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Writing To Be Read *or* Why Can't Lawyers Write Like Katherine Mansfield?†

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Not too many years ago, I found myself at a table in a seedy bar on a less than glamorous stretch between Miami and Key Largo. Sitting across from me was Judge Jack Burgher from Pittsburgh, Pennsylvania.

The judge was not happy. He had signed up for the conference, imagining sunny Florida weather and endless rounds of golf. But it had rained everyday. The nearest course was more than an hour away. Now he was hunched over a table, listening to me, an English teacher who does not even have a law degree, criticise a judgment he had written.

"This is good." I said, referring to his narration of the facts. "It reads like a story." A used car dealer suing another used car dealer for fraud. They deserve each other, I thought.

"And this is good, too." I said, referring to a passage about welding the undamaged halves of two wrecked Hondas together, but imperfectly. Burgher had made it easy to follow, even for someone who knew nothing about the underbodies of cars.

"And here, you're writing like a normal human being." - a phrase I use whenever judges and other lawyers manage to avoid the "saids", "sames", "hereinafters" and convoluted syntax they pick up in law school, like parasitic viruses few ever expel. "But here," I said, with some hesitation, "you're writing like a judge."

Burgher knew it was not a compliment. When he rose from the table he towered over me in a way that might have been threatening if

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he had not worn such an injured expression on his face. "I write like a judge, Professor Raymond," he said, "because, by God, I am a judge."

The conversation ended and so did the course. But the exchange raised an important point for anyone trying to learn how to write.

Writing is always an act of creating a voice. It is sounding like "somebody" on paper. It is creating a character. I wanted Judge Burgher to sound like a journalist, writing about the law for an audience that includes non-lawyers. But the voice he preferred was that of the *legal expert*. He felt comfortable with a certain formality of style, a reliance on legal jargon, and though he was too kind to admit this, a disdain for non-lawyers.

On paper, legal experts often "sound" like this—

"In resolving the question whether, and how, to count ballots not marked by voters in accordance with instructions, so that the intent of the voter is unclear, we have said that 'if the intent of the voter can be determined with reasonable certainty from an inspection of the ballot, in the light of the generally known conditions attendant upon the election, effect must be given to that intent and the vote counted in accordance therewith.'"

Of course, they do not sound like this when they speak to their families. They would never say, "pass the salt please, and the pepper therewith". They do not use legalese in love letters. They would never write "My dearest spouse (hereinafter called honeylips)". And they could not possibly speak in sentences as long as those they write—not without pausing to inhale.

But when lawyers are in their chambers, writing contracts or briefs, they are transformed, like actors, into different personalities. Their choice of words and the structure of their sentences suggest a certain kind of person behind the words. They write things like this

—
"The Government's concern lest the Act be held to be a regulation of production or consumption rather than of marketing is attributable to a few dicta and decisions of this court which might be understood to lay it down that activities such as 'production', 'manufacturing', and mining are strictly 'local' and, except in special circumstances which are not present here, cannot be regulated under the commerce power because their effects upon interstate commerce are, as a matter of law, only indirect."

—and we know instantly that the author is not Katherine Mansfield.

The convener of this conference, Tim Castle, has indicated his hope that the speakers would stimulate "debate, even controversy". In this spirit, I raise the question in my subtitle: Why Can't Lawyers Write Like Katherine Mansfield? Of course, the question could be used to taunt professionals in many fields, including my own. Few people can write like Katherine Mansfield.

But there is one quality of her writing that lawyers would do well to imitate: her accessibility to the widest possible audience, an accessibility that in no way compromises the quality of her art. In his introduction to *The Short Stories of Katherine Mansfield*,¹ John Middleton Murry recalls how Mansfield regarded it as a "moment of triumph" that 'Prelude' was appreciated by the printer who set its type. According to Murry, who was Mansfield's husband as well as her editor, "It was characteristic of her that she preferred the praise of simple 'unliterary' people to that of the cultured and the critics".

It would be unrealistic to hope that professionals in every field — physics, medicine, cybernetics, engineering—would reach the laity in their writing. It would, in fact, be extremely inefficient if microbiologists and tax accountants had to pause to define every term not well known to the people who print their publications.

But law is different.

