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### Shot Selection

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# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

ESSAY

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## SHOT SELECTION

Patrick J. Barry\*

*The simple declarative sentence used in making a plain statement is one sound. But Lord love ye it mustn't be worked to death.*

One of the more common pieces of writing advice in our post-Hemingway world is to keep sentences short. Experts on legal writing are particularly fond of this position—and for good reason. Few judges look at the sentences that appear in briefs, memos, statutes, and contracts and say, “You know what each of those could use? More words.”<sup>2</sup>

Professor Noah Messing does a particularly good job making the case for short sentences. Brevity, he explains,

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\*Clinical Assistant Professor, University of Michigan Law School. I thank James Coatesworth, Stephen Rees, Kara Rickey, and Sage Wen for their excellent research help. I am also very grateful to John Pottow for participating in the Faculty Briefs session that triggered the idea for this essay.

1. ROBERT FROST, A GOOD PLACE TO START: THE LETTERS OF ROBERT FROST: VOLUME 1 1886–1920, 122–23 (Donald Sheehy, Mark Richardson, & Robert Faggen eds., 2014) (quoting Frost’s July 4, 1913, letter to John Bartlett).

2. See generally, e.g., Sean Flammer, *Writing to Persuade Judges: A New Comprehensive Study Confirms that Judges Find Plain English More Persuasive than Legalese*, MICH. BAR J. 50, 51 (Sept. 2011) (reporting on survey showing judicial preference for “succinctness” and “brevity”).

“reduces the risk that your writing will confuse or irk readers,”<sup>3</sup> especially given that “empirical studies show that writing verbosely makes writers sound *dumber*, not smarter.”<sup>4</sup> He even suggests that struggling writers consider imposing on themselves a strict twenty-five-word limit. He admits that the limit will sound radical to some people, but he insists that it produces remarkable results.<sup>5</sup> “Simply by keeping sentences under twenty-five words,” he suggests,

writers ensure that they comply with many of the principles of good style. They hack wordy phrases, cut passive verbs, and limit the number of ideas in any given sentence, among other salutary changes. The results tend to thrill clients and supervisors, both because coping with the twenty-five-word limit causes writing to sparkle and because short sentences are *vastly* easier for them to edit.<sup>6</sup>

Yet Professor Messing and others caution against taking a commitment to concision too far. “Even as you follow my advice to write short sentences,” he warns, “beware of one grave risk. If every sentence resembles every other sentence, your prose will grow dull, sound robotic, or convey anger.”<sup>7</sup> None of those qualities will help you win a lot of cases.

The standard remedy for this off-putting homogeneity is to vary your sentence structure, a practice I have persuaded my students to adopt by encouraging them to consider the importance of shot selection. Think of a basketball team, I tell them. To be successful, the players must be able to make long shots, like three-pointers, and they will also need to be able to make short shots, like lay-ups and dunks. A team that relies on only one form of scoring will become predictable . . . even boring. Variety makes them more effective<sup>8</sup> . . . and more fun to watch.

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3. NOAH A. MESSING, *THE ART OF ADVOCACY: BRIEFS, MOTIONS, AND WRITING STRATEGIES OF AMERICA’S BEST LAWYERS* 247 (2013).

4. *Id.*; see also Daniel M. Oppenheimer, *Consequences of Erudite Vernacular Utilized Irrespective of Necessity: Problems with Using Long Words Needlessly*, 20 *APPL. COGNITIVE PSYCHOL.* 139 (2006) (summarizing empirical studies).

5. MESSING, *supra* note 3, at 248.

6. *Id.*

7. *Id.* at 249.

8. See generally Mark Finchman & John O’Brien, *Three Point Shooting and Efficient Mixed Strategies: A Portfolio Management Approach*, 4 *J. SPORTS ANALYTICS* 107 (2018)

Or sometimes I use tennis as the analogy. A tennis player who excels back at the baseline or up at the net will not go as far as a tennis player who excels back at the baseline and up at the net. Nor will someone who only has a good forehand go as far as someone who has both a good forehand and a good backhand.

