Symptoms of Bad Writing

Irving Younger

So prevalent is bad legal writing that we get used to it, shrugging it off as a kind of unavoidable occupational disability, like a cowboy's bowlegs. This is an unfortunate state of affairs. Bad writing goes with bad thinking, and since bad thinking is the source of many of the ills that beset us, lawyers should acknowledge a professional obligation to wage war against bad writing. If the author who produced it is you, correct it. If another, condemn it.

But who can correct or condemn without first recognizing? It's not hard. The disease of bad writing has many symptoms, five of which a child could spot. The first shows up chiefly in statutes; the second in contracts and similar documents; the third, fourth, and fifth in briefs and judicial opinions.

First, the dread *provided that*. Use a proviso and you show that you hadn't thought through what you wanted to say before starting to write. You came to the end with matter left unexpressed. Rather than begin again and weave the unexpressed matter into your text where it belongs, you tack a *provided that* into your last sentence, vexing the reader and convicting yourself of slovenly intellectual habits. For example:

> No person who has not attained the age of twelve years shall be competent to testify, provided that, if the court finds that any such person understands the nature and obligation of the oath, such person shall be competent to testify.

This statute should have been rewritten as follows:

> Every person above the age of twelve years is competent to testify, but a person beneath that age is also competent if the court finds that the person understands the nature and obligation of an oath.

Second, the unnecessary *herein*, *hereinabove*, and *hereinafter*. These are show-off words. Anyone who uses them wants the world to see that it's a lawyer talking, for only lawyers use such words. There's no need to remind the world that you're a lawyer, and there's no need for *herein*. When asked where's the library, you don't reply, "Two streets down in this city." "Two streets down" suffices, because no one will mistake your meaning. So strike the *hereinabove* from *as defined in paragraph 2 hereinabove*. "Paragraph 2" can't refer to some other document unless you say that it does, in which case you'll write, for example, "as defined in paragraph 2 of the master lease of December 20, 1985."

Third, the screaming adverb or adjective. Here, you wish to convey to the court the intensity of your feelings. You do so by adverbs and adjectives that neither communicate nor convince. They merely register your dudgeon, which an experienced advocate knows serves only to mark the offending brief as beginner's work. For example, in "This ruling was outrageously unfair and is a blatant violation of due process," the adverb *outrageously* and the adjective *blatant* are screamers. Delete them.

Fourth, humorless exaggeration. When Mark Twain says of *Huckleberry Finn* that "persons attempting to find a plot in [this narrative] will be shot," we laugh. No judge so much as smiles at the solemn overstatement that many lawyers seem to think is the way to argue a case. It isn't. Humorless exaggeration merely leaves the judge suspicious of the trustworthiness of a brief replete with the likes of this:

> The evidence demonstrates that [the university] has consistently appointed to tenured professorships so few [members of an identifiable group] as to constitute only about half of their representation in the population at large. This is naked racism, amounting to genocide.

Naked is a screamer, and in the circumstances, it's absurd for counsel to be speaking of "racism" and "genocide." Avoid humorless exaggeration.

Fifth, egregious legalisms. Legalisms, the jargon of the law, have a limited utility. Employ them within those limits. Beyond those limits, use plain English. This memorandum by an appellate court is an example of how not to do it:

> The order of the trial court denying appellant-appellant-respondent's motion for summary judgment and granting respondent-respondent-respondent's cross motion for, *inter alia*, leave to amend the complaint and for leave to serve a late notice of claim, *nunc pro tunc*, against respondent-respondent-appellant is reversed, respondent-respondent-respondent's motion denied, and appellant-appellant-respondent's motion for summary judgment granted.

Substitute *plaintiff* or *defendant*, *Jones* or *Smith*, for those whirling *appellants* and *respondents*, and you've mitigated the memorandum's opacity.

Skimming the Fat Off Your Writing

Irving Younger

When Rudyard Kipling finished a story, he would put the manuscript away in a drawer. After a month or so, he took it out, read it over, and struck out every word he then saw to be unnecessary. Kipling called this "letting it drain," and Kipling's "letting it drain" is among the chief assurances of persuasive writing.

So "let it drain," not necessarily in Kipling's way by revising your pleading, contract, or opinion after a 30-day cooling-off period, but certainly by rewriting your first draft in accordance with two related principles inspired by Kipling's example.

First, eliminate. Examine each word sitting there on your page and ask it, "What do you do for me?" If the answer is that it merely loiters, doing nothing, make the superfluous word get up and move along. Let lazy language take its ease elsewhere, but never in your writing.

