

What a Breeze: The Case for the “Impure” Opinion*

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A key challenge for ambitious judges is to settle on a style that’s inviting and engaging but not crass or self-consciously cute. That said, if you survey the world’s consumers of judicial opinions — law students, lawyers, and judges alike — you’ll rarely hear that the problem with opinions is that they’re just too darn catchy and casual. Instead, readers moan that opinions are too stuffy, turgid, and formal.

In that spirit, I share below examples of down-home, “impure” diction that might very well push you past your comfort zone — and I do so by design. Were I to have written about the matter a half-century ago, I might not have endorsed a conversational style. Even Judge Posner, who favors direct and “impure” writing himself, points out that justices as great as Brandeis and Cardozo had a loftier, “purer,” and more formal voice that worked very well for their purposes — and perhaps for their eras.¹

But is such a style the way to go for today’s judges? I’d say no, and for two reasons.

First of all, the contemporary era resists formality. And second, writing in a profound, imperious style requires a rare innate talent. Justice Kennedy, for example, often adopts the mien

* Based on an excerpt from the author’s forthcoming book *Point Taken: How to Write Like the World’s Best Judges*. Citations of the quoted opinions are omitted, as in the book.

¹ *Judges’ Writing Styles (And Do They Matter?)*, 62 U. Chi. L. Rev. 1421, 1432 (1995).

of a philosopher-king when he writes. But as one tough critic put it:

His prose alternates between bureaucratic and grandiose, resulting in sentences that manage to be pompous and clueless at the same time, like this gem from *Bush v. Gore*: “None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution’s design to leave the selection of the President to the people, through their legislatures, and to the political sphere.”²

One of my own favorites is this quote from the gay-rights case *Lawrence v. Texas*: “The instant case involves liberty of the person both in its spatial and more transcendent dimensions.” (The parallelism glitch doesn’t help, either.) Even in routine cases, Justice Kennedy tends to pen sentences like this one from *Already LLC v. Nike*:

This brief, separate concurrence is written to underscore that covenants like the one Nike filed here ought not to be taken as an automatic means for the party who first charged a competitor with trademark infringement suddenly to abandon the suit without incurring the risk of an ensuing adverse adjudication.

So unless you’re a born poet, don’t even try to wax eloquent. Relax the diction instead. Although all judges are capable of drafting overwrought, overwritten, and convoluted sentences, few have the clarity of mind, not to mention the editing chops, to express their thoughts naturally and directly.

For inspiration on this front, let me share some excerpts from one of the greatest living examples of a judge with an “impure” style: Justice Elena Kagan. Although Kagan’s woman-on-the-street vernacular can sometimes distract, her style is a

² Jeffrey Rosen, *Strong Opinions*, New Republic (July 8, 2011), <http://www.newrepublic.com/article/politics/magazine/92773/elena-kagan-writings>.

refreshing antidote to the stilted and haughty tone that keeps so many other judges from connecting with their audience.

Part of her talent stems from simple diction choices. Like her colleague Justice Scalia, she inhabits the direct and witty side of the judicial style spectrum. One of her strategies, especially when she is hungry to persuade, is to mime the sort of language that her various readers might use:

Elena Kagan, *Arizona Free Enterprise Club v. Bennett*, dissenting

Except in *a world gone topsy-turvy*, additional campaign speech and electoral competition is not a First Amendment injury.

Or the sort of language that might provoke a chuckle, if not some friendly eye-rolling:

Elena Kagan, *Arizona Free Enterprise Club v. Bennett*, dissenting

So [Petitioners] are making a novel argument: that Arizona violated *their* First Amendment rights by disbursing funds to *other* speakers even though they could have received (but chose to spurn) the same financial assistance. **Some people might call that *chutzpah*.**

Oh, sure, you say — how hard is it to write an engaging dissent about election law? Fair enough. So let’s put Kagan to the test by seeing how clearly she writes when the issues are as dry as toast. In the majority opinion below, Kagan had to wend her way through a labyrinth of conflicting statutory language on the not-so-scintillating subject of federal employees’ procedural rights upon termination of employment. Displaying empathy

and even frustration as she speaks to her readers candidly, Kagan eventually throws up her hands on their behalf:

Elena Kagan, *Kloeckner v. Solis*

If you need to **take a deep breath** after all that, you're not alone. It would be hard to dream up a more round-about way of bifurcating judicial review of the [agency's] rulings in mixed cases.

Suddenly, we realize that the problem isn't us, it's the statutes — and that's Kagan's very point.

Addressing the reader directly, professor style, is indeed one of Kagan's opinion-writing hallmarks:

Elena Kagan, *Scialabba v. Cuellar de Osorio*

A word to the wise: Dog-ear this page for easy reference, because these categories crop up regularly throughout this opinion.

