ARTICLE

PROFESSIONAL IRRESPONSIBILITY AND JUDICIAL OPINIONS

Nina Varsava[*]

ABSTRACT

In the United States, the style of judicial opinions is subject to little formal constraint, and judges exercise sweeping rhetorical discretion in their opinion writing. Some judges write conversationally and in a jocular tone, others formally and solemnly. Some regularly include legally irrelevant details about litigants, with no apparent purpose other than to create an engaging or emotionally satisfying narrative. And many judges take care to develop and maintain their own distinct, personal styles through their judicial opinions. Not only are judges permitted to use opinion writing as a means of self-expression and individuation, but they are also widely encouraged to do so.

We should be concerned about this kind of judicial discretion because judges exercise it in ways that undermine the integrity of the judicial role and compromise the legitimacy of opinions, courts, and the adjudicative process. This Article suggests that the kind of colorful and aesthetically pleasing judicial writing style that commentators widely encourage, and that many judges adopt,

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makes for professionally irresponsible opinions. I argue, accordingly, that judges should exercise greater rhetorical restraint, and I describe what this kind of restraint would look like and propose possible mechanisms for fostering it.

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I. INTRODUCTION

What makes for a well-written judicial opinion? How should we evaluate an opinion's style? As others have noted, "there is no clear standard for a 'better' opinion and no obvious way to test for opinion quality."[1] Many commentators suggest that opinions should be lively, engaging, and appealing; judges are supposed to shape facts into compelling and memorable narratives.[2] On this

1. Frank B. Cross & James W. Pennebaker, *The Language of the Roberts Court*, 2014 MICH. ST. L. REV. 853, 861 (2014).

2. *See infra* note 10 and accompanying text.

view, opinion writing is a kind of literary task, and well-written judicial opinions have much in common with good poetry or fiction.

Imagine that legislative drafters received the same kind of advice: to write in a way that will "entice the reader into reading" the statute, from "start to finish."[3] Instead, the literature on legislative writing instructs drafters to write in a scientific and formulaic style. Judges are supposed to vary their diction and use colorful language, whereas legislative drafters are advised to do just the opposite.[4] Unlike judicial opinions, statutes generally aren't criticized for their aesthetic failings.[5]

Despite some critical differences, judicial opinions are similar to legislation in terms of purpose, author, and audience—and certainly more similar to legislation than to poetry or fiction. So why should judges write like creative writers and legislative drafters like scientific or technical writers? Do opinions and statutes really call for such different styles of writing?[6]

In this Article, I argue that popular advice and wisdom on judicial writing style is misguided and that judges should not aim to write engaging or aesthetically appealing opinions. Nor should they express their own personalities in their opinions or write with their own distinct voices. Not only are those objectives beside the point of judicial writing, they also stand to undermine the integrity of the judicial role and the legitimacy of the adjudicative process. The judicial opinion, unlike many other genres of writing, does not call for expressive freedom or artistic license. And the

3. RUGGERO J. ALDISERT, OPINION WRITING 142 (2d ed. 2009) (quoting an unidentified friend).

4. *See, e.g.*, Adam Chilton et al., *Rappers v. Scotus: Who Uses a Bigger Vocabulary, Jay Z or Scalia?*, SLATE (June 12, 2014, 7:49 AM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/06/supreme_court_and_rappers_who_uses_a_bigger_vocabulary_jay_z_or_scalia.html [https://perma.cc/3XVT-M7VM] (presenting an empirical study of judicial opinion style that takes range of vocabulary as the mark of "great writing"); OFF. OF THE LEGIS. COUNS., U.S. HOUSE OF REPRESENTATIVES, HLC 104-1, HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE §§ 101, 102(d)(4) (1995), https://www.llsdc.org/assets/sourcebook/manual_on_drafting_style.pdf [https://perma.cc/3NAD-XJA9] [hereinafter HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE] (directing drafters to "[u]se [the] same word over and over[]—If you have found the right word, don't be afraid to use it again and again").

5. Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1455, 1460–61 (1995) (observing that commentators who criticize opinions as "uninteresting to read" and "devoid of anything even remotely resembling literary style" do not level the same kind of criticism against the style of regulations or statutes); *see infra* notes 82–84 and accompanying text.

6. Professor Frederick Schauer has likewise pointed out that commentators seem to care much more about judicial opinion style than statutory style and has argued that the incongruity is unjustified, given similarities in purpose between opinions and statutes. Schauer, *supra* note 5, at 1460–62, 1470.

reputation-enhancing stylistic qualities that commentators urge judges to embrace interfere with judicial responsibilities, including to recount material facts accurately, to represent all parties to disputes fairly, and to present reasonable legal justifications for decisions reached.

Judicial opinions, I argue, should conform to an even-keeled and restrained institutional style. To facilitate such conformity, judicial opinion writing, currently a "free-for-all,"[7] should be subjected to some kind of regulation. This regulation could take any of a number of possible forms: for example, internal court rules, rules of judicial conduct, or even statutory requirements.

Trial court and appellate court opinions serve different, although overlapping, purposes and likewise have different, although also overlapping, audiences. Here my main targets are appellate judges and their opinions, although some of my points also apply to judges and opinions at the trial court level. I focus mainly on U.S. federal intermediate appellate judges, but with some qualifications my analysis extends to other types of appellate judges as well, including state appellate judges and U.S. Supreme Court Justices. This Article's primary aim is to show how the writing style that scholars, lawyers, and journalists alike widely encourage appellate judges to embrace, and that many judges strive to achieve, can make for professionally irresponsible judicial opinions. My secondary aims are to suggest that judges should have less stylistic or rhetorical discretion and to propose possible mechanisms for constraining judicial rhetoric. That said, as with most interesting normative questions, there are good arguments on both sides. My overarching aim is to draw attention to the ethical stakes of the stylistic choices that judges make when they write opinions and that we should keep in mind when evaluating the stylistic merit of judicial writing.

This Article spans and contributes to several bodies of literature: on the judicial role and judicial ethics; on legitimacy and the adjudicative process; and on law, language, and rhetoric. The analysis proceeds as follows. In the first Part, I survey the literature on judicial writing, from scholarly articles to writing manuals and how-to guides to journalistic takes. In the second Part, I describe my view of the judicial role and the purposes that judicial opinions are supposed to serve, and I argue that the dominant criteria of stylistic success are in tension with judicial

7. ROSS GUBERMAN, POINT TAKEN: HOW TO WRITE LIKE THE WORLD'S BEST JUDGES xxi (2015).

duties and conflict with the legitimate purposes of opinions. In Part III, I examine the relationship between rhetorical style and power in the context of judicial opinions, and I argue that equality considerations counsel against permitting widespread stylistic discretion in opinions. In Part IV, I turn to possible means of regulating judicial opinion writing—from the less drastic (for example, internal court rules) to the more (for example, legislation)—and I propose possible norms that would constrain judicial style to make opinions more professionally responsible without unduly interfering with the judicial process.

II. WRITING ADVICE FOR JUDGES

A large body of literature focuses on judicial writing style.[8] Lawyers, judges, academics, and journalists all contribute to the conversation. There are numerous manuals on the topic, as well as scholarly articles, legal blog posts, and popular media pieces.[9] Judges are advised to write engaging, aesthetically pleasing, even exciting opinions[10] and to write with personality, character, and in compelling voices. Commentators complain that judicial opinions are too often insipid and uninspiring and encourage judges to leave

8. I surveyed some of this literature in previous work. *See generally* Nina Varsava, *Elements of Judicial Style: A Quantitative Guide to Neil Gorsuch's Opinion Writing*, 93 N.Y.U. L. REV. ONLINE 75, 80–82 (2018).

9. *E.g.*, *id.* at 77, 81.

10. *See, e.g.*, Daniel A. Farber, *Missing the "Play of Intelligence,"* 36 WM. & MARY L. REV. 147, 153 (1994) (praising an opinion by Judge Posner for displaying "a vigor and intellectual excitement that is missing from . . . [other] opinions"); Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 249 (2008) (arguing that an opinion "should spark interest" and "need not be a dull, stereotyped, colorless recital of facts, issues, propositions, and authorities but can be good writing and make good reading" (quoting BERNARD E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS § 103, at 202–03 (1977))); Gerald Lebovits, *Ethical Judicial Writing—Part III*, N.Y. ST. BAR ASS'N J., Feb. 2007, at 64, 64 ("Memorable opinions with literary style best communicate the law."); Laura Krugman Ray, *Doctrinal Conversation: Justice Kagan's Supreme Court Opinions*, 89 IND. L.J. SUPPLEMENT 1, 6 (2013) (suggesting that Justice Kagan's writing shows that opinions, "like film and fiction, [are] narratives that are most effective when they engage their readers"); Nancy A. Wanderer, *Writing Better Opinions: Communicating with Candor, Clarity, and Style*, 54 ME. L. REV. 47, 55 (2002) (stating that judges "must write in plain English . . . and adopt an engaging writing style" (footnotes omitted)); JOYCE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 29 (5th ed. 2007) (advising judges that opinions "should be easy to read, interesting, and should flow from one subject to another"). *But see* Schauer, *supra* note 5, at 1474–75 (suggesting that, if we consider "the more mundane functions" of opinions, functions that they share with statutes, we may "find the literary and the aesthetic distracting, and the imaginative and stylish counterproductive"); Gerald Lebovits, *Ethical Judicial Writing—Part II*, N.Y. ST. BAR ASS'N J., Jan. 2007, at 64, 50 ("Deriding litigants, using droll references, and treating the opinion as though it were literature diminishes the opinion's quality.").

out tedious technical details and to shape facts into gripping narratives.[11]

Former Seventh Circuit Judge Posner and others endorse what he calls an "impure" style over a "pure" one.[12] Impure writers "like to avoid quoting previous decisions so that they can speak with their own tongue—make it new, . . . fresh," and "entertain[ing]."[13] In contrast, "pure" writers "quote[] heavily from previous judicial opinions . . . [and] compl[y] scrupulously with whatever are the current conventions of citation form."[14] Ross Guberman, president of Legal Writing Pro LLC and author of multiple books on legal writing, says similarly that judges should not "institutionalize or sterilize [their] voice[s]," but should "let [their] writing live and breathe instead through a sympathetic style and a strong dramatic arc."[15] Describing a Lord Denning opinion about a barmaid, Guberman says that the "case is justly famous as an example of superb legal analysis, precisely because Denning adopts and maintains an authentic voice, becoming the story's narrator instead of merely parroting back the facts in the

11. *See, e.g.*, Farber, *supra* note 10, at 150–52, 157–58 (characterizing the tone of a U.S. Supreme Court opinion as "unhappily reminiscent of a software manual or the inscrutable instructions accompanying an IRS tax form," describing the opinion as an "uninspiring" "written performance," and criticizing the Court for producing such "bureaucratic documents"); Stephen M. Johnson, *The Changing Discourse of the Supreme Court*, 12 U. N.H. L. REV. 29, 36 (2014) (observing that "there is a growing consensus that the Supreme Court[']s opinions are becoming long [and] boring" and that this is a bad thing); Richard A. Posner, *Judges' Writing Styles (and Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1442 (1995) (dissecting the late Judge Wald's opinion writing for "its patient marshaling of factors and facts and its dense citation of previous cases").

12. Posner, *supra* note 11, at 1428.

13. *Id.* at 1430; *see also* BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE § 12.1 (4th ed. 2018) ("Fortunately, the trend today is toward plain language and away from the stuffiness and jargon-laced prose that characterized so much legal writing in the past. It's a welcome trend, and one that writing coaches universally encourage."). *The Redbook* is described on its cover as "[t]he acknowledged authority for legal writers" and in its preface as "a kind of 'restatement' of legal style[,] . . . [t]he widespread adoption of [which] . . . has been gratifying." *Id.* at xi.

14. Posner, *supra* note 11, at 1429.

15. GUBERMAN, *supra* note 7, at 162. Guberman is also often commissioned to train judges directly. According to the Legal Writing Pro website, Guberman "has conducted thousands of [legal writing] workshops on three continents for prominent law firms, judges, agencies, corporations, and associations," and "[h]is workshops are among the highest rated in the world of professional legal education." *About Ross Guberman*, LEGAL WRITING PRO, https://www.legalwritingpro.com/bio/ [https://perma.cc/6RHH-FVTQ] (last visited July 22, 2021). "For the past 6 years, [Guberman] has been invited to train all new federal judges, and he has presented at many other judicial conferences," including internationally. *Id.*

record."[16] "Don't be afraid to play storyteller," Guberman counsels.[17]

Judges are supposed to sound like individuals, with their own distinct personalities and voices, and not like cogs in an institutional wheel. On this view, judicial opinions represent a means for judges to express themselves and for readers to get to know them as people. Judge Posner complains of "jargon," "impersonality," "piled-up details," and "long quotations from previous cases" in opinions.[18] Many scholars support Judge Posner's view and some have gone even further, advocating for "emotionally-infused" opinions.[19] For example, Professor Terry Maroney describes an opinion by former Ninth Circuit Court of Appeals Chief Judge Kozinski "that, in [Judge Kozinski's own] words, 'bristled' with anger" and suggests that such "overt expressions of emotion in the courtroom or in the written opinion" can be desirable, serving worthy functions.[20]

Scholars and judges alike discuss opinions as if they are works of creative writing, much like poems or autobiographies. For example, Professor James Boyd White maintains that, like with poetry, the ideal judicial opinion is personal and antibureaucratic.[21] Judge Lebovits[22] insists that judicial writing style represents "a judge's signature—the judge's own imprimatur on the law";[23] Judge Posner asserts that stylistic tools serve "to establish a mood and perhaps a sense of the writer's personality";[24] and Judge Wilson of the Eleventh Circuit Court of Appeals says that one of his main objectives in opinion writing is to "write with character."[25] Likewise, for Justice Kagan, "[i]t's important that

16. GUBERMAN, *supra* note 7, at 72.

17. *Id.*; *see also* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 11, 95 (2000) (recognizing the late Justice Scalia's storytelling abilities); Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. CHI. L. REV 1477, 1505 (1995) (praising Judge Posner's "literary selectivity and skill"); GUBERMAN, *supra* note 7, at 14–15 (praising Judge Posner's "true narrative style").

18. Posner, *supra* note 11, at 1430.

19. Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485, 1529 n.263, 1530 (2011).

20. *Id.* at 1529–30.

21. James Boyd White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, 82 MICH. L. REV. 1669, 1691 (1984).

22. Judge Lebovits has been a New York City judge since 2001 and an acting justice on the New York County Supreme Court since 2015. *Gerald Lebovits*, BALLOTPEDIA, https://ballotpedia.org/Gerald_Lebovits [https://perma.cc/R7CF-4CAS] (last visited July 22, 2021).

23. Lebovits et al., *supra* note 10, at 249.

24. Posner, *supra* note 11, at 1421–22.

25. Charles R. Wilson, *How Opinions Are Developed in the United States Court of Appeals for the Eleventh Circuit*, 32 STETSON L. REV. 247, 264 (2002).

[her] opinions sound like [her]."[26] And indeed, commentators have praised Justice Kagan's distinct voice and personal style.[27] The Federal Judicial Center's writing manual—which purports to "distill[] the experience and reflect[] the views of a group of experienced judges, vetted by a distinguished board of editors"—echoes and generalizes these sentiments, describing opinion writing as "a highly personal endeavor."[28]

Journalists, lawyers, legal scholars, and judges themselves seem to share the idea that judicial writing is a personal and creative enterprise. In the United States, judges have long received publicity and acclaim for writing with flair and personality,[29] which perhaps helps to explain the demand for instructional literature on how to write "sparkling" opinions.[30] As Guberman points out, "[t]he celebrity-driven legal culture in the United States . . . spurs the nation's most-ambitious judges to perfect their craft and to develop a powerful voice."[31]

For example, before he became a Supreme Court Justice, then-Judge Gorsuch attracted considerable, and largely positive, media attention for his lively and heavily narrative opinions.[32] As Guberman observed, reporters "gush[ed] about everything from Gorsuch's 'playful, witty dissents' to his factual accounts that read like 'wry nonfiction.'"[33] According to Guberman, "[f]ew judges have

26. Krugman Ray, *supra* note 10, at 9.

27. *Id.* at 9–11.

28. William W. Schwarzer, *Foreword to the First Edition of* FED. JUD. CTR., JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES, at vii (2d ed. 2020) (purportedly produced "[t]o serve the cause of good opinion writing," but "not held out as an authoritative pronouncement on good writing, a subject on which the literature abounds"); *see also* Wanderer, *supra* note 10, at 66 ("[A]ll judges must set their own standards for their opinions.").

29. For example, in an article about Justice Cardozo's writing style, Professor Walton Hamilton maintained that "[i]n the exercise of his calling a great judge may be a man of letters; Cardozo elevates the jurist's craft to a fine art." Walton H. Hamilton, *Cardozo the Craftsman*, 6 U. CHI. L. REV. 1, 21 (1938). In a book-length treatment of Justice Cardozo's career, Judge Posner asserts that "[t]he power of vivid statement lifts an opinion by a Cardozo, a Holmes, a Learned Hand out of the swarm of humdrum, often numbing, judicial opinions, rivets attention, crystallizes relevant concerns and considerations, provokes thought." RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 136 (1990).

30. *See* POSNER, *supra* note 29, at 143 ("The *sparkling*, vivid, memorable opinion is not so chained to the immediate context of its creation." (emphasis added)).

31. GUBERMAN, *supra* note 7, at xxiv–xxv.

32. Several of Justice Gorsuch's 10th Circuit opinions won The Green Bag's yearly honorific writing award. Many of Justice Kagan's opinions have also won. *Exemplary Legal Writing*, GREEN BAG, http://www.greenbag.org/green_bag_press/almanacs/almanacs.html [https://perma.cc/YW5T-9C88] (last visited July 18, 2021).

33. Ross Guberman, *Judge Gorsuch Is a Gifted Writer. He's a Great Writer. But Is He a "Great Writer"? Part One: Four Gifts*, LEGAL WRITING PRO (Feb. 7, 2017), https://www.legalwritingpro.com/blog/judge-gorsuch-gifts/ [https://perma.cc/YS3H-R3N8].

Gorsuch's talent for weaving compelling narrative lines."[34] Both the popular and legal media highlighted playful opinions such as *Western World v. Markel*.[35] That opinion opens as follows:

> Haunted houses may be full of ghosts, goblins, and guillotines, but it's their more prosaic features that pose the real danger. Tyler Hodges found that out when . . . [he] plummet[ed] down an elevator shaft. But as these things go, this case no longer involves Mr. Hodges. Years ago he recovered from his injuries, received a settlement, and moved on. . . .
>
> The problems began at the front door of the Bricktown Haunted House in Oklahoma City. There Mr. Hodges was working the twilight hours checking tickets as guests entered. When the flashlight he used began flickering and then died, he ventured inside in search of a replacement. To navigate his way through the inky gloom, Mr. Hodges used the light of his cell phone. But when an actor complained that the light dampened the otherworldly atmosphere, Mr. Hodges turned it off and stumbled along as best he could. . . . When he reached the elevator, Mr. Hodges lifted the wooden gate across the entrance and stepped in. But because of the brooding darkness, Mr. Hodges couldn't see that the elevator was on a floor above him and he crashed 20 feet down the empty elevator shaft.[36]

The news media and legal community published enthusiastic commentary about the opinion's style, without much discussion of the legal doctrine or consequences. This is perhaps unsurprising, given that Judge Gorsuch himself seemed more interested in the evocative background facts than the legal issues involved in the case. The *ABA Journal*, for example, published an article about *Western World* and other Judge Gorsuch opinions with the headline "Gorsuch writes reader-grabbing opinions with fact summaries that are 'a form of wry non-fiction,'" and *CBS News* published a piece commenting on Judge Gorsuch's haunted house

34. *Id.*

35. W. World Ins. Co. v. Markel Am. Ins. Co., 677 F.3d 1266 (10th Cir. 2012). For a more extensive discussion of the aesthetics of this and other opinions by then-Judge Gorsuch, and the attention he received for his writing before he was appointed to the Supreme Court, see Varsava, *supra* note 8, at 83–85 and *Supreme Court Nominee Neil Gorsuch's Writing Described as "Breezy,"* CBS NEWS (Mar. 8, 2017), https://www.cbsnews.com/news/supreme-court-nominee-neil-gorsuch-writing-style-breezy-clever/ [https://perma.cc/35SJ-2ZAT].

