

THE DANGERS OF DEFAULTS

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The most difficult editing that any writer faces takes place deep within a document's structure, down at a level to which many lawyers and most law students never descend.

Ordinarily, when editors tackle a document's organization, they address one of two common problems—or, most often, they focus on both, one after the other. First, the organization may not be fully logical, and it has to be rearranged into a more rigorous sequence. Second, the organization may be logical, but it is not yet truly coherent from the readers' perspective: they have to work too hard to follow the logic and to grasp the document's point and overall structure. To cure the second problem, an editor usually has to add better introductions, "road maps," sub-headings, transitions, and other kinds of meta-information.

Sometimes, however, when editors focus on a document's organization, they should begin by tackling another problem, one that is harder to spot and to cure. This problem involves what we will call "default" organizations. By the end of law school, everyone has used some organizing patterns so often that they have become deeply internalized and, as a result, can be deployed on the page with almost no effort—by default, as it were. These organizations are perfectly logical: there is a clear order to the information. And, because they are so familiar to legal readers, they are usually easy to follow. But their "logic" may be inconsistent with—or, at least, a distraction from—the legal or factual "story" the writer is

trying to tell. As a result, the strength of that story, and the clarity of themes from which it arises, are lost behind the façade of a plausible "logic." The editor's difficult task, then, is to spot the underlying story or theme and bring it into the open, by reorganizing the document (or section) to reflect it. Not that default organizations are always wrong. But they are so easy to use, and so comforting to novices, that they fall onto the page far more often than they should—and, once on the page, to the casual editor they can look just fine.

Although this problem arises in organizing both law and facts, our topic here is writing about facts. As we noted in a previous column on storytelling (Winter 2001), facts are subject to one great "automatic pilot" structure: chronology. In that column, we dealt with one danger of the chronological default: it lets us avoid the hard organizational work we should undertake to tell a story effectively. In this column, we deal with the default's two other dangers. It tempts a writer to include too much detail and—as the previous paragraph forewarned—it can blur the clarity of key facts (or factual issues) that do not have chronology at their root. The first problem is relatively easy to diagnose and cure. The second is trickier on both counts, and therefore deserves more attention.

1. The Magnet Effect

Left to its own devices, as it often is when writers are lazy, chronology functions with the same lack of discrimination as one of those giant junkyard magnets: it picks up every fact that comes into range, important or trivial, relevant or distracting. Once the first date or time falls onto the page, every step in the sequence tumbles after. We won't inflict an example on you: you will have seen far too many already. Students and novice lawyers find this default particularly difficult to resist because it feels both conscientious and safe. Surely no one can blame them for being so careful to tell the whole story, so attentive to the whole record.

As a cure, it's not always enough just to slash away the irrelevant facts. When writers begin to slash, they often discover that so much irrelevance ended up on the page because they hadn't yet come to a conclusion about what would be

relevant—and, as a result, they don't know what to cut. The more fundamental cure, therefore, may be to write a better introduction, one that forces the writer to focus on the themes or issues that determine which facts are relevant and which can be discarded.

2. The Who-Did-What Syndrome

When we write about facts, we generally have two tasks: to create a context for what happened and to focus on the key facts relevant to the issues. In each task, at the substantive core of the facts, there may be a sequence—who did what when? If so, chronology will be the best match for that underlying substance. Sometimes, though, if you step back from the welter of facts and search for their core, you find something other than a sequence. If you are creating a context, for example, the most important information might be a conglomerate's corporate structure, or the ecology of a marsh that was polluted by an oil spill. In the key facts, what matters most could be just as varied: sometimes a sequence of actions but sometimes, for example, a description of a place or the facts that establish a person's character or credibility. When sequence is not what matters most, chronology obscures the story and theme the facts should convey.

Besides chronology (“when”), the patterns into which facts most often fall are the standard categories of journalism: who, what, where, and why.

- Who: The main character (the plaintiff, the defendant, the police, the corporation's board of directors, etc.) and other key characters, important witnesses, or sources of information (the examining doctors, other experts, fact witnesses, etc.).
- What: The materials, documents, things, or issues (a company's stock or assets or records, the key documents in a transaction, the defective product or manufacturing process, the mental state of the defendant, etc.).
- Where: The location or other geographical context of an incident (the nature of a highway intersection, the neighborhood next to which the airport will be built, a deserted country road, etc.).
- Why: The explanation or motive for events (wet roads, alcohol consumption, racial animus, greed, gravity, etc.).

