

Counting Each Shot: Techniques for Emphasis and De-emphasis

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Effective Legal Writing: From Commas to Contracts to Courtrooms
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Introduction

Briefwriters are often faced with two tasks: stressing favorable facts and downplaying adverse facts. This session will show you how to stress favorable facts without doing THIS, or ***this!!*** It will also show you how to downplay unfavorable facts without hiding them in footnotes. We will use as clinical models the competing fact statements from Justice Stevens's majority opinion and Justice Scalia's dissenting opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002).

The two passages quotes below are from *Atkins v. Virginia*, 536 U.S. 304 (2002), a death-penalty case. One was written by a justice who voted to affirm the death penalty; the other by a justice who voted to reverse the death penalty:

A

At approximately midnight on August 16, 1996, Atkins and William Jones, armed with a semiautomatic handgun, abducted Eric Nesbitt, robbed him of the money on his person, drove him to an automated teller machine in his pickup truck where cameras recorded their withdrawal of additional cash, then took him to an isolated location where he was shot eight times and killed.

B

After spending the day drinking alcohol and smoking marijuana, petitioner Daryl Renard Atkins and a partner in crime drove to a convenience store, intending to rob a customer. Their victim was Eric Nesbitt, an airman from Langley Air Force Base, whom they abducted, drove to a nearby automated teller machine, and forced to withdraw \$200. They then drove him to a deserted area, ignoring his pleas to leave him unharmed. According to the co-conspirator, whose testimony the jury evidently credited, Atkins ordered Nesbitt out of the vehicle and, after he had taken only a few steps, shot him one, two, three, four, five, six, seven, eight times in the thorax, chest, abdomen, arms, and legs.

1. Can you tell which passage was written by the justice who voted to affirm the death penalty, and which was written by the justice who voted to reverse the death penalty?
2. How can you tell?

The Gettysburg Address

Fourscore and seven years ago our fathers brought forth on this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal.

Now we are engaged in a great civil war, testing whether that nation or any nation so conceived and so dedicated can long endure.

We are met on a great battlefield of that war.

We have come to dedicate a portion of that field as a final resting-place for those who here gave their lives that that nation might live.

It is altogether fitting and proper that we should do this.

But, in a larger sense, we cannot dedicate, we cannot consecrate, we cannot hallow this ground.

The brave men, living and dead who struggled here have consecrated it far above our poor power to add or detract.

The world will little note nor long remember what we say here, but it can never forget what they did here.

It is for us the living rather to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced.

It is rather for us to be here dedicated to the great task remaining before us—

that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion –

that we here highly resolve that these dead shall not have died in vain—

that this nation under God shall have a new birth of freedom—

and that government of the people, by the people, for the people shall not perish from the earth.

Counting Each Shot: Techniques for Emphasis and De-emphasis*

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“The difference between direct and indirect writing is the difference between witnessing the murder and finding the body.” Patricia T. O’Conner, *Words Fail Me* 150 (1999). As writers, we often want to write directly, to confront the reader with harsh facts. Other times, we want to write indirectly, to soften or deflect those harsh facts.

Too often, though, we resort to easy but ineffective ways to achieve emphasis or de-emphasis. To emphasize, we use typographical gimmicks such as italics, underlining, bold print, all capital letters, or various combinations of these. To de-emphasize, we hide things in footnotes; or worse, we omit them completely, as if ignoring them will make them go away.

Good writers rarely use typographical gimmicks for emphasis. To prove this point, try an exercise suggested by writing instructor Benjamin Opipari in *To Boldly Go Without Bold*, 16 Perspectives 131 (Winter 2008). Go to your bookshelf, pick out your favorite book by your favorite author, the one whose prose grips you. Flip through the book and see if you can find a passage underlined, italicized, bolded, or all-capitalized. You’ll probably find few to none.

While you’re at it, try one more thing: look for your favorite passage in that favorite book, the one that hit you in the gut the first time you read it. Is it in bold, italics, or all capital letters? Probably not. Good writers don’t need typographic gimmicks to pack their prose with power.

