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CARDOZO'S "LAW AND LITERATURE": A GUIDE TO HIS JUDICIAL WRITING STYLE

*Richard H. Weisberg**

In 1925, Benjamin N. Cardozo published an article called "Law and Literature" in the *Yale Review*.¹ Although gradually approaching its centennial, the essay remains topical. Its first paragraph posits in most lawyers and judges an attitude of willful rejection of Law and Literature that we still find in many places in the contemporary legal landscape, despite a vigorous recent movement inspired by Cardozo:² "I am told at times by friends," the essay begins, "that a judicial opinion has no business to be literature. The idol must be ugly, or he may be taken for a common man."³

How many lawyers, today in 2018 as well as back in 1925, project law and letters into separate spheres, fearing that a joinder will somehow diminish law, which must resist it at all costs? Law, they seem to be admitting, is so deeply dependent on language and form that any emphasis on the identity of the spheres somehow risks erasing the seemingly stronger one. It's like twins trying to move away from each other precisely because of their similarities—so they deny the relation altogether. Keep as far away as you can from your sister discipline, even or especially by eschewing the "aestheticism" in law, because the similarities may overwhelm the differences, they seem to say. If you want an "outside" discipline to control law, choose one that is very far removed from the everyday practice and language of law. Choose, say, law and economics. This reduces the threat that law will once again, heaven forbid, be considered one of the humanities.

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¹ Benjamin N. Cardozo, *Law and Literature*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 339-56 (Margaret E. Hall, ed. 1947) (originally published in Yale University Press, ed. 1925).

² *Id.*

³ *Id.* at 339.

The fallacy, or one among many perhaps, is the use of a straw man that almost anyone who has thought about Law and Literature—including Cardozo—would want to upset: a false emphasis on “ornament,” imagined as frivolity, embellishment, or an artificial overlay of verbiage to make a text seem aesthetically appealing. But the literary relation to law, as Cardozo’s essay emphasizes, has very little to do with ornament and everything to do with the everyday use of language by lawyers. For Cardozo, “style” in law counts for much more than the imposition of occasional uses of Shakespeare or abuses of a thesaurus. In fact, he argues, attention to the literary is *mandatory* in all acts of legal communication, because style controls meaning; it is not added on for fun. His essay might be sub-titled “*How the Law Means.*”

For the 19th century French novelist Stendhal, cited before Cardozo’s essay’s first paragraph ends, the Code Napoleon was the sole example of the perfect style, not of course because it had ornamental beauty but rather because, “there alone everything was subordinated to the exact and complete expression of what was to be said.”⁴ Stendhal associated with his own literary expression this statutory quest for the perfect fit.

Literary style and legal command must conjoin if the outcome of legal pronouncement is to be effective. Far from an outmoded notion, the unity of form and function in law is a universal component of legal expression (written or oral); it crosses the generations. Although judges in 2017 certainly express themselves differently than do judges from earlier times, the central thesis of Cardozo’s essay supersedes any “style of the time” idea.⁵ Cardozo’s central idea—that style and substance *always* merge—is a universal observation about writing in the service of justice:

“Form is not something added to substance as a mere protuberant adornment. The two are fused into a unity.”⁶

This joining of style and substance thus may or may not involve ornament, in the sense of words deliberately chosen to add beauty to the product. But it *always* exists: a bad legal pronouncement fails to

⁴ See *Law and Literature*, *supra* note 1.

⁵ See Carlson et al., *A Quantitative Analysis of Writing Style on the U.S. Supreme Court*, 93 WASH. U. L. REV. 1461 (2016) (accepting Cardozo’s premise, but then identifying and quantifying contemporary judicial styles).

⁶ See *Law and Literature*, *supra* note 1, at 340.

integrate form and substance, and an excellent opinion, oral argument, or statute always does so.⁷

Cardozo, in elaborating on form, goes on to emphasize not just word choice but also the “architectonics” of the judicial opinion.⁸ By this he means the way the writer structures her argument. The judges he reveres map an almost perfect ability to choose their words onto an organized elaboration of their thought, word to word, sentence to sentence, and paragraph to paragraph.

