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Good Legal Writing: A Guide for the Perplexed

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Lawyers need not write badly. Contrary to an article in the *Harvard Law Review*[1], there is nothing in or about the law that compels ugliness or obfuscation. Indeed, good legal writing can be a thing of beauty, a literary genre in its own right. Yet with the rare exception of a Holmes or a Cardozo, much legal writing is really ghastly literature — convoluted, flatulent, obscure. Why? Perhaps, the reason lies in a sense of self-importance that infects everything lawyers write and say. Whatever falls from a judge's or draughtperson's pen needs little clarity, beauty or elegance for it so threatens the citizen's liberty and property that everyone will pore over it (or pay someone else to do so) for as long as it takes to dredge meaning out of obscurity. Blessed are the lawmakers for theirs is the privilege of writing badly. But not so the law student or the legal academic. For these, writing well is their only assurance that they will be read. It is, principally, for them that this article has been written.

The secret of good legal writing, it has been said, is to know precisely *what* one wants to say and to know *how* to say it. This terse statement captures the essence of good legal writing as both a product and a process. The product is that happy blend of content and form that occasionally graces the pages of a law review in the form of an outstanding article or case comment, or glows between the covers of a memorable book or legal dissertation. The process is the journey to that end. This article discusses these three aspects of good legal writing: its content, its form and the process that generates and blends them into a literary composition. One might say that it is about the message, the medium and the method of good legal writing.

THE CONTENT OF GOOD LEGAL WRITING

Much of the discussion on legal writing has concentrated on style, but it has studiously avoided content. It has centered on *how* lawyers write badly and produce their impenetrable thickets of 'thereofs' and 'heretofores', or on *why* they do it (to which some have found even economic explanations[2]), but not so much on the substance of *what* they have to say in their writing. One could

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[1] Steven Stark, 'Why Lawyers Can't Write' (1984) 97 *Harv LR* 1389.

[2] 'For starters, if lawyers stopped writing like lawyers, they might have trouble charging as much for their work. Every time lawyers confound their clients with a case citation, a "heretofore" or an "in the instant case", they are letting everyone know that they possess something the non-legal world does not. As anyone who has been "sutured up" by a doctor knows, lawyers are not alone in using professional "doublespeak". One need not be a Marxist to understand that jargon helps professionals to convince the world of their occupational importance, which leads to payment for services': Stark op cit.

think of several explanations for this: for instance, the view that 'content' cannot be taught[3], or the feeling that telling people *what* to write is presumptuous and smacks of indoctrination, or the modern belief that anything at all will sell provided it is attractively packaged. The main reason for this concentration on style, however, seems to be that commentators see style, rather than content, as the major problem with legal writing. For so long, it has been assumed that legal writers always do have something to say and need only improve how to say it.

I doubt the validity of this assumption. Most bad writing owes its malaise to only one failing: having nothing to say. Want of something to say in a written piece may come about by design or by accident. The politician's empty platitudes and the bureaucrat's gobbledygook are contentless by design. Their purpose is not to communicate anything. Quite the opposite. Their many words are intended to send the humble enquirer away empty-handed but with a feeling of having received something. For substance, they substitute vaguer words, and more words, and confirm this dictum from Pope's *Essay on Criticism*:

> 'Words are like leaves; and where they most abound,
> Much fruit of sense beneath is rarely found.'

For politicians and other propagandists, language is, of course, also often used not to convey meaning but to hide unpalatable truth from the populace by burying it beneath a pile of euphemisms[4]. Most legal writers, however, do not belong to this club of professional obfuscators. They are not for the most part trying to appear to say something while saying nothing, or to hide the truth. Often they *are* trying to say something but are not quite sure what. Bad graduate theses and rambling law review articles particularly are of this kind. Their lack of content is inadvertent rather than deliberate. But wilful or inadvertent, lack of content always results in bad writing, for contentless writing however glamorously clad cannot be good legal writing. Moral: If you have something to say, say it; if not, hold your peace.

