

Thinking (Legal Reasoning) and Writing: What Can Judges Learn from Cognitive Science?

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1. INTRODUCTION

After a long period of thinking and acting law as an autonomous discipline, the legal community is beginning to recognize that other disciplines, particularly the social sciences and humanities can provide insights and approaches that can enrich our understanding of law and the legal system. One of the sciences particularly significant in this respect is cognitive science. This paper considers why a subset of the legal profession-judges, should be interested in cognitive science and the insight it can give them in opinion writing, the because opinion writing constitute their primary judicial function. Practice lawyers, who similarly, write briefs can benefit from the contribution of cognitive science to the art of writing, especially as it shows how the intersection between thinking and writing can aid them write better, brighter, and tighter briefs. This notwithstanding, this paper's main objective is targeted at how the recognition of cognitive science can help judges improve the writing of ethical opinions and perhaps help them to be more introspective in writing opinions.

No question about it. Judges, by their oath, are obligated to think (i.e., reason) and write well. It is a commitment that will not change. By nature of the work they do, they are expected to write opinions, whether in the form of rulings (including bench ruling), and judgments.

Judges writing matter. Judges' opinion command a degree of authority over both individual citizens and society in general. Their opinion influences the contours of laws and help shape citizens' freedoms and lives. Judges work as interpreters of law, fact-finders, policy and decision-makers. It is in this way that we can figuratively say they hold lives in their hands; because their daily decisions affect people's livelihoods, liberties, and reputations.¹ For example, in a single day, a judge's decision in a sentencing case could see a person serve the rest of their life in prison; another judge's decision in a transaction case may end the livelihood of an individual or many others; while a third

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¹ Hanna Malloch, Beyond a Number Game: Developing a Nuanced Approach to Judicial Diversity for Aotearoa New Zealand (2022) 20 *NZJPIL* 113, 117-118.

judge's decision in a family law case could mean someone loses care of their children. In all situations just described, the three individuals' or entities lives can be dramatically altered by judges' decision. Thus, everyone, including judges must take seriously judicial writing.

Writing well is therefore a core skill for judges. Judges take seriously the judicial function by interrogating why they write and how writing is itself a function of thinking. Judges write for many reasons. They do not only to decree results in cases or to announce applicable law to controversies. They do for many other reasons that are ethical.² It is therefore, not sufficient for judges to write opinions that are correct—their opinion must also be seen as fair, reasonable (yes, the product of reason)—a value enhanced by language and style easy to understand.³ This is what places an onerous burden on judges—to explain, as well as to persuade with their writing. The obligation to explain and persuade is heightened because a judge's opinion is to a large extent a good reflection of the judge's personality and it provides a window revealing the depth of a judge's thinking.

While no good judge will doubt that the call to duty demands deploying (critical) thinking to what they do, some could reason, 'I am a judge, not a lawyer who ought to persuade.' Such a thinking is fallacious to say the least. Why? Simply, because judges, like lawyers, are also obligated to persuade. Stevens states why: "[T]he purpose of the written opinion is not, after all, for the judge to arrive at a conclusion. He has already done that. Rather, it is for him to protect his conclusion and his reasons for holding it to those audiences who need to know about it. . . . The written opinion is not a set of notes written by a judge for his own use. Rather, it is a persuasive essay directed outwards towards specific audiences."⁴ What this imply is that judges must think well and write well.

² Patricia M. Wald, (extra-judicial), 'Rhetoric of Results and the Result of Rhetoric: Judicial Writing' (1995) 62 *U. Chi. L. Rev.* 1371 (exploring the rationale for judicial decision-making at appellate courts, and stating how judges and their words matter). For general reading on judicial writing, see Ruggero J. Aldisert, *Opinion Writing* (2nd ed. Author House 2009) (a four-part division book dealing with (i) theoretical concepts underlying judicial opinion, (ii) opinion anatomy, (iii) writing style, and (iv) opinion writing checklists); Joyce J. George, *Judicial Opinion Writing Handbook* (5th ed. William S. Hein & Co. 2007); Ruggero J. Aldisert et al., 'Opinion Writing and Opinion Readers' (2009) 31 *Cardozo L. Rev.* 1; Symposium, 'Judicial Opinion Writing' (1995) 62 *U. Chi. L. Rev.* 1363; Richard A. Posner, 'Judges' Writing Styles (And Do They Matter?)' (1995) 62 *U. Chi. L. Rev.* 1421; Gerald Lebovits et al. 'Ethical Judicial Opinion Writing' (2008) 21 *Geo. J. Leg. Ethics* 237 (discussing style and substance of judicial opinion writing through the lens of judicial ethics; posit that opinion writing shapes the public's perception of the judiciary, and therefore, judges must follow the highest ethical standards in writing opinions).

³ Jennifer Sheppard, 'The "Write" Way: A Judicial Clerk's Guide to Writing for the Court' (2008) 38 *U. Baltimore L. Rev.* 73, 108 (emphasizing that a judicial opinion should convey information to the reader in a manner understandable states "to that end, you should write the opinion so that a layperson with a high school education can understand it."). See also, Ruggero J. Aldisert, *Opinion Writing* (2nd ed. 2009) 22-23 (urging judges to recognize that opinions are intended to inform litigants and the general public why the court acted in the manner it does).

⁴ D. W. Stevens, 'Writing Opinion,' Oct. 1975 *Judicature*, 135, cited in Michael R. Smith, *Advanced Legal Writing: Theories & Strategies in Persuasive Writing* (3rd ed. Wolters Kluwer 2013) 6.

Even though there is no general rule prescribing what good opinion is, there are recognized threshold standards for measuring good opinions. A well written opinion is expected to be a discursive narrative, consisting of clear, candid and reasoned explanation of the court's holding that meets the requirements of objectivity from the standpoint of the litigants, and the public. It should also provide some guide for future conduct or activity.⁵

Common lawyers consider an opinion as a valuable legal institution in its own right.⁶ Common law treats an opinion as a vehicle for setting forth the judge's views of the substantive considerations bearing on the outcomes of cases, as well as the interplay between policy concerns and such formal constraints, such as precedent and rules. An opinion is more than just a text in writing by a judge. Independent of the holding in a case, an opinion represents more. Aside persuading the litigants about the rightness of the decision, it is an instrument for achieving professional and societal goals-providing guidance to lawyers and courts (particularly lower courts); constraining arbitrary action on the part of judges; legitimating judges' efforts; and many more. No wonder why the legal profession-lawyers, judges and scholars think that an opinion that does not meet these legitimate goals is valid ground for criticizing it, no matter the substantive merits of the opinion.⁷

Thus, judicial opinions serve to communicate a court's conclusions and the reasons for them to the parties and their lawyers; when published, to announce the law to other lawyers, judges, academics, and the interested public; its preparation imposes intellectual discipline on the author, requiring the judge to clarify her reasoning and assess the sufficiency of precedential support.⁸ Every opinion should be written to persuade as to the correctness of a decision. Opinion writing is thus, an essay in persuasion. Judges persuade.

This paper has a simple thread line. It essentially explores how cognitive science plays a fundamental role in legal reasoning, particularly in the writing process harnessing the brain to work harder and smarter in reaching logical conclusions. The plot is divided into seven parts. Part II is a primer on what cognitive science is about. Part III examines why many judges are dismissive of its place in improving the art of adjudication, particularly opinion writing despite its useful insight. In Part IV the paper examines why writers should

⁵ Michael Wells, 'French and American Judicial Opinions' (1994) 19 *Yale J. Int'l. L.* 18. See also, Festus Emiri, et. al. *Overarching Precepts for the New (Not so New) Judge: A Primer in Festus Emiri & Chidi Lloyd, Judges and Judging in Nigeria: Essays in Honor of Kate Abiri*, J. (Lagos: Malthouse Press, 2023) 224, 233-34.

