

University of Nebraska - Lincoln

DigitalCommons@University of Nebraska - Lincoln

---

Court Review: The Journal of the American  
Judges Association

American Judges Association

---

July 2001

## Court Review: Volume 38, Issue 3 - Complete Issue

Follow this and additional works at: <https://digitalcommons.unl.edu/ajacourtreview>



Part of the [Jurisprudence Commons](#)

---

"Court Review: Volume 38, Issue 3 - Complete Issue" (2001). *Court Review: The Journal of the American Judges Association*. 184.

<https://digitalcommons.unl.edu/ajacourtreview/184>

This Article is brought to you for free and open access by the American Judges Association at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Court Review: The Journal of the American Judges Association by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

# Court Review

Volume 38, Issue 2  
Summer 2001

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

## T A B L E O F C O N T E N T S

### ARTICLES

- 4** Clearing the Cobwebs from Judicial Opinions  
*Bryan A. Garner*

- 24** Against Footnotes  
*Richard A. Posner*

- 26** No Longer Speaking in Code  
*Rodney Davis*

- 28** Afterword  
*Bryan A. Garner*

- 30** First Things First: The Lost Art of Summarizing  
*Joseph Kimble*

- 36** Extra-Judicial Speech: Navigating Perils and Avoiding Pitfalls  
*William G. Ross*

- 41** Recent Criminal Decisions of the  
United States Supreme Court:  
The 2000-2001 Term  
*Charles H. Whitebread*

---

### DEPARTMENTS

- 2** Editor's Note
- 3** President's Column
- 48** The Resource Page

#### EDITOR

Judge Steve Leben  
Johnson County, Kansas

#### EDITORIAL BOARD

Judge B. Michael Dann  
National Center for State Courts

Julie Kunce Field  
Fort Collins, Colorado

Professor Philip P. Frickey  
University of California at Berkeley

Mark D. Hinderks  
Overland Park, Kansas

Judge Leslie G. Johnson  
Amer. Academy of Judicial  
Education

Professor Steven Lubet  
Northwestern University

Judge Gregory E. Mize  
Washington, D.C.

Professor Reginald L. Robinson  
University of Kansas

C. Robert Showalter, M.D.  
Harrisonburg, Virginia

Professor Jacqueline St. Joan  
University of Denver

Professor Charles H. Whitebread  
University of Southern California

#### NATIONAL CENTER FOR STATE COURTS STAFF

Charles F. Campbell  
Managing Editor

# Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION  
Volume 38, Issue 2

Summer 2001

## EDITOR'S NOTE

In early July, when I opened the Sunday *New York Times*, I was surprised to see a front-page article devoted to whether legal citations in court opinions should appear in text or be placed in footnotes. Before the end of the day—thanks to the modern miracle of e-mail and people so driven that they are online on Sundays—both Bryan Garner and Judge Richard Posner, each among the best writers the legal world has known, had agreed to write articles on this topic for *Court Review*. The next day, Justice Rodney Davis joined the group and the debate over citational footnotes had moved squarely to our pages.

Garner has written a masterful article in support of citational footnotes. Just as the *New York Times* was forced to change its front-page layout to accommodate examples—with and without footnotes—right on its pages, we have modified our normal two-column format and type sizes so that his article and the examples within it would be easy to read. Judge Posner, who has never used footnotes in his 20 years as a judge, both responds to Garner's arguments and discusses his personal reasons for opting against the use of footnotes in opinions for any purpose. Justice Davis, who switched to the use of citational footnotes after hearing a Garner seminar a year ago, adds his personal experience about the hurdles he encountered in making the change. Garner then rounds out the series with a brief Afterword in response both to Judge Posner and Justice Davis.

We augmented the focus on opinion writing with an article by law school writing professor Joseph Kimble, who took on the task of demonstrating how a good summary can improve an opinion. We also offer a Resource Page focus section on legal writing and opinion writing.

In addition, two other articles are included in this issue. Professor William Ross, both a law professor and a former news reporter, provides a practical discussion about the limits of permissible comments by judges to the public, especially the media. His article goes beyond the *U.S. v. Microsoft* case, which has been excerpted here in the preceding issue, discussing both applicable canons and cases. Last, Professor Charles Whitebread presents his annual review of the criminal decisions from the past Term of the United States Supreme Court; his review of civil cases will be in the next issue.—SL



*Court Review*, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 25. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

*Court Review* is indexed in the Current Law Index, the Legal Resource Index, and LegalTrac.

Letters to the Editor, intended for publication, are welcome. Please send such letters to *Court Review's* editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: [sleben@ix.netcom.com](mailto:sleben@ix.netcom.com). Comments and suggestions for the publication, not intended for publication, also are welcome.

Advertising: *Court Review* accepts advertising for products and services of interest to judges. For information, contact Deloris Gager at (757) 259-1864.

Photo credit: cover photo, Mary Watkins. The cover photo is of the Old Courthouse in St. Louis, Missouri. It was the St. Louis County Courthouse from 1828 (in a predecessor building on the same site) until 1877; it then was the St. Louis City Courthouse until 1930. Two state court trials in which Dred Scott sought his freedom from slavery were held in 1847 and 1850 in this courthouse. In the background of the photo is the Gateway Arch, part of the Jefferson National Expansion Memorial.

© 2001, American Judges Association, printed in the United States. *Court Review* is published quarterly by the American Judges Association (AJA). AJA members receive a subscription to *Court Review*. Non-member subscriptions are available for \$35 per volume (four issues per volume). Subscriptions are terminable at the end of any volume upon notice given to the publisher. Prices are subject to change without notice. Second-class postage paid at Williamsburg, Virginia, and additional mailing offices. Address all correspondence about subscriptions, undeliverable copies, and change of address to Association Services, National Center for State Courts, P.O. Box 8798, Williamsburg, Virginia 23187-8798. Points of view or opinions expressed in *Court Review* are those of the authors and do not necessarily represent the positions of the National Center for State Courts or the American Judges Association. ISSN: 0011-0647.

# President's Column

Bonnie Sudderth

Dr. Martin Luther King, Jr. once said, "Injustice anywhere is a threat to justice everywhere." His words are as true today as when they were first uttered. It is an observation that we, as human beings, should never forget. It is an observation that we, as judges, should be ever mindful.

Every day, all across the United States, Canada, and Mexico, judges go about the business of dispensing justice. But absolute justice, like any other ideal, can never be fully realized, because its achievement would require human infallibility. Nevertheless, while it may never be fully realized on this earth, the quest for justice is an endeavor of the noblest order. For judges in courts of law and equity, it is the ultimate endeavor of our profession. It is upon that endeavor that our system of justice is premised, and without which our system of justice would fail.

Judges from across our countries are faced every day with increasing caseloads, more onerous mandates, and legal problems inextricably linked to social ills over which we exercise little control. Each day, judges are faced with the prospect of doing more, with less, at a faster pace.

Yet, all across our countries judges are stepping forward to meet the challenge of justice. Court-community collaborations, providing opportunities for courts to participate in broader community justice initiatives, are springing up across our nations. From the Peacemaking Project of the Judicial Branch of the Navajo Nation in Arizona and New Mexico, to the Midtown Community Court of New York City, to the Handgun Intervention Program of Detroit, judges from all over our continent are responding to the challenge of justice by developing and instituting coherent community justice programs so that justice can be achieved not only through the legal process but in the broader community sense as well.

Judges are diligently addressing the need for justice through problem-solving courts as well. Over the past decade, substance abuse courts, mental health courts, and other problem-focused courts have been established to enhance the core values of the justice system with considerations of the psychological and physical well-being of individuals who come in contact with the court system. These courts of "therapeutic jurisprudence" seek justice by embracing therapeutic outcomes through recognition and development of individual and systemic responses to particular issues confronting the individuals who appear in their courts.

The Trial Court Performance Standards are being adopted in

court systems throughout our land, signifying our commitment to five basic principles in the pursuit of justice: (1) access to justice, (2) expedition and timeliness, (3) equality, fairness and integrity, (4) independence and accountability, and (5) public trust and confidence in our judicial system. The Trial Court Performance Standards were developed not only for the purpose of trial court improvement, but in a larger context in order to define a philosophy that promotes justice in all aspects of our court systems.

A cornerstone of the American justice system has always included the concept that judges will protect the basic rights of the individuals and decide cases fairly. In our ever-changing, ever-demanding world, the role of judges and justice has expanded beyond mere protection of basic rights and fair procedural adjudication. Justice now embraces a larger concept—the concept that in order to achieve justice, citizens must have access to and confidence in the justice system.

The American Judges Association is actively involved in promoting the ideal of justice by providing continuing education and highlighting programs such as court-community collaborations, therapeutic jurisprudence, and the Trial Court Performance Standards. The AJA provides its members exposure to new and innovative approaches to legal, judicial, and societal problems that face our courts every day. Recognizing that a one-size-fits-all approach is neither appropriate nor desirable in such a diverse society, members of the AJA are free to take the benefits of these approaches and adapt them to for use in their own jurisdictions back home.

Perhaps most important, each time the American Judges Association meets, whether at an annual educational conference or at a mid-year conference, judges from across our countries are able to share information on an individual basis. By attending these conferences and participating in group discussions, both formal and informal, judges learn about the successes of individual judges in the areas of docket management, community outreach, and a myriad of other issues that face judges on a daily basis.

The American Judges Association is devoted to providing assistance in the endeavor of justice through education and information. By maintaining your membership and encouraging your colleagues to join, you help promote justice, not just in your courthouse, but in courthouses across the United States, Canada, and Mexico. Thank you for your membership, and thank you for your commitment to justice.



# Clearing the Cobwebs from Judicial Opinions

Bryan A. Garner

“[A]ny interruption in the flow of language is a source of difficulty and of irritation to the reader . . . .”

—Adams Sherman Hill<sup>1</sup>

I propose that judges, in their opinions, put citations in footnotes and generally abstain from using substantive footnotes.<sup>2</sup> And I propose that courts adopt a rule that brief-writers may single-space footnotes if they contain only citations (or parentheticals coupled with citations) but must double-space all footnotes that contain sentences. These simple proposals, if widely adopted, would promote better writing within the legal profession by encouraging legal writers to:

- Use shorter sentences.
- Compose paragraphs that are more coherent and forceful.
- Lead their readers to focus on ideas, not numbers.
- Lay bare poor writing and poor thinking.
- Discuss the controlling caselaw more thoroughly.
- Use string citations with impunity.

Before going any further, I must point out that I’m not a proponent of footnotes generally. For a decade I edited the only U.S. law journal that prohibits footnotes—well, substantive footnotes.<sup>3</sup> So please don’t judge my proposal based on your feelings about footnotes generally. I dislike them as much as anyone reading this journal. But there’s a world of difference between reference notes and so-called “talking” footnotes. I’m championing notes largely for bibliographic material such as volume and page numbers.

## ADVANTAGE #1: ENHANCED READABILITY THROUGH SHORTER SENTENCES

Footnoting citations allows writers to vary their sentence length and to shorten the average sentence length. No one wants a three-word sentence sandwiched between citations. It gets lost. Consider the following example from a judicial writer of indisputably high standing—Judge Richard A. Posner. The average sentence length (excluding so-called “citation sentences”) is 50 words:

The district court dismissed the suit as barred by the Tax Injunction Act, 28 U.S.C. § 1341, which withdraws from the federal courts jurisdiction to “enjoin, suspend or restrain the assessment, levy or collection” of state taxes (including local taxes, *Platteville Area Apartment Ass’n v. City of Platteville*, 179 F.3d 574, 582 (7th Cir. 1999); *Hager v. City of West Peoria*, 84 F.3d 865, 868 n. 1 (7th Cir. 1996); *Folio v. City of Clarksburg*, 134 F.3d 1211, 1214 (4th Cir. 1998)) unless the taxpayer lacks an adequate state remedy. See *In re*

©2001 by Bryan A. Garner. All rights reserved.

### Footnotes

1. ADAMS SHERMAN HILL, OUR ENGLISH 56 (1888).
2. You shouldn’t be looking at this. Nothing important will appear in footnotes. Please just read past the superscripts and concentrate on the content. Oh, and by the way, you won’t ever have to put

your eyes on fast-forward to zip past citations—except, of course, when I’m quoting some outlandish passage with citational vortexes. Now please look back up.

3. See generally SCRIBES J. LEGAL WRITING (1990-2000).

*Stoecker*, 179 F.3d 546, 549 (7th Cir. 1999), *aff'd* under the name *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15 (2000). The Act is a gesture of comity toward the states; recognizing the centrality of tax collection to the operation of government, the Act prevents taxpayers from running to federal court to stymie the collection of state taxes. E.g., *RTC Commercial Assets Trust 1995 NP3-1 v. Phoenix Bond & Indemnity Co.*, 169 F.3d 448, 453 (7th Cir. 1999). The Act's goal could not be achieved if the statutory language were read literally, as barring only injunctions, and so it's been stretched to cover declaratory judgments, *California v. Grace Brethren Church*, 457 U.S. 393, 408-13 (1982), and, what is as necessary to prevent the Act from being completely undone, suits for refund of state taxes. *Marvin F. Poer & Co. v. Counties of Alameda*, 725 F.2d 1234 (9th Cir. 1984); *Cities Service Gas Co. v. Oklahoma Tax Comm'n*, 656 F.2d 584, 586 (10th Cir. 1981); *United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323 (5th Cir. 1979). It is an open question whether the Act covers damages suits under 42 U.S.C. § 1983 as well, see *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 107 (1981), which would be another method of making an end run around the statutory prohibition. The Supreme Court held in the *Fair Assessment* case that such a suit was in any event barred by the principle of comity, operating independently of the Tax Injunction Act. The Court declined to rule on whether that principle "would also bar a claim under § 1983 which requires no scrutiny whatever of state tax assessment practices, such as a facial attack on tax laws colorably claimed to be discriminatory as to race." *Id.* at 107 n. 4.<sup>4</sup>

Once the citations are gone, it's fairly easy to reduce the length of the average sentence to 22 words, while summarizing the information contained in citations:

The district court dismissed the suit as barred by the Tax Injunction Act,<sup>1</sup> which withdraws from the federal courts jurisdiction to "enjoin, suspend or restrain the assessment, levy or collection" of state taxes. We have held that this includes local taxes.<sup>2</sup> But there's an exception: the federal court may have jurisdiction if the taxpayer lacks an adequate state remedy.<sup>3</sup> The Act is a gesture of comity toward the states. Recognizing the centrality of collecting taxes for governmental operations, the Act prevents taxpayers from running to federal court to stymie state tax collection.<sup>4</sup> The Act's goal could not be achieved if the statutory language were read literally, as barring only injunctions. So the Supreme Court has stretched it to cover declaratory judgments.<sup>5</sup> Further, to prevent the Act from being completely undone, the Fifth, Tenth, and Ninth Circuits have stretched it to cover suits for refund of state taxes.<sup>6</sup> It remains an open question whether the Act covers damage suits under 42 U.S.C. § 1983 as well,<sup>7</sup> which would be another method of making an end run around the statutory prohibition. The Supreme Court held in the *Fair Assessment* case that such a suit was in any event barred by the principle of comity, operating independently of the Tax Injunction Act. The Court declined to rule on whether that principle would also bar a § 1983 claim that "requires no scrutiny whatever of state tax assessment practices, such as a facial attack on tax laws colorably claimed to be discriminatory as to race."<sup>8</sup>

1. 28 U.S.C. § 1341.
2. *Platteville Area Apartment Ass'n v. City of Platteville*, 179 F.3d 574, 582 (7th Cir. 1999); *Hager v. City of West Peoria*, 84 F.3d 865, 868 n. 1 (7th Cir. 1996); *Folio v. City of Clarksburg*, 134 F.3d 1211, 1214 (4th Cir. 1998).
3. See *In re Stoecker*, 179 F.3d 546, 549 (7th Cir. 1999), *aff'd* under the name *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15 (2000).
4. E.g., *RTC Commercial Assets Trust 1995 NP3-1 v. Phoenix Bond & Indemnity Co.*, 169 F.3d 448, 453 (7th Cir. 1999).
5. *California v. Grace Brethren Church*, 457 U.S. 393, 408-13 (1982).
6. *Marvin F. Poer & Co. v. Counties of Alameda*, 725 F.2d 1234 (9th Cir. 1984); *Cities Service Gas Co. v. Oklahoma Tax Comm'n*, 656 F.2d 584, 586 (10th Cir. 1981); *United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323 (5th Cir. 1979).
7. See *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 107 (1981).
8. *Id.* at 107 n. 4.

4. *Wright v. Pappas*, 256 F.3d 635, 636-37 (7th Cir. 2001).



When case names and numbers aren't splashed across the page, it's not just average sentence length that improves. It's also average paragraph length.<sup>5</sup>

## **ADVANTAGE #2: MORE COHERENT AND FORCEFUL PARAGRAPHS**

Subordinating citations allows greater variety in sentence structure—with more opportunities for using phrases and dependent clauses. To the professional writer, this is no small matter. Variety adds interest. And the sentences connect smoothly, leading to paragraphs that are well-composed exposition rather than an assemblage of disjointed sentences. Consider this fairly clotted example:

In a manner consistent with this hierarchy of political entities, the Arizona Constitution in Article 13, Section 1, gives the legislature plenary power over the “methods and procedures for [municipal] incorporation.” *State ex rel. Pickrell v. Downey*, 102 Ariz. 360, 363, 364-65, 430 P.2d 122, 125, 126-27 (1967); see *Territory v. Town of Jerome*, 7 Ariz. 320, 326, 64 P. 417, 418 (1901) (state has absolute power to “create, enlarge and restrict municipal franchises”). Thus, those persons seeking municipal incorporation are “mere supplicants, with no rights beyond those which the legislature [sees] fit to give them.” *Burton v. City of Tucson*, 88 Ariz. 320, 326, 356 P.2d 413, 417 (1960), citing *Hunter*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151. Furthermore, the “legislature may delegate to a subordinate body” discretion over the procedures for municipal incorporation. *Pickrell*, 102 Ariz. at 363, 430 P.2d at 125; see *City of Tucson v. Garrett*, 77 Ariz. 73, 267 P.2d 717 (1954) (legislature may delegate to municipality total discretion whether to grant or deny annexation); *Skinner v. City of Phoenix*, 54 Ariz. 316, 320-21, 95 P.2d 424, 426 (1939) (legislature free to delegate this power to existing cities and towns “upon such terms as [it] may think proper”); see also *Holt*, 439 U.S. at 70-71, 74, 99 S.Ct. 383 (State has “extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them.”). With that understanding, we consider the voting-rights doctrine of the Equal Protection Clause.<sup>6</sup>

Stripping out the citations makes plain just how clunky and laborious the prose is:

In a manner consistent with this hierarchy of political entities, the Arizona Constitution in Article 13, Section 1, gives the legislature plenary power over the “methods and procedures for [municipal] incorporation.” Thus, those persons seeking municipal incorporation are “mere supplicants, with no rights beyond those which the legislature [sees] fit to give them.” Furthermore, the “legislature may delegate to a subordinate body” discretion over the procedures for municipal incorporation. With that understanding, we consider the voting-rights doctrine of the Equal Protection Clause.

Now it's possible to improve the sentence structure and flow, while restoring the parenthetical material that contributes to the reasoning:

Consistently with this hierarchy of political entities, the Arizona Constitution<sup>1</sup> gives the legislature plenary power over the “methods and procedures for [municipal] incorporation,”<sup>2</sup> including the power to “create, enlarge and restrict municipal franchises.”<sup>3</sup> Those seeking municipal incorporation are “mere supplicants, with no rights beyond those which the legislature [sees] fit to give them.”<sup>4</sup> And since the legislature “may delegate to a subordinate body” discretion over procedures for municipal incorporation,<sup>5</sup> it may also give municipalities total discretion to grant or deny annexations.<sup>6</sup> It is within this context that we consider the voting-rights doctrine of the Equal Protection Clause.

5. See BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH § 26, at 72 (2001).

6. *City of Tucson v. Pima County*, 199 Ariz. 509, 516, 19 P.3d 650, 657 (Ariz. Ct. App. 1 2001).

1. Ariz. Const., Art. 13, § 1.
2. *State ex rel. Pickrell v. Downey*, 102 Ariz. 360, 363, 364-65, 430 P.2d 122, 125, 126-27 (1967).
3. *Territory v. Town of Jerome*, 7 Ariz. 320, 326, 64 P. 417, 418 (1901).
4. *Burton v. City of Tucson*, 88 Ariz. 320, 326, 356 P.2d 413, 417 (1960), citing *Hunter*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151.
5. *Pickrell*, 102 Ariz. at 363, 430 P.2d at 125.
6. See *City of Tucson v. Garrett*, 77 Ariz. 73, 267 P.2d 717 (1954); *Skinner v. City of Phoenix*, 54 Ariz. 316, 320-21, 95 P.2d 424, 426 (1939); *Holt*, 439 U.S. at 70-71, 74, 99 S.Ct. 383.

With citations up in the text—the traditional format—writers have an unfortunate choice. They can put citations consistently at the ends of their sentences, typically leading to a monotonous sentence structure. Or they can embed their citations within sentences, in support of subordinate clauses. Though unwise, this latter choice is quite common, as in this recent example from the Nebraska Supreme Court:

The warrantless search exceptions recognized by this court include: (1) searches undertaken with consent or with probable cause, see *State v. Lara*, 258 Neb. 996, 607 N.W.2d 487 (2000), and *In re Interest of Andre W.*, 256 Neb. 362, 590 N.W.2d 827 (1999); (2) searches under exigent circumstances, see *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998); (3) inventory searches, see *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996); (4) searches of evidence in plain view, see *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000); and (5) searches incident to a valid arrest, see *State v. Ray*, 260 Neb. 868, 620 N.W.2d 83 (2000), and *State v. Roach*, *supra*.

