How I Write

In 1956, Bertrand Russell wrote a charming essay entitled "How I Write." In 1993, this essay came to the attention of the *Scribes Journal* editors, who decided to ask some of their favorite legal writers to do as Russell had done and describe their writing processes.

Several of Russell's observations relate indirectly to legal writing. For instance, he gave the following example of a sentence that "might occur in a work on sociology":

> Human beings are completely exempt from undesirable behaviour-patterns only when certain prerequisites, not satisfied except in a small percentage of actual cases, have, through some fortuitous concourse of favourable circumstances, whether congenital or environmental, chanced to combine in producing an individual in whom many factors deviate from the norm in a socially advantageous manner.[1]

As a plain-language revision, Russell suggested this:

> All men are scoundrels, or at any rate almost all. Those men who are not must have had unusual luck, both in their birth and in their upbringing.[2]

How enlightening it might have been to turn Russell loose on the law reviews! He could transform the most cacophonous clamor into music.

And music is what one finds in the pages that follow: variations on a splendid melody, played by virtuosos.

—The Editors

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[1] Bertrand Russell, *How I Write*, in THE BASIC WRITINGS OF BERTRAND RUSSELL: 1903–1959, 63, 65 (1961).

[2] *Id.*

Lawrence M. Friedman

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The mandate given us was to tell the readers more or less how we go about writing; but I have to admit I have not really taken up this challenge. Most of what follows is about how *not* to write; and about what is wrong with legal writing, generally speaking.

This is (I hope) not mere negativism. I don't have that much to say about my own writing habits. I'm not sure why I write the way I do, or how my style (such as it is) came about; and I am even less sure that what I might say would be useful to anybody else. Writing is a very personal, very idiosyncratic process. Also, some people like to write; others don't. If you don't like it, it's hard to do it well. Myself, I like it. I start writing the day I begin a new project. I don't wait for the index cards to pile up; and I don't begin with detailed outlines and plans; I just plunge right in. It's important to me to get *something* down on paper — anything at all. I can always improve it later. But that scheme doesn't work for everybody.

Style is, as I said, inherently personal; we all have to work it out for ourselves. Only a handful of people can be *great* writers, with a great style. But — and here's the hopeful part — anybody, I'm convinced, can be a *good* writer, if he or she works at it. One key to good writing is to be natural. Don't try to write like somebody else. The second key to good writing is clarity and

simplicity. All children are good writers: they write the way they talk, and what they communicate is direct, simple, unadorned, often charming or even insightful. Somehow they lose the knack as they grow older; and by the time these children have matured into law students (or later, into lawyers, jurists, and law professors), they seem incapable of producing anything but a thick, unreadable sludge.

The only advice I ever give students about writing is this: "There's no such thing as too simple." It's the same advice I give prospective teachers, with regard to classroom presentation. Most of them smile and ignore my remarks. If they wanted more advice, about writing or teaching, I would tell them to be vivid and concrete. I don't like being baffled and bored when I read a book or article by somebody else; and I don't particularly want to bore and baffle people on my own.

I often wonder why so many people in the law business write so badly. Of course, they're not alone in this. Most adults write very badly. But lawyers seem to be an especially serious case. For one thing, lawyers are terrorized by the power of words. They live in fear of imprecision. They race about trying to plug every hole, every chink, every gap, with words, words, and more words, most of them dense and Latinate. Some of this verbiage may be necessary; a will, a contract, a statute, or an IRS regulation is not, after all, a poem, or a letter home to mother. The text has to cover all the situations you want it to cover — nothing more and nothing less. This may not be easy to do, and slathering on the synonyms is often the line of least resistance.

But this is, in part, only an excuse for bad writing; and the excuse does not work for the law reviews, for example, which are the citadels of such writing — priestly bearers of a long, cryptic tradition of wretched, crabbed, stifling, mindless semi-English. The

dreary secrets of this trade seem to be handed down from one group of fresh-faced editors to another. Most law-review editors treat examples of clean, vivid writing that arrive in the mail with the same enthusiasm they would greet a letter bomb. They immediately set out to defuse and denature it. Most of the time they succeed beyond their wildest dreams.

Of course, a well-written manuscript is itself a rarity; most of what the mail brings in is as awful as the editors could possibly wish. After all, who wrote these manuscripts? Law professors and lawyers; and who are they? They are these very same law-review editors, some years later down the road. The bad habits carry over. These grown-ups are now able to write miserably on their own, without the help of student editors. This is a major professional achievement.

The fact is that legal writing, as it pours out of thousands of word-processors, is overblown yet timid, homogeneous, and swaddled in obscurity. The legal academy is positively inimical to spare, decent writing. It is a very snobbish place, and people are afraid to be simple or direct. Won't people think they are — God forbid — somewhat shallow? If any Tom, Dick, or Harriet can understand what they write, then surely it must be rather superficial.

To be fair, most adults do not find it easy to write clearly and simply. The writer has to kick some deeply ingrained habits. It takes a lot of work, and a lot of rewriting, to remove the layers of dirt, smoke, and old varnish that congeal around the prose. Not everybody has the patience or the knack.

In recent years, there has been something of a countertrend to high law-review style. A small number of law writers have taken what is almost the opposite path. What they write is chatty, personal, full of reminiscences, observations, true confessions,

sometimes a yarn or a joke or a story or two. They go in for "narrative," or for "parables" or the like. Of course, a lot of this is bilge; but I have a soft spot in my heart for the genre nonetheless. At least it's human; and at least it's entertaining.

But this is a small, small trend. The bulk of the writing is as bad as ever. If we overthrew the crazy system of student-run law reviews, it might help a bit; but frankly, writing in the peer-review journals is only slightly better. The problems of legal writing go back to college, high school, and beyond. The law schools make everything worse. Most of what the students read and hear will ruin whatever style they have left; and the learned professors are busy churning out sludge at an ever-increasing rate. Somebody or something has to break the cycle of bad writing; but I have no idea who or what.

Meanwhile, I advise putting down that law review and picking up a good novel. It does wonders for the soul.

Thomas Gibbs Gee

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In the brief lines to follow, I confess to an element of "do as I say, not as I do"; but one who appears in distinguished company should wear his best suit. Here, then, are my suggestions for effective writing:

- **Think first.** Nothing facilitates good writing more than having carefully thought out what you want to say before you pick up the pen. If your subject is complex or lengthy, you will probably want to make a few notes or a rough outline so that you do not omit any point that you meant to make.

- **Go off in a corner and write.** You can do a smoother, quicker, and better job if you write the piece through from beginning to end without a lot of interruptions. Use as few words as you can to convey your meaning and the simplest word that you can to convey each thought or concept. That is not to say, however, that what you are saying should be dumbed down: sometimes (though rarely) *antidisestablishmentarianism* is the only word that will do.

  Think about your audience; you would not write in the same vein for a formal address to the Oxford Dons Assembled as you would for a talk to a class of five-year-olds. Struggle to find the right word; we have all heard Mark Twain's famous dictum: the difference between the right word and the almost-right word is the difference between lightning and the lightning bug. Remember that the adjective is the enemy of the

noun, the adverb of the verb; if you have found the right word, you will seldom need either. Avoid high-flown terms, and prefer the Saxon to the Latin: *later*, not *subsequently*; *before*, not *prior to*; and so on. Eschew legalisms. Use the active voice whenever possible and write in the present tense.

Beware the word *only*. It is an ace of trumps, and moving it around can change the meaning of a sentence completely. Compare "he only thought that he would study French" with "he thought that only he would study French." The first means that he considered studying French but did nothing about it, the second that only he and no one else would study French.

- **Rewrite.** As has been wisely said, "There is no good writing, only good rewriting." Hammer away at it, stay with it. When you feel at last that it is in good form, lay it aside for as long as you can afford to and return to it. I guarantee that you will find more changes to be made. I found three after putting the third revision of this short piece aside for a month.

- **Read good writing.** In between your own efforts, read the good work of others: George Orwell, C.S. Lewis, Abraham Lincoln, Samuel Johnson, and Shakespeare — all of Shakespeare, but if you can't get to it all, read the Crispin's Day speech of *Henry V* and Shakespeare's sonnet on lust. The force of these great writers will impress itself upon you willy-nilly, and you cannot read them without improving your own technique.

- **Read your compositions aloud to yourself.** This will help you ensure that they have a pleasing rhythm, which is of great importance even in prose. For this reason, avoid writing long strings of simple declarative sentences. I know, I know, they get the idea across; but you run the risk that no one will ever read your piece through to the end. A long, well-punctuated sentence that sticks to one idea and has rhythm carries the reader along. An occasional one, that is.

Michael Gilbert

Solicitor, Trower Still & Keeling of New Square, Lincoln's Inn, 1947–1981. LL.B., London University, 1957. Author of crime novels: *Close Quarters*, 1947; *They Never Looked Inside*, 1948; *The Doors Open*, 1949; *Smallbone Deceased*, 1950; *Death Has Deep Roots*, 1951; *Death in Captivity*, 1952; *Fear to Tread*, 1953; *Sky High*, 1955; *Be Shot for Sixpence*, 1956; *The Tichborne Claimant*, 1957; *Blood and Judgement*, 1958; *After the Fine Weather*, 1963; *The Crack in the Tea Cup*, 1965; *The Dust and the Heat*, 1967; *The Etruscan Net*, 1969; *The Body of a Girl*, 1972; *The Ninety Second Tiger*, 1973; *Flash Point*, 1974; *The Night of the Twelfth*, 1976; *The Empty House*, 1978; *Death of a Favourite Girl*, 1980; *The Final Throw*, 1983; *The Black Seraphim*, 1983; *The Long Journey Home*, 1985; *Trouble*, 1987; *Paint Gold and Blood*, 1989; *The Queen Against Karl Mullen*, 1991; *Roller Coaster*, 1993. Short-story anthologies: *Game Without Rules*, 1967; *Stay of Execution*, 1971; *Petrella at Q*, 1977; *Mr Calder and Mr Behrens*, 1982; *Young Petrella*, 1988; *Anything for a Quiet Life*, 1990. Plays: *A Clean Kill; The Bargain; Windfall; The Shot in Question.* Reference book: *The Oxford Book of Legal Anecdotes*, 1986. Literary honors: Lauréat de Grand Prix de Littérature Policière, 1957; Grand Master, Swedish DeKarademins, 1981; Grand Master, Mystery Writers of America, 1987; Cartier Diamond Dagger, Crime Writers' Association, 1994.

How do I write?

What a simple-sounding question, and what a difficult one to answer. One could evade it by dealing with it literally.

I once posed the question literally when I had been invited to tea in the House of Lords by that noted television and radio dramatist, Ted Willis.

I expected that his answer to my question would be that he didn't do anything so downbeat as actually *writing* his plays; that he dictated them into some recording machine. Or at least that he used the latest and most sophisticated word-processor.

Not a bit of it. His memorable answer was: "I write in pencil, with a rubber on the end. If I want to change anything, I use the rubber."

I was delighted. His method was only one degree more primitive than mine. I write in pen on the right-hand side of a large double notebook (known in the legal trade as a Counsel's Note Book). Corrections go on the left-hand page, their place in the text being indicated by a series of circles and squiggles. When there are too many corrections, and the page begins to look like Clapham Junction, I tear it out and start again. This doesn't happen often.

I appreciate, however, that what is wanted here is something more than an account of the physical method of getting words onto the page. Where do they come from, and how are they organized?

Let us deal with the second question first: the organization, or drill, that marshals words into sentences and paragraphs. I was struck by Sir Winston Churchill's view of the matter. He was a man who had views on most things and was never loath to express them. He wrote, "Just as one sentence contains one idea in all its fullness, so a paragraph should embrace a distinct episode, and, as sentences should follow one another in harmonious sequence, so the paragraphs must fit into one another like the automatic coupling of a line of railway carriages."

Excellent advice; but the first question still awaits an answer.

Before you can use your pen or pencil or typewriter or whatever, before you can begin to organize your product into paragraphs and chapters, it has got to be imagined and conceived.

I must confess that I had not considered the matter before with any precision. A happy golfer wallops the ball off the tee and sees it disappear into the middle distance. It is only your serious-minded performer who analyzes how he did it — exactly where he placed his feet on the ground and his hands on the club.

Let me, for once, try to turn analyzer.

It is here, with considerable nervousness, that one has to approach the question of style. Nervously, because it is difficult to define and almost impossible to dissect.

The French have made the attempt. They have said, with masterly succinctness, "Le style c'est l'homme." But the more one looks at this well-known dictum, the less does it seem to help. All it really says is that a writer's style will reflect the sort of person he is. To start with, I doubt whether this is true. What could you deduce about the real character of Charles Dickens or Lewis Carroll or Oscar Wilde from the closest study of his writings? And, even if you could, a man's character cannot be considered as static. Originally formed in the earliest years, it either develops or deteriorates; and is conditioned by his mode of life, which may, itself, be different at different periods.

In my case, my working life can be divided into three fairly distinct sections. I was first a schoolmaster, after that a soldier, finally a lawyer.

As a schoolmaster I wrote one-act plays for the boys to perform at their school functions. I did this because the headmaster disliked paying royalties to outside writers. Possibly he imagined that since I was his employee, the copyright in anything I wrote belonged to him. (In fact a dubious legal concept.) Or maybe he simply thought that junior masters were there to do what they were told. The plays set out to be comedies. Now boys have a deflating habit of saying about someone — "Oh, he's just trying to be funny." The sting of this lies in the word *trying*, and if I learned only one lesson from my attempts as a schoolmaster-dramatist, it was that jokes, to be effective, must be concealed. The jester must keep a straight face. His hearers may consider him funny. He himself must never do so. This is so obvious that it hardly seems worth stating, but there are after-dinner speakers who do not seem to have grasped it. (A short course of reading, starting with *Huckleberry Finn* and finishing with *The Diary of a Nobody* would put them straight on this point.)

Writing in the Army is sometimes misunderstood. It is not an everyday part of a soldier's activity, but when it does occur it is of

the greatest importance. I am referring to the writing of orders. These can be given by quite junior officers, occasionally even by N.C.O.'s. And since they precede some form of violent action, offensive or defensive, they can very well affect men's lives. They may, occasionally, be inspirational, like the Australian subaltern's orders to his embattled section — "The position will be held and the section will remain here until relieved. The enemy cannot be allowed to interfere with this program. If the section cannot remain here alive, it will remain here dead. Any man who attempts to surrender will remain here dead." The subaltern may not have considered himself a stylist, but he had the root of the matter in him: clarity and precision on a strong basis of nouns and verbs.

