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I have been a federal court of appeals judge for thirty years, and naturally over this long span of time I have formed judgments about how federal court of appeals judges should go about deciding cases, what their judicial opinions should be like (which raises the issue of how judges should use staff, consisting mainly of law clerks), and how lawyers should brief and argue cases in these courts. My purpose in this article is to distill my beliefs concerning opinions and advocacy into practical advice for federal court of appeals judges, their law clerks, and the lawyers who practice before these courts.

I. DECISION MAKING

Opinion writing and advocacy obviously cannot be divorced from decision making. How judges make up their minds about the outcome of a case is bound to influence opinion writing and it should also influence how lawyers argue before judges.

Unfortunately judges tend not to be candid about how they decide cases. They like to say they just apply the law—given to them, not created by them—to the facts. They do this to deflect criticism and hostility on the part of losing parties and others who will be displeased with the result, and to reassure the other branches of government that they are not competing with them—that they are not legislating and thus encroaching on legislators' prerogatives, or usurping executive-branch powers. They want to be thought of as technicians, as experts, rather than as politicians in robes—more precisely, rather than as full-time judges compelled by circumstances sometimes to legislate from the bench.

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* Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. This article is a much amplified version of a talk of the same title that I gave at the Duquesne University School of Law upon receiving the law school's first Dr. John and Liz Murray Award for Excellence in Scholarship. I thank Dean Kenneth Gormley for his hospitality on that occasion and Michael Zhu for his research assistance and William Domnarski for his extremely helpful comments on a previous draft.

And most of the time, judges, such as federal court of appeals judges, who have a mandatory jurisdiction—who cannot pick and choose the cases they hear, as the U.S. Supreme Court can and does—really *are* engaged in objective, non-ideological decision making. Most appeals to federal courts of appeals really can be decided satisfactorily by straightforward application of known and definite law to the facts of the case, and most judges take seriously their role as modest law appliers—also it takes less time and effort to dispose of a case by application of known law to facts than by forging new law. So most of the time federal court of appeals judges do decide appeals in a modest, "legalist" or "formalist" manner. But in the American legal system, owing to such factors as the absence of disciplined legislative processes, the difficulty of amending the U.S. Constitution and the resulting pressure on federal courts to engage in loose interpretation (which is not easily distinguished from making law), the broad domain of common law (explicitly judge-made law), and the complexity and confusion engendered by a stratified legal system (state statutory and state common law, state constitutional law, federal statutory and federal common law, and federal constitutional law), a great deal of American law is actually made by judges rather than by legislators or the drafters of constitutions. The playing of a legislative as well as a conventionally judicial role (as that role would be understood in most legal systems outside the Anglo-American sphere) is more congenial to judges in a system of lateral entry than in the career judiciaries found in legal systems outside the Anglo-American sphere. A lawyer who becomes a judge after another career in the law is less disposed to play a passive role than a lawyer who started to climb the judicial ladder right out of law school and learned as in any bureaucracy to please his superiors by following rules, not by making or bending them.

The cases in which judges are called upon to play a legislative role (though rarely acknowledged) yield the decisions that shape the law. They are not only the most important and most interesting, but also the most challenging, cases that judges decide. How do they (do we) decide them? There is no uniform approach. There is a spectrum that runs from extreme "formalism" to extreme "realism" on which American judges can be located, though most federal court of appeals judges cluster in the central portion of the spectrum, where formalism and realism mix. Both formalist and realist use a formalist approach when deciding straightforward cases. But they part company when dealing with cases in

the open area—the area in which the judge is required to make a legislative decision. For clarity, I describe first a model formalist, and second a model realist.

The formalist court of appeals judge like most American judges is a lateral entrant into the judicial profession. He became a court of appeals judge in early middle age following a career in a law firm or a prosecutor's office. He may have been a federal district judge for several years but would have had a non-judicial career before that. As a practitioner in a law firm or government legal office, he would have been operating in a hierarchical environment in which the drafting of briefs and other legal documents was delegated to junior members of the office, often first-year associates. The first draft would be carefully edited by more senior members of the firm. By the time he was ready for a judicial appointment it had been years since he had written a first draft or even carefully edited a draft—the principal editing was being done by lawyers junior to him. He was an executive, a manager, not a writer or editor.

His years in practice had habituated him to the conventional norms of the practice of law, which had changed little in centuries. He was accustomed to regard the law as a given and the lawyer's task as applying the law to the particular facts of a case. Judges—mysterious, remote, and, especially if they were federal judges and therefore enjoyed life tenure, powerful—were to be treated deferentially, and to be assumed to be engaged in a technical, almost algorithmic task of law application. Of course some judges were known to be indolent, biased, or "result oriented," but briefing and argument assumed the judge's competence and neutrality, lest otherwise the judge feel insulted. (Notice the tension between assuming that judges are truly disinterested appliers of the law and fearing that they will retaliate against lawyers who do not treat them deferentially.) The judge was assumed to be thoroughly comfortable with legal jargon, to be knowledgeable about the legal doctrines involved in the cases appealed to him, to have mastered the facts and the commercial or other background of the case (the transaction or other activity out of which the case had arisen), to have firm expectations with respect to the style and tone of briefs and arguments, and to be a stickler about format, grammar, spelling, page length, and citation form, as well as to expect the utmost deference. If a judge asked a question at argument, and, before the lawyer could answer, the red light lit up, signifying the expiration of the time allotted to argument, the lawyer would be

expected to ask the judge whether he could answer the question despite having run out of time.[1]

The judge was assumed to be in quest of "right answers," and the feasibility of the quest was assumed. The lawyer's task was to try to persuade the judge that, properly interpreted, the authoritative materials yielded the answer to the legal question posed by the case that favored the lawyer's client. Sophisticated lawyers knew (and know) better—knew that matters were not that simple, that some cases, and those the most important in terms of impact, were indeterminate to orthodox legal reasoning. But they did not allow that awareness to show in their briefs and oral arguments. Effective advocacy was and is thought to require the lawyer to maintain an elaborate decorum, a sense of propriety of argument and expression based on acceptance of judicial pretensions to neutrality and objectivity.

The judge appointed to a federal court of appeals from this practice environment would tend to think that what mainly had changed as a result of his career change was that it was now his task to decide which side's lawyer had done the more persuasive job of applying the law according to the conventions of legal analysis. A lawyer is a practicing lawyer one day, and a judge the next. There is no transition, no (or very little) training for the new career, and so it is natural for the lawyer newly appointed a judge to continue with as little change as possible his accustomed approach. The lawyers will offer their interpretations of the legal materials and the judge will match them to the materials and decide which advocate is more faithful to the language of the statute or the holdings of decisions that have the status of precedents. The judge's role is umpireal. The contestant has become the referee. As John Roberts, in his confirmation hearing to be Chief Justice, famously described the judge's (even the Supreme Court Justice's) role, it is to call balls and strikes, not to pitch or bat.[2]

The judge may realize that the statutory language applicable to a particular case may be hopelessly vague, the legislators' intentions inscrutable, the precedents distinguishable or in conflict. Often he will strive to resolve these indeterminate-seeming cases by invoking higher-level rules or principles (rules or principles for

1. When lawyers ask me that at argument, I tell them peevishly that I would not have asked the question had I not wanted it answered.

2. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005).

resolving disputes over the scope or meaning of a rule), such as a rule requiring deference to a statutory interpretation made by the administrative agency charged with enforcing the statute, or a rule disfavoring summary judgment in cases involving issues of intent, or a rule that waivers of sovereign immunity should be construed narrowly, or "canons" of statutory interpretation, or the principle of judicial self-restraint in considering whether to hold a statute unconstitutional. By relying on such rules and principles, he minimizes the occasions on which he has to base a decision on his own notions of a sensible resolution of the case, notions that would not produce a "right answer" by reference to an authoritative text. He will therefore be loath to base his decision on the theories of empirical findings of social scientists, as that would seem to him to be going "outside" the law. Nor will he be adept at the use of such materials, because they will not have figured largely in his career as a practitioner.

The umpireal conception of the judge breeds passivity. The judge does not pick the players, the plays, etc. He just watches. The lawyers make the factual record, make the legal arguments; legislators, constitution drafters, and higher and earlier judges make the rules. The judge is an applier of rules made by others to facts generated by others. Of course no informed person, least of all Chief Justice Roberts, believes that an adequate description of a Justice of the U.S. Supreme Court, but to many judges of lower courts it is plausible, and it is attractive from the standpoint of avoiding controversy and limiting effort.