This list is not meant to be exhaustive or precise but, rather, suggestive. The goal is not to seize quickly on one pattern from the list, but to identify the central theme (or themes) in your facts that tie them most directly to your legal analysis or argument. The next step, of course, is to choose an organization that best reflects that theme. In many cases, you may have to use more than one organization, in sequence, to capture all the relevant aspects of your facts.

Here is a simple example of the danger of the chronological default when chronology is not your thematic “substance.”

Before:

On August 4, 1983, Jessica Hall was involved in a motor vehicle accident at the intersection of routes 6 and 25 and the spur from exit 9 of I-84 in Newtown. Jessica was a passenger in a pickup truck driven by her mother, Wendy Hall. Wendy Hall left exit 9 of I-84 and proceeded eastbound on the exit spur to routes 6 and 25. At this point, routes 6 and 25 overlap into one road. When she approached the intersection of the spur and routes 6 and 25, she attempted to turn left to go north on routes 6 and 25. She testified that because her vision was obstructed by brush, she could not see traffic traveling south on routes 6 and 25, so she inched her way onto the highway to obtain a view. At that point, a tractor trailer driven by John Jones was driving southbound on routes 6 and 25. Wendy Hall did not see the tractor trailer until it was suddenly upon her vehicle. Jones attempted to avoid a collision by braking and swerving to the left but was

unable to do so and struck Wendy Hall's truck, severely injuring Jessica Hall.

These facts are chronologically organized from start to finish. But the key factual issue is not who-did-what-when. It is a geographical question about the sight lines at the intersection. Because the writer is locked into this chronological default, however, he or she has no choice but to insert the key geographical facts wherever the chronology permits, blurring the emphasis they deserve.

The revision escapes this trap, while still using chronology to capture the who-did-what:

After:

[FIRST, THE CONTEXTUAL FACTS]

On August 4, 1983, Jessica Hall was severely injured when a tractor trailer driven by John Jones collided with a pickup truck driven by her mother, in which she was a passenger.

[NEXT, THE GEOGRAPHY] The accident took place at an intersection where, for drivers pulling onto the main road, vision is obscured until they are already in the road. At that intersection, exit 9 of I-84 meets routes 6 and 25 as they merge into one road. According to the testimony of Wendy Hall, Jessica's mother, the view from the exit spur is partially obstructed by brush, so that drivers leaving the exit cannot see traffic traveling south on Route 6.

[FINALLY, THE NARRATIVE] Wendy Hall left I-84 at exit 9. When she approached the intersection, she attempted to turn left to go north on routes 6 and 25. She testified that, because she could not see traffic traveling south on Route 6, she inched her way onto the highway to obtain a view. She did not see Jones' tractor trailer until it was suddenly upon her vehicle. Jones attempted to avoid a collision by braking and swerving to the left, but was unable to do so and struck Wendy Hall's truck.

With facts this simple, the default was not particularly destructive. With longer, more

complex facts, the default can cause much more damage, as the next example shows.

This example comes from the fact section of an appellate judicial opinion. The appellant, Hann, was convicted of criminal trespass after taxiing his airplane from a hangar to an airport runway. To get to the runway, he crossed part of the airport that the complaining witness, Hyde, leased and had posted with "no trespassing" signs. Pieces of the airport had changed hands over the years in a complicated sequence. What turns out to be at issue, however, is not the history of who owned what when, but the language in a couple of deeds. The first version of the facts, as you can see just by glancing at the beginning of each paragraph, is relentlessly chronological. As a result, it obscures the real issue so successfully that, as the writer realized when he tried a revision, it even omitted a key provision in a controlling agreement.

Before:

The Aero-Valley Airport was constructed around 1970 by Edna Gardner Whyte on thirty-four acres of her land. She later bought more land northeast of the original tract and made additional improvements, including extensions to the runway and taxiways.

In 1980, Whyte sold to Gene Varner the runway and taxiways together with a portion of the land, including the portion where the transient area is located. Part of the purchase price was carried by a note from Varner to Whyte and secured by a vendor's lien and deed of trust. In the deed to Varner, Whyte reserved certain easements and rights for access to the runway from her property located in the northeast corner of the airport. In 1982, Hyde-Way, Inc., owned by Hyde, acquired all of Varner's interest and assumed the note owed by Varner to Whyte.

