LAW REVIEWS, JUDICIAL OPINIONS, AND THEIR RELATIONSHIP TO WRITING

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I am pleased to have been asked to speak to all of you tonight. Law review dinners are very special occasions for me. I was editor in chief of the *University of Chicago Law Review* when we planned the first law review dinner in our history. As toastmaster of the event, I likened our humble organization to a corporation, with our law review alumni as the equivalent of stockholders. One guest immediately shouted out that the dividends were lousy. Then I introduced Robert Maynard Hutchins, the president of the University of Chicago and former boy-wonder of Yale Law School, whose dean he had been at the age of thirty and where he had been a law review editor. He advised all of us that no one ever knows as much or is as certain of that knowledge as a law review editor. Fortunately, he told us, the disease lasts only a year and returns only when you become a judge. Then I called on our law school dean, Edward Levi, and he read a promotional form letter from Harvard Law School, addressed to Dean Levi as the dean of one of those law schools who did not have a law review of their own. Because of our deprived state, Harvard offered to let the students and faculty of the University of Chicago subscribe to the *Harvard Law Review* at a greatly reduced subscription price.

I recall that the next issue of our *University of Chicago Law Review* was late that year, because the board of editors spent a goodly amount of time drafting a suitable reply to Harvard's effrontery. We finally proposed a merger of their law review with ours. But since we recognized that they were as attached to their name as we were to ours, we suggested that we take the first half of our name and the last half of their name so that the merged product

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would be known as the *University of Chicago Law Review*. That was the last time that Harvard offered us any deals.[1]

But I came to talk about something more ponderous than law review dinners, past or present. When Associate Dean Darby Dickerson of Stetson University College of Law invited me, she suggested that I might talk about the state of law reviews and legal writing in general. I am prepared to do that; the state is awful.

Let me start with a critic from the past, the late Professor Fred Rodell of Yale Law School. He wrote an article over sixty years ago in which he said, "There are two things wrong with almost all legal writing. One is its style. The other is its content."[2] His article was entitled *Goodbye to Law Reviews*, although he broke his vow and in fact did write again. But rather than directly bite the hand that feeds me tonight, I will concentrate most of my complaints on judicial opinions. If, however, you might feel the shoe pinch from time to time, that is okay too. After all, most judges first learn how to write legalese in law reviews.

I will skip over the content of legal opinions; that is the province of law reviews and law professors — to criticize judicial holdings. Most important is the style that so frequently gets in the way of even finding out the holding. Let me give you an example from a case involving an important variation on the *Miranda*[3] rule. The synopsis of the "holding" reads as follows:

> WHITE, J., delivered an opinion, Parts I, II, and IV of which are for the Court, and filed a dissenting opinion in Part III. MARSHALL, BLACKMUN, and STEVENS, JJ., joined Parts I, II, III, and IV of that opinion; SCALIA, J., joined Parts I and II; and KENNEDY, J., joined Parts I and IV. REHNQUIST, C.J., delivered an opinion, Part II of which is for the Court, and filed a dissenting opinion in Parts I and III. O'CONNOR, J., joined Parts I, II, and III of that opinion; KENNEDY and SOUTER, JJ., joined Parts I and II; and SCALIA, J., joined Parts II and III. KENNEDY, J., filed an opinion concurring in the judgment.[4]

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1. Abner J. Mikva, *Symposium Addresses: Reason, Passion & the Progress of Law: Remembering and Advancing the Constitutional Vision of Justice William J. Brennan*, 33 Harv. Civ. Rights-Civ. Libs. L. Rev. 325, 325–326 (1998) (recounting the story of the offer for a reduced subscription rate made by the *Harvard Law Review*).

2. Fred Rodell, *Goodbye to Law Reviews*, 23 Va. L. Rev. 38, 38 (1937).

3. *Miranda v. Ariz.*, 384 U.S. 436 (1966) (mandating that law enforcement must warn a suspect of certain rights prior to questioning, commonly known as the *Miranda* rule).

4. *Ariz. v. Fulminante*, 499 U.S. 279, 281 (1991) (citations omitted).

The case involved the question of whether a coerced confession could be treated, in appropriate cases, as "harmless error."[5] Contrary to prior holdings, five members of the Court seemed to be saying "yes," but five members also seemed to be saying "not in this case." And four members thought that the confession was not coerced in any event. There were other variations on the theme, but I think that I have spread enough confusion to make the point.

Was the confusion necessary? Obviously the Justices felt very strongly about their positions, and the exclusionary rule is a very contentious doctrine. But, if we remember that the Constitution is being expounded and that the opinions of the Court are supposed to guide all of us who take an oath to support and defend that Constitution, it is hard to find any guidance from the synopsis in that case.

I obviously picked out an extreme example of chaos at the Court. All judicial opinions are not that bad. Opinions, like law reviews, come in all shapes and sizes. You can think of them as being on a continuum. At one end is what I term the Justice Oliver Wendell Holmes model — two or three beautifully phrased pages that cut to the heart of the problem facing the Court, an appropriate resolution of the problem with reasoning behind it, and *finis* — all of this without the use of footnotes.

