

2009

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### Recommended Citation

Jeffrey A. Van Detta (2009) "The Decline and Fall of the American Judicial Opinion, Part II: Back to the Future from the Roberts Court to Learned Hand – Segmentation, Audience, and the Opportunity of Justice Sotomayor," *Barry Law Review*: Vol. 13: Iss. 1, Article 2.

Available at: <http://lawpublications.barry.edu/barryrev/vol13/iss1/2>

**THE DECLINE AND FALL OF THE AMERICAN JUDICIAL OPINION,  
PART II: BACK TO THE FUTURE FROM THE ROBERTS COURT TO  
LEARNED HAND – SEGMENTATION, AUDIENCE, AND THE  
OPPORTUNITY OF JUSTICE SOTOMAYOR**

*Jeffrey A. Van Detta\**

**I. INTRODUCTION**

This is a continuation of the work I undertook in an article that appeared in Volume 12 of this publication. There I made a close and exacting examination of representative opinions written by Judge Learned Hand during the midst of his fifteen--year Federal District Court tenure. That examination germinated from the attention recently garnered by the decline in influence of the opinions of American courts, including the Supreme Court of the United States, in the estimation of courts around the world.<sup>1</sup>

I posited a number of influences on this trend. Among them was a surprising<sup>2</sup> lack of trial court experience among the members of the Roberts Court, as well as a seemingly concomitant lack of appreciation for the process of writing opinions at the Federal District Court level, which I posited was a gap in knowledge and experience that leads to less effective appellate opinion writing. By looking to the strengths and opportunities of Learned Hand's work as a U.S. District Judge, I believed we would achieve greater insight into improving the cognitive impact of all American judicial opinion writing by looking "back to the future" from the perspective of the decade and a half of trial court opinion writing experience by the jurist who went on to become America's most famous 20<sup>th</sup> century federal appellate judge.

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1. Adam Liptak, *American Exception: U.S. Court Is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008, at A1, available at <http://www.nytimes.com>; American judicial opinions once "were 'studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C.'" *Id.* Now, according to authorities as diverse as Chief Justice Aharon Barak of Israel and Justice Michael Kirby of Australia, "America is in danger . . . of becoming something of a legal backwater . . ." Michael Kirby, *Think Globally*, 4 GREEN BAG 2d 287, 291 (2001); see also Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002).

2. *But see* LAWRENCE S. WRIGHTSMAN, *THE PSYCHOLOGY OF THE SUPREME COURT* 32 (2006) (observing that "[t]oday's Court is different from the past ones in that, during the period between 1994 until 2005, eight of the nine justices had prior experience as a judge, mostly at the federal circuit court level, or as a state appellate court justices. . . . In contrast, when Earl Warren was named Chief Justice in 1953, only Justices Minton and Black had prior experience on the bench . . . .")

In short, by understanding the challenges of trial court opinion writing and relating those to the writings of opinions by the courts that review them, we would achieve a more holistic vision of what contributed to the formerly high reputation of American court opinions, and what may have changed on the road to their decline and fall in international reputation.

My stated objectives in that previous undertaking also apply to the present endeavor:

But how does Hand stand up as a writer of trial court opinions? Is a great appellate writer also a great writer of findings of facts, conclusions of law, and judgments? By what standards would we judge Hand as a judicial writer, based on his legacy of published trial court opinions (which number over 1,000)? Would good trial-court writing skills produce better appellate opinions? Would giving more weight to trial-court experience in judicial selection processes improve the insight and quality of appellate opinions?

To solve the riddle of the decline and fall of the American judicial opinion, I have written two articles – this is Part I of II —and I start here not with an exegesis of the politics or opinions of the Roberts Court. Rather, in both articles I seek to go back to the future, by looking to Learned Hand’s trial court writing and what it can teach us, in order to evaluate the current state of American judicial writing. A critical component of this undertaking is the adoption of a methodology well suited for the analytic task. Thus, these articles undertake to answer each of those questions, using the principles and techniques of superior legal writing developed by Armstrong and Terrell in their seminal work: THINKING LIKE A WRITER.<sup>3</sup>

The tools I used in Part I, and continue to employ in Part II, are those which Terrell and Armstrong have adapted from cognitive psychology and tailored to the arts of legal writing and editing.<sup>4</sup> Part I examined Hand’s District Court opinions

3. Jeffrey A. Van Detta, *The Decline And Fall Of The American Judicial Opinion, Part I: Back To The Future From The Roberts Court To Learned Hand--Context And Congruence*, 12 Barry L. Rev. 53 (2009) (citing STEPHEN V. ARMSTRONG & TIMOTHY P. TERRELL, THINKING LIKE A WRITER: A LAWYER’S GUIDE TO EFFECTIVE WRITING AND EDITING (1992) [hereinafter ARMSTRONG & TERRELL 1st]; STEPHEN V. ARMSTRONG & TIMOTHY P. TERRELL, THINKING LIKE A WRITER: A LAWYER’S GUIDE TO EFFECTIVE WRITING AND EDITING (2d ed., Practising Law Institute 2003) [hereinafter ARMSTRONG & TERRELL 2d]).

4. Using Terrell’s and Armstrong’s framework for evaluating the cognitive virtues and vices of judicial opinion writing makes much more sense than some of the recent efforts by professors at national law schools to set up citation frequency as a proxy for the quality of written opinions. See, e.g., Stephen J. Choi and J. Mitu Gulati, *Choosing The Next Supreme Court Justice: An Empirical Ranking Of Judge Performance*, 78 SO. CAL. L. REV. 23, 48-49 (2004). Such approaches do not survive even the lightest scrutiny by those familiar with how federal courts really work. The fatal flaw of using citation counts as a proxy for quality is evident to anyone taking a moment to consider the many reasons that particular court cases happen to be cited – their status as Circuit precedent, their vintage as an overview or most recent statement of the law of the Circuit, and the mere fact that more senior judges on appellate panels tend to end up with the presiding duties and many more opinions to write—

from the context and the congruence principles, two of the four foundational principles articulated in Terrell and Armstrong's work. I observed that the results evidenced a mixed bag, moments of strength and superior coherence intermixed with more stretches of a somewhat banal, work-a-day approach, lacking in the merits of establishing context and achieving congruence.

What bringing to bear the segmentation and the audience principles will reveal about Hand as a trial-court opinion writer is the subject of the present article. Here, I will make holistic observations about Hand's trial-court writing, and will consider the complete picture painted from the perspective of all four foundational principles.

I will also discuss how the recent confirmation of the first U.S. Supreme Court Justice in our lifetimes with extensive experience on the U.S. District Court creates a unique opportunity for the Supreme Court to apply the lessons from Learned Hand's strengths and opportunities in trial-court opinion writing to reclaim lost leadership among the world's high courts.

## II. "THINKING LIKE A WRITER": THE PRINCIPLES AND TECHNIQUES OF EFFECTIVE LEGAL PROSE—SEGMENTATION AND AUDIENCE

In Part I, I explained the crucial analogy between legal thought and legal writing upon which Terrell and Armstrong construct a highly effective taxonomy and analytic template for excellence in legal writing and editing. Terrell and Armstrong note that just as legal principles are the overarching guides from which legal rules spring, so too are the "background principles" of effective legal writing that, "establish the framework within which all [written] rules (and what we will call 'techniques') apply."<sup>5</sup> The principles of effective writing, "speak to fundamental purposes" and guide legal writers in, "assess[ing] the relative importance of specific rules (and techniques), to choose among them when they conflict, and to draw them together toward the single end of clear, persuasive prose."<sup>6</sup> These principles are the product of applied cognitive psychology.<sup>7</sup>

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that have nothing whatsoever to do with the "quality" of the written opinion. In fact, the author from long hours of personal experience as a federal appellate judge's clerk can testify emphatically that federal courts do not base their search for and use of authorities on how "well written" they are, nor do they have a rich palette of degrees of writing excellence from which to choose.

5. ARMSTRONG & TERRELL 1st, *supra* note 3 at 1-2 to 1-3 (citing RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1976)).

6. ARMSTRONG & TERRELL 1st, *supra* note 3, at 1-3. Having lived with both texts for a number of years, including as a senior lecturer for LAWriters, [www.lawriters.org](http://www.lawriters.org), Professor Terrell's platform for instructing judges and practicing lawyers on this conceptualization of effective legal writing, I borrow freely from both works, rather than treating either as *urtext*, and consider them as, together, providing the overall approach used in my analysis below.

7. Raffaele Caterina, *Comparative Law and the Cognitive Revolution*, 78 TUL. L. REV. 1501 (2004). Professor Caterina observes that:

[T]he development of cognitive science brings on stage human nature. Models of vision and object recognition, generation and comprehension of language, reasoning and other cognitive processes elaborated by cognitive science are universal models. The linking of the cognitive processes to deep mechanisms characteristic of our species brings with itself the reconstruction of human nature.

As explained in Part I, Terrell and Armstrong have distilled effective legal writing into four principles that apply at the level of the entire document (which they call macro-organization). First, the context principle: readers absorb information best if they understand its significance as soon as they receive it. Second, the congruence principle: the organization of the information should match the logic of the analysis. Third, the segmentation principle: readers absorb information best if it is presented to them in relatively short pieces that do not exhaust the reader's span of attention. Fourth, the audience principle: readers are much more attentive and receptive if the writer approaches the material from the readers', rather than the writer's, perspective. An effective writer not only applies these principles, but does so with an informed perspective from having determined the identities, knowledge bases, and needs of each audience of the document.

The context and congruence principles were explained, explored, and applied in Part I. Here in part II, we explain the content, and consequences, of the segmentation and audience principles.

### A. The Segmentation Principle

The segmentation principle is based on a fundamental observation from cognitive psychology. That observation is that, "[r]eaders absorb information best if they can absorb it in pieces."<sup>8</sup> The genesis of the segmentation principle however should not be misunderstood as a patronizing view of modern readers' abilities, nor founded on a defeatist attitude toward the products of our current system of education. As Terrell and Armstrong observe:

[P]roperly applied, this principle is more than a sop to your readers' impatience. It should walk hand in hand with an earlier principle: Make the structure explicit. . . . If you break your prose into chunks, the divisions should help to make the document's structure

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*Id.* at 1501; accord Adam J. Hirsch, *Cognitive Jurisprudence*, 76 S. CAL. L. REV. 1331 (2003); Alan M. Lerner, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us about Teaching Law Students to Make Ethical, Professionally Responsible, Choices*, 23 QUINNIPIAC L. REV. 643 (2004). A significant application of cognitive theory has delved into the heart of judicial decision-making itself:

Based on a connectionist cognitive architecture, coherence-based reasoning shows that the decision-making process progresses bidirectionally: premises and facts both determine conclusions and are affected by them in return. A natural result of this cognitive process is a skewing of the premises and facts toward inflated support for the chosen decision. . . . [This theory of cognition may be applied] to four important aspects of the trial. . . . [C]urrent doctrine in these areas is based on misconceptions about human cognition, which lead to systematic legal errors. By identifying the cognitive phenomena that lie at the root of these failings, the research makes it possible to devise interventions and introduce procedures that reduce the risk of trial error.

Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 511 (2004). Similarly, by identifying the cognitive phenomena that lie at the root of reader incomprehension, Terrell and Armstrong's work make it possible to devise interventions – the principles of effective writing – and to introduce procedures (the techniques for implementing the principles) that reduce reader incomprehension.

8. ARMSTRONG & TERRELL 2d, *supra* note 3, at 33; see ARMSTRONG & TERRELL 1st, *supra* note 3, at 5-21 to 5-23.

visible. And, if you set out to make the structure explicit, a step that requires you to make it clear to yourself, you will find it much easier to “chunk” the writing.<sup>9</sup>

In practice, this principle applies throughout a document. First, on a macro-organizational level, large blocks of undifferentiated text are quite daunting to readers and generally operate as a metaphorical “keep out sign”. On a more sophisticated level they are writer’s equivalent of the greeting to Hell imagined by Dante: “*ABANDON ALL HOPE, YOU WHO ENTER HERE[!]*”<sup>10</sup> The writer, however, is not condemned to this outcome. Rather, the writer can take the reader by the hand, as Virgil took Dante, and use segmenting (i.e., “chunking”) of blocks of information to make the information mentally digestible. This is accomplished by breaking up larger blocks of text using subheadings, shorter paragraphs, and “white space” on the page.<sup>11</sup>

Within the mid-level (or “intermediate”) structure of a document, even shortened paragraphs can be made more comprehensible to readers by employing segmenting devices such as numerical lists or bullet point presentations.<sup>12</sup> At the micro-level, segmenting requires crafting sentences to either be shorter, or to be broken into mentally digestible segments, separated by an effective use of punctuation.<sup>13</sup>

9. ARMSTRONG & TERRELL 2d, *supra* note 3, at 16, 114; *see* ARMSTRONG & TERRELL 1st, *supra* note 3, at 5-21 to 5-23.

10. DANTE ALIGHIERI, *THE INFERNO OF DANTE* 25 (Robert Pinsky trans., Farrar, Straus & Giroux 1994) (emphasis added).

11. ARMSTRONG & TERRELL 2d, *supra* note 3, at 16, 33-34, 114. The concept of white space is the idea of using the absence of text itself as a communicative and organizing tool. As a case in point, Armstrong and Terrell quote the following observation from a writing manual published by a federal agency whose regulatory ambit includes the most vexing of reader unfriendly documents—financial disclosure statements:

The white space signals a break for the reader while lightening the overall look of the document. White space especially strikes readers of disclosure documents because these documents usually feature dense blocks of impenetrable text. Increased white space invites reading and emphasizes important points.

*Id.* at 117 (citing U.S. SEC. & EXCH. COMM’N, *PLAIN ENGLISH MANUAL: HOW TO CREATE CLEAR SEC DISCLOSURE DOCUMENTS* 50 (1998), available at <http://www.sec.gov/pdf/handbook.pdf>).

12. *Id.* at 114, 118–121.

13. *Id.* at 16, 33–34, 114. This is in sharp contrast to the trite admonition, “write short sentences.” *Id.* at 117. Two of the greatest American stylists of political language—Abraham Lincoln and Rev. Dr. Martin Luther King, Jr.—showed great adeptness at using very long, yet very readable, sentences to convey complex ideas. For example, the famous closing sentence of Lincoln’s Gettysburg Address is justly celebrated for its clarity, memorability, and communicative power. Yet it also weighs in at a hefty eighty-four words. The words are punctuated so carefully and naturally that to subtract even one would destroy the sentence’s effectiveness. *See, e.g.*, GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 60-61, 171-75 (Simon & Schuster 1992); *see also, e.g.*, RONALD C. WHITE, JR., *LINCOLN’S GREATEST SPEECH: THE SECOND INAUGURAL* 18, 153, 154 (2002) (noting that in emphasizing that the scourge of war was divine retribution for the “offence” of slavery, “[i]n a complex sentence of eighty-six words, he worked with imagery that brought the long dark night of slavery under an intense light that allowed his audience both to see and to understand the dimensions of this American ‘offence.’”) (original emphasis); *id.* at 19 (where the famous last sentence of the Second Inaugural, “With malice toward none; with charity for all” demonstrates a powerful combination of complex ideas that is incredibly forward-moving and easy to read despite being seventy-six words in length). An even more impressive example is the over 300-word sentence in Dr. King’s *Letter from a Birmingham Jail*, where he lists the grievances of the African-American community in a sentence that flows like a mighty river to a waterfall, with an ever-rising surge of syn-

## B. The Audience Principle

Although discussed last, the fourth principle is one that imbues and guides the implementation of the other three principles. “Readers pay more attention if you approach your material from *their* perspective, not *yours*,” Terrell and Armstrong observe.<sup>14</sup> The challenge, they say, is *ab initio*, from the get-go, to “mak[e] busy, impatient readers pay attention throughout the document—not grudgingly, not just out of a sense of duty, but because you have shown that they will be richly rewarded.”<sup>15</sup> To use modern business parlance, the first persuasion that must be achieved in any legal writing is to persuade the reader that working through all of your text “adds value” to him or her. Thus, Terrell and Armstrong liken the writer’s preparation for a writing project to “preparing to negotiate” to “kno[w] as much as possible about” the reader’s “business environment and background and, most importantly, about” the reader’s “real needs, as distinct from his explicit demands.”<sup>16</sup> Thus, they advise determining whether you are writing for “more than one audience”—to whom will this writing be important or useful?—to understand what each audience really wants, (besides “a thorough, reliable legal analysis”) and determining what each audience already knows about your subject to avoid “being condescending or wasting time.”<sup>17</sup> Among other techniques for implementing the audience principle, the writer needs to determine “which conventions of style and organization will seem natural” to each audience “and which will seem alien[,]”<sup>18</sup> as well as to “analyze the practical constraints”—i.e., “[h]ow much time do you have, and how much effort is the project worth[.]”<sup>19</sup> Taking the reader-centric approach advocated in this principle will prevent the writer from “becom[ing] a sopilist, creating an audience to suit his needs rather than adapting himself to his audience.”<sup>20</sup>

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tactical power producing an incredible rhetorical effect that leaves the reader feeling the depth of outrage created by racist societal institutions. See MARTIN LUTHER KING, JR., *Letter from a Birmingham Jail*, in WHY WE CAN’T WAIT 64, 69-70 (2000).

14. ARMSTRONG & TERRELL 2d, *supra* note 3, at 17 (emphasis added).

15. *Id.* at 126.

16. ARMSTRONG & TERRELL 1st, *supra* note 3, at 2-1.

17. *Id.* at 2-2, 2-4.

18. *Id.* at 2-3. The result, say Armstrong and Terrell, is the “more you can show your readers that you understand how they think and speak, the more receptive they will be.” ARMSTRONG & TERRELL 2d, *supra* note 3, at 129. Thus, the writer should keep three reader questions in mind:

[1] “Will you help me? Or will leave . . . [the mental heavy-lifting to me by] just hand[ing] me some information and then leave me to figure out how I should use it?”; [2] “Will you use my time efficiently? Or . . . waste it by [repeating] what I already know[;] . . . or by . . . [forcing] me to wade through pages of tedious detail before I . . . [come upon] anything [in your document that] I care about?”; and [3] “Are we even from the same planet?”

*Id.* at 135–36. Thus, writers are admonished to, “[a]t the start, show (quickly) that you will give your readers practical help without wasting their time” because “[i]n those few seconds, you often win or lose your struggle to capture the reader’s attention and establish your credibility.” *Id.* at 130. This short window of opportunity with readers is dramatized by J.K. Rowling in the opening of a Harry Potter novel. See J.K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE 1-2 (2005) (describing narrating the internalized, cognitive reaction of a busy politician attempting to wade through a subordinate’s memorandum, until the politician “gave it up as a bad job”).

19. ARMSTRONG & TERRELL 1st, *supra* note 3, at 2-10.

20. *Id.*

### III. UNITED STATES DISTRICT JUDGE LEARNED HAND: HIS APPROACH TO THE TRIAL COURT WRITING TASK—SEGMENTATION AND AUDIENCE

#### A. Making the Digestible Indigestible: The Segmentation Principle in District Judge Hand's Opinions

Many of the observations made already about the context and congruence principles also apply to the way in which Hand approached the segmentation principle. Some of his writing, as in the *Masses*, does an effective job of presenting information to the reader in segments, or “chunks,” that allow the reader to absorb it most effectively. In other opinions critiqued above, Hand has not assisted his readers as much as he might by scrupulous attention to the cognitive implications of this principle.

The cardinal tenet of segmentation is that readers absorb information best if it is presented to them in relatively short pieces that do not exhaust the reader's span of attention. In practice, this principle applies throughout a document on a macro-organizational level, large blocks of undifferentiated text are quite daunting to readers; in many opinions, Hand does not seem to notice this, and he, like many judges of the era, did not take advantage of ways to re-package of blocks of information to make them mentally digestible —e.g., by using subheadings, shorter paragraphs, and white space on the page. As previously noted, even paragraphs can be made more comprehensible to readers by employing these techniques; Hand's paragraphs work better from a segmentation perspective —although primarily not by intelligent design, but rather by his realization of the segmentation principle at the micro-level, where he more often crafted sentences either to be shorter, or to be broken into mentally digestible segments, separated by effective use of punctuation.

Indeed, Learned Hand's greatest strength as a judicial writer was his ability to construct strong, clear, and oftentimes, even songful sentences—a—as noted previously, Hand was a balladeer in his heart of hearts, and the rhythm of ballad often seems to permeate his best sentences. If one reads these sentences aloud, for example, the listener's ear is attuned not only to the segmentation through grammatical units, but also to a beat running through them not unlike the effect of “the fourteener”<sup>21</sup> epitomized in George Chapman's celebrated Elizabethan translations of Homer:

And therefore since my mother-queene (fam'd for her silver feet)

Told me two fates about my death in my direction meet —

The one, that, if I here remaine t'assist our victorie

21. “A Fourteener, in poetry, is a line consisting of 14 syllables, usually having 7 iambic feet, often used in 16th century English verse.” [http://en.wikipedia.org/wiki/Fourteener\\_\(poetry\)](http://en.wikipedia.org/wiki/Fourteener_(poetry)) (last visited March 21, 2008).

My safe returne shall never live, my fame shall never die:

If my returne obtaine successe, much of my fame decayses

But death shall linger his approach and I live many dayes.<sup>22</sup>

Both intellectually and aesthetically, then, segmentation was for Hand primarily a function of his sentences. These were like unto the bricks from which he assembled his District Court opinions from the ground up. Thus, unlike some judges who appear to start from the “big idea” and work their way down to the sentence-level, Hand’s writing gives the appearance of a master mason at work on the wall of a cathedral, his ultimate objective—deciding a case—clear in his mind’s eye, but his conception of the task emanating from the bricks—the individual quanta of ideas—that lay before him in his carefully crafted sentences. To paraphrase Emily Dickinson, Hand’s “wars were laid away” in sentences.<sup>23</sup>

### 1. Segmentation in Aid of Fairness: *In re Denny*

*In re Denny*<sup>24</sup> presents a case of contemporary resonance, in which Hand uses cognitive segmentation in aid of a fair outcome. Born in Russia, having resided in the British Empire, and having petitioned to become a naturalized English citizen, Denny sought United States citizenship, but his lawyer erred in guiding his application and created a technical ground for denying his application.<sup>25</sup> His filings stated he was foreswearing loyalty to the Russian Czar, when in fact he needed to do that with respect to his most recent sovereign, King George V of England.<sup>26</sup> Rather than subject Denny to deportation and other harsh consequences (as he might well be subjected to in our immigration environment of today), Hand sought to do equity. In doing so, he recognized that his opinion was of significance “for future guidance in this circuit.”<sup>27</sup> Hand’s organization of the opinion is a bit problematic from both the context and congruence perspectives. He begins the opinion by stating cases with which he disagrees, and their citations, but without explanation as to what issue they are relevant, what they hold, or why he is rejecting them (other than to say “none of these are authoritative” and to suggest they run counter to his “quite positive belief” that Denny “is entitled to” the benefit of his doubt).<sup>28</sup> Despite this inauspicious opening, Hand crafts the most important section of the opi-

22. GEORGE CHAPMAN, CHAPMAN’S HOMER: THE ILIAD, Bk. 9, lines 396-401, at 191 (Allardyce Nicoll ed. 1998) (This is the famous passage where Achilles explains the choice confronting him of living a short yet glorious life—or living a long yet undistinguished one, as most men do.).

23. EMILY DICKINSON, My Wars Are Laid Away In Books, Poem No. 1579 (1882) from THE POEMS OF EMILY DICKINSON: READING EDITION 581 (R.W. Franklin, editor 1998).

24. *In re Denny*, 240 F. 845 (S.D.N.Y. 1917).

25. *Id.* at 845.

26. *Id.*

27. *Id.* at 846.

28. *Id.*

nion, the two well-constructed paragraphs setting forth the “reasons” which Hand determined it was “proper for [him] to give” in support of the ruling.<sup>29</sup>

The segmentation skills displayed by Hand in these two paragraphs operate at both the paragraph and sentence level. Grammatical cores contain the most important information and are clearly constructed; he observes the OI/NI sequencing; and he skillfully uses dependent and parenthetical clauses to make effective transitions, to set up points of emphasis, and to provide a rhythm, variety, and vitality that makes his writing in these two critical passages of the opinion both lively and memorable. To roughly paraphrase Cervantes, the proof of the segmenting is in the reading:<sup>30</sup>

The question is whether, when in his declaration and petition an applicant has honestly mistaken the name of the sovereign whose allegiance he means to abjure, he may, upon final hearing, abjure the proper sovereign, and, if necessary, correct the declaration and petition. At the outset I may observe that, unless there be some particular jurisdictional reason, every reasonable motive should allow the relief, which would be allowed at the present day in every other form of legal proceeding, so far as I know. No one wants gratuitously to impose upon naturalization proceedings that technical spirit which easily follows a literal application of so detailed a statute, and which results in vexatious disappointment, and in needless irritation, to a defenseless class of persons necessarily left to the guidance of officials, except in so far as the courts may mitigate the rigors of their interpretation. The decisions in question have, therefore, all depended upon the supposed jurisdictional nature of the requirement.

The section controlling the case is section 4, which provides the preliminaries upon which the citizen may apply for admission. The first formality is the ‘declaration of intention’ to become a citizen and to renounce his allegiance ‘to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject.’ This must be at least two years before his admission, and must be followed by a petition, three months before his admission, which must repeat the earlier expression of his intention in the same words. Under our notions of national fealty, accepted in part by other nations, a subject may voluntarily and with the consent of his new sovereign change his allegiance. His own consent is to be manifested by his oath of abjuration and his

29. *Id.* at 846–47.

30. MIGUEL DE CERVANTES SAAVEDRA, *DON QUIXOTE*, Pt. I, Book IV, Ch. 10. (Edith Grossman, tr., 2003)(“the proof of the pudding is in the eating”).

oath of allegiance. Hence the critical fact for the change in allegiance is the oath; that is the definitive act by which the change takes place, and perhaps even an innocent mistake in that is fatal. At least that question may be reserved. However, the applicant's prior declarations, either in the 'declaration of intention' or in the 'petition,' are both mere preliminaries, designed to assure the new sovereign of the persistency of the applicant's purpose, and perhaps in a measure as well to identify him by his existing allegiance.<sup>31</sup>

The sentences sing, as does Chapman's Homer, and they build a strong analysis within an opinion that is otherwise rather undistinguished in its structure, despite the importance of its topic.

## 2. *The Ada*

In an admiralty case captioned *The Ada*,<sup>32</sup> Hand handles the prose well at the sentence level, which may be why Hand is so often quoted,<sup>33</sup> and why Robert Jackson advised the bar to "quote Learned;" but the macro-structure may have impelled Jackson to admonish the bar to "follow Gus."<sup>34</sup>

*The Ada* is a classic work product of a very busy judge. Hand's opinion does not even open with the obligatory lengthy, small-font factual recitation. We simply learn that this is a "[s]uit by the Universal Transportation Company, Incorporated, against the steamship *Ada* and the *Rederiaktiebolaget Amie*" and that the case is "in admiralty" and "[o]n exceptions to the commissioner's report."<sup>35</sup> We are not given context. For example, what is the nature of the claim? Tort? Contract? Special rules of admiralty law? And what is a commissioner? What is the commissioner's role in the decision of the case? These, and numerous other matters, are not explained to the reader. We are given no roadmap—only a declaration, clear and

31. *Denny*, 240 F. at 846-847.