⁶ Moses Lasky, 'Observing Appellate Opinions from Below the Bench' (1961) 49 *Cal. L. Rev.* 831, 838. See also, Gerald Lebovitts, Alifya V. Curtin & Lisa Solomon, 'Ethical Judicial Opinion' (2008) 21 *Geo. J. L. Ethics* 237, 244 (positing that opinion writing constrain judges' arbitrariness).

⁷ See Ruggero J. Aldisert, *Opinion Writing* (2nd ed. Author House 2009); but cf. Wells 19 (challenging the common law conception of judicial opinion as an instrument for achieving guidance, persuasion, legitimacy, and constraint. The author argues that the evaluation of an opinion appraisal should focus more on the formal and substantive merits of the legal doctrine that they expound, and less on the sufficiency and quality of the reasoning they contain).

⁸ Abner J. Mikva, 'For Whom Judges Write' (1988) 61 *S. Cal. L. Rev.* 1357.

embrace cognitive science input in craft better readable documents, particularly legal writers who must now face the reality that the profession cannot continue to pretend to be an autonomous discipline. Law must 'borrow' to improve its majesty. Part V, examines the contribution of cognitive science to the art of writing, revealing the intersection between thinking and writing and how judicial style implicates substantive and form commitments in adjudication. Part VI encourages judges to take opinion writing seriously, using insight from cognitive science. The concluding Part VII is the normative suggestion encouraging judges, if possible, to infuse more doses of the 'impure style' in their opinions, because it is a style more amenable to modern communication style. The impure style also come more readily handy to deal with "hard" cases, some of which judges' will occasionally handle.

How can cognitive science contribute to the persuasive enterprise?

2. WHAT IS COGNITIVE SCIENCE?

Judging, a domain renowned for its decision-making process, is an interesting field of study for cognitive science. All who judge, whether as parents, superiors, official judges or administrators know that much of judging involves the use of intuitive reasoning, characterized as concise cognitive shortcuts, capable of facilitating both swift judgments and cognitive efficiency. For example, research shows that the way in which judges, a critical component of the legal system reach decisions, apply rules, or determine many questions in the legal process is influenced not only by the evidence and information presented during legal proceedings but also by underlying cognitive processes that play a significant role.⁹ Cognitive science therefore finds attractive an analysis of the legal process in an attempt to offer insights to judges how they can better follow fairer procedures and achieve more favorable judicial outcomes.

Significantly, cognitive science reveals that decision-making process involves dual cognitive process. Humans, like judges, process and make decisions based on two systems of thought.¹⁰ The first system is characterized by rapid, intuitive, or experiential decision-making with minimal cognitive effort. In contrast, to it, the second system involves analytical processing, cognitive demands, and longer duration of decision-making processes. System one would closely resemble the initial conclusions a judge forms reading pleadings

⁹Thomas Gilovich, D. Griffin & Daniel Kahneman, *Heuristics and Biases: The Psychology of Intuitive Judgment* (Camb: Camb. U. Press. 2002)

¹⁰Daniel Kahneman, Oliver Sibony & Cass R. Sunstein, (2021). *Noise: A Flaw in Human Judgment* (Little, Brown Spark, 2021) (showing how 'noise' considered as undesirable variability in judgment of the same problem affect judgment and decision-making); Win De Neys, *Dual Process Theory 2.0*. (London: Routledge, 2018) (noting that human thinking is often characterized as an interplay of intuition and deliberation); Jonathan St. B. T. Evans, In Two-Minds: Dual-Process Accounts of Reasoning, Judgment, and Social Cognition (2008) 59 *Annu. Rev. Psychol.* 255; William H. Gravett, The Myth of Rationality: Cognitive Biases and Heuristics in Judicial Decision-Making (2017) 134 *S. Afr. Law J.* 53 (documenting systemic errors in the thinking of normal people, showing how relying on cognitive shortcuts generate relying on limited cues; how judges, like all human beings, even without conscious prejudice, even understanding the facts and law in cases, might still make systematic error decisions).

or listening to witnesses or counsel's argument. It is a conclusion that readily comes up to the mind. The intuitive reasoning is typically linked to prior knowledge and new experiences based on shared features. As a result, the judge's working memory does not fully process the new information, but she reaches conclusion based on heuristic thinking. It is usually the case where the decision-making process is continuous, leaving insufficient time to thoroughly consider all aspects before reaching a verdict, as where judges deliver bench rulings. They are situations where heuristics readily serve as cognitive shortcuts. The judge simply considers prior experiences and the common features of the decisions at hand to reach quick conclusion.¹¹

In contrast, system two thinking, characterized by analytical processing, cognitive demands, and longer duration of decision-making processes, closely resembles the process of writing the opinion—a process that interrogates some use of the 'alphabet' soup styles of say, IRAC, CRAC, CRRPAC, or CREAC, thinking through whether the reader will understand what the judge is saying, rationalizing the facts, law, policy and all the many components of ethical opinion writing. This type of thinking takes a longer time for decision-making, much of which translates to putting thoughts in writing. This paper therefore centralizes how recognizing the two systems of thinking can better inform and reform ethical opinion writing.

Cognitive science is an interdisciplinary field that studies the mind and its processes. It therefore pigeonholes a wide variety of questions like perception, reasoning, memory, and even language. It is primarily concerned with how the brain works in diverse fields, such as in thinking, analyzing, learning, and many more. It is a research discipline that has yielded profound insights into how humans think, learn, behave and communicate. Some of its findings support long-held notions, but many contradict our most cherished assumptions and practices. For example, it has uncovered promising new approaches for enhancing comprehension, critical thinking, and communication in ways hitherto before unknown.

As a diverse science, it studies thinking: how we gather information and how we communicate. In particular, it studies the processes involved in thinking—the thought process, recalling information, and how we link both by way of writing or speaking. It is a science that shows how problem-solving involves a process of recognizing patterns and retrieving solutions from a stored repertoire acquired by encountering similar problems in the past. It unveils how problem-solving involves understanding of patterns from matching new information to schema (knowledge structures), scripts, or models that embody prototypical expectations about the world, and how these cognitive structures help us make decisions without some form of complete information.

¹¹Rudiger F. Pohl, Cognitive illusions," in Pohl, ed. *Cognitive Illusions: Intriguing Phenomena in Thinking, Judgment and Memory* (NY: Routledge, 2017) 3 (noting that the use of heuristics cognitive shortcuts can impair validity and increase the likelihood of cognitive errors, introducing cognitive biases in the decision-making process); but cf. Win De Neys, Advancing Theorizing about Fast-and-Slow Thinking (2022) 46 *Behav. Brain Sci.* 111 (heuristics could prove to be effective as an adaptive toolbox in high workload situations, facilitating cognitive processing and decisionmaking to operate efficiently and economically).

But as a science it goes further. It also provides insight into how human after processing information, justify their conclusions in writing. It is in this respect, that it reveals the covert nature of how justification (writing) disciplines us to deeper reflection on consequence. Cognitive theory can therefore help lawyers re-focus on the interaction between thinking and writing; what can be termed in fundamentalist cognitivist studies, as the division between creation of categories and interpretation of rules respectively.¹²

Contextualized in legal setting, the former (categories) can be likened to what we refer to as intuition. It logically arises the moment when the judge weighs the justice of the claim of the plaintiff and refutation by the defendant. At that point, the judge forms an opinion about where the pendulum of justice ought to swing. The formed opinion, can be likened to categories in the sense that it is formed from the common properties with which the legal mind classifies things. In this respect, intuition is simply descriptive and definitional summation of the parties' legal problem.

In contrast, interpretation of rules can reveal that category formation is much more imaginative and so should be treated as flexible, first shorthand solution that ought to yield to more and deeper introspection and reflection of the legal problem. Thus, the writing process, likened to the rule interpretation, could just reveal to the judge that it may not be possible to bring the instant case within the central model of the formed category, and that, though the case may be related to the category in some way, it nevertheless cannot be justified by rule. This may be because the instant case though derived from the category is itself different. In that case, the rule extension has little or nothing in common with it beyond their shared connection to the central category. This is how writing though related to intuitive thinking, goes beyond it, to intricately implicate critical (reasoned) thinking.