Much of what lawyers write—contracts, statutes, judgments, decrees—has the laity as its ultimate audience. Lawyers, like journalists and teachers, have reason to break out of their closed circles and write, as Katherine Mansfield did, for everyone who can read.

It is not the poetic quality of Mansfield's prose that I am suggesting as a model. Indeed, Mansfield's prose is rarely adorned. Her effusive description of a New Zealand landscape in 'Millie' is uncharacteristic²—

"The sun hung in the faded blue sky like a burning mirror, and away beyond the paddocks the blue mountains quivered and leapt like sea."

For the most part, Mansfield's prose seems so natural, so unaffected, so much like conversation written down, that one is hard pressed to define what makes it compelling³—

"Millie stood leaning against the veranda until the men were out of sight. When they were far down the road Willie Cox turned round on his horse and waved. But she didn't wave back. She nodded her head a little and made a grimace. Not a bad young fellow, Willie Cox, but a bit too free and easy for her taste. Oh, my word! It was hot. Enough to fry your hair!"

In isolation, each sentence seems quite ordinary. But in the classical tradition (*ars est celare artem*), it is the *apparent* artlessness that conceals her art. Murry commented on this quality of her work. "Her secret died with her," he wrote in his introduction. "And of the many

¹ 1957, Knopf, New York; reprinted 1980, p vii.

² *The Short Stories of Katherine Mansfield*, op cit, p 143.

³ 'Millie', *ibid*, pp 142-143.

critics who have tried to define the quality in her work which makes it so inimitable, everyone has been compelled to give up the attempt in despair."⁴

Her secret was an alchemy that transforms ordinary conversation. She has larger secrets as well. But on the level of individual sentences, her writing *seems* like conversation. It is spare. Every detail counts. It is free of jargon and clichés. It exploits everything good about conversational English - its accessibility, its naturalness, its simplicity of syntax - and avoids the false starts, wordiness and bumbling irrelevances that make real conversation, accurately transcribed, an absolute bore to read. Her prose is not esoteric. Printers can understand it. And taxi-drivers, and sales clerks, and school children if they are so inclined. It is equally accessible to artists, professors and lawyers.

The problem with much legal writing is that it imitates the least desirable aspects of spoken English and avoids the most desirable. For this reason, legal writing may be criticised, with equal justification, for being too much *and* too little like spoken English.

One virtue of spoken English is its lexicon, which is generally simple and ordinary - a social constraint keeps us (I would hope) from dropping nunc pro tunc into our cocktail conversations. It would be pedantic to say to a real person, face to face, "The pie is great; have you tried same?" But when lawyers write, they feel free to wax pedantic, perhaps because they do not have to look their readers in the eye. They feel free to write "inter alia", when in ordinary conversation they would probably say "among other things". Legalisms give legal writing an arcane odour - like the smell of old books, not entirely unpleasant, but not exactly inviting. Legal jargon is quaint, but (with a few notable exceptions) it serves no purpose. And it distances the law from people who need to understand it.

Spoken English also differs from good prose in its syntax. Because we have so little time to plan our speech, we generally stick to simple, straightforward, short syntactic paths. When we deviate from these paths, we generally wander into syntactic thickets. Oddly enough, good writers - not just literary writers like Katherine Mansfield, but good journalists as well - tend to use basic syntax. Simple sentences are the norm. Subordinate clauses generally occur no more than once in a sentence, rarely more than twice.

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When the need for a longer sentence arises, however, good writers can plan them carefully, so that they can be followed easily, like paths in a pleasant garden. The second sentence in 'Miss Brill' (41 words) is a fine example⁵—

"The air was motionless, but when you opened your mouth there was just a faint chill, like a chill from a glass of iced water before you sip, and now and again a leaf came drifting - from nowhere, from the sky."

In print it seems as natural as breath. But as soon as we read it aloud - as soon as we try to imagine ourselves or anyone else spontaneously uttering this sentence - we become aware of its artifice. No one is likely to utter this sentence, say, between two

⁴ Ibid, p x.

⁵ Ibid, p 549.

sips of tea on a Sunday afternoon. Nor do we have to turn to literary models to discover sentences of this sort. Examples abound in any good daily newspaper.

