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Craft and Power

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[I]t is as craftsmen that we get our satisfactions and our pay.

—Learned Hand
The Bill of Rights

Oliver Wendell Holmes—a great judge—said that "the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees." Appellate courts command that force in ways that principle and practicalities leave little fettered. Judges must fetter themselves, not least by honoring the judicial duty of craftsmanship.

That duty obliges courts to respect procedural rules, for they keep courts within their bounds and promote fair and sound decisions. That duty obliges courts to analyze legal authority scrupulously, since judicial legitimacy depends on that authority. That duty obliges courts to explain their decision and reasoning lucidly, since only then can the litigants and we the governed tell what is required of us and see that the court acted lawfully. No court, no judge, no person always achieves high standards of craft. But a court that betrays its duty of craftsmanship is a court that has lost its moral authority and wrongfully asserted its legal power.[1]

Such a court is the court that decided *Grimes v. Kennedy Krieger Institute*.[2] *Grimes* is the case (actually two cases consolidated in a single appeal) in which parents whose homes had been part of KKI's research into ways to abate the dangers of lead paint in old buildings sued KKI on the grounds that KKI's negligence had harmed their children. They centrally claimed (the court seems to say) that KKI had failed to warn them properly about dangers to their children arising from the lead paint that had once been used in their homes.

The Maryland Court of Appeals (Maryland's supreme court) eagerly commanded the public force. But its justification for its judgments and decrees fell intolerably short of the requirements of judicial craftsmanship in area after area.

The most primitive requirement of the judge's craft is writing well enough to be understood. Even this task overwhelms the *Grimes* court. Its opinion is swamped with errors in syntax, grammar, punctuation, and even proofreading. It is awash in sentences that cannot be parsed. It is flooded with passages so bungled that they stupefy more than clarify. For example: "If consent agreements contain such provisions, and the trial court did not find otherwise, and we hold from our own examination of the record that such provisions were so contained, mutual assent, offer, acceptance, and consideration existed, all of which created contractual relationships imposing duties by reason of the consent agreement themselves (as well, as we discuss elsewhere, by the very nature of such relationships)." Or: "Though not expressly recognized in the Maryland Code or in our prior cases as a type of relationship which creates a duty of care, evidence in the record suggests that such a relationship involving a duty or duties would ordinarily exist, and certainly could exist, based on the facts and circumstances of each of these individual cases."

This is not how competent law students, much less competent judges, write. *All* the students in my last brief-writing course wrote more correctly and comprehensibly.

Second, a court's duty of explanation requires it to set out a case's facts, its procedural history, and its legal issues. *Grimes* spends eight of its twenty-eight thousand words on the facts, but its account is so jumbled and disjointed that even a heroic reader retires defeated. Ordinarily, appeals go from trial courts to intermediate appellate courts, but the reader never learns how Maryland's highest court got the case. Statements of issues litter the opinion, but the reader can only wonder whether those are the issues the litigants actually posed.

Third, a court's duty of justification obliges it to identify the governing law and then show how it applies to the issues at hand. *Grimes* botched both obligations.

The trial courts had granted KKI summary judgment because they concluded that even if KKI had done everything the plaintiffs alleged, it had violated no legal duty. The Court of Appeals' job was to decide whether the trial courts were wrong. One can certainly imagine a legal argument that Maryland law provided a remedy for the acts plaintiffs alleged. However, the court made no such argument. Indeed, it made no disciplined legal argument at all.

The court's abandonment of legal argument is far too thoroughgoing to be surveyed here. A few examples of the many failures must suffice. For instance, the court said, "Of special interest to this Court, the Nuremberg Code, at least in significant part, was the result of legal thought and legal principles, as opposed to medical or scientific principles, and thus should be the preferred standard for assessing the legality of scientific research on human subjects. Under it, duties to research subjects arise."

So is the Nuremberg Code part of Maryland tort law? Apparently, since the code is the "preferred standard for assessing . . . legality." But then what is the legal basis for incorporating the code in state law? Rather than answer that necessary question, the opinion unreels some 550 words (one-third of the length of this essay) from an academic article. Is the court adopting the article's reasoning? Surely not, because the article reports that "only a handful [of cases] have even cited" the code and that "no United States court has ever awarded damages to an injured experimental subject, or punished an experimenter, on the basis of a violation of the Nuremberg Code." And if the code *is* law, which of its provisions apply to *Grimes*? How? Why? The court just slaps down the *entire* code and leaves the reader to supply the reasoning.