Recognizing the importance of cognitive science in law, some legal scholars have begun deploying the science to reassess legal assumptions about human decision-making. For example, cognitive science has been deployed to contract, criminal law, evidence, intellectual property, jurisprudence, legal education and many other areas of law to ground better understanding of many assumptions in law.¹³

¹² Fundamentalism is rooted in the thinking that rational thought and truth is different from emotion, expression, and subjective truth. See H Mark Johnson, 'Law Incarnate' (2002) 67 *Brook. L. Rev.* 949, 952-63 (stating "[B]y fundamentalism I mean the view that all meaning is specifiable in sets of literal concepts and propositions that can apply directly to our given experience and that reasoning is a rule-like activity that operates logically and linearly with these concepts."). See also, George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal About the Mind* (U. Chi. Press 1987) xii (referring to fundamentalism as objectivism because "[m]odern attempts to make it work assume that rational thought consists of the manipulation of abstract symbols and that these symbols get their meaning via a correspondence with the world, objectively construed, that is, independent of the understanding of any organism.") cited in Linda L. Berger, 'What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law' (2004) 2 *J. ALWD* 169, 172.

¹³ For a review of literature deploying cognitive science to law, see especially Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind* (U. Chi. Press 2001) (applying cognitive

Since thinking and writing are primary to judges' function, it is significant to assess the place of cognitive science, in the intersection between how judges think and write, particularly interrogating the thinking and writing process. This is important because, like many areas of intellectual inquiry, writing is interdisciplinary. It draws insights from a host of other fields. It is therefore welcoming for legal writing scholars to explore the relationships between legal writing and cognitive sciences.¹⁴

3. WHY ARE SOME JUDGES DISMISSIVE OF COGNITIVE SCIENCE PLACE IN ADJUDICATION?

Despite the benefits cognitive science can bring to the thinking and writing process, the legal community remains largely dismissive of its place in law. Legal (judicial) writing is largely introspective. Judges for example, have ever doubted that opinion writing can benefit from advances from other discipline. This is understandable. Lawyers for decades have striven to protect the majesty of law from all invading 'army of knowledge.' 'Talk like law is an autonomous, self-container discipline;' 'law is the only learned profession,' and the like, are common in lawyers' conversation.¹⁵

The thinking that law is autonomous is conventionalism.¹⁶ It is rooted in certain assumptions. One, that law is apolitical. It is neutral, dispassionate, the product of reason and not politics. In insisting that it is complete, self-contained system, lawyers claim that legal disputes generate the correct set of legal issues, reasoning applied by lawyers to generate correct answers.¹⁷

science to jurisprudence). See also, Deborah W. Denno, 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 *Minn. L. Rev.* 269; Cass R. Sunstein, 'Behavioral Analysis of Law' (1997) 64 *U. Chi. L. Rev.* 1175 (countering argument against the rational man assumption in economic analysis of law); Jedediah Purdy, 'The Promise (and Limit) of Neuroeconomics' (2006) 58 *Ala. L. Rev.* 1; Linda H. Krieger, 'The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity' (2007) 47 *Stan. L. Rev.* 1161.

¹⁴ See Winter (providing the basis for symposium subject in 'Cognitive Legal Studies: Categorization and Imagination in the Mind of Law' (2002) 67 (4) *Brooklyn L. Rev.* See also, Berger, n. 8 (applying metaphoric theory to analyze the US Supreme Court brief in a case raising First Amendment corporate speech issues); Paula Lustbader, 'Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students' (1997) 33 *Willamette L. Rev.* 315, 321 (recommending that teachers use "a cognitive theory that explains the evolutionary learning process of law students"); Linda Flower & John R. Hayes, 'A Cognitive Process Theory of Writing' (1981) 32 *College Composition & Commun.* 365, 366–367.

¹⁵ Richard A. Posner, 'Legal Scholarship Today' (2002) 115 *Harv. L. Rev.* 1314. See generally, 'Harvard Symposium on Law, Knowledge and the Academy' (2002) 115 *Harv. L. Rev.* 1278; Charles W. Collier, 'The Use and Abuse of Humanistic Theory in Law: Reasoning the Assumptions of Interdisciplinary Legal Scholarship' (1991) 41 *Duke L.J.* 191, 192 (suggesting the need for a reassessment of law as an academic discipline, as a subject of study, and as an intellectual institution); Richard Posner, 'Conventionalism: The Key to Law as an Autonomous Discipline' (1988) 38 *U. Toronto L. J.* 333.

¹⁶ See Donald H. Gjerdingen, 'The Future of Legal Scholarship and the Search for a Modern Theory of Law' (1986) 35 *Buffalo L. Rev.* 381 (defining the concept of law, "conventionalism," as rooted in the presumption that law was an autonomous, apolitical discipline dominated by the study of adjudication and classical common law categories.)

¹⁷ See for example the reply of Chief Justice Edward Coke in response to King James' claim to exercise jurisdiction personally. "[T]hen the King said, that he thought the law was founded

For lawyers, it is generally the thinking that though the art of adjudication may draw on other disciplines like economics, ethics, psychology and others to inform the legal mind, they do not largely influence it, because legal concepts are sufficient to supply the necessary framework to arrive at correct conclusions. So, if a conflict arises between law and the other disciplines, law trumps. It controls. Simple.¹⁸

Two, given that conventionalism is the dominant conception about law, coupled with its solidification promoted by scientific thinking, it would not be surprising that most judges are dismissive of any useful lessons cognitive science can contribute to opinion writing. Remember that judges were students of law in the faculties of law and probably must have encountered the subject of legal ontology as unquestionable from their study of legal methods. That subject has as one of its objectives, the building of “faith” in institution of law as a given ontological system. It is all strategy for securing the laws’ empire.¹⁹ Students therefore assume that law is some kind of ancient craft devoted to the study of rules and right answers. They come to see law as neutral, and that once they have learnt the special techniques of lawyers that they too can generate right answers.²⁰

upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life ... or fortunes of his subjects are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience ...” *Prohibitions del Roy*, 12 Co. 63, 64-65, 77 Eng. Rep. 1342, 1343 (K.B. x655), cited in Robert M. Cover, ‘Nomos and Narrative’ (1983-84) 97 *Harv. L. Rev.* 4, 42.

¹⁸See Fried, ‘The Artificial Reason of the Law or: What Lawyers Know’ (1981) 60 *Tex. L. Rev.* 35 (stating “[I]f judges are neither economists nor philosophers, what is it that they are good at; what is it that they know? What is their special competence? What judges know, what judges are expert at, is, not surprisingly, the law. My thesis holds that the law is a distinct subject, a branch neither of economics nor of moral philosophy, and that it is in that subject that judges and lawyers are expert; it is that subject which law professors should expound and law student’s study. Of course, I do not suggest the absurd proposition that the law does not have economic consequences, or that legal rules are without a history. And in the end, the law, like every other branch of human endeavor, must submit to moral judgment. My thesis is merely that law is a relatively autonomous subject, and that rights will be best and most reasonably respected if reasoning about them goes forward within its special discipline”).

¹⁹ Pierre Schlag, *Hiding the Ball* (1996) 71 *N.Y.U. L. Rev.* 1681 (stating that the evidence of ontology and epistemic inquiry into the nature of law is a characteristic pattern of legal education, because teaching is organized in a rhetorical hierarchy that channels inquiry from ontological and epistemic questions. Reinforcing the majestic unquestionableness of law follows this pattern: (i) do not confront an ontological question if it can be handled as an epistemic question, (ii) do not confront an epistemic question if it can be handles as a normative question, (iii) do not confront a normative question if it can be handled as a technical question. By such reasoning technique the position of law as an autonomous system is reified.

