So Ordered: The Techniques of Great Judicial Stylists*

Jill Barton

Judges are writers first. And many write exceptionally well, lacing their prose with artful passages, vivid descriptions, stinging rebukes, and clever turns of phrase. What's even more remarkable is that they do all this while crafting the law.

The goal of great legal writing has always been plain language. James Madison called for concise, straightforward language when defending the U.S. Constitution, writing that it "will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood."[1] That's not an easy task — and anyone who has read a few opinions from the last 200 years knows that it's not always achieved.

Writing about the law in plain language is one of the legal writer's biggest challenges. This article celebrates some of the many examples of excellent judicial writing. While each example shows many qualities of good writing, the examples are organized into six strategies that all legal writers can emulate to improve their own prose.

Tell a Story

Behind every court case is a story, with real people and real emotion and real conflict. The more the story shines through the

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1 James Madison, *The Senate*, Federalist No. 62 (Feb. 27, 1788).

legal complexities, the better the writing and the more convincing the point. The next examples show how you can focus on the facts, strip a story of legalese, and tell that story in plain language. Plain doesn't mean boring. It means free of jargon and clichés and stilted phrases. It means that readers can focus on what's important because they don't have to take the time to figure out the meaning behind a word, sentence, or paragraph.

The first excerpt, from a dissent by Pennsylvania Supreme Court Justice Michael Musmanno, describes a bull charging at a woman. The scene helps justify why the woman should win her negligence lawsuit, even though the bull did not physically touch her, as the law requires:

> Like those human beings who believe that fame and fortune always lie in some land distant from their own, the cows of the Dale Andrews farm in West Salem, Mercer County, were not satisfied to browse and chew their cuds in their own pasture. They were certain that in the fields across the highways which bordered their owner's domain, the grass was greener, the earth fresher, the trees shadier, and the skies above bluer. Thus from time to time they would leave their own preserves and invade the Bosley farm on the other side of the road where, with the spirit of bovine buccaneers, they devoured their neighbor's corn and wheat, destroyed his vegetable gardens, knocked over young peach trees, damaged the apple orchard, mangled berry bushes, and eventually departed, leaving behind them a wide swath of ruin and destruction. They sometimes went away of their own accord, but frequently they had to be driven back to their home territory by the Bosleys.
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> On the morning of April 10, 1950, . . . they came, eight of them, with reinforcements. They brought along their boy friend, a 1500-pound Hereford white-faced bull . . . .
>
> Mr. Hereford and Mrs. Bosley saw each other at the same time. Mrs. Bosley screamed, and the truculent Hereford lowered his head to charge. Terror-stricken, Mrs. Bosley tried to run, but, as in a bad dream one cannot flee although disaster is at one's heels, she froze to the spot . . . .

> Although the bull was about 25 feet away from Mrs. Bosley when she first beheld him charging toward her, she ran some "five steps" before she collapsed. Allowing for at least two feet for each step, it becomes evident that the bull was within 10 to 15 feet of Mrs. Bosley before his course was diverted. It is enough merely to visualize a snorting, charging bull with impaling horns only a dozen feet away, to grasp at once the magnitude of Mrs. Bosley's fright and the extent of the terror to which she was subjected.[2]

This dissent could have focused on the law and the reasons for an exception to the physical-contact rule. But instead, the vivid account shows just how close the bull came to Mrs. Bosley, and it helps sell Justice Musmanno's argument that the rule needs tweaking. The story sets the scene with green grasses and blue skies. Tension rises as the eight cows and bull escape, building up to the climax of the bull's charging. The story has good pacing, and that's one of the things Chief Justice John G. Roberts looks for in writing, "whether it's a thick biography of one of the founding fathers or the latest by Elmore Leonard or something. The pacing — bringing the reader along at the particular speed you want, for the effect you want — is, I think, very important."[3]

Some cases might seem blessed with more innately entertaining facts, and maybe a charging bull would help any story. But legal writers can become storytellers when writing about any case. In the next excerpt, U.S. Supreme Court Justice Robert H. Jackson uses just a few facts from the case to bring the defendant to life and spin a gripping tale:

> Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by residence. No claim is made that he is not loyal to this country. There is

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[2] *Bosley v. Andrews*, 142 A.2d 263, 267–68 (1958) (Musmanno, J., dissenting).

[3] Interview by Bryan A. Garner with Chief Justice John G. Roberts Jr., 13 Scribes J. Legal Writing 5, 40 (2010).

no suggestion that apart from the matter involved here he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.

Even more unusual is the series of military orders which made this conduct a crime. They forbid such a one to remain, and they also forbid him to leave. They were so drawn that the only way Korematsu could avoid violation was to give himself up to the military authority. This meant submission to custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps.

