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Book Review of In the Opinion of the Court

Laura A. Heymann
William & Mary Law School, laheym@wm.edu

IN THE OPINION OF THE COURT by William Domnarski. Urbana: University of Illinois Press, 1996. Pp. xi, 183. $32.50 cloth, $14.95 paper.

Reviewed by Laura A. Heymann

The field of "law as literature"[1] has been well plowed. The movement gained force in the mid-1980s, led by James Boyd White,[2] among others, and has attracted many adherents, both among academics and in the judiciary. Judge Richard Posner, a member of both groups, has written forcefully on the literary qualities of opinions, most often to decry the use of law clerks as ghostwriters and the use of footnotes as repositories of anything other than bibliographical information.[3] More recently, the "law as literature" movement has led to a broader exploration of narrative in the law, of how the need to tell stories is at the heart of most, if not all, legal endeavors.[4]

William Domnarski, an attorney and writer, is no stranger to the field, having written of Shakespeare and *Billy Budd* in the context of the "law and literature" movement.[5] His latest work, *In the Opinion of the Court*, is his attempt to fill what he perceives to be a void in the scholarship: the lack of a "comprehensive study of the opinions that judges . . . have labored at in interpreting our statutes and our Constitution" (p. 1). Opinions, Domnarski writes, "have not been analyzed as a literary form, as communications between the court and society. . . . I hope to change that with this book" (p. 2). While Domnarski is not the first to consider opinions as a literary genre,[6] his book is a lively collection of lists and statistics that is free of the jargon

1. Law *as* literature has been distinguished from law *in* literature (both of which constitute the field of law *and* literature); as one writer has described them, "'law *in* literature' examines the possible relevance of literary texts, particularly those which present themselves as telling a legal story, as texts appropriate for study by legal scholars. . . . 'Law *as* literature,' on the other hand, seeks to apply the techniques of literary criticism to legal texts." IAN WARD, LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES 3 (1995).

2. *See, e.g.*, JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985). White has been called "a founder of law and literature studies." Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 201 n.1 (1990).

3. *See, e.g.*, RICHARD A. POSNER, THE FEDERAL COURTS 140-57 (1996 ed.).

4. *See, e.g.*, LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996).

5. *See* William Domnarski, *Shakespeare in the Law*, 67 CONN. BAR J. 317 (1993); William Domnarski, *Law-Literature Criticism: Charting a Desirable Course with Billy Budd*, 34 J. LEGAL EDUC. 702 (1984).

6. For example, Robert Ferguson's often-cited work on judicial opinions as a literary genre, *supra* note 2, fails to garner a mention.

that might have bogged down another literary analysis. In the end, however, the issues Domnarski raises, while important, are never fully explored. As a brief introduction to judicial opinion writing, *In the Opinion of the Court* hits the mark; as a "comprehensive study," the book doesn't quite live up to its potential.

By the end of the book, two themes emerge: the issue of authorial control and the question of audience. Authorial control is always a concern when an intermediary exists between writer and reader. Usually, this is an editor or publisher; the West Publishing Company fills this role for judicial opinions. Domnarski thus focuses initially on the issue of publication. In chapter 1, "Reporting and Publishing Judicial Decisions," he traces the familiar tale of how a lawyer from Philadelphia named Dallas convinced the Supreme Court in the late 1700s to let him act as the unofficial reporter. Neither he nor his successor, Cranch, were particularly skilled at the endeavor: the reports were published late, incomplete, and filled with errors (pp. 6-7). The quality improved when Wheaton began adding scholarly commentary in 1816, but the venture did not become a profitable one until Peters added headnotes and sold the volumes containing condensed versions of all previous opinions (pp. 7-9). No doubt piqued by Peters's success, Wheaton filed suit, claiming that Peters had violated his copyright in opinions that he had reported. The Court, in *Wheaton v. Peters*,[7] held that no copyright existed in its opinions, thus opening the door to competing reporters, most notably the West Publishing Company, which is responsible for publishing most of the judicial opinions in this country. It wasn't until 1922 that the U.S. government assumed publication of Supreme Court opinions; Domnarski notes, "The Court now controlled its own product and established, after 130 years, its own means of communication with the country" (p. 17). This is not the case, however, with lower federal courts, most of which have no official reporter and thus no one to "break the stranglehold West Publishing has on the actual content of the opinions it publishes by interposing a facilitator acting on the court's behalf" (pp. 28-29).

