



TOWARD A MORE IMPURE WRITING STYLE:  
*The Opinions of Judge Posner  
and Chief Judge Easterbrook*  
and What the Bar Can Learn from Them

By Brian J. Paul <sup>1</sup>

*Lawyers tend to be wretched writers, which is odd given that the written word is their stock in trade. Perhaps the problem comes from reading principally the work of other lawyers.*

— *Interview of Hon. Frank Easterbrook, Chief Judge of the U.S. Court of Appeals for the Seventh Circuit, How Appealing, <http://howappealing.law.com/20q>.*

There is more truth to this statement than many of us would care to admit. The problem isn't so much that we don't care about our writing; in a sense it is that we care too much about our writing. For ours (I'm speaking in generalities here of course) is a style premised on meticulous imitation. We begin our motions more or less the same way every time: "Party so and so, by counsel, respectfully requests . . . ." We tend to end them the same way every time, too: "For the foregoing reasons . . . ." We are fond of using the same high-sounding legalisms: there are the hoary classics, such as "instant" (as in "the instant case") and "said" (as in "said agreement"); there are also the hedgers ("on or about" is popular); the redundancies ("true and correct" and "any and all" are common); and the worn-out intensifiers ("clearly" may just be the single most overused word in legal writing today). We quote liberally from case law, instead of paraphrasing; block quotes blot our briefs. We take great pains to detail propositions of law that judges know by heart. We observe certain rules of grammar to a fault, even if it results in awkward-sounding sentences—the sort of English up with which Winston Churchill would not put. Alas, the typical brief is formulaic, prissy, and detached—in a word, tedious.

There is a better way. I want to suggest just one modeled after the writing styles of two prominent federal judges who currently sit on the Seventh Circuit: Judge Richard Posner and Chief Judge Frank Easterbrook. But first let's talk a little bit more generally about style and why it matters.

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### Style Matters

Lawyers are fond of telling each other that style is so much fluff, especially when editing each other's work. Emails accompanying redline drafts usually distance the editor from his stylistic revisions. "You can ignore these changes if you like—they're just stylistic," a typical email will read. We include disclaimers like this for various reasons. One is that editing for style is viewed by many lawyers to be a waste of time; what really matters is what's said, not how it's said, the reasoning goes. Another is that style is considered to be strictly personal, and lawyers don't want to be in the business of spilling red ink all over a colleague's ego. The third is that lawyers are comfortable with the predominant style; it's what we were taught in law school, it's familiar, and above all it's safe.

There is something to all of this. Substance is a common denominator: a unanimous Supreme Court opinion could be written by any one of nine justices and the syllabus is likely to describe the holding in more or less the same terms. Style, moreover, *is* personal: Justice Souter's writing style (detailed and cautious) is poles apart from that of Justice Scalia's (sweeping and impassioned), and this difference seems to reflect their individual judicial philosophies. And there *is* something to be said for hewing to tradition; we're less likely to invite criticism if we do.

But these truths mask important realities. We all know (if only intuitively) that the way something is communicated is often every bit as important as what is communicated, particularly so in persuasive writing. We'd be out of a job if it weren't—as would diplomats, presidential speech writers, public relations consultants, and any other number of professionals who regularly use the written word to persuade. Most of the opinions written by Holmes and Hand are irrelevant to modern legal questions, but the reason we still read them has as much to

do with the genius of how they said things as with what they had to say.

Just because style is personal, furthermore, doesn't mean we shouldn't edit for it. If we are willing to accept the proposition that certain styles are easier to read than others, and I hazard to guess that most of us are, then we should be willing to accept the further proposition that certain styles are better than others. This is not to say that clarity necessarily translates into superiority: Grisham goes down like a milkshake compared to Faulkner, but few literary critics would say *A PAINTED HOUSE* is "better" than *ABSALOM, ABSALOM!*. In legal writing, however,

clarity counts for a lot. Judges are too busy to re-read briefs that should be clear on the first pass. Instantaneous comprehension has to be our goal. So if editing for clarity means editing for style, so be it; for as Bryan Garner has written, "[t]he chief aim of style is clarity."