As Karl Llewellyn, the great literary author of the Uniform Commercial Code, put the same issue somewhat later, understanding as a legal codifier himself the novelist Stendhal’s daily readings of the Napoleonic code: “[T]he only esthetic rule which I recognize about adornment in relation to function is that adornment is best when it can be made to serve function, and is bad when it interferes with function.”⁹

A literary style in law has to do with achieving the tightest possible fit between form and substance; if ornament or choices concerning esthetic beauty apply—and only when that is also true—then literature for law may also contribute to the “beauty” of an opinion or other act of legal communication. In no event are fancy or esoteric words mandated—or metaphor or simile—just appropriate word choice and structure.

Some post-Cardozo-era examples of the perfect configuration of form to substance have come from the pens and mouths of lawyers; some have been relatively spontaneous oral pronouncements. We remember them because they follow the mandate of “Law and Literature.” So it helped his client greatly when Oliver North’s counsel, Brendan Sullivan, interrupted hostile questioning of his client by stating to the interrogator: “Well, sir, I’m not a potted plant”¹⁰—or when, famously, Boston lawyer Joseph Welch put an end to Joseph McCarthy by challenging with perfect verb and noun choices the Senator’s abuse of Welch’s younger colleague on national television: “Until this moment, Senator, I think I never really gauged your cruelty

⁷ RICHARD H. WEISBERG, *POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE* (Columbia University Press ed., 1992).

⁸ See *Law and Literature*, *supra* note 1, at 352.

⁹ Karl Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224, 248 (1941).

¹⁰ *Iran-Contra Hearings; Note of Braggadocio Resounds at Hearing*, N.Y. TIMES, July 10, 1987, <http://www.nytimes.com/1987/07/10/world/iran-contra-hearings-note-of-braggadocio-resounds-at-hearing.html>.

or your recklessness.”¹¹ And Welch went on, hinting as we shall see that he was familiar with Cardozo’s stylistics and his stunning opinion in *Hynes v. New York Central Railroad*:¹² “Let us not assassinate this *lad* further, Senator. You have done enough.”¹³ Form matched content, and the coup de grace was accomplished, right there in front of millions of Americans. These lawyers’ statements, because they found the right words and structure, moved the audience to their view.

Cardozo shows us, both in his essay and his opinions, that ordinary language is usually up to the task. Precisely because it takes some thought to fit form to substance, most of the lawyers in Cardozo’s intended audience dismissively misstate the relation, associating it with a floweriness that is no part of the quest. If they understood it better, they would have to commit to a career-long trajectory toward better writing that, unfortunately for the profession, many abandon early. Cardozo’s essay is designed to show the bench and bar that they have gotten something badly wrong, but the corrective is written with a gentleness and humor that perfectly fit the subject.

Two prominent appellate judges have responded to this central theme of Cardozo’s essay, as they have also applied it to Cardozo’s own judicial style. Although both fine writers themselves, neither has quite grasped the simplicity of Cardozo’s stylistic approach. In 1943, Jerome Frank spoke of the “alien grace” of Cardozo’s judicial writing. So unsure of his description was Frank that he leveled this charge anonymously in the *Virginia Law Review*.¹⁴ He was right about “grace,” but utterly misguided about “alien.” Cardozo’s opinions rarely replace ordinary speech with lofty or ornamental phrases. Judge Posner, more recently, does add to our knowledge of Cardozo’s stylistic techniques by emphasizing and praising his “rhetorically effective use of irregular word order.”¹⁵ For Posner, the structure of sentences from *Hynes* such as “[w]ithout wrong to them, cross-arms might be left to rot,”¹⁶ creates a loosening of syntax that is far from

¹¹ *Executive Sessions of the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, Army—McCarthy Hearings*, 83d Cong. (1954) (statement of Joseph Welch).

¹² 131 N.E. 898 (N.Y. 1921).

¹³ See *supra* note 11 (emphasis added).

¹⁴ Anonymous, *The Speech of Judges: A Dissenting Opinion*, 29 VA. L. REV. 625, 630 (1943).

¹⁵ RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 51 (University of Chicago Press ed., 1990).

¹⁶ *Hynes*, 131 N.E. at 899.

