

What is a Judicial Author?

by Peter Friedman*

Martha Woodmansee has pointed out that

the law has yet to be affected by the “critique of authorship” initiated by Foucault and carried forward in the rich variety of post-structuralist research that has characterized literary studies during the last two decades. Indeed, . . . it would seem that as creative production becomes more corporate, collective, and collaborative, the law invokes the Romantic author all the more insistently.¹

Woodmansee wrote about the conceptions of authorship that legal institutions bring to bear in deciding copyright-related disputes.² Nevertheless, the law’s ignorance of the “critique of authorship” includes a willful ignorance of the means of its own production. Inasmuch as law—particularly Anglo-American common law—constitutes a continual reinterpretation of its existing texts, this blindness to the collaborative nature of the production of those texts leads to poor interpretation of

* Associate Professor of Law, Case Western Reserve University School of Law. Visiting Professor of Law, University of Detroit Mercy School of Law. Brown University (B.A., 1981); University of Michigan (J.D., 1984). Member, State Bar of New York. The Author wishes to thank Tamara Millner for her yeoman research and writing efforts in support of this Article. The Author also wishes to thank Martha Woodmansee, without whose unflinching support, brilliant writing, insightful teaching, and dear friendship this Article could never have been conceived. In many ways, Martha is one of the few who can genuinely claim to have “originated” the ideas underlying its conception. Finally, the Author would like to thank the Association of Legal Writing Directors, whose scholarship grant made the initial work on this Article possible.

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1. Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 15, 28 (Martha Woodmansee & Peter Jaszi eds., 1994).

2. *See id.* at 15-28.

those texts, misguided law, and a misbegotten approach to traditional United States legal education.

In short, there is confusion about what it means to say that a judge is the “author” of a judicial opinion. A judicial opinion is the quintessential product of a collaborative writing enterprise, as are the written products of the lawyers who participate as advocates in the enterprise that results in judicial opinions. At every level of the trial and appellate process, a judicial opinion is the outcome of the careful consideration of persuasive arguments posed by the parties’ lawyers and contained in judicial opinions produced in earlier cases.³ The collaborative nature of legal writing is such that no one takes seriously any real notion of copyright interests in the products of legal writing produced by lawyers and judges in the course of the judicial process. Literal, unattributed cutting-and-pasting, instinctively considered plagiarism in most contexts, is simply everyday professional practice. In short, collaborative writing communities produce judicial opinions. Those opinions are not the inspired products of judges who excel as original authors in any traditionally Romantic sense.

The collaborative nature of judicial opinions is, however, inconsistent with conventional ways in which both professional and popular opinion represent judges—as authors in the creative, originating sense. Individual judges are lionized in a manner inconsistent with their real accomplishment, and the study of law as “literature” thereby threatens to engage in a type of misreading that is far more conventionally applied to poetry or fiction. Moreover, the near universal failure of legal scholars to explicitly recognize and examine the collaborative nature of legal writing of all sorts—including, of course, the briefs written by lawyers that the courts consider before rendering their decisions and writing their opinions—undermines the ways students are taught to *read* legal writing. In other words, the emphasis in United States legal education on the judicial opinion as the principal—and almost exclusive—subject of study inevitably leads students to read one way: as if they are reading great literature from which they are meant to derive wisdom they can later regurgitate at the appropriate time. Instead, because law students are lawyers-in-training, they should read every opinion as just the latest voice in a never-ending conversation in which they themselves are necessary participants.

3. Those earlier opinions, of course, are themselves the product of arguments made by lawyers to the courts that wrote those earlier opinions, and those lawyers’ arguments were derived from earlier writings by judges and lawyers in even earlier cases. Thus, every judicial opinion is the product of writings derived, via a process of infinite regress, from earlier legal writings.

I. LEGAL WRITING IS A COLLABORATIVE WRITING ENTERPRISE
CULMINATING IN THE JUDICIAL OPINION

To fully understand the collaborative nature of all legal writing produced in the course of litigation that culminates in a judicial opinion, it is necessary first to understand the distinction the common law draws between judicial judgments on the one hand and the opinions justifying those judgments on the other. The judgment is the remedy ordered by the court and applied to the litigants before it.⁴ The opinion, on the other hand, sets forth the judge's justifications for that remedy under those facts.⁵ As explained more fully below, this distinction between judgment and opinion is central to common-law reasoning. Lawyers and judges know that the court's ordered result and the facts of the case are of paramount importance in interpreting a judicial opinion. Any justifications for the result that the court expresses are no more persuasive merely by virtue of being expressed than are justifications the court never dreamed of, much less mentioned. Common-law judging is, most importantly, judicial *decision-making*; the reasons advanced by a judge for those decisions—that is, for those results—are at best secondary, and as far as the prospective functioning of the judicial enterprise is concerned, they are entirely dispensable.

It is almost a cliché that judges reach intuitive (albeit contingent) decisions in cases after considering the evidence but before coming up with the legal rationalizations for those a priori decisions. To admit as

4. See 12 JAMES W.M. MOORE, MOORE'S FEDERAL PRACTICE § 58.02[1] (3d ed. 2010); *Glossary*, UNITED STATES COURTS, <http://www.uscourts.gov/common/glossary.aspx> (last visited Jan. 7, 2011).

Judgment, defined in [Federal] Rule [of Civil Procedure] 54(a), includes a decree and any order from which an appeal lies. *Judgment* thus includes both a final order, and any interlocutory order that is appealable. . . . A final order is one that is meant to dispose of all issues in dispute. For example, a denial of relief "at this time" is not final and therefore is not appealable, nor is dismissal of a complaint if the plaintiff may, under proper circumstances, be entitled to replead.

MOORE, *supra* (footnotes omitted). In the words of the Federal Judiciary Website, a judgment is "[t]he official decision of a court finally resolving the dispute between the parties to the lawsuit." *Glossary, supra*.

5. MOORE, *supra* note 4, § 58.02[2].

Certain terms in this area are often used imprecisely, which can lead to confusion.

