LESS IS MORE: ONE LAW CLERK'S CASE AGAINST LENGTHY JUDICIAL OPINIONS

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French polymath Blaise Pascal is reputed to have apologized once for writing a letter he thought was too long, explaining to the letter's recipient that he did not have time to write a shorter one. We chuckle at Pascal's apology because it highlights our tendency to think that the length of a writing correlates to the amount of time and effort expended to create it. We thus tend to presume that longer writings are better writings. Judging by the length of today's judicial opinions, it appears that some judges and their law clerks likewise treat quantity as a proxy for quality. A forty-page opinion, it seems, must be better considered than a seven-page opinion, right? Contrary to what I suppose to be the conventional wisdom, I suggest the answer is no, all things being equal. My hope here is to convince you to reach the same conclusion.

I begin with an observation: judicial opinions are getting longer. I've noticed it when I research case law and when I review proposed opinions. Perhaps you've noticed it too. I decline here to support my observation with authority; I take it as given. I'm sure a simple Google search could provide the interested reader authority for this observation. But if you doubt it, I hope you will at least concede that judicial opinions as a whole, whether growing or shrinking, are generally longer than they should be.

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There are probably several reasons for this growth. Word-processing programs make it easy to write and move words without much cost. Online research databases make it easy to find springs of legal authorities and commentaries that encourage discussion. Many judges, especially in the federal system, employ droves of law clerks who help write opinions. Many of these law clerks are fresh out of law school and fall into two camps, though they are not mutually exclusive. The first camp is eager to make a personal impression on the law, and one way to do so is to draft opinions that invite as many citations as possible. And what better way to invite citation than to insert several banal statements of law and quotations from earlier opinions, even when those statements of law are not at issue or when the precise wording of those legal points is unimportant. The second camp is rife with diffidence. The best way to hide a lack of confidence in one's own voice is to drown the opinion in quotations and other markers of scholarship, mimicking the long-winded opinions so prevalent today. I do not mean to pummel law clerks for these inclinations; I merely point out that these tendencies contribute to the mushrooming of opinions.

Judicial opinions thus tend to be more bureaucratic and robotic and less conversational and personal. More and more it seems judges and their clerks write opinions to resemble law review articles, perhaps out of the belief that those articles reflect a fastidiousness that imitation can capture. For example, many opinions now overflow with footnotes, block quotations, string citations, parentheticals, and (heaven forbid) tables of contents, despite that opinions have very different functions than law review articles and are typically read by a much wider audience.

I suspect another contributing cause to longer judicial opinions can be found in America's law schools. Law students are often taught to "show what they know" on exams by regurgitating as much as possible about a legal topic so that when they use buzz words or phrases their professors will award them points. I sus-

pect at least some law professors grade as much for the number of issues a student can spot as for clarity of thought. And though some legal-writing courses preach brevity, I do not believe it's common for law students to be rewarded for practicing what those courses preach. In this setting, a student is thus wise to err on the side of rabbit holes, and this tendency from our formative years in legal writing might sometimes carry over to judicial opinion writing, whether by clerks or judges.

Finally, I suspect judges fear the prospect of missing something important to a case more than the annoyance they cause a reader by including unimportant details or discussions. So judges feel pressure to include information of marginal relevance because they are more concerned with accusations of ignorance than accusations of verbosity.

There are probably more reasons why too many words find themselves in judicial opinions, but I'll leave that discussion aside. Instead, I hope to convince judges and law clerks to resist the pressures of volubility and focus instead on writing concise and clear-headed opinions.

The first virtue of short opinions is that they contain less dicta than long opinions. I suspect the reader is familiar with many of dictum's drawbacks, but I'll give some for good measure. Most importantly, dicta distract from an opinion's main points. A good opinion coaxes readers to follow the thread, without diverting attention to immaterial discussions. The next time you question whether you should mention a point of minimal concern, remember that coherence and persuasiveness are the biggest sacrifice of prolixity. When in doubt, leave it out.

Relatedly, an abundance of dicta suggests the author lacks a firm grasp on the legal difficulties at issue. It can also show that authors lack confidence in their opinions when they pepper them generously with distracting details and discussions, perhaps to hide difficult, controversial, or doubtful conclusions. I've learned that the best way to handle such matters is to shoot

them between the eyes, not to bury them in the weeds in the hope that no one finds them.

Dicta also tend to be less accurate. Judges often stray into the world of dicta without the benefit of argument from the parties, so it's easier to miss important points or authorities.[1] Even when the parties have briefed the point, judges are less inclined to think critically about information that has no bearing on the outcome of the case. In other words, if the judge does not expect the parties to call their statements into question, judges are less careful to ensure what they say is correct. I suspect, moreover, a dictum-laden opinion is less accurate overall because those who review the opinion drafts must spread their reviewing time over more material. It's easier to overlook mistakes, especially when a tired reviewer is rounding page 30 and is ready to finish the reviewing task. This is a common way for errors to creep into the law.

