure style suddenly became popular, perhaps because pragmatism had become the orthodox jurisprudence, formalist judges would employ that style. This seems unlikely, though, for it implies, somewhat dubiously, both that a consistent formalist approach to judging is possible and that law clerks can be taught to write in the impure style. A livelier possibility is that, as I have already suggested, some nonformalist judges masquerade as formalists by employing the pure style. There may even be a few formalist judges who employ the impure style because their brand of formalism is unorthodox.

This analysis suggests a warning to judicial biographers and other observers of the judiciary: do not infer a judge's jurisprudential stance from the judge's style without a consideration of both the content and form of the judge's opinions. Or the judge's character. All that a choice of style infallibly communicates is what the judge thinks an admirable character for a judge to have.

³³ The creation of the implied author corresponds to the ethical appeal in classical rhetoric—that is, to the devices by which a speaker tries to convince his audience that he is the kind of person who is worthy of belief.

³⁴ Willard Hurst rightly notes Holmes's "irreverence toward judicial pretense"—a salient characteristic of Holmes's opinions. See *Who Is the 'Great' Appellate Judge?*, 24 *Ind L J* 394, 398 (1949).

IV. A CASE STUDY: *UNITED STATES V MORRIS*

Judge Patricia Wald of the U.S. Court of Appeals for the District of Columbia Circuit is an experienced judge and one who is reflective about opinion writing.³⁵ Moreover, she is the only other judicial participant in this Special Issue. I shall illustrate the modern "pure" style of judicial opinion writing with an opinion, *United States v Morris*,³⁶ drawn essentially at random from Judge Wald's decisions, and I shall then contrast it with a rather obscure opinion by Holmes.

The principal issue in *Morris* was whether the defendant had used a gun "during and in relation to a drug trafficking offense."³⁷ The jury found that he had, and he appealed, challenging both that conviction and his conviction for the underlying drug offense, possession of cocaine with intent to sell it. The third sentence of the opinion announces: "We reject both challenges and affirm the judgment below."³⁸ "Impure" stylists generally avoid beginning their opinions with the conclusion. It gives the impression that the opinion is just the rationalization of a preordained decision, rather than an exploration leading up to a conclusion that might be changed in the course of writing—which does happen from time to time. And starting with the punchline rather spoils the story; the impure style is more dramatic, the pure more discursive. I imagine that Judge Wald would deem these considerations frivolous.

The next section of the *Morris* opinion (after the conclusion) is captioned "I. Background," and consists of a meticulous statement of the crimes and the course of the trial. The defendant was arrested in a one-bedroom apartment in which were also found one hundred small ziplock bags containing cocaine, and three loaded pistols. Two of the guns were found under the cushions of the living room couch where Morris was sitting when the officers entered, and the third was found in a nightstand in the bedroom. The bags of cocaine were hidden in ducts in the bedroom ceiling. We learn the date on which Morris was arrested and his apartment searched. We even learn the street address of the apartment.³⁹ These details of time and place are extraneous but con-

³⁵ See, for example, Patricia M. Wald, *How I Write*, 4 Scribes J Legal Writing 55 (1993).

³⁶ 977 F2d 617 (DC Cir 1992).

³⁷ Id at 618.

³⁸ Id.

³⁹ Id at 619.

tribute to the sense that the court is in command of all the facts and hence is more likely to be right.

There follows a brief, unexceptionable, but also not strictly necessary statement of the standard of appellate review—unnecessary because it is well known and because nothing in the case turns on it—and then comes a discussion of Morris's first ground of appeal, that there was not enough evidence to convict him of possession of the drugs.⁴⁰ "Possession, of course, can be either actual or constructive."⁴¹ "Constructive possession" is actually a rather tricky concept, so we may suspect that the "of course" is a bit of whistling in the dark. It does not help much to be told that constructive possession "requires evidence supporting the conclusion that the defendant had the ability to exercise knowing 'dominion and control.'"⁴² Or that "[a] jury is entitled to infer that a person exercises constructive possession over items found in his home."⁴³ The opinion reviews the facts and finds "ample evidence from which the jury could infer that Morris lived alone in the apartment and exercised constructive possession over its contents."⁴⁴

One begins to sense that an elephant gun is being discharged against a mouse. Morris was found in an apartment fairly bursting with drugs, and there was plenty of evidence that he was the only resident of the apartment. He testified, it is true, that he was just a visitor, that he had in fact, by an unhappy coincidence, showed up just a few minutes before the police raid. The jury did not have to believe this and obviously did not. It believed he was the tenant, so the drugs must have been his, since no theory was advanced as to who else might have owned the drugs if Morris was indeed the tenant. There is really no more that the opinion needed to say about the drug conviction. Indeed, I find the notion of "constructive" possession of the contents of one's own apartment extremely weird. Morris was sitting on his couch when the police entered. Was he in merely "constructive" possession of the couch? If so, then what is "actual" possession?