32. *The Ada*, 239 F. 363 (2d Cir. 1916), *rev'd on other grounds*, 250 F. 194 (2d Cir.1918).

33. Richard A. Posner, *The Learned Hand Biography And The Question Of Judicial Greatness*, 104 YALE L.J. 511, 536 (1994). Posner starts from the thesis that "[t]he counting of citations to the work of a [judge] is therefore a possible method of evaluating the quality of the [judge's] output, and of comparing the output of different [judges]." *Id.* at 534-35. (Employing an empirical analysis of citations by other courts of the Second Circuit opinions of Hand as well as other Second Circuit Judges who served 1925-1961, Posner finds that Hand leads by a wide margin in total citations (nearly 2,300) but also, more significantly, that contemporary judges continued to cite Hand in the last period studied by Posner, 1988-1992. Posner notes that he considers this to be "a measure of the durability of a judge's opinions" and notes that "here Hand's lead is the greatest." *Id.*

34. See, e.g., Pierre Riou, Note, *General Jurisdiction Over Foreign Corporations: All That Glitters Is Not Gold Issue Mining*, 14 REV. LITIG. 741, 765 n. 137 (1994) (quoting Dictionary of American Biography 269 (James A. Garraty, ed. Supp. 5 1977) ); Adam J. White, *Justice Jackson's Draft Opinions In The Steel Seizure Cases*, 69 ALB. L. REV. 1107, 1110 n. 18 (2006) (quoting Robert H. Jackson, Assoc. Justice, U.S. Supreme Court, *Why Learned and Augustus Hand Became Great*, Address before the New York County Lawyers' Association (Dec. 13, 1951) ("[I]f I were to write a prescription for becoming the perfect district judge, it would be always to quote Learned and always to follow Gus."), available at <http://www.roberthjackson.org/documents/Why%20Learned%20and%20Augustus%20Hand%20Became%20Great.pdf>.

35. *Ada*, 239 F. at 363-64.

unmistakable, that if we are not a party to this case, Hand is of no mind to helping us fathom it. “The commissioner’s report gives the general facts in the case with enough detail to justify the omission of any preliminary statement, and I may therefore proceed at once to the specific matters in dispute as shown by the exceptions.”<sup>36</sup>

Hand, however, does not make that report part of the opinion, neither as an attachment nor as an appendix. Thus, Hand is in effect telling us that he is in control of what he wants us to know and he has no intention of making it easy for us to know what he knows. On the macro-structural level, the opinion’s structure does not mirror the overall logic of the analysis—the only structure he appears to provide is around default organizations, and even there, he is not consistent. For example, Hand declares that the organizing structure he has chosen is another document to which we are not privy—the “exceptions” that have been filed to the commissioner’s report, although we are not told by whom (i.e., one or both parties) those exceptions are filed.<sup>37</sup> Even if the exceptions themselves suggested some logical structure, it would be easier to navigate this opinion. But they do not appear to, and making matters even more challenging for the reader, he really is not using the exceptions as the organizing structure! Instead, he immediately quotes eight issues—not exceptions to the Commissioner’s findings or conclusions—which appear to be listed in issues that were delegated to the Commissioner to address, rather than organized around the logic of the exceptions.<sup>38</sup> And even this opening listing is a false roadmap; the opinion does not contain a correlative set of headings or subheadings that match the organization of the eight questions he lists. In fact, Hand uses a few “lead sentence fragments” that tersely have as their referent some of the eight issues he listed as “the exceptions.”<sup>39</sup>

For example, his lead sentence fragment, to which the West editors assigned Headnote 1, “The Outward Voyage,” corresponds to the first “exception” he listed up front: “First. What was the primary damage from the loss of the outward voyage from New York to Genoa, about May 1, 1916?”<sup>40</sup> He includes in this discussion, however, an evaluation of profits, which was separately listed as the second issue up front; he provides the reader no separate indication that he is doing so.<sup>41</sup> The discussion of lost profits consumes several pages in which Hand discusses numerous sub-arguments, uncontextualized documentary and testimonial evidence, and calculation issues that fall upon the reader like a surprise rain shower encountered without an umbrella.<sup>42</sup> Only after several pages of reciting this “bushel of facts”<sup>43</sup> does Hand provide any container that gives us a clue as to their legal relevance: “All this evidence should, in my judgment, have some effect upon whether the *Ada* could have booked more freight than she did, but for the with-

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36. *Id.* at 363.

37. *Id.* at 363–64.

38. *Id.*

39. *Id.* at 364.

40. *Compare id.* at 364 with *id.* at 363.

41. *Compare id.* at 364–65 with *id.* at 363–64.

42. *Id.* at 364–67.

43. See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 65 (1994).

drawal.”<sup>44</sup> He discusses arguments, counterarguments, and additional sub-issues for another page and a half.<sup>45</sup>

We then are greeted with lead sentence fragments, “The Future Return Voyage From Genoa,”<sup>46</sup> “The Loss on the Zealandia” (which appears more confusing as it is designated by the West editor as Headnote 2, although it appears to correspond with Hand’s third issue)<sup>47</sup>; “The Sarnia and the General Damages” and “The Net Freight Inward,” which appear to correspond to the Fourth and Fifth issues stated by Hand up front but which have no numbering indicating that;<sup>48</sup> “Incidental Items,” “The Payments Of Hire Under Charter,” and “Interest” (once again, made more confusing for the reader trying to deduce the macro-structure as it is designated by the West editor as Headnote 3, although it corresponds to the Eighth issue), which appear to correspond to the Sixth through Eighth issues listed up front.<sup>49</sup> Thus, while a reader can labor to figure out what Hand is doing—and what Hand is doing is logical—it takes several re-readings and cross-referencing across the opinion to do so, and considerable retention of information (the “Eight issues”) in short-term memory to do so.<sup>50</sup> The reader has carried the burden of the mental heavy lifting with little help.

To truly understand what this case is about, one must go to the Second Circuit’s opinion on the appeal from Judge Hand’s decision—in which the appeals court reversed.<sup>51</sup> The Second Circuit sets out at least a comprehensible narrative of how the case arose, what the claims and arguments were of the parties, and the context for Judge Hand’s decision. The appeals court did not address any of the

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44. *Ada*, 239 F. at 366.

45. *Id.* at 367–68.

46. *Id.* at 367.

47. Compare *id.* at 368 with *id.* at 363.

48. Compare *id.* at 369 with *id.* at 364. The “Net Freight Forward” becomes quite confusing because Hand appears to begin going through a detailed list of accounting credits and disbursements, some of which he identifies by number (e.g., “item 10”), others of which he identifies by a phrase or a sentence (“The Journal of Commerce item is disallowed” or “The coal at Bermuda would have cost \$1500. I follow the commissioner” or “I disallow Stapleton’s and allow Hennessey’s charges”). *Id.* at 369–71. It is almost as if this portion of the opinion is the judge scanning down through a list, scanning the commissioner’s report, and reacting out loud with his words transcribed by the stenographer, although the opinion does not so state. Hand even initiates out of nowhere a discussion of the effect of some mysterious “interlocutory,” collateral proceeding, introduced out of the blue with the opening phrase, “As to Judge Sith’s order, it was irrelevant to the question”, and Hand tells us little more than that “[i]t would be extremely unjust to throw out \$9,000 from the account on any such procedural point as the supposed impropriety of cross-examining one’s own witness. After some experience in trials, I think I can say that I have never seen a case where the objection made [sic] for justice, unless a willing witness was being led.” *Id.* at 371.

49. Compare *id.* at 371–72 with *id.* at 364.

50. See Terrell and Armstrong’s discussion of the ineffectiveness of a writing that expects readers to carry excessive amounts of information in “suspension” in order to understand the significance of information provided by the writer later in the document. ARMSTRONG & TERRELL, *supra* note 3, at 3-2. Judge John Minor Wisdom once waded through Hand’s opinion to encapsulate it in this concise way: “Judge Hand found that the owner had wrongfully withdrawn the vessel and was liable to the charterer for the loss sustained by it as charterer, although the damages for breach of the sale provisions were not recoverable in admiralty.” *Jack Neilson, Inc. v. Tug Peggy*, 428 F.2d 54, 59 (5th Cir. 1970).

51. *The Ada*, 250 F. 194 (2d Cir. 1918).

questions taken up by Hand, since it was found that the matters Hand decided were outside of the District Court's admiralty jurisdiction.<sup>52</sup>

Then why do I contend this opinion is at all memorable, given its macro-organizational problems and its subsequent reversal, albeit on procedural grounds that Hand did not pass upon? Although it dealt not with a citable subject matter jurisdictional issue and instead dealt with the fine points in dispute between the parties, the opinion enjoys twenty-two citations in Westlaw (in cases, treatises, and briefs), the most recent of which occurred in 1997 by a federal appeals court and in 2006 by a federal district court.<sup>53</sup> Why? Because, I maintain, the strength of Hand's ability to express ideas clearly, concisely, and memorably in his sentences and paragraphs.

For example, in *Navieros Inter-Americanos, S.A. v. M/V Vasilias Exp.*,<sup>54</sup> the First Circuit cited to a concise, pithy, and memorable statement of the rule Hand articulated in terms of damages due for breach of a time charter:

The breach of the Navieros time charter occurred when the vessel was diverted to the use of Comet, after performance of the Navieros contract commenced but before Navieros's cargo was loaded. Without noting the distinction, defendants assert that the measure of damages should be that which is used in cases where the owner breached the charter party by repudiating it before performance began. *The general rule for recovery in that situation was stated long ago by Judge Learned Hand: "the withdrawal of the ship entitled [the charterer] prima facie to damages measured by the difference between the hire reserved in the charter and the hire necessary to secure such another bottom."*<sup>55</sup>

While it may well be Hand's reputation that otherwise impelled the court to seize upon one of his cases for citation and quotation, I think that it is equally true that the expression of key ideas in this case with Hand's careful attention to segmentation and syntax make them attractive even beyond the fading memory of his admiralty work. The opinion is replete with sentences, and paragraphs that bear

52. *Id.* at 194 ("We shall dispose of the case on grounds which relieve us from the duty of considering the merits at all. . . . Evidently the whole controversy could have been disposed of in an action at law, but the jurisdiction of a court of admiralty is confined to maritime subjects. It cannot, having obtained jurisdiction, dispose of nonmaritime subjects, for the purpose of doing complete justice, after the manner of courts of equity, nor can it distribute funds in its possession, as do courts of equity and bankruptcy, among all creditors, preferred and general."). *Id.* at 194. Interestingly, although the decision was unanimous, each judge of the three-judge panel wrote separately. *Id.* at 194 (Opinion of Ward, J.), 197-198 (Opinion of Rogers, J.), 198 (Opinion of Hough, J.)

53. *Navieros Inter-Americanos, S.A. v. M/V Vasilias Exp.*, 120 F.3d 304 (1st Cir. 1997); *Onhtrup v. Gallagher*, 2006 WL 2792790, \*6 (D.N.J. Sep 27, 2006) (NO. CIV.A.03 4891 TJB). International commercial arbitrators have also relied on Hand's *Ada* opinion. See, e.g., *In The Matter Of An Arbitration Between Federal Commerce And Navigation Company Limited, Charterer, And Overseas Bulk Transport Corp., Owner Of S. S. Dryad, Arbitration At New York, N.Y.*, 1973 A.M.C. 2065, 2068 (Arbit. May 08, 1972)

54. *Navieros*, 120 F.3d 304 (1st Cir. 1997).

55. *Id.* at 317 (quoting *The Ada*, 239 F. 363, 364 (S.D.N.Y.1916), *rev'd on other grounds*, 250 F. 194 (2d Cir.1918)) (emphasis supplied).

their length by appropriate punctuation and syntax—take for example his assessment of a witness’s testimony on lost profits:

There is no evidence of the inward freights, except F. Frankel’s estimate that it would result in a gross return of \$15,000, equal to the first voyage. The witness supposed that \$7,500 of freight was due at New York, though the account subsequently disclosed nearly \$11,000. It seems, therefore, that the libelants had already collected at Genoa and Leghorn \$7,500, and that the gross freight on that voyage was \$18,500. I can scarcely make such an inference, however, without more basis, considering the power of the libelants to produce the exact facts. Assuming that the inward voyage netted \$11,000, have we any ground for accepting F. Frankel’s estimate that the next would have done so? Taken merely as an estimate, it seems to me clear that we have not. The witness made no attempt to show that he knew the values or conditions at Genoa. Yet the testimony, which might have been justified by adequate information, was not objected to, so far as I can find, and the libelants had good reason to suppose that it would not be challenged. Whether they could have supported it no one can tell, but they should have been advised that the respondents would insist that it was insufficient. That the ship would have earned some freight was practically certain. The amount would in any case necessarily have been an estimate, and there was at least some basis for supposing that the earlier voyage was an indication of what it would have been. When Frankel made that estimate, he testified to an opinion which, being possibly competent, should stand while unchallenged. I allow \$11,000 for the inward voyage.<sup>56</sup>

Similarly, Hand uses a strong segmentation technique of using complex sentences appropriately balanced by placement of subordinate clauses and punctuation to make the following finding that is based more so on an absence of credible evidence rather than its presence:

As I have already indicated, it presses my credulity hard, especially in view of Herrmann’s and Nichols’ testimony, to suppose that, in such dearth of shipping as existed, the mere withdrawal of the *Ada* without any fault of the charterers should so have affected their power to fill the *Zealandia*; but the proof stands uncontradicted, with the exception of the witnesses just mentioned, that the cancellations were because of the withdrawal. Moreover, there would apparently have been no trouble on the face of it in calling those shippers who canceled to see whether any effort was made to

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56. *Ada*, 239 F. at 367-368.

secure them for the Zealandia, and why they refused. Upon such a record, whatever I may suspect, I do not feel at liberty to disregard proof which the commissioner has accepted. I shall therefore assume that the Zealandia was not filled because of the Ada's withdrawal.<sup>57</sup>

Hand's greatest strength as a trial court writer may have been his ability to build from the bottom up, rather than from the top down. At the building-block level of lawyerly communication—the sentence and the paragraph—he was a master of the segmentation principle in action. Given his excellent undergraduate education by luminaries including George Santayana, that comes as no surprise.<sup>58</sup>

## **B. For Whom are You Writing? The Problem of Audience in District Judge Hand's Opinions**

### **1. A Tale of Two Hands: “Razzle-Dazzle” and “The Importance of Being Earnest”**

The Audience Principle,<sup>59</sup> discussed in Section II.D, *supra*, is implicated throughout our examination of principles relating to context, congruence, organizing patterns, and segmentation. The choices the judicial writer makes in these areas are important components in the sum total of his or her approach to the audience. To that list we add syntax as well.

Syntax—word choice—can often be a determinative factor in assessing the accessibility and cognitive effectiveness of prose.<sup>60</sup> While syntax may not change the ultimate meaning of a phrase, a sentence, or an opinion, it can change the efficacy of communicating the message – and in some cases, the message itself.<sup>61</sup>

Syntax can be inviting and inclusive. Or it can be opaque and exclusive. A reader's cognitive reaction to syntactically difficult judicial writing might well be described in Franz Kafka's parable:

[O]f a “man from the country” who seeks the Law. A doorkeeper stands at the entrance to the Law and bars admittance. The man sits down and waits for days, weeks, months, and years. He examines

57. *Id.* at 368.

58. GUNTHER, *supra* note 43, at 33-35.

59. ARMSTRONG & TERRELL 2d, *supra* note 3, at 128. (“Readers pay more attention if you approach your material from *their* perspective, not *yours*.” In addition, the Audience Principle commands us to explicitly determine who our audience is, whether we have multiple audiences, and what varying content and degree of meta-information those audiences bring to the reading of our work.) ARMSTRONG & TERRELL 1st, *supra* note 3, at 2-1-2-8.

60. See, e.g., Edward J. Eberle, *Comparative Law*, 13 ANN. SURV. INT'L & COMP. L. 93, 100 (2007) (“Law and literature teaches us the power and complexity of language in shaping legal data. Words, their syntax, grammar, style and the like convey the particular context in which words sit, and form meaning.”).

61. See, e.g., Parker B. Potter, Jr., *Antipodal Invective: A Field Guide To Kangaroos In American Courtrooms*, 39 AKRON L. REV. 73 (2006) (a fascinating study of how courts and litigants have affected their messages by including the phrase “kangaroo court” in the syntax).

the doorkeeper with his eyes and cross-examines him with his questions. As the man grows old and death draws near, he asks one final question of the doorkeeper: why, during this long period of time, no one else has come to seek admittance to the Law. The doorkeeper roars into the man's nearly deaf ear that the gate to the Law "was made only for you. I am now going to shut it."<sup>62</sup>

Syntax serves as an implicit invitation, or exclusion, of the audience whom the writer wishes to engage. In a revealing remark made towards the end of his judicial career, Learned Hand observed that, "I confess when I look at my service it seems to have been for the most part trivial. It amounted to a good deal to the people at the moment."<sup>63</sup> Hand's district court opinions reveal that, in the main, he seemed to be writing for lawyers representing the immediate parties to the case and for himself—occasionally with an eye, too, for an appeals court, but certainly not always.

#### a. "Razzle-Dazzle"

Hand did not seem to be especially dedicated to an inclusive approach to writing. Like the English attorneys who could not bear to give up their beloved French law even when the language was deadlier than a doornail, Hand demonstrated an unusual proclivity, at times, to restrict full understanding of his opinions to a smaller circle – a circle who, like himself, would have known the things that a classically educated young man at Harvard in the 1890s would have learned from professors such as the fabled Santayana.<sup>64</sup> In fact, Hand's greatest weakness in terms of audience was that he sometimes wrote in a cryptic, almost exclusionary sort of way—for the "guild." Second Circuit Judge Roger Miner, among the finest of our judicial writers, once referred to the writing of judges who like to sound important and make things look harder than they really are — or, as the English would say, are prone to making rather heavy weather of it — as "razzle-dazzle." At times, that phrase describes Hand's judicial writing as well.

Hand's clubby, collegiate mindset is perhaps best exemplified by one of his more curious writing idiosyncrasies. This being his fondness for the relatively obscure Latin phrase, *vade mecum*, which roughly means a handbook or a "bible" for some area of specialty. In an early personal jurisdiction case, that in some ways was a stepping-stone to *International Shoe*,<sup>65</sup> Hand offers us *vade mecum* in the

62. George Dargo, *Reclaiming Franz Kafka, Doctor of Jurisprudence*, 45 BRANDEIS L. J. 495, 501 (2007).

63. Fifty Years of Federal Judicial Service, 264 F.2d 5, 27 (2d Cir. 1959)(special session to commemorate 50 years of service by Hand) (separately paginated section).

64. See GUNTHER, *supra* note 43, at 33-35 (quoting Hand as stating that the study of philosophy was his "first love", and his reverence for George Santayana, a member of Harvard's faculty during Hand's student years and one of his teachers, most often remembered today for his aphorism about those not remembering history being condemned to repeat it).

65. See Jeffery A. Van Detta & Shiv K. Kapoor, *Extraterritorial Personal Jurisdiction For The Twenty-First Century: A Case Study Reconceptualizing The Typical Long-Arm Statute To Codify And Refine International Shoe After Its First Sixty Years*, 3 SETON HALL CIRCUIT REV. 339 (2007).

denouement to his opinion. In that case, describing what would later come to be called the lack of a non-resident defendant's forum contacts for purposes of personal jurisdiction analysis, there occurs a passage that a few courts have quoted (adding to the already small number of times any federal judge since 1796 has used *vade mecum* in a published judicial opinion):

None of this, and not all of it, seems to us a good reason for drawing the defendant into a suit away from its home state. In the end there is nothing more to be said than that all the defendant's local activities, taken together, do not make it reasonable to impose such a burden upon it. It is fairer that the plaintiffs should go to Boston than that the defendant should come here. Certainly such a standard is no less vague than any that the courts have hitherto set up; one may look from one end of the decisions to the other and find no *vade mecum*.<sup>66</sup>

"*Vade mecum*," a 21st century reader might ask, "what does that phrase mean?"

*Vade mecum*<sup>67</sup> appears again in numerous Hand opinions and dissents in the Court of Appeals.<sup>68</sup> One might expect some judges to feel the need to write more learned-sounding prose in an appeals court capacity. Yet *vade mecum* also appeared in at least one of Hand's district court opinions.<sup>69</sup>

Among legal phrases, even in 1930, this was not one typically encountered. In fact, a search of the Federal Reporter series through 2007 reveals that the phrase has been used in twenty-three federal judicial opinions from 1796 until its last appearance in 1999, *eight of which (35%)* Hand authored as noted above.<sup>70</sup> That kind of syntax seems to be quite uninviting, even among the most narrowly conceived audience of judicial opinions; and it excludes many readers whose educations did not include a substantial amount of Latin instruction. While the education of many who became lawyers included some Latin, given the paucity of the use of *vade mecum* in the federal courts suggests that is not one of the helpful Latin legal

66. *Hutchinson*, 45 F.2d at 142.

67. A *vade mecum* is a useful reference, such as a handbook, OXFORD AMERICAN DICTIONARY 1027 (1980).

68. *New York Trust Co. v. Commissioner of Internal Revenue*, 68 F.2d 19, 20 (2d Cir. 1933); *Catalin Corporation of America v. Catalazuli Mfg. Co.*, 79 F.2d 593, 595 (2d Cir. 1935); *Kuhner v. Irving Trust Co.*, 85 F.2d 35, 38 (2d Cir. 1936); *Pink v. U.S.*, 105 F.2d 183, 188 (2d Cir. 1939) (Hand, J., dissenting); *U.S. v. Goldstein*, 120 F.2d 485, 491 (2d Cir. 1941); *U.S. v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950).

69. *Van Heusen Products v. Earl & Wilson*, 300 F. 922, 929 (S.D.N.Y. 1924) ("The prospect of getting objective tests for invention is tempting, but it is a mirage. How is it possible to say a priori what combination of elements needs an original twist of the mind, and what is within the compass of the ordinary clod? Is it not clear that the quality of a man's inventiveness must be tested by reconstituting the situation as it was in the light of the preceding history of the art? There is no *vade mecum* for such inquiries.")

70. Compare *Roberts v. Cay's Ex'rs*, 2 U.S. (2 Dall.) 260, 261 (1796) (in which the phrase is part of the title of a treatise listed in a string citation), with *Longhi v. Animal & Plant Health Inspection Service*, 165 F.3d 1057, 1060 (6th Cir. 1999) (in which Judge Nelson writes, "This prohibition is found in Subchapter A of Title 9 of the Code of Federal Regulations, the Agriculture Department's *vade mecum* of regulatory provisions relating to animal welfare.")

phrases that many 19<sup>th</sup> and early 20<sup>th</sup> century lawyers and judges incorporated into their syntax. Further, considering how many attorneys of the day clerked their way into bar admission with a minimum of formal education. The use of such a Latin phrase could leave out many of the audience even in the legal profession. Indeed, when the Military Court of Appeals employed it in a 1954 opinion, the court felt the need to define it immediately: “This Court has, from the first, emphasized that the Manual for Courts-Martial constitutes the military lawyers’ vade mecum, his very Bible.”<sup>71</sup>

### b. The Importance of Being Earnest

Perhaps Hand’s greatest strength in terms of audience was his impressive and consistent earnestness in judicial writing. Hand understood, as we have seen, the terrors and tribulations of being a litigant.<sup>72</sup> Hand also held a modest assessment of his own corpus of judicial work that was focused on the parties before him: that “I confess when I look at my service it seems to have been for the most part trivial. It amounted to a good deal to the people at the moment.”<sup>73</sup> Thus, in any of the opinions known to the author, Hand always treated the rendering of the opinion with the seriousness of purpose and sense of occasion for the litigants befitting the judicial role and the deconstructive suffering endured by all litigants as a result of the process, no matter how “due,” itself.<sup>74</sup> While that may seem obvious to some, expected, *de rigeur*, it is not so simple.

Complexities abound from judges who become too literary, and use the opinion as an opportunity to impress in a manner usually reserved for creative writing classes. Judge John Brown, for example, whose maritime and admiralty opinions are deservedly celebrated for their clarity, did have a distracting habit of injecting “humor” into his opinions. His clerks reminisce fondly about it:

Judge Brown’s legal opinions are equally legendary. Judge Brown very much believed that the law and its language need not be dull and lifeless. Legal writing was his passion and ultimately, his leg-

71. U.S. v. Drain, 1954 WL 2443 (CMA), 16 C.M.R. 220, 4 USCMA 646, 648 (Ct. Mil. App. 1954). Certainly, of course, Hand might have explained his reference this way—that he did not do so is telling for his view of the audience. One might compare the way that even the antiquarian Cardozo dealt with terms or phrases on which he sought to build his metaphors; thus, while he felt no need to help the reader with the unusual word, “punctilio” in *Meinhard v. Salmon*, he sometimes took more solicitude for the reader, as when he sought to build a metaphor on a modern medical device, the *sphygmograph*. See, e.g., *People v. Zachowitz*, 172 N.E. 466, 467 (N.Y. 1930) (“The sphygmograph records with graphic certainty the fluctuations of the pulse. There is no instrument yet invented that records with equal certainty the fluctuations of the mind.”). Cardozo’s use of the word does not appear, however, entirely accurate. See, e.g., Jennifer Leonard Nevins, *Measuring The Mind: A Comparison Of Personality Testing To Polygraph Testing In The Hiring Process*, 109 Penn. St. L. Rev. 857, 864 n.56 (2005) (describing the device as one of three used in polygraphing, “to record changes in blood pressure”).

72. See generally GUNTHER, *supra* note 43.

73. Fifty Years of Federal Judicial Service, 264 F.2d 5, 27 (2d Cir. 1959)(special session to commemorate 50 years of service by Hand) (separately paginated section).