36. *W. World*, 677 F.3d at 1267–68.

opinion among others and celebrating his "knack for narrative . . . [and] appealing style."[37]

Judges, then, are widely encouraged to write in a lively, evocative, and personal style. Commentators are surely right that this kind of style attracts attention from the news media, casebook editors, and the legal community, which helps judges to get noticed and create reputations for themselves.[38] Much of the literature on judicial writing caters to judges' egos and reads as a kind of how-to guide on building a reputation and attracting a fan base.[39] The writing advice also comes with potentially more lofty aims, however. If judges can successfully capture people's attention through opinions,[40] that might in turn increase public awareness

37. Debra Cassens Weiss, *Gorsuch Writes Reader-Grabbing Opinions with Fact Summaries that Are 'a Form of Wry Nonfiction,'* ABA J. (Feb. 1, 2017, 9:43 AM), http://www.abajournal.com/news/article/gorsuch_writes_reader_grabbing_opinions_with_fact_summaries_that_are_a_form [https://perma.cc/2W9S-647Z]; *Supreme Court Nominee Neil Gorsuch's Writing Described as "Breezy," supra* note 35; *see also* Joe Palazzolo, *Supreme Court Nominee Takes Legal Writing to Next Level*, WALL ST. J. (Jan. 31, 2017, 8:26 PM), https://www.wsj.com/articles/supreme-court-nominee-takes-legal-writing-to-next-level-1485912410 [https://perma.cc/BZ7Y-UCWB]. As a Ninth Circuit Court of Appeals judge, Judge Kozinski also received a lot of attention for his lively and amusing writing style. One law review article declared that Judge Kozinski's opinions are a "cure for . . . dreary casebooks." David A. Golden, *Humor, the Law, and Judge Kozinski's Greatest Hits*, 1992 BYU L. REV. 507, 513 (1992). And a newspaper article referred to the last line of his opinion in Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 908 (9th Cir. 2002)—"The parties are advised to chill."—as an instance of "super-coolness in judicial history." Duncan Campbell, *Judge Advises Barbie Litigants to 'Go Chill,'* GUARDIAN (July 26, 2002, 3:06 AM), https://www.theguardian.com/media/2002/jul/26/marketingandpr.internationalnews [https://perma.cc/2CTV-UQV5]. Facing sexual harassment accusations, Judge Kozinski resigned in 2017. Matt Zapotosky, *Judge Who Quit over Harassment Allegations Reemerges, Dismaying Those Who Accused Him*, WASH. POST (July 24, 2018), https://www.washingtonpost.com/world/national-security/judge-who-quit-over-harassment-allegations-reemerges-dismaying-those-who-accused-him/2018/07/23/750a02f2-89db-11e8-a345-a1bf7847b375_story.html [https://perma.cc/Z8WM-KGPR] ("Kozinski, 67, stepped down from the U.S. Court of Appeals for the 9th Circuit in December [2017] after . . . more than a dozen women, including former clerks, law students and a fellow judge . . . said he had subjected them to a range of sexual misconduct.").

38. As Professor Elaine Craig observes, when judges write stylistically striking opinions, "the writing itself becomes newsworthy, [and] the likelihood of [media] exposure is . . . high[]." Elaine Craig, *Judicial Audiences: A Case Study of Justice David Watt's Literary Judgments*, 64 MCGILL L.J. 309, 323 (2018).

39. *See, e.g.*, GUBERMAN, *supra* note 7, at xxi; *see also* Ross Guberman, *What a Breeze: The Case for the "Impure" Opinion (Part 2)*, MICH. BAR J., Nov. 2015, at 42, 42, http://www.michbar.org/file/barjournal/article/documents/pdf4article2747.pdf [https://perma.cc/64GN-Y7B5] (praising Justice Kagan's writing and asserting that "[m]ost of the world's best-known judges have[, like Kagan,] broken the mold" with their writing style).

40. *See, e.g.*, Greg Johnson, *Is Neil Gorsuch a Good Role Model for Legal Writers? Yes and No.*, VT. BAR J., Fall 2017, at 27, 27 ("[E]ffective legal writers grab the reader's attention right from the start. Writers should save any requisite procedural history or other less interesting material until after they have pulled the reader in with a compelling story."); ALDISERT, *supra* note 3, at 142 ("The first job for any piece of writing is to entice the reader into reading it, start to finish.").

of the legal system and the state of the law. And colorful, engaging opinion writing might help convince readers that cases were correctly decided, which might in turn contribute to the stability of caselaw as well as the credibility or perceived legitimacy of the judiciary and legal system.[41] Some commentators suggest further that personally expressive opinions are effectively more candid ones, and that this kind of writing makes for a more transparent judicial process because that process is inevitably shaped by the personalities and passions of judges and not merely by hard and dry law.[42]

In the Parts that follow, I argue that the writing guidance that I have surveyed here, though at first glance benign, is ethically dubious because it is difficult, if not impossible, for judges to follow it and at the same time meet some of their basic professional responsibilities. This is a tension that other commentators have given insufficient attention.[43] I show how we cannot separate the question of what makes for well-written opinions from considerations about the integrity of the judicial role and the legitimacy of the adjudicative process. And I propose an alternative vision of good judicial writing, which I argue fits better with the role of judges and the point of opinions.

III. THE ROLE OF JUDGES AND THE POINT OF OPINIONS

In this Part, I argue that the aesthetic and reputational objectives commonly associated with judicial opinions are at best overrated and at worst entirely misplaced. Judges have no

41. *See, e.g.*, Johnson, *supra* note 11, at 33 (observing that "many academics, judges, and journalists criticize the Court for adopting a technocratic, rather than persuasive, style and tone in its modern opinions" and suggesting that a critical purpose of opinions is "to inspire and persuade the public"); Wanderer, *supra* note 10, at 49 (suggesting that one of the primary functions of opinions is to "persuad[e] judges, officials, and citizens that the court has reached the proper resolution of a dispute"); Cross & Pennebaker, *supra* note 1, at 861 ("A key function of style is to make an opinion more persuasive and ultimately more effective as a precedent.").

42. *See, e.g.*, Maroney, *supra* note 19, at 1529–30 (explaining that, for Judge Kozinski, expressing anger in an opinion "was an important signal of the degree of his displeasure, thus increasing that opinion's punishment impact and deterrent value," and concluding that "[w]hile judges need not always—or even regularly—disclose their emotional processes in public, the examples offered by Chief Judge Kozinski strongly suggest that doing so sometimes should be accepted—and even regarded as desirable").

43. *But see* GEORGE, *supra* note 10, at 428–31 (noting that opinions are not meant to entertain or amuse); William L. Prosser, *Preface* to THE JUDICIAL HUMORIST, at vii (William L. Prosser ed., 1952) ("[T]he bench is not an appropriate place for unseemly levity. The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig.").

obligation to write evocative, lively, or literary opinions, just as legislators and legislative drafters need not worry about appealing to their readers in that way. Judges may, of course, do things with their opinions that they are not obligated to do—but not if those things are incompatible with other professional responsibilities that come with the judicial role. This role demands that judges are transparent and candid in their legal reasoning, that they are impartial and appear to be so, and that they respect and demonstrate respect for litigants. The effort to write engaging and aesthetically pleasing opinions can, and often does, interfere with these responsibilities.

A. The Role of Judges

In this Article I presuppose a conception of the judicial role that should be relatively uncontroversial.[44] On this conception, the job of judges is to resolve disputes between parties who raise and frame the disputes themselves, to interpret legal rules, and to apply those rules to disputes in an impersonal and impartial manner. The role of the appellate judge in a common law system like that of the United States can be effectively divided into two parts: dispute resolution and rule formulation.[45] Judges are charged with resolving actual disputes and with articulating rules to be applied in future cases. This conception of the judicial role, which has been developed and defended at length by other

44. In doing so, I take a similar approach to Professor Micah Schwartzman, resting my conclusions about judicial ethics on an "abstract model of the judicial role" together with "a general concept of adjudication that is *robust* with regard to more specific conceptions of it." Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 998, 1027 (2008).

45. District judges are primarily responsible for dispute resolution, whereas apex judges are arguably responsible primarily for rule formulation; intermediate appellate judges divide their responsibilities between the two. *See, e.g.*, Thomas E. Baker, *A Compendium of Proposals to Reform the United States Courts of Appeals*, 37 U. FLA. L. REV. 225, 228 (1985) ("Karl Llewellyn and Roscoe Pound . . . taught that the dual appellate functions are correction of error . . . in particular litigation and declaration of law by creation, clarification, elaboration, or overruling." (citing KARL LLEWELYN, THE COMMON LAW TRADITION—DECIDING APPEALS 11–15 (1960); ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 1–2 (1941))); Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. U. L. REV. 729, 732 (1906); Schwartzman, *supra* note 44, at 1003 ("[I]t is a mistake to conceive of adjudication solely as a mechanism for resolving disputes between individuals with private ends."); Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power*,*"* 80 B.U. L. REV. 967, 993–94 (2000) ("For all practical purposes . . . the modern Supreme Court does not resolve disputes between litigants, it does not decide cases, and it does not enforce legal rights or duties. Instead, [it] *makes rules*." (emphasis added)).

scholars, "reflects the judiciary's institutional competence" as well as its "constitutional authority."[46]

Judges are tasked with resolving disputes and not with initiating lawsuits or framing legal arguments themselves. This is because "[j]udges are relatively poorly equipped to identify social problems or undertake their own factual investigations into those problems."[47] Article III of the U.S. Constitution gives the federal Judicial Branch the power to resolve "Cases" and "Controversies," which the Supreme Court has interpreted as prohibiting the judiciary from finding its own controversies, or resolving hypothetical or prospective ones.[48] Relatedly, the "party presentation" principle requires courts to decide the issues that actual parties present and frame, not to discover their own issues in cases or substantively recharacterize those presented.[49]

In their adjudication of disputes, judges are supposed to rely on preexisting legal rules and standards, whether or not they would personally endorse them.[50] Just as judges do not possess the institutional competence to bring or frame cases themselves, they do not have the resources or expertise to come up with optimal

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46. Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 32 (2003).

47. *Id.* at 60.

48. U.S. CONST. art. III, § 2; DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so."); Muskrat v. United States, 219 U.S. 346, 362 (1911) (asserting that the Court will not "give opinions in the nature of advice concerning legislative action, a function never conferred upon it by the Constitution, and against the exercise of which this court has steadily set its face from the beginning"). Even jurisdictions without a formal requirement akin to Article III embrace these kinds of restrictions on judicial power. *See* Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 DUKE J. CONST. L. & PUB. POL'Y 285, 308 n.78 (2019) (noting Article III-like limitations on the judiciary in the state and Canadian contexts).

49. *See, e.g.*, Greenlaw v. United States, 554 U.S. 237, 243–44 (2008) ("In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation," which means that "we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. . . . [A]s a general rule, 'our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.'" (quoting Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment) (alteration in original))).

50. *See, e.g.*, David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 556 (1988) ("[T]he fact that judges are protected in significant ways from the popular will does make it inappropriate for them to reach outcomes on the basis of their personal (and possibly idiosyncratic) values."); *see also* Shirley S. Abrahamson, *Commentary on Jeffrey M. Shaman's* The Impartial Judge: Detachment or Passion?, 45 DEPAUL L. REV. 633, 637 (1996) ("[J]udging draws much of its meaning and validity from separation[:] The judge's non-involvement with the parties and issues, the judge's disinterested state of mind and heart, the sense that a decision is foredoomed by the law . . . .").

resolutions without relying on external authority. Moreover, in contrast to elected representatives—who can legitimately make decisions that affect society "simply by virtue of the fact that they are elected by the people to reflect their views"—U.S. federal judges, and many state ones too, do not enjoy electoral legitimacy and were not appointed to represent constituents.[51]

The personal preferences and passions of judges, then, do not have a special claim to legitimacy.[52] Judges are hired to interpret and apply the law as they find it.[53] Of course, because there may be gaps or imperfections in existing law, judges also have the task of developing legal doctrine in the process of resolving cases—but they aren't entitled to pull holdings out of thin air or base them on their personal preferences or passions.[54] Rather, in their judicial role, judges have a duty to develop legal doctrine in a way that coheres with the existing body of law and the principles behind it.[55]

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51. Molot, *supra* note 46, at 62; *see also* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2029 (1994) (asserting that "elections justify" "the exercise of governmental authority . . . by the political branches"); Vicki C. Jackson, *Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy*, 57 WM. & MARY L. REV. 1717, 1761 (2016) (observing that judges must be principled in ways that elected officials need not be, but also arguing that elected officials must nevertheless "be accountable to voters," which "requires that the voters be able to evaluate their . . . work").

52. *See, e.g.*, Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 6 (1994) (suggesting that although judges strive for impartiality, subjective influences may consciously or unconsciously impact their assimilation of information).

53. *See supra* note 50.

54. *See, e.g.*, Nugent, *supra* note 52, at 5 ("Judges are expected to be rigorous in excluding personal bias when making decisions.").

55. This reflects roughly a Dworkinian view of law. *See generally, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986); *see also* RONALD DWORKIN, JUSTICE IN ROBES 251 (2006) (in deciding cases, judges "must not appeal to their personal interests or to the interests of some group to which they are connected. That obvious constraint seems part of the very idea of a justification"). Dworkin maintained that even a hard case has a right answer, which is the result that flows from the set of principles that best fits with and justifies a jurisdiction's legal practices as a whole. *Id.* at 218–21. But even legal theorists who submit that judges fill gaps in the law when they decide hard cases generally do not believe that judges may fill these gaps however they like. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 204–05 (2d ed. 1994) ("Very often [the judge's] choice [in indeterminate cases] is guided by an assumption that the purpose of the rules which they are interpreting is a reasonable one, so that the rules are not intended to work injustice or offend settled moral principles. . . . At this point judges . . . often display characteristic judicial virtues[:] . . . impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision."); *see also* H.L.A. Hart, *Discretion*, 127 HARV. L. REV. 652, 664 (2013) (although judges have discretion when the law is indeterminate, this does not mean that they may decide according to private interest or prejudice; they remain, rather, constrained in various ways, including the duty to make a "determined effort to

The backgrounds and experiences of judges inevitably do, however, influence their decision-making, informing how they understand and operationalize legal principles and how they interpret facts.[56] That influence is not necessarily illegitimate. An example, well-known in legal circles, is how the late Justice Ginsburg in *Safford Unified School District No. 1 v. Redding* relied on her knowledge of what it is like to be a thirteen-year-old girl to determine that the strip search of Savanah Redding, a girl of that age, would have been humiliating to Redding *in light of her sex and age*, and so violated the Fourth Amendment.[57] Notice that, although Justice Ginsburg and Justice Breyer appeared to rely on their own personal experiences during oral arguments and in the news media, they did not refer to their experiences in the decision itself.[58] And Justice Ginsburg never suggested that her personal experience, or ability to identify or empathize with Savanah Redding, *justified* the conclusion she reached. Instead, her experience and identity help explain why she interpreted the facts as she did and also why someone without her experience might interpret them differently and, indeed, mistakenly. The justification for Justice Ginsburg's conclusion—that is, the legal reason that supports it—was that the search would have been humiliating to Redding, given her sex and age, and not that Justice Ginsburg was a woman with the ability to relate to or empathize with the litigant.

A legitimate process of adjudication depends on the participation of the parties to the dispute—who bring the relevant

identify . . . the various values which have to be considered and subjected in the course of discretion to some form of compromise or subordination"); Felipe Jiménez, *Dworkinian Positivism* 21 (June 29, 2021) (on file with author) ("A careful reading of [Hart's] arguments shows that positivism argues that discretion ought to be governed by legal considerations.").

56. *See, e.g.*, Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 257 (1995) ("[I]t has [become] axiomatic that the background and worldview of judges influence cases.").

57. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 381–82 (2009) (Ginsburg, J., concurring in part and dissenting in part); Joan Biskupic, *Ginsburg: Court Needs Another Woman*, ABC NEWS (May 6, 2009, 12:25 AM), https://abcnews.go.com/Politics/ginsburg-court-woman/story?id=7513795 [https://perma.cc/XMW5-LNCV].

58. During oral argument, Justice Breyer asserted that he was "trying to work out why is this a major thing to say strip down to your underclothes, which children do when they change for gym, they do fairly frequently," betraying his ignorance of a teenage girl's perspective, whereas Justice Ginsburg emphasized that the girl "wasn't just . . . stripped to [her] underwear," but also "asked to shake [her] bra out, [and to] stretch the top of [her] pants and shake that out." Transcript of Oral Argument at 45, *Redding*, 557 U.S. 364 (No. 08-479); *see also* Biskupic, *supra* note 57 ("'They have never been a 13-year-old girl,' [Justice Ginsburg] told USA TODAY later when asked about her colleagues' comments during the arguments. 'It's a very sensitive age for a girl. I didn't think that my colleagues, some of them, quite understood.'").

facts to the table and pose the legal arguments—and on independent and impartial adjudicators who base their decisions on publicly articulated legal reasons. These norms "reflect [some of] the qualities generally viewed as essential to fair and legitimate judicial process" and "are widely accepted within both scholarly and judicial discourse."[59] The stylistic choices that judges make in writing their opinions can serve to undermine or, alternatively, support these norms.

B. The Point of Opinions

Judges fulfill their duties in part by writing and issuing judicial opinions, which serve as a platform for judges to present reasons for their decisions; these reasons are meant to justify the legal consequences that flow from decisions and to provide guidance to those who wish to follow or abide by caselaw. Although appellate judicial opinions arguably have many purposes, on my view, the two main ones are to provide (1) explanations and justifications for decisions; and (2) instruction and guidance about legal rights and duties. Judicial opinions also have multiple potential audiences, but I take the most important of these to be litigants, other judges, and the legal community, including other branches of government. The general public is also a conceivable audience for opinions, but (as I discuss in more detail below[60]) members of the public generally do not read opinions and that reality should inform a normative analysis of opinion style.

1. Justification. Interested readers, and especially the litigants involved in a case and others affected by it, have a right to know why the case came out the way it did—that is, on what legal grounds the judges rested their conclusion. People deserve legal justifications for the consequences that courts impose on them. The presentation of legal reasons for decisions also enables interested parties to hold judges accountable for their reasons; this is especially important for other judges who may be in a position to dissent from a decision, reverse a decision, or decide whether to follow a decision as precedent.

Moreover, by showcasing the kind of reasoning that the judiciary and legal system deems appropriate, judicial opinions enable people to evaluate and critique the system. As Justice

59. Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1379–80 (1991).

60. *See infra* note 69 and accompanying text.

Kagan has said, "[P]art of what we do [through opinions] is show the American public *how* we reason about cases."[61] Former Federal Appellate Judge Aldisert maintained that the primary purpose of judicial opinions is an explanatory one.[62] As I argue below, however, it is a special type of explanation that belongs in a judicial opinion: that is, a specifically *legal* explanation, which amounts to a justification for the legal conclusion that the court reached and not a full-fledged causal explanation for why the case came out the way it did, which might involve many factors that are extraneous for legal purposes and have no place in an opinion.[63]

2. Guidance. As Judge Leval of the Second Circuit Court of Appeals writes, judicial opinions are meant "to instruct in the meaning of the rules of law."[64] People can comply with legal norms only if they know what those norms are; opinions help publicize caselaw so that people—prospective litigants and the lawyers who advise them—can follow it.[65] Opinions also provide guidance to other judges, of course, and facilitate the system of precedent because judges rely on opinions to determine the extent to which a past case is similar to, and so has precedential force over, a new one.[66]

A judicial opinion presents a court's interpretation and application of existing law to a particular dispute or its creation of

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61. Jacob Shamsian, *6 Writing Tips from a Sitting Supreme Court Justice*, BUS. INSIDER (Aug. 31, 2015, 1:47 PM), http://www.businessinsider.com/us-supreme-court-justice-gave-some-amazing-tips-on-how-to-be-a-better-writer-2015-8 [https://perma.cc/6JC9-23ZH].

62. ALDISERT, *supra* note 3, at 9.

63. *See infra* Section III.C.3.

64. Pierre N. Leval, *Judicial Opinions as Literature*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 207 (Peter Brooks & Paul Gewirtz eds., 1996); *see also* Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 810 (1961) (discussing the "law-announcing function of opinions"); Kathleen G. Noonan et al., *Reforming Institutions: The Judicial Function in Bankruptcy and Public Law Litigation*, 94 IND. L.J. 545, 593 (2019) (explaining that the public record produced through the process of adjudication "increases the capacity for parties in future cases to gauge their likelihood of success and to learn techniques for resolution that might not otherwise be apparent"); Paul Gewirtz, *Narrative and Rhetoric in the Law*, *in* LAW'S STORIES, *supra*, at 10 ("A judicial opinion serves . . . to give guidance to . . . the general public about what the law is.").

65. *See* RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 42–45, 47–49 (2017); Rachael K. Hinkle et al., *A Positive Theory and Empirical Analysis of Strategic Word Choice in District Court Opinions*, 4 J. LEGAL ANALYSIS 407, 409 (2012) ("[T]he text of judicial decisions and opinions constitutes the law by which our common law system abides and the basis on which judges, lawyers, and citizens make reasoned legal judgments about future action.").

66. *See* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1400 (1995).

new law.[67] Judges should write opinions in a style that serves the justificatory and guidance functions outlined above, while preserving the legitimacy of courts and the adjudicative process. Just what such a style would and would not look like are difficult questions, which I take up in the pages that remain.

C. The Relationship Between Judicial Functions and Opinion Properties

In this Section, I explore the relationship between judicial duties and opinion style. I argue that the kind of writing that tends to receive positive reviews comes with nontrivial and underappreciated ethical costs. I do not claim that the calculus is easy or one-sided. My aim, rather, is to draw attention to costs of "attractive" writing that have been overlooked or underestimated in the related literature and by judges themselves, and at the same time to suggest that the benefits of this approach to writing have been exaggerated.