Admittedly this particular occasion (during the so-nearly successful German offensive of March 1918) was exceptional. But in all other cases, great or small, the Army, in its wisdom, had laid down a formula to be followed. It is divided into about ten heads — "Own Troops," "Enemy Troops," "Supporting Arms," etc. I have forgotten the remainder, but the opening one was always "Object." It has sometimes occurred to me that nonmilitary writers might benefit from a similar discipline. If, before planning a chapter or a paragraph, or even a sentence, the author was to ask himself, "What, exactly, is the object of this bit of writing?" then many passages that neither advance the plot nor enlighten the reader might find themselves in the hands of that ever-cogent and ever-present critic, the wastepaper basket.

On the other hand, solicitors do a great deal of writing. Not only the drafting of leases, mortgages, wills, and cases to counsel but, more than any of these, the writing of letters. If you doubt this, examine the file that any matter rapidly accumulates. Letters to the client, letters to other solicitors, letters asking awkward questions, and letters attempting to answer or evade awkward questions. The file is soon bursting with carbon copies of these, and with the answers they elicit.

When I was starting out, an experienced solicitor advised me that I should never write an important letter without visualizing its being read out in court by a hostile barrister to a sardonic

judge. This advice, when followed, results in what I can only call a defensive style of writing. Do not indulge in flights of fancy that may be laughed at. Stick to the point at issue, or you may give away facts that are better suppressed. A friend of mine in the Foreign Service once told me that a similar rigid spareness was expected in his reports. Before they saw the light of day, two, or maybe three, senior authorities would have been through them with a blue pencil. "You're lucky," he said, "if a single adjective survives."

Before attempting to arrive at a conclusion as to how these shifts in my career may have altered my style of writing, I must add one influence that was not imposed from outside, but that I devised for myself. It has been said that a writer's first book will almost always derive from his own favorite reading. I think this is true. It does not mean that his book will be a carbon copy, but that whatever his admired predecessor has done well, he will strive to do, or do better.

This was certainly true in my case. I had devoured the novels of Raymond Chandler, Dorothy Sayers, Dashiell Hammett, and Margery Allingham, and it was in their steps that I was treading. But why, I thought, should I confine myself to them as masters or mistresses. Surely there were hints to be picked up everywhere. With this in mind I compiled a private anthology. I started it in 1946 when I began writing novels, and 30 years later, when the book was crammed from cover to cover, it contained more than a hundred entries from 66 different authors. If I mention only the ones that attracted more than one entry, it will give you some idea of the range of my selected models. Winston Churchill, Joseph Conrad, Victor Hugo, Rudyard Kipling (six in his case), Somerset Maugham, C.E. Montague, Siegfried Sassoon, Osbert Sitwell, R.L. Stevenson, Lytton Strachey, W.M. Thackeray, and Evelyn Waugh. If by writing out the extracts, and reading and rereading them, something of the style and rhythm of such authors brushed off into mine, I was more than satisfied.

So what was the end result? What was produced by these different expedients and experiences, this attempt at self-education,

this continued practice in the labor of writing? It is a question no author can answer for himself.

So I will hand it over to the critics.

The Boston Review of the Arts said about one of my policemen, "Mercer, the brutish but brilliant detective, remains inscrutable to the last, the rich possibilities of his personality left unexplored."

Harry Keating, an excellent critic and a distinguished writer of crime stories, said, "One always feels a scintilla of disappointment on setting down a new Gilbert. Yes — but surely — just a little deeper."

And Julian Symons, from the bench, sums it all up: "There remains an impression that Michael Gilbert is not quite content to be appreciated just as an entertainer, but that some restraint (legal caution perhaps) checks him from writing in a way that fully expresses his personality."

All three critics, you will observe, are saying the same thing. No ornamentation, no expression of his own personality, lack of depth, lack of interest in the important questions of today. See what a military-legal upbringing will do for a novelist.

No matter, there is time yet. My next book will concern six characters, three male and three female, on a desert island. To pass the long days and nights, they will discuss world problems and in this discussion will plumb the depths of their own and each other's characters.

My only doubt is whether it will get a publisher.

Geoffrey C. Hazard, Jr.

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How do I write?

It all depends. First, it depends on what I am writing. I write letters, office memoranda, newspaper articles, legal briefs and opinions, and sometimes serious scholarship. Second, it depends on my audience. I write to my wife and children; to friends of greater or lesser intimacy; to students and academic colleagues; to professional groups and the general public; to courts and other repositories of public authority; to opposite-number lawyers in various professional relationships; to hostile parties. I sometimes write to myself.

Third, it depends on how much time there is. Woodrow Wilson observed that writing something short and to the point takes more time and is more difficult than doing a long piece. My experience, however, is that a short deadline conduces to being concise and to the point — concentrates the mind, as Samuel Johnson said.

Fourth, it depends on whether I am stating or explaining something I already have worked through or am having to think out a problem through the medium of writing. If I already have the matter in mind, I write quickly and easily. If I don't, the labor in writing can be arduous.

These things said, in the craft of writing I draw upon accumulated experience. When I was a child, my father and my grandmother often read to us aloud. Their readings were interesting, expressive, and had rhythmic cadence. Perhaps because of this experience, I grasp things more quickly by hearing than by reading. Hence, when writing I silently "sound" my phrases, which gives me a feeling of better precision, cadence, and intelligibility.

In eighth-grade English we had systematic drill in diagramming sentences. I still think of sentence structure in the images of a diagram and thereby position adjectives and adverbs, phrases, clauses, and often the noun-verb relationship itself. The word-processor now provides wonderful flexibility in repositioning sentence elements. I often put the key words and phrases on the screen without knowing their proper sequence and move them around to find what seems the best fit.

In high school I came to understand that I was not good at fiction or poetry. Hence, with Molière, for more than 40 years I have been speaking prose — and nonfiction prose, at that. Taking serious account of one's limitations saves a lot of grief.

In my last year in college we were required to write a paper of 10 to 15 double-spaced pages, researched and documented, every week. I came to understand that a subject can be explored to substantial depth even in a short time, but also that no subject is ever developed to its full depth. Someone said a book is never finished, it is merely abandoned; the same is true of any expressive undertaking.

In the second year in law school, my writing had to survive the preternatural standards of amateur editorial superiors on the law-review staff. A student law-review article, at least at Columbia in those days, had to "exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert," to borrow a formulation that Holmes employed in another context. But nothing is perfect, nor can it be made so.

In the apprentice years of law practice I had to write decent but imperfect prose, researched and documented, every week,

knowing that client well-being could turn on whether the work did the job. Words can have real consequences.

My most intense learning about writing has come in drafting legislation and other general legal rules, first for the State of Oregon and later for other sponsors. Legislation is abstract in form and legal effect, but specific and concrete in its application. It must be coherent in technical terms and yet understandable and acceptable in popular terms. Like the Bible, it draws on all of the social experience that can be brought to mind but addresses events that have yet to occur. It represents both linguistic expression and the exercise of political authority — art and power.

From these lessons I conclude:

First, begin with the hard parts — the parts that are most difficult to analyze or articulate, or most unpalatable or contentious. Once these are formulated, the supporting arguments and the introduction and conclusion are relatively easy.

Second, the basic analysis should be expressed in no more than three propositions. Only very powerful minds can handle anything more complicated. A mathematician once told me there are four elemental numbers: one, two, three, and "many." If the structure of an argument extends to "many," it should be restructured.

Third, each step in the exposition should be constructed like a pyramid, with the point at the beginning and the support underneath. Members of an audience follow most readily when they know where they are going.

Accordingly, I begin in the middle of the problem with single sentences addressed to the hardest issues, and work from there in all directions. I do the outline afterward.

Tony Honoré

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I write this piece with some hesitation. It is surely arrogant for an author to think that others might be interested in how he writes. But I hope it is in order to reply to a courteous request for information, with the caveat that every writer must find the method that suits him or her.

Much of my work has been concerned with the differing styles of legal writers, especially those of the jurists (and laymen) who in the Roman empire drafted laws or answered inquiries about the law. But it is difficult to think about one's own work in the objective spirit in which one judges that of others. As I compose on the computer, I am used to asking myself, "Does this sound right or should it be changed?" but not to assessing my own sentence or paragraph from the point of view that I would adopt in judging others. I have never asked how my writings rate for word length, sentence length, sentence structure, logical form, intellectual force, rhetorical ornament, and so on. An effort of imagination is needed to think about myself in this way. Suppose a legal historian of a future age were confronted with some anonymous 20th-century legal texts. They might be by Coleman, Daube, Dworkin, Finnis, Hart, Simpson, Wright, etc. — or by Honoré. Could he tell Honoré from the others?

I think he probably could. Most authors, or at any rate most legal authors, write in a pretty uniform manner. Even when they

try to vary their manner, for example by writing simply for students, they can be detected. Over a lifetime their styles may indeed change. Some of us become verbose as we grow older, others thinner. But these changes are gradual. They unfold bit by bit. Deliberate disguise is harder to penetrate. But on the whole what is most striking is the consistency of each author's style. Apart from obvious changes — the number of references, the use of technical language — it seems to make little difference whether the author is writing for practitioners, scholars, or students. Probably the same is true of writing for a lay audience. This I shall find out, as my next book will be an introductory work for nonlawyers.

Another point that I have learned from experience is that each author has fingerprints — perhaps they should now be called file-prints. No two are quite alike. Sometimes one must dig deep to find idiosyncrasies, but with patience they emerge. One writer likes to begin a sentence with a conjunction such as *and* or *but*, another eschews the habit. One employs inversions like *did she but know*, another avoids them. One favors the subjunctive, as in *provided the vendor insure*, another spurns it. We all have favorite phrases. One of mine is *in the upshot*. A careful observer can spot our kinks. But it is also true that literary styles are not pure types. Authors like to vary their mode of expression, but only within certain limits.

How, then, do I write? At school my style was flamboyant, at least when I was trying for a prize essay. When legal studies began, I settled into what came more naturally — a plain, concise manner, with an occasional striking word or phrase. As a law student I most admired some of the Roman jurists, especially Gaius, Paul, and Ulpian, and among the moderns, Oliver Wendell Holmes. The English lawyers of the day (1946–1948) who most attracted me were Alfred Denning, then in his early years as a judge, when he was free of the gimmicks of style he adopted later; and Glanville Williams, a model of perspicuity. All these writers adopted the plain or humble style, *genus humile*, which has been traditional for lawyers in the Western tradition for the last 2,000 years. The main exceptions have been those lawyers who were paid by the word

and those who were concerned to close every conceivable loophole, in the style of 19th-century legislation in Britain.

The result was that I came to value lucidity and brevity above other virtues. But commitment to these virtues has its downside. In law examinations I was haunted by the thought that I might not find enough to say to cover a decent number of pages. I could never, for example, have managed the expansive manner of Zelman Cowen, a year senior to me, later Governor-General of Australia. This anxiety has clung to me all my life. When a lecture or article is to be written, two worries torment me. One is whether I can find something to say, an original theme. The other is how to fill up the hour or the 20 pages or whatever is called for.

These worries assailed me when I began teaching law and knew that I ought to contribute to scholarly literature. The first article I had to write was for a conference in Paris. It was about rescue and had to be in French. To fill the time and space required, I decided to write in a pretentious, inflated way, which I thought would go better in French than English. The result was repugnant, so much so that, though the article was published, I felt ashamed of it. I have never tried this way of filling space again.

It was collaboration that helped me over my difficulties as a young writer. My first books were joint works. I assisted Robert Warden Lee with two books on South African law, published in collaboration in 1950 and 1954. He was an authority on Roman and Roman-Dutch law and a good classical scholar. Our books took the form of propositions, rather like a code. Lee taught me to pare the propositions down to essentials. There must be no superfluous word.

My second collaboration was with a great man and an eloquent writer, H.L.A. Hart. We wrote *Causation in the Law* together in 1953–1958, and it was published in 1959. Over these five years we met weekly, apart from Hart's visit to the United States in 1956–1957. The partnership was both exhilarating and exhausting. We took as a model Walter Wheeler Cook's *Logical and Legal Bases of the Conflict of Laws* (1942), a treatise that, though excellent, is probably not much read today. We tried to follow Cook's method

of expounding the basic themes of the book by returning to them in different chapters and contexts, rather as in a musical composition.

Clarity was to Hart the chief intellectual virtue, and we tried hard to achieve it. But the subject is difficult, and some have found it a strain to follow the arguments in the book. We wrote separate chapters but were not satisfied until we reached agreement on every link in the reasoning and every word in the text. Since we were both keenly alive to the nuances of logic and language, this took time. Indeed we went through the strenuous process of agreeing on the text twice over. After Hart returned from America in 1957, we thoroughly revised the book to take account of what he had learned there.

In the second edition (1985), prepared when Hart no longer found writing easy, though his mind remained crystal clear, we again agreed on every word. As a result the style of this work is, in theory at least, neither his nor mine but a joint one. A reader should not be able to tell from the style who wrote which chapter; and some readers of *Causation* have told me that they could not.

After these exercises in collaboration I began to write books and articles on my own. I have found that the best way to overcome worries about theme and length is to start writing. Put down a few sentences and then see how they strike you. The playback may stimulate ideas. When I have done this I feel slightly better, but for the first few days what I have written seems painfully boring.

I usually write a few hundred words a day, say 500 to 800. Each day I start again at the beginning, trying to improve what I wrote the previous day and to add something to it. After three or four days a theme usually begins to emerge, and then I start to enjoy the process of writing.

As the article, lecture, or chapter gets longer, I may spend a whole day without getting beyond the point I had reached the night before. Indeed I may go backwards, striking out more than I add during the course of the day. But over a period the work

progresses, though unevenly, at the rate of a few hundred words a day.

In the end two things happen. First, the required number of words or pages is filled — indeed the piece may by now have become too long. Then I go through the text until I am satisfied that it reads properly (or perhaps it would be more accurate to say that it sounds right, since, though I don't usually read aloud, I am listening with an inner ear as I read). Superfluous words have to be eliminated; words must not be repeated too close to one another. Gaps in the argument must be filled, but the thought sequence must not become too complicated. Propositions must be qualified to make sure that difficulties have not been overlooked, but when that leads to long sentences, the sentences must be split in two. Lifeless phrases must be injected with life but without making the text seem flashy. There must be some variety, but not just for variety's sake.

After reading the piece, or parts of it, several times and correcting it as best I can, it finally reaches the stage at which it seems to read properly from beginning to end. Then I have it printed out. If it is read as a paper to a seminar or conference, I naturally revise it afterwards, and when I do so I usually find that I want to make corrections in the text quite apart from responding to criticisms or suggestions from others.

In the upshot my prose is concise and rapid, perhaps too rapid. I sometimes wish it could slow down, nudging readers more gently into the details of the argument and inducing in them a sense of relaxation. Instead some sort of impatience, or fear of being tedious, hurries me along.

On the whole my methods have not changed much over the years. Technically the main difference is that since I began to use a personal computer in 1985, it has been easier to correct drafts, and I think this has helped my writing. I do not think that articles or books come out any faster by the use of a computer, but the product seems logically and stylistically better because it is easier to make changes. In the old days I used to type a draft and then modify it by inserting or eliminating bites of text with Sellotape.