74. See, e.g., ANITA MILLER, UNCOLLECTING CHEEVER: THE FAMILY OF JOHN CHEEVER VS. ACADEMY CHICAGO PUBLISHERS (1999) (describing bankrupting effects--emotionally and financially--of protracted litigation between author’s widow and small publishing house).

acy. As a result, he and his clerks made every effort to make his opinions entertaining as well as illuminating. In fact, when I began clerking for the Judge, I was told that the funnier the draft (in appropriate cases, of course) the more likely he was to accept it without changes. That proved to be pretty good advice. As a result, “Pac-Man” starred in one of our opinions, and even Dickens was employed as the voice of garbage to describe its landfill destination as the “far, far better rest I go to than I have ever known.”<sup>75</sup>

Yet, the humorous school of judging takes little account of the sacrifice of emotion, time, expense, resources, and orientation within the context of normal life that attends all litigation, even that involving “soulless corporations,” for individual corporate agents have responsibility for the litigation and are typically among the witnesses; these sufferings Hand always seemed to be keenly aware of. Imagine then, what Hand’s reaction might have been to the following anecdote about Judge Brown:

Judge Brown’s creativity in making his point through humor is shown in *Croft & Scully Co. v. M/V Skulptor Vuchetich*. The issue in the case was whether the \$500 package limitation set forth by the Carriage of Goods by Sea Act (COGSA) applied to a 20-foot steel container that held 1,755 cases of a soft drink called Delaware Punch. In the context of a container that capsized during loading operations at Houston, Judge Brown declined to apply the [COGSA package monetary limitation.] He noted that “Pepsi Cola Hits the Spot-On the Pavement”; “during the Refreshing Pause between the arrival of the container and the arrival of the Skulptor”; “42,120 cans of soft drinks crashed to the ground, never a thirst to quench”; “[i]n the Crush. . . . [t]he stevedore . . . was in no mood to have a Coke and a smile”; “the winds of judicial change Schwepped away the \$500 shelter”; and the appellee’s argument held “no water, carbonated or otherwise.”<sup>76</sup>

The litigants—and lawyers—in this case spent considerable time, resources, and efforts arguing these points. To make their dispute the subject of corny humor

75. Collyn A. Peddie, *Lessons From The Master-The Legacy Of Judge John R. Brown*, 25 HOUS. J. INT’L L. 247, 250 (2003) (footnotes omitted) (Pettie attempted to rationalize Brown’s thinking by asserting that “[t]here was a method to the Judge’s apparent madness. Judge Brown instinctively knew that humor—perhaps more than any other language tool—has the ability to make an idea memorable and concrete and to explain a complex concept in terms that people can understand.”). *Id.* at 250. While that may be true, there are other, countervailing considerations in writing a judicial opinion—lessons of the Audience Principle. See, e.g., *Patterson v. People of State of Colorado ex rel. Attorney General of State of Colorado*, 205 U.S. 454, 465 (Brewer, J., dissenting) (taking Justice Holmes to task gently for treating as “frivolous . . . a distinct claim that [appellant] was denied that which he asserted to be a right guaranteed by the Federal Constitution.”).

76. Gus A. Schill, Jr., *John R. Brown (1910-1993): The Judge Who Charted The Course*, 25 HOUS. J. INT’L L. 241, 243-244 (2003) (discussing *Croft & Scully Co. v. M/V Skulptor Vuchetich*, 664 F.2d 1277 (5th Cir. 1982) (footnotes omitted)).

that would not pass muster in even the remotest of Catskill Resorts<sup>77</sup> would seem to trivialize the gravity of the dispute to the parties, let alone the legal system. This is something Hand would never do.<sup>78</sup>

The Audience Principle is even more poorly served by judicial opinions that actually poke fun at parties. A most egregious example, now included in law-school casebooks on contracts,<sup>79</sup> is the New York Appellate Division's opinion in *Stamovsky v. Ackley*.<sup>80</sup> Justice Rubin's majority opinion is a rollicking exercise in finding as many ways to work in words and phrases relating to the supernatural as possible; however, the jokes not only are demeaning to the parties (however skeptical one is of the world of the supernatural) but also interfere in communicating to a broader audience the nature of the case and the issues that required an appellate opinion to resolve them. In fact, it is only in the dissenting opinion of Justice Smith, who plays it straight, that we clearly learn what the case is about:

Plaintiff seeks to rescind his contract to purchase defendant Ackley's residential property and recover his down payment. Plaintiff alleges that Ackley and her real estate broker, defendant Ellis Realty, made material misrepresentations of the property in that they failed to disclose that Ackley believed that the house was haunted by poltergeists. Moreover, Ackley shared this belief with her community and the general public through articles published in Reader's Digest (1977) and the local newspaper (1982). In November 1989, approximately two months after the parties entered into the contract of sale but subsequent to the scheduled October 2,

77. For those unfamiliar with the genre of "borscht-belt" humor, this cultural phenomenon is nicely surveyed at [http://en.wikipedia.org/wiki/Borscht\\_Belt](http://en.wikipedia.org/wiki/Borscht_Belt) (last visited March 26, 2008).

78. Hand might well have shared the sentiments of W.S. Gilbert, the 19th century barrister best recalled as the pungent librettist for Sir Arthur Sullivan in their string of hit operettas. See generally ANDREW GOODMAN, GILBERT AND SULLIVAN AT LAW 9-10, 15 (1983). Into the mouth of Ko-Ko, the "Lord High Executioner of Titipu," Gilbert placed his famous song "I've got a little list." Included among those whom Ko-Ko considered as executable to satisfy the Mikado's one-execution-per-month decree are "society offenders who might well be underground/and who never would be missed" — such as "that Nisi Prius nuisance, who just now is rather rife, The Judicial humorist." W.S. Gilbert, *The Mikado*, Act I, lines 240-242, 262-263, in THE COMPLETE ANNOTATED GILBERT & SULLIVAN 571, 573 (Ian Bradley, ed. 1996). Ian Bradley notes that the phenomenon that Gilbert was skewering may have been lost on non-lawyers producing *The Mikado* in the latter 20<sup>th</sup> Century. See *id.* at 572, nn. 263, 264. One wonders what Gilbert might have made of Justice Peter Smith's 71-page ruling in *The Da Vinci Code* copyright lawsuit he decided — in which he embedded, among his findings, his own "Code" which he challenges readers to decipher. Sarah Lyall, *A Puzzle Embedded In "Code" Ruling*, N.Y. TIMES, Apr. 27, 2006, at B1, B8 (noting that the judge wrote that deciphering his "code" was "[t]he key to solving the conundrum posed by this judgment"). The reporter charitably characterized the opinion as "an opportunity for Justice Smith to indulge in a flight of judicial and cryptographic fancy." *Id.* at B1 (noting that the "Code" covered over 13 pages of the opinion, and even included the typeface as one of the "clues"). Of course, neither Gilbert nor the author intend to make light of real *uidecide*, a phenomenon unimaginable in Victorian England but all-too-familiar to American federal judges from the 1970s onward. See, e.g., *Remembering A Judge Who Died For His Work*, N.Y. Times, May 3, 1992, at section 1, p. 50 (New York edition); Rick Lyman, *Focus on Safety for Judges Outside the Courtroom*, N.Y. Times, Mar. 11, 2005, at A18.

79. E.g., BRIAN BLUM & AMY BUSHAW, CONTRACTS: CASES, DISCUSSION, AND PROBLEMS 333 (1st ed. 2003).

80. 169 A.D.2d 254 (N.Y.A.D. 1 Dep't 1991).

1989 closing, the house was included in a five-house walking tour and again described in the local newspaper as being haunted.

Prior to closing, plaintiff learned of this reputation and unsuccessfully sought to rescind the \$650,000 contract of sale and obtain return of his \$32,500 down payment without resort to litigation. The plaintiff then commenced this action for that relief and alleged that he would not have entered into the contract had he been so advised and that as a result of the alleged poltergeist activity, the market value and resaleability of the property was greatly diminished. Defendant Ackley has counterclaimed for specific performance.<sup>81</sup>

It is rare that the dissent has to take on the tasks of setting forth the basic facts and claims in the case. But Justice Rubin's opinion left Judge Smith little choice. Justice Rubin opens the opinion with the first in a string of bad puns, "The majority opinion goes on to observe that 'no divination is required to conclude that it is defendant's promotional efforts in publicizing her close encounters with these spirits which fostered the home's reputation in the community.'"<sup>82</sup> But Justice Rubin was just getting his comedy-club audience warmed up, as we see him "top" himself in the next passage:

While I agree with Supreme Court that the real estate broker, as agent for the seller, is under no duty to disclose to a potential buyer the phantasmal reputation of the premises and that, in his pursuit of a legal remedy for fraudulent misrepresentation against the seller, *plaintiff hasn't a ghost of a chance*, I am nevertheless *moved by the spirit of equity* to allow the buyer to seek rescission of the contract of sale and recovery of his down payment.<sup>83</sup>

But Justice Rubin was not done. As if we were reading the work of a judicial Jim Carey, having lost control of a skit and now far over the top and out of any reasonable bounds of decorum, we are treated to the climatic passage of the opinion, "Pity me not but lend thy serious hearing to what I shall unfold."<sup>84</sup>

From the perspective of a person in the position of plaintiff herein, a very practical problem arises with respect to the discovery of a *paranormal phenomenon*: "*Who you gonna' call?*" as the title song to the movie "*Ghostbusters*" asks. Applying the strict rule of caveat emptor to a contract involving a house possessed by poltergeists *conjures up* visions of a *psychic or medium* routinely accompanying the structural engineer and Terminix man on an in-

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81. *Id.* at 261.

82. *Id.* at 256.

83. *Id.* at 256 (emphases added).

84. WILLIAM SHAKESPEARE, *HAMLET THE FIRST ACT*, sc. 5.

spection of every home subject to a contract of sale. *It portends that the prudent attorney will establish an escrow account lest the subject of the transaction come back to haunt him and his client-or pray that his malpractice insurance coverage extends to supernatural disasters.* In the interest of avoiding such untenable consequences, the notion that a haunting is a condition which can and should be ascertained upon reasonable inspection of the premises *is a hobgoblin which should be exorcised from the body of legal precedent and laid quietly to rest.*<sup>85</sup>

In their teaching notes on this case, Professors Brian Blum and Amy Bushaw of the Lewis & Clark School of Law posit troubling questions about this opinion, striking at the heart of the Audience Principle:

We don't mean to spoil the fun, but think that it is worth raising the issue of whether it is appropriate, and not a lapse of proper judicial conduct, for a judge to write an amusing or facetious opinion. Although the facts may be funny to an outsider, the parties have spent considerable money and time, and have no doubt incurred some emotional cost, in litigating the case. Their perception of the system of justice may be diminished by an opinion that is not serious and judicious, even if the case itself seems silly. (There are more appropriate sanctions for frivolous or vexatious litigation.)<sup>86</sup>

Two of these points especially merit further development and emphasis. First, the diminution of the judicial system from such writing is not just in the eyes of the parties, it has toxicity for the judiciary (abasing general rules of decorum and sensitivity in adjudication), for the legal profession (where professionalism and decorum are already seriously at-risk), for the general public (to see courts having a laugh at the expense of non-lawyers and non-insiders) -and for law students (who read such cases in forming their own values, perceptions, and standards at a very critical time in their professional lives). Second, the suggestion that frivolous and vexatious claims (which this was not, given that the majority reinstated the rescission claim) can be better handled through established means is one that was lost on this court. Another opinion in which a judge—a federal trial judge, no less—loses sight of the line between decorum and toxicity, between appropriate sanctions and inappropriate humiliation, is *Bradshaw v. Unity Marine Corp., Inc.*<sup>87</sup>

The *Bradshaw* court was ruling on a defense summary judgment, but found the briefs and authorities submitted by both parties to be inadequate and inaccurate. Rather than simply holding a hearing on the motion and scolding the attorneys in

85. *Stambovsky*, 169 A.D.2d. at 257 (emphases added).

86. BRIAN A. BLUM & AMY C. BUSHAW, TEACHER'S MANUAL FOR CONTRACTS: CASES, DISCUSSION, & PROBLEMS 156-157 (1st ed. Aspen 2003).

87. *Bradshaw v. Unity Marine Corp., Inc.*, 147 F.Supp.2d 668 (S.D. Tex. 2001).

open court, the court elected to subject counsel to the modern equivalent of the pillory—forever etching his humiliation of them into the pages of the Federal Supplement Second Series:

Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact—complete with hats, handshakes and cryptic words—to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor’s edge sense of exhilaration, the Court begins.<sup>88</sup>

The court, however, was not satisfied with that lashing. The court continues in the same mocking tone as it begins to evaluate specific arguments:

Defendant begins the descent into Alice’s Wonderland by submitting a Motion that relies upon only one legal authority. The Motion cites a Fifth Circuit case which stands for the whopping proposition that a federal court sitting in Texas applies the Texas statutes of limitations to certain state and federal law claims. *See Gonzales v. Wyatt*, 157 F.3d 1016, 1021 n. 1 (5th Cir.1998). That is all well and good—the Court is quite fond of the *Erie* doctrine; indeed there is talk of little else around both the Canal and this Court’s water cooler. Defendant, however, does not even cite to *Erie*, but to a mere successor case, and further fails to even begin to analyze why the Court should approach the shores of *Erie*. Finally, Defendant does not even provide a cite to its desired Texas limitation statute. A more bumbling approach is difficult to conceive—but wait folks, There’s More!<sup>89</sup>

It continues such hyperbolic sarcasm throughout the opinion:

Plaintiff responds to this deft, yet minimalist analytical wizardry with an equally gossamer wisp of an argument, although Plaintiff

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88. *Id.* at 670.

89. *Id.*

does at least cite the federal limitations provision applicable to maritime tort claims. See 46 U.S.C. § 763a. Naturally, Plaintiff also neglects to provide any analysis whatsoever of why his claim versus Defendant Phillips is a maritime action. Instead, Plaintiff “cites” to a single case from the Fourth Circuit. Plaintiff’s citation, however, points to a nonexistent Volume “1886” of the Federal Reporter Third Edition and neglects to provide a pinpoint citation for what, after being located, turned out to be a forty-page decision. Ultimately, to the Court’s dismay after reviewing the opinion, it stands simply for the bombshell proposition that torts committed on navigable waters (in this case an alleged defamation committed by the controversial G. Gordon Liddy aboard a cruise ship at sea) require the application of general maritime rather than state tort law. See *Wells v. Liddy*, 186 F.3d 505, 524 (4th Cir.1999) (What the ...)?! The Court cannot even begin to comprehend why this case was selected for reference. It is almost as if Plaintiff’s counsel chose the opinion by throwing long range darts at the Federal Reporter (remarkably enough hitting a nonexistent volume!).<sup>90</sup>

The insults are too numerous to catalog easily; they even penetrate into the lowest of the vernacular in the court’s *Wells v. Liddy* parenthetical, which (if we are trying to imagine the audience) should appeal to cynical teens, perhaps. The shrillness of tone reaches a pitch at which the reader begins to feel sympathy, if not empathy, for these lawyers, no matter how poor their lawyering, since the public judicial response is so far over the top. For example, at one point, the district court writes:

Despite the continued shortcomings of Plaintiff’s supplemental submission, the Court commends Plaintiff for his vastly improved choice of crayon-Brick Red is much easier on the eyes than Golde-nrod, and stands out much better amidst the mustard splotched about Plaintiff’s briefing. But at the end of the day, even if you put a calico dress on it and call it Florence, a pig is still a pig.<sup>91</sup>

The court then dismissively transitions back into a legal analysis with the barb, “Now, alas, the Court must return to grownup land.”<sup>92</sup> The *ad hominem* attack on the attorneys continues unabated right into the concluding paragraphs of the opinion, in which the court not only casts more aspersions on the lawyer’s abilities, but allows the venom to spill over into disrespect for the parties and the cause of action:

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90. *Id.* at 670–71.

91. *Id.* at 671.

92. *Id.*

After this remarkably long walk on a short legal pier, having received no useful guidance whatever from either party, the Court has endeavored, primarily based upon its affection for both counsel, but also out of its own sense of morbid curiosity, to resolve what it perceived to be the legal issue presented. Despite the waste of perfectly good crayon seen in both parties' briefing (and the inexplicable odor of wet dog emanating from such) the Court believes it has satisfactorily resolved this matter.

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[I]t is well known around these parts that Unity Marine's lawyer is equally likable and has been writing crisply in ink since the second grade. Some old-timers even spin yarns of an ability to type. The Court cannot speak to the veracity of such loose talk, but out of caution, the Court suggests that Plaintiff's lovable counsel had best upgrade to a nice shiny No. 2 pencil or at least sharpen what's left of the stubs of his crayons for what remains of this heart-stopping, spine-tingling action.<sup>93</sup>

Despite exhausting nearly every contumely a court might think of, this court went so far as to finish off the opinion with a final, demeaning footnote, admonishing that, "[i]n either case, the Court cautions Plaintiff's counsel not to run with a sharpened writing utensil in hand—he could put his eye out."<sup>94</sup>

We of course do not know how vexing the pleadings were with which the judge dealt. Perhaps they were worthy of the level of scorn and contempt heaped upon them. But the Audience Principle tells us that the manner of the heaping was utterly inappropriate. The judge could have played it straight in the opinion; he might have noted the amateurish nature of the pleadings, and might even have made an appendix of highlights of some of the more embarrassing lowlights. However, in losing the restraint of language and tone that decorum demands, the court, instead, abdicated its judicial role with a public audience of bench, bar, and public—it committed a judicial sin at least as mortal as, if not more so, than the incompetence with which it charges the lawyers. As Professor Steven Lubet has observed of this opinion:

Let's resist th[e] urge [to delight in misfortune well-earned], at least for the time being, while we think a bit about the use and misuse of judicial opinions. In that regard, [the judge's] stylings turn out to be a symptom, or perhaps an exemplar, of a more general problem for both the judiciary and the legal profession.

93. *Bradshaw*, 147 F.Supp.2d at 671.

94. *Id.* at 671 n.4.

Federal judges exercise enormous power over lawyers and their clients. Armed with life tenure and broad discretion, a judge can do great damage to an attorney's reputation and career, while the lawyer has almost no recourse. So when [the judge] decided to torment the hapless counsel in the *Bradshaw* case—who are identified by name in the published opinion—he was taking aim at people who could not defend themselves. Under prevailing law, they cannot even get their case transferred to a new judge. They just have to grin and bear it, in the hope that ‘His Honor’ doesn't decide to go after them again.<sup>95</sup>

Even more significant, however, to our discussion of Learned Hand and the Audience Principle is the impact of a judicial opinion like this on the injured plaintiff:

Furthermore, there are severe costs when courts use published opinions for the purpose of humiliation, even when couched in humorous terms. First, we ought to worry about the impact on the parties. *Bradshaw* is a Jones Act case, involving serious personal injuries to a seaman. Judge Kent's decision dismissed an important defendant from the case, causing a definite setback to the plaintiff. Imagine how the injured Mr. Bradshaw would feel upon reading [the opinion] . . .

Put aside the fact that Mr. Bradshaw was injured when climbing from a tugboat to the pier, which Judge Kent chose to use as part of a joke. Until seeing this excerpt, Mr. Bradshaw might once have believed that federal judges decided cases out of an obligation to justice, not out of affection for counsel, and certainly not out of morbid curiosity (another bad joke). He would surely be

95. Steven Lubet, *Bullying from the Bench*, 5 GREEN BAG 2D 11, 12 (2001) (footnote omitted). This judge's excess eventually proved not confined merely to his writings. See, e.g., James C. McKinley, Jr., *Judge Sentenced To Prison For Lying About Harassment*, N.Y. TIMES, May 12, 2009, at A15 (discussing Samuel Kent's guilty plea to obstruction of justice charges in the wake of his confession that falsely denied in forcing unwanted sexual contact on two of the district court's personnel). The victims of the judge's excesses were quoted as follows:

Both women made statements before the sentencing, The Houston Chronicle reported. Ms. McBroom expressed anger that Judge Kent had tried to portray her complaints as those of a spurned lover.

“Being molested and groped by a drunken giant is not my idea of an affair,” she said in court.

Ms. Wilkinson called Judge Kent “the biggest bully of them all.”

*Id.* Recently, it was reported that “Dick DeGuerin, a lawyer for Judge Kent, said the judge suffered from depression, alcoholism, diabetes and bipolar disease. Rather than resign before he serves his time in prison, Judge Kent, appointed to the lifetime post by President George Bush in 1990, has asked to be allowed to claim that he is disabled so he can continue to collect his salary of \$169,300 a year.” *Id.*

confused, or more likely appalled, by the court's trivializing reference to the odor of a wet dog. And remember, the plaintiff lost. Although you would not know it from reading the opinion, the case was about Mr. Bradshaw, not about the judge's relationship to the lawyers. Will Bradshaw be able to read Kent's opinion and feel that he received a fair hearing?<sup>96</sup>

What would Judge Hand say to such opinion? As Richard Posner reports, Hand didn't suffer fools gladly and wasn't afraid to, "[s]wivel his chair 180 degrees, thus presenting his back to the lawyer, and at times he would toss briefs over the bench in disgust."<sup>97</sup> One can easily see Judge Hand turning his back on such judicial writing and tossing the opinions back over the bench to their authors.

## 2. Audience and Judicial Motivation

Speaking metaphorically, if syntax is but a key to estimating the audience intended for a judicial opinion, it may also be a surrogate for judicial attitudes and motivations otherwise disclosed. The subject of audience in judicial opinions has recently been tackled by Professor Lawrence Baum.<sup>98</sup> Professor Baum's approach to the subject might be fairly deemed a motivational perspective—he examines a range of communications, both judicial and extra-judicial, to decipher motivations for their decisions beyond merely “making good law” or even “making good policy.”<sup>99</sup>

Baum hypothesizes that judges are also driven by the very human desire for popular approval and public respect, and, as a result, these extra-legal factors both shape their decision-making and define the audiences for whom they write.<sup>100</sup> A strong motivator—both conscious and unconscious, for most judges is the perception of them as “elite” groups in American society, “whose values are more similar to those of the mass public than they are different,”<sup>101</sup> but when those views “differ, however, judges' links with their personal audiences will draw them toward the

96. *Id.* at 12–13; see David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509, 568, 574 (2001). It is interesting to contrast this judge's contempt for the status of the injured merchant mariner with the solicitude for injured sailors shown by District Judge Edmund Waddell, Jr., whose admiralty opinion in *The Mina*, 241 F. 530 (E.D. Va. 1917), was contrasted with one of Hand's, *supra* notes 208–09 and accompanying text.

97. Richard Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 521 (1994).

98. LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (1st ed. Princeton U. Press 2006).

99. *Id.* at 158–59.

100. *Id.* at 148. Baum observes that “an audience-based perspective can supply some of the missing motivational bases” for models of judicial behavior and assist in harmonizing disparate models.

101. *Id.* at 5 (stating that although his study has focused on “higher courts,” especially the U.S. Supreme Court, his “interest extends to lower courts” and that “a perspective based on judges' relationships with their audiences is one means to study lower courts in the same terms as higher courts.”). The phenomenon of lawyering targeted at elites begins even in the fundamentals of legal education, as Professor Lucille Jewel has recently brought to light. See Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFFALO L. REV. 1157 (2008).

views of elites.”<sup>102</sup> Baum makes other, extensive empirical observations about how judges’ perceptions of audiences drive their decision-making. I do not propose to test those hypotheses here against Hand’s District Court work—the environment in which he did that work is remote and the contextualizing personal and societal sources require more research than resources at hand permit. However, recognizing that Terrell and Armstrong’s approach to cognitive communication is on a parallax with this recent work on audience-versus-outcomes in the field of political science, I turn to a more explicit discussion of audience in Hand’s opinions than the article has explored until this point. The key to understanding Hand’s style goes beyond idiosyncrasies he may have indulged. A broader assessment of his work suggests that Hand was keenly aware of writing for the parties as audiences;<sup>103</sup> and that he was often writing for other judges in the District, as well as for lawyers whose practices were centered there.<sup>104</sup> Of more significance, however, is Richard Posner’s observation that, “no careful reader, making due allowance for differences in linguistic conventions between the nineteenth century and today, will fail to note the personal, direct, and conversational tone of” Learned Hand’s judicial opinions.<sup>105</sup>

The following is an eclectic, yet representative selection of cases that reveal issues of audience arising inferentially from Hand’s District Court opinions; and for the reader who wishes to enrich this with Baum’s exploration of decision-making models, the following are worthy of case study.

### a. Isn’t this Important Enough to Lay Out Logically? *In re Kerner*

Fraud—whether done by commission or omission—is an all-too-familiar phenomenon to bankruptcy practitioners.<sup>106</sup> Hand dealt with such a problem in *In re Kerner*,<sup>107</sup> as he worked to develop the bankruptcy law of the Southern District of New York (an obviously bustling place for bankruptcies).<sup>108</sup> The question in the

102. BAUM, *supra* note 98, at 163.

103. See Learned Hand, *The Deficiencies of Trials To Reach The Heart Of The Matter*, 3 ASS’N OF THE BAR OF THE CITY OF NEW YORK LECTURES ON LEGAL TOPICS 87 (1926).

104. See *In re Denny*, 240 F. 845, 847 (S.D.N.Y. 1917).

105. Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1429 (1995).

106. See, e.g., DAVID A. SKEEL, JR., *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* (Princeton U. Press 2001).

107. 245 F. 807 (S.D.N.Y. 1917).

108. See DAVID A. SKEEL, *supra* note 106, at 40–43 (discussing the history of the Bankruptcy Act of 1898 and its early development); see also F. REGIS NOEL, *A HISTORY OF THE BANKRUPTCY LAW 157-162* (William S. Hein & Co., Inc. 2003) (1919); CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY 128-43* (Harvard U. Press 1935); PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY 1607-1900* (State Historical Society of Wisconsin 1974); Charles Jordan Tabb, *A History of the Bankruptcy Laws of the United States*, 3 AM. BANKR. INST. L. REV. 5, 23-26 (1995); David A. Skeel, Jr., *The Genius of the Bankruptcy Act of 1898*, 15 BANKR. DEV. J. 319 (1999). Bankruptcy cases were a very significant part of Hand’s work from the beginning of his District Court service, yet he was new to the subject. GUNTHER, *supra* note 43, at 137. Bankruptcy “cases produced more than half of his written opinions during his first year on the bench.” *Id.* In a letter to his mother, Hand described the stress that such cases caused him:

case was whether a debtor could obtain a discharge of debts when he omitted in a mid-winter financial statement information about inventory he had purchased for the spring season. The debtor's excuse (at least according to the Reporter of Decisions) was that "it was customary in the trade to omit from the financial statement such assets and liabilities." The issue here seems fairly significant—in general, establishing the standard of disclosure in bankruptcy cases; and in particular, establishing whether business practices alleged to be common are relevant to, let alone modify, the disclosure standards that Congress intended to establish through the Bankruptcy Act. Obviously, this would be a ruling of critical importance to individuals, businesses, and lawyers.

One might think that the importance of this issue would have moved Hand to have written a well-organized opinion, explaining the background of the issue and its significance to a broad audience. However, Hand did not take that approach—the opinion is cryptic, and the importance of the issue is not revealed until the very end of what might be fairly described as a somewhat cursory opinion. Indeed, Hand's opening leaves the reader feeling as if we have walked into a conversation already well under way during our absence:

This case falls directly under my ruling in *Re Maaget*, 245 Fed. 804, and I shall follow it, unless it appears that it has been overruled in *Re Rosenthal*, 231 Fed. 449, 145 C.C.A. 443. The opinion in that case does not pass upon the point, and I have no means of determining whether it was raised on the appeal. In any event the opinion below does not diverge from *In re Maaget*, but quotes it with approval, and the case has the distinguishing point that the bankrupt, who could not read or write, may well have supposed the statement to have been true. I cannot find that any court has decided that, where a bankrupt deliberately chooses to omit a liability for the purchase price of goods still on hand, he has made a true financial statement. *Scienter* is, of course, a necessary element in the charge, and it would be a defense to show that the bankrupt, however erroneously, supposed that the liability did not in fact exist.<sup>109</sup>

There is a lot going on here—a juggling of case precedents the reader has no particular reason to know, facts of those cases contrasted with facts of this case, and the judge's thinking out loud about the effect of one precedent upon another. It should hardly be the lead in. In fact, the lead in should have been crafted around what Hand left for the end of the opinion —crafted with the syntactical excellence

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It is not that the bankruptcy cases are more difficult to decide than others . . . only there are so many of them, and I get mixed up; and besides that, I am constantly interrupted by people who come in asking usually for what they ought not to have.