Finding out what to say in one's article, thesis or dissertation is really finding out what *needs* to be said. A piece of legal writing is not simply an occasion for literary indulgence, nor primarily a work of intrinsic or aesthetic value. It is not poetry or music or a painting which can stand on its aesthetic beauty alone. Although it should possess beauty, grace and elegance, legal writing is primarily instrumental. It fails in its fundamental purpose if it is not a contribution, however modest, either to the solution of a practical problem, or to the doctrinal enlightenment or stock of ideas from which good solutions to

[3] In his otherwise excellent *Introduction to the Study and Practice of Law* (St Paul, Minn, West Publishing Co, 1983) Kenney Hegland opens the chapter on legal writing with these words:
'Legal writing, it has been said, suffers from but two defects, style and content. There is little we can do about content except lament the fact we weren't born musical, athletic or less squeamish. So be it. There is much we can do about style.'

[4] For an excellent account of this dishonest use of language see George Orwell's enduring gem: 'Politics and the English Language' in George Orwell, *Inside the Whale and Other Essays* (London, Penguin Books, 1980) 143–57.

practical problems may ensue. The first step towards giving content to one's law review article or graduate dissertation, therefore, is to understand the general nature of legal problems.

There are various levels of problems in law. There is the problem which a client presents to his or her lawyer: the problem of the legal brief. In various hypothetical forms, this type also appears on various law school examinations but hardly anywhere else. Its solution lies in a reasoned advocacy of a client's case using all the relevant legal material at the writer's disposal. At a slightly higher level, there is the problem for the judge. This is similar to the first but here the Court weighs two competing legal arguments and adopts its own position. The reasoning at both these levels is similar; the only difference lies in the fact that the Court unlike the advocate should not be partisan. Second-level problems are even more common on law school examinations because they require an argument that considers the merits of both sides, and are, therefore, a better test of a student's knowledge and skill.

Analogies are imperfect and for every similarity one can find a difference, but the legal problems faced by the lawyer and the judge can be likened to those of an airline pilot at the controls. The operation of a normative system is, of course, not quite the same as the working of a technological device, but there is this significant similarity: the pilot, the lawyer and the judge are all trying 'to work the thing'. They are located at the operational level (which, sadly, many law school curricula rarely venture beyond).

For the majority of legal writers, however, it is the next level, the one beyond advocacy and adjudication, that is of the greatest interest. This is the level of the commentator, the critic, the reformer. This, too, comes in various tiers. To use our airline analogy, beyond the piloting of an aircraft one could focus on its design or safety or efficiency, or on the workings of the airline industry, or on transport systems generally, and so on. Similarly, beyond advocacy and adjudication, legal writing can focus on the operation of the legal system as analytical jurists used to do[5], or on the socio-ethical milieux of the law[6], or on the nature of society generally. The higher up these tiers one goes, however, the less obvious will be the connection between his or her enterprise and the law itself.

Of course, the design of an aircraft or the nature of the airline industry will have an important bearing on how easily or safely that aircraft is piloted, just like the nature of the legal system and the society to which it belongs will have an important bearing on what kinds of argument will or ought to win the day in court; but the two considerations come from different levels. To say this is not to profess faith in the outmoded view of law as an insular and fully autonomous system — a view now vehemently under attack from both the

[5] John Austin, *Lectures on Jurisprudence* (5th ed, London, John Murray, 1885); H Kelsen, *Pure Theory of Law* (Berkeley and Los Angeles, University of California Press, 1967); HLA Hart, *The Concept of Law* (Oxford, Clarendon Press, 1961); J Raz, *The Concept of a Legal System* (2nd ed, Oxford, Clarendon Press, 1980).

