

Justice Freedman's Literary Style

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Eight years ago I spoke at a symposium about Sam Freedman's contribution to the law. In the course of concluding I stated:

Sam Freedman's potential legacy in fact remains to be fully realized. He left behind a set of judgments that can stand today, and for all times, as a model: of stylistic grace, of lucid analysis, and of humane judgment. It is worthy of study and emulation throughout the common law world, no matter how the details of the law and society may change.

His life stands as a model no less than his works. We law teachers tend to teach about doctrines and institutions, but not enough about the human beings who animate them. Sam Freedman is worthy of a full-length biography. It is a book that still calls out to be written.¹

In the course of preparing a special volume last year on five decades of Chief Justices in Manitoba, I discovered that there were, in fact, the makings of a full-length autobiography. As it turned out, after Sam's death a talented historian and editor, Robert Clarke, had worked with Mrs. Brownie Freedman to edit Sam's own short autobiography and add to it various judgments, speeches, and interviews and mold them into a memoir written in the first person. We at the Manitoba Law Journal have since worked with Robert to bring it fully to life, so that readers may have the experience of not only hearing of Sam's life from his own perspective, but experiencing it through the medium of his own manner of expression.

Sam's autobiography shows again how much of his life and work was influenced by – or at least harmonious with – his Jewish heritage. It cannot be inferred from his autobiography precisely how tradition worked its influence on his style of writing and thinking. Perhaps he was affected to some extent by his limited direct study of traditional sacred literature. Sam may, in some respects, have emulated his father, who was (Sam relates

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¹ Bryan P Schwartz, "Samuel Freedman's Contribution to the Law" ("Samuel Freedman: Man of Law" exhibition, delivered at the Jewish Heritage Centre, Winnipeg, 7 November 2006), (2012) 36:SI Man LJ 145 at 147.

here) learned in the rabbinic traditions and who had a celebrated talent for witty turns of phrase. Sam's childhood home was a fragment of Eastern European Yiddish culture, which in turn incorporated styles of thought and expression from its ancient Hebrew-based religious foundation.

His life and work are characteristic of a sage of the Talmud. His intellectual assumption in addressing the common law is the same as that of the Talmudic tradition: that there is an underlying order and justice to the entire corpus of decisions and sayings of the past. The task of the sage is to study assiduously the tradition, resolve its variety and surface contradictions, and derive a principle that governs the current case. The system is composed of packages of words; the truth is not foundationally expressed in scientific formulas, mathematical propositions, visual or musical art, or by way of esoteric methods such as silent meditation or feeling a pulse of emotions until there is a felt resolution. The words themselves are compact and concrete. Hebrew, the language of the Bible and much of the Talmud, is based on roots of three consonants; there may be vowel changes, prefixes and suffixes, but the essential meaning of a word is embodied in a few simple, solid and perseverant letters. The sage is able to combine words into short phrases which command assent by the clarity, simplicity and elegance with which they are expressed, and the compelling intrinsic moral force of the proposition they state.

Meaning is often conveyed in the Hebrew Bible by comparing and contrasting one phrase with another; a repetition or slight variation can speak volumes. The reader is invited to ponder and draw inferences from subtle linguistic nuances. The sparseness of language and information conveyed by the narrator invites the reader to use his own powers of logic and reason to recreate a story in his mind or arrive at a conclusion about what a passage is conveying about a narrative that unfolded, or the meaning of a tale, or the implications of a principle.

In this memoir, Sam recalls losing Walter Stoney to the hangman. The narrative is extremely short. It tells us that Stoney stabbed his girlfriend, then tried to kill himself by throwing himself in front of a train. At his trial, he testified. He interrupted Sam, his lawyer, to confess. Sam does not say so explicitly, but the reader can infer that the confession was a renewed attempt by Stoney to kill himself. First he stood in front of a train, then he confessed in open court; in both cases, he attempted to place himself in the path of a lethal intervention, rather than directly delivering the blow. Sam writes of the execution:

I didn't attend the execution, but Harold Buchwald, a law student who worked with me on the trial, attended. He told me later that an instant before they put the black hood over Stoney, his eyes circled the room. When they landed on Harold, there was a look of recognition. A moment later the trap sprung, and that was the end of the case of *The King v Stoney*.