Part of what makes Roger Federer perhaps the greatest tennis player of all time, for example, is the completeness of his skillset. As the writer David Foster Wallace explained in 2006, the range of Federer's game inspires a profound sense of awe:

Federer's forehand is a great liquid whip, his backhand a one-hander that can drive flat, load with topspin, or slice—the slice with such snap that the ball turns shapes in the air and skids on the grass to maybe ankle height. His serve has world-class pace and a degree of placement and variety no one else comes close to; the service motion is lithe and uneccentric, distinctive (on TV) only in a certain eel-like all-body snap at the moment of impact. His anticipation and court sense are otherworldly, and his footwork is the best in the game—as a child, he was also a soccer prodigy.<sup>9</sup>

Imagine if your writing had Federer's grace and versatility, if you could communicate in more than one mode, at more than one velocity, and through more than one syntactic configuration. Think of the range of thoughts you'd be able to articulate, and how nimble and customized you could make your arguments. One-dimensional writing, like one-dimensional lawyering, is not very persuasive. The best appellate advocates have a much bigger repertoire of shots.

### I. VITAL AND ALIVE

The appellate writer's repertoire of shots includes more than just a range of sentence structures. It also includes a range of sentence lengths. Which is why I ask my students to try this exercise:

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(applying theory underlying risk management in competitive financial markets to NBA basketball); see also Ty Chow, Kenny Miller, Simiso Nzima & Scott Winder, *Game Theory (MBA 217) Final Paper* (2014), available at <http://faculty.haas.berkeley.edu/rjmorgan/mba211/Chow%20Heavy%20Industries%20Final%20Project.pdf> (applying game theory to basketball).

9. David Foster Wallace, *Roger Federer as Religious Experience*, NY TIMES (Aug. 20, 2006), <https://www.nytimes.com/2006/08/20/sports/playmagazine/20federer.html>.

- Circle the longest sentence on a page of your writing.
- Then circle the shortest sentence.
- Now subtract the length of the shortest sentence from the length of the longest sentence.

If your longest sentence is thirty-six words and your shortest sentence is thirty-four words, you have a problem. If your longest sentence is eight words and your shortest sentence is six words, you also have a problem. In fact, even if your longest sentence is twenty-one words and your shortest sentence is nineteen words—making your average sentence length right around that sweet spot of twenty words recommended by many style guides<sup>10</sup>—you still have a problem. The range of your sentences, in all these cases, is way too uniform.

Professor Joseph Williams identifies the issue nicely. Instead of using an analogy to basketball or tennis, he uses an analogy to music. “The ability to write clear, crisp sentences that never go beyond twenty words is a considerable achievement,” he explains. “You’ll never confuse a reader with sprawl, wordiness, or muddy abstraction. But if you never write sentences longer than twenty words, you’ll be like a pianist who uses only the middle octave; you can carry the tune, but without much variety or range.”<sup>11</sup>

The travel writer and novelist Pico Iyer takes a similar position, characterizing our writing as too often “telegraphic as a way of keeping our thinking simplistic, our feeling slogan-crude.”<sup>12</sup> The short sentence, he says, “is the domain of uninflected talk-radio rants and shouting heads on TV who feel that qualification or subtlety is an assault on their integrity (and not, as it truly is, integrity’s greatest adornment).”<sup>13</sup> He even

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10. E.g., BRYAN A. GARNER, *LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES* 27 (2013); JOSEPH KIMBLE, *LIFTING THE FOG OF LEGALESE* 71 (2006); MARTIN CUTTS, *OXFORD GUIDE TO PLAIN ENGLISH* 1 (4th ed. 2013).

11. JOSEPH M. WILLIAMS, *STYLE: TOWARD CLARITY AND GRACE* 135 (1990).

12. Pico Iyer, *The Writing Life: The Point of the Long and Winding Sentence*, *LATIMES* (Jan. 8, 2012), <http://articles.latimes.com/2012/jan/08/entertainment/la-ca-pico-iyer-20120108>.

13. *Id.*

worries that “[i]f we continue along this road, whole areas of feeling and cognition and experience will be lost to us.”<sup>14</sup> Brevity is efficient, he acknowledges, but at what cost?

Mr. Iyer suggests we use longer sentences, more hospitable to depth and nuance, as a way to resist the speed and urgency of texts, news flashes, and constantly updating internet feeds.<sup>15</sup> “Not everyone,” he says, “wants to be reduced to a sound bite or a bumper sticker.”<sup>16</sup>

Even Dr. Seuss advocated for more variety in sentence length. “Simple, short sentences don’t always do the work,” he advised in a 1965 issue of the *Saturday Evening Post*. “You have to do tricks with pacing, alternate long sentences with short, to keep [your writing] vital and alive.”<sup>17</sup>

## II. PROFESSIONAL EXPLAINERS

Dr. Seuss’s focus on alternating long sentences with short provides a nice lead-in to some additional advice, which I first gave with the help of John Pottow, a bankruptcy law expert here at Michigan.<sup>18</sup> Back in the fall of 2016, he generously let me use his winning brief<sup>19</sup> in one of his Supreme Court cases to show students how to pair short and long sentences. Here is an example of a combination that works particularly well: putting a short sentence soon after a long sentence.