[6] As for instance, Julius Stone's, *Human Law and Human Justice* (California, Stanford University Press, 1968) and *Social Dimensions of Law and Justice* (Sydney, Maitland Publications Pty Ltd, 1968 and 1966 respectively).

left[7] and the right[8]. Much current legal scholarship attempts, rightly, to correct legal positivism's exclusive and blinkered concentration on the operational level, and to jolt into wakefulness lawyers too dazed by formal rules to see the ends that are the very *sine que non* of those rules. Some of this scholarship, however, has gone further and turned every operational question into a design one — on the view that no design is sacrosanct and that one design is as good as another — and every legal question (not just those in 'hard cases') into a socio-ethical problem. But it is neither safe nor desirable to turn every pilot's decision on the way from London to New York some Saturday afternoon into a design issue. The legal writer or commentator will, therefore, need to determine carefully at which level his or her piece is to be pitched: whether closer to the institutional or operational level of the courts, or closer to a more theoretical level, or somewhere in between.

However, in areas of controversy or uncertainty it is necessary to take a vertical approach that cuts through different levels. A legal problem in these areas will often have no answer at the operational level. Its solution will be likely to encompass higher levels just like a stubborn ethical problem will often extend one's search beyond ethics into the realm of meta-ethics. The best legal writing deals with problems of this kind.

The content of a particular piece of legal writing once crystallized takes the form of a thesis about the writer's chosen topic and its supports using various aspects of legal reasoning. For legal writing involving first level issues and actual or simulated advocacy or adjudication, the writer needs to be adept at using the lawyer's traditional techniques of interpretation and, in common law countries, reasoning from precedent. He or she also needs to be keenly aware of what Professor Julius Stone so effectively demonstrated in his *Precedent and Law: Dynamics of Common Law Growth* (1985): that the doctrine of precedent not only imposes 'limits' upon what judges can do; it also provides them with 'leeways' of choice between one rule and another, between one outcome and another. In the light of this knowledge, therefore, what is useful for the writer or advocate to master are the skills for *identifying* 'leeways' presenting the court with a choice, and for *evaluating* the particular choice made in the light of justice and prevailing community values.

In order to determine whether the exercise of judicial discretion on a particular occasion is legitimate, the legal writer dealing with textual material — as most are — must be guided by an understanding of the limits and leeways endemic in legal reasoning. But if he or she wishes to go beyond this and evaluate the choices made within the leeways, the writer also needs a familiarity or at least a nodding acquaintance with an array of other fields of knowledge: moral and political philosophy, economics, literature, psychology, social theory, to name only a few. This wider literacy is, of course, even more important for the writer who starts and remains at the higher levels

[7] See generally, Roberto Unger, 'The Critical Legal Studies Movement' (1983) 96 *Harv LR* 561.

[8] See generally, Richard Posner, 'The Decline of Law as an Autonomous Discipline' 100 *Harv LR* 761.

described above — of critiques from outside the legal system itself — such as those dealing with the nature of law itself or its social setting.

With the decline of law as a fully autonomous system, these critiques have in recent times become more and more philosophical, economic, sociological, literary etc, to an extent which renders the lawyer unversed in these other disciplines quite unable to join in this debate so pertinent to his or her work. This widening of horizons is generally a welcome correction to a system which had become so insular and impervious to the ends it was designed to serve. But it is a wasteful mistake to believe that disciplines other than law will provide a panacea for all legal problems. Often all that happens after much interdisciplinary huffing and puffing these days is no more than a redefinition or rephrasing of the issues in the philosopher's or economist's or now the novelist's or poet's idiom in place of the lawyer's. Perhaps there is some poetic justice in the lawyer's resulting disenfranchisement here — after all, for so long jargon has shielded much legal work from lay scrutiny. But a better justification than this is surely necessary for these forays and frolics.

So much for the content of good legal writing. The process most suited to crystallizing that content is discussed later; first let us look at the other indispensable component of good legal writing: style.