The bulk of the opinion is given over to Morris's challenge to his conviction for having used or carried a gun during and in

⁴⁰ Quite rightly, the opinion deals summarily with the question whether, if Morris possessed the cocaine found in the apartment, he possessed it with the intention of selling it. That was obvious from the quantity and packaging of the drugs. See *id.* at 620.

⁴¹ *Id.* at 619.

⁴² *Id.*

⁴³ *Id.* at 620.

⁴⁴ *Id.*

relation to his drug dealings.⁴⁵ The opinion says that the court is going to analyze this as a “use” rather than a “carry” case. But a footnote toys with the alarming possibility—the sort of thing that makes the laity wonder about the legal mind—that Morris could have been found to be “carrying” the two guns found under the couch on which he was sitting when the officers entered the apartment.⁴⁶ And here is a warning against footnotes in judicial opinions: although the “carry” footnote says the guns were under the couch, the statement of facts with which the opinion had begun (well, almost begun) had said that they were *in* the couch, under the seat cushions,⁴⁷ which if true (it is repeated later, so I shall assume it is true) makes the idea that Morris committed the carrying offense a little more plausible.

In the text we are told that the test for the “use” offense is whether “the gun facilitated or had a role in the trafficking offense”⁴⁸—but this is just a restatement of “use”—and that to help in applying the test, “this court has identified a number of factors. . . . We discuss only some of them here, recognizing that courts have identified and will identify others.”⁴⁹ This is faintly alarming. Multifactor tests are notoriously difficult to apply, and the difficulties are not reduced by leaving the list of factors open-ended. More to my present point, multifactor tests invite tedious, meandering opinions.

The first factor discussed is possession. But while stressing its importance, the opinion also expresses puzzlement about how someone could use a gun that he did *not* possess. The obvious answer, though it is not mentioned, is that he could threaten to use a gun that was not his—and that he would never have tried to grab—but that was within his reach, making his threatening gesture credible.

The opinion says that “[m]ere possession of a gun even by a drug trafficker does not violate the statute” but that the statute does reach “any case in which the gun facilitated or had a role in the trafficking offense.”⁵⁰ This means that “the defendant’s possession of the gun is an important factor,” and “[p]ossession, of course [of course], encompasses joint, as well as constructive

⁴⁵ See 18 USCA § 924(c)(1) (Supp 1995).

⁴⁶ *Morris*, 977 F2d at 620 n 1.

⁴⁷ *Id* at 619.

⁴⁸ *Id* at 621.

⁴⁹ *Id*.

⁵⁰ *Id*.

possession.”⁵¹ It begins to look as if, despite the initial denial, mere possession of a gun by a drug dealer *is* use during and in relation to the drug offense. But maybe not, if it is in a safe-deposit box, for “[a] gun kept close at hand is more likely being used for protection than a gun packed away in a hard-to-reach spot.”⁵² But drug dealers, like the rest of the armed population, have little use for guns other than protection, so why would they ever pack their guns away in hard-to-reach spots?

Other factors are discussed. One is the “proximity of the gun to the drugs.”⁵³ I think it is correct that, other things being equal, the closer the gun is to the drugs the more likely they are intended for conjoint use. So I was surprised to find the court say that proximity can cut either way. The court gives the curious example of a case in which the gun and the drugs were found together in the pocket of a raincoat in the defendant’s closet; the inference was therefore that the gun was intended only to be used for some *future* sale, when he put on his coat and went outside.⁵⁴ But it wasn’t the *proximity* of the gun to the drugs that tended to show that the gun was not intended for use in connection with a current sale; it was the fact that both the gun and the drugs were in a raincoat in a closet.