For example, findings of fact and conclusions of law are often referred to as a "decision" or an "opinion." Such a decision is not a "judgment," but rather a statement of the reasons supporting the judgment. The judgment itself is separate from the opinion or memorandum. However, an opinion or memorandum may clarify the terms of a judgment or the intent of the court issuing an order.

Id. (footnotes omitted).

much is perhaps not as radical and anarchic a notion as some legal formalists might suggest. Court cases are, after all, disputes between particular individuals in their own particular circumstances—any emotionally and intellectually functioning human will inevitably arrive at a very human judgment regarding a particular dispute between particular people. Indeed, United States courts only have the power to decide cases in which there are tangible disputes between individuals who have direct stakes in the outcome of those disputes.⁶ Moreover, courts have the option to issue judgments setting forth orders without providing any justification—that is, any “opinion”—whatsoever.⁷

Nevertheless, it is unfashionable in the extreme to suggest that judges reach intuitive decisions about the evidence before them before closely analyzing the applicable legal rules. The common fear seems to be that without the a priori restraint imposed on the interpretation of evidence by immutable rules, judges would rule purely according to subjective, morally unconstrained emotion. In short, to suggest that judges might decide cases before articulating compelling reasons to support those decisions threatens the belief of many that the judge’s role is simply to interpret law, not to make law.

Nevertheless, no one immersed in common-law analysis can argue that there is a difference between a court’s decision and the court’s opinion announcing that decision or that the decision is far more important to the future development of the law than the opinion. It is fundamental to a true understanding of the common law that when interpreting a court’s opinion, what a court does matters far more than what it says. As James Boyd White puts it, “The most important message is the one

6. U.S. CONST. art. III, § 2. Based on both constitutional and judicially developed doctrines derived from political concerns and deference to the doctrine of separation of powers, United States courts only have the power to decide actual cases and controversies. U.S. CONST. art. III, § 2; 15 JAMES W.M. MOORE, MOORE’S FEDERAL PRACTICE § 101.01 (3d ed. 2010). Thus, courts only have the power to rule in cases that are termed “justiciable.” MOORE, *supra*. Justiciability is a doctrine derived from “the so-called ‘private rights’ model of adjudication, which posits that the sole role of the federal judiciary is to adjudicate live disputes, and any judicial pronouncements of law must come as an incident to performance of that adjudicatory function.” *Id.*

A court can only rule in situations involving tangible disputes that can be resolved by means having “a concrete impact on the parties to the dispute.” *Id.* Accordingly, courts do not have the power to decide purely “political questions,” to answer requests for advisory opinions, to resolve disputes that subsequent events have rendered moot, or to resolve disputes between persons who have no concrete stake in the outcome of the dispute. *Id.*

7. See Honorable Ruggero J. Aldisert et al., *Opinion Writing and Opinion Readers*, 31 CARDOZO L. REV. 1, 8 (2009) (“[Certain] cases do not merit even a nonprecedential opinion. Instead, a plain judgment order or citation to the district court opinion in the appendix is sufficient.”).

the judge performs, not the one he states.”⁸ Any lawyer knows that courts tend to be very good at reaching the right decisions; courts’ abilities to articulate persuasive reasons for those decisions, however, often leave a lot to be desired.

Because it is the court’s decision that matters, and the justification for that decision may or may not be convincing, common-law lawyers and judges understand that any persuasive interpretation of that decision is acceptable, whether articulated in the opinion or not. In fact, the most persuasive explanations of earlier decisions are often—or even usually—explanations the deciding courts never articulated. One author notes that

if the legal process is approached as though it were a method of applying general rules of law to diverse facts—in short, as though the doctrine of precedent meant that general rules, once properly determined, remained unchanged, and then were applied, albeit imperfectly, in later cases[,] . . . it would be disturbing to find that *the rules change from case to case and are remade with each case. Yet this change in the rules is the indispensable dynamic quality of law.* It occurs because the scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced. The finding of similarity or difference is the key step in the legal process.

The determination of similarity or difference is the function of each judge. Where case law is considered, and there is no statute, he is not bound by the statement of the rule of law made by the prior judge even in the controlling case. The statement is mere dictum, and this means that the judge in the present case may find irrelevant the existence or absence of facts which prior judges thought important. It is not what the prior judge intended that is of any importance; rather it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification. *In arriving at his result he will ignore what the past thought important; he will emphasize facts which prior judges would have thought made no difference.*⁹

Even a staunch opponent of postmodernism such as Richard Posner admits that the notion “[t]hat the judicial decision precedes the judicial opinion is a more plausible hypothesis” than to suppose that the judge

8. JAMES BOYD WHITE, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, in HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 107, 117 (1985); see also Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 819 (1961) (stating that opinions “are what courts do, not just what they say”).

9. Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 502 (1948) (emphasis added) (footnote omitted).

reasons his way through the drafting of his opinion and only then reaches his conclusion.¹⁰ Thus, as do the vast majority of lawyers and judges, Posner accepts that in the process of reaching a decision, there is a distinction between what a judge does and what a judge writes to justify what he has done.¹¹ In addition, lawyers know that although a judge's decision has precedential force, the judge's opinion is a contingent, partial justification for that decision and that the judge's original justification can be later reinterpreted or superseded entirely if different reasoning can support the decision. The judicial decision is treated as inviolate (within limits, of course); in contrast, the judge's reasoning lasts only until a better justification is put forward.

Given the distinction lawyers draw between judicial decision-making and judicial justification-making, judicial decisions—not judicial reasoning—provide the driving force of the common-law system via the doctrine of *stare decisis*. Under *stare decisis*, the common-law legal system requires prior decisions to be followed in subsequent cases when the material facts of those cases are indistinguishable from those in earlier decisions.¹² It should be plain, therefore, that the interpretation of common-law decisions is a far more contestable matter than it would be if interpretation of those decisions involved only the transposition of justifications and rationales announced by earlier courts

10. Richard A. Posner, *The Law of the Beholder*, NEW REPUBLIC, Oct. 16, 2000, at 49, 52 (reviewing ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000)).