This judge will understand by a "learned," a "scholarly," judicial opinion, one that summarizes the decision of the lower court and the arguments made by the parties to the appeal, that recites in detail the facts to which the law was to be applied, that specifies and explains the applicable higher-level rules (such as the standard of appellate review), that elaborates upon those and other doctrinal materials by copious reference to authoritative texts, that applies the rules extracted from these materials to each of the non-frivolous arguments made by the parties, that proliferates footnotes in which to place qualifications and discuss side issues (thus striving for completeness), that throughout deploys the specialized vocabulary of the law ("the instant case," "*eiusdem generis*," "case of first impression," "inferior court," etc.)—even when synonyms in ordinary English are readily available ("this case," "of the same kind," "novel case," "district court" or "lower court")—that conforms scrupulously to the format prescribed for citations

by the applicable form book, usually *The Bluebook: A Uniform System of Citation,*[3] now in its nineteenth edition, and that maintains a formal, dignified, "official" style throughout, eschewing contractions and colloquialisms (and no pictures!).

The realist judge has now to be described, but I need to make two preliminary points, the first concerning the caseload of the typical federal court of appeals, the second the meaning, at least the modern meaning, of a judicial "realist."

There are three broad types of case in the federal courts of appeals. The first consists of direct appeals in criminal cases. Almost all these appeals are by a convicted defendant, and in the vast majority of the cases he is not paying his lawyer and, as a result, the proportion of cases of very little merit—cases easily and satisfactorily disposed of by formalist methods—is very high. Next, are cases in which the appellant has no lawyer; most of these are habeas corpus cases and prisoner civil rights cases, and again the proportion of appeals having very little merit is very high. Third, are civil appeals in which both parties are represented, but which never get to decision because they are settled or abandoned en route. Each federal court of appeals employs a small staff of lawyers to try to settle cases that have been appealed, before they are argued or otherwise submitted for decision. Generally, it is the easier cases that are settled and the cases of little merit that are abandoned.

My court allows oral argument in all cases in which both sides have counsel; most of these are civil cases but a substantial minority are criminal. A substantial fraction of the civil cases that are argued, and a smaller but nontrivial fraction of the criminal cases, are difficult cases, in the sense that reversal or affirmance would be defensible outcomes—a mainstream judge, whether formalist or realist, could write a respectable opinion defending either outcome. It is in such cases—cases in which a formalist outcome is not preordained, because the materials of formalist decision making do not line up in one direction—that the realist judge comes into his own.

So what *is* a judicial realist? I do not wish to tie my concept of judicial realism to the views of the legal realists of the 1920s and 1930s. Nor do I equate it to economic analysis of law or to pragmatism, though both economics and pragmatism have significant

3. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 19th ed. 2010).

parts to play in realistic judicial decision making. Rather, my conception of a judicial realist is a judge who (1) understands the limitations of formalist analysis; (2) does not (a related point) have a "judicial philosophy" that generates outcomes in particular cases; (3) wants judicial decisions to "make sense" in a way that could be explained to, and persuade, a lay person; (4) is a "loose constructionist," who believes that interpretation should be guided by a sense of the purpose of the text (contract, statute, regulation, constitutional provision) being interpreted rather than by the literal meaning of the text (this is implicit in (3)); (5) has a distaste for legal jargon and wants judicial opinions, so far as possible, to be readable by non-lawyers (this too is implicit in (3)); (6) wants to get as good a handle as possible on the likely consequences of a decision, one way or the other (this is pragmatism and is still another implication of (3)); (7) has an acute sense of the plasticity of American law (this is implicit in (1) and (3)); (8) is acutely conscious of the manifold weaknesses of the American judicial system; and (9) wants to do what he can to improve the system. It is obvious that realism, like formalism, has implications for the judicial opinion, and not merely outcome, but I largely reserve those for the next section of this article.

The precepts I have just listed imply that the realist's approach to deciding a case is likely to differ in a number ways from that of the formalist: adoption of a purposive as distinct from a semantic conception of interpretation; a desire for a fuller understanding of the facts; an emphasis on weighing consequences as a guide to decision making; a critical stance on American law; and a desire to conform the law to lay intuitions, so far as it is within a judge's authority and capability to do so. Let me elaborate these points briefly.

1. When Holmes said that "[g]eneral propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise,"[4] he was exaggerating in order to emphasize that legal principles, rules, and doctrines tend to be stated with a generality that transcends the circumstances of a particular case. That is necessary not only to provide guidance for future disputants but also and relatedly because we instinctively think of particulars as instantiations of generalities. Mars is a planet, subsumption under the general term "planet" is useful, but to say that because Mars is a planet

4. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

and Mercury is a planet they must be of the same size and have the same surface temperature would be senseless. Similarly, in law a human being is an animal, but a sign forbidding animals in a restaurant should not be interpreted to ban humans from the restaurant. One cannot safely apply a rule on the basis of its grammatical structure and the meaning of the words that compose it; one has to have a sense of what the rule is concerned with (which is why, by the way, the oft-repeated judicial slogan that in interpreting a statute one begins with its words is false), which in turn requires a sense of the context in which the rule is intended to apply, and in short, a sense of its purpose. And the purpose, once understood, ordinarily guides interpretation. The realist judge is always interested in the purpose of the rule (or standard, or doctrine, or statutory or constitutional provision or regulation) that he is being asked to apply, for without knowledge of its purpose he cannot be confident of the rule's domain, and specifically whether it embraces the case before him. And this will require him to know more than the semantic extension of the words in which the rule is stated.

A case may look close because vaguely stated legal rules or principles are in play that enable both sides to make colorable arguments, though one side's arguments may be pretty obviously wrong, even absurd. Such a case invites the judge to trim the vaguely stated rule or principle by explaining the purpose behind it, conforming the rule to the purpose, and making its meaning and conformity clear. Lawyers like to think they use language with precision, but they do not; they use it with care (if they are good lawyers), which is different. Ambiguity abounds in American law. The realist judge tries to dispel ambiguity in the particular case by digging beneath the semantic surface of the applicable rule for the practical considerations that motivated its adoption, and then by restating the rule in a modern idiom and with a clear indication of the rule's limits as derived from its purpose. Most legal rules, provided they are not allowed to balloon to their semantic outer limits, have at least a kernel of practical sense. Finding and exhibiting that kernel (and maybe limiting the rule to it) is a goal of realist analysis.

2. Wanting to produce a decision and opinion that will make sense of the law to a lay reader, the realist judge needs to understand a case in a richer sense of "understanding" than the formalist judge. The latter is generally content with the facts found by the trial court or administrative agency. Usually these are the

facts stated in the appeal briefs; a party will often argue facts that he thinks the trial court or agency should have found but did not.

Factual assertions in briefs tend to be of two kinds: names, dates, and other background facts likely to be encountered in any narrative but rarely significant to a case; and facts similar to facts that have appeared in previous cases, the cases the parties will have cited as precedents. All too often facts important to a sensible decision are missing from the briefs, and indeed from the judicial record. If it is a commercial case, the judge needs to understand why the transaction at issue was configured as it was; if it is a criminal case, in which the defendant is accused of reckless endangerment by firing a gun into the air, the realist judge needs to know such things as the height, occupancy, density, and proximity of surrounding buildings, the time of day or night, and pedestrian density within the range of the bullet.[5] The reason for the judge's wanting to get deep into the weeds in a case is that, by hypothesis, it is a case that is indeterminate from a formalist perspective.

I have been criticized by lawyers for including in my opinions facts drawn from Web research conducted by me or my law clerks. My response is that the lawyers should do the Web research and spare me the bother. The Web is an incredible compendium of data and a potentially invaluable resource for lawyers and judges that is being underutilized.

Not that an appellate court should make its decision turn on a fact, unless it is uncontestable, that is not in the judicial record. But often what is left out of the briefs is background material (for example, the basic facts about a corporate defendant, such as, what its business is—which are sometimes omitted even from briefs in employment discrimination cases!) that would be less likely to affect our decision than just to reassure us that we understood the real-world setting of the case. Those are not "adjudicative facts," which if contested can reliably be established (it is believed) only by the adversary process of a trial, involving testimony (including testimony given under cross-examination) and exhibits that are admissible in accordance with the rules of evidence, although expert witnesses are allowed to rely on inadmissible facts if they are the kind of facts on which reputable practitioners in their field of expertise rely.[6] Besides adjudicative facts,

5. The reckless-endangerment case is a real one that I had occasion to hear a few years ago: United States v. Boyd, 475 F.3d 875 (7th Cir. 2007).

6. *See* FED. R. EVID. 703.

however, there are facts of which a judge can take judicial notice because they are incontestable.[7] There are also "legislative facts," which are facts that bear on the design or interpretation of legal doctrines. And there are background facts—facts (I have given some examples) designed to increase the reader's understanding of a case by placing the adjudicative facts in an illuminating context—and what might be called "coloring-book" facts, designed to make a judicial opinion a little more vivid and colorful than that which lawyers and judges are accustomed. There are also visual aids, such as a map or a photograph, which can enhance understanding.[8]

Lawyers want to control litigation. They are unhappy when appellate judges go outside the record that the lawyers have shaped. They think they should be warned whenever an appellate judge is minded to inject something into an opinion that they had not thought to argue, though if judges had to do this, the appellate process would be protracted beyond endurance. Appellate judges are permitted to go outside the record without the lawyers' permission—it is only the adjudicative facts that they are not supposed to augment with their own research. Their reluctance to do so is an aspect of the passivity that the umpireal conception of the judge fosters.