1. Appeal and Accessibility. A judicial writing style meant to attract readers or maintain their interest can undercut duties that judges have to their audiences. And judges' primary audiences do not need to be pulled in with an appealing style because they have strong motivating reasons to read and comprehend opinions aside from any entertainment or aesthetic value that opinions might provide. The few additional readers that an appealing style might capture would not seem to be worth the associated risks. Judges should certainly strive to write opinions that are accessible to interested readers—meaning that an opinion would enable a motivated reader to understand the legal grounds for the decision reached. But that does not mean that opinions need to take on an evocative or lively style, only that they need to be as simple and straightforward as the actual complexity of the legal dispute and applicable doctrine allows—which might not be particularly simple or straightforward at all!

Some commentators suggest that people will only read judicial opinions if they resemble short stories or newspaper articles and that judges ought to inspire people to read their

67. As the Supreme Court observed in *Marbury v. Madison*, "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

opinions.[68] But litigants, other judges, and lawyers do not read opinions for fun or leisure. If litigants read the opinions that resolve their cases, it's because their fates turn on those opinions. Judges and lawyers read opinions because they can't do their jobs, at least not well, without doing so. As for the general public, ordinary citizens rarely read opinions—and it's hard to imagine that increasing the aesthetic appeal or entertainment value of opinions would significantly change that reality.[69]

There is a related and long-standing debate on the role of the judiciary, and especially of the U.S. Supreme Court, as a public educator. Several scholars have argued that the Court has a responsibility to educate the public about constitutional law. Professor Eugene Rostow famously declared that "[t]he discussion of problems and the declaration of broad principles by the Courts is a vital element in the community experience through which American policy is made" and that the Supreme Court is "an educational body," with the Justices serving as "teachers in a vital national seminar."[70] Many scholars have called this idea into

68. Gerald Lebovits, *Plain English: Eschew Legalese*, N.Y. ST. BAR ASS'N J., Nov./Dec. 2008, at 64, 64 ("Ignoring the audience leads to documents no one wants to read and which don't inform or persuade.").

69. *See, e.g.*, Posner, *supra* note 11, at 1431 (noting that people who are not "legal insiders" rarely read opinions); RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 234 (1990) ("[A]s far as anyone knows, it is just a lawyers' fancy that public respect for courts is a significant influence on the extent to which a society is law-abiding. Most people are uninformed and incurious about courts, especially those courts lawyers most dither over—appellate courts."); Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 63 (1965) ("[O]nly a small fraction of the lay public comes into any immediate, regular contact with court decisions and opinions."); NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 29 (2019) ("It is clear that the great majority of Supreme Court decisions are essentially unknown to the general public."). One might contend that the public does not read opinions precisely because of the unappealing or inaccessible style in which they tend to be written. As Professor Schauer has observed, though, if that were true, then we should "expect to have found more reading of court opinions by the general public back when they were (arguably) more readable, but there is no evidence that this was the case." Schauer, *supra* note 5, at 1465 n.36; *see also* Mark Tushnet, *Style and the Supreme Court's Educational Role in Government*, 11 CONST. COMMENT. 215, 219 n.20 (1994) (noting that "[p]erhaps public knowledge [of Supreme Court decisions] is low because of the turgidity of the Court's opinions, and would improve if the Court changed the way in which its opinions were written," but explaining that he "find[s] this suggestion quite implausible").

70. Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952); *see also* Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127, 180 (1967) ("By their decisions—and especially through a coherent explanation of the grounds of their decisions—the judges could partially introduce the language of the law into the vulgar tongue."). For a more recent spin on this idea, see Jon D. Michaels, *Baller Judges*, 2020 WIS. L. REV. 411, 417, 433 (2020)

question, however, precisely because empirical evidence suggests that the public is generally not interested in reading judicial opinions and is largely ignorant about the Court's decisions.[71] As Professor Jane Schacter observes, the claim that the Court serves as "a critical teacher of constitutional values" may be "exceptionally salient" in some cases—for example, *Obergefell v. Hodges*.[72] Perhaps in such cases, the Court should strive to issue especially clear and even engaging or inspiring opinions, even if that would require glossing over legal complexities and ambiguities. But for the vast majority of cases, courts have little reason to cater to the stylistic preferences of the public.

Further, even if the general public could be induced to read opinions, it is not necessarily the judge's responsibility to motivate people to read them, just as it is not the legislator or legislative drafter's responsibility to motivate people to read statutes. The news media is in a better position than judges to direct the public to important judicial decisions and to communicate their significance. As Professor Mark Tushnet observes, the public already depends on the news media and other opinion leaders to digest judicial decisions for the public and relay their implications.[73] If reporters lack the training or motivation to understand the implications of judicial opinions and translate them into everyday language, then the communicative task could and should be outsourced to individuals and institutions better equipped for it. In Canada, for example, the Supreme Court employs an "Executive Legal Officer," typically a law professor, who acts "as the liaison between the court and the news media," helping Canadian reporters cover the court's decisions.[74] The

(introducing the concept of the "baller judge": this kind of judge is charismatic, at least in their writing; engages directly with the public; performs community outreach; and "elevate[s] public constitutional debate").

71. *See, e.g.*, Gerald N. Rosenberg, *Romancing the Court*, 89 B.U. L. REV. 563, 564–66 (2009) (citing social science research to suggest that the general public does not read judicial opinions and criticizing legal academics who insist that the Court plays an educative role); Tushnet, *supra* note 69, at 215 (arguing that "[c]laims for the Court as educator" face serious difficulties because the general public does not read its opinions); Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution*, 67 N.Y.U. L. REV. 961, 1002 (1992) ("The Court teaches part-time—in fact, rarely—if at all."); Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1353 (1995) ("While the education of the public through judicial and extrajudicial writings may be socially and politically valuable (although empirically quite debatable), at best it is an incidental benefit arising from the judicial process.").

72. Jane S. Schacter, Obergefell*'s Audiences*, 77 OHIO ST. L.J. 1011, 1012 (2016).

73. Tushnet, *supra* note 69, at 221–22.

74. FLORIAN SAUVAGEAU ET AL., THE LAST WORD: MEDIA COVERAGE OF THE SUPREME COURT OF CANADA 200–01 (2006).

position was created in response to journalists' complaints about the complexity and technicality of judicial opinions.[75] The Officers "are positioned as neutral and independent experts; they explain the law, describe the options the justices face, and point journalists to the key parts of decisions."[76] In addition, in 2018, the Supreme Court of Canada began producing brief plain language summaries of decisions, which are available on the Court's website.[77] Called "Cases in Brief," the summaries "are prepared by communications staff of the Supreme Court of Canada" and are written "in reader-friendly language, so that anyone interested can learn about the decisions that affect their lives."[78] The Court invites newspapers to reprint Cases in Brief, provided they do so with attribution and without any modifications.[79]

Some scholars have argued for similar programs in the U.S. context. For example, Professor Michael Serota proposes an "Office of Public Opinion," which would be responsible for publicizing judicial opinions and translating them for a general audience.[80] Judicial opinions and statutes could also be included in the school curriculum, and educators could teach their students how to find and read these legal documents as well as why they might want to do so. Many legal academics have already taken it upon themselves to educate the public far beyond law school classes, as they regularly write and speak about judicial decisions through popular media channels, including, increasingly, podcasts.[81]

In any event, if ordinary citizens should be reading legal sources directly, legislation would seem to be equally or perhaps even more important than judicial opinions because opinions tend to grow the law only in an incremental way, whereas through statutes legislators can establish entirely new rights and take away preexisting ones. And yet, although there is some overlap in

75. *Id.* at 200.

76. *Id.* at 201.

77. *See Cases in Brief*, SUP. CT. OF CAN., https://www.scc-csc.ca/case-dossier/cb/index-eng.aspx [https://perma.cc/683J-GLR6] (July 30, 2021).

78. *Id.*

79. *Cases in Brief for Community Newspapers*, SUP. CT. OF CAN., https://www.scc-csc.ca/case-dossier/cb/cb-news-journaux-eng.aspx [https://perma.cc/WP93-VRBB] (Oct. 8, 2020).

80. Michael Serota, *Intelligible Justice*, 66 U. MIA. L. REV. 649, 662 (2012).

81. See, for example, STRICT SCRUTINY, https://strictscrutinypodcast.com/ [https://perma.cc/63LZ-QEHU] (last visited Aug. 3, 2021), a podcast hosted by law professors Leah Litman, Melissa Murray, and Kate Shaw, which began in 2019 and covers "the Supreme Court and the legal culture that surrounds it."

the guidance directed at judicial writers and legislative drafters (mainly, both are advised to write in a direct and clear manner), I haven't seen commentators suggest that drafters ought to adopt a rhetorical style that would engage or entertain readers. The guidance aimed at judges depicts the writing enterprise as a freewheeling and artistic activity, whereas that aimed at legislative drafters details a systematic and scientific task.[82] Judicial writers are advised to inject their own personalities and voices into their writing, whereas legislative drafters are advised to follow formulas and templates and to mimic the institutional style of existing legislation.[83] Indeed, one of the main purposes of the *House Legislative Counsel's Manual on Drafting Style* is "to promote greater stylistic uniformity in" federal legislation.[84] That a statute may be stylistically dull or boring as a result is not raised as a cause for concern.

Commentators who are concerned about the aesthetically displeasing, bureaucratic language of judicial opinions do not make the same complaints about statutory language. Maybe they are just choosing their battles. I suspect, though, that the distinct criticisms levelled at judicial opinions reflect a particular, and I believe misguided, vision of the judicial role—one that conceives of judging as an individualistic enterprise and privileges the reputations of individual judges[85]—and that this vision explains why commentators do not express the same kind of stylistic concerns about legislative drafting.

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82. *See, e.g.*, ARTHUR J. RYNEARSON, LEGISLATIVE DRAFTING STEP-BY-STEP, at xviii (2013) ("Professional legislative drafting is a way of writing legislation in a systematic, almost scientific manner that may be applied to all legislation regardless of content.").

83. *See, e.g.*, *Drafting Legislation*, HOUSE OFF. OF THE LEGIS. COUNS., https://legcounsel.house.gov/holc-guide-legislative-drafting [https://perma.cc/KY2E-F3PD] (last visited July 5, 2021) (presenting a "[g]eneral template for structuring content" and explaining that the Office of the Legislative Counsel "generally tries to organize the content of a bill, and provisions within a bill, according to [this] template").

84. HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE, *supra* note 4, at v. Likewise, Colorado's state manual on legislative drafting style, which is produced by the state's general assembly, "is intended to promote uniformity and standardization in the form, style, and language of legislation." OFF. OF LEGIS. LEGAL SERV., COLO. GEN. ASSEMBLY, COLORADO LEGISLATIVE DRAFTING MANUAL 0-21 (online ed. 2020), https://leg.colorado.gov/sites/default/files/drafting-manual-20200908.pdf [https://perma.cc/E6LX-DAM4]. Maryland's state manual is similarly meant "to ensure accuracy, clarity, and uniformity in the drafting of legislation in Maryland by promoting compliance with constitutional principles, rules of law and statutory interpretation, and accepted practices regarding style, form, and process." DEP'T OF LEGIS. SERV., LEGISLATIVE DRAFTING MANUAL, at iii (2019), dls.maryland.gov/pubs/prod/NoPblTabPDF/LegislativeDraftingManual.pdf [https://perma.cc/R3P4-MVRM].

85. For more on this point, see *infra* notes 282–83 and accompanying text.

2. Persuasion and Approval. Many commentators insist that a judicial opinion is successful to the extent it persuades its readers that the case was correctly decided.[86] Persuasion is not among the fundamental purposes of opinions, however, and the costs of aiming to persuade might not be worth the benefits.

Again, we must consider the audience. As I discussed already in the previous subsection, members of the public do not generally read opinions, and so, a few exceptional cases aside, judicial attempts to persuade the public would seem to be misplaced.

Moreover, as Professor Felipe Jiménez points out, legal concepts do not necessarily reflect ordinary cognition[87]—accordingly, a legally sound opinion might include elements that are counterintuitive or uncompelling to ordinary readers and even uncareful expert readers. Jiménez suggests further that "[o]ne of the great contributions of law to social life is that it can provide an artificial . . . normative order that transcends ordinary judgments and disagreements."[88] If this is correct, and I think it is, then we should not measure the legal quality of an opinion by the likelihood that it will persuade a reader that the case was correctly decided.

As Professor Richard Fallon explains, an opinion that succeeds in terms of exposition will demonstrate "to a reasonable reader who was acquainted with relevant law, including conventions of legal reasoning" how the judges "could regard the reasons that they adduce in support of a decision as legally adequate under the circumstances."[89] An opinion that meets those criteria will not necessarily be persuasive to the general public. It might not even be broadly persuasive to legal experts.

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86. *See, e.g.*, Judith S. Kaye, *Judges as Wordsmiths*, N.Y. ST. BAR J., Nov. 1997, at 10, 10 ("Writing opinions [represents], at bottom, [an] effort[] to persuade."); GUBERMAN, *supra* note 7, at 162 ("The opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis[; without] . . . the help of these allies, [an opinion] may never win the day." (quoting BENJAMIN CARDOZO, LAW AND LITERATURE 9 (1931))). For further sources claiming that persuasion (and in particular persuading the public) is a key function of opinions, see *supra* note 41.

87. Felipe Jiménez, *Some Doubts About Folk Jurisprudence: The Case of Proximate Cause*, USC CLASS RSCH. PAPER SERIES, no. CLASS21-18, 2021, at 1, 31, https://ssrn.com/abstract=3815405 [https://perma.cc/3YHD-ZZDD].

88. *Id.* at 31.

89. Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2293 (2017). W.B. Wendel makes a similar point when he asserts that "[i]f the argument given by the judge refers to the sorts of reasons that other judges, lawyers, and legal scholars tend to find persuasive *as justifications*, then the judge is acting ethically." W. Bradley Wendel, *Impartiality in Judicial Ethics: A Jurisprudential Analysis*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 305, 321 (2008).

We might hope that an opinion that presents a sound legal justification for the result of the case will be persuasive, at least to the legal community, just because it presents that justification. But such an opinion would be praiseworthy not because it successfully convinces readers that the court got the judgment right. The opinion's persuasiveness, rather, would be a happy by-product of its virtue in offering valid legal reasons to support the outcome of the case. We cannot count on readers to be persuaded by, and only by, sound legal arguments. And persuasive rhetoric is not a good in itself, because it can accompany both good and bad legal reasons. Together with bad legal reasons, persuasive rhetoric may even be ethically objectionable.[90]

An opinion might be unpersuasive to readers, even legally trained ones, for many reasons other than that its legal reasoning is defective or the case was wrongly decided. Appellate judges often have to decide tough borderline cases with strong arguments on both sides; in this type of case, a fair and candid opinion is likely to leave significant room for doubt. An opinion might fail to persuade because the legal theory supporting the result, although sound, was highly complex or involved legal concepts that do not track ordinary cognition. Even lawyers might struggle to set ordinary cognition aside when they read judicial opinions, and their legal judgment might be clouded by extralegal preconceptions and expectations. People can be persuaded for all kinds of suspect and extralegal reasons. For example, some readers might find an opinion that trades in racial or gender stereotypes, and appeals to common biases, persuasive for those reasons.

Professor Christopher Eisgruber expresses a similar concern in his analysis of the potential educative function of the Supreme Court:

> [I]f the Court is to communicate effectively with the people, it must somehow bring its interpretation of the Constitution to the level of the people. If the people's understanding of the Constitution is defective by comparison to the Court's—as the education metaphor might presuppose—then one might say that the Court must bring its message down to the level of the people. This might, in the end, elevate the people. It

90. As Professor Claudia Mills observes, style of presentation in itself is not a good reason to be convinced of an argument: "we can say that bad reasons are those that one warns against in critical thinking or informal logic courses: they involve such common fallacies as excessive reliance on . . . style of presentation . . . ." Claudia Mills, *Politics and Manipulation*, 21 SOC. THEORY & PRAC. 97, 107 (1995).

> also risks, however, corrupting the Court (or, at least, the Court's message).[91]

In other words, we can't expect the public to be receptive to valid legal reasons in support of a decision or to be persuaded by an opinion that articulates those reasons as clearly as possible. People might be more persuaded by an artful opinion that masks legal reasons behind evocative narratives and aesthetically pleasing rhetorical flourishes. Even worse, as Eisgruber notes, "the republic might be vulnerable to pernicious teachings: one would expect, after all, that it is easier to encourage the people to do what they feel like doing than it is to persuade the people they would in fact be better off doing something else."[92] When judges offer explanations "pertaining to identity," he adds, that "may sometimes persuade people to act upon unsavory principles."[93]

Because persuasiveness and sound legal justification sometimes, perhaps even often, come apart, we should be cautious about using the property of persuasiveness to assess the quality of judicial writing. By all means, judges should attempt to persuade their readers by offering clear legal reasons to support their conclusions. Attempts to persuade through an evocative or engaging writing style, however (and as I discuss in more detail in Sections III.C.3 and III.C.4 below), come with substantial costs in the form of guidance and fairness. Even though persuasion in judicial opinions has certain benefits—for example, increasing the likelihood of unanimous decisions, which might in turn increase the credibility or perceived legitimacy of the judicial system—I doubt that those benefits are worth the risks of aiming to persuade by way of evocative or engaging writing.

Judges have a duty to write opinions that would be legally persuasive to the ideal reader: that is, someone who finds rigorous, impartial legal reasoning to be convincing. But judges have no responsibility—and indeed no ability—to ensure that their

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91. Eisgruber, *supra* note 71, at 1030.

92. *Id.* at 1031. Eisgruber suggests that these risks may sometimes be worth taking, and I agree that there may be some cases with particular potential for educating and guiding the public and that in these cases using rhetorical devices to engage and persuade may be justifiable and worth the associated risks. *Id.* at 1006 n.119 ("[I]n some instances, the Justices may believe that their mandate will receive extra-judicial support only if their opinion is immediately persuasive."). Eisgruber names *Brown v. Board of Education* as exemplary in this respect, stating that "[n]o case better illustrates the tension between normative integrity and educative efficacy." *Id.* at 1022. Schacter suggests that Justice Kennedy's commitment to instructing the public might explain the "emphasis on rhetoric over doctrine" in his *Obergefell* majority opinion. Schacter, *supra* note 72, at 1022.

93. Eisgruber, *supra* note 71, at 973.

readers will be persuaded, and only persuaded, for the right kinds of reasons. In many cases, judges seemingly aim to persuade for the wrong kinds of reasons,[94] perhaps out of a fear that good legal reasons will not be sufficient to persuade readers that cases are correctly decided.

Some commentators suggest that judges ought to write accessible and engaging opinions because the legitimacy and authority of the judiciary depends on the public's approval of its work product, whereas the Legislative Branch gets its legitimacy and authority from the electoral process.[95] For example, the "Foreword to the First Edition" of the Federal Judicial Center's *Writing Manual* provides that "whatever the court's statutory and constitutional status, the written word, in the end, is the source and the measure of the court's authority": consequently, "[t]he burden of the judicial opinion is to explain and *to persuade and to satisfy the world* that the decision is principled and sound."[96] The idea is that judges need to convince the public and other government officials that they are doing a good job adjudicating legal disputes, and the only way that they can accomplish that feat is by writing widely persuasive opinions. Legislators, in contrast, do not have a duty to provide compelling reasons for their decisions because those government officials wield legitimate power just by virtue of being elected.

As an initial matter, and as I discussed above, the general public doesn't tend to read judicial opinions, even the most accessible and engaging ones, so citizens are unlikely to approve of the judiciary on the basis of opinion writing style.[97] Put

94. *See infra* Sections III.C.3–4.

95. *See, e.g.*, Leflar, *supra* note 64, at 812 ("One of the major functions of any system of law is to assure its own acceptance in the society it governs, and this is part of the job of each judicial opinion."); Cross & Pennebaker, *supra* note 1, at 861 ("A key function of style is to make an opinion more persuasive and ultimately more effective as a precedent."); Wald, *supra* note 66, at 1372 (claiming that one of the main reasons judges write opinions is "to reinforce our oft-challenged and arguably shaky authority to tell others . . . what to do"); Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1336–37 (2008) (asserting that the judiciary is legitimized through its written opinions).

96. Schwarzer, *supra* note 28, at vii (emphasis added). The "Foreword to the Second Edition" of the *Manual* emphasizes the importance of the "persuasive quality . . . for judges' writing." Jeremy D. Fogel, *Foreword to the Second Edition* of FED. JUD. CTR., *supra* note 28, at ix; *see also* Serota, *supra* note 80, at 649 (asserting that, to secure the "approval and obedience of the governed," "judges must . . . rely upon the power of persuasion" (quoting Ray Forrester, *Supreme Court Opinions—Style and Substance: An Appeal for Reform*, 47 HASTINGS L.J. 167, 173 (1995))).

97. *See supra* note 69 and accompanying text.

differently, to the extent the public approves of the judiciary, its approval is not likely a result of its assessment of judicial opinions.