11. *See id.* at 52. It is not the purpose of this Article to address the criticism that Posner's distinction between a judge's reasoning and the language the judge employs to express that reasoning might be inadequate. Posner can reject his conception of postmodernism and still hold the dangerous belief that "the judicial decision precedes the judicial opinion" because he distinguishes between the reasoning and the writing processes. *Id.* First, he believes that "judges *reason* to the outcome" and that only after such reasoning does it come time to put that reasoning into words. *Id.* (emphasis added). Thus, "when it comes time to write the opinion explaining and justifying their conclusion[s], [judges] resort to literary devices and cultural cues, either in a conscious effort to make the opinion more persuasive or in unconscious conformity to the customs and the usages that define advocacy prose, which is what a judicial opinion is." *Id.* Posner, it seems, believes rhetoric is merely the dress reasoning is forced to wear among the *hoi polloi*. In contrast, James Boyd White argues that the process of formulating justifications is inseparable from the process of formulating the language in which those justifications are expressed: "The judge is always a person deciding a case the story of which can be characterized in a rich range of ways; and he (or she) is always responsible both for his choice of characterization and for his decision. He is always responsible . . . for the composition that he makes." WHITE, *supra* note 8, at 123 (emphasis omitted).

12. Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 770 (1995).

to new cases.¹³ Again, however, common-law interpretation binds a court in a new case to follow the results in an earlier case only to the extent that no persuasive rationale distinguishes the circumstances that gave rise to the dispute in the new case from circumstances in the earlier case. In other words, the reasoning of the first case does not control if the court in the new case identifies facts in that case that in its judgment do not justify application of the reasoning in the new case. As Chief Justice John Marshall stated in 1821,

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.¹⁴

Thus, even if a literal reading of the earlier court's reasoning would compel a single conclusion in the later case, the court in the later case could legitimately reach a different result by means of a rationale that justified not extending the reasoning of the earlier case to the facts of the later case. Karl Llewellyn put the point concisely: "Where the reason stops, there stops the rule."¹⁵ Failing to follow the result in the earlier case does not reject its reasoning; it only rejects extending the reasoning to the new facts.

Conversely, reasoning that supports the result in a case might subsequently be discredited, but that decision would remain legitimate if a persuasive alternative justification supports that result on those facts:

Strictly speaking, the later court is not bound by the statement of reasons, or *dictis*, set forth in the rationale. We know this because a decision may still be vital although the original reasons for supporting

13. Such a mechanical application of comprehensive, specific legal rules is much more a characteristic (with some exaggeration) of "civil law" systems derived from the Napoleonic Code (as contrasted with "common law" systems) and is more dominant in the non-Anglo-American legal world. In pure common-law cases, courts do make an effort to articulate forward-looking legal rules, and those rules are often useful in future efforts to interpret and apply those decisions, but those rules are always considered contingent on the facts to which they have previously been applied and modifiable under materially different facts.

14. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

15. KARL LLEWELLYN, *THE BRAMBLE BUSH* 158 (7th ed. 1981).

it may have changed drastically or been proved terribly fallacious. In a large number of cases, both ancient and modern, one or more of the reasons given for the decision can be proved to be wrong, but the cases have retained vitality.¹⁶

Thus, a later court may be bound to follow a legitimate rationale supporting an earlier decision whose result remained valid even if the reasoning the court had used to support the earlier decision was no longer accepted. The determination the later court would have to make is (a) whether the rationale now accepted as conferring legitimacy on the earlier decision is applicable to the new facts under consideration or (b) if the facts the court is considering in the new case are so distinguishable from those in the earlier case that the court is not bound by the reasoning that supports the earlier decision.

In short, it is what a court does that matters.¹⁷ That deed—the decision—is binding on subsequent courts as long as that result can be persuasively justified on any grounds.¹⁸ Inevitably, therefore, the

16. Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605, 607 (1990).

17. WHITE, *supra* note 8, at 117. The Honorable Ruggero J. Aldisert, who has served as a judge on the United States Court of Appeals for the Third Circuit, has expressed this reasoning in terms of symbolic logic:

The “material implication” formula is the essence of precedent: if antecedent fact P is present, then legal consequence Q will follow. This is indicated: $P \supset Q$. Precedent thus is embodied in the following formula:

$P \supset Q$

$R \cdot P$

$\therefore R \supset Q$

The key to logic and the law is correctly deciding when R is equal to P. If R's material facts are similar or the same as P's, then the previous case, $P \supset Q$, controls. The essence of common-law precedent is, therefore, two-fold:

+ The rule or holding of the case has the force of law.

+ The *decision* constitutes the rule in subsequent cases containing material facts similar to or identical with those in the case.

Aldisert, *supra* note 16, at 608 (emphasis added).

18. The tension between narrow and broad interpretations of common-law judicial precedents is reflected in the perpetual effort of the common-law legal community, including judges in their opinions, to enunciate comprehensive systems of rules. The mere existence of these written rules, especially (as discussed more fully below) when combined with the misapprehension of how a judicial opinion is produced, means that

[i]n a legal system built on stare decisis, the law-announcing function of opinions as precedents . . . is the function most emphasized among law students, law teachers and members of the bar, particularly as they study opinions in an attempt to ascertain “what the law is” . . . [J]udicial opinions originate the legal rules, principles, standards, and policies that comprise the main body of society's law.

Dragich, *supra* note 12, at 771 (alterations in original).

meaning of a judicial decision is remarkably contestable; the deciding court's statements—no matter how unqualified in tone—are always subject to qualification when applied to different facts.