The devices that Kagan uses — shunning jargon, talking to the reader in the imperative or with the second-person *you*, projecting her own reactions, mimicking natural oral language — bring her closer to her intended audience in a way that few other judges could even dream of. Not to mention making the substance easier to read and understand.

Most of the world's best-known judges have broken the mold in a similar way. Take this priceless explanation of an adhesion contract, courtesy of Lord Denning:

Lord Denning, *Thornton v. Shoe Lane Parking*

These cases were based on the theory that the customer, on being handed the ticket, could refuse it and decline to enter into a contract on those terms. He could ask for his money

back. That theory was, of course, a fiction. No customer in a thousand ever read the conditions. If he had stopped to do so, he would have missed the train or the boat.

Judge Posner, Lord Denning’s American heir apparent, is yet another judge who favors unusually direct, candid, and “impure” prose, as I mentioned above. Unlike Kagan, though, who has an unabashedly populist yet upbeat style, Posner has a bit of an edge:

Richard Posner, *United States v. Gutman*

When a codefendant drops out in the course of trial, a juror would have to be pretty stupid not to surmise that he had pleaded guilty; and if this knowledge were grounds for mistrial it would be impossible for a defendant in a multiple defendant case to plead guilty after trial began.

Posner’s Seventh Circuit colleague Judge Easterbrook sometimes pushes the envelope even further, even adopting in the example below some astronomical metaphors to discuss the problem of divining legislative intent, of all things:

Frank Easterbrook, *In re Sinclair*

Some cases **boldly stake out a middle ground**, saying, for example, “only the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the ‘plain meaning’ of the statutory language.” This implies that **once in a blue moon** the legislative history trumps the statute (as opposed to affording a basis for its interpretation) but **does not help locate such strange astronomical phenomena**. These lines of cases have coexisted for a century, and many cases contain statements associated with two or even three of them, not recognizing the tension. **What’s a court to do?**

To be fair, some might find this imagery off-putting. But keep in mind that Judge Easterbrook is targeting caselaw, not the parties themselves, and so we should cut him a little slack.

In any event, a lighter touch can be more effective. Chief Justice Roberts has a knack for deploying wry humor to his advantage. Take this example from a case about whether Congress violated the Constitution by withholding federal funding from law schools that excluded the military from on-campus recruiting:

John Roberts, *Rumsfeld v. Forum for Academic & Inst. Rights*

We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so Surely students have not lost that ability by the time they get to law school.

Or consider another Roberts classic in this soft-sarcasm vein. This one comes from his opinion in an otherwise austere dispute about whether a corporation, in this case AT&T, had a right to “personal” privacy under the Freedom of Information Act. The corporation argued that it did because it was a “person,” the root word of “personal.” Roberts snips away at those threads through a playful tour of the dictionary, ending with a dig that I imagine might have made even a few AT&T executives chuckle:

John Roberts, *FCC v. AT&T*

We reject the argument that because “person” is defined for purposes of FOIA to include a corporation, the phrase “personal privacy” in exemption 7(c) reaches corporations as well. The protection in FOIA against disclosure of law enforcement information on the ground that it would con-

stitute an unwarranted invasion of personal privacy does not extend to corporations. **We trust that AT&T won’t take it personally.**

There’s a fine line between gentle humor and outright mockery, of course. When Chief Justice Roberts was first nominated to the U.S. Supreme Court, his opponents made hay over a single line in a dissent from a denial of rehearing that he had written on the D.C. Circuit. The case was about whether the arroyo toad could be protected under the Endangered Species Act, with the subtext that perhaps the Act was unconstitutional altogether. Here is Roberts’s infamous line, which proved to be one of the few hiccups in his meteoric rise:

John Roberts, *Rancho Viejo v. Norton*, dissenting from a denial of en banc rehearing

The panel’s approach in this case leads to the result that regulating the taking of a **hapless toad that, for reasons of his own, lives his entire life in California** constitutes regulating “Commerce . . . among the several states.”

Part of what fueled the objection to this line was substantive, of course. For his critics, Roberts’s approach to the Commerce Clause here was radical. But part of the objection was decidedly stylistic, so much so that a pro-environment website even took on the name “The Hapless Toad.” On the one hand, few judges have Roberts’s gift for rhythm and cadence that inspired him to pen a phrase like “a hapless toad that, for reasons of his own, lives his entire life in California.” But on the other hand, Roberts’s wry language here could strike some as disdainful, if not callous. Perhaps that’s exactly why so few judges attempt to write with flair. In the end, of course, these judgment calls often depend on how receptive you expect your readers to be —

and perhaps on the extent to which you're seeking to make the record books or the legal news.