“alien.”¹⁷ But in general, Posner’s analysis in *Cardozo: A Study in Reputation*¹⁸ adds little to what had been written about *Hynes* and other masterpieces. The book, which many reviewers found to be more about Posner’s reputation than Cardozo’s,¹⁹ exemplifies perhaps one of Cardozo’s less favored styles, the “tonorial and agglutinative”²⁰ and in the most important respect, as we shall see in returning to *Hynes*, misses the main point of the 1925 article.

As the essay proceeds, Cardozo, with characteristic modesty, yields most of the ensuing narrative space to other judicial writers. But his *thesis* is far from modest: he is saying that every legal utterance we make needs to be judged according to the congruence of form and substance within it.

“Law and Literature” identifies six kinds of judicial styles: “magisterial or imperative;” “laconic or sententious;” “conversational or homely;” “refined or artificial;” “demonstrative or persuasive;” and “tonorial or agglutinative.”²¹ Cardozo’s praise unambiguously is for the first style, though he confesses that changing attitudes have rendered it less frequent these days. He names judges in England and America who have moved audiences through the “style magisterial.” Cardozo modestly prefers to laud the John Marshall’s and Oliver Wendell Holmes’s and Lord Mansfield’s of his guild, rather than to identify himself with the “style magisterial” he so admires in them (that job has been done by others).²² Consistent with the whole essay’s theme, he emphasizes that this finest judicial style “eschews ornament” and “is meager in illustration and analogy.”²³ He continues, “[i]f it argues, it does so with the downward rush and overwhelming

¹⁷ See POSNER, *supra* note 15, at 51.

¹⁸ See POSNER, *supra* note 15.

¹⁹ See more generally about Posner’s “agglutinative” approach to Cardozo’s style: See Richard Weisberg, *Review Essay “Richard Posner,”* by William Domnarski, 29 LAW & LITERATURE 507, 513 (2017).

²⁰ I have written a lot about the case, and Judge Posner picked up on my analysis of it in *Cardozo: A Study in Reputation*. His analysis may be agglutinative but as I said, he adds carefully to the appreciative dissection of Cardozo’s techniques. As I did, he stresses not only word choice but the “architectonics” of the whole document. As I did, he notes that the “lad of sixteen” sharply distinguished the narrative from the impersonality of approach to the plaintiff in the far better known *Palsgraf*. And there is much more that exemplifies Judge Posner’s more general view that not too much should be made of seeming plagiarism. See Weisberg, *supra* note 19.

²¹ See *Law and Literature*, *supra* note 1, at 342.

²² See, for example the lawyer/novelist Louis Auchincloss’s excellent essay, *The Styles of Mr. Justice Cardozo*, in LIFE, LAW AND LETTERS 47-58 (Houghton Mifflin, ed. 1979).

²³ See *Law and Literature*, *supra* note 1, at 342.

conviction of the syllogism, seldom with tentative gropings towards the inductive apprehension of a truth imperfectly discerned.”²⁴

Cardozo finds these great predecessors’ style to be exemplary *not* because they deliberately embellish their opinions with fanciness, but on the contrary because they fit their declaration of justness within a perfect formal setting that is more simple than it is elaborate. You may not be in their league, Cardozo is telling us toilers in the field, but if all lawyers understood better the contribution of literature to law, improvement would ensue, for all of us, immediately.

These greats wield pens with an effortless unity of style and substance and a complete confidence that what appears will be transparent and oracular to the intended audience: “It is thus men speak when they are conscious of their power. One does not need to justify oneself if one is the mouthpiece of divinity. The style will fit the mood.”²⁵

Two standard torts opinions by Justice Holmes help demonstrate the style magisterial, but only the first ultimately passed the Cardozo test of architectonic and verbal perfection, which means only that the standard is so high for that style that even Jupiter nods. But not in the first case, a pithy one from the Supreme Judicial Court of Massachusetts. Goddard was hurt when he tripped and fell on a banana peel left on defendant railroad’s platform—he had just disembarked, and there were many other passengers on the platform at the time. As Justice Holmes stated, “[t]he banana skin upon which the plaintiff stepped and which caused him to slip may have been dropped within a minute by one of the persons who was leaving the train. It is unnecessary to go further to decide the case.”²⁶

Forty-one words decide the case, as a matter of law, favorably to the defendant. Olympian pithiness suits the ease with which the court dismisses the case, but the average law student reading it might have wanted a bit more. That is as much as to say: every aspect of negligence law is implicit in this decision, and it is an obvious one. MAKE SURE YOU UNDERSTAND THE LAW, Holmes is telling future potential claimants, BEFORE BOTHERING THE COURT AGAIN, or—he seems to be saying to law students: learn the law well enough to be able to get into the weeds on duty, causation, evidence;

²⁴ See *Law and Literature*, *supra* note 1, at 342.