THE STYLE OF GOOD LEGAL WRITING

Much has been written on the need for style to be faithful to both beauty and clarity. For instance, Sheridan Baker opens his excellent book, *The Practical Stylist*, as follows:

> 'Style in writing is like style in a car, a gown, a Greek temple — the ordinary materials of this world so poised and perfected as to stand out from the landscape and compel a second look, something that hangs in the reader's mind, like a vision. It is your own voice, with the hems and haws chipped out, speaking the common language uncommonly well. It calls for a [craftsperson] who has discovered the knots and potentials in [his or her] material, one who has learned to like words as some people like polished wood or stones, one who has learned to enjoy phrasing and syntax, and the very punctuation that holds them straight. It is a labour of love, and like love it can bring pleasure and satisfaction.'[9]

Another writer describes good legal writing style as that which is 'flawlessly clear, lucid and enlightening.'[10] To these vivid accounts of what good style ought to be I want to add another, arguably its more fundamental, function.

Thought and perception are multi-dimensional. We think and perceive the world around us in several dimensions at once. But writing is not like that. It is a linear process. We are given one word at a time and until we get to the end of

[9] S Baker, *The Practical Stylist* (5th ed, New York, Harper & Row Publishers Inc, 1981).

[10] Pamela Samuelson, 'Good Legal Writing: Of Orwell and Window Panes' (1984) 46 *Univ of Pittsburgh Law Rev* 149.

a sentence, the wholeness of meaning which it is intended to convey does not become fully apparent. The same is true of paragraphs, sections and the entire piece whether it is an article or a dissertation. The content of our writing, the substance of what we wish to say, crystallizes in multi-dimensional wholeness, but writing conveys it to the reader piecemeal, one bit at a time. To make any sense of it, the reader must take these bits and re-construct in his or her own mind the writer's original wholeness of thought. This is not always easy and the reader needs assistance. It is the function of style to provide that assistance. Style is charged with the task of re-creating the writer's wholeness of thought, of giving it form and contour and beauty in the reader's mind.

The type of style suited to this task will have two features: (i) structure, organisation, and balance; and (ii) skilful use of language.

1. Structure Organisation and Balance

Structure, organisation, and balance require focussing with a carefully formulated thesis, dividing this into appropriate sections, and linking these logically with subheadings, thesis-sentences, and other sign-posts. One's writing should also have an introduction, a body, and a conclusion: the literary version of 'tell them what you are going to tell them; tell them; tell them what you have told them'. As Baker says:

> 'Give your essay the three-part *feel* of beginning, middle and end — the mind likes this triple order. Many a freshman's essay has no structure and leaves no impression. It is all chaotic middle. It has no beginning, it just starts; it has no end, it just stops; fagged out at two in the morning.'[11]

The division of one's thesis into sections and paragraphs should follow a logical progression. The topic sentence for each paragraph should itself be a mini-thesis. In the final product these topic sentences should more or less interlock to reveal the skeleton or outline of the piece to the reader. This allows the reader to anticipate the flow of the writer's argument and even to do a little guessing of his own as to what is to follow. Suspense and surprise, unless deliberately and skilfully executed for a specific purpose, have no place here.

For illustration, let us take a well written piece from a famous book that lawyers might be familiar with: Rawls, *A Theory of Justice.*[12] In Chapter One there is a section entitled 'The Role of Justice'. Only the first (topic) sentences in this section are extracted below just to show how these interlock with the section title:

> 'The Role of Justice
>
> Justice is the first virtue of social institutions, as truth is of systems of thought . . .
>
> These propositions seem to express our intuitive conviction of the primacy of justice . . .

[11] Baker, op cit 15.
[12] J Rawls, *A Theory of Justice* (Oxford, Oxford University Press, 1971) 3–5.

> Now let us say that a society is well-ordered when it is not only designed to advance the good of its members but when it is also effectively regulated by a public conception of justice . . .
>
> Existing societies are of course seldom well-ordered in this sense, for what is Just and unjust is usually in dispute . . .
>
> Some measure of agreement in conceptions of justice is, however, not the only prerequisite for a viable human community . . .'