The formalist orientation is heavily semantic ("plain language" and the like), and this is reflected in appellate briefs. So disfavored are pictures, maps, objects, and diagrams in such briefs that I have said that some lawyers think a word is worth a thousand pictures.[9] In cases involving the alleged infringement of pictorial trademarks, trying to compare trademarks in words is no alternative to showing the judges the two marks. But it is natural for lawyers to carry their semantic preoccupation with them when they become judges. And sticklers will object that maps and satellite photos—any photos, for that matter—are unreliable evidence because they are not continuously updated. That matters little if the map or the photo is offered to illustrate uncontested facts. And in the unusual case, in which the map or photo is inaccurate, someone is bound to notify the court of its error and the opinion will be corrected; provided that the map or photo was used for il-

7. *See* FED. R. EVID. 201.
8. *See, e.g.*, Grayson v. Schuler, 666 F.3d 450 (7th Cir. 2012).
9. Coffey v. Ne. Ill. Reg'l Commuter R.R. Corp., 479 F.3d 472, 478 (7th Cir. 2007).

lustrative purposes, rather than as a source of adjudicative facts, the correction will not affect the outcome.

Of course Web research can result in errors. But no one should be so naïve as to believe that the determination of facts by the familiar adversary process at a trial is proof against error—that witnesses dare not violate their oath to tell the truth, the whole truth, and nothing but the truth, so help them God, for fear of divine retribution; that cross-examination is an infallible or even a reliable tool for exposing lies and mistakes; that all expert testimony is reliable and intelligible; that all trial lawyers are competent at obtaining, evaluating, and presenting evidence; that judges and jurors are skilled at evaluating the credibility of witnesses; or that the rules of evidence are single-mindedly designed to produce truth rather than to serve other, and inconsistent, goals as well, such as, protecting people's privacy, limiting executive power, and conserving judicial resources. There is no legal shibboleth so often repeated as that determinations by a trial judge (or jury) whether to believe or disbelieve a witness can be overturned on appeal only in extraordinary circumstances, because of the inestimable value, in assessing credibility, of seeing and hearing the witness rather than reading a transcript of his testimony, since the transcript eliminates clues to veracity that are supplied by tone of voice, hesitation, body language, and other nonverbal expression. Actually, that is one of those commonsense propositions that may well be false,[10] since nonverbal clues to veracity both are unreliable and distract the trier of fact (or other observer) from the cognitive content of the witness's testimony.[11]

Yet it would occur to few judges to question the proposition that the trial judge has superior ability to judge credibility than the appellate judge, because nothing in the culture of the law encourages its insiders to be skeptical of oft-repeated propositions accepted as the age-old wisdom of the profession.

Not that there are not good reasons for appellate deference to credibility determinations by the trier of fact. The trier of fact spends much more time on a case than the appeals court and may have a better feel for the facts of the case, and anyway, the primary job of appellate courts is to repeat, restate, correct, and maintain uniformity of legal doctrines, and correcting erroneous factual

10. *See* Michael J. Saks, *Enhancing and Restraining Accuracy in Adjudication*, 51 LAW & CONTEMP. PROBS. 243, 263-64 (1988).

11. *Id.*

determinations is incidental to that primary responsibility for doctrine; getting the facts just right is not that important from the appellate judges' perspective. So they defer.

The limitations of the conventional judicial record are especially acute in two fields in which the "judicial" record is actually a record compiled by an administrative law judge, who is a judicial officer but not (quite) a judge. The two fields are asylum law and social security disability law. The federal immigration statute allows refugees from certain forms of persecution (mainly political or religious) to remain in the United States even though, were it not for the likelihood of their being persecuted if returned to their country of origin, they would be deported. The immigration judges are heavily overworked, and the immigration bar is weak because most illegal immigrants (including asylum seekers) have very little money and because immigrants tend to gravitate to lawyers of the same ethnic background regardless of the lawyer's competence.[12] The federal courts of appeals, to which denials of asylum are appealed, reverse these denials at a very high rate, often because the immigration judges and the Justice Department's lawyers display an appalling ignorance of foreign countries—of facts about them that should be common knowledge and not require "proof" in the normal legal sense of the word: such facts as the difference between being denationalized when a country is split in two (so citizens of Czechoslovakia had to choose between Czech and Slovakian citizenship when Czechoslovakia divided in two) and when a country revokes the citizenship of a despised minority (as Nazi Germany did to German Jews); that poor African countries do not have as elaborate a system of documentation as the United States; that African husbands are less likely than American husbands to discuss their business dealings with their wives; and so on.[13]

In reviewing decisions denying applications for social security benefits by people who claim to be physically or mentally incapable of full-time employment—decisions made by overworked administrative law judges of the Social Security Administration (aided, like the immigration judges, by a weak bar, because social security disability practice is not lucrative)—judges encounter all

12. *Improving the Immigration Courts: Effort to Hire More Judges Falls Short*, TRAC IMMIGRATION (July 28, 2008), http://trac.syr.edu/immigration/reports/189/.

13. *See* Haile v. Holder, 591 F.3d 572, 573 (7th Cir. 2010); Apouviepseakoda v. Gonzales, 475 F.3d 881, 893 (7th Cir. 2007) (Posner, J., dissenting); Soumahoro v. Gonzales, 415 F.3d 732 (7th Cir. 2005).

too often jargon-concealed ignorance of disease and disability, especially mental disease.[14]

It is not as if all district judges knew a great deal about foreign countries or about disease and disability, so that replacing immigration judges and social security administrative law judges by federal district judges (which would require roughly quadrupling the number of federal district judges) would remedy the considerable injustices perpetrated by the present system. Many federal district judges and court of appeals judges, and for that matter Supreme Court Justices, are not well informed about foreign countries or about disabilities; and this points to a broader problem, which is found throughout the American judicial system and is intensifying as knowledge expands and becomes more complex, technical, esoteric, and counterintuitive. American *law* is becoming more complex, but the judges can cope with that. What most of them cannot cope with is the increased complexity of activities that gave rise to litigation. Increasingly, cases involve statistical proof, advanced medical technology, environmental science, computer science, and what is revealingly termed "financial engineering," which is the application of mathematical techniques to investment and lending. None of the current Supreme Court Justices has a background in any of those areas, and few lower-court judges do either. Some lawyers do, but they tend not to be very good at explaining technical issues to judges or jurors (patent lawyers are an exception). A judge can help himself or herself by hiring at least one law clerk with a good technical background. The field of the techie's expertise is not critical; my experience has been that technically trained law clerks will usually feel comfortable in dealing with any technical issue that arises in a case. And online research can be a life saver in helping judges cope with technical issues, because the Internet contains a vast amount of technical information in all fields, much of it accessible to persons with limited technical background.

The courts of appeals have staffs of law clerks, called staff attorneys or staff law clerks, who are not hired by or assigned to particular judges, but form a pool to which particular classes of case, and especially ones in which the appellant has no counsel (these are mainly habeas corpus and civil rights cases brought by

14. *See* Martinez v. Astrue, 630 F.3d 693, 694-95 (7th Cir. 2011); *see, e.g.*, Parker v. Astrue, 597 F.3d 920 (7th Cir. 2010); Spiva v. Astrue, 628 F.3d 346 (7th Cir. 2010); Kohler v. Astrue, 546 F.3d 260 (7th Cir. 2008); Kangail v. Barnhart, 454 F.3d 627 (7th Cir. 2006).

state and federal prisoners), are relegated and in which the appeal is not orally argued. Virtually by default (since most judges are formalists), staff attorneys generally write formalist bench memos or order drafts (where "order," at least in the terminology of my court, signifies a non-precedential opinion), which the judges review. A useful innovation, with which my court is beginning to experiment, would be to reserve several staff-attorney slots for lawyers with a technical background, who could be a resource on which the judges could draw for help with cases presenting difficult technical issues.

The standard judicial strategy in dealing with subject matter that judges and their law clerks do not understand is to transform issues of fact and policy into semantic issues (so-called "plain meaning"—often not so plain when read in context—of statutes, or the interpretation of precedents, or applying ducking principles—principles of deferential review of rulings by district judges and especially by administrative agencies, which deal disproportionately with technical matters) that enable appellate judges to avoid having to decide the actual merits of the parties' arguments to them. This is evasion.