It is precisely this radical contestability that fuels the enormous enterprise that is the United States litigation system. Most legal disputes that proceed far enough to result in any sort of judicial opinion involve some reasonable interpretation of existing law on the part of the parties on all sides of those disputes.¹⁹ Those competing interpretations result in a lot of writing that is read, interpreted, and responded to before a judicial opinion is produced. Suzanne Ehrenberg has described the process that results in judicial opinions as a collaborative endeavor involving the advocates and the adjudicator in a series of four stages.²⁰ In the first stage, the attorneys articulate arguments for the judge in the form of written briefs.²¹ During the second stage, the judge “absorb[s]” the facts and legal arguments presented in the attorneys’ written briefs (often delegating the principal responsibility for first doing so to a clerk), allowing the judge (and the clerk) to evaluate the merits of the arguments.²² During the third stage, the judge produces a written opinion, or the clerk produces an opinion and subjects it to the judge’s scrutiny.²³ During the final stage of the appellate writing process, the opinion is reviewed by other judges and their staffs; the opinion is scrutinized “for thoroughness, accuracy, and consistency.”²⁴

19. In a recent survey of 278 out of 400 federal trial court judges, 70% of the respondents called “groundless litigation” either a “[s]mall problem” or a “[v]ery small problem,” and 15% said it was “[n]o problem.” David Rauma & Thomas E. Willging, *Report of a Survey of United States District Judges’ Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure*, FEDERAL JUDICIAL CENTER 2, 4 (2005), [http://www.fjc.gov/public/pdf.nsf/lookup/rule1105.pdf/\\$file/rule1105.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/rule1105.pdf/$file/rule1105.pdf). Only 1% called it a “[v]ery large problem,” 2% called it a “[l]arge problem,” and the rest rated it as a “[m]oderate problem” in their courts. *Id.* at 4.

It is important also to note that the vast majority of legal disputes in the United States are resolved without any necessity of a judicial opinion of any sort. More than 98% of civil lawsuits filed in the United States settle before trial. R. LAWRENCE DESSEM, *PRETRIAL LITIGATION: IN A NUTSHELL* 6 (4th ed. 2008). The vast majority of legal disputes do not even result in a lawsuit. One of the likely preconditions to the rare case resulting in a written judicial opinion is that the application of the existing law to its facts gives rise to at least two inconsistent but reasonable interpretations of the law.

20. Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1191-92 (2004).

21. *Id.* at 1191.

22. *Id.* at 1191-92.

23. *Id.* at 1192.

24. *Id.*

At every stage of that writing process, determining an “author” in any conventional sense would be a difficult task. Each lawyer or set of lawyers representing each client is likely to have privileged and confidential interpretations and arguments committed to writing in one form or another. To determine the effects of applicable precedent, there is likely to be plenty of description and outright quotation of that precedent in those writings. In many instances, the principal responsibility for initially drafting such a legal analysis will be relegated to the most junior lawyer, whose analysis is always subject to the guidance of more senior lawyers and often to outright rewriting. The best arguments for a client’s legal position are only produced in writing—in a brief—to the court when the court needs to decide a matter pertaining to that position. The author of the brief is as contestable as the author of any underlying, confidential memoranda might be. It is a cliché in the big-firm world that when a brief indicates multiple authors, as often is the case, the “real” author is the person at the bottom of the list (typically the most junior lawyer).²⁵

However, it is not simply the collaborative nature of the writing process in legal practice that makes it difficult to identify the author of a legal brief. There is no effective legal claim to the rights of a traditional author in the writing set forth in a brief, and legal practice reflects as much. Lawyers writing briefs borrow wholesale from previously produced legal writing. Lawyers literally cut and paste from other lawyers’ briefs without any attribution to the authors of those briefs. It is, of course, in the interest of lawyers in the same firm to share writing in this way, but the sources of wholesale borrowing are not limited to the writing of allies. Briefs are public documents,²⁶ and no

25. Law is by no means unique in this regard. A similar collaborative “authorship” is seen in the world of architecture:

Another reason accusations of plagiarism rarely make it to court is that architecture, despite the romantic image of the solitary genius, is largely a collaborative pursuit. Principal, project architect, project designer and outside consultants of all stripes contribute to a design. All the while, young architects move from firm to firm, spreading ideas and sometimes eventually opening their own, competing offices. As for student architects, well, just because they don’t get paid for their work doesn’t mean it never enters the commercial arena. “There’s so much rich activity going on at the schools,” said Bill Sharples of the Manhattan firm SHoP/Sharples Holden Pasquarelli, “it’s hard not to be influenced by it.” With so many influences and so many echoes, authorship is rarely a simple question.

Fred A. Bernstein, *Hi, Gorgeous. Haven’t I Seen You Somewhere?*, N.Y. TIMES, Aug. 28, 2005, <http://www.nytimes.com/2005/08/28/arts/design/28bern.html>.

26. See *Nixon v. Warner Comm’ns, Inc.*, 435 U.S. 589, 597 (1978) (footnote omitted) (“It is clear that the courts of this country recognize a general right to inspect and copy

one has ever successfully claimed copyright infringement for unacknowledged use of someone else's legal argument in a writing submitted to or written by a court.

Nor is there any sanction imposed against lawyers for what would constitute plagiarism in any other context. Courts are not really concerned with the origin of the arguments. Courts may be bound to follow statutes (and earlier court decisions under the doctrine of *stare decisis*), but they are not bound at all to any secondary authorities. Accordingly, the effectiveness of an argument is unlikely to be affected in any positive way by attributing the argument to a secondary source that lacks persuasive weight.²⁷ Therefore, attribution often is of no practical use to the lawyer and may in fact be counter-productive by distracting the brief's audience—the judge and clerk—from the main thrust of the argument. Except in those rare instances where the “borrowed” material carries persuasive weight simply because of its author's identity, attribution is not necessary to the production of a persuasive legal argument. In a brief, as in an opinion, utility as persuasion is all that matters; thus, attribution is purely a function of whether the attribution makes the argument more persuasive. If attribution does not do so, then the attribution is entirely unnecessary.