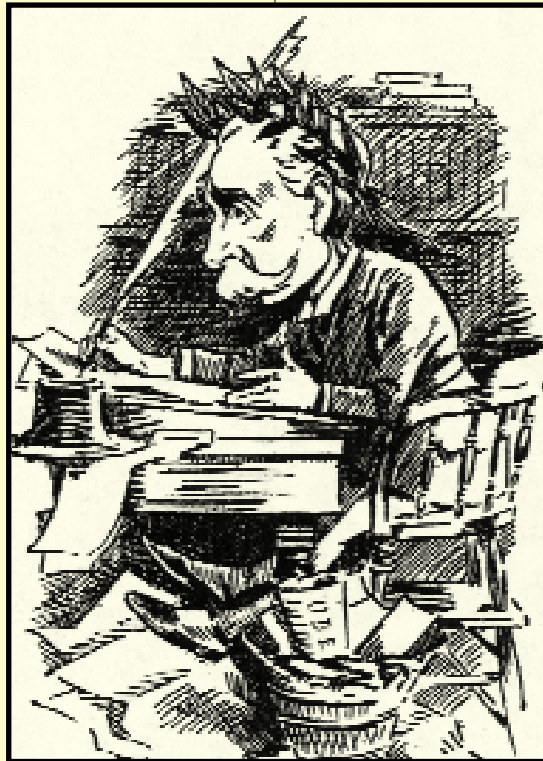
BRYAN A. GARNER, *THE ELEMENTS OF LEGAL STYLE* 4 (2d ed. 2002) (emphasis added).

The need to change our ways may be the bitterest pill of all to swallow. Most of us see no need to change; some might even say the predominant style is how lawyers *should* write. It predominates for a reason, right? I leave it to others to debate why we write like we do. I suspect though that it is more a relic of an antiquated guild mentality—the felt need to set ourselves apart from other professionals—than it is an instance of the cream rising to the top. What I know for certain, however, is that writing

styles among American business professionals in general have been drifting (critics would say "sliding") toward a more relaxed, "oral" style in recent years. See Lecture by Brenda Danet, *The Language of Email* 23-24 (2002), <http://pluto.mssc.huji.ac.il/~msdanet/papers/email.pdf> (last visited Sept. 17, 2007). The proliferation of email communication has accelerated the trend. It's at least worth pausing to consider, then, whether a plainer, more informal style of legal writing might be a more effective way of communicating in this day and age.

So style matters. But what style might we emulate? And what exactly does "a plainer, more informal" style look like?

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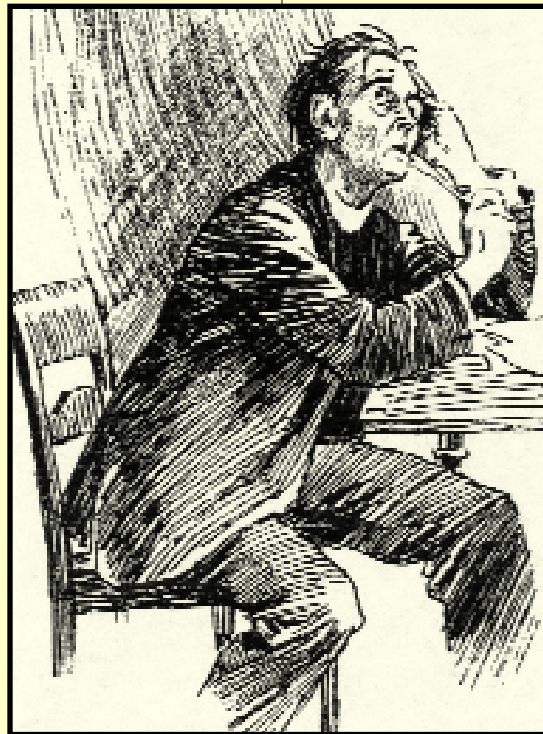


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## The Impure Style

Some years ago Judge Posner wrote an article in which he distinguished between the two basic types of judicial writing styles. See Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421 (1995). The one that I have been referring to as the “predominant” style he called the “pure” style. See *id.* at 1428. The pure style, wrote Posner, is “lofty, formal, imperious, impersonal, ‘refined,’ ostentatiously ‘correct’ (including ‘politically correct’), even hieratic . . .” *Id.* at 1426. It is marked by detailed factual narratives, extended discussions of background propositions of law, rote recitations of undisputed legal principles, deliberate use of refined terms in place of their commoner cousins (“employ” instead of “use,” to give just one example), as well as frequent use of substantive (as opposed to citational) footnotes. See *id.* at 1426-27, 1430. It is “solemn, highly polished and artifactual—far removed from the tone of conversation . . .”; indeed, purists are careful to underscore the difference between their diction and the diction of ordinary speech. *Id.* at 1429.