This listing becomes easy and routine once the citations are removed, and there's no question how good the caselaw is or what court it issued from:

The warrantless search exceptions recognized by this court include: (1) searches undertaken with consent or with probable cause,<sup>1</sup> (2) searches under exigent circumstances,<sup>2</sup> (3) inventory searches,<sup>3</sup> (4) searches of evidence in plain view,<sup>4</sup> and (5) searches incident to a valid arrest.<sup>5</sup>

1. See *State v. Lara*, 258 Neb. 996, 607 N.W.2d 487 (2000), and *In re Interest of Andre W.*, 256 Neb. 362, 590 N.W.2d 827 (1999).
2. See *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).
3. See *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996).
4. See *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000).
5. See *State v. Ray*, 260 Neb. 868, 620 N.W.2d 83 (2000), and *State v. Roach*, 234 Neb. 620, 452 N.W.2d 262 (1990).

This need for listing in a visually appealing way is virtually limitless within the legal profession. But with citations festooned throughout, the lists lose their power and significance.

### **ADVANTAGE #3: IDEAS CONTROL, NOT NUMBERS**

When cases are cited in text, invariably the most prominent characters on the page are the numbers, which draw undue attention. Once more, consider an integer- and italic-laden example from a recent opinion by Judge Posner:

A law that grants preferential treatment on the basis of race or ethnicity does not deny the equal protection of the laws if it is (1) a remedy for (2) intentional discrimination committed by (3) the public entity that is according the preferential treatment (unless, as



is not argued here, the entity has been given responsibility by the state for enforcing state or local laws against private discrimination, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491-92 (1989) (plurality opinion)) and (4) discriminates no more than is necessary to accomplish the remedial purpose. E.g., *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224, 235, 237-38 (1995); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1987) (plurality opinion); *Chicago Firefighters Local 2 v. City of Chicago*, 249 F.3d 649, 654-55 (7th Cir. 2001); *Billish v. City of Chicago*, 989 F.2d 890, 893 (7th Cir. 1993) (en banc); *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000). Whether nonremedial justifications for “reverse discrimination” by a public body are ever possible is unsettled. *Hill v. Ross*, 183 F.3d 586, 588 (7th Cir. 1999); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998); *Brewer v. West Irondequoit Central School Dist.*, 212 F.3d 738, 747-49 (2d Cir. 2000); *Wessmann v. Gittens*, 160 F.3d 790, 795 (1st Cir. 1998). This court upheld such a justification in *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996), but the Fifth Circuit has stated flatly that “nonremedial state interests will never justify racial classifications.” *Hopwood v. Texas*, 78 F.3d 931, 942 (5th Cir. 1996). The Supreme Court will have to decide the question eventually (maybe it will do so next term in the *Slater* case, cited below, in which certiorari has been granted), but it is of no moment here, because the County has not advanced any nonremedial justification for the minority set-aside program.<sup>7</sup>

It’s hard even for lawyers, much less nonlawyers, to concentrate on ideas presented in this fashion. A revision that strips out the numbers can be every bit as respectful of precedent as the original, but far more readable. And notice that the sentence structure gets cleaned up a little, so that the numbered items are now grammatically parallel:

A law that grants preferential treatment on the basis of race or ethnicity doesn’t necessarily deny the equal protection of the laws. It is constitutional if three conditions are satisfied: (1) the preferential treatment is a remedy for intentional discrimination, (2) a public entity is responsible for according the preference,<sup>1</sup> and (3) the preference discriminates no more than is necessary to accomplish the remedial purpose.<sup>2</sup> Whether nonremedial justifications for “reverse discrimination” by a public body are ever possible is unsettled in this and other circuits.<sup>3</sup> We upheld such a justification in *Wittmer v. Peters*;<sup>4</sup> the Fifth Circuit, meanwhile, stated flatly in *Hopwood v. Texas* that “nonremedial state interests will never justify racial classifications.”<sup>5</sup> The Supreme Court will have to decide the question eventually. Maybe it will do so next term in the *Slater* case,<sup>6</sup> in which certiorari has been granted. But that is of no moment here because the County has not advanced any nonremedial justification for the minority set-aside program.

1. But see *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491-92 (1989) (plurality opinion) (stating an exception to this second element when, as is not argued here, the entity has been given responsibility by the state for enforcing state or local laws against private discrimination).
2. E.g., *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224, 235, 237-38 (1995); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1987) (plurality opinion); *Chicago Firefighters Local 2 v. City of Chicago*, 249 F.3d 649, 654-55 (7th Cir. 2001); *Billish v. City of Chicago*, 989 F.2d 890, 893 (7th Cir. 1993) (en banc); *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000).
3. *Hill v. Ross*, 183 F.3d 586, 588 (7th Cir. 1999); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998); *Brewer v. West Irondequoit Central School Dist.*, 212 F.3d 738, 747-49 (2d Cir. 2000); *Wessmann v. Gittens*, 160 F.3d 790, 795 (1st Cir. 1998).
4. *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996).
5. *Hopwood v. Texas*, 78 F.3d 931, 942 (5th Cir. 1996).

7. *Builder’s Ass’n of Greater Chicago v. County of Cook*, 256 F.3d 642, 643-44 (7th Cir. 2001).

6. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), cert. granted in part, *Adarand Constructors, Inc. v. Mineta*, 121 S.Ct. 1598, 69 U.S.L.W. 3670 (U.S. Apr. 13, 2001) (No. 00-730).

Because the numbers and italic type are more prominent than plain text, they stand out. That usually helps the reader skip over the citation. But not always. Try to find the beginning of all three sentences in this California opinion—without backtracking:

Such erroneous instructions also implicate Sixth Amendment principles preserving the exclusive domain of the trier of fact. (*Carella v. California*, supra, 491 U.S. at p. 265, 109 S.Ct. 2419; *People v. Kobrin*, supra, 11 Cal. 4th at p. 423 [45 Cal. Rptr. 2d 895, 903 P.2d 1027].) In *People v. Avila* (1995) 35 Cal. App. 4th 642, 651-652, 43 Cal. Rptr. 2d 853, we synthesized the federal constitutional authority on the right to instruction as to the elements of an offense as follows: “It is well established that the Sixth Amendment guarantees a criminal defendant the right to require the prosecution to prove [ . . . ] guilt [ . . . ] beyond a reasonable doubt.” (*Victor v. Nebraska* (1994) 511 U.S. [1, 5] [114 S.Ct. 1239, 127 L.Ed.2d 583].) In *Sullivan v. Louisiana* (1993) 508 U.S. [275, 277] [113 S.Ct. 2078, 124 L.Ed.2d 182], the United States Supreme Court held . . . .<sup>8</sup>

#### **ADVANTAGE #4: POOR WRITING AND POOR THINKING GET LAID BARE**

Mid-text citations are often—not sometimes, but often—camouflage for poor writing and poor thinking. As a class, lawyers have lost the ability to write shapely paragraphs. Stripping out the bibliographic references immediately reveals threadbare ideas and underdeveloped paragraphs, as well as other problems. Consider the following passage:

Government agents “flagrantly disregard” the terms of a warrant so that wholesale suppression is required only when (1) they effect a “widespread seizure of items that were not within the scope of the warrant,” *United States v. Matias*, 836 F.2d 744, 748 (2d Cir. 1988), and (2) do not act in good faith, see *Marvin v. United States*, 732 F.2d 669, 675 (8th Cir. 1984) (holding that complete suppression is inappropriate where government “agents attempted to stay within the boundaries of the warrant and . . . the extensive seizure of documents was prompted largely by practical considerations and time constraints”); *United States v. Lambert*, 771 F.2d 83, 93 (6th Cir. 1985) (similar); *United States v. Tamura*, 694 F.2d 591, 597 (9th Cir. 1982) (similar); *United States v. Heldt*, 668 F.2d 1238, 1269 (D.C. Cir. 1981) (similar); see also *United States v. Foster*, 100 F.3d 846, 852 (10th Cir. 1996) (ordering blanket suppression when “at the time he obtained the warrant, [the officer who applied for it] . . . knew that the limits of the warrant would not be honored”); *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978) (similar).

The cornerstone of the blanket suppression doctrine is the enduring aversion of Anglo-American law to so-called general searches. Such searches—which have been variously described as “wide-ranging exploratory searches,” *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987), and “indiscriminate rummaging[s],” *United States v. George*, 975 F.2d 72, 75 (2d Cir. 1992)—are especially pernicious, and “have long been deemed to violate fundamental rights.” *Marron v. United States*, 275 U.S. 192, 195, 48 S.Ct. 74, 72 L.Ed. 231 (1927); see also, e.g., *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357, 51 S.Ct. 153, 75 L.Ed. 374 (1931) (“Since before the creation of our government, [general] searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every State in the Union. The need of protection against them is attested alike by history and present conditions.” (internal citation omitted)). Eliminating general searches was the basic impetus for the Fourth Amendment’s Warrant Clause, see *Garrison*, 480 U.S. at 84, 107 S.Ct. 1013, and the instruments that authorized government agents to conduct such searches were much-reviled throughout the colonial period.<sup>9</sup>

8. *People v. Marshall*, 99 Cal. Rptr. 2d 441, 446 (Cal. Ct. App. 2000).

9. *United States v. Liu*, 239 F.3d 138, 140-41 (2d Cir. 2000).

In that example, the first sentence has a glaring ambiguity. It literally says that government agents flagrantly disregard warrant terms so that suppression will be required. But why would they do that?

When the citations are stripped out, it becomes apparent that the first “paragraph” is only a sentence—one that doesn’t make literal sense—and the final sentence has clauses that are out of order (because unchronological):

Government agents “flagrantly disregard” the terms of a warrant so that wholesale suppression is required only when (1) they effect a “widespread seizure of items that were not within the scope of the warrant,” and (2) do not act in good faith.

The cornerstone of the blanket suppression doctrine is the enduring aversion of Anglo-American law to so-called general searches. These searches—which have been variously described as “wide-ranging exploratory searches” and “indiscriminate rummaging[s]”—are especially pernicious, and “have long been deemed to violate fundamental rights.” Eliminating general searches was the basic impetus for the Fourth Amendment’s Warrant Clause, and the instruments that authorized government agents to conduct such searches were much-reviled throughout the colonial period.

With a little editing, the passage becomes more coherent:

Federal courts have held that wholesale suppression of evidence is necessary only when the government agents (1) effect a “widespread seizure of items that were not within the scope of the warrant,”<sup>1</sup> and (2) do not act in good faith.<sup>2</sup> When the agents “flagrantly disregard” the terms of the warrant this way, the blanket-suppression doctrine applies.

The cornerstone of this doctrine is the enduring aversion of Anglo-American law to so-called general searches. These searches—which have been variously described as “wide-ranging exploratory searches”<sup>3</sup> and “indiscriminate rummaging[s]”<sup>4</sup>—are especially pernicious. In the words of the Supreme Court, they “violate fundamental rights.”<sup>5</sup> The instruments that authorized government agents to conduct general searches were much-reviled throughout the colonial period. And eliminating such searches was the basic impetus for the Fourth Amendment’s Warrant Clause.<sup>6</sup>

1. *United States v. Matias*, 836 F.2d 744, 748 (2d Cir. 1988).
2. *See Marvin v. United States*, 732 F.2d 669, 675 (8th Cir. 1984) (holding that complete suppression is inappropriate where government “agents attempted to stay within the boundaries of the warrant and . . . the extensive seizure of documents was prompted largely by practical considerations and time constraints”); *United States v. Lambert*, 771 F.2d 83, 93 (6th Cir. 1985) (similar); *United States v. Tamura*, 694 F.2d 591, 597 (9th Cir. 1982) (similar); *United States v. Heldt*, 668 F.2d 1238, 1269 (D.C. Cir. 1981) (similar); *see also United States v. Foster*, 100 F.3d 846, 852 (10th Cir. 1996) (ordering blanket suppression when “at the time he obtained the warrant, [the officer who applied for it] . . . knew that the limits of the warrant would not be honored”); *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978) (similar).
3. *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987).
4. *United States v. George*, 975 F.2d 72, 75 (2d Cir. 1992).
5. *Marron v. United States*, 275 U.S. 192, 195, 48 S.Ct. 74, 72 L.Ed. 231 (1927); *see also, e.g., Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357, 51 S.Ct. 153, 75 L.Ed. 374 (1931) (“Since before the creation of our government, [general] searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every State in the Union. The need of protection against them is attested alike by history and present conditions.” (internal citation omitted)).
6. *See Garrison*, 480 U.S. at 84, 107 S.Ct. 1013.

#### **ADVANTAGE #5: YOU HAVE TO DISCUSS THE CONTROLLING CASELAW**

This may come as a surprise, but footnoting citations ordinarily results not in the subordination or even the hiding of caselaw, but in better discussions of it. You have to talk

about the controlling precedents—how and why they apply. Too many advocates and judges are splattering their pages with citations and parentheticals but never really discussing the living past of the law. Citations have displaced reasoning.

In the following passage, from a dissent by Justice Thomas, the relevance of the cited case is unclear from the text. It is not directly discussed either here or on the earlier page referred to. The reader is left with the impression that the *Bose* case set a precedent concerning trial length and the appropriate standard of review:

[T]he Court appears to discount clear error review here because the trial was “not lengthy.” *Ante*, at 1458-1459. Even if considerations such as the length of the trial were relevant in deciding how to review factual findings, an assumption about which I have my doubts, these considerations would not counsel against deference in this action. The trial was not “just a few hours long,” *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 500, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984); it lasted for three days in which the court heard the testimony of 12 witnesses. And quite apart from the total trial time, the District Court sifted through hundreds of pages of deposition testimony and expert analysis, including statistical analysis. It also should not be forgotten that one member of the panel has reviewed the iterations of District 12 since 1992. If one were to calibrate clear error review according to the trier of fact’s familiarity with the case, there is simply no question that the court here gained a working knowledge of the facts of this litigation in myriad ways over a period far longer than three days.<sup>10</sup>

But this impression turns out to be wrong. In the original passage, Justice Thomas added a clarifying footnote in which he explained the real reason why he considered the *Bose* case bad authority:

*Bose*, which the Court cites to support its discounting of clear error review, *ante*, at 1459, does state that “the likelihood that the appellate court will rely on the presumption [of correctness of factual findings] tends to increase when trial judges have lived with the controversy for weeks or months instead of just a few hours.” 466 U.S., at 500, 104 S.Ct. 1949. It is unclear, however, what bearing this statement of fact—that appellate courts will defer to factual findings more often when the trial was long—had on our understanding of the scope of clear error review. In *Bose*, we held that a lower court’s “actual malice” finding must be reviewed *de novo*, see *id.*, at 514, 104 S.Ct. 1949, not that clear error review must be calibrated to the length of trial.

When the passage is revised to incorporate the footnote’s substantive language and relegate the citations to the footnotes, the point becomes much clearer. The substantive footnote is gone, the backwash of citations is no longer splashing through the passage, and the paragraph is more closely reasoned:

[T]he Court discounts clear error review here because the trial was “not lengthy.”<sup>1</sup> The Court cites *Bose*<sup>2</sup> as support, apparently relying on its dicta that appellate courts will defer to factual findings more often when the trial was long.<sup>3</sup> But in *Bose*, a case which lasted “just a few hours,”<sup>4</sup> we held that a lower court’s “actual malice” finding must be reviewed *de novo*, not that clear-error review must be calibrated to the length of trial. In fact, how the length of the trial affects our understanding of the scope of clear error remains unclear. What is clear is that this trial lasted for three days in which the court heard the testimony of 12 witnesses. The District Court also sifted through hundreds of pages of deposition testimony and expert analyses. And one member of the panel has reviewed the iterations of District 12 since 1992. If clear-error review is to be calibrated according to the trier of fact’s

10. *Hunt v. Cromartie*, 121 S.Ct. 1452, 1472 (2001) (Thomas, J., dissenting).

familiarity with the case, the court here gained thorough knowledge of the facts in myriad ways over a period far longer than “just a few hours.”

1. *Ante*, at 1458-1459.
2. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S.485, 500-501, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984).
3. *Id.* at 514.
4. *Id.* at 500.

If readers want more information, then they can use the citation to look up the case. And if the substantive material is important enough to include in your opinion, include it in the text. There is no good reason to give citations in the text and force readers to combine the substance of a vague textual discussion with a substantive footnote. It may be easier on the writer that way, but it's harder on the reader.

### **ADVANTAGE #6: STRING CITATIONS ARE NO LONGER BOTHERSOME**

With footnoted citations, the whole debate over string citations becomes moot. Judges and advocates have never been able to agree about string citations. But if they're in footnotes, nobody should care that five or six cases have been cited. Until 1985 or so, we didn't have any real choice: we were using typewriters. Now we've been liberated from this technological constraint. We should liberate the page from the numerical hiccups that appear between sentences or in midsentence. If you want to cite five cases—and say in the text that there are five Nebraska or Vermont or whatever cases on point—that's fine. If one of those cases needs further discussion, then you can discuss it by name in the text. But there's no problem in citing five or fifteen cases if you need to—if they're in footnotes, you keep the narrative line moving.

### **WHY CITATIONS HAVE GROWN SO THICK**

As caselaw has proliferated, so have citations. And in recent years, citations have gotten much longer for two reasons: (1) parallel citations are now used routinely, and (2) parenthetical snippets now routinely get appended to citations. In the following example just the parentheticals are enough to create little thickets that ensnarl the reader but add little if anything to the content. Imagine this passage if there were various *cert. denied* citations to all three Supreme Court reporters:

[O]ur review of decisions by other courts of appeals reveals a consensus that the Speedy Trial Act requires the dismissal of only those charges that were made in the original complaint that triggered the thirty-day time period. See *United States v. Miller*, 23 F.3d 194, 199 (8th Cir. 1994) (“A defendant's arrest on one charge does not necessarily trigger the right to a speedy trial on another charge filed after his arrest.”); *United States v. Nabors*, 901 F.2d 1351, 1355 (6th Cir. 1990) (“18 U.S.C. § 3162(a)(1) only requires the dismissal of the offense charged in the complaint . . . .”); *United States v. Giwa*, 831 F.2d 538, 541 (5th Cir. 1987) (“The Act requires dismissal of only those charges contained in the original complaint.”); *United States v. Napolitano*, 761 F.2d 135, 137 (2d Cir. 1985) (“The statutory language is clear: it requires dismissal only of ‘such charge against the individual contained in such complaint.’”); *United States v. Heldt*, 745 F.2d 1275, 1280 (9th Cir. 1984) (“Charges not included in the original complaint are not covered by the Act . . . .”); *United States v. Pollock*, 726 F.2d 1456, 1462 (9th Cir. 1984) (“We hold that when the government fails to indict a defendant within 30 days of arrest, section 3162(a)(1) requires dismissal of only the offense or offenses charged in the original complaint.”); *United States v. Brooks*, 670 F.2d 148, 151 (11th Cir. 1982) (“An arrest triggers the running of § 3161(b) of the Speedy Trial Act only if the arrest is for the same offense for which the accused is subsequently indicted.”). Moreover, courts have rejected the application of the transactional test sug-



gested by Oliver and point out that Congress itself considered and rejected this option. See, e.g., *United States v. Derose*, 74 F.3d 1177, 1184 (11th Cir. 1996) (“Congress considered and declined to follow the suggestion that the Speedy Trial Act’s dismissal sanctions should be applied to a subsequent charge if it arose from the same criminal transaction or event as those detailed in the initial complaint or were known or reasonably should have been known at the time of filing the initial complaint.”); *Napolitano*, 761 F.2d at 137 (“[T]he legislative history of the Act clearly indicates that Congress considered and rejected defendant’s suggestion that the Act’s dismissal sanction be applied to subsequent charges if they arise from the same criminal episode as those specified in the original complaint or were known or reasonably should have been known at the time of the complaint.”).<sup>11</sup>

When you digest what the cases stand for and where they come from, the passage becomes much cleaner:

[O]ur review of decisions by other courts of appeals reveals a consensus that the Speedy Trial Act requires the dismissal of only those charges made in the original complaint that triggered the 30-day time period. During the past two decades, the Second,<sup>1</sup> Fifth,<sup>2</sup> Sixth,<sup>3</sup> Eighth,<sup>4</sup> Ninth,<sup>5</sup> and Eleventh Circuits<sup>6</sup> have all so held. Moreover, the Second<sup>7</sup> and Eleventh<sup>8</sup> Circuits have rejected the idea of applying the transactional test suggested by Oliver, both pointing out that Congress itself considered and rejected this option.

1. *United States v. Napolitano*, 761 F.2d 135, 137 (2d Cir. 1985) (“The statutory language is clear: it requires dismissal only of ‘such charge against the individual contained in such complaint.’”).
2. *United States v. Giwa*, 831 F.2d 538, 541 (5th Cir. 1987) (“The Act requires dismissal of only those charges contained in the original complaint.”).
3. *United States v. Nabors*, 901 F.2d 1351, 1355 (6th Cir. 1990) (“18 U.S.C. § 3162(a)(1) only requires the dismissal of the offense charged in the complaint . . .”).
4. *United States v. Miller*, 23 F.3d 194, 199 (8th Cir. 1994) (“A defendant’s arrest on one charge does not necessarily trigger the right to a speedy trial on another charge filed after his arrest.”).
5. *United States v. Pollock*, 726 F.2d 1456, 1462 (9th Cir. 1984) (“We hold that when the government fails to indict a defendant within 30 days of arrest, section 3162(a)(1) requires dismissal of only the offense or offenses charged in the original complaint.”).
6. *United States v. Brooks*, 670 F.2d 148, 151 (11th Cir. 1982) (“An arrest triggers the running of § 3161(b) of the Speedy Trial Act only if the arrest is for the same offense for which the accused is subsequently indicted.”).
7. *Napolitano*, 761 F.2d at 137 (“[T]he legislative history of the Act clearly indicates that Congress considered and rejected defendant’s suggestion that the Act’s dismissal sanction be applied to subsequent charges if they arise from the same criminal episode as those specified in the original complaint or were known or reasonably should have been known at the time of the complaint.”).
8. See, e.g., *United States v. Derose*, 74 F.3d 1177, 1184 (11th Cir. 1996) (“Congress considered and declined to follow the suggestion that the Speedy Trial Act’s dismissal sanctions should be applied to a subsequent charge if it arose from the same criminal transaction or event as those detailed in the initial complaint or were known or reasonably should have been known at the time of filing the initial complaint.”).

