

JUDGES AND THEIR EDITORS

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INTRODUCTION

Judge Hugh R. Jones served on the New York Court of Appeals from 1973 until he reached mandatory retirement age in 1984. When he died in 2001, the *New York Times* praised him as “an intellectual leader of the state’s highest court and one of its best writers.”¹ A colleague later reminisced that Judge Jones’ “beautifully crafted opinions stand out in the New York Reports as models of scholarship, clarity of thought, and lucid graceful wordsmanship.”² They were “clear, crisp powerful writings,” Chief Judge Judith S. Kaye certified, “not a spare or careless word in them.”³

I began my career as one of Judge Jones’ law clerks more than thirty years ago, and I still recall his lessons about the pivotal role that others’ editing can play in judicial opinion writing. Thanks to modesty sustained from a solid sense of self that left him comfortable with his capacities, Judge Jones at the drafting stage actively sought and welcomed scrutiny from his in-chambers law clerks, and in appropriate cases, also from central staff law clerks and other court administrators who served as intermediaries in preparing and publishing opinions in the New York Reports.

The Judge’s abiding professional modesty provides a compass for trial and appellate judges throughout the United States who strive for written opinions marked by precision, conciseness, simplicity, and clarity.⁴ I suspect, too, that the Hugh R. Jones compass is well calibrated for judges in other nations whose judicial systems are guided by the written word.

I. ETHICAL CONSTRAINTS

America’s adversarial system of civil and criminal justice constricts the small circle of editors a judge may consult *ex parte* in the opinion writing process. The ABA Model Code of Judicial Conduct permits a judge to:

¹ Laura Mansnerus, *Hugh R. Jones, 86, Ex-Judge on New York Court of Appeals*, N.Y. TIMES, Mar. 6, 2001, at A19.

² Stewart F. Hancock, Jr., *Meeting the Needs: Fairness, Morality, Creativity and Common Sense*, 68 ALB. L. REV. 81, 81 (2004).

³ Hon. Judith S. Kaye, *A Tribute to the Honorable Hugh R. Jones*, 65 ALB. L. REV. 1, 2 (2001); see John Caher, *Obituary: Judge Hugh R. Jones*, N.Y. L.J., Mar. 6, 2001, at 2.

⁴ See HENRY WEIHOFEN, LEGAL WRITING STYLE 8–104 (2d ed. 1980) (discussing these four fundamentals).

consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, . . . provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.⁵

This discrete group includes the judge's own in-chambers law clerks and staff assistants, together with central staff law clerks, and other court administrators with responsibilities for shepherding opinions to official or unofficial reporters. Depending on the particular court system, the administrators may hold such titles as Clerk of the Court, Court Administrator, Legal Counsel, Staff Attorney, or (the generic term I use in the rest of this article) Reporter of Decisions.

Judges consulting with any of these persons need not give the parties the notice and the opportunity to respond or object that the Model Code requires when judges venture outside the court's inner circle to "obtain the written advice of a disinterested expert on the law."⁶

II. MODESTY AND OFFICIAL JUDICIAL WRITING

American judges follow no single prescribed path in opinion writing. As Judge Jones did, some trial and appellate judges make a practice of writing the first drafts of their opinions before their law clerks turn to refinement, cite checking, and verification. After providing initial direction about the anticipated analysis and result, other judges generally charge their clerks with writing a first draft for the judge's review and revision. Regardless of the chosen route, however, the opinion should become solely the judge's early in the journey; the law clerks and other staff may then assume an editorial role en route to publication.

The author of the first draft of any legal document can sometimes retain significant influence over the tenor, substance, and style of the final product. In recent years, leading commentators have debated whether law clerks charged with writing first drafts of opinions, particularly in the Supreme Court of the United States, now exercise unhealthy influence over

⁵ MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A)(3) (2008); *see* MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(c) (1990).