*Id.*

109. *In re Kerner*, 245 F. at 807.

characteristic of Hand's sequencing skills at the paragraph and sentence level, and leaving therefore an indelible impression:

[W]hile the bankrupt's error touching the existence of the liability would make the statement honest and excuse a mere mistake, his error as to his obligation to make a true statement is irrelevant. His duty is to speak the truth, so far as he knows it, and no mistake as to the scope of that duty affects the legal consequences of his omission. Like any other duty, the law imposes it upon him at his risk. The test is honesty in the statement, not in the belief that an honest statement is necessary. It would be as intolerable as it is anomalous to allow men to make financial statements which they know to be false, on the plea that they supposed the recipient was not entitled to honest ones.<sup>110</sup>

Interestingly, Hand invites the parties to appeal; “[i]t would be satisfactory if a ruling upon the point could be obtained from the Circuit Court of Appeals.”<sup>111</sup> The debtor's attorney took him up on this; and the Second Circuit reversed Hand's decision.<sup>112</sup> Perhaps “the point” deserved a more cognitively well-crafted opinion. As it was, there was a dissent,<sup>113</sup> but Hand's view on this important issue of developing clear standards of veracity in bankruptcy did not command either of the remaining two judges on the panel.

It is a bit odd that Hand put little into crafting an opinion that he invited the parties to appeal. The Circuit Court of Appeals is a potential audience to virtually every district court opinion; Hand, who frequently sat by designation on the Appeals Court from 1917 onwards, certainly had that constituency in mind among his audience. Beyond the immediate parties, a future panel of appeals court judges is one of the significant audiences for an opinion of a district judge. While some of Hand's opinions were not written in a way that would seem to take that audience into account,<sup>114</sup> others were written to engage that audience—who showed their cognitive connectedness not only by affirming Hand's ruling, but by adopting his opinion as the opinion of the appeals court. A Westlaw search reveals four opi-

110. *Id.* at 807–08.

111. *Id.*

112. *In re Kerner*, 250 F. 993, 995 (2d Cir. 1918). The Reporter helped to make clear the issue and its context better than Hand had in the district court:

Under Bankruptcy Act, § 14b, as amended by Act Feb. 5, 1903, c. 487, § 4, and Act June 25, 1910, c. 412, § 6 (Comp.St.1916, § 9598), prohibiting a discharge where the applicant has obtained credit on a materially false statement in writing, a financial statement, made by the bankrupt as a basis for credit which omitted from the assets certain merchandise and from the liabilities the amount due thereon, held not so materially false as to warrant denial of discharge and furnish ground for objection to a composition offer.

*Id.* at 993.

113. *Id.* at 995 (Hough, dissenting) (“[D]issents, on the ground that the financial statement in question was ‘materially false’; i.e., substantially untrue, and made so with intent to deceive.”).

114. *E.g.*, *United States v. Fong On*, 240 F. 234 (S.D.N.Y. 1916); *In re Lampitos*, 232 F. 382 (S.D.N.Y. 1916).

nions in which the Second Circuit rendered an affirmance by incorporating Hand's district court opinion as its own: *F.I.A.T. v. A. Elliot Ranney Co.*;<sup>115</sup> *Owens v. Breitung*;<sup>116</sup> *The Walter Green*;<sup>117</sup> and *May v. Hartford Fire Insurance Co.*<sup>118</sup> None of these occurred during the 1916-1917 period under examination. Perhaps that suggests that he was still learning how the principles of cognitively effective communication play out in actual application; the evidence principles in application, and only after a decade of seasoning (and increasingly frequent-stints on appellate panels by designation<sup>119</sup>) was he fully in tune with the judicial craft to the degree that his opinions reflected the style and presentation of the appellate judge.

**b. Writing for The Parties, Not Posterity: Contrasting *Coronet Phosphate and Pressed Steel***

In an admiralty opinion that implicates the Congruence Principle and the use of default organizations as well as the Audience Principle, *Coronet Phosphate Co. v. United States Shipping Co.*,<sup>120</sup> neither Hand nor the Reporter of Decisions graces us with a faculty summary. In fact, were it not for the Headnotes inserted by a West Publishing Company Editor, we would have no idea what the opinion is about. That is because Hand begins with a discussion of a pleading we have not seen, which is itself a response to another pleading we have not seen:

The first defense is contained in the forty-eighth article of the answer. It alleges . . . ”<sup>121</sup>

The rest of the opinion is organized in this same mechanical fashion, based on the order of articles in the answer:

The second defense is set up in the forty-ninth article of the answer. It alleges . . .

. . .

The third defense is contained in the fiftieth article of the answer. It alleges . . .

. . .

The fourth defense, in the fifty-first article, asserts that . . .

115. 249 F. 973, 973 (2d Cir. 1918).

116. 270 F. 190 (2d Cir. 1920).

117. 266 F. 269, 271 (2d Cir. 1920).

118. 297 F. 997, 998 (2d Cir. 1923).

119. GUNTHER, *supra* note 43, at 56.

120. 260 F. 846 (S.D.N.Y. 1917).

121. *Id.* at 846.

...

The fifth defense is contained in the fifty-second article of the answer, and arises under the clause . . . <sup>122</sup>

. . . and so on. The organization of the answer, therefore, becomes the organization of the opinion. This default organization works conveniently enough for the parties' lawyers; out of their numerous case files, they could pull the required pleadings and lay them down alongside Hand's opinion to, in effect (and with apologies to Mitch Miller), sing along with Learned. As a result, Hand provides no meta-information about the case, about the relative legal importance of the arguments, or about how they might relate to the overall disposition of the case. He simply, and efficiently for the lawyers in the case, ticks off the various exceptions to the answer. He closes the opinion, in effect, to an outside audience as if he were a school board in executive session. There are, however, matters of real interest to other parties. For example, World War I was raging on land and sea. Although the United States had not yet entered the war, United States businesses and foreign businesses with United States presence were being greatly affected by the slings and arrows of belligerence among the European powers. Thus, the defenses to contract performance associated with doctrines such as impossibility of performance and with contract clauses such as *force majeure* came into play. The case raises issues such as the proper pleading (in the pre-Federal Rules of Civil Procedure ("FRCP") days of stricter pleading rules) of such defenses:

[T]he charter party under which the carriage was to be made contained the usual provision against restraints of rulers, princes, and people. It then goes on to allege that, in consequence of the Great War, 'restraints, restrictions, and limitations have been placed on shipping, both under neutral and belligerent governments' among them being Great Britain and her allies, on shipments destined to Sweden and Holland, and that by reason of these restraints, limitations, and restrictions respondent was prevented and restrained from performing the charters mentioned in the libel and furnishing the tonnage.

This allegation is certainly bad as it stands. I do not mean to pass upon the question whether the British Orders in Council excused the respondent from the voyage; but I do mean to say that in pleading foreign ordinances having the force of law the pleader is bound to allege more than his conclusion of the effects of the ordinance. He is bound to set out its substance, so that the court may judge whether it has the effect which he ascribes. Without passing, therefore, upon the question as to whether shipments to Sweden

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122. *Id.* at 847-49.

and Holland were excused by the Orders in Council, or any other ordinances promulgated by any of the powers, the exception is sustained.<sup>123</sup>

But the significance of the legal matters ruled upon is buried under the default organization, which operates as a kind of code that, absent considerable reader effort, can be readily unlocked only by the parties' counsel.

That is not to say, however, that Hand was unconscious in this case of an audience beyond counsel of record. We find mid-way through the opinion that there are two other sets of exceptions that he is ruling on, "[t]he other exceptions, except the last two, touch the interrogatories"<sup>124</sup>—but here, Hand sets aside the mechanical run-through to give a commentary on the function of interrogatories in admiralty cases and the limits of (pre-FRCP) discovery:

Interrogatories in the admiralty serve two purposes, to amplify the pleadings of the party interrogated, and to procure evidence in support of the libel or defense of the party interrogating. They should not, however, be used merely to fish into the evidence which the party interrogated may produce in support of his own allegations. This limitation upon discovery has remained even in the most modern rules of procedure. A party is of course entitled to know whether his opponent admits the truth of his own allegations, and how far, so as to avoid unnecessary preparation for trial. He is not entitled to know what evidence his adversary will produce to prove the adversary's allegations, and what evidence he must himself produce to overcome the case so made. The result will, of course, be, as it has been in the past, that he must go to trial somewhat in the dark as to what he must meet. The pleadings are intended to advise him of that, and interrogatories are proper to reduce those allegations to very specific form. They should be encouraged for that purpose, but so far as they call upon the pleader to go further, and give, not only the details of his allegations, but the evidence by which he means to prove them, they are liable to abuse. If there develop on the trial a case of genuine surprise, the court, especially where there is no jury, has ample power to protect the party surprised.<sup>125</sup>

This digression is clearly aimed at a larger audience, beyond counsel of record. Hand appears to be speaking to the admiralty bar in New York, if not more broadly. Having recognized the broader audience, even for matters in this opinion, one

123. *Coronate Phosphate Co.*, 260 F. at 847 (citations omitted).

124. *Id.* at 849.

125. *Id.*

might have thought that Hand would structure the opinion to be more accessible to that audience.

While Hand hid the ball in discussing the important discovery issue in *Coronet Phosphate* for an audience of fireside intimacy, he certainly showed a greater appreciation for a broader audience in *Pressed Steel Car Co. v. Union Pacific Rail Co.*,<sup>126</sup> where Hand tackled a subject that is the bane of many trial judges' existence—discovery disputes.

Part of the challenge presented by the bill of discovery was that this was an equitable process being sought in an action-at-law for breach of contract. At the time, the equity and law jurisdictions of the Federal District Court had not yet been merged. This was not to occur until 1935. Hand addressed the problem in an earlier opinion in this litigation.<sup>127</sup> In this subsequent opinion, the Reporter of decisions provides an extensive prologue setting forth the details of the pleadings in what boiled down to a breach of patent licensure agreement.<sup>128</sup> This set the stage for Hand to discuss, for the benefit of practitioners throughout the country, the changes from the “old course of equity” and “the abolition of pleas” to new rules (at that time) “that discovery shall be by interrogatories, to which specific objections may be taken, . . . and that pleadings shall contain no evidence, but the ‘ultimate facts.’”<sup>129</sup> Then, as if turning to address a gathering of federal court civil practitioners at an American Bar Association annual meeting, Hand details that “the proper practice in a bill of discovery is now as follows,” and proceeds to lay out the steps, and then demonstrate, as a case study, how they apply to the discovery dispute between these parties.<sup>130</sup> While Hand helps us out a bit more here than in *Coronet Phosphate* as to the content of the interrogatories being challenged and their relationship to the lawsuit, it seems to matter less: Hand is holding a master class in the “new” federal court discovery. This becomes clear as Hand describes not only how the discovery he’s allowing will proceed here, but also, how he will *not* allow discovery to proceed:

If the defendant can be brought to acknowledge the possession of any documents which appear to be pertinent to the issues, it will be required to produce them, but not until it does. Any other rule would enable the plaintiff to fish among all the documents which the defendant may have for the purpose of picking out those on which it chooses to sue. Such a course is wholly unauthorized, not only under the old practice (Langdell, Secs. 204, 205), but equally under rule 58, which requires a party to produce only those docu-

126. 241 F. 964 (S.D.N.Y. 1917).

127. *Pressed Steel Car Co. v. Union Pac. Rail Co.*, 240 F. 135 (S.D.N.Y. 1917) (justifying exercise of court’s equitable jurisdiction over bill of discovery petition in a breach-of-contract action at law).

128. *Pressed Steel Car Co.*, 241 F. at 964–66.

129. *Id.* at 966.

130. *Id.* at 966–67.

ments which contain evidence material to the case or defense of his adversary.<sup>131</sup>

If any doubt could be entertained to how much more broadly Hand acknowledges his audience here, that doubt would be dispelled by the use of this opinion as a platform to preach greater party cooperation in the use of discovery to save the “maximum of expense in time and labor”:

The plaintiff will have leave to frame and keep reframing interrogatories till it has extracted from the defendant all the information which it possesses. Much the most convenient way would be for the parties to agree upon a master and allow the plaintiff an oral examination. This, however, I cannot compel; but the same result may probably be obtained, though it must be confessed with the maximum of expense in time and labor, by allowing interrogatories to be renewed as often as justice requires. If that does not serve, the plaintiff must rely upon such rights as he will have at the trial under Revised Statutes, Sec. 724 (Comp. St. 1916, Sec. 1469).<sup>132</sup>

### c. Deferring To The Special Master: *Page Machine Co. v. Dow, Jones & Co.*

Another question on the Audience Principle is at what point does the audience come to the litigation? Should a judge reprise the facts, at least in summary form, if the opinion is to be published? Or should the judge simply leave it to the reader

131. *Id.* at 967.

132. *Id.* at 967. As Professor Peter Subrin has described pre-FRCP discovery:

In 1935, Edson Sunderland started drafting what became Rules 26 to 37 of the Federal Rules. Up to that time, extremely limited discovery took place in both law and equity cases in the federal courts. For law cases, the sole discovery (except the motion for a bill of particulars, which was considered a pleading device, and an equitable bill for discovery in support of a law case, a cumbersome and infrequently used device) was provided for in two federal statutes dealing with depositions.

Peter N. Subrin, *Fishing Expeditions Allowed: The Historical Background Of The 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 698 (1998) (footnotes omitted). Professor Subrin then elaborates on the bill of discovery and its treatment in *Pressed Steel*:

One could use an equitable bill of discovery in aid of a legal action, but “there was a conflict of opinion as to whether a party could obtain discovery only of evidence that was relevant to the claim or defense or whether the party could obtain discovery of evidence which was relevant to any issue in dispute.” *Id.* Moreover, “[t]he bill of discovery was a cumbersome proceeding. The courts were constantly burdened with applications to settle the form, scope, and propriety of interrogatories.” *Id.* (citing a Learned Hand opinion (*Pressed Steel Car Co. v. Union Pac. R. Co.*, 241 F. 964, 967 (S.D.N.Y. 1917)) (stating that “Judge Learned Hand pointed out the wastefulness of this procedure”).

*Id.* at 698 n.41 (quoting 6 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 26 App.100 (3d ed. 1997)).

either to look up another opinion, or more burdensomely try to obtain from the Clerk of Court's Office a copy of an unpublished opinion, order, or report?

Learned Hand opted for the latter approach in a factually interesting litigation, *Page Machine Co. v. Dow Jones & Co.*<sup>133</sup> In that case, Hand did not orient his readers in his published opinion; he passed them off to the unpublished report of a special master, "I think there is no gain in repeating the general outline of the litigation, which sufficiently appears in the [s]pecial master's report."<sup>134</sup>

And just where is this report? What would it tell the reader? The "gain" that Hand could not see is actually apparent—the gain to be had is by a broader audience of readers beyond the attorneys for the respective parties, who would have more ready access to the Special Master's report in their files. Without it, other readers—lay, attorney, or judicial—are left with little context in which to order Hand's discussion of the details at issue in that opinion. To gain such context, a reader would have to be highly motivated—willing to spend the time, money, and frustration in trying to obtain a manuscript copy of the Special Master's report from the clerk's office—or if the file is checked out to chambers, from the issuing Judge's chambers.<sup>135</sup>

In contrast to Hand's attitude towards audience in *Page Machine*, Michael Mukasey (the last of President George W. Bush's Attorneys General), as a United States District Judge in Hand's former Southern District of New York, certainly saw the value of orienting a broader audience of readers. A good example of this is found in his opinions in a litigation filed by a sports and entertainment promoter against American poet and author Maya Angelou.<sup>136</sup> In issuing an opinion on contract-claim issues remanded to him by a Second Circuit panel, Judge Mukasey made passing reference to the prior opinion (giving readers familiar with it an opportunity to opt out of the fact section and to go directly to the legal discussion), but also oriented all readers not involved with the case by providing a synthesized—but not cursory—presentation of the facts pertinent to the issues addressed in the remand:

133. 238 F. 369 (S.D.N.Y. 1916).

134. *Id.* at 369.

135. See, e.g., Comment, *Discretionary reporting of Trial Court Decisions: A Dialogue*, 114 U. PA. L. REV. 249, 255 (1966). Hand's occasional predilection to dive into legal discussions without context, and sometimes even facts, vexed Professor Grant Gilmore, the reporter for Article 9 of the UCC. In a seminal book of debtor-creditor law, Gilmore quoted at length from a Hand opinion that decried the artificiality and incoherence of the common-law distinction between pledge and chattel mortgage. 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 8-9 (1965) (citing *In re German Publication Society*, 289 F. 509 (S.D.N.Y. 1922), *aff'd*, 289 F. 510 (2d Cir. 1923)). However, when trying to bring Hand's legal discussion to life by providing the factual context for that case, Gilmore lamented, "I find it impossible to make out from Judge Hand's opinion what the facts of the case could have been." *Id.* at 9 n. 12.

136. *B. Lewis Productions, Inc. v. Angelou*, No. 01 Civ. 0530 (MBM), 2003 WL 21709465 (S.D.N.Y. Jul 23, 2003), *rev'd* Nos. 03-7864(L), 03-7922(XAP), 2004 WL 11470712d Cir. 2004) (unpublished summary order), *remanded* to No. 01Civ.0530MBM, 2005 WL 1138474 (S.D.N.Y. May 12, 2005) (on remand after the U.S. Court of Appeals reversed the above decision in part to have Judge Mukasey consider "whether the Letter Agreement formed a contract other than a formal joint venture or exclusive agency agreement"—such as a simple bilateral contract).

Although familiarity with the facts in this case can be assumed, as they were set forth in detail in the court's previous opinion, *B. Lewis Prods.*, 2003 U.S. Dist. LEXIS 12655, at \*2-\*15, a brief recapitulation is necessary to provide context for this decision.<sup>137</sup>

Thus, by recognizing the simple teachings of the Audience Principle (not to mention the Context Principle), Judge Mukasey expanded the potential audience for this opinion from the immediate parties to others who might encounter it in researching the litigation, the law involved, or the operation of his court. It is no surprise that lawyers from all sides of the equation have praised Judge Mukasey for the transparency of proceedings in his court.<sup>138</sup>

#### IV. THE OPPORTUNITY OF SONIA SOTOMAYOR

During the interim in which Part I of this article was in the publication process, President Barack Obama nominated Second Circuit U.S. Court of Appeals Judge Sonia Sotomayor to the first vacancy on the U.S. Supreme Court during his administration. The media coverage and political discourse about her nomination seemed firmly fixed on her Latina heritage and her gender.<sup>139</sup> What is, however, most remarkable about the nominee is her experience on the District Court bench. While a District Judge for only six years (1992-1998) before her nomination and confirmation to the U.S. Second Circuit Court of Appeals,<sup>140</sup> those six years on the District Court bench are far more than any Supreme Court nominee since the ill-fated nomination of G. Harold Carswell<sup>141</sup> in 1969, and the most substantial prior judicial

137. *B. Lewis Productions, Inc. v. Maya Angelou, Hallmark Cards, Inc.*, No. 01Civ.0530MBM, 2005 WL 1138474 at \*1 (S.D.N.Y. May 12, 2005). Judge Mukasey made good on his promise to the reader, compressing lengthy findings and prior proceedings into three-and-a-half slip opinion pages. *See id.* at \*1-\*4.

138. *E.g., The New Man at the Justice Department*, N.Y. Times, Sept. 20, 2007, at A1, 25. Some have attributed Mukasey's crisp, concise, and clean judicial writing style to his admiration of George Orwell's and to a stint at United Press International. Adam Liptak, *Nuance and Resolve in Rulings by Attorney General Nominee*, N.Y. TIMES, Sept. 23, 2007, at A1.

139. *See, e.g., Nico Pitney, Sonia Sotomayor, Supreme Court Nominee: All You Need To Know*, THE HUFFINGTON POST (June 1, 2009) ("President Barack Obama has tapped federal appeals judge Sonia Sotomayor for the Supreme Court, making her the first Hispanic in history picked to wear the robes of a justice."), available at [http://www.huffingtonpost.com/2009/05/01/sonia-sotomayor-supreme-c\\_n\\_194470.html](http://www.huffingtonpost.com/2009/05/01/sonia-sotomayor-supreme-c_n_194470.html) (last visited Aug. 28, 2009); Peter Hamby, Ed Henry, Suzanne Malveaux and Bill Mear, *Obama Nominates Sonia Sotomayor To The Supreme Court*, CNN.com (May 26, 2009) ("If confirmed, Sotomayor, 54, would be the first Hispanic U.S. Supreme Court justice and the third woman to serve on the high court."), available at <http://www.cnn.com/2009/POLITICS/05/26/supreme.court/index.html> (last visited Aug. 28, 2009); Jeff Zeleny, *Obama Chooses Sotomayor for Supreme Court Nominee*, N.Y. TIMES, May 26, 2009 ("If confirmed by the Democratic-controlled Senate, Judge Sotomayor, 54, would replace Justice David H. Souter to become the second woman on the court and only the third female justice in the history of the Supreme Court. She also would be the first Hispanic justice to serve on the Supreme Court."), available at <http://thecaucus.blogs.nytimes.com/2009/05/26/obama-makes-decision-on-supreme-court-nominee/?scp=3&sq=Sotomayor%20nominated&st=cse> (last visited Aug. 28, 2009).

140. Charlie Savage, *A Primer on the Sotomayor Hearings*, N.Y. TIMES July 12, 2009, available at <http://thecaucus.blogs.nytimes.com/2009/07/12/a-primer-on-the-sotomayor-hearings/?scp=7&sq=Sotomayor%20nominated&st=cse> (last visited August 28, 2009).

141. Martin Waldron, *Supreme Court Choice—George Harrold Carswell*, N.Y. TIMES, Jan. 20, 1970 (noting that Carswell was nominated by President Eisenhower to the District Court in 1958, where he served until he was nominated and confirmed to the U.S. Appeals Court in 1969), available at

experience of any nominee since Benjamin Cardozo in 1932.<sup>142</sup> Confirmed by the Senate in August 2009, Justice Sotomayor presents the first opportunity in a very long time to forge the hard-earned lessons of trial court judging with the opportunity to bring those lessons to bear on appellate judging at both the Circuit and Supreme Court levels.

As she embarks upon the work of the Court, Justice Sotomayor has an even greater opportunity to affect the practice of writing opinions than she does to impact doctrine (which will be more difficult given established voting blocs awaiting her on the Court). From our examination of what laboring in the Southern District of New York taught Learned Hand about opinion writing, we can anticipate that Justice Sotomayor is likely to bring many of the same lessons to the Supreme Court. But her spin on those lessons may be a bit different than Hand's after the Senate Judiciary Committee, reflecting political polarization in the media, used her confirmation hearings to debate — albeit on a terribly simplistic and poorly informed level — the very notion of what it means to be a judge both in 21st century America as well as in the Anglo-American legal tradition as perceived 222 years after the judicial power was created in the Constitution of 1787.

Detailed explorations of legal, judicial, or political philosophy are outside of this article's stated purview. However, Justice Sotomayor's confirmation hearings raised three specific philosophical issues that bear directly on how the cognitive theories of communication will be applied to opinion writing. A judge's view of each of these issues defines the milieu within which the principles, particularly the audience principle, operate. These issues do not bear merely on a judge's jurisprudence or legal philosophy; how they are viewed erects the critical intellectual scaffolding within which cognitive communication occurs. These issues involve:

[1] the dangerous – and fictional – “judges as baseball umpires” metaphor;

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<http://select.nytimes.com/mem/archive/pdf?res=F10E17F83C5D137B93C2AB178AD85F448785F9> (last visited Aug. 28, 2009). It must be noted, however, that Judge Carswell's actions and words as a District Judge are what ultimately torpedoed his nomination. See, e.g., *Senators Are Told That Carswell Was Insulting To Negro Lawyers*, N.Y. TIMES, Feb. 2, 1970, at 15 (“Louis H. Pollock, Dean of the Yale Law School,” testified before the Senate Judiciary Committee in 1970 “that after a study of Judge Carswell's opinions, ‘I am compelled to conclude that this nominee presents the most slender credentials of any man put forward in this century’ for the Supreme Court.”), available at <http://select.nytimes.com/mem/archive/pdf?res=FB0F15F9355D1B7493C1A91789D85F448785F9> (last visited Aug. 28, 2009). After the Senate Judiciary Committee rejected his nomination, Judge Carswell resigned from the bench to campaign for a seat in the Senate “on a platform based largely on his ridicule of liberal senators who had turned down his nomination to the Supreme Court by President Nixon”; he lost by nearly 90,000 out of slightly over 317,000 votes cast in the election. John Nordheimer, *Cramer Beats Ex Judge*, N.Y. TIMES, Sept. 9, 1970, at 36, available at <http://select.nytimes.com/mem/archive/pdf?res=F40612F8345E157B93CBA91782D85F448785F9> (last visited Aug. 28, 2009).

142. Cardozo was elected to the New York State Supreme Court in November 1913, sworn in on January 1, 1914, but in little over a month was detailed as a judge of the Court of Appeals, the New York's highest court, where he served until sworn in as a U.S. Supreme Court Justice in 1932. See *Hornblower Goes On Appeals Bench—Glynn Also Designates Cardozo For That Tribunal And Names Weeks For The Supreme Court*, N.Y. TIMES, Feb. 2, 1914, available at <http://query.nytimes.com/mem/archive-free/pdf?res=9B0DEED81F3BE633A25750C0A9649C946596D6CF> (last visited Aug. 30, 2009).

[2] the ahistorical and erroneous notion that in deciding cases judges do not make “policy” or “law”; and

[3] the bizarre denunciation of “empathy” as a quality of judges.

These are important issues in the fabric that connects the District Court opinions of Learned Hand at the turn of the last century to the opinions being written by the Supreme Court in the period of decline at the turn of the present century. We will examine each of these issues in turn. Then we will coalesce the product of that examination into an attempt to read what the tea leaves, in the form of a representative opinion from the many Justice Sotomayor wrote as a District Judge – suggest is an opportunity for Justice Sotomayor to elevate the cognitive integrity of the Court’s opinions from the sophistic to the transformational.

### **A. Of Umpiring, Legislating, and Empathizing: Three Confirmation Hearing Issues And Their Implications For Justice Sotomayor’s Judicial Opinion Writing**

#### **1. The Dangerous – And Fictitious – “Judges As Baseball Umpires” Metaphor**

Perhaps the most unfortunate metaphor yet invoked to describe the judicial function is the notion of the judge as an umpire calling balls and strikes.<sup>143</sup> Such a simplistic metaphor would be anathema to any of the eminent judges in Anglo-American legal history<sup>144</sup>, be they labeled “liberal,” or “moderate,” or “conserva-

143. See John G. Roberts, Chief Justice of the United States, Text of John Roberts Opening Statement before the Senate Judiciary Committee, (Sept. 12, 2009) (available at [http://www.usatoday.com/news/washington/2005-09-12-roberts-fulltext\\_x.htm](http://www.usatoday.com/news/washington/2005-09-12-roberts-fulltext_x.htm).) The relevant portion of then-Judge Roberts statement about judging as umpiring follows:

Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.