And finally, judges push the bounds of separation of powers when they utter dicta. Article III of the U.S. Constitution grants federal courts the judicial power to resolve certain cases or controversies. State constitutions generally contain similar grants of authority to state courts. Whatever the precise contours of "the judicial power," it seems generally to mean the power to adjudicate disputes, but when courts use dicta, which by definition are unnecessary to resolve the dispute before them, it raises questions about whether courts are exceeding their authority.[2]

Dictum is not the only problematic consequence of overlong opinions. Overlong opinions also tend to be wordier and thus less clear and direct. Spending time shaving stubble off your opinion can work wonders. It makes the opinion smoother and more persuasive. Perhaps most important, wordy opinions reflect an intellec-

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1. Michael C. Dorf, *Dicta and Article III*, 142 U. PENN. L. REV. 1997, 2000 (1994) ("Dicta are less carefully considered than holdings, and, therefore, less likely to be accurate statements of law.").

2. *See* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1259–60 (2006).

tual lethargy that offsets the reasoned consideration authors want to project.

Overlong opinions also raise the costs of litigation. In law as elsewhere, time is money. It generally takes less time and effort to read and understand a five-page opinion than a ten-page opinion. Judges and their clerks must also devote more time separating wheat from chaff in longer opinions. And since overlong opinions tend to be more difficult to comprehend, more effort is needed to make sense of them.[3] Litigation already costs too much, and those with their sleeves caught in the litigation machinery already complain enough about the time and expense needed to litigate. Long judicial opinions give credence to their concerns.

I am not alone in this observation. More than a century ago, an anonymous author in the *Harvard Law Review* opined that "the judge who condenses his opinions as rigorously as is at all consistent with thoroughness is conferring a benefit on the entire profession."[4] A few decades later, a commentator in the *Yale Law Journal* suggested that "the verbosity or prolixity of judicial opinions . . . add[s] to the labors and consequent delays of the courts," and may be one reason for a growing disrespect for the law.[5] These observations are even more suitable today, and though it's easier to keep that extra discussion in the opinion than to scratch it, remember that you are forever sentencing attorneys to grapple with the content. And they'll make their clients pay for it.

The public, moreover, is not seriously interested in overlong opinions. In today's 280-character culture, the public simply does not have the attention span to spend

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3. Long opinions may also increase uncertainty about what the law is, which increases the likelihood of litigation. Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 107 (1989).

4. Note, *Judicial Opinions Long Drawn Out*, 9 HARV. L. REV. 537, 537 (1896).

5. Francis A. Leach, *The Length of Judicial Opinions*, 21 YALE L.J. 141, 141 (1911).

hours reading judicial opinions.[6] Overlong opinions therefore encourage public ignorance of the law and the courts and thus discourage public participation in the judicial system. So if public education is one of your opinion-writing goals, think twice before including that extra word or thought.

Relatedly, overlong opinions are ripe for misinterpretation. I recently read an article online that explained the court for whom I work had held that citizens do not have the right to film public officials in public.[7] When I checked the opinion cited for that proposition,[8] I discovered that it says absolutely nothing about such a right one way or the other. I do not maintain that the opinion in that case was too long (it was actually a relatively short per curiam opinion); I submit that the media often has trouble understanding and explaining the work courts do.[9] Why make it more difficult to report accurately on our work?

Overlong opinions also make it difficult for the most important members of the public, the parties before the court, to understand court decisions. Parties should not have to spend hours reading an opinion (often more than once) to figure out why the court decided as it did; attorneys should not have to act as professional interpreters of legalese. Opinions should be accessible and clearly and concisely explain the basis for decision. The best way to increase a court's legitimacy is to write opinions that allow even the losers to feel that the court reached a justifiable decision; what losers cannot stomach is a decision that makes no sense or that requires them to rely on their expensive attorneys to navigate and explain the vernacular.

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6. Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 247–48 (2010).

7. Dan Claxton, *Eighth Circuit: Citizens Do Not Have a Right To Film Public Officials in Public*, 13 KRCG (Aug. 9, 2017), https://krcgtv.com/news/local/eighth-circuit-citizens-do-not-have-a-right-to-film-public-officials-in-public.

8. *Akins v. Knight*, 863 F.3d 1084 (8th Cir. 2017) (per curiam).

9. *See also* Erwin Chemerinsky, *A Failure to Communicate*, 2012 B.Y.U. L. REV. 1705, 1705 (2012) (describing initial media confusion over the *Bush v. Gore* decision).

And finally, overlong judicial opinions might discourage law students and those thinking about becoming law students. When the uninitiated encounter one of today's long, inscrutable opinions, they may suspect they don't have what it takes to think, sound, or write like a lawyer. Unfortunately, many students' doubts are probably the product of encountering bad writing, not discovering some personal shortcoming. There's no difference between good writing and good legal writing. Good opinions make sense, and most should be easy for law students to grasp. Not to mention that law students can be an overburdened, anxious lot. I see no good reason to add to their stress.

I hope this piece convinces at least some to reconsider their preconceptions about the qualities of a good judicial opinion. When considering each word or idea in an opinion draft, keep in mind that everything that doesn't help hurts. Instead of erring on the side of inclusion, I recommend you commit to omit and elide with pride.

And I do apologize for not writing a shorter piece. I didn't have the time.