Further, even though U.S. federal judges are appointed, a large proportion of judges in the United States are elected state judges, and most legal cases are handled by state judges.[98] Many judges presumably do gain legitimacy, then, through the electoral process—and they need not rely on opinion rhetoric for that purpose. It might be particularly important, however, for opinions by elected judges to be transparent and accessible to the public so that voters can make informed decisions about judges if they wish to do so.[99]

But even if we focus exclusively on appointed judges and grant that members of the general public will read at least some parts of some opinions (even if only quotations selected by the news media), the legitimacy-based argument for persuasion falters. Commentators suggest that the legitimacy of an appointed judiciary rests on the public's approval of judges and their work product and that the public won't approve unless it is persuaded by judicial opinions.[100] The point of having an appointed rather than elected judiciary, though, is to have a branch of government that is relatively isolated and protected from public opinion.[101] As Professor Ralph Lerner explained, "implied in the technical knowledge needed by this branch of government alone . . . the judiciary acts as [a] special guardian of the principles of the Constitution"; among the branches of government, the judiciary is "[u]niquely situated and uniquely protected," and "[t]o the extent that it can remove itself from its popular source of power, the judiciary is able to display and act in its unique character."[102]

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98. *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (May 8, 2015), https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures [https://perma.cc/4T2V-CXJ5] ("Most states use elections as some part of their [judge] selection process—39 states use some form of election at some level of court."); INST. FOR ADVANCEMENT AM. LEGAL SYS., FAQS: JUDGES IN THE UNITED STATES 3 (2014), https://iaals.du.edu/sites/default/files/documents/publications/judge_faq.pdf [https://perma.cc/AV9T-96X4] (reporting that "[t]here are approximately 30,000 state judges, compared to only 1,700 federal judges"; and "[m]ore than 100 million cases are filed each year in state trial courts, while roughly 400,000 cases are filed in federal trial courts").

99. *But see* Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1979–80 (1988) (suggesting that people do not choose which judges to vote for based on the content of judicial opinions, but rather "on the basis of whether or not they like the results in the cases that the judge has decided").

100. *See supra* notes 95–96 and accompanying text.

101. *See, e.g.*, Lerner, *supra* note 70, at 170 ("Nowhere is the separation from the people more complete and more necessary than in the judicial branch.").

102. *Id.* at 173.

Others have gone so far as to suggest that the judiciary's independence and "relative unaccountability" are "its source of legitimacy— . . . its *raison d'être* amidst a field of otherwise publicly accountable governmental institutions."[103] If judges attempt to gain public approval by writing persuasive opinions, then they risk undermining their own legitimacy. As Professor Scott Idleman asserts, courts are under no obligation to "express themselves in ways that are satisfying to the public at large."[104] He cites a concurrence in *Planned Parenthood v. Casey*, where Chief Justice Rehnquist wrote that "[t]he Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution."[105] Idleman adds that even if it was common for members of the general public to read judicial opinions—which it isn't[106]—we should not expect people to "possess the capacity to critique [the reasoning of opinions] meaningfully."[107] In Idleman's view, it may be unrealistic even to expect the legal community to effectively evaluate judicial opinions.[108]

The legitimacy of the judiciary is parasitic on the legitimacy of the system of which it is a part and the processes through which judges enter and exit the bench. In a democracy, the legitimacy of that system and those processes depends on the public's support for them. But that does not mean that the legitimacy of a judge or court depends on the public's direct or specific endorsement of that

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103. Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1341 (1995); *see also* Bhagwat, *supra* note 45, at 1013 (observing that federal court judges "enjoy one great advantage over Congress and the President—they are not elected" and "[a]s a result, they are insulated from popular reaction"). Judicial accountability is a complex issue in its own right, with a body of literature devoted to its study. *See* Idleman, *supra*, at 1343 n.110 (citing judicial accountability literature).

104. Idleman, *supra* note 103, at 1349.

105. *Id.* at 1343 n.110 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 963 (1992) (Rehnquist, C.J., concurring in part and dissenting in part)).

106. *See supra* note 69 and accompanying text.

107. Idleman, *supra* note 103, at 1349. Because of the different grounds of legitimacy for elected and appointed representatives, Professor Anita Krishnakumar makes the intriguing suggestion that opinions issued by elected judges should be subject to different writing standards than those issued by appointed judges and in particular that opinions by elected judges "should be written in a voice that ordinary citizens can understand" so that the voting public can "identify when an elected judge has misgauged current social values" and respond accordingly in judicial elections. Anita S. Krishnakumar, Response, *Interpretive Divergence All the Way Down: A Response to Aaron-Andrew P. Bruhl and Ethan J. Leib,* Elected Judges and Statutory Interpretation*, 79 U. Chi L Rev 1215 (2012)*, 79 U. CHI. L. REV. ONLINE 44, 48, 51 (2012), https://chicagounbound.uchicago.edu/uclrev_online/vol79/iss1/5/ [https://perma.cc/YJ8R-V32D].

108. Idleman, *supra* note 103, at 1349 n.128.

judge or court, or any particular decision. Indeed, in accepting a system where judges are appointed rather than elected—and especially a system like the one we have in the United States at the federal level with lifetime judicial appointments—the public implicitly consents to a system in which a judge will get to remain a judge and their decisions will merit respect and obedience, even if the judge is not popular among the public and even if they would not have been elected had citizens been asked to vote on the matter.[109] Indeed, a judge might have a duty on a given occasion to issue a highly contentious decision that rests on a sound legal argument, even if that argument involves unpopular reasons. An opinion that is legally correct and legitimate may nevertheless be unpersuasive to and fail to get approval from broad segments of the public and even members of the legal community.

3. Transparency and Guidance. Judges have a duty to provide guidance and instruction to future litigants, judges, and other legal actors by articulating legal rules and principles in their opinions. Crafting engaging stories and using evocative language interferes with a judge's professional responsibilities because it often means conveying ambiguous or misleading messages. Judges who present facts in the form of appealing narratives, or inject their personalities and emotions into their writing, risk compromising the guidance value of their opinions in the process.

In the world of stories, no facts or events are irrelevant or there by accident. We have been primed, through literature and film, to see narrative details as meaningful and purposeful. In real life, though, many circumstances surrounding a legal dispute are irrelevant for legal purposes; when judges include them in their opinions for narrative or dramatic effect, they can mislead people into thinking that legal rights and duties somehow turn on these details.

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109. Former Federal Appellate Judge Wald suggested that "because [judges] . . . do not for the most part seek popular approval or public attention, . . . on great occasions, they defy the popular will and survive to see themselves vindicated by history." Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the* Harvard Law Review *and Other Great Books*, 100 HARV. L. REV. 887, 907–08 (1987); *see also* Rostow, *supra* note 70, at 197 ("[T]he ultimate responsibility of the electorate [with respect to judges] . . . is a responsibility for the quality of the judges and for the substance of their instructions, never a responsibility for their decisions in particular cases."); Idleman, *supra* note 103, at 1343–44 ("[T]he central idea of American constitutionalism is the unfolding and maintenance of a functioning and acceptable political and social order over the long term, not necessarily the rightness or democratic acceptability of particular decisions.").

For example, recall then-Judge Gorsuch's lively narration of Tyler Hodges's elevator accident in an opinion concerning a dispute between insurance companies:

> Haunted houses may be full of ghosts, goblins, and guillotines, but it's their more prosaic features that pose the real danger. Tyler Hodges found that out when . . . [he] plummet[ed] down an elevator shaft. . . .
>
> . . . Mr. Hodges was working the twilight hours checking tickets as guests entered. When the flashlight he used began flickering and then died, he ventured inside in search of a replacement. . . . When he reached the elevator, Mr. Hodges lifted the wooden gate across the entrance and stepped in. But because of the brooding darkness, Mr. Hodges couldn't see that the elevator was on a floor above him and he crashed 20 feet down the empty elevator shaft.[110]

These details about Mr. Hodges and Bricktown Haunted House have nothing to do with the legal analysis that Judge Gorsuch goes on to conduct. As the opinion acknowledges, the "case no longer involve[d] Mr. Hodges," who had received a settlement years ago and "moved on."[111] But Mr. Hodges's accident lends itself to an evocative story, and Judge Gorsuch takes advantage of the rhetorical opportunity.[112]

In his description of Mr. Hodges's accident, which seems to serve the purpose of dramatic effect only, Judge Gorsuch capitalizes on colorful background details that are irrelevant to the otherwise dry and banal dispute between insurance companies. The narration, taking up more than ten percent of the opinion, distracts from the legal issues, compromising the opinion's guidance value.[113]

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110. W. World Ins. Co. v. Markel Am. Ins. Co., 677 F.3d 1266, 1267–68 (10th Cir. 2012). For a longer excerpt, see *supra* Part II.

111. *W. World*, 677 F.3d at 1267.

112. Gorsuch's narration seems to take advantage of a tragic incident in order to amuse, entertain, and attract attention—which is disrespectful and unfair to the accident victim and those who care about him. See *infra*, Section III.C.4, for a discussion of the value of fairness or impartiality in judicial opinions.

113. The Federal Judicial Center recognizes this danger in its *Writing Manual*, which notes that "[s]ome judges like to include facts that, although not material to the decision, add color" and that "[s]ome feel that this is a mark of the author's flair and improves readability," but "[t]here is the obvious danger . . . that the reader may think the decision is based on these facts even though they are not material." FED. JUD. CTR., *supra* note 28, at 15. Of course, there are also other kinds of legally superfluous material that judges might include in their opinions, besides narrative details, which are problematic for similar reasons. For example, Professor Maggie Gardner observes that judges sometimes include

An opinion in which the facts are arranged into an engaging story may well be more compelling than one in which the facts are relayed dryly and impassively. To make a compelling narrative out of a case, though, a judge will likely have to shape the individuals involved into good guys and bad guys and to gloss over facts and law that would go against the good ones. The legally relevant facts and applicable law might not lend themselves well to a compelling narrative. But opinions should communicate the material facts of the dispute and the legal justifications for the judgment, regardless of their narrative value. A version of the case that makes for a good story is not necessarily compatible with a judicious and legally apt telling.[114]

Compelling stories tend to oversimplify facts, make consequences of human actions seem inevitable, and make conclusions concerning culpability appear deceptively obvious or stable. Professor Bernadette Meyler suggests that abridged opinions of the type presented in casebooks do a disservice to students because they obscure "alternate readings or . . . disparate paths that the law might have taken."[115] But judges can, and often do, obscure alternate readings and paths themselves by crafting tidy narratives that seem to lead inexorably to single conclusions.[116] The acceptability of a narrative depends on how

fake legal reasons in the form of unnecessary and inappropriate citations to cases as a kind of legitimizing rhetorical device, and she argues against "such performative judging." Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1678 (2020).

114. Scholars have drawn attention to this issue as it arises in the presentation of facts by litigants. *See, e.g.*, Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 285, 307, 314 (2013) (observing that "[n]arrative's indifference to objective facts, its invitation to readers to construct parts of the tale, and the expectations it raises for the sequence, significance, and coherence of evidence all risk distortions in fact-finding"; jurors "may err in their interpretation of evidence . . . when [they] rely on preexisting models for stories in which every detail has significance, events occur in a basic sequence, the point of view is omniscient, and the characters achieve closure"; and "jurors recognize stock characters and then overvalue character traits as a determinant of behavior in life"). *But see* Anne E. Ralph*, Narrative-Erasing Procedure*, 18 NEV. L.J. 573, 575, 590–91 (2018) (arguing that "[n]arrative is central to the proper functioning of the civil litigation system," and that "advocates are not limited to the stories they receive from the dominant culture" and "[a] powerful counter-narrative—that is, a narrative that undermines the master narrative—can help to lessen the power of cultural master narratives and to de-bias the audience" (citation omitted)).

115. Bernadette Meyler, *Law, Literature, and History: The Love Triangle*, *in* NEW DIRECTIONS IN LAW AND LITERATURE 160, 169 (Elizabeth S. Anker & Bernadette Meyler eds., 2017).

116. *See, e.g.*, AMSTERDAM & BRUNER, *supra* note 17, at 187 ("Any convincing story suspends, at least temporarily, the claims of competing interpretations to define contestable issues within the movement of events that the story recounts."); Irving Younger, *On Judicial Opinions Considered as One of the Fine Arts: The Coen Lecture*, 51 U.

well its characters and sequence of events conform to audience expectations and desires—expectations and desires that are based on and informed by conventional character types and stock plots, and not on empirical or logical truth.[117] As psychologist Jerome Bruner argued, "Narratives . . . are a version of reality whose acceptability is governed by convention and 'narrative necessity' rather than by empirical verification and logical requiredness."[118] Audiences accept narrative conclusions because they feel right, and the conclusions feel right because they are consistent with conventional plot patterns.[119]

Some commentators praise the use of narrative and literary devices in judicial opinions for precisely these reasons: the idea is that judges must approach their opinions as artistic and literary endeavors if they wish to convince their readers of the soundness of those opinions. The late Judge Wald of the D.C. Circuit Court of Appeals remarked that "the facts can—and indeed must—be

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COLO. L. REV. 341, 342 (1980) (recommending that judges "[b]ring to bear the resources of music, of literature, and of painting, [so] . . . that the obscure is illuminated and the difficult made easy").

117. *See* WAYNE C. BOOTH, THE COMPANY WE KEEP: AN ETHICS OF FICTION 431 (1988) ("The writer of fictions is . . . inevitably driven into conventional ways of heightening plot, ways that are radically reductive of life's complexities. Most notably, novelists find themselves granting superlative virtues and vices to heroes and villains . . . ."); AMSTERDAM & BRUNER, *supra* note 17, at 49 ("Once we put a creature . . . in a category, we will attribute to it the features of that category[,] . . . fail to see the features of it that don't fit[, and] miss the opportunities that might have existed in all the alternative categories we did *not* use."); Dan M. Kahan, Foreword, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 59 (2011) ("The legal academy should stop rewarding storytelling, in which behavioral mechanisms are selectively invoked and manipulated to make conclusions that are (at best) plausible appear empirically unchallengeable."); Jerome Bruner, *The Narrative Construction of Reality*, 18 CRITICAL INQUIRY 1, 6 (1991) ("[S]tories plainly fall into more general types: boy-woos-girl, bully-gets-his-comeuppance, and so on. . . . [T]he particulars of narratives are tokens of broader types."); J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING 53, 67 (2008) (observing that listeners or readers evaluate the veracity of a story according to how well it fits with their stock stories: "The narrative is plausible, and persuasive, to the extent that it bears a structural correspondence to one of these stock scripts or stories, not to the extent that it 'really happened.'" (citation omitted)); Jennifer Sheppard, *What if the Big Bad Wolf in All Those Fairy Tales Was Just Misunderstood?: Techniques for Maintaining Narrative Rationality While Altering Stock Stories That Are Harmful to Your Client's Case*, 34 HASTINGS COMMC'N & ENT. L.J. 187, 188, 193 (2012) (explaining how "[s]tock stories allow us to make decisions based on minimal facts because they supplement those facts with assumptions about how the world works and how the current events should play out," and discussing "the biasing effects of" stock stories); Helena Whalen-Bridge, *The Lost Narrative: The Connection Between Legal Narrative and Legal Ethics*, 7 J. ASS'N LEGAL WRITING DIRS. 229, 245 (2010) ("[T]he power of narrative to persuade, regardless of merit, has been [widely] recognized by . . . scholars . . . .").

118. Bruner, *supra* note 117, at 4.

119. *See, e.g.*, J. David Velleman, *Narrative Explanation*, 112 PHIL. REV. 1, 19 (2003) (arguing that narratives end with the reader "com[ing] to rest in a stable attitude about the series of events in its entirety").

retold to cast a party as an innocent victim or an undeserving malefactor, to tow the storyline into the safe harbor of whatever principles of law the author thinks should control the case."[120] Professor Robert Ferguson likewise maintained that an opinion must "appear as if forced to its inevitable conclusion."[121]

Consider, for example, the opening of an opinion that then-Judge Gorsuch wrote when he was serving on the Tenth Circuit Court of Appeals: "Adam Casaus was going nowhere fast."[122] The defendant, Adam Casaus, had run a red light and collided with another car in the intersection.[123] With just the first six words of the opinion, Judge Gorsuch manages to create forceful narrative expectations about where the decision is going, and to make the outcome seem both acceptable and inevitable. As Professor Kim Scheppele explains, "in legal stories, 'where one begins'" may appear neutral or benign, but it "has a substantial [rhetorical] effect because it influences just how the story pulls in the direction of a legal outcome."[124] Judge Gorsuch depicts the defendant, right off the bat, as a rebel without a cause. And so of course the defendant will, and should, lose the legal battle. But was the defendant really going *nowhere*? And if so, is that a legally material fact or a literary flourish? Would it have made a difference if the defendant was going somewhere—to the grocery store perhaps? Or to the hospital where his wife was in labor? A reader can't be sure. But the opinion nevertheless makes good sense *as a story*. Judge Gorsuch's narrative invites readers to view Casaus as reckless for speeding without a cause, and so blameworthy, without really explaining how or whether the absence of purpose was legally material. Professor Tushnet criticizes Justice Blackmun's opinion in *DeShaney v. Winnebago County Department of Social Services*, which gushes with sympathy for one of the individuals involved in the case, on similar

120. Wald, *supra* note 66, at 1386. Professor Irving Younger went even further, suggesting that judges should take a lesson from the Russian author Nikolai Gogol, who was able to take the nonsensical and, "by telling it with tremendous intensity and sharpness of focus, persuade[] us to accept as true what plainly could not be true." Younger, *supra* note 116, at 346.

121. Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMANS. 201, 207 (1990).

122. Browder v. City of Albuquerque, 787 F.3d 1076, 1077 (10th Cir. 2015). Casaus was a police officer, and the Court of Appeals was reviewing (and affirmed) the district court's ruling against Casaus's motion to dismiss the plaintiff's Section 1983 action. *Id.*

123. *Id.*

124. Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2094 (1989).

grounds, as "directly appeal[ing] to his readers' sentiments without . . . connecting that appeal to the underlying legal" claims at issue.[125]

In her compelling critique of Ontario Court of Appeals Justice Watt's opinion writing, Professor Elaine Craig observes that Justice Watt often includes evocative factual details about litigants and events without connecting them to the legal doctrines at play, so it is unclear how or whether certain facts legally matter.[126] Although Justice Watt's vivid fact descriptions, like Justice Gorsuch's, are likely to be both accessible and engaging to a wide audience, it is often hard to see how the stylistic devices these judges employ would be "likely to make the law—the legal issues in [the] decisions—more comprehensible to" readers.[127] Instead, the rhetorical approach seems more likely to distract or even mislead its audience.

For the same kind of reasons, Professor Kenneth Simons suggests that "[w]e should be careful . . . not to be mesmerized by the eloquence of Judge Cardozo's writing."[128] Simons focuses on the classic tort case of *Murphy v. Steeplechase Amusement Co.*, where the New York Court of Appeals found an amusement park company was not liable to a young man who fell and injured himself while on a ride.[129] The "[p]laintiff, a vigorous young man, visited the park with friends," stepped on a moving belt that was "the Flopper," and next thing he knew landed with "his heels above his head."[130] "There would have been no point to the whole thing," wrote then-Judge Cardozo,

> no adventure about it, if the risk [of such a flop] had not been there.
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> . . . .
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> . . . Visitors were tumbling about the belt to the merriment of onlookers when [the plaintiff] made his choice to join them. He took the chance of a like fate, with whatever damage to

125. Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 301–02, 306 (1992).

126. Craig, *supra* note 38, at 324–26.

127. *Id.* at 327.

128. Kenneth W. Simons, Murphy v. Steeplechase Amusement Co.*: While the Timorous Stay at Home, the Adventurous Ride the Flopper*, *in* TORTS STORIES 179, 180 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

129. Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 173–75 (N.Y. 1929).

130. *Id.* at 174.

> his body might ensue . . . . The timorous may stay at home.[131]

Simons shows how Judge Cardozo's vivid and memorable language makes for a seductive and superficially persuasive opinion. As Simons explains, Judge Cardozo begins the opinion "with a cinematic narration of the injury," which, although memorable, is of questionable veracity.[132] The opinion succeeds rhetorically precisely because it tells a one-sided story that is dismissive of the losing party's point of view[133] and the legal analysis is opaque and overly simplistic.[134] Simons surmises that "the vivid fact pattern" and "striking vitality of Cardozo's writing" help explain why the opinion is "cited frequently and is prominently featured in many torts casebooks," even though its legal analysis "is not especially strong, [or] path-breaking."[135] Justice Cardozo's writing style is "distinctive, arresting, and irresistible"[136]—just the kind of writing that commentators like Ross Guberman and Bryan Garner would endorse. "But the technique is a sly one," says Simons, "when [Justice Cardozo] tells a compelling story, he also [falsely] insinuates that the legal standard is as compelling as the tale."[137]

Stories work through categorization and typecasting: good guys versus bad guys, for instance. "Once we put a creature . . . in a category," explained Bruner, "we will attribute to it the features of that category and fail to see the features of it that don't fit. We will miss the opportunities that might have existed in all the

131. *Id.*

132. Simons, *supra* note 128, at 204 & n.50.

133. Of course, standards of review require appellate courts to give considerable deference to the factual findings of trial courts. But they can give factual findings their due deference without dismissing the plausibility of other versions of facts and even without endorsing the trial court's version. *See* Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 468, 476 (1988) (explaining that factual findings of trial judges receive "substantial, but not total, deference" under the "clearly erroneous" standard of review); Jackson v. Virginia, 443 U.S. 307, 319 (1979) (determining that appellate courts must view the evidence in the light most favorable to a jury's verdict). Other situations—for example, decisions on summary judgment motions—likewise require courts to privilege a particular version of the facts. *See, e.g.*, Tobias Barrington Wolff, Scott v. Harris *and the Future of Summary Judgment*, 15 NEV. L.J. 1351, 1354 (2015) ("The received account of the summary judgment standard holds that a court must consider the factual record in the light most favorable to the non-moving party, drawing every reasonable inference in that party's favor . . . .").