²⁰ See for example, A. Smith, *Cognitive Styles in Law School* (1977) 29-31 (discussing legalism as a cognitive style in legal education); Schlegel, ‘Searching for Archimedes-Legal Education, Legal Scholarship and Liberal Ideology’ (1984) 34 *J. Legal Educ.* 103, 107 (discussing dominance of notion of “law as rue” in legal education).

What is more, much of legal writing is formal, written in stilted prose.²¹ Composition theorists tag the style used by the majority as the traditional model or the formalist approach in writing. Formal legal writing emphasizes the product (in contrast with process). It places high premium on the formal features of legal documents that the legal community (judges and lawyers) write—emphasizing clarity and accuracy.²² Formalists see writing as starting with an analysis of the legal problem. It starts with thinking about it. Thereafter the writer begins writing when the thoughts are completely formed. Thus, writing is simply the expression of thoughts completely formed (complete and well developed).²³ This is how the majority of judges write their opinion. It is therefore not surprising that the majority write as traditionalist, what Judge Posner will describe as the ‘pure style.’²⁴ Formalism is the dominant writing style of lawyers and judges.²⁵

It all starts for the legal system or legal method classes. There teachers, centralizes the formalist approach to legal writing. Law students are taught that social complexities and controversies in society find legal solution through the legal schemata of an analytical organization structure called IRAC. From there they learn to focus on the formal aspects of law, which invariably makes them conceive every legal document in the formal structure—issue statements, brief answers, discussion sections, and conclusions. The result is that students graduate to become lawyers (some become judges) ultimately writing formulaic and so, produce uninspired writings.²⁶

All of this is however changing as cognitivists are revealing a deeper understanding of writing as a recursive activity that involves the use of language as a medium through which our experience is organized; that writing is not simply the transparent medium for conveying objective truth.²⁷ Cognitive scholarship challenges the inadequacy of formalism in grossly failing to explain the dynamic nature of the writing process. It reveals that writing is a process involving a series of transactions between reader and writer; reality and language; prior texts and present text; the individual and the context. By

²¹Bryan A. Garner, *Legal Writing in Plain English* (U. Chi. Press, 2001) xvii (stating “you’re in law, you’re already swimming in a sea of bad writing.”).

²²J. Christopher Rideout & Jill J. Ramsfield, ‘Legal Writing: A Revised View’ (1994) 69 *Wash. L. Rev.* 35.

²³Philip Kissam, Thinking (By Writing) About Legal Writing (1987) 40 *Vand. L. Rev.* 135, 138 (stating that the formalist approach is “instrumental writing” because it is a model that sees writing as simply a tool for expressing thoughts). The formalist model assumed that thinking preceded writing and that writing was simply the expression of preformed thoughts. See, Rideout & Ramsfield, n. 22, 49; Terrill Pollman, ‘Building a Tower of Babel or Building a Discipline? Talking About Legal Writing’ (2002) 85 *Marq. L. Rev.* 887, 894-96.

²⁴Richard A. Posner, ‘Judges’ Writing Styles (And Do They Matter?)’ (1995) 62 *U. Chi. L. Rev.* 1421.

²⁵Bryan, n. 21.

²⁶Festus Emiri, Ayuba Giwa & Jonathan Ehisani, ‘Revisiting the Traditional IRAC Organizational Structure for Legal Analysis: Towards a Multidisciplinary Approach’ [2016] *NLJ* 23 (stating that IRAC and other schemata such as ‘(QrFR)+IRAC,’ IGPAC, CREAC, TREAT, CREXAC, CRAC, CRuPAC, and other similar formulations are rooted in the philosophy that it is best to teach students to reason as syllogistically as possible, and that a rule-based approach enables law to remain an autonomous discipline, divorced from mundane bias).

²⁷Teresa Godwin Phelps & Jenny Ann Pitts, ‘Questioning the Text: The Significance of Phenomenological Hermeneutics for Legal Interpretation’ (1985) 29 *St. Louis U. L.J.* 353.

so doing it showed why formalism is unrepresentative of the writing process, and why writing should be taken more seriously. The “new rhetoric” cognitive movement views writing as a cognitive process negotiating meaning.²⁸

Because the majority of lawyers come to know law as prescribing formal writing, it is natural for judges to engage judicial writing without considering perspective of rhetoric and those of writing experts. No wonder why much of opinion writing has not benefited from the cognitive science. For many judges and lawyers, it is not easily conceivable for them to recognize how cognitive science interacts with writing and law, talk more of specialized judicial writing, in ways that can improve the quality and persuasiveness of opinions.²⁹ In fact, many judges have remained oblivious of the cognitive science and its usefulness in unveiling emerging techniques to writing.³⁰

4. COGNITIVE SCIENCE PLACE IN LEGAL WRITING

As a heuristic activity, writing is the process of creating knowledge. Through writing, the writer experiences the reciprocal nature of the process—the reading of what is written, the negotiation of meaning between writer and text, the negotiation of meaning between the reader and text, the negotiation of meaning between writer and reader, and ultimately, the creation of meaning. It is in this way that we can say that writing is actually a different mode of thinking. Writing is constitutive of thought.³¹ During the writing process, the writer learns more than what the writer does speaking, thinking, listening, or reading. Writing engages all of these activities and more.³²

²⁸ Linda L. Berger, ‘A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer’ (2000) 6 *J. Legal Writing* 58 (characterizing writing as “the weaving of thought and knowledge through language, not merely the clothing of thought and knowledge in language); Linda L. Berger, ‘Studying and Teaching “Law as Rhetoric:” A Place to Stand’ (2010) 16 *J. Legal Writing* 3 (explaining the various rhetorical theories and approaches).

²⁹ George Lakoff, *Cognitive Science and the Law* (1989) (positing that because law is committed to the use of human reason and human language it cannot afford to dispense with development of the cognitive science, where language and thought are empirically studied. For legal analysis see, Steven Winter, ‘The Metaphor of Standing and the Problem of Self-Governance’ (1988) 10 (6) *Stanford L. Rev.* 1371; Steven L. Winter, ‘Transcendental Nonsense, Metaphoric Reasoning and the Cognitive Stakes in Law’ (1989) 137 *U. Pa. L. Rev.* 1105 (discuss the process of legal reasoning, and offering an experientialist analysis that focuses on the importance of metaphor in the construction of law); Steven L. Winter, ‘The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning’ (1989) 87 *Mich. L. Rev.* 2225.

³⁰ For example, see Maureen F. Fitzgerald, ‘What’s Wrong with Legal Research and Writing? Problems and Solution’ (1996) 88 *Law Lib. J.* 247, 259 (noting of American law schools that “the use of theories about teaching and learning is seriously lacking in law school . . . Law faculty tends to gravitate toward the case-method and large-group forum, only rarely introducing innovative teaching methods. Although several universities acknowledge that different teaching methodologies should be used, in practice, the introduction of new teaching methodologies has been extremely slow.”).

³¹ J. Christopher Rideout & Jill J. Ramsfield, ‘Legal Writing: A Revised View’ (1994) 69 *Wash. L. Rev.* 35, 55.

³² Laurel Currie Oates, ‘Beyond Communication: Writing as a Means of Learning’ (2000) 6 *J. Legal Writing* 1.

It is natural to ask, should judges really care about this new understanding of writing as thinking and more? You will say yes, if judges should in their writing persuade. Make no mistake about it. Judges must persuade. Rhetoric ought to influence judicial writing. The classical rhetorical focus on an appeal to logic, emotion, and the speaker/writer credibility (logos, pathos, and ethos, respectively) should inform opinion writing.

