

ON LAWYERS AND WRITING: PASS THE CONSTITUTIONAL MUSTARD, PLEASE

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In an age of information overflow, we too easily forget the power of words.

I was reminded of that power last year when a friend invited me to visit her class of fifth graders during national reading week. She asked me to talk with her students about what reading had meant to me. She also requested that I bring along something to read aloud.

Finding the right thing to read to ten-year-olds seemed daunting, until I found a book of famous statements and writings on the shelf at home. I do not remember ever buying or receiving this book, but a quick survey of its contents solved my problem. I found several short pieces that I enjoyed reading myself and enjoyed reading to fifth graders, talking with them about who wrote each one and why the words were important.

I chose first the opening paragraphs of the Declaration of Independence. Written by Thomas Jefferson, these words have moved men and women around the world since 1776. The modern reader might find Jefferson's introduction a little long, but what would you leave out?

When, in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Government long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present

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King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.¹

Moving along chronologically, I chose a shorter message, a mere two lines by Abraham Lincoln. Many Americans would recognize the first sentence, but the simple beauty of Lincoln's prose is apparent only when one reads the whole statement: "I believe this government cannot permanently endure half slave and half free. I do not expect the Union will be dissolved—I do not expect the house to fall—but I do expect it will cease to be divided."² Shakespeare rarely turned a better phrase.

Finally, I chose a passage from Longfellow which was employed under historic circumstances. It seems that during the dark, early days of World War II, President Franklin Roosevelt gave Wendell Willkie, his opponent in the 1940 presidential election, a hand-written letter of introduction for presentation to Winston Churchill. Roosevelt included Longfellow's poetry as a message of encouragement to the British:

Sail on, O Ship of State!
Sail on, O Union, strong and great!
Humanity with all its fears,
With all its hopes of future years,
Is hanging breathless on thy fate!³

During a speech in February 1941, Churchill told the story of receiving FDR's message. No mean wordsmith himself, Churchill mused publicly about what response he should give to the President. In doing so, he delivered one of the most famous lines of the war: "Put your confidence in us. Give us your faith and your blessings and, under Providence, all will be well. Neither the sudden shock of battle, nor the long-drawn trials of vigilance and exertion will wear us down. Give us the tools and we will finish the job."⁴

Famous words like these have had a profound impact on the course of history. The words we lawyers generate while plying our trade are likewise serious of purpose, and they too can make a difference in the lives of our fellow citizens. Contemplate, for example, the results of words written and uttered by lawyers in litigating *Brown v. Board of Education*.⁵

THERE IS ROOM FOR WHIMSY

On the other hand, lawyers can sometimes produce words designed for entertainment, fun, and frolic. Former I.U. Dean Douglass Boshkoff recently published a series of limericks about the law of contracts, editing the work of a student of the law who knew

1. THE DECLARATION OF INDEPENDENCE paras. 1-2 (U.S. 1776).

2. Abraham Lincoln, Speech at Republican State Convention, Springfield, Illinois (June 19, 1858), in JOHN BARTLETT, FAMILIAR QUOTATIONS 635 (14th ed. 1968).

3. Winston Churchill (British Broadcasting Corporation worldwide radio broadcast, Feb. 1941), in JAMES C. HUMES, THE WIT AND WISDOM OF WINSTON CHURCHILL 124 (1994).

4. *Id.*

5. 349 U.S. 294 (1954).

and revered the famous Professor Williston.⁶ Any lawyer with a playful mind will find them great reading. I share here three of these light-hearted rhymes about well-known cases of the sort I remember from my own experience as a student in Contracts 101.