134. *See* Simons, *supra* note 128, at 180.

135. *Id.* at 203.

136. *Id.* at 204.

137. *Id.*

alternative categories we did *not* use."[138] Stories tend to be one-sided. Facts that do not favor the good guys are left out or minimized, and facts unfavorable to the bad guys are amplified. As Professor David Velleman argues, "Insofar as historical discourse conveys understanding by organizing the past into stories, what it conveys is not an objective understanding of how historical events came about but a subjective understanding of how to feel about them."[139] When the defendant in then-Judge Gorsuch's narrative loses, we can feel good about it because we know, even from the opening line alone, that he is a bad guy. When the plaintiff in then-Judge Cardozo's narrative fails to get any legal relief for his injuries, we aren't too bothered because the adventure-seeking "vigorous young man" had his injuries coming.

Typecasting and strong narrative arcs in opinions are prone to be deceptive because litigants and the disputes in which they are involved are unlikely to fit neatly into stock character types and plot lines. Accordingly, judges who wish to maintain the integrity of a plot line may have to embellish, downplay, or otherwise distort events. This kind of distortion is detrimental to an opinion's guidance function.

Some scholars have suggested that judges who take some creative license with their opinions and express their personalities, passions, and sensibilities in them give their readers a window into the true nature of judging, which is highly personal and emotional.[140] The idea seems to be that if judges exercise discretion in ways that reflect their emotions and extralegal beliefs, then they ought to reveal how those emotions and beliefs affect their decision-making.[141] To the extent that judges recite facts in the form of evocative stories, the narration may simply

138. AMSTERDAM & BRUNER, *supra* note 17, at 49; *see also* BOOTH, *supra* note 117, at 431 ("The writer of fictions is . . . inevitably driven into conventional ways of heightening plot, ways that are radically reductive of life's complexities. Most notably, novelists find themselves granting superlative virtues and vices to heroes and villains . . . .").

139. Velleman, *supra* note 119, at 20. Velleman concludes that "[t]elling a story is often a means to being believed for no good reason." *Id.* at 22. Judge Posner suggests similarly that stories in law "may merely be appealing to credulous and sentimental intuitions." Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 743 (1997) (reviewing LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996)); *see also* JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 25 (Harvard Univ. Press 2003).

140. *See, e.g.*, Maroney, *supra* note 19, at 1529 & n.263, 1530 (agreeing with Judge Kozinski that judges should include genuine displays of emotion in their opinions, and reporting that Judge Kozinski believed expressing anger in an opinion served "an important 'moral and pedagogical' function").

141. *Id.* at 1529–30.

reflect how the judges perceive litigants and events, and judges are doing readers a service by shedding light on the judicial point of view in this way.

I suspect that the kind of narratives we see in opinions by Justices Gorsuch, Watt, and Cardozo are carefully crafted and tailored to create certain emotional and psychological effects in readers and do not simply reflect the judges' own reactions to the facts. Even if I'm wrong about that, however, we have reason to doubt that these kinds of perceptions merit a showing in judicial opinions. All kinds of extralegal factors affect judicial behavior and judicial decision-making, and social scientists are rightly interested in shedding light on these factors. Researchers have studied, for example, the effects of various judge attributes, including ideology, gender, race, and personality type, on judicial decision-making, in some cases finding significant associations between judge attributes and voting behavior.[142] But the point of a judicial opinion is to explain the *legal* reasoning behind a decision. Or in other words, to present a legal justification for the outcome. The judicial opinion is not a platform for judges to display their personal impressions of and opinions about the individuals involved upon introspection—even if judges were willing and able to do so accurately. As Professor Mark Yudof argues, "Some detachment is both inevitable and desirable in a system of formal justice . . . . Defensible legal methods 'revalue and devalue such case equities as remain too individual to properly determine or influence decision.'"[143] When the late Justice Scalia, for example, expressed his hope that the facts of a case concerning parental rights were "extraordinary,"[144] or Judge Orme of the Utah Court

142. *See, e.g.*, Lee Epstein & Jeffrey A. Segal, *Trumping the First Amendment?*, 21 WASH. U. J.L. & POL'Y 81, 86, 88 (2006) (finding that judge ideology affects outcomes of free speech cases); James Stribopoulos & Moin A. Yahya, *Does a Judge's Party of Appointment or Gender Matter to Case Outcomes?: An Empirical Study of the Court of Appeal for Ontario*, 45 OSGOODE HALL L.J. 315, 315 (2007) ("[A]t least in certain categories of cases, both party of appointment and gender are statistically significant in explaining case outcomes."); Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1768–69, 1777 (2005) (finding a relationship between judge gender and voting behavior in sexual harassment and discrimination cases); MATTHEW E.K. HALL, WHAT JUSTICES WANT: GOALS AND PERSONALITY ON THE US SUPREME COURT 112–13 (Cambridge Univ. Press 2018) (finding that the personality traits of Justices can predict how they will vote in cases). *But see* Ashenfelter et al., *supra* note 56, at 277, 281 (finding no substantial relationships between individual judge characteristics and outcomes in civil rights cases at three federal district courts).

143. Mark G. Yudof, *"Tea at the Palaz of Hoon": The Human Voice in Legal Rules*, 66 TEX. L. REV. 589, 598 (1988) (quoting KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 273 (1960)).

144. Michael H. v. Gerald D., 491 U.S. 110, 113 (1989) (plurality opinion).

of Appeals described a defendant's "bizarre road rage" and exclaimed that he did not find the defendant sympathetic despite agreeing with the defendant's legal argument,[145] they made the opinions about themselves and not about the law, inappropriately foregrounding personal reactions and perceptions that have, or should have, no legal bearing on the decisions.

Many Judge Kozinski opinions fit this same kind of description. Consider, for example, his concurrence in *United States v. Alvarez* (a case about the degree to which the First Amendment protects deceptive speech), which features a nearly five-hundred-word litany of examples of supposedly common lies that people tell.[146] Some of them are prurient and capitalize on gender stereotypes, and all are superfluous to the legal analysis. For example, then-Chief Judge Kozinski says that "[w]e lie . . . to maintain domestic tranquility ('She's just a friend'); . . . to achieve an objective ('But I love you *so* much'); to defeat an objective ('I'm allergic to latex'); . . . to get a clerkship ('You're the greatest living jurist')."[147] Chief Judge Kozinski's rhetoric here makes the opinion more colloquial and accessible than the average one. It caters to the very few people who read opinions just for fun and wastes the time of the many more who read them to make out the law. Moreover, Chief Judge Kozinski's unconventional approach oversimplifies First Amendment jurisprudence and casts the opposing argument as absurd and unworthy of serious consideration, which is disrespectful to both the dissenting judges and the losing party. Unsurprisingly, Guberman praises this opinion (and describes the particular passage quoted above as a "tour de force"), among others by Judge Kozinski, in his book on judicial writing style.[148] Garner's *Manual on Legal Writing Style* features Judge Kozinski in its list of "[w]idely admired judicial writers," whose work Garner advises judges to study and emulate.[149]

A recent opinion from the Third Circuit Court of Appeals takes on a similar tone. Judge Oldham opens the opinion with this zinger: "The question presented is 'Where's the beef?'"[150] The

145. State v. Watson, 485 P.3d 946, 948 (Utah Ct. App. 2021). Thanks to Cherise Bacalski for the example. See *infra* Section III.C.4.a for further discussion of these opinions.

146. United States v. Alvarez, 638 F.3d 666, 673–75 (9th Cir. 2011) (Kozinksi, C.J., concurring in the denial of rehearing en banc).

147. *Id.* at 674–75.

148. GUBERMAN, *supra* note 7, at 249–50.

149. GARNER, *supra* note 13, at 507.

150. United States v. Williams, 993 F.3d 976, 977 (5th Cir. 2021).

opinion is exceedingly informal throughout, in terms of both grammar—for example, taking every opportunity to use contractions—and diction—using colloquial language and even slang. Describing an attempted sale of cattle, Judge Oldham says that the cows "had 'problems,'" as a result of which the buyer "said no dice" to the deal.[151] At the end of the opinion, Judge Oldham paraphrases the losing party's legal position in one sentence and concludes with, "That won't cut it."[152] *Where's the beef* is not actually the question presented in the case, which concerns, rather, how victim restitution awards are to be calculated under a particular federal criminal statute.[153] The judge seems to relish in the apparently unusual facts that gave rise to the dispute, creating a colorful and playful opinion despite the serious criminal law issue being decided.

In these examples, the judges draw attention to themselves and take advantage of legal disputes to develop their personas and display their wits. Members of the public and legal community might well want to know more about the sensibilities of their judges than judicial opinions would appropriately present. For this purpose, people can turn to judges' extrajudicial writing, including autobiographies, or other content on the lives and personalities of judges, such as scholarship and journalistic accounts. I do not mean to suggest that people have no business getting to know judges as people, only that judges should not use judicial opinions as a platform for this purpose.

A decision might be legally justified even if various extralegal factors—even what the judge ate for breakfast—contributed to bringing it about. As others have convincingly argued, even if judges employ extralegal reasoning in the process of deciding cases, they "should omit [from opinions] discussion of [their] reliance on that factor and justify [their] decision[s] with legal reasoning"; the "outward limit on what judges are required to disclose . . . is legality."[154] In an argument in favor of candor in judicial opinions, Professor Henry Monaghan suggests that "[i]f justifications cannot be stated in the opinion, they should not be relied upon in entering the judgment" and that "[a] Justice who initially reached a decision on the basis of factors he is unwilling

151. *Id.* at 978.

152. *Id.* at 981.

153. *Id.* at 980.

154. Eric Dean Hageman, Note, *Judicial Candor and Extralegal Reasoning: Why Extralegal Reasons Require Legal Justifications (and No More)*, 91 NOTRE DAME L. REV. 405, 406, 416 (2015).

to assert publicly as a justification is . . . under a duty to reconsider his decision with the impermissible factors excluded so far as is humanly possible."[155] I think that is exactly right. But it does not follow that judges should reveal the sensibilities, impressions, and visceral reactions that may have contributed to their decision-making; judges must only have and present sufficient legal reasons to support their conclusions.

Professor W. Bradley Wendel helpfully explains the difference between a causal story that would explain how judges arrived at their conclusions and a justificatory one that would justify, through legal reasons, their conclusions.[156] Only the latter belongs in a judicial opinion: "A reason that may be given as an explanation of a judicial decision (e.g., that a judge has a particular partisan or ideological commitment) may be insufficient as a justification," and a judge who performs the role properly must be "prepared to give reasons in justification of a judicial decision."[157]

As Professor Micah Schwartzman explains, because judicial decisions "are backed with the collective and coercive force of political society," those decisions "must be defended in a way that those who are subject to it can, at least in principle, understand and accept. To determine whether a given justification satisfies this requirement, judges must make public the *legal grounds* for their decisions"—in other words, "they must disclose what they believe are adequate grounds to justify their exercise of legal authority."[158] This principle, which Schwartzman calls judicial *sincerity*, does not require judges to disclose causal explanations or psychological motivations for a decision, but only "what they believe is a sufficient reason to justify a decision."[159] This kind of reasoning makes the decision legitimate, and other reasons are beside the point for the purposes of a judicial opinion, even though the latter may well be of interest to social scientists, lawyers, and

155. Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 25 (1979).

156. W. Bradley Wendel, *Impartiality in Judicial Ethics: A Jurisprudential Analysis*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 305, 315–16 (2008).

157. *Id.* at 316, 321. Dworkin emphasized the same kind of "distinction between the explanation and the justification of a moral conviction," the former being "a matter of fact, and the latter of morality." RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 79–80 (2011). The explanation for why or how a judge reached a legal judgment is likewise a matter of fact, whereas the justification for that judgment is a matter of law.

158. Schwartzman, *supra* note 44, at 990, 1008 (emphasis added).

159. *Id.* at 1017.

members of the general public.[160] In Professor Richard Fallon's words, "Candor requires a judge to disclose enough about the details of her legal analysis to make it intelligible to a reasonable observer how or why the judge could have thought her stated reasons were legally adequate in the face of contrary arguments."[161] As long as judges "believe in good faith that legal reasons that are independent of their moral and policy views adequately sustain their judgments," then "they have no obligation of candor to disclose their moral and policy beliefs, even though others may suspect that those views furnish the 'real' reasons behind the judges' legal conclusions."[162]

I would go even further, to suggest that judges have an obligation to resist including psychological accounts of their decision-making in their opinions. If judges do include extralegal causal or explanatory reasons for their decisions, then readers might mistake those reasons for legal ones. Given that one of the main purposes of appellate opinions is to articulate and clarify the law, judges should refrain from presenting personal reasons to explain their decisions, even if the inclusion of such reasons might in some sense increase the transparency and candor of opinions—unless, that is, they can also explain how those personal reasons are legally relevant and should be brought to bear in subsequent cases.

Judicial opinions should, to be sure, allow people to see, if they wish to and perhaps with the help of the media or other facilitators, how judges are deciding cases. That way people could assess whether their system of government is producing the kind of judiciary and legal decisions they would want, and so they could determine whether they want to continue endorsing or consenting to that system. To facilitate this kind of evaluation, judicial opinions would have to be candid and transparent in terms of legal

160. *Id.* ("When these conditions are met, there is no reason to criticize the court for failing to disclose any additional information. The judges have carried out their duties to the parties and to everyone else affected by their decision.").

161. Richard H. Fallon, Jr., Essay, *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2279 (2017).

162. *Id.* at 2306; *see also* Schwartzman, *supra* note 44, at 991, 992 n.19 (emphasizing the difference between judicial candor and sincerity, the latter of which represents "a more limited constraint on judicial behavior," and arguing that judicial opinions ought to be sincere but not necessarily candid); Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1137 (2010) (arguing that "the requirement to give reasons is best understood as demanding that [a judge] justif[ies] decisions based on justificatory reasons that [the judge] sincerely believe[s] to be good and sufficient reasons for picking the outcome," even if the judge was in fact motivated by other reasons).

reasoning: they would have to reveal the actual rules, principles, and policies that judges take to legally justify their decisions. But there is no necessary connection, and certainly no necessarily positive relationship, between legal transparency and candor of this sort on the one side, and aesthetic appeal, entertainment value, or personal expression on the other.

4. Fairness and Its Appearance. Judges have duties, enshrined in formal codes of judicial conduct, to decide cases impartially and to exhibit impartiality in the process of adjudication.[163] An engaging and evocative narration of the events that gave rise to a legal dispute can interfere with these duties of impartiality.

a. Fairness. It may be unfair to litigants and their communities for judges to depict and publicize facts about them when those facts are not necessary to justify the legal conclusion of a case, even if the additional facts would make an opinion more emotionally satisfying. In this sense, attempts to craft appealing narratives or create dramatic effect can be disrespectful and inconsiderate, infringing on the privacy and dignity interests of litigants and other interested parties.

Further, an intimate and colloquial style seems often to come with inappropriate expressions of personal contempt or, alternatively, approval of the individuals involved in or affected by the case. For example, in *Michael H. v. Gerald D.*, a case concerning the parental rights of the biological father (Michael) of a child conceived while the biological mother was married to a different man, Justice Scalia expressed disdain toward Michael, referring to him multiple times as the "adulterous natural father"

163. The ABA's Model Code of Judicial Conduct, which states widely take as a model for their own codes of judicial conduct, emphasizes the obligation of judges to perform their duties in an impartial, fair, and objective manner, and also with the *appearance* of impartiality. *See, e.g.*, MODEL CODE OF JUD. CONDUCT r. 2.2 (AM. BAR ASS'N 2020) ("A judge . . . shall perform all duties of judicial office fairly and impartially."); *id.* r. 1.2 ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."); *see also* Baker, *supra* note 45, at 253 (asserting that the judicial profession "judges itself by the appearance of impropriety"). It should go without saying that impartiality is a fundamental value in the U.S. legal system and others, and that the legitimacy of the judiciary, and indeed the government as a whole, depends on its impartiality. *See, e.g.*, DWORKIN, *supra* note 157, at 2 (maintaining that a necessary (but insufficient) condition for a government's legitimacy is giving "equal concern for the fate of every person over whom it claims dominion"); Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 681 (1995) ("The concept of justice as impersonal occupies a central place in American law. For example, the Constitution includes several provisions requiring that law not vary depending upon the person to whom it is applied.").

and toward the entire situation, asserting at the opening of the opinion that "[t]he facts of this case are, we must hope, extraordinary."[164] As Tushnet observes, "The opinion could hardly conceal its disdain for the lives of the people involved."[165] And indeed, in an interview about the case, Michael himself indicated that he was offended by the opinion's overly personal rhetoric.[166] Judges who embrace a personal style often make a point of conveying the extent to which they sympathize with parties, even when their sympathy or lack thereof is legally irrelevant. In the opening paragraph of a recent Utah Court of Appeals opinion, Judge Orme seems to go out of his way to express a lack of sympathy for the defendant, stating that, "[w]ithout sympathy for Watson, we do agree with his legal position."[167] The judges' degree of sympathy for the parties, though, is completely irrelevant to the legal issue, which was whether the defendant's conduct proximately caused the victim's need for counselling.[168]

Other scholars have argued, with empirical support, that greater formality in decision-making increases fairness by "deterring prejudice."[169] As Professor Richard Delgado explains, formal adjudication may be fairer than alternative dispute resolution, in part because "the formalities of a court trial—the flag, the black robes, the ritual—remind those present that the occasion calls for the higher, 'public' values, rather than the lesser values embraced during moments of informality and intimacy."[170] Likewise, an informal and intimate judicial opinion might be more likely to play on prejudices and implicit biases such that readers—including other judges and lawyers—are more likely to assess the decision and parties involved based on preconceptions and emotions that have or should have nothing to do with the legal issues. The implicit biases of opinion writers themselves might also be checked by more formal constraints on judicial writing.

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164. Michael H. v. Gerald D., 491 U.S. 110, 113–14, 120, 127 n.6, 129 n.7, 130 (1989).

165. Tushnet, *supra* note 125, at 299.

166. Marcia Coyle, *After the Gavel Comes Down*, NAT'L L.J., Feb. 25, 1991, at 1, *quoted in* Tushnet, *supra* note 125, at 299 n.214.

167. State v. Watson, 485 P.3d 946, 948 (Utah Ct. App. 2021). On some occasions, judges even engage in what has properly been characterized as bullying in their opinions. *See* Steven Lubet, *Bullying from the Bench*, 5 GREEN BAG 2D 11, 12, 15 (2001) (describing how a particular federal district court judge regularly attacked and humiliated litigants' attorneys in his written opinions and suggesting that this was abusive and unethical).

168. *Watson*, 485 P.3d at 948.

169. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1375 (1985).

170. *Id.* at 1388.

Whereas casting disputes as gripping and highly personal narratives invites prejudgments and categorizations that are not grounded in the law and takes advantage of "[t]he human propensity to prejudge and make irrational categorizations," that propensity can perhaps be tempered by greater formal constraints on adjudicative procedure, including on opinion writing.[171] As Delgado asserts, "majority group members are most likely to exhibit prejudicial behavior" in informal, unstructured settings, which "allow[s] wider scope for [people's] emotional and behavioral idiosyncrasies," and "the risk of prejudice" increases "when there are few rules to constrain conduct."[172] Professor Toni Massaro suggests that formality and detachment in adjudication might be most critical for individuals from marginalized groups because they will be "least understood by decisionmakers";[173] given the persistent underrepresentation of both people of color and women on courts, judges may less readily empathize with people of color and women than with White men.[174] And so we might reasonably expect that opinions displaying judges' emotions and empathic responses might relatively disadvantage women and people of color.

In response to arguments in favor of making more space for human voices in legal discourse, Professor Yudof points out "the danger that the human voice" "may lure us away from formal justice, equal treatment of persons, and legal principles that transcend individual cases."[175] He worries that "the human voice, when used primarily to ameliorate legal doctrines in individual cases rather than to criticize the doctrines externally, may undermine the idea of law and formal justice in a modern legal system."[176] I share that worry, although it admittedly remains largely speculative, raising difficult empirical questions about the relationship between language and prejudice in the adjudicative context, which can't be settled without further and sustained empirical study.