Whether it is admitted or not, it can no longer be seriously argued that law cannot now remain autonomous.³³ By arguing that an intellectual structure exists that influences legal argument, the legal community can no longer locate legal analysis within the narrow confines of legal artifacts, to cases. In fact, legal meaning can no longer be derived merely from the application of an autonomous system of analysis. Materials outside law is beginning to have significant bearing on what shapes the law. For instance, a lawyer who desires to persuade effectively is now obliged to master the skill of using non-legal resources in the business of lawyering. The special language and tools of the profession now demands that law can no longer remain impervious of other disciplines.

Think for once, jurisprudence in the 1960s was dominated by debates between H.L.A. Hart positivism and Lord Patrick Devlin natural law disputation and the relationship between law and morals.³⁴ Some still understand the subject through that (false) dichotomy.³⁵ That trend is now on the decline. The publication of Judge Richard Posner's seminal text, "Economic Analysis of Law" in 1973 introduced a new lexicon to law.³⁶ Some scholars are even of the view that the ecological re-arrangement economics brings to law heeds the 1897 Holmes' occupational-call.³⁷ The Brandies 1908 brief described as

³³ Richard A. Posner, 'The Decline of Law as an Autonomous Discipline, 1962–1987' (1987) 100 *Harv. L. Rev.* 761.

³⁴ H.L.A. Hart, *Law, Liberty, and Morality* (OUP, Oxford, 1963); Patrick Devlin, *The Enforcement of Morals* (OUP, Oxford, 1965).

³⁵ Festus Emiri & Felicia Eimunjeze, 'Law, Objectivity and Truth: A Cathedral View' (2011) 10 *NLPJ* 1 (positing that the logical objectivity of law has nothing to do with the "separateness thesis" of law and moral, but more with the philosophical analysis of objectivity, truth and meaning).

³⁶ Anthony T. Kronman, 'Remarks at the Second Driker Forum for Excellence in the Law' (1995) 42 *Wayne L. Rev.* 115, 160 (a critic describing the book as "an enormous enlivening force in American legal thought" saying that it "continues and remains the single most influential jurisprudence school in the country"); Jon Hanson & David Yosifson, 'The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture' (2003) 152 *U. Pa. L. Rev.* 129, 142. See also, Jules L. Coleman, *Markets, Morals and the Law* (Camb. U. Press 1988) 67 (describing law-and-economics as the dominant theoretical paradigm for understanding and assessing law and policy; that its emergence as a trend in legal scholarship (at least in the United States of America) constitute the main discourse about law in our time, strong enough to abysses (if for nothing, at least temporarily), analytical and all other philosophical thoughts promoted by great minds like Rawls and Nozick type of legal scholarship, as it introduces and welcome scholars like Ronald Coase, Pigou, Calabresi and Richard Posner).

³⁷ Oliver Wendell Holmes, stated in 1897 that: 'for the rational study of law the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.' The Louis Brandies brief is an example of the normative power of economics and statistic in the legal process. See Robert D. Cooter, *Law and the Imperialism of Economics: An Introduction to the Economic Analysis of Law and Review of the Major Books* (1981-2) 29 *UCLA L. Rev.* 1260 (an article describing the extension of economics

one of the greatest litigation brief ever filed, contained over 90 percent of non-legal materials.³⁸ Virtually all of the named sources were men telling stories about women they had known. It had only a few pages of legal analysis. The time to think interdisciplinary is here.

Anyone who has read the seminal work of Judge Richard Posner will not need tutorial about the immense place of economics in solving concrete legal problems.³⁹ For example, emphasizing the benefit of interdisciplinary approach to law from economics, Robert Cooter and Thomas Ulen states: “[E]conomists and lawyers can also learn techniques from each other. From economists, lawyers can learn quantitative reasoning for making theories and doing empirical research. From lawyers, economists can learn to persuade ordinary people—an art that lawyers continually practice and refine. Lawyers can describe facts and give them names with moral resonance, whereas economists are obtuse to language too often. If economists will listen to what the law has to teach them, they will find their models being drawn closer to what people really care about.”⁴⁰ There is no question that legal conventionalism and the assumption that law is an autonomous system skews the nature of the legal dialogue away from the kinds of questions that the law must ask and solve if it is to be effective.

5. CONTRIBUTION OF COGNITIVE SCIENCE TO WRITING

Writing is a very complex and effortful cognitive work. It is a cognitive task that draws on the full resources of our nervous system and it actively influences our nervous system as well. It is the study of how the mind works, functions, and behaves, applying multiple existing disciplines, such as philosophy, neuroscience, or artificial intelligence to understand how the brain makes decision or performs task. How the writing process works through the writer's thought processes is thus of its concern.

beyond its traditional precincts of the market to law, sociology, philosophy and political science as economic imperialism.)

³⁸ The Brandies brief was submitted by Louis D. Brandies in *Muller v Oregon*, 208 U.S. 412 (1908). In it he defended the constitutionality of an Oregon statute limiting the number of hours women could work in a day, relied on existing social science research about the detrimental effect of long working hours on women. The 101 pages consisted almost entirely of non-legal information, such as statements by doctors, academics, anonymous government employees, and co-workers relating observations of and opinions about the lives of women workers and just a few pages of legal analysis. See also, Ellie Margolis, ‘Beyond Brandies: Exploring the Use of Non-Legal Materials in Appellate Briefs’ (2000) 34 *U. San Francisco L. Rev.* 197 (an article examining the scope of social science and empiricism in law); Amy J. Griffin, ‘Dethroning The Hierarchy of Authority’ (2018) 87 *Oregon L. Rev.* (describing the conventional view of legal authority centered on the judicial hierarchy, while proposing a re-orienting view of authority as a pluralistic practice rather than a fixed hierarchical list, accounting for a more nuanced and holistic account of legal authority); Frederick Schauer & Virginia J. Wise, ‘Non-legal Information and the Delegalization of Law’ (2000) 29 *J. Leg. Stud.* 495 (tracking and analyzed the increase in use of “non-legal” authority, and questioning whether the distinction between legal and non-legal authority is itself breaking down).

³⁹ Richard Posner, *Economic Analysis of Law* (8th ed. 2015).

⁴⁰ Robert Cooter & Thomas Ulen, *Law and Economics* (6th ed. 2016) 10-11.

5.1 Writing as a Recursive Process

It tells us why writing is a deep recursive process of thinking, not just the putting of words on paper.⁴¹ This being so, the writer (judge) must be conscious, recognizing that every opinion is dynamic, comprising a series of transactions between the writer and reader, negotiated in the realities of language used (both substance and form), prior texts and present text, the individual and the context. This is because writing is a communicative act—a process whereby one person "moves" ideas from his or her mind into the mind of another (the "transportation metaphor"). It is a process composed of many sub-processes.

Generally, judges write rulings and judgments. Judgments are complete-dress opinions delivered at the end of litigation. They require structured discussion of the facts, legal principles, and governing authorities and conclusion. The significance or number of the issues presented, the novelty of the question, and the complexity of the facts are among the factors that determine whether an opinion requires full-dress treatment or not.⁴²

Rulings on the other hand are judicial opinions declared on preliminary matters pending the final disposition of a case. They include court decision on motions and applications filed either before or during or after hearing of a case. Usually, they are in the form of summary orders that simply state the disposition of an application, sometimes with a brief statement of findings and conclusions, but often with little or no in-depth explanation. Depending on its complexity, most judges would dispose of them during bench hearing. In other instances, the court may deem it necessary to elaborate if the ruling is dispositive of the case in its entirety or would substantially affect the materiality of the litigation.

Summary orders are uncommon for courts of record. They are often a type of opinion reserved for 'inferior' courts and tribunals, such as magistrates and area courts. They simply dispose of the case, sometimes with a brief

⁴¹ See, Linda Flower et al., *Reading to Write: Exploring a Cognitive and Social Process* (OUP 1990) (exploring social and cognitive processes in writing and expanding literary knowledge as an active constructive process); Patricia Portanova, J. Michael Rifenburg & Duane Roen, eds. *Contemporary Perspectives on Cognition and Writing* (U. Press Colorado 2017) (exploring the historical context of cognitive studies, the importance to our field of studies in neuroscience, the applicability of habits of mind, and the role of cognition in literate development and transfer).