⁶ MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A)(2) (2008); *see* MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7)(b) (1990).

judicial decision-making.⁷ We need not enter this debate because I do not urge judges to cede any aspect of their decision-making authority to their law clerks or anyone else in the court's inner circle. As the ABA Model Code commands, judges in civil and criminal cases alike hold sole constitutional and statutory "responsibility personally to decide the matter" presented to the court.⁸ The judge's written opinion not only identifies the winners and losers (the jury's responsibility on a verdict form, for example), but also explains the decision to the parties and establishes a precedent to guide future decision-making. With bearings set by the Hugh R. Jones compass, I suggest only that, as judges retain the personal decision-making authority contemplated by the Model Code, they should welcome input from subordinates in the give-and-take of the editorial process.

This suggestion may sound like common sense, and perhaps it is. A judge's willingness to remain receptive to editorial input may not come naturally, however, because judicial chambers are not assured incubators of the modesty on which that receptiveness depends. Our nation rejected monarchy when the Founders created a democratic republic in 1787, a decade before George Washington stunned the world by voluntarily relinquishing the highest office in the land in a peaceful transition of power. Then as now, however, judges enjoyed many of the trappings of royalty denied to legislators and executive officers. American courts today are still frequently called supreme or superior—formal honorifics that even Presidents cannot claim. Everyone in the courtroom rises when judges enter and ascend to their elevated benches. Judges ordinarily don robes rather than conventional business attire. Lawyers, parties, and witnesses address judges as "Your Honor" in the courtroom, and even longtime friends sometimes hesitate to call judges by

⁷ Compare, e.g., David J. Garrow, *When Court Clerks Rule*, L.A. TIMES, May 29, 2005, at 5 ("[T]he degree to which young law clerks, most of them just two years out of law school, make extensive, highly substantive and arguably inappropriate contributions to the decisions issued in their bosses' names" in the U.S. Supreme Court; "an excess of clerks encourages justices to give away essential parts of their jobs to inexperienced people in their 20s whose political biases sometimes go unchecked."), with JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 156 (2007) ("The fact that law clerks draft most opinions has given rise to several misimpressions, particularly on the part of the clerks themselves. Because they have this responsibility, many clerks think they are more important than they are. . . . In general, only a small part of each opinion has any lasting significance, and the justices themselves monitor that section with care.")

⁸ MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A)(3) (2008).

their first names in public or private. Judges hold public office for life, or for a lengthy term of years unavailable to other elected or appointed officials.

Immodesty may easily intrude on the opinion writing process. Judges remain free to avoid editorial input altogether, establish ground rules for the editors with whom they choose to work, and ignore editorial input without challenge. To the undoubted envy of other professional writers whose mail regularly bulges with rejection letters, official and unofficial reports publish everything that judges submit, whether polished by editors or not. Even so-called “unpublished” opinions are routinely published today, either in bound volumes or online.⁹

Judge Jones taught that wise judges do not permit these daily reminders of respect, conferred by constitution and custom, to upset the delicate equilibrium between pride of authorship (a writer’s emotional attachment to what the writer has already put on paper) and modesty (a writer’s willingness to solicit and weigh input from others before releasing the final product).

“[F]ierce pride of authorship,” says Judge Bruce M. Selya of the U.S. Court of Appeals for the First Circuit, “is, on balance, a good thing. It is the pride of the craftsman”¹⁰ But balance is the key to quality judicial writing, like quality writing generally, because pride unrestrained can stiffen resistance, or even close the mind entirely, to helpful suggestions from others. “[T]he two most crucial aspects” of a writer’s character, explains Professor Ira C. Lupu, “are pride and humility. The perfect author has an optimum mix of the two. . . . Of the two qualities, . . . humility is by far the more important.”¹¹

Modesty means recognizing that, as Justice Louis D. Brandeis taught, “there is no such thing as good writing. There is only good re-writing.”¹² Literary giants without law degrees have said the same thing.¹³ Good rewriting connotes editing, but at some

⁹ See, e.g., Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235, 1290–91 (2004).

¹⁰ Bruce M. Selya, *In Search of Less*, 74 TEX. L. REV. 1277, 1279 (1996).

¹¹ Ira C. Lupu, *Six Authors In Search of a Character*, 70 CHI.-KENT L. REV. 71, 73–74 (1994).