You may say that the information within parentheses is often important. I agree, though in practice anything in parentheses has been subordinated already. It typically ought to be in the text. Highlight that information by weaving it into the text, and then subordinate the numbers. Give due proportion to the elements of your writing. Consider this passage:

11. *United States v. Oliver*, 238 F.3d 471, 473 (3d Cir. 2001).



While § 1997e(a) does not expressly define the term “prison conditions,” similar language is used and explicitly defined in a different section of the PLRA, 18 U.S.C. § 3626(g)(2). This definition, by its own terms, only applies to “this section”—i.e., 18 U.S.C. § 3626. Nevertheless, the defendants urge that § 1997e(a) should be read *in pari materia* with 18 U.S.C. § 3626, based on the interpretive canon that language “used in one portion of a statute . . . should be deemed to have the same meaning as the same language used elsewhere in the statute.” *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993); *see also Russo v. Trifari, Krussman & Fishel, Inc.*, 837 F.2d 40, 45 (2d Cir. 1988) (“Construing identical language in a single statute *in pari materia* is both traditional and logical.”). Other courts have read the “prison conditions” language of § 1997e(a) *in pari materia* with the definition provided in 18 U.S.C. § 3626(g)(2). *See, e.g., Booth*, 206 F.3d at 294; *Freeman*, 196 F.3d at 643-44; *Beeson*, 28 F.Supp.2d at 888; *Giannattasio*, 2000 WL 335242, at \*11-\*12. *But see Carter*, 1999 WL 14014, at \*3-\*4 (declining to rely upon the § 3626(g)(2) definition to interpret meaning of “prison conditions” under § 1997e(a)). The text of § 3626(g)(2), however, is no less ambiguous than the text of § 1997e(a) itself—indeed, judges have reached opposite conclusions on whether § 1997e(a) encompasses excessive force and assault claims notwithstanding their common reliance on 18 U.S.C. § 3626(g)(2) for guidance. *Compare, e.g., Booth v. Churner*, 206 F.3d at 294-95 (opinion of the court) (excessive force claims are encompassed within the § 3626(g)(2) definition); *and Beeson*, 28 F.Supp.2d at 888-89 (same), *with Booth*, 206 F.3d at 301-02 (Noonan, J., concurring and dissenting) (excessive force claims do not fall within the definition of 18 U.S.C. § 3626(g)(2) and are therefore outside the scope of § 1997e(a)); *Baskerville*, 1998 WL 778396, at \*4-\*5 (same).<sup>12</sup>

Now look what happens when you elevate the parenthetical information and minimize the volume and page numbers:

While § 1997e(a) does not expressly define the term “prison conditions,” the phrase is defined in a different section of the statute—but that definition explicitly applies only to “this section.”<sup>1</sup> Yet the defendants urge that § 1997e(a) should be read *in pari materia* with § 3626. The United States Supreme Court has recognized the interpretive canon that language “used in one portion of a statute . . . should be deemed to have the same meaning as the same language used elsewhere in the statute.”<sup>2</sup> Some courts have read the “prison conditions” language of § 1997e(a) *in pari materia* with the definition provided in § 3626(g)(2).<sup>3</sup> But whether the latter section provides a definition may not matter at all, since § 3626 is itself ambiguous. On the critical question here, even judges who rely on the definition in that section do not agree on whether § 1997e(a) encompasses excessive-force and assault claims. The Third Circuit has held that it does.<sup>4</sup> So has a judge sitting in the Southern District of New York.<sup>5</sup> On the opposite side of this question are Circuit Judge John T. Noonan<sup>6</sup> and yet a different district judge sitting in the Southern District of New York.<sup>7</sup>

1. 28 U.S.C. § 3626(g)(2).
2. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993); *see also Russo v. Trifari, Krussman & Fishel, Inc.*, 837 F.2d 40, 45 (2d Cir. 1988) (“Construing identical language in a single statute *in pari materia* is both traditional and logical.”).
3. *See, e.g., Booth*, 206 F.3d at 294; *Freeman*, 196 F.3d at 643-44; *Beeson*, 28 F.Supp.2d at 888; *Giannattasio*, 2000 WL 335242, at \*11-\*12. *But see Carter*, 1999 WL 14014, at \*3-\*4 (declining to rely upon the § 3626(g)(2) definition to interpret meaning of “prison conditions” under § 1997e(a)).
4. *Booth v. Churner*, 206 F.3d at 294-95 (opinion of the court).
5. *Beeson*, 28 F.Supp.2d at 888-89.

12. *Nussle v. Willette*, 224 F.3d 95, 101-02 (2d Cir. 2000).

6. *Booth*, 206 F.3d at 301-02 (Noonan, J., concurring and dissenting).
7. *Baskerville*, 1998 WL 778396, at \*4-\*5.

The ideas are more crisply expressed in the revised version. The paragraph is now about 40% shorter. Oh, and by the way, the average sentence length has gone down to 21 words. It's hard to know what the average sentence length is in the original: if you count the citations, it's 39; if you don't, it's 30.

### REFUTING THE OPPOSITION

So, you may ask, are there no good arguments against my proposals? Well, there are some, but the weight of the evidence is against them.

The first counterargument, and the most serious one, is that citations tell the knowledgeable reader important things: what cases you're relying on, what courts they derive from, and how old they are. This isn't much of an argument. For any but the most basic propositions, a good writer will give this information in the text. Consider how Charles Alan Wright, the great procedural writer, used his own words to introduce authorities in his magisterial treatise, *Federal Practice and Procedure*:

- “It was not until *Rhode Island v. Innis*, in 1980, that the Court had an opportunity to shed further light on what it had meant in *Miranda* by ‘interrogation.’ Writing for the Court, Justice Stewart agreed that the repeated references in *Miranda* to ‘questioning’ might suggest that . . . .”<sup>13</sup>
- “The second kind of prejudice, that proof of defendant’s guilt of one crime may be used to convict him or her of another even though proof of that guilt would have been inadmissible at a separate trial, was considered by the Court of Appeals for the District of Columbia in *Drew v. United States*.”<sup>14</sup>
- “The federal attitude was best expressed by Justice O’Connor, speaking for the Court in *Zafiro v. United States*. She wrote . . . .”<sup>15</sup>
- “In a 1964 case the Court was unanimous in speaking, through Justice Clark, of ‘the erroneous holding of the Court of Appeals that criminal defendants have a constitutionally based right to a trial in their own home districts.’”<sup>16</sup>

Good scholarly writers have long used this technique. Yet judges who cite in the text almost never use explanatory sentences like those.

The second major counterargument is that readers shouldn't have to look down at footnotes. I agree. I don't think that readers should be distracted by a netherworld of talking footnotes. The important stuff—including the court and the date (didn't I just say this?)—should be up in the body. Despite what some say, the tiny superscript isn't nearly the distraction that a 45-character citation is.

The other counterarguments are hard to take seriously. Some say that footnoted cita-

13. 1 CHARLES ALAN WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 76.1, at 201 (3d ed. 1999) (introducing *Rhode Island v. Innis*, 446 U.S. 291 (1980)).

14. 1A CHARLES ALAN WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 222, at 480 (3d ed. 1999) (introducing *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964)).

15. 1A CHARLES ALAN WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 223, at 493 (3d ed. 1999) (introducing *Zafiro v. United States*, 506 U.S. 534, 539 (1993)).

16. 2 CHARLES ALAN WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 301, at 297 (3d ed. 2000) (quoting *Platt v. Minnesota Min. & Mfg. Co.*, 376 U.S. 240, 245 (1964)).

tions will encourage unscrupulous writers to fudge their authorities. Some say that footnoted citations undermine the doctrine of precedent. Some say that footnoted citations will encourage greater use of substantive footnotes. And some say that the footnoted citations are bad simply because they're nontraditional. Surely the best refutation of these objections is merely to state them.

When I teach my seminar called Advanced Judicial Writing—which I've conducted for courts in 14 states—I ask judges whether they think ordinary people should be able to read and understand judicial opinions. Does it matter whether the average citizen can make sense of the judges' writing? One or two judges may say that they write only for lawyers—not for people in general—but the overwhelming majority say that reasonably well-educated people ought to be able to understand why disputes come out the way they do. That's my view, and that's the view of 97% of the judges who consider the matter.

But then most judicial writers do something that would cause most nonlawyer readers to stop reading almost instantly: they interrupt their prose with lots of names and meaningless numbers. These are serious impediments to readability. One more example:

Our opinions in *Hughes Aircraft Co. v. United States*, 86 F.3d 1566, 39 USPQ2d 1065 (Fed. Cir. 1996) (*Hughes XIII*) and *Hughes Aircraft Co. v. United States*, 140 F.3d 1470, 46 USPQ2d 1285 (Fed. Cir. 1998) (*Hughes XV*) do not lead to a different result. *Hughes XIII* explicitly held that *Hughes Aircraft Co. v. United States*, 717 F.2d 1351, 219 USPQ 473 (Fed. Cir. 1983) (*Hughes VII*) was entirely consistent with our intervening en banc decision in *Pennwalt Corp. v. Durand-Wayland*, 833 F.2d 931, 4 USPQ2d 1737 (Fed. Cir. 1987). *Hughes XV* held that *Warner-Jenkinson* provides no basis to alter the decision in *Hughes VII* because the court properly applied the all-elements rule. 140 F.3d at 1475, 46 USPQ2d at 1289. In neither case was there controlling authority that in the interim had made a contrary decision of law applicable to the relevant issue.<sup>17</sup>

The passage becomes significantly clearer when shorn of the citations:

Our opinions in *Hughes XIII*<sup>1</sup> and *Hughes XV*<sup>2</sup> do not lead to a different result. *Hughes XIII* explicitly held that *Hughes VII*<sup>3</sup> was entirely consistent with our intervening en banc decision in *Pennwalt v. Durand-Wayland*.<sup>4</sup> And *Hughes XV* held that *Warner-Jenkinson* provides no basis to alter the decision in *Hughes VII* because the court properly applied the all-elements rule.<sup>5</sup> In neither case was there controlling authority that in the interim had made a contrary decision.

1. *Hughes Aircraft Co. v. United States*, 86 F.3d 1566, 39 USPQ2d 1065 (Fed. Cir. 1996) (“*Hughes XIII*”).
2. *Hughes Aircraft Co. v. United States*, 140 F.3d 1470, 46 USPQ2d 1285 (Fed. Cir. 1998) (“*Hughes XV*”).
3. *Hughes Aircraft Co. v. United States*, 717 F.2d 1351, 219 USPQ 473 (Fed. Cir. 1983) (“*Hughes VII*”).
4. *Pennwalt Corp. v. Durand-Wayland*, 833 F.2d 931, 4 USPQ2d 1737 (Fed. Cir. 1987).
5. *Hughes XV*, 140 F.3d at 1475, 46 USPQ2d at 1289.

## CONCLUSION

In a *New York Times* piece dealing with this issue, Judge J. Michael Luttig of the Fourth Circuit was quoted as supporting the idea that nothing could make ordinary people read court decisions: “[T]he lay public still won’t read legal opinions. They’re too complex, laborious, and uninteresting to the lay public.”<sup>18</sup> If I understand the comment correctly, it represents a retrograde view—that lawyers deal with matters that surpass

17. *Litton Systems, Inc. v. Honeywell, Inc.*, 238 F.3d 1376, 1380 (Fed. Cir. 2001).

18. William Glaberson, *Legal Citations on Trial in Innovations v. Tradition*, N.Y. TIMES, July 8, 2001, at A1, A16.

most people's ability to understand.

But it's not really so, and never has been. We just think our subject necessitates overhead flying. Let's face it: if you can't explain the case to a nonlawyer, the chances are that you don't understand it yourself. This is true of the advocates who come before courts and of the judges who decide their cases. And as every judge knows, it's much harder to write a clear opinion when the advocates haven't fully grasped their cases or can't demonstrate their grasp through cogent exposition.

Even one citation, such as *Spartan Mills v. Bank of Am. Ill.*, 112 F.3d 1251, 1255-56 (4th Cir.), *cert. denied*, 522 U.S. 969, 118 S.Ct. 417, 139 L.Ed.2d 319 (1997) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (internal quotation marks omitted)), is enough to drive sensible readers away from legal writing. I urge you to do what you can to make the law more accessible to more people. You should do it for selfish reasons: you'll think more clearly if you do.

### AN AFTERTHOUGHT

A columnist in the *Colorado Lawyer* has opined that "if better readability is the goal, citations are not the biggest impediment," adding: "There are simple techniques to keep citations from seriously interrupting the train of thought. One of the simplest is to move most citations to the end of sentences. Also, most writers can better improve readability by concentrating on their writing techniques."<sup>19</sup> She quotes a judge as saying that good legal writing is "about writing in the active voice and keeping the sentences short. It's not just about where you put the cites."<sup>20</sup>

OK. But I hope that the many examples in this article—those already cited and those about to be—show something important: it's not just about active voice and short sentences and all the other tips that can improve any kind of writing. In legal writing, it's also about where you put your citations. Those at the ends of sentences are better than those in midsentence, that is true. But they are still major impediments to clarity, like cobwebs in a musty old room. We can't just move the cobwebs or collect them in one place. They really need to be swept away altogether.



*Bryan A. Garner, the president of LawProse, Inc., is the author most recently of Legal Writing in Plain English (2001). He is also editor in chief of all the current editions of Black's Law Dictionary. Garner's other books include A Dictionary of Modern American Usage (1998) and A Dictionary of Modern Legal Usage (2d ed. 1995). He is a 1984 graduate of the University of Texas School of Law. After law school, Garner clerked for Judge Thomas M. Reavley of the United States Court of Appeals for the Fifth Circuit. He has taught at both the University of Texas School of Law and Southern Methodist University School of Law, where he is now an adjunct professor.*

19. K.K. DuVivier, *Footnote Citations?*, COLO. LAW., May 2001, at 47.

20. *Id.*

## EXAMPLE 1

### ORIGINAL VERSION

Excerpt from *Cooper Indus. v. Leatherman Tool*,  
121 S.Ct. 1678, 1684-85 (2001) (per Stevens, J.).

Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 346 (1972) (*per curiam*). The Due Process Clause of its own force also prohibits the States from imposing "grossly excessive" punishments on tortfeasors, *Gore*, 517 U.S., at 562, 116 S.Ct. 1589; *TXO Production Corp.*, 509 U.S. 443, 453-455, 113 S.Ct. 2711, 126 L.Ed.2d 366 (1993) (plurality opinion).

The Court has enforced those limits in cases involving deprivations of life, *Enmund v. Florida*, 485 U.S. 782, 787, 801, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (death is not "a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life"); *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (opinion of White, J.) (sentence of death is "grossly disproportionate" and excessive punishment for the crime of rape); deprivations of liberty, *Solem v. Helm*, 463 U.S. at 279, 103 S.Ct. 3001 (life imprisonment without the possibility of parole for nonviolent felonies is "significantly disproportionate"); and deprivations of property, *United States v. Bajakajian*, 524 U.S. 321, 324, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) (punitive forfeiture of \$357,144 for violating reporting requirement was "grossly disproportional" to the gravity of the offense); *Gore*, 517 U.S., at 585-586, 116 S.Ct. 1589 (\$2 million punitive damages award for failing to advise customers of minor predelivery repairs to new automobiles was "grossly excessive" and therefore unconstitutional).

In these cases, the constitutional violations were predicated on judicial determinations that the punishments were "grossly disproportional to the gravity of . . . defendant[s] offense[s]." *Bajakajian*, 524 U.S., at 334, 118 S.Ct. 2028; *see also Gore*, 517 U.S., at 585-586, 116 S.Ct. 1589; *Solem*, 463 U.S., at 303, 103 S.Ct. 3001; *Coker*, 433 U.S., at 592, 97 S.Ct. 2861 (opinion of White, J.). We have recognized that the relevant constitutional line is "inherently imprecise," *Bajakajian*, 524 U.S., at 336, 118 S.Ct. 2028, rather than one "marked by a simple mathematical formula," *Gore*, 517 U.S., at 582, 116 S.Ct. 1589. But in deciding whether that line has been crossed, we have focused on the same general criteria: the degree of the defendant's reprehensibility or culpability, *see e.g., Bajakajian*, 524 U.S., at 337, 118 S.Ct. 2028; *see also Gore*, 517 U.S., at 575-580, 116 S.Ct. 1589; *Solem*, 463 U.S., at 290-291, 103 S.Ct. 3001; *Enmund*, 485 U.S., at 798, 102 S.Ct. 3368; *Coker*, 433 U.S., at 598, 97 S.Ct. 2861 (opinion of White, J.); the relationship between the penalty and the harm to the victim caused by the defendant's actions, *see Bajakajian*, 524 U.S., at 339, 118 S.Ct. 2028; *see also Gore*,

### REVISED WITH CITATIONS IN FOOTNOTES

Edited Version of *Cooper Indus. v. Leatherman Tool*,  
121 S.Ct. 1678, 1684-85 (2001).

The States have broad discretion to impose criminal penalties and punitive damages. But that discretion is substantively limited by the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. It prohibits the States from imposing "grossly excessive" punishments on tortfeasors.<sup>1</sup> And it makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States.<sup>2</sup> The Court has enforced those limits in cases involving deprivations of life,<sup>3</sup> liberty,<sup>4</sup> and property.<sup>5</sup> The Due Process Clause is violated if a levied punishment is "grossly disproportional to the gravity of . . . defendant[s] offense[s]." <sup>6</sup> Instead of an explicit formula applicable to all cases,<sup>7</sup> we examine objective criteria to decide whether a penalty is grossly disproportionate. We must consider (1) the degree of the defendant's reprehensibility or culpability,<sup>8</sup> (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions,<sup>9</sup> and (3) the sanctions imposed in other cases for comparable misconduct.<sup>10</sup> Each criterion must be examined independently.<sup>11</sup>

1. *Gore*, 517 U.S., at 562, 116 S.Ct. 1589; *TXO Production Corp.*, 509 U.S. 443, 453-455, 113 S.Ct. 2711, 126 L.Ed.2d 366 (1993) (plurality opinion).
2. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 346 (1972) (*per curiam*).
3. *Enmund v. Florida*, 485 U.S. 782, 787, 801, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (death is not "a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life"); *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (opinion of White, J.) (sentence of death is "grossly disproportionate" and excessive punishment for the crime of rape).
4. *Solem v. Helm*, 463 U.S. at 279, 103 S.Ct. 3001 (life imprisonment without the possibility of parole for nonviolent felonies is "significantly disproportionate").
5. *United States v. Bajakajian*, 524 U.S. 321, 324, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) (punitive forfeiture of \$357,144 for violating reporting requirement was "grossly disproportional" to the gravity of the offense); *Gore*, 517 U.S., at 585-586, 116 S.Ct. 1589 (\$2 million punitive damages award for failing to advise customers of minor predelivery repairs to new automobiles was "grossly excessive" and therefore unconstitutional).
6. *Bajakajian*, 524 U.S., at 334, 118 S.Ct. 2028; *see also Gore*, 517 U.S., at 585-586, 116 S.Ct. 1589; *Solem*, 463 U.S., at 303, 103 S.Ct. 3001; *Coker*, 433 U.S., at 592, 97 S.Ct. 2861 (opinion of White, J.).
7. *Bajakajian*, 524 U.S., at 336, 118 S.Ct. 2028 (noting inherent imprecision of measuring excessiveness); *Gore*, 517 U.S., at 582, 116 S.Ct. 1589 (acknowledging disproportionality is not "marked by a simple mathematical formula").
8. *See, e.g., Bajakajian*, 524 U.S., at 337, 118 S.Ct. 2028; *see also Gore*, 517 U.S., at 575-580, 116 S.Ct. 1589; *Solem*, 463 U.S., at



## ORIGINAL VERSION

Continued

517 U.S., at 580-583, 116 S.Ct. 1589; *Solem*, 463 U.S., at 293, 103 S.Ct. 3001; *Enmund*, 485 U.S., at 798, 102 S.Ct. 3368; *Coker*, 433 U.S., at 598, 97 S.Ct. 2861 (opinion of White, J.); and the sanctions imposed in other cases for comparable misconduct, see, e.g., *Bajakajian*, 524 U.S., at 340-341, 118 S.Ct. 2028; see also *Gore*, 517 U.S., at 583-585, 116 S.Ct. 1589; *Solem*, 463 U.S., at 291, 103 S.Ct. 3001; *Enmund*, 485 U.S., at 789-796, 102 S.Ct. 3368; *Coker*, 433 U.S., at 593-597, 97 S.Ct. 2861 (opinion of White, J.). Moreover, and of greatest relevance for the issue we address today, in each of these cases we have engaged in an independent examination of the relative criteria. See, e.g., *Bajakajian*, 524 U.S., at 337-344, 118 S.Ct. 2028; see also *Gore*, 517 U.S., at 575-586, 116 S.Ct. 1589; *Solem*, 463 U.S., at 295-300, 103 S.Ct. 3001; *Enmund*, 485 U.S., at 788-801, 102 S.Ct. 3368; *Coker*, 433 U.S., at 592-600, 97 S.Ct. 2861 (opinion of White, J.).

## REVISED WITH CITATIONS IN FOOTNOTES

Continued

- 290-291, 103 S.Ct. 3001; *Enmund*, 485 U.S., at 798, 102 S.Ct. 3368; *Coker*, 433 U.S., at 598, 97 S.Ct. 2861 (opinion of White, J.).
9. See *Bajakajian*, 524 U.S., at 339, 118 S.Ct. 2028; see also *Gore*, 517 U.S., at 580-583, 116 S.Ct. 1589; *Solem*, 463 U.S., at 293, 103 S.Ct. 3001; *Enmund*, 485 U.S., at 798, 102 S.Ct. 3368; *Coker*, 433 U.S., at 598, 97 S.Ct. 2861 (opinion of White, J.).
  10. See, e.g., *Bajakajian*, 524 U.S., at 340-341, 118 S.Ct. 2028; see also *Gore*, 517 U.S., at 583-585, 116 S.Ct. 589; *Solem*, 463 U.S., at 291, 103 S.Ct. 3001; *Enmund*, 485 U.S., at 789-796, 102 S.Ct. 3368; *Coker*, 433 U.S., at 593-597, 97 S.Ct. 2861 (opinion of White, J.).
  11. See, e.g., *Bajakajian*, 524 U.S., at 337-344, 118 S.Ct. 2028; see also *Gore*, 517 U.S., at 575-586, 116 S.Ct. 1589; *Solem*, 463 U.S., at 295-300, 103 S.Ct. 3001; *Enmund*, 485 U.S., at 788-801, 102 S.Ct. 3368; *Coker*, 433 U.S., at 592-600, 97 S.Ct. 2861 (opinion of White, J.).

