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Review of *Draft No. 4*

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Beth Hirschfelder Wilensky

Draft No. 4. By John McPhee. Farrar, Straus and Giroux, 2017. Pp. 208, \$25.

“Writing is selection.”¹ That line appears in several places in *Draft No. 4*, the new essay collection on the craft of writing by John McPhee, longtime writer for *The New Yorker*. For McPhee, that line applies to his selection of subject matter, to his selection of the specific words he puts on the page, and to his selection of nearly everything in between. And if one theme of the book is that writing is a series of choices, the book also shows how often those choices are constrained. Those constraints are useful; they help narrow our choices — our “selections” — in helpful ways, but only if we embrace instead of disdain them. The constraints that a journalist like McPhee faces — and the decisions he makes in the face of those constraints — will likely resonate with lawyers, who are frequently bound by similar constraints.

The eight essays that make up *Draft No. 4* originally appeared in *The New Yorker*, though McPhee has revised them for this collection. McPhee, who also teaches writing at Princeton, has built a career on the kind of long-form journalism that *The New Yorker* is known for. He explains that he tackles simply those things that interest him² — and by that measure, many, many things interest him, including solitude; oranges; the science, people, and places of the wilderness; and the craft and experiences of people in countless vocations. In *Draft No. 4*, we get only snippets of those writings, since McPhee’s focus is on the process he used to produce them and not on their substance. But reading this

¹ John McPhee, *Draft No. 4* 56, 98, 180 (2017).

² *Id.* at 7 (explaining that he once determined that “more than ninety per cent” of the pieces he had written were about subjects he developed an interest in before he went to college).

book will leave you hungry to pick up one of his many book-length collections of essays on those topics.³

Many of the essays in *Draft No. 4* reveal that McPhee struggles with the same constraints that legal writers face: facts, deadlines, word limits, and the audience's needs. As a result, lawyers — who, like journalists, are professional writers — are likely to find much to mine for advice and inspiration in *Draft No. 4*.

Facts

Like journalists, lawyers deal in facts. That might not be obvious to a layperson who sees lawyers as dealing primarily with “the law,” but a good lawyer knows that the facts of her case are often at least as important as — and frequently even more central than — the law. And if facts constrain what journalists and lawyers can write, both have strategies for turning that constraint to their advantage. McPhee's description of creative nonfiction will ring true to any attorney who has worked to wrestle facts onto the page in a way that will resonate with a judge:

The creativity lies in what you choose to write about, how you go about doing it, the arrangement through which you present things, the skill and the touch with which you describe people and succeed in developing them as characters, the rhythms of your prose, the integrity of the composition, the anatomy of the piece (does it get up and walk around on its own?), the extent to which you see and tell the story that exists in your material, and so forth. Creative nonfiction is not making something up but making the most of what you have.⁴

³ E.g., John McPhee, *In Suspect Terrain* (2011); John McPhee, *Uncommon Carriers* (2007); John McPhee, *The Control of Nature* (1990).

⁴ McPhee, *Draft No. 4* at 185.

That sounds a lot like the Platonic ideal of an appellate brief. Except for the ability to “choose [what] to write about” (more on that later), McPhee perfectly captures the attitude that can turn a disjointed mess of bad facts into a winning motion, brief, or litigation strategy.

McPhee “mak[es] the most” of his facts in two ways: He both welcomes preexisting constraints on his writing and imposes external ones. On the benefits of being fact-bound, McPhee writes that “[f]iction . . . is much harder to do than fact, because the fiction writer moves forward by trial and error, while the fact writer is working with a certain body of collected material.”⁵

A significant constraint that McPhee manufactures when working with that material is the complicated structure that has come to define his writing. (More on that below.) In many ways, McPhee’s use of structural constraints is his way of dealing with another constraint that lawyers also face: that of having *too much* material to deal with — too many facts, too many things to say about them, too many ways to put the pieces together. Legal writers are constrained both by the actual facts we have to deal with and by the often-overwhelming dump of things we need to address. When we self-impose structural constraints, we can better deal with the abundance of information that we need to get onto the page.

So too with McPhee. After describing his intricate method for dividing voluminous material into discrete folders, and then working with only a single folder at a time,⁶ McPhee writes: “It painted me into a corner, yes, but in doing so it freed me to write.”⁷ McPhee’s description of his original note-card system — and his eventual switch to a computer to track information —

⁵ *Id.* at 80.

⁶ *Id.* at 35–38.