Then there is the “impure” style. Impure stylists “tend to be more direct, forthright, ‘man to man,’ colloquial, informal, frank, even racy, even demotic.” *Id.* at 1426. The impure style is more exploratory than it is declaratory. *Id.* at 1427. Impure stylists are apt to be concrete in their writing, *id.* at 1430, and thus make more frequent use of analogies, examples, hypotheticals, and illustrations, so as to bring abstract concepts home. Heeding Holmes’ admonition to “strike the jugular and let the rest go,” OLIVER WENDELL HOLMES, JR., SPEECHES 77 (1934), impure stylists tend to eschew unimportant details, Posner, *supra*, at 1430. They also tend to elevate their personal voice; instead of quoting from prior authority, for example, “they speak with their own tongue.” *Id.* Theirs is a conversational tone. *Id.* They write for the ear, not the eye. *Id.* Impure stylists mind the cadence of their sentences, even if it means

disregarding the rules of grammar. See *id.* at 1424. This approach to legal writing is bolder than the pure style, if only because it runs counter to the expectations of its audience. See *id.* at 1431.

This is a study in extremes, as Posner himself acknowledged; few legal writers dwell squarely in one camp or another. *Id.* at 1431-32. Judge Henry Friendly is a notable example. *Id.* at 1432. And it is not as though there are no purists worth emulating. Cardozo, Brandeis, Frankfurter, Brennan, and the second Harlan, pure stylists all according to Posner, *id.*, were some of the finest legal writers of the last century. It’s just that, as Garner has put it, those of us less talented than a Cardozo, Brandeis, Frankfurter, Brennan, or Harlan are more likely to “stumble—or plunge—when we try it.” GARNER, *supra*, at 11.

So then let’s take a look at a few specific examples of the impure style. At the risk of being parochial, and as I mentioned earlier, I’m going to use excerpts from the opinions of Judge Posner and Chief Judge Easterbrook. I use their opinions largely because I happen to practice in the Seventh Circuit (Indiana) and therefore am more familiar with their work than that of judges in other circuits. But to be sure there are other first-rate impure stylists sitting on courts located elsewhere; Judge Alex Kozinski of the Ninth Circuit Court of Appeals comes immediately to mind.

My focus is on three concepts: what I’ll refer to here as concreteness, plain talk, and cadence.

## Concreteness

Posner and Easterbrook put abstract concepts into concrete terms. This is a remarkably persuasive writing technique that adherents of the predominant, purist style tend to underutilize.

A paragraph from Posner’s opinion in *Ty, Inc. v. Publications International Ltd.*, 292 F.3d 512 (7th Cir. 2002), will illustrate. The basic issue in that case was whether Publications International had been properly enjoined from selling books containing pictures of Beanie Babies, pellet-stuffed plush toys manufactured by Ty. Publications International’s main defense and argument on appeal was that its books were protected by the fair use doctrine.



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Posner’s discussion of the doctrine starts with an affirmation of its importance: “The defense of fair use, originally judge-made, now codified, plays an essential role in copyright law. Without it, any copying of copyrighted material would be a copyright infringement.” *Id.* at 517. This is all well and good, we might say to ourselves at this point, but Posner is at such a high level of generalization that, if he were to stop there, we’d be unconvinced. Posner knows this, so to sharpen the point he provides an illustration: “A book reviewer could not quote from the book he was reviewing without a license from the publisher.” *Id.* Ah, now he’s getting somewhere! That seems extreme—having to get permission just to quote something. If that were the law, copyright holders could squelch written criticism of their work. But there’s more to it than that, as Posner explains:

Quite apart from the impairment of freedom of expression that would result from giving a copyright holder control over public criticism of his work, to deem such quotation an infringement would greatly reduce the credibility of book reviews, to the detriment of copyright owners as a group, though not to the owners of copyright on the worst books. Book reviews would no longer serve the reading public as a useful guide to which books to buy. Book reviews that quote from (“copy”) the books being reviewed increase the demand for copyrighted works; to deem such copying infringement would therefore be perverse, and so the fair-use doctrine permits such copying. On the other hand, were a book reviewer to quote the entire book in his review, or so much of the book as to make the review a substitute for the book itself, he would be cutting into the publisher’s market, and the defense of fair use would fail.