The risk of alteration, though, slight as it is, seems to me to be a less interesting issue than other benefits that might arise from control, which go unexplored. How, for example, might the Court use its control over publication to better disseminate opinions that are intended to be read by the general public? Has West's system of headnotes and the prevalence of electronic publication, both of which allow researchers to jump directly to the pertinent parts of the opinion, frustrated the literary aspirations of judges? And what lessons can be learned from examples of control in other literary forms: the editor of a long-dead author's

7. 33 U.S. (8 Pet.) 591 (1834).

novel, for example? These are, of course, not the only questions that could be explored, but an analysis of the role of publishers in shaping judicial opinions seems to require something more than mere history.

For most appellate opinions, authorial control is further undermined by an additional intermediary: the law clerk, who is often given the task of drafting opinions. Domnarski highlights the debate, beginning in the 1950s and continuing today, over the influence law clerks should have in judicial decision making and the implications of their role for analysis of opinions: "[O]ur discussions of who the Justices are and what their opinions mean are so falsely premised that they lose intellectual respectability" (p. 41). Because we can't be sure to whom the words we read belong, the entire effort to discuss judicial opinions as a literary genre is undermined. Without an author around whom to center the writing, Domnarski suggests, an analysis of style becomes aimless. Nevertheless, chapter 2, "Who Writes Judicial Opinions," and chapter 3, "Style and Substance in Supreme Court Opinions," both focus on the internal aspects of opinions—language and style—rather than on opinions as literary products. Domnarski is solidly in Judge Posner's camp here in decrying the blandness and similarity of many judicial opinions. This, he claims, stems from two sources. First, because law clerks write many of the opinions coming out of federal courts (pp. 30-31, 38-44), and because these clerks are "almost always" recent law review editors who have been trained to write in "law reviewese," the opinions are usually "colorless, scholarly in the sense of citing many cases as precedent for each and every principle of law, and extensively footnoted" (p. 57). Second, the necessity of gaining a majority means that opinion writers have to appeal to their colleagues, who may have slightly different views about how an issue should be decided. Justice Douglas, for example, noted that opinions "are sometimes so opaque or irrational perhaps, in the sense of not being logical developments structurally . . . because of the patchwork that goes into their creation, satisfying this judge, getting a majority by putting in a footnote, striking out a sentence that would have made a paragraph lucid . . ." (p. 34). Free from these concerns, the writer of a concurrence or a dissent can be more flamboyant and provide "relief from the tedium" (p. 58). The difference in control is illustrated in the attributions that precede opinions. The author of the majority opinion, although identified, is always delivering the "opinion of the Court," in which the pronoun "we" is used; the author of the concurrence or dissent retains the honor individually—he or she may be joined by other Justices but is always speaking for himself or herself, using "I."[8]

8. *But see* Sanford Levinson, *The Rhetoric of the Judicial Opinion*, *in* LAW'S STORIES, *supra* note 4, at 188: "[A]ssignment of individual responsibility invites the onlooker to become all too aware

The discussion of the stylistic appeal of opinions also highlights the issue of audience. Domnarski's most salient point—although it is a rather thin thread drawn throughout the book—is that opinions work best when they are written with a broad, lay audience in mind (p. 88). "The connection between the medium and the message in the Supreme Court's work," he writes, "was especially clear in the fifties and sixties. Opinions resolving issues of important individual rights tended to be shorter than the usual opinion and were more directly aimed at the average reader" (p. 70). Thus *Brown v. Board of Education*[9] was intentionally kept short (fourteen paragraphs) and in simple language, so that the general public, most of whom would be affected by the decision, could understand it (pp. 70, 82).[10] By contrast, the output of the Court's nineteenth-century Justices is less readable, due in part to the fact that their opinions "had little dissemination and received even less critical commentary to guide them" (p. 62) —in short, they were not part of a public dialogue.