Long sentence:

In 2003, Paleveda and his then-partners had a falling-out about the distribution of insurance commissions, and the partners instructed the remitting carrier to deposit future

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14. *Id.*

15. Mr. Iyer wrote the article in 1992, well before the rise of Twitter.

16. Iyer, *supra* note 12.

17. C. Robert Jennings, *Dr. Seuss: “What Am I Doing Here?”* SAT. EVENING POST (Oct. 23, 1965), <https://www.saturdayeveningpost.com/2016/02/dr-seuss/>.

18. In addition to being a world-class scholar and engaging teacher, Professor Pottow maintains an active appellate practice and has more than once found himself trying to help the Justices of the Supreme Court sort through tricky bankruptcy issues. *E.g.*, *Wellness Int’l Network, Ltd. v. Sharif*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 1932 (2015); *Exec. Bens. Ins. Agency v. Arkison*, 573 U.S. 25 (2014).

19. Brief for Respondent, *Exec. Bens. Ins. Agency v. Arkison*, 2013 WL 6019314 (U.S. Nov. 8, 2013) (No. 12-1200) [hereinafter *Pottow Brief*].

commissions into a separate account not accessible by Paleveda.<sup>20</sup>

Short sentence:

Paleveda responded by initiating arbitration.<sup>21</sup>

Range:

Twenty-nine words.<sup>22</sup>

Here's a second example. This time, though, the short sentence follows two long sentences.

Long sentence:

Under Bankruptcy Rule 7012, when a defendant denies in its answer that a proceeding is core, as EBIA did, it is required to state in that same answer whether it consents to the bankruptcy court's entry of a final judgment, or whether it prefers instead to exercise its right to insist that the bankruptcy judge merely issue proposed findings of fact and conclusions of law subject to de novo review in the district court.<sup>23</sup>

Long sentence:

(This up-front declaration prevents sandbagging by making it impossible for a party who chooses to proceed before a bankruptcy judge to claim in regret after a loss that it never consented to bankruptcy court resolution.)<sup>24</sup>

Short sentence:

EBIA violated Rule 7012.<sup>25</sup>

Range:

Sixty-eight words.<sup>26</sup>

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20. *Id.* at 1.

21. *Id.*

22. The long sentence has thirty-four words, but the short sentence has only five.

23. *Pottow Brief*, *supra* note 19, at 4.

24. *Id.*

25. *Id.*

26. The first long sentence has seventy-four words and the second thirty-five, but the short sentence has only four.

The appeal of this long-short combination is nicely captured by journalist Meghan Daum, whose writing has appeared in magazines like *The New Yorker*, *GQ*, *Harper's*, and *Vogue*. "I use a lot of short sentences—I like staccato," she told fellow journalist Ben Yagoda. "After a long riff, I always have a short one after it, for readers to catch their breath."<sup>27</sup>

Ms. Daum's reader-focused sensibility is a great way to decide how to balance your long and short sentences. Have your readers just absorbed a bunch of complex information? Do you think they could use a break? If they were reading out loud, would they need to take a breath?

If so, perhaps it is time for something shorter, something simple, something that won't tax their brains. Three-point shots can only work so often. Sometimes it's nice to have a lay-up.

### III. "I AM AN INVISIBLE MAN"

Another good place for a short sentence is at the beginning of a paragraph, especially if that paragraph contains a number of more syntactically sophisticated sentences. Here, for example, is how Ralph Ellison opens *Invisible Man*, a novel that beat out Ernest Hemingway's *The Old Man and The Sea* for the National Book Award in 1953 and has since become one of the most celebrated novels in American literature.

I am an invisible man. No, I am not a spook like those who haunted Edgar Allan Poe; nor am I one of your Hollywood-movie ectoplasms. I am a man of substance, of flesh and bone, fiber and liquids—and I might even be said to possess a mind. I am invisible, understand, simply because people refuse to see me. Like the bodiless heads you see sometimes in circus sideshows, it is as though I have been surrounded by mirrors of hard, distorting glass. When they approach me they see only my surroundings, themselves, or figments of their imagination—indeed, everything and anything except me.<sup>28</sup>

Notice the contrast between the short, punchy first sentence—"I am an invisible man"—and the longer, more

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27. BEN YAGODA, *THE SOUND ON THE PAGE: GREAT WRITERS TALK ABOUT STYLE AND VOICE IN WRITING* 44 (2005).