## EXAMPLE 2

### ORIGINAL VERSION

Excerpt from *Cooper Indus. v. Leatherman Tool*,  
121 S.Ct. 1678, 1689-90 (Scalia, J., concurring).

I was (and remain) of the view that excessive punitive damages do not violate the Due Process Clause; but the Court held otherwise. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); *id.*, at 598, 116 S.Ct. 1589 (SCALIA, J., dissenting). And I was of the view that we should review for abuse of discretion (rather than *de novo*) fact-bound constitutional issues which, in their resistance to meaningful generalization, resemble the question of excessiveness of punitive damages—namely, whether there exists reasonable suspicion for a stop and probable cause for a search; but the Court held otherwise. See *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d (1996); *id.*, at 700, 116 S.Ct. 1657 (SCALIA, J., dissenting). Finally, in a case in which I joined a dissent that made it unnecessary for me to reach the issue, the Court categorically stated that “the question whether a fine is constitutionally excessive calls for . . . *de novo* review.” *United States v. Bajakajian*, 524 U.S. 321, 336-337, n. 10, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998); see *id.*, at 344, 118 S.Ct. 2028 (KENNEDY, J., joined by REHNQUIST, C.J., and O’CONNOR and SCALIA, JJ., dissenting). Given these precedents, I agree that *de novo* review of the question of excessive punitive damages best accords with our jurisprudence. Accordingly, I concur in the judgment of the Court.

### REVISED WITH CITATIONS IN FOOTNOTES

Edited Version of *Cooper Indus. v. Leatherman Tool*,  
121 S.Ct. 1678, 1689-90 (2001).

This Court decided five years ago that an award of excessive punitive damages violates the Due Process Clause.<sup>1</sup> That same year, it decided that a *de novo* review is appropriate for fact-bound constitutional issues that cannot be meaningfully generalized.<sup>2</sup> And two years later, the Court categorically stated that “the question whether a fine is constitutionally excessive calls for . . . *de novo* review.”<sup>3</sup> Although I disagreed with each of those decisions, our current jurisprudence supports *de novo* review of an excessive-punitive-damages question. So I concur in the Court’s judgment.

1. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); *id.*, at 598, 116 S.Ct. 1589 (Scalia, J., dissenting).
2. See *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d (1996); *id.*, at 700, 116 S.Ct. 1657 (Scalia, J., dissenting).
3. *United States v. Bajakajian*, 524 U.S. 321, 336-337, n. 10, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998); see *id.*, at 344, 118 S.Ct. 2028 (Kennedy, J., joined by Rehnquist, C.J., and O’Connor and Scalia, JJ., dissenting).



### EXAMPLE 3

#### ORIGINAL VERSION

Excerpt from *Barbieri v. United Technologies Corp.*,  
255 Conn. 708, 720-21, 771 A.2d 915, 925 (2001).

“A second pre-emption principle, *Machinists* pre-emption, see [*Lodge 76, International Assn. of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 147, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976) (*Machinists*)], prohibits state and municipal regulation of areas that have been left to be controlled by the free play of economic forces. . . . *Machinists* pre-emption preserves Congress’ intentional balance between the uncontrolled power of management and labor to further their respective interests.” (Citations omitted; internal quotation marks omitted.) *Building & Construction Trades Council of the Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 225-26, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993); see also *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 749, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985) (pre-emption under National Labor Relations Act “protects against state interference with policies implicated by the structure of the Act itself, by pre-empting state law and state causes of action concerning conduct that Congress intended to be unregulated”); *Belknap, Inc. v. Hale*, supra, 463 U.S. at 499, 103 S.Ct. 3172 (discussing *Machinists* preemption). Thus, under *Machinists*, federal law supplants state law, but federal law may direct that the activity at issue is to be free from any regulation whatsoever. See *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 614-15, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986) (states are prohibited under *Machinists* “from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts . . . unless such restrictions presumably were contemplated by Congress”).

#### REVISED WITH CITATIONS IN FOOTNOTES

Edited Version of *Barbieri v. United Technologies Corp.*,  
255 Conn. 708, 720-21, 771 A.2d 915, 925 (2001).

The U.S. Supreme Court has said that *Machinists*<sup>1</sup> preemption reflects congressional intent that laws governing labor relations remain uniform nationwide.<sup>2</sup> It “prohibits state and municipal regulation of areas that have been left to be controlled by the free play of economic forces. . . . *Machinists* pre-emption preserves Congress’ intentional balance between the uncontrolled power of management and labor to further their respective interests.”<sup>3</sup> So under *Machinists*, federal law supplants state law, but federal law may direct that the activity at issue is to be free from any regulation whatsoever.<sup>4</sup>

1. *Lodge 76, International Assn. of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 147, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976).
2. *Building & Construction Trades Council of the Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 225-26, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993).
3. *Id.* (citations and internal quotation marks omitted). See also *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 749, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985) (preemption under National Labor Relations Act “protects against state interference with policies implicated by the structure of the Act itself, by preempting state law and state causes of action concerning conduct that Congress intended to be unregulated”); *Belknap, Inc. v. Hale*, 463 U.S. at 499, 103 S.Ct. 3172 (discussing *Machinists* preemption).
4. See *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 614-15, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986) (states are prohibited under *Machinists* “from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts . . . unless such restrictions presumably were contemplated by Congress”).

**AMERICAN JUDGES ASSOCIATION  
2002 ANNUAL EDUCATIONAL CONFERENCE  
THE WESTIN HOTEL - MAUI, HAWAII SEPT. 8-13, 2002**

Make plans now to attend the 2002 Annual Educational Conference at the Westin in Maui. There will be outstanding speakers on a variety of subjects of special interest to judges, followed by the business meetings of the American Judges Association. Several social activities are planned for judges and their families. More information will be coming in later issues of *Court Review*. Conference brochures will be mailed to AJA members early in 2002.

## EXAMPLE 4

### ORIGINAL VERSION

Excerpt from *Commonwealth v. Senior*,  
433 Mass. 453, 461, 744 N.E.2d 614, 620 (2001).

Although in Massachusetts we have implicitly considered the issue of retrograde extrapolation, most recently in *Douillard v. LMR, Inc.*, 433 Mass. 162, 163, 740 N.E.2d 618 (2001), see *Commonwealth v. Smith*, 35 Mass. App. Ct. 655, 663 (1993) (prosecutor entitled to think, when referring to retrograde extrapolation in opening statement, that such evidence would be admitted), we have never been asked to address the admissibility of retrograde extrapolation as a matter of law. Several other jurisdictions have admitted similar evidence. See, e.g., *Ullman v. Overnight Transp. Co.*, 563 F.2d 152, 152-156 (5th Cir. 1977); *People v. Latto*, 304 Ill. App. 3d 791, 803, 237 Ill. Dec. 649, 710 N.E.2d 72 (1999); *Rice v. Merchants Nat'l Bank*, 213 Ill. App. 3d 790, 797, 157 Ill. Dec. 370, 572 N.E.2d 439 (1991) (while not required, retrograde extrapolation admissible); *State v. Jensen*, 482 N.W.2d 238, 240 (Minn. Ct. App. 1992); *People v. MacDonald*, 227 A.D.2d 672, 674-675, 641 N.Y.S.2d 749 (N.Y. 1996); *State v. Catoe*, 78 N.C. App. 167, 169-170, 336 S.E.2d 691 (1985); *State v. Fode*, 452 N.W.2d 779, 782 (S.D. 1990); *State v. McDonald*, 421 N.W.2d 492, 494 (S.D. 1988) (State must provide extrapolation back to time of offense for blood test results to be admissible); *Hartman v. State*, 2 S.W.3d 490, 494 (Tex. Ct. App. 1999); *State v. Bradley*, 578 P.2d 1267, 1269 (Utah 1978); *State v. Dumont*, 146 Vt. 252, 254-255, 499 A.2d 787 (1985) (“relation back” testimony necessary to establish blood alcohol content at time of actual operation); *State v. Carter*, 142 Vt. 588, 591-593, 458 A.2d 1112 (1983).

### REVISED WITH CITATIONS IN FOOTNOTES

Edited Version of *Commonwealth v. Senior*,  
433 Mass. 453, 461, 744 N.E.2d 614, 620 (2001).

Although in Massachusetts we have implicitly considered the issue of retrograde extrapolation, most recently in *Douillard v. LMR, Inc.*,<sup>1</sup> we have never been asked to address the admissibility of retrograde extrapolation as a matter of law. Several other jurisdictions have admitted similar evidence.<sup>2</sup> At least two of these—South Dakota<sup>3</sup> and Vermont<sup>4</sup>—require extrapolation back to the time of the offense in order for evidence of blood alcohol content to be admissible.

1. *Douillard v. LMR, Inc.*, 433 Mass. 162, 163, 740 N.E.2d 618 (2001), see *Commonwealth v. Smith*, 35 Mass. App. Ct. 655, 663 (1993) (prosecutor entitled to think, when referring to retrograde extrapolation in opening statement, that such evidence would be admitted).
2. See, e.g., *Ullman v. Overnight Transp. Co.*, 563 F.2d 152, 152-156 (5th Cir. 1977); *People v. Latto*, 304 Ill. App. 3d 791, 803, 237 Ill. Dec. 649, 710 N.E.2d 72 (1999); *Rice v. Merchants Nat'l Bank*, 213 Ill. App. 3d 790, 797, 157 Ill. Dec. 370, 572 N.E.2d 439 (1991) (while not required, retrograde extrapolation admissible); *State v. Jensen*, 482 N.W.2d 238, 240 (Minn. Ct. App. 1992); *People v. MacDonald*, 227 A.D.2d 672, 674-675, 641 N.Y.S.2d 749 (N.Y. 1996); *State v. Catoe*, 78 N.C. App. 167, 169-170, 336 S.E.2d 691 (1985); *Hartman v. State*, 2 S.W.3d 490, 494 (Tex. Ct. App. 1999); *State v. Bradley*, 578 P.2d 1267, 1269 (Utah 1978).
3. *State v. Fode*, 452 N.W.2d 779, 782 (S.D. 1990); *State v. McDonald*, 421 N.W.2d 492, 494 (S.D. 1988).
4. *State v. Dumont*, 146 Vt. 252, 254-255, 499 A.2d 787 (1985); *State v. Carter*, 142 Vt. 588, 591-593, 458 A.2d 1112 (1983).





# Against Footnotes

Richard A. Posner

**B**ryan Garner has done yeoman work in the uphill battle to improve the writing of lawyers and judges. Most of his suggestions for improving that writing are excellent, and he has urged them with skill and tenacity. But I am not persuaded by his suggestion that judges place the citations in their opinions in footnotes. There is some merit to the suggestion, but not enough to offset its negative features.

The obvious objection to footnotes is that they force the reader to interrupt the reading of the text with glances down to the bottom of the page. They prevent continuous reading. In doing so they make the reader work harder for the same information. In articles, which are (in law anyway) usually much longer than judicial opinions, and *a fortiori* in books, bringing citations into the text would elongate the text unduly. But opinions, as I say, usually are short; the two opinions of mine that Garner quotes from in his article are only 1,300 and 2,700 words respectively, while a law-review article of 20,000 words would be considered short. If an opinion does become very long or clogged with citations, the author always has the option of putting some of them in footnotes, though I myself have never found that either necessary or appropriate; I do not use any footnotes in my opinions, and never have during my 20 years as a judge.

A second objection weighed heavily with me in my decision not to use footnotes in opinions. Footnotes are the very badge of scholarly writing, and so they give a spurious air of scholarship to judicial opinions. Judges are not scholars, and judicial opinions are not scholarship, and these are important points that footnotes in opinions obscure.

The objections to footnotes in opinions are strong enough to shift to the proponent of footnoting citations, that is, to Garner, the burden of persuasion. He makes three arguments in an effort to carry his burden. The first is that it would make the opinions more readable, especially by lay persons, who are not accustomed to seeing citations in text rather than in footnotes. This is not a weighty argument. Legal professionals are accustomed to reading citations in text; moving citations to footnotes will not make reading opinions any easier for them. On the contrary, it will make it harder for them. Just compare the original to the Garner-revised version of the search-warrant opinion of the Nebraska Supreme Court; the original is the more readable.

As for lay persons, very few of them read judicial opinions or ever will do so. The principal exceptions are lay persons who have a professional interest in the law, such as economists, political scientists, and historians who do scholarly research on law, and these people, too—who are not really lay persons—have no difficulty reading citations in text; it is hardly a knack that takes a long immersion in reading judicial opinions to

pick up. When opinions are published or excerpted by the media, the citations are edited out by legal journalists, all of whom are either law-trained or habituated by their job to the judicial opinion style.

Garner's second argument for footnoting citations has slightly greater merit; it is that the "thickening" of a paragraph of judicial prose with citations makes the paragraph less transparent to its author and so impedes his efforts to express himself clearly. But this problem is easily overcome by the opinion author's deciding to write his initial draft without citations, or with citations relegated to footnotes. When he has finished and polished his draft, he can restore the citations to the text and so spare the reader having to glance up and down, up and down, up and down in order to absorb the entire opinion.

In support of his second argument Garner confuses two separate questions. The first is whether a judge should strive to write an opinion that would make sense to a nonlawyer; the second is whether a judge should strive to write an opinion that a nonlawyer would actually read. The answer to the first question is yes, but to the second no. A judge should try to make sense of the law, and one test of sense is whether the judge's arguments would be convincing to a lay person; if not, the judge may have gotten tangled in some absurd technicality, and should cut the Gordian knot. But having satisfied himself that his opinion does make sense, the judge doesn't have to go the next step and rewrite the opinion so that it will attract a lay audience. Nothing he does to the opinion will do that.

Garner has a third, subsidiary argument for his proposal, that it will enable judges to include longer string citations in their opinions. But, first, there is a downside in encouraging judges to cite more, and, second, as I suggested earlier, a judge who really thinks a very long string citation is necessary can put that string in a footnote without feeling obliged to put *all* his citations, or even the bulk of them, in footnotes.

Garner has made the case for his proposal seem stronger than it is by editing the paragraphs from judicial opinions that he quotes in his article beyond merely shifting the citations to the footnotes. The result is an illegitimate comparison. A paragraph that has the citations in the text is compared to a *different* paragraph that has the citations in footnotes, a paragraph that Garner has edited to make it read better irrespective of where the citations are. He has done this with two paragraphs from opinions of mine, and in the process has altered their meaning. In the paragraph he quotes from my opinion in *Wright v. Pappas*,<sup>1</sup> by changing my parenthetical ("including local taxes") into a new sentence ("We have held that this includes new taxes") he has created an ambiguity: It is unclear from his editing whether the exception to which the next sentence refers (the exception for the case in which the taxpayer

## Footnotes

1. 256 F3d 635 (7th Cir. 2001).

lacks an adequate state remedy) is limited to local taxes (it isn't). By another editing change, Garner has created a doubt unintended by me as to whether the Fifth, Ninth, and Tenth Circuits are in step with the Supreme Court.

Or consider what he's done to my other opinion, *Builders Association of Greater Chicago v. County of Cook*.<sup>2</sup> By putting the *Croson* case into a footnote preceded by "But see," he gives the misleading impression that I am treating this aspect of *Croson* as contrary to prevailing law, rather than, as I intended and as is clear in the original version of my opinion, as a statement of that law. And he does this—so dogmatically committed is he to putting citations in footnotes—by means of a textual footnote, though he's opposed to textual footnotes and this one (as so often) makes the argument of the opinion difficult to follow. He also attributes to me the view that "whether nonremedial justifications for 'reverse discrimination' by a public body are ever possible is unsettled in" my circuit, creating a contradiction with the next sentence of the edited opinion. (The insertion of "Meanwhile" in the following sentence introduces additional confusion concerning the state of the law.) The mistaken attribution is based on a misunderstanding of my opinion in *McNamara v. City of Chicago*<sup>3</sup> as holding that the issue of the possibility of nonremedial justifications for

reverse discrimination is unsettled in my circuit. In fact the opinion makes clear that the issue is unsettled in some other circuits and in the Supreme Court but that the Seventh Circuit has held that such justifications *are* possible.

These are details. The important point is that if Garner wants to demonstrate that a paragraph of judicial prose is clearer even to a law-trained reader if all the citations in it are relegated to footnotes, he should print side by side the original version with the footnoted version without changing a word of text. Otherwise comparison is impossible.



*Richard A. Posner is a judge on the U.S. Court of Appeals for the Seventh Circuit and a senior lecturer at the University of Chicago Law School.*

2. 256 F3d 642 (7th Cir. 2001).

3. 138 F3d 1219, 1222 (7th Cir. 1998)

## Court Review Author Submission Guidelines

*Court Review*, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work.

*Court Review* is received by the 3,000 members of the American Judges Association (AJA), as well as many law libraries. About 40 percent of the members of the AJA are general jurisdiction, state trial judges. Another 40 percent are limited jurisdiction judges, including municipal court and other specialized court judges. The remainder include federal trial judges, state and federal appellate judges, and administrative law judges.

**Articles:** Articles should be submitted in double-spaced text with footnotes, preferably in WordPerfect format (although Word format can also be accepted). The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the 17th edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better state bar association law journals and/or other law reviews.

**Essays:** Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

**Book Reviews:** Book reviews should be submitted in the same format as articles. Suggested length is between 3 and 9 pages of double-spaced text (including any footnotes).

**Pre-commitment:** For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay, or book review has been received and reviewed by the *Court Review* editor or board of editors.

**Editing:** *Court Review* reserves the right to edit all manuscripts.

**Submission:** Submissions may be made either by mail or e-mail. Please send them to *Court Review's* editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com, (913) 715-3822. Submissions will be acknowledged by mail; letters of acceptance or rejection will be sent following review.



# No Longer Speaking In Code

Rodney Davis

The first week of every new year, I can barely find a place to stand in the exercise room at the athletic club I belong to. By Valentine's Day, you can shoot a cannon off in the room and not hit anyone. The club is practically deserted. A similar phenomenon occurred in California regarding the adoption of Bryan Garner's suggestion that appellate judges put citations in footnotes.

In October 2000, 90 of the 100 appellate and supreme court justices of California were attending their annual appellate institute when Bryan Garner lectured on judicial writing and proposed dropping citations into footnotes. Garner was persuasive and when he announced his "altar call" through a show of hands of judges that were willing to change, I, along with a clear majority of those present, indicated that we were. Yet, a year after that institute only five of us have adopted Garner's suggestion. I believe I know why.

While it has been worth doing, Garner's suggestion has been more burdensome to implement than he let on. Since it calls for improvement of a writing style that is working satisfactorily rather than correcting an erroneous way of doing things, many colleagues sympathetic to his suggestion have simply declined to make the effort. Not only has it required me to spend more time on the mechanics of my writing, it has also required me to secure the cooperation of colleagues, research attorneys, and legal assistants. The effort has been substantial.

I do not share Judge Posner's view that Garner is advocating that judges strive to write in a style that will entice lay readers to read judicial opinions. What Garner champions is a style that can be read without unnecessary distractions. This is an outcome that is useful to lawyers and lay persons alike, and especially to litigants who are profoundly affected by the opinions we write.

Litigants are interested in more than the result of a decision. They are also concerned about the underlying reasons for it. I have discussed the matter with members of the California Academy of Appellate Lawyers. Their experience has largely been that their clients carefully read judicial opinions. Civil litigants know the positions they are taking in their appeal and read the opinion to confirm that the court has understood and addressed their position. Business and institutional litigants carefully read the opinion to gauge whether to change similar practices. Criminal appellants are similarly diligent about reading the opinion, both because of their confinement and because of their continued interest in filing new actions that may lead to their release.

Accordingly, litigants and other lay persons affected by judicial opinions should be one of the several types of readers that judges write for. Without compromising the content of an opinion, a judge can and should make stylistic adjustments that assist both lawyer and lay person alike to understand the reason for a decision. Logical organization, clarity, complete coverage, and avoidance of repetition and superfluous matter can and should be accomplished in a style that is appealing to

anyone reading the opinion.

I have spent years mastering the technique of setting forth legal rules without having to identify the source of the rule in the sentence itself. I do this by placing the formal citation at the end of the sentence or in parentheses within the sentence. It is a legal shorthand or code I am used to and is a style lawyers are familiar with. As Garner eloquently points out, however, the convenience of this shorthand comes with a price. It interrupts and distracts the reader from the sentence itself. If a judge identifies the court and name of the opinion whenever it is important for the reader to know it, a formal citation plugged into or tacked onto a sentence becomes superfluous. Lawyers have little trouble overcoming these interruptions because they have learned to ignore the citation except when the text implies that identification of the authority is significant to what is being said. Litigants and other lay readers seldom have such training and are more distracted by the style. If it is important for the reader to know the identity of the authority supporting the stated rule, then the more effective and powerful way of doing this is to name the authority in the sentence. If it is not important, then a better place for the reference is the bottom of the page where the coded citation does not detract from the sentence.

Skillfully weaving the name of a court and case into a sentence is not as easily done as Garner implies. This is a style of writing that I had only occasionally used in instances where the trailing formal citation doesn't adequately differentiate between courts or decisions. Garner's style has required me to learn techniques for seamlessly identifying authority within a sentence. The tried and true style championed by Justice Posner does so as a matter of course, albeit in a distracting way.

Another consequence of adopting Garner's style is that the use of quotations tends to be awkward. Putting the name of the quoted case in the sentence is often unsatisfactory, while failing to do so forces the reader to bob their head down to a footnote to learn the source of the quote. I have found, however, that weaning myself of the practice of pasting quotations into my opinions is improving my writing and sharpening my understanding of the rules I am applying. It forces me to put the rule into my own words and consequently take a closer look at its meaning and relevance to my analysis.