The next factor discussed is “whether the gun is loaded.” “[T]he number and type of guns” are then brought in as factor number five.⁵⁵ These two, really three, factors seem not to have much heft. The opinion makes clear that one unloaded gun of ordinary design accessible to Morris would have been quite enough for his conviction to be sustained, especially since the government’s expert witness testified to “the well-nigh universal use of guns to protect such [drug-trafficking] operations.”⁵⁶

The purest makeweight factor discussed is whether the gun is on “open display.”⁵⁷ If it is, this suggests “a deterrent to poachers. . . . This is not to say, however, that a gun that is within reach, though out of sight, does not also strongly suggest its intended use for protection of the drugs.”⁵⁸ Heads the government wins, tails the defendant loses.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 622.

⁵⁴ *United States v Bruce*, 939 F2d 1053 (DC Cir 1991).

⁵⁵ *Morris*, 977 F2d at 622.

⁵⁶ *Id.* at 622.

⁵⁷ *Id.*

⁵⁸ *Id.* at 622-23.

Trudging patiently through all the factors mentioned in previous cases (well, not all—just nine, by my count, although the opinion stops counting at five) conveys an impression of deliberateness, of moving step by step, of leaving no stone unturned. It is a reassuring style, not only because it gives the impression of great thoroughness but also because it enables the opinion to be padded with a number of propositions of unchallengeable truth, propositions of the kind that such-and-such a factor was mentioned in such-and-such a case. Padding is an important part of most judicial opinions. Judges are not comfortable writing opinions to the effect that, “We have very little sense of what is going on in this case. The record is poorly developed, and the lawyers are lousy. We have no confidence that we have got it right. We know we’re groping in the dark. But we’re paid to decide cases, and here goes.” Nevertheless, this is the actual character of many appellate cases that are decided in published opinions.⁵⁹ The simplest cases are not brought, or not appealed, or are decided in unpublished opinions (sometimes with no opinion—just with the word “affirmed”). A substantial fraction of published appellate opinions are in close cases, and another substantial fraction are in cases that do not seem close but that are in a muddle of one sort of another. The unnecessary details and truisms that stud most judicial opinions create a soothing facade of facticity.

But this style, appealing as it is (not wholly for bad reasons) to the judicial mind, obscures the issue in some cases, possibly including the “use or carry” gun cases. Americans love guns and fear violent crime. A vast number of perfectly law-abiding Americans, including—perhaps especially including—the residents of big-city slums, keep loaded guns in their homes to protect themselves from intruders.⁶⁰ Some of these people are not law-abiding⁶¹ yet keep loaded guns in their homes for reasons unrelated to their illegal activities, in fact for the same reasons as the law-abiding people. The challenge for the courts in administering the “use or carry” statute is, one might have thought, to distinguish

⁵⁹ As Learned Hand acknowledged: “The fact that we are ourselves not agreed cautions us that we should not be too sure of our conclusion; and obviously the really important matter is that the question should reach the Supreme Court as soon as possible.” *Fishgold v Sullivan Drydock & Repair Corp*, 154 F2d 785, 791 (2d Cir 1946).

⁶⁰ A careful recent study estimates that 10 percent of all U.S. households contain a loaded and unlocked—that is, an immediately usable—firearm. David Hemenway, Sara J. Solnick, and Deborah R. Azrael, *Firearm Training and Storage*, 273 JAMA 46, 48 (1995).

⁶¹ These would be in addition to the 10 percent in the survey referred to in the preceding footnote. It was a telephone survey, and 27 percent of those called refused to be interviewed. *Id* at 47. Undoubtedly the non-law-abiding were among the nonrespondents.

between having a gun for self-protection and having it for the protection of one's drug business, or of oneself in one's capacity as a drug dealer. The *Morris* opinion does not relate the factors that it discusses to this task of distinguishing between these two possible inferences from defendants' having loaded guns lying about, and the relation is not obvious. It would be absurd to suppose, for example, that the concept of "possession" could help distinguish between a gun kept for self-protection and a gun kept for the defense of illegal drugs; or that whether the gun was loaded, working, accessible to the owner, and strategically placed for defense of self and property could do so. As the size of the arsenal grows, as the arsenal takes on a more "professional" character, as the proximity of the arsenal to the drugs increases, the inference that the guns are being used to defend drugs rather than (just) person or other property grows. The decisive factor in *Morris's* case, I think, was that he had stuffed two guns under the cushions of his couch—an extraordinary location for a home-defense arsenal. Rather than zero in on this critical fact, the court actually forgot it in the "carry" footnote.