²⁵ See *Law and Literature*, *supra* note 1, at 344.

²⁶ *Goddard v. Boston & M. R. Co.*, 179 Mass. 52, 52 (Mass. 1901).

don't expect help from me or your professor! The style magisterial leaves that busy work to the group Cardozo labels "sluggard[s]."²⁷

But in *Baltimore & O. R. Co. v. Goodman*,²⁸ a United States Supreme Court opinion, Holmes missed the mark perhaps not so much because his powers had diminished as because his audience's need for more detailed explanations of legal rules had increased over time. Cardozo's essay sees this as a progression from the style magisterial to a "spirit of cautious seeking,"²⁹ the style is still superb when it formally admits it no longer issues "a divine command." So off base was *Goodman*'s dictum requiring drivers nearing a railroad track to stop, look, listen, and get out of their cars, that Cardozo had to correct his stylistic master by over-ruling it in *Pokora v. Wabash Ry. Co.*³⁰ a few years later in 1934. Cardozo might have situated himself among those who have "doubts" and sometimes show "cautious seeking" after truth for which the form and substance fit is even more important—and the results in his own more difficult cases are usually nonetheless dazzling for their implied admission of human fallibility.³¹

Yet without any doubt, *Hynes* stands as the greatest appellate opinion of all time. The "lad of sixteen . . . poised for his dive"³² into the Harlem River is struck down by the railroad's carelessly maintained wires and flung into the waters below. *Hynes* may have been a technical trespasser to whom defendant owed no duty.³³ The legal choice involved closely matched principles, themselves in collision. Cardozo takes that simile—as the boy and wires, so the formal rule and the just outcome are in conflict, and through perfect architectonics achieves the just result. The same can be said for *Palsgraf*;³⁴ John Noonan objected, precisely, to that case's "severe impartiality" leading to one of the judge's "least humane" outcomes.³⁵ But he misses everything in so saying. Cardozo's only "client" is justice! So, if in one he humanizes *Hynes*, but in the other he treats Ms. *Palsgraf* impersonally, it is because the style and form of

²⁷ See *supra* note 1, at 345.

²⁸ 275 U.S. 66 (1927).

²⁹ See *supra* note 1, at 345.

³⁰ 292 U.S. 98 (1934).

³¹ See, on this point, Auchincloss, *supra* note 22.

³² *Hynes*, 131 N.E. at 898-99.

³³ *Id.*

³⁴ 162 N.E. 99 (N.Y. 1928).

³⁵ Richard H. Weisberg, *Law Literature and Cardozo's Judicial Poetics*, 1 CARDOZO L. REV. 283, 294 (1979) (quoting JOHN NOONAN, PERSONS AND MASKS OF THE LAW 144 (1976)).

the opinion in such difficult cases must match the substance perfectly. Both cases were close, and justice required differing outcomes, which the form and word choice further and indeed produce. Justice is served, and it needed the help of literary technique every step of the way.

Judge Posner comes closer than these earlier critics to seizing Cardozo's method but ultimately misses the mark, too. He cites *Hynes* at length: railroads "are not bound to regulate their conduct in contemplation of the presence of trespassers intruding upon private structures[, but] *are* bound to regulate their conduct in contemplation of the presence of travelers upon the adjacent public ways"³⁶ (it is in dispute whether the horizontal extension from defendant's land made the fatal diving board public or private). Cardozo, grappling with the uncertainty of property law, continues:

Rules appropriate to spheres which are conceived of as separate and distinct cannot both be enforced when the spheres become concentric. There must then be readjustment or collision. In one sense, and that a highly technical and artificial one, the diver at the end of the springboard is an intruder on the adjoining lands. In another sense, and one that realists will accept more readily, he is still on public waters in the exercise of public rights. The law must say whether it will subject him to the rule of the one field or the other, of this sphere or of that. We think that considerations of analogy, of convenience, of policy, and of justice, exclude him from the field of the defendant's immunity and exemption, and place him in the field of liability and duty.³⁷

Says Posner of this astounding stylistic move, "[i]n his soaring peroration, Cardozo has given no reason why the plaintiff should win. Again it is Cardozo the rhetorician, rather than Cardozo the pragmatic policy analyst, the sociological jurist, whose hand is visible."³⁸

But the eyes of this pragmatic and "scientific" judge are shut tight. He cannot see, because his economic formalism will not let him. The brilliance of Cardozo's reasoning. Cardozo has offered reasons, not in mathematical progression (one of Posner's favorite appellate

³⁶ *Hynes*, 131 N.E. at 900.

³⁷ *Id.*

³⁸ See POSNER, *supra* note 15, at 53.

judges was Learned Hand) but through language and form. This is where a whole avenue of judicial discourse is lacking today, and we need to revive it.

Cardozo in *Hynes* is by no means, nonetheless, the Holmesian Olympian. He knows this case presents him with an almost insuperable barrier. Instead, he knows this case takes him to undiscovered legal territory; in *The Growth of the Law*, he specifically recalls that, in *Hynes*, he was “covering a virgin field.”³⁹ Posner notes this reference, still bemoaning, however, a lack of “fundamental principles” in the decision. He wants a formula, maybe an equation. But Cardozo’s basic lifelong theme is that justice eludes formulas.

Justice, as *Hynes* tells us, needs every ounce of what literature has to offer law. Justice is both real and achievable, but you get there using the lawyer’s basic tool: language, architechtonics, style. In hard cases, the judge must especially rely on what Cardozo calls her “informed intuition” and where that leads her must then be articulated through as perfect a fit as possible between substance and form.⁴⁰ As Cardozo said in *The Growth of the Law*, “[j]ustice in this sense is a concept by far more subtle and indefinite than any that is yielded by mere obedience to a rule.”⁴¹ And in *Paradoxes of Legal Science*: “many are the times when there are no legislative pronouncements to give direction to a judge’s reading of the book of life and manners. . . . Objective tests may fail him, or may be so confused as to bewilder. He must then look within himself.”⁴² This jurisprudence may not be what a social scientist would desire, but it is quite attractive to the lawyer-humanist in Cardozo. He wanted more of this in the profession, and this is why he wrote *Law and Literature*.

Not every verbal act resulting from judicial self-scrutiny need be to our liking; on the contrary—whether it’s Scalia’s tortured discovery within the Second Amendment of a personal right to own guns⁴³ or Justice Kennedy’s remarkable string of opinions from

³⁹ Benjamin N. Cardozo, *Growth of the Law*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 185-251, 203 (Margaret E. Hall, ed. 1947) (originally published in Yale University Press, ed. 1963).

⁴⁰ See Richard H. Weisberg, *Law Literature and Cardozo’s Judicial Poetics*, 1 CARDOZO L. REV. 283, 305-08 (1979).

⁴¹ *Growth of the Law*, *supra* note 39, at 224.

⁴² BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 55 (Columbia University Press ed., 1930).

⁴³ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

*Romer*⁴⁴ to *Lawrence*⁴⁵ to *Obergefell*⁴⁶ that seem to amend the Constitution to include a right to “dignity”—the sense of whether justice has been achieved varies. But Cardozo’s essay interjects a sure method of figuring things out based on what I have called the “poetical fit” or lack of same in the opinion itself.⁴⁷

The essayist finds time also, with a minimum of snarkiness, to pinpoint less successful but more prevalent stylistic approaches, such as the just-referenced “tonorial and agglutinative.”⁴⁸ Even cutting and pasting, arguably falling short of plagiarism, however has its place in legal style. But whatever style suits the task facing the lawyer, whatever voice the writer adopts, the fit is all.

⁴⁴ *Romer v. Evans*, 517 U.S. 620 (1996).

⁴⁵ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁴⁷ See WEISBERG, *supra* note 7.

⁴⁸ See *supra* note 20.