When lawyers write long sentences, they seem less like garden paths than jungle trails, interminable, branching off in bewildering directions. Here, for example, is a proposed amendment to the Constitution of the State of Alabama. Only lawyers could have produced it. Imagine yourself finding this amendment in small print along with many other items on a ballot, when you have taken a few moments from work to vote, and behind you in line are equally hurried people awaiting their turn —

Amendment Number Four

"To amend the constitution of Alabama of 1901 by authorising legislation to permit municipalities and counties to provide for the redevelopment and revitalisation of areas within their corporate limits or boundaries by creating tax increment districts; to provide for the payment of all increased ad valorem taxes resulting from such redevelopment or revitalisation to the municipality or county which created the district until any indebtedness incurred with respect to such project has been paid; to provide that no such payment shall be made to the extent that it jeopardises the payment of any bonded indebtedness secured by any tax applicable in the proposed district with respect to any such project; to provide that any such indebtedness shall not constitute a charge against any constitutional debt limit if it is payable solely from such increased ad valorem taxes; to ratify and approve legislation adoption in furtherance of the powers hereby conferred."
(Proposed by Act No 87634)

There is, of course, no way of knowing how Mansfield would have written this amendment. But it seems likely that her version would be more like the brief translation that was printed in the *Tuscaloosa News* one day after the election —

"Amendment Four would allow city and county governments to issue bonds to revitalise slum areas and recover the investment through increased property taxes."

It would be equally speculative to suggest how Katherine Mansfield would have re-written the sentence about defective ballots, cited earlier in this paper. Chances are, however, that she would have reduced the essence of its 75 words to, perhaps, 16 —

"We have already said that defective ballots should be counted if the voter's intent is clear."

The problem with many legal sentences is not that they are too long. Sentences can be both long and clear, if they are carefully constructed. When Mansfield writes a long sentence, she sets it out like a plate full of individual hors-d' oeuvres, each phrase a tidbit with a toothpick of its own.

Here is an example from 'The Canary' — 74 words, in which the narrator describes her deceased pet⁶—

"For instance, when I'd finished the house in the afternoon, and changed my blouse and brought my sewing on to the veranda here, he used to hop, hop, hop from one perch to another, tap against the bars as if to attract my attention, sip a little water just as a professional singer might, and then break into a song so exquisite that I had to put my needle down to listen to him."

One sign of a well crafted long sentence is that the phrases between commas seem to be additions, not qualifications. Its phrases and clauses are short and self contained, often followed by commas that could be properly replaced by periods if the writer had chosen to do so. This is the characteristic structure of modern prose. Subordination is relatively rare. Long sentences are rendered readable by structures that include either parallelism or frequent points of closure.

At this point, it is easy to make a few rules for lawyers who want to write for the largest possible audience.

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Ibid, p 603.

- (1) **Avoid legal jargon whenever possible** It is not always possible of course. There is no handy equivalent for habeas corpus in ordinary English. But otherwise, use English instead of Latin or old French. And use ordinary English in an ordinary way. "Said", "same" and "such" never add precision. They just call attention to themselves.
- (2) **Write short sentences** Mansfield's sentences are generally quite short: the average length in 'The Garden Party', perhaps her most celebrated story, is 9.39 words.
- (3) **When you write a long sentence, construct it "cumulatively"** In other words, make sure it comes to a possible stopping point early on - usually marked by a comma that could be replaced by a period. And make sure that phrases after that point are relatively short and separated by commas that could also be replaced by periods. Here is an example from 'The Garden Party'⁷—

"That's right, miss,' said the tallest of the men, a lanky, freckled fellow, and he shifted his tool bag, knocked back his straw hat and smiled at her."

These rules apply to all sorts of legal writing: wills, contracts, statutes, decrees and briefs. And they are relatively easy to follow. When followed, they result in clear, inviting prose that lawyers find accurate and everyone finds easy to understand, like this opening paragraph from a Canadian judgment written by the Honourable Ken Halvorson —

"Last spring Ralph Cook set his nets in the Saskatchewan River, near Cumberland House, just as he had for many years, but this time, in breach of the law, he failed to write his license number on the stakes securing the nets. Instead, he mistakenly inserted his fisherman number.

He was convicted of improperly marking his nets contrary to s 27(2) of the *Saskatchewan Fishery Regulations* (SOR/79-486): Canada Gazette, July 11, 1979 passed pursuant to the *Fisheries Act* 1970 RSC c F-14."