Second, boil down. A briefer version is always better than a longer. Remember, verbosity endangers. Language is as precious as any coinage and as easily debased. The spendthrift of words risks a fate even worse than that awaiting the spendthrift of money. All the latter need fear is an empty pocket; the former hazards an empty head.

"Draining" lends precision to your ideas. You can't eliminate unnecessary words without first determining which are the necessary words. You can't boil down unless you have first thought hard about what you propose to say.

Further, eliminating unnecessary words gives your prose clarity of focus. Boiling down leads to economy of effort, the parsimonious adaptation of linguistic means to intellectual ends. These two qualities — clarity and economy — bespeak a mind at work, and

when your reader perceives a mind at work, persuasion is only a step away.

To illustrate, take the opening paragraph of the Supreme Court's opinion in the celebrated case of *Roe v. Wade*, 410 U.S. 113 (1973):

> This Texas federal appeal and its Georgia companion . . . present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

This wants revision. One respectfully wishes the author had proceeded as follows:

First sentence. (1) Because the United States Supreme Court is a federal court, to describe the appeal as "federal" is redundant. Eliminate. (2) What do Supreme Court appellants do but challenge state legislation under the Constitution? Boil down *present constitutional challenges*. (3) *State criminal abortion legislation*, a string of four nouns with the first three serving as adjectives, is barbarous English. A verb would handle the job better.

Second sentence. (1) Given the first sentence's reference to the statutes under attack, the phrase *under attack here* adds nothing. Eliminate. (2) The clause *that have been in effect* can be boiled down.

Third sentence. (1) By describing the Georgia statutes as modern and, in the preceding sentence, the Texas statutes as old, the author has already drawn the contrast. Eliminate the unnecessary phrase *in contrast*. (2) *Modern cast* means "modern." Why two words instead of one? And why expend a word to label the Georgia statutes modern when the rest of the sentence elucidates their modernity? (3) To say that "statutes . . . are a legislative product" is to say that statutes are statutes. Boil down. (4) The phrase *to an extent at least* is inconsistent with the adverb *obviously*. Neither is necessary. Eliminate. (5) *Reflects* means "shows the influence of" something. Hence, *reflects the*

influence of is redundant. Boil down. (6) *Recent attitudinal change.* People always have attitudes. A recent attitude must, therefore, be a change from old attitudes. Boil down. (7) "Medical knowledge" includes "techniques." Boil down.

Rewritten, the paragraph reads as follows:

> This Texas appeal and its Georgia companion . . . challenge state legislation making abortion a crime. The Texas statutes are typical of those in effect in many states for approximately a century, while the Georgia statutes reflect recent attitudes, advancing medical knowledge, and new thinking about an old issue.

Consider this general method for writing persuasively. (1) Since clear ideas make clear writing, think about your meaning before trying to express it. (2) Use verbs liberally, especially verbs other than *to be*, and preferably verbs in the active voice. (3) "Let it drain" by eliminating the superfluous and boiling down the verbose.

A Good Example and a Bad

Irving Younger

Go to 112 *Federal Reporter Second*, and at page 538 you will find *Meaney v. United States*, in which the Court of Appeals for the Second Circuit held that a patient's statements to his physician describing past physical symptoms are admissible despite the bar of the rule against hearsay.

No one but a zealot of the law of evidence would be concerned with the opinion were its author not Learned Hand. That it is a Learned Hand opinion commends it to all who love the English language.

Observe how the great judge begins:

> This is an appeal from a judgment entered upon the verdict of a jury, dismissing a petition in an action to recover upon a policy of war risk life insurance. The insured was mustered out on December 31, 1918, and the policy lapsed on January 30, 1919; he died of pulmonary tuberculosis on July 6, 1922, and the question was whether he was permanently and totally disabled when the policy lapsed.

No throat-clearing, no fanfares, and no preliminary juggling act to warm up the audience. Hand gets right to it, demonstrating that a principal virtue of persuasive legal writing, as of all good expository prose, is directness.

Your eye and mind move effortlessly from the two sentences just quoted, on through the next eight sentences, to the end of the opinion's first paragraph. Having read it, and one reading will suffice, you possess all the complicated facts necessary to understand the rest of the opinion. No effort is required. You come to the second paragraph with resources undiminished, fresh and ready for the difficult legal analysis there presented. This doesn't happen by accident. Clarity being another principal virtue of persuasive writing, Judge Hand has made sure that his first paragraph is clear.