Good legal writers know the same thing. They know how to structure their sentences and paragraphs to emphasize things without typographic gimmicks. Applying the same knowledge in reverse, they can de-emphasize things without hiding them in footnotes.

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A clinical lesson in doing these things is presented by *Atkins v. Virginia*, 536 U.S. 304 (2002), a capital murder case. This case contains two accounts of the crime: one by Justice Stevens, writing for the majority, and the other in dissent by Justice Scalia. The issue was whether the Eighth Amendment forbids execution of the mentally retarded. The majority held that it does, so as author of the majority opinion, Justice Stevens wanted to downplay the defendant's culpability. Justice Scalia had the opposite goal. To paraphrase Patricia O'Conner, Justice Stevens just wanted readers to find the body, while Justice Scalia wanted them to witness the murder. By analyzing their competing accounts of the crime, we can see several techniques each used to accomplish his goal.

Here is Justice Stevens's account of Atkins's crime:

At approximately midnight on August 16, 1996, Atkins and William Jones, armed with a semiautomatic handgun, abducted Eric Nesbitt, robbed him of the money on his person, drove him to an automated teller machine in his pickup truck where cameras recorded their withdrawal of additional cash, then took him to an isolated location where he was shot eight times and killed.

Id. at 307.

Here is Justice Scalia's account of the same crime:

After spending the day drinking alcohol and smoking marijuana, petitioner Daryl Renard Atkins and a partner in crime drove to a convenience store, intending to rob a customer. Their victim was Eric Nesbitt, an airman from Langley Air Force Base, whom they abducted, drove to a nearby automated teller machine, and forced to withdraw \$200. They then drove him to a deserted area, ignoring his pleas to leave him unharmed. According to the co-conspirator, whose testimony the jury evidently credited, Atkins ordered Nesbitt out of the vehicle and, after he had taken only a few steps, shot him one, two, three, four, five, six, seven, eight times in the thorax, chest, abdomen, arms, and legs.

Id. at 338 (Scalia, J., dissenting).

Nouns: Whose Story Is Being Told

In reading a sentence, the first thing the reader wants to know is whose story is being told. In seeking an immediate answer to this question, readers expect that a sentence will tell the story of whoever or whatever shows up first in the sentence. If the sentence is complex, they expect it to tell the story of whoever or whatever shows up first in its main clause. George D. Gopen, *The Sense of Structure* 26, 29 (2004).

Justice Stevens's account is the story of "Atkins and William Jones, armed with a semiautomatic handgun ..." His naming of Atkins's accomplice is significant; it makes us subconsciously assign some of Atkins's culpability to Jones. Note too the location modifying phrase, "armed with a semiautomatic handgun." Grammatically it cannot modify *Atkins*; it must modify either *William Jones* or the collective *Atkins and William Jones*. We are told that the two had a gun; we are not told that Atkins had the gun. We may get the idea that it was Jones who had the gun.

If we analyze Justice Scalia's four main clauses to see whose story he is telling, this is what we find:

- "petitioner Daryl Renard Atkins and a partner in crime" (Note that, while Justice Stevens names the accomplice, Justice Scalia does not. He wants to keep the focus on Atkins.)
- "Their victim ... Eric Nesbitt, an airman from Langley Air Force Base" (Justice Scalia not only makes this sentence Nesbitt's story, but also enables us to picture him. Yet even here, Nesbitt is defined according to his relation to Atkins and his accomplice; he is defined as "[t]heir victim.")
- "They [Atkins and accomplice]" (Justice Scalia returns full focus to Atkins and his unnamed accomplice.)
- "Atkins" (As the story shift from the kidnapping and robbery to the murder, Justice Scalia narrows the story's focus from the two to the one: Atkins.)

Verbs: What Is Going on Here

The respective accounts of the ATM robbery reveal an interesting use of verbs to emphasize or de-emphasize the action.