Sometime prior to October 19, 1983, Hyde's corporation purchased 119 acres located west of the runway and referred to as the Northwest Development Addition. Misunderstandings and disputes arose

between Whyte and Hyde concerning obligations, rights, and other matters pertaining to the airport. On October 19, 1983, a settlement agreement was entered into between Whyte and Hyde-Way, Inc. and Glen Hyde, individually, and by which Hyde agreed to convey to Whyte certain real property located on the Northwest Development Addition. This conveyance was apparently in payment of the balance owed to Whyte under the 1980 note from Varner. This conveyance also included ten hangars located on the land, one of which was being used by appellant as a tenant of Whyte at the time of his arrest. Whyte was then still the owner of the hangar and told the appellant that he had access to the runway across the transient area under the terms of the settlement agreement between Whyte and Hyde.

Under that agreement, Whyte agreed to quit claim to Hyde all rights and reservations saved and excepted in her deed to Varner:

[E]xcept that Whyte shall have the right to convey easements to persons who are tenants or heirs or assigns of land she presently owns or will own in the future within the confines of the Aero-Valley Airport as it now exists, including the residential lots in the Northeast corner of said airport. Whyte agrees, however, that on the sale of any of the hangars granted to her in this agreement or purchased by her in the Northwest Development Addition she or her buyers will execute the Runway License Agreement now required by Hyde from purchasers in the Northwest Development Addition.

On February 5, 1987, Hyde sold whatever property he owned, including the transient area, to a Nevada mining corporation. At the time appellant was arrested for trespassing, on April 20, 1987, Hyde owned only a month-to-month tenancy under a verbal lease from the mining company.

The testimony shows that there has been a long history of disputes between Whyte and Hyde over their airport transactions, and that they had been in civil litigation for over two years before appellant was convicted in this case. This litigation apparently did not involve the interpretation of the above quoted language from the settlement agreement insofar as it was determinative of appellant's right to cross the transient area on April 20, 1987. Appellant urges that as Whyte's tenant he had access across the transient area on that date by virtue of the easement rights which Whyte retained in her agreement with Varner and which she was authorized to convey under the settlement agreement with Hyde.

In the revision, many of the irrelevant details have been discarded. But the more important change is structural: the chronology has been separated out from the "what" of the key documents, with each given its own section. This separate focus on separate topics not only highlights the second one, but ties it more directly to the legal discussion that follows. After reading the revised facts, we now expect the analysis to hinge on those documents, not on the chronology of ownership.

After:

The Aero-Valley Airport was constructed around 1970 by Edna Gardner Whyte on her land. Over the years, parts of it changed hands several times. Throughout these changes, Whyte retained part of the property, some of which she leased to tenants such as Hann.

History of the Airport's Ownership

In 1980, Whyte sold to Gene Varner the runway and taxiways together with a portion of the land, including the portion on which appellant allegedly trespassed. Part of the purchase price was carried by a note from Varner to Whyte.

In 1982, all of Varner's interest was acquired by Hyde-Way, Inc., owned by Hyde.

Hyde-Way also assumed the note. Sometime thereafter, it purchased more land located west of the runway and referred to as the Northwest Development Addition.

On October 19, 1983, Hyde-Way, Inc., and Hyde individually entered into an agreement with Whyte in which, among other matters, Hyde agreed to convey to Whyte certain real property in the Northwest Development Addition, in payment of the balance owed under the 1980 note. This conveyance included ten hangars, one of which was the hangar appellant was renting at the time of his arrest.

On February 5, 1987, several weeks before the arrest, Hyde sold his airport property to a Nevada mining corporation. On the day of the arrest, he owned only a month-to-month tenancy under an oral lease from the mining company.

The testimony shows that there has been a long history of disputes between Whyte and Hyde. The 1983 agreement between them was intended to settle these disputes, but they had been in civil litigation for over two years before appellant was convicted in this case. The litigation, however, did not address the issues raised by this appeal.

The Key Agreements

Appellant relies on the terms of Whyte's 1980 sale of the airport to Varner, Hyde's predecessor, and of Whyte's 1983 agreement with Hyde. Based on those agreements, appellant argues, there is sufficient reason to believe that he had effective consent to enter Hyde's property so that the trial court could not have found him guilty beyond a reasonable doubt.