Generalizing from this example in economic terminology that has become orthodox in fair-use case law, we may say that copying that is complementary to the copyrighted work (in the sense that nails are complements of hammers) is fair use, but copying that is a substitute for the copyrighted work (in the sense that nails are substitutes for pegs or screws), or for derivative works from the copyrighted work, is not fair use . . .

*Id.* (internal citations omitted). Even if we disagree with Posner’s economic analysis, we’d probably concur with him when he suggests that a critic should have the freedom to quote select portions of a book without risking a federal lawsuit; at least that much rings true. Yet we’d also likely agree that someone can’t just reprint a book under the guise of criticism; that, too, makes sense. So here, with this illustration, Posner has shown us the purpose of the fair use doctrine, and thus its importance. This in turn frames the discussion for the remainder of the opinion.

Notice again that Posner doesn’t simply tell us that the fair use doctrine is important—he *shows* us its importance. Why might this be an effective persuasive-writing technique for lawyers to use? For at least a couple of reasons. First, critical readers are more apt to accept a conclusion if they come to it themselves. The fair use doctrine may indeed “play an essential role in copyright law,” but if Posner had just stopped there, we’d have to take his word for it; that’s telling, not showing. Putting the fair use doctrine to work in the context of a book review, however, allows even copyright neophytes to appreciate the doctrine’s importance.

Second of all, illustrations aid in instantaneous comprehension. We might be confused if Posner had declared only that “copying that is complementary to the copyrighted work is fair use.” Complementary how? we might wonder. As in similar? Related? Supplementary? It’s not clear. But when Posner adds, “in the sense that nails are complements of hammers,” we know exactly what he means.

Bryan Garner again: “Don’t say that something is unfair; show why it is, and let the reader conclude that it is. \* \* \* Don’t say that somebody acted unprofessionally; explain what the person did, and let the reader decide. \* \* \* Don’t call an argument absurd; show why it is.” BRYAN A. GARNER, *THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS* 398 (2d ed. 2003). In short, “[s]how, don’t tell.” *Id.* at 397.

### Plain Talk

Most lawyers seem to be repulsed by the spoken word when it comes to putting pen to paper. Why? You wouldn’t say, “This automobile has required recurrent maintenance from the date of purchase.” So why write that way? You’re more likely to say, and therefore you should consider writing, “This car has been in the shop ever since she bought it.” Or just: “It’s a lemon.”

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The writings of Posner and Easterbrook have an oral quality to them. Theirs is an easy, conversational style. They aren't afraid to use colloquialisms, for example. As a result their tone is unceremonious, informal, almost folksy:

<i>Instead of writing this:</i>	<i>They wrote this:</i>
He did not profess to be privy to knowledge only a few had.	"He did not pretend to have the inside dope." <i>Haynes v. Alfred A. Knopf, Inc.</i> , 8 F.3d 1222, 1227 (7th Cir. 1993) (Posner).
This is a recurrent misunderstanding that must be clarified.	"This is a recurrent misunderstanding and it is worth taking a moment to try to straighten the matter out." <i>Mucha v. King</i> , 792 F.2d 602, 604 (7th Cir. 1986) (Posner).
Plaintiff raises several additional issues. However, they are either frivolous or likely to be resolved at a second trial.	"Some other issues are raised, but they are either unimportant or likely to wash out at a new trial if one is held." <i>Ty Inc. v. Softbelly's, Inc.</i> , 353 F.3d 528, 537 (7th Cir. 2003) (Posner).
Canons of construction aid in ascertaining the meaning of an ambiguous statute.	"Canons are doubt-resolvers . . ." <i>United States v. Marshall</i> , 908 F.2d 1312, 1318 (7th Cir. 1990) (Easterbrook).
Minimum sentences are designed for low-level offenders.	"Minimum sentences are designed for little fish, the ones judges would throw back if the legislature would let them." <i>Id.</i> at 1322.