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171. *Id.* at 1389.

172. *Id.* at 1391, 1400, 1402.

173. Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2112–13 (1989).

174. *See, e.g.*, Danielle Root et al., *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019, 8:15 AM), https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/ [https://perma.cc/6BPR-TWDF] (reporting that "[s]ince the nation's founding, the [U.S.] federal judiciary has been overwhelming[ly] white and male" and presenting data on judge demographics).

175. Yudof, *supra* note 143, at 595.

176. *Id.* at 606.

Some scholars have argued in favor of narratives as a tool of resistance for historically marginalized groups. The basic idea is that the dominant legal discourse is bureaucratic, exclusive, and insular, and that narratives can disrupt this dominant discourse and have a "humaniz[ing]" effect.[177] As Delgado puts it, "Stories attack and subvert the very 'institutional logic' of the system."[178] As I have suggested, though, the dominant legal discourse is already infused with narrative. Many of the most acclaimed and influential judges—the ones that tend to be featured in casebooks and the news media—adopt a highly accessible and narrative style in their opinions. That said, I agree with those, like Delgado, who have argued for counterstories and "multiple stories" in the legal arena; as Scheppele asserts, "The presence of . . . different, competing versions of a story is . . . an important feature of the dispute at hand that courts are being called upon to resolve."[179]

I'm not sure the extent to which we can reasonably expect a judicial opinion to accommodate multiple competing stories or voices, but I do think that both transparency and fairness would be furthered to the extent that judges acknowledge different viewpoints and show respect especially for the viewpoints of losing parties, which might require making some space for them in judicial opinions, even if that would make for less compelling narratives overall.

Parties to a legal dispute have a right to feel that their participation has been meaningful—that the court has taken their arguments seriously and given them full consideration. A one-sided opinion is unlikely to enable all parties to the dispute to feel that way. Professor Lon Fuller proposed that reasoned opinions serve to assure parties "that their participation in the decision has been real, that the arbiter has in fact understood and taken into account their proofs and arguments."[180] Scholars link participation to dignity interests, suggesting that participation "respects the dignity of the individual by affording those [directly] 'affected by the decisions . . . [with a] formally guaranteed

177. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2439–41 (1989).

178. *Id.* at 2429.

179. Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2312 (1989); Scheppele, *supra* note 124, at 2097.

180. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 388 (1978); *see also* Oldfather, *supra* note 95, at 1337 (suggesting that opinions should "give the parties a basis for concluding that, whether they won or lost, each side received an appropriate hearing of their grievances").

opportunity to affect those decisions.'"[181] "The opportunity to introduce information and arguments," explains Professor Susan Sturm, "to have one's perspective heard, underlies this [dignity] value."[182]

If a court communicates facts from multiple points of view and represents the strengths of each side's position, then both sides get to participate in the opinion.[183] But this kind of balance does not lend itself well to the "strong dramatic arc[s]" that many commentators want to see in judicial opinions.[184] Stories, at least of the type that tend to make for captivating judicial opinions, are not given to "the serene and impartial uniformity" that some say "is of the essence of the idea of law."[185]

For another example, consider how Justice Watt presents facts in his opinions. The following is representative of how the Justice opens his opinions in criminal cases:

> [1] They met in a bar in London. Melvin Flores and Cindy MacDonald. Soon, they became lovers. Then, Cindy got pregnant. Melvin was excited about the prospect of fatherhood. He wanted to get married. Cindy did not share her lover's excitement. She had an abortion.
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> . . . .

181. Sturm, *supra* note 59, at 1391–92 (quoting Lon Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 19 (1963)); *see also* Goldberg v. Kelly, 397 U.S. 254, 264–65 (1970) (asserting that allowing litigants to participate in the adjudicative process "foster[s] the dignity and well-being of all persons"); Carrie Menkel-Meadow, *Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process*, 31 LOY. L.A. L. REV. 513, 522–23 (1998) (arguing that "an ability to tell one's story, to know that someone will hear it, to know that what one has suffered is meaningful . . . is an important part of how we must deal with mass torts"); Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 320, 348, 349 (1997) (arguing that adjudication is legitimate to the extent that it allows for "significant litigant participation in the decisionmaking process and fact-specific, case-by-case decisionmaking," and that "Anglo-American adjudication is a fundamentally participatory enterprise," in which "adjudicative decisions actually are created . . . by the litigants, not by the court").

182. Sturm, *supra* note 59, at 1392.

183. *See* Abrahamson, *supra* note 50, at 640 ("[B]y engaging [litigants] the judge gives voice to [their] cares and concerns. . . . [And] insures [sic] that their voices will echo in the decisions she makes and the opinions she writes.").

184. GUBERMAN, *supra* note 7, at 162.

185. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 36 (Yale Univ. Press 1921); *see also* Steven J. Johansen, *This Is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 ARIZ. ST. L.J. 961, 979 (2006) ("Law is predicated on a principle of neutrality and rationality. That is, in law, we seek to determine an objective understanding of a conflict to which we can apply objective, neutral principles that will lead to a fair result.").

> [3] Early one morning in June 2006, Melvin Flores closed the book on his relationship with Cindy MacDonald. With a butcher knife left embedded in Cindy's back. Fifty-three blunt force injuries.[186]

Watt relays the facts in a stylized and easily digestible form. Defendant Melvin Flores is depicted as a one-dimensional monster, a psychopathic misogynist, and Cindy MacDonald comes across as a stock character of a domestic violence victim. As University of Ottawa Professor Rakhi Ruparelia observed in response to the opinion, "It seems as though Justice Watt was trying to titillate and entertain with his writing rather than offer a careful and appropriate consideration of the facts."[187]

If Watt had included each side's point of view in the fact section, we might have a more balanced understanding of the situation and the undoubtedly complex psychological factors at play, even if a less riveting narrative. Instead, Watt invites readers to judge, impulsively and emotionally, the characters and moral worth of the individuals involved.

This approach to opinion writing, which is widely praised in the United States (in Canada it seems to receive more mixed reviews), is unfair to litigants, who are cast as cookie-cutter characters. Their perspectives on the facts and legal reasons that support their position are not reflected in the opinion, which often constitutes the final word in the adjudicative process. Litigants don't have a chance to respond, and the case record is effectively buried.[188]

As Judge Posner writes, "[a]n extremely important, even a defining, element of the judicial protocol" requires judges to judge "the case rather than the parties, an aspiration given symbolic expression in . . . the judicial oath requiring judges to make

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186. R. v. Flores (2011), 274 O.A.C. 314, para. 1, 3 (Can. Ont. C.A.).

187. Kirk Makin, *The Judge Who Writes Like a Paperback Novelist*, GLOBE & MAIL (Mar. 10, 2011), https://www.theglobeandmail.com/news/national/the-judge-who-writes-like-a-paperback-novelist/article570811/ [https://perma.cc/5ZND-HVRU].

188. As others have noted, crosschecking the facts as told in an appellate opinion against the original record can be a formidable or even impossible task. *See, e.g.*, Wald, *supra* note 66, at 1390 ("[T]he reader [of a judicial opinion] cannot go to the library and read the original source [of the facts]. Case records are not practically available to the public; often they are not even sent to court but stored in the agency's archives far from metropolitan centers. . . . [And] the likelihood of a case being reviewed on appeal over an alleged factual misstatement in the opinion is nil."); RANDY D. GORDON, REHUMANIZING LAW: A THEORY OF LAW AND DEMOCRACY 177 (2011) ("[W]e have no way to test the final, published narrative against its building blocks in the overall record—all we see is what the judge wants us to see.").

decisions without respect to persons."[189] Judge Posner goes on to explain that this commitment to impersonality is also captured in the ideal of the "rule of law," which demands that judges "abstract[] from the particular characteristics of the litigants—their personal attractiveness, their standing in the community, their wealth or poverty, their political affiliation, their race, sex, ethnicity, and so forth—and see[] them rather as representatives of abstract positions or interests."[190] When judges take advantage of or embellish personal details about litigants to enhance the narrative appeal of their opinions or make their conclusions more emotionally satisfying, they betray their duties to participants in the adjudicative process and undermine the rule of law.

b. The Appearance of Fairness. Empirical studies have found that people perceive the legal system as more legitimate, and are more likely to comply with legal norms, when they perceive the law as impartial and impersonal, and specifically as treating different people the same despite personal differences.[191] Judges who conform to the prevailing advice on opinion writing style may compromise the appearance of impartiality and impersonality in two ways: first, by failing to express equal and balanced regard to both sides of a dispute; and second, by putting their own personalities and proclivities on display in their opinions.[192]

First, a judicial opinion gives a court the opportunity to show that, and how, the court processed the arguments of each party.

189. Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1057 (2006).

190. *Id.*; *see also* Sturm, *supra* note 59, at 1397 (analyzing two dominant models of adjudication and showing that, in both models, the legitimacy of judicial decision-making depends on "the judge's detachment and distance from the participants in the controversy to ensure judicial impartiality and independence").

191. *See, e.g.*, Edith Barrett-Howard & Tom R. Tyler, *Procedural Justice as a Criterion in Allocation Decisions*, 50 J. PERSONALITY & SOC. PSYCH. 296, 303 (1986) (finding that it is more important to perceptions of legitimacy that officials treat different people the same than that they treat a single person the same over time). *But see* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 153 (1990) (failing to find a significant effect of consistent treatment across people on perceptions of legitimacy and describing the finding as "puzzling" in light of other research, but suggesting as a possible explanation that participants might have lacked knowledge of how they were treated relative to other similarly situated individuals and so might not have been able to make a relevantly informed judgment).

192. Although judges have duties both to be and to appear impartial in the process of adjudication, the former duty is, I think, more fundamental, and the latter duty may only exist where the former is satisfied. We could have a system in which opinions make the adjudicative process appear completely impartial while judicial decision-making is in fact deeply unfair. In that event, we could have a workable system that even enjoys a high

Stylized, plot-driven writing can indicate partiality by giving the impression that the court did not take the losing side seriously. When the first line effectively disposes of the case, using narrative technique as opposed to legal reason to do so—as in "Adam Casaus was going nowhere fast"—it makes it seem as though the judges had their minds made up to begin with and that their reasoning may not have been led by the law. When the opinion rests on stock characters and plots, we get the impression that the court's decision-making was driven by preconception and convention and that the court may not have given full and equal consideration to each side of the dispute. In this way, the style of representation can compromise the appearance of impartiality.[193]

Second, stylistic variability from one opinion to the next is a highly visible and readily apparent type of inconsistency, and such variability might suggest an inconstant or whimsical judiciary. A court that speaks with a unified, institutional, and impersonal voice across opinions may come across as more objective, authoritative, and ultimately legitimate—more committed to the rule of law—than one where opinions are opportunities for authoring judges to develop and display their own distinct voices and personas.[194] A consistent and detached style across judges and cases has expressive value because it suggests that individuals are

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degree of perceived legitimacy, but that has little actual legitimacy—because of its serious failures in terms of impartiality and transparency. In such a system, the value of the appearance of impartiality would be undermined—perhaps cancelled entirely—by the dishonesty and deceptiveness of that appearance. Indeed, the system would arguably be better if judicial decision-making did *not* appear impartial. I take the appearance of impartiality in adjudication as a value to be protected only assuming that certain conditions—including some base level of actual impartiality—are satisfied.

193. The Federal Judicial Center's *Judicial Writing Manual* warns that "colorful writing—though appealing to the author—may be seen by the parties as trivializing the case" and advises that "[i]t must therefore be used with caution." FED. JUD. CTR., *supra* note 28, at 15–16; *see also* David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509, 509 (2001) ("Judges should not see the law or litigants as a game or a puzzle set up for their amusement."). Stylized, plot-driven writing that disregards one side's version of events may also be indicative of hastiness and inaccuracy. Sturm, *supra* note 59, at 1392. The norm of enabling each party to participate fully in the process of adjudication is supposed to "serve[] the instrumental value of enhancing the prospect of a reasoned and accurate decision." *Id.*

194. *See, e.g.*, ARTHUR J. GOLDBERG, EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT 75 (1971) (suggesting that "the appearance of impersonal, consistent, and reasoned opinions" "foster[s] public confidence in the judiciary"); *see also* Nuno Garoupa & Tom Ginsburg, *Reputation, Information and the Organization of the Judiciary*, 4 J. COMPAR. L. 228, 232 (2009) ("[I]ndividual reputation might encourage judges to differentiate themselves from other judges; excessive differentiation across the bench might seriously undermine collective reputation.").

receiving equal treatment under the law and that individuals are being ruled by the law and not by people.[195]

On the other hand, to the extent that evocative language and engaging narratives make opinions more persuasive, that kind of rhetoric might also enhance the credibility of the judiciary. The question of what kind of opinion style maximizes the perceived legitimacy of the judiciary is ultimately an open empirical one, and the answer may well change depending on the audience. I doubt that the style of opinion writing that I take issue with in this Article is best for the credibility of the judiciary generally. Even if I'm wrong there, however, any benefit in perceived legitimacy associated with that style would be unlikely to justify its ethical costs, especially if we prioritize actual over perceived legitimacy in our value scheme, which I believe we should do.

D. Judicial Versus Lawyerly Writing

The legal writing advice for judges aligns remarkably well with that geared toward lawyers.[196] This is odd because the duties of judges and lawyers differ markedly as do the purposes of judicial and litigant writing. Advocates are advised to approach their "briefs as stories instead of pieces of technical writing"; that way, the briefs will "be more interesting and therefore more persuasive."[197] Lawyers are supposed to present disputes as dramas, with parties as characters—their clients as protagonists or heroes and their opponents as antagonists or villains.[198]

Also striking is that most of the ethics literature on aesthetics and storytelling in legal writing focuses exclusively on the work product of advocates.[199] Velleman warns that "[e]ncouraging a

195. *See, e.g.*, Nina Varsava, *How to Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J.L. & HUMANS. 62, 79 (2018) (explaining how courts might offer valuable "public affirmation[s] of equality").

196. *See, e.g.*, Kaye, *supra* note 86, at 10 ("Writing opinions is a lot like writing briefs. Both are, at bottom, efforts to persuade."); *see* Farber, *supra* note 10, at 166 (conflating standards for good advocate writing with standards for good judicial writing); Alan B. Handler, *A Matter of Opinion*, 15 RUTGERS L.J. 1, 9 (1983).

197. Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 127, 131 (2008).

198. *See, e.g.*, *id.* at 142–44; Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767, 774–76, 779–80, 782 (2006).

199. *See, e.g.*, Whalen-Bridge, *supra* note 117, at 241, 243 (arguing that students should be taught legal ethics when they "are first taught narrative skills" and "the skills of persuasive argument," and explaining that "the deeply embedded human orientation toward narrative and the corresponding potential for highly effective deception means that

lawyer to make his case with a story may be like encouraging a politician to make his point with a joke—good strategy, but not conducive to the social ends of rationality and truth."[200] "Telling a story," says Velleman, "is often a means to being believed for no good reason."[201] But we should be less concerned with lawyers using stories and literary devices to persuade than judges using the same strategies. This is because, when it comes to advocate arguments, the judges and other individuals involved in the case have access to both sides of the story. In the plaintiff's argument, the defendant is a villain. But the defendant gets to argue, too, to tell the story from his point of view, and that version of the story will make him out as a sympathetic human being instead of a bad guy.[202]

Moreover, we can expect that during the course of the adjudicative process, counsel for each side will dissect the other side's story, making every effort to uncover its gaps and falsehoods.[203] That's the beauty of the adversarial system.[204] But in the context of judicial opinions, we have no such balancing mechanism. Unless a judge issues a dissent in a case (which is rare

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teaching students narrative skills is one area that arguably requires simultaneous treatment of ethical issues"); *see also* Jeanne M. Kaiser, *When the Truth and the Story Collide: What Legal Writers Can Learn from the Experience of Non-Fiction Writers About the Limits of Legal Storytelling*, 16 LEG. WRITING: J. LEGAL WRITING INST. 169, 169–74 (2010).

200. Velleman, *supra* note 119, at 22.

201. *Id.*; Whalen-Bridge asserts, "It is arguably the presence of narrative and its impressive potential to deceive, combined with the type of advocacy at work in common law legal systems, which has produced ethical restrictions on lawyers' communications with the court in many common law jurisdictions around the world." Whalen-Bridge, *supra* note 117, at 237.

202. *See* Johansen, *supra* note 185, at 971–72 ("In litigation, the adversarial system protects the truth by giving all parties the opportunity to present their own version of the truth.").

203. *See, e.g.*, Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ASS'N LEGAL WRITING DIRS. 63, 70 (2010) (discussing this aspect of the adversarial process). This claim assumes a base level of parity between the quality of lawyering on each side of a dispute, which is not always the case, of course.

204. However, we should keep in mind that narratives can gain persuasive force by taking advantage of cultural stereotypes, which incorporate prejudices on multiple dimensions, including race and gender; certain litigants (for example, White litigants), then, might stand to benefit from narratives more readily than others (for example, Black litigants). As Professor Angela Harris points out in an analysis of the capital punishment context, the claim that defense attorneys can effectively counter victim impact evidence during the penalty phase of a trial "seems irresponsible in light of the documented problems of racism in capital punishment," given "the jury's tendency to assess situations with reference to easily comprehended and widely shared stereotypes." Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77, 97 (1991).

at the Federal Courts of Appeals),[205] we see only the argument that supports the winning party. Accordingly, judges have a responsibility, one that advocates do not share, to relay the material facts and relevant law in a balanced manner, even if it makes for a less persuasive opinion overall. These differences in the professional responsibilities of advocates and judges call for drastically different approaches to writing.

Scholars have addressed at length advocate storytelling as an ethical issue.[206] Advocates are trained to craft compelling stories out of the facts they are dealt—stories that depict their clients in a sympathetic light. Sometimes this means conveying information about their clients that those clients might want to keep private—details about sexuality or mental health, for example. Scholars accordingly raise concerns about insufficient consent, misappropriation, and breaches of privacy in the attorney–client relationship.[207] The same kinds of concern apply to the retelling and manipulation of facts at the hands of judges. Even if the public doesn't typically read judicial opinions, opinions undoubtedly have a much more extensive audience than lawyer briefs. And, like lawyers, judges have incentives to reveal and highlight facts that support their conclusions, even if those facts are legally immaterial or misleading, and to portray facts in a light that makes for more intriguing and persuasive opinions, even if that comes at the expense of parties involved.

Many judges have gained acclaim for their entertaining or literary writing styles; other judges have been criticized for writing boring or inartistic opinions.[208] Narrative and literary flair in judicial opinions admittedly have potential benefits—possibly making the law more accessible, for example. But the potential benefits of aesthetically pleasing and narratively persuasive opinions are outweighed, I believe, by associated ethical costs: judges' efforts to please, entertain, and persuade through their

205. *See* Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 106 & n.9 (2011) (finding that 2.6% of courts of appeals decisions from 1990 to 2007 have dissents).

206. *See* Whalen-Bridge, *supra* note 117, at 241, 244–45; *see also* Johansen, *supra* note 203, at 64 (exploring which "characteristics of story" create "concerns that storytelling is unfairly manipulative"); Kaiser, *supra* note 199, at 173–74 (finding that it may be "debatable whether lawyers should even make the attempt" to "manipulate the subconscious impulses of a judge" by use of advocate storytelling).

207. *See, e.g.*, Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1, 30–31, 33, 39, 50–51, 54 (2000).

208. *See supra* notes 11–13 and accompanying text.

opinions may make it more difficult for them to fulfill their most fundamental professional responsibilities.

IV. STYLE AND POWER

The risks of embracing narrative and drama in the judicial process are not unique to the context of judicial opinions. And, indeed, courts have recognized and responded to the problematic relationship between rhetorical eloquence and emotional appeal on the one side, and power and persuasion on the other, in various contexts. As Professor Lisa Kern Griffin observes, "The law of evidence has long engaged to some extent in the regulation of story telling."[209] Even though courts have generally overlooked or neglected the problem as it arises in the context of judicial opinions, the idea that we should curtail the use of narrative devices and emotional appeals in the process of adjudication should be familiar to judges.

Consider, for example, limitations on victim impact statements and video broadcasting of courtroom proceedings.[210] In *Booth v. Maryland*, the Supreme Court held that in the context of capital trials, victim impact statements are unconstitutional under the Eighth Amendment's prohibition on cruel and unusual punishments.[211] Writing for the majority, Justice Powell explained that victim impact statements contain inflammatory and emotionally charged facts that are legally irrelevant and "may be wholly unrelated to the blameworthiness of a particular defendant."[212] As Professor Erik Aucoin explains, "Empathy and other 'extraneous emotional factor[s]' are typically absent from criminal courtrooms, and courts regularly instruct jurors not to

209. Griffin, *supra* note 114, at 315.

210. *See* FED. R. CRIM. P. 53 ("Except as otherwise provided by a statute or these rules, the court must not permit . . . the broadcasting of judicial proceedings from the courtroom."); *see also* United States v. Hastings, 695 F.2d 1278, 1284 (11th Cir. 1983) (rejecting constitutional challenges to Rule 53 and a local version of that rule).