What started as a page of ordinary length might by this means expand to two or three pages. Secretaries used to describe this as the "kitchen-roll" method. On the other hand, I have virtually never written a piece by hand. Handwriting I use only for personal letters and for taking shorthand notes.

Another change that I have made in recent years concerns the way in which the theme is expounded. In the early days I used sometimes to write in the manner of a detective story. The main theme would emerge only toward the end of the paper; it formed a sort of denouement. Nowadays I tend to state the thesis at or near the beginning of the paper and then to allow the arguments in support of and against it to unfold gradually. The reader knows what to expect and roughly along what lines the argument will proceed. I no longer attach importance to the element of surprise as a means of keeping the reader's attention. I am also less inclined to use foreign words or unusual phrases. This is partly because of the decline in the knowledge of languages, ancient and modern, that has taken place in my lifetime, at least in Britain.

Edith Hollan Jones

Judge, United States Court of Appeals for the Fifth Circuit, since 1985. B.A., Cornell University, 1971; J.D., The University of Texas School of Law, 1974. Partner, Andrews & Kurth, 1982–1985.

I never aspired to write for a living, but then I also never really aspired to be a judge. God's wisdom, or perhaps His sense of humor, placed both challenges before me. I expect to spend many years rising to the tasks of both.

Because I never sought to write for an audience, I have not studied style and composition rigorously, although a very good high-school English curriculum developed a sensitivity for fine English that reading in later years has heightened. My friend, the former Judge Tom Gee, a prose master, has taught by example and encouraged me. Exposure to excellent writing has, I believe, improved my attempts at it, and at the very least, provides inoculation from the crudeness, inaccuracy, and egregious grammatical errors that are commonplace today.

My approach to writing has also been affected by high-school experiences in debate and extemporaneous speaking. The cardinal rule in debate was, "Tell 'em what you're going to tell 'em; then tell 'em; and finally, tell 'em what you told 'em." This is not a rule of redundancy so much as of forcefulness. Moreover, the rule connotes that an argument is either not worth making, or it makes no sense, if it cannot be expressed as easily in summary as in a complete fashion. From extemporaneous speaking, in which competitors are judged on their ability to create a speech on a topic received a few minutes in advance of the presentation, I learned how to construct a logical argument, emphasizing its critical points. Obfuscation had to be avoided. Succinctness was prized.

Writing based on these rhetorical models certainly exposes the quality of the writer's thoughts even as it expresses them. Some

people can express banalities so artfully that their shallowness is skillfully concealed; others write with a complexity that appears deep but is on a later reading only confusing. I have tried to avoid artifices. I have concentrated on prevailing by clarity at the expense of adornment or complexity. If the thoughts have then seemed meager, they would at least be understood.

Before going on the bench, I wrote as a lawyer in all the ways a trial lawyer must write. Among these usually pedestrian types of written communication, the trial and appellate briefs offered what opportunity there was for rhetorical skill. Briefs were a challenge; if I had known then what I now know about the art of judging, I would have considered them an even more formidable undertaking. Brief-writing supplied the basic preparation for judicial opinion-writing.

A good brief is like a classical sonata. Written within rigid rules of length and order, it must nevertheless convey a powerful image of credibility, of legal understanding, and of the essential justice of the advocate's cause. While emotion is acceptable in limited quantities, the foremost impact of the brief ordinarily lies in its clear and forceful logic. Sharing a common failing of young lawyers, I almost surely wrote longer briefs than are necessary. There are several reasons for such a mistake. One of them is the pleasure of displaying the writer's often newly acquired erudition on the legal points covered by the brief. Another is the temptation to discuss supporting authorities tendentiously, as if each issue they considered had never been ruled upon before. There is also an urge to treat the court as a blank slate on which the unlikeliest legal arguments may be successfully pressed. I am sure I burdened courts with superfluous issues and argument, even though I tried not to drown out the important points in a sea of useless ones.

Exercises in brief-writing conveyed both obvious and subtle lessons that have proved useful on the bench. The obvious lesson was a humbling one: how hard it was to write accurately and clearly even when I thought I knew my subject well. It often took an hour to compose each handwritten page of the brief. Like the pages in this essay, each page in a brief evolved by fits and starts,

with many scratched-out words and rephrasings. (Curiously, I learned to dictate with more fluidity, even on some important writings, but I still handwrite those in which I invest the most effort.)

The more subtle lesson learned from brief-writing is judgment. Any reasonably competent attorney can raise the proper issues in a brief, but judgment provides perspective and a sense of the relationship between the case and the specific jurisprudence into which it fits. A brief informed by such judgment draws the reader to a particular outcome of the case as if it were the only one consonant with the law as it is and should be. Bringing that type of judgment to bear on a brief, creating an argument that is lucid, unforced, and readable, should be an epitome of the lawyer's professional experience. I have had the pleasure of ascending that height a few times.

From the bench, exercising judgment as I have described it is not just a desideratum but a duty in each of the over 600 cases in which I participate annually. All of my earlier experiences and understanding of writing have been distilled during the past eight years in the service of judicial duties. But I quickly learned that the demands of an increasing caseload force compromises in writing. One cannot "craft" in deathless prose my average of 180 "opinions" a year. Indeed, for the sake of maintaining some coherence in the body of law, judges dare not do so. A vital task of exercising judgment has become that of discerning the few appeals that present issues that must be written about to expound the law. If those cases are successfully identified, the next challenge is to resolve the others the "right" way while leaving enough time for the difficult ones. Writing must therefore be done at two levels: in a barebones style and a fully articulated style.

In the barebones style, I write to explain a conclusion that I believe follows naturally from settled legal principles. When cases lend themselves to a barebones or summary-calendar decision, the factual predicate and issue or issues may be paraphrased in a sentence or two. The result often turns on a clear legal rule or on a standard of review such as the sanctity of the jury verdict or the

broad discretion of the trial judge. I try to prepare such opinions, or more aptly "reasons for decision," in a few pages, and I often dictate them to maintain conciseness. My purpose is to assure the losing party that the issues he raised were considered in light of the record and that their outcome was legally foreordained, albeit, to him, unpalatable. These opinions make up more than two-thirds of my appellate writing. I have largely overcome the urge to write for publication — a temptation thoroughly mortified by the now-promiscuous output of federal appellate opinions. As a result, I write barebones opinions formulaically, not unlike the way I used to write pleadings and standard legal correspondence. The style, I hope, suits the legally inconsequential nature of the appeals, while satisfying the parties' concern about our diligence.

Joy, gratitude, and a sense of challenge attend the opportunities I have to write significant opinions and dissents. As a direct consequence of educating lawyers by the caselaw method, we have developed an overwrought infatuation with precedent and with the importance of individual decisions. I fell prey to this tendency only until I watched the volumes of F.2d multiplying before my eyes and wondered how the treatise writers, not to say the judges and the common folk who just want to follow the law, could keep up with this explosion. My response has been a particular form of judicial self-restraint: I avoid writing "precedentially" if possible. Thus, it is a rare pleasure to work on a difficult, novel case.

Articulation of the opinion is, however, chronologically my last concern in such a case. Legal research takes place first, guided by the parties' briefs and the appellate record. The preparatory work often fosters rather than resolves complexity. Whether this is because my mind moves slowly, I do not know. But I have found it best to dwell on a perplexing case for at least several days; over time, and after discussions with my law clerks and colleagues, the desirable approach gradually sorts itself out in my mind.

At last, one must set pen to paper. As I write, I often look at a small cartoon on the wall behind my desk. It depicts the transparent figure of a writer, but his outline is shaped like a pitcher with the spigot as his hand. Although he is full of liquid,

the spigot merely drips — the incarnation of writer's block. Eventually, usually as a deadline approaches, I overcome the block.

Like a brief, a good judicial opinion should be organized according to certain conventions. Qualities of style and substance that I earlier described regarding briefs pertain even more emphatically to opinions. It would be tedious to dwell on the mechanical conventions here, so I will not. Instead, I will describe my substantive criteria for a good judicial opinion.

Expressions of the law should aspire to be evocative yet lean, to follow inevitably from existing precedent, and to be comprehensible to an intelligent nonlawyer. In my view, the Ten Commandments are not a bad starting point for considering how complete yet succinct a legal code may be. This is not to say that significant legal opinions often or always lend themselves to such terse treatment, for unlike Holy Writ, the reasoning of mortal judges must be explained. The legal writings of Justice Holmes and Professor Charles Alan Wright are in this way exemplary.

Consistent with these principles, I ordinarily abhor dicta and superfluous, decorative, quasi-scholarly discussions of the law. Extensive discourse on the facts may lend color and a sense of equity to the outcome of the case but is often unnecessary. I also try to resist using the royal *we* in opinions because I believe that this pronoun casts an air of subjectivity upon statements that ought to reflect the objectivity of the law and legal process. Before sending out any significant opinion, I ordinarily revise it several times and let it sit, nearly finished, for a few days. The ripening process allows me to reconsider whether the work is satisfactory; it also provides a fresh perspective on final editing.

As I write, I am always conscious of how small the audience is for appellate opinions and, far more unsettling, how insensitive we as a people are becoming to the beauty of fine English. The age of computers, mass communication, and poor teaching of respect for our language and culture reflect and also cause a steady deterioration in writing, including legal writing. Thus, to write for even a part of one's living is an almost reactionary pursuit, which, some would say, fits me perfectly. I persist in believing not only

that ideas have consequences, but also that one cannot communicate ideas except by writing well. To these ends, I write. *Ad astra per aspera.*

Robert E. Keeton

Judge, United States District Court for the District of Massachusetts, since 1979. B.B.A., The University of Texas, 1940; LL.B. 1941; S.J.D., Harvard Law School, 1956. Professor, Harvard Law School, 1953–1979. Author: *Trial Tactics and Methods*, 1954, 2d ed. 1973; *Legal Cause in the Law of Torts*, 1963; *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance*, 1965 (with O'Connell); *Venturing to Do Justice*, 1969; *Tort and Accident Law*, 1983, 2d ed. 1989 (with others); *Prosser and Keeton on Torts*, 5th ed. 1984 (with Page Keeton and others); *Insurance Law*, 2d ed. 1988 (with Widess); *Judging*, 1990.

If I knew how I write, I would probably have declined this invitation — in fear either of telling secrets I should keep or of having too little worth saying. Since I do not know exactly how I write, I have yielded to temptation.

Adapting Style to Purpose

One thing I do know is that I have no interest in developing a single style — either for legal writers generally or for myself alone. How one writes, or should write, depends on what one is writing and why.

Writing a judicial opinion is different from writing a contribution (either ill- or well-advised) to *The Scribes Journal of Legal Writing*. Each imposes some constraints and bypasses others. A judge must respect the distinctive constraints of the judicial role when drafting an order or an opinion and is free of those constraints when writing in another role — even at the price of accepting, for example, an editor's constraints that a trial judge escapes when acting alone. Of course, a judge who writes for a panel of three must satisfy at least one other person that the chosen style is at least permissible. A combination of judicial and

stylistic demands can be even harder to meet than the demands of an editor.

"Freebies"

Whatever the assignment may be, my favorite way to write is to wake up (preferably in the early morning rather than the middle of the night) to the conscious realization that the subconscious, freed of the inhibitions that full awareness imposes, has a suggested way of resolving some problem that was on my mind before I fell asleep. More often than not these "freebies" turn out under scrutiny to be too far out of bounds to merit more than passing bemusement. But occasionally an idea seems worthy of closer examination. It sometimes even works and becomes the structure of a judicial opinion, article, or essay that almost seems to write itself.

Amanuenses

I acknowledge that I seldom write without help. The kind of help depends not only on the writing assignment but also on the allocation of available resources.

I have a superb secretary, whose skills include shorthand. But it is difficult to find time for dictation — time when I am not in the courtroom, in conference, reading, or on the telephone, and she is not busy with other responsibilities, including those my law clerks describe as her den-mother functions. Of course, I could dictate on tape; years ago I did so. But the keyboard and computer screen are tempting. Moreover, my secretary and our computerized word-processing are so proficient that she is sometimes at the keyboard as I dictate. Moments after I finish, the first draft is out of the printer and in my hands.

Over the years I have valued the wise counsel of Judge Charles F. Wyzanski, Jr., both published (for example, in *Whereas — A Judge's Premises*) and personal. His personal advice included one element, however, that I have chosen not to follow. His view was that a judge should never allow a law clerk to draft any part of any

judicial opinion. "You are the judge. Every word of your orders and opinions must be yours." If we mortal judges of current time heeded that admonition, inevitably our backlog would grow.

One reason this is so is more characteristic of our times than of Judge Wyzanski's. Heavy caseloads in trial and appellate courts force a different choice on judges now. We must accept the help of law clerks in drafting, as well as research and consultation, or else make fewer and less prompt decisions. At some point — and we are perilously close if not already there — overloads affect the quality of judicial decision-making. At the least, legislative and executive decision-makers who determine Third Branch caseloads and resources should be taking seriously the substantial departure from Judge Wyzanski's ideal; that departure is an inevitable consequence of excessive caseloads.

A second reason I do not adhere strictly to Judge Wyzanski's admonition that a judge should accept no help in drafting orders and opinions concerns the kinds of help a judge has in making hard decisions. I believe in the fundamental values of an adversary system, especially when the temptations to counterproductive excesses are controlled by the combined influences of wisely designed procedural rules, professionalism in the bench and the bar, and incentive structures that reinforce desired behavior. At its best, however, the adversary system informs the judge about the implications of a decision only as they are developed from the opposed perspectives of partisans. Ordinarily the only available sources of nonpartisan advice about the implications of a particular decision are other judges, who are just as busy, and law clerks.

An able law clerk is a valuable source of considered advice not just about the range of the judge's choices under applicable sources of authority, but also about what the choice should be and precisely why. The best form for the expression of that advice is often a draft opinion and order.

Clarity, Brevity, and Precision

Vagueness that permits different meanings for different interpreters, influenced by their own perspectives, has a secure place in artistic expression generally. Sometimes it has a place in legal writing as well. The assertion that vagueness serves a constructive function is more suspect, however, when applied to judicial opinions than to contracts or statutes — where vagueness may be the vehicle for deferring to another day hard choices that imperil a current declaration of a formal agreement or of a new rule of law. Perhaps the principle extends in some circumstances even to a judicial opinion written on behalf of a majority of the judges of a panel of three or more. But rarely, if ever, does it excuse a trial judge's deviation from clarity, brevity, and precision.

The central purpose of a judicial opinion is to explain — candidly, openly, and precisely — the reasons for a decision. The best judicial opinions are not partisan briefs for the choices that a court has made in deciding the case. They are, instead, explanations of the clashing interests and principles that merited consideration and why the court decided as it did.

I do not claim that this is how I write. I do say this is my aim.