Nor does the court make its legal case for incorporating the code into Maryland law in the paragraphs following the article excerpt. Instead, it switches without explanation to (more than six hundred words worth of) another academic article, which, the court says, "describes nontherapeutic experimental research, differentiating it from therapeutic medical treatment." We lose track of the code until pages later, when the court drops a few more Delphic remarks about it.

Eventually, the court invokes some undoubted Maryland law—cases that prescribe the legal tests the court is supposed to apply. The court announces the tests' outcomes. But what is missing—systematically—is the reasoning by which the court moves from test to conclusion. Lawyers call this *ipse dixit*—substituting assertion for argument. It is the *Grimes* court's maddening method.

The legal basis for *Grimes* is further obscured because the court regularly transgresses the boundaries of its role. In America, trial courts "find" facts through procedures in which the parties present, challenge, and interpret evidence. Appellate courts are not equipped to discover facts and are not supposed to try. In *Grimes*, summary judgments had preempted trials, and hence there were no reliably established facts. Unfazed, the court chronically makes pronouncements that depend on conclusions about facts. (In a separate opinion, a judge who concurred in the court's result but rejected its opinion listed—conservatively—eleven factual findings about questions "not properly before this Court.")

For example, the court says flatly, "*Fully informed* consent is lacking in these cases." How could the court know? As it admits, at least one plaintiff agreed to participate "[a]fter a discussion regarding the nature, purpose, scope, and benefits of the study." What was said in that informed consent discussion is exactly the kind of factual issue that trial courts are designed to resolve and appellate courts cannot.

Had the court stuck to the question that provoked the appeal—whether summary judgment was proper—its legal argument would have been bad and baffling enough. But the court reached out to address other topics (even if the litigants hadn't been given their right to address them fully). These were "important" issues "of first impression" (that is, issues no Maryland court had considered). The court "therefore attempted to address those issues in a full and exhaustive manner." "Therefore" is backwards. Not only do supreme courts depend on trial courts to discover facts, they postpone entering legal debates until intermediate appellate courts have worked at them long enough for a mature understanding of the problem to emerge.

But in the *Grimes* court rushed. For example, it conceded that "[t]he issue of the parents' right to consent on behalf of the children has not been fully presented." Nevertheless the court began its "Conclusion" by saying bluntly: "We hold that in Maryland a parent . . . cannot consent to the participation of a child . . . in nontherapeutic research or studies in which there is any risk of injury or damage to the health of the subject." When a court says "hold," it is announcing its considered resolution of a legal issue a case presents. This "holding," however, was so unexplained and unsettling that the court—most unusually—had to explain itself further in response to a motion for reconsideration. The court said airily, "As we think is clear from . . . the Opinion, by 'any risk,' we meant any articulable risk beyond the minimal kind of risk that is inherent in any endeavor." Did the court really think it was just clarifying what it said (more than once) in the opinion? Was it announcing a new standard? Did it understand what that standard meant and what its implications were?

The *Grimes* court could not know what the litigants had actually done, how lead poisoning is caused and combated, or how human subject research is conducted and regulated. Nevertheless, the opinion self-righteously denounces (with bald accusation and snide insinuation) KKI, the Johns Hopkins IRB, and "the scientific community" as dishonest and vicious. For instance, the IRB "encouraged the researchers to misrepresent the purpose of the research. . . . The IRB's purpose was ethically wrong and its understanding of the experiment's benefit incorrect." The *Grimes* judges (who enjoy judicial immunity against libel suits) reach their shameful nadir when they compare the KKI researchers with Nazi "doctors." Judge not, that ye be not judged. For with what judgment ye judge, ye shall be judged.

Learned Hand—a great judge—said that "for a judge to serve as communal mentor appears to me a very dubious addition to his duties and one apt to interfere with their proper discharge." He could not have asked for better evidence than the opinion in *Grimes v. Kennedy Krieger Institute*. *Grimes* is now a name in the litany of scandals used to justify governmental regulation of human subject research. *Grimes* is treated respectfully because people trust courts. But this court fell so disgracefully below the standards of craftsmanship by which courts earn our trust that *Grimes* should be excised from our discourse.

1. All this has nothing to do with judicial activism or restraint, with strict or liberal constructionism, all of which are regularly practiced with craftsmanlike skill.

2. 782 A2d 807 (Md 2001).