Just in case the hapless-toad example is intimidating, controversial, or both, I want to end with a couple of more straightforward, and perhaps more realistic, examples of the “impure” style. The first comes from Bankruptcy Judge Benjamin Goldgar, a relatively unknown judge whom I find to be a superlative writer all around.³ Notice the pattern in what I've highlighted below: each bolded phrase is close to what Judge Goldgar would likely have used were he recounting the case out loud:

Benjamin Goldgar, *In re Brent*

Liou's misrepresentations to the court were quite serious, far worse than simply **checking the wrong box on a bunch of forms.**

Liou unquestionably **should have known better.** He has represented debtors in chapter 13 bankruptcies for almost fifteen years and is a regular practitioner in this court. His practice of modifying the [Model Retention Agreement] with an addendum was not only inconsistent with the basic principle underlying the court's flat fee arrangement but plainly so. If, as he now says, he did not actually intend to conceal anything or mislead anyone, he should certainly have realized that was the effect. **The call is not even a close one.** All told, Liou's **moral compass badly needs repair.**

Although reliance on counsel is not usually relevant to the question of whether there has been a Rule 9011 violation, it can be relevant to the sanction itself. The problem for Liou is that the record shows he consulted Sukowicz about fee agreements other than the MRA. He never sought Sukowicz's advice about using the MRA with the addendum

³ See Ross Guberman, *The Seven Writing Strategies of Highly Effective Trial Judges* (Mar. 9, 2014), <http://legalwritingpro.com/blog/the-seven-writing-strategies-of-highly-effective-trial-judges/>.

and then representing on his fee applications that he had entered into the MRA, the specific violation here. Liou **gets no points** for consulting counsel over a different ethical problem.

Finally, Liou asks to be recognized for “taking corrective action.” After the December 2010 show cause order suggested his conduct was sanctionable, Liou says he amended the MRAs and withdrew and then refiled any pending fee applications. But Liou’s “corrective action” was **half-hearted at best**. He filed amended MRAs in only thirty-three cases and withdrew fee applications in only eighteen. In several instances, moreover, Liou **added insult to injury** by committing yet another set of Rule 9011 violations. Ten of the thirty-three amended MRAs were not true amendments at all but, as described earlier, simply had the word “amended” added to the title and the phrase “see attached addendum” **scratched out**. The debtors in these cases evidently never saw, let alone signed, the amended agreements. **There is no such thing in Illinois law** as a unilateral contract amendment, as Liou surely knew.

In Judge Goldgar’s style, you can almost feel the air lifting you up: lots of short and crisp words, idiomatic turns of phrase, and visual imagery.

My final example really pushes the limits, and it may push your buttons as well. It’s from a relatively new federal judge, First Circuit Judge O. Rogeriee Thompson. She spouts an unusually conversational tone and even indulges in slang (her uses of “legit” and “gobs” are head-turners), all to breathe life into an otherwise dry tale of financial shenanigans:

O. Rogerie Thompson, *United States v. Seng Tan*

A federal jury convicted James Bunchan and Seng Tan, a husband and wife team, of numerous mail-fraud, money-laundering, and conspiracy crimes committed in furtherance of a classic pyramid scheme that **swindled some 500 people** out of roughly \$20,000,000 in the **early to mid-2000s**. Fellow scammer Christian Rochon pled guilty to similar charges.

. . .

Here is how it all worked. Bunchan tasked Tan with **drumming up** new members, something **she was born to do, apparently**. . . . As “CEO Executive National Marketing Director,” Tan ran informational seminars for potential investors, meeting them at hotels, their homes, and elsewhere. **She usually made quite an entrance**, showing up in a chauffeur-driven Mercedes. . . .

When prospective investors asked her **point-blank** whether they had to sell company merchandise to get money, Tan answered no. She and Bunchan reduced their promises to writing, with Tan even signing letters guaranteeing monthly returns **basically forever**. One member who got **cold feet** and asked for her investment back received a letter from Tan saying that she (Tan) would return her money if [the marketing scheme] **went belly up**. . . .

The scheme started out **swimmingly**. [The marketing schemes] used newly-invested money to **trick** old investors into thinking that the **good times were here to stay**. Not knowing any better, members were ecstatic. Bunchan and Tan were too, **obviously**. And with cash pouring in, the pair used the companies’ coffers as **their own personal piggy bank**.

As much as I like the style here generally, I cringe at the teenager-like phrase “basically forever.” That one goes too far,

in my view, and in exchange for a more staid expression there, I’d change “numerous” to “many” toward the start.

If I can use a breezy expression myself to characterize the examples in this article, it would be “Lighten Up.” Direct and brisk wording choices do more than just boost the chances that you’ll find your name in a casebook one day or even in the pantheon of “Great Judicial Writers.” They make your substantive points more memorable as well. And they also bring you closer to your readers, infusing your analysis with a populist and democratic flavor that conveys a lot about how you see the role of a judge.