Footnotes

A curious trend appears to be developing in the style of judicial opinions. More and more of them lack footnotes.

At least since mid-1981, Chief Judge Breyer of the First Circuit has never graced or marred (take your choice) a judicial opinion with even a single footnote.

Some of the best-known and most frequently cited passages in opinions of Justices of the Supreme Court are in footnotes. Yet, footnotes may be growing scarcer. Two Justices of the Court (O'Connor and Kennedy) used very few footnotes last Term. Chief Judge Mikva of the District of Columbia Circuit is another who rarely uses footnotes.

Some footnotes merely cite authority. Others are analytic or reflective. The extent to which judges halt the march of thought in

their opinions to insert asides, as well as the ways they cite authority, may sharply affect readability. Perhaps the most rigorous practitioner of the no-footnote principle is Chief Judge Breyer, who apparently brooks no pause in the march of thought. He uses citations as posted signs. Some mark the route of the march to the decision in the current case. Others mark departure points for other paths that might be taken on a different march. From experience in reading opinions crafted in this way, in comparison with generously footnoted opinions, and from attempts at writing in each of these contrasting ways, I am persuaded of three points. First, drafting an opinion with no excursions and no footnotes is harder work. Second, the result, if well done, is a clearer and more readable opinion, with fewer ambiguities. (This method may, however, sacrifice creatively suggestive passages as well as unpardonably opaque ones.) Third, the added value seems to me well worth the extra effort — at least when I am a reader.

When I made remarks of this kind recently to our distinguished mentor of legal writing, Bryan Garner, he urged me to reconsider and at the least drop citations out of the text and into footnotes to make it easier for the reader to follow with ease the opinion writer's text. Bryan Garner has also called attention — during the work of the Subcommittee on Style of the Judicial Conference Standing Committee on Rules of Practice and Procedure — to typography, indentation, and structure as methods of improving readability. The temptation to garner more from these insights has led me to experiment with indentations, rather than footnotes, for citations — especially when using two or more citations, each with a parenthetical explanation of the point for which the case, article, or statute is being cited. Thus, for example, one may say:

> I conclude that a correctional officer is performing a "discretionary function" as that term is used in the context of the federal law of qualified immunity, applied in section 1983 cases, when the officer exercises his authority to use reasonable force for a permissible purpose.

> *See, e.g., Horta* at 11–12 (finding, for purposes of federal law a qualified immunity, that police officer was engaged in discretionary function when making quick decision under municipality's high speed pursuit guidelines);
>
> *Gooden v. Howard County*, 954 F.2d 960, 964 (4th Cir. 1992) (en banc) (extending qualified immunity to police officers in mistaken custody case after noting that police officers exercise "what are inescapably discretionary functions replete with close judgment calls");
>
> *Davis v. Scherer*, 468 U.S. 183 (1984) (for purposes of applying qualified immunity, an official has discretionary authority when acting under a "law that fails to specify the precise action that the official must take in each instance").
>
> The more difficult issue is whether, in the circumstances of the record in this case, defendant's conduct was objectively reasonable.[1]

At the choice of the reader of this excerpt, the reader's eye may race through the names of cases that are familiar, pausing to scan the parenthetical statement about any case that is unfamiliar, or may instead jump to the next sentence of text. At the least, the reader is saved from having to look down to the bottom of the page to scan or even peruse a footnote and then back up to search for the right place to resume reading the text.

Perhaps we should treat new options of word-processing and publishing, with the availability of new tools and techniques, as the occasion to reconsider our practices of footnoting and citing authorities.

Caring and Learning

When you pick up an article, essay, or judicial opinion of someone whose work you have admired, you read with an edge of expectancy. When your hope is fulfilled, you are very likely to have sensed that the writer cares about both the quality of the

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[1] Foster v. McGrail, 844 F. Supp. 16, 24 (D. Mass. 1994).

writing and the substance of the message. At least when it is legal writing, the two objectives are mutually reinforcing. Each is more likely to be achieved along with the other than separately. And you may believe, as I do, that the writers whose work you prefer to read care about both.

A writer who cares enough will be willing to revise and revise, and then discard the later drafts in favor of the first, with barely a tinge of regret over the energy that went into the failed effort to improve. I confess that I seldom make that judgment about the quality of my own first drafts, however. I speculate that legal acculturation may be a contributing factor. Long and involved sentences come all too naturally to the minds of persons who read a lot of legal writing — even those who care enough to do better in revised drafts of their own writing.

If we could develop in the legal profession a common striving for style as well as substance, we might change the acculturation that goes with learning law. Might we even transform legal reading into a part of our professional lives that we especially enjoy?

James W. McElhaney

Joseph C. Hostetler Professor of Trial Practice and Advocacy, Case Western Reserve University Law School, since 1977. A.B., Duke University, 1960; LL.B., 1962. Author: *Effective Litigation: Trials, Problems and Materials*, 1974; *Trial Notebook: A Practical Primer on Trial Advocacy*, 1981, 2d ed. 1987, 3d ed. 1994. Author, quarterly column in *Litigation*; monthly column in *ABA Journal*.

I have a conversation with my readers.

One on one.

"Wait a minute," you say. "*Conversation* is the wrong word. Maybe you try to write the way you talk to your readers, but you don't have a conversation with them. Writing is a one-way street — even with computers and fax machines. Sure, you can go back and change what you said — explain what you meant, add to it, or subtract from it — after you get a response. But that's different. You're supposed to be talking about how you write something in the first place, not how people react to it later on, or how you reply."

But that's just my point. I really do have a conversation with my readers — as I write. Not only in the give and take that develops on the page, but in what I actually hear while my fingers are clacking out words on the keyboard.

First, I want people to hear my words as well as see them. I want my ideas to come alive — something that doesn't happen very easily when the reader has to translate what I have to say into English.

The trick is to listen to your words, to write for the ear, not the eye. Pay attention to the sound of what you have to say. It does remarkable things.

Listening to your words as they speak on the page corrects unintended ambiguities, cures accidental overstatements and

understatements, catches unwanted words, and smooths out awkward phrases that the eye might let pass.

But the real magic happens when you keep on listening. It's quiet at first, so pay attention.

You hear your readers answering what you say. They challenge your ideas, question how you've put them, sharpen your thinking. The great ideas that you get when you read what you've just written are your readers talking back to you. It almost seems wrong to take credit for their work.

I'm not the only one who carries on a conversation with my readers. There are some people (all right, characters, if you insist) who talk with each other as well as with the readers.

Angus — that's his only name — is the guru of the lawyers who hang out at the Brief Bag. He explains things so well that other lawyers (especially me) actually take notes when he talks. Some of my "Litigation" columns in the *ABA Journal* have been based entirely on what Angus had to say.

Having a friend like Angus makes writing a lot easier. When things need to be said with simple authority, he can do it. That way I don't have to put on airs or type out the verbose written equivalent of a stuffy "harrumph" to get people's attention. But that's not all. Angus can also take on wrong-headed judges who don't understand (or who haven't read) the rules, as well as explain why some popular trial techniques actually do more harm than good.

Lawyers are in serious need of mentors. We need people who know how to do it the right way. We need teachers who not only know what the rules say, but also know how they actually work. We need guides who have a simple sense of moral justice that helps point the way.

That's too big a role for a simple columnist who hammers out both a monthly and a quarterly column. (You counted right — 16 regular essays a year in addition to occasional other articles.)

It's gratifying to see how many lawyers think of Angus as that kind of mentor. It's also fascinating to see how many lawyers have a strong mental picture of how he talks and what he looks like.

They've done that entirely on their own. I have deliberately avoided ever saying anything about Angus so people would be free to see and hear an image that fits their needs.

Any number of lawyers have asked me whether Angus was modeled after someone they know and admire. Lawyers in Nebraska have wondered whether he was based on a lawyer who used to be in Lincoln a few years ago. Some lawyers in New Jersey thought he had a solo practice outside of Hopewell (under another name), while some folks in Dallas were sure he was one of the legends who used to try cases out in West Texas.

Angus isn't the only one. There are some others who help me talk to readers. Judge Wallop, for example, is the kind of curmudgeon who can say, "I blame the law schools for not teaching lawyers to be bilingual," when Professor McElhaney would have to use a lot more words to convey the same sense. Because you know Judge Wallop's bias, he doesn't have to be as objective as I do, or as careful with his words.

Beth Golden is an experienced trial lawyer who can challenge anyone at the Brief Bag with penetrating questions, while Flash Magruder is sure he's got the answers, even if they do scrape a few corners. People like Mike Pirelli and Regis McCormick make young lawyers' mistakes, while Barbara Swanson demonstrates solid professional competence.

They collide. They confront and challenge one another. Their ideas compete for recognition and approval. They create interest and understanding. They get the reader to the point more quickly than traditional expository writing. Then once they've done their job, they don't hang around and get in the way. They disappear back into the office, the court, or the Brief Bag — without any comment. They only come back if there's something they left unresolved.

One other thing. If they're not needed for a month or two, they never complain.

One of the best parts of writing a column is that you're always looking at another deadline. How, you wonder, could there be any joy in a succession of 16 deadlines every year?

Easy. The obligation to get the column done is a duty to sit and think — for hours, sometimes days. It is a justification for sweeping away the niggling demands of everyday life. The bills can wait another day, maybe another week. You can blow off committee meetings, casual appointments, luncheons, correspondence, telephone messages. You can dig in the library, shut off your phone, cancel office hours, hide out at home.

Writing justifies brushing almost everything else aside. The freedom it gives is exhilarating. But with it comes the price of actually producing the piece. If you are going to do it more than once or twice, you have to have a system — a method that makes the most of your freedom. Here is mine.

Write first, research second.

"Hold on," you say, "you've got that backwards."

Nope. If you don't know anything about your topic, then of course you've got to do the research first. But if you don't know anything about your topic, you probably shouldn't write the article. If you know the subject, you can start writing and later do research to fill in the holes as you go.

How you start writing makes all the difference.

Write down every point you want to make before you try to organize your thoughts. I still do this for every piece I write. I make a list of everything I want to say. I call it "Ideas Not in Order" so I won't worry about how I'm going to put it together. I just concentrate on listing every idea that the topic deserves.

You are brainstorming, and you have to understand what that means. You are writing down every idea you have on the subject, as fast as you can. At first, every thought brings up three or four others, and you are in a state of manic productivity. As you go on, you find you are listing the more important ideas three or four times, using different words.

That's okay. Keep on writing everything down. At this point there are no good ideas or bad ideas — there are just ideas. If you reject something now because it's a bad idea, you will cut off the train of thought that might have led to a new insight or a telling argument.

When you can't think of anything else, read through what you've got. Cull through your list, rejecting the points you don't like, setting aside the good ideas that just don't fit. But don't actually throw the first list away. You will be surprised to see how often you can write about why some suggestion is a bad idea.

Now write an outline that covers every point that's left on your list. Don't take a lot of time, because this is not an outline of your article — it's only a logical organization of what's going into your article.

Then why do it?

Because it lets you see what you've got and what is missing. It is a simple method that will let you look at the whole topic at once and avoid short-circuiting yourself by leaving out something essential — like the articles in airline magazines that always seem to promise more than they deliver.

Now you're ready to organize what you've got into a working outline that will guide you through the entire piece. It is an amazingly fast way to work that avoids rewrites, reworks, and shuffling pieces and parts from one section of the article to another. It works so well I don't even know the block commands for moving words and paragraphs around with my word-processor — I don't ever use them.

Instead, spend your time polishing. Read your article out loud to everyone you can make listen. When you polish your piece, get rid of unnecessary words. Strike every adjective and adverb you can — let nouns and verbs do the work. And keep listening.

Let me share something with you that the late Irving Younger told me 15 years ago when we were teaching together at the National Institute for Trial Advocacy in Boulder, Colorado.

"Jim," he said, "you will appreciate this. When Rudyard Kipling finished writing something, he would put it in a desk drawer for 30 days — to 'drain,' as he said.

"At the end of 30 days he would take it out and read it. After 30 days he would see the words he had actually written, instead of just remembering what he had wanted to say. Then he would edit in India ink — not with a pen, but with a small stick that had a

little square sponge glued to the end — so all he could do was take out unnecessary words instead of adding new ones."

What an elegant way to listen to the conversation.

Richard A. Posner

Chief Judge, United States Court of Appeals for the Seventh Circuit, since 1993 (Judge since 1981); Senior Lecturer, University of Chicago Law School. A.B., Yale College, 1959; LL.B., Harvard Law School, 1962. Law Clerk to Justice William J. Brennan, Jr., United States Supreme Court, 1962–1963. Associate Professor of Law, Stanford Law School, 1968–1969; Professor of Law, University of Chicago Law School, 1969–1981. Author: *Economic Analysis of Law*, 1973, 4th ed. 1992; *Law and Literature: A Misunderstood Relation*, 1988; *The Problems of Jurisprudence*, 1990; *Cardozo: A Study in Reputation*, 1990; *Sex and Reason*, 1992.

The anterior question is what I write, because different genres require different approaches. A private letter is not a judicial opinion, a book review in the *New Republic* is not an article in an economics journal, an article on jurisprudence is not a book on AIDS, a book based on previously published essays is not a book written from the ground up, an edited book is not an authored book, an authored book is not a coauthored book, a majority opinion is not a dissenting opinion, and an en banc opinion is not an unpublished order or an internal judicial memorandum. My writing covers all these genres. I will discuss just two: the majority judicial opinion and the authored book (whether or not written from the ground up — not an important distinction, at least in my work, for reasons that I'll explain).

Here is how I write a judicial opinion. In my court, panels normally of three judges ordinarily hear six cases in a day's sitting, and at the end of the day confer on the cases and take a tentative vote, after which the presiding judge — the active judge with the most seniority — assigns the writing of the majority opinion (or unpublished order, if the case is not considered significant enough for a published opinion) in each case. Almost always, each judge on the panel is assigned two of the cases. That evening (or sometimes

the following day or evening) — while the oral argument and the judges' discussion are fresh in my mind — I write a rough draft of the opinions assigned to me. I have before me as I type my opinion (on a computer, of course) always the briefs and printed appendixes and sometimes in addition key statutory material or a few key opinions. After 40 years of typing, I am a proficient typist, so the production of an opinion is not slowed by the time it takes to type what I want to say; and after 12 years of judging and with more than 1,100 opinions under my belt, I can usually plan and write an opinion draft in an hour if it's a simple case and in two to four hours if it's a complex case. These are *rough* drafts; refinements are for later.

As I write, I identify and mark on the draft the areas where further research is necessary. After printing out the drafts of my two assigned opinions, I give them to my law clerks to complete the research, to criticize the drafts, to check the facts, and to suggest corrections and improvements of every sort — style, tone, logic, lucidity, whatever. The law clerks' research is embodied in a memorandum, backed up by a library cart or two or three containing the cases and other materials referred to in the memo. (I do not cite anything in an opinion unless I have read the pertinent portion of the cited item.) I then do a redraft, and give it to the clerks for further research, criticism, etc. Redrafting may continue for several rounds before I have a draft that I feel reasonably comfortable about circulating to the other members of the panel.