The judicial opinion itself, which responds to the legal briefs, is clearly the result of a further set of collaborations on the arguments already written by the lawyers for the parties. Although judges are permitted to write opinions in their own style and to express their own personality to some extent, even a superficial examination of the attributions in a typical opinion reveals that the opinion is essentially authored by many individuals and derived from a number of sources—including the established law, the lawyers' written and spoken legal arguments, official notes of advisory committees created during the judicial rulemaking process, and earlier opinions.²⁸

Those attributed borrowings sit on top of a large pile of unattributed borrowings. Anecdotal evidence shows, and further inquiry is likely to show that, in producing their opinions, judges habitually cut and paste *without attribution* from lawyers' briefs as freely as lawyers do in producing their briefs. I tell my first-year legal writing students

public records and documents, including judicial records and documents.”).

27. The vast majority of secondary sources—commentaries on primary law rather than on the law itself—lack any practical persuasive weight in courts. In a review of Ohio appellate court opinions, only 4.3% of the citations in the sample were to secondary sources. James Leonard, *An Analysis of Citations to Authority in Ohio Appellate Decisions Published in 1990*, 86 LAW LIBRARY J. 129, 136 (1994).

28. Adrian Vermeule, *Judicial History*, 108 YALE L.J. 1311, 1328 (1999).

truthfully that I knew I had written the best brief I possibly could on a motion when the court's opinion announcing its decision was directly cut-and-pasted from my brief. Benjamin Cardozo, who is as lionized an author as any twentieth-century judge, was said to have written one of the most important New Deal era decisions—the one finding the Social Security system constitutional—by simply “plagiarizing” the Franklin D. Roosevelt administration's brief in the case.²⁹

Recently, the unconscious misconception of legal authorship resulted in a claim that was, given the conventionality of such misconceptions, inevitable. Lawyers who had won a \$145 billion judgment against the tobacco industry moved for reconsideration en banc of a decision reversing that judgment on the grounds that a Florida panel of judges had engaged in “judicial plagiarism” in their opinion announcing the decision.³⁰ The lawyers alleged that the three-member panel lifted their opinion from the defendant tobacco companies' own briefs and somehow thereby violated the plaintiffs' due process rights.³¹ The allegation of plagiarism was grounded in the following contention: “[More than] 86 percent of the panel opinion was authored by the tobacco industry, representing approximately 59 pages of the 68-page opinion through an almost verbatim replication of tobacco's appellate briefs, without a single attribution.”³² The argument went nowhere. The appeal was dismissed in a memorandum opinion announcing merely—without any reference to law, facts, or argument—that the motion for reconsideration en banc was denied.³³ As conventional as it may be to believe legal texts have authors who somehow own them, the results of the legal process quite clearly reject the idea.

Judges are never likely to be found to be “plagiarists” in their judicial opinions;³⁴ they are certainly not able to claim a copyright in the opinions they issue. To guarantee due process, “[j]udicial opinions are

29. See *Helvering v. Davis*, 301 U.S. 619 (1937); John Attarian, *Is Social Security Constitutional?*, LEWROCKWELL.COM (May 23, 2003), <http://www.lewrockwell.com/orig3/attarian7.html>.

30. Siobhan Morrissey, *A Case of Judicial Plagiarism? Plaintiffs Object to Court's Liberal Use of Defense Briefs*, A.B.A. J., Aug. 1, 2003 (internal quotation marks omitted).

31. *Id.*

32. *Id.* (alteration in original) (internal quotation marks omitted).

33. *Liggett Group, Inc. v. Engle*, No. 3D00-3400, 2003 Fla. App. LEXIS 14774, at *1 (Fla. Dist. Ct. App. Sept. 22, 2003).

34. *But see* Jaime S. Dursht, Note, *Judicial Plagiarism: It May Be Fair Use but Is It Ethical?*, 18 CARDOZO L. REV. 1253, 1255 (1996) (arguing that judicial plagiarism is unethical and proposing that the offense be specifically prohibited by an amendment to the Model Code of Judicial Conduct).

the law of the land, and must be made available to the public.”³⁵ In *Wheaton v. Peters*,³⁶ the Supreme Court of the United States established the government works exception and denied copyright protection to the official reporter of its cases.³⁷ The Court’s decision in *Banks v. Manchester*³⁸ expanded the ruling in *Wheaton* by denying copyright protection for state judicial opinions, explaining that judicial opinions belong to the people, judges have adequate financial incentives to ensure creation of opinions, judicial opinions constitute the law, and due process requires complete access to the law.³⁹ As stated by the Court in *Banks*,

Judges . . . can themselves have no . . . proprietorship, as against the public at large, in the fruits of their judicial labors. . . . The question is one of public policy, and there has always been a judicial *consensus*, from the time of the decision in the case of *Wheaton v. Peters*, that no copyright could, under the statutes passed by congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties. The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all.⁴⁰

Finally, section 101 of the Copyright Act of 1976,⁴¹ which statutorily defines “work of the United States Government,” does not permit copyright protection of “work prepared by an officer or employee of the United States Government as part of that person’s official duties.”⁴² Judicial opinions plainly constitute governmental work and thus are incapable of being copyrighted.⁴³

II. THE TOO-CONVENTIONAL VIEW IS THAT THE JUDGE IS AN “AUTHOR” IN THE CREATIVE AND ORIGINATING SENSE

In short, the only credible characterization of the process that produces a judicial opinion is that of a collaborative writing enterprise. Nevertheless, the Romantic view that forms contemporary common

35. Cary E. Donham, Note, *Copyright, Compilations, and Public Policy: Lingering Issues After the West Publishing-Mead Data Central Settlement*, 64 CHI.-KENT L. REV. 375, 384 (1988).

36. 33 U.S. (8 Pet.) 591 (1834).

37. *Id.* at 668.

38. 128 U.S. 244 (1888).

39. *Id.* at 253-54.

40. *Id.* at 253 (citation omitted).

41. 17 U.S.C. § 101 (2006).

42. *Id.* (internal quotation marks omitted).