We need evidence-based law, just as we need evidence-based medicine. For years the courts have struggled to determine what should count as a "crime of violence," under the Armed Career Criminal Act[15] and the United States Sentencing Guidelines, for purposes of increasing the defendant's sentence on the basis of his criminal record.[16] An attempt, successful or not, to break out of a jail or prison is pretty clearly a crime of violence; but what about a "walkaway" escape, from an unlocked place of detention, or a failure to show up on time at the jail or prison to begin serving one's sentence? Whether these more placid forms of eluding custody create a risk of violence comparable to that of crimes that would be widely agreed to be violent crimes ought to be resolved by data rather than by judges' guesses. Judges need a better grasp of and grounding in empirical reality, and the methods of ascertaining that reality.

3. The judicial realist is a consequentialist. A natural, though not the only, way in which to interpret "reasonable" as a description of the outcome aimed for by the judicial realist in a close case

15. 18 U.S.C. § 924(e) (2006).

16. *See, e.g.*, Chambers v. United States, 555 U.S. 122 (2009); Begay v. United States, 553 U.S. 137 (2008).

is by reference to consequences. A non-judge asked to resolve a dispute between two people will seek a "reasonable" resolution in a sense shaped by notions that he would be likely to call fairness, common sense, normal practice, or customary understandings. I do not agree with Justice Scalia that indifference to hundreds of deaths that might result from embracing a broad interpretation of the Second Amendment is the sign of a good judge,[17] or with Justice Breyer that it is the sign of a bad one.[18] If deaths are a consequence of deciding a case one way rather than another, that is something for the judge to consider—but to consider along with the other consequences as well. The basis for dissatisfaction with the limited facticity of the typical judicial proceeding—with its heavy emphasis on live testimony, its pathetic faith in the ability of judges or jurors to determine "credibility" from the body language, voice tones, and hesitations of a witness,[19] and its discomfort with empirical methodology—is that the way in which the litigation process obtains and presents fact makes it very difficult for judges to gauge the consequences of deciding a case one way or the other, or adopting one rule rather than another.

But I must emphasize that the realist judge, like the formalist, must, before considering consequences, seek guidance in the orthodox resources of judicial decision making. Often he will find it and if he does, he need go no further—ordinarily he should go no further. It is in what I have been calling the "open area" that the realist and the formalist diverge. There, the realist is likely to approach a case in much the same way as a layperson would, but with a sharper focus on consequences in order to discipline his thought, including systemic consequences that would not occur to the layperson. These are consequences, such as the effect a decision is likely to have on the continuity, predictability, and stability of legal rules and decisions, or the effect on legislators' thought processes if judges ignore clearly written statutes without having a compelling reason to do so (for then legislators will not know what they are legislating—they will merely be producing putty for

17. *See* District of Columbia v. Heller, 554 U.S. 570, 634-35 (2008).

18. *Id.* at 681 (Breyer, J. dissenting).

19. *See* Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1159-60 (1993); Olin G. Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1075 (1991). For a more recent survey, see Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557, 2566 (2007), where we read that "these results are generally consistent with the dismal view among legal academics. Demeanor cues do not lead to accurate lie detection."

the judges to shape), and on lawyers and litigants if judges ignore statutory text and judicial precedent without compelling reasons, thus making law inscrutable. Shortsighted justice has bad overall consequences.

4. The shibboleth that judges apply law rather than make it is deeply engrained in the judiciary, in Congress and other legislatures (legislators like to think of themselves as the only lawmakers), and in the legal profession as a whole. This is partly defensive—the judges ducking blame for unpopular decisions and doctrines by saying that "the law made me do it"—and partly *politesse* (to avoid ruffling legislators' feathers). But it is also responsive to a valid interest in maintaining stability of legal rights and duties, an important social value. Actually believing that judges do not make law, however, dulls the judges' critical faculties, even as the slow pace (a result of trying to maintain stability) of legal change leaves many obsolete legal doctrines in place too long. The realist judge realizes, and is prepared within reason to act on the realization that, at any moment, a significant portion of legal doctrines, procedures, usages, and so forth are obsolete and should be reformed or jettisoned.

But *responsible* realist judges, who acknowledge and embrace a legislative function for the judiciary, will confine its exercise to areas of judicial expertise, avoiding the temptation to legislate from the bench in fields about which most judges know little, whether it is gun control, legislative apportionment, the administration of public schools, or campaign finance—areas into which judges have blundered because of (I believe) their political ideology.

Legislating from the bench should be distinguished, however, from careful, searching review of decisions by lower courts and administrative agencies. I mentioned immigration law and social security law as areas of legal administration that judges can improve by careful scrutiny of the agency decisions that they are asked to review. Some judges resist this on the ground that judicial review of agency decisions is meant to be deferential. But realism requires recognition that a strong norm of deference to the decisions of administrative agencies is the fossil remnant of an era in which judges were excessively hostile to agencies and "progressives" had excessive faith in the potential of agencies as agents of reform. The progressives prevailed in the New Deal, and "deferential" standards of appellate review of agency decisions, whether the standard is called "substantial evidence" or "abuse of discre-

tion," ensued and persist, producing many injustices. First-line decision makers, including the judicial officers and review boards of administrative agencies, often do have significant advantages over reviewing judges in knowledge of technical fields. But it is unrealistic for appellate judges to accord comparable deference to decisions of immigration and social security judges who conduct hundreds of hearings a year as to administrative law judges of the National Labor Relations Board, who conduct an average of fewer than five hearings a year, though they have other work as well. We judges see the differences in the opinions. Must we ignore the differences and accord equal deference to all administrative decisions? The realist judge thinks not. The realist judge thinks that deference is earned, not bestowed.

5. The realist judge wants the law to conform so far as possible to lay intuitions. I can illustrate this point with a case in which a prison inmate was complaining that improper treatment in the immediate aftermath of a stroke amounted to cruel and unusual punishment.[20] To be permitted to bring a federal civil rights suit, an inmate of a state prison has to exhaust "available" grievance procedures offered by the prison.[21] The plaintiff claimed that he had been unable to file a timely grievance because of the stroke.[22] The deadline for filing was sixty days from the date of the event giving rise to the grievance.[23] The grievance procedures allowed for a late filing if "good cause" for its untimeliness was demonstrated, but did not define "good cause" and the state refused to concede that physical incapacitation was "good cause."[24] But how could it not be? The implication would be that if the inmate were in a coma for the sixty days after the event giving rise to his claim, he would have failed to exhaust his prison remedies and so would be barred from access to a federal court. A layperson would think it obvious that a prison remedy so constrained was not "available" to the inmate. It would be a mistake for a judge to dismiss the lay intuition as irrelevant to interpreting the term "available" or the omission to mention physical incapacitation in the statute setting forth the prison's grievance procedures. So strong a lay intuition should require a lot of formalist gymnastics to overcome in the name of "the law."

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20. Hurst v. Hantke, 634 F.3d 409, 411 (7th Cir. 2011).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 412.

I have been going on at length about the differences between formalist and realist judges, but most federal judges nowadays, at all levels, are hybrids, though their realism is often concealed by formalist rhetoric. And much of the advice that I would give to new federal court of appeals judges on how to approach decision making is independent of the mixture of the formalist and the realist in their judicial disposition. For example, I think it is important that a judge who has never been a trial judge, either state or federal, should volunteer to conduct trials, including jury trials, in the district courts of his circuit from time to time, as I have done since I was first appointed. If an appellate judge does not have first-hand acquaintance with the litigation process from the perspective of a trial-court judge, his ability to review decisions and rulings by district judges will be handicapped. I have found my trial experience invaluable in my appellate decision making.

I also have some advice to impart about law clerks.[25] The judge should ask his law clerks in advance of oral argument not only to read the briefs, but to dip into the record; and if it is obvious that the decision will turn on some key cases or statutory provisions, to make sure the judge has copies of those critical materials to study before, and take with him to the oral argument. The law clerks should also do some background research, if time permits. Law clerks for the realist judge will doubtless want to Google the parties and do other online research to help them and him (or her) understand the parties, the commercial or other context of the case, and the activities of the parties or others that gave rise to the case.

Most judges assign just one law clerk to help him prepare a case to be argued. I think that is a mistake. One clerk should take the lead, based on his background or interests, but all three (or four) should be engaged. Their views may diverge in interesting ways helpful to the judge.

I do not think that law clerks should be required to write bench memos. That is time consuming and will reduce the time they have available for conducting research.

I do not favor the "Becker model," discussed in the next section of this article, which interposes a senior law clerk between the judge and the other law clerks. That seems needlessly hierarchical and formal for such a small staff, and diminishes the enthu-

25. There is helpful literature on law clerks. *See, e.g.*, ALIZA MILNER, JUDICIAL CLERKSHIPS: LEGAL METHODS IN MOTION (2011).

siasm and contributions of the other clerks. I can see, however, how a weak judge would find the model irresistible, as it would provide him with, in effect, an assistant judge. Given the ratio of American lawyers to federal court of appeals judges—it is roughly 5,000 to 1—there should not be any difficulty in avoiding the appointment of weak judges, though some strong judges will weaken as a result of old age. But federal judges are appointed by politicians, so a uniform high quality of appointees cannot be assumed. (Which is not to suggest, however, that a purely meritocratic system of selecting federal judges would be an improvement on balance, as it would sacrifice diversity of experience and insight and tend to create a judicial mandarinate that had limited understanding of the larger society.)