The published opinions focused on by Garner and Justice Posner in their articles are representative of a very small segment of the writing a judge of an intermediate court of appeal produces. Most opinions of an appellate judge are unpublished and apply established legal analysis to recurring factual contexts. Seldom is it necessary or desirable to confirm that sister appellate districts have concurred with such principles. Nor is it necessary or desirable to trace the legal lineage of the time-worn analysis used to resolve such appeals.

In such opinions I am primarily engaged in correcting a misapprehension by litigants and their lawyers regarding the legal rules that apply, rather than resolving a novel question of

law. Here is where Garner's suggested style is the most effective. Since the identity of the familiar authority relied on in such opinions is of marginal interest to the reader, its inclusion in the body of the opinion merely interrupts the flow of the sentence rather than contributes to an understanding of it.

I was not able to adopt Garner's suggestion unilaterally. In 2000, California's appellate judges authored, on average, 147 written opinions and concurred or dissented in another 297. In addition, we participate in the summary disposition of hundreds of other matters that do not require a comprehensive statement of reasons for our decision. This cannot be accomplished without the willing assistance of fellow judges, as well as research attorneys, legal assistants, and other support staff that read, edit, and critique, take responsibility for summarizing lengthy records, prepare initial draft opinions, and check and cross-check drafts for mechanical and procedural error. Busy appellate courts operate collegially in the truest sense of the term. Judges, research attorneys, and legal assistants have had to accommodate my change in style. In some cases they have had to change the style of their writing.

The most important readers of my opinions are the colleagues assigned with me to decide the appeal. The volume of material I send to them to read during the year is huge and they are accustomed to reading it in the traditional format preferred by Justice Posner. Having heard Garner's presentation, they were not opposed to me giving the suggestion a try. I knew, however, that opposition would build if they found themselves routinely bobbing their heads to the bottom of the page in search of the authority I was referring to. I have had to be careful to identify the source of quoted material in the body of the sentence and otherwise do so when prominent identification of the authority is desirable. I have had no complaints from my colleagues. Alas, I have made no converts either.

A far more difficult constituency to appeal to was the research attorneys of the court. They not only have to read material formatted in the new style, but also have to write in the new style when preparing draft opinions for my use. Here in California each appellate judge is assigned two research attorneys who work only for that judge. Both of my lawyers loyally acquiesced to my decision to change, one less reluctantly than the other. One year later, one of them is still merely "going along" with the change, while the other has embraced

it and is now convinced his writing has improved because of it. Changes of this nature are of inordinate importance to career research attorneys. Requiring these two professional writers to change their writing style in such a profound way could have easily led to one or both of them leaving my chambers. This is a risk that you take in making such a demand.

The research attorneys on our central staff were even less enthusiastic about my decision. These attorneys write for me only occasionally and did not welcome the prospect of learning a new writing style for the benefit of someone they only infrequently interacted with. I was sympathetic and offered to continue receiving their drafts in the traditional style. When their drafts reached my chambers, my legal assistant would then drop the citations into footnotes before forwarding the drafts to me. I then made any necessary changes to the text. The court's principal attorney who supervises the central staff has since unilaterally directed the attorneys to adopt Garner's style for the drafts sent to me. These attorneys, however, simply do not use Garner's style frequently enough to get good at it. Substantial additional editing is still required.

The group most receptive to my decision to change turned out to be the support staff responsible for cite checking my opinions. This group includes my legal assistant and the central staff secretaries. I have been told that cite checking citations listed in a series of footnotes is noticeably easier than searching for them throughout the text.

Adjusting to Garner's style is still a work in progress for me. My staff and I are gradually getting better at using it. It continues to be worth the effort since I remain convinced that Garner's style leads to clearer and more concise writing at a time when the judiciary is legitimately criticized for writing that is unnecessarily long and difficult to read.



Rodney Davis is an associate justice on the California Court of Appeal's Third Appellate District in Sacramento. Before assuming his current position 11 years ago, Justice Davis served as a Sacramento County trial judge for five years. He received his law degree from UC Hastings College of Law, a master's degree from the University of Southern California, and a bachelor's degree from UC Davis.

## **COURT REVIEW**

### **AUTHOR SUBMISSIONS WELCOME**

*Court Review* invites the submission of original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to working judges. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of articles, essays, or book reviews for *Court Review* are set forth in detail on page 25.

# Afterword

Bryan A. Garner

**N**o one is more surprised about the amount of attention that citational footnotes are getting than I am. In a way, the attention is gratifying. But all in all, I find it rather disappointing. When marked improvement is possible, and so palpably demonstrable, it isn't gratifying to encounter opposition.

Before answering Judge Richard Posner, I should say how much I admire his work. In several of my books, I quote him favorably, and in two of them I hold up his scholarly prose as a model to be emulated. No reasonable person could doubt that he has made important contributions to legal literature.

That said, Judge Posner's response here is off the mark (he doesn't distinguish citational from substantive footnotes, and therefore doesn't address my main thesis), based on an irrelevant standard (our opinions are short enough as it is), self-contradictory (a judge can always use footnotes to shorten the text), and downright quirky (opinions shouldn't have a "spurious air of scholarship"). Although opinions may not be scholarship, their very essence is reasoning, and the citations that judges now throw on the page can obscure the reasoning for both the reader and the writer.

Judge Posner's main complaint is that in so many of my examples, I edited the "after" versions. But this is a key part of

my point. Almost any legal writer who strips out citations will at first say, "I hate this! It's bad writing." And that's exactly right. So what's the remedy? "Move the citations back up! Give me some camouflage!" Maybe that's an answer.

But I think the better answer is to start working on the prose: the connections between thoughts, the flow of the material, and more contextual discussion of controlling authority. If I misstated some nuances that Judge Posner intended in the passages from his opinions, the answer is that when you footnote citations in your own prose, you'll never misstate your own point. You, after all, are the opinion's author. More likely, you'll state your points far better than you've been doing with all the citational clots.

In short, I couldn't, in good conscience, give an unedited "after" version. For a professional editor to do that would be like having a doctor remove tumors and then idly watch as the patient bleeds.

Justice Rodney Davis's essay gives a fascinating view of the practical daily challenges for judges who adopt the sleeker, more accessible style. His insights help explain why so many judges sympathetic to the change haven't yet made it. I hope that Judge Davis's words will embolden more judicial writers.



# First Things First: The Lost Art of Summarizing

Joseph Kimble

If you value clarity, if you insist on lighting the way for your reader, then you'll provide good summaries where they belong in just about every piece of legal writing: up front. You should always have one at the beginning or near the beginning, and if you're dealing with multiple issues, you should have one at the beginning of each issue. Call them what you will—summaries, overviews, brief answers, thesis statements, synopses—they are central to clear writing:

A vast amount of empirical research has studied the effects of overviews on learning from written prose. The research support for this principle is broad and consistent. . . . [T]he support is sufficiently broad to establish the general value of overviews for understanding written text in any environment and for any audience.<sup>1</sup>

All legal writing should be front-loaded. It should start with a capsule version of the analysis. It should practice the art of summarizing.

## SUMMARIES IN JUDICIAL OPINIONS — THE OPENING PARAGRAPHS

An often quoted article on writing opinions gives this advice:

The importance of the first paragraph cannot be over-emphasized. . . . The readability of an opinion is nearly always improved if the opening paragraph (occasionally it takes two) answers three questions. First, what kind of case is this: Divorce, foreclosure, workmen's compensation, and so on? Second, what roles, plaintiff or defendant, did the appellant and the appellee have in the trial court? Third, what was the trial court's decision? A fourth question, What are the issues on appeal?, should also be answered unless the contentions are too numerous to be easily summarized.<sup>2</sup>

The advice is incomplete in two respects. It doesn't make clear that the court should set out the deep issue or issues, not just the superficial issues. And just as important, the advice doesn't say that the court should summarize its answer to the deep issues.

The term "deep issue" was coined by Bryan Garner, who explains that "the surface issue does not disclose the decisional premises; the deep issue makes them explicit. It yields up what Justice Holmes once called the 'implements of decision.'"<sup>3</sup> Garner identifies 12 categories of judicial openers along a continuum from "no issue" to "surface issue" to "deep issue." I can hardly add to his exposition, except to say that there will usually be degrees or levels of deepness to choose from and that briefs and memos may require slightly different choices than opinions will. I'll explain these two points more fully in the next two sections.

Meanwhile, let's remind ourselves what clarity—maximal clarity—demands of a judicial opener: (1) the crucial facts; (2) the deep issue, stated explicitly or implicitly in terms of the pertinent legal rule or requirement; and (3) the answer, which may involve simply applying the pertinent rule, or choosing between two possible rules, or sometimes applying an even deeper rule that I'll call the dispositive rule. Note that the answer goes beyond a mere yes or no; it includes the reasoning. All this may seem complicated, but you'll have no trouble identifying these parts in a good opener.

The only trouble is in finding good ones. (Are you surprised?) For instance, I looked at Volume 462 of the *Michigan Reports*, the most recent bound volume as I was writing. The first four opinions are per curiam opinions, with first paragraphs like this (it's one of the better ones):

The defendant was convicted of delivering between 50 and 225 grams of cocaine, which presumptively requires a prison term of ten to twenty years. The trial court concluded that there were substantial and compelling reasons for departing from the statutory mandate, however, and imposed a prison term of five to twenty years. We agree with the dissenting judge in the Court of Appeals that the trial court considered an inappropriate factor in concluding that a departure was warranted. We thus reverse and remand to the trial court for resentencing.<sup>4</sup>

But the deep issue there was whether a defendant's expression of remorse is an objective and verifiable factor. It could have been included so easily: "We agree with the dissenting judge in the Court of Appeals that the trial court inappropri-

©2001 Joseph Kimble.

### Footnotes

1. DANIEL B. FELKER ET AL., GUIDELINES FOR DOCUMENT DESIGNERS 16 (1981); see also Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 THOMAS M. COOLEY L. REV. 1, 12 (1992) (recommending summaries as an element of plain language); Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 SCRIBES J. LEGAL WRITING 1, 6 (1996-1997) (again recommending summaries).
2. George Rose Smith, *A Primer of Opinion Writing for Four New*

*Judges*, 21 ARK. L. REV. 197, 204 (1967); see also RUGGERO J. ALDISERT, *OPINION WRITING* 72-77 (1990) (citing Smith with approval but also recommending a conclusion in the first paragraph).

3. Bryan A. Garner, *The Deep Issue: A New Approach to Framing Legal Questions*, 5 SCRIBES J. LEGAL WRITING 1, 4 (1994-1995) (citation omitted).
4. *People v. Daniel*, 609 N.W.2d 557, 557-58 (Mich. 2000).

ately considered a factor that was not objective and verifiable—defendant’s expression of remorse.” That one sentence identifies the pertinent rule and applies it to the crucial facts.

After the four per curiams comes an authored opinion with these first two paragraphs:

The question in these consolidated appeals is whether the state of Michigan was barred by [a statute] from indicting defendants for conspiracy to possess with intent to deliver more than 650 grams of a mixture containing cocaine when they had previously been convicted in federal court in Florida of conspiracy to possess with intent to distribute more than five kilograms of cocaine.

I would hold that the state prosecution was not barred by [the statute] because conspiracy charges are not a violation of “this article” (article 7 of the Public Health Code) for purposes of the statute. The statute does not apply because the conspiracy charges arose under chapter 24 of the Penal Code, not under article 7 of the Public Health Code. Therefore, I would reverse the judgments of the trial court and Court of Appeals and reinstate defendants’ convictions.<sup>5</sup>

That just about gets it. That gets to the deep issue (although, unfortunately, (1) you have to read a footnote to find the statutory rule against double convictions for violating “this article,” and (2) the initial paragraph is a 62-word sentence in reverse chronological order). Notice the two uses of *because* in the second paragraph. That’s a good sign. *Because* is the word that signals an answer, the word that almost forces the writer to explain.

I spent a long day reading all the opinions in Volume 462. By my reckoning, only 9 of the 27 opinions set out the deep issue, coupled with an answer, in the opening paragraphs. Here’s another one that does; the court is choosing from possible rules:

In this premises liability case the plaintiff, Violet Moeller, was injured when she tripped over a concrete tire stop in defendant church’s parking lot. Plaintiff was visiting the church to attend bible study. Plaintiff sued the church, alleging that the defendant negligently placed the tire stops and failed to provide adequate lighting in the parking lot.

At trial, the jury was instructed on the obligations property owners owe to licensees. The jury returned a verdict in favor of the church. The Court of Appeals reversed and remanded the case for a new trial after determining that the trial court erred by instructing the jury on the obligations owed to licensees rather than “public invitees” as defined in 2 Restatement Torts, 2d, § 332, p. 176.

We granted leave in this case to determine the proper standard of care owed to individuals on church property for noncommercial purposes. We hold that the trial court correctly instructed the jury that such individuals are licensees and not invitees. Accordingly, we reverse the Court of Appeals decision and reinstate the trial court judgment in favor of the church.<sup>6</sup>

This could have been shorter, though, especially since the next section of the opinion is called “Factual and Procedural Background.” A revised version:

In this premises-liability case, the plaintiff, Violet Moeller, was injured when she tripped over a concrete tire stop in defendant church’s parking lot. She was visiting the church to attend bible study. The Court of Appeals determined that Moeller was not a licensee but rather a “public invitee” as defined in 2 Restatement Torts, 2d, § 332, p. 176. We disagree. We hold that to become an invitee, a person must show that the premises were held open for a commercial purpose. We reject the Restatement’s definition of “public invitee.”

Finally, here’s another incomplete opener:

We consider in this case the trial court’s decision to suppress defendant’s voluntary confession on the ground that defendant did not “knowingly and intelligently” waive his *Miranda* rights. We conclude that the trial court applied an erroneous legal standard in assessing the validity of defendant’s *Miranda* waiver. Moreover, we conclude that the waiver was valid. Therefore, we reverse the trial court’s decision suppressing defendant’s confession.<sup>7</sup>

This misses the crucial facts and the dispositive legal rule. A revised version:

The defendant waived his *Miranda* rights and confessed to murder. According to a psychiatric expert, he was delusional and believed that God would set him free if he confessed. The trial court concluded that his waiver was not “knowing and intelligent” [the pertinent rule]. But the court erred in focusing on why the defendant confessed. The proper test for waiver is whether defendant understands the *Miranda* rights [the dispositive rule], not whether he understands the consequences of waiving them.

## LOOKING DEEPER INTO ONE OPINION

A few years ago, to test styles of opinion-writing, I rewrote a fairly routine opinion of the Michigan Court of Appeals.<sup>8</sup> I labeled one version X and the other version O, and sent them

5. *People v. Hermiz*, 611 N.W.2d 783, 784 (Mich. 2000) (citations omitted).

6. *Stitt v. Holland Abundant Life Fellowship*, 614 N.W.2d 88, 90 (Mich. 2000) (citations omitted).

7. *People v. Daoud*, 614 N.W.2d 152, 153-54 (Mich. 2000) (citation omitted).

8. *Wills v. State Farm Ins. Co.*, 564 N.W.2d 488 (Mich. Ct. App. 1997).



out randomly to several hundred Michigan lawyers. I asked the lawyers which opinion they preferred and why. (For the “why,” I included a list of possible reasons.) Result: 61% of 251 lawyers preferred the revised version.

A full report on this study will appear in *The Scribes Journal of Legal Writing*. For now, suffice it to say that the revised opinion followed a number of the guidelines for writing in plain language: break the material into sections and use headings, organize by putting more important information before less important, cite only the controlling cases, omit other unnecessary detail, use topic sentences that advance the analysis, keep the paragraphs short, use plain words, and provide summaries at the beginning and at the major breaking points.

Now, the results of my study were certainly not produced by any one change or technique. Still, the difference between the two opinions’ first paragraphs, where the writer should get down to the nitty-gritty, is striking:

Original:

Plaintiff Robert Wills filed a declaratory judgment action against defendant State Farm Insurance Company to determine whether defendant has a duty to pay benefits under the uninsured motorist provisions found in plaintiff’s policy with defendant. Pursuant to the parties’ stipulated statement of facts, the trial court granted summary disposition in plaintiff’s favor upon finding coverage where gunshots fired from an unidentified automobile passing plaintiff’s vehicle caused plaintiff to drive off the road and suffer injuries. Defendant appeals as of right. We reverse and remand.

Revised:

### Summary

Robert Wills was injured when someone drove by him and fired shots toward his car, causing him to swerve into a tree. He filed a declaratory-judgment action to determine whether State Farm had to pay him uninsured-motorist benefits. The issue is whether there was a “substantial physical nexus” between the unidentified car and Wills’s car. The trial court answered yes and granted a summary disposition for Wills. We disagree and reverse. We do not find a substantial physical nexus between the two cars, because the bullets were not projected by the unidentified car itself.

Why does the original fall short? It doesn’t get to the deep issue. And it doesn’t get to the answer, which in this case involves a deeper, dispositive rule—namely, that “substantial physical nexus” requires contact with something that the phantom car itself projected.

Let me explain what I mean by levels of deepness. All legal analysis is based, explicitly or implicitly, on the deductive reasoning that we recognize as a syllogism. Often, the minor premise of the syllogism involves reasoning by analogy. In the case I tested, there are four syllogisms; the minor premise of each one depends for its validity on the deeper syllogism that follows it. In the figures below, the a, b, and c stand for major premise, minor premise, and conclusion. The sentences are not smooth, but I believe that the forms are correct.

1. a. A policyholder must show injury arising from the use of an uninsured motor vehicle to recover under the policy.  
b. The policyholder, Wills, cannot show bodily injury arising from the use of an uninsured motor vehicle.  
c. Therefore, the policyholder cannot recover under the policy.
2. a. Under the policy, a vehicle whose driver is unknown and which “strikes” the insured’s vehicle is an uninsured motor vehicle.  
b. The other vehicle had an unknown driver, but it didn’t strike the insured’s vehicle.  
c. Therefore, the other vehicle was not an uninsured motor vehicle.
3. a. According to previous decisions involving indirect physical contact, a “substantial physical nexus” between the unidentified car and the object it casts off or projects is required for “striking” the insured’s vehicle.  
b. There was no substantial physical nexus between the unidentified car and the object it projected.  
c. Therefore, the unidentified car did not strike the insured’s vehicle.
4. a. The object must be projected by the unidentified car itself to meet the requirement of a “substantial physical nexus.”  
b. The bullets were not projected by the unidentified car itself.

[Analogy: This case is like another one in which someone in the unidentified car shot the policyholder while he stood beside his car. This case is distinguishable from cases in which the unidentified car threw a rock or dropped a piece of metal on the road.]

- c. Therefore, the requirement of “substantial physical nexus” is not met.

Now you see what’s wrong with the original first paragraph. Although it does state the crucial facts, it barely gets to the first level of reasoning, the first syllogism; it just concludes, baldly and superficially, that plaintiff has no uninsured-motorist coverage. The revised version, on the other hand, gets down to the last syllogism. It gets down to the *ratio decidendi*, the dispositive rule.

### SUMMARIES IN BRIEFS AND MEMOS

Good summaries in briefs and memos will contain the same three elements that opinions do: the crucial facts, the deep issue, and the answer. The differences are mainly structural: in briefs and memos, the issue is stated explicitly and the answer follows in a separate part. This may, in turn, present a choice of how deep to go into the issue.

Let me illustrate with that uninsured-motorist case, *Wills*. It’s mundane, but typically mundane, and thus a good example.

Suppose you were stating the issue in the insurance company’s brief. (Incidentally, I’ll follow Garner’s sensible advice to not cram everything into a single sentence.<sup>9</sup>) You might start the issue with these facts: “Robert Wills was injured when somebody drove by him and fired shots toward his car, causing him to swerve into a tree. Only the bullets—and nothing from the unidentified car itself—struck Wills’s car.” Then, as you round out the issue, you have a choice about how deep to go in the sentences that follow those first two. Here are the possibilities, from surface issues to increasingly deeper issues:

- Can Wills recover uninsured-motorist benefits?
- Can Wills show that his injury arose from “the use of an uninsured motor vehicle” as defined in his policy?
- To recover uninsured-motorist benefits under his policy, Wills must show that the unidentified car “struck” his car. Can Wills make that showing?
- To recover uninsured-motorist benefits under his policy, Wills must show that the unidentified car “struck” his car. And according to cases involving indirect “striking,” there must be a “substantial physical nexus” between the cars. Can Wills show a substantial physical nexus?
- To recover uninsured-motorist benefits under his policy, Wills must show that the unidentified car “struck” his car. And according to cases involving indirect “striking,” there must be a “substantial physical nexus” between the cars created by something that is projected by the unidentified car itself.

Can Wills show that the unidentified car itself projected the bullets that hit his car?

You can see that it’s increasingly difficult to frame the issue concisely as you go deeper into the levels of analysis. I would probably settle for the third bullet dot. Oddly enough, the third formulation seems more persuasive than the fourth, with its vague—and unhelpful—concept of “substantial physical nexus.” The third issue is more persuasive because the facts (in the first two sentences) suggest no “striking.”

After so stating the issue, you could answer as follows in the Summary of Argument part of your brief:

Wills’s policy with State Farm provides coverage for bodily injury “arising from the use of an uninsured motor vehicle.” The policy defines an uninsured motor vehicle as one whose driver is unknown and which “strikes” the insured’s vehicle.

In this case, the unidentified car did not strike Wills’s car, even indirectly. In other cases involving indirect contact, the Court of Appeals has ruled that the striking object must be cast off or projected from the unidentified car itself; only then is there a “substantial physical nexus” between the two cars. And here the bullets that hit Wills’s car were not projected by the unidentified car itself, but by a gun.

Later, of course, would come the Argument section, with a point heading and another summary after the point heading. (Some writing texts call this second summary a thesis statement.) Inevitably, the second summary will require some repetition, but an adroit writer can minimize it. Thus:

#### **Plaintiff Wills cannot show that the unidentified car “struck” his car.**

Wills cannot show that the unidentified car “struck” his car, as his policy requires him to do, because he cannot show that the unidentified car *itself* fired the bullets. It’s not enough that the bullets came from a gun fired by someone riding in the car.