I try to write clearly, concisely, candidly, concretely, and freshly. That is, I try to say what I mean, avoid the unnecessary details that crowd judicial opinions, avoid legal jargon and flights of rhetoric, minimize citations to and quotations from previous opinions, avoid euphemisms, and walk without the crutches that judges use to get over gaps in analysis (crutches such as the canons of statutory construction, gobbets of legislative history, and strained analogies to earlier decisions). I do not employ the mealy-mouthed and hypocritical vocabulary of political correctness, I do not use section breaks or headings to subdivide my opinion

(and hence am sometimes accused, by lawyers who are *not* students of Joyce or Faulkner, of writing in a stream-of-consciousness style), and I do not use footnotes. I do a lot of rewriting but I am not sure polishing is the right word, for I try to make my opinions sound conversational rather than declamatory. I am not above using slang. As Holmes once said, a judge doesn't have to be heavy in order to be weighty. I know that only a few of the readers of my opinions are not lawyers, but the exercise of trying to write judicial opinions in a way that makes them accessible to intelligent lay persons contributes to keeping the law in tune with human and social needs and understandings and avoiding the legal professional's natural tendency to mandarin obscurity and preciosity.

Because my opinions are nonstandard in this age when the vast bulk of judicial opinions are written by law clerks, they draw a somewhat higher fraction of concurring and dissenting opinions than is usual in my court. Because I give the reasons that actually moved me to vote as I did in the case or that persuade me that the decision that I am trying to justify is a sound one, rather than regurgitating the standard pablum of judicial rationalization, my opinions are sometimes said to contain too many dicta and to stray too far from the lawyers' framing of the issues. I prefer a strong and honest opinion to a unanimous opinion or an opinion that makes a judge popular with the bar. And I am not sure how many of the critics who say my opinions contain too many "dicta" even have a clear idea of what the word means.

The process that I have described of writing a rough draft right off the bat as it were and gradually expanding and refining it is almost the opposite of how most judicial-opinion writers (who are mainly today, as I have said, law clerks) work. First they complete their research; then they write a draft that, since it incorporates the results of the complete research, is close to a final draft. The problem with that approach is that it fosters procrastination. As one's research mounts up, the difficulty of organizing a draft that will incorporate it mounts up too. It is far easier in my experience to write a rough draft before one has done extensive research and then build on it to a final draft. The writing of the rough draft is

not that formidable a task, and once it is done one has a sense of accomplishment and a solid base for expansion.

I follow a rather similar approach in writing books. I like to write a complete draft, however rough, early in my research. I like it even better if I can incorporate in that draft some articles or parts of articles, or even book reviews, that I have already written, because that makes the preparation of the first draft of the book that much less formidable. I am not one of those writers who believe that one's published work is sacrosanct, and should not be revised. In fact I regard all my work as work in progress and always subject to improvement, correction, refinement. Anyone who cares to compare chapters in my books with articles on which those chapters were based will observe extensive revisions.

Once I have the complete draft of a book, I proceed much as in the case of my judicial opinions, except with academic research assistants (usually but not always law students) substituted for law clerks. The process of drafting will identify for me the gaps, often vast, in my research. I ask my research assistants to try to fill them in for me. They bring me books and articles to read. (As with opinions, so with books, I do not cite anything that I have not read, or, if it is a general citation rather than something on which my argument relies, at least skimmed.) Over a period of months, I revise my draft to incorporate the results of this research and I obtain criticisms of portions of the draft from academic friends and acquaintances. Often I will give a chapter or several chapters as a lecture or workshop paper to obtain criticisms from participants. I find criticism immensely stimulating. Word-processing has made it possible to revise a book manuscript several, even many, times before it is submitted to the publisher, and I have taken enthusiastic advantage of this new capability.

Books have a different function and a different audience from judicial opinions. I do not flinch from using footnotes in books, although I try to keep them to a minimum and in particular to avoid long textual footnotes. I insist that the publisher place the footnotes at the bottom of the pages of my books rather than, as is increasingly common, at the back of the book. It is most

inconsiderate to force a reader to flip back and forth in order to associate footnote with text. Almost all my books are intended for an interdisciplinary audience, so I am particularly careful to avoid jargon, and to write simply and clearly. For certain types of writing a high level of technicality is unavoidable; but in general it is the second-rate intellect that cultivates a pretentious vocabulary and a solemn and portentous style. I want my books to be readable, and that is why I insist as I have said that the footnotes appear at the bottom of the pages. I try to write plainly, even bluntly. But except for the occasional textbook or casebook, I write academic books published by academic presses for an academic and professional audience. I do not aspire to write for a truly general audience.

Thomas M. Reavley

Judge, United States Court of Appeals for the Fifth Circuit, since 1979. B.A., The University of Texas, 1942; J.D., Harvard Law School, 1948; LL.M., University of Virginia Law School, 1984. Justice, Supreme Court of Texas, 1968–1977.

How do I write?

Perhaps none too well, but better when I believe I have something to say that someone should read.

Here I address, briefly, my process for writing and some thoughts about the composition of judicial opinions under the circumstances of current dockets. My purpose is to convey a valid notion and not to impress the reader. Scholarship is for others; it is no priority for me. And I care not what length fits the custom or even the expectation of editors; I oppose the practice of stretching briefs and law-review articles and books beyond what the authors came to say.

First, the steps I take to write. If responding to a particular assignment, as the matter comes to mind over the time available, I make notes on what I ought to say. If I generate the project, it will brew over time and be fed by notes and clippings dropped into files and drawers. The writing itself must begin with an outline. The outline usually begins with a simple spine of my principal points in due order, and then the outline grows as it is fleshed out with ideas and illustrations and references. Some Zeus-like writers may do the outlining in their heads, perhaps consciously or even subconsciously, but most of us must put the outline on paper or screen. Except for simple correspondence, I would rarely begin any writing without an outline, however cursory it may be. Think how much easier exam-paper grading would be, and how much higher the grades could be, if students would outline their answers before launching into whatever comes to mind on subjects suggested by the question.

With the outline before me, and with my notes and potentially helpful material nearby, I dictate to the recorder. My first purchases when I began law practice were a good chair, the best available typewriter for my secretary, and a set of dictating machines — in my case, the Ediphone. Others may begin to write by hand or typewriter or word-processor, but that comes as more labor than I will readily expend. Fortunately, I am seldom too lazy to talk. So I talk through my outline, knowing that I am producing what will probably be an extremely rough draft.

When that draft has been transcribed, I take my pencil to it, correcting and rewriting and even reorganizing. That is how and when I write to be read. The rough draft only sets the stage, but it is essential for me. Somehow, when I have the draft to work on, my thinking and interest and energies are all boosted.

How do I go about correcting and rewriting the rough draft? By looking at the statements from the vantage of the reader, a stranger to my own thoughts. By laying out my words to help the reader follow along without detour or obstruction. By making it simple.

There you have my method of writing. Now to the particular writing I do most often, judicial opinions, and to my own thoughts about what is called for in these times.

My method is usually to have a law clerk write the rough draft. I dictate a preliminary outline after the opinion conference. The clerk is to read the record, plan the disposition of the issues, and then confer with me on her outline. She then drafts an opinion and places it at my table on a library cart, along with all cited authorities and the record. I take over with the final phase of writing. It may be a complete rewrite or, under the pressure of time and by virtue of the good work of fine clerks, it may be done with only a little editing.

I read many criticisms of appellate opinions for their incompleteness or less-than-grand style; some even criticize courts for not publishing more of them. My own wish is to go in the other direction: toward more unpublished decisions consisting only of concise statements of the reasons for the judgment.

The choice of form and substance depends, of course, on the case. There are unsettled and contested questions of law that should be decided with full exposition and then published for the benefit of all. But those cases are only a very small part of our dockets. It is time to cut back on all this flood of writing and publishing. Cases awaiting decision have lingered too long. The shelves are bursting. Brief writers, and members of the profession who read to stay abreast, have far more to work with than they need. Enough is enough!

I see three classes of appeals. Too many are frivolous appeals from a correct judgment properly explained by the trial judge. These appeals justify no more than a word affirming for the reasons given below or by simple reference to the rule that the judgment is correct and requires no elaboration of any precedential value.

Then comes the largest number of our appeals: to be decided upon a correct understanding of the record without stating any new rule of law and without contributing to precedent. One or more of the litigants need the court to explain the disposition of the appeal and to demonstrate the legitimacy of the process. Those decisions should be written only for the litigants. The factual and procedural background need not be restated. A succinct list of reasons for the decision is all that is required or justified.

Finally, there are the relatively few cases that establish legal precedent or that may be beneficial to the understanding of legal rules by persons other than the parties to the appeal. Those decisions are published for readers who will be strangers to the case. In writing, the judge should be directed and restrained by a narrow purpose: to help the bench and bar read the law. It is not to entertain. It is not to achieve literary acclaim in future centuries. And it is not for the personal performance or pontification of the author.

I fear that some of my esteemed colleagues imagine their opinions lying on night-tables for bedside reading and being reprinted in great-works editions. If that should ever occur, they may be credited for their style and wit. But I fail to see so exalted

a purpose or how the demands of our dockets allow those efforts. I do not understand so grand a dispensation to be our assignment or duty. It may be that some judges take themselves, and their every word, too seriously.

Our primary audience is the busy professional. The opinion should be written to explain the decision of the case on appeal, with those explications and distinctions added as will be helpful to that audience. We respect the media critics and the academics, but they are not our audience. They do their thing and we do ours; and our thing is something other than writing for their commendation.

Our audience does not need a full review of the law in every opinion we write. It may tempt the appellate judge in chambers to fully review all of the rules and exceptions for a presentation of an elaborate scheme of law. Let that effort produce an article for a journal or law review rather than a judicial opinion.

I would not give the impression that I think style and composition do not matter. Of course they do. We write to be read by lawyers and judges. To be read and understood, readily and correctly. Unnecessary words should be boiled out. Do not tell the full story of the case; tell only the part that the reader needs in order to understand the legal ruling. The facts should be stated in digestible order, probably chronological, with the issues clearly delineated. The reader will be helped by an introduction stating the subject and perhaps the précis of the decision, by descriptive signpost captions at stages of the opinion, and by a conclusion telling precisely what is done to the trial court's judgment.

The texts of controlling contracts and statutes should be available for the reader, either in footnotes or appendixes.

Having written what I hope someone might read, I stop.

Patricia M. Wald

Chief Judge, United States Court of Appeals for the District of Columbia Circuit, since 1986 (Judge since 1979). First Vice President, The American Law Institute. B.A., Connecticut College, 1948; LL.B., Yale Law School, 1951; Assistant Attorney General for Legislative Affairs, U.S. Department of Justice, 1977–1979. Author: *Bail in the United States*, 1964 (with Freed); *Law and Poverty*, 1965; *Dealing with Drug Abuse*, 1972 (with Hutt).

First of all, I don't consider myself a "writer" in the sense that a novelist or poet or journalist is; I don't revel in anticipation at the thought of writing opinions or articles or speeches about legal subjects. Dread is more often the dominant reaction when I have to write, which is pretty much all the time. I actually enjoy reading briefs, making notes, engaging counsel in oral argument, discussing cases with colleagues. I am uneasy trying to put it down on paper. I have the sense, reading other legal writers, that many of them love to write. They undoubtedly have a vision, an organizational plan in their minds when they sit down and begin filling in the details. My own technique is more akin to that of one author who described writing a first draft as like trying to put a roof on a paper shack in a tornado — you just grab anything that sails by and nail it down. I'm always desperately afraid something will fly away. My first drafts are way too long.

Second, I seem to have no real control over what initially comes out. Thoughts, doubts, problems surface that I had not thought about before I sat down to write. So, I waffle endlessly between checking out some idea or impression now — thereby abandoning the grand view — or plodding on through, knowing that I may be building my paper shack on subsided soil. My first draft wanders; it is full of irrelevancies and blind alleys. I am driven by this overwhelming desire to get it over with. I savor nothing. It is a crude beginning. But when I finish that draft, I at

least have definite clues as to what I am trying to say, and it often surprises me. It is at that point that I must decide if it is worth saying. If so, I go back, fill in blanks, check sources, and write topic headings or sentences so I have an outline in my head. If it doesn't make sense, I chastise myself for incompetence and start again, this time with some stronger sense of the landmines down the trail. On a second or third draft, I look for a little fun — the insertion of a wry sentence or an unusual word, unexpected in context, something that might make even a reader of legal prose pause before rushing on. It's usually not until later drafts, sometimes a fourth or fifth, or even sixth draft — if I am lucky — that I begin actually to enjoy the writing process in any sense, to indulge myself with the prediction that a point has been made or a pitfall avoided. Meanwhile, through all the successive drafts, I am cutting frantically. I persist in underestimating my own ability to communicate or my readers' ability to comprehend, and I say the same thing too many times. The first outlander who gets to read my prose — be it my long-suffering spouse if it is a speech or a law clerk if it is an opinion — usually points this out quickly. "We get it, we get it," they cry piteously.

I suppose the way one writes — even on legal topics — says a lot about the way one thinks or experiences the world. Afraid that I would miss something, I have always wanted to take it all in, process it all somehow, make it all come together — obviously an impossible task. Only when I know a lot about something do I feel comfortable in classifying, characterizing, or rejecting it. This attitude has not always been a help; I am gregarious, not terse; I ask lots of questions and tend to be suspicious of neat analytical constructs or solutions. The result is: I must constantly fence myself in, in my research, my thinking, and eventually my writing.

Some critics have accused me of being "result-oriented" as a judge. Whatever epithets I deserve, that one is decidedly off the mark. In a hard case, I am never sure of the right result until I have been through interminable angst, fussing, devil's advocacy, and even backsliding. I generally see — in neon lights — the other point of view up to and even past the moment of decision-making.

All of that internal turmoil of course rarely finds its way into the final opinion, or speech. Once the decision is made, the later drafts inevitably tend to hone and strengthen the winning arguments, though as a judge one tries to deal fairly with rejected positions.

The proper degree of candor in opinion-writing is troublesome. Should the judge frankly confess how close the case is, how much the final analysis depends on her judgment as to which side of the line drawn by precedent, statute, or commentary a case falls on? Or is it better to make a hard choice, then present it in the surest possible way so that readers will view it as more authoritative? I have found that the more intense a dissent is, the more assertive the majority becomes. Leaving ad hominem attacks aside (as indeed we should), primitive instincts tend to take over when a writer is attacked on premise or reasoning or even prose. If a dissent is outraged and self-righteous, the majority author will frequently rejoin in kind. Adrenalin spurts, and no judge who has worked her way — however torturously — to a decision-point wants to defend that point wimpishly.