⁴² Benjamin N. Cardozo, *The Nature of the Judicial Process* (1949) 164-166 (stating the three categories of opinion writing as: (i) first category, comprised of those cases where the law and its application alike are plain, these cases do not merit even a non-precedential opinion; (ii) the rule of law is certain, and the application alone doubtful, such fact-oriented opinions do not add to our jurisprudence and thus do not require publication; (iii) where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law, in this case a full-length, written opinion is necessary). See also, Ruggero J. Aldisert et al., *Opinion Writing and Opinion Readers* (2009) 31 *Cardozo L. Rev.* 1, 8 (suggesting four categories of cases: where the facts and law are both clear; where the facts are clear but the law is not; where the law is clear but the facts are not; and where the law and facts are both disputed); S. I. Strong, *Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced, and Foreign Judges* (2015) *J. Disp. Resol.* 93 (providing a structured and content-based method of writing fully reasoned decisions and opinions for both experienced and novice judges).

statement of findings and conclusions, but often with little or no explanation. Summary orders are usually unpublished.

Because of the centrality of opinion writing, a judge saddled with the responsibility of writing an opinion should first identify the type of opinion the case deserves. Next, she should consider the complexity of the facts and nature of the issues, the intended audience, and whether the opinion will be published. After considering the type and purpose of the opinion, it will be proper for the judge to begin to marshal the material facts, identify the issues and the applicable rules of law, and determine the appropriate form of judicial relief. This requires a judge to break the case down into its components.

At the stage of preparation to write, a judge certainly reaches some tentative conclusion. But here is the danger! It is advisable that the judge at this stage should go further, take pain to set out the reason in writing for the tentative conclusion. The reason should be what justifies the decision. As Judge Ruggero Aldisert wrote, “[I]f a judge wants to write clearly and cogently, with words parading before the reader in logical order, the judge must first think clearly and cogently, with thoughts laid out in neat rows.”⁴³

Whatever reasons the judge thinks justifies the conclusion must be treated as mere intuitive starting point. This is how to see writing. It is an art. The very process of writing imposes intellectual power on intuitive reasoning. A judge may well discover that once the writing process begins, the initial tentative, intuitive conclusion, can hardly be justified by writing. This should not surprise the writer. The very process of writing creates rediscovery that could change the tentative conclusion. When it happens, the judge should be willing to change. If the logic of writing dictates a conclusion not initially held, judges should change their legal conclusions.

Justice Roger Traynor aptly describes the feeling this way: “[that he] found [no] better test for the solution of a case than its articulation in writing, which is thinking at its hardest. A judge, inevitably preoccupied with the far-reaching effect of an immediate solution as a precedent, often discovers that his tentative views will not jell in the writing. He wrestles with the devil more than once to set forth a sound opinion that will be sufficient unto more than the day.”⁴⁴

Writing teachers know from cognitive studies that writing is thinking, and thinking more corrective. Judges should, if possible, therefore resist the temptation of issuing as a matter of course, bench ruling without deep reasoning. Intuition can be disciplined by deep reflection and the writing process.

⁴³ Ruggero J. Aldisert, *Opinion Writing* (2nd ed, 2009) 11.

⁴⁴ Roger Traynor, ‘Some Open Questions on the Work of State Appellate Courts’ (1957) 24 *U. Chi. L. Rev.* 211.

5.2. The Speluncean Case Example

The *Speluncean* case is one such example.⁴⁵ Judge Handy states how his initial intuition changed through the discipline of writing. He initially will support criminal liability for murder against the four defendants, but it will appear that the intellectual force of the writing suddenly dawned on him, making Handy to change to a common-sense approach. He narrates the experience: "When we came to the trial, the case at first seemed very complicated to me. The attorneys raised a host of legal issues. There were nice questions on the admissibility of evidence, and, in connection with the suit against the association, some difficult problems turning on the question whether the minister was a trespasser or a licensee. As a novice on the bench, I was eager to apply my law school learning and I began studying these questions closely, reading all the authorities and preparing well-documented rulings. As I studied the case, I became more and more involved in its legal intricacies and I began to get into a state approaching that of my brother Tatting in this case. *Suddenly, however, it dawned on me that all these perplexing issues really had nothing to do with the case, and I began examining it in the light of common sense.* The case at once gained a new perspective, and I saw that the only thing for me to do was to direct a verdict for the defendants for lack of evidence."⁴⁶

Judge Handy certainly changed his mind because the writing process brings frontally to him what dawned on him the perplexity of the case. It is therefore important for judges to see writing as a process that disciplines thinking. If anything, writing is not simply putting the writer's thoughts on paper, but it is a "conversation" between the writer and reader.⁴⁷ One thing the legal community can borrow from composition scholars is to see writing as a process that creates and shapes thinking, not simply the expression of already-formed thought. The writing process does not simply reveal thought, it makes thought. In other words, writing is thinking—a different way of thinking.⁴⁸

⁴⁵ *Speluncean Explorers Case* (1949) 62 *Harv. L. Rev.* 1 (fictional judgment created by the legal philosopher Lon L. Fuller to puzzle reader of five possible solutions in the form of judicial opinion attributed to judges sitting on the fictional "Supreme Court of Newgarth" in 4300).

⁴⁶ *Id.* 26, per Judge Handy. See also, Richard A. Posner, *How Judges Think* (Camb: Mass. Harv. U. Press 2008) 63 (stating "[A] judge often has a strong sense of which way a case should be decided, but when he tries to explain the decision in a judicial opinion the explanation will often turn out to be a rationalization of a result reached on inarticulable grounds, though sometimes the effort to explain will operate to refine and perhaps reverse the intuition that drove his vote."); Gerald Lebovitts, Alifyav. Curtin & Lisa Solomon, 'Ethical Judicial Opinion' (2008) 21 *Geo J. L. Ethics* 237, 245 (stating "[M]any '[m]isconceptions and oversights of fact and law are discovered in the process of writing.'"); Reed Dickerson, 'Legal Drafting: Writing as Thinking, or, Talk-Back from Your Draft and How to Exploit It' (1978) 29 *J. Legal Educ.* 373.

⁴⁷ Teresa Godwin Phelps, 'The New Legal Rhetoric' (1986) 40 *Sw. L. J.* 1089 (applying principles of New Rhetoric to legal writing it urges the writer to view writing as a "conversation" with the reader).

⁴⁸ For example, James Boyd White says that law is "most useful and completely seen as a branch of rhetoric, defined as the art by which culture and community are established, maintained and transformed. See, James Boyd White, *Heracles Bow: Essays on the Rhetoric and Poetics of the Law*, (U. Wisconsin Press 1985) 28 (discussing the relationship between law, rhetoric and culture).

Formalism does not capture the essence of writing because the writer begins writing only when thoughts are complete, using writing merely to express thoughts.⁴⁹ The traditional view that writing is simply a tool for *expressing* thought, rather than one for *forming* thought is what composition theorists disagree with.⁵⁰ Composition scholars posit that the process of writing is the process of creating knowledge. Writing is constitutive of thought. It is a dialectical relationship between thought, language and writing. In fact, writing and then reading what is written, is a negotiating process of meaning between writer and text, reader and text, writer and reader, and so it creates meaning. Writing is thus a different mode of thinking—a dialogue between thought and language, between writing and thought, and between reading and writing. Writing generates thoughts.⁵¹

5.3. Substantive Implications for Judicial Writing

What substantive lesson can this teach judges? Judge Posner says: “The difference between what is merely thought in silence and what is written down is a reason for having judicial opinions rather than blind announcements of results.”⁵² He accordingly, cautions against both the unrestrained use of bench ruling and against allowing law clerks to draft judicial opinions.