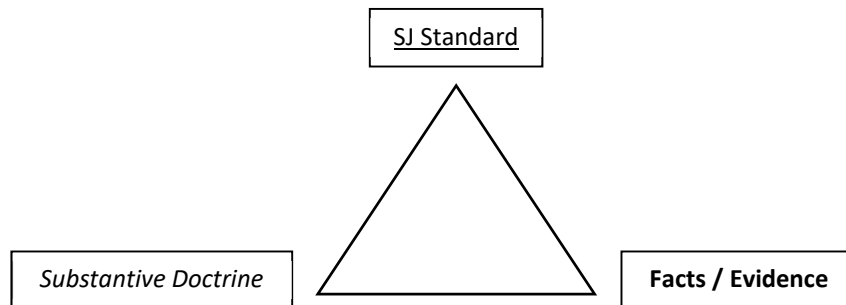
⁷ *Id.* at 36.

brings to mind litigation databases that attorneys use to code, manage, and deploy large amounts of discovery.

Structure

McPhee’s writing is perhaps best known for its structure: the unusual ways he pieces together his articles. In the first two essays — “Progression” and “Structure” — he takes us inside his process with visuals. He shows us the curlicues and circles and other shapes that he uses to denote such things as time, people, settings, and relationships. His specific approaches are probably too intricate (and too specific to his topics) to work for legal writers, but the idea of mapping out, visually, how the pieces fit together is one that lawyers might find useful.

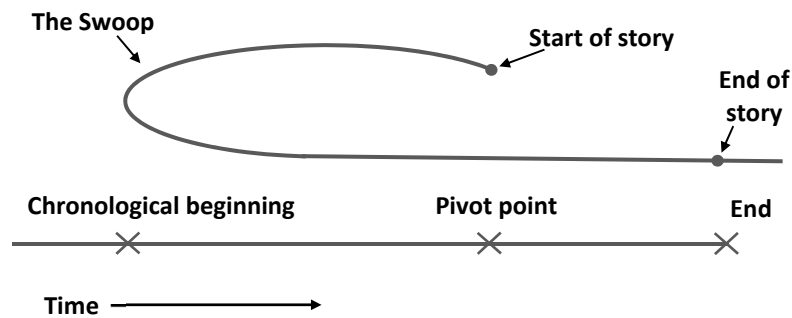
Consider one straightforward example: the summary-judgment motion. An effective motion or opposition needs to work nimbly with the summary-judgment standard, the substantive law, and the facts. Students often struggle to pull those threads together. McPhee’s diagrams brought to mind the simple visual that I sometimes use to show students what they need to do:



Now imagine a high-school student’s opposition brief in a case about her right to display a political message on her shirt. When we pull together the threads of our triangle, a sentence like this might emerge: “**The plaintiff’s testimony that students routinely violate the dress code without repercussion could lead a**

jury to conclude that *the school engaged in viewpoint discrimination when it punished only her for violating the dress code.*” A paragraph with that topic sentence would be primed for effective explication of all three points on the triangle.

For experienced litigators, those three threads usually come together easily, without the need for a visual. But the lesson holds for more complicated structures. And McPhee’s examples of different ways to visualize structure — as a circle or a spiral denoting points in time and unusual places to start the story; as a series of circles and lines that diagram places in a timeline where specific facts might be plotted; as groups of shapes showing how two stories converge in one consequential spot; etc. — might spur ideas about nonobvious ways to structure a brief, particularly the Facts section. In fact, McPhee’s diagrams brought to mind this visual from a popular legal-writing textbook,⁸ which suggests centering the facts on a key “pivot point,” for persuasive effect, and then “swoop[ing]” backward in time to cover earlier events:



Legal writers face more constraints in structuring a story than journalists do. We don’t have the luxury of holding back crucial information merely to build suspense. But we also needn’t be tethered to rote chronology, reflexively starting at “the

⁸ Alexa Z. Chew & Katie Rose Guest Pryal, *The Complete Legal Writer* 323 (2016).

beginning” — or even think of the story as points in time instead of, for example, scenes with characters or thematically connected bits of evidence.