One of the Boshkoff limericks tells the story of *Mitchill v. Lath*,⁷ a New York Court of Appeals case about the parol evidence rule. The court held that the rule prevented testimony concerning an oral promise by the seller of real estate to remove an ice house on the adjacent lot.⁸ The poetic version came out like this:

The writing gave nary a clue
As to what the seller must do.
So, like it or not,
In that very same spot
Is the ice house, still blocking the view.⁹

Reading the verse about *Hawkins v. McGee*¹⁰ brought back fond law school memories. Is there anybody who can forget learning about the “hairy hand” case? Dr. McGee solicited the opportunity to operate on Hawkins’ hairy hand and promised “to make the hand a hundred per cent perfect hand.”¹¹ Unfortunately, the operation was unsuccessful. The New Hampshire Supreme Court decided that the doctor could properly be held liable for breach of contract,¹² and concluded that the value of the expectancy, not reliance, was the proper measure of damages.¹³ Boshkoff managed to tell this story by only hinting at the condition of the hand:

A terrible need for a fee
Brought great grief to Doctor McGee.
And his promises airy
Led a patient unwary
To a hand that no mortal should see.¹⁴

A third rhyme told the story of the famous case on foreseeable damages, *Hadley v. Baxendale*.¹⁵ An English court held that a carrier of goods was not liable to the shipper

6. Douglass G. Boshkoff, *Selected Poems on the Law of Contracts*, 66 N.Y.U. L. REV. 1533 (1991). Despite countless clerk research hours devoted to tracing the poems’ authorship, the identity of Boshkoff’s “student” has apparently been lost to the ages. This exhaustive search for clues left yet uncovered in the stacks of the Raintree County Library proved fruitless, though a delightful exercise nonetheless.

7. 160 N.E. 646 (N.Y. 1928).

8. *Id.* at 648.

9. Boshkoff, *supra* note 6, at 1544.

10. 146 A. 641 (N.H. 1929).

11. *Id.* at 642-43.

12. *Id.* at 643.

13. *Id.* at 644.

14. Boshkoff, *supra* note 6, at 1542.

15. 156 Eng. Rep. 145 (Ex. Ch. 1854). My law school classmates and I were so enamored of this case that we commonly referred to a well-known New York firm as “Millbank, Tweed, Hadley & Baxendale.”

for profits he lost after a delay in shipping because those damages were not reasonably foreseeable at the time the parties made their contract.¹⁶ The poetic version reads:

There once was a young man named Hadley
Whose contract of transport went badly.
 “My mill shaft is gone,
 All my goods are in pawn,
And my business is closed,” he said sadly.¹⁷

These are good fun and we certainly have light moments while practicing law.¹⁸ But alas, most of law is not literature. And much of what we lawyers say to each other about the decline of legal writing, including calls for more piquant prose or more dramatic pacing misses the mark.¹⁹ Still, those who focus on legal craftsmanship are correct to observe that good writing is widely undervalued.²⁰ This is not to say that polished prose goes unappreciated. Most of us—inside and outside the legal profession—prefer reading ideas clearly and concisely presented, and we recognize the difficulty of extracting meaning from poorly presented thoughts. Notwithstanding the preeminence of written communication skills among the tools of our craft, however, we too often think of finely-tuned written work product as more luxury than necessity.

CARELESS WRITING EXACTS A TOLL

In part, we undervalue good writing because we overlook the potential injurious effects of bad writing. Dean Bryant Garth deftly identified the downside risk in a recent panel discussion for the American Bar Association billed as “Bad Legal Writing Is Not a Victimless Crime.” I thought of this title a few months back during a conversation with a very capable lawyer, Shirley Shideler, who recently retired from Barnes & Thornburg. She told me with some pride that the lawyers in the trust and estates section of her firm had long believed that there should not be a division of labor between those who prepare the legal instruments and those who administer the estates and trusts created by them. “We’ll always be better writers if we know we will have to live with the documents we prepare,” she said.

16. *Id.*

17. Boshkoff, *supra* note 6, at 1542.

18. I put in a plug here for the entertaining work of my friend Justice Hecht of the Texas Supreme Court. See Nathan L. Hecht, *Extra-Special Secrets of Appellate Brief Writing*, 3 SCRIBES J. LEGAL WRITING 27 (1992) (“It is impossible to exaggerate the importance of having the right color [brief cover], since that is how the Court decides who wins.”).

19. See REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* § 1.1, at 2 (2d ed. 1986) (“So long as drafting is considered solely a search for the accurate and felicitous phrase, many a vigorously practical lawyer will continue to think of it as the kind of exercise that can safely be minimized when the going gets tough.”).