Why is writing reflective of thinking? Posner offers this answer: “In thinking about a case, a judge might come to a definite conclusion yet find the conclusion indefensible when he tries to write an opinion explaining and justifying it. The reason is that we do not think entirely in words, and certainly not entirely in sentences and paragraphs. Inarticulable or even unconscious feelings and impressions fill in around the sentence fragments that form in our minds as we think about a problem. Reasoning that seemed sound when “in the head” may seem half-baked when written down, especially since the written form of an argument encourages some degree of critical detachment in the writer, who in reading what he has written will be wondering how an audience would react. Many writers have the experience of not knowing except in a general sense what they are going to write until they start writing.

⁴⁹ J. Christopher Rideout & Jill J. Ramsfield, ‘Legal Writing: A Revised View’ (1994) 69 *Wash. L. Rev.* 35, 41-42 (referring to the traditional view of legal writing as primarily emphasizing clarity and accuracy).

⁵⁰ Linda Flower & John R. Hayes, ‘A Cognitive Process Theory of Writing’ (1981) 32 *C. Composition & Comm.* 365, 365-87 (stating how the writing process works positing that readers do not simply relay or even discover meaning in a text, rather they “construct” meaning); Linda L. Berger, ‘A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer’ (2000) 6 *J. Legal Writing Inst.* 58 (characterizing writing as “the weaving of thought and knowledge through language, not merely the clothing of thought and knowledge in language).

⁵¹ Linda L. Berger, ‘Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context’ (1999) 49 *J. Legal Educ.* 155. See generally, Terrill Pollman, Building a Tower of Babel or Building a Discipline? Talking About Legal Writing (2002) 85 *Marq. L. Rev.* 887 (analyzing how theories of modern rhetoric and composition influences legal writing).

⁵² Richard A. Posner, ‘Judges’ Writing Styles (And Do They Matter?)’ (1995) 62 *U. Chi. L. Rev.* 1421, 1448.

A link is somehow forged between the unconscious and the pen.”⁵³ Certainly, writing disciplines thought.

5.4. ‘Form’ Implications for Judicial Writing

There is also “form” interrogated in writing. Though categorized as “form” or “style,” it can carry with it substantive commitment. For can reveals the adjudicating philosophy of a judge. For example, Posner identifies two main judicial styles of writing—the pure and the impure styles. The pure stylist writes for the readers “eye” only, while the impure stylist writes more for the “ear.”

The pure style is lofty, formal, imperious, impersonal, refined, ostentatiously correct even hieratic.⁵⁴ It is marked by detailed factual narratives, extended discussions of background propositions of law, rote recitations of undisputed legal principles. It is often solemn, highly polished and artifactual—far removed from the tone of conversation. The pure opinion style is characteristically a structured opinion, far removed from conversation, is solemn, impersonal, masks the judge’s voice with details, numerous and lengthy quotations from previous judicial opinions, is useful for efficiency and readability. Judges that follow the style are in the majority.

On the other hand, is the “impure” style. It is often directed at the public. Impure opinions tend to be simple, candid, fact-based and uses almost no legalese. The impure style is best for the lay reader. The candor and simplicity that characterize the style make it easier to understand. Impure stylists tend to be more direct, forthright, ‘man to man,’ colloquial, informal, frank, even racy, even demotic.”⁵⁵ Characteristically, it is more exploratory than it is declaratory, concrete, frequently using analogies, examples, hypotheticals, and illustrations, so as to bring abstract concepts home.⁵⁶ Impure stylists tend to eschew unimportant details. They elevate judges’ personal voice; instead of quoting from prior authority. For example, they speak with personal signature, in a conversational tone. They are writers who write engagingly, for the ear, not the eye.

The impure approach is not superior to the pure style, but as an approach to legal writing it is bolder than the pure style because it runs counter to the expectations of its audience.⁵⁷ Posner himself acknowledged that both styles are not watertight as few judges’ square in one camp or another.⁵⁸

⁵³ Id. 1447-48.

⁵⁴ Id. 1426.

⁵⁵ Id.

⁵⁶ It more is like a style heeding Holmes’ admonition to “strike the jugular and let the rest go,” *Oliver Wendell Holmes, Jr. Speeches* (1934) 77.

⁵⁷ See Posner, n. 52, 1431. (Cardozo, Brandeis, Frankfurter, Brennan, and the second Harlan, were all pure writers, yet they were some of the finest legal writers of the last century). See also, Bryan Garner, *Of Legal Style* (2nd ed. 2002) 11 (stating those of us less talented than a Cardozo, Brandeis, Frankfurter, Brennan, or Harlan are more likely to “stumble—or plunge—when we try it.”).

⁵⁸ Posner, n. 52, 1431-32.

Notwithstanding, style reveal something deeper-the judges thought, thinking process and how the judge connects with the social controversies before her court. This is because though many think that words enable thought, in reality, words can also substitute for thought. The pure style is an anodyne for thought. The impure style forces-well, invites-the writer to dig below the verbal surface of the doctrines that the judge is interpreting and applying.⁵⁹ This being so, there appears good basis to prefer the impure judicial style of writing as it is more congruent with judicial pragmatism.

The way a judge writes undoubtedly has a bearing on the judge's perception and philosophy. While there is really no clear-cut dichotomy between the pure and impure stylists, it can with a modest degree of confidence be said that judges who fall more in the class of impure stylist have a keener sense of justice.

The impure judicial stylists generally take more pains over style than the pure stylists do. In fact, unless a writer is a particularly gifted one, it takes much effort to write in the impure style.⁶⁰ This is to be expected. The pure style is what comes naturally to the pen of a person who is legally trained. This invariably means that impure writers are more concerned about the business of adjudication because the style reveals to the audience what the judge aims at. Pure writers aim primarily at the legal community (judge or judges of the lower court whose decision is being reviewed and the lawyers for the parties). To use the very words of Judge Posner, "anyone else is an (authorized) eavesdropper."⁶¹ But that is not the case with impure writers. Impure judicial stylists are conversational. They write as if it were for the "ear" rather than for the "eye." They choose their audience. A larger one! Not just the legal community. They write for the lay audience, explaining why a case is decided in the way it is.

Studies in psychology (cognitive science) show that the audience sought to be addressed by any writing carries with it social and moral commitments.⁶² So, while we are not in a position to state as categorical truth that impure judicial writers are superior to their pure stylist counterparts, "any more than all impure poetry is superior to all pure poetry,"⁶³ there is no question that Wole Soyinka's impure poetry is sure deeper than many pure poetry or other pure narrative literary writings. And who says, that Soyinka's impure style isn't reflective of his philosophy, particularly in advancing social justice.

In like manner, the writing style of a judge shades to a large extent with the judge's judicial stance. Judge Posner for example acknowledges that the pure style fits naturally with judicial formalism.⁶⁴ The formalist believes in right and

⁵⁹ Id. 1447

⁶⁰ Posner, n. 52, 1430.

⁶¹ Id. 1431.

⁶² Steven Pinker, *The Stuff of Thought: Language as A Window into Human Nature* (2007) (trilogies exploring the nature of language, the mind and human nature).

⁶³ Posner, n. 52, 1432.

