

# JUDICIAL OPINION WRITING

## What's an Opinion For?

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The question the papers in this Special Issue address is whether it matters how judicial opinions are written, and if so why. My hope here is to suggest a way of elaborating the question that may provide the reader with a useful point of departure for reading the more extensive papers that follow.

It might help, to begin with, if we were to imagine a legal world without the judicial opinion at all. Suppose that we had a system designed by one who truly believed that the law really “is what officials do about disputes,” as Karl Llewellyn used to say, and nothing else. We might have statutes and a constitution and judges appointed to resolve disputes arising under them, but the judges would never explain themselves, for it would be irrelevant for them to do so: the law would be what they did, not what they said. They would simply decide the cases, issuing orders reflecting their judgment. Their judgments might be appealed, but an appellate court would simply affirm or reverse, in the latter case substituting its judgment for that of the lower court, but never issuing an opinion explaining or justifying its decision. What would life in such a regime be like?

One's first reaction might be to think that in such a system there would be no precedent, no argument from precedent, and in this sense no law: every question would be argued as an original matter, without the advantage of the collective experience over time that the judicial opinion provides. We would be deprived of

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a crucial method of learning from the past, indeed of a way of making ourselves over time. Courts would be actors in a voiceless bureaucracy, silent figures ruling the lives of others, never explaining themselves, in a system that Kafka might recognize as his own. We would lose a crucial part both of our present life and of our collective memory.

But is this entirely right? In particular, why could we not use prior decisions as precedent even without the aid of judicial opinions? One reason, I think, is that we would find it difficult to reason from such precedents with confidence, for we would not know how the judges perceived the cases they decided or why they decided them as they did. We would not know which of the arguments made in a prior case worked and which ones did not. We would not know what the cases meant.

Yet might our legal system work, and perhaps work well enough, even without precedent? For an example of such a system we might look to ancient Athens, where cases were argued to juries of several hundred people, who decided them by vote, without deliberation. There were no judges to regulate the process or to instruct the jury; no effective restraints upon what arguments could be made, except the jury's own reaction (which was sometimes to shout down the speaker); no reliable way of evoking precedent or of enforcing the application of statutory law, which could be disregarded by the jury without consequence; and no appeal, except through the process of starting a new suit, against the winning party or one of his witnesses, say for perjury. There were no lawyers, no judges, no appeals, no precedent, no effective limitation of argument, no construction of the case by legal issues. It was considered perfectly appropriate, for example, to argue that one's opponent was a rascal on grounds totally unrelated to what we would regard as the "merits" of the case, or to draw attention to the services performed for the city by oneself or one's family. Since the jury was a large segment of the Assembly—which was the source of statutory law and was subject to virtually no constitutional or legal constraints<sup>1</sup>—people argued to the jury less as fact-finders than as lawmakers, for whom the statutes were advisory rather than binding.

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<sup>1</sup> For clear and useful accounts of the Athenian system, see S.C. Todd, *The Shape of Athenian Law* (Clarendon, 1993); Douglas M. MacDowell, *The Law in Classical Athens* (Cornell, 1978). For discussion of the limits placed on the Assembly in the fourth century, see Todd, *The Shape of Athenian Law* at 294-95; MacDowell, *The Law in Classical Athens* at 48-49.

To one trained in Roman law, or even common law, there seems to have been no law at all here (or at least no legal science), no profession of law, and no texts that tried to connect one case with another or to learn from their experience. But obviously there were people who flourished within this system. How did they do so? By training themselves to know which arguments appealed to the jury and which did not, a matter sometimes requiring nice judgment and at others—when the jury shouted out its approval or disapproval—not so hard. Law without precedent, perhaps, but law nonetheless. And although one cannot make a confident judgment about the law's efficacy without knowing more than I do about its political and social functions, it does seem to have worked well enough, at least in the sense that people knew what to say and how to say it. And, more practically, the Athenians had a flourishing international trade, complex rules of property and inheritance, and a criminal law, all maintained in part by this system.