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I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench. And I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability. And I will remember that it’s my job to call balls and strikes and not to pitch or bat.

*Id.*

144. See, e.g., Wilfred Prest, *Blackstone On Judges; Blackstone As Judge*, 11 MURDOCH UNIVERSITY ELECTRONIC JOURNAL OF LAW, NO. 4 (Dec. 2004), available at <http://www.murdoch.edu.au/elaw/indices/issue/v1ln4.html> (last visited Sept. 4, 2009); Edward Mason, *Builders Of Our Law During The Reign Of Queen Victoria (1904)*(each judicial biography within that volume is chock full of detail that makes it clear that the great English common-law judges hardly saw themselves as mere “umpires” ); Emily Kadens, *Justice Blackstone’s Common-Law Orthodoxy*, 103 NORTHWESTERN L. REV. (forthcoming 2009, Issue 4), available at <http://ssrn.com/abstract=1359284>.

tive,”<sup>145</sup> whatever those labels are supposed to mean. Harlan Fiske Stone, a Dean of Columbia University Law School, a Republican, and an appointee of Republican President Calvin Coolidge,<sup>146</sup> would have no truck with such boyish metaphors<sup>147</sup> when he observed that:

[O]ne of the evil features, a very evil one, about all this assumption that judges only find the law and don't make it, often becomes the evil of a lack of candor. By covering up the lawmaking function of judges, we miseducate the people and fail to bring out into the open the real responsibility of judges for what they do.<sup>148</sup>

Yet, it is a contemporary, conservatively-identified judge, Richard Posner of the Seventh Circuit, who delivers the most devastating critique of the Roberts “umpire” metaphor. In *How Judges Think*, Judge Posner takes us, the readers,

145. See Sir Michael Hardie Boys, *The Right Honourable the Lord Cooke of Thorndon*, 39 VICT. U. WELLINGTON L. REV. 9, 13 (2007) (Eulogy given at Lord Cooke of Thorndon's funeral) (“Some have called Robin an activist, but that is a foolish label, indicative of a failure to understand our legal history and the nature of the judicial process. He was in truth liberal, open minded, seeing the law as a living instrument, unafraid to ensure as far as he could that it met the needs of contemporary society; above all, that it achieved fairness.”); Archibald Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 118, 121-123 (1987) (demolishing the typical use of the “liberal”/“conservative” and “activist”/“restrained” judicial labels). As a wise law-student writer has admonished:

Much is expected from the judicial power of the United States. Expected to possess neither force nor will, it must serve as a bulwark for discrete and insular minorities. At the same time, it is expected to give effect to the will of the legislature. The demands on the federal judiciary are far from homogenous, and at times, they are conflicting. A court is expected to do justice yet receives public criticism for engaging in “activism.” Yet, American law finds its roots in a tradition of adjudication that is evolving and flexible: the common law. At the heart of its charge is the obligation\*<sup>1458</sup> to safeguard the will of the legislature, to ensure the protection of the minority, and resolve particular disputes and redress particular injuries.

It is difficult to imagine a philosophy of law that accommodates such a tension.

Yavar Bathaee, *Comment: Incompletely Theorized Agreements: An Unworkable Theory Of Judicial Modesty* 34 FORDHAM URB. L.J. 1457, 1457-1458 (2007) (footnotes omitted).

146. John W. Johnson, *Harlan Fiske Stone*, in *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 425-426 (Melvin I. Urofsky ed. 1994).

147. See Robert Bruce Weber, *The Deciders: Judges v. Umpires*, N.Y. TIMES, July 12, 2009, at WK1, available at [http://www.nytimes.com/2009/07/12/weekinreview/12weber.html?\\_r=1&scp=1&sq=Judges%20v.%20Umpires&t=cse](http://www.nytimes.com/2009/07/12/weekinreview/12weber.html?_r=1&scp=1&sq=Judges%20v.%20Umpires&t=cse). Weber makes the point nicely:

The judge-umpire analogy, in the end, is unfair to both judges and umpires, and in the current context it's worth remembering the 1933 eulogy that F. Scott Fitzgerald delivered for his friend Ring Lardner, whose focus on baseball — “a boy's game, with no more possibilities in it than a boy could master,” Fitzgerald lamented — kept him from fulfilling his promise as a writer.

*Id.* The same might be said of the effect of the umpire metaphor on the fulfillment of promise a judge.

148. Edward Lazarus, *Overall, The Miers Nomination Is Troubling-But It Does Have One Virtue*, FindLaw, Oct. 13, 2005, <http://writ.news.findlaw.com/lazarus/20051013.html>. (quoted in, Theodore A. McKee, *Judges As Umpires*, 35 HOFSTRA L. REV. 1709, 1723 (2007)). See also, MANFRED LACHS, *THE TEACHER IN INTERNATIONAL LAW* 205-209 (2d 3d. 1987) (discussing the transition of international law publicists to international tribunal roles and disputing the notion that such academics leave behind the nuances acquired in their study and scholarship to assume some kind of antiseptic role as a judge).

aside and speaks plainly to us as persons of intelligence when he writes, “[n]either [John Roberts] nor any other knowledgeable person actually believed or believes that the rules that judges in our system apply, particularly appellate judges and most particularly the Justices of the U.S. Supreme Court, are given to them the way rules of baseball are given to umpires.”<sup>149</sup> If judges are umpires, Posner writes, “[w]e must imagine that umpires, in addition to calling balls and strikes, made the rules of baseball and changed them at will.”<sup>150</sup> As Judge Posner elaborates, Chief Justice Roberts:

149. RICHARD A. POSNER, *The Judge As Occasional Legislator* in HOW JUDGES THINK 78 (2008).

150. *Id.* at 78-79. Judge Posner also notes another flaw in the Roberts umpire metaphor:

There is a less obvious mistake in Roberts’s baseball analogy. Until recently, different umpires defined the strike zone differently, so that pitchers had to adjust their tactics to the particular umpire. The analogy is to the way in which different judges interpret the Constitution differently.

. . . As is usually true of “reasoning by analogy,” what is interesting about the comparison between umpires and judges is not the similarities but the *differences*.

*Id.* at 79 (emphasis supplied). Judge Posner highlights those differences by offering “the story of the three umpires asked to explain the epistemology of balls and strikes”:

The first umpire explains that he calls them as they are, the second that he calls them as he sees them, and the third that there are no balls and strikes until he calls them. The first umpire is the legalist. The second umpire is the pragmatic trial judge . . . . The third is the appellate judge deciding cases in the open area. His activity is creation rather than discovery.

*Id.* at 81. The popular press is largely in accord with Judge Posner’s critique. See, e.g., Dahlia Lithwick, *The Sotomayor Test: Will She Limit Obama’s Next Pick?*, NEWSWEEK, Aug. 3, 2009, available at <http://www.newsweek.com/id/208123>; Edward Lazarus, *The Supreme Court as Umpire?: How the Global Warming Decision Illuminates the Role We Ask the Justices to Play*, FINDLAW, April 13, 2007 (“no matter the Chief Justice might say, judicial decision-making is often, inevitably, about policy judgments. Moreover, the decisions themselves are, inevitably, political in consequence”), available at <http://writ.news.findlaw.com/lazarus/20070412.html>; Joshua Green, *Chief Umpire Rove*, THE ATLANTIC, July 13, 2009 (attributing the origin of the phrase to Karl Rove from his consultancy on Alabama Supreme Court election races), available at [http://politics.theatlantic.com/2009/07/chief\\_umpire\\_rove.php](http://politics.theatlantic.com/2009/07/chief_umpire_rove.php). Another national commentator aptly observed that Justice Sotomayor may have gone too far in conceding deference to this unhistorical notion, “by staging what was, in effect, a three-day infomercial for judges as mechanical umpires who simply ‘apply the law’ by ‘calling balls and strikes,’” and in so doing “Sotomayor has proved conclusively that it’s John Roberts’s world now—we all just rent space there.” Dahlia Lithwick, *The Sotomayor Test: Will She Limit Obama’s Next Pick?*, NEWSWEEK, Aug. 3, 2009, available at <http://www.newsweek.com/id/208123>. Another commentator has taken to task both John Roberts and Sonia Sotomayor for seeking confirmation refuge in creating philosophical constructs so bizarrely off-base that the importance of the very position they sought would be imperiled if reality mirrored their confirmation persona:

An eavesdropper from Mars listening in on the confirmation hearings of John Roberts and Sonia Sotomayor might wonder why any attorney of lively intelligence would aspire to serve on the U.S. Supreme Court. Roberts’s umpire calling balls and strikes and Sotomayor’s dispassionate technician doggedly applying law to facts make the process of judicial decision[-]making seem simple and dull. Both know that cases where the law is clear, the facts are unambiguous, and reasonable minds agree on the right result seldom reach the Supreme Court, or, for that matter, any appellate court.

Leslie Carothers, *Closing Statement—Judging And The “Empire Of Unconscious Loyalties*, THE ENVIRONMENTAL FORUM at 60 (Sept./Oct. 2009), available at <http://www.eli.org/pdf/forum/26-5/26-5closingstatement.pdf>. Ruth Marcus has provided an even more amusing way to describe the absurdity of the metaphor:

Winnie the Pooh, or so he tells us, is a Bear of Very Little Brain. As he struggles to think his way out of a predicament, you can see him trying to knock the solution out of his fluff-

[K]nows that when legalist methods of judicial decision-making fall short, judges draw on beliefs and intuitions that may have a political hue . . . [S/]he will draw on these intuitions and believes in the legalistically indeterminate cases because the judicial imperative is to decide cases, with reasonable dispatch . . . . The judge cannot throw up his [or her] hands, or stew indefinitely, just because [s/]he is confronted with a case in which the orthodox materials of judicial decision-making, honestly deployed, will not produce an acceptable result. They may not produce *any* result, as in a case in which two canons of statutory construction are applicable and they point to different results.<sup>151</sup>

Adding to the concerns that Harlan Fiske Stone expressed about the harm to the public's perception of the bench resulting from such caricatures of judging, Richard Posner finds that such false modesty is just as harmful to the judge who appears to wear it on his sleeve:

Roberts may have made a tactical error. His confirmation did not turn on convincing Senators that a Supreme Court Justice is like a baseball umpire. In the spring of 2007, less than two years after his confirmation, he demonstrated by his judicial votes and opinions that he aspires to re-make significant areas of constitutional law. The tension between what he said at his confirmation hearing and what he is doing as a Justice is a blow to Roberts's reputation for candor and a further debasement of the already debased currency of the testimony of nominees at judicial confirmation hearings.<sup>152</sup>

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filled head. By contrast, Chief Justice John G. Roberts and Justice-in-Waiting Samuel Alito are, as Pooh might say, Very Clever Brains indeed. But, listening to their confirmation hearings, they seem to have a Winnie the Pooh theory of judging: a conviction that if they just *think, think, think*, they will come up with the correct result.

Ruth Marcus, *Underneath Their Robes*, WASHINGTON POST, Jan. 17, 2006, available at [http://www.washingtonpost.com/wp-dyn/content/article/2006/01/16/AR2006011600909\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/01/16/AR2006011600909_pf.html) (original emphasis).

151. POSNER, *supra* note 149, at 79 (original emphasis).

152. *Id.* at 81. Professor Timothy Terrell has undertaken a deeper, jurisprudential exploration of this territory, in which he finds an integral relationship between the metaphor chosen to express the judicial function and the very notion of an independent judiciary:

[J]udges, properly understood in their most fundamental political sense, are not simply observers of "balls and strikes." They are instead essential to the existence of balls and strikes in the first place. The key proposition is therefore this: Judges do not exist as a part of modern political life to make the "easy" calls that make the sandlot game a bit more efficient and (perhaps) fun and satisfying; they exist to make the frequent "hard" calls that our circumstances now demand for us to remain a viable civil community. The "players" in this "game" of civil life expect nothing less, for the game itself has been redefined by all of us to include the presence, and authority, of these "official scorers."

Richard Posner is not the only sitting federal circuit judge to find cause for pause in the face of the Roberts umpire metaphor. Judge McKee of the U.S. Third Circuit Court of Appeals cautioned two years before the Sotomayor confirmation hearings that he:

[R]ealize[d], of course, that the confirmation hearings of both Chief Justice Roberts and Associate Justice Alito were largely theater and that the metaphor was offered in that context. However, the metaphor has become accepted as a kind of shorthand for judicial “best practices,” that obscures a complex dynamic that is far more amorphous, elusive and troublesome than its simplistic appeal suggests.<sup>153</sup>

Judge McKee helpfully observes that “[r]ather than indulging the pretense that judges are umpires and that umpires merely ‘call’um as they see’um,’ we should accept the fact that the law is flexible enough and strong enough to accommodate a far more honest approach to adjudication.”<sup>154</sup>

With respect to appellate judges, Richard Posner calls that approach the recognition that “judges are *occasional legislators*.”<sup>155</sup> He emphasizes that judges do not

This observation, I think, gives additional perspective to the concept of “judicial independence” about which we hear from time to time – quite often from the judiciary itself. Judges are indeed not “players” in the drama of real life the way the rest of us are; they are “scorers” who should be able to provide this vital function without being harassed by the players or the fans. The ability of an umpire to end a dispute by throwing a player or manager out of the game is therefore entirely appropriate and easily explained: At some point, to preserve the game itself, interference with the umpire’s function must end, and the umpire is in fact in the best position at that moment to make that determination. By the same token, judges must be able to operate from a vantage of perspective “outside” the fray that produced the dispute that is before them. It is not as if they do not live in our ordinary non-judicial communities – they most certainly do. But those communities should not be able to dictate to a judge – once the issue of a “score” has been brought before him or her – what the judge’s assessment of the situation should be.

Perhaps most daunting of all, however, is the further observation that because judges are essential to the game, they are also essential to the values that constitute and justify the game. An important additional conclusion is therefore unavoidable: Every judicial decision will be relevant in some way to the values that are inherent in civil life, and the only question becomes whether judges acknowledge that fact or attempt to hide from it.

Timothy P. Terrell, *Babe Pinelli’s Moment of Truth: An Essay on the Art of Legal Reasoning and the Angst of Judging*, at 92-94 (unpublished manuscript 2008, on file with author). Professor Terrell’s essay is expected to become part of a forthcoming book that he is preparing for publication.

153. Theodore A. McKee, *Judges As Umpires*, 35 HOFSTRA L. REV. 1709, 1710 (2007); see Neil Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701 (2007) (stating that the Court sustains its institutional legitimacy over the long run, not by pursuing the impossible task of simply applying ‘the rules,’ but by articulating a vision of social order that resonates with fundamental public values.).

154. *Id.* at 1719.

155. POSNER, *supra* note 149, at 81. Judge Posner notes that “[i]n their legislative capacity they labor under constraints that do not bind official legislators—rules of standing, for example, and limitations on whom the judges may consult and more generally on what methods of inquiry they may employ.” *Id.* On the other hand, Judge Posner observes, “judges also enjoy leeways that official legislators do not” — such as lower “[t]ransaction costs” (because, as he notes, “there are many fewer judges on a panel . . . than there are members of a legislative body”), that “constituent pressures are usually nonexistent,” and greater liberation than legislators because of “the

consciously divide their deliberative process along a divide of “judging” versus “legislating.” Rather, what occurs is, as Judge McKee’s observations suggest, a phenomenon in which “[m]ost judges blend the two inquiries, the legalist and the legislative, rather than addressing them in sequence. Their response to a case is generated by legal doctrine, institutional constraints, policy preferences, strategic considerations, and the equities of the case, all mixed together and all mediated by temperament, experience, ambition, and other personal factors.”<sup>156</sup>

Of course, while both Judge Posner and Judge McKee provide valuable, contemporary discussions of the law-making functions of judges, their thinking owes a great debt to the candor and labors of Benjamin N. Cardozo, whose classic and most insightful statements on the nature of judging come from his Storrs Lectures at Yale in 1921, later published as a book that he called *The Nature of the Judicial Process*.<sup>157</sup>

In *The Nature of the Judicial Process*, Cardozo made critical points about judging with a clarity and intelligence that makes the current debate appear to be idle. Thus, Cardozo would have been contemptuous, to say the least, of the judges-as-balls-and-strikes-umpires metaphor.<sup>158</sup> As he pointedly observed in Lecture I, the “inherited instincts, traditional beliefs, acquired opinions” of those who become judges produce “an outlook on life, a conception of social needs . . . which, when reasons are nicely balanced, must determine where choice shall fall.”<sup>159</sup> Betraying his own outlook of decisively artistic and of a literary temperament rather than a

fact that they cannot sit in cases in which they have a financial or personal stake enlarges their decisional freedom, just as not being answerable to an electorate does.” *Id.* at 81-82. Judge Posner further elaborates these ideas in the balance of his chapter on “The Judge As Occasional Legislator.” *See id.* at 83-92.

156. *Id.* at 84-85.

157. If the members of the Senate Judiciary Committee have ever encountered this book, nothing said in Justice Sotomayor’s confirmation hearings showed either the temperance or wisdom to betray any familiarity with it whatsoever. Every Senate Judiciary member ought to get a copy. It should be required reading—whether as an inaugural encounter or a refresher—for every member on the Senate Judiciary Committee and their staff before every judicial confirmation hearing. From appearances, they either haven’t read it; or have forgotten they read it; or, for purposes of political posturing, are simply ignoring that they have read it.

158. The only reference to baseball Cardozo made in a published judicial opinion was by way of explaining a precedent in a premises liability case:

We may say more simply, and perhaps more wisely, rejecting the fiction of invitation, that the nature of the use itself creates the duty, and that an owner is just as much bound to repair a structure that endangers travelers on a walk in an amusement park as he is to repair a structure that endangers travelers on a highway. Whatever the underlying principle that explains the rule, the rule itself is settled. The owner of such a park must use all reasonable care to make its structures safe before he leases it for his profit. In *Lusk v. Peck*, (*supra*), the defendant had leased a grand stand and bleachers *to be used for baseball games*. The lease was for a term of years. The plan of the structure was proper. Some of the timbers, however, had decayed before the lease was made. Because inspection would have disclosed the defect, the landlord was held liable.

*Junkermann v. Tilyou Realty Co.*, 213 N.Y. 404, 408-409, 108 N.E. 190, 191-192 (N.Y. 1915)(emphasis supplied). In fact, on the few occasions when Cardozo mentioned “sport” in his opinions, it was used in a way to refer to juvenile amusement. *See* . *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 166 N.E. 173 (N.Y. 1929); *Hynes v. N.Y. Cent. R.R. Co.*, 231 N.Y. 229, 131 N.E. 898 (N.Y. 1921); *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 128 N.E. 711 (N.Y. 1920).

159. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS, Lecture I: Introduction—The Method of Philosophy* 11 (1921).

follower of professional or collegiate sports – Cardozo invoked a painting metaphor to expose the same kind of mechanistic view of both judge and judge’s audience that underlies the umpire metaphor: “Their notion of their duty is to match the colors of the case at hand against the colors of the many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule.”<sup>160</sup> “But of course,” wrote Cardozo in dismissing such notions out of hand, “no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. . . . *It is when the colors do not match, . . . when there is no decisive precedent, that the serious business of the judge begins.*”<sup>161</sup>

If the Senate Judiciary Committee’s complaints of “activist judges” are sincere, then Cardozo—who, along with Hand, considered among America’s greatest common-law judge, and who in 1932 was confirmed by a unanimous voice-vote in the Senate to the U.S. Supreme Court, and even though nominated by a Republican President—should have been rejected as a dangerous, activist, and radical nominee. What an odd fate that would have been for a founding member of the American Law Institute.<sup>162</sup> In such a bizarre anti-intellectual climate whose logic would foster such an absurd result, the Sotomayor confirmation hearings became a spectacle of intellectual paucity on the part of her interlocutors – on both sides of the political aisle.<sup>163</sup>

One must hope that *Justice* Sotomayor—unlike *Nominee* Sotomayor—will be willing to renounce the fallacy of the cramped and intellectually vacuous “balls-and-strikes” perspective of the “umpire analogy,” and instead embrace that aspect of judging — unquestionable integrity – that has characterized her seventeen years of federal judicial service. It is the same unquestionable integrity that Justice Robert H. Jackson eloquently and accurately described in a 1951 tribute to Learned Hand and his cousin, Judge Augustus Hand:

These men found their highest satisfaction in judicial work. It fulfilled their every ambition. They put all they had into it—they have not shirked even its drudgery. They wrote their opinions with no appeal for applause and sought only to merit the ultimate approval of their profession. They have not been looking over their shoul-

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160. *Id.* at 19.

161. *Id.* at 20.

162. *See, e.g.*, The American Law Institute Archives, <http://www.law.upenn.edu/bll/archives/ali/> (describing the history of the American Law Institute).

163. *See* Sherilyn A. Ifill, Editorial,— *A Failed Conversation GOP Assertions To The Contrary, The Sotomayor Hearings Shed Little Light On Either Race Or Justice*, BALTIMORE SUN, July 23, 2009, at 17A, available at 2009 WLNR 14255261. As Professor Ifill aptly sums the hearings up:

The atmospherics alone were astonishing. A panel of white, mostly Southern men (on the still all-white Judiciary Committee), using tones that were alternately scolding and condescending, sought to school the first Latina Supreme Court nominee on the dangers of racism and the importance of equal opportunity.

*Id.* Sadly, too, the Sotomayor confirmation hearings suggest yet another audience for judicial opinion writing, another constituency in the mix: the U.S. Senate’s Judiciary Committee.

ders to see whom they please. *They have represented an independent and intellectually honest judiciary at its best. And the test of an independent judiciary is a simple one—the one you would apply in choosing an umpire for a baseball game.* What do you ask of him? You do not ask that he shall never make a mistake or always agree with you, or always support the home team. *You want an umpire who calls them as he sees them. And that is what the profession has admired in the Hands.*<sup>164</sup>

## 2. The Heretical Notion That Judges Do Not Make Law In A Common-Law Legal System—Cardozo Redux

During the Roberts confirmation hearings, Dean Chemerinsky felt compelled to write an editorial in the popular press responding to another distortion of the historic Anglo-American judicial role:

Misleading and silly slogans about what judges do are dominating the debate about Supreme Court nominee John Roberts.

[Supporters] repeat, as a mantra, that Roberts is a desirable choice because he won't "legislate from the bench" and will merely "apply the law, not make it."

But every lawyer knows that judges make law — it's their job. In fact, law students learn in the first semester that almost all tort law (governing accidental injuries), contract law and property law are

164. Robert H. Jackson, *Why Learned And Augustus Hand Became Great* (Address by Associate Justice Robert H. Jackson of the United States Supreme Court at the Association's Annual Bar Dinner at the Hotel Waldorf-Astoria on December 13, 1951), available at <http://www.roberthjackson.org/documents/121351/>. Accord Marvin E. Frankel, *The Adversary Judge*, 54 TEXAS L. REV. 465, 467-469 (1976) (employing the "umpire" metaphor as a proxy for "impartiality and detachment"). As Judge Frankel, who served on the U.S. District Court of Hand before him and Sotomayor after him, elaborated:

What should go without saying is that the essence of the judicial role, active or passive, is impartiality and detachment, both felt and exhibited. In the quest for truth through the clash of contradictions, which is, of course, the only reason in theory for having trials, the judge does not care where the chips may fall. Concerned only that the right is done, the judge "should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others" as [s/] he presides over the contentious strivings toward that end.

*Id.* Perhaps the real "umpire" metaphor here is that there is, as Benjamin Wittes has recently written, no one playing role of umpire in the sense of functioning as "a trusted source of information about [judicial] nominees and the controversies surrounding them." Benjamin Wittes, *Judicial Nominations In An Umpireless Game: Trusted Sources, A Complaint, And A Proposal*, 93 MINN. L. REV. 1487, 1488, 1490 (2009) ("My purpose in this Article is both to describe the consequences of our umpireless confirmation game and to suggest the establishment of an institutional umpire for it. That is, I mean to propose the deliberate construction of an intellectual counterweight to the ideological interest groups that now dominate the confirmation process, the creation of a trusted source of information about judicial confirmations.").

made by judges. Legislatures did not create these rules; judges did, and they continue to do so when they revise the rules over time.<sup>165</sup>

We find the seed from which such thoughts grew not in the era of David Bazelon and the D.C. Circuit of the 1960s<sup>166</sup>, nor from the days of the Warren Court. “I take judge-made law as one of the existing realities of life.” So said Cardozo in *The Nature of the Judicial Process*.<sup>167</sup> Indeed, he candidly titled the third of his seven Storrs Lectures at Yale Law School in 1921, “The Method of Sociology—The Judge as Legislator.”<sup>168</sup> Having discussed three examples of areas of the law that were, at the time, in the process of development by judicial appreciation of sociological perspectives and application of those perspectives in judicial rule-making for example, the extent of legislative “power to control and regulate a business affected with ‘a public use’”; “modern decisions which have liberalized the common law rule condemning contracts in restraint of trade”; and “a like development in the attitude of the courts toward the activities of labor unions,”<sup>169</sup> – Cardozo expressed the operation of the common-law, judicial law-making process in terms of a horticultural metaphor:

I have chosen these branches of the law merely as conspicuous illustrations of the application by the courts of the method of sociology. But the truth is that there is no branch where the method is not fruitful. Even when it does not seem to dominate, it is always in reserve. It is the arbiter between other methods, determining in the last analysis the choice of each, weighing their competing claims, setting bounds to their pretensions, balancing and moderating and harmonizing them all. *Few rules in our time are so well es-*

165. Erwin Chemerinsky and Catherine Fisk, Editorial/Opinion, *Judges Do Make Law — It’s Their Job*, USA Today, Aug. 23, 2005, available at [http://www.usatoday.com/news/opinion/editorials/2005-08-23-forum-judges\\_x.htm](http://www.usatoday.com/news/opinion/editorials/2005-08-23-forum-judges_x.htm).

166. See, e.g., Marilyn Berger, *David Bazelon Dies At 83; Jurist Had Wide Influence*, N.Y. Times, Feb. 21, 1993, at Section 1, p. 38 (“Rather than follow precedent set in a simpler time, he questioned the status quo and sought to apply new findings in the social sciences and psychiatry to issues the court faced. . . . Judge Bazelon . . . believed that the judiciary should reach beyond the bench and speak out on social issues” and “was assailed by conservatives as being soft on crime and by some legal scholars for bringing the judiciary into the regulatory process.”)

167. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS, Lecture I: Introduction—The Method of Philosophy*, 10 (1921); see, e.g., *Republican Party of Minnesota v. White*, 536 U.S. 765 & n.12 (2002) Writing for the Court, Justice Scalia echoed Cardozo in words that are not likely to be spoken by any nominee before the Senate Judiciary Committee anytime soon:

Th[e]complete separation of the judiciary from the enterprise of “representative government” might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess the power to “make” common law, but they have the immense power to shape the States’ constitutions as well.

*Id.*

168. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS, Lecture III: The Method Of Sociology The Judge As Legislator* 97 (1921).

169. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS, Lecture II: The Methods of History, Tradition, & Sociology* 85-86, 93-94 (1921).