⁶⁴ Posner, n. 52, 1433 (stating "Either way, the pure style fits naturally with formalist content. Yet there are exceptions."). Even though Justice Cardozo was a formalist he wrote pragmatic,

wrong, truth and falsehood, and so believes that the function of a judicial opinion is to demonstrate to the legal community that the decision is logical right. But pragmatists are different. Impure stylists, largely pragmatic judges, while observing the integrity of law, subscribe to deciding non-routine cases in ways that produce the most reasonable result, with due regard for systemic constraints on freewheel “reason.”⁶⁵

Impure pragmatic judges-connect law to the very concerns of social life, giving life to law in “reason” steeped in justice and pragmatism.⁶⁶ With no fear of contradiction we can say that exceptional judges like Justice(s) Oputa, Ayoola, Kayode Eso, Niki Tobi,⁶⁷ to mention only a few, made concrete in Nigeria, Justice Holmes pragmatic approach to law: “the life of the law has not been logic; it has been experience,” an approach he later elaborated in his article, “The Path of the Law.”⁶⁸ Following this philosophy of pragmatic adjudication, centered on judicial concern for consequences, impure stylists write opinion disposing cases based more on policy rather than on conceptualisms and generalities; considering not only consequences to the parties, but also for systemic and including institutional consequences.

a rare feat acknowledges by Posner, saying “when discussing Cardozo that it is possible to be a pragmatic judge yet write one's opinions in the conventional pure style, but it is difficult. If you are the kind of judge who thinks that the considerations that bear on a judicial decision range far beyond the canonical materials of formalist legal thought—if you think that values (not just feelings), history, and policy are legitimate considerations—you will find the pure style confining because it is not designed for the expression of those considerations.”). *Id.* 1448.

⁶⁵ Posner, *How Judges Think* (Camb: Mass. Harv. U. Press 2008) 13 (stating “[T]he pragmatic judge is a constrained pragmatist. He is boxed in, as other judges are, by norms that require of judges’ impartiality, awareness of the importance of the law’s being predictable enough to guide the behavior of those subject to it (including judges!), and a due regard for the integrity of the written word in contracts and statutes. The box is not so small that it precludes his being a political judge, at least in a nonpartisan sense. But he need not be one unless “political” is given the broadest of its possible meanings that I reviewed earlier, in which the “political” is anything that has the slightest whiff of concern for policy. A pragmatic judge assesses the consequences of judicial decisions for their bearing on sound public policy as he conceives it.”).

⁶⁶ *Id.* 41 (stating that pragmatism refers to basing judgments on consequences, rather than on deduction from premises in the manner of a syllogism, thus belonging to a family resembling utilitarianism); Richard A. Posner, *Law, Pragmatism, and Democracy* (2003), ch. 2 (stating that good pragmatic judges balance two types of consequence, the case-specific and the systemic. It is suggested that most American judges are pragmatists. See, Brian Z. Tamanaha, ‘How an Instrumental View of Law Corrodes the Rule of Law’ (2007) 56 *DePaul L. Rev.* 469 @ 490 (“It is fair to surmise that a greater proportion of contemporary judges are judicial pragmatists . . . Judicial decisions today routinely cite policy considerations, consider the purposes behind the law, and pay attention to law’s social consequences”); Nelson Lund, ‘The Rehnquist Court’s Pragmatic Approach to Civil Rights’ (2004) 99 *Northwestern U. L. Rev.* 249. For a discussion of the pros and cons of pragmatic interpretation, see John F. Manning, ‘Statutory Pragmatism and Constitutional Structure’ (2007) 120 *Harv. L. Rev.* 1161.

⁶⁷ See Festus Emiri, ‘Judicial Application of Language and Philosophy in the Judicial Policy-Making Process’ [2021] Biennial Symposium on Niki Tobi of 2nd December, 2021, Abuja (stating that the concreteness and cadence nature of Justice Niki Tobi, JSC judgments reveals his deep pragmatic stance, rendering them proper candidates of “legal opinion-museum” worthy). See Symposium on Niki Tobi of 2nd December, 2021, Abuja.

⁶⁸ Oliver Wendell Holmes, ‘The Path of the Law’ (1897) 10 *Harv. L. Rev.* 457.

6. WHAT JUDGES CAN LEARN FROM COGNITIVE SCIENCE

By revealing the connection between thinking and writing as a recursive process and further showing that style matters, cognitivists invite judges to introspectively interrogate both the substance and form of judicial opinion writing. Further lessons can be learnt. While the prevailing the traditional “pure” style will hardly disappear, cognitive science encourages judges to see the need to slant writing in the “impure” direction; because it is largely an antidote to our (legal) traditional unproductive writing conventions rooted in abstraction, excessive formality, and stilted prose.

Judges should lead the legal community in the new path of conversational writing—writing concretely-without muting the speaking voice. After all, much of law is constituted as stories. Judges should therefore centralize good prose writing, eschewing formulaic writing. Lawyers are storytellers. There’s no reason why judges writing shouldn’t evoke good storyteller’s response, recognizing that their writing constitutes general benchmark for how lawyers and law students view what is good writing.⁶⁹

7. CONCLUSION

Cognitivists reveal to us that writing and thinking are partners. They go hand in hand. Judges writing matters. And it must be taken seriously. Judges, especially when faced with hard, interrogating reasoning beyond the conventional categories need a writing style beyond conventionalism. Since hard cases call into question a range of considerations beyond the normal, they may need the uncommon style that interrogate considerations that bear on judicial decision beyond canonical materials of formalist legal thought. Judges desirous of being “change-makers” are therefore encouraged to write more impure and pragmatic. This will be so because a judge who thinks that the considerations that bear on a judicial decision range beyond canonical legal materials will find the pure style confining. The style is not designed for the expression of those considerations. For example, Judge Handy, would have found it conscripting to express his pragmatic reasoning in the pure style. He therefore chose the impure style to drive home the common-sense conclusion.⁷⁰

Cognitive science by showing the intricate difference between what we think and what we write is a reason for judges to take seriously judicial writing as serious business. It discourages the practice of blind announcements of outcome, and then, judges thereafter taking responsibility for their opinion, without consciously disciplining the thinking through the writing process.

⁶⁹ Lebovitts, et. al. n. 6, 254 (noting “[J]udicial opinions are the building blocks on which future lawyers model their legal-writing skills. If judges write in a particular way, then students will take their cues from that style in crafting their own writing: . . . Appellate opinions are the main source of educational material in casebooks that law professors use to teach the next generation of lawyers.”). See also, David Mellinkoff, *Legal Writing: Sense and Nonsense* (West Group, 1982) 70 (book-length brief in favor of plain-English legal writing, urging legal writers to eschew traditional legalese, states that judges’ opinion writing affects the basic writing pattern of the profession).

⁷⁰ *Speluncean Explorers Case* (1949) 62 *Harv. L. Rev.* 1.

There is something further fundamental that judges may need to reflect on about cognitive science insight in writing and thinking. Since judges are selected from a pool of experienced lawyers who have not been given instruction in judicial opinion writing and other functional judicial skills, writing and thinking as a judge can be challenging. Judicial writing and work interrogate significantly different skills from those associated with advocacy.

While a measure of judicial education opportunities abounds, teaching judges writing should be an ongoing concern. Unfortunately, many seminars and workshop for teaching judges writing suffer from structural challenges. Some judicial education centers would only use judges as faculty, based on the fact that judges prefer to be taught only by other judges. But the practice can result in a number of self-reinforcing behaviors. For example, judges as faculty are known to emphasize writing that they consider important, with little input from external or empirical sources. This can be the problem.⁷¹ Judges are not necessarily experts qualified to teach writing and thinking skills, despite their experience on the bench. Because judges alone are used as faculty in many judicial writing seminars, the ‘teachers’ end up focusing on personal anecdotes or reinforcing traditional writing techniques that may not address the deeper challenges of current best-practices in producing well-reasoned opinions. Unquestionably, reforming judges writing training to reflect “outsider” insight from the cognitive science and writing scholarship can help improve judicial writing style and language. Judges therefore should not shy away from unashamedly borrowing from cognitive science to improve the art of adjudication.

⁷¹ See, Strong, n. 42, 96 (noting judges’ aversion for use of non-judges faculty, based on the fact that most judges prefer to be taught by other judges, but stating why the practice of self-reinforcing behaviors does not help the judiciary to address deeper challenge of producing well-reasoned judgments, requiring interrogating anew judicial writing techniques).