Not counting dates or citations, the first paragraph contains 319 words. Of that total, 7 are words of five syllables (*tuberculosis* twice, *sanatorium* twice, *examination* twice, and *determinative*), 5 are words of four syllables, 35 are words of three syllables, 44 are words of two syllables, and 228 — 71% of the whole — are words of one syllable. A third principal virtue of persuasive writing, as Judge Hand's opinion shows us, is simplicity of vocabulary, the use of those short and exact words that are the glory of English and the joy of every skillful writer.

For a contrasting example, turn back in 112 F.2d to page 163, where a judge of the Court of Appeals for the Third Circuit starts an opinion as follows:

> We think it fair to say that the resolvement of the case at bar depends upon the judicial stigmatism of the court deciding it. The learned district judge and ourselves are required to appraise facts in relation to, first, causation and, second, a standard of care. Our appraisal happens to differ with his and we find the same difference in the 'books'. It is an application of facts to a point of view. We should begin, therefore, with a statement of those facts.

Since faithful readers of this column know by now how to spot bad legal writing, I do not need to put a label on the quoted paragraph.

It is not direct. Why impose on our patience with introductory curlicues serving no purpose? Had the judge omitted his first paragraph, he would have produced a better opinion.

The quoted paragraph is not clear. Read it; read it a second time. Do you know what its author is trying to say? You can guess, perhaps, but legal writing that leaves the reader guessing at its meaning is invariably unpersuasive.

The quoted paragraph is not simple. Its first sentence alone contains an unnecessary clause, *We think it fair to say* (if the court thought it unfair, the court wouldn't say it); an awkward and unusual word, *resolvement* (perhaps a slip of the pen for *resolution*); and an out-of-control metaphor, *judicial stigmatism*. Look up

stigmatism in the dictionary and try to figure out what in heaven's name the judge wants to convey. I think it's something like, "It all depends on how you look at things." If so, *stigmatism* is the wrong word, and the thought is excessively trite, even (with all respect) by the inexigent standards of judicial philosophizing.

A fourth principal virtue of persuasive legal writing is wonderfully illustrated by comparing another aspect of our two examples. Judge Hand's paragraph, for all its excellence, never clamors for attention. It is modest and quiet, confident that its merit lies partly in the art by which the author has concealed his art. The other judge's paragraph is different. It promises handstands and backflips, shouting, "Look! See how clever I am! Admire me!" When the attempted acrobatics become a pratfall, the embarrassed bystander can only look the other way. One might say that persuasive legal writing should be like a triple-dry martini — colorless but powerful.

Lessons from a Bar Journal

Irving Younger

Lawyers must sometimes turn their hand to homelier stuff than the formal documents of legal practice. Not long ago, for example, a member of the board of editors (M.B.E.) of the journal of a state bar association was asked to put aside his weightier engagements and write the prefatory "editors' note to our readers" for the journal's next issue. This is what he produced, anatomized here not out of lack of charity, but to show that elevated status within the organized bar, lamentably, does not presuppose command of the mother tongue.

Our M.B.E. starts off with the following paragraph:

> This year marks the bicentennial celebration of the writing of the Constitution of the United States of America. This historic document was signed by representatives of twelve of the thirteen colonies. It is an incredible masterplan of representative government that has withstood the erosive forces of time and of events.

Concerned only with the mental quality of what is being said, an experienced reader of bar journals would probably overlook the triteness of these three sentences and remark merely that the first of them has its subject and object reversed (the year does not mark the bicentennial; the bicentennial marks the year), that the second is unrelated to the sentence before or after or to anything else in the editors' note (and the information it conveys — that the Constitution is historic and was adopted — is presumably familiar to members of a bar association), and that the third is overblown. How can the Constitution be "incredible," impossible to believe, when any doubt about its existence will be allayed by reference to the nearest almanac or encyclopedia? If that were all, one might chalk up the third sentence to bicentennial enthusiasm and forgo comment. But that isn't all. In addition to being overblown, the sentence can be replaced by a sentence of exactly opposite meaning without noticeable effect on the paragraph: "It is an incredible masterplan of representative

government that has overcome the inertial forces of time and of events." This is fatuousness of a kind that lawyers are much given to.

Our M.B.E. now quotes a passage from the foreword to Catherine Drinker Bowen's *Miracle at Philadelphia*. He describes the passage "as part of the forward to her book" and uses it to introduce a paragraph of his own that summarizes the issue's lead article:

> He [the author] presents to the readers a comprehensive study of this freedom shrine of American history. His article includes three aspects of the subject, namely the background material surrounding the composing of the document; the subsequent significant changes (amendments) to the text; the challenges facing the American people in the preservation of its effectiveness. More than any other professional group, lawyers are in the position to appreciate this great collective accomplishment of our Founding Fathers and the bearing the Constitution has on our legal system.