¹² QUOTE IT II: A DICTIONARY OF MEMORABLE LEGAL QUOTATIONS 462 (Eugene C. Gerhart ed., 1988) (listing Justice Brandeis’ quote among many memorable quotations pertaining to legal writing); see, e.g., John Minor Wisdom, *How I Write*, 4 SCRIBES J. LEGAL WRITING 83, 86 (1993) (describing his “three indispensable rules of writing: (1) rewrite; (2) rewrite; and (3) rewrite”).

¹³ See JACQUES BARZUN & HENRY F. GRAFF, *THE MODERN RESEARCHER* 34 (5th ed. 1992); Elsie Goth Marshall, *Story by Willa Cather’s Neighbors*, in WILLA CATHER IN PERSON: INTERVIEWS, SPEECHES, AND LETTERS 127, 131 (L. Brent

point even talented writers lose the capacity to improve their project by themselves because a writer's thought processes and meticulous proofreading can induce the eyes to see what is in the mind rather than what is on the page.

Judge Jones' imposing reputation did not depend on editorial input from his law clerks or anyone else in the court's inner circle. We clerks had some residual impact on an opinion's style and substance, but Judge Jones did not need our editing because he was a consummate writer even without us. He simply wanted editing because he recognized that a writer's self-editing cannot substitute for the objectivity and new ideas that accompany a fresh perspective, and that anyone's drafts can stand improvement—even a judge's.

By word and deed, Judge Jones taught the wisdom of encouraging spirited editorial give-and-take, beginning in chambers with his law clerks and proceeding in some cases to other internal court personnel. By helping to assure that the published reports unveiled the most graceful product possible, his willingness to run the editorial gauntlet enriched not only the Court of Appeals as an institution, but also the fabric of the law in New York and (because of the Court's preeminence) throughout the nation.

III. EDITORS IN THE CHAMBERS

Before circulating draft opinions to the court's other six members for their response and input, Judge Jones would gather with his two law clerks around a table for an hour or more to parse every paragraph, word-for-word and line-by-line.¹⁴ With pride of authorship removed as an impediment, the three of us enjoyed wordsmithing because words are tools, and crafting remains creative regardless of who holds the toolbox.

Collegial discussion extended beyond matters of grammar, syntax, and style to issues of substance, persuasion, and argumentation. Judge Jones knew that robust, no-holds-barred editing in chambers could help avoid later pitfalls because judicial opinions, like most other published legal writing, ultimately face a "hostile audience" that "will do its best to find the weaknesses in the prose, even perhaps to find ways of turning

Bohlke ed., 1986) (quoting Willa Cather).

¹⁴ Douglas E. Abrams, *Hugh Richard Jones, in THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY* 721, 725 (Albert M. Rosenblatt ed., 2007).

the words against their intended meaning.”¹⁵ With future advocates waiting to distinguish troublesome precedents, careful editing can help alert the judge to potential weaknesses before less friendly readers get their hands on the published opinion.

The playing field for judges and their clerk-editors is not level unless the judge makes it level. Editors of any stripe may feel natural reticence to challenge a writer who holds a superior position, and nods of approval may appear the easier and more prudent course. Because the ABA Model Code of Judicial Conduct sharply constricts a judge’s team of editors, however, perpetuating reticence squanders valuable opportunities for pre-publication improvement predicated on candid interchange.

Both clerks knew that Judge Jones had the final say, but we also knew that he genuinely valued our input because he gracefully accepted both praise and critique. One clerk’s articulated concern was sufficient to give him pause about something he had written, but he also followed an informal “Rule of Two”: where both clerks expressed the same concern, he paid particularly close attention to whether other readers similarly situated might later feel the same way. Even when Judge Jones rejected an editorial suggestion and assumed the role of teacher to explain why, we had no reason for future reluctance because he extended every courtesy worthy of our status as fellow professionals, even if professionals considerably less experienced than he.

In-chambers editorial contributions did not necessarily end with the clerks. Judge Jones also welcomed suggestions from his administrative assistant concerning spelling, grammar, syntax, and phrasing that caught her trained eye as she typed. Readers of the New York Reports never identified her input, but the Judge and we law clerks knew.

IV. THE REPORTER OF DECISIONS

Normally the role of the Reporter of Decisions or similar court officer begins before the court formally hands down the opinion, or else the slip opinion contains a public disclaimer that it is not final until it reaches the bound volume of the reports.¹⁶ One way

¹⁵ GEORGE D. GOPEN, *WRITING FROM A LEGAL PERSPECTIVE* 1 (1981).