From long before the time of that case I had been against capital punishment, and I still am. Capital punishment is fundamentally a moral question, though many people refuse to classify it that way. They say it is a practical question arising from the need to assist effectively in the ongoing and ever-present war on crime. I take the moral position. I submit that it is wrong for the state deliberately to take a human life. The sanctity of human life is something to be cherished, not destroyed. True enough, a murderer himself doesn't show much respect for the sanctity of his victim's life, but there's a difference. The state should not, of set purpose, put itself in a position of doing what the murderer has done, namely taking a human life. The state must not allow itself to adopt the standard of conduct of the murderer.

Sam does not describe his own emotions. We might infer that he was too distraught to attend the execution himself. Sam says that Stoney looked around just before the black hood was placed over his head at the gallows. We wonder whether Sam felt some guilt for not being present for his client at the ultimate moment. Sam concludes the narrative by simply saying "that was the end of the case of *The King v Stoney*." In his depersonalized phrasing of the end of the tale, is Sam reinforcing his need to distance himself emotionally, as much as he can, from the brutal human reality of the killing of a human being, and of Sam's inability to save him?

Sam switches in the next paragraph to a wider reflection. The transition moves through personal story to legal reporting to general observation about capital punishment. As Sam so often does, he reduces a debate to a very few fundamental elements expressed in the simplest of terms. Jewish scriptures often make binary distinctions - indeed, God creates the world by a series of divisions (such as the heavens and the earth, day and night) and assigning a label to each - and Sam often follows that method ("judge of caution" versus "judge of valour"). The case for the death penalty, in Sam's characterization, is "practical"; the case against is "moral". He contends that the "state must not allow itself the standard of conduct of the murderer." Perhaps his general conclusion is especially resonant and persuasive because of the story it builds upon: Stoney followed up his murder of an innocent human being by trying to kill himself, and the state ultimately obliged him.

Here, as in some other respects, while Sam's conclusions will strike many (including me) as sound, his literary power may lead the reader to believe the debate is simpler than it really is. The Talmud recalls that:

A Sanhedrin that puts a man to death once in seven years is called destructive. Rabbi Eliezer ben Azariah says that this extends to a Sanhedrin that puts a man to death even once in seventy years. Rabbi Akiba and Rabbi Tarfon say: Had we been in the Sanhedrin none would ever have been put to death. Rabban Simeon ben Gamaliel says: they would have multiplied shedders of blood in Israel.

The reply of Rabbi Simeon ben Gamaliel evokes more powerfully than Sam's rhetoric the moral implications of foregoing a deterrent to murder – if the death penalty is indeed such a deterrent. Sam speaks of the practical argument as involving “the war against crime”. Rabbi Simeon ben Gamaliel speaks of the spilling of “blood in Israel”. Compare the rhetoric. Rabbi Simeon makes it concrete (“shedders of blood”, not Sam's abstract “war on crime”) and he reminds the reader that the potential victims are now living within the community for which the lawmaker has ties of solidarity and responsibility (“in Israel”), whereas Sam's formulation does not mention victims, not their blood, not their presence within the land in which he owes duties of loyalty and responsibilities of governance.

Sam's artful use of language to persuade is illustrated by an appendix we have included in this volume. A largely unknown body of literature in Canada is the recommendations that trial judges made in capital murder cases concerning whether the royal prerogative of mercy should be exercised, by the federal cabinet, to commute a death sentence to life imprisonment. In the case of the murder of Father Alfred Quirion, Sam presided over the trial of the three accused of being involved in his killing. After the jury convicted, Sam had no choice under the law but to pronounce a death sentence on each of them. He wrote a report to the federal government, however, recommending mercy. His account is concise, painstaking to accurately and precisely report on all essential points of law and fact, and generally impartial in all respects. He uses, however, a subtle rhetorical maneuver throughout the report. It is replete with references to the convicted individuals as “the boys”. They are not referred to impersonally as “the accused”, and certainly not in a pejorative way, as “the culprits” or “the offenders”. At one point, Sam refers to one of them as “a lad”. In the end, Sam identifies their youth as the primary ground for clemency. The repeated description of them as “the boys” provides an emotional, as well as intellectual, reinforcement of his recommendation – which was accepted. In this autobiography Sam writes:

I am satisfied that the jury weighed the matter correctly and that their verdict of guilty in each case was the proper verdict. But the result of the jury's verdict was that I had to pronounce the death sentence, and because there were three accused, I had to pronounce them individually, three separate times. I am not going to pretend that it was an easy thing to do. During the course of this trial, which took place in the presence of the parents of these boys, I acquired a feeling towards them (I won't say a paternal feeling, perhaps an avuncular feeling). In any event, to pronounce the death sentence—to say that these boys should on a certain day between 1:00 A.M. and 6:00 A.M. be taken from their place of confinement and taken to the place of execution, there to be hanged by the neck until dead—that was not a very pleasant thing to do, nor an easy thing. The date set for execution of the sentence was Tuesday, February 28th, 1956.

I had to pronounce this sentence despite my own aversion to capital punishment—Parliament having spoken, and having declared, during that time at least, that capital punishment was the law, in the trial itself I would have been false to my oath as a judge if I had recommended clemency simply because I did not like capital punishment and not because the facts of the case warranted such a recommendation. I *did* impose the death sentence, because following the jury's verdict, the judge must impose the death sentence.

You can draw a parallel with a field far away from murder: divorce, for example. Many a Catholic judge who personally doesn't believe in divorce because of his religious convictions will pronounce a decree of divorce as a judge implementing the law of the land.

I did something afterwards, though. The trial judge has to present a report of the case to the Minister of Justice in Ottawa. When I presented my report, I accompanied it with the recommendation for clemency. There were at least three grounds for the recommendation: one was the youth of the boys; second, the fact that the one that did the shooting, while not legally insane, was clearly abnormal mentally; and thirdly, the carrying out of the execution would mean taking three lives for the one they had taken.

The Minister and the cabinet acted on the recommendation. The death penalty was set aside. A commutation took place in favour of life imprisonment.

A footnote to the case: The boys were in Stony Mountain Penitentiary for about eight or nine years, and then they were released on parole. When last I heard of them, in the late 1970s, they were still out on parole, and according to the information I had received, none of them had been in any trouble since.

Even in the footnote, Sam is still referring to the three individuals as “the boys”. Notice as well how Sam conveys the sense that he handled the case in a judicious manner, rather than being overwhelmed by emotion. His feeling for the three was “avuncular” rather than “paternal”. In describing his revulsion to having to sentence the three to having their necks broken, he uses understated language: “not a pleasant thing to do, not an easy thing to do.” The use of negative formulations (rather than something direct like, “it was painful for me to pronounce the sentence”)

conveys both his revulsion for the task and his desire to convince the reader (and himself) that he was throughout acting in a detached and professional manner. The sense of his inner struggle between personal conviction and legal duty is conveyed, however, by a threefold repetition – first, “I am not going to pretend that it was an easy thing to do” and then, “not a very pleasant thing to do, nor an easy thing.”

For another illustration of Sam’s attentiveness to nuance in language, the reader is invited to review the following passage from his autobiography and observe the use of the word “fortune”. First there is the arresting and funny phrase that the plaintiff had “the great good fortune” of being struck by a car. By the end of the paragraph a majority (from which Sam dissented) has ordered the plaintiff to turn her compensation over to a municipality – as reimbursement for its earlier provision of welfare payments. Sam now characterizes the accident as “very unfortunate”:

Another case in which I dissented, *Montcalm v. Lafontaine*, concerned a woman who was the recipient of welfare payments from a municipality in which she lived. One day this woman had the great good fortune to be hit by a motorcar. As a result, in very short time, she became entitled to an award of about \$3,000. Well and good, but at this point the municipality stepped in and said, “You owe this money to us, because we have been paying out welfare money to you. We are going to take it.” The case came to court, and when it reached our court and minds were made up, I was the sole dissenter. In my judgment I reviewed the history of the common law relating to welfare payments. It seemed perfectly plain to me that the receipt by a welfare recipient of moneys did not constitute a debt repayable to the municipality. That was the common law. Unless the statute in explicit terms changed the common law, the old common law should be applied. I found that the statute did not in express terms constitute the welfare payments as a debt, hence the money was not repayable by the woman to the municipality, and the bonanza she had received as a result of her very unfortunate automobile accident redounded only to her benefit and not to that of the municipality.