In some sense, this is an Achilles' heel of appellate opinion-writing: while writing, judges commonly undergo a conversion. They begin with a complex weighing of many factors. They know that there are two respectable sides to the argument, but they still come to a final decision. Yet, when they actually write the opinion, they produce just a heightened replay of the adversary contest that the lawyers have put before them in briefs and argument. Because all judges have been lawyers for a goodly part of their lives — most of them involved in adversary endeavors — the techniques and strategies and put-downs of advocacy reemerge far too easily when they engage in opinion colloquies. It is a peculiarly judicial phenomenon that demonizes rather than simply disputes the opposition.

A brilliantly written opinion on an appellate court is a particularly rare commodity. The best lines — the literary asides, the arresting analogies — are too often left on the cutting-room floor to secure a concurrence. It is as if judicial colleagues were continually conspiring to prevent one from making a reputation as

a closet wit or Renaissance spirit. That is probably why so many of us teach, lecture, or write articles on the side; we need not get colleagues' approval of every word. On closely divided courts such as the one in which I serve, colleagues are — justifiably — suspicious of any gratuitous remark or irrelevant dictum that might be picked up and repeated more firmly in future cases, that might take on a life of its own and end up as a holding down the road. Indeed, persistent colleagues have a wearying habit of pressing for the excision of a particular word, phrase, sentence, or paragraph in the middle of an opinion; and often in our desire to get approval and publish, we will comply. The result is a choppy or erratic transition or no transition at all. Dissents are literarily liberating in that respect; unfortunately they seldom affect the law.

Any judge thinks of how she wants her readership to react. I'm not talking now of sound bites for the evening news in those rare cases that receive attention outside the profession, though it is not unknown for judges to write with tomorrow's headlines in mind. Most of us, however, know it is a futile mission to second-guess what lines may tickle the omnipotent or even the confused reporter's fancy, and write instead largely for a professional audience — lawyers, other judges, law teachers, students — but sometimes where an important principle is at stake, for ordinary citizens as well.

When I write, I want my readers to understand (a) what the issue is I am facing and why it is important; (b) what the law has said previously about it — be it consensus or conflict; (c) what sources I feel must be consulted and the constraints I am under in reaching a result; (d) what I think of the arguments on both sides and why I ultimately come down on one side rather than the other; and (e) most of all, that I have been fair in conducting the inquiry and not inexorably committed to one result. Of course I would also like the reader to come away with some overriding feel for the judging process — even if she disagrees with the choice I made in that one case. I would like the reader to perceive the way judges, day after day, year after year, working in relative obscurity (at least those on the lower courts), sift through briefs, engage

counsel in oral arguments, and parry with law clerks (and not infrequently with colleagues) to arrive at results that are reasonably consistent with the thousands of federal decisions that have gone before and that will move the law incrementally in the right direction, or redirect it from a wrong course. That is probably asking too much and sounds more grandiose than I mean it to, but I do want my readers to understand what, in my view, is the law and why it should be the law.

I read over my opinions many times to try to catch all the toe-stubbers — the place where an inner scoffer will say "why?" or "so what?" or "come on" or "I don't get it." My own turn of mind is to the concrete rather than to the abstract. I spend a lot of time avoiding conceptual discussions or translating them, where possible, into Joe Six-Pack language. You would be surprised how often abstract concepts conceal a failure to come to grips with the precise issues or facts in the case. Ideally, the appropriate legal concept should emerge almost spontaneously from a close analysis and arrangement of the facts. Doctrine should not descend like a lightning bolt to strike randomly whatever is in its path.

Everything I have said so far ignores a central reality of judicial opinion-writing today — and for the past half-century: the role of the law clerk. Federal appellate judges on the average sit on more than 250 cases a year (in the District of Columbia we carry only half that caseload because of the disproportionate number of heavy administrative-law cases on our docket); they write 40–80 law-making opinions each year (plus interminable numbers of "unpublished" opinions and orders). Those opinions contain myriad case citations; except for those of a handful of purist holdouts, they are generously footnoted. A judge simply can't do all that by herself. A few try, I am told, but they become rarer as time goes by. Actually, even when I clerked for an illustrious pathbreaking judge back in the early 1950s, I wrote many of his first drafts. I suspect the practice goes back even earlier.

Can a judge today claim to be the author of an opinion for which someone else has written the original draft, and she has only added, subtracted, reformulated, and furiously edited? After such

a process I feel that it is my opinion, in style as well as substance. Certainly in an institutional sense, as my "fan mail" in controversial cases attests, I am held solely and totally responsible for what I say and any repercussions that come from what I say.

But more basically, I have selected the priorities among the subjects and arguments discussed, described how broadly or narrowly the principles will be stated, edited the piece for style, and put my tonal mark on it. What I have not done is research all the cases that may be cited for a principle, or all the precedent that can be used to reject a failing position. (I have personally read all cases cited for any significant proposition.) One of the clerks may have done the first organization of ideas, but in most cases I will have switched at least some, if not most, around. The final product will contain some of the clerk's prose and much of mine. I will have digested everything in the opinion. Still, I could not have done it alone (in the time allowed) without the clerk.

Few opinions on any court are great literature; but a large number fulfill their function — to inform, to explain, to justify, and very occasionally to inspire. Justice Holmes wrote elegantly, but he also made mistakes. Judge Jerome Frank, for whom I clerked, picked those opinions he wanted to write in their entirety and those he would delegate more liberally to a clerk. On my watch we write longer, more complex opinions about harder-to-understand subject matter, and my colleagues are more punctilious in line-editing each other's work than I remember his were back then. (That was the great Second Circuit of Thomas Swan, Charles Clark, Augustus and Learned Hand, Harrie Chase, and Frank himself.)

Opinion-writing, like politics, is the art of the possible. I do not think we can go back to a judicial pen-in-hand age, nor need we apologize for not doing so. The clerks are young and fresh, bright and energetic; the computer-assisted research is faster and easier to do; the combination, I think, will produce a better result in most cases than the judge shut away in a library by herself. There is no doubt in my mind, however, that if that judge had to sit down and write one seamless opinion on her own, it might read

less stiffly or spasmodically (if she were innately a good writer), and perhaps contain fewer free-falling conceptual allusions, but it would be at a heavy cost to the system that, after all, exists to decide disputes, not churn out great literature.

Of course, there is no formula for opinion-writing, no matter how many schools for "baby judges" you attend. Any judge worth her commission puts her own mark on an opinion; law clerks come and go annually, but I believe I can tell you the judicial author of almost any opinion coming out of our court. We all have our favorite phrases, our stylistic idiosyncrasies, our special judge-mentors from earlier in our careers (often we clerked for them) whom we frequently cite; they make our work product recognizable to the cognoscenti. Former academicians or new judges coming on the court sometimes feel a compulsion to reinvent the wheel, giving us capsule histories of an entire field of law before they get to the narrow issue in the case — an example of the proverbial super-highway leading to a footpath.

Some judges tell it all in the first paragraph (I try to do this), previewing the issue and the outcome; others hold you in suspense until the final page, like a murder mystery. Some have provocative subheadings in the form of questions; for others it is "Background," "Analysis," and "Conclusion" — over and out. Some try in the last paragraph or two to put the case into a global framework — be it separation of powers, federalism, judicial restraint, due process; others emphasize a narrow focus — "We decide today only that . . . ."

On the whole, I think it a good thing that judges write and reason differently — and recognizably so. It is no sin if the personality of the individual judge colors the opinion. It should be at least minimally comforting to a litigant to know that a live human being has brought her faculties to bear on his problem, not that a computer has punched out an answer or a pro forma justification. In this sense, it is too bad that the sheer volume of litigation has taken much of the personality out of our federal appellate courts; we decide well over 50 percent of our cases by unpublished orders and lifeless memoranda. When I came on the

court 15 years ago, it was less than 10 percent. Most lawyers are reconciled; it is the pro se lawyer-litigants who anguishedly protest in letters and petitions when their claims are decided by these pro forma decisions. While most have no cognizable cause of action, they resent being denied even the small comfort of knowing a live judge has poured a little of herself into their case.

It will be interesting — assuming our globe survives — to see how opinion-writing evolves over the next century. Originally, our British ancestors recited their opinions — stream-of-consciousness fashion — from the bench, elucidating their spontaneous, original, and true reactions to the facts of the case and the advocacy they had just witnessed. In some countries still, only judgments, not opinions, are published, and only the judgments of the majority, no dissents. The judicial opinion in our country has its own unique style and tempo, emphasizing reasoning and displaying profound differences among authors. In that sense it is an attempt to bridge the chasm between governor and governed, the official who wields power and those who must submit to it. In a democracy the judicial opinion, by putting forth objective reasons for the court's judgment, legitimates the power given to unelected officials. But it is also the vehicle for a subjective form of communication from one citizen of the democracy to another — the identification of the disembodied voice behind the Wizard's Throne.

Some students of judicial style espouse a narrative form of writing, sprinkled generously with actual stories and candid reactions of the decision-makers — with less emphasis on the trappings of legal formalism, "neutral principles," citations to authority, and distancing from the real-world consequences of outcomes. Several of our best opinion writers in the late 19th century — Holmes, for example — set shining examples of all these techniques.

A word of caution, however, about "humor" in opinions — especially double entendres or wordplays on the subject matter at hand. Litigants do not like to be laughed at. I — and colleagues — have on occasion failed to resist the temptation and have engaged in thematic wordplay throughout the opinion (watery images in a

FERC dam case; visual images in an FDA contact-lens case; a reference to "the friendly skies" in an airline regulation case). But in retrospect I find it self-indulgent. The law is not a sport, and legal opinions should not be a vehicle for showing how clever we are. After-dinner speeches at judicial conferences and law-review banquets fit that bill nicely.

It is possible, I think, to write a well-reasoned, fair, principled opinion in prose that is absorbing, refreshing, colorful, and still readable and comprehensible to an ordinary person. There are, for example, instances when a complicated legal doctrine can be summed up in a homely, handy phrase, which then becomes the code-name for that doctrine in future cases. In search and seizure law, we have a series of "groin grope" cases dealing with the limits of consensual police searches of suspects in public places. We also have the "Mother-May-I" principle (from the childhood game), which says that once consent is given to search of luggage, the officer need not re-seek permission every time he encounters a closed bag or box inside the luggage. These catchphrases help make legal problems more understandable by comparing them to ordinary experiences in everyday life. To the extent that any legal writer — judge or otherwise — can make the law and its labyrinthine turns more accessible, she is sailing with the wind.

Most of us, however, are too timid to try more radical style changes; our colleagues might laugh at us (or even insist we excise them in exchange for their concurrence); the law reviews might not think we were "serious" enough; a dissenter might make sport of us or accuse us of pretensions or pandering to the media or, God forbid, the public. And at least initially, our law clerks would be of no help in writing such first drafts. It could, however, be a worthwhile experiment; we might end up producing less-pretentious opinions, more like those of our common-law ancestors. Maybe I'll summon up enough nerve to try it myself soon.

David M. Walker

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I have never really thought about how I write. My writing has been confined to topics of private law and legal history, and the way I write might not be equally applicable to other branches of law, still less to topics outside the law, or to philosophy or literature. I can only say a little about the way I have done it without implying that this is the right or the best way, even in these fields. Writings on law and history must be informative before they are literature, and some legal history that is literature, such as some of Maitland's works, is short on dates and precise information. My concern has been to present a clear and logical exposition and as accurate a statement as I can manage, rather than to achieve a stylish presentation or what is a pleasure to read. In short, substance has mattered more to me than style.

The first requisite, I have always found, is to have a consuming interest in the subject and to want to understand it and expound it better than it has been done before. Readers will read it for matter and not for style; indeed they will frequently read only the

page or even paragraph that seems relevant to their quest. What is to me more important than style is technique and the way of getting the material into the desired logical order.

My first step has always been to try at the outset to determine the basic shape and structure of my intended book, the layout I envisage, the divisions and chapter-headings, the subdivisions and topics. I have always, in teaching and writing, regarded the order of treatment of a subject as vitally important, and also found it very difficult to determine the best order. It should, I feel, be such that the reader, unfamiliar with the subject, finds the whole subject steadily unfolding as he goes through the book. In many cases I had largely settled this by experiment in teaching before I started to write.

Another question about order is in what order a practitioner, having to deal with a case within the field of the subject, would have to resolve his problems. In a contract case, for example, the practitioner has to consider in succession whether his client had capacity and power to make the contract, whether he reached agreement, whether he complied with any necessary formalities, whether the bargain was vitiated by illegality, mistake, fraud, or the like, what the terms and conditions were, and so on. Sometimes an order is fairly obvious, such as that of the major governing statute, though the order of a statute is not always the best for exposition.

I do not use a word-processor or any similar device, partly because I had begun to write before these were invented, partly because I have to collect and transcribe materials in many places, and because I do not think that a computer would offer any material advantage over my accustomed methods. I write on sheets of A4 paper (about 11½ inches x 8½ inches) with a fountain pen (because I write more neatly and legibly with a pen than with a ballpoint). On each sheet I draw a horizontal line about three-quarters of the way down the page; below that is the space for the footnotes, which will be keyed to words in the text.

I find it always useful to become familiar with the main existing recognized books on the topic and to discover what they

contain. Some views expressed may be stimulating; some may need controverting. The works usually include examples and references to the authorities that the author thought relevant and important on each topic he deals with, and these are always worth considering. But the real investigation must be of the original sources, trying to distinguish sets of circumstances, groups of cases, and so on, trying to discern general trends or attitudes, developments, and statutory changes. One must always be critical and not be overawed by regard for a respected scholar or a distinguished judge because either may sometimes err or express a mistaken view.

I do not try to make notes and then seek to integrate them into a text. I work on the jigsaw-puzzle principle. As soon as I have formulated views on a point, possibly quite a small point, I try to put down a text on that point on a sheet under a shoulder heading, that is, to get a basic statement on paper as soon as possible, knowingly leaving gaps to be filled in later. Then, over time, I add other pieces of information as I find them or as points occur to me, so as to fill in the gaps. Each sheet contains only the text on that particular point, so that a sheet may have only a few lines on it and one or two references. Every distinct point gets a separate sheet. Indeed, frequently at an early stage I write nothing but a heading on a sheet and put it in the appropriate folder, as a reminder that I must say something about that point, if I can find something to say and still think it worth mentioning.

As each chapter takes shape, the sheets are put in order, numbered within that chapter, and put into a labeled folder. The sheets can readily be re-ordered and the topics transposed, or even moved into different chapters. Sometimes sheets get moved from one folder to another; frequently there have to be interpolations and sometimes renumbering of the sheets. Sometimes, too, a sheet needs to be rewritten to reflect a change of view or because of interpolations and corrections having become confusing.

I always keep handy a pile of small sheets of paper and when, as I regularly do, I come across an interesting point or a reference or a dictum about something that I am not then working on, I write it down or at least note a reference and put the sheet aside.