A citizen's presence in the locality, however, was made a crime only if his parents were of Japanese birth. Had Korematsu been one of four — the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole — only Korematsu's presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.

Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that "no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained." Article 3, § 3, cl. 2. But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should enact

> such a criminal law, I should suppose this Court would refuse to enforce it.[4]

Meaningful examples, like the parallels Justice Jackson draws to alien enemies from other countries, underpin his dissent. Good characters can do the same for a story, even when they're inanimate. In the next excerpt, Chief U.S. Circuit Judge Diane Wood exploits the facts in a copyright-infringement case and injects some subtle humor. She describes dolls, which are the subject of the suit, as characters, as if they were players in a work of fiction:

> Meet Pull My Finger® Fred. He is a white, middle-aged, overweight man with black hair and a receding hairline, sitting in an armchair wearing a white tank top and blue pants. Fred is a plush doll and when one squeezes Fred's extended finger on his right hand, he farts. He also makes somewhat crude, somewhat funny statements about the bodily noises he emits, such as "Did somebody step on a duck?" or "Silent but deadly."
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> Fartman could be Fred's twin. Fartman, also a plush doll, is a white, middle-aged, overweight man with black hair and a receding hairline, sitting in an armchair wearing a white tank top and blue pants. Fartman (as his name suggests) also farts when one squeezes his extended finger; he too cracks jokes about the bodily function. Two of Fartman's seven jokes are the same as two of the 10 spoken by Fred. Needless to say, Tekky Toys, which manufactures Fred, was not happy when Novelty, Inc., began producing Fartman, nor about Novelty's production of a farting Santa doll sold under the name Pull-My-Finger Santa.
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> Tekky sued for copyright infringement, trademark infringement, and unfair competition and eventually won on all claims. The district court awarded $116,000 based on lost profits resulting from the copyright infringement, $125,000 in lost profits attributable to trademark infringement, and $50,000 in punitive damages based on state unfair

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[4] *Korematsu v. United States*, 323 U.S. 214, 242–44 (1944) (Jackson, J., dissenting), *overruled by Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

> competition law. The district court then awarded Tekky $575,099.82 in attorneys' fees. On appeal, Novelty offers a number of arguments for why it should not be held liable for copyright infringement, argues that Illinois's punitive damages remedy for unfair competition is preempted by federal law, and contends that the attorneys' fees awarded by the district court should have been capped according to Tekky's contingent-fee arrangement with its attorneys. For the reasons set forth below, we affirm.[5]

With the crux of the Fartman–Fred dispute focused on attorney's fees, Judge Wood chose not to focus the start of her opinion on that issue or another of Fartman's arguments, which revolved around the preemption of Illinois' "punitive damages remedy for unfair competition." That's enough to lull any reader to sleep. Instead, she shifts focus to tell the story behind those costs, effectively and entertainingly setting up why they're justified.

Judge Wood's use of humor is restrained and therefore effective. Patricia M. Wald, a former chief judge for the D.C. Circuit Court of Appeals, explains that too much humor can degrade the serious work of the judiciary: "The law is not a sport, and legal opinions should not be a vehicle for showing how clever we are."[6] So humor, when subtle, can inject interest in an opinion, but the best legal writers — like Judge Wood here — take care that it's not overdone.

Keep It Short

Legal writers too often take 20 words to say something when 10 will do. Writing about complicated legal issues in plain language might require twice the editing as writing about it in a convoluted way. But the payoff for concise, plain writing is that the

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[5] *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910, 912–13 (7th Cir. 2007).

[6] Patricia M. Wald, *"How I Write" Essays*, 4 Scribes J. Legal Writing 55, 62–63 (1993).

reader will figure out what you're saying in half the time — and probably understand it better too.

To prove this point, U.S. Circuit Judge Richard Posner famously took a 3,237-word opinion by a district judge and slashed it to 602 words.[7] For anyone keeping track, that's a cut of more than 80% of the words in the original. His chief reasons were that the opinion lacked focus, forethought, and editing. Judge Posner's aim was to inspire others to think hard about what they are writing and revise their documents until the content is precise and the style is readable and clear.

The next few examples show how effective judicial writing can be when judges keep it short. Good legal writers use short paragraphs, short sentences, and short words to explain the law in an approachable way. "A good test" for choosing the right word, U.S. Supreme Court Justice Antonin Scalia said, "is if you used the word at a cocktail party, would people look at you funny? You talk about *the instant case* or *the instant problem*. That's ridiculous. It's legalese. *This case* would do very well."[8]

The memorable closing lines from U.S. Supreme Court Justice Anthony Kennedy's majority opinion in *Obergefell v. Hodges*, which granted same-sex couples the right to marry, average just 15 words per sentence:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for them-

[7] Richard A. Posner, *Reflections on Judging* 260 (2013).