At the other extreme are opinions by judges who take two or three pages just to clear their throats. For want of a better name, I call this the Judge Jerome Frank model. Judge Frank, a very distinguished judge on the United States Court of Appeals for the Second Circuit, was infamous for his exhaustive (and exhausting) opinions, which fill page after page of the Federal Reporter. One of the legends surrounding Judge Frank involves one of his law clerks who received a fifty-page draft of one of his opinions on which the clerk was supposed to do some light editing. The clerk, strongly believing that fewer pages would suffice, rewrote the entire opinion and cut it down to six pages — covering every point, but more succinctly. After working up his courage to present his effort to the judge, he was relieved to hear the judge express his approval. "Superb," said Judge Frank, "We will put it at the end of my draft."

For whom do judges write? Important audiences are law schools and law reviews. Many judges think it is the law school audience that requires and justifies the incredible length of judicial opinions. They think these long opinions are good teaching tools and good

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5. *Id*. at 282.

subjects for law review comments; I think they are wrong. As I look over the casebooks used in most law schools, I am struck by how much editing has occurred — both by the casebook author and by the teaching professor who uses the casebook — editing that should have been done by the judge who wrote the opinion at the outset. One of the problems caused by trying to excerpt five pages from a fifty-page opinion is that the case not only loses the true flavor of the opinion, but also the extra knowledge, procedural and substantive, that made the case method of teaching such a great reform when it was first instituted a century ago.

The second- or third-year law student who tries to wrestle with one of those long opinions for a law review comment or article finds even more difficulty in separating the wheat from the chaff. I do not recall a single law review comment on *Arizona v. Fulminante*,[6] the confession case I described earlier, which shed much light on the opinion. I felt sorry for the students who tried to parse out all of the shades of disagreement that were expressed in those opinions.

Of course, all of those epexegetic, sesquipedalian opinions provide a lot of law review fodder — so much so that there has been a geometric growth in the number of journals per law school and overall. The argument is made that it gives more students legal writing experience and I agree. But if the experience mirrors only the kind of opinions that I just described, I am not sure that more is better.

I have mentioned footnotes, and I might as well disclose my real bias against them. I stopped using them in my opinions and still do not use them for any substantive purpose. I think footnotes are an abomination. If God had intended the use of footnotes to be a norm, He would have put our eyes in vertically instead of horizontally. When I was on law review, I think I was persuaded that an important measure of the scholarly worth of an article was the number of footnotes that it contained. I think some judges and law review editors still believe that. I think footnotes add to the length of opinions and articles, since they allow judges and other writers to go off on all kinds of tangents. When I stopped using footnotes, I was forced to discard some marginally relevant thought. When you use footnotes, it is like having a trash can for such semirelevant material, but the can is attached to the opinion and has to be sorted out. I do believe that the footnote virus first attacks law review

6. 499 U.S. 279 (1991).

members. It hits them the hardest, and they are the most difficult to cure.

I got rid of my virus when then-Judge Stephen G. Breyer, now Justice Breyer, and I were having lunch with his former employer and my former partner, Justice Arthur J. Goldberg. Both Judge Breyer and I were then on the court of appeals and Justice Goldberg was telling us that footnotes are terrible things, and we ought to get rid of them. We should not use them. And as we walked out after lunch, Judge Breyer said to me, "You know, I think that is a good idea. We should just stop using them." So we made a pact. From then on, we would not use footnotes in our opinions.

I went back to my chambers and told my clerks we would not be using footnotes in opinions. They went out of the chambers, and they caucused, obviously, and came back and said, "Judge, you cannot do this." I said, "Why? Where does it say in the commission or in the law that I have to use footnotes?" They said, "Well, you do not understand. You are still a new judge, and you are still being measured by law schools and other places where they look at what judges write, and you are not going to be perceived as being a very scholarly judge if you do not use footnotes."

I said, "That is ridiculous. Judge Breyer is not going to use them either." And they said, "Yes, but he is a schol—," and they stopped one syllable short.

No matter who we write for, I am convinced that legal writers write too much and use too many footnotes. We obfuscate as often as we educate. There are opinions in the Federal Reporter that cover hundreds of pages and include hundreds and hundreds of footnotes. Some of these opinions are even indexed and catalogued, almost as if they were the books they resemble. I doubt that such opinions are often justified, and they are even less read. To the extent that law students and law professors emulate that kind of writing, they suffer the same fate.

Would I have passed over my law review experience? Not for a minute. It was a great learning experience. To this day, it is one of the most important credentials that I advertise and is advertised in my background as a lawyer, a lawmaker, and a judge. I just wish it had not taken me so long to get rid of the footnote virus and that I did not still secretly think that maybe the number of footnotes does have something to do with the worthiness of the writing.

When I speak to young lawyers about how to make effective oral arguments, I tell them that if their briefs are really good, they ought to get up at oral argument and say, "Your Honors, it is all in the

brief, and I will be happy to answer any questions." I never had the courage to make such an argument when I was a young practicing lawyer, and I suspect that I would not have the courage to write my first law review note without footnotes. But by the time you get to be scholars, or at least judges, you ought to think about that possibility.