Thus, the delegation of opinion writing to clerks not only diminishes authorial control but also engenders a distancing between writer and audience. In chapters 4 through 6, Domnarski explores examples of opinions in which this distance has been shortened. The eleven opinions of Domnarski's "canon" in chapter 4 are all Supreme Court opinions that establish or augur "an important rule . . . affecting a fundamental aspect . . . of the American democracy or the American way of life . . . with clarity, conviction, or eloquence" (p. 77).[11] Chapter 5, "Style and Substance in Lower Federal Court Opinions," moves quickly through various examples of notable stylists, including Judges Hand, Kozinski, and Selya (of whom Domnarski says, "He consistently and frequently uses obscure diction, for no other apparent reason than to show off" (p. 106)), but pauses at none of these long enough to offer much in the way of analysis. And chapter 6, "Closing the Circle," is Domnarski's paean to Posner, an opinion writer who has "close[d]

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of the importance of assignment practices within the Court because of the potentially different styles and approaches associated with the particular members of the Court."

9. 347 U.S. 483 (1954).

10. This point is also made by Sanford Levinson, *see* Levinson, *supra* note 8, at 198.

11. Domnarski's canon includes, in order, McCullough v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Holmes's dissent in Abrams v. United States, 250 U.S. 616 (1919); Chambers v. Florida, 309 U.S. 227 (1940); Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case), 343 U.S. 579 (1952); Brown v. Board of Education, 347 U.S. 483 (1954); Miranda v. Arizona, 384 U.S. 436 (1966); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Gideon v. Wainwright, 372 U.S. 335 (1963); Loving v. Virginia, 388 U.S. 1 (1967), Skinner v. Oklahoma, 316 U.S. 535 (1942); and Roe v. Wade, 410 U.S. 113 (1973). Domnarski has likely taken his cue from Judge Posner, who noted in his landmark work, *Law and Literature*, that he left to "lawyers, judges, and law professors" the task of constructing the "canon of 'leading' cases." RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 20 (1988).

the gap between reader and writer" through various techniques, including addressing the reader directly (p. 124).[12]

The relationship between opinion and audience is an important consideration, and one that has been addressed by several other writers.[13] But Domnarski leaves unsaid (at least in the pages of this book) that perhaps not every opinion is designed to be read by the general public; that, in fact, each opinion has multiple audiences.[14] The attempt to appeal to many or all of these audiences simultaneously is in part what causes the incoherence of which Domnarski complains. Writing for a lay audience's understanding has its appeal, but it may not always be appropriate. Strong arguments have been made for positioning the litigants as the primary audience; they are, after all, the ones for whom the opinion has immediate meaning and thus deserve a complete and detailed response to their arguments. "By demonstrating to litigants and lawyers that they have been heard," Judge Becker has asserted, "written opinions reinforce the bar's confidence in the bench and enhance the legitimacy of the judicial process in the eyes of the people."[15] The litigants in the particular case and their lawyers might be the primary audience, but there are others, including other courts that might review the case, other courts that review similar cases, the legislature that drafted the statute at issue, lawyers, academics, and law students. Opinions are "communications between the court and society," to be sure, but society is multilayered; Domnarski's book would have benefited greatly from a consideration of those layers.

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12. Unfortunately, Domnarski slightly undercuts the evidence for these arguments. He works to establish a canon of judicial opinions in chapter 4, laying out six determinative factors and eleven qualifying opinions but admits that "not all of the cases of the canon meet all of the criteria I set out earlier" (pp. 87-88). (Domnarski attempts to deflect this criticism by attributing it to "readers keen on detecting inconsistencies, discrepancies, and ambiguities—lawyers, for example.") In chapter 6, he quotes a Posner opinion in full in order to "illustrate[] Posner's methodology" only to conclude after seven pages that it "is in some ways not the best example of a Posner opinion. He is not as colloquial and there is little figurative language here. And as for tone, there is not as much of the whirlwind flavor and glee that infects so many of Posner's other opinions . . ." (pp. 136-43).

13. Judge Posner explored this relationship in a 1995 article and reached similar conclusions. *See* Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1429-30 (1995) (contrasting "pure" judicial opinions, written for lawyers, which are long-winded, solemn, impersonal, and predictable, with "impure" judicial opinions, written for laypersons, which are bold, conversational, fresh, and enjoyable).

14. As Professor Schauer has noted, the general public might be at the bottom of this list: "[O]rdinary people simply do not read judicial opinions." Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1463 (1995). It is doubtful, although open to debate, whether this would change if opinions were written with lay audiences in mind.