The judge should be aggressive at oral argument. The prepared remarks of the lawyers add little if anything to what is in their brief. Only through questioning does the judge learn more about the case than he knows already. And tendentious questioning—questioning that indicates how the judge is leaning with regard to the merits of the appeal—is an important method of communication with the other judges on the panel. The deliberations that follow oral argument often are stilted. The judges speak in a prescribed order (junior to senior or senior to junior, depending on the court), and for the sake of collegiality they often pull their punches in stating their view of how the case should be decided. Once a judge has indicated his vote in the case, even if tentatively, concern with saving face may induce him to adhere to the vote in the face of the arguments of the other judges.

I suggest that when trying to make up his mind about which way to vote, the judge remind himself of his limitations (limitations that all judges have)—the limitations of his knowledge of the law, the limitations of his knowledge of the case at hand, the limitations of his knowledge of the real-world context of the case, and the limitations (or distortions) of his thinking that result from the biases that all judges bring to judging. Not that it is wrong, let alone possible, to judge without biases. The neutral term is "priors"—the expectations, formed by background, experience, and temperament, which every judge or decision-maker brings to a case. Banish all priors, and the only way to decide a case in the open area—a case indeterminate to legalist reasoning—would be to flip a coin. But one should try to be aware of one's priors, so that they do not exert too great an influence on one's judicial votes. A judge might have a soft spot for animals; for environmen-

tal values, generally; for the police; for paramedics; for asylum seekers; for people with serious mental illnesses; and for marginal religious sects. He may have a range of antipathies as well, such as the Internal Revenue Service or insurance companies (these were common judicial antipathies when I first became a judge, though I did not share them), litigious people, hypersensitive people, and people afflicted with *pleonexia*—Aristotle's word for unjustly wanting to appropriate what is rightfully another's. Through self-awareness and discipline a judge can learn not to allow his sympathies or antipathies to influence his judicial votes—unduly. But the qualification in "unduly" needs to be emphasized. Many judges would say that nothing outside "the law" influences *their* judicial votes at all. Some of them are speaking for public consumption, and know better. Those who are speaking sincerely are fooling themselves.

II. APPELLATE OPINION WRITING

I have long been critical of judicial opinion writing. A decade ago I listed my criticisms:

> *First*, there is a noticeable lack of candor, and, *second* and related, a notable lack of concreteness, in judicial opinions. These are pragmatic failings; more precisely, they are stylistic failings caused by a failure to be pragmatic. . . .
>
> *Third*, there is an overuse of jargon, one of the marks of what I've called elsewhere the "pure" style of judicial opinion writing. It is a style self-consciously professional; its antithesis, what I call the "impure" style, is simple, nontechnical, colloquial, narrative, essayistic.
>
> *Fourth* is a lack of economy of expression—lack of considerateness for the audience for judicial opinions. Under this rubric can be grouped the tendency to overkill, to repetition, to tedium, and the clutter of citations, facts, quotations, and boilerplate, that are such characteristic features of judicial prose.
>
> *Fifth* is the preoccupation with trivia that is so marked a characteristic of the legal mind. It is the hypertrophy of the high degree of verbal *care* that is a genuine asset of the well-trained lawyer.

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

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

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

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

writers (the law clerks and staff attorneys) drawn from the best law schools.[26]

There is a literature on judicial opinions and opinion writing.[27] There are even book-length manuals on opinion writing,[28] though they are overly ambitious; they try to teach good writing to a middle-aged and elderly audience, and that is likely to be a fruitless undertaking. Some judges may profit from the tips on writing style in an excellent book by Bryan Garner.[29]

The fundamental decision that an appellate judge must make in regard to opinion writing is whether to write his own opinions from the ground up or to edit law clerks' drafts. The choice is thus between two models of the appellate judge: the writer model, which prevailed before judges had law clerks, and for a time after that before they had many law clerks (and other staff, such as interns and externs), and the manager model, which is increasingly common today, and I believe dominant.

The most highly developed form of the manager model is the "Becker model," named after the late Judge Edward Becker of the Third Circuit and adopted (though often in a diluted form) by a number of federal appellate judges. In that model the judge hires a former law clerk (not necessarily one of his former law clerks), who has additional legal experience besides the clerkship, to be his senior law clerk. The senior clerk assigns opinion writing, editing, and other duties to the judge's other clerks in accordance with his evaluation of their strengths and weaknesses, and these junior law clerks report to him rather than to the judge, with whom indeed they may have little face-to-face contact. The staff may include unpaid part-time interns or externs as well, who report to the clerks. Sometimes the senior clerk is permanent, while

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26. Richard A. Posner, *Legal Writing Today*, 8 SCRIBES J. LEGAL WRITING 35-36 (2001–2002) (footnotes omitted).

27. *See, e.g.*, WILLIAM D. POPKIN, EVOLUTION OF THE JUDICIAL OPINION: INSTITUTIONAL AND INDIVIDUAL STYLES (2007); RICHARD A. POSNER, LAW AND LITERATURE 329 (3d ed. 2009); *cf.* LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES (1993).

28. *See, e.g.*, RUGGERO J. ALDISERT, OPINION WRITING (2d ed. 2009); JOYCE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK (5th ed. 2007); APPELLATE JUDICIAL OPINIONS (Robert A. Leflar ed., 1974).

29. BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE (2d ed. 2002). Also very good are STEPHEN V. ARMSTRONG & TIMOTHY P. TERRELL, THINKING LIKE A WRITER: A LAWYER'S GUIDE TO EFFECTIVE WRITING AND EDITING (3d ed. 2009), and (much shorter) THEODORE L. BLUMBERG, THE SEVEN DEADLY SINS OF LEGAL WRITING (2008). The Armstrong and Terrell book has a heavy focus on editing, as well as writing. The authors may assume, realistically, that very few judges write their own first drafts any more; they are editors.

the junior law clerks serve the usual one-year term; sometimes some or all of the clerks are permanent, though court of appeals judges are no longer permitted to have more than one permanent law clerk (but those who had more when the rule of only one was adopted can keep them). After an opinion drafted by one of the junior clerks is edited by the senior (perhaps by the other junior clerks as well), it is submitted to the judge for final editing, which, depending on the judge, may be perfunctory at one extreme or, at the other extreme, come close to rewriting the opinion from scratch.

Notice that the Becker model involves delegation by the judge not only of opinion drafting but also of opinion editing; and this delegation is also found in the offices of many judges who have not gone all the way to the Becker model. There is a certain logic in this delegation. A clerk who writes well enough to be entrusted with drafting a judicial opinion is quite likely to be a competent editor of another clerk's draft. As the number of law clerks increases, there is a natural tendency for an increase in hierarchy. Many, perhaps most, federal court of appeals judges now have four law clerks, because each judge is allotted five slots that he can fill with any combination of law clerks and secretaries, and the electronic revolution has eliminated judges' need for a second secretary.

The decision to write the first draft of the opinion, and thus to reject the management model of the appellate judge, is a hard one for the judicial appointee to make who has spent many years in a managerial role in a law firm or government legal service; as a writer of first drafts, he is rusty. What he may not realize is that editing is no substitute for writing from scratch because he who writes the first draft controls the final product to a degree the editor will not realize; that the process of writing, which means searching for words, for sentences, in which to express meaning, is a process of discovery rather than just of rendition and therefore often gives rise to new ideas;[30] and that fluency in writing comes from—writing. "[O]pinion drafting places a great deal of responsibility on the clerk, because the first draft influences everything that follows. Even though judges work with drafts to make them

30. MARY L. DUNNEWOLD, BETH A. HONETSCHLAGER, & BRENDA L. TOFTE, JUDICIAL CLERKSHIPS: A PRACTICAL GUIDE 91 (2010). "[W]riting is 'thinking in ink.' The actual process of writing helps the writer analyze the subject at hand and draw conclusions. Thus, as you write, new ideas will bubble up that you should incorporate into the analysis . . . ." *Id.* (footnote omitted).

their own, they often adopt the authorities, organization, and language from their clerks' drafts."[31]

When I was the chief judge of my court (1993–2000), I suggested to newly appointed judges of the court that they write their own opinions and let the law clerks do the research, criticize the opinions, etc. but not write them. I said that maybe, at first, the judge, if he did not come out of a background in which writing was a big part of the job (academia, for example), would find it tough sledding to write a decent opinion. But practice makes perfect; opinion writing would become easier for the judge as the years rolled by; eventually he would develop a proficiency that no law clerk, working for only one year, could develop. The time of law clerks would be freed up for criticism of the judge's drafts (for editing the drafts, if the clerks are good editors, as they apt to be if they are good writers) and for doing research—research in greater depth than possible when clerks are charged with writing judicial opinions, since the clerks (unless permanent, or nearing the end of their one-year term) are inexperienced opinion writers, laboring painstakingly, fearful of the judge's criticism. My impression is that the average judge is not a very good manager and does not know how best to allocate work between himself and his law clerks.