I admit that it is a critical fact only if I have got the purpose of the statute right, and I may not have. Maybe the purpose is simply to punish drug dealers who, having guns at hand, *could* use them in their drug business. The language of the statute is not entirely consistent with such an interpretation—it does, after all, say "use" rather than "could use"—but many of the cases nonetheless interpret it this way.⁶² I do not want to get any deeper into the question of what the statute means.⁶³ That is not my subject, and the opinion in the *Morris* case does not so much as hint that there might be an interpretive question.

My point is that the style of the opinion retards the search for meaning. With its patient marshaling of factors and facts and its dense citation of previous cases (twenty-five in all, mostly concerned with the gun charge), the opinion is calculated to sweep the reader along to a confident conclusion that *Morris* was guilty of the gun offense as well as of the drug offense. It is highly effective rhetoric.⁶⁴ That is one reason why the "pure" style of ju-

⁶² See, for example, *United States v Edwards*, 36 F3d 639, 644 (7th Cir 1994).

⁶³ Judge Wald's court has discarded the multifactor approach to gun cases in favor of a much simpler approach, in which proximity of the guns to the drugs and accessibility of the guns to the defendant are the only factors to be considered. *United States v Bailey*, 36 F3d 106 (DC Cir 1994) (en banc). Judge Wald dissented, as did several other judges. None of the opinions, however, discusses the theory of the statute that I expound above.

⁶⁴ See Duangkamol Chartprasert, *How Bureaucratic Writing Style Affects Source*

dicial opinion writing is dominant, the other reason being that it is the style that comes naturally to the pen of a person who is legally trained. I have not been picking on a weak opinion, or on a heterodox one.

I connect the style of *Morris* with Judge Wald's comment that "[f]ormer academicians . . . sometimes feel a compulsion to reinvent the wheel,"⁶⁵ and her comment that Holmes, whom she describes as one "of our best opinion writers in the late 19th century,"⁶⁶ "wrote elegantly, but he also made mistakes."⁶⁷ I think she thinks that the time for elegance, for "the judge shut away in a library by herself,"⁶⁸ has passed. I imagine she thinks that after so many opinions have been written about the "use and carry" provision, it would be impertinent to suppose the basic meaning of the statute unsettled, the wheel uninvented; and that Holmes is a charming fossil.

I hope she's wrong.

V. SPEAK, FOSSIL!

*Stack v New York, N.H. & H.R. Co.*⁶⁹ is not one of Holmes's best-known opinions. It was written in 1900, when Holmes was still on the Massachusetts Supreme Judicial Court. It deals with a personal injury suit. Shortly before trial, two doctors selected by the defendants conducted a medical examination of the plaintiff. After trial began and the plaintiff completed the presentation of his evidence, and after the two doctors had testified for the defense, the defendant asked the court to order the plaintiff to submit to another medical examination, by a third doctor selected by the defendant. The plaintiff objected on the ground that his relations with that doctor were unfriendly, but offered to submit to an examination by any other doctor selected by the defendant. The defendant declined the offer. The judge refused to order the examination, "ruling that [he] had no power or right to make

Credibility, 70 Journalism Q 150 (1993), finding that a writer who employs a bureaucratic style, marked by passive voice, nominalization, abstraction, and jargon, is likely to be rated by readers as having greater expertise than a writer who employs a nonbureaucratic style to say the same thing. Compare Tushnet, 11 Const Commentary at 225 (cited in note 1).

⁶⁵ Wald, 4 Scribes J Legal Writing at 61 (cited in note 35).

⁶⁶ Id at 62. He was not appointed to the U.S. Supreme Court until 1902.

⁶⁷ Id at 60.

⁶⁸ Id.

⁶⁹ 177 Mass 155, 58 NE 686 (1900). The opinion is less than two pages long, so I shall not pinpoint cite my quotations from it.

[such an order] under the circumstances." The defendant appealed.

All this is stated in a short paragraph, no longer than my paraphrase; and without further preliminaries we are in the heart of the opinion, where Holmes first considers whether

the words "under the circumstances" so far cut down the seemingly absolute denial of power in the first part of the ruling that it meant only to state emphatically the plain injustice and outrage which it would have been to make the order proposed.