Clearly one needs to read the entire text to get the full meaning of what Rawls is talking about, but one can discern or guess the general drift just from a glance at the opening sentence of each paragraph. The structure enables the reader to anticipate and to catch an early glimpse of the writer's wholeness of thought.

A piece that illustrates both the structural interlocking of ideas and the three-part feel mentioned above is this one from Bertrand Russell:

> 'What I Have Lived For
>
> Three passions, simple but overwhelmingly strong have governed my life: the longing for love, the search for knowledge, and unbearable pity for the suffering of mankind. These passions, like great winds, have blown me hither and thither in a wayward course, over a deep ocean of anguish, reaching to the very verge of despair.
>
> I have sought love, first, because it brings ecstasy — ecstasy so great that I would often have sacrificed all the rest of life for a few hours of this joy. I have sought it, next, because it relieves loneliness — that terrible loneliness in which one's shivering consciousness looks over the rim of the world into the cold unfathomable lifeless abyss. I have sought it, finally, because in the union of love I have seen, in a mystic miniature, the prefiguring vision of the heaven that saints and poets have imagined. This is what I sought, and though it might seem too good for human life, this is what — at last — I have found.
>
> With equal passion I have sought knowledge. I have wished to understand the hearts of men. I have wished to know why the stars shine. And I have tried to apprehend the Pythagorean power by which number holds sway above the flux. A little of this, but not much, I have achieved.
>
> Love and knowledge, so far as they were possible, led upward toward the heavens. But always pity brought me back to earth. Echoes of cries of pain reverberate in my heart. Children in famine, victims tortured by oppressors, helpless old people a hated burden to their sons, and the whole world of loneliness, poverty, and pain make a mockery of what human life should be. I long to alleviate the evil, but I cannot, and I too suffer.
>
> This has been my life. I have found it worth living, and would gladly live it again if the chance were offered me.'

In a microcosm this piece illustrates the structure, organisation and balance which all good legal writing should aspire to.

2. Skilful Use of Language

The other feature of a good legal writing style is the skilful use of language. I shall not go into the general concerns of standard works on literary style such as grammar or sentence patterns. I am, again, only concerned here with the

use of language to recreate the writer's wholeness of thought in the reader's mind. The style that does this is, in the first instance, simple and direct.

Simplicity and directness mean that lawyers must be weaned from their addiction to rambling circumlocutions. They also mean that the short, active, and direct word will often be preferred; that abstractions will be shunned; that the spoken word and the written word will be increasingly seen for the kindred spirits they really are. On simplicity, what Galbraith said of economics, is also true of law, that:

> 'there are no important propositions that cannot, in fact, be stated in plain language. Qualifications and refinements are numerous and of great technical complexity .... But ... the refinements rarely, if ever, modify the essential and practical point. The writer who seeks to be intelligible needs to be right; he must be challenged if his argument leads to an erroneous conclusion and especially if it leads to the wrong action. But he can safely dismiss the charge that he has made the subject too easy. The truth is not difficult.'[13]

As we shall soon discover, the process which unearths a creative or inventive idea is usually a tortuous and laborious one. But the gem once found is itself simple and logical in hindsight[14]. Complexity and lack of clarity in writing is thus often a sign of incomplete thought,[15] and half-baked ideas. The reader's puzzlement can be likened to that of an audience watching a play in which, suddenly, the cast begins rehearsing their lines in the middle of a performance.

Simplicity and directness are with structure, organisation and balance the bare minimum for effectively reconstructing the author's wholeness of thought in the mind of the serious and attentive reader. But language skilfully handled, and all good legal writing, should do more than this. It should go beyond the reader's intellect and at least touch his or her feeling. It should create for the reader a total experience similar to that which inspired the writing in the first place. It should welcome the reader into the writer's world. In this respect law is indeed like literature.