[8] Interview by Bryan A. Garner with Justice Antonin Scalia, 13 Scribes J. Legal Writing 51, 58 (2010).

> selves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.
>
> The judgment of the Court of Appeals for the Sixth Circuit is reversed.[9]

The dissents follow in concise fashion. The dissent by Chief Justice Roberts ends with a short paragraph that uses repetition and a series of short sentences (averaging less than eight words each) to forcefully make his point:

> If you are among the many Americans — of whatever sexual orientation — who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.[10]

Chief Justice Roberts's first line sets up a powerful sequence. The repetition in each line creates a rhythm. And the staccato length of each sentence propels the reader forward.

Writers can speed up the pace of their writing or add a punch by mixing in short sentences like this. Justice Scalia was a master at injecting a pithy line or two, especially in his dissents. True to form, the closing in his *Obergefell* dissent punctuates two longer sentences with a couple of snappy ones (bolded below):

> Our Constitution — like the Declaration of Independence before it — was predicated on a simple truth: One's liberty, not to mention one's dignity, was something to be shielded from — not provided by — the State. **Today's decision casts that truth aside.** In its haste to reach a desired result, the majority misapplies a clause focused on "due process" to

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[9] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

[10] *Id.* at 2626 (Roberts, C.J., dissenting).

> afford substantive rights, disregards the most plausible understanding of the "liberty" protected by that clause, and distorts the principles on which this Nation was founded. **Its decision will have inestimable consequences for our Constitution and our society.**[11]

All legal writers have a point to make, and the best writers know they can make an impact with a mix of short sentences and short words. The crisp lines "They ask for equal dignity in the eyes of the law," "It had nothing to do with it," and "Today's decision casts that truth aside" make the reader pay attention.

Good legal writers consider the reader when constructing paragraphs, drafting sentences, and choosing words. No reader wants to see a wall of text — with a paragraph spanning more than a page. And no reader wants to start reading a sentence without being able to see the end of it. Long sentences lead to run-ons, subject–verb disagreement, and confusion. Picking long words because they sound more impressive also won't do. *But* works just as well as *however*. *And* works for *additionally*, *moreover*, and *furthermore*. And *about* works in place of *regarding* or *concerning*.

U.S. Supreme Court Justice Elena Kagan shuns these overly complex adverbs and connectors in favor of simple language. In the next excerpt, she starts a series of sentences with short conjunctions and speeds up the pace. The use of *so* especially[12] shows how she employs a conversational tone:

> **And then** Marvel stumbled across *Brulotte*, the case at the heart of this dispute. In negotiating the settlement, neither side was aware of *Brulotte*. **But** Marvel must have been pleased to learn of it. *Brulotte* had read the patent laws to prevent a patentee from receiving royalties for sales made

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[11] 135 S. Ct. at 2639–40 (Scalia, J., dissenting) (emphasis added).

[12] *See* Jill Barton, *Supreme Court Splits — On Grammar and Writing Styles*, 17 Scribes J. Legal Writing 33, 37–39 (2016–2017).

> after his patent's expiration. **So** the decision's effect was to sunset the settlement's royalty clause.[13]

Writing concisely — and conversationally — about a complex case takes many rounds of editing. When Judge Posner condensed an opinion to 600 words from 3,200, he cut many details extraneous to the core issue, such as the defendant's address and the date of the arrest and search.[14] The next example shows a similarly militant approach to compressing a case to its essence. The opening by U.S. Circuit Judge Frank H. Easterbrook tackles a case that spans nearly three decades. He clips it to a core narrative:

> This suit began 28 years ago and has been to the Supreme Court three times. All defendants who stuck it out to the end (some settled) prevailed across the board. They applied for costs under 28 U.S.C. § 1920 and were awarded most of what they sought — but not until District Judge Coar held the request under advisement for three years and then retired, after which the case was transferred to District Judge Norgle. He awarded a total $63,391.45, modest for a suit that entailed discovery, a long trial, many motions in the district court, and appellate proceedings that span a generation. The costs amount to less than $2,300 per year of litigation.
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> Plaintiffs dispute some of the district judge's decisions about particular items, but we do not perceive either a clear error of fact or an abuse of discretion and have no more to say about those matters. Plaintiffs also offer three reasons why defendants should get nothing: (1) they took too long to request costs; (2) they did not establish that the transcripts and copies were "necessarily obtained for use in the

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[13] *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2406 (2015) (citations and footnotes omitted) (emphasis added).

[14] Posner, *Reflections on Judging* at 260.