In the school-dress-code case described above, the chronological story might start with the student’s decision to wear a shirt with a provocative message, or even earlier, with the political awakening that prompted her to wear the shirt. But in its summary-judgment motion, the school might begin by telling the story entirely from the viewpoint of the school administrator who witnessed the disruption the shirt caused and acted to ward off further erosion of stability in the school. And it might then tell the story from the viewpoint of a teacher who struggled to keep her students focused in the face of that disruption, and then from the viewpoint of a teacher who wasn’t even aware of the shirt but who had to intervene in a fracas it caused. In other words, that structure would take as its singular focus the disruption and describe that disruption from multiple viewpoints. The school’s story starts when faculty members witness the disruption and trace it to the shirt. To the extent that earlier events might be legally relevant, they can be introduced *after* the motion explains how the disruption unfolded from the school’s vantage point. McPhee’s sophisticated way of thinking about structure is a good reminder that stories don’t have to start at the beginning.

Audience

If the legal writer’s mantra is “Write for Your Audience,” then the chapter called “Frame of Reference” is the one most closely aligned with the work that lawyers do. In it, McPhee fleshes out “a topic of first importance in the making of a piece of writing: . . . the things and people you . . . allude to in order to advance its

comprehensibility.”⁹ Done poorly, those frames of reference can “irritate rather than illuminate.”¹⁰ Lawyers must similarly take care not to assume that we share our readers’ frames of reference — not just about “things and people,” but also about the law. We are taught to assume that judges are generalists — that they know “the law” but not the specific *laws* relevant to our case. Lawyers must constantly assess how much detail to provide about the relevant doctrine, walking the fine line between being helpful and irritating.

Frames of reference can be quite useful in giving a lot of detail in a short space, but only if the reader knows the reference. Here is McPhee: “If you say someone looks like Tom Cruise — and you let it go at that — you are asking Tom Cruise to do your writing for you. Your description will fail when your reader doesn’t know who Tom Cruise is.”¹¹ McPhee calls such references “borrowed vividness.”¹² He suggests that writers can partly rescue a reference from landing flat by providing detail to help a reader who doesn’t know the reference. As just one example, McPhee quotes a student who described a professor like this: “He looks a bit like Gene Wilder, and has some of the same manic energy.”¹³ According to McPhee, even if the reader doesn’t instantly conjure an image of Gene Wilder, the phrase “the same manic energy” works to “pay[] back much of the vividness [the writer] borrowed.”¹⁴

⁹ McPhee, *Draft No. 4* at 118.

¹⁰ *Id.*

¹¹ *Id.* at 120. Reading this, I wondered: Who doesn’t know who Tom Cruise is? But then I thought about a case I used to teach in which Rodney Dangerfield was the plaintiff, and his fame was relevant to the court’s analysis. Each year, fewer students knew who he was. In the last year I taught the case, one student tentatively volunteered this: “I think he’s that guy from that golf movie?” I dropped the assignment.

¹² *Id.*

¹³ *Id.* at 121.

¹⁴ *Id.*

Lawyers would do well to learn from McPhee’s examples. When we use references for “borrowed vividness,” we run the risk that one won’t land because the reader doesn’t know the reference. When that happens, the reference is more than just ineffective; it *undermines* the writing’s persuasiveness because the reader must stop to ponder, and perhaps Google, the reference.

A recent example appeared in Paul Clement’s brief to the U.S. Supreme Court in *Murphy v. NCAA*.¹⁵ On the question of a statutory provision’s severability, Clement wrote: “To try to avoid an empty victory, New Jersey proffers an implausible if-you-give-a-mouse-a-cookie argument”¹⁶ This is a great reference — if you’re an avid reader of books for preschoolers. If you aren’t, you’re likely to wonder who is giving a mouse a cookie and why, and what that has to do with New Jersey’s severability argument.¹⁷ Clement was alluding to the children’s book *If You Give a Mouse a Cookie*, in which the narrator describes how giving in to an insistent mouse’s demands will lead to ever more demands.¹⁸ Clement wrote that New Jersey was “contending that if the authorization provision falls, then the licensing provision must fall, and if the licensing provision falls, then the prohibitions on state conduct must fall, and if the prohibitions on state conduct

¹⁵ 584 U.S. ____ (2018).

¹⁶ Brief for Respondents at 54, *Christie v. NCAA*, 584 U.S. ____ (2018) (as *Murphy v. NCAA*) (No. 16-476).

¹⁷ Other lawyers have used this reference before the Supreme Court. Neal Katyal used it on page 42 of his Brief for Petitioners in *Wells Fargo & Co. v. City of Miami*, 581 U.S. ____ (2017) (as *Bank of Am. Corp. v. City of Miami*) (“The causal chain could be never ending — like in the children’s book *If You Give a Mouse a Cookie*.”). And in another case, an advocate dropped a quick cite to the book with no further explanation of its relevance. Brief for Petitioner at 40, *Leidos Inc. v. Ind. Pub. Ret. Sys.*, No. 16-581 (June 21, 2017).