20. See Robert Sack, *Hearing Myself Think: Some Thoughts on Legal Prose*, 4 SCRIBES J. LEGAL WRITING 93 (1993); see also George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333 (1987).

Being a better writer requires real effort and there really are no substitutes for time, care, and thought. I once heard a speaker commence his address by telling the audience, "Before I begin my speech, there are a few things I'd like to say." This was purely the result of not thinking, not connecting with the situation, and plunging ahead anyway. That is more or less what the lawyer did who submitted a brief to our Court in which he defended a particular statute by telling us that it "clearly passes constitutional mustard." Honest.

Neither pen nor keyboard should ever be utilized without first making sure the brain is fully engaged. This is not to say that every first draft must be a matter of great labor. I frequently find it productive to begin by brainstorming on paper—writing down every idea I have on the subject, as fast as I can—in the preliminary stages of a writing project. Professor James McElhaney advocates this technique and observes: "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."²¹ Under the most fortunate circumstances, a first draft comes flooding out of you almost on its own. As Judge Pat Wald says, "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."²²

It is certainly important to focus what energy we have on the most productive activities. I agree with Professor George Gopen that far too often we proceed on the mistaken belief that all the thinking attendant to producing written work product—conceiving strategies, conducting research, organizing the approach to be taken, and distilling the input of others—takes place before the fingers touch the keyboard.²³ Conventional wisdom, as well as more than a few writing manuals, suggests that if you devote your energies to developing a clear blueprint, the construction of the piece takes care of itself. How many law clerks, associates, judges and partners accordingly focus their attention on literary site preparation? Preparing to write is certainly important and planning is usually worth the effort, but it is in the execution of the plan that our intellects must be most engaged if we hope to produce a commendable final product. "The writing process is not to be separated from the thinking process; it *is* a thinking process."²⁴

THERE IS ONLY GOOD REWRITING

Besides thinking, the only reliable way to improve something we have written is to write it again. I find that decent opinions of even the most modest sort require four drafts before they are ready to show the world. Really important work requires seven or eight drafts. Even then, I am often astonished at how much room for improvement there is if one has the time to do yet another revision. In short, as former Judge Thomas Gibbs Gee has said, "There is no good writing, only good rewriting."²⁵ Clear, simple writing "takes a lot of work, and a lot of rewriting, to remove the layers of dirt, smoke, and old varnish

21. James W. McElhaney, *How I Write*, 4 SCRIBES J. LEGAL WRITING 39, 42 (1993).

22. Patricia M. Wald, *How I Write*, 4 SCRIBES J. LEGAL WRITING 55, 55 (1993).

23. Gopen, *supra* note 20, at 343.

24. Gopen, *supra* note 20, at 343.

25. Thomas Gibbs Gee, *How I Write*, 4 SCRIBES J. LEGAL WRITING 7, 8 (1993).

that congeal around the prose."²⁶ Yet what beautiful and powerful expression would otherwise remain hidden without the effort.

When discussing the mechanics of writing, writing teachers sometimes sound like astronomical physicists describing the process in terms oddly consonant with theories about the formation of the universe. We start with the proverbial (Kingsfieldian?) skull full of mush and word by word distill into communicable form our fog of thoughts, theories, impressions, hunches and notions. Out of the primordial soup comes solid matter: the ideas on which intellectual discourse is based and with them the potential to influence the actions and ideas of others.

Still, I join with writing teachers in the belief that good writing can be both taught and learned. We know a fair amount about how and where that can occur. In a recent poll, interviewers asked Illinois lawyers where each had learned how to be a legal writer. The results were confirming:

Repeated experience	75%
Other lawyers	69%
Law school curriculum	50%
Law review	14% ²⁷

I do not take the last number on this list as a demonstration that law journals are a bad place to learn writing. It likely reflects that most lawyers did not have law journal experience. The Illinois poll also provided evidence that some law schools are more effective than others at teaching their students how to write. When asked whether they had learned writing while in law school, the Illinois lawyers gave dramatically different answers, such as:

Chicago-Kent	67%
John Marshall	44%
Chicago	20% ²⁸

The annual Survey issue of this journal shows a commitment by the school and its students to continuing scholarship and to written expression. It is not an accident that America's law journals are a considerable source of intellectual fodder for litigation and legislation.