Holmes thinks that this is probably the correct interpretation of the ruling, and remarks,

When the plaintiff coupled with his objection an offer to accept any other doctor whom the defendant might choose to send, bearing in mind the large possibilities that were open by telegraph and rail, he had a plain right to have his personality respected to the small extent that he asked. If that is all that ruling meant, as it certainly was all that was needed to dispose of the matter, in our opinion it was right.

There are no citations as yet; none is needed. There are no names or dates. There are no footnotes and no headings. There is not an ounce of fat.

Holmes could have stopped with the sentence I just quoted, but he decided to go on. The words that immediately follow that sentence are, "But, if the ruling requires the decision of a broader question, we agree with . . . [other courts] that the power does not exist." Three cases are cited in support, and two more go the other way, but none is discussed. The statement of authorities is merely an introduction to Holmes's discussion of the issue, which begins with the common-sense observation that "the need of the power [of compulsory examination] easily may be exaggerated, because, if, contrary to usual experience, a plaintiff should dare to refuse a reasonable examination, it would be the subject of just comment to the jury." But Holmes has bigger fish to fry. His next point is that the power claimed is contrary to the traditions of the common law, which "was very slow to sanction any violation of or interference with the person of a free citizen." And this is true. For example, a money judgment, the standard remedy in a case at law, operates against the defendant's goods; it is not an order that he pay, disobedience to which might be punishable as contempt.

Holmes moves now to his largest point, which is political or jurisprudential in character, and which he justifies introducing because "[w]e agree that, in view of the great increase of actions for personal injuries, it may be desirable that the courts should have the power in dispute." And Holmes acknowledges—pretty daringly for 1900—"that in a clear case it might be possible even to break away from a line of decisions in favor of some rule generally admitted to be based upon a deeper insight into the present wants of society." That, however, is a power to be exercised with great caution:

[T]he improvements made by the courts are made, almost invariably, by very slow degrees and by very short steps. Their general duty is not to change, but to work out, the principles already sanctioned by the practice of the past. No one supposes that a judge is at liberty to decide with sole reference even to his strongest convictions of policy and right. . . . No one supposes that this court might have anticipated the legislature by declaring parties to be competent witnesses, any more than today it could abolish the requirement of consideration for a simple contract. In the present case we perceive not such pressing need of our anticipating the legislature as to justify our departure from what we cannot doubt is the settled tradition of the common law, to a point beyond that which we believe to have been reached by equity, and beyond any to which our statutes dealing with kindred subjects ever have seen fit to go.

The ability demonstrated by Holmes in the *Stack* opinion of embedding the particular issue presented by a case in a much broader context, here consisting both of the common law tradition and of the institutional role of courts in the scheme of American government, is characteristic of great judges.⁷⁰ It not only lends resonance to an opinion but also connects what may be a narrow technical issue of interest only to lawyers—and often to precious few of them—with concerns shared by a broader educated public that in *Stack* would include historians and political scientists. An opinion so crafted speaks in the language of the general intellectual community to that community. And this ascent from a pinched professional discourse to a sunnier upland of general culture can fairly be described as a stylistic characteristic of the

⁷⁰ See Paul A. Freund, *Foreword: Homage to Mr. Justice Cardozo*, 1 Cardozo L Rev 1, 2 (1979).

opinions of the great judges. It is combined in *Stack* as in Holmes's opinions generally (allowing for the slightly musty flavor of 1900-vintage judicial prose to the modern palate) with an utter simplicity and economy of expression and a determined refusal to overpower the reader with a parade of learning. The opinion cites a total of eight cases, two statutes, and one treatise.

Have we outgrown Holmes's style of opinion writing? Does it belong to some primitive era of judicial expression, before law clerks and the *Bluebook*? Does it deserve Judge Wald's condescension? Is it somehow unavailable to modern judges dealing with modern issues?⁷¹ I answer all these questions "no." Case-loads are heavier, but judges have far more help, both mechanical and human. Certainly the docket of the modern judge is no less interesting than dockets in 1900. If the modern judge is less interesting, who is to blame?