¹⁸ Laura Joffe Numeroff, *If You Give a Mouse a Cookie* 1–5 (1985) (“If you give a mouse a cookie, he’s going to ask for a glass of milk. When you give him the milk, he’ll probably ask you for a straw. When he’s finished, he’ll ask for a napkin. Then he’ll want to look in a mirror . . .”).

fall, then the prohibitions on private conduct must fall with them.”¹⁹ So perhaps he wasn’t asking Tom Cruise to do *all* the writing; he paid back some of the vividness he’d borrowed. But he might still have left readers frustrated and Googling. That suggests one difference between long-form journalism and legal writing: McPhee can shrug and say, “Eh, maybe readers won’t get it” (and in fact admits to doing that at least once).²⁰ Lawyers don’t have that luxury.

It is likely no accident that the “Frames of Reference” essay contains multiple anecdotes from McPhee’s teaching career. (He recalls students who couldn’t identify Norman Rockwell, Vivian Leigh, or Bob Woodward, to name just a few.²¹) I suspect that those of us who regularly stand up in front of a classroom are more likely to be aware of the risk of a frame-of-reference misfire. There is nothing like trying out a joke before a live audience to remind you that not everyone shares your store of arcana. McPhee’s examples remind us to think about how our experiences might blind us to what things we know that our reader doesn’t. They also suggest a tactic that attorneys can use to avoid a potentially confusing reference: try out your references on multiple, diverse audiences.

Journalists have a built-in check on whether they’ve kept their audience in mind: their editor, whose job it is to bring a new set of eyes to the work. The chapter from which the book takes its name focuses on the revision process and describes the editor’s role in that process. In it, McPhee shares a wonderful description

¹⁹ Brief for Respondents at 54, *Christie v. NCAA*, 584 U.S. ____ (2018) (as *Murphy v. NCAA*) (No. 16-476).

²⁰ McPhee, *Draft No. 4* at 127 (recalling that for an article about Wimbledon, McPhee convinced his editor to keep an obscure reference categorizing British social classes according to which staterooms they could have afforded on the trip to India in colonial times — for the “one reader in ten thousand who would get that”).

²¹ *Id.* at 125.

of the writer's task in service to the reader, one that's apt for consumers of both journalistic and legal writing. He describes editor Eleanor Gould's "foremost pet peeve in factual writing" as "indirection — sliding facts in sideways, expecting a reader to gather rather than receive information."²² What better description could there be of the legal writer's task in describing cases, evidence, and arguments than ensuring that the audience receives, rather than gathers, information? If a lawyer introduces a case by writing that "in *Boroff*, the school said that the Marilyn Manson shirt could be banned as disruptive,"²³ she is expecting the reader to gather that a student wore a Marilyn Manson shirt to school from a sentence whose focus is on something else, i.e., the school's argument about that shirt. The better approach is to first state directly that a student wore a Marilyn Manson shirt to school and *then* explain that the school argued that it could ban the shirt as disruptive. True, most readers would be capable of "gathering," from the first version, that a student wore the shirt and that the school had a dress code. But the lawyer's job is to make sure that the reader *receives* the information. The challenge for lawyers — who usually don't have an editor on staff — is to find a new set of eyes to ensure that they do just that.

Another surface-level distinction between journalists and lawyers, in writing for their audience, is this: The long-form journalist must make the reader *want* to read. Many journalists have more freedom to pick their subjects than attorneys do. But unlike a lawyer's typical reader, McPhee's audience is under no obligation to read his work. Convincing a reader to dive into and then stick with a lengthy article requires skill. In the era of blog posts and short attention spans, it might be getting harder to engage the reader for 10,000 words. McPhee's intricately structured articles

²² *Id.* at 169.

²³ These facts come from *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000).

frequently start slowly — with scene-setting, or a vignette whose significance won't be apparent until much later. The complicated structures he uses often don't reveal themselves for many pages; they reward the reader who sticks with the article until the very end. As a result, his writing requires a significant reader commitment. In the Internet era, his work risks being the tab that stays open on a computer screen — “I'm going to get to it, I swear.” — until reality sets in and it eventually gets closed, unread.

Legal writers, in contrast, ostensibly have a captive audience — a judge, colleague, or client who is professionally obligated to read their work. And yet McPhee's success at getting people to read his work for pleasure for so many years suggests that his writing holds lessons for lawyers. We need to make lengthy writing on complex subjects engaging for our readers, even if — and perhaps especially because — our readers' jobs require them to read what we write.

