

# What a Breeze: The Case for the “Impure” Opinion (Part 1)

By Ross Guberman

A key challenge for ambitious judges is to settle on a style that’s inviting and engaging but not crass or self-consciously cute. That said, if you survey the world’s consumers of judicial opinions—law students, lawyers, and judges alike—you’ll rarely hear that the problem with opinions is that they’re just too darn catchy and casual. Instead, readers moan that opinions are too stuffy, turgid, and formal.

In that spirit, I share below examples of down-home “impure” diction that might very well push you past your comfort zone—and I do so by design. Were I to have written about the matter a half-century ago, I might not have endorsed a conversational style. Even Judge Posner, who favors direct and “impure” writing himself, points out that justices as great as Brandeis and Cardozo had a loftier, “purer,” and more formal voice that worked very well for their purposes—and perhaps for their eras.<sup>1</sup>

But is such a style the way to go for today’s judges? I’d say no, and for two reasons.

First of all, the contemporary era resists formality. And second, writing in a profound, imperious style requires a rare innate talent. Justice Kennedy, for example, often

adopts the mien of a philosopher-king when he writes. But as one tough critic put it:

His prose alternates between bureaucratic and grandiose, resulting in sentences that manage to be pompous and clueless at the same time, like this gem from *Bush v Gore*: “None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution’s design to leave the selection of the President to the people, through their legislatures, and to the political sphere.”<sup>2</sup>

One of my own favorites is this quote from the gay-rights case *Lawrence v Texas*: “The instant case involves liberty of the person both in its spatial and more transcendent dimensions.”<sup>3</sup> (The parallelism glitch doesn’t help, either.) Even in routine cases, Justice Kennedy tends to pen sentences like this one from *Already LLC v Nike, Incorporated*:

This brief, separate concurrence is written to underscore that covenants like the one Nike filed here ought not to be taken as an automatic means for the party who first charged a competitor with trademark infringement suddenly to abandon the suit without incurring the risk of an ensuing adverse adjudication.<sup>4</sup>

So unless you’re a born poet, don’t even try to wax eloquent. Relax the diction instead.

Although all judges are capable of drafting overwrought, overwritten, and convoluted sentences, few have the clarity of mind, not to mention the editing chops, to express their thoughts naturally and directly.

For inspiration on this front, let me share some excerpts from one of the greatest living examples of a judge with an “impure” style: Justice Elena Kagan. Although Kagan’s woman-on-the-street vernacular can sometimes distract, her style is a refreshing antidote to the stilted and haughty tone that keeps so many other judges from connecting with their audience.

Part of her talent stems from simple diction choices. Like her colleague Justice Scalia, she inhabits the direct and witty side of the judicial style spectrum. One of her strategies, especially when she is hungry to persuade, is to mime the sort of language that her various readers might use:

Except in *a world gone topsy-turvy*, additional campaign speech and electoral competition is not a First Amendment injury.<sup>5</sup>

Or the sort of language that might provoke a chuckle, if not some friendly eye-rolling:

So [Petitioners] are making a novel argument: that Arizona violated *their* First Amendment rights by disbursing funds to *other* speakers even though they could

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have received (but chose to spurn) the same financial assistance. **Some people might call that *chutzpah*.**<sup>6</sup>

Oh, sure, you say—how hard is it to write an engaging dissent about election law? Fair enough. So let's put Kagan to the test by seeing how clearly she writes when the issues are as dry as toast. In the majority opinion below, Kagan had to wend her way through a labyrinth of conflicting statutory language on the not-so-scintillating subject of federal employees' procedural rights upon termination of employment. Displaying empathy and even frustration as she speaks to her readers candidly, Kagan eventually throws up her hands on their behalf:

If you need to **take a deep breath** after all that, you're not alone. It would be hard to dream up a more round-about

way of bifurcating judicial review of the [agency's] rulings in mixed cases.<sup>7</sup>

Suddenly, we realize that the problem isn't us, it's the statutes—and that's Kagan's very point.

Addressing the reader directly, professor style, is indeed one of Kagan's opinion-writing hallmarks:

**A word to the wise: Dog-ear this page** for easy reference, because these categories crop up regularly throughout this opinion.<sup>8</sup>

The devices that Kagan uses—shunning jargon, talking to the reader in the imperative or with the second-person *you*, projecting her own reactions, mimicking natural oral language—bring her closer to her intended audience in a way that few other judges could even dream of. Not to mention making the substance easier to read and understand. ■

*This column is based on an excerpt from the author's recently published book, Point Taken: How to Write Like the World's Best Judges.*

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#### ENDNOTES

1. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U Chi L R 1421, 1432 (1995).
2. Rosen, *Strong Opinions* (July 8, 2011) <<http://www.newrepublic.com/article/politics/magazine/92773/elena-kagan-writings>> (accessed September 22, 2015).
3. *Lawrence v Texas*, 539 US 558, 562; 123 S Ct 2472; 156 L Ed 2d 508 (2003).
4. *Already, LLC v Nike, Inc.*, \_\_\_ US \_\_\_, 133 S Ct 721, 734; 184 L Ed 2d 553 (2013).
5. *Arizona Free Enterprise Club v Bennett*, \_\_\_ US \_\_\_, 131 S Ct 2806, 2833; 180 L Ed 2d 664 (2011) (dissenting).
6. *Id.* at 2835.
7. *Kloechner v Solis*, \_\_\_ US \_\_\_, 133 S Ct 596, 605; 184 L Ed 2d 433 (2012).
8. *Scialabba v Cuellar de Osorio*, \_\_\_ US \_\_\_, 134 S Ct 2191, 2197; 189 L Ed 2d 98 (2014).

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