In the world I started to imagine above, where cases are tried not by juries but by judges—bureaucrats answerable to other bureaucrats—it would be harder to figure out which arguments would work and which ones would not. Yet even here I believe an expertise in such matters would arise, a sense of audience that would enable one to pitch one's arguments effectively. One who observed a set of such cases, especially as a lawyer interested in developing his or her capacity to argue successfully, would get some notion of which facts were relevant, and which ones not; of which arguments appealed, and which did not; of the methods of statutory and constitutional interpretation that were congenial or uncongenial—these judgments would be made both about individual judges and about judges as a class.<sup>2</sup> In such a way the lawyers could presumably learn to frame arguments, much as the Athenian litigants came to do, feeling they were acting in an intelligible universe.

But could the lawyers effectively use the past as *precedent*, that is not merely as predictors of judicial behavior but as constraints upon it? "Since you decided this earlier case in this way, you must follow it in this present case?" As an abstract matter I suppose they might, but to do so they would need to compile a system of reference to the cases and be able to explain what each one meant in an accurate and authoritative way. This they could

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<sup>2</sup> Compare the way medieval courts worked, partly through written records, partly through oral memory.

not do, for only the judge himself can tell you what facts counted for him, or did not count; what paradigm or template he applied to it; or how he resolved the tension, present in nearly every case, between the claims that can rationally be made on one side and those that can be made on the other. Of course you can guess at these things from the outside, for purposes of description and prediction, but your account can never have the authority of the judge's own.

Rough prediction, then, and with it a certain kind of argument, might be possible in such a system, but the invocation of the past as authority is a different matter and seems to require the existence of the judicial opinion, or something like it. One reason, just suggested, is that no one else can speak for the judge in a way that will bind him or her. Another is that when we treat a text as authoritative we treat it differently from the way we do when we read it merely for a general attitude or disposition. We hold it up to the closest scrutiny, searching for its meaning in detail, finding in it materials of argument both ways; we argue carefully about exactly what this phrase or that sentence should be taken to mean, standing alone or as part of the whole; and the opinion as we know it is written to invite that treatment.

One could put the point by asking the question: to exactly what in a case do we, or could we, grant authority? Not the "result" standing alone, for it is often an open question exactly how the "result" should be described: what facts are relevant, for example, or at what level of generality the "result" is to be stated. We grant authority not to the result *simpliciter*, then, but to the result as characterized. One aspect of an opinion for which authority will accordingly be claimed (and resisted) is its characterization of the result. In addition, the reasons why the result was reached are obviously part of the opinion, and one will argue for their authority as well, using them to distinguish future cases from the precedent or to assimilate such cases to it.

But what are a court's "reasons?" Not just reified propositions, but its whole method of thought as it is exemplified in the opinion, its ways of imagining the world and its own role within it, its intellectual and literary procedures, its sense of the shape of a proper argument, including what counts as a conclusion. It invites lawyers and judges in the future to think and speak as it does.

For in every case the court is saying not only, "This is the right outcome for this case," but also, "This is the right way to think and talk about this case, and others like it." The opinion in

this way gives authority to its own modes of thought and expression, to its own intellectual and literary forms. These, like modes of reasoning in other fields, may be sound or defective, and this is true not only intellectually but ethically and politically too. An opinion may be authoritarian or democratic, generous or mean-spirited, doctrinaire or open to multiple arguments, and so on—indeed, it may exhibit many of the ethical and political qualities that other kinds of conduct can. Action with words is after all a form of action, in relation both to a cultural inheritance and to other people, and it is charged with ethical and political significance. The excellence of the opinion is not one of “mere style,” but an excellence of thought, represented and enacted in language in such a way as to live in the minds of others.

One can have law of a certain kind without the judicial opinion, then, perhaps of a good kind. But with the opinion, a wholly different dimension of legal life and thought becomes possible—the systematic and reasoned invocation of the past as precedent. With this practice, in turn, there can emerge an institution that simultaneously explains and limits itself over time. It is here, in the creation of legal authority, rather than in the facilitation of prediction, that the opinion performs its peculiar and most important task. For the law as we know it is not merely the prediction of what those with power will do, nor even of what arguments will move them in one direction or another; it is also the invocation of the authority of prior texts to shape and constrain what may be done in the present.<sup>3</sup>

The judicial opinion is a claim of meaning: it describes the case, telling its story in a particular way; it explains or justifies the result; and in the process it connects the case with earlier cases, the particular facts with more general concerns. It translates the experience of the parties, and the languages in which they naturally speak of it, into the language of the law, which connects cases across time and space; and it translates the texts of the law—the statutes and opinions and constitutional provisions—into the terms defined by the facts of the present case. The opinion thus engages in the central conversation that is for