Unlike McPhee, we *don't* have the luxury of keeping our reader on tenterhooks for many pages with a payoff that comes only at the end, or of introducing information without quickly revealing its relevance. In fact, that aspect of McPhee's approach is precisely the opposite of what nearly every expert on legal writing agrees is an essential writing technique for a busy audience: conclusions come first.²⁴ Legal readers don't like to be kept in suspense and don't like to have to figure out, along the way, the key point of the paragraph, argument, or brief. But McPhee's ability to marshal voluminous material on complicated subjects, to make

²⁴ See, e.g., Chew & Pryal, *The Complete Legal Writer* at 37 (“[H]aving the conclusion at the beginning is what legal readers expect.”); Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* 156 (5th ed. 2010) (“Law-trained readers are nearly always in a hurry. They want answers quickly and right up front.”); Richard K. Neumann, Jr., J. Lyn Entrikin & Sheila Simon, *Legal Writing* 146 (3d ed. 2015) (“State your conclusion first because a practical and busy reader needs to know what you are trying to support before you start supporting it.”).

it accessible and *enjoyable* for the reader, to find the “story” in even the most mundane topics (oranges!) is a model for all lawyers.

Deadlines and Word Limits

Lawyers will recognize in McPhee’s discussion of time and space constraints the external limits that similarly affect their own writing. And some may envy — at least initially — the leisurely pace at which McPhee can research and write. But in “Checkpoints,” the essay about the fact-checking process, McPhee turns to the frenetic end of the writing process: the race against the clock to pin down those final pesky facts and ensure that everything is scrupulously accurate; the intense final moments before a piece must close; the compulsive desire for substantive and stylistic perfection even as the minutes tick down. McPhee could be describing the moments before filing an important brief. He doesn’t offer advice on how to manage the time leading up to a deadline. But he does share the playful expression coined by a *New Yorker* fact-checker to describe the “zone of time” when a deadline closes in: “the last-minute heebie-jeebies.”²⁵ Lawyers will probably find use for that phrase too.

Even if McPhee’s deadlines seem luxurious to lawyers, we might have the advantage when it comes to word limits. Like lawyers, journalists must grapple with space constraints. Unlike lawyers, journalists often don’t know how much space they have until after they’ve written a draft and revised it multiple times — a scenario that often requires “tailoring your stories past the requests, demands, fine tips, and incomprehensible suggestions” of editors.²⁶ Depending on the publication’s other content, the writer might receive an order to cut, for example, eight lines

²⁵ McPhee, *Draft No. 4* at 134–35.

²⁶ *Id.* at 186.

(indicated by the notation “Green 8” on the galleys) so that the piece will fit. Viewed in that light, lawyers are lucky to know from the start that they have 13,000 words, or 30 pages, or whatever, and that that limit won’t change after they’ve written a brief they’re happy with. But lawyers would also benefit from McPhee’s advice to view this greening as “a craft in itself — studying your completed and approved product, your ‘finished’ piece, to see what could be left out.”²⁷ It’s a good reminder to look for ways to constantly tighten your prose even if the word limit doesn’t require it.

The Writing Process

McPhee also addresses the constraint that is the bane of every writer’s work: writer’s block. The penultimate chapter, the one from which the book takes its name, contains an extended discourse on writer’s block and the writing process. McPhee has the best advice I’ve seen for overcoming it: write a letter to your mother explaining your despair over the writing process. In this letter, describe in detail what you’re struggling with — say, an essay about a grizzly bear — and why you’re struggling, what words about the bear you’re trying and failing to get on the page, and why those words matter. “And then you go back and delete the ‘Dear Mother’ and all of the whimpering and whining and just keep the bear.”²⁸ It’s a version of the “freewriting” approach to winning the staring contest with the blank page, an approach that other authors recommend.²⁹ But McPhee’s description is particularly convincing because it acknowledges the self-doubt that haunts many of us who write for a living:

²⁷ *Id.*

²⁸ *Id.* at 157–58.

²⁹ See, e.g., Chew & Pryal, *The Complete Legal Writer* at 299–301.