> case" as § 1920 requires; and (3) they did not nudge Judge Coar to rule before he retired. We consider these in turn.[15]

The description of this protracted case is most remarkable for what it doesn't have. It's not littered with detailed history or unnecessary descriptions of the conflict. It has no intensifiers, like *clearly* and *obviously*. It has no qualifiers, like *rather* and *quite*. It doesn't have multiple negatives. And it doesn't have any common wordy phrases, like *in order to* or *it is important to consider* or *the fact that*. The opinion reveals only what's necessary in skillfully simple language, until the crisp closing lines: "This litigation has lasted far too long. At last it is over."[16]

Writers use wordy phrases as crutches to warm up to their main point. Cutting a wordy phrase, like *it is important to note that* or *it would be helpful to consider*, can make any sentence more direct. These wordy warm-ups often begin with *there is* or the undefined pronoun *it*. Be on the lookout for these wordy warm-ups in your drafts and, like Judge Easterbrook, omit them or replace them with something more direct:

- Arguably
- As noted above
- In light of the fact that
- In order to
- It could be argued that
- It is
- It is clear
- It is crucial to consider
- It is generally recognized that
- It is important to note that
- It is interesting to consider
- It is to be noted
- It is worth considering
- It might be said that
- It must be recognized that

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[15] *Nat'l Org. for Women, Inc. v. Scheidler*, 750 F.3d 696, 697–98 (7th Cir. 2014) (citations omitted).

[16] *Id.* at 699.

- It seems
- It seems likely that
- It should also be noted
- It would appear that
- It would be helpful to consider
- The fact that
- There are/is/was/were
- There is little doubt that
- With regard/respect to

Avoid Jargon

Some lawyers and law professors espouse the idea that learning the language of the law is like learning a foreign language. And in some ways, it is. Legal words and phrases help every lawyer's vocabulary to swell. But too often legal writers use Latin and jargon to prop up poor writing, and they use (or copy) convoluted explanations to skirt the need to translate their words into plain language.

The law has plenty of precise legal terms that lawyers need to know and use, like *de novo* and *res ipsa loquitur*. Legal writers typically do not translate these terms of art because their pleadings, briefs, and opinions wouldn't make sense without them. But while *res ipsa loquitur* sounds fancy, note that it translates from Latin to the beautifully simple phrase "the thing speaks for itself."[17]

Many legal terms appear in legal writing for show and should be translated into plain language. Here are some examples of what to cut:

- Outdated formalities — *now comes*, *further affiant sayeth naught*
- Redundancies — *null and void*, *each and every*

[17] *Johnson v. Blue Chip Casino, LLC*, 110 N.E.2d 375, 378 (Mass. 2018).

- Archaic words — *aforementioned*, *hereinabove*, *herewith*, *whereof*
- Uncommon titles — *lessor*, *lessee*, *testatrix*
- Most Latin terms — translate a phrase like *inter alia* to *among other things*
- Overlong words and phrases — *firstly*, *pursuant to*, *in order to*, *in the event of*

Justice Scalia's test works here too: To avoid overwrought language, consider whether you would use the term or phrase in everyday conversation, and if you wouldn't, swap it for simple English. The next example takes on legalese explicitly. While U.S. Circuit Judge O. Rogeriee Thompson uses two terms of art — "actual malice" and "reckless disregard" — she labels them as legalese before explaining these elements in a defamation claim. Her writing is direct and concise and begins like a novel, with the apt heading of "Prologue":

> **PROLOGUE**
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> Campaigning for public office sometimes has the feel of a contact sport, with candidates, political organizations, and others trading rhetorical jabs and sound-bite attacks in hopes of landing a knockout blow at the polls. It is not for the thin-skinned or the faint-hearted, to use two apropos clichés. And because political speech is the life-breath of democracy, the First Amendment — applied to the states via the Fourteenth — bars public figures from recovering damages under state defamation laws unless they show that the defamer acted with "actual malice," legalese that might suggest ill will or evil motive to the uninitiated but really means knowledge of falsity or reckless disregard for the truth. Cases define "reckless disregard" variously as a defamer's having "'serious doubts'" about a statement's falsity, or "actually" having "a 'high degree of awareness of . . . probable falsity,'" or suspecting falsity and purposefully — not just negligently — avoiding the truth.