Here is the policy language at issue . . . .

Now, let’s briefly go back. How would you frame the issue for the plaintiff, who of course lost? I suspect that he was trying to distinguish an earlier case in which the policyholder was hit by bullets shot from a moving car as he stood outside his car; the bullets hit him, not his car.<sup>10</sup> So plaintiff Wills might frame his issue like this:

Robert Wills was injured when somebody drove by him and fired shots that hit his car, causing him to swerve into a tree. The shots from the unidentified car actually hit his car as they were both moving. To recover uninsured-motorist benefits under

9. Garner, *supra* note 3, at 1.

10. Kreager v. State Farm Mutual Auto. Ins. Co., 496 N.W.2d 346 (Mich. Ct. App. 1992).

his policy, Wills must show that the unidentified car “struck” his car. Can Wills make that showing?

Finally, how might you state the issue in an office memo—that is, when you are in objective, not persuasive, mode? In the *Wills* case, the differences are not as substantial as they would be in a more complicated case, with messier, conflicting facts and more arguable rules and policies. So this will sound familiar:

Robert Wills was injured when somebody drove by him and fired shots that hit his car, causing him to swerve into a tree. To recover uninsured-motorist benefits under his policy, Wills must show that the unidentified car “struck” his car. Can Wills make that showing?

A Brief Answer, which should follow directly, will complete the summary and send the reader down a marked path toward a clear destination. I’ll spare you this last example, though. You have the idea by now.

## SUMMARIES IN OTHER LEGAL DOCUMENTS

So far we have considered the kind of précis that should appear up front in analytical writing. But when it comes to the field that we call drafting—contracts, wills, trusts, statutes, rules, and the like—the summary will not capsulize the analysis because there is no analysis. Rather, the summary will take the form of an introduction or overview.

In a contract, for instance, the first paragraph (which is typically unnumbered), will identify the parties and the nature of the contract:

This is a lease between McKinley Morganfield (Landlord) and Chester Burnett (Tenant) for the property at 123 Red Rooster Street. The parties agree as follows:

In addition, long contracts should have an informative table of contents. For that matter, any legal document that’s longer than five or six pages will benefit from a table of contents.

In statutes, ordinances, and rules, the summary will take the form of a purpose clause. Reed Dickerson, the father of legal drafting in the United States, was skeptical about purpose clauses. He thought that most of them “wind up as pious incantations of little practical value because what little information they contain is usually inferable from the working text.”<sup>11</sup> But plain-language experts disagree, believing as they do that most laws and legal documents should be drafted for

an ordinary literate reader, and not just for judges and other lawyers. Here are two main reasons why: focusing on legal readers perversely ignores the very subjects of the law, the administrators and citizens it applies to; and by aiming to make the law clear to ordinary readers, skilled drafters will usually sharpen its meaning.<sup>12</sup>

One plain-language expert, Martin Cutts, has actually tested the value of purpose clauses. He rewrote an act of Parliament and included the following in his “Introduction”:

**1.1** The main purposes of this Act are to give a customer:

(a) the right to cancel a timeshare agreement or timeshare credit agreement; and

(b) the right to receive information about the terms of the agreement.

The rest of this Act explains how and when these rights apply.

**1.2** This Act applies to a timeshare agreement or timeshare credit agreement if, when the agreement is being entered into, the customer, seller, or lender is in the United Kingdom or the agreement is to some extent governed by the law of the United Kingdom or a part of the United Kingdom.<sup>13</sup>

From his testing on law students, Cutts concluded that “an introductory section, giving an overview of the main purpose of the Act, is a great asset to readers (40% cited it as a source of main points).”<sup>14</sup>

And that’s not all. Cutts also included, at the end, a so-called “Citizen’s Summary” of the act’s main substantive points. This summary was labeled as not part of the act and not to be used by judges who interpret it. In the testing, 97% of participants said that a Citizen’s Summary should be provided in every act of Parliament.<sup>15</sup>

That will be the day—when legislators and legislative drafters, without fretting or finding reasons to avoid change, take extra steps to make law clear to the people whose lives it governs.

## FINAL THOUGHTS ON OPINIONS

In judicial opinions with several issues, it may be difficult to summarize each one in the opening paragraphs. But with two

11. REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* 286 (2d ed. 1986).

12. See BRYAN A. GARNER, *LEGAL WRITING IN PLAIN ENGLISH* 91 (2001) (setting out five reasons why it is wrongheaded to write only for legal experts); LAW REFORM COMM’N OF VICTORIA, *PLAIN ENGLISH AND THE LAW* 50 (1987; repr. 1990) (“The law should be drafted in such a way as to be intelligible, above all, to those directly affected by it. If it is intelligible to them, lawyers and judges should have no difficulty in understanding it and applying it.”); Joseph Kimble, *Answering the Critics of Plain Language*, 5 *SCRIBES*

J. *LEGAL WRITING* 51, 53-60 (1994-1995) (arguing that, most of the time, clarity and precision are complementary goals); Joseph Kimble, *The Great Myth That Plain Language Is Not Precise*, 7 *SCRIBES* J. *LEGAL WRITING* 109, 112-15 (1998-2000) (showing, through one example, why plain language is often *more* precise than legalese).

13. MARTIN CUTTS, *LUCID LAW, Clearer Timeshare Act* at 3 (2d ed. 2000).

14. *Id.* at 25.

15. *Id.* at 27.

or even three solid issues, you should be able to summarize in no more than four tight paragraphs, allowing one for the facts if you need it. The paragraphs do have to be tight, though. (Notice that my revised and meatier summaries of those Michigan opinions were shorter or only a mite longer than the originals.) At the very least, you can usually state all the deep issues, even if you can't answer each one except to say, for instance, that "we find no reversible error." At times, you can summarize selectively: "Penniman raises four issues on appeal, two of which require careful review." And in any event, most cases do not involve more than a couple of weighty issues.

As you realize by now, I don't buy the notion that the summary must be only one or two paragraphs. Typically, it will be. But I don't object to several short paragraphs. Beyond that, though, the summary starts to become self-defeating. Garner says that, ideally, a deep issue should not exceed 75 words. He must mean 75 words for *each issue*, especially when you include the answer.

I would not hesitate to call the summary just that, despite the traditional lack of a heading to begin opinions. Before I tested the revised *Wills* opinion, a colleague urged me to drop the heading, "Summary." Too radical, he said. Well, maybe. But if business memos can have a heading, like "Executive Summary," why can't opinions have one too? Calling the opener a summary might even encourage writers to really summarize.

That leads to my last point—the value of summaries not just for the reader, but for the writer as well. They help test the

opinion. Although they appear first, they should be written last. More accurately, they should be completed and polished last. Start with the issue part of the summary, but hold off on writing the answer part until the end. For how can you summarize your answer until you have worked through your analysis? You may eventually decide that your issue, too, needs refining—or deepening.

The summary, then, both shapes and reflects the analysis. The quality of the one affects the quality of the other. Of all the Michigan opinions cited earlier, the one that seemed to me the most slippery was *People v. Daoud*.<sup>16</sup> And I had the hardest time summarizing the answer. I'm not suggesting that summarizing is easy. But it's bound to be easier with a clear opinion. Bad summaries are a bad sign.



*Joseph Kimble graduated from Amherst College and the University of Michigan Law School. He is a professor at Thomas Cooley Law School, where he has taught legal writing for 17 years. He is the editor of the "Plain Language" column in the Michigan Bar Journal, the editor-in-chief of The Scribes Journal of Legal Writing, and the drafting consultant to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. You can contact him at [kimblej@cooley.edu](mailto:kimblej@cooley.edu).*

16 614 N.W.2d 152 (Mich. 2000)

## AMERICAN JUDGES ASSOCIATION Future Conferences

### 2002 ANNUAL MEETING

September 8-13

**Maui, Hawaii**

The Westin Maui

(\$155.00 single or double –  
golf/mountain view;

\$169.00 single or double – ocean view)

### 2002 MIDYEAR MEETING

April 18-20

**Biloxi, Mississippi**

Beau Rivage Resort & Casino

(\$119.00 single or double)

### 2003 ANNUAL MEETING

**Montreal, Quebec**

(Dates and hotel to be determined)

### 2003 MIDYEAR MEETING

**Billings, Montana**

May 15-17, 2003

(Tentative date; hotel to be determined)

### 2004 MIDYEAR MEETING

March 2004

**Savannah, Georgia**

(Tentative date; hotel to be determined)

# Extrajudicial Speech: Navigating Perils and Avoiding Pitfalls

William G. Ross

The disqualification of Judge Thomas Penfield Jackson from the Microsoft case for his free-wheeling comments to the news media<sup>1</sup> has provided a sharp reminder of the dangers of extrajudicial speech.

In its biting opinion, the U.S. Court of Appeals for the District of Columbia castigated Judge Jackson for giving media interviews and public speeches in which he made remarkably astringent remarks about Microsoft. Among his more colorful comments, the judge mused that Bill Gates had Napoleonic hubris and he likened the break-up of Microsoft to swatting a recalcitrant mule with a two-by-four.<sup>2</sup> Among his more potentially prejudicial remarks were his speculation to reporters—before his order splitting Microsoft—that ‘a break-up is inevitable’ and his post-trial comments disparaging the credibility of trial witnesses.<sup>3</sup>

The court concluded that the judge’s remarks violated Canon 3A(6) of the 1972 Code of Judicial Conduct, which requires a judge to “avoid public comment on the merits of pending and impending cases,” and its corollary, Canon 3A(4), which prohibits *ex parte* communications about a case.<sup>4</sup> The court also determined that the judge violated Canon 2, which requires a judge to ‘avoid impropriety and the appearance of impropriety in all . . . activities.’<sup>5</sup> Declaring that these “violations were deliberate, repeated, egregious, and flagrant,”<sup>6</sup> the court ordered the judge’s disqualification pursuant to a federal statute that requires disqualification of a judge when a reasonable observer would question his or her impartiality.<sup>7</sup>

As the court pointed out, the “Microsoft case was ‘pending’ during every one of the District Judge’s meetings with reporters; the case is ‘pending’ now; and even after our decision issues, it will remain pending for some time.” The court explained that the judge “breached his ethical duty under Canon 3A(6) each time he spoke to a reporter about the merits of the case.”<sup>8</sup>

The court’s ruling was appropriate because any public comment by a judge about the facts, applicable law, or merits of a case that is *sub judice* in his court or any comment concerning the parties or their attorneys may raise grave doubts about the

judge’s objectivity and his willingness to reserve judgment until the close of the proceeding. Moreover, any such comments in a jury trial might unduly sway the jury.

The need to avoid bias and the appearance of bias also seems to explain why the canon embraces public comments concerning proceedings in *any* court, rather than merely proceedings in the judge’s own court. This appears to guard against the danger that a judge would feel pressured or appear to feel pressured by the comments of his peers on other benches or that a jury would accord deference to an opinion expressed by another judge. The rule against comments by judges who are not involved in a proceeding likewise helps to ensure the integrity of the judicial process itself since a judicial proceeding should be a self-contained entity that remains immune from outside influences, even if such influences are not specifically prejudicial.

Paradoxically, the apparent increase in inappropriate extrajudicial remarks by judges reflects positive developments—the increased and improved media attention to legal issues in response to growing public sophistication about legal issues. For example, first-year students that I have taught during recent years are better informed about legal concepts and terminology than were the students that I first taught thirteen years ago.

Although the growing public fascination with legal issues may reflect society’s growing litigiousness, it also demonstrates a widespread desire to become better informed about issues that have a pervasive impact on everyday life. Unfortunately, this healthy public appetite for information about the law has stimulated in some judges an undue hunger for publicity. Such craving for media attention debases the dignity of the judiciary and erodes the public confidence in judicial objectivity which is a predicate for the rule of law. As the court of appeals observed in the Microsoft case, judges “who covet publicity, or convey the appearance that they do, lead any objective observer to wonder whether their judgments are being influenced by the prospect of favorable coverage in the media.”<sup>9</sup>

## Footnotes

1. United States v. Microsoft Corp., 253 F.3d 34, 115 (D.C. Cir. 2001).
2. *Id.* at 110-11.
3. *Id.* at 109-11.
4. *Id.* at 108-13. The parallel of Canon 3A(6) in the ABA Model Code of Judicial Conduct approved in 1990 is Canon 3B(9), which states, “A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially inter-

fere with a fair trial or hearing.” The parallel of Canon 3A(4) in the 1990 Code is Canon 3B(7), which provides, “A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding.”

5. *Id.* at 113.
6. *Id.* at 107.
7. *Id.* at 115 (invoking 28 U.S.C. § 455 (a)).
8. *Id.* at 112.
9. *Id.* at 115.



## FREE SPEECH CONSIDERATIONS

Judges and journalists who complain that ethical canons unduly restrict judicial speech are fond of correctly pointing out that judges are citizens, too, and that judges—like other citizens—enjoy the protection of the First Amendment.<sup>10</sup> Like other citizens, however, a judge does not enjoy unlimited rights to free speech.<sup>11</sup> While restrictions on judicial speech are subject to scrutiny under the First Amendment, courts long have recognized that judges may be disciplined for speech that would not warrant sanctions against other citizens inasmuch as there is a compelling interest in protecting public confidence in the impartiality of the judiciary. Public comments by judges about the facts, applicable law, or merits of a case or any comment about the parties could easily raise doubts about the judge's objectivity and his or her willingness to reserve judgment until the close of the proceedings. The judge's right to free speech in these circumstances must therefore be tempered by the compelling public interest in protecting the integrity of the judicial process and public confidence in the judiciary.<sup>12</sup>

## COMMENTS ABOUT A JUDGE'S OWN DECISIONS

In addition to following the Canon's prohibition on comments about pending and impending cases, a judge also should generally refrain from public comment about his own decisions. As an official pronouncement, a judicial decision is a self-contained entity that must speak for itself. Any public comment by the judge about the decision detracts from its integrity. A judge therefore should not gild his judicial lily. Such comments may distort the legal process by encouraging lawyers and even courts to interpret the decision in the context of the judge's remarks. In contrast to statutes, which may be interpreted with reference to legislative history, a judicial decision must be its own exponent.<sup>13</sup>

It may be appropriate and even wise, however, for a judge to discuss his opinion with the news media in off-the-record sessions in order to help facilitate more intelligent and informed news coverage. As the Supreme Court of Alabama has observed, "Often there is no one, other than the judge, who is in a position to give a detailed and impartial explanation of the case to the news media."<sup>14</sup>

Judges are most likely to feel tempted to comment upon or explain their decisions when those decisions encounter widespread criticism. In accordance with the need to protect the

integrity of the decision, a judge should ordinarily offer no apology for what she has done. If the criticism is scurrilous, the criticism does not deserve the dignity of a judicial reply. If the criticism is temperate and expresses a reasonable point of view, the judge could not contribute anything of value beyond what his opinion already says; the opinion itself therefore provides the most effective retort to public criticism. Moreover, a host of lawyers, journalists, public officials, and academics are available to come to the judge's defense. In rare instances, however, a public comment by a judge may help to mute criticism of the judiciary more effectively than a comment by anyone else. For example, it may have been appropriate for several members of the Warren Court to publicly defend the Court during the 1960s after the Court's decisions on such controversial issues as school desegregation, subversion, school prayer, and criminal procedure had disaffected substantial portions of the public.<sup>15</sup>

**As an official pronouncement, a judicial decision is a self-contained entity that must speak for itself. Any public comment by the judge about the decision detracts from its integrity.**

## CRITICISM OF FELLOW JUDGES

Judges should attempt to stem the growing trend toward direct criticism of other judges.<sup>16</sup> Such criticism is ill-advised because it tends to impugn public confidence in the quality and objectivity of justice by calling undue attention to the political aspects of the judicial process.<sup>17</sup> In particular, judges should refrain from making bilious comments about other judges in their opinions, concurrences, and dissents since such comments are generally superfluous, adding little or nothing to the usefulness of the opinion. Biting dissents may erode the legitimacy of the decision,<sup>18</sup> while majority decisions that sting dissenters may create contentiousness and verbosity that impede the court's ability to provide clear guidance to lower courts, law enforcement agencies, legislators, and citizens.

Incivility among judges also may exacerbate incivility among lawyers. As U.S. District Court Judge Stanley Sporkin has observed, "Civility starts at home. How can courts expect

10. For discussions of the constitutional aspects of regulation of judicial speech, see Leonard E. Gross, *Judicial Speech: Discipline and the First Amendment*, 26 SYRACUSE L. REV. 1181 (1986); Erwin Chemerinsky, *Is It the Siren's Call? Judges and Free Speech While Cases Are Pending*, 28 LOYOLA L.A. L. REV. 831 (1995).

11. See, e.g., Halleck v. Berliner, 427 F. Supp. 1225 (D.D.C. 1977); In re Kaiser, 111 Wash. 2d 275, 759 P.2d 392 (1988); In re Rome, 218 Kan. 198, 542 P.2d 676 (1975).

12. For a recent dialogue about this issue, see Monroe H. Freedman, *Free Speech for Judges: A Commentary on Lubet et al. v. Posner*, COURT REVIEW, Winter 2001, at 4-5; Steven Lubet, *Free Speech and Neutrality: A Reply to Professor Freedman*, COURT REVIEW, Winter 2001, at 6-7.

13. See William G. Ross, *Extrajudicial Speech: Charting the Boundaries*

*of Propriety*, 2 GEO. J. LEGAL ETHICS 589, 609-11 (1989).

14. *Matter of Sheffield*, 465 So.2d 350, 355 (Ala. 1984).

15. *Id.* at 607-08, 610.

16. Some 50% of the 82 judges in the Seventh Circuit who responded to a 1989 survey believed that there were "civility problems" between judges; 47% perceived no problem, and 3% provided no response. See Interim Report of the Committee on Civility of the Seventh Circuit, 143 F.R.D. 371, 431 (1992).

17. See William G. Ross, *Civility Among Judges: Charting the Bounds of Proper Criticism by Judges of Other Judges*, 51 FLA. L. REV. 957-73 (1999).

18. See Anthony D'Amato, *Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought*, 85 NW. U.L. REV. 113, 115 (1990)(arguing that any dissent might harm a court's legitimacy).



**Judges should confine their criticism of the abilities or character of fellow judges to private judicial disciplinary channels, for public aspersions . . . tend to undermine faith in the judicial system.**

lawyers appearing before them to be more civil when Article III judges are not civil to one another?

. . . We who try to discharge our judicial responsibilities in a conscientious and just manner . . . should not be the victim of vicious personal attacks from other judges.”<sup>19</sup>

Judges should confine their criticism of the abilities or character of fellow judges to private judicial disciplinary channels, for

public aspersions bring both the target of the criticism and the critic into disrepute and tend to undermine faith in the judicial system. Any private or public remarks by a judge about a fellow judge should be made with the objectivity, balance, and civility that is worthy of the temperament that is expected of a judge.<sup>20</sup> Although judicial civility codes recently adopted by various states may encourage more civility among judges,<sup>21</sup> judges generally should not need written codes to reinforce elementary decorum.

#### **COMMENTS ABOUT POLITICAL ISSUES**

Judges should be particularly wary about making any comment concerning political issues. Judges who take public stands on partisan questions erode the independence and integrity of the judiciary by blurring the line between the courts and politics. Such statements also create the danger of prejudice since a judge may later face in court an issue about which he has spoken. Although she can recuse, “[a] judge is paid to be a judge, not paid to do things which disqualify him from acting as a judge.”<sup>22</sup>

#### **COMMENTS ABOUT THE JUDICIAL ADMINISTRATION AND THE JUDICIAL PROCESS**

Despite the various formal and prudential restrictions on extrajudicial speech, there are many circumstances under which extrajudicial speech is highly desirable. Canon 3B(9) explicitly provides that the rule against comment on a pending or impending case “does not prohibit judges from making public statements in the course of their official duties or from

explaining for public information the procedures of the court.” Extrajudicial discussion by judges about issues concerning the legal system are particularly appropriate, provided that such comments are well reasoned and are not expressed in a manner that detracts from the dignity of the court. Indeed, one organization of state trial judges has urged judges to “explain legal terms, and concepts, procedures, and the issues involved in [a] case so as to permit the news representatives to cover the case more intelligently.”<sup>23</sup> By helping to facilitate more intelligent news coverage, judges can serve an important role in educating the public about the judicial process and can thereby enhance public respect for the judiciary and the judicial system.

Judges likewise have a duty to comment on issues of judicial administration about which they have unique knowledge. It is particularly appropriate for judges to speak out about proposed legislation or other actions by coordinate branches of government that would affect their own court. For example, it was proper for Chief Justice William H. Rehnquist in 1997 to express anxiety about the growing number of judicial vacancies caused by the friction between the Clinton Administration and the Senate Judiciary Committee.<sup>24</sup> Indeed, judges have a virtual duty to make such communications to the extent that they are in a special or unique position to inform legislators or the general public about the benefits or dangers of various forms of legislation. During the controversy over President Roosevelt’s Court-packing plan in 1937, for example, Chief Justice Charles Evans Hughes properly rebutted Roosevelt’s contention that the Court needed more justices because the Court was overworked, for no one was better qualified to speak to this question than was Hughes.<sup>25</sup> When a judge cannot bring anything other than his own prestige to a controversy over judicial administration, however, the propriety of comments is more troublesome.

Judges have made many significant improvements to the law by teaching, publishing, and serving as members of professional organizations. Recognizing the importance of such contributions, Canon 4(B) provides that “[a] judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.” As the commentary to this Canon aptly notes, “As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice.”

19. *United States v. Webb*, No. 94-0245SS, 1998 WL 93052 at \*7, 1998 U.S. Dist. LEXIS 2328 at \*21-\*22 (D.D.C. Feb. 20, 1998).

20. See Edward M. Gaffney, Jr., *The Importance of Dissent and the Imperative of Judicial Civility*, 28 VAL. U.L. REV. 583, 644 (1994).