The judge who writes his own opinions becomes an experienced opinion writer; the judge who does not write his own opinions, and who hires new law clerks every year, must either adopt the Becker model or spend his judicial career editing novice lawyers who brought to their clerkships no previous experience in writing judicial opinions.

One factor in the decline of opinion drafting by judges is the decline in the literary culture in America. Partly because of the increase in popular entertainment, partly because of the decline in the prestige of highbrow literature (in part because so little such literature of great distinction is being created—in striking contrast to the first thirty years of the twentieth century, the great age of modernist literature), writing is no longer considered a skill relevant to high office. Presidents and other politicians do not write their own speeches. Judges do not write their own opinions. Only a few fusspots, like me, care. Some judges feel a twinge of conscience, and offer excuses. Justice Ginsburg has been quoted as saying that she would like to "write all my opinions myself, but

31. *Id.* at 216.

there is just not enough time to do that."[32] Instead, she says, she edits heavily. But the claim that she does not have enough time to write her opinions is odd, given how few opinions Supreme Court Justices write. Over the past five complete terms (2006 through 2010), Ginsburg has written a total of only 75 opinions (39 majority opinions, the rest concurring or dissenting opinions). That is an average of only 15 opinions per term. Suppose it would take her 4 hours to write the first draft of an opinion, on average. That would be 60 hours a year. If she works 2000 hours a year, writing her own opinions would require reallocating only 3 percent of her time from other judicial tasks—mainly, one supposes, editing law clerks' drafts, which must be time consuming; so the net increase in her opinion writing/editing would be slight. Even those of us who write our own opinions do editing—self-editing—but that is less time consuming than editing someone else's writing, and a good deal more pleasurable. If you are Manet, do you want to put the finishing touches on Thomas Couture's *Les Romains de la décadence*, or on your own *Olympia*?

Law clerks perforce are formalists. What they bring to their clerk's job is mainly what they learned in law school; and what they learned—in part because it was what they expected they would learn—was the conventional sort of legal analysis that consists of fitting the facts of a case to a legal rule usually found in previous cases. "[L]aw clerks may write well but—in speaking for another—they employ a safely formulaic mode usually learned in editing a law review."[33] Anxious about his inexperience, the law clerk conceals his deficiencies with detailed factual recitation, irrelevant procedural detail, stale legal jargon, Latinisms ("ambit"), legal clichés (such as "plain meaning" and "strict scrutiny" and "chilling" effect), legal terms that have no actual meaning (such as "fairness" and "proximate cause"), and legal barbarisms ("choate," "pled" for "pleaded" when referring to a complaint or other pleading, "proven" as a verb instead of "proved", "habeas claim" for "habeas corpus claim," "implicate" as meaning "involve," "he breached his contract" for "he broke his contract," "*de minimus*" for "*de minimis*").[34] Not for that judge Ezra Pound's dictum: "Make It

32. Todd C. Peppers, *Ruth Bader Ginsburg and Her Law Clerks*, *in* IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 391, 396 (Todd C. Peppers and Artemus Ward eds., 2012).

33. Michael Boudin, *Judge Henry Friendly and the Craft of Judging*, 159 U. PA. L. REV. 1, 13 (2010).

34. *See, e.g.*, United States v. Tobeler, 311 F.3d 1201 (9th Cir. 2002).

New." To read a judicial opinion to the writing of which, as in the case of so many judicial opinions today, a law clerk or team of law clerks has made the decisive contribution is all too often to navigate a muddy, tumid stream.

The decision to delegate opinion writing to law clerks encourages a judge to adopt a formalist conception of the judicial role, since that facilitates such delegation. And because the materials out of which to fashion a formalist opinion can all be found either in the parties' briefs or in publications readily available to the law clerks, such as statutes and cases of course, but also treatises and law review articles, judge and clerk can operate within a hermetically sealed body of distinctively legal documents from which to generate a "right answer," however difficult or even indeterminate the case might seem to be to someone lacking the judge's (and therefore his law clerks') real or assumed faith in the sufficiency of orthodox legal materials to yield the answer to any legal question.

The fact that the scope of the materials that the formalist judge or (inevitably formalist) law clerk consults in preparing an opinion, or the clerk a bench memo, is limited does not mean that the law clerk, or the judge if he is conscientious, has an easy job. The available materials often are voluminous, and because the formalist judge is strongly averse to inaccuracies, even in such trivial forms as abbreviating a case name differently from the prescription in *The Bluebook*, law clerks for a formalist judge have to spend a lot of time proofreading and blue-booking, lest a typographical error or an error of citation form end up in the published opinion. Attention to unimportant detail is characteristic of legal practice and no doubt related to hourly billing and to a certain insecurity that legal reasoning is as cogent as formalists like to think it is; the accuracy and consistency of the opinion at the formal level, along with length and detail and citations and quotations and professional jargon, are intended in part (largely unconsciously) to signal, however misleadingly, the reliability of the analytical content of the formal envelope.

A formalist opinion will usually start with a detailed recitation of "the facts," many of them irrelevant as well as uninteresting (dates, for example, where nothing turns on the date of a particular occurrence), yet with much left out that is both interesting and important and could be found in a five-minute search of the Web; for often a case involves mysterious business practices, arcane foreign customs (in asylum cases, for example), rare medical mishaps, and other esoterica that the lawyers do not bother to explain

to the judges—maybe because the lawyers think that judges know more than they do or because they think the judges would be offended to be spoon-fed background facts (in my experience, they would not be offended) or because they do not themselves understand the facts—and that the judges do not think to investigate on their own.

After the facts (at once too many and too few) comes often a summary of the lower court's opinion and of the parties' contentions, and a statement of the standard of review, particularly whether it is deferential or plenary. And then at long last comes the analysis, often well concealed in quotations from previous judicial opinions (quotations often taken out of context, in defiance of Holmes's dictum quoted earlier that "[g]eneral propositions do not decide concrete cases"), in bromides that do not describe actual judicial practice (such as "we start from the words of the statute"—which judges never do; judges always start from some general sense of what the statute is about), in strings of citations that would be seen not to support the decision if anyone actually read the cited cases, and in vacuous appeals to "justice" or "fairness" or "plain meaning" or made-up legislative "intent." The aim of such drafting is to make the opinion seem learned, comprehensive, orthodox, and exact, and to make the outcome seem to follow ineluctably from prior authoritative pronouncements with no addition from the writer, who pretends merely to have displayed the authorities that make the outcome an inevitability.

The formalist opinion is in the ascendant. The typical appellate opinion nowadays is more formalist than the typical opinion of a half-century ago. The change is related to the increased role of law clerks in the judicial system and to the heavier caseloads of the appellate courts. Heavier caseloads beget more clerks (except in the Supreme Court, where the increase in law clerks has been correlated with a decrease in caseload) and require more delegation of judicial work to them.

The character of the judicial opinion, which is the culmination of the judge's work on a case, is likely to determine the interaction between judge and law clerks in the earlier stages of the case. The formalist judge is likely to ask one of the law clerks, in advance of oral argument, to draft a bench memo, which is a kind of précis of the briefs, plus the law clerk's evaluation; and probably the judge will discuss the case with that clerk (perhaps with the others as well) before the oral argument, as well as reading the bench memo.

Judge Alex Kozinski of the Ninth Circuit, in an essay surprisingly denouncing legal realism (he is a legal realist), thinks that law clerks keep judges honest (by which he means formalist): "You have to give them reasons [for the decision you favor], and those reasons better be pretty good—any law clerk worth his salt will argue with you if the reasons you give are unconvincing."[35] This is not true, unless very few law clerks are "worth [their] salt." Especially if the judge has come from a hierarchical practice environment, and given the age difference between most law clerks and most judges, and also (paradoxically) given that law clerks are on average sharper analytically than their judge (law clerks are appointed by a judge to help the judge; judges are appointed by politicians), law clerks are reluctant to argue with their judge. Judges have been known to fire law clerks: Judge Kozinski is one of those judges.