If you lack confidence in setting one word after another and sense that you are stuck in a place from which you will never be set free, if you feel sure that you will never make it and were not cut out to do this, if your prose seems stillborn and you completely lack confidence, you must be a writer. If you say you see things differently and describe your efforts positively, if you tell people that you “just love to write,” you may be delusional.³⁰

So those insecurities and doubts are valuable; they tell us that we are serious about writing well and know that good writing isn't cheap or easy. The more we learn to embrace those doubts, the more we will free ourselves to write and rewrite until we end up with satisfying words on the page.

The chapter contains much more that will be familiar to legal writers who are serious about their craft. Indeed, it is full of the sort of advice that makes this legal-writing professor's heart sing. McPhee offers his take on revisions as the essence of the writing process. He describes the importance of getting the first draft down in writing so that your mind has something to work on: “Without the drafted version — if it did not exist — you obviously would not be thinking of things that would improve it.”³¹

McPhee insists on clean, simple words over fancy, polysyllabic ones — and explains why a dictionary is better than a thesaurus for finding just the right word.³² Dictionaries, he notes, are apt not only to provide synonyms, but also to “tell you how each listed word differs from all the others.”³³ They are thus better at helping writers find just the right word, whereas thesauruses “are useful things, but they don't talk about the words they list.”³⁴

³⁰ McPhee, *Draft No. 4* at 158.

³¹ *Id.* at 159–60.

³² *Id.* at 162–64.

³³ *Id.* at 164.

³⁴ *Id.*

Thesauruses also tempt writers to select “a polysyllabic and fuzzy word when a simple and clear one is better.”³⁵

As for voice, McPhee believes that it’s perfectly fine for young writers to adopt the style of whatever they happen to be reading at any moment; over time “the components of imitation fade,” leaving the writer with a new thing, a personal style that has formed one fragment at a time. And he offers these words of reassurance to novice writers: “A relaxed, unselfconscious style is not something that one person is born with and another not. Writers do not spring full-blown from the ear of Zeus.”³⁶ In other words, writing is a craft that takes years to develop, and the work of perfecting it is never done. Any lawyer who has looked back at briefs she wrote ten years earlier and cringed will recognize that.

Language

There is plenty in *Draft No. 4* for word nerds to love. Read it for McPhee’s description of the etymology (which he admits might be apocryphal) of *posh*. (Briefly, it’s an abbreviation of “port out, starboard home,” which describes the most expensive staterooms for those sailing from England to India and back in un-air-conditioned ships.)³⁷ I loved McPhee’s description of how Eleanor Gould, the usage and grammar expert at *The New Yorker* for more than 50 years, expressed her irritation with writers’ “artistic” use of the definite article *the*.³⁸ I see even my best students routinely make this error when they describe the facts of a case — using *the* to introduce a noun as though the reader already knows exactly what thing they are referring to. Here is McPhee

³⁵ *Id.* at 163.

³⁶ *Id.* at 161.

³⁷ *Id.* at 126–27.

³⁸ *Id.* at 169.

on Gould: “If you say ‘a house,’ you are introducing it. If you say ‘the house,’ the reader knows about it because you mentioned it earlier.”³⁹ I can’t wait to try out that example with my students.

Legal writers will be particularly interested in McPhee’s Solomonic approach to a dispute between two of his students over the plural of *attorney general*. McPhee consulted two dictionaries, which both accept both *attorneys general* and *attorney generals* as plurals. (That is contrary to standard legal usage, which recognizes only the former.⁴⁰) In his conversations with the students, McPhee identified the “sense of sight and sound” as a problem with phrases like “attorneys general’s cars” and said he’d prefer “attorney generals’ cars” — but then sensibly suggested the better alternative of “the cars of the attorneys general.”⁴¹ So in the end, he avoided the “wrong” answer (*attorney generals*) while solving the mouthful-of-s-endings problem. I suspect that excellent legal writers would reach a similar result.

There is something joyous about being a fly on the wall in an expert writer’s study, observing how he goes about his craft. That is perhaps doubly true when the writer’s discipline is different from your own; we get to compare and contrast how we lawyers approach our craft with how a master in another field does it — to watch how that writer approaches his process, struggles with his words, and revels in his product. That joy captures the experience of reading *Draft No. 4*.

³⁹ *Id.*

⁴⁰ See, e.g., Bryan A. Garner, *The Redbook: A Manual on Legal Style* 7.14(b) (4th ed. 2018); Michael Herz, *Washington, Patton, Schwarzkopf and . . . Ashcroft?*, 19 *Constitutional Commentary* 663, 665 (2002) (explaining that using “Attorneys General” as the plural of “Attorney General” is “quite universal”).

⁴¹ McPhee, *Draft No. 4* at 174.