¹⁶ *See, e.g.*, Supreme Court of the United States, 2008 Term Opinions of the Court, <http://www.supremecourtus.gov/opinions/08slipopinion.html> (last visited Sept. 20, 2009) (“Caution: These electronic opinions may contain computer-generated errors or other deviations from the official printed slip opinion

or the other, these court administrators normally have an opportunity to provide last-minute editorial input.

By the time an opinion reaches the desk of the Reporter of Decisions, the case's disposition has been determined. Judges and their law clerks have read the briefs and other written submissions, and the parties have had opportunity for whatever oral argument the court rules permit. Where appropriate, the judge and the clerks have engaged in confidential discussion about the outcome. In a trial court, the judge has reached a decision and committed it to paper. In an appellate court, the full court or a panel of judges has reached a collegial decision reflected in majority, concurring, and dissenting opinions.

Reporters of Decisions, however, can verify citations of authority and play a meaningful role in suggesting finishing touches on matters of style. Grammar, punctuation, syntax, and spelling errors can evade even trained eyes, and the Reporter is normally the last person to scrutinize the opinion before its public unveiling.¹⁷ Stylistic or typographical errors do not affect the disposition, but they remain enduring embarrassments to the court.

If the judge permits, the Reporter's influence may also extend to matters of substance. In my experience, Reporters of Decisions are generally lawyers with a rich understanding of their court and keen instincts for the judicial process. Reporters who have served their court for years may have a deeper institutional memory than some of the sitting judges, and a greater sense of tradition than nearly all the young in-chambers law clerks who serve temporary appointments for a year or two.

With this memory and sense, the Reporter of Decisions might flag passages in an opinion that seem inconsistent with the ebb and flow of what the court has done in years past. The Reporter might even recall, however vaguely, a source of law or a prior decision whose discussion or citations have escaped the parties, *amici*, and the judges or their clerks in the present case. The

pamphlets. Moreover, a slip opinion is replaced within a few months by a paginated version of the case in the preliminary print, and one year after the issuance of that print by the final version of the case in a U. S. Reports bound volume. In case of discrepancies between the print and electronic versions of a slip opinion, the print version controls. In case of discrepancies between the slip opinion and any later official version of the opinion, the later version controls").

¹⁷ See, e.g., Illinois Courts, Supreme Court Support Staff & Contact Information, <http://www.state.il.us/court/supremecourt/supportstaff.asp> (last visited Sept. 20, 2009) (stating that the Illinois Reporter of Decisions and staff members "verify case citations . . . and edit opinions for style and grammar").

recollection might provide a fruitful avenue for last-minute research that would avoid a motion for re-argument or reconsideration.

In many European Continental systems, the maxim *ius curia novit* (the court knows the law) suggests that regardless of the content or quality of counsel's submissions, the court will inevitably apply all relevant sources of law.¹⁸ Courts in the United States know better. The sheer breadth and intricacy of contemporary American law means that even experienced judges and their law clerks might sometimes overlook sources not presented to the court.¹⁹ As the U.S. Court of Appeals for the Seventh Circuit acknowledges, "[o]urs is an adversarial system, and courts rely on lawyers to identify the pertinent facts and law."²⁰

The courts' acknowledged reliance on lawyers is nearly as old as the nation's judicial system itself. The United States Supreme Court has long held that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."²¹ The holding, which offers flexibility when a court is pressed to give precedential effect to an issue not previously considered, dates from an opinion delivered by Chief Justice John Marshall in 1805.²²

¹⁸ See, e.g., P. Oberhammer & T. Domej, *Germany, Switzerland, and Austria*, in *EUROPEAN TRADITIONS IN CIVIL PROCEDURE* 295, 303 (C.H. van Rhee ed., 2005); C.H. van Rhee, *Introduction*, in *EUROPEAN TRADITIONS IN CIVIL PROCEDURE* 185, 190 (C.H. van Rhee ed., 2005).