And when they do use colloquialisms, they don't draw attention to it; they just treat them as a natural part of their writing:

<i>They wrote this:</i>	<i>Not this:</i>
Alarm bells went off when we read the jurisdictional statement of Fred Hart's brief: "Amount in controversy: \$72,436.62 plus Plaintiff's attorney's fees, to be assessed by the court, should plaintiff prevail, pursuant to 705 ILCS § 225/1." Oops. <i>Hart v. Schering-Plough Corp.</i> , 253 F.3d 272, 273 (7th Cir. 2001) (Easterbrook).	"Alarm bells" went off when we read the jurisdictional statement of Fred Hart's brief . . . "Oops."
Big fish then could receive paltry sentences or small fish draconian ones. <i>Marshall</i> , 908 F.2d at 1315 (Easterbrook).	"Big fish" then could receive paltry sentences or "small fish" draconian ones.
Jiri smelled a rat. <i>Mucha</i> , 792 F.2d at 612 (Posner).	Jiri "smelled a rat."

Impure statements like these are in the main punchier, more personal, more relaxed, more concrete (there's that word again), and livelier than the corresponding purist versions. We get the sense that the author actually enjoys writing, that he thinks the law is interesting. With the purist we get a different sense—that writing is a chore reducible to a formula. Issue, rule, application, conclusion; issue, rule, application, conclusion; repeat. Whose writing would you rather read?

### Cadence

Impure stylists also pay attention to the rhythm and movement—the cadence—of their sentences and paragraphs. This means you usually won't see many substantive footnotes in their writing. Nor will you see many of those one-word transitions (invariably followed by a comma)—"However," "Moreover," "Therefore," "Thus," "Hence," "Accordingly," and so on—that lawyers like to use so much at the beginning of their sentences. Block quotes are also few and far between in their writing. Instead of long parentheticals following case citations, you're more apt to see just the cite with an explanation of its significance seamlessly woven into the adjoining text. And "but" and "and" are used to begin sentences.



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Two examples will give you a flavor of what I mean by “cadence.” First is an excerpt from Easterbrook’s opinion in *American Booksellers Association, Inc. v. Hudnut*, 771 F.2d 323, 330-31 (7th Cir. 1985), a case that challenged an Indianapolis pornography ordinance:

Much of Indianapolis’s argument [in defense of the ordinance] rests on the belief that when speech is “unanswerable,” and the metaphor that there is a “marketplace of ideas” does not apply, the First Amendment does not apply either. The metaphor is honored; Milton’s *Aeropagitica* and John Stewart Mill’s *On Liberty* defend freedom of speech on the ground that the truth will prevail, and many of the most important cases under the First Amendment recite this position. The Framers undoubtedly believed it. As a general matter it is true. But the Constitution does not make the dominance of truth a necessary condition of freedom of speech. To say that it does would be to confuse an outcome of free speech with a necessary condition for the application of the amendment.

A power to limit speech on the ground that truth has not yet prevailed and is not likely to prevail implies the power to declare truth. At some point the government must be able to say (as Indianapolis has said): “We know what the truth is, yet a free exchange of speech has not driven out falsity, so that we must now prohibit falsity.” If the government may declare the truth, why wait for the failure of speech? Under the First Amendment, however, there is no such thing as a false idea, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339, 94 S.Ct. 2997, 3006, 41 L.Ed.2d 789 (1974), so the government may not restrict speech on the ground that in a free exchange truth is not yet dominant.

At any time, some speech is ahead in the game; the more numerous speakers prevail. Supporters of minority candidates may be forever “excluded” from the political process because their candidates never win, because few people believe their positions. This does not mean that freedom of speech has failed.

The Supreme Court has rejected the position that speech must be “effectively answerable” to be protected by the Constitution. For example, in *Buckley v.*

*Valeo, supra*, 424 U.S. at 39-54, 96 S.Ct. at 644-51, the Court held unconstitutional limitations on expenditures that were neutral with regard to the speakers’ opinions and designed to make it easier for one person to answer another’s speech. See also *FEC v. National Conservative PAC*, 470 U.S. 480, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985). In *Mills v. Alabama*, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966), the Court held unconstitutional a statute prohibiting editorials on election day—a statute the state had designed to prevent speech that came too late for answer. In cases from *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), through *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), the Court has held that the First Amendment protects political stratagems—obtaining legislation through underhanded ploys and outright fraud in *Noerr*; obtaining political and economic ends through boycotts in *Claiborne Hardware*—that may be beyond effective correction through more speech.