Halvorson's sentences, like Mansfield's, seem unremarkable in isolation. In his sentences, as in hers, the artifice is neatly concealed.

The first sentence, for example, is fairly long - 42 words. But Halvorson's sentence, like Mansfield's, consists of additive phrases set off by commas that could be replaced by periods. Grammatically, the sentence could end after "River", "Cumberland House" or "years".

The second sentence is remarkably brief - seven words.

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Ibid, p 535.

The third sentence does have legal paraphernalia. But it is necessary paraphernalia, and therefore exempt from the first of our three rules. Moreover, Halvorson artfully appends the citation where it should be, at the end of a sentence, where lay readers can skip it - and lawyers too, except those who need the reference for research or verification.

This is an example of what I mean when I argue that lawyers should write like Katherine Mansfield. It provides useful information for readers trained in the law. It does not sacrifice legal precision. It has no *unnecessary* legal jargon. It is accessible to the widest possible audience.

Halvorson's style is his own, but the technique of beginning certain kinds of legal documents with a narrative could be added to our list of rules.

(4) When drafting a pleading judgment, always begin with a story Tell who did what to whom.

Of course, the story has to be told simply and in short sentences. Tell who did what to whom - not the legal consequences thereof or the various interlocutories and hearings held thereafter. Here, for example, is a story of sorts, but told in a way that no-one but lawyers can understand —

"This is an application by three inter-related plaintiffs against two related defendants (the second defendant having been joined at the commencement of the hearing without opposition) seeking an interim injunction against the defendants, their agent, servants or employees, restraining them from using the word 'Regal' upon or in relation to paints; or a trademark so nearly resembling Regal as to be likely to cause confusion between the plaintiff's products and the defendant's product, and more specifically for an injunction to prevent the use of the word, Regal, or any word confusingly similar there to by the defendants upon paint containers, advertising materials, signs, packaging, fascias, stationary, labels or other printed matter."

Many lawyers find this sentence clear. Those who prefer a Mansfieldean aesthetic, however, will not be happy with it. It violates all the rules. It is long and ungainly. The diction is hardly conversational.

The remedy is not to revise the sentence, but to start all over. Tell the story. In this case, the story is about two paint companies using the same trade name. The plaintiff, which had been using the name

"Regal" for many years, is seeking an injunction to prevent another company from using "Regal" as a trademark for its paint.

In writing this paper I have been pretending that lawyers really could write like Katherine Mansfield if they wanted to, simply by following a few simple rules. But Mansfield's art subverts law, as literature often does. Law seeks closure; literature thrives on ambiguity. Law assigns blame; literature, for the most part, provides understanding. When Katherine Mansfield writes about a murder in 'A Woman at the Store', we sympathise with the woman who kills her husband - not forgiving her necessarily, just understanding. We understand, too, what drives 'The Child-Who-Was-Tired' to infanticide. It is her foster parents who deserve prosecution, but we doubt the law will see it that way. And when the "little blue men" come running to rescue Pearl Button from her kidnappers, we perceive them as intruders rather than rescuers. We have been lured into the radically innocent point of view of the kidnappers and of Pearl Button herself. In these short stories, though, there are writing lessons to be learned, certainly for defense attorneys, and possibly for anyone else who would like the law to be more sensitive to the nuances of human experience than the adversarial system generally allows.

The decision to write the sort of prose that Ned Halvorson and Katherine Mansfield write is choice, not an obligation. Mansfield was, after all, born in the same year as TS Eliot and six years after James Joyce - writers who, for various reasons, chose to limit their audiences. Many lawyers, for reasons of their own, choose to write for other lawyers only, like my friend Judge Burgher from Pittsburgh.

How could lawyers learn to write clearly if they chose to? By incessant scrutiny and revision. By refusing to write even a single word that would seem odd in a big city newspaper. By preferring short sentences, and carefully structuring the long ones. By foregrounding the story when there is a story to be told. By avoiding pontifical diction and technical or archaic words. By assuming the role and voice of a journalist communicating with friends and neighbours in the community, not the mannerisms of an expert addressing a coterie.

And perhaps by imagining Katherine Mansfield as a reader, maybe even keeping her photograph on the writing desk, and trying not to make her wince.