28. RALPH ELLISON, *INVISIBLE MAN* 1 (1952).



layered, even meandering, sentences that follow. There is a boldness that comes with that kind of beginning, one that goes well, as a lead-in, with the indirectness and qualifications that follow.

Here are two more examples. One is from the opening paragraph of Herman Melville's 1851 classic *Moby Dick*, and the other is from the opening paragraph of a more recent hit, *The Martian* by Andy Weir, which was adapted into the movie starring Matt Damon. I have included the sentence range between the first sentence (which I've underlined) and the longest sentence (which I've also underlined) as well.

Herman Melville, *Moby Dick*

Call me Ishmael. Some years ago—never mind how long precisely—having little or no money in my purse, and nothing particular to interest me on shore, I thought I would sail about a little and see the watery part of the world. It is a way I have of driving off the spleen, and regulating the circulation. Whenever I find myself growing grim about the mouth; whenever it is a damp, drizzly November in my soul; whenever I find myself involuntarily pausing before coffin warehouses, and bringing up the rear of every funeral I meet; and especially whenever my hypos get such an upper hand of me, that it requires a strong moral principle to prevent me from deliberately stepping into the street, and methodically knocking people's hats off—then, I account it high time to get to sea as soon as I can.<sup>29</sup>

Andy Weir, *The Martian*

I'm pretty much fucked.

That's my considered opinion.

Fucked.

Six days into what should be the greatest month of my life, and it's turned into a nightmare.

I don't even know who'll read this. I guess someone will find it eventually. Maybe a hundred years from now.

For the record... I didn't die on Sol 6. Certainly the rest of the crew thought I did, and I can't blame them. Maybe

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29. HERMAN MELVILLE, *MOBY DICK* 1 (1851). The range here is eighty-four.

there'll be a day of national mourning for me, and my Wikipedia page will say, "Mark Watney is the only human being to have died on Mars."<sup>30</sup>

It is unlikely that Professor Pottow was thinking of Ellison, Melville, and Weir when he was writing his brief for the Supreme Court. Yet he definitely achieves the same effect. Here's the opening paragraph of the "Statutory Context" section in his brief:

In 1800, Congress passed its first bankruptcy act. The 1800 act entrusted administration of the debtor's estate to judicial officers called "commissioners," who were appointed by district courts. Congress largely copied the English bankruptcy statute then in force. English bankruptcy commissioners had great power over the affairs of bankrupts; for instance, they could "[s]ell and 10 a[ss]ign all property which a bankrupt has conveyed in contemplation of an act of bankruptcy," i.e., a fraudulent conveyance.<sup>31</sup>

And here is the closing paragraph of the "Summary of Argument" section, which wraps up Professor Pottow's overview of an important bankruptcy case that the Justices had recently decided.<sup>32</sup>

Stern creates no insoluble statutory gap. Bankruptcy judges may issue proposed findings of fact and conclusions of law on "Stern claims" if the parties do not consent to final judgment in bankruptcy court. EBIA's contrary argument misreads the permissive power to enter an order or judgment under 28 U.S.C. § 157(b)(1) as mandatory, reads the reference-withdrawal power of section 157(d) out of the statute, and is otherwise unsound.<sup>33</sup>

Simple, direct, helpful, each of these opening sentences makes the paragraph it introduces more inviting. They reduce the barriers to entry and lay out a kind of grammatical welcome mat. "Come in," they seem to be saying. "Don't be intimidated.

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30. ANDY WEIR, *THE MARTIAN* 1 (2014). The range here is twenty-four.

31. *Pottow Brief*, *supra* note 19, at 9–10 (citations omitted). The range here is twenty-nine.

32. *Stern v. Marshall*, 564 U.S. 462 (2011).

33. *Pottow Brief*, *supra* note 19, at 21. The range here is twenty-nine.

There may be complex material in here, but I promise to be your guide.”

#### IV. “THIS APPEAL FOLLOWED.”

A third place to consider the interplay of short and long sentences is at the end of a paragraph. Few things cap big thoughts better than a tidy, summative closing. After being introduced to an idea and seeing it develop, there can be something satisfying about receiving it in a more compact, clarifying form.