Generally readers of English expect that the action of the sentence will be expressed by its verb. Gopen at 19. Thus, when he describes the ATM robbery, Justice Scalia tells us that Atkins and his accomplice “forced [Nesbitt] to withdraw \$200.” The verb *forced* leaves us with no doubt that this was a robbery.

Justice Stevens, on the other hand, removes the human actors from the ATM robbery, telling us that “cameras recorded their withdrawal of additional cash.” The action here is not a robbery, but a video recording of a withdrawal—it sounds like an ordinary banking transaction. Justice Stevens uses the verb in this clause to deflect attention from what was going on here: an armed robbery.

In another context, Justice Stevens’s choice might fit the action perfectly. For example, if the point to be emphasized were that the criminals were caught on videotape, then “cameras recorded their withdrawal” would focus the reader’s attention on the important action: a video recording. But in the context of the *Atkins* case, the action is the crime itself, not the video recording, and Justice Stevens’s choice deflects attention from that action.

Sentences: Using Structure to Create or Eliminate Stress Positions

The number of sentences in any passage is important, because readers look to the end of each sentence for important information. Opiari at 132; Gopen at 36. Thus, any information a writer puts at the end of a sentence will receive special attention. Bryan A. Garner, *The Winning Brief*, 205 (2d ed. 2003). Gopen refers to the end of each sentence or independent clause as the stress position.

Good writers, aware of the stress position, structure their sentences to put the important information there. Good writers do something else: they manipulate the number of sentences to increase or decrease the number of stress positions.

Justice Stevens crams the entire crime spree into a single 61-word sentence. By limiting his account to just one sentence, he creates just one

stress position. He appropriately puts the murder in the stress position, but he does other things to soften its impact (more on that below). He de-emphasizes the ATM robbery preceding the murder not only by his choice of subject and verb (“cameras recorded their withdrawal”), but also by burying it in the middle of that long sentence, far away from a stress position.

Justice Scalia, on the other hand, uses four sentences to describe the crime spree, thus creating four stress positions. And observe what he puts in those four stress positions:

- “intending to rob a customer.” (In a case turning on Atkins’s mental capacity, Justice Scalia emphasizes Atkins’s criminal intent.)
- “forced to withdraw \$200.” (This robbery, a felony preceding the murder, receives emphasis by being placed in a stress position.)
- “ignoring his pleas to leave him unharmed.” (We picture the victim pleading for his life.)
- “shot him one, two, three, four, five, six, seven, eight times in the thorax, chest, abdomen, arms, and legs.”

Finding the Body versus Witnessing the Murder

Although Justice Stevens places his description of the murder in a stress position, he does several things to lessen its impact.

First, this particular stress position comes at the end of a 61-word sentence. Mental weariness sets in long before the reader reaches the end of this long sentence. By the time the reader reaches the 50th word or so, he or she just wants to get this sentence over with and move on to the next. The result is that the reader reads faster, speeding past the murder without slowing down to look.

Second, Justice Stevens gets the murder over with quickly in just seven words—the last seven words in a 61-word sentence. The fewer words there are to read, the less mental energy the reader will expend on them.

Third, he puts the murder in a dependent clause: “where he was shot eight times and killed.” Readers tend to assign more importance to material appearing in an independent clause, and less importance to material in a

dependent clause. Gopen at 49. Because Justice Stevens relegates the murder to a dependent clause, the reader tends to assign less importance to it. (He also puts the ATM robbery in a dependent clause: “where cameras recorded their withdrawal”)

Fourth, he puts the murder in passive voice (“he was shot eight times and killed”) without identifying the shooter. We don’t know from reading Justice Stevens’s account who pulled the trigger. Good writers use passive voice when they want to create uncertainty about who did it. *E.g.* Gopen at 153; O’Conner at 152; C. Edward Good, *Mightier Than the Sword* 126–27 (1989). We have found the body (“he was shot eight times”), but we have not witnessed the murder.