It might be thought that warmth and liveliness are inappropriate for legal writing, that legal literature should don the garb of studied aloofness — the literary version of robes and wigs — and eschew any appeals to feelings or emotions; that legal writing must embrace a heart of stone, impervious to the colourful emotions of love, fear, anguish and despair which keep other literature throbbing with life: 'Deprived of such concepts as hope and fear, most novelists would have little to write about', Stark reminds us, 'But lawyers must persevere and write on.'[16]

The legal writer's appeal is, indeed, principally to the intellect rather than the emotions; so legal writing must always maintain an air of sobriety, objectivity and authority. But beyond this it must, like all good writing, create a

[13] John Kenneth Galbraith, 'Writing and Typing' in Galbraith, *Annals of An Abiding Liberal* (Boston, Houghton Mifflin Co, 1979) 285–94, 293.
[14] Edward de Bono, *I am Right You are Wrong* (London, Viking Penguin Inc, 1990).
[15] Galbraith, op cit 293.
[16] Stark, op cit 1392.

pleasant and memorable experience for the reader. It is not a cross to be endured or a club to batter the reader into discipline. Good legal writing, no less than a good play or a musical concert, should welcome the reader aboard and, once there, treat him or her with courtesy and respect until the conclusion of the journey. In this it would be aspiring to the literary excellence of other forms of composition without necessarily abandoning its instrumental goal.

To demonstrate that legal writing can be good literature, let me use some selections from two of the best legal writers: a judge and a university professor. The judge is, of course, Holmes whose judgments and writings are regularly used as models of a style to be emulated by lawyers and non-lawyers alike. The following is taken from Holmes' judgment in *Schenck* v *US.*[17] He is discussing freedom of expression:

> 'We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right.'

The style is clear and unaffected and, if one forgives the gender-specific references, an example of good legal writing. Holmes was also a master of imagery and other literary devices, and used them to good effect in much of his writing and speech. Take this example on the single-minded pursuit of a goal:

> 'If you want to hit a bird on a wing, you must have all your will in a focus. You must not be thinking about yourself; equally, you must not be thinking about your neighbour. You must be living in your eye on that bird. Every achievement is a bird on a wing.'

The University professor from whom I wish to draw an illustration is HLA Hart. In his excellent essay, 'American Jurisprudence through English Eyes: The Nightmare and the Noble Dream', Hart deals with the perennial issue of whether judges make or simply find the law they apply to the disputes before them. He employs the imagery of dreams, nightmares and sleep to concretise two competing views on the matter, and the middle one he himself favours. The nightmare is that judges always make the law they apply to the cases before them. The noble dream is that judges, if they looked hard enough, would always *find* the law for the resolution of every dispute. This is how Hart skilfully uses imagery to create a memorable experience for his reader:

[17] *Schenck* v *United States* (1918) 249 US 47, 39 Sup Crt Rep 247, 473–4.

> 'In conclusion let me say this; I have portrayed American jurisprudence as beset by two extremes, the Nightmare and the Noble Dream; the view that judges always make and never find the law they impose on litigants, and the opposed view that they never make it. Like any other nightmare and any other dream, these two are, in my view, illusions, though they have much of value to teach the jurist in his waking hours. The truth, perhaps unexciting, is that sometimes judges do one and sometimes the other.'[18]

And rejecting both the Nightmare and the Noble Dream, Hart decides to settle instead for a good night's sleep. The imagery not only recreates his own thought in the reader's mind, it also takes the reader by the hand and gently leads him or her through the writer's world.