And law clerks that draft opinions do not have much time to study the cases in advance of argument, because drafting judicial opinions intended for publication is a daunting task for just-graduated law students. A clerk's disagreeing with his judge's vote on the outcome of the case is likelier after the case has been argued and a tentative vote taken by the judges, when in drafting the opinion the clerk discovers a problem that neither he nor his judge had noticed earlier. The clerk may be tempted to paper over the problem rather than admit to his judge that he had failed to provide accurate advice before the argument and the vote. This is especially likely given that the clerk is apt to think his job in writing an opinion draft is to write a brief in support of the outcome for which his judge has voted. That is another drawback to the delegation of opinion writing to law clerks, and a serious one because an opinion in the form of a brief for the decision is apt to be the judge's inclination as well as the clerk's. The judge is a former advocate; it is natural for him to regard, though probably unconsciously, the opinion as a brief for the outcome. He decides how to vote; his opinion, or the clerk's opinion, is the brief in support of the vote. Judging and advocacy merge.

The clerk-written opinion, to sum up, lacks the authenticity of the judge-written opinion. You cannot express yourself through another's words. The authentic opinion narrates the encounter of the judge and the case—discloses the judge in the act of judging.

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35. Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993, 994 (1993).

Both formalist and realist, and whether judge or law clerk, can write a better, more readable, and also a more honest opinion by heeding a few simple rules.

1. Eschew legal jargon, which tends to obfuscate and to deceive the legal writer into think that he is writing with great precision, when he is simply writing anachronistically. Some technical language is inescapable; the judge cannot simply rename legal doctrines that have established, even if opaque, names, such as "consideration," "promissory estoppel," "res ipsa loquitur," and "burden of production." But, the examples I gave earlier of fusty legalisms can easily be replaced with plain English.

2. Indeed, try pretending you are writing for a lay audience. That will help you avoid unnecessary jargon, turgid prose, footnotes, long quotations, tedious repetitions, and the other earmarks of professional legal writing.

3. State the purpose, unless obvious, of any doctrine or principle on which the opinion relies; this is a check against mindless invocation of doctrines or principles that make no sense—maybe they did once but have since succumbed to mindless repetition.

4. Do not announce the decision (affirmed, reversed, dismissed, etc.) until the end of the opinion. When as is common it is announced at the beginning (often the first paragraph of the opinion will end with: "We affirm" or "We reverse"), the impression conveyed is that what follows is simply the rationalization of a result reached for undisclosed reasons. My suggestion is "rhetorical" because of course the outcome *will* have been determined, at least tentatively, before the opinion was written. But it is not dishonest rhetoric to put the conclusion after rather than before the analysis that supports it, and by doing so make the opinion seem less dogmatic. (A compromise is to say at the outset, "For reasons to be explained, the judgment of the district court is affirmed [reversed, etc.].")

5. Do not, in a case in which the panel is split, refer in the majority opinion to the dissenting opinion (a practice that has become orthodox in the Supreme Court, helping, along with the Court's eighteenth-century orthography, pseudo-learning, and uncontrolled verbosity, to make many of the Court's opinions extremely painful to read). Such references invite the reader to interrupt his reading of the majority opinion to see what it is the author is responding to (often heatedly), or to suspend belief pending the reading of the dissenting opinion. The way to deal with argu-

ments in the dissenting opinion that are worth replying to is to state them without attribution ("it could be argued that . . . .").

6. Eschew most acronyms and most abbreviations, as they are ugly and distracting.

7. No footnotes. A judicial opinion is not a scholarly article. If the material in a footnote is peripheral to the opinion, it can be deleted; if important, it can be worked into the text.

8. The judge assigned the majority opinion, when he is about ready to circulate it to the other judges on the panel, should ask himself, concerning every comma, every word, every sentence, every parenthetical phrase or clause, every paragraph, in the opinion: what work does this word, this sentence, etc., actually do? If the answer is "nothing," it should be deleted. Facts, names, dates, procedural details—how often they merely pad out an opinion! Must every opinion list the parties' contentions? For that matter, must all the *parties* be mentioned? The answer is "no," because often the caption of a case will list parties that have dropped out or were supernumerary from the beginning; they can be ignored in the opinion. Must every opinion include a detailed summary of the district court's or administrative agency's opinion? Repeat the standard of review? Assure the reader that the court has given "careful" consideration to the issues? Demonstrate, in short, that the literary culture in America is indeed dead?

9. Finally, be sure to read every case, statute, regulation, article, treatise, etc., cited in your opinion. Do not trust the law clerk who found the item and inserted it in the opinion (or, if you write your own opinions, who suggested you do so) to have characterized it correctly. Not that you need to read the entire case, statute, regulation, article, treatise, etc., but you need to read the material, within the cited work, that your opinion cites and enough before and after it to be sure you understand the context.

These are rules for the realist as well as for the formalist, but the realist needs some additional rules. For example, he will want to eschew solemnity and pomposity in his opinions, but to include everything that he is conscious of having influenced the decision—so more dicta, more attention to the real-world background and consequences of the decision, and, for some realist judges, greater receptivity to the lights that other fields can cast on the law. And part of being realistic is to be practical and candid, and part of sounding realistic is to be informal—to write without pretense or

adornment, striving for the "impure" style that I have argued elsewhere is superior to the "pure" style of the formalist opinion.[36] The impure style is the style epitomized by Justice Robert Jackson, who "rarely seemed to be searching for the proper 'judicial' stance or tone in his opinions. Instead, he appeared capable of expanding the stylistic range of opinion writing to accommodate his human reactions. . . . In such moments the distance between judges and mortals was suddenly shortened."[37]

And not by Jackson alone; other highly regarded judges and Justices, including John Marshall, Oliver Wendell Holmes, Benjamin Cardozo, Learned Hand, and Roger Traynor, were practitioners of the "impure" style as well (the impression of Cardozo's style as being overripe is based on his books and essays, not on his opinions), yet are not considered to have "lowered" the tone of the judiciary by writing as they did. As Holmes once said, a judge's opinions do not have to be heavy in order to be weighty.

And while I am speaking of Holmes, I note that William Popkin, who in a book on judicial opinions terms what I am calling the "impure" style the "personal voice," correctly singles out Holmes's opinions as "provid[ing] the best examples of a personal judicial voice. . . . Holmes's language is direct, unadorned, and without artifice, neither magisterial nor professional. He uses language shared by a community that includes both the judicial author and the public audience."[38]

Popkin also, however, describes Holmes's personal voice as authoritative and contrasts it with what he calls a "personal/exploratory" style—using me as his exemplar of that style, with quotations from opinions of mine.[39] He explains:

> A judge who adopts an exploratory tone shares with the audience the difficulty of reaching a decision, rather than speaking down to the reader by adopting an authoritative tone. There are three ways in which Posner opinions are exploratory. The first is that he admits doubts about how to find the right answer. The second is that the opinion reads as though the author is thinking out loud about how to work through the issues—often speculating about questions that turn out

36. Posner, *supra* note 27, at ch. 9.

37. G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 185 (3d ed. 2007).

38. POPKIN, *supra* note 27, at 146-47.

39. *See id.* at 153-69.

not to be essential to dispose of the case but that are part of the judge's thought process.

The third way relates to the substantive criteria used to reach a decision. Posner rejects clear-sounding rules for deciding a case, such as textualism in statutory interpretation. Instead, he prefers more fuzzy standards (often the purpose of the underlying rule) or rules-with-exceptions, except when there are good pragmatic reasons for adopting a simple-to-apply rule.[40]

Popkin defends the approach, explaining:

The public projection of judicial authority through an authoritative institutional and individual style of presenting judicial opinions has always existed in tension with the internal professional reality that the development of the law is a messy task fraught with conflict and uncertainty. And this has placed tremendous pressure in the Anglo-American tradition on the judicial opinion, which must implement the dual external and internal goals of preserving judicial authority and developing judicial law. That pressure has only increased in the modern legal culture where judges acknowledge the intersection of law and politics, reject the older tradition of judges authoritatively declaring law derived from legal principle, and consider an institutional base for judging to be insufficient support for justifying judicial law in a legal system where democratic legislation is now the dominant source of law. The judge is no Hercules.

This leaves modern judges with the difficult task of appealing to an external source of substantive law, without the protective armor of authoritative legal principle or a completely secure institutional base. My suggestion for responding to this difficulty . . . is to make greater use of a personal/exploratory style of presenting judicial opinions, as illustrated by Posner's approach. This style implements what I call "democratic judging," which is suited to a legal culture where law and politics are clearly related and in which a democratic process is

40. *Id.* at 159.

essential to maintaining the authority of government institutions.[41]

III. APPELLATE ADVOCACY

I shall be brief because the subject of appellate advocacy has recently been exhaustively, and very sensibly, addressed in a book by Justice Scalia and Mr. Bryan Garner[42]—the latter the author of many first-rate works on legal writing.[43]

The most important thing for the appellate advocate to understand is that a sense of the audience is the key to an advocate's rhetorical effectiveness. The advocate must think his way into the brains of the audience. And so the key to effective appellate advocacy is to imagine yourself an appellate judge. If you do that, you will see immediately that the judge of such a court labors under an immense disadvantage: he has very little time to spend on each case and is bound, therefore, to know far less about the parties, the product, and the context than you do. In addition, if he is, like most American judges, a generalist, he lacks specialized knowledge of most of the cases that come before him; you, in contrast, are probably a specialist. Unless you are arguing a criminal appeal, moreover, the judge is unlikely, because of the vastness of the jurisdiction of the federal courts, to have a deep or comprehensive knowledge of the law applicable to your case. This will vary from judge to judge depending on the judge's background and interests, but you may not be told which judges of the court of appeals will be hearing your case until it is too late to change your brief or even your oral-argument strategy, unless you are very nimble.