Before these few sentences, the critical faculties stand amazed. How can anyone born to the language perpetrate such a phrase as *freedom shrine of American history*, or call "background material" an aspect of the subject? How can he make so mindless an assertion as the one contained in his last sentence? How can he permit to be published over his name a piece of prose so ugly, so awkward, so false to the melody of decent English?

The rest of the editors' note is about twice again as long as the introductory paragraphs I have quoted and of equal quality with them. The lessons to be learned from this example of how not to do it are no fewer than six:

(1) Write as carefully for your local bar journal as you would for the United States Supreme Court.

(2) If you do write, be sure that you are acquainted with the vocabulary of English and that your words are used correctly.

(3) Make each of your sentences say something that an intelligent person might regard as sensible or worth saying.

(4) Arrange your sentences so that they express a connected line of thought.

(5) By reading the writing of good writers, teach yourself what good writing sounds like and try to make your writing sound like that.

(6) Failing these things, consider the virtues of silence.

Culture's the Thing

Irving Younger

Breathes there the lawyer who doesn't recall *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285 (1892)? Its facts were stated by John Maguire in his classic article, *The Hillmon Case — Thirty-Three Years After*, 38 Harv. L. Rev. 709 (1925):

> More than forty-six years ago Frederick Adolph Walters, then at Wichita, Kansas, wrote letters to his sister and his sweetheart in Fort Madison, Iowa, declaring his intention to leave on an early date "with a certain Mr. Hillmon, a sheep-trader, for Colorado or parts unknown to me." The rest is silence. None of the persons who would naturally have heard from Walters if alive ever had any later communication of his existence or whereabouts. "Parts unknown" evidently included eternity.
>
> Eternity, but not oblivion. About two weeks after Walters wrote his last letters a man was shot and killed at Crooked Creek, Kansas. Around the body raged a dispute as famous in its time as the fight over the body of Patroclus. For Hillmon had recently and heavily insured his life, and the dead man was said to be Hillmon.

Earlier this semester, I put two questions to my evidence class, 150 students who had read *Hillmon* and Maguire's commentary on it. First, I asked, who recognizes "The rest is silence," in Maguire's first paragraph? Second, who understands the reference to "the fight over the body of Patroclus," in the second paragraph?

One student recognized "The rest is silence" as Hamlet's last words, and ten understood the reference to Patroclus' body, recovered by Achilles in one of the central episodes of the *Iliad*.

Considering that each of those 150 young people had been declared by a good college to be an educated man or woman and that all of them were then just weeks short of completing their studies for entrance into a learned profession, these results are appalling. They

also explain the inability of so many lawyers and judges to write well, an inability that for some seems incurable, no matter how often the patients are doused with grammar, syntax, and vocabulary. The most they ever manage is the bare transmission of data.

The bare transmission of data is a mechanical function requiring only a command of grammar, syntax, and vocabulary. Though grammar, syntax, and vocabulary can be programmed into a computer, no computer will ever write well. The reason is that there are demesnes of language closed to computers and to those who aspire to no more than a computer's function.

In ways transcending its elements, language permits the writer's mind to enter the reader's mind and become part of the reader's very sense and experience of the world. Writing and reading are separate processes, of course; but when a skillful reader reads the writing of a competent writer, the two come together, much like two gametes forming a zygote, to create something new, different, and better than either of the components that went into its making. That is writing well.

If this miracle is to occur, reader and writer must stand on common ground, united by shared presuppositions.

These shared presuppositions go by the name "culture," a familiarity with mankind's story and with the poetry and myth, art and music, by which mankind has tried to make sense of that story.

It is culture that marks the skillful reader and the competent writer, turning language into a medium by which the mind of one meets and is enriched by the mind of the other. No computer will ever possess culture, and it is through culture manifested in language that language acquires the depth, richness, and resonance by which a piece of writing becomes part of one's experience of life, rather than a mere printout.

There was a time when the writer of a law-review article, like Maguire, could take for granted the culture that bound his readers to him. Anyone with an interest in reading the article would surely know Shakespeare and Homer (and much else). No footnote was

necessary to inform the reader of Hamlet's doom or of the wrath of Achilles. These were matters in common between writer and reader.

Unlike grammar, syntax, and vocabulary — which, as many lawyers and judges have demonstrated, anyone can learn — the acquisition of culture is the enterprise of a lifetime. Lawyers and judges who've never embarked on it will never write well. They'll transmit data, but that is computers' work. For anyone who aims at something higher than word processing, culture's the thing.