15. Edward R. Becker, *In Praise of Footnotes*, 74 WASH U. L.Q. 1, 3 (1996). *See also* Patricia M. Wald, *A Reply to Judge Posner*, 62 U. CHI. L. REV. 1451, 1453 (1995) (countering Posner's criticism of nonliterary opinions by asserting that litigants are the primary audience for judicial opinions).

Instead, too much of the book is taken up by statistics and facts that make for interesting reading but stray from the book's mission. Much of chapter 2, for example, is spent listing the credentials of various sitting judges, including which ones are members of Phi Beta Kappa and which were law review editors (a dubious honor, given Domnarski's earlier critique). Many pages are spent in chapter 5 collating statistics on lower federal court opinions: the number of criminal cases, the various statutes challenged, the number of words in published opinions. Domnarski's research is impressive, and could serve as the foundation for a literary analysis, but it has been underutilized in this book.

There are, however, some useful thoughts on the process of opinion writing to be found in Domnarski's book. He quotes Justice Holmes, who, in a letter to diplomat Lewis Einstein, wrote, "[m]y only serious interest when I first got here a week ago was to have my work for the term bound up in a little volume as I do each year. Until that is done the term is not closed. Then it becomes history and I can hold eight months of my life in my hand and look it over" (p. 35). Domnarski presents this quotation merely as evidence of Holmes's writing habits, but the connection it makes between publication and authority is ripe for exploration. Another such thought comes from Justice Jackson, who noted, "[u]ntil Cardozo's time, there was a suspicion among lawyers of any lawyer who wrote too well. It was almost believed that a good literary style was evidence of poor legal craftsmanship" (p. 67).

Anecdotes such as these make for entertaining reading and suggest the richness of the material available for analysis. What Domnarski's book seems to be missing, however, is any probing consideration of the whole. If judicial opinions are to be seen as a literary form, how does that form compare with or borrow from other literary genres? Is the art of ghostwriting an independently analyzable style?[16] Is Posner's "closing the gap" by addressing the reader directly simply a twentieth-century form of the Victorian novelist's "Dear Reader"? Do legal aficionados await forthcoming Supreme Court opinions much as Dickens fans awaited the arrival of the next installment of *Bleak House*? And why do we have literary expectations for judicial opinions and not for

16. The Nancy Drew series, for example, which carried the author's name of "Carolyn Keene," was written by several writers over the years, all conforming to a specific style. *See* Susan Chira, *Harriet Adams Dies; Nancy Drew Author Wrote 200 Novels*, N.Y. TIMES, Mar. 29, 1982, at A1, B11. *But see* Joseph Vining, *Law and Enchantment: The Place of Belief*, 86 MICH. L. REV. 577, 590 (1987): "[J]ust as literary critics feel foolish in applying elaborate techniques of literary analysis to segments of a book that turn out to have been ghostwritten by an editor, lawyers simply have to have difficulty reading ghostwritten texts as if they were authentic." Vining's assertion, of course, leaves open the question of what "authentic" means.

other government writings, such as agency publications in the Federal Register?[17]

It is usually not very fruitful to criticize a book simply because it is not the book one would have written or searched for on the subject. And perhaps Domnarski's book will serve as the basis for a deeper exploration of the subject; he does, after all, describe the project as "a general, comprehensive essay" (p. 2). *In the Opinion of the Court* seems to be written for readers in other disciplines—those literature or policy students who want a brief taste of how judicial opinions are written. Yet Domnarski concludes by calling for a consideration of judicial opinions "without the edges of current critical theory" in order to recognize opinions as "legal literature that can soar to the level of literature generally" (p. 155)—in other words, to read opinions much as we might read a novel or a particularly well-written magazine article. It's a lofty and public-minded goal, and one that might inject a note of democratic participation into what has often been seen as an antidemocratic process. But so long as opinions have an instrumental function, such as resolving differences between litigants, it's a goal that may never be fully realized.

17. As Professor Schauer has noted:

> It is a routine charge against contemporary judicial opinions that they read more like statutes than like opinions of a court. . . .
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> . . . Yet those same commentators typically fail to castigate OSHA regulations as uninteresting, do not worry about the lack of literary style in the Internal Revenue Code, and are reluctant to complain about the intricate scheme of exceptions, definitions, parts, and subparts in the Securities Act of 1933. Schauer, *supra* note 14, at 1455.