The judge so circumstanced, as I have described is badly in need of the advocates' help, which is something that few advocates seem to understand. Legal education is partly at fault. Law schools naturally focus on imparting the vocabulary and rhetoric of legal rules and standards, without which one cannot function as a lawyer. And increasingly, with the rise of law and economics (economic analysis of law), they provide students with sophisticat-

41. *Id.* at 168-69 (footnotes omitted).

42. ANTONIN SCALIA AND BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (2008).

43. *See, e.g.*, Garner, *supra* note 29. In what follows, I draw in part on my article: Richard A. Posner, *Convincing a Federal Court of Appeals*, LITIG., Winter 1999, at *3, *available at* 25 No. 2 Litigation 3 (Westlaw).

ed policy analysis of those rules and standards. What they do not much do is take the next step and impart a realistic understanding of the judicial process and of how, in light of such an understanding, to present cases most effectively to judges and juries. Maybe they are afraid of inducing premature skepticism in the students or angering the judges.

Some advocates may fear that a judge will feel he is being patronized if the lawyer tries to explain the case to him in words of one syllable. Fear not; in my thirty years of judging, I have never encountered a judge who took umbrage at being spoon fed by the lawyers.[44]

So, the essential advice to the appellate advocate is to put yourself in the judge's shoes. That will enable you to grasp the essential differences between judge and advocate. It will also help you as an advocate if you understand that most judges are practical people (even the former academics among them). Do not be fooled by the formalist cast of most judicial opinions nowadays. It reflects the formalism of the clerk authors, which exceeds that of the judges. Most judges are a blend of formalism and realism. They want to reach a sensible, reasonable result in those cases that are not governed by clear statutory text or precedent. They are interested not only in the rule, but also in the purpose of the rule, that you are invoking; and not only in the facts that have been developed in an evidentiary hearing, but also in the non-adjudicative facts that illuminate the background and context of a case—that make the case come alive to a person not immersed in the field in which it arises. You should not just state a rule and note a semantic correspondence between it and the facts of the case.

A closely related point is that the advocate should make his brief, as far as possible, self-contained, intellectually as well as physically. You should explain not only what the case is about and what the background law is, but also why the case is important (or unimportant)—what, if anything, turns on the outcome, either for the parties or for some larger community. If, for example, the amount in controversy in a civil appeal is only fifty dollars, the first question the judge will ask himself is: what on earth has impelled the parties to bear the expenses of litigation over such a trivial sum? You should anticipate the question and explain in your brief why such a dispute is being litigated. If there are other puzzling features of the case, explain them so the judges

44. *Cf. infra* note 45 and accompanying text.

are not left with a sense that something must be missing from their understanding of the case. A common puzzler is for multiple parties to be listed in the caption of a case, yet the briefs are silent about most of them, who may have fallen by the wayside in the course of the litigation or may have been named as parties for technical reasons or for completeness of relief. Tie up the loose ends; do not make the judge approach your argument with furrowed brow. Do not waste your time at argument dispelling mysteries that a sentence in your brief could have cleared up.

If you engage in the imaginative exercise that I have suggested is the key to successful appellate advocacy—that of imagining yourself in the judge's shoes—you will quickly see that rarely is it effective advocacy to try to convince judges that the case law compels them to rule in your favor. Just think: how likely is it that if the case law relating to the case at hand were one-sided, would the case (if it is a civil case—for most criminal appellants are not paying for the appeal and hence are not deterred by the unlikelihood, however great, of a successful outcome) have gotten to the appellate stage?

If the case is not controlled by precedent, the advocate's task is to convince the court that the position for which he is contending is the more reasonable one in light of the relevant circumstances, which include but are not exhausted by the case law, the statutory text, and the other conventional materials of legal decision making. Normally the most effective way of arguing such a case is to identify the purpose behind the relevant legal principle and show how it would be furthered by a decision in favor of your position.

Be sure to "front" adverse legal or factual materials that your opponent can be expected to emphasize in his response brief (if he is the appellee) or reply brief (if he is the appellant), so that the judge, who when reading your brief formed a favorable impression, does not feel when he turns to your opponent's brief that you were trying to pull the wool over his eyes.

As should be obvious from the earlier discussion, the advocate would be well-advised to conduct background research online—explore Google, Wikipedia, Google Earth, and the other riches of the Web for information that will help you, the advocate, help us, the judges, acquire a realistic understanding of your case—just as "real" people do, and just as judges and their law clerks (and jurors!) increasingly are doing. It should be obvious (if you imagine yourself an appellate judge) that much that goes into a judicial decision was never a part of any evidentiary record. The judicial

mind is not a *tabula rasa*. It is informed, enriched, by a judge's experiences, impressions, temperament, and outside reading, which increasingly is the reading of online materials. The Web is as great a resource for lawyers as for judges—and is underutilized by both.

Wherever possible, use pictures, props (for example, trademarked items in a trademark case), maps, diagrams, and other visual aids, in your brief or at argument. *Seeing* a case makes it come alive to judges.

Avoid jargon: business jargon, industry jargon, computerese and other technical jargon (and yes, economic jargon too), and legal jargon. Avoid, like the plague, legal clichés, such as "plain meaning" (typically, and futilely, argued by both sides in the same case!). At the oral argument of a case under the Telecommunications Act of 1996, I said to one of the lawyers that my law clerks and I had read the briefs and having done so had no idea what the case was about, and would he please explain it to the panel in words of one syllable.[45] He was momentarily taken aback because judges do not usually talk like that, but he was an excellent lawyer, and he proceeded to explain the case lucidly, without either technical jargon or communications-law jargon, and the judges were duly grateful. The lawyers in the case doubtless do most of their advocacy before the Federal Communications Commission, and had failed in their briefs to recognize that the Seventh Circuit, which gets very few telecommunications cases (unlike the District of Columbia Circuit), do not have the same familiarity with either modern telecommunications technology or federal telecommunications legislation as the FCC does.

And finally, go light on district court citations, remembering that they are not precedents. This is not said in disrespect of district judges, but in recognition of the fact that if district court decisions were given precedential effect there would be no uniformity of federal law within a district or circuit.

I close with a few bits of advice concerning oral argument:

Be sure to know and abide by the rules for oral argument of the court you are arguing before.

If you are the appellant's lawyer, *always* save time to rebut, whether or not you decide to use it. The reason is that otherwise, you give your opponent a free shot at the judges. He may take

45. The appeal was decided in *Illinois Bell Telephone. Co. v. Box*, 548 F.3d 607 (7th Cir. 2008).

liberties with the facts or the law, knowing that you cannot respond. The judges may detect these exaggerations—or not. If they detect them after the post-argument conference at which they make their tentative decision, it may be too late for you, because the ostensibly tentative vote that the judges take at the conference carries a lot of momentum.

Rehearse your oral argument before you write your brief, and rehearse it in front of a panel that includes lawyers who are not experts in the field to which the case belongs, because the judges will (with rare exceptions) not be experts either.

In case the panel asks no questions or seems poorly prepared, be prepared with a few key, simple commonsensical points. Simplicity is the key, given how often the judges will know *much* less about the case than the lawyers arguing it.

A related point: do not beat the judges over the head with statutory language and precedent, because it is difficult in the oral setting to follow arguments that are based on highly specific language or facts. And (this applies also to your brief) do not exaggerate the cogency of reasoning by analogy by trying to persuade the judges to base their decision on a case from another field of law. The value of analogous cases lies in the reasoning or policies that the opinions disclose that may bear on your case, and it is the reasoning and policies that you should emphasize.

If rather than being silent the panel is noisy and interrupts you constantly, extend the answer to a question in a way that enables you to make a smooth transition to a point that you need to make.

Avoid irritating the judges. If the judge asks a question that can be answered yes or no, answer it yes or no and if necessary explain your answer. If the judge asks a hypothetical question, do not respond that "that is not this case." He knows that.

Display confidence by not using up all your allotted time unless you have something really important to say that will fill it up. Especially if the argument is in the morning and lunchtime is approaching; do not forget Alexander Pope's dictum (from *The Rape of the Lock*):

> Meanwhile, declining from the noon of day,
> The sun obliquely shoots his burning ray;
> The hungry judges soon the sentence sign,
> And wretches hang that jury-men may dine.