Periodically these notes are sorted and the points in them incorporated in the main text at the appropriate places. I have repeatedly found points of interest in the most unlikely places, such as in cases reported on expenses or procedure or jurisdiction.

In general I try to investigate and write at least a basic text about each topic of the subject in the order I have envisaged for the final order of chapters. But if a topic proves difficult, I frequently leave it and go on to another topic and come back later to the difficulty. Even without such difficulties I have frequently had second thoughts about the way of presenting some topic and rewritten some or many sheets. Surprisingly quickly, the pile of folders grows and each becomes larger. There comes a stage when it is necessary to go through the whole pile and revise the sheets, trying to make them read as a consecutive narrative. All the time there is a constant inrush of new cases and statutes, which sometimes require substantial reconsideration of matter already written. One of my great sins is including too many examples or references; but when I have found many instances, I am hesitant to throw any out lest any later searcher think that there are no other specimens.

On many occasions, I have had two or even more books in progress at the same time. While this doubtless slows completion, I have frequently found it a relaxation to turn from one subject to another. I have also consistently set myself deadlines, dates for completion, and preferred to work to meet deadlines.

I have been asked sometimes how I have managed to publish so much. It has come about largely for two reasons. First, I have never written much for the journals but have preferred the bigger challenge of books. This in turn was because when I began to write, there was a desperate need in Scotland for new, modern textbooks on all the central subjects of private law, on delict (tort), contracts, remedies, and other major topics. All the fields had been long neglected, and badly needed restatement. I felt also that I wanted to make available to students and others a lot of the information that as a student and a young lawyer, I had had difficulty in finding myself — information that was not then

readily available but that I thought every student should be able to find readily; that was what gave rise to *The Oxford Companion to Law* and *The Scottish Legal System*. In my later years I have been able to devote myself to trying to make sense of Scotland's legal history (which is totally different from that of England).

The second cause of my productivity is an incurable disease with which I became afflicted in student days and for which no one has been able to offer any palliative. It is called *daimonia scribendi* — the existence within me of a tyrannical daimon that relentlessly pursues me with whips and scorpions if I do not do something every day, evening, weekend, holiday, and any other time not absolutely necessarily spent on eating and sleeping (and formerly teaching, examining, and administering). I get a little relief daily from a medicine called *canis ambulatio* (walking the dog), and during our summer vacation I take treatment called *montium peregrinatio* (walking the hills) and frequent doses of *librorum lectio* (reading books). Writing has been my consuming interest and hobby to the exclusion of sports and relaxations, and I have enjoyed it. But I still don't know how I write.

Elizabeth Warren

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When I was a little girl my relatives would gather for various occasions — mostly birthdays and holidays, sometimes when a distant cousin was visiting or someone got a new car. These events were laden with expectation. My mother always washed my hair and tied it with a satin ribbon while it was wet. The ribbon spent most of its time sliding down to the bridge of my nose, but it gave a satisfactory (to my mother) wave to my stock straight hair. All the women in the family would plan who was bringing stuffed peppers and which cakes would be available. The men ate first, then the table was cleared and the women ate. The children big enough to fill their own plates were consigned to the kitchen, which usually meant wandering anywhere they wanted with their food so long as they stayed out of the purview of Aunt Alice, who presided over the dining room and who was the sworn enemy of anyone who might spill on the floor.

The best part of these occasions was after the food was all cleared away and everyone had caught up on the events in everyone else's lives. Someone in the living room, usually my grandfather or my Uncle Roy, would start telling a story. At the conclusion of the story, someone else would start with another one, and so on. Sometimes, two or three people would have stories to tell, and Pappaw would say, "Now, hush, and let Betsy tell her story." Mostly the men started the stories, but the women had their own stories. And while some people never told a story, by

mid-evening everyone in the room had starred or co-starred in at least one story, so no one was excluded. So long as there were stories, no one went home. People sat and listened and went out to the kitchen if they needed to scold a child or make arrangements to trade dress patterns. Best of all from my viewpoint, so long as there were stories, no one who was quiet was sent to bed.

I learned to listen to stories sitting on the floor, leaning back against some grownup's legs, seeing every story that someone told. (To this day, I have a terrible time sorting out which of my childhood memories I really experienced and which ones I think I experienced but must have only heard and remembered in the retelling. More than once, when I got older, I would tell a story, putting myself in the back of the tent on a camping trip to Sulphur Springs or in the store when Uncle Crow had his heart attack, only to be corrected by an older brother who would point out with obvious malice that I hadn't been born yet when that story happened. But I remembered it all the same.) My first story-telling occurred in these gatherings, where I tried out my tales, modified them, and tried again at the next gathering.

I still tell stories. We have family gatherings, but not so many as when we all lived in the same state. And I have friends who indulge my love for a good story by listening to tales of unprepared students or spats in the academic playpen. But mostly I tell stories in print. I write books about legal policy, casebooks, articles for law reviews, short pieces for the popular press, and about every other form of wordsmithing available to an interdisciplinary legal academic. The stories have changed a lot, but I still see myself as a storyteller.

My stories today might not be recognizable as such to my Uncle Travis, who rewarded a good story with the most generous chuckle in the world, nor would they likely hold the interest of my Uncle Roy, who would quickly grow impatient and interrupt a slow-moving story with a quicker-paced one of his own (sometimes prompting my grandfather to shout, "Here! Let the gal finish" — but only if Pappaw hadn't yet grown bored himself). They might not be interested in my stories about the meaning of

section 1129(b)(2)(B)(ii), valid inferences from a nested variable regression analysis, and comparisons of managerial control in pre-Code and post-Code reorganizations of publicly traded companies — all subjects that I have tackled in print. But what I write are real, live stories nonetheless. They have the essential elements of a story — a central idea to communicate to an audience — and I make all the same decisions when I write as I made when I leaned forward and said, "Well, that reminds me of the time . . . ." The lessons I learned sitting on the itchy green wool rug in Aunt Max's living room are the ones I write with today.

The first thing the storyteller had to decide was the point of the story. Why tell this story? There were lots of stories that could be told. What did this story add that wasn't already part of the conversation? A story had to have a point. Maybe we were talking about misunderstandings, plans that went awry, unrealistic expectations, or saving face. A story was judged, in the first instance, by whether it had a good point. To tell a story — even a well-told story — without a point was just showing off.

I learned early that stories may be retold to illustrate different points. The same story might show how theory and reality often differ. (Like the time my brother David, enamored with all the cartoon pictures of the Katzenjammer kids giving the old Colonel a hotfoot while everyone laughed hysterically, spotted my Uncle Roy sleeping on the side porch and stuck some matches in the space between his sock and his sandal on his right foot. When the matches burned down, the sock — which was one of those 1940s nylon jobs — exploded in a single flash of fire. Uncle Roy wasn't hurt, but it scared the tar out of David and the other folks dozing on the porch.) Or a story might be extended to show how retribution is powerful. (Uncle Roy was so mad that he told David he could not come to swim again in the pond on his farm, a punishment of great consequence in hot summers in prairie towns in the days before air conditioning and swimming pools. The sentence earned Uncle Roy the fear of the other high-spirited nephews who decided to try out their antics on someone else next

time.) Or extended even again to show the triumph of the spirit. (David said he didn't want to swim in Uncle Roy's old mudhole anyway, got himself a job as a paperboy that summer, and bought a motor scooter with the proceeds.) It was the storyteller's privilege to put the spin on the story, to pick the point from this telling.

The second thing I learned about stories is that they are a form of conversation. It was clearly unacceptable to tell a story just to get to be the storyteller. A story was a good story only if it connected with an ongoing conversation. Stories might distinguish points made in other stories, offer new examples, clarify, quantify, dispute, or any number of other things, but they brought respect to the storyteller only if they were told to further a conversation.

Because the stories were parts of conversations, they also required letting others participate. The storyteller who tried to hold the floor for several stories in a row was not obeying the rules of reciprocity. Lots of stories made it into the conversation, and all got a first hearing. Some would be worth retelling, and some wouldn't, but they all had a chance to be heard and thought about. A good storyteller listened as well as talked, and she learned a new story or two or rethought a point about her own stories and how the conversation might develop.

Stories were also told with care about the audience. A story told deliberately for the younger children was told differently from the same story told to the whole group. And some stories were inappropriate for the children. (I was 14 before I learned that my Aunt Alice had been married before and that my Uncle Claude was not my cousin Janyne's daddy. Later I heard some funny and some sad stories about the long-departed Skeet, Janyne's real daddy.) When people outside the family were around, the story selection also changed — although not always for the better. (We now have family stories about people telling stories about a young cousin whose sweetheart was present and how the sweetheart responded to the stories.) If Aunt Max was there, the story generally needed to have a funny ending, and when Uncle Roy was in the group, it was a good idea to keep things moving quickly.

The storyteller was responsible for story selection and for telling the story in a way that was appropriate to the audience.

The final lesson that I learned about stories was that telling a story about someone else revealed more about the storyteller than perhaps the storyteller intended to reveal. Cousin Butch's obvious delight in telling stories that made someone else really miserable spoke volumes about him, and Uncle Travis's observation of odd little details that escaped everyone else's notice defined him as well as anything could. Aunt Alice told only stories in which she was the heroine, and Carol's stories frequently made her eldest son the goat. For some of my relatives who have passed on, I can summon memories of them only as they leaned forward to tell a story; that is how they are etched in my mind. For good or for ill, the storyteller told more than the story.

And that is how I write. I start with some point I want to make, something to add to a conversation — or sometimes to start a new one. I think about the conversation to date, what has passed before me, and what I have observed or figured out or surmised that I would like to tell others. I don't write a word until I have the central idea firmly in mind about what story I want to tell. I pray that I will never tell a story just to show how much I know.

Then I think about the audience. Who are the people I'm telling this to? Is this for a group of academics? lawyers? judges? creditors? debtors? students? people caught in a dentist's office with nothing else to read? It makes a huge difference in determining what is likely to be interesting, how much background is needed, whether a specialized vocabulary can be used, and so on.

When I start a new writing project, I picture the audience with as much specificity as I can — even if I have to make up some of the details. I sometimes name the people I'm writing to. (My latest casebook was written to three students who face my text for a reading assignment for class tomorrow, and they aren't quite sure why they are reading it, and, no offense, but they would rather be watching *L.A. Law*. The cute guy named Hank was always the hardest to hold on to, and I still think I lost him in places.) When I really get stuck on what to say or how to say it, I stop and tell

it out loud to this imaginary audience. First I tell it just to get the point straight, then I tell it again to make it a little more interesting. But I rarely write a word that isn't addressed to someone in particular.

When I write, I intend to continue conversations with others. Sometimes the conversations are vigorous, even contentious. (The eminent historian Eugene Genovese once remarked about something I had written: "Personally, I would not want you for an enemy — which is the highest compliment you should expect from a Sicilian-American.") They are sometimes supportive, informative, encouraging, argumentative, or any number of other things that I am when I talk. But they are always intended to continue some line of thought begun somewhere else and to elicit a continuing conversation from someone else.

Finally, I recognize that when I write, I will say more about myself than I ever intend to. A long time ago when I was first writing in law, I tried to write in a way that I thought made me sound like some abstract, anonymous, learned law professor. After all, that was what I aspired to be, and maybe if I sounded like one I could be one. But bits and pieces of me kept leaking out around the edges. One day my colleague Jack Getman remarked that he would catch fleeting glances of a real person in the things I wrote. With his encouragement, I finally decided that I couldn't hide anything very successfully for very long anyway, so I might as well simply write as I spoke. If the piece showed me to be a sweetie or a stinker, I'd just have to live with it.

I learned a zillion other things on the itchy green carpet. I learned about making images vivid, about getting to the point, about making friends with the audience, but all of those are subsidiary. If the reader buys the main point about storytellers and scholarly legal writers, the implications will sprinkle out for a long time.

As I conclude this story, I pause for a little self-consciousness about writing about writing. Have I kept this story alive and interesting? Have I made a reasonable point? I wonder whether I should have said so much about Uncle Roy and my brother David,

and whether I will send David a copy after this is finished. (Uncle Roy died years ago, but I don't think this was snappy enough for him to wade through anyway.) But there is nothing to do but plunge in — tell the story and learn something from the telling.

William R. Wilson, Jr.

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Most folks have heard the story about the mule that jumped out of the mule pen and ran in the Kentucky Derby. Of course, he came in dead last, and when he jumped back into the mule pen, the other mules chided him for this hopeless effort. The outclassed runner replied, "I knew I couldn't win, but I thought the association would do me a world of good." I wouldn't repeat this chestnut but for the fact it so aptly describes how I feel about writing alongside Judge Robert Keeton and Professor Charles Alan Wright — and the other luminaries who are contributing to this project.

Abraham Lincoln supposedly wrote, "With educated people, the semicolon is a matter of rule; with me, it's a matter of feeling." This pretty much describes the way I write. My missives do not square with Strunk and White (nor do they meet the Bryan Garner standards). It's not that I didn't have the opportunity to pick up the rules of grammar and construction — since my parents were schoolteachers from the old school. Proper grammar was an article of faith with them. To borrow from Merle Haggard, "Mamma tried"; but unfortunately, too little stuck.

Despite this shortcoming, I have always loved to read and write. For better or worse, Mark Twain, Josh Billings, and Bret Harte were my early favorites. Additionally, my maternal grandfather was a rock-ribbed, circuit ridin', shoutin', whiskey hatin' Methodist preacher, so the Holy Writ (King James Version, of course) has been a staple for me.

When I was a young man I had the privilege of hearing the late Oswald Jacoby give a talk on poker (which, incidentally, he

preferred to bridge). His talk was chock-full of interesting anecdotes. After his presentation, I visited with him briefly, and commented on his skills as a raconteur. He said, "I learned long ago that if you will entertain first, education may follow."

I doubt that students of the law are much different than those who would improve their game of chance.

When I was growing up (in the 40s and 50s) my elders had just weathered the Great Depression, and their language was rich with figures of speech, born of that experience. One might preface a rumor with, "This is just what I heard, but 'course now, you can hear anything but meat fryin' and money jinglin'." How better to express the lack of reliability of hearsay — at least to listeners who knew full well of the scarcity of meat and hard money during the Depression?

Similes and metaphors common to a particular area or occupation have always been a favorite study of mine. For someone who grew up around livestock, and remembers the first days of DDT, how better to describe a weird person than "crazy as a sprayed fly."

I am sorely afraid, however, that television is homogenizing our language. The disappearance of the farm family also concerns me. Will "crazy as a peach orchard boar" mean anything to a person who has never seen a hog drunk on peaches that fell to the ground and fermented? Perhaps it is my rural background that draws me to the bucolic aphorism.