In legal writing, this is often the place for a clear conclusion or directive. Professor Pottow, for example, finishes the opening paragraph of his Summary of Argument with the precise determination he wants the Justices to make: that the opposing party can’t now renege on its decision to waive its right to have a federal district court—rather than a bankruptcy court—hear its claim.

As this Court explained in *Commodity Futures Trading Comm’n v. Schor*, . . . “as a personal right, Article III’s guarantee of an impartial and independent federal adjudication is subject to waiver.” In that case, Schor waived his right to an Article III adjudication, preferring instead the faster procedure before the Commodities Futures Trading Commission. . . . So too in this case, EBIA chose to take its summary judgment chances in the bankruptcy court on its fraudulent conveyance claim instead of exercising its right to proceed in district court. Only after EBIA lost did it raise an Article III challenge on appeal. As in *Schor*, EBIA’s waiver of its personal right did not offend Article III. And while *Schor* adds that in some, but not all, cases, Article III presents “structural” concerns that the parties cannot waive, those concerns do not arise in this case. EBIA’s waiver was thus fatal.<sup>34</sup>

A second example comes as Professor Pottow is concluding the Statement of the Case. After a rather packed, parentheses-filled sentence, he ties up the paragraph with a crisp three-word statement.

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34. *Id.* at 17 (citations omitted).

Although EBIA's consent rendered entry of judgment by the bankruptcy court appropriate, the Court of Appeals (to provide guidance to future cases) also decided that in non-creditor fraudulent conveyance cases where the defendant does *not* consent to bankruptcy court adjudication, bankruptcy judges may nonetheless enter proposed findings of fact and conclusions of law for district court de novo consideration (the procedural treatment accorded non-core proceedings). . . . This appeal followed.<sup>35</sup>

What readers often want at the end of a paragraph is clarity, some way to bring together all the information they've just encountered. Short sentences have a nice way of doing that. They're sort of like elegant little bows you attach at the end, something to wrap up and enhance a structured package of content.

#### V. BLACKMON BOW

Before I had Professor Pottow's brief to offer as an example, I used to teach students this end-of-the-paragraph technique with excerpts from *Slavery By Another Name*, Douglas Blackmon's Pulitzer-Prize winning account of how a system of arresting, imprisoning, and then selling African Americans into forced labor throughout the Reconstruction Era meant that, in Blackmon's words, "slavery, real slavery, didn't end until 1945."<sup>36</sup>

I was teaching a course called "The Syntax of Slavery" at the time, and Blackmon's book provided not just a helpful account of an often-overlooked part of American history but also a model of effective storytelling. Here is how the first chapter opens. Note the snappy "bow" at the end of the second paragraph:

On March 30, 1908, Green Cottenham was arrested by the sheriff of Shelby County, Alabama, and charged with "vagrancy."

Cottenham had committed no true crime. Vagrancy, the offense of a person not being able to prove at a given moment that he or she is employed, was a new and flimsy

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35. *Id.* at 9 (citations omitted).

36. DOUGLAS BLACKMON, *SLAVERY BY ANOTHER NAME* 402 (2008).

concoction dredged up from legal obscurity at the end of the nineteenth century by the state legislatures of Alabama and other southern states. It was capriciously enforced by local sheriffs and constables, adjudicated by mayors and notaries public, recorded haphazardly or not at all in court records, and, most tellingly in a time of massive unemployment among all southern men, was reserved almost exclusively for black men. Cottenham's offense was blackness.<sup>37</sup>

My students and I started referring to this move as the "Blackmon Bow." It's not a great name, but it worked for us, and I soon noticed an uptick in the number of their paragraphs that closed with a punch.

When I have explained the move to other groups of people, some preferred to call it a "bowtie," a term that adds an extra bit of class to the construction. Either name works. So does no name at all. The point is simply to be more deliberate about how you end paragraphs and think whether something pithy may be the way to go. It often is.

## VI. "NOT SO"

A final place in which to consider the interplay of long and short sentences is when you want to refute an argument. Professor Pottow does this nicely. He first identifies the position the other side is trying to advance: "EBIA attempts to distinguish *Roell* by arguing that it was decided on statutory grounds alone and thus has no relevance to Article III issues."<sup>38</sup> Then he immediately dismisses that position: "But EBIA's reading is too wooden."<sup>39</sup> That's only six words, but already he has the reader moving towards his interpretation of the situation.

Some lawyers do this kind of maneuver in even fewer words. Tom Goldstein, a regular at the Supreme Court and a founder of SCOTUSblog, once used just two words—"Not

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37. *Id.* at 1.