¹⁹ See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2653 (holding that the Eighth Amendment prohibits imposition of the death penalty for rape of a child where the crime did not result, and was not intended to result, in the victim's death; the Court found that "[t]he evidence of a national consensus with respect to the death penalty for child rapists . . . shows divided opinion but, on balance, an opinion against it"), *reh'g denied*, 129 S. Ct. 1, 1 (2008) (rejecting the state's claim that the longstanding military death penalty for rape of a child, and a related 2006 congressional amendment of the Uniform Code of Military Justice, and 2007 executive order—not cited by either party or any *amicus*, and not discussed in the Court's decision—should alter the Court's constitutional analysis).

²⁰ *In re Cont'l Cas. Co.*, 29 F.3d 292, 295 (7th Cir. 1994).

²¹ *Webster v. Fall*, 266 U.S. 507, 511 (1925); *accord* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed."); *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (explaining that where an issue is not "raised in briefs or argument nor discussed in the opinion of the Court," the decision does not constitute "a binding precedent on th[e] point").

²² See *United States v. More*, 7 U.S. (3 Cranch) 159, 172 (1805) ("No question was made, in that case, as to the jurisdiction. It passed *sub silentio*, and the

CONCLUSION

Judge Jones' 1984 farewell to the Court of Appeals was marked by the same modesty that had marked his opinion writing during his twelve-year tenure. Transcripts of retirement ceremonies, with their final opportunity for public reminiscence and outlook, are published in the New York Reports. Judge Jones concluded his remarks by thanking Court personnel by name—not only the other Judges, but also the law clerks and other support staff.²³ Many of these people had devoted their entire adult lives to the Court's service, and others had served shorter appointments before continuing their career journey with memories of time well spent. Many had played supporting roles in Judge Jones' opinion writing because he had permitted and indeed encouraged their input. Now these devoted public servants were immortalized in the Reports because someone in a high position thought to pause and remember.

Judge Jones taught by example that a judge's pride of authorship in a preliminary draft seems counterproductive and utterly misplaced when it closes the mind to responsible editorial advice. The lesson is grounded in the *stare decisis* doctrine itself, which ensures that influential judicial opinions frequently outlive the judges who wrote them. To be sure, published judicial opinions speak first to the lawyers and parties immediately before the court. Our system of precedent, however, also extends the audience to future courts, lawyers, litigants, academic researchers, and perhaps also to future lay readers when the decision touches on matters of social concern.²⁴

court does not consider itself as bound by that case.”).

²³ *Remarks at Ceremony Marking Retirement of Associate Judge Hugh R. Jones* (Dec. 19, 1984), in 63 N.Y.2d xiii, xv–xviii (1984).

²⁴ Compare LEE C. BOLLINGER, IMAGES OF A FREE PRESS 42 (1991) (explaining that the U.S. Supreme Court “can perform a deeply educative role in society, affecting behavior far beyond the strictly legal domain”), and ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 58 (1948) (“The Supreme Court . . . is and must be one of our most effective teachers.”), and Bernard J. Ward, *The Federal Judges: Indispensable Teachers*, 61 TEX. L. REV. 43, 46 (1982) (explaining that judges are “the indispensable teachers of the American people,” conducting seminars “every day from the classrooms of [their] courtrooms”), with William H. Rehnquist, *Act Well Your Part: Therein All Honor Lies*, 7 PEPP. L. REV. 227, 228 (1980) (“[T]he Supreme Court does not ‘teach’ in the normal sense of that word at all. In many cases we hand down decisions which we believe are required by some Act of Congress or some provision of the Constitution for which we, as citizens, might have very little sympathy and would not choose to make a rule of law if it were left solely to us.”). See generally James Boyd White, *Judicial Opinion Writing*, 62 U. CHI. L. REV. 1363,

And preliminary drafts of opinions? If not consigned to the judge's confidential files, they usually disappear in the trash, deleted from the computer, forgotten, and never to be seen or heard from again.

By submerging pride of authorship during an opinion's gestation and by carefully weighing editorial input, judges secure in their craft advance the interests of justice by placing the focus where it belongs—on what will survive, and not on what will quickly disappear.²⁵

1367–68 (1995) (discussing the importance of the judicial opinion and the effect it has on its readers).

²⁵ *See, e.g.*, FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 215 (1994) (discussing judges' need to restrain "one's pride of authorship").