Whatever my writing skills may be, I lay no claim to originality. My scholarly friends tell me that Shakespeare himself was a shameless thief of lines; and if the Bard himself could purloin thoughts from others, surely an ordinary street lawyer can. Proper attribution is in order, but Mark Twain might have added, "only if one is fairly certain to get caught."

Drafting and redrafting have always been a necessity for me. I am in awe of those speakers and writers who can just let it flow, but I simply have not acquired that ability. Perhaps this is a rare skill. When I was first called to the bar, I heard an inspiring speech by a lawyer of yesteryear who was known as a great extemporane-

ous speaker. After his talk, I asked him if his skill was inherited or acquired. He told me that he had always invested a great deal of time in rehearsing his impromptu speeches.

Redundancy is abhorred by the purist, but I simply cannot resist *in truth and in fact. Irregardless* is scorned, but doesn't it make something more irrelevant than *regardless*? (*Ir-by-God-regardless* is used in the Ouachita Mountains for especial emphasis.)

For anyone who has ever climbed a tree and *drug* a squirrel out of its hole, saying *dragged* grates on the ear. So that you can let the reader know that you have had passing exposure to proper grammar, it is best, in this instance, to go ahead and add your own *sic.*

It is my belief that from time to time, digression is good for the writer's soul, if not for the reader's train of thought. If one does not stray too far afield, a digression may even lighten the load for the reader. Further, it is my firm belief that one should get some fun out of writing so that one does not dread the experience like a teenager facing a two-hour sermon.

In fine, my notion of writing was pretty well described by the late Dizzy Dean's advice for living: "Be yo-self."

John Minor Wisdom

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English is a rich language. The Oxford English Dictionary defines 500,000 words; another 500,000 technical words are not listed. German has perhaps 180,000 to 200,000 words. French has probably only 100,000 words. For example, the French *de* has to do the work of *of, from,* and *out*; *à* has to serve for *at, to,* and *till.* It is no wonder that Flaubert, a superb stylist, is reputed to have spent sometimes a whole day searching for the *mot juste* to perfect a single sentence.

The large number of English words is both a boon and a detriment to lawyers and judges. The unskilled writer can easily find a word that may seem good enough at first blush, but by critical standards is just not the right word. The skilled authors of the King James Bible, with a great treasury of words to draw from, carefully selected only 8,000 words. On the other hand, Shakespeare, who began work on his last play, *The Tempest,* the same year that the King James Bible was published, used an immense vocabulary. Dickens, Joyce, and Thomas Wolfe followed Shakespeare's path — some steps behind. Bunyan, Mark Twain, and Hemingway followed the path of the King James Bible.

The close association of good reading with good legal writing has always been obvious. In a well-known incident in Sir Walter Scott's *Guy Mannering* — an incident likely to be remembered when its source is no longer read — Counsellor Pleydell was showing off his library to Colonel Mannering. His library was well stocked with the classics. He said: "These are my tools of trade. A lawyer without history or literature is a mechanic, a mere working

mason; if he possesses some knowledge of these he may venture to call himself an architect." There is no substitute for wide reading of good writing.

I am not so foolish or pretentious as to hold myself out as a great writer. I am comfortable with my style of writing, although I often fall short of my goal. I like lean, lucid prose, with an occasional, really only an occasional, metaphor. Putting to one side the great dramatists — Shakespeare and Marlowe, for example, whom I dearly love, as does my wife — I prefer the style of Francis Bacon and Florio's translation of Montaigne to that of any of the modern writers. I prefer Tom Wolfe to Thomas Wolfe.

I am a frustrated historian, partly because of G.A. Henty, an English author who wrote historical novels for young readers shortly after the turn of the century. One night, after a pleasant dinner with Henry Friendly — whom I greatly admire as a person and as a judge — we spent at least an hour talking about G.A. Henty, who wrote *The Young Carthaginian, With Clive in India,* and many other novels in which young readers absorbed history painlessly. G.A. Henty must have led many of his readers, as he led Henry Friendly and me, to a life-long love of serious history and biography. Each of us had read most of Henty's many works. This was at a time when the Rover Boys and Tom Swift were becoming popular. Fortunately, my father used to send to England for books for me and my brothers for Christmas and birthdays. I remember with special pleasure *The Chatterbox* and *This Year's Book for Boys.* The staples, Kipling's *Jungle Book,* Lewis Carroll, James Stephens, Mark Twain, and others, usually came from New Orleans and New York.

I advise my law clerks to read now, for they will have little time to read for pleasure and enlightenment when they are trying to run up billable hours. Between graduation from law school and appointment to the bench, I read widely in Southern social and political history, legal philosophy, and the history of the law. Maine, Maitland, Holdsworth, Ehrlich, Pound, Cohen, and Cahn (who was in my class in elementary school) held great interest for me. For reasons that are obvious, I concentrated on Madison,

Hamilton, Marshall, Story, Holmes, Cardozo, and Brandeis. I muddled through the classic philosophers and the social philosophers, but not with any feeling that I had rounded out my education.

Early in the practice of law I became interested in books on writing. For improving one's style, few books compare with *The Reader over Your Shoulder* by Robert Graves and Alan Hodge. One may pick it up and read a page, any page, to advantage. Then, of course, who can fail to profit from Sir Ernest Gowers, Sir Arthur Quiller-Couch, and F.L. Lucas? Compared with this group, Rudolf Flesch, with his reliance on a count of words and syllables, is cheap stuff. There is one book I would recommend above all others to a newly appointed judge. This is Karl N. Llewellyn's *The Common Law Tradition*. I studied this book as closely as I have studied any book. There are, however, a number of excellent handbooks designed especially for American judges and lawyers whose practice in brief-writing and opinion-writing is entirely different from the British practice. Some of the best are Aldisert's *Opinion Writing*, George's *Judicial Opinion Writing* (third edition), Leflar's *Appellate Court Opinions*, Weihofen's *Legal Writing Style*, Witkin's *Manual on Appellate Court Opinions*, and of course, the judges' Fowler — Garner's *The Elements of Legal Style*. Not surprisingly, these books are in general agreement on the process, style, and organization of an opinion.

One's writing style is developed over a long period of years and is largely a product of his reading. It changes imperceptibly sometimes and perceptibly at other times. For a long period I was influenced by James Branch Cabell, who is now going through a spell of disfavor by the critics. He was a master of words, but his carefully pruned and poetic style is as incompatible with judicial writing as the ample style of Macaulay or Addison. I am committed to short and simple declarative sentences. This leads to choppy writing, but tends to avoid the ambiguity and difficulty in following a long sentence with subordinate clauses.

We all develop idiosyncrasies. I have mine:

(1) Citations belong in a footnote: even one full citation such as 494 U.S. 407, 110 S. Ct. 1212, 108 L. Ed. 2d 347 (1990), breaks the thought; two, three, or more in one massive paragraph are an abomination.
(2) I have trouble with former law-review writers who, to get away from footnotes, break the thought expressed in the text with one, two, or more incomplete sentences enclosed in a parenthesis after a citation, producing prodigiously long sentences.
(3) When a quotation comes at the end of a sentence, logic demands that the stop be placed outside the quotation marks. I know that I am swimming against a mighty current of persons dedicated to the *Bluebook* and certain other style books, but Fowler and Vallins are on my side. It is my little idiosyncrasy and should be deferred to just as I defer to any colleague who uses *fit* not *fitted* as the past tense of *fit*.
(4) Finally, I do not like flamboyancy or humor at the expense of a litigant, or a metaphor laboriously carried throughout an opinion. Collegiality, however, is a prime factor in any court. A colleague's style is therefore his choice to make.

There are a few rare individuals who can get it right the first time. Elbert Tuttle was a journalist before he became a lawyer and judge. He has the ability to know what he wants to say and to say it well without redrafting, or without much redrafting. Not I. I have to rely on my three indispensable rules of writing: (1) rewrite; (2) rewrite; and (3) rewrite. If one has written a long rambling letter that should be cut down and revised, one may use the excuse given by Pliny the Younger, Lady Mary Wortley Montagu's daughter, and Madame de Staël: Please excuse the length of this letter; I did not have time to write a shorter one.

Charles Alan Wright

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"Pitching is easy," Nolan Ryan says. "Preparing to pitch is hard." That quotation, which appeared in the October 4, 1993 issue of *Sports Illustrated*, catches perfectly the way I feel about writing. Writing is easy. Preparing to write is hard.

I give no more thought to how I write than I do to how I breathe. One is as easy and as natural as the other. This does not mean that I pay no attention to the rules of usage and the learned advice on style. The bottom shelf of the bookcase next to my desk, where things are always in easy reach, contains the works of the great mentors: Fowler and the Brothers Fowler, Strunk and White, Gowers, Partridge, Follett, Bernstein, and Garner. I consult these books regularly, sometimes for the pure pleasure of reading about a subject that fascinates me, but much more often to amass overwhelming authority with which to demolish someone with whom I am working on a brief or a book when that person has committed some blunder against my notion of proper English usage. I am sure that the advice of these masters has worked itself into my subconscious. I have had the benefit also of great teachers. At Wesleyan University I had a course in Creative Writing from Wilbert Snow, a fine poet and writer. At Yale Law School I was one of the students the first time that Fred Rodell gave his famous

seminar on legal writing.[1] I had a wonderful teacher at home in my father. Dad was a journalist, a teacher of journalism, and a freelance writer.

From all of these I learned, and am still learning, about the best ways to use the language. Only last week I learned something new. Consider this sentence (which I hasten to say I did not write): "Neither is the practice of law fully intelligible without reference to the inner mind of each of us who engages in law practice." The sentence is not easy to comprehend, but the grammar seemed right. I had supposed that the subject of *engages* was *each*, which clearly must take a singular verb. But now I am persuaded that the subject is *who*, that it takes its number from *us*, and that the verb should have been *engage*.[2] It is always fun to learn something new.

But when I sit down to write I do not have visions of serial commas or the proper antecedents of relative pronouns dancing through my head. If I did I would never get any writing done. Nolan Ryan learned how to throw his fastball through years of practice and experience. When he threw the pitch in a game, he must have done so automatically, rather than figuring out when to shift his weight, how to snap his wrist, and things like that. So must it be with writing.

It is the preparation that is hard. Someone who is writing fiction must work out a plot and have ideas about characters. For my kind of nonfiction it is necessary first to have a complete grasp of whatever subject it is I am going to be writing about. This we can take for granted, though the research is often long and tedious. The next stage, and to me the hardest of all, is organization. I never sit down to the keyboard — in the old days it was a typewriter, then an electronic typewriter, and in recent years it has been a computer — until I am clear in my mind how I am going to organize whatever it is that I am doing.

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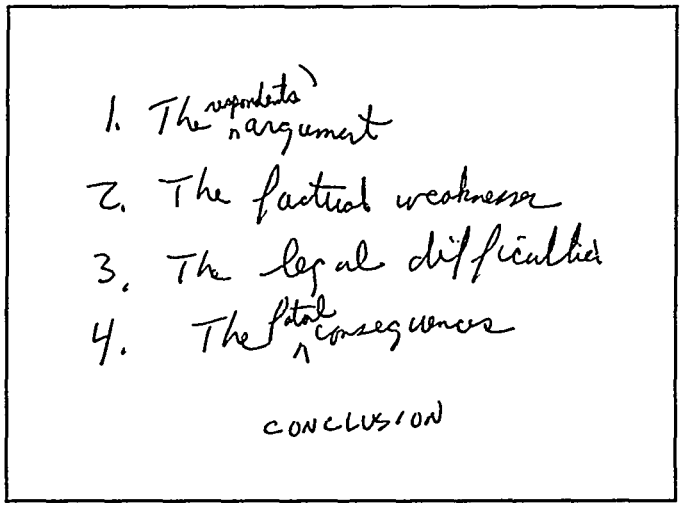
[1] I have described that seminar in Wright, *Goodbye to Fred Rodell*, 89 YALE L.J. 1455, 1457–58 (1980).

[2] *See* H.W. FOWLER, MODERN ENGLISH USAGE 402 (Ernest Gowers ed., 2d ed. 1965).

My most difficult experience with organization came in 1972. I had been retained to represent the State of Texas on its appeal to the United States Supreme Court from a decision of a three-judge district court that the state's method of school financing violated the Fourteenth Amendment. I had done a massive amount of reading and felt that I had in hand all the relevant literature on school finance as well as the caselaw on the Equal Protection Clause. But I could not see how to organize the argument in defense of the Texas system. The days went by and I wrote nothing. One day in August I was in Washington for a meeting of a committee dealing with the Federal Rules of Civil Procedure. School finance was the furthest thing from my thoughts. On the plane home I was reading yet again Josephine Tey's famous crime novel about Richard III, *The Daughter of Time*. I had a couple of drinks and, as often happens at the end of a long day, I was finding it hard to concentrate on even so excellent a book. In this unfocused state there suddenly came to my mind an idea about the organization of my brief. I was afraid that by morning this good idea would have gone out of my mind as quickly as it had come in, so I took out my pen and wrote it in the back of my book. There it still appears, inside the back cover of the anthology, entitled *Four Five and Six by Tey*.



As I later explained in my brief: "Because of the unusual background of this case, and of the constitutional principle it announces, it does not lend itself readily to the usual form of appellate brief, in which Roman-numbered topic sentences proceed in syllogistic splendor to the inevitable conclusion." I took the Tey book to the office the next day and, with the organization now safely in mind, was able in a long day's work to write the 48-page brief. There were some refinements in language, but the finished brief shows how closely it followed the outline that came to me on the airplane.

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Since the Supreme Court ruled 5–4 in my favor in the case,[3] the organization seems to have been effective.

When I actually begin writing I generally proceed by paragraphs. Sometimes one paragraph follows another so naturally that there is little need to pause in between. At other places I may have to think for a time about the next paragraph and the best way to phrase what I want to say in it.

Because I think carefully about what I am writing before I strike the keys, I do very little editing. There cannot be such a thing as too many proofreaders. I use the SpellCheck that comes in my word-processor[4] and have one of my secretaries proof the document. I then read it a final time myself, looking mainly for typographical errors, indefinite referents for pronouns, inadvertent repetition of the same word or phrase within a few sentences, and other things like that. I also am considering the sense of the document as I read it and may change a word or two if I think this will add to clarity. It would be highly unusual for me to make any significant change in what I have written in the first draft.

All of this makes writing sound very easy. It is.

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[3] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[4] When I put WordPerfect 6.0 in my computer, I saw that it includes Grammatik. I tried that out on the first letter I wrote, a letter to my children describing my wife's play in a golf tournament. I had written: "There is a snack bar between the 7th tee and the 13th tee." According to Grammatik, this was wrong. "*Between* refers to the relationship of only two things or people. When referring to three or more use *among*." That was bad, but the worst was when I had said that her opponent in the first match had a higher handicap than my wife had. "Pejorative," Grammatik shouted at me, and told me I should say *disability* rather than *handicap*. I have not used Grammatik again.