38. *Pottow Brief*, *supra* note 19, at 26–27.

39. *Id.* at 27.

so”<sup>40</sup>—when responding to the government’s argument against his clients.<sup>41</sup>

Mr. Goldstein isn’t the only one ever to use “not so” in this way, and there is certainly a danger in employing it too often, like a trick shot that becomes mundane, even obnoxious, the more times you see it. But the general technique of having a short sentence refute the other side’s stated position remains sound. Short sentences communicate confidence. They don’t hem. They don’t haw. They don’t get lost in equivocations and caveats. They get right to the point, sometimes devastatingly—which can be a good thing when you are taken on by a mistaken point of view. “Pithy sentences,” the Enlightenment philosopher Denis Diderot wrote, “are like sharp nails that force truth upon our memory.”<sup>42</sup> Used in the right places, they pack a persuasive punch.

## VII. EXAMPLES TO EMULATE

Here, as a close to this essay, are several more examples worth emulating—three excerpts from published judicial opinions and one literary wildcard:

Benjamin N. Cardozo, *Murphy v. Steeplechase*

One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. . . . The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquility. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made

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40. Defendants Wei Seng Phua & Darren Wai Kit Phua’s Joint Objection to Magistrate Judge Leen’s Report and Recommendation (DKT #407) at 4, *US v. Phua*, 100 F. Supp. 3d 1040 (D. Nev. Feb. 17, 2015) (No. 2:14-CR-00249-APG-PAL).

41. Soccer fans and sports gamblers may remember the case because Mr. Goldstein’s client, Paul Phua, was perhaps the world’s biggest sports bookie at the time. Disclosure: I remember the case because I worked on it as a law clerk for Judge Andrew P. Gordon of the United States District Court in Las Vegas.

42. See, e.g., TRYON EDWARDS, A DICTIONARY OF THOUGHTS: BEING A CYCLOPEDIA OF LACONIC QUOTATIONS 338 (1891) (attributing maxim to Diderot).

his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.<sup>43</sup>

John G. Roberts, Jr., *Caperton v. A.T. Massey Coal*

It is an old cliché, but sometimes the cure is worse than the disease. I am sure there are cases where a “probability of bias” should lead the prudent judge to step aside, but the judge fails to do so. Maybe this is one of them. But I believe that opening the door to recusal claims under the Due Process Clause, for an amorphous “probability of bias,” will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts. I hope I am wrong.<sup>44</sup>

Sonia Sotomayor, *Schuette v. Coalition to Defend Affirmative Action*

Such reordering of the political process contravenes *Hunter* and *Seattle*. . . . Where, as here, the majority alters the political process to the detriment of a racial minority, the governmental action is subject to strict scrutiny. . . . Michigan does not assert that § 26 satisfies a compelling state interest. That should settle the matter.

The plurality sees it differently. Disregarding the language used in *Hunter*, the plurality asks us to contort that case into one that “rests on the unremarkable principle that the State may not alter the procedures of government to target racial minorities.” . . . And the plurality recasts *Seattle* “as a case in which the state action in question . . . had the serious risk, if not purpose, of causing specific injuries on account of race.” . . . According to the plurality, the *Hunter* and *Seattle* Courts were not concerned with efforts to reconfigure the political process to the detriment of racial minorities; rather, those cases invalidated governmental actions merely because they reflected an invidious purpose

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43. *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 482–83 (1929) (Cardozo, C.J.) (citations omitted).

44. *Caperton v. A. T. Massey Coal Co., Inc.*, 556 U.S. 868, 902 (2009) (Roberts, C.J., Scalia, Thomas & Alito, JJ., dissenting).

to discriminate. This is not a tenable reading of those cases.<sup>45</sup>

Joan Didion, *Slouching Towards Bethlehem* (1968)

We drink some more green tea and talk about going up to Malakoff Diggings in Nevada Country because some people are starting a commune there and Max thinks it would be a groove to take acid in the diggings. He says maybe we could go next week, or the week after, or anyway sometime before his case comes up. Almost everybody I meet in San Francisco has to go to court at some point in the middle future. I never ask why.<sup>46</sup>



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45. *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 357–58 (2014) (Sotomayor & Ginsburg, JJ., dissenting) (citations omitted).

46. Joan Didion, *Slouching Towards Bethlehem* in JOAN DIDION, *WE TELL OURSELVES STORIES IN ORDER TO LIVE: COLLECTED NON-FICTION* 67, 70 (2006).