The source material with which an author is working can have a great effect on his style of expression. Such material—a set of events, the facts of a case, the reasons for judgment of an earlier judge, the text of a statute—is there to generate principles. It is easier to write simply and persuasively when the distillation of principle is the object of reviewing source material that can be lengthy and technical. In his era, Sam generally did not need to explore the complexities, uncertainties, or contradictions contained in material such as social science theory and evidence. He rarely had to analyze, compare, and contrast the writings of academic authorities of any

sort on a matter. Contrast the style of modern Supreme Court of Canada judgments, and you will see how the longwinded and arcane style of a judgment can be fuelled by its reliance on social science evidence and academic articles.

The submissions of the participants in a case can make a strong contribution to the content and style of legal judgments that emerge. Sam was mostly deciding cases in which the formal “input” consisted of briefs and oral arguments by the lawyers representing their own clients. He rarely had to deal with submissions by interveners for nongovernmental organizations or others, who can be less focused on the specifics of a case and more concerned with advancing a wider philosophical or political agenda, and using a specialized vocabulary and set of scientific and academic sources to do so. Even in dealing with submissions, Sam tends to not spend a great deal of time characterizing, explaining, and wrestling with the argument from counsel; he says enough about them to identify the issue, and then his engagement is with the law, not with their submissions.

Having remarked that in Sam’s time the material judges had to review was sometimes less complex than now, it must be noted that the opinion of which Sam was most proud – reported in this autobiography – was the *Patriation Reference*. In that case, Sam was called upon to review a mass of historical material and evaluate it in light of contesting constitutional theories. His opinion is still a masterpiece of concision and clarity. I believe that if Sam were operating in current times, and called upon to review and apply material from the social sciences and political theories submitted by a welter of litigants and interveners, he would still have managed to summarize and evaluate the competing perspectives in a fair and jargon-free manner, and produce opinions of unsurpassed compactness and lucidity.

Judicial opinions can bear the mark of collaboration in a sense other than the contribution of advocates. They can incorporate comments or suggestions by other judges sitting on a panel. They can also incorporate the compositions or revisions of clerks – junior lawyers who are assigned to assist a court with its official business. Judges at the Supreme Court of Canada each have three law clerks. Judges in lower courts may, in many cases, draw extensively on such assistance. As a result, it can be difficult at times to know how much of a judicial opinion has been formulated personally, and how much is the directed or approved work of a helper.

There is no indication anywhere in his autobiography that Sam Freedman ever worked with a law clerk. All the judgments of his that I have read, all the speeches, embody the same way of sourcing, thinking, and choice of language.

Style can be influenced by the author's sense of intended audience. For whom is a judge writing? Is the objective to explain and justify a decision to the litigants? To impress academic critics? To guide government decision-makers? Sam seems to address himself not only to the parties of the case, and to lawyers who will examine it in the future, but to the ordinary citizen here and now who might be interested in how and why the law is applied. Sam's background was that of a public speaker. He was used to engaging with members of the public. He enjoyed doing so. He knew that to engage and inform an audience in the context of a speech, you have to be clear, direct, and concise.

Style can bear the impression of the technology of expression. Modern technologies of composition, including the use of computers to process text, may affect style in a variety of ways, for better or worse. They can allow a judicial author to more easily become verbose or digressive. Or they can allow a judge to repeatedly refine a composition until it is as compact and clear as the judge can ever make it. They can facilitate the cutting and pasting of quotes into a judgment beyond the extent that is necessary, or they can save time on such mechanical tasks and free up the judge to focus on their own contribution, such as placing a quote in context, analyzing it, or applying it to the facts of a case. Some of my colleagues in the Bar and the teaching profession are concerned that modern technologies of communication, such as email, social network, and text message, accustom students to think of writing as simply conveying a basic point, and putting no effort towards finding the precise or evocative words, or even to making concession to proper spelling or grammar.