*tablished that they may not be called upon any day to justify their existence as means adapted to an end. If they do not function, they are diseased. If they are diseased, they must not propagate their kind. Sometimes they are cut out and extirpated altogether. Sometimes they are left with the shadow of continued life, but sterilized, truncated, impotent for harm.*<sup>170</sup>

Thus, “[c]odes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled.”<sup>171</sup> Such language, however, should not be misread to import unrestrained judicial law-making. Cardozo squarely speaks to the judge in law-making capacity as he admonishes that “[t]here should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants.”<sup>172</sup> The law-making judge must, as Cardozo wrote:

remembe[r] that the scope of law-making power in the judiciary is circumscribed . . . . [E]ven when he is free, he is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to “the primordial necessity of order in the social life.”<sup>173</sup>

Cardozo had no hesitancy in drawing a direct, and close, parallel between the law-making function of judges in their common-law sphere, and the law-making function of legislators in the age of statutes:

We must keep within those interstitial limits which precedent and custom and the long and silent and almost indefinable practice of other judges through the centuries of the common law have set to judge-made innovations. But within the limits thus set, within the range over which choice moves, *the final principle of selection for judges, as for legislators, is one of fitness to an end.*

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. . . [L]aw is also a conscious or purposed growth, for the expression of customary morality will be false unless the mind of the

170. CARDOZO, *supra* note 168, at 97-98 (emphasis supplied).

171. CARDOZO, *supra* note 159, at 14.

172. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS, Lecture IV: Adherence To Precedent—The Subconscious Element In The Judicial Process—Conclusion 151* (1921).

173. CARDOZO, *supra* note 168, at 139-40.

judge is directed to the attainment of the moral end and its embodiment in legal forms. Nothing less than conscious effort will be adequate if the end in view is to prevail. *The standards or patterns of utility and morals will be found by the judge in the life of the community. They will be found in the same way by the legislator. That does not mean, however, that the work of the one any more than that of the other is a replica of nature's forms.*<sup>174</sup>

As Cardozo's contemporary, Hand clearly exhibited the ability to take on effortlessly the role of restrained law-maker. Hand's decision in *Stohr v. Wallace*,<sup>175</sup> for example, a Trading-With-The-Enemy Act case in the wake of U.S. entry into World War I, exhibits this quality, as Hand had to chart a course between Congress's intentions, the language of the statute, international law, and sound policy:

It is quite true that the right of capture on land depends upon the action of Congress, and is not a part of our customary law arising from a state of war. Yet the incidents of sea capture might, in the absence of contrary legislative expression, be perhaps looked to as a fair analogy. The reason of the rule which makes the transitu a test of the validity of a transfer, *imminente bello*, was considered by the Privy Council in *The Baltica*, *supra*, and it was held to be the difficulty involved in detecting reserved enemy interests. Therefore a ship was restored when delivery was made to the transferee at an intermediate port. The theory was \*841 repudiated that while at sea the belligerent's rights are already inchoate, and that the ship has come, as it were, already into the jurisdiction of the captor.

In spite of *The Baltica*, it might still be that sales of goods within enemy territory, *imminente bello*, and to avoid capture, ought to be regarded as in fraud of belligerent rights, if the statute said nothing. A serious argument might be made in favor of such a result, once a policy of land capture be inaugurated; but under this act it appears to me that section 7b effectively closes any such discussion. A part of the first paragraph of that section reads as follows:

'No person shall by virtue of any assignment \* \* \* to him of any \* \* \* chose in action by \* \* \* an enemy \* \* \* have any right or remedy against the \* \* \* obligor \* \* \* unless said assignment \* \* \* was made prior to the beginning of the war.'

174. *Id.* at 103, 105 (emphasis supplied)(footnotes omitted).

175. 269 F. 827, 841 (S.D.N.Y. 1920) (suit by shareholders in multi-national corporation against the Alien Property Custodian seeking declaratory and injunctive relief to reclaim their interest in German-held stock shares that had been seized under color of authorization by the Trading with the Enemy Act of 1917).

It might indeed be open to a good deal of question whether this included an assignment of equitable interests in shares of stock, though shares are analogous to choses in action, and a fortiori equitable interests in shares. *But I think that the purpose of the statute is pretty clearly indicated, even if its letter does not cover this precise case.* It can scarcely be supposed that an exception would be made in favor of ante bellum transfers of choses in action which did not apply to property so nearly akin as this, or indeed to all property, and it is clear that absolute transfers of choses in action before April 6, 1917, would be valid. Apparently the United States meant not to inquire into such transfers as in fraud of its rights. There is no reason to extend the application of so penal a statute beyond its fair import; therefore the capture must stand upon the ground that the contract conveyed nothing to Stohr & Sons, Incorporated. Upon that ground it finds sufficient support.<sup>176</sup>

Hand wrote hundreds of district court decisions in which the court was called upon to establish the rule of law, from the relevant available sources, needed to decide the claims in the case. As he once wrote to Justice Brandeis, “[i]t is of course true that any kind of judicial legislation is objectionable on the score of the limited interests which a Court can represent, yet there are wrongs which in fact legislatures cannot be brought to take an interest in, at least not until the Courts have acted.”<sup>177</sup>

### 3. Empathy As A Corollary Of The Audience Principle In Action

It should chill good people to the bone when one hears judges criticized for having the quality of empathy.<sup>178</sup> It should make us recoil to hear denunciation of a chief executive, or judicial commission, who considers the capacity for empathy as a judicial qualification.<sup>179</sup> For those, however, who do embrace such harsh rhetoric,

176. *Stohr*, 269 F. at 841.

177. Letter from Learned B. Hand to Louis D. Brandeis, Jan. 22, 1919, available at [http://en.wikiquote.org/wiki/Learned\\_Hand](http://en.wikiquote.org/wiki/Learned_Hand).

178. Charlie Savage, *A Judge's View Of Judging Is On The Record*, N.Y. Times, May 15, 2009, at A21, available at <http://www.nytimes.com/2009/05/15/us/15judge.html?scp=6&sq=obama%20empathy%20judges&st=cse>.

179. See, e.g., Slate.com, Dahlia Lithwick, *Once More, Without Feeling: The GOP's Misguided And Confused Campaign Against Judicial Empathy*, <http://www.slate.com/id/2218103/>, (last visited SLATE. Nov. 6, 2009) (discussing criticism of President Barack Obama's listing of empathy as one of the qualities he seeks in judicial nominees). President Obama has described his view of empathy in the following terms: “It is at the heart of my moral code, and it is how I understand the Golden Rule — not simply as a call to sympathy or charity, but as something more demanding, a call to stand in somebody else's shoes and see through their eyes.” Sheryl Gay Stolberg, Political Memo: *Buzzwords Shape The Debate Over Confirmation*, N.Y. TIMES, May 29, 2009, at A15 (quoting Barack Obama, *The Audacity of Hope* (2006)), available at <http://www.nytimes.com/2009/05/29/us/politics/29memo.html>. For a psychological view of empathy and the law, see Richard Warner, *Empathy and Compassion*, 9 MINN. J.L. SCI. & TECH. 813, 824 (2008) (“we often fail to empathize, which can lead to intolerance”); See also, Tibor Varady, *Harold Berman--An Empathy For Difference That Made All The Difference*, 57 EMORY L.J. 1455 (2008). For a fascinating discussion of empathy, ritual, and

a slipperiest of slopes is presented: Where would we hope to end up with such a qualification standard?<sup>180</sup>

That the quality of empathy *is* a most desirable characteristic of a judge is a notion at least as old as Solomon and Sheba.<sup>181</sup> A judge who cannot empathize is a poor judge of character, motivation, and psychology; as Professor Linder has observed, “[e]mpathy, unlike intuition, is an ‘act of great sophistication,’ necessitating imagination of the beginning, middle, and possible end of another human being.”<sup>182</sup>

In flushing out the true mother in a custody contest between two women, King Solomon demonstrated a capacity for empathy when he startlingly proposed that the child should be vivisected.<sup>183</sup> At first, this assertion may seem preposterous given the obvious savage cruelty of the royal decree if it had actually been executed—but the statement was the sophisticated product of empathy, delivered in the form of what we commonly call “reverse psychology.” As Solomon correctly understood, the birth mother would rather give up possession of the child than to see him slaughtered. He also knew that the other woman, a maternal pretender, was simply trying to escape a state of semi-servitude for childless widows, and cared naught for sacrificing the child to gain the freedom of the maternal status. Thus, over two thousand years later, we marvel at the wisdom of Solomon. But that wisdom came not from cleverness, or detachment, or logic, or playing the umpire; it came straight from the ability to empathize – King Solomon was able to

the legal profession within the context of a celebrated law-based novel, *see generally*, Note, *Being Atticus Finch: The Professional Role Of Empathy In To Kill A Mockingbird*, 117 HARV. L. REV. 1682 (2004).

180. We have seen that destination in the fulfillment of the “scientific” method of the law in Germany 1933-1945. *See generally* INGO MULLER, *HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH* (1991); Rabbi Yitzchok Breitowitz, *Book Review of Hitler’s Justice*, available at <http://www.jlaw.com/Commentary/book.html>. That period of German legal history is epitomized by Roland Freisler, the infamous judge who served as President of the Volksgerichtshof (“People’s Court”. See the surreal portrait of Freisler on the bench at [http://germanhistorydocs.ghi-dc.org/images/highres\\_30016345%20copy.jpg](http://germanhistorydocs.ghi-dc.org/images/highres_30016345%20copy.jpg). No one would be able to detect even the scintilla of empathy in his visage. <http://decker.extra.hu/wp-content/2007/10/f3.>); Freisler, preserved forever on film by the Nazi’s obsessive documentation of their crimes see <http://www.youtube.com/watch?v=aNi5256dhvM>; <http://www.youtube.com/watch?v=Q1pMk73UCYY&NR=1>. Freisler was apotheosis of the unempathetic judge. *See The People’s Court* (1934-1945), JEWISH VIRTUAL LIBRARY, available at <http://www.jewishvirtuallibrary.org/jsources/Holocaust/peoplesct.html>. Yet, it could be said for Freisler that he, indeed, applied “the law”—without once ever questioning whether “the law” he applied was in fact lawlessness institutionalized. *See Breitowitz, supra*. The phenomenon is not entirely unknown in America. *See generally* ROBERT M. COVER, *JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS* (1975); Jeffrey A. Van Detta, *Requiem For A Heavyweight: Costa As Countermonument To McDonnell Douglas — A Countertermemory Reply To Instrumentalism*, 67 ALB. L. REV. 965 (2004) (discussing choices confronting anti-slavery Justice Joseph Story in ruling on the constitutionality of the Fugitive Slave Act).

181. *See* 1 Kings 3:16-27; *see also*, 1 Kings 10:1-13.

182. Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 891 (1996) (footnotes omitted).

183. An exegesis of Jewish law concerning the widowed and childless woman makes it clearer why King Solomon would have proposed a solution that to the modern ear sounds utterly absurd, and contrary to his reputation for wisdom. In short, the childless woman was seeking to escape the childless widow’s obligation of *Yibbum* -- having to marry her brother-in-law or having to persuade him to emancipate her. Provided she had given birth to her late husband’s child, be the child now living or dead, she escaped that state of servitude to her brother-in-law, who “may not be locatable, compliant or appealing.” She was interested, in other words, in preserving her socio-economic status, rather than being dull-witted. *See* Baruch C. Cohen, *The Brilliant Wisdom of King Solomon*, JEWISH LAW (1998), available at <http://www.jlaw.com/Commentary/solomon.html>.

place himself in the shoes of both women, and found the correct solution to what at first seemed an intractable swearing contest.<sup>184</sup>

Solomons are sought today. Despite the tenor of recent political debate, it is well-documented that the general public desires empathy as a quality of any lawyer—practitioner or judge—in the legal system with whom they come into contact.<sup>185</sup> Thus, the Audience Principle cannot be effectively applied to judicial opinion writing unless the quality of empathy is taken into account in determining what a very predominant segment of the audience expects and demands.

Our subject, Learned Hand, struggled with finding the right balance of empathy with other factors—but he nonetheless recognized the value of that struggle and strove to realize its beneficial potential for judicial decision-making.<sup>186</sup> Indeed, Hand has not been alone in that search; as it has been said of another federal judge in one of the few examinations in the law-review literature of empathy as a judicial quality:

Deciding any given case likely requires a judge to rely on a combination of different abilities and knowledge including a firm understanding of rules of law, statutes, and precedent; an appreciation for legal theory and policy; and an incorporation of common sense and judgment informed by an empathic understanding of context. . . . [E]mpathy [may therefore be understood] as an integrated component of the decision making process that may enhance, but does not undermine, other vital judicial considerations.<sup>187</sup>

184. For a modern analog in the tradition of King Solomon, see the rare and hard-to-find IRVING YOUNGER, *IMAGINARY JUDICIAL OPINIONS: A CREATIVE VIEW FROM THE BENCH* (1989). Professor Younger wielded the wisdom of Solomon in fictional cases such as *In the Matter of the Application of Redan*, *id.* at 67-70 (described as “an application for an injunction to prevent the end of the world,” offering a Malthusian analysis circa 1822 predicting a dire future for New York City due to transportation pollution – from horses –and conditionally dismissing the petition that sought the court to enjoin “further enlargement of the population, human or equine” on the condition that “within three years hereof, there has . . . been bred and made available to the public a ‘clean’ horse”); *In the Matter of the Application of a Number of Fetuses*, *id.* at 25 (a decision of Solomonic logic upholding a challenge to a “limited abortion law” on the grounds that it “unlawfully distinguishes between permissible and impermissible abortions”).

185. See, e.g., Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the “Heart” of Lawyering*, 87 NEB. L. REV. 1, 12-15 (2008); see also Michael J. Zimmer, *Systemic Empathy*, 34 COLUM. HUM. RTS. L. REV. 575 (2003). (proposing “that judges ought to adopt an approach to victims of discrimination rooted in . . . ‘systemic empathy’” and “explor[ing] how the existence of discrimination can be used to educate judges in the hopes that they will develop this sort of empathy”).

186. See MARKUS DIRK DUBBER, *THE SENSE OF JUSTICE: EMPATHY IN LAW AND PUNISHMENT* 40-41 (2006)(discussing Hand’s struggle with applying the concepts of “crime of moral turpitude,” a standard for ordering deportation of an alien, and “good moral character,” a requirement for naturalization of an alien).

187. Catherine Gage O’Grady, *Empathy and Perspective in Judging: The Honorable William C. Canby, Jr.*, 33 ARIZ. ST. L. J. 4, 7 (2001). Professor O’Grady’s observations about the difference between desirable judicial empathy as a quality of judging versus undesirable favoritism are worth recounting here:

In the judicial process, the conscious attempt to employ empathy-to understand a case by imagining the perspectives and situations of others-requires a judge to consider thoughtfully the unique context that surrounds a dispute and to recognize the individual perspective, or “life story,” that each litigant brings to the court. The notion of empathy in judging is intertwined with a widespread “call to context” in judicial decisionmaking. Judges are urged

It is not unprecedented for Supreme Court Justices who are very open and candid about the work of the court, to reveal, at least in intimate circles, how a case made them feel and how they tried to understand the emotions of the parties, particularly those who had not prevailed in the high court. In 1831, for example, the Supreme Court turned back the Cherokee Nation's effort to use the federal courts to contest Georgia's encroachment on their native sovereignty, an encroachment that ultimately led to their complete disenfranchisement and their expulsion from the State.<sup>188</sup> In a divided court, Chief Justice Marshall ruled that the Court had jurisdiction only over disputes between a sovereign state (Georgia) and a sovereign nation, not a sovereign state and an association of people with cultural and familial ties within that nation, which is how he characterized the Indian Nations. Justice Joseph Story, however, joined Justice Thompson's comprehensive dissent from that ruling, and would have found federal subject matter jurisdiction.<sup>189</sup> The case deeply affected Justice Story. Story wrote to his wife, at the beginning of the second half of the term of court (January 1832), that:

At Philadelphia I was introduced to two of the Chiefs of the Cherokee nation so sadly dealt with by the State of Georgia. I never in my whole life was more affected by the consideration that they and all their race are destined to destruction. And I feel, as an American, disgraced by our gross violation of the public faith towards

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to consider context, or individual life stories, as a fundamental part of deciding a case. It is suggested that a focused concentration on legal rules and legal theory, which are typically far removed from individual experience, takes a judge away from the human concerns that are actually at issue in the case. The "call to context" seeks to "bring law down to life, to the people, 'to the ground.'"

Although empathy is sometimes used interchangeably with compassion, sympathy, and pity, empathy as a component of judicial decisionmaking does not mean experiencing sympathy or pity for another and allowing that sympathy to shape an outcome. Empathy in judging is not predictive of outcome—it is part of a process, but it does not carry the day. When a judge proceeds to apply the law and judicially assess a case that is empathically understood, the fact that the judge has achieved empathic understandings may or may not affect the eventual outcome of the case. With respect to judicial decisionmaking, empathy is an important part of the process, not because it may have an impact on the result, but because the incorporation of empathy in judicial decisionmaking will provide a judge with new understandings and enhanced knowledge of context with which to assess a case. Moreover, as illustrated in the Canby opinions analyzed below, empathic understandings can usefully integrate with legal analysis in ways that illuminate the intent of a statute or law. Indeed, some concepts imbedded in law can only be understood from an empathic perspective; thus, it follows that judges interpreting laws that incorporate such concepts ought to be employing empathy in the judicial decisionmaking process.

*Id.* at 9-11 (footnotes omitted).

188. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

189. *Id.* at 80 (Thomson, J., dissenting, and noting "I am authorised by my brother Story to say that he concurs with me in this opinion.").

them. I fear, and greatly fear, that in the course of Providence there will be dealt to us a heavy retributive justice.<sup>190</sup>

Story, who died in 1845, did not live to see truth come of his fearsome prophecy.

Like Story, Justice Sotomayor was to encounter a previous litigant in the wake of a decision. However, the retributive aspect of this encounter was immediate and political, not predictive and dispensational. A litigant confronted Justice Sotomayor from a case in which, unlike Story, she did not dissent, but rather, added her vote to rule against the litigant. And unlike the exiled Cherokee Nation, who left Story's East-Coast antebellum world along a "trail of tears," the litigant who returned to haunt Justice Sotomayor was mustered by those most opposed to her advancement to argue that her empathy was selectively effectuated and that this litigant, unlike the Cherokee Nation for Story, had not received the benefit of judicial empathy. In an ironic twist, Justice Sotomayor's confirmation opponents constructed a seemingly intractable conundrum as their assessment of the nominee—criticizing her for being empathetic (and for being the nominee of a President who valued empathy) while at the same time decrying her supposed lack of empathy for this particular litigant. Only "double-think" worthy of Orwell could reconcile the incongruity in these inconsistent positions.

To complicate matters even more, the criticism of empathy drove Justice Sotomayor to seek the same kind of deflecting shelter that John Roberts took refuge in during his confirmation hearings with the simplistic "umpire" metaphor. Put on the defensive by a hostile press and hostile Judiciary Committee members, Justice Sotomayor appeared constrained to distance herself from empathy as a quality of judges.<sup>191</sup> This is unfortunate.

The role of empathy has been distorted so far beyond its meaning and its tradition that it is time for a voice that commands the attention of politicians and of the people to set its role aright.<sup>192</sup> In bringing a clearer acknowledgement of the Audience Principle to the Supreme Court's opinions, Justice Sotomayor has an opportunity to rehabilitate and reinstall empathy in the pantheon of values on which the tradition of American judicial opinion-writing is based.

Her bona fides for doing so were, in fact, enhanced as a result of her confirmation process, and the odd roles that the topic of empathy played in it. The only criticism that could be—and was—leveled at her actual judicial record involved the

190. 2 LIFE AND LETTERS OF JOSEPH STORY 49 (WILLIAM WETMORE STORY, EDITOR 1851)(letter of Joseph Story to Mrs. Joseph Story, January 13, 1832); see JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 299 & n. 115 (1971).

191. Sheryl Gay Stolberg, *Political Memo: Buzzwords Shape the Debate Over Confirmation*, N.Y. TIMES, May 29, 2009, at A15, available at <http://www.nytimes.com/2009/05/29/us/politics/29memo.html>.

192. See, e.g., Editorial Advisory Board, *Commentary: The Empathy Of Judges*, THE DAILY REC. (Balt., Md.), July 16, 2009, available at <http://mddailyrecord.com/2009/07/16/editorial-advisory-board-the-empathy-of-judges/> (distinguishing among empathy, sympathy, and judicial activism; observing that "there is no necessary correlation between having empathy for a litigant and employing empathy to achieve a predetermined policy objective"; and concluding that "the judicial standard must be scrupulous impartiality, informed by empathy").

Second Circuit's opinion in *Ricci v. DeStefano*,<sup>193</sup> known to most as “the New Haven firefighters’ case.” *Ricci* has become paradigmatic of the perils in short-shrifting the Audience Principle, particularly by choosing a manner and means of communicating a ruling that is perceived by the Audience — rightly or wrongly, fairly or unfairly — to denigrate, rather than promote, empathy. The *Ricci* case is now perhaps better known than any other contemporary federal court decision among the general public (except, of course, for *Roe v. Wade*) — and the aspect of the case that is most well-known is not so much the divisive legal issue it presented on whether promotions in a public fire department could be deferred for those who passed a qualifying examination when the examination results showed a statistically significant disparate impact on non-white examinees. What is most well known is the way in which the Second Circuit chose to issue its affirmation of the U.S. District Court that had found the firefighter's claims legally insufficient.<sup>194</sup> The Second Circuit elected to dispose of the case by an unpublished summary order and considerations of the way such a disposition would be received by the parties, the public, the press, and the politicians apparently eluded or were downplayed in the panel's deliberations.<sup>195</sup> It was Justice Sotomayor's lot to have been a member of that very appellate panel.

The panel's miscalculation of what the Audience Principle required of them in *Ricci* might have gone unnoticed outside of the parties' circle, had it not been for the further levels of scrutiny to which the slender opinion was subjected.

First, there was a petition for rehearing in banc, and a request by Circuit Judges for a poll of the Circuit to determine whether rehearing would be granted.<sup>196</sup> At that point, the panel thought it better to convert the summary order into a published per curiam opinion without enhancing or adding anything to the text itself.<sup>197</sup> The divisive issue ended up dividing the Circuit quite closely – seven judges to six, in fact, voting by the slenderest of margins to allow the slender summary order (now dressed in per curiam raiments) to stand without a full-Circuit rehearing. But even more than the merits of the case *per se*, it was the panel's choice to employ summary disposition that provoked the strongest reaction from the judges who favored in banc rehearing.

193. *Ricci v. DeStefano* 530 F.3d 87 (2d Cir. 2008) (per curiam), *reh'g in banc denied*, 530 F.3d 88 (2d Cir. 2008), *cert. granted*, 129 S. Ct. 894 (2009), *rev'd*, 129 S. Ct. 2658 (2009).

194. *Ricci v. DeStefano*, 554 F. Supp. 2d 142 (D. Conn. 2006).

195. *Ricci*, 530 F.3d at 87. Here is the entirety of the summary order:

We affirm, substantially for the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below. In this case, the Civil Service Board found itself in the unfortunate position of having no good alternatives. We are not unsympathetic to the plaintiffs' expression of frustration. Mr. Ricci, for example, who is dyslexic, made intensive efforts that appear to have resulted in his scoring highly on one of the exams, only to have it invalidated. But it simply does not follow that he has a viable Title VII claim. To the contrary, because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected.

196. *Id.* at 88 (order and opinions on petition for rehearing in banc).

197. *Id.* at 87.

The opinion, filed by Circuit Judge Jose Cabranes, dissenting from the seven to six denial of in banc rehearing, has garnered the most attention and it epitomizes how badly a miscalculation under the Audience Principle may redound to the detriment of the judicial authors.

Judge Cabranes' dissent started in strictly factual and measured tones, but one can sense the disquietude building as he wrote:

The use of *per curiam* opinions of this sort, adopting in full the reasoning of a district court without further elaboration, is normally reserved for cases that present straight-forward questions that do not require explanation or elaboration by the Court of Appeals. The questions raised in this appeal cannot be classified as such, as they are indisputably complex and far from well-settled.<sup>198</sup>

Judge Cabranes' tone and his pace were marked by both *accelerando* and *crescendo* as he contrasted the weight of the filings and argument against the wisp of an opinion issued by the panel:

On appeal, the parties submitted *briefs of eighty-six pages each* and a *six-volume joint appendix of over 1,800 pages*; plaintiffs' *reply brief was thirty-two pages long*. *Two amici briefs* were filed and oral argument, on December 10, 2007, lasted *over an hour (an unusually long argument in the practice of our Circuit)*. More than two months after oral argument, on February 15, 2008, the panel affirmed the District Court's ruling *in a summary order containing a single substantive paragraph*.<sup>199</sup>

Judge Cabranes had harsher words for what, in effect, was the Audience Principle impact of choosing the summary order format to communicate the panel's decision to affirm:

This *per curiam* opinion adopted *in toto* the reasoning of the District Court, without further elaboration or substantive comment, and thereby converted a lengthy, unpublished district court opinion, grappling with significant constitutional and statutory claims of first impression, into the law of this Circuit.<sup>200</sup> It did so, moreover, in an opinion that lacks a clear statement of either the claims raised by the plaintiffs or the issues on appeal. Indeed, the opinion contains no reference whatsoever to the constitutional claims at the core of this case, and a casual reader of the opinion could be ex-

198. *Id.* at 94 (Cabranes, J., dissenting from order denying in banc rehearing).

199. *Id.* at 95-96 (emphasis supplied).

200. Author's note: Apparently Judge Arterton's opinion had not appeared in the official reports at the time Judge Cabranes wrote. Ultimately, she submitted her opinion for publication in the *Federal Reporter*. See *Ricci v. DeStefano*, 554 F. Supp. 2d 142 (D. Conn. 2006).

cused for wondering whether a learning disability played at least as much a role in this case as the alleged racial discrimination. This perfunctory disposition rests uneasily with the weighty issues presented by this appeal.<sup>201</sup>

Judge Cabranes then proceeded to reel off, in substantial detail with specific legal authorities, all of the major issues raised by the appeal of the District Court's opinion that had been summarily addressed, overlooked, or not addressed at all in the panel's summary disposition.<sup>202</sup> This extensive critique culminated in a terse conclusion how far off the mark the panel's summary disposition was for some very important members of its audience — six of the seven Circuit Judges polled on the in banc rehearing petition:

It is arguable that when an appeal raising novel questions of constitutional and statutory law is resolved by an opinion that tersely adopts the reasoning of a lower court—and does so without further legal analysis or even a full statement of the questions raised on appeal—those questions are insulated from further judicial review. . . . [T]his Court has failed to grapple with the questions of exceptional importance raised in this appeal.<sup>203</sup>

Never in the author's experience has a sitting Judge of a Circuit Court of Appeals publicly taken others of his own court to the proverbial woodshed in quite this way.