Here we see several of the hallmarks of an impure stylist at work. Easterbrook’s sentences tend to begin or end in important words. They vary in length, some long, some short; short sentences in particular are used for impact, longer ones for elaboration. Case law is discussed in such a way that it becomes part of the fabric of the opinion; cases are rarely discussed in separate paragraphs or parentheticals, and when they are, they’re *short* paragraphs and parentheticals. One sentence in the first paragraph begins with “but,” not “however,” and where the word “however” does appear, it’s pushed to the middle of the sentence. And finally, in the third paragraph, Easterbrook uses the colloquialism “ahead in the game,” without quotation marks.

Now for an excerpt from one of Posner’s opinions, *Peaceable Planet, Inc. v. Ty, Inc.* 362 F.3d 986, 988-89 (7th Cir. 2004) (internal citations omitted), yet another Beanie Baby case:

In the spring of 1999, Peaceable Planet began selling a camel that it named “Niles.” The name was chosen to evoke Egypt, which is largely desert except for the ribbon of land bracketing the Nile. The camel is a desert animal, and photos juxtaposing a camel with an Egyptian pyramid are common. The price tag fastened to Niles’s ear contains information both about camels and about Egypt, and the Egyptian flag is stamped on the animal.



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A small company, Peaceable Planet sold only a few thousand of its camels in 1999. In March of the following year, Ty began selling a camel also named “Niles.” It sold a huge number of its “Niles” camels—almost two million in one year—precipitating this suit. The district court ruled that “Niles,” being a personal name, is a descriptive mark that the law does not protect unless and until it has acquired secondary meaning, that is, until there is proof that consumers associate the name with the plaintiff’s brand. Peaceable Planet did not prove that consumers associate the name “Niles” with its camel.

The general principle that formed the starting point for the district court’s analysis was unquestionably sound. A descriptive mark is not legally protected unless it has acquired secondary meaning. An example is “All Bran.” The name describes the product. If the first firm to produce an all-bran cereal could obtain immediate trademark protection and thereby prevent all other producers of all-bran cereal from describing their product as all bran, it would be difficult for competitors to gain a foothold in the market. They would be as if speechless. Had Peaceable Planet named its camel “Camel,” that would be a descriptive mark in a relevant sense, because it would make it very difficult for Ty to market its own camel—it wouldn’t be satisfactory to have to call it “Dromedary” or “Bactrian.”

Although cases and treatises commonly describe personal names as a subset of descriptive marks, it is apparent that the rationale for denying trademark protection to personal names without proof of secondary meaning can’t be the same as the rationale just sketched for marks that are “descriptive” in the normal sense of the word. Names, as distinct from nicknames like “Red” or “Shorty,” are rarely descriptive. “Niles” may evoke but it certainly does not describe a camel, any more than “Pluto” describes a dog, “Bambi” a fawn, “Garfield” a cat, or “Charlotte” a spider. (In the *Tom and Jerry* comics, “Tom,” the name of the cat, could be thought descriptive, but

“Jerry,” the name of the mouse, could not be.) So anyone who wanted to market a toy camel, dog, fawn, cat, or spider would not be impeded in doing so by having to choose another name.

There are a few things to note about this excerpt. One is that it contains little factual detail. There are some additional facts, both before and after this part of the opinion, but not many. And many of the facts that the opinion does contain are approximations. Posner tells us that Peaceable Planet began selling its Niles camels “[i]n the spring of 1999,” not on April 3, 1999; and that the company sold only “a few thousand,” not 5,402. Not only would this additional level of detail have added nothing to the opinion, it would have interrupted the opinion’s cadence. Further precision also would have distracted us from the details that are important, such as the camels’ name, “Niles.” Note also Posner’s use of contractions (“wouldn’t” and “can’t”), and, to use his word, the “huge” number of illustrations. These qualities give the excerpt a flowing feel; you get the sense that Posner is spinning these scenarios out in his head and telling us about them as he does.

\* \* \* \* \*

My point is not that lawyers should disregard all traditional stylistic conventions. It is rather that the impure style is an antidote to the most unproductive aspects of those conventions: abstraction, excessive formality, and a wooden, stilted prose. So be concrete. Use your speaking voice and write directly and plainly. And mind the cadence of your sentences. Your writing will improve by leaps and bounds if you do.

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