Perhaps some of the compactness of traditional Judaic materials flows from the fact that much of it consists of fixing in writing material that was originally conveyed by oral tradition, and that the act of writing was slow and difficult. In any case, the author had to write by hand with a stylus on a slab of clay, or a quill on parchment. Perhaps the supply of writing materials was limited and expensive. Many authors, then and now, would have found that the speed of inscription was much slower than the speed of mental composition. This can be frustrating for some, but for others it

is an invitation to think through and edit what they are going to write before they set it to paper. It may be that Sam mentally composed and edited much of his writing before inscribing it. His manner of speaking was itself slow; perhaps that is because he was thinking intensely about the content, ordering, and exact phrasing of his thoughts before he uttered them.

The stylistic conventions of a genre of literature evolve. They can facilitate authorship; the dictates of a rhyming scheme can help produce a composition that is more pleasant to the ear, memorable and orderly. The same constraints may make it difficult or impossible, however, to choose an otherwise apt word or to convey a sense of disorder or naturalness that the author wishes to convey in the voice of the author or a character or about the events described. After Sam's time, judges began to experiment with using an explicit template for their opinions. A standard segmentation and order in opinions has emerged in Canada, under the influence of a template developed in the Supreme Court of Canada and by judicial writing manuals and training seminars. A standard sequence nowadays, identified by underlined headings, is "introduction", "relevant statutory provisions", "facts", "judicial history", "analysis", "disposition". In earlier times, judicial opinions left the outcome to the end, and suspense was maintained as the reader travelled along with the judge's reasoning. More judgments now state the outcome at the outset; perhaps the rationale is that many readers will first jump to the end, so it is just as well to frankly disclose it at the beginning.

In whatever variant, the modern template has the advantage of promoting clarity and consistency in the manner of expressing opinions. It has the disadvantage of limiting a judge's ability in a particular case to arrange material that is most suited to the distinct features of the case or the judge's most natural means of self-expression. Sam was, in his own time, relatively free to present his reasons in any particular case in a manner that suited his own legal and literary judgment. He did not need headings or segmentations to ensure that the product was logically coherent, easy to understand, and complete in its attention to the various dimensions of the evidence, arguments, and issues.

Sam's autobiography is, to use an English word borrowed from Yiddish - a language Sam was comfortable quoting from - a mishmash. It recalls both his personal life and professional performances. His account of them mixes personal reminiscences, descriptions of historical events

and quotes from official legal texts, including his own opinions. The source materials for this autobiography include interviews, speeches, and official documents produced at various times over many years, rather than being composed through one method in a compact time frame. In all these respects, Sam is again able to address his mainstream audience while still feeling entirely at home with his Jewish intellectual upbringing. The Jewish Bible and the Talmud are constantly interweaving different kinds of materials from different sources. Within the length of a page or two, you might find a description of social or political events, the tale of an individual or family, a poem or song lyric, a genealogy, a legal norm.

This year marks the one-hundredth anniversary of the University of Manitoba law school. Sam Freedman might have been the most capable judge to serve in a Manitoba court in that whole course of time. He had a magisterial grasp of the law, an ability to analyze and apply it in individual cases with accuracy and precision, an extraordinary efficient yet dignified and graceful manner of expression, an unpretentious manner that must have made appearing before him as comfortable as possible for lawyers, witnesses and litigants, a strong work ethic, and an evenness of temperament that contributed to his stamina and productivity, a practical and fair-minded way of looking at things, and a kind heart. In reading his autobiography, however, I must report an inevitable sense of sadness. So many of the issues he grappled with have been settled or rendered irrelevant by changes in law and society. There is a bust of Sam on one level of the law school, a painting of him on another. But unless they read the caption on the bust, students will not even know whose it is. And even if they do, it will be without any understanding of his life and work.

It is our hope that by publishing this work, we at the Manitoba Law Journal will make it possible for some students, some lawyers, some judges, some ordinary citizens of the future to learn that someone of such talent and humanity once rose to the top of our legal system, once provided a model of wisdom and civility in any proceeding in which he was involved, and even now has left a body of work that can inspire and instruct anyone who wishes to learn to express themselves with clarity and grace.