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<sup>3</sup> Without the judicial opinion one can of course invoke the statute or contract or constitutional provision as such a text, but to a large degree these texts, as they exist among us, are declarations of will rather than statements of reason. To make them intelligible, purposes must be ascribed to them—justifications, explanations, motives. It is the function of the judicial opinion to do these things in an authoritative way, and not only for nonjudicial texts, but also for the judges' own exercises of power.

us the law, a conversation that the opinion itself makes possible. In doing these things it makes two claims of authority: for the texts and judgments to which it appeals, and for the methods by which it works.

These things can be done well or badly in virtually every dimension—in the establishment of the facts, in the reading of prior texts, in the construction of legal meaning, in the performance of its method. It is important that they be done well, not only because it is important that the parties be shown that their case has been treated with intelligence and respect, but because the way the opinion is written has large consequences for the future. It deeply affects and shapes the way we think and argue and, in so doing, constitute ourselves through the law.

If an opinion is narrow minded or unperceptive or dishonest or authoritarian, it will trivialize the experience of those it talks about, and it will trivialize the law too. If it is open and generous, full of excitement at the importance it gives to the events and people it speaks of, and to its own treatment of them as well, it will dignify the experience of those it talks of, and in so doing it will dignify the law itself. It may even be touched with nobility.<sup>4</sup>

The criticism of opinions, on all these grounds—rational, political, moral—is an essential part of the activity of law. It is crucial to legal practice, for it is on the basis of such criticism that one will argue for or against the continued authority of a particular opinion or line of opinions. The opinion is not merely an epiphenomenon to the law, a slight adjunct to the real business of deciding cases and predicting what officials will do, but is central to the activities of mind and character of the law as we know and value it.

Of course it is true that particular results, in the more usual sense, are important. This is certainly so for the parties who win or lose. It is no small matter to go to jail, or be forced to give up your home, or be subject to an injunction; or, on the other hand, to see a villain sent to jail, or to recover a loan, or to have the judiciary keep an abusive spouse at bay. And such results matter in another way too, as they are generalized; for the court not only decides the case but explains why it does so, in ways that are meant to be both predictive and binding on other cases. The rule of law thus adopted has great consequences and can be evaluated

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<sup>4</sup> At least this is what I have argued for many years, most completely in *Justice as Translation: An Essay in Cultural and Legal Criticism* ch 4-10 (Chicago, 1990).

to some degree independently of the opinion. In thinking about the desirability of the result we are not confined to the perception or modes of reasoning found in the opinion itself.

Yet in the end it is not sensible, I think, to talk as though one made a choice between the importance of the opinion and the importance of the result. In our system we have both, and it is important that both be right. There is a profound relation between them, because the right "style" or the right mode of reasoning will over time lead to the best results; not automatically, for things in the law do not work that way, but through the ways in which the imaginations, minds, and feelings of those who live with the law are affected. To come back to an earlier point, it seems to me that the great question of the day is whether law will move in the direction of trivializing human experience, and itself, or in the direction of dignifying itself and that experience. This is in large measure a function of the ways in which the minds that work in this field manifest themselves. The deepest sources of meaning and dignity in human life are activities of love and art; properly understood, the law cannot only enable them, it can be one of them, an activity fully worthy of the human mind and spirit.

Such are some of the themes the topic of this Special Issue suggests to me, along with my tentative views. The papers that follow pursue analogous but distinct lines of inquiry, and naturally do so in much greater depth: Judge Posner writing about two judicial styles, which reflect two modes of legal thought; Professor Schauer challenging the significance of style at all, and suggesting that perhaps judicial opinions should be more like statutes or regulations; Judge Wald offering a kind of ethnography of the judicial opinion, defining many of the practical and other constraints under which it is written; and Professor Nussbaum arguing that a good judicial opinion should have good literary qualities, especially the combination of sympathetic engagement and intellectual detachment that certain kinds of literature encourage in their readers.

In working through these papers perhaps the reader might usefully ask of them—and of this Introduction too—a question parallel to that posed by the Issue itself: How much of the meaning of this text lies in its "style," its mode of thought and manner of engagement, how much in something else? And how is that "something else" to be characterized: as "substance" or "ideas" or in some other way altogether?