> All this makes it quite obvious that defamation law does not require that combatants for public office act like wartime neutrals, treating everyone evenhandedly and always taking the high road. Quite the contrary. Provided that they do not act with actual malice, they can badmouth their opponents, hammering them with unfair and one-sided attacks—remember, speaking out on political issues, especially criticizing public officials and hopefuls for public office, is a core freedom protected by the First Amendment and probably presents "the strongest case" for applying "the *New York Times* rule." And absent actual malice, more speech, not damages, is the right strike-back against superheated or false rhetoric.
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> Today's appeal — targeting speech critical of a candidate's performance in public office and challenging the dismissal of his defamation-based complaint for failure to state a claim — brings these principles into bold relief. Finding no reversible error in the judge's careful opinion, we affirm. The story follows.[18]

While a paragraph riddled with jargon can turn readers away, Judge Thompson's writing prompts you to read her story that follows. Chief Justice Roberts is well known for expertly translating complicated cases into plain language. In the following excerpt, he frankly details what's happening in a case that had a Question Presented spanning three paragraphs and ending with this mouthful: "Should the clarity *Gelboim* gave to multidistrict consolidated cases be extended to single district consolidated cases, so that the entry of a final judgment in only one case triggers the appeal-clock for that case?"[19]

> Petitioner Elsa Hall and respondent Samuel Hall are siblings enmeshed in a long-running family feud. Their mother,

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[18] *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 52 (1st Cir. 2012) (citations and footnotes omitted).

[19] *Hall v. Hall*, No. 16–1150, Brief for Petitioner, 2017 WL 5495448, at *1 (Nov. 13, 2017).

> Ethlyn Hall, lived and owned property in the United States Virgin Islands. Samuel, a lawyer in the Virgin Islands, served as Ethlyn's caretaker and provided her with legal assistance. But trouble eventually came to paradise, and Samuel and Ethlyn fell out over Samuel's management of Ethlyn's real estate holdings. During a visit from Elsa, Ethlyn established an *inter vivos* trust, transferred all of her property into the trust, and designated Elsa as her successor trustee. Ethlyn then moved to Miami — under circumstances disputed by the parties — to live with her daughter.
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> The family squabble made its way to court in May 2011. Ethlyn, acting in her individual capacity and as trustee of her *inter vivos* trust, sued Samuel and his law firm in Federal District Court (the "trust case"). Ethlyn's claims — for breach of fiduciary duty, legal malpractice, conversion, fraud, and unjust enrichment — concerned the handling of her affairs by Samuel and his law firm before she left for Florida.
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> Then Ethlyn died, and Elsa stepped into her shoes as trustee and accordingly as plaintiff in the trust case. Samuel promptly filed counterclaims in that case against Elsa — in both her individual and representative capacities — for intentional infliction of emotional distress, fraud, breach of fiduciary duty, conversion, and tortious interference. Samuel contended that Elsa had turned their mother against him by taking advantage of Ethlyn's alleged mental frailty. But Samuel ran into an obstacle: Elsa was not a party to the trust case in her individual capacity (only Ethlyn had been). So Samuel filed a new complaint against Elsa in her individual capacity in the same District Court (the "individual case"), raising the same claims that he had asserted as counterclaims in the trust case.
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> The trust and individual cases initially proceeded along separate tracks. Eventually, on Samuel's motion, the District Court consolidated the cases . . . .[20]

Chief Justice Roberts uses the term of art "*inter vivos* trust" but then simplifies it to the "trust case," and he simplifies another

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[20] *Hall v. Hall*, 138 S. Ct. 1118, 1122–23 (2018).

of the consolidated cases to the "individual case." These careful word choices show a concerted effort to rid his writing of legalese and achieve a plainspoken style.

Show with Examples

Show, don't tell. It's a common canon for novelists, screenwriters, journalists, poets, speechwriters — and legal writers. And it's especially important for legal writers. The excerpts so far in this article have come to life through examples: a charging bull, alien enemies in World War II, a doll that passes gas just like another doll. These examples help lead the reader to the judge's conclusion, showing why the outcome is correct.

The next few excerpts show how Justice Kagan skillfully weaves simple — and often hypothetical — examples into her opinions. The first, from a dissent, draws readers in with a story about a stranger at the door:

> For me, a simple analogy clinches this case — and does so on privacy as well as property grounds. A stranger comes to the front door of your home carrying super-high-powered binoculars. He doesn't knock or say hello. Instead, he stands on the porch and uses the binoculars to peer through your windows, into your home's furthest corners. It doesn't take long (the binoculars are really very fine): In just a couple of minutes, his uncommon behavior allows him to learn details of your life you disclose to no one. Has your "visitor" trespassed on your property, exceeding the license you have granted to members of the public to, say, drop off the mail or distribute campaign flyers? Yes, he has. And has he also invaded your "reasonable expectation of privacy," by nosing into intimacies you sensibly thought protected from disclosure? *Katz v. United States,* 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Yes, of course, he has done that too.

> That case is this case in every way that matters.[21]

In a short opening paragraph, Justice Kagan uses an example to describe her rationale and invites all readers to understand a complex constitutional question. She makes it personal, using "your home" and "your life."