VI. THE EFFECT OF STYLE ON CONTENT

I have noted the affinity of the pure style to formalist content. I want now to consider whether a judicial writing style—which might be adopted for reasons independent of one's jurisprudential stance (because one could not write any other way, because of one's aesthetic principles, or because a particular style was in fashion)—can affect content. I think it can, even if one concedes as I do that judicial writing is effectively paraphrasable. While it is possible to formulate a position in pragmatic terms to oneself and then wrap it in formalist wrapping paper, as Cardozo appears to have done in *MacPherson v Buick Motor Co.*,⁷² there is a danger that the wrapping will make it more difficult for the writer as well as for the reader to come to grips with the essential questions.

That may have happened in the *Morris* opinion. In its preoccupation with enumerating and applying a series of factors mentioned in previous cases, it seems, I respectfully suggest, to have lost sight of what may have been the essential question about the gun charge (depending on one's view of the statute's purpose, about which the opinion is silent): whether Morris would have possessed the same armory identically deployed had he not been a drug dealer. It is easier to grasp that question as a gestalt than

⁷¹ The power to compel a medical examination of an opposing party is no longer open to doubt. See FRCP 37; *Sibbach v Wilson and Co.*, 312 US 1 (1941).

⁷² 217 NY 382, 111 NE 1050 (1916). See Edward H. Levi, *An Introduction to Legal Reasoning* 14-18 (Chicago, 1949); Posner, *Cardozo* at 108-09 (cited in note 1).

to reformulate it as whether enough of the previously identified factors were present to warrant an inference that the guns were intended for the protection of Morris's drug dealing. The gestalt approach brings more quickly and surely into view the critical fact (as it seems to me)—that there were two guns under the cushions in the sofa. It is possible that the court posed the question to itself in functional terms but decided not to write the opinion in those terms. But there is no hint of that in the opinion, whereas reading between the lines in *MacPherson* one gets a fairly broad hint of the practical concerns that motivated Cardozo.

We tend to believe that words enable thought. But words can also substitute for thought. The pure style is an anodyne for thought. The impure style forces—well, invites—the writer to dig below the verbal surface of the doctrines that he is interpreting and applying. What he may find is merely his own emotions, as I have suggested may be the case with a number of Blackmun's opinions. It is also true of many of Black's and Douglas's opinions. But if the judge is lucky, he may find, when he digs beneath the verbal surface of legal doctrine, the deep springs of the law. The idea of punishing drug dealers more heavily for (in some sense) using guns in connection with their drug dealing is not senseless or inoperable. But its sensible application is not advanced by chanting a litany of relevant factors.

There is a further point. It has to do with the difference between thinking and writing (with informal speaking in the middle). In thinking about a case, a judge might come to a definite conclusion yet find the conclusion indefensible when he tries to write an opinion explaining and justifying it. The reason is that we do not think entirely in words, and certainly not entirely in sentences and paragraphs. Inarticulable or even unconscious feelings and impressions fill in around the sentence fragments that form in our minds as we think about a problem. This silent, incompletely verbalized thinking can be insightful, as I implied in my reference to approaching an issue as a gestalt rather than analytically. But it can also be muddy, with the result that when we try to systematize it in sentences and paragraphs that are unmistakable because written down and not just imperfectly remembered, we may find that our confident conclusion is wrong; it "will not write." Reasoning that seemed sound when "in the head" may seem half-baked when written down, especially since the written form of an argument encourages some degree of critical detachment in the writer, who in reading what he has written

will be wondering how an audience would react. Many writers have the experience of not knowing except in a general sense what they are going to write until they start writing. A link is somehow forged between the unconscious and the pen. The link is lost to the judge who does not write.

The difference between what is merely thought in silence and what is written down is a reason for having judicial opinions rather than blind announcements of results. It also cautions against allowing law clerks to draft judicial opinions. The law clerk will be reluctant to confess to the judge or even to himself that the outcome that the judge told him to write up will not write (and he may think it due to his own inexperience), while the judge, by not writing, will be spared a painful confrontation with the inadequacy of the reasoning that supports his decision. The judge could be thought to be delegating the dirty work of defending an unprincipled decision to the clerk. Delegating implementation is a traditional method of avoiding having to confront the consequences of one's decisions. I am not suggesting that it is a conscious strategy of judges. The judge does not know the opinion will not write, and the law clerk will not tell him.