The sharp reaction to the panel's opinion did *not*, however, end when Judge Cabranes' set down his pen. The Supreme Court took up the case (as Judge Cabranes urged them to do). Again, the Audience Principle exacted its toll for those unfortunate enough to transgress it. Not only was the panel reversed, but in a separate concurring and widely quoted opinion, Justice Samuel Alito demonstrated a reaction similar to Judge Cabranes' dissent in its exasperated tone, but with a more pointed assault. Zeroing in on the panel's half-hearted sounding statement (as it was echoed substantially in Justice Ginsburg's dissent) that “[w]e are not unsympathetic to the plaintiffs’ expression of frustration” (and citing, almost gratuitously, that, “Mr. Ricci, for example, who is dyslexic, made intensive efforts that appear to have resulted in his scoring highly on one of the exams, only to have it invalidated”<sup>204</sup>), Justice Alito rebuked the confusion of “sympathy” with “empathy”:

201. *Ricci*, 530 F.3d at 96.

202. *Id.* at 96-101.

203. *Id.* at 101. It should be noted that the Second Circuit's order denying rehearing in banc was also accompanied by other Judges' opinions, both for and against in banc rehearing. *See, e.g.*, the separate opinions of Chief Judge Jacobs, Judge Katzmann, Judge Calabresi, and Judge Barrington Parker; *Id.* at 92 (Chief Judge Jacobs dissenting from order denying in banc rehearing); *Id.* at 89 (Judge Katzmann concurring in order denying in banc rehearing); *Id.* at 88 (Judge Calabresi concurring in order denying in banc rehearing); *Id.* at 90 (Judge Barrington Parker concurring in order denying in banc rehearing).

204. *Ricci v. DeStefano*, 264 Fed. App'x 106, 107 (2d Cir. 2008) *withdrawn, aff'd on other grounds*, 530 F.3d 87 (2d Cir. 2008), *reh'g denied*, 530 F.3d 88 (2d Cir. 2008). Judge Cabranes had not let the panel's peculiar singling out of this one fact as a sop to the plaintiffs go unnoted: “[T]he opinion contains no reference whatsoever

The dissent grants that petitioners' situation is "unfortunate" and that they "understandably attract this Court's sympathy." *But "sympathy" is not what petitioners have a right to demand.* What they have a right to demand is evenhanded enforcement of the law of Title VII's prohibition against discrimination based on race. And that is what, until today's decision, has been denied them.<sup>205</sup>

Even this, however, was not the final word to be heard for the panel's misestimation of their audience. Yet another audience member was yet to be heard from—lead plaintiff Ricci himself. The potential for the most subjective, and thus the most passionate, rebuke—that from lead plaintiff Ricci himself—portended a scenario unseen<sup>206</sup> since the Senate rejected President Hoover's nomination of Circuit Judge John J. Parker for the Supreme Court in 1930.<sup>207</sup>

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to the constitutional claims at the core of this case, and a casual reader of the opinion could be excused for wondering whether a learning disability played at least as much a role in this case as the alleged racial discrimination." 530 F.3d at 96 (Cabranes, J., dissenting from order denying in banc rehearing).

205. Ricci v. DeStefano, 129 S. Ct. 2658, 2689 (2009) (Alito, J., concurring) (emphasis supplied) (quoting Ricci v. DeStefano, 129 S. Ct. at 2710 (Ginsburg, J., dissenting)).

206. See Randy Barnett, *Ricci Testimony Is Political Stunt*, The Volokh Conspiracy, July 15, 2009 (quoting James Taranto), <http://www.volokh.com/posts/1247666706.shtml>.

207. See, e.g., George W. C. McCarter, *Confirmation Denied: The Senate Rejects John J. Parker* (Unpublished Thesis 1971), available at <http://www.mccarterhiggins.com/Parkerthesis.pdf>. The author describes the case in which Judge Parker's Ricci-like troubles arose:

Three judges heard the case, *International Organization United Mineworkers of America v. Red Jacket Consolidated Coal & Coke Co.* (18 Fed. 2d. 839), and all concurred in the opinion which Parker wrote. The court found precedent for the injunction, which it upheld, in previous Supreme Court decisions which forbade even peaceful union interference with workers' contracts. The Supreme Court apparently agreed with Parker's reasoning for it refused to hear the union's appeal.

*Id.* at 14. Walter Green, then American Federation of Labor President, appeared, not quite the representative of a party to this case, represented, at the very least, a party whose interests were directly affected by contacts prohibiting workers from engaging in any union-related organizing activity. His testimony was powerful:

Supreme Court Justices, he observed, "should possess a trained mind sympathetic toward the hopes and aspirations of the masses of the people." Judge Parker, according to Green, did not have such a judicial disposition, and for that reason the A.F. of L. protested his nomination. Green then zeroed in on the *Red Jacket* case in which Parker's sustaining of the district court's injunction had the effect of making "criminals out of law abiding, honest, loyal American citizens if they requested, in the exercise of peaceful, law abiding methods, workmen to join with them in a labor organization." Green reminded the Senators that their late colleague, Robert M. LaFollette of Wisconsin, had found the district judge in the *Red Jacket* case, George McClintic, "to be a petty tyrant and an arrogant despot." McClintic seems to have been a fairly notorious anti-union judge, and Green must have been trying to pass along some of McClintic's bad reputation to Parker.

A major obstacle to the success of Green's argument was the prevailing impression that Parker had been bound by precedent to uphold McClintic's injunction. In his *Red Jacket* opinion Parker cited several Supreme Court decisions which he felt supported the injunction. Primarily he relied upon *Hitchman Coal and Coke Co. v. Mitchell*, 245 U.S. 229, which was handed down by the Court in 1917. Green knew that his own case would be immeasurably strengthened if he could show that the *Hitchman* and *Red Jacket* cases were in some respect different and that Parker was not in fact bound by precedent to decide as he did. Green began by emphasizing that the *Hitchman* decision was rendered thirteen years ago and that "[s]ince that time many economic, industrial, and social changes have taken

Ricci was called to testify in the Sotomayor confirmation hearings. Having some personal experience with civil litigation, I attest that it is many a party's dream to get to express their feelings about a judge's decision (even when that party "won" the case) once they are finally beyond the power of the judge's pen, especially in a setting, like testimony before a judiciary committee, where the judge is compelled to sit nearby, and listen silently. Ricci might have described all of the emotions that he and his fellow plaintiffs endured when their hard-fought case seemingly came to its final act with a one-paragraph dismissal. He might have galvanized the country with testimony about how poorly, from his perspective, the

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place." Green then claimed that even the late, and conservative, Chief Justice Taft was of the opinion that "yellow dog" contracts were made under duress and thus unenforceable.

*Id.* at 25-26. The witness inflicted even greater blows by calling out what he'd divined was the nominee's vision of the common working person while trying to hide behind *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917)—an intellectually compromised precedent if there ever was one:

The *Hitchman* decision—I will try to make it plain— was the *Dred Scott* decision to labor. . . . What I stated in the preceding paragraph was not so much that Judge Parker followed the *Hitchman* decision as laid down by the Supreme Court, but that he shows himself as in entire sympathy with that decision, and that is our objection to Judge Parker." Therein Green was stating the kernel of truth in labor's argument against the Judge. . . . Most of the pro-labor and anti-Parker Senators were simply disturbed that Judge Parker, even if he were bound by precedent when he wrote the *Red Jacket* decision, failed to make clear that his opinion was dictated by the law and that "yellow dog" contracts violated his personal code of abstract justice. Though he would have ample opportunities to do so during the six weeks that his name was before the Senate, Parker never publicly declared his personal opinion of the hated contract, and indeed it is safe to presume that the "yellow dog" probably did not offend him terribly.

*Id.* at 27-28 (footnotes omitted). See also WILLIAM C. BURRIS, DUTY AND THE LAW: JUDGE JOHN J. PARKER AND THE CONSTITUTION, Colonial Press (1987). Interestingly, had Judge Parker been a bit more scholarly in his approach to the application of *Hitchman*, he might have found, digested, and applied the law-review article written by Professor Cook, which would have supplied a sound intellectual and legal basis for limiting *Hitchman* and denying enforcement of the "yellow-dog" contract in *Red Jacket*. See Walter Wheeler Cook, *Privileges Of The Labor Unions In The Struggle For Life*, 27 YALE L. J. 779 (1918). That he did not do so would seem to suggest that he did not wish to limit *Hitchman* or to deny enforcement of contracts intended solely to interfere, restrain, and coerce employees in the exercise of personal autonomy to discuss unionization. That apparent choice ended up being quite costly. Current judges of ambition might consider how resort to the calmer reflection found in legal scholarship might assist their opinion writing, despite perennial judicial complaints that judges no longer find legal scholarship to be relevant or helpful. See, e.g., Adam Liptak, *Sidebar: When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, March 19, 2007, available at <http://select.nytimes.com/2007/03/19/us/19bar.html> (quoting, among others, Second Circuit Chief Judge Dennis Jacobs as saying "I haven't opened up a law review in years. . . . No one speaks of them. No one relies on them."); see also TRENDS IN FEDERAL JUDICIAL CITATIONS AND LAW REVIEW ARTICLES—COURT OF APPEALS FOR THE SECOND CIRCUIT ROUNDTABLE DISCUSSION, BENJAMIN N. CARDOZO SCHOOL OF LAW, MARCH 8, 2007, available at [http://graphics8.nytimes.com/packages/pdf/national/20070319\\_federal\\_citations.pdf](http://graphics8.nytimes.com/packages/pdf/national/20070319_federal_citations.pdf). Of course, the judges' principle complaint is that so many of the "national" law reviews — such as the Yale Law Journal of 2009 rather than of 1917 — publish too much inter-disciplinary scholarship, and not enough doctrinal scholarship to assist courts. See, e.g., Richard A. Posner, *Against The Law Reviews: Welcome To A World Where Inexperienced Editors Make Articles About The Wrong Topics Worse*, LEGAL AFFAIRS (Nov./Dec. 2004), available at [http://www.legalaffairs.org/issues/November-December-2004/review\\_posner\\_novdec04.msp](http://www.legalaffairs.org/issues/November-December-2004/review_posner_novdec04.msp). The solution to that problem, however, may be to recognize that scholarship useful to judges can be found in the pages of the excellent law reviews and journals published by law schools that do not happen to carry the "branding" of the *U.S. News & World Report's* so-called "first tier." That such a realization has not seemed to have taken hold may be explained by the candid observation of Second Circuit Judge Robert Sack that "[j]udges use them like drunks use lamp-posts—more for support than for illumination." See Adam Liptak, *supra* note 207 (quoting comments of Hon. Robert D. Sack at the Second Circuit Roundtable Discussion March 8, 2007).

court considered its audience, and how it patronized that audience with its “not unsympathetic” throw-away line. What was portended, however, did not transpire. Ricci’s testimony was short, delivered with seemingly great effort, and did not discuss at any length how the *form* of the panel’s decision had made the plaintiffs *feel* about the court system, its transparency, its integrity, its empathy, and its competency.<sup>208</sup> He stuck to a script on the merits, denouncing activist judges, and thus this potential blow was greatly softened.<sup>209</sup>

Yet the mere fact that a litigant from an appeals case seemingly treated by the panel as hum-drum could become a public player in a confirmation hearing is testimony to the power of the Audience Principle—and the 21<sup>st</sup> century media’s capacity to expose and exploit when a judicial opinion has served it poorly.

It is not fair, however, as many in the press have done, to lay this mishandling of the Audience Principle generally, and of judicial empathy in particular, at the feet of Justice Sotomayor. It is most *unlikely*, in fact, that she would have written the summary or per curiam opinions.<sup>210</sup> Nor is it likely that she directed the form

208. See, e.g., Frank Ricci Testifies At Sonia Sotomayor’s Confirmation Hearings, WASHINGTON POST, July 16, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/16/AR2009071603090.html>; Maureen Dowd, *Op-Ed: Pharisees On The Potomac*, N.Y. TIMES, July 18, 2009, at WK11, available at <http://www.nytimes.com/2009/07/19/opinion/19dowd.html>; Naftali Bendavid, *Washington Wire: Firefighter Ricci Takes Witness Seat At Sotomayor Hearing*, WALL ST. J., July 17, 2009, available at <http://blogs.wsj.com/washwire/2009/07/16/firefighter-ricci-takes-witness-seat-at-sotomayor-hearing/>; Skyagunsta Pickens, *Weasel Or Injured Party?*, Kellia’s World, July 21, 2009, <http://kelliasworld.wordpress.com/2009/07/21/weasel-or-injured-party/#comment-341> (blog ending Oct. 1, 2009); Randy Barnett, *Ricci’s Testimony Is Political Stunt*, The Volokh Conspiracy, July 15, 2009, <http://www.volokh.com/posts/1247666706.shtml>. The testimony even inspired parody of the hearings; See, e.g., *Sotomayor Spontaneously Combusts, Firefighter Frank Ricci Suggests Letting Fire Burn Itself Out*, CARBOLIC SMOKEBALL, July 2009, <http://carbolicSmoke.com/2009/07/17/sotomayor-spontaneously-combusts-firefighter-frank-ricci-lets-her-burn/>.

209. See, e.g., Dana Millbank, *Fireman Ricci Fails To Extinguish Sotomayor’s Hope*, WASHINGTON POST, July 17, 2009, Bus. Section, 2009 WLNR 13624929 (noting that although “Frank Ricci was to be Sonia Sotomayor’s Anita Hill,” he left the witness chair having “reduce[d] to embers the case *against* Sotomayor. *Id.* (emphasis supplied); see CEO Wire, July 13, 2009, 2009 WLNR 13318848 (transcript of panel discussion)(comments of James Taranto, of the *Wall Street Journal* Editorial Board, describing as a “very bad idea having a litigant testify against a judge who ruled against him.”). Of course, if the decision to include litigant testimony in a confirmation hearing is to be perceived as anything other than cheap political grandstanding, the summoning committee needs to have testimony from defendants and other interested parties and amici, not just from plaintiffs.

210. Nor, as Professor Ifill has, among other, pointed out, is it tenable to attack Justice Sotomayor, or her panel of colleagues, for not reaching the same ruling as did the Supreme Court, even if they disagreed with the precedents that lay before them at the time they reviewed the District Court’s decision in Ricci:

Her now-infamous “wise Latina” statement raised legitimate questions about Judge Sotomayor’s approach to judging. But in the context of the full speeches she gave, Judge Sotomayor’s remarks were an honest attempt to talk about how all judges are shaped by their backgrounds and must be consistent enough of this reality to guard against how these influences might skew their judicial view.

The firefighter case was problematic for the Republicans as well, because although the Supreme Court overturned the decision of the court on which Judge Sotomayor was a part, it had done so by announcing a new legal standard - one that Judge Sotomayor could not fairly have been expected to divine or impose as an appellate court judge when she heard the case. But no matter. The case involved the inflammatory issue of race, and combined with her “wise Latina” remark, the Republican committee members settled on a strategy that could at least arouse their base. And so, ignoring thousands of decisions in which Judge Sotomayor has participated, they undertook to paint the nominee as a dangerous racial partisan.

of the disposition. She sat as the junior member of a three-judge Appeals Court panel. Judge Rosemary Pooler was the Presiding Judge of the panel during that week of oral arguments; and under Circuit tradition, it was Judge Pooler's chambers that would take the responsibility for proposing cases to be disposed on summary orders and for her law clerks to draft the summary orders in the cases decided that week.<sup>211</sup> Then, Judge Sotomayor and Judge Sack agreed with the Presiding Judge that summary disposition was appropriate.

*Ricci* cannot be, and should not have been, held up as an example of Judge Sotomayor's judicial opinion writing, or even as one of "Judge Sotomayor's opinions." However, she apparently did not reckon that the risks created by communicating the court's decision in summary order fashion was worth digging in her heels to bring her colleagues back to political reality. Nor did her empathy appear sufficiently attuned for how important audiences of this opinion would receive its form, apart from its substance. A significant opportunity to save the panel from itself appears to have been missed as a result.<sup>212</sup>

Of significance now is what Justice Sotomayor may have gleaned from the *Ricci* experience. The opportunity, and the hope, is that now given the independence that comes with life tenure, she can put that experience to positive use in re-

Ifill, *supra* note 163, 2009 WLNR 14255261. That some Senators themselves had not come to terms with their own racial stereotypes was evident, Professor Ifill notes, in two telling statements:

There were moments that were almost too painful to watch . . . [such as] Sen. Tom Coburn's tortured, historical reading of the history of the passage of the 14th Amendment as a debate about gun rights, and the Oklahoma Republican's channeling of Ricky Ricardo in another sequence, joking that the Latina judge might have some "'splainin' to do." And Mr. Sessions chided the judge that if she had just voted in the firefighters' case along with her colleague on the Second Circuit Court of Appeals who "is also of Puerto Rican ancestry," there wouldn't be all this trouble.

*Id.*

211. With her home chambers in Vermont, Judge Pooler would quite likely be pushing to wrap up the presiding judge's post-argument responsibilities to catch the Amtrak at Penn Station on her way home to Vermont for the weekend. The end of a week of oral arguments for the chambers of the federal appeals judge presiding that week is one of the most hectic periods in the life of the law clerks (who must complete the work) and the judge (who must manage it). This is particularly so when the Judge's chambers are upstate or out-of-state, as are Judge Pooler's. In the chambers where I clerked twenty-two years ago, the rule was that all work from the sitting, other than the writing of the more extensive opinions expected to be published, would be completed before judges and clerks departed on Friday evening. This made for many an interesting dash from Foley Square to the immensely crowded rush-hour subway and (in the 1980s) struggle through the throngs of commuters at Grand Central Terminal looking for some distant departure track. By the time one found and awkwardly settled into a seat on the sleek aluminum cars of Amtrak's *The Henry Hudson*, utter exhaustion was the only emotion left, thirst the only desire to be quenched, and three hours of restless sleep the only scheduled activity (except for the judge, who, always vigilant and diligent, used this quiet time to read recently issued advance sheets of opinions from our Circuit (and nobody knew them better than did our judge)).

212. Christopher Caldwell, *The Limits Of Empathy For Sonia Sotomayor*, TIME, June 8, 2009, available at <http://www.time.com/time/magazine/article/0,9171,1901478,00.html>. Mr. Caldwell observes that the *Ricci* case puts the quality of Justice Sotomayor's empathy into a different light:

Whether or not you like racial preferences, they involve a way of looking at the law that is sophisticated rather than commonsensical. If the New Haven opinion is fair, it is the kind of fairness you learn at Yale Law School, not the kind you learn in the South Bronx. Sotomayor may be a child of the barrio, culturally speaking, but the judicial philosophy she represents comes from the mandarin, not the proletarian, wing of the Democratic Party.

*Id.*

engaging the Supreme Court with the Audience Principle and its empathetic basis. She will have on her side the persuasiveness that comes from being the bearer of such a *stigmata*, the memorable scar inflicted from failing to give the Audience Principle its full due.

### **B. Justice Sotomayor's District Court Opinions As Augurs Of Her Opportunity**

Justice Sotomayor comes to the U.S. Supreme Court with a portfolio of judicial opinions larger than that any other sitting Justice brought with them. She is credited with over 600 federal court opinions in the Federal Cases database on Westlaw, most of those written in the District Court. As might be expected of a talented writer and thinker, her opinions realize a baseline of quality in applying the four critical principles of effective cognitive communication that we have examined in our Part I and Part II articles. Adam Liptak speaks knowingly and well for her canon when he writes:

Judge Sonia Sotomayor's judicial opinions are marked by diligence, depth and unflashy competence. If they are not always a pleasure to read, they are usually models of modern judicial craftsmanship, which prizes careful attention to the facts in the record and a methodical application of layers of legal principles.<sup>213</sup>

This achievement, however, may leave room for further progress. As Liptak observes, her opinions written on the District and Circuit courts:

[R]eveals no larger vision, seldom appeal to history and consistently avoid quotable language. Judge Sotomayor's decisions are, instead, almost always technical, incremental and exhaustive, considering all of the relevant precedents and supporting even completely uncontroversial propositions with elaborate footnotes.<sup>214</sup>

Some might argue that the Supreme Court thrusts a judge on a stage with many diverse audiences. The stakes are even higher there than they were on the federal trial and appellate benches on which she has served for seventeen years. To use a theater metaphor, what "plays in the Catskills" may need to be turned up a notch or two "for Broadway." Here is an opportunity for Judge Sotomayor to glance back from her future to the example of Learned Hand. While her opinions reflect a more consistent application of the context and congruence principles than Hand's trial-court opinions, Justice Sotomayor may find inspiration in Hand's impactful use of the sentence in realizing both the segmentation and audience principles, while creating a style of memorable and quotable syntax that marked his writings with

213. Adam Liptak, *Nominee's Rulings Are Exhaustive But Often Narrow*, N.Y. TIMES, May 27, 2009, at A1, available at <http://www.nytimes.com/2009/05/27/us/politics/27judge.html>.

214. *Id.*

uniqueness. Hand hewed this achievement out of the bricks he laid at the sentence level. From that vantage point, he created – in his best opinions – a truly literary style of writing that not merely made his points, but made them memorably. Hand never sounded like a bureaucrat; nor should any Supreme Court Justice.

Yet, there is much virtue in judicial writing that eschews using opinions to state “larger vision[s]”; that appeals “not to history” – in the sense of discursive displays of erudition or the evasion of rigorous analysis in favor of questionable reasoning cloaked in the fog of history<sup>215</sup>—but rather deals predominantly with the Constitutional provision, treaty, statute or case that frame the context of the legal analysis; and to emphasize substance over “quotable language,” which, as some of the examples by a variety of judges discussed earlier in this article show, often come at the expense of empathy to the parties and clarity of the ruling. Perhaps Justice Sotomayor best articulated why we may expect that she will consciously seek to avoid such artifices in her judicial opinions. Echoing Learned Hand’s assessment of his own judicial career many years ago<sup>216</sup>, Justice Sotomayor has observed of her own that she was “not going to be able to spend much time on lofty ideals,” “since[t]he cases that shake the world don’t come along every day. But the world of the litigants is shaken by the existence of their case, and I don’t lose sight of that, either.”<sup>217</sup>

Of the more than 400 District Court opinions credited to Justice Sotomayor, her opinion-writing strengths and opportunities are well illustrated by the last district court opinion she appears to have authored – *Barlett v. New York Bd. Of State Law Examiners*.<sup>218</sup> This was the third of three opinions written by Justice Sotomayor in a case brought by a bar examinee who challenged the New York State Board of Bar Examiners’ denial of requests for accommodation of an alleged dys-

215. See, e.g., FRIEDRICH NIETZSCHE, *THE USE AND ABUSE OF HISTORY* 3 (1873) (“[W]e need [for] life and action, not as a convenient way to avoid life and action, or to excuse a selfish life or a cowardly or base action.”). A classic example of the use and abuse “of appeals to history” is *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), in which Justice Brandeis resorted to the flawed pseudo-historical research of Charles Warren (which he described as the “recent research of a competent scholar”) on the legislative history of Section 34 of the Judiciary Act of 1789 (the so-called “Rules of Decision Act”) to severely limit the authority of federal courts to develop the common-law in diversity cases coordinately with, rather than subordinately to, the state courts. See, e.g., LARRY L. TEPLY & RALPH U. WHITTEN, *CIVIL PROCEDURE* 399-400, 403-404 & authorities cited in nn. 109, 111, & 112 (2d ed. 2000). *Erie* is the classic example of the Supreme Court’s “appeal to history,” and the kind of reasoning designed to insulate instrumentalism against its own faulty logic; as Professors Teply and Whitten aptly describe it, “[a]s a criticism of *Swift [v. Tyson]* and as a justification for a change of course, however, the *Erie* opinion was an intellectual disaster.” *Id.* at 402; see generally *id.* at 402-406. History as buffoonery, rather than the pseudo-scholarship of *Erie*, afflicted *Flood v. Kuhn*, 407 U.S. 258 (1972), about which it has been said:

The opinion — for which Blackmun would long be ridiculed — included a juvenile, rhapsodic ode to the glories of the national pastime, sprinkled with comments about legendary ballplayers and references to the doggerel poem “Casey at the Bat.”

David Greenberg, *Baseball’s Con Game: How Did America’s Pastime Get An Antitrust Exception?*, SLATE, July 19, 2002, available at <http://www.slate.com/id/2068290>. Justice Sotomayor is to be praised for avoiding such uses and abuses of history.

216. *Supra* text & note 73, *Fifty Years of Federal Judicial Service*, 264 F.2d 5, 27 (2d Cir. 1959)(special session to commemorate Hand’s half-century on the federal bench) (separately paginated section).

217. Liptak, *supra* note 213.

218. No. 93-CV-4986, 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001) (Sotomayor, C.J., sitting by designation).

lexia-based cognitive impairment under both the Americans with Disabilities Act and the Rehabilitation Act of 1973.<sup>219</sup> The case garnered national attention.<sup>220</sup> When it started in 1993, Justice Sotomayor was a relatively new District Judge; by the time of its last iteration in 2001, Justice Sotomayor had been promoted to the Circuit for three years, but returned to the trial court to continue hearing a case about which she likely knew more than any other single living person. During her confirmation process, Judge Sotomayor's handling of this case was recalled with praise for her attention to detail and ability to navigate uncertainties, in both the legal standards under the relatively new Americans with Disabilities Act ("ADA"), as well as in the starkly conflicting expert testimony about both the meaning of standardized reading tests and the significance of the plaintiff's impairment.<sup>221</sup>

In her original 1997 opinion, Judge Sotomayor gave an excellent introduction to, and synthesis of, the *Bartlett* case that would serve to guide readers throughout the years of proceedings to come:

This case, tried to the bench in 21 days of testimony accompanied by exhibits and briefs aggregating to more than 5000 pages, principally devolves to the meaning of a single word- *substantially*-as used in the Americans with Disabilities Act . . . and the Rehabilitation Act . . . . Both Acts define a disability as "a physical or mental

219. The extensive procedural history of this case, as presented in Westlaw's Insta-Cite is: *Bartlett v. New York State Bd. of Law Examiners*, 970 F. Supp. 1094 (S.D.N.Y. 1997), *reconsideration denied* *Bartlett v. New York State Bd. of Law Examiners*, 2 F.Supp.2d 388 (S.D.N.Y. 1997), *aff'd in part and vacated in part*, *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321 (2d Cir. 1998), *cert. granted, judgment vacated*, *New York State Bd. of Law Examiners v. Bartlett*, 527 U.S. 1031 (1999), *remanded*, *Bartlett v. New York State Bd. of Law Examiners*, 226 F.3d 69 (2d Cir. 2000), *remanded* *Bartlett v. New York State Bd. of Law Examiners*, 2001 WL 930792 (S.D.N.Y. Aug 15, 2001).