In the next example, she again leads the reader along, plainly depicting two clear-cut examples to show why the majority's decision doesn't fit:

> If a police officer stops a person on the street without reasonable suspicion, that seizure violates the Fourth Amendment. And if the officer pats down the unlawfully detained individual and finds drugs in his pocket, the State may not use the contraband as evidence in a criminal prosecution. That much is beyond dispute. The question here is whether the prohibition on admitting evidence dissolves if the officer discovers, after making the stop but before finding the drugs, that the person has an outstanding arrest warrant. Because that added wrinkle makes no difference under the Constitution, I respectfully dissent.[22]

Justice Kagan's logic and rhythm make her conclusion seem inescapable. She offers more hypotheticals in the next excerpt, where she describes plainly why the term *use*, as in "use of force," does not mean that the actor must have "intention, knowledge, or recklessness":

> Consider a couple of examples to see the ordinary meaning of the word "use" in this context. If a person with soapy hands loses his grip on a plate, which then shatters and cuts his wife, the person has not "use[d]" physical force in common parlance. But now suppose a person throws a plate in anger against the wall near where his wife is standing. That hurl counts as a "use" of force even if the husband did not

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[21] *Florida v. Jardines*, 569 U.S. 1, 12 (2013).

[22] *Utah v. Strieff*, 136 S. Ct. 2056, 2071 (2016) (Kagan, J., dissenting).

> know for certain (or have as an object), but only recognized a substantial risk, that a shard from the plate would ricochet and injure his wife. Similarly, to spin out a scenario discussed at oral argument, if a person lets slip a door that he is trying to hold open for his girlfriend, he has not actively employed ("used") force even though the result is to hurt her. But if he slams the door shut with his girlfriend following close behind, then he has done so — regardless of whether he thinks it absolutely sure or only quite likely that he will catch her fingers in the jamb. Once again, the word "use" does not exclude from § 922(g)(9)'s compass an act of force carried out in conscious disregard of its substantial risk of causing harm.[23]

Judges can take a paragraph or more to craft an example — hypothetical or otherwise. But sometimes they do so in a single sentence. Here, Judge Posner creates a dramatic image in the reader's mind and quickly makes his point:

> To take the period of limitations from one statute and the accrual date from another, however, is like grafting a giraffe's head onto an alligator's body.[24]

Simply stated, the analogy helps the reader see the point with just a few words. Justice Jackson pulls off the same feat here by deftly summing up the major flaw in a case:

> We granted certiorari, and in this Court the parties changed positions as nimbly as if dancing a quadrille.[25]

A fan of Justice Jackson's, Chief Justice Roberts explains why his predecessor's writing makes an impression: It's "the felicity of expression and the breadth of analogy and reference . . . . [I]t has a very plainspoken approach to it. You don't have to be a lawyer

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[23] *Voisine v. United States*, 136 S. Ct. 2272, 2279 (2016) (citation omitted).

[24] *Singletary v. Cont'l Ill. Nat'l Bank & Tr. Co. of Chicago*, 9 F.3d 1236, 1242 (7th Cir. 1993).

[25] *Ortloff v. Willoughby*, 345 U.S. 83, 87 (1953).

to read one of Justice Jackson's opinions and understand exactly what he's saying. And that's very valuable."[26]

And that's exactly what examples in legal writing can achieve. They are plainspoken, freed from explanations of complicated doctrine or rationale, and they show every reader how to understand.

Start with a Bang

Every writer wants the reader to keep going after the opening line. The first words are meant to hook or tease readers, or introduce them to something that's worth their time. Author Stephen King writes that the "opening line should invite the reader to begin the story. It should say: 'Listen. Come in here. You want to know about this.'"[27] A good opinion should do the same.

U.S. Supreme Court Justice Samuel Alito commands the reader to listen in the next opening. His wrath, directed at the lower courts, can be felt throughout his majority opinion — and tugs at the reader to feel the same way:

> This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee. Because Baby Girl is classified in this way, the South Carolina Supreme Court held that certain provisions of the federal Indian Child Welfare Act of 1978 required her to be taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological father, who had attempted to relinquish his parental rights and who had no

[26] Interview by Garner with Chief Justice Roberts, 13 Scribes J. Legal Writing at 9.

[27] Joe Fassler, *Why Stephen King Spends "Months and Even Years" Writing Opening Sentences*, Atlantic, July 23, 2013, http://www.theatlantic.com/entertainment/archive/2013/07/why-stephen-king-spends-months-and-even-years-writing-opening-sentences/278043/.