These two excerpts amply illustrate that beauty and legal writing are not natural enemies. But I cannot resist the temptation — and writers ought to resist such temptations — to include this last one from another judge, Benjamin Cardozo, also on the nature of the judicial function, just in case one thought that Holmes and Hart were creatures from outer space:

> 'The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by. We like to figure to ourselves the processes of justice as coldly objective and impersonal. The law, conceived of as a real existence, dwelling apart and alone, speaks, through the voices of priests and ministers, the words which they have no choice except to utter. That is an ideal of objective truth towards which every system of jurisprudence tends .... So Marshall, in *Osborne* v *Bank of the United States*, 9 *Wheat* 738, 866: The judicial department "has no will in any case .... Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law". It has a lofty sound; it is well and finely said; but it can never be more than partly true. Marshall's own career is a conspicuous illustration of the fact that the ideal is beyond the reach of human faculties to attain. He gave to the constitution of the United States the impress of his own mind; and the form of our constitutional law is what it is, because he moulded it while it was still plastic and malleable in the fire of his own intense convictions.'[19]

All these legal writers use simple, direct language. They also use it and other literary devices skilfully to create crisp, multi-dimensional images, and to breathe life into what would otherwise be the dull and dreary prose that readers of much legal writing are forced to endure. Perhaps the current law and literature movement will make a lasting contribution to this noble cause.

THE PROCESS THAT BLENDS CONTENT WITH FORM

It is one thing to describe good legal writing, but quite another to identify the way to that happy end. This section provides a few sign posts to guide the

[18] HLA Hart, *Essays in Jurisprudence and Philosophy* (Oxford, Clarendon Press, 1983) 144.

[19] Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven, Yale University Press, 1921) 168–70.

perplexed to that goal. From the *content* and *style* of good legal writing we thus turn briefly to the *process* that will blend these two into a literary composition.

Legal writing is an evolutionary process. I suggest that it is also a three-phase process, progressing from the *pure thought phase*, through the *thought-composition phase* to the *pure composition phase*. I do not, of course, cling to the demarcation between these the way one clings to articles of faith, for in practice they do merge into each other. The three phases I have identified, however, should serve as important sign posts to the hapless travellers who may have lost their way, or to the timid ones who for fear of losing their way continue to cling to the safe but unproductive shores of literary barrenness. In these three phases, writers of graduate theses, law review articles and books should glean how to find useful content for their work and how to blend this with an appropriate style into a compelling piece of legal writing.

1. The Pure Thought Phase

The pure thought phase hardly gets a mention in all the literature on legal writing. There are two explanations for this. The first is simply excessive faith in deductive and inductive logic to provide worthwhile ideas. This condition afflicts lawyers rather more than the general population, and it accounts for the absence of any creative spark in much legal writing; it also explains why so many law review articles are just reportage. In this game the first to get his or her hands on the latest court decision or statute gets the prize: all it then takes to get published is simply to paraphrase or summarise in the writer's own words (if that even) the facts and the judgment and perhaps to point out that the decision is consistent or inconsistent with some previous ones.

Edward de Bono has recently put his finger on the cause of this unwarranted faith in logic: 'Every valuable creative idea ... must always be logical in hindsight.'[20] From this, de Bono points out how the barrenness of logic has eluded so many:

> 'Unfortunately, because all valuable creative ideas must always be logical in hindsight if we are to accept them, we have supposed that better logic would have reached the idea in the first place and that there is therefore no need for creative thinking. This apparently "logical" line of thought is why we have never paid serious attention to creative thinking.'[21]

The second reason for the neglect of the pure thought phase of legal writing is the perception that this phase is a purely private affair, a psychological process that nobody fully understands although everyone knows about the brilliant idea that arrived unannounced in the shower or in peak-hour traffic or while asleep. De Bono explains that this phenomenon is a characteristic of the human brain as a self-organising patterning system[22].

At the pure thought phase, the legal writer is seeking a creative idea for his

[20] de Bono, op cit 14.
[21] Id 1-32.
[22] Ibid.

or her article or thesis. As noted in the section on content, however, this creativity needs to be focussed on the nature of legal problems discussed earlier. My suggestion at this stage is to immerse oneself in the material on one's chosen topic, and to read reflectively, while allowing the mind free reign over the literature. One should at this stage concentrate on the primary sources such as statutes and cases rather than other people's opinions. These, one can use later to test an idea or a thesis that has already crystallized. The researcher should employ the mental processes of free association or apply a more directed form of these such as de Bono's lateral thinking[23], to cut across existing paradigms and patterns of thought and escape the rusty grip of conventional wisdom. The writer can thus effect a paradigm shift that will render his or her work original, creative and enduring.

