

Clearing the Cobwebs from Judicial Opinions

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

—Adams Sherman Hill¹

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

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

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

ADVANTAGE #1: ENHANCED READABILITY THROUGH SHORTER SENTENCES

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

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

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Footnotes

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

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

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

Stoecker, 179 F.3d 546, 549 (7th Cir. 1999), *aff'd* under the name *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15 (2000). The Act is a gesture of comity toward the states; recognizing the centrality of tax collection to the operation of government, the Act prevents taxpayers from running to federal court to stymie the collection of state taxes. E.g., *RTC Commercial Assets Trust 1995 NP3-1 v. Phoenix Bond & Indemnity Co.*, 169 F.3d 448, 453 (7th Cir. 1999). The Act's goal could not be achieved if the statutory language were read literally, as barring only injunctions, and so it's been stretched to cover declaratory judgments, *California v. Grace Brethren Church*, 457 U.S. 393, 408-13 (1982), and, what is as necessary to prevent the Act from being completely undone, suits for refund of state taxes. *Marvin F. Poer & Co. v. Counties of Alameda*, 725 F.2d 1234 (9th Cir. 1984); *Cities Service Gas Co. v. Oklahoma Tax Comm'n*, 656 F.2d 584, 586 (10th Cir. 1981); *United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323 (5th Cir. 1979). It is an open question whether the Act covers damages suits under 42 U.S.C. § 1983 as well, see *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 107 (1981), which would be another method of making an end run around the statutory prohibition. The Supreme Court held in the *Fair Assessment* case that such a suit was in any event barred by the principle of comity, operating independently of the Tax Injunction Act. The Court declined to rule on whether that principle "would also bar a claim under § 1983 which requires no scrutiny whatever of state tax assessment practices, such as a facial attack on tax laws colorably claimed to be discriminatory as to race." *Id.* at 107 n. 4.⁴

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

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

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

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

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

ADVANTAGE #2: MORE COHERENT AND FORCEFUL PARAGRAPHS

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

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

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

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

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

Consistently with this hierarchy of political entities, the Arizona Constitution¹ gives the legislature plenary power over the “methods and procedures for [municipal] incorporation,”² including the power to “create, enlarge and restrict municipal franchises.”³ Those seeking municipal incorporation are “mere supplicants, with no rights beyond those which the legislature [sees] fit to give them.”⁴ And since the legislature “may delegate to a subordinate body” discretion over procedures for municipal incorporation,⁵ it may also give municipalities total discretion to grant or deny annexations.⁶ It is within this context that we consider the voting-rights doctrine of the Equal Protection Clause.

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

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

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

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

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

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

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

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

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

ADVANTAGE #3: IDEAS CONTROL, NOT NUMBERS

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

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

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

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

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

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

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

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

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

Such erroneous instructions also implicate Sixth Amendment principles preserving the exclusive domain of the trier of fact. (*Carella v. California*, supra, 491 U.S. at p. 265, 109 S.Ct. 2419; *People v. Kobrin*, supra, 11 Cal. 4th at p. 423 [45 Cal. Rptr. 2d 895, 903 P.2d 1027].) In *People v. Avila* (1995) 35 Cal. App. 4th 642, 651-652, 43 Cal. Rptr. 2d 853, we synthesized the federal constitutional authority on the right to instruction as to the elements of an offense as follows: “It is well established that the Sixth Amendment guarantees a criminal defendant the right to require the prosecution to prove [. . .] guilt [. . .] beyond a reasonable doubt.” (*Victor v. Nebraska* (1994) 511 U.S. [1, 5] [114 S.Ct. 1239, 127 L.Ed.2d 583].) In *Sullivan v. Louisiana* (1993) 508 U.S. [275, 277] [113 S.Ct. 2078, 124 L.Ed.2d 182], the United States Supreme Court held⁸

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

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

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

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

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

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

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

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

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

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

With a little editing, the passage becomes more coherent:

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

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

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

ADVANTAGE #5: YOU HAVE TO DISCUSS THE CONTROLLING CASELAW

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

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

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

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

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

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

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

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

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

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

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

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

ADVANTAGE #6: STRING CITATIONS ARE NO LONGER BOTHERSOME

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

WHY CITATIONS HAVE GROWN SO THICK

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

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

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

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

[O]ur review of decisions by other courts of appeals reveals a consensus that the Speedy Trial Act requires the dismissal of only those charges made in the original complaint that triggered the 30-day time period. During the past two decades, the Second,¹ Fifth,² Sixth,³ Eighth,⁴ Ninth,⁵ and Eleventh Circuits⁶ have all so held. Moreover, the Second⁷ and Eleventh⁸ Circuits have rejected the idea of applying the transactional test suggested by Oliver, both pointing out that Congress itself considered and rejected this option.

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

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

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

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

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

While § 1997e(a) does not expressly define the term “prison conditions,” the phrase is defined in a different section of the statute—but that definition explicitly applies only to “this section.”¹ Yet the defendants urge that § 1997e(a) should be read *in pari materia* with § 3626. The United States Supreme Court has recognized the interpretive canon that language “used in one portion of a statute . . . should be deemed to have the same meaning as the same language used elsewhere in the statute.”² Some courts have read the “prison conditions” language of § 1997e(a) *in pari materia* with the definition provided in § 3626(g)(2).³ But whether the latter section provides a definition may not matter at all, since § 3626 is itself ambiguous. On the critical question here, even judges who rely on the definition in that section do not agree on whether § 1997e(a) encompasses excessive-force and assault claims. The Third Circuit has held that it does.⁴ So has a judge sitting in the Southern District of New York.⁵ On the opposite side of this question are Circuit Judge John T. Noonan⁶ and yet a different district judge sitting in the Southern District of New York.⁷

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

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

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

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

REFUTING THE OPPOSITION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The passage becomes significantly clearer when shorn of the citations:

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

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

CONCLUSION

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

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

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

most people's ability to understand.

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

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

AN AFTERTHOUGHT

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

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



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

20. *Id.*

EXAMPLE 1

ORIGINAL VERSION

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

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

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

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

REVISED WITH CITATIONS IN FOOTNOTES

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

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

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

ORIGINAL VERSION

Continued

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

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

EXAMPLE 2

ORIGINAL VERSION

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

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

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

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

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

EXAMPLE 3

ORIGINAL VERSION

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

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

REVISED WITH CITATIONS IN FOOTNOTES

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

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

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

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EXAMPLE 4

ORIGINAL VERSION

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

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

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

Although in Massachusetts we have implicitly considered the issue of retrograde extrapolation, most recently in *Douillard v. LMR, Inc.*,¹ we have never been asked to address the admissibility of retrograde extrapolation as a matter of law. Several other jurisdictions have admitted similar evidence.² At least two of these—South Dakota³ and Vermont⁴—require extrapolation back to the time of the offense in order for evidence of blood alcohol content to be admissible.

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