I said when discussing Cardozo that it is possible to be a pragmatic judge yet write one's opinions in the conventional "pure" style. But it is difficult. If you are the kind of judge who thinks that the considerations that bear on a judicial decision range far beyond the canonical materials of formalist legal thought—if you think that values (not just "feelings"), history, and policy are legitimate considerations—you will find the "pure" style confining because it is not designed for the expression of those considerations. To the impure poet, "nothing that is available in human experience is to be legislated out of poetry."⁷³ Substitute "law" for "poetry" and we have the credo of the "impure" judicial stylist.

There is a striking example in Hand's opinion in *Fishgold v Sullivan Drydock & Repair Corp*⁷⁴ The issue was whether the veterans' reemployment statute gave the returning veteran more seniority than any nonveteran in his job classification. Among the considerations that persuaded Hand and his colleagues that the answer was "no" was the following:

⁷³ Warren, *Pure and Impure Poetry* at 26 (cited in note 11).

⁷⁴ 154 F2d 785 (2d Cir 1946).

When we consider the situation at the time that the Act was passed—September, 1940—it is extremely improbable that Congress should have meant to grant any broader privilege than as we are measuring it. It is true that the nation had become deeply disturbed at its defenseless position, and had begun to make ready; but it was not at war, and the issue still hung in the balance whether it ever would be at war. If we carry ourselves back to that summer and autumn, we shall recall that the presidential campaigns of both parties avoided commitment upon that question, and that each candidate particularly insisted that no troops should be sent overseas. The original act limited service to one year, and it was most improbable that within that time we should be called upon to fight upon our own soil; as indeed the event proved, for we were still at peace in September, 1941. Congress was calling young men to the colors to give them an adequate preparation for our defence, but with no forecast of the appalling experiences which they were later to undergo. Against that background it is not likely that a proposal would then have been accepted which gave industrial priority, regardless of their length of employment, to unmarried men⁷⁵

This effort “to reconstruct . . . the purpose of Congress when it used the words in which [the provisions in issue] were cast”⁷⁶ owes nothing to distinctively “legal” methods of reasoning and could not, I think, be adequately expressed in a style designed for the articulation of those methods. It may be a good or a bad approach to statutory interpretation, but that is not the issue. Judges whose thought carries—rightly or wrongly—beyond the conventional categories of legal thinking need a style equal to the range of considerations that they consider relevant. They need a style that is increasingly rare.

⁷⁵ *Id* at 788-89.

⁷⁶ *Id* at 789.

A Reply to Judge Posner

Patricia M. Wald†

Oh my. I had thought the Federal Judiciary—or some of it at least, including by its own proud proclamation, the Seventh Circuit—was the last refuge of courtesy in our increasingly mean-spirited society. Surely not on the evidence of this Article.

After fifteen pages of intermittently scholarly, esoteric and impenetrable analysis of judicial style, Judge Posner launches a surprise eight-page strike on an obscure five-page opinion of mine so insignificant that even I had to dig into memory to recall it.¹ Why? It turns out because “she is the only other judicial participant in this Special Issue.”²

If I am somewhat stunned, let me explain to the reader that I learned of Judge Posner’s intent to use *United States v Morris*³ as the centerpiece in his denunciation of the “pure” judge only upon receiving the galleys of his article, though from the footnote credits it is clear earlier drafts were widely circulated among other participants and faculty.

I feel like Humphrey Bogart in *Casablanca*: “Of all the gin joints, in all the towns, in all the world, [he] walks into mine.”

Other jurists in Judge Posner’s taxonomy get judged on their whole life’s work; I am rated on the basis of a single minor opinion drawn “essentially at random.”⁴ (What exquisite random aim Judge Posner has! It is Number 513 in a career corpus of 660 opinions as of this writing.) This lonely wisp, without more, apparently consigns me to the fearful rhetorical hell reserved for lazy and untalented “pure” judges whose opinions are notorious for “jargon,” “solemnity,” “high sheen,” “impersonality,” “piled-up details,” “fondness for truisms,” “unembarrassed repetition of

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¹ “‘Littlepaugh’, [the old judge] said musingly . . . ‘You know,’ he said marveling, ‘you know, I didn’t even remember his name.’” Robert Penn Warren, *All the King’s Men*, 367 (Harcourt Brace, 1946).

² Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U Chi L Rev 1421, 1436 (1995).

³ 977 F2d 617 (DC Cir 1992).

⁴ Posner, 62 U Chi L Rev at 1437 (cited in note 2).