In 1980, when Whyte sold part of her land to Varner, the deed reserved to Whyte certain easements and rights for access to the runway from her property. In relevant part, the deed states:

[NOTE: In this form of organization, it becomes clearer that a crucial item—the relevant language from the 1980 deed—is missing.]

Under Whyte's 1983 agreement with Hyde, Whyte agreed to quit claim to Hyde all rights and reservations saved and excepted in her deed to Varner, with the following exceptions:

... Whyte shall have the right to convey easements to persons who are tenants or heirs or assigns of land she presently owns or will own in the future within the confines of the Aero-Valley Airport as it now exists, including the residential lots in the Northeast corner of said airport.

As both examples demonstrate, and as we mentioned earlier, the trick to organizing facts successfully is often to rely on more than one organizing pattern. (And, of course, to provide adequate introductions before the details.) Most of the time, you have a story to tell, and therefore need to use some chronology. Some of the time, however, you will also want to make the facts do other work, for which another form of organization may be best. In situations that call for two or more forms of organization, their sequence can be important. In the facts about the accident, for example, if you represent the Halls you probably want the geography before the chronology, because readers will respond to the story more sympathetically if they have first focused on the messy state of the intersection. If you represent the other side, you might make the opposite choice, because Hall's description of the intersection may then sound more like an excuse for bad driving.

Here is an example of a similar choice being made by Justice Robert Jackson, in a famous case about mens rea. Where most writers would have started with a chronological narrative, he instead describes a place, and then things in that place. When he turns to the who-did-what-when chronology, he minimizes its chronological aspect by emphasizing "who" and "why"—character and motive—not "when." The only date is buried in the third paragraph, and facts that paint an upright

character and blameless motives receive far more emphasis.

These choices are artful. Once we have read through the facts, by the time Jackson gets to the defendant's arrest we are primed to agree with the legal conclusion: There was no *mens rea*, and hence no crime.

On a large tract of uninhabited and untilled land in a wooded and sparsely populated area of Michigan, the Government established a practice bombing range over which the Air Force dropped simulated bombs at ground targets. These bombs consisted of a metal cylinder about forty inches long and eight inches across, filled with sand and enough black powder to cause a smoke puff by which the strike could be located. At various places about the range signs read "Danger—Keep Out—Bombing Range." Nevertheless, the range was known as good deer country and was extensively hunted.

Spent bomb casings were cleared from the targets and thrown into piles "so that they will be out of the way." They were not stacked or piled in any order but were dumped in heaps, some of which had been accumulating for four years or upwards, were exposed to the weather and rusting away.

Morissette, in December of 1948, went hunting in this area but did not get a deer. He thought to meet expenses of the trip by salvaging some of these casings. He loaded three tons of them on his truck and took them to a nearby farm, where they were flattened by driving a tractor over them. After expending this labor and trucking them to market in Flint, he realized \$84.

Morissette, by occupation, is a fruit stand operator in summer and a trucker and scrap iron collector in winter. An honorably discharged veteran of World War II, he enjoys a good name among his neighbors and has had no blemish on his record more

disreputable than a conviction for reckless driving.

The loading, crushing and transporting of these casings were all in broad daylight, in full view of passers-by, without the slightest effort at concealment. When an investigation was started, Morissette voluntarily, promptly and candidly told the whole story to the authorities, saying that he had no intention of stealing but thought the property was abandoned, unwanted and considered of no value to the Government. He was indicted, however, on the charge that he "did unlawfully, willfully and knowingly steal and convert" property of the United States of the value of \$84, in violation of 18 U.S.C. § 641, which provides that "whoever embezzles, steals, purloins, or knowingly converts" government property is punishable by fine and imprisonment. Morissette was convicted and sentenced to imprisonment for two months or to pay a fine of \$200. The Court of Appeals affirmed, one judge dissenting.

As impressive as this example of how to marshal is, we suspected that its effectiveness might have had less to do with Justice Jackson's skill than with the efforts of Morissette's lawyer in his brief to the Supreme Court. So we went to the records to read it. What we found is worth discovering on your own. The brief begins with a section labeled, with wonderful irony, "Summary Statement of the Facts." In our programs on persuasive writing, we include in the materials the first six, single-spaced pages of this remarkable section, which contains almost no paragraph breaks. Justice Jackson's skill as a legal writer—distilling from this disastrous mush the clean, compelling story he tells by escaping from the chronological default—is even more remarkable than we had thought.

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