In contrast to Justice Stevens’s artful use of passive voice, Justice Scalia’s account contains not a single passive-voice verb. When he comes to the actual murder, he tells us plainly who did what: “Atkins ordered Nesbitt out of the vehicle and ... shot him”

We saw above that Justice Scalia uses the number of sentences to control the number of stress positions. His use of multiple sentences has another effect: it slows the reader down. If a paragraph is a journey down a road, then each period is a stop sign. Roy Peter Clark, *Writing Tools* 46 (2006). By incorporating three more stop signs than Justice Stevens does, Justice Scalia slows the pace of the story.

When Justice Scalia comes to the actual murder, he slows things down even further. He counts each shot, with each shot followed by a comma. If this account were read aloud, each comma would signify a pause. *See* John R. Trimble, *Writing With Style* 111 (2d ed. 2000). If a period is a stop sign at the end of a sentence, then the commas after each shot (“one, two, three, ...”) are speed bumps inside the sentence, forcing the reader to slow down. Clark at 46. Justice Scalia not only makes us witness the murder; he makes us witness it in slow motion.

If Justice Scalia knew the sequence of Nesbitt’s wounds, he might have slowed the action down to a crawl by giving each shot its own sentence: “Atkins shot Nesbitt, hitting him in the right arm. He shot him a second time, hitting him in the left leg. He shot him a third time,” Imagine the power of eight sentences like that! The eight periods would mean eight stress positions, with each stress position occupied by a gunshot wound. And with eight periods and eight commas, we would have eight stop signs and eight speed bumps. We would witness the murder in super-slow motion.

The counting of the eight shots has another effect: it emphasizes the excessiveness of the crime. In language, more than three of anything starts to be too many. Three signifies wholeness, completeness. But “[o]nce we add a fourth or fifth detail, we have achieved escape velocity, breaking out of the circle of wholeness.” Clark at 101. For readers, three is satisfying, but four starts to become uncomfortable. Justice Scalia takes that uncomfortable four and doubles it.

But the number of things does not subliminally affect the reader unless the writer names them one by one, that is, *enumerates* them. Webster’s New College Dictionary 476 (2007). To say that “Atkins shot Nesbitt eight times” is not the same as saying that “Atkins shot Nesbitt one, two, three, four, five, six, seven, eight times.” By enumerating the shots, Justice Scalia gives power to their number.

Lessons

We’ve looked at just five sentences: one by Justice Stevens, and four by Justice Scalia. Yet these five sentences are packed with lessons on how to emphasize or de-emphasize facts:

- To focus attention on the actor, use the active voice. To deflect attention from the actor, use passive voice.
- To further focus attention on the actor, make the actor the first person or thing that shows up in the main clause. To lessen focus on the actor, put someone or something else in that position.
- To focus attention on the action, use a verb that describes the action (e.g. “forced to withdraw \$200”). To focus attention elsewhere, do the opposite (e.g. “cameras recorded their withdrawal ...”).
- Control the number of stress positions by controlling the number of sentences. Use more sentences to create more stress positions, and fewer sentences to create fewer stress positions. Consciously use each stress position to emphasize important information. To de-emphasize something, keep it out of a stress position; instead try to put it in the middle of a long sentence.
- Control the pace of the story by controlling the number of sentence and the number of commas inside sentences. To speed past bad facts,

minimize the number of periods and commas, and let the reader read on cruise control. To make the reader slow down and have a good long look, increase the number of stop signs (periods) and speed bumps (commas).

- Understand the power of numbers. Three signifies wholeness, completeness. Four or more is usually too much. But for the number of things to have subliminal effect, the writer must enumerate them. Count the shots.

Bibliography

Roy Peter Clark, *Writing Tools* (2006).

Bryan A. Garner, *The Winning Brief* (2d ed. 2003).

C. Edward Good, *Mightier Than the Sword* (1989).

George D. Gopen, *The Sense of Structure* (2004).

Patricia T. O'Conner, *Words Fail Me* (1999).

Benjamin Opipari, *To Boldly Go Without Bold*, 16 Perspectives 131 (Winter 2008) (available on line at http://west.thomson.com/pdf/perspec/Winter_2008/Winter08_9.pdf).

John R. Trimble, *Writing With Style* (2d ed. 2000).