It is a mistake to hurry the pure thought phase in order to get to the first draft. When something is written down it assumes a rigidity of form which renders fundamental alterations impossible. Revisions and successive drafts may improve style but they will not provide the content that should have been settled at the pure thought phase. Turning out a first draft has been likened to constructing a building:

> 'Once you've put up the walls and laid down the roof, whatever changes you make are at best modifications. You can improve the building — often dramatically and with surprisingly little effort — but not change its architecture in any fundamental way. You can make a telephone booth a better telephone booth, a hamburger stand a better hamburger stand, and a factory a better factory. But you cannot really turn a telephone booth into a hamburger stand or a hamburger stand into a factory . . . if you make an *architectural* mistake in the first draft — that is, if you build the wrong thing, however well you build it — you're more or less stuck.'[24]

As distinct from building a first draft, one can and should have a pen and paper (or system cards) ready as one delves into the literature. The phrase 'pure thought phase' does not mean that writing is absolutely prohibited. As new ideas come, they should be jotted down. Some of them will appear as memorable turns of phrase or complete sentences or even paragraphs. Unless one is ready to put them down as they come they may drift again out of sight, never to return. It is advisable to have pen and paper in the car, by one's bed side and in other such places during the pure thought phase.

The pure thought phase should culminate in a clearly formulated thesis that the writer feels comfortable with. If after a reasonable time none is forthcoming, one should query whether that area of research is suitable or one that moves the writer to creativity.

2. The Thought-Composition Stage

The thought-composition stage is an intermediate one. It is charged with transforming the thesis into a composition. Thought is not yet complete and modifications of the original thesis may become necessary along the way, as

[23] Edward de Bono, op cit 93–5.
[24] HE Meyer and JM Meyer, *How to Write* (Washington, Storm King Press, 1986).

thinking and writing continually inform each other. As the earlier drafts may be rather ugly, marred by the need to combine composition with thought, several drafts are advisable.

Scientists believe that at the time of the 'big bang' our vast universe was 'infinitesimally small and infinitely dense'[25]. Over the years, it has expanded into its present glorious vastness. A piece of legal writing should follow a similar course. The first draft should be not only the shortest but also the most compact, consisting of the thesis statement and a series of brief paragraphs charting its main course. Subsequent drafts would then progressively expand it to its ideal length, filling it out with detail from argument and further research. Many articles and graduate theses fail because they start at the opposite end — with a large *lightweight* collocation of information that then has to be cut down to the right size. The process may reduce the size but it does not intensify the weight of the final product, and it is weight rather than volume that ultimately counts.

At the thought-composition stage, ideas should also be tested for their soundness and 'fit' in the general scheme; the structure, organisation and balance strengthened, and language continually polished. Necessary details should also be tirelessly sought and obtained from further research and inserted as the original idea is fleshed out through successive drafts.

3. The Pure Composition Stage

At the pure composition stage, the process of discovery is complete and all that remains is justification and communication of the product to the reader. The goal here is not to find anything (some student theses still look like voyages of discovery even in their final form); it is to justify publicly and to communicate effectively what one *has already* found. The search is at an end. The reader is not interested in joining the writer on his or her agonising journey of discovery which led to the thesis. That, admittedly, is a lonely voyage and companionship desperately desired, but it is one the writer must make alone. The reader's journey is a different one, a more pleasant one of experiencing those treasures the writer has unearthed.

At the pure composition stage the two pillars — legal reasoning and style — upon which the final product rests should be tested again for strength and clarity. If this final product is the perfect blend of content and style this article advocates, it will most definitely also be a literary masterpiece.

[25] Stephen W Hawking, *A Brief History of Time: From the Big Bang to Black Holes* (London, Bantam Books, 1988) 9.