> prior contact with the child. The provisions of the federal statute at issue here do not demand this result.[28]

Plenty of opinions can read like high-drama novellas. Cases revolve around characters, themes, conflict, and carefully crafted plots. The best judicial writers exploit these opportunities, writing in a way that's engaging enough to compel even the most reluctant reader to keep going. Readers of Justice Alito's *Baby Girl* opinion want to know why she was taken and what happens next. So too do readers of the next opening, where U.S. Circuit Judge Irving L. Goldberg quotes Ecclesiastes to masterfully turn a tax case about fertilizer deductions into a compelling read.

> "To every thing there is a season, and a time to every purpose under the heaven: A time to be born, and a time to die; a time to plant, and a time to pluck up that which is planted;" a time to purchase fertilizer, and a time to take a deduction for that which is purchased. In this appeal from a Tax Court decision, we are asked to determine when the time for taking a fertilizer deduction should be.[29]

Judge Goldberg could have played it straight — and boring. But he chose to create a lyrical opening that asks the reader to keep going — if only to see whether he can keep up the poetic style.

Judges don't have to invent drama to animate their opinions. In the next example, then–New York Chief Judge Benjamin Cardozo builds up the suspense to the inevitable accident in describing a 1929 amusement-park ride:

> The defendant, Steeplechase Amusement Company, maintains an amusement park at Coney Island, N. Y. One of the supposed attractions is known as "the Flopper." It is a moving belt, running upward on an inclined plane, on which passengers sit or stand. Many of them are unable to keep

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[28] *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641 (2013).

[29] *Schenk v. Comm'r of Internal Revenue*, 686 F.2d 315, 316 (5th Cir. 1982).

> their feet because of the movement of the belt, and are thrown backward or aside.[30]

Plenty of cases won't have facts as naturally compelling as a ride on "the Flopper." And some cases easily offer up those facts — but only for one side. That can work, but what if the party that doesn't have a great story to tell has the law on its side? That was U.S. District Judge Amul R. Thapar's challenge in a case that pitted an employee who suffered a stroke and loss of eyesight against his employer. Judge Thapar detailed the employee's plight with empathy — his 20 years of dedicated service that ended when he fell ill and was placed on disability leave. But in granting summary judgment for the employer, Judge Thapar created a story for the employer as well by looking to the big picture:

> Specialty retailers have it rough these days. Big-box stores and internet vendors can offer one-stop shopping, more-convenient ordering, and lower prices. But there is something that those competitors cannot offer: face-to-face service. It is often the only thing. To have any hope of remaining competitive in that kind of marketplace, specialty retailers need to forge strong, in-person bonds with customers. That is what Sherwin-Williams, a specialty paint retailer, tries to do.[31]

It can be tricky to champion an American Fortune 500 company over the little guy in the typical David–Goliath showdown. But the context that Judge Thapar creates helps bolster his holding. Like any other writer, a judge can use various devices to make an opinion more interesting and more vibrant. These examples by Judge Thapar and others have shown how to use emotion, characters, playful language, suspense, and context to craft winning

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[30] *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 173–74 (N.Y. 1929) (punctuation error revised).

[31] *Wagner v. Sherwin-Williams Co.*, No. CV 14-178-ART, 2015 WL 5174130, at *1 (E.D. Ky. Sept. 2, 2015).

stories. The openings make the reader want to keep going — not just to find out the answer but also because they're just good reads.

Persuade with Power

While focusing on good writing can help any opinion, the purpose is still to persuade. The best judges do both. The final examples in this article show how to pack a persuasive punch — using common themes like protecting democracy from corruption, upholding precedent, and casting ire on the mistakes of lower courts or your colleagues on the bench. All of them draw on the shared values that make the country and its judicial system what it is.

In the next example, Justice Kagan takes on political corruption in a dissent. She uses strong verbs: *plagued*, *ignore*, and *languishes*. And she casts her hypothetical with convincing terms, like *bargains* and *cancerous effect*. All of it leads to the simple conclusion that the majority's holding just won't work:

> Imagine two States, each plagued by a corrupt political system. In both States, candidates for public office accept large campaign contributions in exchange for the promise that, after assuming office, they will rank the donors' interests ahead of all others. As a result of these bargains, politicians ignore the public interest, sound public policy languishes, and the citizens lose confidence in their government.
>
> Recognizing the cancerous effect of this corruption, voters of the first State, acting through referendum, enact several campaign finance measures previously approved by this Court. They cap campaign contributions; require disclosure of substantial donations; and create an optional public financing program that gives candidates a fixed public

> subsidy if they refrain from private fundraising. But these measures do not work.[32]

Judges often reserve their strongest language for their dissents. A majority opinion needs to represent the majority view, and that can call for a more toe-the-line approach. But sometimes judges lay into lower courts, the parties, or their colleagues on the bench. Take the next example from Justice Ruth Bader Ginsburg. In straightforward language, she describes how the Court has "ventured into a minefield" with its holding in *Burwell v. Hobby Lobby Stores, Inc.*:

> In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based optouts impose on others, hold no sway, the Court decides, at least when there is a "less restrictive alternative." And such an alternative, the Court suggests, there always will be whenever, in lieu of tolling an enterprise claiming a religion-based exemption, the government, i.e., the general public, can pick up the tab.
>
> The Court does not pretend that the First Amendment's Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score. Instead, the Court holds that Congress, in the Religious Freedom Restoration Act of 1993 (RFRA), dictated the extraordinary religion-based exemptions today's decision endorses. In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith — in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons

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[32] *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011) (Kagan, J., dissenting).

> those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court's judgment can introduce, I dissent.[33]

Justice Ginsburg's hard-hitting choice of adjectives — *extreme* accommodations, *extraordinary* exemptions, and *radical* purpose — compels readers down the page. For cases tasked with addressing serious crimes and fundamental rights, judges have historically used emotion and a shared desire to protect the nation's core values as an underlying theme to support their position. In the next example, Texas Supreme Court Justice Don Willett (now on the U.S. Court of Appeals for the Fifth Circuit) draws on a case from 1882 to frame a case that's focused on a seemingly innocuous practice today — eyebrow threading:

> *To understand the emotion which swelled my heart as I clasped this money, realizing that I had no master who could take it from me — that it was mine — that my hands were my own, and could earn more of the precious coin. . . . I was not only a freeman but a free-working man, and no master Hugh stood ready at the end of the week to seize my hard earnings.*
>
> Frederick Douglass's irrepressible joy at exercising his hard-won freedom captures just how fundamental — and transformative — economic liberty is. Self-ownership, the right to put your mind and body to productive enterprise, is not a mere luxury to be enjoyed at the sufferance of governmental grace, but is indispensable to human dignity and prosperity.
>
> . . .
>
> This case raises constitutional eyebrows because it asks building-block questions about constitutional architecture — about how we as Texans govern ourselves and about the relationship of the citizen to the State. This case concerns far more than whether Ashish Patel can pluck unwanted hair

[33] 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting) (citations omitted).

> with a strand of thread. This case is fundamentally about the American Dream and the unalienable human right to pursue happiness without curtsying to government on bended knee. It is about whether government can connive with rent-seeking factions to ration liberty unrestrained, and whether judges must submissively uphold even the most risible encroachments.[34]

Justice Willett skillfully uses an old but revered precedent to broaden a seemingly simple case about eyebrow threading into one that's about the American Dream. He mixes a spirited line — "This case raises constitutional eyebrows" — with undeniably serious ones — "the unalienable human right to pursue happiness without curtsying to government on bended knee."

Few judicial writers have mixed spirited writing with a serious tone better than Justice Scalia. And he's well remembered for accomplishing this feat in a single line — many times. The following examples are just a few of his best lines that persuade with power:

> Words no longer have meaning if an Exchange that is *not* established by a State is "established by the State."[35]

> The Court's next bit of interpretive jiggery-pokery involves other parts of the Act that purportedly presuppose the availability of tax credits on both federal and state Exchanges.[36]

> The somersaults of statutory interpretation they have performed ("penalty" means tax, "further [Medicaid] payments to the State" means only incremental Medicaid payments to the State, "established by the State" means not established by the State) will be cited by litigants endlessly, to the confusion of honest jurisprudence.[37]

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[34] *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 92–93 (Tex. 2015) (Willett, J., concurring) (citations omitted).

[35] *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (Scalia, J., dissenting).

[36] *Id.* at 2500.

[37] *Id.* at 2507.

> A candidate who says "If elected, I will vote to uphold the legislature's power to prohibit same-sex marriages" will positively be breaking his word if he does not do so (although one would be naive not to recognize that campaign promises are — by long democratic tradition — the least binding form of human commitment).[38]
>
> The sheer applesauce of this statutory interpretation should be obvious.[39]

A writer needs confidence to inject words like *jiggery-pokery* and *applesauce* into an opinion and skill to successfully pull it off. But that's what good legal writing is all about. Judges take care in choosing their words and in telling the stories behind the cases they're deciding. They have confidence in their command of the law and in how they choose to describe it. Justice Ginsburg says that the "law should be a literary profession, and the best legal practitioners do regard law as an art as well as a craft."[40] The literary examples in this article show judges at all levels doing just that.

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[38] *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002).

[39] *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 113 (2007) (Scalia, J., dissenting).

[40] Interview by Bryan A. Garner with Justice Ruth Bader Ginsburg, 13 Scribes J. Legal Writing 133, 133 (2010).