43. Nick Martini, *Veeck v. Southern Building Code Congress International, Inc.*, 18 BERKELEY TECH L.J. 93, 100 (2003).

wisdom—that the opinion is the original work of the wise and creative judge pronouncing from on high—persists even among readers of judicial opinions. Moreover, the failure to understand a judicial opinion as a model of Neoclassical craftsmanship has a significant and deleterious effect on the ways in which opinions are read.

The Romantic view of the judge as a “judicial genius,” drawn from legal literature of nineteenth-century legal professionals, was representative of what has been deemed the “Age of Formalism.”⁴⁴ The term “Romanticism” refers to the nineteenth-century American spiritual conception of the human mind: “Whereas empirical psychology portrayed the mind as a passive ‘reflector of the external world,’” the contemporary Romantic view was of “the mind as both ‘projective and capable of receiving back the fused product of what it gives and what is given to it.’”⁴⁵ The Romantics viewed perception as a creative process: “the perceiving mind recreated the world as it came in contact with it, assimilating and synthesizing its disparate elements into a new whole.”⁴⁶

Analysis of legal discourse between 1800 and 1930 reveals a corresponding emergence of judicial thinkers whose insights were conceived to be both spontaneous, *sui generis* products of their own minds and legitimate expressions of the politically sanctioned rule of law.⁴⁷ In contrast to “[a]ntebellum judicial biographers [who] tended to depict the judge as a neoclassical artisan, whose legal constructions were made from given precedents, . . . [the] new judicial ideal [was] . . . a romantic author who left his unique imprint on the law.”⁴⁸ The judge was an artist, celebrated “as an ‘original genius’ whose work was a spontaneous production emanating from his own mind under the impulse of feeling.”⁴⁹ The Romantic judge “was considered ‘distinctly and personally responsible for his creation’” and was “guided [only] by laws of his own origination.”⁵⁰ In 1831 Joseph Story wrote of Chief Justice Parker, “[I]t is difficult to combine so many valuable qualities in a single character . . . as a judge, he was eminent for sagacity, acuteness, wisdom, impartiality, and dignity; as a citizen, for public spirit, and elevated consistency of conduct; as a man, for generosity, gentleness, and

44. Susanna L. Blumenthal, *Law and the Creative Mind*, 74 CHI.-KENT L. REV. 151, 154 (1998) (internal quotation marks omitted).

45. *Id.* at 157–58.

46. *Id.* at 158.

47. *Id.* at 159.

48. *Id.*

49. *Id.* at 165.

50. *Id.*

moral purity.”⁵¹ This depiction “of the [1831] judge also mirrors liberal theologians’ characterizations of God in the nineteenth century,” symbolizing the elevated god-like status to which judges were ascending.⁵² For example, pre-Civil War judges were considered god-like in their profound understanding of human nature and their possession of impartiality, benevolence, sagacity, and artless simplicity.⁵³

The characterization of the judge as a “genius” suggests that the success of Romanticism extended well into nineteenth-century American legal culture.⁵⁴ While Neoclassicism reveled in the collaborative enterprise as a means of personal identity, Romanticism focused more on individualistic qualities in describing personal identity.⁵⁵ The evolution of the meaning of the word “genius” exhibits an example of the evolution of thought concerning personal identity: “in its original Latin sense ‘genius’ meant ‘a guardian spirit,’ [but] by the sixteenth century it had come to refer to the ‘characteristic disposition or quality’ of an individual man.”⁵⁶ Additionally, the modern notion of a genius, which dates back to the mid-eighteenth century, describes such a person as one possessing “extraordinary ability.”⁵⁷ By the mid-nineteenth century, however, the word genius meant a person possessing “creative power” stemming from “higher faculties of imagination, reason, and the will.”⁵⁸

A new judicial ideal emerged as judges started associating the word genius with themselves.⁵⁹ Simultaneously, there emerged another judicial ideal of “legal formalism” that was characterized “by a rigid, deductive mode of reasoning.”⁶⁰ In essence, during legal Romanticism, the judge was viewed as saving the legal world from chaos and providing law for his citizens; this judge “possessed three key attributes: (1) creative power, (2) strength of intellect, and (3) courageous independence.”⁶¹ The ideal Romantic judge was “robust and rugged” in appearance and possessed innate intellect.⁶² According to Judge

51. *Id.* at 172 (alterations in original) (footnote omitted) (internal quotation marks omitted).

52. *Id.* at 172-73.

53. *Id.* at 173.

54. *See id.* at 187.

55. *Id.* at 188.

56. *Id.*

57. *Id.* at 188-89 (internal quotation marks omitted).

58. *Id.* at 189 (internal quotation marks omitted).

59. *Id.* at 192.

60. *Id.* at 193 (internal quotation marks omitted).

61. *Id.* at 202.

62. *Id.* at 205 (internal quotation marks omitted).

Parsons, complicated legal texts were made clear to the judge simply because of his profound intelligence.⁶³ Others also held judges in high regard, as seen in eulogies that identified these judges. For example, Chief Justice Marshall was acknowledged in antebellum eulogies as the “strenuous defender and expounder of the Constitution’ who ‘mould[ed] his own genius into its elements.”⁶⁴ Moreover, other commentators stated that Justice Marshall “was not the [expounder of the Constitution but] . . . the author [and] the creator of it.”⁶⁵ Ultimately, this ideal judge possessed the ability to combine his subjective and objective view of the world to deliver impartial yet personal written opinions.⁶⁶

To the present day, across lines of legal ideology, legal commentary continues to endow judges with elevated, hero-like status. Ronald Dworkin, in his *Taking Rights Seriously*,⁶⁷ presents a Romantic hero—a judge he calls Hercules (the most popular and widely worshipped of Greek heroes)—whose world is liberal, apocalyptic, and intensely communitarian.⁶⁸ Hercules was not an ideal judge but rather a Romantic hero: “He is a romanticization of the reasonableness of authority, and his world romanticizes reason itself.”⁶⁹ Similarly, in *Law’s Empire*⁷⁰ Dworkin stated, “The courts are the capitals of law’s empire, and judges are its princes.”⁷¹ Finally, Justice Holmes described

63. *Id.* at 204.