21. See e.g., *Standards of Professional Conduct*, W. VA. LAWYER, Jan. 1997, at 12; Final Report of the Committee on Civility of the Seventh Judicial Circuit, 143 FR.D. 441, 452 (7th Cir. 1992); Iowa Standards for Professional Conduct, available at 1996 WL 260622; Standards for Professional Conduct within the Rhode Island Judicial System, published at *President’s Message*, R.I. BAR J., May 1996, at 10.

22. *Hearings on Nonjudicial Activities of Supreme Court Judges and Other Federal Judges before the Subcomm. on Separation of Powers, Comm. on the Judiciary, U.S. Senate*, 91st Cong., 1st Sess. 87 (1969)(testimony of Adrian S. Fisher).

23. National Conference of State Trial Judges Committee on News Reporting and Fair Trial, *Judicial Guidelines for Dealing with News Media Inquiries and Criticism* (5<sup>th</sup> Draft, June 5, 1984), cited in *Matter of Sheffield*, 465 So. 2d 350, 355 (Ala. 1984).

24. See *Delay in Approving Judicial Nominees Angers Rehnquist*, WALL ST. J., Jan. 2, 1998, at 40.

25. See M.J. PUSEY, 2 CHARLES EVANS HUGHES 754-57 (1951).

## PRACTICAL POINTERS FOR EXTRAJUDICIAL SPEECH

In many instances, judges may walk a very fine line between useful comments about the judicial system and remarks about issues that may come before the judge or create the appearance that the judge is unduly “political.” The danger is not so great when a judge publishes her thoughts, since the publication process enables the judge to take the time and effort to ensure that he presents his views in a careful and nonprejudicial manner. Similarly, comments made by judges in the relatively cloistered contexts of teaching, public addresses, and service in professional organizations are not likely to cause problems if the judge observes elementary caution to avoid remarks that detract from judicial dignity or create the appearance of bias.

The greatest risk occurs in contacts with the news media. Even a discrete and self-disciplined judge may slip across this line when he enters into a conversation with the press about a case. Another danger is the threat of misquotation. The Supreme Court of Alabama noted that “the risk of being misquoted, albeit honestly, may enter into the consideration and tilt the balance in favor of ‘no comment.’”<sup>26</sup> Since a judge’s interviews with the news media can serve the useful purpose of helping to educate the public about the law, however, judges need to consider ways to talk with the media in a manner that is consistent with judicial decorum.

This conflict between the goal of intelligent media coverage and judicial discretion and decorum may be resolved in part by off-the-record comments. Speaking off-the-record helps to facilitate media understanding of the judge’s work and can help to prevent misunderstandings that could confuse the public or even diminish public respect for the court. At the same time, such comments help to avoid the danger of an appearance of bias or self-promotion that may occur when a judge speaks for attribution. Although off-the-record comments during the pendency of the proceeding probably would constitute “public comment” within the definition of Canon 3B(9), explanations of procedures, history, or terminology would not run afoul of the Canon because they would not be directed to the merits of a case. Neither would such comments be likely to interfere with the fairness of the trial or hearing, in violation of Canon 3B(9). After the conclusion of a case, a judge’s off-the-record comments explaining a judicial decision would not add or detract from the decision insofar as there would be no public record of her comments.

A judge would be prudent to begin every interview off-the-record in order to ensure that nothing that he says can be quoted without permission and that all of his remarks are immunized from quotation if he finds himself talking too freely. It is essential that the judge inform the reporter in advance that his remarks will be off-the-record since journalistic custom generally does not respect retrospective requests for anonymity, even if they are made immediately after the interviewee has spoken.

This off-the-record format also may enable the judge to speak more coherently, without having to break up her

remarks by going on and off the record or engaging in self-censorship that might produce omissions or elliptical remarks that would detract from the reporter’s comprehension of what the judge says. Toward the close of the interview, the judge could select remarks that she wanted to place on the record.

Of course, a judge needs to be circumspect even when speaking off the record, and even here should avoid comments about the merits of pending or impending cases or the personalities of attorneys and their clients. Not only is such silence commanded by the Canons, but it will avoid embarrassment if the reporter does not honor his promise to refrain from quoting the judge because there is always the danger that a reporter will unprofessionally attribute any off-the-record remarks to the judge. Such derelictions, however, are relatively rare, and they will be particularly unlikely if the judge places all of his remarks off-the-record except for those that he specifically authorizes the reporter to quote. Since a judge can avoid careless or unscrupulous reporters only by avoiding the news media altogether, most judges are likely to find that the benefits of talking with the news media about subjects permitted by the Canons will outweigh the danger that the reporter will transgress the line between what is on and off the record.

A judge also would be wise to begin every media interview by declaring that he refuses to comment on the merits of any pending case, any case that might come before him, or any case in which he has participated in the past. The judge might soften this declaration by explaining that the Canons prevent such comment. The judge likewise should make clear that he is willing to comment only about such matters as legal terms, concepts, and procedures.

In talking with the news media, judges also need to take care to consider the background of the reporter and the character of the media. A judge who speaks with a reporter for a legal newspaper or a reporter who specializes in legal affairs for a major newspaper obviously can address legal issues in a more sophisticated manner than if she speaks with a reporter who is unfamiliar with the law. When speaking with a reporter who is not trained in the law, the judge needs to take great patience in explaining legal terminology or issues and should not make the mistake of assuming the reporter knows anything about the law.

## SUMMARY

Extrajudicial speech can produce great public benefit and also can cause tremendous harm. Temperate extrajudicial speech that avoids discussion of pending cases or controversial

**This conflict between the goal of intelligent media coverage and judicial discretion and decorum may be resolved in part by off-the-record comments.**

26. Matter of Sheffield, 465 So. 2d 350, 355 (Ala. 1984) (affirming the Court of the Judiciary’s finding that the judge had violated Canon

3A(6) by discussing with a local newspaper editor a proceeding for constructive contempt that was pending in the judge’s court)

political issues can help to enhance public respect for courts and understanding of judicial issues. As the disqualification of Judge Jackson demonstrates, however, indiscrete comments may create the appearance of bias or encourage the perception that judges are excessively emotional or political in their adjudication of cases. Accordingly, judges need to exercise a high level of circumspection in making comments off the bench about judicial issues. A judge generally should refrain from making comments unless he has carefully weighed both the potential benefits and risks and has concluded that the former significantly outweigh the latter. Although sanctions may be imposed for grossly inappropriate comments, it is impossible for judicial ethics commissions to monitor the myriad extrajudicial comments of tens of thousands of judges or to establish standards that would apply to all situations. Most questions

about the propriety of extrajudicial comments therefore must be resolved through the sound discretion and common sense of judges themselves.



*William G. Ross, visiting professor at Notre Dame Law School during 2001-02, is a professor at the Cumberland School of Law of Samford University. He has published numerous articles about the professional responsibilities of judges and lawyers and his books include The Honest Hour: The Ethics of Time-Based Billing by Attorneys (Carolina Academic Press, 1996). A former news reporter, Ross is a graduate of Stanford University and Harvard Law School.*

## **Great educational programs Fellowship with other judges The Westin Maui**

- 36 holes of golf at Ka'anapali golf courses
- Five separate pools – 85,000 square feet of water, plus a 120-foot water slide
- Health club and spa
- Snorkeling, sailing, windsurfing



***Mark your calendars now – registration materials coming early in 2002!***

**American Judges Association  
2002 Annual Educational Conference  
The Westin Hotel Maui, Hawaii Sept. 8-13, 2002**

# Recent Criminal Decisions of the United States Supreme Court: The 2000-2001 Term

Charles H. Whitebread

The United States Supreme Court's 2000-2001 term will always be remembered for the Court's role in deciding the outcome of the contemporaneous presidential election. Despite the notoriety of that decision, the rest of the term was relatively uneventful. Marked by recurrent split decisions, the Court addressed significant issues regarding an individual's Fourth Amendment rights in the face of technological advance and law enforcement authority, the death penalty, and other topics of criminal procedure.<sup>1</sup>

## THE FOURTH AMENDMENT

In *City of Indianapolis v. Edmond*,<sup>2</sup> the Court held that though Indianapolis's vehicle checkpoint program was instituted to discover drugs in stopped vehicles by using narcotics detection dogs, its "primary purpose . . . [was] ultimately indistinguishable from the general interest in crime control" and therefore contravened the Fourth Amendment's requirement of "individualized suspicion." Though the city argued that its program, like previously accepted drunk-driving checkpoints, had the "ultimate purpose of arresting those suspected of committing crimes," the Court refused to accept such a "high level of generality" because it would provide no conceivable stopping point for law enforcement activity." Regarding the city's secondary purpose of "keeping impaired motorists off the road and verifying licenses and registrations," the Court pointed out that such a justification would permit any checkpoints "so long as they also included a license or sobriety check." The Court concluded that the Indianapolis program lacked a specific "connection to the roadway," unlike a sobriety checkpoint that focuses on "immediate, vehicle bound threat to life and limb."

Justice Breyer, writing for the Court in *Illinois v. McArthur*,<sup>3</sup> held that police officers may deny individuals unaccompanied entrance into their home for a limited time as long as there is probable cause to believe that drugs are present and a reasonable belief that those drugs would be destroyed without restraining the occupant's entrance. Informed of the presence of drugs, police officers refused to let Charles McArthur enter his trailer unaccompanied until they could obtain a search warrant. Balancing the privacy and law enforcement interests at stake, the Court pointed out four significant considerations in this case. First, the officers had probable cause based on the

testimony of McArthur's wife that drugs were present. Second, they had good reason to believe that McArthur would destroy the drugs before they could obtain a warrant. Third, by merely denying McArthur unobserved entrance, the officers "made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy." Finally, the restraint lasted only two hours, which is reasonable time to diligently obtain a warrant. Therefore, this brief warrantless seizure met Fourth Amendment demands because it was "limited and tailored reasonably to secure law enforcement needs while protecting privacy interests."

The Court in *Ferguson v. City of Charleston*<sup>4</sup> held that a state hospital's administration of nonconsensual drug tests to obtain evidence of a patient's criminal conduct for law enforcement purposes does not comport with the "special needs" doctrine and is an impermissible search under the Fourth Amendment. When a patient of the Medical University of South Carolina was identified as using drugs during pregnancy, the hospital immediately notified police, and the patient was subject to arrest if she did not agree to treatment. Identifying previous cases that used the "special needs" doctrine to validate suspicionless searches, the Court noted that it used a "balancing test that weighed the intrusion on the individual's interest in privacy against the 'special need' that supported the program." In those earlier cases, "there was no misunderstanding about the purpose of the test or the potential use of the test results" and there were "protections against the dissemination of the results to third parties." The Court considered the hospital's tests to be a severe intrusion because patients have a "reasonable expectation" that their test results "will not be shared with nonmedical personnel without [their] consent." Most significantly, the Court asserted that when the "special needs" doctrine has been used, "the 'special need' that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement." Though the hospital's policy ultimately sought to protect the health of both mother and child, the Court believed "the immediate objective of the searches was to generate evidence for law enforcement purposes" and therefore concluded that "this case simply does not fit within the closely guarded category of 'special needs.'" Moreover, the Court indicated that if an "ultimate purpose" justification were sufficient,

## Footnotes

1. For a more in-depth review of the decisions of the past Term, see CHARLES H. WHITEBREAD, RECENT DECISIONS OF THE UNITED STATES SUPREME COURT, 2000-2001 (Amer. Acad. of Jud. Educ. 2001).

2. 531 U.S. 32 (2000).

3. 531 U.S. 326 (2001).

4. 532 U.S. 318 (2001).



“virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose.”

A divided Court in *Atwater v. City of Lago Vista*<sup>5</sup> held that the Fourth Amendment does not prohibit police officers from making a full custodial arrest when they observe a minor violation, like failing to wear a seat belt, for which the penalty is only a fine. A police officer for the city of Lago Vista observed Gail Atwater driving her pickup truck and neither she nor her two small children were wearing seat belts. After being arrested and placed in jail for an hour, she was released on bond and subsequently paid the fine for the misdemeanor seat-belt offense, which was \$50. Atwater argued that pre-founding English and early American common law prohibited peace officers from making warrantless misdemeanor arrests unless the offense was a “breach of the peace.” To the contrary, the Court recognized “considerable evidence of a broader conception of common law misdemeanor arrest authority unlimited by any breach-of-the-peace condition.” Further, statutes in all 50 states and the District of Columbia permit warrantless arrests “for any misdemeanor committed in the arresting officer’s presence.” The Court declined to “mint a new rule of constitutional law” that would prohibit a custodial arrest when conviction for the offense would not result in jail time. Recognizing that Atwater would prevail under such a rule, the Court nonetheless said that “a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations.” Instead, the Court must “draw [reasonableness] standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made.” Moreover, the Court concluded that there are sufficient practical and statutory protections already in place, and if more protections are required in the future, it would be “easier to devise a minor-offense limitation by statute than to derive one through the Constitution.” In her dissent, Justice O’Connor criticized the majority for holding constitutionally permissible an arrest that it recognized as “a pointless indignity” in the name of “administrative ease.” She stressed that “clarity is certainly a value worthy of consideration . . . [but,] it by no means trumps the values of liberty and privacy at the heart of the Amendment’s protections.” She warned that the Court’s “*per se* rule . . . has potentially serious consequences for the everyday lives of Americans” because “unbounded discretion carries with it grave potential for abuse.”

Justice Scalia, writing the opinion for the divided Court in *Kyllo v. United States*,<sup>6</sup> held that the use of a sense-enhancing device that is not in general public use to explore details of the home that would previously have been unknowable without physical intrusion is a “search” and is presumptively unreasonable without a warrant. Danny Kyllo was suspected of growing marijuana in his home, which typically requires high-intensity lamps. Officers used a thermal-imaging device to

scan the heat emanating from his home and determined that the heat was consistent with the use of such lamps. They subsequently obtained a warrant and found more than 100 marijuana plants. Noting that a warrantless search of the home is generally unreasonable, Scalia explained that the relevant inquiry is to determine “when a search is not a search.” Citing *Katz v. United States*,<sup>7</sup> he explained that the Court had formulated a two-part answer to that question: an individual must manifest a subjective expectation of privacy in the object of the search and society must be willing to recognize that expectation as reasonable. Scalia observed that though “the advance of technology . . . [has] uncovered portions of the house and its curtilage that once were private,” the Court has never decided “how much technological enhancement of ordinary perception . . . is too much.” Therefore, he set out to establish a general principle that “assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted” and yet takes into account technology “already in use or in development.” Based on that principle, “the information obtained by the thermal imager . . . was the product of a search.” Scalia rejected the contention that “the thermal imaging must be upheld because it detected ‘only heat radiating from the external surface of the house.’” He pointed out that this “mechanical interpretation of the Fourth Amendment” was also rejected in “*Katz*, where the eavesdropping device [placed on the outside of a telephone booth] picked up only sound waves that reached the exterior of the phone booth.” To depart from this precedent “would leave the homeowner at the mercy of technology—including imaging technology that could discern all human activity in the home.” Although the government insisted that the thermal imaging did not detect private activities in the home or reveal “intimate details,” Scalia asserted, “in the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes.” Justice Stevens, in dissent, argued that the thermal-imaging device only “gathered data exposed on the outside of petitioner’s home” and should therefore be permissible because “what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”

In *Saucier v. Katz*,<sup>8</sup> the Court held that “qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest.” During a speech by Vice President Al Gore in 1994, protester Elliot Katz was apprehended, quickly “shoved” into a military van, and briefly detained. The Court of Appeals for the Ninth Circuit agreed with the district court “that ‘in the Fourth Amendment context, the qualified immunity inquiry is the same as the inquiry made on the merits,’” and accordingly ruled “that the reasonableness inquiry into excessive force meant that it need not consider aspects of qualified immunity, [therefore] leaving the whole matter to the jury.” The United States Supreme Court overruled that ruling because qualified immunity is intended to be “an entitlement [to officials] not to

5. 532 U.S. 318 (2001).

6. 121 S.Ct. 2038 (2001).

7. 389 U.S. 347 (1967).

8. 121 S.Ct. 2151 (2001).

stand trial or face the other burdens of litigation” such as “the costs and expenses of trial.” Accordingly, “a qualified immunity defense must be considered in proper sequence . . . [and] a ruling on that issue should be made early in the proceedings” and not be fused with the constitutional analysis to be decided later by the jury.

### THE FIFTH AMENDMENT

In *Ohio v. Reiner*,<sup>9</sup> the Court reversed an Ohio Supreme Court holding that a witness who denies all culpability cannot claim a Fifth Amendment privilege against testifying. The Court cited its holding in *Hoffman v. United States*<sup>10</sup> that “it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.” Thus, a person who claims innocence may still invoke the Fifth Amendment as long as there is reasonable cause to apprehend incrimination from a direct answer at trial. The Court asserted that although it had previously “held that the privilege’s protection extends only to witnesses who have ‘reasonable cause to apprehend danger from direct answer,’ it has ‘never held . . . that the privilege is unavailable to those who claim innocence.’”

### DOUBLE JEOPARDY

In *Seling v. Young*,<sup>11</sup> the Court held that a confinement statute, found to be civil, cannot be deemed punitive “as applied” to a single individual in violation of the Double Jeopardy and Ex Post Facto clauses and thus provide cause for release. Andre Brigham Young was convicted of six rapes over the course of three decades. Upon release from prison, he was found to be a “sexually violent predator” under Washington State’s Community Protection Act of 1990 and therefore civilly “committed for control, care, and treatment to the custody of the department of social and health services.” The Washington Supreme Court found that the statute was “clearly intended to create a civil scheme both in the statutory language and legislative history,” and since its “goals of incapacitation and treatment” were distinguished from a goal of punishment, it did not violate the Double Jeopardy and Ex Post Facto Clauses of the Federal Constitution. When Young claimed that he was subject to confinement conditions that were punitive and “incompatible with treatment,” however, the Ninth Circuit reasoned that “the actual conditions of his confinement could divest a facially valid statute of its civil label” if there is clear proof that it is “punitive in effect.” The United States Supreme Court held that this “as applied” analysis of the statute on Double Jeopardy and Ex Post Facto grounds was “fundamentally flawed” and could not be used to provide relief. The Court explained that it must look at the “legislature’s manifest intent” when determining whether an act is civil or punitive in

nature. The Court also insisted that in evaluating the civil nature of an act, courts must refer “to a variety of factors ‘considered in relation to the statute on its face’” and not on the effect the statute has on a single individual. In concluding that the “as applied” analysis was “unworkable,” the Court said that such analysis “would never conclusively resolve whether a particular scheme is punitive and would thereby prevent a final determination of the scheme’s validity under the Double Jeopardy and Ex Post Facto Clauses.”

### THE SIXTH AMENDMENT

Chief Justice Rehnquist, writing for a divided Court in *Texas v. Cobb*,<sup>12</sup> held that the Sixth Amendment right to counsel attaches to offenses, though not formally charged, that are the “same offense” under the test set forth in *Blockburger v. United States*.<sup>13</sup> In that case, the Court explained that whether the Sixth Amendment right to counsel will attach to an uncharged offense depends on “whether each provision requires proof of a fact which the other [charged] offense does not.” In the present case, Raymond Cobb was indicted for burglary and was appointed counsel. While free on bond, Cobb confessed to his father that he had murdered the occupants of the home he burglarized. Police took him into custody and administered warnings pursuant to *Miranda v. Arizona*,<sup>14</sup> which he waived. He then confessed to the police and was convicted of capital murder. Cobb argued that his confession should have been inadmissible because it was obtained in violation of his Sixth Amendment right to counsel, which attached when counsel was appointed for him on the burglary charge. However, the chief justice pointed out that under Texas law burglary and capital murder are different offenses based on the *Blockburger* test, and therefore the right to counsel did not attach to the capital murder offense. Thus, the confession was admissible. In response to predictions that this “offense specific rule will prove ‘disastrous’ to suspects’ constitutional rights” by allowing police “complete and total license to conduct unwanted and uncounseled interrogations,” the chief justice offers two important considerations. First, suspects are guaranteed their rights against self-incrimination under *Miranda*. Second, “the Constitution does not negate society’s interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses.”

### THE DEATH PENALTY

In *Penry v. Johnson*,<sup>15</sup> the Supreme Court reversed a Texas court’s judgment sentencing John Paul Penry, a retarded man, to death. The Court failed to reach the question of whether the Constitution prohibits the execution of the retarded, however, overturning the sentence based on inadequacy of the jury instructions. When Penry was originally found guilty of capital murder, the jury was instructed to determine his sentence by answering three statutorily mandated “special issues”

9. 532 U.S. 17 (2001).  
10. 341 U.S. 479, 486-87 (1951).  
11. 531 U.S. 250 (2001).  
12. 532 U.S. 162 (2001).

13. 284 U.S. 299 (1932).  
14. 384 U.S. 436 (1966).  
15. 121 S.Ct. 1910 (2001).



regarding: (1) whether he acted deliberately, (2) the probability of his future dangerousness, and (3) whether he responded unreasonably to any provocation. The Court found, however, that “the jury was never instructed that it could consider and give mitigating effect to” evidence concerning Penry’s mental retardation and past child abuse. Therefore, the Court vacated his sentence, emphasizing the fact that the three special issues were not broad enough to provide the jury with a “vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence.” During the retrial, Penry was again found guilty and the trial court again instructed the jury to answer the same three “special issues” explaining that a “yes” to all of the questions would result in a death sentence and a “no” on any issue would result in a life sentence. The jury was also given a “supplemental instruction” that informed them to consider and give effect to any mitigating circumstances and that if they believed that a life sentence was appropriate, “a negative finding should be given to one of the special issues.” However, “the verdict form itself . . . contained only the text of the three special issues, and gave the jury two choices with respect to each special issue.” Penry was again sentenced to death, and the Supreme Court again vacated the sentence because the instructions “had no practical effect . . . [and] were not meaningfully different from the ones [it] found constitutionally inadequate” in the first case. The Court suggested that the “confusing” instructions were problematic for two reasons. First, the jury was “shackled and confined within the scope of the three special issues” already found inadequate to give effect to Penry’s mitigating evidence. Second, to give effect to the mitigating evidence, the jury would have been forced to “change one or more truthful ‘yes’ answers to an untruthful ‘no’ answer in order to avoid a death sentence for Penry.” The Court concluded that “it would have been both logically and ethically impossible for a juror to follow both sets of instructions” because either the supplemental instruction or the verdict form would have to have been ignored.