220. Frances McMorris, *One Aspiring Lawyer Wins Accommodations for Bar Exam*, WALL ST. J., July 18, 1997, at B1; Tamar Lewin, *Dyslexic Law Graduate Sues On Exam's Time Limit*, N.Y. TIMES, Oct. 23, 1997, at A14, available at <http://www.nytimes.com/1997/10/23/us/dyslexic-law-graduate-sues-on-exam-s-time-limit.html>; Tamar Lewin, *U.S. Court Upholds Aid for the Disabled On State Bar Exams*, N.Y. TIMES, Sept. 16, 1998, at A1, available at <http://www.nytimes.com/1998/09/16/nyregion/us-court-upholds-aid-for-the-disabled-on-state-bar-exams.html> (calling ruling "first . . . of its kind"); Tamar Lewin, *Ideas & Trends; Shaky Crutch for the Learning-Disabled*, N.Y. TIMES, Sept. 20, 1998, at Section 4, page 1, available at <http://www.nytimes.com/1998/09/20/weekinreview/ideas-trends-shaky-crutch-for-the-learning-disabled.html>; Robert D. McFadden, *High Court Sends Claim Of Disability To Rehearing*, N.Y. TIMES, June 25, 1999, at B5, available at <http://www.nytimes.com/1999/06/25/nyregion/high-court-sends-claim-of-disability-to-rehearing.html>; *Judge Rules That Dyslexic Can Get Exam Help*, N.Y. TIMES, Aug. 17, 2001, at B4, available at <http://www.nytimes.com/2001/08/17/nyregion/judge-rules-dyslexic-can-get-exam-help.html>. Not all the media coverage has been favorable to bar-examinee accommodations or Justice Sotomayor's rulings. See, e.g., Walter Olsen, *Standard Accommodations: The Road To Universal Disability*, REASON, Feb. 1999, available at <http://www.reason.com/news/show/30908.html>; Walter Olsen, *Sotomayor and the ADA/bar-exam case*, OVERLAWYERED BLOG, June 4, 2009, available at <http://overlawyered.com/2009/06/sotomayor-and-the-adabar-exam-case/>; Dr. Tana Dineen, *The School Of Soft Knocks: Does Anyone Really Benefit When Universities Cut Academic Corners To Accommodate The Disabled?*, THE OTTAWA CITIZEN, Aug. 17, 2001, available at <http://tanadineen.com/COLUMNIST/Columns/SoftKnocksDisability.htm>. ("Here's a hint of just how much sillier it can get . . . [t]he fact that Bartlett would have a very hard time meeting the job requirements of a practising lawyer was, in the judge's opinion, precisely the reason why Bartlett had a protected right to become a practising lawyer. . . . Only in America, you say.")

221. Jim Dwyer, *On the Bench, With Fairness And Empathy*, N.Y. TIMES, May 27, 2009, at A21, available at <http://www.nytimes.com/2009/05/27/nyregion/27about.html>.

impairment that *substantially* limits one or more of” an individual’s “major life activities.”

...

The evidence at trial has convinced me that Marilyn Bartlett suffers from a learning deficit that evinces itself as a difficulty in reading with the speed, fluency and automaticity of an individual with her background and level of intellectual ability. Despite this impairment, plaintiff obtained a Ph.D. in Educational Administration and a law degree. By virtue of superior effort and not a small amount of courage, Marilyn Bartlett has been able to succeed academically and professionally despite the limitations her impairment has placed upon her.

But this case asks whether, in light of the confined language of the law, plaintiff is not merely impaired, but disabled.<sup>222</sup>

Years later, after appeals to the Circuit and the Supreme Court and remands from both courts, Justice Sotomayor was required to hold yet another trial, this one lasting four days and focusing on highly contentious testimony of expert witnesses – and this time focusing on standards of disability in the major life activity of both reading and working, under legal standards that the Supreme Court itself had only just started to evolve during the pendency of the *Bartlett* case.<sup>223</sup> Despite the disruption of being taken away from her Circuit Court duties, Justice Sotomayor treated the remand with the same care and attention to detail as the original trial. Her opinion is 48 pages long<sup>224</sup>, which in and of itself does not necessarily equate with quality — yet the quality is there. The opinion is efficiently written, with focus on the new issues at hand rather than repeating discussions in previous opinions.

After a thorough, yet concise, reprise of the procedural history of the case, Justice Sotomayor specified the questions that were now on remand to her from the Second Circuit, and — unlike Hand in so many of his District Court opinions — proceeded to set forth the result up front, providing critical context for the detailed findings of fact and conclusions of law that followed:

Having witnessed all of this additional testimony and having studied the exhibits and affidavits submitted by the parties on the issues before me on this remand and in the original trial record, I conclude that, when considering both the positive and negative ef-

222. *Bartlett v. New York State Bd. of Law Examiners*, 970 F. Supp. 1094, 1098-99 (S.D.N.Y. 1997).

223. *Bartlett v. New York State Bd. of Law Examiners*, 2001 WL 930792 at \*3 (S.D.N.Y. Aug 15, 2001).

224. In the Westlaw formatting; the slip opinion as filed in the Clerk’s office is apparently 99 pages. See *Judge Rules That Dyslexic Can Get Exam Help*, N.Y. TIMES, Aug. 17, 2001, at B4, available at <http://www.nytimes.com/2001/08/17/nyregion/judge-rules-dyslexic-can-get-exam-help.html>.

fects of plaintiff's self-accommodations, plaintiff is substantially limited in the major life activity of reading when compared to the average reader by her slow reading rate and by the fatigue caused by her inability to read with automaticity. I also conclude, in the alternative, that plaintiff is substantially limited in the major life activity of working because the Board's failure to accommodate her reading impairment is a substantial factor in her failure to pass the bar. For these reasons, I find that plaintiff is entitled to receive reasonable accommodations in taking the New York State Bar Examination.<sup>225</sup>

Had the opinion also included a roadmap through the detailed factual findings in Sections III and IV of the opinion, the context principle might have been even better served, and the foundation upon which the congruence principle builds laid down. As it is, the opinion's findings appear to be organized around categories of testimonial evidence, with each category further sub-organized around a summary of each witness's testimony (although the principle on which that sub-organization is based — e.g., chronological order of presentation at trial, the order of significance to the judge's ultimate conclusions, the order of ascending or descending credibility, etc.. — is not revealed in the opinion). Thus, there are no evident "road signs" beyond the witness's name, as well as no overall road map, to guide the reader through the lengthy opinion; nor is there a table of contents to help the reader locate specific information quickly.

Rather, the opinion moves immediately from the final paragraph of the introduction, quoted above (and a brief summary of previous findings on plaintiff's psychometric evaluations and previous bar examination attempts) to a new section headed "Plaintiff's Expert Witnesses," in which the testimony of each witness is summarized and separated by subheadings listing only the witness's name.<sup>226</sup> That section is followed by one that does the same thing for the defendant Board of Bar Examiners' expert witnesses,<sup>227</sup> and for the "lay testimony" presented by both parties, including the plaintiff herself.<sup>228</sup>

The organizational pattern of the factual findings shifts abruptly, and without warning, to "observations about the limitations of using psychometric measures to diagnose learning disabilities generally, particularly with adults."<sup>229</sup> This portion of the findings is sub-organized around the specific kinds of tests upon which the dueling expert testimony was based. The same kind of structure is repeated for a short section on "clinical observations" of the plaintiff, which concludes the factual findings.<sup>230</sup> While the macro-organization of this opinion remains obtuse, Justice

225. *Bartlett*, 2001 WL 930792, at \*3.

226. *Id.* at \*3-4, 4-13.

227. *Id.* at \*13-20.

228. *Id.* at \*20-22.

229. *Id.* at \*22, 23-28.

230. *Id.* at \*29.

Sotomayor’s picks up energy in her discussion of the evidence and her findings therefrom , and shines from the elegance of a rhetorically sophisticated simplicity:

While defendants now try to couch their argument in terms of the entire gestalt of tests administered to plaintiff, this is a distinction without a difference. Dr. Flanagan [defendant’s testing expert] concluded that plaintiff’s performance on “multiple, individually administered” psychometric measures “indicates that she performs within normal limits or better on all indicators of reading performance.” Of the 35 scores from psychometric measures on which Dr. Flanagan relied, however, thirty are from the Woodcock. For the reasons I discussed in my first opinion and order, I am convinced that the Woodcock cannot be used as the principal instrument to diagnose a reading disability.<sup>231</sup>

This kind of writing that at the micro-organizational level shows an expertise in applying both the segmentation and audience principles.

Like the factual findings, the Conclusions of Law open with no roadmap to explain where the opinion has been, nor where it is going.<sup>232</sup> While each sub-section is introduced effectively and concisely<sup>233</sup>, and tied together at subsection’s end with a concise conclusion<sup>234</sup>, the progress of the section as a whole is not explicit – as

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231. *Id.* at \*24.

232. *Id.* at \*29.

233. For example, in the introduction to Section II of the Conclusions of Law, entitled, “Substantial Limitation Under the Law for the Major Life Activity of Working,” Justice Sotomayor orients the reader well as to where that Section is going and why:

The Second Circuit remanded for me “to determine, if necessary, whether plaintiff has shown that it is her impairment, rather than factors such as her education, experience or innate ability, that ‘substantially limits’ her ability to work.” I interpret the Circuit’s use of the phrase “if necessary” to refer to the fact that (at least in the context of Title I of the ADA), a court should only examine whether an individual is substantially limited in the major life activity of working if it finds that the individual is not substantially limited in any other major life activity. (. . . If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working.”). While ordinarily I would not reach the issue of whether plaintiff has a working disability because I find that she has a reading disability, given the long procedural history of this case, I will exercise an abundance of caution and discuss this issue in the event that the Circuit disagrees with my conclusion that plaintiff is substantially limited in the major life activity of reading.

Bartlett v. New York State Bd. of Law Examiners, 2001 WL 930792 at \*44 (S.D.N.Y. Aug 15, 2001) (citations omitted).

234. Looking again to the Section whose introduction we examined in the previous footnote, *supra*, we find a representative example of Justice Sotomayor’s ability to wrap up a discrete sub-section of the opinion with an effective concluding synthesis. Having previously concluded that non-accommodation in the bar examination may exclude plaintiff from a discrete “class of jobs” in the ADA’s sense of that phrase, that she “still must answer the limited question posed to me by the Circuit on remand—whether ‘the denial of accommodations was a substantial factor preventing her from passing the [bar] exam,’” *id.* at \*45, Justice Sotomayor summarized her conclusions on that question, and Section II overall, as follows:

When I view the evidence as a whole, I find that plaintiff has shown that the Board’s denial of accommodations was a significant factor in her failure to pass the bar exam. While on

Terrell and Armstrong's command would have it, "make the structure explicit on the surface of the prose."<sup>235</sup> Thus, while each sub-section works well on a self-contained level, they are as a whole episodic; there is little to no explanation of how one subsection transitions into another, which on the macro-organizational level, misses a chance to produce vertical and horizontal coherence across the opinion as a whole.<sup>236</sup> Outlined in a schematic form, the structure of the Conclusions of Law should appear as thus:

- I. Substantial Limitation Under the Law for the Major Life Activity of Reading
  - A. Corrective Devices or Mitigating Measures
  - B. Measure of Substantial Limitation By Outcomes Alone
  - C. The Comparison Group of "Most People"
- II. Substantial Limitation Under the Law for the Major Life Activity of Working
- III. Injunctive and Declaratory Relief
- IV. Compensatory Damages<sup>237</sup>

If one looks back at the opinion's opening very carefully, we find, on second glance, that the opinion contains a buried roadmap (or perhaps a buried treasure map, since we had to search to find it), in which Justice Sotomayor explains the remand issues in the Second Circuit's opinion in discussing what she is going to address in her remand opinion. First, she writes, "in this opinion and order, I will first address 'whether Bartlett is substantially limited in the major life activity of reading' by her slow reading rate, or by any other 'conditions, manner, or duration' that limits her reading 'in comparison to most people.'"<sup>238</sup> She then discusses two other aspects of the Second Circuit's opinion:

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any single exam there may have been other factors that affected plaintiff's ability to pass the bar (as I have found to be the case with the July 1993 and 1999 exams), I believe that the Board's failure to provide her with accommodations on those exams deprived her of a fair opportunity to be tested on her knowledge. Therefore, I find that plaintiff has proven that her impairment of dyslexia "substantially limits" her major life activity of working and, therefore, that she is an individual with a disability under the ADA and Section 504.

*Id.* at \*46.

235. See ARMSTRONG & TERRELL 1st, *supra* note 3, at 3-22, 2-24; ARMSTRONG & TERRELL 2d, *supra* note 3, at 23-25, 62-62.

236. *Bartlett*, 2001 WL 930792 at \*29-51; ARMSTRONG & TERRELL 1st, *supra* note 3, at 3-18 – 3-21.

237. *Bartlett*, 2001 WL 930792 at \*46.

238. *Id.* at \*2.

The Circuit further held that if I find that plaintiff is not substantially limited in reading, I should make further findings with respect to whether plaintiff is substantially limited in the major life activity of working. Specifically, the Court directed me to determine, if necessary, “whether plaintiff has shown that it is her impairment, rather than factors such as her education, experience, or innate ability, that ‘substantially limits’ her ability to work.”

Finally, the Second Circuit stated that it adhered to its original remand with respect to compensatory damages. It added, however, that if I were to find that plaintiff is disabled, and therefore entitled to compensatory damages, I should limit my damage award to the bar exams, if any, where the Board had before it sufficient information to determine that plaintiff was disabled.<sup>239</sup>

While this matches up with the earlier quoted context providing conclusions<sup>240</sup>, it does not sufficiently explain the sub-organization of the Conclusions of Law, nor does it even shed any light on the macro- or sub-organization of the factual findings. That is not to say that along the way anything that Justice Sotomayor wrote in the opinion is unclear; the opinion, in fact, is quite amazing in just how coherently and seamlessly it unfolds within each section and subsection, and how strongly organized her writing is at both sentence and paragraph level. One of many fine examples:

In my first opinion and order, I found that the bar examination functions like an employment examination that prevents plaintiff from working in her chosen profession:

If plaintiff’s disability prevents her from competing on a level playing field with other bar examination applicants, then her disability has implicated the major life activity of working because if she is not given a chance to compete fairly on what is essentially an employment test, she is necessarily precluded from potential employment in that field. In this sense, the bar examination clearly implicates the major life activity of working.

While I might have chosen a different word than “implicates” to describe how the bar exam functions like an employment test had I known the confusion its use would cause, I was merely addressing defendants’ argument that the Title I definition with regard to working was not proper in a Title II case because the bar exam is

239. *Id.* at \*2-3 (citations omitted).

240. *Bartlett*, 2001 WL 930792, at \*3.

not an employment test. I in no way intended to imply that plaintiff had shown only that her reading impairment “implicates” the major life activity of working rather than substantially limits it.<sup>241</sup>

What is most striking about this opinion is the incredible command of structure and logic Justice Sotomayor maintains at all levels of the opinion. Her writing is cognitively effective, particularly at the sentence and paragraph level. As we have seen, that was Learned Hand’s forte as well. The writing is also well organized, but viewed from the perspective of logic; it would be even more powerful if it made that organizational structure more explicit, and reassured the reader undertaking the long trek through this opinion about where she is, where she has been, and where she is going.

That rather small criticism, however, pales before the earnest struggle Justice Sotomayor undertook — and largely won — in managing the structure of a lengthy opinion while at the same time marshalling the key portions of the voluminous trial record and prior rulings in the case. Her accomplishment reveals itself clearly as the product of a sincere and earnest struggle to attain a reasonable outcome for the parties within a statutory framework whose parameters had not yet been fully limned. All of this goes to show why it has been observed of her handling of the remanded case in 2001: “Her detailed and respectful treatment of the parties and witnesses in a decision on a matter involving less than ten thousand dollars in damages is testament to her commitment to the fair and equal administration of justice to all who come before her.”<sup>242</sup>

And all of this augurs well for Justice Sotomayor to seize the opportunity afforded by her demonstrated judicial writing talents to take her own—and the court’s, opinion writing to a new level of cognitive effectiveness, responsive to a highly diverse domestic and international audience. To borrow a phrase from novelist Tom Wolfe, Justice Sotomayor has “the right stuff” to elevate her skillful opinion writing to mastery, and in so doing become the apotheosis of the seasoned

241. *Id.* at \*44.

242. Women’s Bar Association of the State of New York, *Statement In Support of Judge Sonia Sotomayor*, at 5 (June 30, 2009), available at [http://www.grawa.org/documents/SotomayorStatement\\_July2009.pdf](http://www.grawa.org/documents/SotomayorStatement_July2009.pdf). Some have speculated that the evident empathy Justice Sotomayor displayed for the disabled is a result of her long-term diabetic condition. See, e.g., Deborah Kendrick, *Commentary: Sotomayor’s Diabetes Surely Helped Shape Her Judicial Career*, COLUMBUS DISPATCH, June 28, 2009, available at [http://www.dispatch.com/live/content/editorials/stories/2009/06/28/Kendrick28.ART\\_ART\\_06-28-09\\_G5\\_JKEA8EJ.html](http://www.dispatch.com/live/content/editorials/stories/2009/06/28/Kendrick28.ART_ART_06-28-09_G5_JKEA8EJ.html). However, a force just as – if not even more – significant may be the struggle that Justice Sotomayor undertook during her Princeton undergraduate days to elevate the level of her writing in English to the excellence expected there, and invaluable to judicial opinion writing. See, e.g., Stewart Taylor, Jr., *Grading Sotomayor’s Senior Thesis*, *The National Law Journal*, June 2, 2009, available at <http://ninthjustice.nationaljournal.com/2009/06/grading-sotomayors-senior-thes.php>. The fruits of these labors—including graduating with the highest Latin honors and election to Phi Beta Kappa—are described in Gabriel Debenedetti, *At Princeton, Sotomayor ‘76 Excelled At Academics, Extracurriculars*, DAILY PRINCETONIAN, May 13, 2009, available at <http://www.dailyprincetonian.com/2009/05/13/23695/>. In this sense, she may well have had genuine sympathy – indeed, empathy – for Mr. Ricci in *Ricci v. DeStefano*, *supra* note 204, whose own Herculean efforts to overcome the effects of dyslexia so that he could pass the promotion test in New Haven were central to the emotional merits of the case. See, e.g., Susan Crile, *Frank Ricci: All You Need To Know*, THE HUFFINGTON POST, July 9, 2009, available at [http://www.huffingtonpost.com/2009/07/09/frank-ricci-all-you-need\\_n\\_228898.html](http://www.huffingtonpost.com/2009/07/09/frank-ricci-all-you-need_n_228898.html).

opinion writer, looking equally at the trial and appellate courts, the parties, and the broader audience to be embraced.

## V. SOME CONCLUDING THOUGHTS ON PARTS I AND II

Frank Easterbrook has observed that “[m]uch of judge-centered scholarship in contemporary law schools assumes judges have the leisure to examine subjects deeply and resolve debates wisely. Professors believe that they have this capacity and attribute it to judges. Pfah!”<sup>243</sup>

Chief Judge Easterbrook’s realism may temper somewhat our assessment of Hand’s District Court work, but it does not change its lessons for whether appellate court writing skill should be a model for trial judges, or for whether skill as an appellate writer implies skill as a writer of trial-court opinions and judgments.

Considering Learned Hand’s work as a District Judge, it is a spotty record from the perspective of the cognitive impact of his opinions. Some, like *The Masses*<sup>244</sup>, show strokes of brilliance in producing a well-organized, cognitively effective work, calculated to be quite reader-friendly; many show a very workman-like approach that while coherent, leaves the readers to fend for themselves; but a surprising number of others—including significant cases involving Congressional attempts to intimidate the United States Attorney<sup>245</sup> and landmark anti-trust lawsuits seeking to dissolve large corporations,<sup>246</sup> show little care or concern for reaching readers beyond the parties—or slim appreciation for the lessons taught by cognitive psychology. Certainly, the sampling of Hand’s record made here, demonstrates that reputation and skill as an appellate writer may be the product of considerable struggle and hard-won increments of improvement as a trial court writer.

But Hand’s uneven *oeuvre* on the Southern District of New York calls even more fundamental questions into play. What exactly is the role of a judicial opinion? Some might quarrel with my assumption that to be of the highest quality, judicial writing need speak beyond the parochial concerns of the lawyers for the parties to the case—that it must speak to a broad audience both within and without the legal profession. Yet this notion has a more venerable pedigree than my preferences, or the points of Terrell and Armstrong. In fact, this expectation goes to the very formational period in American history when publishing any judicial opinion

243. Frank H. Easterbrook, *What’s So Special about Judges*, 61 COLO. L. REV. 773, 778 (1990) (quoted in BAUM, *supra* note 98, at 7 n.14).

244. *Masses Pub Co. v. Patten*, 244 F. 535 (S.D.N.Y.1917). I discussed this opinion in Jeffrey A. Van Detta, *The Decline And Fall Of The American Judicial Opinion, Part I: Back To The Future From The Roberts Court To Learned Hand--Context And Congruence*, 12 BARRY L. REV. 53 (2009), at Section II.A.1.b, text & accompanying notes 114-125.

245. *U.S. ex rel. Marshall v. Gordon*, 235 F. 422 (S.D.N.Y. 1916), rev’d, 243 U.S. 521 (1917). I discussed this opinion in Jeffrey A. Van Detta, *The Decline And Fall Of The American Judicial Opinion, Part I: Back To The Future From The Roberts Court To Learned Hand--Context And Congruence*, 12 BARRY L. REV. 53 (2009), at Section II.A.2.b, text & accompanying notes 284-292.

246. *United States v. Corn Prod. Ref. Co.*, 234 F. 964 (S.D.N.Y. 1916). I discussed this opinion in Jeffrey A. Van Detta, *The Decline And Fall Of The American Judicial Opinion, Part I: Back To The Future From The Roberts Court To Learned Hand--Context And Congruence*, 12 BARRY L. REV. 53 (2009), at Section II.A.1.c, text & accompanying notes 126-174.

was the exception, not the norm—a time that few of us, educated in the firmly-rooted case-method of the latter 20th century law school, realize were not dominated by the minds of judges, but rather, by the arguments of advocates. We were not let in on the secret that opinion writing and publication were 19<sup>th</sup> century developments, hard-fought and slowly adopted. And the battle and reception of these practices came based on an early and intuitive appreciation for the truly American idea that the writing and reporting of court decisions served multiple audiences, not specialists residing at an Inn of Court. “[C]ase reporting,” Denis Duffey has written, “was understood to be directed not only at improving judicial administration and aiding litigants by making the law known, but also at controlling courts by making their decisions subject to public scrutiny.”<sup>247</sup> As an early reviewer of Henry Wheaton’s pioneering efforts in case reporting observed, the writing and reporting of decisions and judgments makes their authors “[a]nswerable, not only to parties and the power of the state, but to the tribunals of judicial and professional opinion. They cannot sin in defiance of the opinion or other judges and the profession of the law . . . .”<sup>248</sup>

Writing and publishing judicial decisions, in the American experience, is therefore transformational. “By making the actions of the court visible and subject to constant analysis and criticism, reports domesticated adjudication.”<sup>249</sup> In doing so, the judicial process is transformed from “a matter of lawyers and judges applying alien, abstract, rigid doctrines in courtrooms,” into “part of an ongoing, communal discussion conducted in the light of day.”<sup>250</sup>

Hand’s struggles to master the facts and to apply the law are evident in our cross-sectional view of a typical year of his trial work. While much of his writing appears to be a continuation of his oral rulings in court, there is a substantial portion of his work that shows real effort of written authorship, to reach audiences beyond the parties in a particular controversy. These efforts vary in effectiveness, and are not consistently made; but Hand struggled to make them, and against rather daunting odds in the low-tech, high-volume District Court of the 1910s. That he struggled at all to do so opened a new vista in American judicial writing that allows us to have the conversation undertaken in this article.

It is now Sonia Sotomayor’s hour to struggle with these questions anew. For the first time in our lifetimes, we have a Supreme Court justice with considerable District Court, not to mention Court of Appeals, experience. This juncture in history, this hour of her dogged professional rise, presents an opportunity for Justice Sotomayor to influence the Roberts Court immediately and the Supreme Court institutionally. The influence of which I speak is not as avatar for so-called (and grossly oversimplified and infelicitously stereotyped) “liberal” or “conservative” political-legal agendas. Far more important than the ephemeral legal squabbles of

247. Denis P. Duffey, Jr., *Genre And Authority: The Rise Of Case Reporting In The Early United States*, 74 CHL.-KENT L. REV. 263, 266 (1998-2000).

248. *Id.* at 266 n.13 (citing Wheaton’s Reports, Vol. iii, 8 N. Am. Rev. 62, 67 (1818) (reviewing 3 Henry Wheaton, Reports of Cases Argued and Adjudged in the Supreme Court of the United States (1818)).

249. Duffey, *supra* note 247, at 267.

250. *Id.*

the day is the influence Justice Sotomayor has the opportunity to wield in pursuit of a goal more enduring, to make the Supreme Court a leader, once again, as a judicial communicator, so that its opinions enjoy influence not merely because they are “final,” but rather, because they embody higher principles of cognitive excellence. By focusing on the context, congruence, segmentation, and audience principles in the judicial writing that will emanate from within her chambers, Justice Sotomayor may seize a unique opportunity to steer the Supreme Court out of the backwaters into which observers argue that it has slowly drifted since the death of its last great opinion writer, Justice Robert Jackson. Should Justice Sotomayor decide to focus less on adding yet another paddle to steering the substantive outcomes, and more on how the court can persuasively and clearly speak to a wide circle of readers and explain its rulings, the reputation of the Supreme Court and of courts everywhere in America will be substantially enhanced as those courts follow her lead. Justice Sotomayor would therefore make an indelible contribution to American jurisprudence that, while not easily distilled into a sound bite or highlighted text-box for the practicing bar or for law students, can have an effect on pushing judges at all levels to confront the issues we have confronted in Parts I and II, which are the requisites to writing opinions to persuade, not merely to pronounce.

In this endeavor, it is Learned Hand – rather than her preferred ideal of Benjamin Cardozo<sup>251</sup> – that should play Virgil to her Dante. Learned Hand’s history provides a pole star by which Judge Sotomayor may steer her efforts in pursuit of this most worthy of goals.

It was Hand’s very iconic status as an appellate judge that has made our critical—and mixed—review of his District Court opinions so much more useful and educational for the federal courts generally, and for Justice Sotomayor and her Roberts Court colleagues in particular, than any collection of gossamer phrases plucked from Second Circuit opinions with a meaningless exhortation to “write like B” so one might be “quote[d]” like B.<sup>252</sup> The exhortation must be *to struggle earnestly like B*—and to recognize that the struggle is not with the law, nor with the facts, but rather with our own ability to write for a broad range of “others,” rather than for ourselves.

It is a lesson well learned by those who pass through the refiner’s fire of trial-court judging. It is this lesson; above all others; our Supreme Court and its Chief Justice must consciously embrace and model for all judges to emulate if America’s judicial opinions are to begin a reformative path to their former prominence among the nations of the world. And it is Sonia Sotomayor’s opportunity—and perhaps, destiny—to catalyze this reformation as she takes up her work on the same Su-

251. See Transcript, *Sotomayor Confirmation Hearings, Day 2*, N.Y. TIMES, July 14, 2009, available at <http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html>.

252. CHARLES E. WYZANSKI, WHEREAS—A JUDGE’S PREMISES: ESSAYS IN JUDGMENT, ETHICS, AND THE LAW 82 (1965) (“it was oft repeated that Gus had better judgment than B—a view shared by Justice Robert H. Jackson, who wittily advised the bench and the bar: ‘Quote B; but follow Gus’”); see also Telford Taylor, Letter to the Editor: *The Judge’s Legacy*, N.Y. TIMES, June 12, 1994, Section 7, page 51 (explaining that in the Second Circuit, Learned Hand was known by the initial for his given first name—“B” for “Billings”—while his cousin Judge Augustus Hand was known as “Gus”).

preme Court to which Learned Hand's ambitions turned, but outran his political luck.