64. *Id.* at 203 (alteration in original) (footnote omitted).

65. *Id.* (internal quotation marks omitted)

66. *Id.* at 226.

67. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

68. *See id.* at 105, 128-30. It is particularly jarring to find such Romanticism about the judge in Dworkin, who plainly recognized at least part of the collaborative nature of judicial writing in his famous article comparing common-law judicial opinions to chapters in a chain novel. *See* Marianne Sadowski, “*Language Is Not Life*”: *The Chain Enterprise, Interpretive Communities, and the Dworkin/Fish Debate*, 33 CONN. L. REV. 1099, 1102 (2001). In “this theory, a group of novelists convenes and agrees to write a ‘chain’ novel, where they will draw random numbers and each novelist will write a chapter.” *Id.* The chapters are “writ[ten] sequentially, whereby one person ‘starts’ the novel, and sends the chapter to a subsequent author, who reads the previous chapter before authoring her own chapter[,] . . . seek[ing] to create a ‘single unified’ ‘work of art’ that is ‘consistent’” in the final product. *Id.* Dworkin’s theory acknowledges that “[a] judge deciding a case does not ‘writ[e] on a clean slate,’ but rather must synthesize relevant precedent” and reconcile present cases with the past. *Id.* at 1102-03 (second alteration in original). For Stanley Fish’s arguments against Dworkin, see STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 110-19 (1989). *See also* RICHARD A. POSNER, *LAW AND LITERATURE* 246-51 (rev. ed. 1998).

69. Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145, 210 (1985).

70. RONALD DWORKIN, *LAW’S EMPIRE* (1986).

71. *Id.* at 407.

the ideal judge as a “combination of Justinian, Jesus Christ, and John Marshall.”⁷²

Needless to say, comparisons of a judge to Hercules and Jesus Christ have perpetuated the elevated and god-like status of judges. The celebrated judge possesses “[i]mmense learning, deep culture, critical detachment, intellectual courage, . . . unswerving disinterestedness[,] reinforced imagination and native humility, . . . the special requisites for the work of the Court to whose keeping is entrusted no small share of the destiny of the nation.”⁷³ A judge’s impact undoubtedly is related to the caliber of opinions he sets forth. Justice Felix Frankfurter compares Justice Oliver Wendell Holmes to both a thinker and a magician, stating that “[i]n deciding cases, . . . his aim was to try to strike the jugular. His opinions appear effortless—birds of brilliant plumage pulled from the magician’s sleeves.”⁷⁴ Additionally, Frankfurter describes how “Justice Cardozo ‘always spoke of Holmes as the Master,’ as ‘the profoundest intellect who had ever dispensed Anglo-American justice.’”⁷⁵

III. JUDICIAL OPINIONS DO NOT FUNCTION THE WAY LITERARY TEXTS CONVENTIONALLY ARE ASSUMED TO

This robust Romantic view of the judge as author-creator is, unfortunately, conveyed both explicitly and implicitly to United States law students and thereby informs the interpretation of judicial opinions by inexperienced legal readers far more than it should. The most obvious way legal education romantically elevates the judge is in its dominant focus on the judicial opinion as the subject of study. It is no exaggeration to say that judicial opinions form almost the *exclusive* subject of study during the first year of law school and the vast majority of the subjects of study during the second and third years. Any attention paid in law school to writing other than judicial opinions—for example, writing by legislators, government regulators, lawyers in nonlitigation contexts, or lawyers writing to a judge in a litigation context that will culminate in a judicial opinion—is a recent phenomenon and is still clearly subordinate to the “case method” of teaching developed at Harvard in the 1880s.

The problem with conveying this privilege of focus on the judge and the judicial opinion in legal education is that beginning legal readers are taught to believe judicial opinions are like literary texts—that their

72. Robert A. Ferguson, *Holmes and the Judicial Figure*, 55 U. CHI. L. REV. 506, 511 (1988).

73. *Id.* at 510.

74. *Id.* at 517 (internal quotation marks omitted).

75. *Id.* at 518.

interpretation is the same sort of exercise as the interpretation of literary authors. As hardly needs to be repeated, Michel Foucault in *What Is an Author?*,⁷⁶ outlined how conferring “authorship” of a text on an individual has several implications for how that text is read.⁷⁷ First, of course, authorship makes texts “objects of appropriation.”⁷⁸ As discussed above, claims that judges have some ownership interests in their opinions have been and continue to be made despite the utter incompatibility of these claims with legal practice.

Second, the fact that a text can be and is most conventionally attributed to an author in and of itself makes the text a literary one.⁷⁹ Interestingly, as Foucault points out, it is with the rise of the Romantic view of the literary author in the seventeenth or eighteenth centuries that the “authorship” of scientific texts diminished in significance so that “[s]cientific discourses began to be received for themselves, in the anonymity of an established or always redemonstrable truth; their membership in a systematic ensemble, and not the reference to the individual who produced them, stood as their guarantee.”⁸⁰ That description of the way scientific texts are interpreted is far more consistent with the practices of lawyers and judges outlined above than with conventional literary interpretation. In contrast, as readers of scientific texts discarded concern for the authorship of those texts, “literary discourses came to be accepted only when endowed with the author function.”⁸¹ It is strange, therefore, that in so much legal commentary the author function is precisely what is emphasized.

Authorship has been conferred on some sets of texts in an effort to find uniformity in those texts and to diminish the significance of any discontinuities and inconsistencies they contained.⁸² Finally, being able to attribute authorship to a legal idea permits argument based purely on authority:

one defines a proposition’s theoretical validity in relation to the work of the founders [of the discipline in which the proposition is advanced]—while, in the case of Galileo and Newton, it is in relation to what physics or cosmology *is* (in its intrinsic structure and “normativ-

76. MICHEL FOUCAULT, *What Is an Author?*, in THE FOUCAULT READER 101 (Paul Rabinow ed., 1984).

77. *Id.* at 101-20.