Part of the challenge confronting lawyers as writers stems from the nature of our profession. Legal writing serves a very different function from the writing of such other non-fiction disciplines as medicine or engineering. Much of our work product must be accessible to lay readers as well as to professional audiences, creating special problems when it comes to the use of technical terms.²⁹ Readers also care about specifics: who did

26. Lawrence M. Friedman, *How I Write*, 4 SCRIBES J. LEGAL WRITING 3, 5 (1993).

27. Bryant G. Garth, Panel presentation at the American Bar Association Annual Meeting (Aug. 5, 1993), in *Lost Words: The Economic, Ethical and Professional Effects of Bad Legal Writing*, 1994 A.B.A. SEC. LEGAL EDUC. AND ADMISSIONS TO B., OCCASIONAL PAPERS 7, at 9.

28. *Id.*

29. "To be of any use, the language of the law (as any other language) must not only express but convey thought. With communication the object, the principle of simplicity would dictate that the language used by lawyers agree with the common speech, unless there are reasons for a difference." DAVID MELLINKOFF, *THE*

what to whom. Yet, the lawyer's need to focus on objective rules tends to divert attention from the subjective details of each legal story. Our focus on legal rules fits the needs of the academy or the courts and the law firms, but the underlying facts matter a great deal to most clients and to the larger audience frequently affected directly by the words we choose.

In this democracy, especially with adversarial advocacy a cornerstone of our legal system, we rely on the marketplace of ideas to help sort fact from fiction, good ideas from bad. While I have great respect for the strength of the spoken word, I think that really good ideas come from writing rather than from speaking. Oral communication provides a more direct link to the recipient, and a skilled orator knows how to reach both head and heart. His words pack a more immediate wallop, but no medium can convey the sweeping power of ideas as can the written word. The most effective means of exchange in this marketplace is the written word.

Not only is text less ephemeral, lingering on the page for repeated perusal and accessible to future audiences, but the prospect of lasting scrutiny imbues the writing enterprise with a seriousness which, even for light pieces, militates against too casual an approach. The very laboriousness of writing carefully mandates clearer thinking. "Expository writing not only reflects thought, but helps shape it."³⁰ Concisely articulating one's thoughts on paper requires a greater degree of attention to detail, not to mention linguistic discipline, and in the process the ideas represented invariably emerge truer for the effort. Judge Edith Jones succinctly expressed the writer's calling as follows: "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*."³¹

"BE READY FOR THE END"

The power of the thinking which approaches us through good writing can hardly be underestimated. Professor Calvin Woodard recently supplied me with an uncommonly elegant expression of the excitement and expectation that can arise in a writer who has done something important. In an 1886 lecture to Harvard undergraduates, Oliver Wendall Holmes said:

No man has earned the right to intellectual ambition until he has learned to lay his course by a star which he has never seen—to dig by the divining rod for springs which he may never reach. In saying this, I point to that which will make your study heroic. For I say to you in all sadness of conviction, that to think great thoughts you must be heroes as well as idealists. Only when you have worked alone—when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and in despair have trusted to your own unshaken will—then only will you have achieved. Thus only can you gain the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard

LANGUAGE OF LAW, preface (1963).

30. DICKERSON, *supra* note 19, at 354.

31. Edith Hollan Jones, *How I Write*, 4 SCRIBES J. LEGAL WRITING 25, 29-30 (1993).

of him will be moving to the measure of his thought—the subtle rapture of a postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more real than that which commands an army. And if this joy should not be yours, still it is only thus that you can know that you have done what it lay in you to do—can say that you have lived, and be ready for the end.³²

Knowing we will often fail, even on our best days, we should all aspire to be such writers.

32. G. Edward White, *Holmes's "Life Plan": Confronting Ambition, Passion, and Powerlessness*, 65 N.Y.U. L. REV. 1409, 1430-31 (1990) (quoting THE OCCASIONAL SPEECHES OF JUSTICE HOLMES 28-31 (M. Howe ed., 1962)).