211. Booth v. Maryland, 482 U.S. 496, 509 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991). *Payne* overruled the *Booth* rule against victim impact evidence concerning the characters and lives of the victim and others affected by the crime. *Payne*, 501 U.S. at 827. The Court has since clarified, in *Bosse v. Oklahoma*, that *Payne* did not overrule the portion of *Booth* that held victim impact statements may not include opinions about the defendant and the kind of punishment he deserves. Bosse v. Oklahoma, 137 S. Ct. 1, 2 (2016) (per curiam). Griffin cites *Old Chief v. United States*, where the Court determined that each side to a dispute has the right to present evidence to tell "a colorful story with descriptive richness," as "perhaps the only facet of evidence law expressly concerned with *decreasing* jurors' [emotional] detachment [from the facts]." Griffin, *supra* note 114, at 295 (citing Old Chief v. United States, 519 U.S. 172, 174–75 (1997)).

212. *Booth*, 482 U.S. at 504–05.

allow 'sympathy, prejudice, or public opinion' [to] influence their view of a case."[213]

The power of a victim impact statement in a trial will inevitably depend on the degree to which it invokes the empathy of listeners, and the ability to empathize might in turn be influenced by morally and legally irrelevant factors including race and gender; research suggests that people can more readily identify and so empathize with individuals from their own demographic groups.[214]

A victim impact statement's effect also depends on its eloquence and rhetorical force, which—like shared demographics between victims and decision-makers—are irrelevant for the purposes of determining the defendant's blameworthiness. As Professor Kenji Yoshino explains, the *Booth* Court based its prohibition on victim impact statements "on three attributes of the excluded genre—its falsity, irrationality, and seductiveness."[215] The law places certain restrictions on the use of video cameras in courtrooms for the same kind of reasons: "[T]he banning of television cameras from courtrooms can be understood as an attempt to preserve judicial proceedings from being framed as drama."[216]

The same considerations counsel against the judicial dramatization of facts in opinions. The way that a judge presents facts in an opinion will affect whether other judges deciding the same case sign on to the opinion, as well as the decision's reception by future courts that may rely on it as a precedent and even use

213. Erik Aucoin, *Empathy Leads to Death: Why Empathy Is an Adversary of Capital Defendants*, 58 SANTA CLARA L. REV. 99, 126 (2018) (first alteration in original) (first quoting California v. Brown, 479 U.S. 538, 543 (1987); then quoting KEVIN F. O'MALLEY, ET AL., FEDERAL JURY PRACTICE & INSTRUCTIONS: CIVIL § 103:01 (6th ed., 2011)); *see also* Susan Bandes, *Empathy, Narrative and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 365, 394–95 (1996) (arguing that "victim impact statements are narratives that should be suppressed because they evoke emotions inappropriate in the context of criminal sentencing," including "unreflective empathy," and "deflect the jury from its duty to consider the individual defendant and his moral culpability").

214. Aucoin, *supra* note 213, at 112–13 (discussing related psychology literature and identifying "race, gender, age, and religion" as "major factors that impact" one's ability to empathize with someone); *see also* Bandes, *supra* note 213, at 399 ("We feel empathy most easily toward those who are like us. . . . [T]here is a pervasive risk that our ability to empathize will be inhibited by ingrained, preconscious assumptions about [people]. . . . [W]ho do not share our life experiences and values.").

215. Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1871 (2005).

216. *Id.* at 1879.

the opinion as a model for crafting opinions in similar cases.[217] And yet judges are encouraged to frame disputes as dramas, even though that kind of framing may impede a balanced and candid representation of events, and may affect the relative impact of decisions on the course of the law. As Schacter observes, given that "the Court has [long] opposed cameras in its courtroom," apparently because the Justices "fear the reduction of law to soundbites," it is ironic that the Justices incorporate punchy, quotable lines into their opinions as if inviting commentators to quote "snippets of . . . opinion[s]," which "strip[s] language from context and permit[s] significant reductionism."[218] Tushnet likewise points out that the Justices sometimes appear to "strive[] for rhetorical effect," as if they "want[] to have [certain language] quoted."[219]

According to Tushnet, though, "memorable lines are expressions of the personalities of individual Justices in an otherwise bureaucratic institution, who use their distinctive phrasings to generate a sense among opinion leaders that the Justices are serious people who ought to have the public's trust."[220] I'm not sure why we should expect the kind of language that the media finds most quotable to have this effect, however. The assessment inevitably depends, of course, on exactly what lines we have in mind. As Tushnet observes subsequently in the same article, "The Court's more bureaucratic aspects, including the dull sentences and opinions that predominate in the U.S. Reports, [demonstrate] that the Justices are sober, responsible, and trustworthy people."[221] But this is not the kind of language that the media is likely to amplify given the other options that are often available.

In my view, personal expression has no place in judicial opinions—at least not in majority opinions that are written for the court. Even though in the United States majority opinions are often "signed" by individual authoring judges, these opinions are not supposed to represent the personal opinions of the authoring

217. As Justice Cardozo said, "Every judgment has a generative power. It begets in its own image. Every precedent . . . has a 'directive force for future cases of the same or similar nature.' . . . Once declared, it is a new stock of descent. It is charged with vital power. It is the source from which new principles or norms may spring to shape sentences thereafter." CARDOZO, *supra* note 185, at 21–22 (quoting JOSEF REDLICH, THE CASE METHOD IN AMERICAN LAW SCHOOLS 37 (Bulletin No. 8, Carnegie Foundation 1914)).

218. Schacter, *supra* note 72, at 1032.

219. Tushnet, *supra* note 69, at 223.

220. *Id.* at 219.

221. *Id.* at 225.

judges but rather the legal opinions of their courts as institutions.[222] In this respect, I agree with the view of the judicial role that Chief Justice Roberts expressed at his nomination hearings insofar as he indicated that judges should not draw attention to themselves: "[N]obody ever went to a ball game to see the umpire. . . . I will remember that it's my job to call balls and strikes and not to pitch or bat."[223] Despite these assertions, however, and like many of the other best-known American jurists, Chief Justice Roberts uses opinion writing as a platform to pontificate and express his own personal sensibilities.[224]

One might contend that, even if aesthetically pleasing or entertaining opinions are sometimes unfair, disrespectful, or deceptive, they aren't necessarily that way—and that, assuming an opinion is impartial, candid, and well-reasoned legally, an engaging version of that opinion is better than a dull one. One might reason that judges should accordingly be encouraged to exercise creative license while taking care to maintain legal candor as well as impartiality and its appearance.

First, I suspect that opinions that succeed on narrative or aesthetic grounds are more likely to be deceptive, unfair, or disrespectful for the reasons I discussed in the previous Part[225] and that it is simply difficult to write an opinion that is professionally responsible and would also please the style gurus. But even if judges were able to include gripping narratives in

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222. The standard opening line of U.S. Supreme Court opinions reflects this principle. For example, "Justice KAGAN delivered *the opinion of the Court*." Florida v. Harris, 568 U.S. 237, 240 (2013) (emphasis added); *see also* Richard M. Re, *Reason and Rhetoric in* Edwards v. Vannoy, DUKE J. CONST. L. & PUB. POL'Y (forthcoming 2021) (manuscript at 33–34), http://dx.doi.org/10.2139/ssrn.3865178 [https://perma.cc/67PD-69GZ] (suggesting that interpersonal attacks aimed at fellow Justices are inappropriate at least in majority opinions because, whereas "[d]issenters have . . . the freedom of individualism to excuse their behavior," the author of the majority opinion "is writing for the Court as an institution" and that institution should not be interested in "embarrass[ing] or personally criticiz[ing] a particular justice").

223. *Confirmation Hearing on the Nomination of John G. Roberts to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (opening statement of John G. Roberts, Jr., J., United States Court of Appeals for the District of Columbia Circuit), *quoted in* NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 1 (2019).

224. Consider, for example, how Chief Justice Roberts addressed the pro-gay rights population in his dissent in *Obergefell*, telling people what they ought to celebrate:

> If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. . . . Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

Obergefell v. Hodges, 135 S. Ct. 2584, 2626 (2015) (Roberts, C.J., dissenting).

225. *See supra* Section III.C.

opinions while maintaining legal transparency, providing effective guidance, and being and appearing impartial, we would still have cause to question efforts on the part of judges to stand out for their style.

If judges exercise wide stylistic discretion, then some opinions will likely have greater legal influence or precedential power than others on the basis of style alone.[226] Judges (and their clerks) typically have a plethora of previous cases to choose from when deciding which decisions to cite in new opinions, and they have considerable discretion in selecting which cases will serve to support or explain their reasoning and conclusions. And, as others have emphasized, "citation choices have 'a profound effect on the way the law grows and the shape legal doctrines take.'"[227] That shape is likely a product, in part, of the way in which previous opinions were written because their stylistic qualities will affect their salience, appeal, and persuasiveness.[228]

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226. Many empirical studies suggest that writing or communication style, apart from content, affects the persuasiveness of the message, including in the legal context. *See, e.g.*, Robert J. Hume, *The Impact of Judicial Opinion Language on the Transmission of Federal Circuit Court Precedents*, 43 LAW & SOC'Y REV. 127, 128, 146 (2009) (finding that judges can "use opinion language to expand their influence"); Hinkle et al., *supra* note 65, at 436–37, 440 (presenting empirical results to support the idea that judges "employ specific words and phrases as strategic tools to further their political goals and ideologies"); Pamela C. Corley & Justin Wedeking, *The (Dis)Advantage of Certainty: The Importance of Certainty in Language*, 48 LAW & SOC'Y REV. 35, 40, 49–51, 54 (2014) (arguing, with empirical support, "that the more certainty expressed in Supreme Court opinions, the more persuasive those opinions will be, leading to an increase in compliance"). Nancy Pennington and Reid Hastie's studies of juror decision-making suggest that juries find evidence more convincing when it is presented in story form. *See generally* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520–21 (1991); Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCH. 189, 189–90 (1992).

227. Ryan C. Black & James F. Spriggs II, *The Citation and Depreciation of U.S. Supreme Court Precedent*, 10 J. EMPIRICAL LEGAL STUD. 325, 326 (2013) (quoting John Henry Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613, 615 (1954)); *see also* Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 493 (2010).

228. *See, e.g.*, POSNER, *supra* note 29, at 143 ("The sparkling, vivid, memorable opinion is not so chained to the immediate context of its creation."); Posner, *supra* note 11, at 1424 ("The effect of style on portability is an important factor in the reputation of judges."). Judge Posner further suggests that judges who write well, according to his own conception of good writing, have an outsized influence on the law. POSNER, *supra* note 29, at 143. Justice Cardozo also suggested that an opinion's impact depends on its style: "[The] opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis . . . . [Without] the help of these allies, . . . [the opinion] may never win the day." BENJAMIN CARDOZO, LAW & LITERATURE 9 (1931), *quoted in* GUBERMAN, *supra* note 7, at 162 (third alteration in original).

Accordingly, stylistic discretion in opinion writing could create undesirable inequities in the law. For example, an opinion that stands out for its humor or narrative strengths might have greater influence on the development of the law than other opinions, not to mention on societal perceptions of the judiciary and the law, even if the other opinions are better examples of legal reasoning or implicate more important legal principles. The stylistic properties of an opinion might also affect the support it receives from other judges in the very case for which the opinion was written—and so the outcome of a case, as well as whether there are concurrences or dissents, might turn on the stylistic properties of an opinion.[229]

The legislative drafting manual produced by the United States Office of the Legislative Counsel suggests that "[a] uniform style can help communicate the message by enabling the reader to concentrate on the important part of the message without being distracted by mere stylistic differences," and that "a general agreement on as many drafting conventions as possible will simplify the drafting process and improve the legislative product."[230] This kind of advice is foreign to the domain of judicial opinion writing, and yet it would seem to be just as important, if not more, that potential stylistic distractions in judicial opinions be kept to a minimum.

The relationship between opinion style on the one side and persuasiveness and power on the other is perhaps particularly concerning if writing style varies systematically with demographics such as gender and race. Scholars have studied the effect of gender on language in a variety of contexts, and many have found that communication styles differ by gender. Professor Robin Lakoff suggested that men's language is "assertive," "direct," "clear," and "precise," whereas women's language is "hyperformal or hyperpolite," as well as "non-assertive," "indirect," "repetitious," and unclear"; empirical studies lend some support to Lakoff's descriptions of gendered language.[231] Professor Rachael

229. *See, e.g.*, Corley & Wedeking, *supra* note 226, at 38 ("Writing a persuasive opinion can hold together a majority coalition or enhance the reputation of the opinion (and its author) in the legal community.").

230. HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE, *supra* note 4, §§ 201(b)(3)(A), 301.

231. Faye Crosby & Linda Nyquist, *The Female Register: An Empirical Study of Lakoff's Hypothesis*, 6 LANGUAGE IN SOC'Y 313, 313–14, 320 (1977) (observing that "sex, like social class or subcultural group, is a variable which strongly affects speech," and that

Hinkle and coauthors find that the writing style of female and Black judges differs systematically from other judges.[232] Consequently, some demographic groups might have differing degrees of impact on caselaw just because of differences in communication style.

One might object that stylistic discretion is particularly important today and will continue to be so going forward as the judiciary becomes increasingly diverse, with more women and racial and ethnic minorities joining the bench. The kind of uniform style that I endorse, however, need not conform to any historically dominant style. Ideally, we would have diverse representation on the committees that would develop rules and policies around judicial opinion writing—so that, even if judges will have less stylistic discretion, the institutional style itself will be heavily informed by the perspectives of those who have been historically marginalized in the legal profession and underrepresented on courts. As Yudof argues, "[T]he professional voice is a manifestation of the community's aspirations and its concrete efforts to bring order to myriad human feelings and circumstances."[233] Opinion writing norms should be informed by a diversity of voices. That would reduce the risk that the norms would perpetuate inequities—which even seemingly neutral rules and standards can do.

It might nevertheless be problematic to curtail judicial discretion in opinion writing at this point in time, as women and people of color are gaining greater representation in the judiciary. The evocative opinions and lively narratives we have on the books were predominantly written by White men, and these opinions won't lose their power or precedential status if opinion writing norms change. As individual judges, committees, and regulating

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"sex-preferred differentiation seems to be widespread across a number of languages and language families," and presenting empirical data that "support Lakoff's hypotheses that the female register is used more by women than by men"); *see also* Lawrence A. Hosman & Susan A. Siltanen, *Powerful and Powerless Language Forms: Their Consequences for Impression Formation, Attributions of Control of Self and Control of Others, Cognitive Responses, and Message Memory*, 25 J. LANGUAGE & SOC. PSYCH. 33, 33, 45 (2006) (finding that a high-power speech style tends to be "evaluated more positively than a low-power speech style"); Campbell Leaper & Rachael D. Robnett, *Women Are More Likely than Men to Use Tentative Language, Aren't They? A Meta-Analysis Testing for Gender Differences and Moderators*, 35 PSYCH. WOMEN Q. 129, 134 (2011) (reporting a small but statistically significant gender difference in the use of tentative language, with women using more than men).

232. Hinkle et al., *supra* note 65, at 432 ("Both women and African Americans use more hedges . . . , but only in the fact section of their opinions.").

233. Yudof, *supra* note 143, at 593–94.

bodies consider the regulation of judicial opinion writing, this kind of concern should be taken seriously.

V. STANDARDIZING STYLE

In this Part, I discuss possible reforms for judicial opinions that would cabin the stylistic excesses I examined above. Strikingly few constraints have been imposed on the form and content of judicial opinions.[234] Judges are legally entitled to, and indeed take advantage of, wide stylistic and narrative discretion, as we saw in examples from a variety of courts in Part II above. Judges have even taken advantage of their stylistic freedom to incorporate raps and poems into their opinions.[235] Professor Chad Oldfather recounts that "there is no body of law [in the United States] that imposes on courts a set of obligations [concerning judicial opinions] consistent with the adjudicative duty," and "the Supreme Court has vested the federal courts of appeals with 'wide latitude in their decisions of whether or how to write opinions.'"[236] Accordingly, "opinion authors enjoy considerable freedom to

234. Court systems do generally follow certain norms that lend some formal consistency to their opinions. These norms take various forms, including informal internal policies, formal court-issued rules, and instructions provided in style manuals. For an example of an unpublished internal norm, the judges of the Colorado Court of Appeals adhered to a no-footnotes policy for many years. (I'm aware of this policy only through word-of-mouth, from my time working for the Colorado judicial branch.) For an example of a published court-issued rule, see Ill. Sup. Ct. R. 23, M.R. No. 10343(B) (2017) (providing that the paragraphs of appellate court opinions must be numbered in a certain way). And for an example of a style manual adopted by a court system, see LAW REPORTING BUREAU OF THE STATE OF N.Y., NEW YORK LAW REPORTS STYLE MANUAL (Kathleen B. Hughes et al. eds., 2012) http://www.courts.state.ny.us/reporter/new_styman.htm [https://perma.cc/HXX6-VSR5] (describing the manual as "a guide for New York judges and their staffs in the preparation of opinions for publication in the Official Reports," which provides guidance in "citation, abbreviation, capitalization, quotation, and word style and usage"). The preface to the New York style guide instructs that "[g]eneral authorities should be consulted on matters not covered by this Manual" and lists sources including Bryan A. Garner's *The Redbook: A Manual on Legal Style* (2d ed. 2006), Gerald Lebovits's *Advanced Judicial Opinion Writing* (7.4th ed. 2004), and Richard C. Wydick's *Plain English for Lawyers* (5th ed. 2005). LAW REPORTING BUREAU OF THE STATE OF N.Y., *supra*. Courts also have staff editors who advise judges on stylistic issues and ensure some consistency in format. *See* Douglas E. Abrams, *Judges and Their Editors*, 74 J. MO. BAR 194, 194, 196 (2018). To the extent that existing rules and guidelines curtail judicial writing style, their restrictions are not particularly intrusive and leave considerable room for judges to exercise stylistic discretion. *See, e.g.*, Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 794 (2006) ("[A]lthough there is certainly a rough uniformity among judicial opinions from judge to judge and from court to court, courts do not closely prescribe format.").

235. *See, e.g.*, Busch v. Busch, 732 A.2d 1274, 1275–78 (Pa. Super. Ct. 1999) (composed as a rhyming poem).

236. Oldfather, *supra* note 234, at 758, 761 (quoting Taylor v. McKeithen, 407 U.S. 191, 194 n.4 (1972) (per curiam)).

manipulate their portrayal of the facts of the case, the parties' arguments, and so forth."[237] As Guberman asserts in one of his judicial writing guidebooks, "opinion-writing has long been a free-for-all."[238] Professor Walton Hamilton likewise emphasized that judges have "endless choice" when it comes to crafting their opinions.[239] And Eisgruber observes that "[j]udges can say almost anything they like in an opinion. . . . [It] probably has to have an argument in it, but it need not be a very good argument."[240]

If judicial opinions should conform to a more restrained, institutional style rather than exhibit the judge's personality and creative proclivities, is there anything to be done to move judicial writing in the right direction? The trend seems to be exactly the opposite—with the news media, scholars, and legal community putting pressure on judges to develop and showcase their literary skills and distinct personalities through their opinions.[241] And precisely because opinion writing in the United States is perceived and embraced as a highly personal endeavor, judges may be resistant to limitations on their rhetorical freedom. Moreover, the prospect of restrictions coming from outside the Judicial Branch may raise separation-of-powers concerns. Judicial conduct, however, is already constrained by various formal and informal rules, and opinion writing should not get a free pass.

Courts should consider issuing rules and standards themselves that would constrain judicial rhetoric from within. Courts are largely self-regulating institutions, after all, governing themselves through both unpublished policies and published court rules and manuals. For an example of the former, for many years the Colorado Court of Appeals followed an internal policy against footnotes in opinions.[242] Examples of the latter include rules dictating which opinions shall be published versus unpublished, and standards of interjudge conduct.[243] Indeed, some internal

237. *Id.* at 795.

238. GUBERMAN, *supra* note 7, at xxi.

239. Walton H. Hamilton, *Cardozo the Craftsman*, 6 U. CHI. L. REV. 1, 3 (1938); *see also* Posner, *supra* note 11, at 1426 ("[S]tyles are optional."); McGowan, *supra* note 193, at 512 ("[T]here are few rules or formally stated norms about how [opinions] should be written and published.").

240. Eisgruber, *supra* note 71, at 1003.

241. *See supra* Part II.

242. *See supra* note 234.

243. *See, e.g.*, 9TH CIR. R. 36-2 (providing that an opinion shall be published if it meets one or more criteria provided, including that it "[i]nvolves a legal or factual issue of unique interest or substantial public importance"). State supreme courts issue rules governing the

court rules already include provisions concerning opinion style; Iowa's rules provide that judges "will be courteous, respectful and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly," and "will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge."[244] These provisions are found in the rule on "Judges' duties to each other," suggesting that the limitations they impose on opinions are somewhat self-serving. Apparently missing from court rules are opinion-writing requirements that would foreground the rights and interests of litigants and other nonjudicial actors. Rules of civil procedure could also house rules on opinion style.[245] Another possibility is that judges develop such rules and standards through judicial decisions themselves.