78. *Id.* at 108.

79. *Id.* at 109-10.

80. *Id.* at 109.

81. *Id.*

82. *Id.* at 111.

ity”) that one affirms the validity of any proposition that those men may have put forth.⁸³

Following Foucault, in assuming an opinion is written by a unitary creator, an inexperienced legal reader reads with the following unconscious premises: (1) the opinion (along with all the judge’s writing) is an organic whole within which each piece has its function as part of that whole; (2) the opinion seeks to be a complete statement on the subject it addresses; (3) the opinion seeks to be a final statement on the subject it addresses; (4) the opinion’s quality lies primarily in the deference accorded its author and the authors he relies upon; (5) the opinion is devoid of ambiguity; and (6) the judge in some way owns the opinion.

As explained above, however, almost exactly the opposite is true about the way the legal profession’s interpretive practices are actually conducted. First, a judicial opinion is not unitary in its composition. The opinion is a pastiche composed from a number of sources, including parties’ briefs, bench memos written by clerks, earlier opinions, other sources of law (including statutes and regulations), commentary on the primary law, and the judge’s own thinking. Each of these sources, in turn, is similarly composed of the same types of pieces. Efforts to impose unity on legal texts that are almost always written in a discourse community that views them as context-specific can lead to absurd and even horrific results.⁸⁴

83. *Id.* at 116.

84. A particularly egregious imposition of unity upon the interpretation of diverse legal texts is the legal memorandum produced by the Bush Justice Department during the George W. Bush Administration. The memorandum determined that the definition of “torture” under 18 U.S.C. §§ 2340-2340A (2006) was limited to treatment that causes “severe pain,” which the memorandum defined as pain that is “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” Memorandum from Jay S. Bybee on Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A to Alberto R. Gonzales, Counsel to the President, at 1 (Aug. 1, 2002), *available at* <http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf>; *see* 18 U.S.C. §§ 2340-2340A (2006). The speciousness of the argument is striking. First, the statute relied upon does not, as the memorandum implies, define severe pain. *See* Bybee, *supra*, at 5-6 (defining severe pain by use of methods of statutory interpretation). More importantly, for present purposes, the memorandum equated the definition of severe pain in the statute relied upon with the definition under the various legal authorities banning torture, thereby imposing a unity upon widely disparate texts. *Id.* The authorities relied upon are part of a statutory governmental insurance program, and to the extent they concern the definition of severe pain, they limit claims under the program and thus further the program’s solvency. *See* 8 U.S.C. § 1369 (2000); 42 U.S.C. § 1395w-22(d)(3)(B) (2000); 42 U.S.C. § 1395dd(e) (2000). It is patently ridiculous to find illumination of the meaning of the term severe pain as used in a statute pertaining to torture, in a statute pertaining to the regulation of an insurance scheme. An insurance regulation will naturally restrict the meaning of covered terms—one of the regulation’s

Second, judicial opinions and the texts that produce them do not possess the status of property. The absence of a proprietary interest in legal texts feeds naturally into legal practice, the conventions of which would be the equivalent of theft in most contexts students have encountered. Conversely, attributing ownership to legal texts discourages such practices.⁸⁵

As a corollary to the absence of any ownership interest in legal texts, experienced legal readers evaluate those texts primarily based on their persuasive power, not on the weight of authority they bear. Few things are more difficult to get across to the novice legal reader: law is not the location and application of authority; rather, its principal object is adherence to its dictates, and this adherence is obtained in our legal culture far more importantly by normative persuasion than by reliance on authority.

In addition, few opinions are the “final” word in any meaningful sense. An opinion may, but often does not, dispose of an entire lawsuit, but even if such a judgment is one of the limited class of opinions issued by a court of last resort, it is never anything but tentative and contingent with respect to generalizations at any higher level than the specific facts resolved by the opinion.

Finally, a judicial opinion is directed at several different audiences, none of which meaningfully include the law student. The opinion’s “implied readers” include the parties to the case and their lawyers, courts up and down the appellate chain, the legislative and executive bodies concerned with the applicable law, legal scholars and critics, the press, and the body politic.⁸⁶

Squaring education with practice is not something law schools are very good at. Inevitably, the failure to do so results in educational deficiencies. When the failure is attributable to a lack of attention to the premises implicit in both the practice and the educational process, it is correctable. Strangely, however, the implications of conventional notions

purposes is maintenance of the scheme’s solvency. The Bush Justice Department subsequently made the memorandum inoperative in a new memorandum that expressly rejected “reasoning” regarding the definition of severe pain advanced in the earlier memorandum. Memorandum from Daniel Levin on Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A to James B. Comey, Deputy Attorney General, at 10 (Dec. 30, 2004), available at <http://www.justice.gov/olc/18usc2340a2.htm>.

85. In fact, the neglect to notice the conflict between academic plagiarism policies and the collaborative nature of legal writing in practice is a difficulty regularly encountered but rarely noted.

86. See, e.g., Robert F. Blomquist, *Playing on Words: Judge Richard A. Posner’s Appellate Opinions, 1981-82—Ruminations on Sexy Judicial Opinion Style During an Extraordinary Rookie Season*, 68 U. CIN. L. REV. 651, 656 (2000).

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of judicial authorship are difficult to overcome. Perhaps the difficulty lies significantly in the prominence “ownership” plays in contemporary political discourse. Perhaps, however, it lies in further study.⁸⁷ After all, while lawyers do not necessarily write about the absence of an author in judicial opinions, their practices clearly reflect an understanding of that absence.

87. At the purely empirical level, I am currently exploring ways of statistically analyzing the similarities between briefs and the opinions issued in response to those briefs. The purpose of this research is to support the anecdotal assertions in this Article that judges regularly do literally cut and paste those briefs into their opinions.