#### THE FOURTEENTH AMENDMENT

In *Rogers v. Tennessee*,<sup>16</sup> the Court held that the retroactive application of a judicial decision abolishing the common-law “year-and-a-day rule” to uphold a murder conviction did not deny a person of due process in violation of the Fourteenth Amendment. Wilbert Rogers was convicted of second-degree murder for stabbing a person who went into a coma and died 15 months later. Rogers asserted that according to common law he could not be convicted because his victim had not “died by [his] act within a year and a day of the act.” The Tennessee Supreme Court reviewed the rule’s justification and “found that the original reasons for recognizing the rule no longer exist” and, therefore, “abolished the rule as it had existed at common law in Tennessee” and affirmed his conviction. A divided United States Supreme Court held that this retroactive judicial abolition of the common-law rule did not offend the

Fourteenth Amendment. It relied on its decision in *Bouie v. City of Columbia*,<sup>17</sup> where it “held that due process prohibits retroactive application of any [judicial construction of a criminal statute [that] is unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue.” The Court considered this limitation on judicial decision making equally apposite in the common-law context because it provides the courts with “the substantial leeway . . . necessary to bring the common law into conformity with logic and common sense.” In reference to the “year and a day rule,” the Court concluded that its abolition was not unexpected and indefensible because it was created to compensate for the inadequacies of medical science in a time when it “was incapable of establishing causation beyond a reasonable doubt when a great deal of time had elapsed between the injury to the victim and his death.” Further, the Court recognized a trend among the majority of jurisdictions in abolishing the rule as relevant in determining whether it was unexpected and indefensible.

#### FEDERAL HABEAS CORPUS

In two cases this Term, the Court addressed whether criminal defendants may use habeas review under the Antiterrorism and Effective Death Penalty Act to collaterally challenge prior convictions upon which a present sentence enhancement is based. The first decision to answer this question was *Daniels v. United States*.<sup>18</sup> Justice O’Connor, writing for a divided Court, held that if an individual failed to pursue remedies (or did so unsuccessfully) that were otherwise available to directly challenge prior convictions while in custody for those convictions, that person may not use a 28 U.S.C. section 2255 challenge of his present, enhanced federal sentence to collaterally attack the prior convictions. Section 2255 “permits ‘a prisoner in custody under sentence of a [federal] court’ to ‘move the court which imposed the sentence to vacate, set aside or correct the sentence’ upon the ground that ‘the sentence was imposed in violation of the Constitution.’” The Court supported this conclusion by focusing on the “ease of administration and the interest in promoting the finality of judgments.” The Court explained that “a district court evaluating a § 2255 motion is as unlikely as a district court engaged in sentencing to have the documents necessary to evaluate claims arising from long-past proceedings in a different jurisdiction.” Regarding the interest in finality, the Court reasoned that “even after a defendant has served the full measure of his sentence, a State retains a strong interest in preserving the convictions it has obtained,” noting that states “impose a wide range of disabilities on those who have been convicted of crimes, even after their release.” The Court acknowledged a forum must be provided in which “defendants may challenge their convictions or constitutional infirmity.” “But it does not necessarily follow,” the Court ruled, “that a § 2255 motion is an appropriate vehicle for determining whether a conviction later used to enhance a federal sentence was unconstitutionally obtained.”

16. 121 S.Ct. 1693 (2001).

17. 378 U.S. 347 (1964).

18. 121 S.Ct. 1578 (2001).

In Justice Souter's dissent, he criticized the Court for placing "a flat ban on §2255 relief" for ease of administration and the interest in finality. He asserted that a prisoner should not "be barred from returning to challenge the validity of a conviction, when the Government is free to reach back to it to impose extended imprisonment under a sentence enhancement law unheard of at the time of the earlier convictions." Breyer concluded, "In denying [a prisoner] any right to attack convictions later when attacks are worth the trouble, the Court adopts a policy of promoting challenges earlier when they may not justify the effort and perhaps never will."

Justice O'Connor wrote the opinion for the same 5-4 majority in *Lackawanna County District Attorney v. Coss*.<sup>19</sup> Referring to its decision in *Daniels*, the Court extended that holding to the 28 U.S.C. section 2254 context. Section 2254 is "a post-conviction remedy in federal court for state prisoners . . . available to 'a person in custody pursuant to the judgment of a State court' if that person 'is in custody in violation of the Constitution.'" The Court held "once a state conviction is no longer open to direct or collateral attack in its own right . . . [and] is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under §2254." The Court offered the same considerations of ease of administration and interest in finality to support this decision as it did in *Daniels*. Justice Souter presented the same criticisms and concerns, declaring, "The error of *Daniels v. United States* . . . is repeated once more."

In *Tyler v. Cain*,<sup>20</sup> a divided Court held that a holding from the United States Supreme Court is the only way a new rule of constitutional law can be made retroactive within the meaning of section 2244(b)(2)(A) of the Antiterrorism and Effective Death Penalty Act. After Melvin Tyler had been found guilty of second-degree murder, the United States Supreme Court decided *Cage v. Louisiana*;<sup>21</sup> under *Cage*, "a jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood the instruction to allow conviction without proof beyond a reasonable doubt." Because his jury instruction was identical to the one criticized in *Cage*, Tyler filed a second federal habeas corpus application after *Cage* was decided. Under section 2244(b)(2)(A), a second or successive habeas application can survive only if "the applicant 'shows' that the 'claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was pre-

viously unavailable." The Court explained that it "is the only entity that can 'ma[k]e' a new rule retroactive," and "based on the plain meaning of the text read as a whole, . . . 'made' means 'held' and, thus, the requirement is satisfied only if this Court has held that the new rule is retroactively applicable to cases on collateral review." Though Tyler argued that the *Cage* rule was "made retroactive to cases on collateral review" by the reasoning of two other Supreme Court decisions, the Court concluded that "[t]he most [Tyler] can claim is that . . . this Court should make *Cage* retroactive to cases on collateral review," which it declined to do. Justice Breyer argued in dissent that "nothing in the statute's purpose favors, let alone requires, the majority's conclusion." In addition, he said, "the most likely consequence of the majority's holding is further procedural complexity." Breyer predicted that "we will be required to restate the obvious, case by case, even when we have explicitly said, but not 'held,' that a new rule is retroactive." He concluded that "the Court's approach will generate not only complexity, along with its attendant risk of confusion, but also serious additional unfairness."

## CONCLUSION

As the numerous 5-4 decisions demonstrate, the ideological balance of the Supreme Court plays a significant role in the outcome of many decisions. Though none of the justices retired this term, the longevity of this balance as well as its influence on future criminal cases will ultimately depend on the Court appointments President Bush is expected to make in the coming years.



Charles H. Whitebread is the George T. and Harriet E. Pfleger Professor of Law at the University of Southern California Law School, where he has taught since 1981. His oral presentations at the annual educational conference of the American Judges Association exploring recent Supreme Court decisions have been well received for many years. He is found on the Web at <http://www-rcf.usc.edu/~cwhitebr/>. Professor Whitebread gratefully acknowledges the help of his research assistant, Robert Downs.

19. 121 S.Ct. 1567 (2001).

20. 121 S.Ct. 2478 (2001).

21. 498 U.S. 39 (1990).

## THE AMERICAN JUDGES ASSOCIATION

The American Judges Association is the largest independent organization of judges in the world. It has about 3,000 members from the United States, Canada, and Mexico. About 40% of AJA's members are state general jurisdiction trial judges, while another 40% are municipal court or other limited jurisdiction trial judges. The remainder include state and federal appellate judges, federal trial judges, and administrative law judges.

# The Resource Page: Focus on Legal Writing



## BOOKS

BRYAN A. GARNER, *A DICTIONARY OF MODERN AMERICAN USAGE*. Oxford Univ. Press, 1998. (\$37.95). 770 pp.

Two aspects of its preparation and design make this the best English-usage book available today. First, computer-assisted research has allowed Bryan Garner to search thousands of sources to find answers to what usages actually are in use today. For example, Garner's search of the NEXIS databases found 10,138 references to ethicist but only 25 to ethician. Garner concludes that although ethician dates back to the 17th century and thus has precedence in most dictionaries, it is a needless relic in today's English. Second, Garner is simply unsurpassed in the sweep of his knowledge, the clarity of his explanations, and the ability to form the sound judgments that are at the heart of all debates about proper usage.

BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE*. Oxford Univ. Press, 2d ed. 1995 (\$65 hardcover; \$25 paperback). 951 pp.

Like a normal dictionary, its entries are alphabetical, but this dictionary covers questions of usage, not definitions. From standard questions like when to use "which" and "that" or "affect" and "effect" to legal-specific issues like the proper use of the word "precedent" or whether you can use the word "conclusory" even though it's not in the dictionary, Garner supplies good advice that's clearly written. He also provides good sources, like the citation to *Greenwood v. Wierdsma*, 741 P.2d 1079, 1086 n.3 (Wyo. 1987) ("[W]e like the word *conclusory*, and we are distressed by its omission from the English language. We now proclaim that henceforth *conclusory* is appropriately used in the opinions of this court."). If you were to

limit yourself to only one resource from those listed on these pages, this is probably the best single background resource for the legal writer: it contains much of the information separately covered in his *Dictionary of Modern American Usage*, while also providing many entries specific to legal writing. For the judge, we add that Garner provides some useful comments about writing style and judicial opinions, as well as his own brief bibliography on those subjects, under the headings "Legal Writing Style" and "Opinions, Judicial."

BRYAN A. GARNER, *THE ELEMENTS OF LEGAL STYLE*. Oxford Univ. Press, 1991 (\$27.50). 236 pp.

This guide is specifically modeled after the best-known general style manual, Strunk & White's *The Elements of Style*. It includes much good advice, with a majority of the book devoted to advice specific to legal writing.

MERRIAM-WEBSTER'S *DICTIONARY OF ENGLISH USAGE*. Merriam-Webster, Inc., rep. ed. 1993 (\$21.95). 992 pp.

For those of you who like to hear opposing viewpoints, this is a great English-usage book. It draws from dozens of other usage authorities, telling you what's generally accepted and, when appropriate, why some disagree with the generally accepted position.

THE AMERICAN HERITAGE BOOK OF ENGLISH USAGE: A PRACTICAL AND AUTHORITATIVE GUIDE TO CONTEMPORARY ENGLISH. Houghton Mifflin Co., 1996 (\$14.00 paperback). 290 pp.

Inexpensive but accurate advice is available in this book, which reports in many cases on the opinions of the 158-member American Heritage Usage Panel. Where else can you learn that most of the panel members believe that only women can be called *vivacious*, while only men can be considered

*debonair*? Usage Panel members at the time of publication included Justice Antonin Scalia, Carl Sagan, Senator Daniel Patrick Moynihan, James Michener, and Garrison Keillor.

BLACK'S LAW DICTIONARY (7th ed.) (Bryan A. Garner, ed.). West Publishing Co., 1999 (\$55.95 hardcover). 1738 pp.

BLACK'S LAW DICTIONARY (Abridged 7th ed.) (Bryan A. Garner, ed.). West Publishing Co., 2000 (\$44.95 paperback). 1308 pp.

BLACK'S LAW DICTIONARY, POCKET ED. (2d ed.) (Bryan A. Garner, ed.). West Publishing Co., 2001 (\$24.95 paperback). 720 pp.

The prior, 6th edition of *Black's Law Dictionary* was published in 1990. Four years later, Bryan Garner, leading a team of editors, legal historians, scholars, lawyers, and judges, began work on a complete revision. Every definition was reexamined and hundreds of new entries were added. Garner's first work product was a pocket edition that came out in 1996; its definitions were clear, concise, up-to-date, and simply superior to the 1,657-page 6th edition. Garner's full edition, *Black's 7th*, came out in 2000. In 2001, for the first time, the United States Supreme Court relied specifically on one of the dictionary's definitions in deciding a case. See *Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources*, 121 S.Ct. 1835, 1853 (2001)(Ginsburg, J., dissenting) ("The Court derives this 'clear meaning' [of the term 'prevailing party'] principally from *Black's Law Dictionary*. . ."). All three editions contain the word *conclusory*, which is not found in the *Oxford English Dictionary* but is a favorite of lawyers and judges. For opinion writing, you'll want the full, hardcover edition; for home or general use, though, either of the paperback editions is quite good.

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed.) (David R. Pritchard, ed.). Houghton Mifflin Co. 2000 (\$60). 2,015 pp. plus appendix.

This dictionary is simply luxurious, with concise, up-to-date definitions and great pictures and graphics. Current usage is reflected, with the same usage panel that completes surveys for the *American Heritage Book of English Usage*. For example, the dictionary notes that “website” is now the preferred spelling over “Web site,” providing a detailed usage note about the changing terminology on technology. And unlike other general-use dictionaries, it contains the word *conclusory*, specifically noting its use in legal writing and even providing an example.



## ARTICLES ON OPINION WRITING

### Chicago Law Review Special Issue on Judicial Opinion Writing

- James Boyd White, *What's an Opinion For?*, 62 *Chicago L. Rev.* 1363 (1995).
- Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 *Chicago L. Rev.* 1371 (1995).
- Richard A. Posner, *Judges' Writing Styles (And Do They Matter)?*, 62 *Chicago L. Rev.* 1421 (1995).
- Patricia M. Wald, *A Reply to Judge Posner*, 62 *Chicago L. Rev.* 1451 (1995).
- Frederick Schauer, *Opinions as Rules*, 62 *Chicago L. Rev.* 1455 (1995).
- Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 *Chicago L. Rev.* 1477 (1995).

Copies of this special issue, the Fall 1995 issue of the *Chicago Law Review*, can be ordered from the William S. Hein Company (1-800-828-7571; [www.wshein.com](http://www.wshein.com)) for \$20 plus shipping. The issue includes an entertaining exchange between federal appellate judges Richard Posner and Patricia Wald.

Robert F. Blomquist, *Playing on Words: Judge Richard A. Posner's Appellate Opinions, 1981-82—Ruminations on Sexy Judicial Opinion Style During an Extraordi-*

*nary Rookie Season*, 68 *U. Cin. L. Rev.* 651 (2000).

Benjamin N. Cardozo, *Law and Literature*, 48 *Yale L.J.* 471 (1939).

Charles N. Day, *Judicial Boilerplate Language as Torts Decisional Litany: Four Problem Areas in North Carolina*, 18 *Campbell L. Rev.* 359 (1996).

Paul Gerwitz, *On "I Know It When I See It,"* 105 *Yale L.J.* 1023 (1996).

Walter Gibson, *Literary Minds and Judicial Style*, 36 *N.Y.U. L. Rev.* 915 (1961).

Paul Horwitz, *Law's Expression: The Promise and Perils of Judicial Opinion Writing in Canadian Constitutional Law*, 38 *Osgoode Hall L.J.* 101 (2000).

Glen Leggett, *Judicial Writing: An Observation by a Teacher of Writing*, 58 *Law Lib. J.* 114 (1965).

Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 *Colum. L. Rev.* 810 (1961).

Abner J. Mikva, *For Whom Judges Write*, 61 *S. Cal. L. Rev.* 1357 (1988).

Steven M. Oxenhandler, *The Lady Doth Protest Too Much Methinks: The Use of Figurative Language from Shakespeare's Hamlet in American Case Law*, 23 *Hamline L. Rev.* 370 (2000).

George R. Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 *Ark. L. Rev.* 197 (1967).

Irving R. Younger, *On Judicial Opinions Considered as One of the Fine Arts*, 51 *U. Colo. L. Rev.* 341 (1980).



## USEFUL WEBSITES

**American Heritage Dictionary of the English Language (4th ed. 2000).**

<http://www.bartelby.com/61/>

This dictionary is available online, along with several other American Heritage resources, including *Roget's Thesaurus*. By searching the “American

Heritage Collection,” you can find the dictionary definition of a word, any other words that include that word in their definition, and synonyms or antonyms from the thesaurus. Searching for the word “condemn,” for example, not only turns up all five definitions of that word (including its legal meaning of appropriating property for public use), but also leads you to the entries for damn, denounce, decry, deplore, disapprove, criticize, doom, and proscribe. We prefer the elegance of the oversized, eight-pound hardback version of the dictionary, but it's awfully convenient to have this full dictionary (and more) available to you wherever you can connect to the Web.

### Bartelby.com

<http://www.bartelby.com>

The Web is vast and hard to search, but we feel certain that the depth and breadth of information available for writers at this website is not matched anywhere else. The contents include the *American Heritage Dictionary of the English Language*, the *American Heritage Book of English Usage*, the *Columbia Encyclopedia*, the *World Factbook*, the *Columbia Gazetteer of North America*, *Roget's Thesaurus*, *Bartlett's Familiar Quotations* and two other quotation collections, the complete works of Shakespeare, poetry from Emily Dickinson, Robert Frost, Walt Whitman, and others, the King James version of the Bible, Gray's *Anatomy of the Human Body*, William Strunk's 1918 *The Elements of Style*, and Emily Post's 1922 *Etiquette*. A search engine allows convenient searching of one or all of these resources.

### HyperGrammar

<http://www.uottawa.ca/academic/arts/writcent/hypergrammar/>

**Jack Lynch's Guide to Grammar and Style**

<http://andromeda.rutgers.edu/~jlynch/Writing/>

Don't want to plunk down the money for one of the usage dictionaries? Well, the Web won't give you the same depth of coverage, but you can find the basic rules at either of these sites.





# The Resource Page



## NEW BOOKS

D. GRAHAM BURNETT, *A TRIAL BY JURY*. Knopf, 2001 (\$21). 192 pp.

In its review of this book, the *New York Times* said, "Any reader who has gone through a tour of jury duty is likely to respond to this engaging book with a glow of recognition." Given some of the views expressed in the book, we hope that few jurors have had the experiences of Burnett, who served on the jury in a New York murder trial. Burnett's jury spent most of its first two days of deliberation trying to figure out the jury instructions, which had been read once in court and not provided to the jurors in writing. The trial judge, who is not named, is described as a "dry and disagreeable man" who ran the court in a tyrannical fashion. For any judge operating in a jurisdiction or courtroom in which modern jury reforms (written instructions given at the start and close of trial, juror note-taking, etc.) have not been adopted, this first-hand account of the reactions of a juror trying to do his job in a trial using traditional methods merits review.

RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY*. Harvard Univ. Press, 2001 (\$35). 440 pp.

Judge Posner, the long-time intellectual leader of the law and economics movement, extends his discussion of the influence of the social sciences on the law. In this book, he discusses the influences on the law of psychology, history, and statistics, while keeping the influence of economic principles front and center throughout. As always, his treatment of these issues is original and well-researched.

BRYAN A. GARNER, *LEGAL WRITING IN PLAIN ENGLISH*. Univ. of Chicago Press, 2001 (\$40 hardcover; \$15 paperback). 221 pp.

Bryan Garner's latest contribution to

the legal writing world is based on the highly successful seminars he has given to thousands of lawyers. Most of the advice in the book could apply to any writing, not just to writing lawyers' briefs, research memos, or contracts. For example, his suggestions for directly dealing with counterarguments would apply just as well to the writer of a judicial opinion as to the author of a brief. The book concludes with a helpful, 17-page summary of the correct uses—and most common misuses—of punctuation.



## WEBSITE UPDATES

**National Center for State Courts**  
<http://www.ncsconline.org>

Even if you've been there before, take a moment to go to the National Center for State Courts website. It has been totally redesigned and the effort no doubt invested in the website design work has greatly improved both the appearance and functionality of the site. Lots of useful reports can be found online. At the Research Division page, for example, more than 25 different reports are available on the first page alone. Or, if you need salary data, the semiannual survey of state judicial salaries can be found easily by using the search engine found in the upper right-hand corner of the National Center's home page and typing in "judicial salary."

## TOP COURT WEBSITES

### Best Overall Sites

1. Ninth Judicial Circuit, Florida  
<http://www.ninja9.org>
2. North Dakota Supreme Court  
<http://www.court.state.nd.us>
3. Maricopa County Superior Court  
<http://www.superiorcourt.maricopa.gov>
4. New Jersey Judiciary  
<http://www.judiciary.state.nj.us>

5. Northern District of Indiana  
<http://innnd.uscourts.gov>
6. Supreme Court of Canada  
<http://www.scc-csc.gc.ca>
7. Los Angeles Superior Court  
<http://www.lasuperiorcourt.org>
8. Vermont Judiciary  
<http://www.vermontjudiciary.org>
9. Dakota County District Court  
<http://co.dakota.mn.us/courts>
10. North Carolina Judiciary  
<http://www.aoc.state.nc.us>

### Best Educational Sites

1. Arizona Supreme Court  
<http://www.lawforkids.org>
2. Washington Judiciary  
<http://www.courts.wa.gov>
3. Maricopa County Superior Court  
<http://www.superiorcourt.maricopa.gov>
4. Utah Judiciary  
<http://courtlink.utcourts.gov>
5. Eighteenth Judicial Circuit, Florida  
<http://www.18thcircuit.state.fl.us>
6. Supreme Court of Canada  
<http://www.scc-csc.gc.ca>

### Best Public Access Sites

1. Ninth Judicial Circuit, Florida  
<http://www.ninja9.org>
2. Dakota County District Court (Minn.)  
<http://www.co.dakota.mn.us/courts>
3. Utah Judiciary  
<http://courtlink.utcourts.gov>
4. Washington Judiciary  
<http://www.courts.wa.gov>
5. Los Angeles Superior Court  
<http://www.lasuperiorcourt.org>

[Top court websites as announced at the CTC7 Conference, sponsored by the National Center for State Courts, held August 14-16, 2001 in Baltimore, Maryland.]



## FOCUS ON LEGAL WRITING

The Resource Page focuses on resources that can help you with legal writing on pages 46-47.