Judicial opinion writing could also be regulated through codes of judicial conduct. Currently, such codes do not contain any rules dealing with judicial opinions directly or explicitly (and indeed the rules are rather vague), but they do generally provide that judges "shall act at all times in a manner that promotes the public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[246] Rules such as this one have been interpreted, for

production of opinions of the lower state courts. *See, e.g.*, Ill. Sup. Ct. R. 23 (providing that "[t]he decision of the Appellate Court may be expressed in one of the following forms: a full opinion, a concise written order, or a summary order conforming to the provisions of this rule," which include that "[a]ll dispositive opinions and orders shall contain the names of the judges who rendered the opinion or order"); Ill. Sup. Ct. Admin. Order, M.R. No. 10343 (1994) (vacated in 2007) (imposing limits on the number of published opinions that each of Illinois's five appellate divisions may issue each year, the length of opinions, and prescribing certain formatting parameters). *See generally* Bert I. Huang & Tejas N. Narechania, *Judicial Priorities*, 163 U. PENN. L. REV. 1719 (2015) (discussing the Illinois rules).

244. Iowa Ct. R. 33.5(1)–(2); *see also Standards for Professional Conduct Within the 7th Federal Judicial Circuit*, UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (Dec. 1, 2020), http://www.ca7.uscourts.gov/rules-procedures/rules/rules.htm [https://perma.cc/3GSJ-4NMA] (containing a section entitled "Judges' Duties to Each Other" with the same content as the Iowa Rules).

245. Rules of civil procedure already regulate judicial conduct in various ways. For example, the California Code of Civil Procedure provides that "[a] judge shall be disqualified" from a case if "[t]he judge believes there is a substantial doubt as to his or her capacity to be impartial" or "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." CAL. CIV. PROC. CODE § 170.1(a), (a)(6)(A)(ii)–(iii).

246. MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR. ASS'N 2020); *see also id.* r. 2.2 ("A judge . . . shall perform all duties of judicial office fairly and impartially."). Most states have developed codes of judicial conduct that align closely with the ABA Model Judicial Code.

example, to impose restrictions on judges' social media activities.[247] Courts and judicial ethics committees could reasonably interpret these rules to limit judicial discretion in opinion writing. Better yet, codes of conduct themselves—perhaps starting with the ABA Model Code of Judicial Conduct—could offer pointed guidance to judges on how they can meet their duties of impartiality and propriety in their opinion writing and could caution judges that certain stylistic choices may interfere with those duties. With any type of court-issued regulation, though, judges would of course have to be on board. And we might reasonably anticipate some resistance, at least from those judges whose reputations have benefited from their exercise of stylistic license.[248]

A more drastic form of regulation would come in the form of legislation. At first glance, this type of intervention may seem to pose separation-of-powers problems. But legislatures already regulate judicial conduct and procedures in various ways, and rules to govern judicial opinion writing would not necessarily be more intrusive than existing rules.[249] For example, Professors

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See, e.g., Wisconsin's Code of Judicial Conduct, which is part of the state's Supreme Court Rules. Wis. SCR Ch. 60 (2019).

247. *See, e.g.*, Cal. Judges Ass'n, Jud. Ethics Comm., *Online Social Networking*, Op. 66 II(B)(1), (D) (2010) (laying out a test for determining whether a judge's social media activities create the perception of impropriety in violation of the California Code of Judicial Ethics and holding that a judge may not be social media "friends" with an attorney who is litigating a case before the judge); Domville v. State, 103 So. 3d 184, 186 (Fla. Dist. Ct. App. 2012), *disapproved of by* Law Offs. of Herssein & Herssein v. United Servs. Auto. Ass'n, 271 So. 3d 889, 896–97, 899 (Fla. 2018) (holding that Facebook friendships between a judge and parties litigating a case before that judge may "create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial" and that such friendships, accordingly, may violate the Florida Code of Judicial Conduct's rule against judicial impropriety and the appearance of judicial impropriety). *See generally* Hon. Richard L. Gabriel & Nina Varsava, *Friending, Following, and Liking: Social Media and the Courts*, COLO. LAW., July 2019, at 9 (discussing the relationship between rules of judicial conduct and social media use).

248. As Professors Nuno Garoupa and Tom Ginsburg point out, "judges who are concerned only with their reputation might undermine collective judicial reputation." Garoupa & Ginsburg, *supra* note 194, at 253 (2009). Garoupa and Ginsburg suggest that judicial councils could play a role in "encourag[ing] the development of professional norms that incentivize judges to internalize the inconsistencies or conflicts created by multiple constituencies." Nuno Garoupa & Tom Ginsburg, *Judicial Audiences and Reputation: Perspectives from Comparative Law*, 47 COLUM. J. TRANSNAT'L L. 451, 460 (2009). Such councils could be employed to develop and monitor standards for opinion writing.

249. For example, Congress has imposed a minimum value (of six) on the number of Supreme Court justices necessary to adjudicate any given case. *See* 28 U.S.C. § 1. Judicial disqualification is also governed by statute. *See generally* 28 U.S.C. § 455 (detailing conditions under which federal judges must disqualify themselves). Some legislatures have even issued rules to govern the judicial interpretation of both statutory and decisional law,

Craig S. Lerner and Nelson Lund have proposed a statutory judicial anonymity rule, which would prohibit judges from signing their names to majority opinions.[250] According to Lerner and Lund, the rule would "foster a more coherent body of doctrine, with Justices less inclined to pursue individual glory and more concerned with the Court's overall reputation."[251] More recently, Professor Suzanna Sherry has advocated for a legislated anonymity rule for Supreme Court opinions.[252] Sherry argues that an anonymity rule would limit the Justices' opportunities "to use their official authority to enhance their own reputations," which she sees as an abuse of power.[253] If the Court were to speak in a single voice, that would enhance "the reputation and legitimacy of the Court as an institution."[254] Sherry proposes further that the number and names of the Justices who agree with the Court's opinion should be hidden from the public.[255] This reform, she maintains, together with anonymous authorship, would "magnif[y] the perception of the Court as an institution rather than as a collection of individuals," and would also help the Justices to "view themselves . . . more as part of an institution and less as individual actors."[256]

Professor Meg Penrose likewise argues that "[t]he Justices increasingly shine the light on themselves" through their written opinions and not, as they should, on the Constitution; as a remedy, she suggests that the Court's majority opinions should be unsigned and the Justices should not be permitted to issue separate opinions (although it is unclear whether Penrose thinks that the Justices should impose these restraints on themselves or that

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which in my opinion likely does raise separation-of-powers problems. For a discussion of legislated rules governing statutory interpretation and possible constitutional problems with them, see Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 872–79 (2009).

250. Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255, 1276, 1281–83 (2010).

251. *Id.* at 1288. Lund and Lerner acknowledge that the proposal would likely be met with constitutional objections, but they contend that "[g]iven the many well-accepted ways in which Congress constrains the judicial power, such as dictating rules of judicial procedure and evidence," the constitutional objections would likely fail. *Id.* at 1282 n.132.

252. Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 197 (2020).

253. *Id.*

254. *Id.* at 223; *see also* Lerner, *supra* note 70, at 179 ("[B]y speaking with one voice through the opinions of the Court, the Supreme Court, under Marshall's politic and artful guidance, was able to survive and even prevail . . . .").

255. *See* Sherry, *supra* note 252, at 197.

256. *Id.* at 199, 203.

Congress should impose them).[257] "The shift to issuing per curiam opinions, or unsigned opinions for the Court," says Penrose, "would help 'place emphasis on the serious nature of the Court's decisions, not on how scintillating or sparkling the language and writing style of its individual members might be.'"[258] Penrose emphasizes that "it is the voice of the Court, not the individual author, that matters."[259] Both Sherry and Penrose believe that whatever transparency benefits are to be gained from signed opinions are overrated.[260] Others have suggested, to the contrary, that having signed opinions increases opinion quality, precisely because the reputations of the individual judge authors are on the line.[261] Although it certainly makes sense that a norm of signed opinions gives judges an incentive to do a good job with the opinions they write, judges undoubtedly do, and should, care about the quality of opinions that their courts issue, regardless of who writes them and whether authorship is revealed.

Regardless of its source, a norm against signed opinions might help subdue the drive among judges to stand out stylistically and to gain personal attention and recognition for their writing styles. It might move judges to focus more on getting the result and the legal reasoning correct and less on crafting an aesthetically

257. Meg Penrose, *Overwriting and Under-Deciding: Addressing the Roberts Court's Shrinking Docket*, 72 SMU L. REV. F. 8, 15–17 (2019); *see also* James Markham, Note, *Against Individually Signed Judicial Opinions*, 56 DUKE L.J. 923, 944 (2006) (likewise arguing for unsigned opinions). *But see* Thomas B. Bennett et al., *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817, 826, 877 (2018) (arguing that concurring opinions "have an important role to play" because "[t]hey signal the direction of possible legal change," but simultaneously acknowledging that "[s]uppressing separate opinions keeps the focus on the court as an institution").

258. Penrose, *supra* note 257, at 17 (quoting Richard Lowell Nygaard, *The Maligned Per Curiam: A Fresh Look at an Old Colleague*, 5 SCRIBES J. LEGAL WRITING 41, 45 (1994–1995)).

259. *Id. But see* Joan Steinman, Response, *Signed Opinions, Concurrences, Dissents, and Vote Counts in the U.S. Supreme Court: Boon or Bane? (A Response to Professors Penrose and Sherry)*, 53 AKRON L. REV. 525, 527, 549, 554, 546 (2019) (arguing that Supreme Court majority opinions should be signed and that the Justices should be permitted to issue separate signed opinions, against Sherry and Penrose).

260. Sherry, *supra* note 252, at 217; *see* Penrose, *supra* note 257, at 18–19.

261. *See, e.g.*, Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1443 (1983) ("By signing his name to a judgment or opinion, the judge assures the parties that he has thoroughly participated in [the adjudicative] process and assumes individual responsibility for the decision. . . . [But the] bureaucratization [of the judiciary] raises the spectre that the judge's signature is but a sham and that the judge is exercising power without genuinely engaging in the dialogue from which his authority flows."); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 528–30 (1986) (indicating that the individual responsibility that a judge takes and expresses for a decision has reputational significance and that judges care about their reputations).

pleasing or entertaining narrative. Moreover, a move away from signed opinions might shift incentives so that judges have more reason to focus on the reputation and legitimacy of the institutions of which they are a part and less on their own personal reputations.[262]

As for rules that regulate the form and content of opinions directly, these could be narrow and concrete or broader and more abstract. Again, such rules would probably be better imposed from within (for example, through internal court rules) than from without (by legislatures). An example of a possible narrow rule is one that limits the use of contractions in opinions (because contractions lend an informal tone to writing and can make an opinion seem flippant and casual, which may be offensive and disrespectful to litigants). Possibilities for more general rules include no overstating or hyperbole, no jokes, and no inclusion of facts for the primary purpose of dramatic or aesthetic effect.

When discussing facts about one of the litigants, perhaps a judge should be required to stick as closely as possible to that individual's own representation as provided in the briefs and at oral argument. Oldfather has proposed that courts include "framing arguments" from each side to a dispute at the start of opinions.[263] These framing arguments would be drafted and submitted by the parties themselves.[264] In this way, courts would be compelled to include the perspectives and interpretations of both the winning and losing sides in their opinions, which would enhance the participation of the parties and might have transparency benefits as well, helping to ensure that the strongest version of each side's position is recognized and displayed.

In defense of her own opinion writing style, Justice Kagan has observed that "[t]here's no rule against fun in" opinions, which is of course true.[265] But perhaps there should be a rule against fun. Litigation can be an incredibly expensive, time-consuming, high-stakes, and stressful endeavor for the parties involved (even in cases where the facts could be construed in a humorous or an otherwise entertaining way), and litigants have a right not only to be taken seriously but also to an adjudicative process that makes

262. Garoupa and Ginsburg suggest that, in many circumstances, "by investing more in building individual reputation, a judge contributes less to building collective reputation." Garoupa & Ginsburg, *supra* note 248, at 458.

263. Oldfather, *supra* note 234, at 799–800.

264. *Id.* at 796.

265. Shamsian, *supra* note 61.

them feel they have been taken seriously. A dramatic or humorous opinion can encroach on those rights.

In *Florida v. Harris*, which concerned the admissibility of evidence that police had obtained through a dog sniff, the Supreme Court concluded that the search in question was constitutional; the upshot was that the evidence uncovered through the search, which supported the defendant's conviction of possession of contraband substances, was admissible at trial.[266] Writing for the Court, Justice Kagan famously quipped that the sniff at issue was "up to snuff."[267] That is a nice turn of phrase, but it seems to make light of the case; the defendant, for whom the decision had carceral stakes (he had been convicted on the basis of the evidence in question and sentenced to two years in prison),[268] might reasonably take offense.

As Craig suggests, judicial opinions "should recognize that the accused persons in criminal proceedings will rarely find humour in [their] circumstances."[269] Craig wonders further how the family members of victims would feel about Justice Watt's efforts to make puns and jokes and to "display literary prowess" in his description of violent crimes.[270] Even those who favor expressions of wit in judicial opinions, like Guberman, acknowledge that "[t]here's a fine line between gentle humor and outright mockery."[271] In my view, attempts at humor are rarely, if ever, worth the risk of humiliating or otherwise offending readers—there is little to gain from those attempts and much to lose.

As Professor Robert Cover emphasized in his work on violence and interpretation, when judges issue decisions they "are engaging a violent mechanism through which a substantial part of their audience loses its capacity to think and act autonomously."[272] But through their opinion language, judges often exhibit a callous disregard for the "significance of the institutional connections between the judicial word and the violent deeds it authorizes."[273] This disregard has become completely normalized in the U.S. context. Cover explained how judges "facilitat[e] . . . violence

266. Florida v. Harris, 568 U.S. 237, 240, 242, 248, 250 (2013).

267. *Id.* at 248.

268. *See* Harris v. State, 71 So. 3d 756, 762 (Fla. 2011), *rev'd*, 568 U.S. 237 (2013), *withdrawn*, 123 So. 3d 1144 (Fla. 2013).

269. Craig, *supra* note 38, at 326.

270. *Id.* at 320.

271. Guberman, *supra* note 39, at 43.

272. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1615 (1986).

273. *See id.* at 1619.

through [their] institutional role[]"; judicial interpretation, embodied in written opinions, "authorizes and legitimates" organized violence.[274] For judges, though, "the pain and fear" of that violence "are remote, unreal," and therefore "almost never made a part of the interpretive artifact, such as the judicial opinion."[275] Judicial opinions might not be the place to reckon with the organized violence that our legal system facilitates; the reality of this violence, however, and the judiciary's role in it, call for a serious and measured tone. And without restraints on opinion style, judges might too often depart from that kind of tone.

Some scholars contrast the open form of U.S. judicial opinions with the more formalist style typical in civil law systems, and suggest that the United States' approach lends itself, admirably, to transparency and in turn to judicial responsibility and accountability. As Professor Mitchel Lasser explains, "In the United States, legal theory has long associated transparently reasoned individual judicial opinions with judicial control and accountability, democratic debate and deliberation, and ultimately judicial legitimacy itself."[276] In contrast, French judicial opinions, for example, are unsigned, short, and formulaic, leaving little room for judges to exercise stylistic discretion.[277] American comparative scholarship demonstrates "distrust of the syllogistic and apparently formalist style of the French civil judicial decision," and suspicion "that something must be going on behind the syllogistic façade of the French judicial decision."[278] U.S. scholars thus suspect that French judges are actually "unconstrained, solo actors hiding behind their formalist judicial decisions."[279] For Professor Michael Wells, "It seems fair . . . to characterize French judicial form as a dysfunctional and deceptive façade, behind which judges exercise a creative role without offering genuinely reasoned explanations."[280]

But we should resist setting up a false dichotomy between the U.S. and French approaches to judicial opinions. The formalistic, obscure, and possibly deceptive style of French judges is not the

274. *Id.* at 1614–15.

275. *Id.* at 1629.

276. MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 1 (2004).

277. *Id.* at 34.

278. *Id.* at 28.

279. *Id.*

280. Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81, 103 (1994).

only alternative to the free-wheeling American opinion. It is possible to have legally transparent and illuminating opinions that nevertheless strike a respectful, sober tone and speak in a formal, institutional voice.

Likewise, of course, a judge could write a stylistically bland opinion that is extraordinarily manipulative in terms of what facts or legal reasons it highlights or omits. As Delgado reminds us, "The supposedly objective point of view often mischaracterizes, minimizes, dismisses, or derides without fully understanding opposing viewpoints."[281] Nevertheless, we need not license broad stylistic freedom to get opinions that are candid and transparent in the right way. In my view, transparency and rhetorical restraint are compatible, and indeed, the right kind of restraint can aid legal transparency.

While new rules to govern the production of judicial opinions could make a positive difference in themselves, a significant change to the way in which judges approach opinion writing would likely require a fundamental shift in legal culture. This is because judicial style is a function or symptom of legal culture, and the phenomenon of judges as potential public figures, even highly influential celebrities with large fan bases (think of "The Notorious RBG," for example), runs deep in the United States,[282] where judges are widely perceived as the protagonists of national political history. This perception is reflected, and supported, by the overwhelming focus on the judge as legal actor and the judicial opinion as legal source, often to the exclusion of other legal actors and sources, in the American law school curriculum.

In an essay for the *Supreme Court Historical Society Quarterly*, Professor David Seipp characterizes Oliver Wendel Holmes's view of the state appellate judge's role "as that of a contributor to a collective enterprise, destined soon to be forgotten in name, and having useful effect only in the incremental improvement of judicial reasoning that he would add to what judges had done before."[283] I think we should embrace this as a conception of the judicial role broadly. Foregrounding as it does the judge's responsibilities to the Judicial Branch, the legal

281. Delgado, *supra* note 177, at 2441.

282. *See, e.g.*, Sherry, *supra* note 252, at 188 (focusing on the "celebrity-seeking" of the U.S. Supreme Court Justices); *see also* Schauer, *supra* note 5, at 1473 ("[T]he culture of judge and court watching in the United States has a large focus on the individual judge and an even larger focus on normative judicial evaluation.").

283. David J. Seipp, *Oliver Wendell Holmes, Jr.: The Judge as Celebrity*, 27 SUP. CT. HIST. SOC'Y Q. 1, 3–4 (2006).

system, and society as a whole, the view is incongruous with calls for judges to make names for themselves through the production of evocative and memorable opinions. Norms that limit judicial discretion in opinion writing and move judges to adopt a consistent, measured, and impassive style would further the adjudicative ideals of impartiality and impersonality and would support the legitimacy of the judicial system.

VI. CONCLUSION

Judges are not only permitted to write professionally irresponsible opinions but are widely encouraged to do so. Commentators criticize colorless and boring opinions, even if they are legally sound, and praise stylistically bold and entertaining ones, even if they are legally suspect. Judges who write in a lively and engaging manner are singled out as exemplars of strong judicial writing, and these judges are more likely to be featured in casebooks and the news media—not necessarily because they make the best or most important law but rather because readers are likely to find their language enjoyable or memorable.

Many commentators insist that "[t]he problem of composing good judicial writing cannot finally be so very different from the problem of composing any kind of good writing."[284] This seems to be a common view among legal experts—scholars, judges, and lawyers alike. As Schauer aptly points out, "The charge [of aesthetically deficient opinions] appears well founded if we see judicial opinions as consumption items for law professors, as evidence of the creative intelligence of their authors, or as objects of aesthetic pleasure."[285] But, to the extent that the latter are functions of opinions at all, they are secondary, and trivial, compared to the critical purposes that opinions are meant to serve—principally, to present, in a manner as clear and impartial as possible, the legal reasons that judges take to justify their decisions.

Judges have no obligation to write entertaining, amusing, or interesting opinions. And the effort to accomplish those feats can interfere with duties that judges do have—including to provide effective legal guidance, and to be and appear fair. The federal legislative drafting manual emphasizes that the "[e]limination of

284. Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. REV. 915, 930 (1961).

285. Schauer, *supra* note 5, at 1455–56.

unwarranted variations in the style of legislation can enhance respect for the work product of the House Legislative Counsel's office, for the efforts of the office's client, and for the House and the Congress as institutions": "When unwarranted variations do occur in the style of legislative language," it warns, "aid is given to those who are looking for grounds to misinterpret the language or to criticize the process or product involved."[286] Judges receive a very different kind of message about how they should approach the task of professional writing. I have argued that this is misguided. There are of course important differences between judicial opinions and legislation. Nevertheless, opinions are closer in purpose to legislation than to literature. The judicial process and legal system would benefit if judges, and the writing guidance directed at them, gave that reality greater consideration. Judges should take advantage of the opinion as a platform to uphold the rule of law, although that might mean passing up opportunities to display their literary skills; to entertain, amuse, and intrigue; and even to persuade their readers.

286. HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE, *supra* note 4 § 201(b)(4).